A New Covenant Chain: An Alternative Model to Extinguishment for Land Claims Agreements

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Contents

Executive Summary

The concept of extinguishment ─ the legal doctrine reflected in a cluster of discredited social and intellectual theories that have discriminated against Aboriginal peoples ─ has played a central role in their dispossession in Canada and other parts of the world. It has eclipsed any alternative vision of a foundation upon which a new relationship between Aboriginal peoples and non-Aboriginal governments can be built. Alternative visions of recognition and respect are possible, however, once we acknowledge that Aboriginal rights are central to how Aboriginal peoples see their place in the world; while grounded in histories from past millennia, they have contemporary meaning and constitute the inheritance of future generations. The shift from extinguishment to recognition and respect for Aboriginal rights is not simply one of moral imperative. Section 35 of the *Constitution Act, 1982* recognizes and affirms Aboriginal rights, the very antithesis of their extinguishment. Evolving international human rights standards point unequivocally toward recognition and condemn policies of extinguishment as well.

Part One

Part One reviews the historical precedents for the extinguishment model from ancient treaties to modern land claims agreements; the objections that Aboriginal peoples have made to this model; developments since the 1982 entrenchment of "existing aboriginal and treaty rights", including the report of the Task Force to Review Comprehensive Claims Policy (*Living Treaties: Lasting Agreements*) and subsequent changes in the federal government's claims policy.

A consideration of the most recent land claims agreements and the extent to which they have addressed objections to the extinguishment model demonstrates the federal government's minimalist conception of Aboriginal rights. As noted by the Task Force report, the concept of extinguishment is charged with the colonial strategies of assimilation and cultural destruction of Aboriginal peoples. However, the concept of extinguishment carries within it a cluster of other assumptions that Aboriginal peoples also reject. It assumes that Aboriginal rights, as legal rights, consist principally, if not exclusively, of `traditional' economic practices (such as hunting and fishing). The corollary assumption here is that legal rights and interests in land and resources, if they are to be asserted within the contemporary legal and economic framework of Canadian

society, can only be those rights and interests granted by the dominant Canadian legal system in accordance with its land tenure system. Inherent in the first assumption is the rejection of Aboriginal peoples' right to be contemporary; inherent in the second assumption is the rejection of legal pluralism, which would recognize the continuing vitality of Aboriginal land tenure and resource management regimes in the development of contemporary Aboriginal societies.

Part Two

In Part Two an approach is outlined that attempts to fulfil the objectives of providing certainty for third-party interests within a matrix that acknowledges the co-existing sources of land title ─ Crown and Aboriginal ─ and that articulates the manner in which the security of non-Aboriginal interests is best established through a bridge of accommodation, a bridge on which the recognition of Aboriginal title and Aboriginal consent are accorded an honourable place in agreements designed to redress historical injustices and pave the way for a future based on mutual respect and mutual benefit.

Suggested model

A tripartite classification of lands and resources originally subject to Aboriginal jurisdiction and ownership is suggested. The first class of territory would be lands over which a First Nation will exercise full rights of beneficial enjoyment and primary, if not exclusive, jurisdiction in relation to lands and resources. The second would be those where the rights of beneficial enjoyment and jurisdiction will be shared with federal, provincial and territorial governments; the third would be territories in which non-Aboriginal governments have full rights of beneficial enjoyment and primary, if not exclusive, jurisdiction in relation to lands and resources. Within these broad classifications the suggested model would contain the following elements:

1. In accordance with the definitions contained in the agreement, the Aboriginal land rights of the Aboriginal party would be affirmed explicitly and the agreement would contain no surrender by virtue of the agreement of any Aboriginal land rights.
2. For lands in the first category where the Aboriginal party would exercise full rights of beneficial enjoyment and primary jurisdiction ("First Nation lands") Aboriginal land rights would be defined either
    (a) in accordance with traditional forms of land tenure, or

(b) in terms of equivalency to Canadian land tenure.

The choice of alternatives (or a combination of the two) would be at the option of the Aboriginal party. The agreement would also define a limited set of rights of non-Aboriginal governments and third parties.

3. On lands in the second category ("shared lands"), where there would be shared rights of beneficial enjoyment and jurisdiction, the retained Aboriginal rights would be defined in terms of joint harvesting rights, joint management and revenue sharing. The agreement would also specify the rights of non-Aboriginal governments and third parties to mark clearly the point of intersection between the two sets of rights and the regimes governing them.

4. On the third class of lands, where non-Aboriginal governments will have full rights of beneficial enjoyment and primary jurisdiction ("provincial, territorial or federal lands"), the retained Aboriginal rights would be defined in terms of the special relationship of the Aboriginal party to their territory and would provide the basis for specified normative rights such as the right to perform the role of diplomatic host at intergovernmental, international and other conferences and the right to name landmarks.

5. To protect specified third-party rights and interests in existence before the agreement, there would be express affirmation of such interests by the Aboriginal party and an undertaking not to exercise or assert retained Aboriginal rights inconsistent with such third-party rights and interests.

6. The agreement would set out the legal regime for granting of future rights and interests and for their protection. On First Nations lands these grants will be made by First Nations governments or the Aboriginal holders of rights of beneficial enjoyment. On shared lands the rights will be granted by bodies having jurisdiction granted by both First Nations governments and non-Aboriginal governments. In specified cases one government might delegate to the other government the right to make grants subject to its prior consent. On provincial, territorial or federal lands the non-Aboriginal government would have the power to make grants that, under the terms of the agreement, would be impressed with the consent and approval of the Aboriginal party. In the case of all grants of rights or interests to third parties on any of the three categories of land, there would be an undertaking by the Aboriginal party not to exercise or assert retained Aboriginal rights inconsistent with such third-party rights or interests.

The creation of a legal climate of certainty does not require the extinguishment and

surrender of Aboriginal rights. To the extent that they have been hitherto undefined, one of the primary purposes of land claims agreements is to provide that definitional content; as suggested, that content can have a dynamic range within different categories of land. It is through this process of definition that the rights and responsibilities of Aboriginal peoples in relation to particular lands is made more certain and, simultaneously, through the definition of the structures and mechanisms for decision making in relation to those lands, that the rights and responsibilities of non-Aboriginal governments and third parties are also rendered certain.

On lands designated `First Nation lands', where Aboriginal peoples would have the fullest range of rights and responsibilities, third parties would look to Aboriginal governments and Aboriginal land-owning entities for the grant of any rights to those lands and resources. The form in which those grants or licences to third parties would be made would depend very much on the form in which the First Nation chooses to have its Aboriginal title defined.

Part Three

Part Three reviews the experiences of three other countries with colonial histories comparable to Canada's and where Aboriginal and treaty claims settlements have been made. Developments in international law regarding the rights of Indigenous peoples are also considered.

The American experience

Though in the 1970s American Indian policy began to shift in the direction of tribal self-determination. The major Aboriginal land claims settlement of that decade, the *Alaska Native Claims Settlement Act* of 1971, was built on a framework of economic and cultural assimilation and the extinguishment of Aboriginal title.

In Alaska the Aboriginal peoples are seeking to retribalize their lands by transferring them from corporations to tribal governments in a form of land holding that reflects their own cultural imperatives and ensures that their ancestral lands will remain in their possession under their own governance. Furthermore, in order to protect and enhance the subsistence economy which remains the core of many Aboriginal communities in Alaska, they have called for the restoration of their Aboriginal rights to hunt and fish, which were extinguished in the settlement legislation of 1971.

In retrospect, the *Alaska Native Claims Settlement Act* provides contemporary

reinforcement for Aboriginal peoples in Canada that a model of settlement based on extinguishment of Aboriginal rights and the restructuring of tribal political and economic life in accordance with non-Aboriginal models is not the path they wish to pursue.

The Australian experience

Until 1992 the Australian courts had ruled that the common law doctrine of Aboriginal title did not apply to Australia. In 1992 the High Court of Australia, in *Mabo* v. *State of Queensland*, rejected the continued application of the settled colony/*terra nullius* doctrine and held that the common law doctrine of Aboriginal title did apply to Australia.

Despite the lack of any legal tradition recognizing Aboriginal title, in the past 20 years (the pre-*Mabo* period), Australian federal and state governments have passed legislation acknowledging the legitimacy of Aboriginal land claims and providing processes for recognizing Aboriginal entitlement. Since *Mabo*, there have been other major policy developments, including federal legislation bearing directly on the issues of recognition and extinguishment of Aboriginal title.

From a Canadian perspective, the Australian approach is doubly flawed, in terms of both process and substance. The process by which recognition and accommodation are reached is a unilateral one with no recognition of government-to-government relationships. As to the substance, the rights that flow from the recognition of Aboriginal title fall far short of those that have been recognized in the Canadian land claims settlements in relation to what has been referred to as "settlement land", and there are no provisions for areas of joint management and shared jurisdiction. For these reasons the proposed legislation seems to hold little in the way of future directions for Canada in relation to the scope and content of retained Aboriginal rights. However, the one important thing the post-*Mabo* proposals show is that in terms of future management of lands and resources, extinguishment of Aboriginal title is not a necessary prerequisite to the achievement of certainty of third-party interests.

The New Zealand experience

The beginning of colonial history in New Zealand was marked by the signing of the Treaty of Waitangi on 6 February 1840 by more than 500 Maori chiefs. The treaty was written in both English and the Maori language, and the overwhelming majority of chiefs signed only the Maori

version.

The Maori text of article 2 of the Treaty of Waitangi probably comes as close as anything so far drafted to expressing the full dimensions of Aboriginal rights. The guarantee in section 2 of the Treaty of Waitangi encompasses the beneficial interest of Aboriginal peoples in all their resources, whether owned collectively or individually, by the tribe, the clan or extended family; it recognizes the authority of the Aboriginal people to manage and control their territories in accordance with their own laws and their own cultural preferences; it acknowledges that the relationship to their territory extends beyond the material and economic and extends into the spiritual with its attendant responsibilities to respect and protect the life forces within the territory.

Although a large number of claims have been filed with the Waitangi Tribunal (established in 1975 to hear Maori claims and make recommendations for redress arising from policies and practices of the Crown that violate the Treaty), New Zealand has not yet entered into anything similar to the comprehensive claims process upon which we have embarked in Canada. Indeed, members of the Waitangi Tribunal have referred to the Canadian experience of comprehensive claims agreements as being a decade in advance of the situation in New Zealand. However, in one area, that of fishing rights, the New Zealand government has entered into a comprehensive agreement with the Maori in which the question of alternatives to extinguishment is addressed specifically.

International law perspective

Because the central purpose of the Draft Declaration on the Rights of Indigenous Peoples is to provide minimum universal standards pertaining explicitly to the human rights of Aboriginal peoples, it provides a principled framework against which national policies and laws can and must be measured. Several provisions of the draft declaration have a direct bearing on the subject matter of this paper.

What we see reflected in the declaration's provisions are Indigenous peoples' own conception of their rights expressed as "the right to maintain and strengthen their distinctive spiritual and material relationship" with their territories, coupled with recognition of their own laws, land tenure systems, and institutions for land and resource management.

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Introduction

If we look back along the path of the "long and terrible shadow" of five hundred years of colonization in the Americas we can see the shifting patterns of relationships between Aboriginal peoples and the colonizers. In the eighteenth century, enlightenment conceptions of Aboriginal peoples as political equals and sovereign nations, underpinned by Aboriginal military and strategic power, were reflected in the Covenant Chain, the remarkable treaty arrangements negotiated over the course of a century by the Six Nations of the Iroquois Confederacy with the British Crown. By the end of the nineteenth century, under the economic weight of the advancing settlement and agricultural frontier, the demise of Aboriginal military power, and the advent of theories of social evolution that placed Aboriginal peoples at the lower end of the spectrum of civilizations, relationships between Aboriginal peoples and colonial governments became redefined, in both law and politics, based on hierarchy and dependency in pursuit of the transformation and assimilation of Aboriginal peoples.

Despite the significant differences in both the theory and the practice of relationships between Aboriginal peoples and colonial governments, there have been common themes that have flowed throughout history. One of these is central to the subject matter of this paper. It is that the driving imperative of colonial government has been that where treaties were made with Aboriginal peoples in relation to lands and resources, the recognition of Aboriginal rights has been legally and economically related to the extinguishment of those rights to open up those lands for settlement and development by non-Aboriginal people. In legal discourse, particularly in the jurisprudence of Aboriginal rights, recognition and extinguishment have been as inexorably related as crime and punishment. In the same way as we have come to conceptualize and define crime as conduct deserving of punishment, the recognition and definition of Aboriginal rights has largely been conceptualized within the context of a process that looks to

extinguishment as the logical and legal corollary of such recognition and definition. In the same way as imprisonment has for two centuries anchored the criminal justice process, it seems that extinguishment clauses have anchored treaty making and the modern land claims agreement process.

We have come to realize only recently how the brooding omnipresence of the prison has placed a lockstop on our imagination in dealing with the problem of crime. In recent years, however, the dominating influence of imprisonment in the crime and punishment paradigm has been challenged, by reconceptualizing crime as a breach in the collective and individual framework of relationships in society that requires restoration and reconciliation, rather than punishment through imprisonment. Significantly, this attempt to build a new social and legal paradigm, while seen as a bold, new initiative in the context of western concepts of crime, is one that has long been an integral part of how many Aboriginal peoples have understood the problem of maintaining peace and order within their communities. Recent reports of royal commissions and the Canadian Bar Association have urged that a recognition of Aboriginal justice systems that build upon the restoration and reconciliation paradigm lies at the core of achieving real justice in Aboriginal communities. Underlying these recommendations is the realization that Aboriginal peoples bring to the process of doing justice their own values and traditions and that we must rid ourselves once and for all of the assumption that these values and traditions would wither away in the face of assimilationist social theory and legal policies.

It has been within the same assimilationist framework that Canadian governments have hitherto approached treaty making ─ as a process to pave the way for non-Aboriginal settlement and development by extinguishing the existing Aboriginal rights to lands and resources, leaving for Aboriginal peoples only the remnant of their lands as reserves. The assumption and the expectation has been that in the fullness of time Aboriginal peoples under the coercive guidance of Indian agents, missionaries and police would make their way out of the darkness of their `primitive' existence and into the light of western society. Extinguishment of Aboriginal title to traditional lands thus implies a particular historical process. Aboriginal peoples once had their territories; nowadays they have their reserves. This asserted continuum of ever-contracting Aboriginal land contains a stereotype that is closely allied to theories of social evolution: the roaming hunter, with the life of relentless freedom that comes with dependence only on subsistence resources, is progressively confined. There is a perceived inexorable logic that

Aboriginal peoples who once had territories in their `traditional' life now have the remnants of those territories, the reserves, matching the remnants of their `traditional' culture. There are further corollaries to this view. A belief in Euro-Canadian superiority has had powerful implications, not only in its devaluation of Indian societies as `primitive', but also in terms of their asserted rights to their territories and to their authority over their resources. If the white people of European ancestry are the representatives of the highest of human, moral, social and technical achievements, then is it not right, and in everyone's interest, that whatever rights the Indians may have be extinguished and vested in us? The links between moral, political and economic hegemony and cultural dominance are not hard to see.

The entrenchment of Aboriginal rights in the *Constitution Act, 1982* would seem to be an unequivocal rejection and abandonment of both the metaphor and the practice of extinguishment in our political and legal discourse. Section 35 speaks unambiguously of the recognition and affirmation ─ not extinguishment ─ of Aboriginal rights. We should not, however, underestimate the persistence of assumptions underlying the ideological metaphor and legal practice of extinguishment. Like many other assumptions underlying and legitimating power, they have an enduring quality that is hard to abandon for those who have become accustomed to exercising power. A review of the post-1982 developments demonstrates the extent to which extinguishment continues to cast its pervasive net in both jurisprudential arguments and land claims negotiations.

In this paper I consider the extinguishment paradigm in light of its historical precedents and examining alternative legal arrangements to implement a new paradigm based upon affirmation and recognition of Aboriginal and treaty rights. In Part 1, I review the historical precedents for the extinguishment model from ancient treaties to modern land claims agreements; the objections that Aboriginal peoples have made to this model; developments since the 1982 entrenchment of "existing Aboriginal and treaty rights", including the report of the Task Force to Review Comprehensive Claims Policy (*Living Treaties: Lasting Agreements*); and subsequent changes in the federal government's claims policy. The section concludes with a consideration of the most recent land claims agreements and the extent to which they have addressed the objections to the extinguishment model. Part 2 explores the issue of alternatives to the extinguishment model that are consistent with a purposive analysis of Canadian constitutional and Aboriginal rights and with Aboriginal and governmental objectives in the negotiation of land claims agreements. I suggest that it is possible and necessary to imagine a

new model based upon recognition and respect for Aboriginal rights, and I draw the contours of that model as the basis for forging a new Covenant Chain. In Part 3 I review the experiences of three other countries with colonial histories comparable to Canada's in which Aboriginal and treaty claims settlements have been made to see what lessons can be learned in the exploration of alternatives to extinguishment. Finally, I consider developments in international law regarding the rights of Indigenous peoples and their implications for identifying new directions in the structuring of modern land claims agreements in Canada.

In understanding the scope of this paper, some preliminary observations are in order. For some of the reasons I have already given, extinguishment, both as an ideological metaphor and as an historical and legal practice, can be seen as a fundamental axis, a full description and understanding of which informs the relationships between colonial governments and their successors and Aboriginal peoples. It is not the purpose of this paper to explore the full dimensions of this relationship and the ways in which the concept and practice of extinguishment illustrate and explain so much of what Aboriginal peoples today experience in terms of dispossession and disempowerment. That larger study is one that has been courageously undertaken by another team of scholars in a parallel study for the Royal Commission on Aboriginal Peoples.[i]

A second point is that although I have scanned a broad historical and geographical terrain, this paper is not meant to be an exhaustive study of treaty making, either in Canada or in other parts of the world. That we stand in need of such a broad-ranging study has been recognized by the United Nations in the appointment of a special rapporteur to report on "Treaties, Agreements and other Constructive Arrangements between Status and Indigenous Populations" for the purpose of ensuring the promotion and protection of the human rights and fundamental freedoms of indigenous populations (discussed in Part 3 of this paper). In this paper my selection of historical and comparative experiences is more modest.

That same modesty of purpose informs my discussion of contemporary Canadian policy regarding the comprehensive claims process. This paper is not an examination of the full scope of that policy or of experience under it in its various reformulations. I have focused only on those aspects of the policy related to the surrender and extinguishment of land and resource rights, which have, from a non-Aboriginal government's perspective, anchored both historical treaties and modern comprehensive claims agreements. What this means is that although I review

government policy regarding extinguishment as it affects Aboriginal peoples' assertions of rights of ownership and jurisdiction over their homelands, I do not address issues of jurisdiction and of self-government in areas not directly related to land and resource rights. I do not see this as constricting my critical vision in light of the fact that the present federal comprehensive claims policy specifically disavows the need for any surrender of Aboriginal rights not related to lands and resources, and, in this regard at least, that policy has been reflected in the most recent comprehensive claims agreements.

In the same spirit of helping the reader better understand what this paper is all about, I would also offer some preliminary explanations and definitions of some of the key terms and concepts to which I refer. It obviously makes sense to start with the concept of `extinguishment'. I use the term in its ordinary legal sense, which is the destruction or cancellation of a right.[ii] Canadian courts have held that prior to the constitutionalization of existing Aboriginal and treaty rights in 1982, those rights could be unilaterally extinguished by non-Aboriginal governments without the consent of Aboriginal peoples through the exercise of the sovereign's "clear and plain intention" to extinguish.[iii] In the most recent appellate decision on unilateral extinguishment, the British Columbia Court of Appeal ruled unanimously that the "clear and plain intention" must be expressed in legislation and could be implied only "if the only possible interpretation of the statute is that Aboriginal rights were intended to be extinguished".[iv] Also included in the concept of extinguishment are the so-called `voluntary' extinguishments, found in many of the historical and modern treaties, generally referred to as `surrenders'. In this paper my focus is on such `voluntary' extinguishments.

The issue of how extinguishment can take place of course leads to the next question of what is being extinguished. This paper is concerned with the extinguishment of Aboriginal rights. There is a somewhat bewildering array of terms in the cases and the literature, such as Aboriginal rights, Aboriginal title, Native title, and Indian title. The reference to `title' usually bespeaks the assertion of a legal interest in land and resources, while the reference to Aboriginal rights is used in a broader way to include both Aboriginal title and also other rights such as the right to self-government. While the term `Aboriginal rights' is often used as a more compendious expression of the totality of the rights of Aboriginal peoples, many Aboriginal people themselves prefer to talk about Aboriginal title as being the source of all their other rights. Out of respect for this usage I refer to both Aboriginal title and Aboriginal rights as reflecting and expressing the

full panoply of Aboriginal interests. As I have already explained, in this paper I am concerned largely with issues of extinguishment as they relate to Aboriginal rights as an interest in lands and resources, including the right of self-government in relation to those lands and resources.

The term `comprehensive claims' refers to those claims made by Aboriginal peoples based on the concept of continuing Aboriginal rights and title that have not been dealt with by treaty or other legal means. They are to be distinguished from `specific claims', which are those arising from non-fulfilment of Indian treaties and other lawful obligations, or the improper administration of lands and other assets under the *Indian Act* or formal agreements. This distinction is one drawn by the government of Canada for the purpose of identifying both the criteria and the process for negotiating such claims.[v] Although my primary focus in this paper is on alternatives to extinguishment in the context of comprehensive claims, my analysis is not without significance for specific claims, particularly those arising pursuant to Aboriginal peoples' understanding of the historical treaties.

As with the term Aboriginal rights, I use `Aboriginal peoples' in a compendious way in line with its usage in the *Constitution Act, 1982* to refer to Indians, Inuit and Métis. I also use the term First Nations, which is the term preferred by many Indian nations. In addition, when referring to developments at the international level I use the term `Indigenous peoples', which has become the accepted usage at the United Nations. Because my historical focus is on treaties and on the agreements that have resulted from the comprehensive claims process, neither of which have involved the Métis, an assessment of the Métis historical experience and the contours of the framework for the settlement of Métis claims is not addressed in this paper. This is not, nor should it be viewed as, an oversight. The Métis people felt the full legal and historical weight of extinguishment when their rights were legislatively extinguished in the *Manitoba Act, 1870*, and even more than some other Aboriginal peoples, have been compelled to grapple with the dislocating effects of dispossession. The legal implications of the extinguishment provisions in the *Manitoba Act* and the required framework for a settlement of Métis claims, one that takes into account the historical and contemporary experience of Metis people, require and are appropriately the subject of separate consideration in another paper being prepared for the Royal Commission on Aboriginal Peoples.

Part 1 ─ Extinguishment: The Precedents and the Problems

The lessons of history are particularly powerful ones in understanding the role extinguishment has played in structuring the relationship between Aboriginal peoples and non-Aboriginal governments. A review of the written historical record, which is the main tributary for non-Aboriginal reconstruction of the past, and also of the oral history of the Aboriginal peoples themselves, provides important insights essential to an understanding of why extinguishment has occupied such a central place in colonial law and policy, why Aboriginal peoples are so opposed to its having any place in a redefined and restructured relationship with non-Aboriginal governments, and why the search for alternatives to extinguishment is a fundamental issue of principle and not a peripheral and technical exercise in semantics.

A review the historical record, both Aboriginal and non-Aboriginal, is important for another reason. Learning the lessons of history should not be seen only as requiring a commitment to do better in the future to avoid the injustices of the past. In cases where those injustices are legally entrenched in treaties that have continuing legal effects, and particularly when the language of that entrenchment does not properly reflect and record the Aboriginal understanding of what was agreed, there is a compelling need to revisit historical texts in light of both our contemporary knowledge and the experiences of those who have borne the weight of the injustices. It has been said, and indeed accepted by some courts, that at some point historical events overtake Aboriginal claims and that the weight of history crushes and obliterates the claim.[vi] Other courts, and most notably the High Court of Australia in its recent decision in *Mabo* v. *State of Queensland*, have implicated the courts and governments in addressing and redressing the injustices of the past. In that case the High Court confronted two of the legal doctrines that for two centuries had been applied in Australia to deny the Aborigines any legal interest in their territories. Deane and Gaudron J.J., in their judgements, clearly identified the role these doctrines played in the unjust dispossession of the Aborigines:

> Inevitably, one is compelled to acknowledge the role played, in the dispossession and oppression of the Aborigines, by the two propositions that the territory of New South Wales was, in 1788, *terra nullius* in the sense of unoccupied or uninhabited for legal purposes and that full legal and beneficial ownership of all the lands of the Colony vested in the Crown, unaffected by any claims of the Aboriginal inhabitants. These propositions provided a legal basis for and justification of the dispossession. They constituted the legal context of the acts done to enforce it and, while accepted, rendered unlawful acts done by the Aboriginal inhabitants to protect traditional occupation or use. The official endorsement, by administrative practice and in judgments of the courts, of those two

> propositions provided the environment in which the Aboriginal people of the continent came to be treated as a different and lower form of life whose very existence could be ignored for the purpose of determining the legal right to occupy and use their traditional homelands. (*Mabo* v. *State of Queensland* (1992) 107 A.L.R. 1 at 82.)

The two justices then addressed the question of whether the weight of history reflected in the doctrine of precedent should prevent a re-examination of what had been recognized hitherto as fundamental principles in the Australian case law:

> If this were any ordinary course, the Court would not be justified in re-opening the validity of fundamental propositions which have been endorsed by long-established authority and which have been accepted as a basis of the real property law of the country for more than 150 years... Far from being ordinary, however, the circumstances of the present case make it unique. As has been seen, the two propositions in question provided the legal basis for dispossession of the Aboriginal peoples of most of their traditional lands. The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices. In these circumstances, the Court is under a clear duty to re-examine the two propositions. For the reasons which we have explained, that re-examination compels their rejection. The lands of this continent were not *terra nullius* or "practically unoccupied" in 1788... (*Ibid.*, at 82-3.)

The Australian courts are not alone in their rejection of the `weight of history' argument. Mr. Justice Lambert, in his judgement in *Delgam Uukw* v. *British Columbia*, also rejected its application to the claims of the Gitksan and Wet'suwet'en peoples:

> The extinguishment or elimination of Aboriginal title and Aboriginal rights by the passage of time or the weight of history...is not part of the law of British Columbia and should be resolutely rejected. As Chief Justice Dickson said in *Mitchell v. Peguis Band*, the burden of history must be shared by all Canadians, not by the Indians alone. ([1993] 5 W.W.R. 97 at 370.)

To the extent that the legal concept of extinguishment and the practices associated with it have, in the Canadian context of treaty making, "provided a legal basis for and justification of the dispossession" of Aboriginal peoples, the charting of new pathways cannot take place without looking back along the paths we have already trod and, where necessary, redressing the injustices of the past within a new framework built upon recognition and respect rather than extinguishment and domination.

Treaty Making in the Seventeenth and Eighteenth Centuries

From the earliest stages of colonial settlement in North America, treaties and agreements were

entered into with Indian nations for the acquisition of territory and jurisdiction. The earliest written records of these agreements are those made between the Dutch and the Indian nations of what are now New York and Delaware. These agreements recognized as pre-existing the Indian system of land ownership, acknowledged the jurisdictional authority of Indian leaders, and referred to the protocol of acquiring the consent of Indian nations for the transfer of rights of both ownership and jurisdiction. A patent to Samuel Godyn of July 1630 recites in relevant part:

> We, the Director and Council in New Netherland, residing on the Island Manahattas and in Fort Amsterdam, under the authority of their High Mightinesses the Lords States General of the United Netherlands...hereby acknowledge and declare, that on this day, the date underwritten, came and appeared before us, in their proper persons, Queskakous and Eesanques Siconesius and the inhabitants of their village,...and freely and voluntarily declared by special authority of the rulers and consent of the Commonalty there, that they already, on the first day of the month of June the past year, 1629, for and on account of certain parcels of cargoes...*have transported, ceded, given over and conveyed in just, true and free property*...for the behoof of Messrs. Samuel Godyn and Samuel Blommart absent; and for whom We, by virtue of our office, under proper stipulation, do accept the same...and that with all the action, right and jurisdiction to them in the aforesaid quality, therein appertaining, constituting and surrogating the said Messrs. Godyn and Blommart in their stead, state, real and actual possession thereof; and giving them, at the same time, full and irrevocable authority, power and special command to hold in quiet possession, occupancy and use...*Without they, the grantors, having, reserving, or retaining for the future any, the smallest part, right, action or authority, whether of property, command or jurisdiction therein*... (A. Vaughan, *Early American Indian Documents, Treaties and Laws 1607-1789*, vol. I, [washington, D.C.: University Publications of America], p. 6, referred to hereafter as E.A.I.D. [emphasis added].)

Quite clearly this deed was designed, from the perspective of the Dutch drafters, to transfer from the original Indian owners a full title and jurisdiction to the land ceded without retention of any Indian interest in the land. It was on the basis of deeds such as these that the Dutch sought to legitimize their territorial claims against other competing European colonial governments, principally the Swedes and the British.

Treaty arrangements also characterized the earliest relationships between British colonists and Indian nations. The early agreements made by the British often dealt with the acquisition of land rights in the context of covenants of mutual assistance. Furthermore, the treaties under which the Indians of Long Island transferred land to the New England colonies were often coupled with a reservation of continuing rights relating to important Indian harvesting activities, particularly fishing, which was a vital part of the Indian coastal economy. Thus, we find in a land

transfer in 1648 this reservation:

> The sayed satchems have covenanted to have libertie freelye to fish in anie or all creekes and ponds and hunt up and downe in the woods without molestation (they giving to the Inglishe inhabitants no just offence or injurie to their goods or chattels). Likewie, they are to have the finnes and tayles of all such whales as shall be cast uppon their proper right... Allso they reserve libertie in all convenyent places shells to make wampum, allso if the Indians hunting any deer they shall chase them into the water and the Inglishe should kill them, the Inglishe shall have the bodie and the satchem the skin. (Indian Deed for the Town of East Hampton, April 29, 1648, E.A.I.D., vol. VII, p.113, Ex. 1244-20.)

This language prefigures a reservation of the right to fish and hunt contained in the Douglas treaties of British Columbia, negotiated some two hundred years later.

These early treaties also raise for the first time the issue of fundamentally different conceptions of colonial and Aboriginal peoples regarding what was being transferred. From the text of these treaties the English acquired title to the lands subject only to limited Aboriginal harvesting rights. Reconstructions of Aboriginal conceptions of land tenure place a different interpretation on these arrangements. Writing about Delaware Indian conceptions of land, Anthony Wallace provides this perspective:

> To the Delaware Indian, land was an element, a medium of existence, like the air and sunlight and the rivers. To him, "ownership" of land meant, not exclusive personal title to the soil itself, but occupation of a certain position of responsibility in the social unit which exploited the soil. "Inheritance" of land was really the inheritance of this place in society. The "sale" of land (to use the white man's term) might, to the Delaware, be almost any mutually satisfactory change in the relationship of two groups of persons subsisting on the land. In the earlier sales, the Indians seemed to have intended only to give the whites a freedom to use the land in conjunction with the native population. (Anthony Wallace, "Women, Land and Society: Three Aspects of Aboriginal Delaware Life", *Pennsylvania Archaeologist* 17 (1947), p. 2.)

Francis Jennings has elaborated further upon how the Delaware understood these early land transactions:

> Under Aboriginal Delaware custom, the "sale" of land conveyed only the rights of use for residence and subsistence as long as the parties lived and were satisfied with the term of compensation. No sales were permanent. Even if all demands were met and the seller completely satisfied, he might show up a second time for further compensation and be entirely fair and honourable according to his standards. Apparently there were complications in these customs that were better understood by Englishmen at the time than by students nowadays. (Francis Jennings, *The Ambiguous Iroquois Empire: The Covenant Chain Confederation of Indian Tribes with English Colonies* [New York/London: W.W. Norton & Co., 1984], p. 326.)

In the eighteenth century, treaty making as exemplified in the Covenant Chain became part of a much more extensive network of relationships between First Nations and colonial governments. Negotiations and agreements between the British and the Six Nations of the Iroquois Confederacy ─ the Haudenasaunee ─ encompassed the spectrum of political and economic concerns, encompassing war and peace, neutrality, military alliances, reciprocal recognition of jurisdiction, administration of criminal justice, trade, and the acknowledgement and transfer of land rights. Relations with the Iroquois were of first importance to the security and prosperity of the American colonies and constituted therefore an object of particular attention for the colonial governments. For this reason, the negotiation and renewal of the Covenant Chain was carefully recorded, both by the British in the form of published accounts of the treaty councils and by the Iroquois in form of the archival wampum belts. Because of the extensive record of the Covenant Chain treaty councils, we can understand the context in which agreements for the transfer of lands from the ownership and jurisdiction of Indian nations to colonial governments took place.[vii]

The Treaty of Lancaster of 1744 and the Albany Congress of 1756 provide particularly interesting windows into the British colonial and Iroquois perspectives on treaty negotiations respecting land rights. The agenda for the Treaty of Lancaster embraced the status of lands within the colonies of Virginia and Maryland, which the Six Nations claimed by right of conquest and which had been settled by citizens of the two colonies without Iroquois consent or any deed from them. The issue turned on the proper interpretation of a previous treaty of 1722 with the colony of Virginia that drew a boundary line between the Six Nations and Virginia along the Allegheny mountains and the Potomac River, across which the Iroquois promised not to pass without a passport from New York or Virginia. The Iroquois maintained that an equally binding reciprocal covenant was to be implied that British settlers would not cross the mountains to settle without Iroquois consent, and this, the Iroquois maintained, the settlers had done in breach of the treaty, thereby violating Iroquois territorial integrity.

From the British perspective, a satisfactory response to the Iroquois sense of trespass on their territory, in violation of treaty agreement, was required because of the importance of maintaining the alliance, or at least the neutrality, of the Six Nations in the continuing imperial conflict between the British and the French, which at mid-century was being focused increasingly on the critically strategic lands of the Ohio valley. If the Ohio fell into the French

sphere, New France would extend its influence in a powerful and impenetrable arc from the mouth of the St. Lawrence to the mouth of the Mississippi, and the potential wealth and strategic superiority that came with control of the Ohio would belong to France. There was also an important military reason for French designs on the Ohio. Once France had completed a strong chain of military posts through the Ohio, communication between New Orleans and Montreal could not be severed by British sea power in times of war. For the British, in addition to these vital military and strategic implications of French control of the Ohio, there were other important interests at stake. The area was rich in furs and, for that reason alone, vital to British trade. In addition, springing from the original coastal settlements of the seventeenth century, the tide of colonial settlement westward was at the crest of the Allegheny mountains by 1748. Without the possibility of future expansion into the Ohio, the British colonial effort would be destined to confine itself to the comparatively narrow strip of land between the mountains and the Atlantic.[viii]

It was within this matrix of competing political, economic and military interests that the Six Nations entered into treaty relationships with the British. Expressing himself in the metaphorical language of the Covenant Chain, Chief Canassatego explained the Iroquois history of their relationships with European governments:

> Brother, the Governor of Maryland,
>
> When you mentioned the Affair of the Land Yesterday, you went back to old Times, and told us, you had been in Possession of the Province of Maryland above One Hundred Years; but what is One Hundred Years in Comparison of the Length of Time since our Claim began? since we came out of this Ground? For we must tell you, that long before One Hundred Years our Ancestors came out this very Ground, and their Children have remained here ever since. You came out of the Ground in a Country that lies beyond the Seas, there you may have a just Claim, but here you must allow us to be your elder Brethren, and the Lands to belong to us long before you knew any thing of them. It is true, that above One Hundred Years ago the Dutch came here in a Ship, and brought with them several Goods; such as Awls, Knives, Hatchets, guns, and many other Particulars, which they gave us; and when they had taught us how to use their Things, and we saw what sort of People they were, we were so well pleased with them, that we tied their Ship to the Bushes on the Shore; and afterwards, liking them still better the longer they staid with us, and thinking the Bushes to slender, we removed the rope, and tied it to the Trees; and as the Trees were liable to be blown down by high winds, or to decay of themselves, we, from the Affection we bore them, again removed the Rope, and tied it to a strong and big Rock (here the Interpreter says they mean the Oneido Country) and not content with thus, for its further Security we removed the Rope to the big Mountain (here the Interpreter says they mean the Onandago Country) and there we tied it very fast, and rowlled Wampum about it; and, to make it still more secure, we stood upon the Wampum, and sat down upon it, to defend it, and to prevent any Hurt coming to it, and did our best

> Endeavours that it might remain uninjured for ever. During all this Time the New-comers, the Dutch acknowledged our Rights to the Lands, and solicited us, from Time to Time, to grant them Parts of our country, and enter into League and Covenant with us, and to become one People with us.
>
> After this the English came into the Country, and, as we were told, became one People with the Dutch. About two Years after Arrival of the English, an English Governor came to Albany and finding what great Friendship subsisted between us and the Dutch, he approved it mightily, and desired to make us strong a League, and to be upon as good Terms with us as the Dutch were, with whom he was united, and to become one People with us: And by his further Care in looking into what had passed between us, he found that the Rope which tied the Ship to the great Mountain was only fastened with Wampum, which was liable to break and rot, and to perish in a Course of Years; he therefore told us, he would give us a Silver chain, which would be much stronger, and would last for ever. This we accepted, and fastened the Ship with it, and it has lasted ever since. (Treaty of Lancaster with the Six Nations Indians, June 22, 1744, E.A.I.D., vol. II, p. 77 at 85.)

In response to the Governor of Maryland's argument regarding Maryland's title to the disputed lands previously purchased from other Indian nations, Canassatego had this to say:

> We now come nearer home. We have had your Deeds interpreted to us, and we acknowledge them to be good and valid and that the Conestogoe or Sasquahannah Indians had a Right to sell those Lands to you for they were then theirs; but since that Time we have conquered them, and their Country now belongs to us, and the Lands we demanded Satisfaction for are no part of the Lands comprised in those Deeds; they are the Cohongorontes Lands; those, we are sure, you have not possessed One Hundred Years, no, nor above Ten Years, and we made our Demands as soon as we knew your People were settled in those Parts. These had never been sold, but remain still to be disposed of; and we are well pleased to hear you are provided with Goods, and do assure you of our Willingness to treat with you for these unpurchased Lands; in confirmation whereof, we present you with this Belt of Wampum. (*Ibid.*, at 86.)

After further subsequent negotiations, the Iroquois agreed to sign deeds transferring the lands under question to the Governor of Maryland. In his final speech addressed to the Governor of Maryland, Canassatego returned to the theme of the Covenant Chain:

> You told us Yesterday, that since there was now nothing in Controversy between us, and the Affair of the Land was settled to your Satisfaction, you would now brighten the Chain of Friendship, which hath subsisted between you and us ever since we became Brethren; we are well pleased with the Proposition, and we thank you for it; we also are inclined to renew all Treaties, and keep a good Correspondence with you. You told us further, if ever we should perceive the Chain has contracted any Rust, to let you know, and you would take care to take the Rust out, and preserve it bright. We agree with you in this, and shall, on our Parts, do everything to preserve a good Understanding, and to live in the same Friendship with you as with our Brother, Onas [the Iroquois name for the Governor of

> Pennsylvania], and Assaragoa [the Iroquois name for the Governor of Virginia]; in confirmation whereof, we give you this belt of wampum. (*Ibid.*, at 107.)

The willingness of Indian nations to continue to cede lands to the British colonies in return for trade advantages and military support against French expansionism came under increasing pressure in the 1750s as British settlers and land speculators continued to encroach upon the lands of Indian nations beyond the great mountain divide of the Alleghenys. The limits to extinguishment were addressed specifically by another great Iroquois statesman, Chief Henricks, ten years after the Treaty of Lancaster at the Albany Congress in June 1754. This was convened, under instructions from the imperial government, for the purpose of unifying all the British colonies under one general treaty, to be made in His Majesty's name with the Iroquois Confederacy following Iroquois threats to breach the Covenant Chain as a result of their dissatisfaction with colonial failure to redress their land grievances. Chief Henricks, as the principal spokesperson for the Confederacy, addressed the requests by Pennsylvania for additional lands west of the Susquahanna River and expressed the Iroquois' concerns with extinguishing their title to yet more land.

> Brother, let Us talk together freely. We thought the Boundaries had been settled between Us and the White people. We received a Message from You relating to those Lands, which We shall now have some Talk about.
>
> We have several times desired the Governor of Pennsylvania to remove his People from our Lands, and We understand he has done his utmost Endeavours for that Purpose, except using Force, which We do not desire he should. We are now therefore willing to part with them, and expect to be paid for them.
>
> What We are now going to say is a Matter of great moment, which we desire you to remember as long as the Sun and Moon last. We are willing to sell You this large Tract of Land for your People to live upon, *but We desire this may be considered as Part of our Agreement, that when We are all dead and gone, your Grand Children may not say to our Grand Children, that your Forefathers sold the Land to our Forefathers, and therefore be gone off them. This is wrong. Let Us all be as Brethren as well after as before of giving you Deeds for Land*. After We have sold our Land, We in a little time have nothing to show for it, but it is not so with You, Your grandchildren will get something from it as long as the World stands, our Grand Children will have no advantage from it. They will say We were fools for selling so much Land for so small Matter, and curse Us: therefore let it be Part of the present Agreement that We shall treat one another as Brethren to the latest Generation, even after We shall not have left a foot of Land.
>
> We desire You to give Ear to what We are now going to say: Land is grown very dear You know and has become very valuable. We desire You would content yourself with what

> We shall now grant You. We will never part with the Land at Shamokin and Wyomink, our Bones are scattered there, and on this Land there has always been a great Council Fire. We desire You will not take it amiss, that We will not part with it, for We reserve it to settle such of our Nations upon as shall come to Us from the Ohio, or any others who shall deserve to be in our Alliance. Abundance of Indians are moving up and down, and We shall invite all such to come and live here, that so We may strengthen ourselves.
>
> As to Wyomink and Shamokin and the Land contiguous thereto on Sasquehannah, We reserve them for our hunting Ground and for the Residence of Such as in this time of War shall remove from among the French and choose to live here: and We have appointed John Shick Calany to take care of them. He is our Representative and Agent there, and has our Orders not to suffer either Onas's people nor the New EngLanders to settle any of these Lands, and if any shall presume to do it, We have directed him to complain to Onas, whether it shall be his own People or from other Provinces, and to insist on their being turned off; and if he shall fail in his Application We will come ourselves and turn them off. No body shall have this Land. Get Your deed ready as fast as You can. (Report of the Pennsylvania Commissioners at the Albany Congress, August 5, 1754, E.A.I.D., vol. II, p. 331 at 335-9 [emphasis added].)

The deed drafted by the English treaty commissioners and executed by the Six Nations reads as follows:

> To all to whom these Presents shall come Greeting. Henry Peters [et al.] Sachems or Chiefs of the Mohock Nation; Aneeghnaxqua [et al.] Sachems or Chiefs of the Oneido Nation; Otsinughyada [et al.] Sachems or Chiefs of the Onondago Nation; Scanurety [et al.]; Sachems or Chiefs of the Cayuga Nation; Kahaickdodon [et al.] Sachems or Chiefs of the Seneca Nation; Suntrughwacken [et al.] Sachems or Chiefs of the Tuscarora Nation for and in Consideration of the Sum of Four Hundred Pounds Currant Money of the Province of New York...do hereby acknowledge for and on behalf of themselves and all the Six Nations aforesaid and every one of them have given, granted, bargained, sold, released, and confirmed, and by these Presents do and *every of them doth give, grant, bargain, sell, release and confirm unto* Thomas Penn and Richard Penn, Proprietaries of the Province of Pennsylvania, their Heirs, Successors, and Assigns, All the Lands lying within the said Province of Pennsylvania bounded and limited as follows [detailed description of the ceded territory]...*so that neither the said [named Indian Chiefs] nor any others of the said Six Nations nor their nor any of their Heirs, Successors and Assigns shall or may hereafter claim, challenge, or demand any right to the said Land, Islands, Rivers, Creeks, Waters, Hereditaments, and Premises hereby granted and released, but from the same shall be barred forever by these Presents*; and the said Chiefs do hereby Covenant and declare that the Right to the said Land and Premises is solely in them and their Nations and in no other Nation whatsoever; and it is hereby mutually covenanted and agreed by and between the said Proprietaries on behalf of themselves, their Successors, and all the Inhabitants of Pennsylvania forever of the one Part, and the said Chiefs on behalf of themselves, their Nations, and their Children's Children forever of the other Part, *that notwithstanding any Sales of Lands which the Indians now make or hereafter shall make to the said Proprietaries or their Successors there shall ever subsist and mutually be preserved between both the said Parties and their Children and*

> *Children's Children to the latest Posterity the same Love, Friendship and kind Treatment that hath all along subsisted and does now subsist between them*. (*Ibid.*, at 339-40 [emphasis added].)

In contrasting the written text ─ what the Iroquois refer to as the `pen and ink work' ─ with the oral record as reflected in Chief Henricks' speech, we can see a wide gulf in terms of extinguishment of rights. Treaty making from the perspective of the Iroquois was a covenant linking past generations of the Iroquois and the British in a relationship based upon mutual respect and paving the way for a future based on mutual benefit. In this framework, the transfer of interests in the land to the British for the purpose of British settlement ─ "for your people to live upon" ─ was subject to a recognition of continuing Iroquois rights in the land and a guarantee that future generations of Iroquois would not be dispossessed of their interest in making use of these lands. "When we are all dead and gone, your grandchildren may not say to our grandchildren, that your forefathers sold the land to our forefathers, and therefore be gone off them. This is wrong." Thus, the Iroquois did not see the treaty as extinguishing their Aboriginal rights in the land but rather as a transfer of limited rights to the British within a framework of past and future mutually beneficial relationships. "Let us all be as brethren as well after as before of giving you deeds for land." However, for some of the land being sought by the British, the Iroquois were not prepared to grant even limited rights. "Our bones are scattered there and on this land there has always been a great Council Fire." The Iroquois required that in these lands the British respect and acknowledge their continuing exclusive Aboriginal rights.

From the British perspective, as reflected in the deed of cession, the Iroquois surrendered their entire legal interest in the lands without any reservation. The transfer of land was conditioned only upon the preservation into the future of "the same love, friendship and kind treatment that had all along subsisted and does now subsist between them". To the British this did not refer to any legal or equitable interest in the land and was likely seen by British draughtsmen as imposing no legally enforceable obligation. It certainly was not seen as giving the Iroquois any legal entitlement in the future governance, management or development of the lands surrendered.

The dissonance between Iroquois and British assumptions and expectations about the purposes and effects of treaties dealing with land rights has continued to reverberate down the centuries and has its mirror images in treaty making in the nineteenth and twentieth centuries

between other Aboriginal peoples and other colonial governments.

Treaty Making in the Nineteenth Century

The *Royal Proclamation of 1763* entrenched in colonial constitutional law the principle that the consent of First Nations was necessary for the acquisition by the British Crown of Indian lands required for settlement and development. That principle, as reflected in the Proclamation's public treaty council protocol, provided the legal framework in the post-1763 period within which the Crown negotiated for the acquisition of lands in Canada in the possession of the Aboriginal peoples. Until the mid-nineteenth century the written text of the Canadian treaties was in most cases limited to conveyancing provisions dealing with the surrender of the Indian interest in order to permit settlement and development of the land free and clear of any legal encumbrance. Starting in 1850 there was a significant expansion in the scope of the treaty provisions beyond the surrender of interests in land. The Robinson Treaties of 1850 are of special legal significance in the pre-Confederation era in so far as they provided a precedent for the numbered treaties negotiated in western Canada, the Northwest Territories and Northern Ontario in the post-Confederation period.

In 1846, after the discovery of minerals along the north shores of lakes Huron and Superior, the Ojibwa nation petitioned the governor of Canada, asking that no mining development take place until after suitable arrangements had been made with them. As a result,

> the government of the lake province of Canada, deemed it desirable, to extinguish the Indian title, and in order to that end, in the year 1850, entrusted the duty to the late Honourable William B. Robinson who discharged his duties with great tact and judgment, and succeeded in making two treaties, which were the forerunners of the future treaties, and shaped their course. (Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* [Toronto: Belfords, Clarke & Co., 1880], p.16.)

The Robinson Treaties, over and above the clauses dealing with the surrender of the Aboriginal interest in the lands ceded, also contained provisions relating to the establishment of Indian reserves, the payment of annuities and the recognition of continuing harvesting rights to hunt and fish over the ceded territory, provisions expanded upon in the post-Confederation numbered treaties.

The Robinson Treaties differ, however, from the post-Confederation treaties in one significant way. While the treaties contain the usual conveyancing language of surrender, the reserves recognized by the treaty are referred to expressly as "reservations" from the grant. Thus

the language of the Robinson Superior Treaty provides that

> The said Chiefs and principal men do freely, fully and voluntarily surrender, cede, grant and convey under Her Majesty...all their right, title and interest in the whole of the territory above described, *save and except the reservations* set forth in the schedule hereunto next. (*Ibid.*, at 303 [emphasis added].)

The Report of the Task Force on Comprehensive Claims Policy saw this language as a precedent reflecting retained Aboriginal rights:

> Through this provision the Indians surrendered their Aboriginal title to some areas and reserved their Aboriginal title to others. In addition, they retained the right to hunt and fish throughout the ceded territory. (*Living Treaties: Lasting Agreements*, Report of the Task Force to Review Comprehensive Claims Policy [Ottawa: Department of Indian Affairs and Northern Development, 1985], p. 37.)

The Task Force also observed that the language of the Douglas Treaties on Vancouver Island used similar language of retained rights to certain areas and harvesting. Thus, the text of the North Saanich Treaties (a text common to the other ten treaties signed in the early 1850s) provides that

> ...We the Chiefs and people of the Saanich Tribe...do consent to surrender, entirely and forever, to James Douglas, the agent of the Hudson's Bay Company, the whole of the land situate and lying as follows...
>
> The condition of our understanding of this sale is this, that our village sites and enclosed fields are to be kept for our own use, for the use of our children, and for those who may follow after us;... It is understand, however, that the land itself, with these small exceptions, becomes the entire property of the White people forever; it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly. (*R.* v. *Bartleman* (1984) 55 B.C.L.R. 78 at 86. See also Wilson Duff, "The Fort Victoria Treaties", *B.C. Studies* 3 (1969), p. 57.)

After Confederation, between 1871 and 1921, the government of Canada negotiated the numbered treaties (Treaties 1 to 11) with Indian nations in the northern and western parts of Canada. In 1923 a further series of treaties was negotiated to deal with the last large areas of unceded land in southern Ontario. In negotiating and concluding these treaties, the federal government reaffirmed the legal principle that it was necessary for the Crown to obtain, through the treaty protocol, Indian consent for the settlement and development of lands in possession of Indian nations. While from the Crown's perspective the numbered treaties reflected a continuing process of obtaining the surrender of the Aboriginal interest in order to clear the Crown's legal title, the language of the treaties introduced a significant difference in dealing with the issue of

retained Aboriginal rights. Treaties 1 to 11 contained a general surrender clause in the following terms:

> The Indians...do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada...all their rights, titles and privileges whatsoever, to the lands included within the following limits. (Treaty 3, quoted in Morris, *The Treaties of Canada*, at 322.)

Following this blanket surrender, the treaty language continues:

> And Her Majesty the Queen hereby agrees and undertakes to *lay aside reserves* for farming lands...which said reserves shall be selected and set aside where it shall be deemed most convenient and advantageous for each band or bands of Indians by the officers of the said Government appointed for that purpose... (*Ibid.* [emphasis added].)

In addition to hunting and fishing rights, the treaty provides that:

> The said Indians shall have right to pursue their avocations of hunting and fishing throughout the tracts surrendered as herein before described. (*Ibid.*)

In comparing the language of the post-Confederation numbered treaties with that of the pre-Confederation Robinson Treaties, the Task Force on Comprehensive Claims Policy provided this analysis:

> In contrast to the pre-Confederation approach, the Indian rights [to reserves and to hunting and fishing over the ceded territory] now flowed from the treaty, rather from the retained Aboriginal title and rights. This change, although subtle, is extremely important to Aboriginal peoples. Instead of the surrender and reservation of the pre-Confederation era, clear title to Aboriginal lands was now obtained through a complete surrender of all rights and a granting back of more limited rights. (*Living Treaties, Lasting Agreements*, p. 38.)

In addressing the issue of alternatives to extinguishment of Aboriginal rights in the context of contemporary land claims agreement, it is necessary to consider further the post-Confederation numbered treaties over and above the shift in the treaty language from retained to granted rights. Thus far we have looked at the Canadian treaties in the context of their legal texts. We have already seen the differences between legal texts and Aboriginal peoples' interpretation of treaty negotiations in the context of the eighteenth century Covenant Chain treaties. Recent research has now documented that the British `pen and ink work' does not do proper justice to the understanding brought to treaty negotiations by First Nations in Canada in the nineteenth century.

For most of the numbered treaties, we do not have the benefit of a detailed documentary record of the conduct of the negotiations, unlike the one that exists for the Covenant Chain treaty

councils of the eighteenth century. However, in the case of Treaty 3, we do have, in addition to the report of one of the treaty commissioners, Alexander Morris, a more detailed report of some of the speeches made during the course of treaty negotiations, which gives a sense of both the treaty protocol and the nature of the negotiations. These speeches, like those of the treaty councils in the eighteenth century, focus far more on issues of cultural and economic accommodation between colonial and Aboriginal nations than they do on blanket extinguishment of rights. Commissioner Morris, in introducing the proposed treaty terms, addressed the representatives of the Saulteaux Nation in this way:

> I told you I was to make the treaty on the part of our Great Mother, the Queen, and I feel it will be for your good and your children... I want to settle all matters, both of the past and the present, so that the White and the Red Man will always be friends. I will give you land for farms, and also reserves for your use. I have authority to make reserves such as I have described, not exceeding in all a square mile for every family of five or thereabouts. It may be a long time before the other lands are wanted, and in the meantime you will be permitted to fish and hunt over them. I will also establish schools whenever any band asks for them, so that your children may have the learning of the White Man. I will also give you a sum of money for yourselves and every one of your wives and children for this year. I will give to each of you this year a present of goods and provisions to take you home... (Morris, *The Treaties of Canada*, p. 58.)

When proceedings resumed the following day, the Chief of Fort Francis, Ma-We-do-pe-nais, addressed the treaty commissioners:

> What we have heard yesterday, and as you represented yourself, you said the Queen sent you here, the way we understand you as a representative of the Queen. *All this is our property where you have come.* We have understood you yesterday that Her Majesty has given you the same power and authority as she has, to act in this business; you said the Queen gave you her goodness, her charitableness in your hands. This is what we think, that the Great Spirit has planted us on this ground where we are as you were where you came from. *We think where we are is our property.* I will tell you what he said to us when he planted us here; the rules that we should follow ─ us Indians, he has given us rules that we should follow to govern us rightly. (Morris, p. 59 [emphasis added].)

The words of Chief Ma-We-do-pe-nais, in asserting the Saulteaux Nation's Aboriginal rights of ownership and jurisdiction, are charged with the same sense of relationship and identity with the land that characterized the statements of Chief Canassatego and Chief Henricks at the treaty councils in Lancaster and Albany a century before.

The Saulteaux, in arguing for better terms, were aware that gold had been discovered in part of their country. Thus, in proposing that the compensation should be greater, one of the

spokesmen reminded the commissioners:

> The sound of the rustling of the gold is under my feet where I stand; we have a rich country; it is the Great Spirit who gave us this; where we stand upon is the Indian's property and belongs to them... It is your charitableness that you spoke of yesterday ─ Her Majesty's charitableness that was given you. It is our Chiefs, our young men, our children, and great-grandchildren and those who are to be born, that I represent here, and it is for them I ask for terms. The White Man has robbed us of our riches, and we don't wish to give them up again without getting something in their place. (Morris, p. 62.)

Here again, the Aboriginal perspective of approaching treaty negotiations with a long-term vision of protecting future generations resonates with the same tones brought to Covenant Chain negotiations by the Haudenasaunee.

The Indians' willingness to reach an accommodation with the government by sharing their resources was conditioned not only upon appropriate financial considerations but also upon economic assistance in the development of new opportunities to supplement the traditional economy, which was coming under great pressure with the advance of the settlement and agricultural frontier. The perspective of mutual accommodation and the sharing of resources that the Indian people brought to the treaty-making process is well reflected in the speech of the Chief of Lac Seule:

> We are the first that were planted here; we would ask you to assist us with every kind of implement to use for our benefit, to enable us to perform our work; a little of everything and money. We would borrow your cattle; we ask you this for our support; I will find whereon to feed them. *The waters out of which you sometimes take food for yourselves, we will lend you in return*... If you give what I ask, the time may come when I will ask you to lend me one of your daughters and one of your sons to live with us; in return I will lend you one of my daughters and one of my sons for you to teach what is good, and after they have learned, to teach us. (Morris, p. 63 [emphasis added].)

The written accounts of the speeches made by the Aboriginal negotiators are available to us only through the voices of interpreters, and these nineteenth-century reports are lacking the detail and texture that characterizes the reports of Covenant Chain councils. The detail and texture have, however, been reconstructed in the various oral history projects undertaken by Aboriginal organizations over the past fifteen years. The Federation of Saskatchewan Indians, in its study, "Elders' Interpretation of Treaty Four ─ A Report on the Treaty Interpretation Project", has identified a number of differences between the text of Treaty 4 and the elders' understanding based on their oral history. In the area of land and resources,

> The elders indicate that it was a limited cession...the difference between the two

interpretations of the land/resources session is best described by reference to the elders' understanding of their rights with the respect of wildlife, subsurface rights, and the status of lands, including waters, not utilized for agriculture.

(a) The subject of wildlife, while it has been conventionally phrased in terms of Indian hunting, fishing and trapping "rights", "right-of-access" or "right to use", is discussed here as an element or feature of the land cession because the elders state that the Indian people continue to own or have exclusive use of all wildlife. Specifically, the elders state the wildlife continues to belong to the Indian people as an element in the inventory of unceded resources. It is stated frequently that the Crown assumed a treaty obligation to protect wildlife populations for continuing Indian use.

(b) Subsurface and other non-agricultural resources ─ the elders indicate that the resources ceded under Treaty Four were limited and restrictive as some land resources were retained by the Indian people in the ceded land. The Commissioner stated that the white men wanted land to farm only to the depth of a plough, stated more frequently as a depth of six inches. There is an implication that non-agricultural land ─ mountain country, lakes, other lands unfit for farming ─ were not requested and not ceded. (D. Opekokew, *The First Nations: Indian Government and the Canadian Confederation* [Saskatoon: Federation of Saskatchewan Indians, 1980], pp. 12-13.)

Research undertaken by the Indian Association of Alberta regarding the oral history of Treaty 6 further supports the concept of a limited cession in the context of continuing Aboriginal rights:

> There is no archival evidence that any overt distinction was made at the treaty negotiations between surface and subsurface rights. The closest any of it comes to the subject is the question raised by the Treaty Three chief about minerals. While the archival evidence is simply silent on the point, it is universally mentioned in the Treaty Six oral testimony...
>
> The elders do not believe that the Indians surrendered the subsurface rights. *They believe that their ancestors understood the treaty as providing for a limited surrender or sharing of territorial rights.* Expected settlement was agricultural. Farmers used only the surface of the earth. The Indians had agreed not to molest settlers who came to farm. When non-Indians began to dig into the subsurface for minerals, oil and natural gas, it seemed to them a breach of the treaty agreement on what it was they had surrendered.
>
> Similarly, commercial use of timber, game and fish by non-Indians was seen by some as a breach of the treaty. There was universal agreement amongst the interviewees that the animals, birds and fish were not surrendered. Some explained that these things would not have been given up because they were needed in order to live... Among those who dealt with water (lakes and rivers) and the mountains, all said that they had not been given up. Some mentioned the spiritual significance of the mountains and said that Indians would never have surrendered them." (John Taylor, "Two Views On The Meaning of Treaties Six and Seven", in *The Spirit of the Alberta Indian Treaties*, ed. R. Price [Montreal:

Institute for Research on Public Policy, 1980], p. 43 [emphasis added].)

Common to the elders' interpretation of Treaties 4 and 6 is that the Indian nations retained their inherent powers of self-government and did not give up their jurisdiction over their people and those resources upon which their livelihoods depended. By signing the treaties, the Indian nations created an ongoing relationship with the Crown in relation to Indian social and economic development in exchange for the grant to the Crown of limited rights in the land surrendered.

There are clear lines of continuity between post-Confederation treaty making and the Covenant Chain of the eighteenth century. From the perspective of the British Crown there is the continuity of signing treaties in order to obtain Aboriginal consent to the surrender of their interest in lands. From the Aboriginal perspective there is the continuing tradition of seeking accommodation with the Crown based upon mutual respect and mutual benefit. What had changed, however, in addition to the balance of power between Indian nations and the Crown, was the economic and social circumstances facing Indian nations. More specifically, the Indians of the prairies were facing increased white settlement, devastating epidemics, the influx of whisky traders into the northwest, and the disappearance of the buffalo. This is reflected in the different ways in which the Indian nations sought the protectorate role of the Crown in return for limited cession of certain interests in Indian lands. That protectorate role is not confined to preserving the Indian nations' territorial and political integrity within the unceded lands but also extends to the protection of the traditional Indian economy and assistance in the development of new forms of Indian economic self-sufficiency. Whereas from the Indian perspective that assistance was to be provided within a framework of continuing autonomy and self-government, from the Crown's perspective assistance was perceived within a framework for cultural, social and economic assimilation.

In the case of several of the later numbered treaties, in particular Treaties 8 and 11, the documentary record of the negotiations and the Indian oral history are to the effect that the Indian people did not see these treaties as a surrender or extinguishment of even limited rights in the land but considered them to be treaties of peace and friendship. Aboriginal witnesses at the Mackenzie Valley Pipeline Inquiry recalled the words that Chief Drygeese spoke when Treaty 8 was signed at Fort Resolution in 1899:

> If it is going to change, if you want to change our lives, then it is no use taking treaty, because without treaty we are making a living for ourselves and our families... I would

> like a written promise from you to prove you are not taking our land away from us... There will be no closed season on our lands. There will be nothing said about the land... My people will continue to live as they were before and no White man will change that... You will in the future want us to live like White man does and we do not want that... The people are happy as they are. If you try to change their ways of life by treaty, you will destroy their happiness. There will be a bitter struggle between your people and my people. (Thomas Berger, *Northern Frontier, Northern Homeland*, Report of the Mackenzie Valley Pipeline Inquiry [Ottawa: Department of Indian Affairs and Northern Development, 1977], vol. 1, p. 167.)

The contemporary evidence and oral history surrounding the signing of Treaty 11 in 1921 shows that, as in 1899, the Dene wanted to retain their way of life and to obtain assurances against the encroachment of white settlers on their land. Dene negotiators were adamant that unless the government was prepared to give the guarantee that they would have full freedom to hunt, trap and fish, they would not sign the treaty. To the Dene, this guaranty that the government would not interfere with their life on the land was an *affirmation*, not an extinguishment, of their right to their homeland.

Treaty Making in the Twentieth Century

Treaties 8 and 11, signed in 1899 and 1921, constitute an historical bridge into the twentieth century. Their significance is, however, more than historical. They represent the beginning of the modern Aboriginal resistance to the settlement of Aboriginal rights based upon the extinguishment model. Beginning in the 1970s, the Dene of the Northwest Territory initiated the decolonization of the legal and political agenda for Aboriginal peoples (symbolized by the Dene Declaration) and insisted that entrenchment, not extinguishment, of Aboriginal rights must be the basis of any new reordering of relationships between Aboriginal peoples and Canada. That position was articulated in the community hearings of the Mackenzie Valley Pipeline Inquiry in 1975-76. The report of that inquiry placed the Dene struggle for a new beginning in its historical and national context:

> Canadian policy has always contemplated the eventual extinguishment of native title to the land. The native people had to make way for the settlement of agricultural lands in the West, now they are told they must make way for the industrial development of the North. But the native people of the North do not want to repeat the history of the native peoples of the West. They say that, in the North, Canadian policy should take a new direction.
>
> Throughout Canada, we have assumed that the advance of Western civilization would lead the native people to join the mainstream of Canadian life. On this assumption, the

> treaties promised the Indians education and agricultural training. On this assumption, the federal government has introduced programs of education, housing, job training and welfare to both treaty and non-treaty Indians. Historical experiences clearly show that this assumption is ill-founded, and that such programs do not work... George Manuel, President of the National Indian Brotherhood, told the Inquiry that the programs failed because the native people were never given the political and constitutional authority to enforce the treaty commitments or to implement the programs. Every program has assumed, and eventually has produced, greater dependency on the government... Manuel argued that the settlement of native claims in the North must recognize the native peoples' rights to land and a political authority over the land, as opposed to cash compensation for the purchase of their land. *The object of negotiations, he said, should be the enhancement of Aboriginal rights not their extinguishment.* Only through transfer to them of real economic and political power can the native people of the North play a major role in determining the course of events in their homeland and avoid the demoralization that has overtaken so many Indian communities in the south. The determination to arrest this historical process, which is already under way in some northern communities, explains the native peoples' insistence on a settlement that entrenches their right to the land and offers them self-determination.
>
> The demand for entrenchment of native rights is not unique to the native peoples of the North. Indians in southern Canada, Aboriginal peoples in many other parts of the world, are urging upon the dominant society their own right to self-determination. As Manuel said:
>
> > Aboriginal people everywhere share a common attachment to the land, a common experience and a common struggle.
>
> James Wah-Shee, voicing the sentiment shared by virtually all of the native people in the North, said:
>
> > The general public has been misinformed on the question of land settlement in the North. What is at issue is land not money. A land settlement in the Northwest Territories requires a new approach, a break in an historical pattern. A "once-and-for-all" settlement in the tradition of the treaties and Alaska will not work in the Northwest Territories. What we are seriously considering is not the surrender of our rights "once-and-for-all" but the formalization of our rights and ongoing negotiation and dialogue. (*Northern Frontier, Northern Homeland*, p. 170 [emphasis added].)

The Dene proposals for the settlement of claims based upon the entrenchment, rather than extinguishment, of Aboriginal rights came shortly after the government of Canada, prompted in large measure by the Supreme Court of Canada decision in *Calder*,[ix] opened the door in 1973 to the era of modern land claims settlements and treaty making by acknowledging that it would negotiate settlements with those Aboriginal groups whose rights of traditional use and occupancy

had been neither extinguished by treaty nor superseded by law. These claims were later described as `comprehensive'. The same policy also identified a process for dealing with `specific claims' ─ claims relating to outstanding lawful obligations of the federal government, particularly those arising from its failure to live up to the terms of treaties. The comprehensive claims process assumed particular significance in those areas of the country where no treaties had yet been negotiated, in particular British Columbia, the Yukon, Quebec and the traditional territories of the Inuit. Although treaties had been signed with the Dene in the Northwest Territories, the government of Canada subsequently accepted that the comprehensive claims process would encompass the lands covered by these treaties.

While acknowledging on the one hand that there was unfinished legal business requiring modern treaty making, the government of Canada ─ in its initial formulations of the comprehensive claims process and its subsequent refinement in *In All Fairness*, published in 1981 ─ clearly envisaged that modern treaties, like their historical counterparts, would be based upon a legal model in which Aboriginal rights were to be extinguished. In return the government would grant other rights and interests in particular lands and resources.

> When a land claim is accepted for negotiation, the government requires that the negotiation process and settlement formula be thorough so that the claim cannot arise again in the future... *The thrust of this policy is to exchange undefined Aboriginal land rights for concrete rights and benefits*. (*In All Fairness, A Native Claims Policy* [Ottawa: Department of Indian and Northern Affairs, 1981], p. 19 [emphasis added].)

This model of extinguishment and the grant-back of rights is reflected in the first two modern land claims settlements following the federal government's change of policy in 1973. The James Bay and Northern Quebec Agreement of 1976 contains these provisions relating to the surrender and extinguishment of Aboriginal rights:

> 2.1 *The James Bay Crees and the Inuit of Quebec hereby cede, release, surrender and convey all their native claims*, rights, titles and interest, whatever they may be, in and to land in the Territory and in Quebec.
>
> 2.2 Quebec and Canada, the James Bay Energy Corporation, the James Bay Development Corporation and the Quebec Hydro Electric Commission (Hydro-Quebec)... *hereby give, grant, recognize and provide to the James Bay Crees and the Inuit of Quebec the rights, privileges and benefits specified herein*. (Éditeur officiel du Quebec, 1976 [emphasis added].)

In addition to this surrender and grant-back formulation a further provision of the agreement provides that the enabling federal legislation

shall extinguish all native claims, rights, title and interest of all Indians and all Inuit in to the Territory. (*Ibid.*, section 2.6.[x])

The Inuvialuit Final Agreement contains similar provisions:

3(4) *The Inuvialuit cede, release, surrender and convey* all their Aboriginal claims, rights, title and interest, whatever they may be, in and to the Northwest Territories and Yukon Territory and adjacent offshore areas...

3(5) *The settlement legislation* approving, giving effect to and declaring valid this agreement *shall extinguish all Aboriginal claims, rights, title and interest* whatever they may be of all Inuvialuit.

3(11) The settlement legislation shall provide that *Canada recognizes and gives, grants and provides to the Inuvialuit the rights, privileges and benefits specified in this agreement* in consideration of the cession, release, surrender and conveyance referred to in subsection (4). (Ottawa: Department of Indian and Northern Affairs, 1984 [emphasis added].[xi])

The language reflected in these agreements has been likened to that of a driftnet fishery. Government lawyers have been instructed to ensure that the language of these documents completely cleans out all Aboriginal title and rights "whatever they may be" in order to ensure that the Crown requires a clear unencumbered title. The federal government's objectives are well described in a Department of Justice memorandum written in 1986:

> Traditional use and occupancy may give the Native people an interest in land, known as Aboriginal title, which constitutes a burden on the Crown title likely to impede use or development of the land for other purposes. The legal purpose of the government in entering into land settlements has been to perfect its title by removing the burden of aboriginal title. The Native group, on the other hand, has negotiated from the government a variety of well-defined monetary and other benefits in exchange for its less certain interest in the land... The precise nature of that interest ─ the content of Aboriginal title ─ is uncertain and controversial ─ whatever that interest may be, however, (and it need not be defined in order to be exchanged) it has been at the heart of the transaction. The presence of the parties at the negotiating table has implied a willingness to enter into an exchange; on the Native side, to relinquish their interest for a sufficient price, and on the government side, to pay some price in order to secure the Aboriginal interest. ("Report of the Task Force to Review Comprehensive Claims Policy, A Legal Commentary", May 13, 1986, pp. 1-2.)

The fundamental problem with this analysis is that the asserted "willingness" on the part of Aboriginal peoples to relinquish their Aboriginal title has been dictated by federal claims policy rather than by Aboriginal peoples' own conceptions of what lies "at the heart of the transaction".

The Problems with Extinguishment

The Report of the Task Force to Review Comprehensive Claims Policy specifically addressed the conjunction of both the surrender and grant-back language with express legislative extinguishment and the problems this approach poses for a principled resolution of Aboriginal claims.

> Clearly there has been a gradual but distinct change in the way in which Aboriginal title has been extinguished in Canada. Before Confederation, it was considered sufficient if specific rights were surrendered voluntarily by the Indian peoples. The Numbered Treaties introduced a complete surrender ─ grant-back approach. In both instances, the act of surrender (whether of partial or total rights) by an Indian people effected an extinguishment of rights. In the modern agreements, an additional mechanism has been included, namely, the blanket extinguishment of all rights by the Crown, through a legislative clause.
>
> There is a serious question as to whether a sweeping clause on extinguishment is necessary to clear the title in circumstances where a voluntary surrender of rights has been procured from the Aboriginal people. From a non-Aboriginal point of view, this issue may seem almost trivial, because, even if the extinguishment clause is not legally necessary to clear the title, it does not reduce the Aboriginal rights by any greater degree than they have been reduced by the voluntary surrender of rights.
>
> Yet, from an Aboriginal point of view the issue is fundamental. The sweeping extinguishment clause in the modern agreements (which may not even be legally necessary to obtain certainty in relation to the land) is perceived as an expression of the federal government's wish to abolish their unique identity and to destroy all Aboriginal rights. It may be accidental rather than purposeful policy that this result is achieved through language that may be legally excessive. In fact, the main objective is the clarification of land and resource rights. The recognition of Aboriginal rights implicit in the pre-Confederation treaties has declined steadily towards a surrender and extinguishment of all rights in the modern agreements. To most non-Aboriginals this progression is insignificant, in that it accomplishes the same result, namely, clarification of the land title.
>
> To many Aboriginals, Aboriginal rights are inherently tied to culture and lifestyle and are integral to their self-identity. The blanket surrender and extinguishment of these rights suggests assimilation and cultural destruction. It is partly for these reasons that Aboriginal groups fought so vigorously for the entrenchment of their rights in the Canadian Constitution. (*Living Treaties: Lasting Agreements*, p. 40.)

In its articulation of the comprehensive claims policy, the federal government objects to the use of `extinguishment' to describe the surrender of Aboriginal rights that characterizes the modern agreements. It prefers to emphasize that the process is one of `exchange' of rights:

> The objective is to negotiate modern treaties which provide, clear and long-lasting

> definition of rights to lands and resources. Negotiated comprehensive claims settlements provide for the exchange of undefined Aboriginal rights for a clearly defined package of rights and benefits codified in constitutionally protected settlement agreements. (*Federal Policy for the Settlement of Native Claims* [Ottawa: Department of Indian and Northern Affairs, March 1983], p. i.)

According to the federal government, therefore, this exchange is a significant advance for Aboriginal peoples in giving them more enforceable rights than they would otherwise have absent the exchange.

In this paper it is necessary to explore in greater depth the reasons for the insistence by Aboriginal peoples that modern settlements and revisions of existing treaties must be built upon a model of recognition and affirmation and not extinguishment of Aboriginal rights and why the federal government's revised concept of `exchange of rights' does not adequately take into account the Aboriginal perspective. There is first the issue of what extinguishment symbolizes. As noted by the Task Force report, the concept of extinguishment is charged with the colonial strategies of assimilation and cultural destruction of Aboriginal peoples. However, the concept of extinguishment carries within it a cluster of other assumptions that Aboriginal peoples also reject. It assumes that Aboriginal rights, as legal rights, consist principally, if not exclusively, of `traditional' economic practices (such as hunting and fishing). The corollary assumption here is that legal rights and interests in land and resources, if they are to be asserted within the contemporary legal and economic framework of Canadian society, can only be those rights and interests granted by the dominant Canadian legal system in accordance with its land tenure system. Inherent in the first assumption is the rejection of Aboriginal peoples' right to be contemporary; inherent in the second assumption is the rejection of legal pluralism that would recognize the continuing vitality of Aboriginal land tenure and resource management regimes in the development of contemporary Aboriginal societies.

These assumptions have not receded in the wake of the entrenchment of Aboriginal treaty rights in section 35 of the *Constitution Act, 1982*. Indeed, because Aboriginal rights are now constitutional rights, provincial and federal governments have argued strenuously that Aboriginal rights to land and resources must be given restricted scope as `traditional' harvesting rights. In the Gitksan and Wet'suwet'en case, the government of Canada advanced this argument before the British Columbia Court of Appeal in 1992:

> This respondent submits that Aboriginal rights specifically recognized and protected by

> the common law and now by Section 35 of the Constitution are those rights which pre-existed British sovereignty or the coming of Europeans. These rights describe Aboriginal, pre-contact life. With Europeans came other economic opportunities. Europeans brought different ways of living in the environment. As European settlement took place, a new regime and different opportunities for economic activity were put in place and Aboriginal people became part of that regime. Rights relating to economic and cultural life were part of the new regime. Aboriginal people had their rights arising from their pre-existing society as recognized in the new regime and rights as citizens of the new regime regardless of their Aboriginality.
>
> . . .
>
> Aboriginal society changed as a result of contact with European society. It is submitted those changes in Aboriginal society do not constitute evolved pre-existing rights. After contact two kinds of rights existed which were recognized by the British legal regime: Aboriginal rights and rights of Canadian citizens. Aboriginal people have available to them both sets of rights. (Factum of the Attorney General of Canada in *Delgam Uukw* v. *A.G.B.C. et al.*, vol. 1, paras. 318-320.)

Canada's conception of Aboriginal rights envisages these rights as a source of legal and constitutional protection for the harvesting of `traditional' resources. If Aboriginal peoples wish to participate in and benefit from the contemporary economy involving non-traditional resources, they must look to the same legal rights and legal regimes as non-Aboriginal people. This is precisely why the federal government argues that by `exchanging' their Aboriginal rights ─ which, according to the federal government's legal argument, are the hallmarks of an old-world `Aboriginal' economy ─ for the more diversified economic rights of the contemporary economy, Aboriginal peoples have little to lose and much to gain by exchanging old rights for new ─ a modern-day version of Aladdin's lamp.

First Nations' conception of Aboriginal rights proceeds from different assumptions about Aboriginal societies, their relationship with the land, and the place of Aboriginal rights in their future. For Aboriginal peoples, Aboriginal rights are the source of their economic, social and cultural well-being and are not tied to any particular use of their homelands. Their societies are open and adaptive and have indeed sought to accommodate and take advantage of new economic opportunities. In so doing, they have developed a mixed economy, and they see their Aboriginal rights as the basis not only to maintain the productivity of their territories for the harvesting of food, both for their own consumption and trade, but also to develop a resource base, in the context of a mixed economy, to provide and guarantee a secure foundation for themselves and their children. First Nations' view of Aboriginal rights, therefore, is in the context of a future that recognizes their distinctiveness as Aboriginal peoples in the contemporary world ─ as opposed to

Canada's view, which frames their rights in a rear-view mirror.

Aboriginal peoples' rejection of extinguishment takes us to the heart of their relationship to their homelands. Oren Lyons, describing Aboriginal rights in the context of traditional Aboriginal philosophy, has expressed that relationship in this way:

> What are Aboriginal rights? They are the law of the Creator. That is why we are here: he put us in this land. He did not put the white people here: he put us here with our families, and by that I mean the bears, the deer and the other animals. We are the Aboriginal people and we have the right to look after all life on this earth. We share land in common, not only among ourselves but with the animals and everything that lives in our land. *It is our responsibility.* Each generation must fulfil its responsibility under the law of the Creator. Our forefathers did their part, and now we have to do ours. Aboriginal rights means Aboriginal responsibility, and we were put here to fulfil that responsibility...
>
> Our Aboriginal responsibility is to preserve the land for our children. Everything on and in the land belongs to our children. It doesn't belong to us. We have no right to sell it, or give it up, or make a settlement. If we do that we will "settle" our great-grandchildren right out of their Aboriginal rights. ("Traditional Native Philosophies Relating to Aboriginal Rights", in *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights*, ed. Boldt and Long (1985), pp. 19-20, 22-23 [emphasis added].)

In this statement Chief Lyons is expressing a fundamental relationship between Aboriginal peoples that is linked in an historical and geographical continuum with chiefs and elders of the Haudenasaunee in the South in the seventeenth century, of the Micmac Nation in the East of the eighteenth century, of the Saulteaux and Cree nations in the West in the nineteenth century, and of the Dene Nation in the North in the twentieth century. From all the four directions Aboriginal peoples have proclaimed their identity unmistakably through the centuries in terms of their relationships and responsibilities to their territories. Its vitality in a contemporary world, and the obligations it places upon government to respect it, is reflected in the draft Universal Declaration on the Rights of Indigenous Peoples. Article 25 provides:

> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard. (*Discrimination Against Indigenous Peoples: Report of the Working Group on Indigenous Populations on its Eleventh Session*, 23 August 1993, E/CN.4/Sub 2/1993/29.)

From the perspective of Aboriginal peoples it makes little difference for the federal government to change the language of its Comprehensive Claims Policy from `extinguishment' to `exchange'. In either case what Aboriginal peoples are being asked to do is to give up those

rights that, according to their own laws and their histories, link them in a circle to their ancestors and to the generations yet to come.

The pathways of justice for First Nations require that modern land claims settlements provide the legal and conceptual space within which their deeply rooted Aboriginal rights and continuing responsibilities to their territories can be respected. Settlement agreements must have a legal framework that has at its foundation the recognition of those rights and responsibilities; they cannot be built upon their extinguishment and replacement with exclusively colonial legal architecture.

Alternatives to Extinguishment ─ The Task Force Recommendations and the Federal Government's Revised Claims Policy

The Task Force to Review Comprehensive Claims Policy concluded that any new claims policy, if it was to succeed, must develop alternatives to the blanket surrender ─ grant-back ─ extinguishment approach. The Task Force was of the view that any alternative to extinguishment must have at least four characteristics to be workable.

> First, it must be acceptable to the Aboriginal people concerned, for their rights cannot be altered without their consent. Secondly, to encourage investment in, and development of, property rights, it must enable the granting of secure rights to lands and resources. Thirdly, it must be simple, because complex approaches promote legal uncertainty. Fourthly, it must be familiar, so that rights can be defined to fit comfortably into the dominant property law system." (*Living Treaties: Lasting Agreements*, p. 41.)

The Task Force then proposed three possible alternatives to extinguishment, recognizing that these were put forward as "workable, but not exclusive" approaches.

> For we believe that, once having removed the constraints of the existing approach, creative negotiators will devise other acceptable alternatives. Both government and Aboriginal groups should be encouraged to propose other alternatives at the bargaining table provided that they meet all the foregoing criteria. (*Ibid.*)

I will be revisiting the fourth of these criteria, because I am of the opinion that it is unduly restrictive and ought not to be a threshold prerequisite to workable alternatives to the extinguishment model. For present purposes, however, I wish to review the three alternatives proposed by the Task Force and go on to consider to what extent subsequent claims policy and settlement practice has accorded with Task Force recommendations.

> The three alternatives are described in the following way:
>
> One alternative would be to return to the legal technique of the pre-Confederation treaties. Starting from a broad recognition of Aboriginal rights, it provides certainty through the surrender of limited rights in relation to particular areas. Thus, aboriginal

groups might retain their aboriginal title or aspects of it in relation to certain traditional areas, and surrender it or parts of it in relation to other areas. At the same time they might retain other rights ─ such as wildlife harvesting rights, a partial interest in the subsurface, or revenue sharing entitlements ─ over the entire area. When title or partial title is retained, they might wish to have their aboriginal land rights described in ways that are easily recognizable under Canada's legal system (for example, the form of tenure they hold). This description would provide certainty for their land rights within the system that defines the land rights of other Canadians. The acceptability of this approach in the negotiations will depend to some degree upon the nature and extent of rights that are to be retained, compared to those that are to be surrendered.

A second, related alternative, which could be used in combination with the one described above, is premised on the assumption that aboriginal rights have a much broader content than land-related rights (embracing matters such as cultural, social, political, linguistic and religious rights). Thus, even if aboriginal title to land and resources is surrendered specifically, other rights that might eventually receive definition through the courts or constitutional processes could be preserved. Because some or all of these other rights might play no part in a land claims agreement, they would be unaffected by it. Certainty as to land and resources would be achieved, however, because the agreement would deal explicitly with aboriginal title to lands and resources.

A third alternative would be to set aside the issue of aboriginal rights in land claims agreements. This might be appropriate where one of the parties to the agreement (such as a provincial government) refuses to admit that aboriginal rights exist. An approach similar to this has been used successfully in the context of offshore oil and gas rights. The federal and Nova Scotia governments held differing legal views as to their proprietary and legislative rights in relation to the offshore, but agreed to set these differences aside for the sake of a co-operative management regime, with neither party conceding its legal position. The agreement, which has a specified term and is intended to survive any judicial determination of the party's rights, has been accepted by industry as sufficiently certain to permit large investments in offshore petroleum exploration and development.

This approach to aboriginal rights might leave unresolved the existence and content of these rights in a particular case. For the term of the agreement, the rights would be defined by the agreement itself. Parties to the agreement would retain the ability to litigate about their rights; however, in doing so, they would renounce all the rights defined within the agreement. Thus, as long as the satisfaction with the operation of the agreement was sufficiently high, there would be strong motivation to keep it working. (*Living Treaties: Lasting Agreements*, pp. 41-42.)

The Task Force Report dealt specifically with the issue of security of third-party interests under this third alternative:

A major consideration under this approach would be the security that could be granted to third parties. They would need to be assured that rights granted to them pursuant to the agreements would be legally enforceable. Third parties that acquire rights in the Nova Scotia offshore are content because they receive their rights from a joint

> federal-provincial board. One or other of the governments has the power to authorize activities and, because both have given their permission, the authorization cannot be attacked later.
>
> A different concern might arise in the context of aboriginal rights. If an agreement fails and litigation is pursued successfully by an aboriginal group, it might wish to deny the validity of third-party rights granted during the term of the now-defunct agreement. Such an agreement could be drafted to preserve any third-party rights granted under its provisions, notwithstanding the subsequent abandonment of the agreement. We hope that such clauses would give adequate protection to third parties. This matter would have to be explored carefully in the design of any agreement. (*Ibid.*, pp. 42-43.)

In its concluding paragraph dealing with extinguishment, the Task Force recommends unequivocally that a new comprehensive claims policy must move away from the extinguishment model:

> A claims policy that requires a surrender and extinguishment of all aboriginal rights can, and must, be abandoned. It *can* be abandoned because, as we have shown, there are other methods for clearing title to the land. It *must* be abandoned because, if it is not, there will be no possibility of achieving land claims agreements based on common objectives.
>
> Agreements should balance the need for certainty in the orderly development of land and resources with the need for flexibility in the evolving relationship between aboriginal groups and governments in Canada. In keeping with section 35 of the Constitution, agreements should recognize and affirm aboriginal rights. (*Ibid.*)

In December 1986 the Minister of Indian Affairs and Northern Development released the federal government's new Comprehensive Land Claims Policy in response to the Task Force report. In the introduction to the new policy the Minister notes that Aboriginal groups have objected to "the practice of seeking to extinguish all Aboriginal rights and interests in and to the settlement area in exchange for the benefits provided through the settlement agreement. They have been concerned that other rights, that might be unrelated to the disposition of lands and resources, might be affected in the process. Further, they have seen this `blanket extinguishment' approach as inconsistent with the constitutional recognition and affirmation of existing Aboriginal rights in Section 35".[xii]

The new policy ─ while reaffirming that "the purpose of settlement agreements is to provide certainty and clarity of rights to ownership and use of land and resources in those areas of Canada where Aboriginal title has not been dealt with by treaty or superseded by law" ─ acknowledges that the extinguishment of all Aboriginal rights and title as part of the claims settlement is not necessary to achieve such certainty and clarity. The new policy thus embraces

the Task Force recommendation that alternatives to extinguishment may be considered "provided that certainty in respect of lands and resources is established". The policy statement sets out the federal government's position on this in the following manner:

> Acceptable options are:
>
> (1) the cession and surrender of Aboriginal title throughout the settlement area in return for the grant to the beneficiaries of defined rights in specified or reserved areas and other defined rights applicable to the entire settlement area; or
> (2) the cession and surrender of Aboriginal title in non-reserved areas, while
> - allowing any Aboriginal title that exists to continue in specified reserved areas;
> - granting to beneficiaries defined rights applicable to the entire settlement area.
>
> In advancing these proposals, certain steps will be followed. The particular approach to be used to obtain certainty will be discussed in individual negotiations and the precise wording will be subject to agreement between the parties. The Department of Justice will be consulted so that the legal implications of the approach and language used to attain certainty are properly understood. In those cases where provincial lands are involved, the province must play a major part in determining the approach to be followed.
>
> It is important to recognize that the Aboriginal rights to be released in the claims process are only those related to the use of and title to land and resources. Other Aboriginal rights, to the extent they are defined through the constitutional process or recognized by the courts, are not affected by the policy. (*Comprehensive Land Claims Policy*, p. 12.)

Option 1 of the policy statement is not a true alternative to extinguishment but reflects the previous practice of a surrender and grant-back of rights. As the Task Force made quite clear, this was not an acceptable alternative to extinguishment; rather it is a version of the extinguishment model. However, option 2 of the new policy ─ in accepting the possibility of the retention of Aboriginal title in certain lands and the surrender of that title in relation to other lands, coupled with the disclaimer that settlements would not affect other Aboriginal rights not related to land ─ in effect adopted the first two alternatives proposed by the Task Force.

The federal government has recently described how it views the 1986 shift in policy in the context of changing the historical emphasis on extinguishment of rights as a condition precedent to settlement of Aboriginal claims:

> The primary purpose of comprehensive claims settlements is to conclude agreements with Aboriginal groups that will resolve the legal ambiguities associated with the common law concept of Aboriginal rights. The process is intended to result in agreement on the special rights Aboriginal peoples will have in the future with respect to lands and

> resources. The objective is to negotiate modern treaties which provide clear, certain and long-lasting definition of rights to lands and resources. Negotiated comprehensive claims settlements provide for the exchange of undefined Aboriginal rights for a clearly defined package of rights and benefits codified in constitutionally protected settlement agreements...
>
> **Exchange of Rights**
>
> It is often stated that the federal government is seeking to end, or extinguish, all Aboriginal rights through claims settlement. This is not the case. The government's objective is to negotiate agreements which will provide certainty of rights to lands and resources in areas where Aboriginal rights have not yet been dealt with by treaty or other legal means. In doing so, the special rights of Aboriginal groups that are agreed upon are set out in constitutionally protected agreements or treaties.
>
> In order to avoid ambiguity and uncertainty, the federal government seeks confirmation from Aboriginal groups that the rights written down in claims settlements are the full extent of their special rights related to the subjects of the agreement. To accomplish this, Aboriginal groups are asked to relinquish undefined Aboriginal rights which they may have with respect to lands or resources, in favour of the rights and other benefits which are written down in the settlement agreement.
>
> Through the 1986 Comprehensive Land Claims Policy a claimant group may retain any Aboriginal rights that it may have with the respect to the lands it will hold following a settlement, so long as such rights are not inconsistent with the final agreement. The Policy also ensures that those Aboriginal rights which are not related to land and resources or to other subjects under negotiation will not be affected by the exchange of rights in a negotiated settlement. (*Federal Policy for the Settlement of Native Claims* [Ottawa: Department of Indian Affairs and Northern Development, March 1993], pp. i, 9.).

The question that must now be addressed is how the 1986 change in government policy has been reflected in government practice. To what extent have real alternatives to extinguishment been embraced by the government of Canada and reflected in the settlement agreements negotiated after 1986?

The New Claims Policy Applied

In a recent article published in the *Queen's Law Journal*, John Merritt and Terry Fenge, both of whom have extensive experience working with the Inuit negotiating team in relation to the Nunavut claim, make this comment on the 1986 policy:

> The 1986 Land Claims Policy is a curious mixture of old and new and, like Janus, looks backward and forward simultaneously. It hesitatingly embraces much of the rhetoric and many of the concepts of the Task Force Report, but also retains much of the substance of

the earlier policy. ("The Nunavut Land Claim Settlement: Emerging Issues in Law and Public Administration", 15 *Queen's Law Journal*, 255 at 261.)

In the context of alternatives to extinguishment, this comment is particularly appropriate. While the new claims policy expresses government willingness to consider new alternatives, government practice has reflected a continuation of the previous extinguishment framework. Since 1986 four agreements have been negotiated, three of which reflect the extinguishment and grant-back model. Only one, the Yukon Agreement, is seen by its Aboriginal negotiators as providing for the retention of Aboriginal title. An examination of these four agreements will be helpful in understanding the extent to which alternatives to extinguishment have remained unexplored and the promise of a new approach unfulfilled.

The Dene/Metis Agreement

In April 1990 the Dene/Metis Comprehensive Land Claim Agreement was initialled by government and Aboriginal negotiators. Under the agreement, its ratification was to be sought from a general assembly of the Dene/Metis shortly thereafter. The agreement contains the following provisions relevant to extinguishment:

3.1.3 Nothing in this agreement or in the settlement legislation shall remove from the Dene/Metis their identity as Aboriginal peoples of Canada or, subject to 3.1.10, affect their ability to participate in or benefit from any existing or future constitutional rights for Aboriginal people which may be applicable to them.

3.1.10 Subject to 3.1.12 and in consideration of the rights and benefits provided to the Dene/Metis by this agreement, the Dene/Metis cede, release and surrender to Her Majesty in Right of Canada

(a) all their Aboriginal claims, rights, titles and interest, if any, in and to lands and waters anywhere within Canada,

(b) all their claims, rights or causes of action whether collective or individual which they ever had, now have, or may hereafter have under, or arising out or by reason of Treaty 8 or Treaty 11, with respect to any matter provided for in this agreement... and

(c) all their claims, rights or causes of action which they ever had, now have, or may hereafter have under, or arising out of or by reason of any Imperial or Canadian legislation or Order-in-Council or other action of the Governor-in-Council or Canada in relation to Metis or half-breed scrip or money for scrip.

3.1.11 ...in consideration of the rights and benefits provided to the Dene/Metis by this agreement the Dene/Metis agree on their behalf, and on behalf of their heirs, descendants and successors not to assert any cause of action, action for

declaration, claim or demand of whatever kind or nature which they ever had, now have or may hereafter have against Her Majesty in Right of Canada or any province, the Government of any territory or any person based on any claim, right, title or interest described in 3.1.10....

7.1.5 Nothing in this agreement is intended to affect any Aboriginal or treaty right to self-government which the Dene/Metis may have.

Section 21 of the Agreement provides for the grant by the government of Canada to the Dene/Metis of certain lands in the following terms:

21.1.2 The Dene/Metis shall, by virtue of settlement legislation, be vested with title to Dene/Metis settlement lands as follows:

(a) 66,100 square miles of lands in fee simple, reserving therefrom the mines and minerals...subject to existing rights, titles or interests in the lands, and

(b) 3,900 square miles of lands in fee simple, including the mines and minerals...subject to existing rights, titles or interests in the lands and such title may be referred to as "Dene/Metis title....

13.4.1 The Dene/Metis have the right to harvest all species and populations of wildlife within the settlement area at all seasons of the year subject to limitations which may be prescribed in accordance with this agreement.

The language in 21.1.2 is virtually the same as that contained in the earlier James Bay Agreement and the Inuvialuit Final Agreement, except that it avoids the provision in the Inuvialuit Agreement that the settlement legislation "shall extinguish all Aboriginal claims, rights, title and interest". However, the legal intent of the provisions in the Dene/Metis agreement is quite clearly that all Aboriginal rights and title in relation to land and resources are irrevocably surrendered, which is to say extinguished, in return for which the government of Canada grants to the Dene/Metis fee simple interests in specific lands together with the right to harvest wildlife throughout the settlement area.

The Dene/Metis Final Agreement, therefore, does not reflect any true alternative to extinguishment but perpetuates the complete surrender and grant-back approach of the post-Confederation treaties and the pre-1986 modern land claims agreements.

The significance of the extinguishment debate is reflected in the fact that at the Dene/Metis ratification assembly, the principal focus of concern ─ and the one that led ultimately to the rejection by the Dene/Metis of the final agreement ─ was the provisions requiring the surrender of their Aboriginal title.

The Gwich'in Agreement

Subsequent to the decision of the Dene/Metis not to ratify the agreement in principle in light of its provisions for surrender of Aboriginal rights and title, separate negotiations took place with the Gwich'in Tribal Council, representing the peoples of the Mackenzie Delta communities. On July 13, 1991 a Comprehensive Land Claim Agreement was signed between Canada and the Gwich'in, an agreement subsequently ratified by the Gwich'in. The first two objectives of the Gwich'in Agreement are set out in a way that clearly foreshadows the surrender and grant-back model.

> The Gwich'in and Canada have negotiated this agreement in order to meet these objectives:
>
> 1.1.1 To provide for certainty and clarity of rights to ownership and use of land and resources;
> 1.1.2 To provide the specific rights and benefits in this agreement in exchange for the relinquishment by the Gwich'in of certain rights claimed in any part of Canada by treaty or otherwise. (Comprehensive Land Claim Agreement Between Her Majesty the Queen in Right of Canada and The Gwich'in as Represented by the Gwich'in Tribal Council, July 13, 1991.)

The general provisions of the Gwich'in Agreement are essentially those originally contained in the Dene/Metis final agreement with some minor modifications. The provisions dealing with Aboriginal title and rights are the following:

> 3.1.5 Nothing in this agreement or in the settlement legislation shall remove from the Gwich'in their identity as Aboriginal peoples of Canada or, subject to 3.1.12 and 3.1.13, affect their ability to participate in or benefit from any existing or future constitutional rights for Aboriginal people which may be applicable to them.
> 3.1.12 In consideration of the rights and benefits provided to the Gwich'in by this agreement, the Gwich'in cede, release and surrender to Her Majesty in Right of Canada all their Aboriginal claims, rights, titles and interest, if any, in an to lands and waters anywhere within Canada.
> 3.1.13 In consideration of the rights and benefits provided to the Gwich'in by this agreement, the Gwich'in cede, release and surrender to Her Majesty in Right of Canada all their claims, rights or causes of action whether collective or individual which they ever had, now have, or may hereafter have, under, or arising out of or by reason of:
> (a) the obligation in Treaty 11 to set aside reserves...
> (b) the once and for all obligations in Treaty 11...
> (d) the rights specified in Treaty 11 of the Indians to pursue their usual vocations of hunting, fishing and trapping, but this right shall only be ceded, released and surrendered;
> (i) within the settlement area, the western arctic region and the

Yukon...

(e) all their claims, rights or causes of action which they ever had, now have or may hereafter have under, or arising out of or by reason of any Imperial or Canadian legislation or Order-in-Council or other action of the Governor-in-Council or Canada in relation to Metis or half-breed scrip or money for scrip

3.1.14 Canada hereby confirms existing treaty rights arising out of those parts of Treaty 11 which are not surrendered in 3.1.13.

3.1.15 Nothing in this agreement shall be construed to affect:

(a) any Aboriginal or treaty right to self-government which the Gwich'in may have...

3.1.17 In consideration of the rights and benefits provided to the Gwich'in by this agreement, the Gwich'in agree on their behalf, and on behalf of their heirs, descendants and successors not to assert any cause of action, action for a declaration, claim or demand of whatever kind or nature which they ever had, now have or may hereafter have against Her Majesty in Right of Canada or any province, the government of any territory or any person based on any claim, right, title or interest described in 3.1.13.

The principal difference between these provisions in the Gwich'in and the Dene/Metis agreement is that the treaty rights surrendered are spelled out with greater specificity and that the provision in 3.1.15 ─ that nothing in the agreement affects any Aboriginal or treaty right to self-government ─ is given a more prominent place in the agreement. However, in all other material aspects the cession or surrender of all Aboriginal rights and title to lands and resources in the two agreements is the same.

The principal provisions specifying the rights and benefits relating to land and resources in return for which the Gwich'in surrendered their Aboriginal rights and title are as follows:

18.1.2 The Gwich'in shall receive title, which may be referred to as "Gwich'in title", to settlement lands as follows:

(a) 16,264 square kilometres (approximately 6,280 square miles) of lands in fee simple, reserving therefrom the mines and minerals... subject to any rights, titles or interests in the lands existing at the date of settlement legislation;

(b) 4,299 square kilometres (approximately 1,660 square miles) of lands in fee simple, including the mines and minerals... subject to any rights, titles or interests in the lands existing at the date of settlement legislation.

18.1.4 Title to Gwich'in land shall be vested in the Gwich'in Tribal Council by virtue of settlement legislation.

18.1.5 Settlement lands may not be conveyed to any person except to government in exchange for other lands or to a designated Gwich'in organization. This provision shall not be interpreted to prevent the Gwich'in from granting

leases or licences to persons who are not participants to use or occupy Gwich'in lands.

18.1.6 Subject to the provisions of this agreement and legislation, the Gwich'in shall manage and control the use of Gwich'in lands, including:

(a) the development and administration of land management programs and policies; and,

(b) the charging of rents or other fees for the use and occupation of Gwich'in lands.

18.1.7 Settlement lands are not subject to seizure or sale and a court order, writ of execution or any other process whether judicial or extra-judicial.

18.1.8 Settlement lands shall not be mortgaged, charged or given in security.

18.1.9 No person may acquire, by prescription, an estate or interest in settlement lands.

18.3.5 (a) Title to Gwich'in lands vested pursuant to 18.1.4 shall be registered with the Northwest Territories Land Titles Office. In order to facilitate registration and subsequent recording of transactions, title shall be registered in as many discreet parcels as considered necessary by the Registrar of Land Titles.

12.4.1 The Gwich'in have the right to harvest all species of wildlife within the settlement area at all seasons of the year subject to limitations which may be prescribed in accordance with this agreement.

In the Gwich'in Agreement, no less than in the Dene/Metis agreement, Aboriginal peoples surrender "all their Aboriginal claims, rights, titles and interest" in lands and "receive" from the Crown a fee simple title. The change in the language from "vested" in the Dene/Metis agreement to "receive" in the Gwich'in Agreement does not change the essential fact that the interest in the settlement lands is a Crown-granted interest. Calling the fee simple title "Gwich'in title", no more than calling it "Dene/Metis title", does not alter the fact that what the Gwich'in have under the agreement is not the affirmation of their pre-existing Aboriginal title but a new form of interest derived from the Crown.

What gives `Gwich'in title' its particular Gwich'in characteristics are those matters referred to in other provisions of Section 18. Some of these other provisions are extremely important and reflect Aboriginal peoples' concerns that lands and resources recognized as Aboriginal lands in land claims agreements should remain the permanent inheritance of future generations and be subject to Aboriginal management. However, these provisions could equally form part of a settlement agreement that affirmed existing Aboriginal rights. The provisions would then reflect an agreed definition of what those rights were and how they were to be exercised into the future. But the Gwich'in agreement does not affirm existing Aboriginal rights;

like the Dene/Metis agreement, it operates within a framework of a complete surrender of all Aboriginal rights and a grant-back by the Crown of defined rights. As such, it does not operate as a true alternative to extinguishment.

The Nunavut Agreement

The third of the trilogy of agreements to be signed and ratified in the Northwest Territories is the agreement between the Inuit of the Nunavut Settlement Area and Canada. This reflects the same approach to extinguishment as that of the Gwich'in Agreement. The preamble to the Nunavut Agreement provides that:

> Whereas the Inuit...assert an Aboriginal title to the Nunavut settlement area...based on their traditional and current use and occupation of the lands, waters and land-fast ice therein in accordance with their own customs and usages;
>
> And Whereas the *Constitution Act, 1982* recognizes and affirms the existing Aboriginal and treaty rights of the aboriginal peoples of Canada, and treaty rights includes rights that may be acquired by way of land claims agreements;
>
> And Whereas the parties agree on the desirability of negotiating a land claims agreement through which Inuit shall receive defined rights and benefits *in exchange for surrender* of any claims, rights, title and interests based on their assertion of an Aboriginal title. (*Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen* [Ottawa: Minister of Indian Affairs and Northern Development and the Tungavik, 1993] [emphasis added].)
>
> The Agreement goes on to provide as follows:
>
> PART 7: CERTAINTY
>
> 2.7.1 In consideration of the rights and benefits provided to Inuit by the Agreement, Inuit hereby:
>
> (a) cede, release and surrender to Her Majesty in Right of Canada, all their Aboriginal claims, rights, title and interest, if any, in and to lands and waters anywhere within Canada and adjacent offshore areas within the sovereignty or jurisdiction of Canada, and
>
> (b) agree, on their behalf, and on behalf of their heirs, descendants and successors not to assert any cause of action, action for a declaration, claim or demand of whatever kind or nature which they ever had, now have, or may hereafter have against Her Majesty in Right of Canada or any province, the government of any territory or any person based on any Aboriginal claims, rights, title or interests in and to lands and waters described in sub-section (a).

The Nunavut provisions dealing with "Inuit owned lands" provide that the primary purpose of such lands "shall be to provide Inuit with rights in land that promote economic self-sufficiency of Inuit through time, in a manner consistent with Inuit social and cultural needs and aspirations" (17.1.1). Under the agreement Inuit-owned lands may be held either in fee simple or in fee simple saving and excepting mines and minerals (19.2.1). This fee simple title vests in designated Inuit organizations (19.3.1), is to be registered (19.3.4), and cannot be conveyed, transferred or otherwise divested except to another designated Inuit organization or the Crown (19.7.1), although, as in the other agreements, this provision does not prevent the grant of leases, licences or any other interests less than fee simple (19.7.3).

Despite the change from "Gwich'in title" to "Inuit owned lands" to describe the interest vested under the Nunavut Agreement, there is no attempt made in the Nunavut Agreement to break any new trails in the direction of entrenchment of pre-existing Aboriginal title. The Inuit of the Eastern Arctic, like the Inuvialuit of the Western Arctic and the Gwich'in of the Mackenzie Delta, have settled for agreements that give them new rights for old rights where those new rights are set out within the framework of an agreement that has constitutional protection as a modern treaty under section 35(4) of the *Constitution Act, 1982*.

The Yukon Agreement

As we have seen, the Dene of the Mackenzie Valley have not been prepared to ratify an agreement that involves the surrender of their Aboriginal title and rights to all of their territory in exchange for the grant-back of other rights and benefits. Nor have the Indians of the Yukon. Because the Yukon Agreement represents the only agreement so far signed that seeks to grapple with the alternatives to extinguishment, it is one to which special attention must be paid in considering new pathways to settlements that are not built upon the foundation of extinguishment.

In 1988 the Yukon Indian Nations ratified a Framework Agreement for the settlement of their land claims. This agreement provides for two types of final agreements. One is an Umbrella Final Agreement, which sets out the provisions applicable to all Yukon First Nations. The second kind of agreement is a Yukon First Nation Final Agreement, which is a land claims agreement incorporating the provisions of the Umbrella Agreement together with the matters specific to that First Nation. The sections set out below are taken from the Vuntut Gwich'in First Nation Final

Agreement. The Vuntut Gwich'in are the people who live in and around the settlement of Old Crow in the northern Yukon.

The Yukon First Nations see their land claims agreements as ones in which Aboriginal title remains intact on what are designated `settlement lands' but are surrendered to the government of Canada in relation to non-settlement lands. Settlement lands constitute 16,000 square miles, non-settlement lands 170,000 square miles. This objective of retention of Aboriginal rights in relation to settlement land in the context of the other objectives of land claims agreements are articulated in the preamble to the final agreements. Thus, the Vuntut Gwich'in First Nation Final Agreement provides as follows:

> Whereas:
>
> The Vuntut Gwich'in First Nation asserts Aboriginal rights, titles and interests with respect to its Traditional Territory;
>
> The Vuntut Gwich'in First Nation wishes to retain, subject to this Agreement, the Aboriginal rights, titles and interests it asserts with respect to its Settlement Land;
>
> The parties to this Agreement wish to recognize and protect a way of life that is based on an economic and spiritual relationship between Vuntut Gwich'in and the land;
>
> The parties to this Agreement wish to encourage and protect the cultural distinctiveness and social well-being of Vuntut Gwich'in;
>
> The parties to this Agreement recognize the significant contributions of Vuntut Gwich'in and the Vuntut Gwich'in First Nation to the history and culture of the Yukon and Canada;
>
> The parties to this Agreement wish to enhance the ability of Vuntut Gwich'in to participate fully in all aspects of the economy of the Yukon;
>
> The *Constitution Act, 1982* recognizes and affirms the existing Aboriginal rights and treaty rights of the Aboriginal peoples of Canada, and treaty rights include rights acquired by way of land claim agreements;
>
> The parties to this Agreement wish to achieve certainty with respect to the ownership and use of lands and other resources of the Vuntut Gwich'in First Nation Traditional Territory;
>
> The parties wish to achieve certainty with respect to their relationships to each other;
>
> The Vuntut Gwich'in First Nation, Canada and the Yukon have authorized their representatives to sign this land claims agreement; (Vuntut Gwich'in First Nation Final Agreement between Her Majesty the Queen in Right of Canada, the Government of the Yukon and the Vuntut Gwich'in First Nation.)

The objectives of retaining Aboriginal title to settlement land and surrendering Aboriginal title

only in relation to non-settlement land is implemented through specific clauses of the final agreements, which, because of their complexity and interrelationship, are set out below:

2.5.0 Certainty

2.5.1 In consideration of the promises, terms, conditions and provisos in a Yukon First Nation's Final Agreement:

2.5.1.1 subject to 5.14.0, that Yukon First Nation and all persons who are eligible to be Yukon Indian People it represents, as of the Effective Date of that Yukon First Nation's Final Agreement, cede, release and surrender to Her Majesty the Queen in Right of Canada, all their Aboriginal claims, rights, titles, and interests, in and to,

(a) Non-Settlement Land and all other land and water including the Mines and Minerals within the sovereignty or jurisdiction of Canada, except the Northwest Territories, British Columbia and Settlement Land,

(b) the Mines and Minerals within all Settlement Land, and

(c) Fee Simple Settlement Land;

2.5.1.2. that Yukon First Nation and all persons eligible to be Yukon Indian People it represents, as of the Effective Date of that Yukon First Nation's Final Agreement, cede, release and surrender to Her Majesty the Queen in Right of Canada all their Aboriginal claims, rights, titles and interests in and to Category A and Category B Settlement Land and waters therein, to the extent that those claims, rights, titles and interests are inconsistent or in conflict with any provision of a Settlement Agreement;

2.5.1.3 that Yukon First Nation and all persons eligible to be Yukon Indian People it represents, as of the Effective Date of that Yukon First Nation's Final Agreement, cede, release and surrender to Her Majesty the Queen in Right of Canada any claims, rights or causes of action which they may ever have had, may now have or may have hereafter, under, or arising out of Treaty 11; and

2.5.1.4 neither that Yukon First Nation nor any person eligible to be a Yukon Indian Person it represents, their heirs, descendants and successors, shall, after the Effective Date of that Yukon First Nation's Final Agreement, assert any cause of action, action for declaration, claim or demand of whatever kind or nature, which they ever had, now have, or may hereafter have against Her Majesty the Queen in Right of Canada, the Government of any Territory or Province, or any person based on,

(a) any Aboriginal claim, right, title or interest ceded, released or surrendered pursuant to 2.5.1.1 and 2.5.1.2,

(b) any Aboriginal claims, right, title or interest in and to Settlement Land, lost or surrendered in the past, present or future, or

(c) any claim, right or cause of action described in 2.5.1.3.

2.5.2 Nothing in a Settlement Agreement shall be construed as an admission or assertion by that Yukon First Nation or Yukon Indian People that Treaty 11 has any application to or effect on Yukon First Nations or Yukon Indian People...

2.6.4 Nothing in any Settlement Agreement shall be construed as an admission by Government that Yukon First Nations or Yukon Indian People have any Aboriginal rights, title or interests anywhere within the sovereignty or jurisdiction of Canada.

5.2.0 General

5.2.1 Nothing in Settlement Agreements shall be construed as affecting any Aboriginal claim, right, title or interest in or to Settlement Land, except to the extent that they are inconsistent with the Settlement Agreements.

5.2.2 Nothing in this chapter constitutes an admission by Government that an Aboriginal claim, right, title or interest can co-exist with the rights described in 5.4.1.1 (a) and 5.4.1.2, of a treaty.

5.4.0 Settlement Land

5.4.1 A Yukon First Nation shall have by virtue of this chapter:

5.4.1.1. for Category A Settlement Land,

(a) the rights, obligations and liabilities equivalent to fee simple excepting the Mines and Minerals and the Right to Work the Mines and Minerals, and

(b) fee simple title in the Mines and Minerals, and the Right to Work the Mines and Minerals

5.4.1.2 for Category B Settlement Land the rights, obligations and liabilities equivalent to fee simple reserving therefrom the Mines and Minerals and the Right to Work the Mines and Minerals but including the Specified Substances Rights; and

5.4.1.3 for Fee Simple Settlement Land, fee simple title reserving therefrom the Mines and Minerals and the Right to Work the Mines and Minerals but including the Specified Substances Right.

5.9.0 Interests in Settlement Land ─ Less than Entire Interest in 5.4.1

5.9.1 Upon and subsequent to the happening of any of the following events:

5.9.1.1 the registration in the Land Titles Office of any interest in a Parcel of Settlement Land, less than the entire interest set out in 5.4.1.1(a) or 5.4.1.2;

5.9.1.2 the expropriation of any interest in a Parcel of Settlement Land, less than the entire interest set out in 5.4.1.1(a) or 5.4.1.2;

5.9.1.3 the granting of any interest in a Parcel of Settlement Land less than the entire interest...to any Person not enrolled under that Yukon First Nation Final Agreement; or

5.9.1.4 the declaration of a reservation in a Parcel by Government pursuant to 5.7.4.2.,

the interest registered, expropriated or granted or the reservation declared, as the case may be, shall take priority for all purposes over:

5.9.1.5 any Aboriginal claims, rights, titles and interests of the Yukon First Nation and all persons eligible to be Yukon Indian People it represents, their heirs, descendants and successors; and

5.9.1.6 the right to harvest described in 16.4.2,

in or to the Parcel referred to in 5.9.1.1, 5.9.1.2, 5.9.1.3 and 5.9.1.4, as the case may be.

5.9.2 Each Yukon First Nation and all persons who are eligible to be Yukon Indian People it represents, their heirs, descendants and successors undertake not to exercise or assert:

5.9.2.1 any Aboriginal claim, right, title or interest; or

5.9.2.2 any right to harvest described in 16.4.2,

in or to any Parcel referred to in 5.9.1.1, 5.9.1.2, 5.9.1.3 and 5.9.1.4 which Aboriginal claim, right, title or interest or right to harvest described in 16.4.2 is in conflict or inconsistent with the interest described in 5.9.1.1, 5.9.1.2 and 5.9.1.3, or the reservation declared in 5.9.1.4, as the case may be.

5.10.0 Interests in Settlement Land ─ Entire Interest

5.10.1 Each Yukon First Nation and all persons eligible to be Yukon Indian People it represents, shall be deemed to have ceded, released and surrendered to Her Majesty the Queen in Right of Canada all their Aboriginal claims, rights, titles and interests, in and to the Parcels described hereunder and waters therein upon the happening of any of the following events:

5.10.1.1 the registration in the Land Titles Office of the fee simple title in that Parcel of Settlement Land;

5.10.1.2 the expropriation of the fee simple title in that Parcel of Settlement Land; or

5.10.1.3 the granting of the fee simple interest in that Parcel of Settlement Land.

5.10.2 A Yukon First Nation shall be deemed to have been granted immediately before the happening of an event described in 5.10.1.1, 5.10.1.2 or 5.10.1.3 for that Parcel:

5.10.2.1 if Category A Settlement Land, fee simple title excepting the Mines and Minerals and the Right to Work the Mines and Minerals...

5.10.2.2 if Category B Settlement Land, fee simple title reserving to the Crown therefrom the Mines and Minerals and the Right to Work the Mines and Minerals...

16.4.2 Yukon Indian People shall have the right to harvest for Subsistence within their Traditional Territory, and with the consent of another Yukon First Nation in that Yukon First Nation's Traditional Territory, all species of Fish and Wildlife for themselves and their families at all seasons of the year and in any numbers on Settlement Land and on Crown Land to which they have a right of access pursuant to 6.2.0, subject only to limitations prescribed pursuant to Settlement Agreements.

16.4.4 Yukon Indian People shall have the right to give, trade, barter or sell among themselves and with beneficiaries of adjacent Transboundary Agreements in Canada all Edible Fish or Wildlife Products harvested by them pursuant to 16.4.2, or limited pursuant to a Basic Needs Level allocation or pursuant to a basic needs allocation of Salmon, in order to maintain traditional sharing among Yukon Indian People and with beneficiaries of adjacent Transboundary Agreements for domestic purposes but not for commercial purposes.

Readers of this paper should not feel inadequate if they were not able immediately to grasp how these provisions relate to the easily understood objectives of the Yukon First Nations to retain their Aboriginal rights and title to settlement land. Indeed, for this writer to understand fully the relationship it was necessary not only to read and re-read the provisions carefully but also to discuss them with lawyers involved in the negotiations and drafting of the language. Once understood, the principal question to be addressed is whether the language in the Yukon Final Agreements reflects legal arrangements that are true alternatives to extinguishment.

A reading of section 2.5 together with sections 5.4, 5.9 and 5.10 leads to the following conclusions. The Yukon First Nations surrender their Aboriginal title to all non-settlement land within the Yukon. The Yukon First Nations retain their Aboriginal title as a pre-existing legal interest in land only in relation to surface rights in Category A and Category B settlement land. This pre-existing legal interest is defined for both Category A and Category B settlement land as "the rights, obligations and liabilities equivalent to fee simple". For Category A settlement land, Yukon First Nations are granted under the agreement fee simple title in the Mines and Minerals. There is no such grant in relation to Category B settlement land, where the Aboriginal rights therefore are limited to surface rights and certain specified substances (for example, sand and gravel). Yukon First Nations also receive fee simple title to the surface rights of land described as "Fee Simple Settlement Land", which consists of those limited parcels previously granted in fee simple prior to their selection by a First Nation as settlement land. Therefore, in relation to the core settlement lands to which Indian First Nations wish, as stated in the preamble to the Agreement, to retain their Aboriginal rights, this holds true only with respect to surface rights. This is made clear not only from the description of settlement land in section 5.9.0 but also in the surrender provisions in section 2.5.0, where Yukon First Nations cede all their Aboriginal claims, rights, titles and interests to "the Mines and Minerals within all Settlement Land" (2.5.1.1(b)) and all their Aboriginal rights in fee simple settlement land. The rights of Yukon Indian First Nations in the mines and minerals in Category A settlement land are not retained Aboriginal title but a

grant-back of the fee simple title. Similarly, the rights recognized in the fee simple settlement lands are not retained Aboriginal rights but the fee simple grant of the surface interest.

The right to harvest fish and wildlife extends to what is described as "traditional territory". This is not the same as settlement land and in fact includes large parts of non-settlement land. Where the right to harvest recognized under section 16.4 is exercised over settlement land, it is done pursuant to a retained Aboriginal right as defined by section 16.4. However, where it is exercised over non-settlement land, by virtue of the general surrender of all Aboriginal rights and title to non-settlement land in section 2.5.1.1, it is not pursuant to a retained Aboriginal right but a right recognized and defined by the Agreement. As such, it constitutes a treaty right in light of the provisions of section 35.3 of the *Constitution Act* that treaty rights include rights acquired by way of land claims agreements.

In analyzing the Yukon Final Agreements it is appropriate to consider two of the principles recommended by the Task Force to Review Comprehensive Claims Policy relevant to a shift away from the extinguishment model of land claims agreements. These two principles were that "agreements should recognize and affirm Aboriginal rights" and "agreements should be flexible enough to ensure that their objectives are being achieved. They should provide sufficient certainty to protect the rights of all parties in relation to land and resources and to facilitate investment and development". (*Living Treaties: Lasting Agreements*, p. 31.)

If the Yukon Agreement was intended to signal a shift away from the extinguishment model of previous agreements and embody the principle of recognition and affirmation of Aboriginal rights, it hardly qualifies as a beacon. Apart from the recital in the preamble, there is no language in the Yukon Agreement affirming that Yukon First Nations retain their Aboriginal rights to those lands. Indeed, it might be more accurate to describe the Yukon Agreement as a model of `non-surrender' rather than `retention and affirmation' in light of the fact that the rights that the Yukon First Nations retain is the sum total of all those rights and interests they have not surrendered.

Even in the oblique manner I have described as `non-surrender', the Yukon Agreements affirm Aboriginal rights only in relation to surface interests in settlement land. In relation to the subsurface interests, the federal government has maintained its position that these interests, if they are to be recognized in land claims agreements, must be by way of a grant from the Crown. It seems that on this point the federal negotiators made it clear there was no room for negotiation.

Why would the federal government demonstrate this apparent inflexibility in achieving the objective of affirming Aboriginal rights in relation to resources that are of major significance in developing Aboriginal economic self-sufficiency. The first explanation relates to a point made earlier in this paper ─ that the federal government has taken the position that Aboriginal rights to lands and resources are, as a matter of law, limited to traditional harvesting rights and therefore do not include an interest in subsurface rights that were not used traditionally by Aboriginal peoples. This `frozen rights' conception is one that has been vigorously rejected by Aboriginal peoples as inconsistent with a purposive analysis of Aboriginal rights reflected in the Supreme Court of Canada's decision in *Sparrow*. There, a unanimous court affirmed that the term "existing Aboriginal rights" in section 35 of the *Constitution Act*

> must be interpreted flexibly so as to permit their evolution over time... The word "existing" suggests that those rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour. Clearly, then, an approach to the constitutional guaranty embodied in s.35(1) which would incorporate "frozen rights" must be rejected. (*R.* v. *Sparrow* (1990) 70 D.L.R. (4th) 385 at 397.)

American cases dealing with the question of compensation for the taking or abrogation of Aboriginal and treaty rights have made it quite clear that these rights are not limited to resources used traditionally by Indian nations but include the beneficial use of other resources, particularly mineral and timber resources.[xiii]

The issue of subsurface rights being included within land claim settlements based on a model of retained Aboriginal rights was addressed specifically by the Task Force in the following manner:

> Negotiating groups seek recognition of the ownership of subsurface resources in many ways and for many reasons. Some seek a generalized right of ownership for subsurface resources throughout the claim area, which, in part, reflects their wish to have an affirmation, rather than an extinguishment, of their rights. It is also consistent with the broad view they take as to the nature of their rights. This approach prevents negotiating groups from having to select lands with unknown mineral potential, and enables the benefits of subsurface development to be shared with members of the group throughout the area. Other groups seek subsurface ownership over more limited areas, for reasons of economic development and also for the protection of special wildlife habitats.
>
> It may be asserted that aboriginal ownership of mineral resources adds a new element to the concept of aboriginal title. In fact, this view may not be accurate. For example, the Robinson-Huron and Robinson-Superior Treaties of 1850 recognize the aboriginal ownership of "any mineral or other valuable productions" on unceded aboriginal lands....

> Moreover, in Chapter 5 we advance reasons why the government should avoid a narrow view of the legal backdrop in approaching the resolution of comprehensive claims. Instead, attention should be directed to achieving the aims of the proposed claims policy. Although aboriginal proposals regarding mineral interest may differ, aboriginal ownership of such resources is consistent with several of the objectives of the proposed claims policy.
>
> Ownership of subsurface resources may help aboriginal societies to become economically self-sufficient. If the suggested policy is followed, such ownership could contribute to the framework of certainty and predictability about lands and resources, and at the same time, could accommodate the interests of both aboriginals and other Canadians. (*Living Treaties: Lasting Agreements*, pp. 57-58.)

Quite clearly, judging by the Yukon negotiations, the federal government has not been prepared to take a broad and purposive approach to the scope of Aboriginal rights in the spirit recommended by the Task Force. It is particularly ironic in the context of the Yukon agreements that the federal government should maintain the position that Aboriginal rights do not include subsurface rights, in view of the fact that it was the Yukon gold rush in 1898 that precipitated the large-scale intrusion of non-Aboriginal people in the territory and initiated the progressive dispossession of Yukon First Nations.

If the federal government's concern in acknowledging, in the case of the Yukon First Nations, that Aboriginal title includes rights to the subsurface is that this would constitute a legal admission that could be used against the government in litigation outside the framework of the settlement agreement, this concern is in any event covered by section 2.6.4, which provides that "nothing in any settlement agreement shall be construed as an admission by government that Yukon First Nations or Yukon Indian People have any Aboriginal rights, title or interest anywhere within the sovereignty or jurisdiction of Canada".

Apart from the federal government's narrow conception of the scope of Aboriginal title, a second reason for requiring that legal interests in the subsurface be held by way of a Crown grant, rather than under retained Aboriginal title, relates to the objective of obtaining certainty in relation to lands and resources. This objective was also one to which the Task Force paid particular attention. In proposing, as an alternative to the extinguishment model, the legal technique of the pre-Confederation Robinson Treaties, whereby Aboriginal title is retained in relation to certain areas, the Task Force had this to say:

> When title or partial title is retained, they [First Nations] might wish to have their aboriginal land rights described in ways that are easily recognizable under Canada's legal

> system (for example, the form of tenure they hold). This description would provide certainty for their land rights within the system that defines the land rights of other Canadians. (*Living Treaties: Lasting Agreements*, p. 52.)

It is in light of this suggestion that the retained Aboriginal title in relation to the surface interests in settlement land is described in the Yukon Final Agreements as "the rights, obligations and liabilities equivalent to fee simple". The Task Force also addressed the issue of certainty in the specific context of subsurface interests:

> In responding to aboriginal proposals about subsurface ownership, however, federal government policy should accommodate the legitimate concerns of third parties that may wish to acquire exploration or development rights. Any new system of ownership must enable third parties to acquire rights through a system that has clear, certain, and expeditious procedures. The regulatory burden upon industry should not be unduly increased. For this reason, we suggest that a single window approach to rights acquisition should be favoured. Such an approach would prevent developers from having to deal with a myriad of individual parties to procure their rights. Any system put into place as a result of aboriginal-government negotiations must enable parties seeking mineral rights to predict accurately the cost of the rights they wish to obtain. It is also desirable for mechanisms to be developed to enable the resolution of disputes between aboriginal owners and developers. Such processes must be clear, certain and expeditious. We are confident that both government and aboriginal groups can find creative means of meeting all of these concerns. (*Living Treaties: Lasting Agreements*, pp. 58-59.)

It is suggested that all of these legitimate concerns can be met within the contours of a land claims agreement in which the Aboriginal interest in subsurface rights is recognized as part of their retained Aboriginal title. Thus, if the interest of Yukon First Nations in the subsurface rights was expressed in exactly the same way as their interest in the surface ─ that is, an interest "equivalent to fee simple" ─ this would easily accommodate the acquisition by third parties of interest in the subsurface. There is nothing so special about subsurface interests or the concern to ensure clear, certain and expeditious procedures for the grant of such interests to third parties that requires that these interests be held by Aboriginal peoples only by way of a Crown grant rather than through retained Aboriginal title.

The Yukon Final Agreements contain provisions designed, first, to ensure that where a First Nation makes a partial grant of its interest in settlement land to third parties who are not members of the Yukon First Nation, that grant takes priority for all purposes over any Aboriginal right inconsistent with it and, second, to commit Yukon First Nations not to exercise or assert any Aboriginal right or title that is in conflict or inconsistent with the interest granted (sections 5.9.1

and 5.9.2). In situations where a Yukon First Nation is prepared to grant to third parties the whole of its interest in the surface of a particular parcel of settlement land it holds by virtue of retained Aboriginal title, the Final Agreements have specific provisions that have the effect of ensuring that the third party obtains an interest that is not defined as Aboriginal title but rather as a fee simple interest. This is done by deeming that the First Nation, immediately prior to its granting the interest to the third party, had itself been granted a fee simple title by the Crown (section 5.10.2). The effect of this is that the Aboriginal title, described as an interest equivalent to fee simple so long as the First Nation retains some interest in the land, is converted in the hands of a third party into a fee simple grant when that First Nation divests itself entirely of its Aboriginal interest. There appears to be no compelling reason why similar provisions could not apply to subsurface interests to provide a sufficient measure of certainty consistent with affirmation of Aboriginal rights in relation to all resources. The ineluctable conclusion is that the federal government's desire to develop genuinely creative solutions to achieve the twin objectives of affirming Aboriginal rights and achieving certainty is only surface-deep.

If, however, the federal government's commitment to the affirmation of Aboriginal rights as reflected in the Yukon Agreements ends at the surface, other elements of the Yukon Final Agreements suggest a continuing federal government desire to achieve certainty through legal techniques that rely heavily upon the language of surrender and cession of Aboriginal title. Two clauses are exemplary of this approach. Section 2.5.1.2 provides that Yukon First Nations surrender "all their Aboriginal claims, rights, titles and interests in and to Category A and Category B Settlement Land and waters therein, to the extent that those claims, rights, titles and interests are inconsistent or in conflict with any provision of a Settlement Agreement". It is the legal opinion of lawyers for the Yukon First Nations that there are no provisions of a settlement agreement.

This provision was included in the Agreements at the insistence of the federal government, and its purpose is explained in the government's 1993 restatement of its claims policy:

> In order to avoid ambiguity and uncertainty, the federal government seeks confirmation from Aboriginal groups that the rights written down in claims settlements are the full extent of their special rights related to the subjects of the agreement. To accomplish this, Aboriginal groups are asked to relinquish undefined Aboriginal rights which they may have with respect to lands or resources, in favour of the rights and other benefits which are written down in the Settlement Agreement.

> Under the 1986 Comprehensive Land Claims Policy the claimant group may retain any Aboriginal rights that it may have with respect to the lands it will hold following the settlement, so long as such rights are not inconsistent with the final Agreement. (*Federal Policy for the Settlement of Native Claims* [Ottawa: Indian Affairs and Northern Development, 1993], p. 9.)

According to the federal government's rationale, a clause such as section 2.5.1.2 of the Yukon agreement is required "in order to avoid ambiguity and uncertainty". However, the effect of such a clause appears to be that if the scope and content of Aboriginal rights were to be interpreted by the courts in a more generous manner than that contained in a settlement agreement, then this clause would effect a surrender of that broader Aboriginal right.

An example would be the relation to the Aboriginal right to harvest wildlife. In sections 16.4.2 and 16.4.4, the Final Agreements define this right as harvesting for subsistence purposes with a limited right to trade, barter and sell to and with First Nations that are the beneficiaries of adjacent transboundary agreements (for example, the Gwich'in of the Northwest Territories). In a series of cases decided by the British Columbia Court of Appeal, the issue was whether the Aboriginal right to harvest fish and wildlife includes a broader commercial component. By a majority of three to two, the court ruled that it did not.[xiv] Those rulings have been appealed to the Supreme Court of Canada. If that court determines that a purposive analysis of existing Aboriginal rights *does* include such a commercial aspect, the federal government ─ which has been arguing in these cases that Aboriginal rights should be construed narrowly to preclude a commercial right to harvest ─ will be able to argue that in the case of Yukon First Nations, any such larger right than that contained in section 16.4 will have been surrendered to the Crown pursuant to section 2.5.1.2. This would preclude the possibility of Yukon First Nations seeking to renegotiate this aspect of the Agreements to take into account a larger conception of Aboriginal rights than the federal government was prepared to accept at the time of the negotiations. In effect, it ensures that the federal government's narrow conception of Aboriginal rights is entrenched in the Agreements, quite inconsistent with the recommendations of the Task Force that settlement agreements should be flexible in order to take into account changing and broader conceptions of Aboriginal rights in the context of contemporary society.

The inflexibility of the federal claims policy is particularly unfortunate in light of the evolving state of the law regarding Aboriginal rights and the federal government's own admission that the formulation of a federal claims policy has been very much influenced by court

decisions. The effect of a clause such as 2.5.1.2 is that the frozen rights approach of the federal government, already evident in its litigation strategy, has now been carried over into its negotiation strategy. This freezing of rights is disturbing not only in terms of taking away from Aboriginal parties the benefits of an evolving domestic jurisprudence but also because it negates the considerable and important developments that may accrue to Aboriginal peoples as a result of international human rights standard-setting processes such as the draft Universal Declaration on the Rights of Indigenous Peoples (see Part 3 of this paper). The thrust of these initiatives in the international arena, like those taking place not only in Canada but elsewhere in the world where Aboriginal peoples have experienced the effects of colonization, is to bring pressure to bear on governments to reconsider and discard many of the laws and policies that have promoted or condoned the dispossession of Aboriginal peoples. A Canadian claims policy that would deny Aboriginal peoples the benefits of these important international developments by freezing rights to the date of settlement agreements requires rather more justification than the need "to avoid ambiguity and uncertainty".

Lawyers for the Yukon First Nations have sought to provide the necessary balance between the retention of Aboriginal rights and the need for certainty for third parties through the language in section 5.9. Thus, as described earlier, section 5.9.1 provides that where the Yukon First Nation grants any interest in a parcel of settlement land less than the entire interest to a third party not enrolled as a beneficiary of that First Nations Final Agreement, the interest granted shall take priority for all purposes over any Aboriginal rights and any right to harvest. Furthermore, section 5.9.2 contains an undertaking by Yukon First Nations and their descendants and successors not to exercise or assert any Aboriginal right or title or right to harvest that is in conflict or inconsistent with any interest granted to a third party. It seems to this writer that the combination of these two provisions gives the third parties all the security and certainty they need without necessitating the surrender provisions of 2.5.1.2.

This continuing reliance upon surrender as a means to ensure certainty and security to third parties is also reflected in section 5.10.1 of the Final Agreements. I have already pointed out that where a Yukon First Nation makes a grant of its entire interest in a parcel of settlement land, section 5.10.2 ensures that the grantee will receive not Aboriginal title (which can be held only by Aboriginal beneficiaries) but a fee simple, by the technique of deeming that the First Nation had a fee simple prior to the grant. This again is sufficient to ensure certainty and

security. Nevertheless, section 5.10.1 again goes beyond what is legally necessary and contains the further provision that making such a grant of the entire interest shall operate as a surrender of all Aboriginal rights and title.

It is entirely conceivable that the Yukon First Nation might be prepared to make a grant to a third party of a parcel of land for either residential or economic development purposes. For the third party to finance the acquisition by way of mortgage may necessitate that they receive a fee simple interest. Such a grant can co-exist with a First Nation wishing to retain a continuing jurisdiction to ensure that land management decisions in relation to that parcel are compatible with land management decisions made by a First Nation in relation to other settlement land. However, the Yukon Final Agreements provide that in such a case the land shall cease to be settlement land, with the consequence that land management rights are lost and that all Aboriginal rights and title shall be deemed surrendered. Significantly, if at a later date the Yukon First Nation re-acquires the land, it can revert to the status of settlement land, at which time the First Nation will be able to resume land management powers. However, the re-acquisition and resumption of land management powers is conditioned by the provision that "except that the cession, release and surrender of any Aboriginal claim, right, title or interest in respect to the land shall not be affected" (5.12.1.3). In other words, once a First Nation disposes of its entire interest in a parcel of land, it loses forever all its Aboriginal rights and title to that parcel, even if it re-acquires the land. In the event of such re-acquisition, it holds the land by way of Crown grant and not by virtue of its pre-existing Aboriginal title.

The impression gained from a close reading of the Yukon Final Agreements is that of First Nations endeavouring to move away from previous models of settlement agreements based upon the extinguishment and grant-back model, exploring techniques for defining the content of existing Aboriginal rights and providing mechanisms that give third parties security, with a view to implementing the spirit of the Task Force report, and of the federal government seeking to hold the extinguishment line, making only the most minimal concessions to a retained rights model. The resulting agreements contain enough elements to justify the claim of Yukon First Nations that their agreements, unlike the other northern agreements signed so far, do not extinguish all their Aboriginal rights and titles to lands and resources. However, in terms of a spectrum that has extinguishment and grant-back of rights at one end and affirmation of Aboriginal rights at the other, the Yukon Agreements cannot be said to have pulled away from

the gravitational orbit of the extinguishment model. In the political context of the northern land claims settlement process, it is not difficult to see why this might be the case. The Inuvialuit of the Western Arctic, in their agreement, and the Inuit of the Eastern Arctic, in the Nunavut Agreement, have been persuaded to accept the surrender and grant-back model. This quite clearly has given the federal government a strong bargaining position in conceding as little as possible to any other model for the Yukon First Nations. Given the federal government's minimalist conception of Aboriginal rights and their success in persuading other northern Aboriginal peoples to accept the existing model, the climate has not been conducive to a search for creative alternatives to extinguishment.

Indeed, even the modest advances of the Yukon Agreements in terms of a limited retention of Aboriginal rights have not been extended to the land claims negotiations that have taken place with the Dene of the Mackenzie Delta and Mackenzie Valley after the signing of the Yukon Agreements. The reason given by federal negotiators for rejecting a Yukon-style limited retention model was that, unlike the Yukon Indians, the Dene/Metis had already signed blanket surrender clauses in Treaties 8 and 11 and that any hint of an acknowledgement that some land-related Aboriginal rights might have survived these clauses would compromise the federal government's legal position on the effect of the these treaties. The reasonableness of the federal government's position is open to question on two grounds, the first being that in the case of *Re Paulette*, Mr. Justice Morrow of the Northwest Territory Territorial Court, on the basis of extensive historical evidence and the oral evidence of Dene elders, held that there was an arguable case sufficient to support the entering of a caveat in the Land Titles Registry that Treaties 8 and 11 did not legally extinguish Aboriginal rights.[xv] The second reason is that the Yukon Agreements expressly disavow that anything in any settlement agreement shall be construed as an admission by government that First Nations have any Aboriginal rights (paragraph 2.6.4). The resistance of the federal government to extending even the Yukon model to other Dene groups suggests that, absent strong pressure on the government, the development of new models for comprehensive claims that build upon the affirmation of Aboriginal rights will not benefit those Dene/Metis groups that have not yet signed modern agreements or any other Aboriginal peoples with whom comprehensive claims agreements might be negotiated against the backdrop of an historical treaty containing a blanket surrender clause. This would have particular implications in British Columbia for those First Nations that were parties to the

Douglas Treaties, signed in the 1850s, and Treaty 8, signed in northeastern B.C. in 1900. The experience of the Dene/Metis in the Northwest Territories demonstrates clearly that the development of alternatives to extinguishment for future comprehensive claims agreements cannot be neatly divorced from the historical treaty and past comprehensive claims dimensions of the extinguishment issue.

In the continuing search for such alternatives, it is possible to revisit the Yukon Agreements and suggest changes to the language and the deletion of some of the clauses I have already identified as being unnecessarily preoccupied with extinguishment. Other particular changes would be to include mines and minerals in the retained Aboriginal rights on settlement land and exempt from the surrender of Aboriginal rights in non-settlement land the right to harvest on traditional territory. However, in the search for creative alternatives to extinguishment, I suggest that there may be a more promising way to proceed than to suggest amendments to existing arrangements that are premised on a surrender model modified to take into account the aspirations of First Nations to retain some of their Aboriginal rights. Instead, it makes more sense to start from a place where the fundamental premise is that, to the greatest extent possible, Aboriginal rights are to be retained and that surrender of those rights should be contemplated only where there is no other way to achieve one of the legitimate objectives of settlement agreements. Such an approach is consistent with the affirmation of Aboriginal rights in section 35(1) and in line with the critical path of enquiry articulated by the Supreme Court of Canada in *Sparrow*, that any interference with Aboriginal rights requires justification. The process of justification requires that the government demonstrate that the interference fulfils a legitimate governmental objective and that there be "as little infringement as possible in order to effect the desired result".[xvi]

Part 2 — A New Model for Modern Treaties

Acknowledging First Nations' Conception of Aboriginal Rights

In giving shape and content to a new model based on recognition of Aboriginal rights, it is necessary to identify clearly the nature of the rights that First Nations seek to retain in relation to land and resources. Earlier in this paper I sought to demonstrate that for First Nations, Aboriginal rights represents a cluster of rights and responsibilities that are woven into the spiritual, social

and economic relationships that Aboriginal peoples have with their homelands. Before exploring the conceptual framework required to reflect this broad understanding of rights and responsibilities, it will be helpful to consider a recent statement of that relationship by the Gitksan and Wet'suwet'en First Nations in the evidence presented to the Supreme Court of British Columbia in their landmark Aboriginal rights case, *Delgam Uukw* v. *A.G.B.C.*

In his opening statement the hereditary chief, Delgam Uukw, addressed the Chief Justice of British Columbia:

> I am a Gitksan chief and a plaintiff in this case. My House owns territories in the Upper Kispiox Valley and the Upper Nass Valley. Each Gitksan plaintiff's House owns similar territories. Together, the Gitksan and Wet-suwet'en Chiefs own and govern the 22,000 square miles of Gitksan and Wet-suwet'en territory.
>
> For us, the ownership of territory is a marriage of the Chief and the land. Each Chief has an ancestor who encountered and acknowledged the life of the land. From such encounters come power. The land, the plants, the animals and the people all have spirit ─ they all must be shown respect. That is the basis of our law.
>
> The Chief is responsible for ensuring that all the people in his House respect the spirit in the land and in all living things. When a Chief directs his House properly and the laws are followed, then that original power can be recreated. That is the source of the Chief's authority.
>
> My power is carried in my House's histories, songs, dances and crests. It is recreated at the Feast when the histories are told, the songs and dances performed, and the crests displayed. With the wealth that comes from respectful use of the territory, the House feeds the name of the Chief in the Feast Hall. In this way, the law, the Chief, the territory and the Feast become one. The unity of the Chief's authority and his House's ownership of its territory are witnessed and thus affirmed by the other Chiefs at the Feast. (Gisday Wa and Delgam Uukw, *The Spirit in the Land*, Opening Statement of the Gitksan and Wet-suwet'en Hereditary Chiefs in the Supreme Court of British Columbia, May 11, 1987 [Gabriola: Reflections], pp. 7-8.)

The distinctive nature of the Gitksan and Wet'suwet'en concept of ownership was described by Dr. Richard Daly, an anthropologist, in his evidence in the trial.

> The Gitksan and the Wet-suwet'en say that the land belongs to them, and also, that they themselves belong to the land. Dan Michell, for example, explained in his evidence that the Wet-suwet'en do not simply fish and hunt and trap on the land, they are an integral part of those lands.
>
> > They live on those lands. Like I explained before, they are part of that land... They belong [to] it and they return back there.
>
> The relationship between the land and its owners is that of reciprocal interaction, not at

all unlike the relationship that carries on between two founding clans in a village...

> The House group's proprietary representative, its leader or chief, exercises a reciprocal stewardship vis-à-vis the land, and at the same time, a proprietary right towards this land vis-à-vis the claims of other groups or nations. On the one hand, the land is dealt with as a property object between two potentially competitive groups. As such it is subject to ownership... At the same time, ownership in such societies entails a responsibility to care for that which is owned. Management and stewardship in such societies require a blend of ownership and tenantship, aggressive control and careful respect. The resultant interweave of competitiveness and rights to ownership, with respectful reciprocation, is manifest in many features and institutions of Gitksan and Wet-suwet'en culture. (Opinion report of Dr. Richard Daly, *Their Box was Full*, vol.1, pp. 245-249.)

Under the Gitksan and Wet'suwet'en system ─ and that of many other First Nations ─ rights of ownership entail responsibility, the duty to enter a relationship of reciprocity with all the living forces of that place, to use the place well ─ both materially and spiritually ─ such that it is left in good condition for unborn generations. Ownership relates to the rights associated with social, cultural and economic activities on the land, and stewardship relates to the obligations entailed in those rights: obligations of respect and sustainability toward all living things embedded in the land, sea and river, and thus to the unborn generations who, in turn, would have the right to enjoy the wealth of the land.

For the Gitksan and Wet'suwet'en this pervasive relationship with their homeland is reflected in oral histories, songs and crests, images that encapsulate and provide a visual record of the major historical events experienced by their ancestors:

> The Gitksan crests, ayuks, commemorate the group's origins, odysseys from ancient villages, moments when the people drew upon the assistance of spirit power, the defeat of neighbouring peoples who threatened their security, or the discovery of new ways to survive the natural disasters they periodically experienced. With the crest goes the ada'ox, the verbal record of the event. Key images within the ada'ox are evoked by songs, limx'ooy, that come out of the ancient past, literally from the breath of the ancestors to take the listener back in time by the very quality of their music and the emotions they convey.
>
> The formal telling of the oral histories in the Feast, together with the display of crests and the performance of the songs, witnessed and confirmed by the Chiefs of other Houses, constitute not only the official history of the House, but also the evidence of its title to its territory and the legitimacy of its authority over it. The oral history, the crests, and the songs of a House are evidence, however, of something more than even its history, title, and authority. They represent also its spirit power, its daxgyet.
>
> The witnessing and validation of the House's historical identity, territorial ownership, and

> spirit power is integral to the Feast. But also integral is the House's demonstration of its prosperity through a distribution of its wealth. A House's wealth is directly linked to its territory. In very early times, sometimes a cane was touched to the land, to signify the power of the Gitksan House group merging with that of the land, and the existence thereafter of a bond between the group and their territory. The cane used to forge the bond between the House and its territory foreshadowed the crest pole or totem pole. The pole, which encodes the history of the House through its display of crests, also recreates, by reaching upwards, the link with the spirit forces that give the people their power. At the same time it is planted in the ground, where its roots spread out into the land, thereby linking man, spirit power, and the land so they form a living whole. Integral to this link and the maintenance of the partnership, is adherence to the fundamental principles of respect for the land and for its life forms...
>
> In the pole-raising Feast, the power which flows from the pole not only links the House to its territory and the life forms that feed them, but it also spreads out to strengthen the network of human relations forged by this and other feasts... In each pole-raising Feast, the display of the crest, the telling of the ada'ox, the singing of the songs, recreates the historical events they represent. This history is relived in the Feast. The identity and power it confers on the House group is thus kept alive through its continuous recreation by each generation. (*The Spirit in the Land*, pp. 25-28.)

For the Gitksan to contemplate the extinguishment of the Aboriginal rights to their territory is to contemplate the digging up of the roots that connect them to their ancestors and the other life forces, the severing of their continuing responsibilities to respect the land and preserve it for future generations, and the disinheriting of their children's children from having a place in the territory in which their spiritual, cultural and economic well-being resides. For the Gitksan and Wet'suwet'en hereditary chiefs, it is not only unthinkable, it would be unpardonable.

This description of the Gitksan and Wet'suwet'en conception of Aboriginal rights and responsibilities not only explains their, and other First Nations', resistance to an extinguishment model but also provides important insights in the structuring of any modern land claims agreement that seeks to build upon indigenous foundations. Agreements should provide a statement of a First Nation's conception of its own rights and responsibilities in relation to land and resources. Every First Nation has its own histories, carried within the oral tradition, describing its origins in and migrations to its territories and its own stories that link the present generation with the lives of their ancestors. These have a rightful and honourable place in new arrangements, which will have constitutional force under section 35(3) and which are designed to define continuing rights and responsibilities in relation to those territories. These statements should not be seen simply as a narrative preamble to agreements ─ they must also give shape to

the normative structuring of those agreements and the language that defines those rights and responsibilities.

Building Bridges of Accommodation

While modern land claims agreements should be structured to reflect First Nations' conceptions of their Aboriginal rights, they must also build a bridge of accommodation that links, in a modern Covenant Chain, with the evolving jurisprudence of Aboriginal rights. It is important, however, to recognize that judicial statements regarding the nature and scope of Aboriginal rights, particularly those articulated before 1982, cannot be seen as marking the outer boundaries of negotiation. As the Supreme Court of Canada stated in *Sparrow*,

> The nature of 5.35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded. (*R.* v. *Sparrow* [1990] 1 S.C.R. 1075 at 1106.)
>
> The Supreme Court cited with approval the statement of Professor Lyon:
>
> The context of 1982 is surely enough to tell us that this is not a codification of the case law on Aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for Aboriginal peoples. (*Ibid.*, p. 1105.)
>
> The legal change in status of Aboriginal rights effected by section 35 has been described in this way:
>
> The questions surrounding the nature, scope, extent and consequences of Aboriginal rights are first and foremost constitutional issues. It may well have been that prior to 1982, legal questions surrounding Aboriginal claims with respect to land were viewed as common law matters, implicating questions of property and trust law. Whatever may have been the merits of relegating Aboriginal issues to the common law realm in the past, such is no longer the case. What was once spoken in terms of Aboriginal title is now a matter of constitutional right, recognized and affirmed in Section 35(1) of the *Constitution Act* 1982. (Revised Factum of the Province of British Columbia in *Delgam Uukw* v. *The Queen*, April 15, 1992, p. 4.)

Since 1982 the courts have also made it clear that the process of defining Aboriginal rights is not exclusively or even primarily the function of the judiciary and that whichever process is employed ─ negotiation preferably or litigation if necessary ─ it is crucial to take into account the Aboriginal perspective on the meaning of the rights at stake. In *Sparrow* the Court stated that section 35 "provides a solid constitutional base upon which subsequent negotiations can occur".[xvii] In the Meares Island case, Mr. Justice MacFarlane stated:

> I think it is fair to say, in the end, the public anticipates that the claims will be resolved by

> negotiation and settlement... This judicial proceeding is but a small part of the whole of the process which will ultimately find its solution in a reasonable exchange between governments and the Indian nations. (*MacMillan Bloedel* v. *Mullin* [1985] 3 W.W.R. 577 at 607.)

In *Sparrow*, its first case dealing with the proper interpretation of section 35, the Supreme Court stated, in the context of fishing rights,

> While it is impossible to give an easy definition of fishing rights, it is possible and, indeed crucial, to be sensitive to the Aboriginal perspective itself on the meaning of the rights at stake... They are rights held by a collective and are in keeping with the culture and existence of that group. (*Sparrow*, p. 1112.)

The importance of incorporating the Aboriginal perspective in the evolving development of Aboriginal rights is captured in the judgement of Mr. Justice Lambert in *Delgam Uukw* v. *British Columbia*.

> The purpose of Section 35, when it was prepared in 1982, cannot have been to protect the rights of Indians to live as they lived in 1778, the date of the first certain contact between the Indians and the people of European origin in what is now British Columbia. No constitution could accomplish that. Its purpose must have been to secure to Indians, without any further erosion, a modern unfolding of the rights flowing from the fact that, before the settlers with their new Sovereignty arrived, the Indians occupied the land, possessed its resources, and used and enjoyed both the land and the resources through a social system which they controlled through their own institutions. That modern unfolding must come not only in legal rights, but more importantly, in the reflection of those rights in a social organization and in an economic structure which will permit the Indian peoples to manage their affairs with both some independence from the remainder of Canadian society and also with honourable inter-dependence between all parts of the Canadian social fabric. (*Delgam Uukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.) at 277.)

While the federal government in its comprehensive claims policy has accepted that negotiated settlement is the preferred process for defining the rights of Aboriginal peoples, it has insisted that the product of those negotiations take the form of a surrender of pre-settlement "undefined Aboriginal rights" and their replacement with post-settlement rights as defined by the settlement agreement that, under section 35(3), will have constitutional protection as treaty rights. It is very difficult to square this position with what the Supreme Court said in *Sparrow* ─ that a broad, liberal and purposive definition of Aboriginal rights provides "a solid constitutional base upon which subsequent negotiations can take place". It also fails to respect the Aboriginal perspective on the rights at stake in the most fundamental of ways by requiring a surrender of those rights that, from the Aboriginal perspective, define their distinctive identities.

There is also another faultline in the present comprehensive claims policy. Under the

settlement agreements that have been signed so far, the rights defined by the agreements are made to assume the shape of legal rights as they exist elsewhere in the Canadian legal system. The rights that have emerged from settlement agreements, even though they have constitutional status, are rights based upon western legal sources and traditions. In no way do they respect and acknowledge Aboriginal sources and traditions. This is not true accommodation; rather it is legal assimilation. If, as section 35 affirms, the constitutional rights of Aboriginal peoples are different from those of other Canadians ─ because they are the pre-existing rights of peoples who had established societies with their own territories before European contact ─ the process and product of settlement agreements dedicated to the task of defining those rights must respect and recognize that the constitutional rights of Aboriginal peoples are derived as much from the legal tradition of Aboriginal peoples as they are from the common law.

Neither the process nor the substance of the comprehensive claims policy has given sufficient recognition or respect to the well developed diplomatic protocols of Aboriginal peoples or their distinctive conception of their rights. The asymmetrical nature of the relationship between Aboriginal peoples in Canada ─ which is reflected in the claims policy and in the settlement agreements signed as a result of its constricted vision of that relationship ─ has been addressed in the recent report of the British Columbia Claims Task Force, which included representatives of the First Nations and the federal and provincial governments. The Task Force highlighted the imperative of establishing a new relationship as the prerequisite for any claims policy and comprehensive agreements:

> As history shows, the relationship between First Nations and the Crown has been a troubled one. This relationship must be cast aside. In its place, a new relationship which recognizes the unique place of Aboriginal people and First Nations in Canada must be developed and nurtured. Recognition and respect for First Nations as self-determining and distinct nations with their own spiritual values, histories, languages, territories, political institutions and ways of life must be the hallmark of this new relationship. (*Report of the British Columbia Claims Task Force* [Vancouver: June 28, 1991], p. 16.)

The federal and provincial governments have accepted the recommendation of the Task Force as the basis upon which treaty negotiations will take place. It is fundamental to the success of those negotiations ─ and of any others in which Aboriginal rights are at stake ─ that the process and the substance of the agreements respect and genuinely accommodate the distinctive legal, political and spiritual traditions of Aboriginal peoples.

In structuring a bridge of accommodation it is helpful to understand the places at which

Aboriginal peoples' perceptions of their rights are different from the way courts have expressed those rights. Set out below is an attempt to chart in broad fashion the areas of difference in order to see where accommodation can be reached in affirming a contemporary definition of those rights that respects both Aboriginal and common law legal traditions.

First Nations' Conception of Aboriginal Rights

1. The source of Aboriginal title lies in a compact with the Creator and reflects a relationship to the land, waters and all living things. As expressed by Button Chief at the negotiations of Treaty 7 in 1877, "the Great Spirit, and not the Great Mother [Queen Victoria] gave us this land". (Morris, *The Treaties of Canada*, p. 270.)

2. This relationship, as a gift of the Creator, cannot be divested or transferred to others because it is an integral and essential element of a First Nation's cultural and spiritual identity.

3. The relationship with particular territories is charged with historical, spiritual and economic significance and gives rise to duties and responsibilities of stewardship to protect and conserve the land and resources for future generations.

4. The relationship also gives rise to the beneficial enjoyment of the land and its resources.

5. Within a legal and social network of reciprocity, beneficial enjoyment can be shared with others in accordance with principles of mutual respect and consent.

6. Each First Nation has inherent powers of self-government within its territories.

The Common Law's Conception of Aboriginal Rights

1. The underlying title of the Crown vests on the assertion of Crown sovereignty and gives the Crown the exclusive right as against other European governments to acquire Aboriginal lands.

2. Aboriginal title is a pre-existing right, not created by or dependent upon any act of the Crown.

3. Aboriginal title co-exists with the underlying title of the Crown and constitutes a legal burden on the Crown's underlying title.

4. Aboriginal title encompasses rights to possession and beneficial enjoyment of Aboriginal territory. The scope of such beneficial enjoyment at common law has yet to be determined finally by the courts. According to some authorities, it is limited to traditional harvesting rights; according to other authorities, it extends to the full range of beneficial enjoyment in the context of contemporary economies.

5. Aboriginal title cannot be granted or alienated to third parties but can be surrendered only to the Crown by treaty.

6. According to one line of authority, the Crown may make a grant of land still in the possession of Aboriginal peoples before any surrender, but such grant is subject to the continuing Aboriginal title and cannot take effect to convey a right of possession until a surrender of the Aboriginal title by treaty. According to another line of authority, the grant of an interest by the Crown to third parties before any surrender by treaty effects an extinguishment of Aboriginal title to the extent of any inconsistency with the grant. A third line of authority holds that while grants by provincial governments cannot extinguish Aboriginal title, they may impair or interfere with the Aboriginal interest.

7. According to a long line of judicial authority in the United States, the common law recognizes the right of inherent tribal self-government. In Canada, the issue of whether Aboriginal rights encompass the inherent right of self-government has not been determined authoritatively by the Supreme Court of Canada. It is beyond dispute that in many parts of Canada where no treaties have been made, non-Aboriginal governments have made alienations of land and resources without regard to Aboriginal peoples' conceptions of their rights. It has also been argued by First Nations that these alienations have been made with disregard to the common law conception of these rights and their relationship to Crown title. While this disregard has impaired the ability of First Nations to maintain their responsibilities of stewardship and exercise their rights of beneficial enjoyment, it has not diminished or extinguished their original, pre-existing and inalienable relationship to their territories. From a First Nations perspective of its Aboriginal rights, the purpose of a modern land claims agreement, in so far as land and resources are concerned, is to establish a framework that will pay restitutional attention to this disregard in the past and indelibly affirm for the future this relationship and its attendant responsibilities and rights in light of contemporary realities.

The Task Force to Review Comprehensive Claims Policy, in the spirit of providing a

bridge of accommodation between the different conceptions of rights by Aboriginal peoples and non-Aboriginal governments, proposed a set of objectives within which to frame comprehensive land claims agreements. The agreements should

- define the relationship between governments and aboriginal peoples in Canada;
- establish a framework of certainty concerning land and resources that accommodates the interests of aboriginal peoples and other Canadians;
- provide the opportunity for the development of economically viable aboriginal societies;
- preserve and enhance the cultural and social well-being of aboriginal societies for generations to come; and
- enable aboriginal societies to develop self-governing institutions and to participate effectively in decisions that affect their interests.

These objectives should guide the federal government in the negotiations to ensure that claims settlements provide a solid foundation for the future.

The blanket extinguishment of all Aboriginal rights and title should no longer be an objective. (*Living Treaties: Lasting Agreements*, pp. 30-31.)

The sticking point and major impediment to the development of any new model of claims settlement has been the second of these objectives ─ establishing a framework of certainty concerning lands and resources that accommodates the interests of Aboriginal peoples and other Canadians. The federal government has insisted and continues to insist that this requires a surrender/extinguishment and exchange model. Adopting the critical path of inquiry I have suggested ─ which starts from the premise that Aboriginal rights are to be affirmed and that any interference with those rights must be justified ─ this approach must be tested rather than simply asserted. It is suggested that the framework of certainty can be accommodated within a settlement that affirms Aboriginal rights and that the broad surrender clauses common to the modern land claims agreements we have considered so far are not necessary to achieve this important objective in the context of other equally important objectives.

Imagining the Contours of a New Model

In pursuing this path of enquiry, it will be helpful to focus more clearly on different categories of lands in respect of which Aboriginal peoples assert their rights. The modern land claims agreements completed so far divide the lands subject to the agreement into two broad categories, settlement and non-settlement land. Settlement land is that part of the traditional Aboriginal territory in which the Aboriginal parties retain the greatest rights, whether as rights granted by

the Crown in the case of the Inuvialuit, Gwich'in and Nunavut agreements, or retained Aboriginal rights as in the Yukon Agreements. Non-settlement lands are those parts of traditional territories in which all Aboriginal rights are surrendered in return for which defined rights, interests and benefits are granted by the agreement.

For the purpose of developing the contours of a new model based upon affirmation and not surrender of Aboriginal rights, I suggest a tripartite classification of lands and resources originally subject to Aboriginal jurisdiction and ownership. The first class of territories would be those over which a First Nation will exercise full rights of beneficial enjoyment and primary, if not exclusive, jurisdiction in relation to lands and resources. The second would be those where the rights of beneficial enjoyment and jurisdiction will be shared with federal, provincial and territorial governments; the third will be those territories in which non-Aboriginal governments have full rights of beneficial enjoyment and primary, if not exclusive, jurisdiction in relation to lands and resources. Within these broad classifications my suggested model would contain the following elements:

1. In accordance with the definitions contained in the agreement, the Aboriginal land rights of the Aboriginal party would be explicitly affirmed, and the agreement would contain no surrender by virtue of the agreement of any Aboriginal land rights.
2. For lands in the first category where the Aboriginal party would exercise full rights of beneficial enjoyment and primary jurisdiction (`First Nation lands') Aboriginal land rights would be defined either
   (a) in accordance with traditional forms of land tenure, or
   (b) in terms of equivalency to Canadian land tenure.
   The choice of alternatives (or a combination of the two) would be at the option of the Aboriginal party. The agreement would also define a limited set of rights of non-Aboriginal governments and third parties.
3. On lands in the second category, where there would be shared rights of beneficial enjoyment and jurisdiction (`shared lands'), the retained Aboriginal rights would be defined in terms of joint harvesting rights, joint management and revenue sharing. The agreement would also specify the rights of non-Aboriginal governments and third parties, to mark clearly the point of intersection between the two sets of rights and the regimes governing them.

4. On the third class of lands, where non-Aboriginal governments will have full rights of beneficial enjoyment and primary jurisdiction (`provincial, territorial or federal lands'), the retained Aboriginal rights would be defined in terms of the special relationship of the Aboriginal party to their territory and will provide the basis for specified normative rights, such as the right to perform the role of diplomatic host at intergovernmental, international and other conferences and the right to name landmarks.
5. To protect specified third-party rights and interests in existence before the agreement, there would be express affirmation of such interests by the Aboriginal party and an undertaking not to exercise or assert retained Aboriginal rights inconsistent with such third-party rights and interests.
6. The agreement would set out the legal regime for granting of future rights and interests and for their protection. On First Nation lands these grants will be made by First Nation governments or the Aboriginal holders of rights of beneficial enjoyment. On shared lands the rights will be granted by bodies having jurisdiction granted by both First Nation governments and non-Aboriginal governments. In specified cases one government might delegate to the other government the right to make grants subject to its prior consent. On provincial, territorial or federal lands the non-Aboriginal government would have the power to make grants which, under the terms of the agreement, would be impressed with the consent and approval of the Aboriginal party. In the case of all grants of rights or interests to third parties on any of the three categories of land, there would be an undertaking by the Aboriginal party not to exercise or assert retained Aboriginal rights inconsistent with such third-party rights or interests.

Having set out the broad contours of this model of recognition, let me now examine each of them in more detail.

On First Nations lands, First Nations would retain their Aboriginal rights to these territories, and those rights would be described and defined in accordance with each First Nation's understanding of its relationship to these territories, reflecting its rights to full beneficial enjoyment and its responsibilities for the stewardship and management of resources. This could be done in a number of different ways. For those First Nations that have retained their traditional forms of land tenure and that are comfortable with and confident that these forms have

contemporary significance, their retained Aboriginal rights can be described in the form of that land tenure.

The Gitksan and Wet'suwet'en provide one of the most conspicuous examples of a well articulated system of land tenure that has been maintained and that is viewed as the basis upon which Gitksan and Wet'suwet'en original rights are to be exercised in a contemporary world. In Gitksan and Wet'suwet'en society, the House is the basic social and land-holding unit. The House is a group of matrilineally-related kin. The House chief has authority over and responsibility for managing the land and resources on behalf of the House members. In each generation the task of renewing House authority and responsibility over property is transferred with the chiefly name. One of the Gitksan hereditary chiefs, Hanamuxw, explained in evidence before Chief Justice McEachern what was passed to her when she inherited the name Hanamuxw in 1966:

> You are the one that has been selected to take the land that was your inheritance, to hold it, and to take care of it.... That means the land that your forefathers had, that includes the regalia, that includes the adaawk [the oral histories that belong to the House], that includes the pole, that includes the resources on the land, that includes the name Hanamuxw, and the right to use that name within the Gitksan territory. That means the right to use the authority of the chief.... The property is not given to you directly. In other words, it's not your personal property, but rather you are designated as the person to manage that property not just for yourself but for all of the members of your House. (Transcript of Proceedings, *Delgam Uukw* v. *A.G.B.C.*, vol. 80, pp. 5006-5008.)

The Gitksan and Wet'suwet'en system of land tenure, like that of the common law and the civil law, distinguishes between rights of `ownership' and the grant of rights or privileges to `use' property. Members of the House have a right to the beneficial enjoyment of their territories and resources of the House subject to the direction of the hereditary chief. The hereditary chief, as the representative of the House, may also grant permission to use territories to non-members of the House. Under Gitksan and Wet'suwet'en law, there are well defined categories of access and use rights that can be granted to non-House members. The effect of these use rights in the context of the Gitksan and Wet'suwet'en kinship system is that one has access not only to one's own House territory but also the House territory of one's father while he is alive and the House territory of one's spouse. In addition to these privileged rights of access based upon kinship relationships, a House chief may grant permission to others to use and benefit from House resources. Under Gitksan and Wet'suwet'en law persons who are granted rights of access acknowledge the ownership of that House by providing payment to the House chief. This may

involve contribution of part of the resources harvested or a cash payment. Gitksan and Wet'suwet'en law provides for a legal protocol in which these payments are acknowledged in the feast hall, therefore constituting an affirmation of the ownership of the House over the territory.

Under Gitksan and Wet'suwet'en law, rights of ownership and resource management are the subject of succession and limited alienation. Succession occurs through matrilineal inheritance from one holder of a chiefly name to another. The continuous succession of ownership of territories, through the passage of chiefly names, connects the present generation of Gitksan and Wet'suwet'en legally and spiritually to their ancestors. This is reflected linguistically in the Gitksan phrase, "ee dim uma yess", which means "walk slowly on the breath of your ancestors".[xviii]

Territorial ownership under Gitksan and Wet'suwet'en law is recognized and maintained in the feast system and by the display of crests and recorded in oral history. The functions performed by deeds of conveyance, wills and land and estate registries in the property law of non-Aboriginal society are performed in the Gitksan and Wet'suwet'en systems by crests, crest poles and oral histories in the context of public witnessing and validation in the feast hall. The Gitksan and Wet'suwet'en, like other societies with oral cultures, use mnemonic or memory devices. The crests on the chiefly belongings of each House are mnemonic texts that can be read by certain other historically and regionally linked chiefs, all of whom have been taught by their elders a portion of the history of their neighbours and of the boundaries of their territory. The crests are like a map, and their presence on blankets, house fronts and elsewhere calls up the history, the ownership and the authority of the chief and his or her House. In a similar fashion, the crest or totem poles stand as a form of legitimacy of rights to the territory. Properly understood, they provide ─ both metaphorically and physically ─ the root of title to the rights of the House.

In any system that includes rights of exclusive possession, there must be a general knowledge of the persons or groups in whom those rights of possession reside and of the boundaries of their territory. Among the Gitksan and Wet'suwet'en, this announcement of rights and boundaries is carried out, above all else, in the feast hall. One of the principal responsibilities of the Gitksan and Wet'suwet'en hereditary chiefs, when they are invited to the feasts of other Houses and clans, is to act as witnesses to and validators of the host group's titles to territories.

The Aboriginal title of the Gitksan and Wet'suwet'en thus is centred on the ownership and

stewardship of the Houses, and the definition of this Aboriginal title can be stated with some clarity as the basis upon which their retained Aboriginal rights can be defined in a modern land claims agreement.

It is interesting to contrast how the neighbours of the Gitksan, the Nisga'a, have articulated the way Nisga'a Aboriginal title to land is held. The Nisga'a traditional system of land tenure shares many common elements with that of the Gitksan and Wet'suwet'en, in particular the pivotal role of the House group. These common elements, together with an important element of difference, are reflected in the following statement of the Nisga'a Tribal Council:

> Land and resources management was traditionally conducted through a system of family-owned territories in which the use of, and access to, natural resources was regulated by the head of each family, or House.
>
> Some sixty Houses held territories and access by each Nisga'a was guaranteed through complex kinship relations or reciprocity arrangements as determined by the unwritten body of laws and social customs that governs a Nisga'a behaviour ─ Ayuukhl Nisga'a.
>
> Together, these family territories form a contiguous block of land that comprises our territory. Although by tradition, control over each House was unilaterally exercised by the owning family, in the early years of this century our hereditary chiefs agreed that all land was to be held in common ownership for all the Nisga'a. Thus, the land itself is held as a "common bowl" for everyone. (*Nisga'a Government* [New Aiyansh: Nisga'a Tribal Council, 1992].)

As this statement indicates, the "common bowl" concept is itself a development that has taken place in the twentieth century and is an example of a First Nation modifying its land tenure system in response to changed circumstances. But whether a First Nation's system of land tenure reflects the Nisga'a common bowl concept or the Gitksan individual House territory concept, land claims agreements can be drafted that accurately define the rights and responsibilities of First Nations for those lands in relation to which they will exercise primary, if not exclusive, authority.

An alternative definitional approach to Aboriginal rights in this category of land that may be acceptable to some First Nations is that adopted in the Yukon Agreements, where retained Aboriginal title is described in terms of equivalency to Canadian land tenure. Thus, in the Yukon Final Agreements, the rights of Yukon First Nations in settlement land are defined as "the rights, obligations and liabilities equivalent to fee simple". This definitional approach reflects the recommendations of the Task Force that alternatives to extinguishment must have as one of their

characteristics the requirement that it be "familiar, so that rights can be defined to fit comfortably into the dominant property law system".[xix]

When reviewing recommendations of the Task Force, I suggested that this requirement was unduly restrictive. Of course, if a First Nation is comfortable with a description of its pre-existing Aboriginal title in these terms as adequately expressing its rights and responsibilities toward its territory, there can be no objection ─ and it has the advantage, as noted by the Task Force, "that this description would provide certainty for [First Nations] land rights within the system that defines the land rights of other Canadians".[xx]

The attraction of having Aboriginal land rights defined in line with common law property rights is no doubt magnified in light of the experience of those First Nations whose reserve lands have been administered under the *Indian Act*. The provisions of the land regime of that Act have set First Nations apart from the land tenure system of the dominant economy in a way that has held back their economic development and limited their ability to use their resources to achieve economic self-sufficiency.

The reason why defining Aboriginal land rights in terms of equivalency to fee simple is unduly restrictive and ought not to be a prerequisite for a retained rights model is that it holds up, as the standard of reference for the definition of Aboriginal rights, the common (or civil) law system of land tenure. This is an approach that courts have guarded against expressly. Thus, the Privy Council in *Amodu Tijani* v. *Southern Nigeria* stated:

> Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. ([1921] A.C. 399 at 402.)

In framing modern land claims agreements based upon mutual respect, it is not appropriate or justifiable that the rights of First Nations, which have their own systems of land tenure, should have to be defined with reference to forms familiar to the common (or the civil) law.

This point is not limited to the need to abandon the assumptions of colonialism and to decolonize the structure of legal arrangements affecting First Nations; it also goes to the heart of some of the important differences between Aboriginal peoples' relationship to their territories and the relationship that is reflected in fee simple tenure.

Fee simple tenure is the most complete form of land tenure that can be held under the common law system, being of indeterminate duration and carrying with it full rights to beneficial enjoyment and freedom of alienation *inter vivos* or by will. That beneficial enjoyment is circumscribed only by the law of nuisance and other laws of general application. Fee simple title is defined primarily, both in the contemplation of common law and in most Canadians' understanding, by reference to the *rights* that flow from this form of land tenure. For most First Nations, their relationship to their territories is defined principally in terms of the *responsibilities* that flow from that relationship and is best captured by the concept of stewardship. The responsibilities of stewardship and conservation for future generations are now being advanced increasingly as a moral and legal value to be adopted by non-Aboriginal governments and by the international community. Although this value is embraced by the environmental movement and is reflected in particular pieces of federal and provincial legislation, particularly those relating to environmental protection, it cannot be said that thus far it has affected the concept of fee simple. Put another way, it cannot be said that fee simple owners of land in Canada are under a legal obligation to conserve their land and its resources for future generations. To the extent that First Nations have always had this ethic of conservation and concern for future generations built into their relationship with their territories and wish to retain that relationship in relation to certain parts of their territories, it is not an accurate statement of that Aboriginal title to define it by reference to equivalency to fee simple.

Aboriginal title, as understood by First Nations, is different from fee simple; its differences are not only palpable in the ways First Nations speak about their relationship to their territories, it is also definable in land claims agreements. In this way, the narrative and the normative can, in tandem, encompass what it is that First Nations mean when they seek recognition of their Aboriginal title to their land.

However, it should not be assumed that the choices are between two extremes of having Aboriginal rights defined in terms of Aboriginal systems of land tenure or common law regimes. It would be possible, for example, to have the legal interests in lands and resources defined in terms of the Aboriginal land tenure system for purposes of making land and resource grants to members of the First Nation. However, where a grant is made to someone outside that Nation, for example, a corporation wishing to invest in a resource joint venture, the grant of an interest in lands and resources to such a third party could be `deemed' to be a grant of an interest defined in

conventional property terms. Indeed, a partial model for such a transformation is already established in the Yukon Agreements. As described previously, specific provisions in those agreements have the effect of ensuring that where a grant is made to a third party, the grant vests an interest that is not defined as Aboriginal title but rather as a fee interest. In the Yukon Agreements this is done by deeming that the First Nation, immediately before granting the interest to the third party, had itself been granted by the Crown a fee title.[xxi] I suggest that it is not necessary to go this far, and that a provision in a settlement agreement, confirmed by settlement legislation, that deemed the grant to be a fee or lesser interest in the hands of the third party would accomplish the same purpose in ensuring certainty for the third party in terms familiar to non-Aboriginal investors and bankers, without requiring that the Aboriginal interest be deemed retroactively to be a Crown-granted interest before the third-party transaction.

Turning to the second category of land, where the regime is one of shared jurisdiction and beneficial enjoyment, the retained Aboriginal title can also be defined with some particularity. The nature and degree of sharing can cover a very broad spectrum. By way of illustration, consider the provisions in the existing land claims agreements that provide for revenue sharing. The 1993 Federal Policy for the Settlement of Native Claims summarizes the federal government's view of these provisions in the following way:

> The 1986 policy makes it clear that the Federal Government is prepared to negotiate resource revenue-sharing with claimant groups, so they may share in the benefits of non-renewable resource development. The claimant group may receive a share of federal royalties derived from resource extraction throughout the area covered by the group's settlement agreement.
>
> *Resource revenue-sharing arrangements do not imply that claimant groups have resource ownership rights.* (Ottawa: Department of Indian Affairs and Northern Development, 1993, p. 10 [emphasis added].)

The last sentence reflects the legal position advanced by the federal Department of Justice in its arguments in cases such as *Delgam Uukw* that Aboriginal title extends only to the use and occupation of land and the harvesting of traditional resources and thus does not include `ownership' of non-renewable resources that, with some exceptions, were not an integral part of the economy of Aboriginal societies. There is, however, no principled reason or binding legal precedent why the right to share in revenues generated from the development of resources cannot be defined as a benefit flowing from a retained Aboriginal title.

Although the right to share resource revenues could be expressed in terms familiar to

Canadian resource law, it could equally be described with reference to rights and obligations under Aboriginal law. For example, the Gitksan and Wet'suwet'en have well defined categories of access and use rights granted by the owners of House territory to non-House members. While this right enables non-House members to make use of the resources of the House territory, there is an obligation to contribute part of the harvest (in contemporary times often in the form of a cash contribution) at a feast, thereby both acknowledging the ownership of the House and reinforcing the system of reciprocity. Because the regimes on shared lands will be contemporary expressions of reciprocity between Aboriginal and non-Aboriginal governments, the use of Aboriginal terminology has a fitting place in modern treaties. In this regard it has an honourable historical precedent in the long tradition of British and French colonial governments demonstrating their respect for their brethren the Haudenasaunee by making `presents' on the occasion of their meeting in treaty council to address issues regarding lands and alliances.

The existing land claims agreements also acknowledge the legitimate claims of First Nations to participate in harvesting, management and conservation regimes. As reflected in the 1993 federal position paper,

> The 1986 policy states that Aboriginal interests in environmental matters, particularly as these relate to wildlife management and the use of land and water, may also be addressed through participation in government bodies that have decision-making powers. *Such arrangements must recognize that government has an overriding obligation to ensure resource conservation, to protect the interests of all users, to respect international agreements, and to manage renewable resources within its jurisdiction.* (Federal Policy for the Settlement of Native Claims, 1993, p. 10 [emphasis added].)

Here, also, the italicized passage reflects the legal position of the Department of Justice that Aboriginal peoples have no pre-existing right of self-government or jurisdiction over resources and that the constitutional and legal authority in relation to environmental management lies with either the federal government or provincial governments. There are, however, compelling constitutional and legal arguments to the contrary, as the Royal Commission's own study, *Partners in Confederation, Aboriginal Peoples, Self-Government and the Constitution*, documents. Once it is accepted that the present constitutional arrangements do not preclude the existence of an Aboriginal right to self-government, there is no good reason why Aboriginal governments' participation in joint management cannot be expressed as the exercise of a retained Aboriginal right, regardless of the degree of joint management ─ which could range from a veto on any new development to a requirement of prior consultation. By this method the agreement

would build into the concept of Aboriginal rights the necessary bridge of accommodation. Put another way, the agreement would be making contemporary the exercise of Aboriginal rights while taking into account, but not capitulating to, changing economic and political realities.

An example of how this bridge of accommodation can be constructed, using a secure foundation of retained Aboriginal rights and contemporary legal architecture, can be found in what is now a site of major disputation. The resistance of the Haida in South Moresby and of the Nuu-chah-nulth on Meares Island to clear-cut logging are two of many battles between First Nations and non-Aboriginal governments and corporations in the forests of this country. For many First Nations, past logging practices demonstrate most vividly and painfully disregard for the responsible stewardship on which their relationship to the territories is centred. For many First Nations, the future of the forests and their management are not only linked to the discharge of their responsibilities but also provide avenues for economic self-sufficiency.

The forests also represent to non-Aboriginal governments a significant asset for all its citizens in terms of revenue, employment and recreational values. Provincial governments as well as First Nations have an interest in ensuring that the harvesting, management and conservation of the forestry resource take places on an integrated basis. In British Columbia the Tree Farm Licence is the dominant form of tenure through which the provincial government manages the forests. First Nations in British Columbia claim, through their Aboriginal title, a right to harvest and manage forests within their territories. They do not assert as part of that Aboriginal title the right to a tree farm licence. A bridge of accommodation could be built through an agreement whereby the province acknowledges Aboriginal title and the First Nation, for its part, agrees to exercise that right through the instrument of a tree farm licence. From the perspective of the province, the grant of the tree farm licence is pursuant to its underlying title. From the perspective of the First Nation, the acceptance of that licence is a complement to its retained Aboriginal title, thereby ensuring that the two forms of title co-exist based upon a process of accommodation, consent and mutual respect.

The resulting regime of co-management could also accommodate the exercise of shared jurisdictional authority. Provisions of the provincial *Forestry Act* would apply in certain respects, while the First Nation may wish to exercise its jurisdiction through a forestry management plan, which might be more onerous than that imposed by the provincial government ─ for example, in terms of selective logging and reforestation ─ reflecting in this regard a higher priority being

placed by the First Nation on conserving the resource for future generations. Clearly, there could be many variations in the structuring of joint management. The common element would be that the participation of First Nations would be the exercise of a mutually agreed and defined Aboriginal right.

Recently in British Columbia the provincial government and First Nations, as part of the preparatory process to treaty making, signed Interim Measures Agreements. An important purpose of these agreements is to provide for forms of joint management of sensitive areas subject to land claims pending treaty negotiations. Although the agreements are made specifically `without prejudice' to Aboriginal rights and treaty negotiations, it is productive to look at the terms of the most recent and developed of these agreements in the context of the model I have proposed. The significance of the Interim Measures Agreement signed on 10 December 1993 between the province of British Columbia and the First Nations of Clayoquot Sound flows not only from the fact that it is the most detailed joint management scheme thus far developed in British Columbia, but also from the fact that it involves a geographical area of both national and international importance. Set out below are the main provisions of this agreement, following which I consider how, in the context of final settlement agreements, these could be expressed as the recognition and exercise of mutually agreed and defined Aboriginal rights.

A. Whereas Her Majesty the Queen is represented by the Government of the Province of British Columbia, (herein referred to as "British Columbia"), and

B. Whereas the Hawiih of Clayoquot Sound are represented by the Tla-o-qui-aht First Nations, the Ahousaht First Nation, the Hesquiaht First Nation, the Toquaht First Nation and the Ucluelet First Nation, (herein referred to as the "First Nations"), and

C. Whereas, pursuant to the August 20, 1993 Protocol Respecting the Government-to-Government Relationship between the First Nations Summit and the Government of British Columbia, it was agreed that *a government-to-government relationship exists between the First Nations and the Government of British Columbia*, and

D. Whereas the Government of British Columbia has accepted the June 1991 Report of the B.C. Claims Task Force, (including the recommendation that "the parties negotiate interim measures before or during treaty negotiations when an interest is being affected which could undermine the process"), and

E. *Whereas the parties have agreed that the Central Tribes of the Nuu-chah-nulth have the responsibility to preserve and protect their ancient territories and waters for generations which will follow*, and

F. Whereas the First Nations wish to apply the concept of a tribal park to certain selected areas within Clayoquot Sound.

THIS AGREEMENT WITNESSES AS FOLLOWS:

1. This is an interim measures agreement within the meaning of the process established by the June 1991 Report of the B.C. Claims Task Force, the Treaty Commission Act, and the Government to Government Protocol of August 20, 1993.

2. *This agreement intends to conserve resources for future generations of the Central Region Nuu-chah-nulth Tribes* of Hesquiaht First Nation, Ahousaht First Nation, Tla-o-qui-aht First Nations, Ucluelet First Nation and Toquaht First Nation.

3. This agreement begins the process *of identifying areas for First Nations land, areas for joint management, and areas for development*. The parties intend that this process will be concluded with the making of a treaty.

4. This agreement is to be interpreted in light of the commitment by British Columbia that the Clayoquot Sound decision of April 13, 1993 is "without prejudice" to aboriginal rights and treaty negotiations.

5. (a) With respect to Clayoquot River Valley and Flores Island the parties agree to establish the "Ahousaht, Tla-o-qui-aht, Province of B.C. Cooperative Forest Management Area" (herein called the "Cooperative Forest"). *The Cooperative Forest shall be jointly managed through the cooperative mechanisms established within this Agreement by the First Nations and the Province....*

6. Hesquiaht Lake, Satchee Creek, and the Hesquiaht Peninsula shall be identified as an economic development base for the Hesquiaht First Nation. *New development areas will take into account the plan "Management for a Living Hesquiaht Harbour" and will incorporate First Nations interests....*

10. *The parties shall establish a joint management process dealing with resource management and land use planning within Clayoquot Sound* pursuant to the principles set out in the Report of the B.C. Claims Task Force of June, 1991, the Government to Government Protocol of August 20, 1993 between the Province and the First Nations Summit. The process shall apply to the whole of Clayoquot Sound and shall operate as follows:

    (a) The following panels will undertake resource management and land use planning activities in Clayoquot Sound as defined by the terms of reference established or envisioned for each panel:
        (i) The Inter-Agency Review Team
        (ii) The Scenic Corridors Committee
        (iii) The UNESCO Biosphere project
        (iv) The Model Forest

(v) The Forestry Inventory Audit

The panels described above will submit their reports, recommendations and decisions to the Board. In addition, the following specialized panels shall have a special consulting relationship with the Board, and the Province shall present their recommendations to the Board prior to public release.

(vi) The Scientific Panel

(vii) C.O.R.E.

(b) *Any resource management or land use planning decision of the above panels or any government agency must be reported to the Central Region Board. Any such decision may be reviewed at any stage by the Board at the instance of any member of the above panels*.

(c) The Central Region Board will meet periodically and its responsibilities will include:...

(ii) *reviewing Land Use Plans, Local Resource Use Plans, Total Resource Plans, and other similar planning processes for resource extraction, alienation of land or water resources, aquaculture, land tenures, wildlife management and mining in Clayoquot Sound.* The parties may add to this list by mutual agreement. The Board will accept, propose modifications to or recommend rejection of these plans within one month. The findings and the decisions of the Board will be directed back to the originating agency. If these are not implemented to the satisfaction of the Board within one month, the Board may refer the matter to Cabinet....

(vii) analyzing the scientific data to assess the feasibility of *developing a joint First Nations/Provincial goal for representation of ecological zones on Vancouver Island*, having in mind the United Nations goal of 12% representation.

(d) The parties shall establish a Central Region Board composed of representation from the five First Nations, and from the Province. The Board shall have a Chair and a Secretariat in addition to the representatives of the First Nations and the Province. The Board will determine its rules of operation based on the principles of efficiency, effectiveness, sound resource management and respect for the interests of current and future generations.

(e) Decisions of the Board shall be by double majority vote. For greater certainty, there must be a majority vote of the First Nations representatives for any decision to pass the Board. *It is intended that the Board will shift to decision-making by consensus upon further agreement between the parties....*

(g) The following objectives will guide the work of the Board:...

3. Reduction of the 70% unemployment levels within aboriginal

communities within Clayoquot Sound to a level comparable to the unemployment rate in non-aboriginal communities.

4. To support attaining the U.N. goal of 12% representation of ecological zones for future generations in Clayoquot Sound. *The Board may wish to explore innovative ways to achieve this goal that respects the First Nations perspective.*

5. Restoration and enhancement of levels of fish and wildlife and damaged stream and forest areas within Clayoquot Sound, and protection for rebuilt stocks.

6. Assess compliance with world class forest standards, such as those being considered by the Scientific Panel for Clayoquot Sound and the draft Forest Practices Code, *incorporating the perspective of First Nations.*

7. Provision of a viable, sustainable forest industry within Clayoquot Sound....

9. Preservation of options for treaty settlement for the First Nations, paying special attention to the need to preserve options for treaty settlement with respect to the Clayoquot River Valley, Flores Island, Hesquiaht Point Creek Watershed, and Meares Island, as well as to the expansion of the land and resource base for the First Nations.

10. Respect for, and protection of, aboriginal uses of resources in Clayoquot Sound....

12. Reconciliation between environmentalists, labour, industry, First Nations, recreational users, governments, and all others with concerns about Clayoquot Sound.

13. *Encouraging respect for aboriginal heritage within Clayoquot Sound*, including ensuring protection of burial sites and physical artifacts of previous generations of First Nations, as well as any other notable historic sites.

14. Conservation of resources in Clayoquot Sound and achievement of certainty for all.

15. To develop an ongoing dialogue within the community. To develop better ways to determine the best uses of the forest and the economic, social and cultural advantages of each use. Such information and debate could assist in making better land use decisions for the area and could be accomplished through background consultant studies and community workshops.

11. *The parties will establish a Central Region Resource Council composed of the hereditary chiefs of the Central Region Nuu-chah-nulth Tribes and Ministers of the Province*. The hereditary chiefs and the Ministers may appoint designates to the Council so long as the designate may exercise the powers of a hereditary chief or a Minister within the operations of the Council. The Council may invite a Minister of the Government of Canada as it deems appropriate.

    (a) The Council shall meet at least twice a year to deal with matters of fundamental importance.

    (b) The Council shall meet to consider solutions when Cabinet does not accept the Board's decision on a matter referred under 10(c)(ii), and one of the parties refers the matter to the Council.

    (c) The Council shall meet January 15, 1996 to resolve outstanding differences, if any, between the Hesquiaht First Nation and the Province over the Total Resource Plan, which is required, and in which the Hesquiaht First Nation shall be involved *on a government to government* basis for the Hesquiaht Point Creek Watershed which will take into account the plan "Management for a Living Hesquiaht Harbour" and will incorporate First Nations interests...

12. This agreement is to be interpreted in light of the commitment by British Columbia that the Clayoquot Sound decision of April 13th, 1993 is "without prejudice" to aboriginal rights and treaty negotiations." (Interim Measures Agreement between Her Majesty the Queen in Right of the Province of British Columbia and the Hawaih of Claoquot Sound, 10 December 1993 [emphasis added].)

Clearly, because this agreement was made specifically without prejudice to Aboriginal rights and treaty negotiations, there are no references to either recognition or extinguishment of Aboriginal rights. But equally clearly, there are many provisions in this agreement that *could* be made referable to the recognition and exercise of such Aboriginal rights. The acknowledgement of a government-to-government relationship in paragraph C of the preamble can be tied explicitly to the Aboriginal right to self-government, and paragraph E is a clear expression of stewardship, which lies at the heart of the central tribes of the Nuu-chah-nulth (and most other First Nations') conception of their Aboriginal rights framed in the context of responsibilities. The participation of First Nations in the Central Region Board can clearly be referenced to their Aboriginal right to self-government in relation to resources, to be exercised in co-operation with provincial government agencies. The fact that it is envisaged that the Board's decision-making process will shift to that of consensus again is referable to the recognition of Aboriginal

diplomatic protocol. The agreement calls for the incorporation of the perspective of First Nations in the draft Forest Practices Code and the achievement of the United Nations goal for representation of ecological zones in ways that respect the First Nations perspective. Tying recognition of the perspective of First Nations to Aboriginal rights to share in the beneficial enjoyment of lands and resources and in decision making regarding those resources does not require much in the way of a leap in a legal draftsperson's imagination.

Paragraph 3 of the agreement, which speaks to the beginning of a process of identifying areas for First Nations land, areas for joint management, and areas for development, incorporates a tripartite classification of land and resources similar to the model I put forward earlier. The agreement makes reference to the concept of a tribal park. Although this is not defined in the agreement, it builds upon some ideas already developed by the Haida Nation in Gwai Haanas/South Moresby Island. In contrast to most national parks, the protection of these areas for future generations is not only based upon wilderness and recreational values but would incorporate areas of particular spiritual, cultural and historical significance to Aboriginal peoples. As such, the roots of title to such areas are distinctively Aboriginal, and a description of their legal character as grounded in Aboriginal title can acknowledge and respect this reality.

As an Interim Measures Agreement, the Clayoquot agreement concentrates on the establishment of joint management processes for resource management and land use planning. In relation to forestry, it establishes what is called the `co-operative forest', and the agreement contains some detailed provisions (not included in the extracts set out earlier) dealing with harvest rates over the next two years. The concept of the co-operative forest, although developed in the agreement only in terms of co-operative mechanisms for joint management, is one that could also be defined legally in a land claims agreement with reference to the Crown's underlying title and Aboriginal title. Recognition of the perspective of First Nations requires acknowledgement of what it is that First Nations bring to the negotiating table ─ their Aboriginal title and Aboriginal right of self-government ─ and that their recognition is as vital to true co-operation and accommodation as the task of establishing co-operative mechanisms such as the Clayoquot Central Region Board.

I should make it quite clear that I am not suggesting that the Clayoquot Sound Interim Measures Agreement is a model for a final settlement. As an interim measure, it assumes (as does the federal government's existing claims policy) that the ultimate responsibility for resource and

environmental decision making lies with the provincial cabinet on the basis that it is the province that has legal jurisdiction in the matters dealt with in the agreement. The authority of the Central Region Board is thus, in the same manner as the northern agreements reviewed earlier, a delegated jurisdiction rather than one flowing from an existing Aboriginal right to self-government. As with the concept of the co-operative forest, a truly co-operative resource and land use management board with broad umbrella responsibilities for managing and conserving resources for future generations must, if it is to incorporate First Nations interests, acknowledge the historical and legal reality of pre-existing Aboriginal regimes, which provided for productive resource management and which successfully sustained many generations before the arrival of Europeans.

In any final agreement a body such as the Central Region Board must draw its jurisdictional authority from both the Aboriginal right to self-government and provincial powers. This would not preclude an agreement under which the province could retain the final authority to determine certain issues it deemed critical to the public interest and, conversely, providing for First Nations to have such final authority in areas critical to their interests. Recent constitutional dialogue has made us all more aware of the concept of asymmetrical federalism; such a concept may well have its place in the shaping of agreements between First Nations and provincial and federal governments, particularly in the context of joint management of lands and resources. However, it is important not to assume that asymmetry must always work to the advantage of provincial and federal governments.

The third category of lands I identified are those parts of traditional Aboriginal territory that will be under the primary, if not exclusive, jurisdiction of federal, provincial and territorial governments and in which the rights of beneficial enjoyment will not be vested in First Nations. To take perhaps the clearest example, consider an area such as Vancouver in which, as a result of extensive alienations, First Nations have been effectively, if not legally, dispossessed from all but those areas established as reserves. The consistent position of the federal government has been that in relation to such areas, any Aboriginal title to the land has been "superseded by law", which seems to mean that it has been extinguished.

It is probably fair to say that for most non-Aboriginal people it seems self-evident that whatever else may be the subject of negotiations, the inexorable historical changes over the last century in a city like Vancouver are inconsistent with any continuing Aboriginal title. However,

if we take seriously the First Nations' conception of their Aboriginal title, this conclusion is far from self-evident. It is here that we can see the difference between acknowledging the impact of the historical process of colonialism and capitulating to it. I have made the point more than once that at the core of First Nations' Aboriginal title is a special relationship to their territory that draws upon deep historical and spiritual roots. Though this relationship can and has in many cases been impaired, by its nature it is not something that can be given up or extinguished. It relates to who a people are and how they perceive their place in the world and the ground out of which they have come and to which they will always be related. There is every reason why this relationship should be acknowledged and respected in modern land claims agreements.

One way to do this is to include a narrative of First Nations' historical and spiritual relationship to their territory. It is possible to build upon this narrative in the form of normative arrangements in a number of other ways. One example would be to acknowledge as flowing from Aboriginal title the right of a First Nation to host, as a matter of diplomatic protocol, significant events of a civic, national or international nature that take place in their territory and to participate as a matter of right in delegations involving the future of the territory, such as the planning of a world fair, an olympiad or commonwealth games. This role of diplomatic host is an appropriate measure of respect for and recognition of First Nations' special relationship to their territory and their responsibilities for ensuring that their children will always have an honourable place at council fires to plan its future. As such, it is a contemporary reflection of their Aboriginal title and would be defined as such in the agreement.

Imagining the forums in which this expression of Aboriginal title could be honoured presents little difficulty. Consider, for example, the 1993 Vancouver summit between presidents Yeltsin and Clinton. The Canadian government offered Vancouver as a neutral site for this meeting, at which one of the principal agenda items was the role the West can play in supporting and encouraging the economic restructuring of the former Soviet Union. On the occasion of this meeting, Canada acted as diplomatic host. Under the arrangements I have suggested, that role would be shared with the First Nations in whose traditional territories President Yeltsin and President Clinton would be honoured guests. The role of diplomatic host, exercised as an attribute of a retained Aboriginal title, should not be viewed only as one of symbolic significance. Prime Minister Mulroney used his position as diplomatic host to reaffirm Canada's role on the international stage and Canada's commitment to assisting Mr. Yeltsin in his efforts at

economic restructuring. If First Nations had been accorded a diplomatic role in the summit meeting, it would have been an appropriate opportunity, in light of the fact that 1993 was the International Year of Indigenous People, to have related the Vancouver summit agenda to the worldwide struggles of Indigenous peoples and, in particular, to address presidents Clinton and Yeltsin, together with Prime Minister Mulroney, on the need for them to give leadership in exhorting all governments, including their own, to give priority to the political and economic restructuring of their relationships with Indigenous peoples.

A second example drawn from the international stage illustrates how acknowledging the diplomatic rights and responsibilities of First Nations has implications beyond the symbolic. The Institute for Studies in Criminal Justice Policy, which is based at Simon Fraser University, recently began exploring the possibility of an international conference, to be held in Vancouver, dealing with Indigenous peoples' conceptions and experiences of justice. Several individuals were consulted, including the writer, as to how such a conference should be structured. Based on the model advanced in this paper, I suggested that the First Nations, whose traditional territory lies within Vancouver, should be invited to participate in recognition of their rights as diplomatic hosts. At a second meeting of the advisory group, representatives of the Musqueam and Squamish Nations played a very important role, not only accepting responsibility as hosts for the conference, but also providing guidance and advice on how the conference should be organized and what its themes should be. As a result of the second meeting, it was agreed that the First Nations in the Vancouver area will play the major role in extending invitations to Aboriginal and non-Aboriginal governments and organizations to attend this international conference and offering hospitality to those who come to Vancouver. Beyond this diplomatic role, however, it is envisaged that the experiences of these First Nations and their visions of justice will also inform the spirit and substance of this conference.

There are other ways in which the relationship of Aboriginal peoples to their territory can be respected and acknowledged as part of retained Aboriginal title. In 1991, part of the U.B.C. Endowment Lands, which lie within the traditional territory of the Musqueam Nation, were designated by the provincial government, without Musqueam consent, as the Pacific Spirit Provincial Park. Whatever else this represents legally, it is a diplomatic affront to the Musqueam Nation. A land claims agreement could define the retained Aboriginal title of the Musqueam so as to include the right of Musqueam elders to name, in their own language, a place of refuge and

contemplation that has long been, and still is, the home of bald eagles and the spirits of their ancestors. This measure of respect and recognition should flow not from fluctuating fashions of political correctness or governmental largesse, but from legal entitlement based upon Aboriginal title.

The importance of recognizing Aboriginal place names is recognized in the Gwich'in and Yukon First Nations Agreements. Thus, in the Yukon agreement one of the objectives of Chapter 13, dealing with heritage, is to

> Recognize the interest of Yukon Indian People in the interpretation of Aboriginal Place Names and Heritage Resources directly related to the culture of Yukon Indian People. (Section 13.1.1.12.)

Under the Yukon Agreement, Yukon Indians have equal representation with Yukon government appointees on the Yukon Geographical Place Names Board, and when a Yukon First Nation names or re-names places or geographical features on settlement land, such place names are deemed to have been approved by this Board (section 13.11.3). The Board is also required to consult with each Yukon First Nation when naming or re-naming places or features located within a traditional territory of a Yukon First Nation (section 13.7.2). These are important provisions, but in the Yukon Agreement they are not linked directly to, nor are they stated to be a recognition of, retained Aboriginal title. Under the model I am proposing, this recognition would be explicit.

The examples I have given are no more than that. It would be up to each First Nation to identify the different sites and arenas that can provide the acknowledgement of its continuing responsibilities to its territory that can be demonstrated in a contemporary reflection of its Aboriginal title.

One further point should be made in relation to this third category of Aboriginal territory. Clearly, in contrast to the first category, the exercise of Aboriginal title is much more circumscribed. Indeed, that circumscription is principally the product of historical changes. However, it does not follow legally or logically that Aboriginal title, as it is defined in the first category of land, must be seen as having been extinguished in the third category. The purpose of a modern land claims agreement is to affect the bridge of accommodation I have talked about. For each category of land (and my classification is only one model), Aboriginal title would reflect differing clusters of rights and responsibilities, reflecting the different accommodations

that will be worked out in different parts of the territory. It would be a mistake, and an unnecessary one, to measure the bridge of accommodation by the yardstick of extinguishment. Applying my suggested approach (and putting to one side the question of third-party interests ─ to which I will turn next), it is possible to conceive of a modern land claims agreement in which there is no extinguishment of Aboriginal title. Instead, there is an affirmation of that title, which is given specific but different content in relation to the different categories of land established under the agreement.

Achieving Certainty and Protecting Third-Party Interests

The comprehensive claims policy has, from its beginnings in 1973, sought to protect existing third-party interests. The Task Force to Review Comprehensive Claims Policy agreed in 1985 that "the existing rights of third parties on traditional Aboriginal lands should be respected. Third party rights may be affected only in certain cases. In all cases, such rights should be dealt with equitably."[xxii] In its revised policy statement in 1986, the federal government endorsed this approach in the following terms:

> In attempting to define the rights of Aboriginal people, the Government of Canada does not intend to prejudice the existing rights of others. The general public interest and third party interests will be respected in a negotiation of claims settlements and, if affected, will be dealt with equitably. (*Comprehensive Land Claims Policy* [Ottawa: Department of Indian Affairs, 1987], pp. 21-22.)

All the modern land claims agreements concluded thus far make the rights that are recognized in settlement land (either as rights granted by the agreement or as retained Aboriginal title) subject to "existing rights, titles or interests in the land existing at the date of settlement legislation".[xxiii] In non-settlement land, third-party interests are protected by virtue of the blanket surrender of all Aboriginal rights and titles. In the model outlined in the last section, the premise was that Aboriginal title does not have to be surrendered in order to meet the objectives of settlement agreements. The question that must now be answered is whether, notwithstanding this general premise, a surrender is necessary to protect existing third-party interests.

Before answering this question, it is necessary to set out the legal assumptions that underlie the position of the federal government that, to protect existing third-party interests and ensure that future grants of interests in land are secure, a surrender of Aboriginal title is required. This assumption engages several of the legal principles set out earlier as making up the common

law conception of Aboriginal title. These are that the Crown has the underlying title in all lands under its sovereignty; that Aboriginal title constitutes a burden on the title of the Crown; and that Aboriginal title cannot be alienated to third parties but can be surrendered only to the Crown. By requiring First Nations to surrender their Aboriginal title to the Crown, any cloud on previous grants made by the Crown without a treaty of cession is removed, and any future grants can be made free from any Aboriginal entitlement. In either event, third-party interests are not subject to challenge on the basis of Aboriginal title.

It is important to understand the historical and conceptual context in which these principles have developed. It has long been a fundamental principle of English common law, based on the feudal origins and nature of English land tenure, that all title to land derives from the Crown. It was pursuant to this principle that the Crown issued charters and granted patents for lands in the British North American colonies. In the seminal decisions of the U.S. Supreme Court in the early nineteenth century, it was recognized that while these Crown grants conveyed a title to the grantees, they were not intended to, nor did they have the effect of nullifying the pre-existing Aboriginal rights of First Nations. As Chief Justice Marshall stated in *Worcester* v. *Georgia*,

> They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the Natives were willing to sell. The Crown could not be understood to grant what the Crown did not effect to claim, nor was it so understood.
>
> [T]hese grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of the Natives were concerned. (31 U.S. (6 Ed) 515 (1832); 8 L. Ed. 483 at 495-6.)

In the early days of colonial settlement in North America it was common practice for British settlers to perfect their title to lands held by Crown charter by deeds of purchase from First Nations. An example in the seventeenth century illustrates the intersection of feudal principles and the colonial and Aboriginal realities of North America. In 1636, William Alexander, Earl of Stirling and Secretary for the Kingdom of Scotland, received a patent for Long Island, in what is now the state of New York. Three years later, in 1639, Lyon Gardiner, an English settler, negotiated the first grant of land from the Indians of eastern Long Island. The rights granted by the Indians to Lyon Gardiner were confirmed in a parallel grant made on behalf of the Earl of Stirling in 1640. In granting Gardiner the right to enjoy the possession of

Manchonack Island and to institute laws of civil government, the grant recites the prior Indian title and purchase by Gardiner in these terms:

> ...which island hath been purchased, before my coming, from the ancient inhabitants, the Indians; nevertheless, the said Lyon Gardiner had his possession first from the Indians before my coming, yet is he now contented to hold the tenor and title of the possession of the aforesaid island from the Earl of Stirling or his successors whomsoever, who hath a grant from the King of England under the Great Seal of the aforesaid kingdom. (Grant to Lyon Gardiner, March 10, 1640, E.A.I.D., vol. II, p. 59.)

The effect of a grant of land under a royal charter on the existing rights of the Indians is further reflected in the language of a patent granted to a group of Englishmen to settle land on Long Island. This patent, after setting out the grant, states that

> ...the aforesaid inhabitants shall make purchase in their own names and at their own leisure from any Indians that inhabit or have lawful right to any of the aforesaid land and part thereof and thereby assume it to themselves and their heirs as their inheritance forever. (E.A.I.D., vol. VII, p. 60.)

In this way, by virtue of a grant by the Crown of its underlying title and the purchase of the Aboriginal title, the grantee acquired a complete interest in the land. Thereafter, in accordance with the feudal origins of common law land tenure, that interest was deemed to be held from the Crown.

It is a well documented fact of colonial history that the practice of private acquisition of land by colonists from First Nations became characterized increasingly by sharp trading and became the source of great Indian unrest and, in many cases, hostilities. It was because of this that most of the colonies introduced laws prohibiting such purchases and declaring them void. The *Royal Proclamation of 1763* reaffirmed, as imperial law and policy, the Crown's monopoly on the acquisition of Indian rights to land through a public treaty process. Paragraph four of the Proclamation states:

> And whereas great frauds and abuses have been committed in purchasing lands of the Indians to the great prejudice of our interest, and to the great dissatisfaction of the said Indians; in order, therefore, to prevent such irregularities for the future, and to the end that the Indians may be convinced of our justice, and determined resolution to remove all reasonable cause of discontent, we do, with the advice of our privy council strictly enjoy and require, that no private person do presume to make any purchase from the said Indians of any lands reserved to the said Indians within those parts of our colonies where, we have thought proper to allow settlement; but that, if at any time any of the said Indians should be inclined to dispose of the said lands, the same shall be purchased only for us, in our name, at some public meeting or assembly of the said Indians, to be held for the

> purpose by the governor or commander on chief of our colony respectively within which they shall lie. (R.S.C. 1985, Appendix II, No. 1.)

It is clear from the historical circumstances that gave rise to the restriction on alienation of Indian land to third parties that this did not flow from any inherent limitation on the nature of Aboriginal title but was a measure to protect Indian interests. The historical continuity of this policy and its underlying rationale were reviewed by Mr. Justice Dickson in *Guerin*:

> ...This policy with respect to the sale or transfer of the Indians' interest in land has been continuously maintained by the British Crown, by the government of the colonies when they became responsible for the administration of Indian affairs and, after 1867, by the Federal Government of Canada. Successive federal statutes, predecessors to the present *Indian Act*, have all provided for the general inalienability of Indian reserve land except upon surrender to the Crown, the relevant provision in the present Act being Sections 37-41.
>
> The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited. This is made clear in the Royal Proclamation itself, which prefaces the provision making the Crown an intermediary with the declaration that "great Frauds and Abuses have been committed in purchasing Lands of the Indians to the Great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians...". Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s.18(1) of the Act. (*Guerin* v. *The Queen* [1984] 2 S.C.R. 335 at 383-4.)

In *Guerin* Mr. Justice Dickson stated that the nature of First Nations' interests in their lands is "best characterized by its general inalienability [except to the Crown] coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered". The relationship between these two characteristics and the protective policy reflected in the *Royal Proclamation* was made clear by His Lordship:

> These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealing with third parties. (*Guerin* v. *The Queen* [1984] 2 S.C.R. 335 at 383-4.)

In light of the historical contingency of the prohibition on private purchases of Indian land, it is appropriate to question whether in the context of modern land claims agreements it is necessary and justifiable to maintain the principle that the validity of grants to third parties of land that may be burdened by Aboriginal title can be secured only through the instrumentality of

a surrender to the Crown. The private transactions of the eighteenth century to which the policy was directed took place in dramatically different circumstances than those that surround modern land claims agreements. The Indian signatories to deeds often were not authorized to sell the land, the purchasers were often unscrupulous land speculators who misrepresented the extent of the area to be sold, and the deeds were drafted in technical language that often did not accord with the Indians' understanding. While requiring that all purchases be made by way of surrender to the Crown successfully attacked the problem of fraudulent and dishonourable private purchases, the experience of treaty making in the nineteenth century on the frontiers of colonial development in Canada illustrates that, even under the imprimatur of treaty commissioners appointed by the Crown, fundamental misunderstandings about the meaning of the terms of treaties and land cessions took place. Furthermore, during the nineteenth century the superiorist assumptions of colonialism took root and reinforced the need to protect First Nations from their own supposed incompetence and ignorance.

Compare the context in which modern land claims agreements take place. First Nations have learned from bitter experience the lessons of history and the problems that arise when the legal language of an agreement does not reflect their true intentions. Their land claims negotiators can draw upon a broad array of advice from their elders to their lawyers. While the circumstances surrounding particular land claims settlements may make the concept of a level playing field unreal (for example, the impending or actual construction of a large-scale development project as in James Bay), the process of decolonization among First Nations has gone far enough that the need for protective rules ─ which were developed in quite different circumstances from today and reflect colonial assumptions of dependency ─ must not be seen as an impediment to imaginative new arrangements in securing the objectives of modern land claims agreements.

In making the argument that, in the context of modern land claims settlements, there is no longer a need to maintain a restriction on alienation of Aboriginal land except to the Crown, I am not advocating that there can be no restrictions on alienability. Given that one of the central goals of settlements is to ensure that future generations of Aboriginal peoples will have a secure place in the lands of their ancestors, many First Nations may insist that the possibility of alienation of at least parts of the territory be forever foreclosed. Even where alienation of part of the territory is envisaged, First Nations will likely insist on provisions to ensure that these take place only

after the fullest consultation to ensure that the informed consent of the community has been obtained. There are too many historical examples of alienations of Indian reserve lands where the provisions of the *Indian Act*, although intended to ensure community consent, have proved woefully inadequate to that task. There is little doubt that Aboriginal peoples themselves can design provisions to ensure that history does not repeat itself.

Nor should it be thought that my argument requires abandoning the concept of the Crown's fiduciary obligation. The contemporary recognition of this obligation in *Guerin* is an acknowledgement by the courts of the need for legally enforceable remedies to deal with past injustices that have occurred because of the failure of the Crown properly to protect Indian interests in its dealings with Indian lands under a regime in which the Crown had a monopoly on the acquisition of Indian land and was the source of legal advice to Indian bands. Furthermore, the concept of the fiduciary obligation is itself an evolving one and has been given broader significance than its historical source in the restriction on alienation, as evidenced by the Supreme Court's judgement in *Sparrow*. So long as the process of decolonization is incomplete in Canada, there will be ample scope for the fiduciary obligation of the Crown in many areas outside the factual matrix reflected in *Guerin*, in which an Indian band surrendered land to the Crown for the purpose of its alienation to third parties.

This brings me full circle to the question of how third-party interests can be protected within a model that affirms Aboriginal title and does not require surrender of that title to the Crown. There are several strands to such an alternative. The first would be to acknowledge specifically that the interests of third parties are a composite of a grant by the Crown pursuant to its underlying title and the right to beneficial enjoyment derived from Aboriginal title. The agreement could then contain a provision providing explicitly that the First Nation signatories affirm the specified existing rights and interests granted to third parties. This provision could be reinforced by others such as those found in the Yukon Final Agreements, to the effect that a First Nation will not exercise or assert its Aboriginal title in conflict or inconsistent with specified third-party interests.

Such an approach is not only consistent with the affirmation of Aboriginal rights but also provides contemporary recognition of the legal reality that title to land in Canada, as opposed to title to land in England, is derived not simply from the Crown but from a title that pre-dates European presence by millennia. Moreover, it impresses the stamp of First Nations and the

legitimacy of their rights on the title of each individual property owner affected by the agreement.

The issue of certainty, of course, has both retrospective and prospective aspects. Non-Aboriginal governments and third parties that have been granted interests in land and resources require that interests they have previously been granted, and upon which their lives and investments have been organized, ought not to have those vested interests disturbed unless there are compelling reasons ─ having regard to the particular significance of specific lands to Aboriginal peoples ─ and where adequate compensation, in money or alternative lands or grants of resource rights, can be made. There is also, however, the important question of prospective certainty ─ that future decisions, whether made by non-Aboriginal governments, Aboriginal governments or third parties, can be made in a climate not overshadowed by unresolved claims or undefined or poorly defined rights. Indeed, the federal government, in its most recent articulation of its claims policy, in characterizing the extinguishment of Aboriginal rights as an "exchange" of old rights for new, justifies this primarily on the grounds of achieving greater certainty. In a passage cited earlier but that bears repeating, the federal government states that

> The primary purpose of comprehensive claim settlements is to conclude agreements with Aboriginal groups that will resolve the debates and legal ambiguities associated with the common law concept of Aboriginal rights and title. Uncertainty with respect to the legal status of lands and resources, which has been created by a lack of political agreement with Aboriginal groups, is a barrier to economic development for all Canadians and has hindered the full participation of Aboriginal peoples in land and resource management. (*Federal Policy for the Settlement of Native Claims*, March 1993, p. 9.)

It is my argument that the creation of a legal climate of certainty does not require the extinguishment and surrender of Aboriginal rights. To the extent that they have been hitherto undefined, one of the primary purposes of land claims agreements is to provide that definitional content, and that content, as I have suggested, can have a dynamic range within different categories of land. It is through this process of definition that the rights and responsibilities of Aboriginal peoples in relation to particular lands are made more certain and, simultaneously, through the definition of structures and mechanisms for decision making in relation to those lands, that the rights and responsibilities of non-Aboriginal governments and third parties are also rendered certain.

In terms of my tentative three-part model (and emphasizing again that it is only one such

model), on lands designated as `First Nations lands', where Aboriginal peoples would have the fullest range of rights and responsibilities, third parties would look to Aboriginal governments and Aboriginal land-owning entities for the grant of any rights to those lands and resources. The form of those grants or licences to third parties would depend very much on the form in which the First Nation chooses to have its Aboriginal title defined. If it is in accordance with a traditional Aboriginal form of land tenure, the grant to the third party could reflect this. The fact that this would be a novel form of grant, in the sense that it will be different from the usual Crown tenure, need not be a barrier to investment security, because a First Nation could reasonably be expected to provide a detailed description of the rights and responsibilities involved in the grant and tenure and the mechanisms for legal redress if the First Nation does not live up to its obligations under the grant. Alternatively, as discussed earlier, even if Aboriginal title is defined in terms of a traditional Aboriginal form of land tenure, for purposes of making grants of interests to non-Aboriginal third parties, provisions in the agreements could deem these to be the grant of an interest described in conventional Canadian forms of Crown tenure. Such would also be the case where a First Nation chose to have its Aboriginal title defined in terms of equivalency to fee simple (see earlier discussion under *Building Bridges of Accommodation*).

For the `shared lands' that fall within my category of joint entitlement and shared jurisdiction (which, borrowing from the Clayoquot Sound Agreement, could also be referred to as `co-operative lands'), the question of future grants and alienations would be determined by the mechanisms for realizing the co-operation and accommodation of co-existing titles and governmental structures. This does not necessarily involve the creation of parallel agencies or bureaucracies. It would not only be possible, but in times of budgetary constraints desirable, to provide for integrated authorities and agencies such as those developed in the northern agreements and along the lines of the Central Region Board in the Clayoquot Sound agreement. In so far as there is a broad spectrum of the joint management options, it is not possible to spell out how any specific arrangement would work in terms of the process for making grants of land and resource rights, but perhaps some examples can point the direction for shaping a regime of recognition of Aboriginal title and development and investment security.

Taking the forestry resource as an example, a grant of any new forest tenures in the shared or co-operative region would require the approval of both Aboriginal and non-Aboriginal governments. The agreement could, however, provide that those approvals would be issued

through a single agency in which both Aboriginal and non-Aboriginal representatives participate. Moreover, in the interests of integrating and rationalizing forestry management and providing for a form of tenure well known and understood by the banking and investment community, the agreement could specify that the grant should be in the form specified in the provincial forestry act. The fact that the grant is derived in part from Aboriginal title could be reflected in either a positive or a negative form. Its positive reflection would be a recital in the granting document that the grantee's interest is made pursuant to both Crown and Aboriginal title; its negative reflection would be in a recital that for the duration of the grant, Aboriginal title in relation to the land or resource will be suspended and will not be exercised or asserted in any manner inconsistent with the interest granted, along the lines specified in the Yukon Final Agreements.

Turning now to the third category of land ─ those parts of traditional Aboriginal territory that will be under the primary, if not exclusive, jurisdiction of non-Aboriginal governments, the agreement would provide that the First Nation consented to the provincial, territorial or federal government making new grants in accordance with the regular land tenure system and that (except in specified cases) there would be no requirement for obtaining individualized Aboriginal consent to any particular grant. An example of a specified exception might be in the case of land currently designated as a provincial park adjacent to First Nations land in the first category and where the provincial government was contemplating alienations or grants that could negatively affect the use of the First Nations land. My point is that the general regime on this third category of lands would be one in which the provincial, territorial or federal government would have a clearly identified jurisdiction to make grants, and the exceptional circumstances in which prior consent of an Aboriginal government was required would be spelled out with some precision.

The historical reality of pre-existing Aboriginal title in this third category of land would be acknowledged, in the agreement and in the documents of the provincial, territorial or federal grant, as a composite of Crown and Aboriginal title. The point here, as in the case of the validation of third-party interests granted before the signing of the agreement, is to affirm the historical and contemporary contribution of Aboriginal peoples to the collective and individual land and resource entitlements of non-Aboriginal governments and citizens.

The third feature of these lands, that Aboriginal peoples would not be exercising their rights of beneficial enjoyment, would be reflected in the agreement by specific provisions that, in relation to these lands, whether ungranted or granted to third parties, the First Nation will not

exercise or assert its Aboriginal title inconsistent with the Crown's or third parties' interest.

The approach I have outlined attempts to fulfil the objectives of providing certainty for third-party interests within a matrix that acknowledges the co-existing sources of land title ─ Crown and Aboriginal ─ and that articulates the manner in which the security of non-Aboriginal interests is best established through a bridge of accommodation, a bridge on which the recognition of Aboriginal title and Aboriginal consent are accorded an honourable place in agreements designed to redress historical injustices and pave the way for a future based on mutual respect and mutual benefit.

Part 3 ─ Comparative and International Law Perspectives

The goal of reaching just and honourable settlements with Aboriginal peoples is one that has been sought by other countries with experiences of colonialism comparable to Canada's. In this section I review this comparative experience for the light it may shed on our own exploration of alternatives to extinguishment. I then refocus the search for alternatives in the direction of international law and consider whether developments in this area, particularly in the work being done by the Working Group on Indigenous Populations, suggest new approaches leading away from the well-worn pathways of extinguishment.

A Comparative Perspective on the Resolution of Land Claims

The United States Experience

Over the last twenty years increasing attention has been given by legal scholars, policy analysts and First Nations themselves to the American experience, particularly in relation to the recognition of inherent tribal sovereignty and the institutional manifestation of Indian self-government in the form, for example, of tribal court systems. Increasing consideration has also been given by Canadian courts to the seminal decisions of the U.S. Supreme Court in the early part of the nineteenth century in which that court, under the leadership of Chief Justice John Marshall, established the common law framework for Aboriginal rights.

American Indian policy since the days of John Marshall has gone through dramatic shifts in direction, ranging from assimilation of the tribes with the concomitant attempt to break down tribal structures and dismember collective tribal property (reflected in the *Dawes Allotment Act* of 1887), to the Indian `New Deal' reflected in the *Indian Reorganization Act* of 1934, in which

tribal governments were recognized and encouraged with a view to enhancing tribal self-sufficiency and protecting tribal lands. Since 1934 there have continued to be policy shifts between the opposite poles of terminating tribal status and encouraging tribal self-determination.

Inevitably the modern experience with the settlement of Aboriginal claims has been a reflection of these underlying policy shifts. As an example, the *Indian Claims Commission Act* of 1946, which represented the first comprehensive attempt on the part of the United States to resolve outstanding land claims, had an overtly assimilationist purpose. A select committee of the House of Representatives reported in 1945 that unsettled tribal claims serve "to hold the Indian to his life on the reservation through fear that separation from the tribe might deprive him of his share of a settlement which he believes the government may some day make". This reasoning was reflected in the comments of Secretary of the Interior Krug in urging presidential support of the Claims Commission bill. He explained:

> The efforts of the government to make of the Indian a self-supporting and fully assimilated segment of our civilization can never hope for complete success so long as a considerable number of Indian tribes follow the very human and natural inclination to sit back and wait for the day of payment of the claims which will bring them riches. Adjudication of these claims by the Commission...would once and for all cause the Indians to realize that their further progress will depend upon their own efforts...". (Russel Barsh, "Indian Land Claims Policy in the United States", (1982) 58 *North Dakota Law Review* 7, pp. 11-13.)

Under the *Indians Claims Commission Act* the Commission had jurisdiction to hear claims based upon Aboriginal title but, consistent with the philosophy of the Act, the Commission had no power to restore land to claimant tribes but could only award compensation. Not surprisingly, the Claims Commission Act model has been rejected in Canada as an appropriate model for the resolution of comprehensive claims.

Even though in the 1970s American Indian policy began to shift in the direction of tribal self-determination, the major Aboriginal land claims settlement of that decade, the *Alaska Native Claims Settlement Act* of 1971, was built on a framework of economic and cultural assimilation and the extinguishment of Aboriginal title. Thomas Berger, who in 1983 led a commission to review the first decade of experience under the *Alaska Native Claims Settlement Act* (ANCSA), described the purposes of the settlement in this way:

> ANCSA was hailed as a new departure for the resolution of Aboriginal claims. By its terms, Alaska Natives would have land, capital, corporations and opportunities to enter the business world. By its terms, Alaska Natives would receive title to forty-four million

> acres of land and $962.5 million in compensation. By its terms, Alaska Natives were obliged to set up corporations to serve as the vehicles for the ownership and management of this land and the money, which became corporate assets...
>
> Congress wanted to bring the Alaska Natives into the mainstream of American life... Congress also rejected the possibility that tribal governments might be used to implement the settlement. Douglas Jones, Assistant to Senator Mike Grevel of Alaska when ANCSA was passed...testified that ANCSA was a form of `social engineering'. (Thomas Berger, *Village Journey, The Report of the Alaska Native Review Commission* [New York: Hill and Wang, 1985], p. 20.)

The link between economic assimilation into the mainstream of American life and the extinguishment of Aboriginal title is made clear in the Declaration of Policy in the *Settlement Act*. Section 2 provides as follows:

> 2. Congress finds and declares that:
>
> (a) there is an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on Aboriginal land claims;
> (b) the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges or obligations... (*Alaska Native Claims Settlement Act*, 1972, Public Law 92-203.)
>
> Section 4 of the Act provides that:
>
> (a) All prior conveyances of public land and water areas in Alaska, or any interest therein...shall be regarded as an extinguishment of the Aboriginal title thereto, if any;
> (b) All Aboriginal titles, if any, and claims of Aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any Aboriginal hunting or fishing rights that may exist, are hereby extinguished.

Twenty years' experience with the Alaska Settlement has reaffirmed in the context of the late twentieth century the lessons of the nineteenth ─ that assimilation, whether pursued in the name of social engineering, economic transformation or religious conversion, is a policy that Aboriginal peoples have resisted and will continue to resist. In Alaska the Aboriginal peoples are seeking to retribalize their lands by transferring them from corporations to tribal governments in a form of land holding that reflects their own cultural imperatives and ensures that their ancestral lands will remain in their possession under their own governance. Furthermore, in order to protect and enhance the subsistence economy that remains the core of many Aboriginal

communities in Alaska, they have called for the restoration of their Aboriginal rights to hunt and fish that were extinguished in the settlement legislation of 1971.[xxiv]

In retrospect, the *Alaska Native Claims Settlement Act* provides contemporary reinforcement for Aboriginal peoples in Canada that a model of settlement based upon extinguishment of Aboriginal rights and the restructuring of tribal political and economic life in accordance with non-Aboriginal models is not the path they wish to pursue.

The Australian Experience

A review of the Australian experience with Aboriginal land rights settlements reveals an ironic inversion of expectations when compared to the U.S. experience. As we have seen, even though the United States has a long and well established legal tradition of recognizing Aboriginal title and inherent self-government, this has not translated well in terms of a contemporary affirmation of Aboriginal rights in the most important recent settlements. By contrast, we should have very little expectation that the Australian experience would reveal anything of significance in the developing of new models of settlement based upon the affirmation of Aboriginal rights, in light of the fact that until 1992 the Australian courts had ruled that the common law doctrine of Aboriginal title did not apply to Australia. The legal reasoning behind this position was that Australia was established as a "settled" colony, and because this presumed ─ as a matter of law, not anthropological fact ─ that the territory was "without settled inhabitants or settled law", the common law of Aboriginal title had no place.

In 1992 the High Court of Australia in *Mabo* v. *State of Queensland* acknowledged the role that the *terra nullius* doctrine had played in the dispossession and oppression of the Aborigines of Australia and stated that "the acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation". The Court went on to reject the continued application of the settled colony/*terra nullius* doctrine and held that the common law doctrine of Aboriginal title did apply to Australia, and the underlying title of the Crown and the Colony of New South Wales was "reduced or qualified by the burden of the common law native title of the Aboriginal tribes and clans to the particular areas of land on which they lived or which they used for traditional purposes".[xxv]

In Australia, therefore, the acknowledgement that Aborigines have common law title to their traditional territories has come very late in the history of the country. However, despite the

lack of any legal tradition recognizing Aboriginal title, Australian federal and state governments in the past twenty years (in the pre-*Mabo* period) have passed legislation acknowledging the legitimacy of Aboriginal land claims and providing processes for recognizing Aboriginal entitlement. Since *Mabo*, there have been other major policy developments, including proposed federal legislation bearing directly on the issues of recognition and extinguishment of Aboriginal title. I will turn first to developments in the pre-*Mabo* period, then consider those that have taken shape since the decision of the High Court of Australia.

The first and, from a Canadian perspective, the most important of the Australian legislative settlements in the pre-*Mabo* era is the *Aborigines Land Rights Act* of 1976, which was passed by the federal parliament in relation to Australia's Northern Territory. This legislation, in addition to vesting existing Aboriginal reserves in Aboriginal land trusts, established a land claims process under which an Aboriginal Land Commissioner is empowered to hear traditional land claims and recommend the granting of title with respect to unalienated Crown land. What is unique about the Australian Northern Territory legislation is that, by contrast with the U.S. American and Canadian settlements, an explicit attempt has been made to respect and reflect traditional Aboriginal relationships to the land. The *Aborigines Land Rights Act* permits "a claim by or on behalf of the traditional Aboriginal owners of the land arising out of their traditional ownership". The expression "traditional Aboriginal owners" is defined to mean a local descent group of Aboriginals who

(a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
(b) are entitled by Aboriginal tradition to forage as of right over that land. (*Aboriginal Land Rights (Northern Territory) Act*, 1976. No. 101 (Cth) s.3(1).)

Mr. Justice Toohy, who from 1977 to 1982 was the Aboriginal Land Commissioner in the Northern Territory, in an article describing the legislation and the work of the Land Commissioner, has drawn upon the following statements as reflecting what the legislation seeks to capture in its recognition of traditional Aboriginal claims:

It was explained by the late Professor W.E.H. Stanner in this way:

> No English words are good enough to give a sense of the links between an Aboriginal group and its homeland. Our word `home', warm and suggestive though it be, does not match the Aboriginal word that may mean `camp', `hearth', `country', `everlasting home', `totem place', `life source', `spirit centre' and much

> else all in one. Our word `land' is too spare and meagre. We can now scarcely use it except with economic overtones unless we happen to be poets. The Aboriginal would speak of `earth' and use the word in a richly symbolic way to mean his `shoulder' or his `side'. I have seen an Aboriginal embrace the earth he walked on. To put our words `home' and `land' together into `homeland' is a little better, but not much. A different tradition leaves us tongueless and earless towards this other world of meaning and significance.

During the hearing of the Finniss River land claim, one of the witnesses spoke in these terms:

> We belong to this special place. We do not think to possess the earth, the trees, rocks and waters of our traditional home, because it is the other part of us. It brought us forth and has taken many of us back... There are the sacred places of the dreaming. There are the special places for food gathering, water to drink and where we once hunted for game to feed us. This land is our heritage; our home; it is our history. This land is our very life. Separate us from it and we are nothing. (J. Toohy, "Aboriginal Land", (1985) 15 *Federal Land Review*, 159 at 161.)

These words not only resonate with meaning for Australian Aborigines in the Northern Territory but they strike deep chords of understanding in the minds of Aboriginal peoples in Canada for whom their relationship with their own territory speaks to their heritage, their home and their history. What is significant about the *Aborigines Land Rights Act* of the Northern Territory is that this relationship, although expressed somewhat less elegantly, is given definition in the law.

Other land rights legislation passed by individual state governments has also built upon Aborigines' relationship to their land. Thus *the Pitjantjatjara Land Rights Act* of South Australia requires of traditional owners, in relation to the land described in the Act, that they have "in accordance with Aboriginal tradition, social, economic and spiritual affiliations with, and responsibilities for, the lands or any part of them".[xxvi] Even Queensland, which has long had the unenviable reputation of having the most repressive policy toward Aborigines, in its 1991 *Torres Straight Island Land Act* enabled claims to be made to the Land Tribunal on the ground of "customary affiliation", among other grounds. Section 409(1) of the Act provides that

> A claim by a Torres Straight Islander or a group of Torres Straight Islanders for an area of claimable land on the ground of customary affiliation is established if the Land Tribunal is satisfied that the Torres Straight Islander has a connection, or that the members of the group have a common connection, with the land based on spiritual or other associations with, rights in relation to, and responsibilities for, the area of land under Island custom." (*Torres Straight Island Land Act*, 1991.)

Although the Australian legislation recognizes the existence of Aboriginal customary law

and land tenure in the structuring of the claims process, the legislation provides that where a successful claim is made based upon traditional ownership, that land is henceforth to be held as Aboriginal land pursuant to a grant of fee simple. Thus the *Aboriginal Land Rights Act* provides for the governor general to execute a deed of grant "of an estate in fee simple" in land that has been recommended for a grant by the minister following a report by the Aboriginal Land Commissioner. The relevant legislation of South Australia and New South Wales also provides for the grant of an estate in fee simple. The Queensland legislation enables the governor in council either to grant claimable land in fee simple or to grant a lease in perpetuity or for a term of years. Therefore, none of the Australian legislative schemes affirms existing Aboriginal title, although this is hardly surprising given that until 1992 the Australian courts had refused to recognize that any such concept was recognizable. By reason of the same logic, the Australian legislation does not provide for the extinguishment of Aboriginal title because, until the decision of the High Court in *Mabo*, no such title existed to require extinguishment.

Even though the pre-1992 Australian legislative schemes are not based on a model that seeks to affirm existing Aboriginal title, there are provisions that seek to build elements of Aboriginal decision making into the way in which the fee simple title is held following a successful claim. For example, under the *Aborigines Land Rights (Northern Territory) Act*, the land is vested in a land trust as the registered proprietor, but all decisions regarding Aboriginal land are made by a land council. The legislation requires the land council, in carrying out its functions with respect to Aboriginal land, to have regard to the interests of and to consult with traditional Aboriginal owners of the land and any other Aboriginal people interested in the land. In particular, a land council is precluded from taking any action, including but not limited to the giving of consent or the withholding of consent in any matter in connection with land held by a land trust, unless the land council is satisfied that the traditional Aboriginal owners understand the nature and purpose of the proposed action and as a group consent to it. Mr. Justice Toohy has described the thinking behind these provisions:

> The notion of the traditional owners `as a group' consenting to proposed action is an attempt to reflect the decision making mechanisms of Aboriginal society and to eschew the requirement of unanimous consent or even, I think, the consent of the majority, at least in the sense in which that expression is generally understood... Rather the Act gives effect to the notion that in Aboriginal society decisions on many matters are made by consensus, hence all that which emerges is a decision of the group rather than of particular individuals who belong to it. It is, I think, proper to regard the provisions as

> requiring no more and no less than that the consent of traditional owners to a proposed action in regard to land is a consent given in accordance with the mechanism for decision making appropriate to that community. ("Aboriginal Land", p. 170.)

In summary, the pre-1992 Australian experience demonstrates that it is possible to define Aboriginal entitlements to land in terms appropriate to and respectful of Aboriginal relationships and responsibilities to their territories and to recognize elements of Aboriginal customary law in the manner in which decisions about Aboriginal land are made. However, because the Australian legislative schemes translate Aboriginal entitlement into a grant of fee simple or leasehold under the common law system of land tenure, ultimately they do not provide any new models for reflecting that entitlement with reference to existing Aboriginal title.

The High Court decision in *Mabo*, in rejecting the *terra nullius* doctrine and declaring that the common law of Australia did recognize the concept of Aboriginal or Native title to land, precipitated an intense public debate within Australia and the development of both policy and legal initiatives to respond to the implications of the judgement ─ in particular, the role that Aboriginal title, now recognized as a legal reality in Australia after being disregarded for two hundred years, would play in the future evolution of the country's land and resource regimes and the effect this recognition would have on the myriad grants and alienations made in the past on the basis that Aboriginal title was not part of the law of Australia.

The major part of the majority judgements in *Mabo* is devoted to a comparative review of the common law jurisprudence dealing with the recognition of Aboriginal title as a pre-existing right surviving the assertion of Crown sovereignty, as part of an impressive argument for the rejection of earlier Australian precedents that this principle of the common law never applied to Australia, because the Aborigines had no organized and civilized societies with any system of law and thus Australia was to be treated as *terra nullius*. The judgements not only address and affirm the common law recognition of Aboriginal title in Australia, however, but also deal with the issue of extinguishment of that title and the circumstances under which extinguishment legally could and had been effected in the last two centuries. Whereas the High Court's discussion and rejection of the *terra nullius* doctrine is animated by a search to recognize and correct an historical injustice done to the Aborigines of Australia, the later parts of the judgements dealing with extinguishment are wanting in the critical judicial scholarship characterizing the earlier parts and also appear to legitimate the consequences of that injustice in

terms of the dispossession of the Aborigines.

In relation to extinguishment the High Court held that a Crown grant, such as a fee simple, that vests in the grantee an interest in land that is inconsistent with the continued right to enjoy a Native title in respect to the same land necessarily extinguishes the Native title. In his judgement, Mr. Justice Brennan acknowledged the consequences of extinguishment by adverse dominion:

> As the governments of the Australian colonies and, latterly, the governments of the Commonwealth, States and Territories have alienated or appropriated to their own purposes most of the land in this country during the last two hundred years, the Australian Aboriginal peoples have been substantially dispossessed of their traditional lands. They were dispossessed by the Crown's exercise of its sovereign powers to grant land to whom it chose and to appropriate to itself the beneficial ownership of parcels of land for the Crown's purposes. *Aboriginal rights and interests were not stripped away by operation of the common law* and first settlement by British colonies, but by the exercise of a sovereign authority over land exercised recurrently by government... Aborigines were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement. Their dispossession underwrote the development of the nation... Does it make any difference whether Native title failed to survive British colonization or was subsequently extinguished by government action? In this case, the difference is critical; except for certain transactions...nothing has been done to extinguish Native title in the Murray Islands [the claim at issue in *Mabo*]. There, the Crown has alienated only part of the land and has not acquired for itself the beneficial ownership of any substantial area. And there may be other areas of Australia where Native title has not been extinguished and where an Aboriginal people, maintaining their identity and their customs, are entitled to enjoy their Native title. Even if there be no such areas, it is appropriate to identify the events which resulted in the dispossession of the indigenous inhabitants of Australia, *in order to dispel the misconception that it is the common law rather than the action of governments which made many of the indigenous peoples of this country trespassers on their own land*." (*Mabo* v. *State of Queensland*, p. 58 [emphasis added].)

Mr. Justice Brennan appears to take comfort from the fact that dispossession was not, under his interpretation, brought about by the common law but by the acts of governments. However, in his attempt to vindicate the common law and to focus attention on the dispossessing acts of governments, he does not acknowledge that, in accepting the doctrine of adverse dominion and validating extinguishment of Aboriginal rights on the basis of an inconsistent Crown grant, the Court is accepting a particular judicial theory of extinguishment that legitimates dispossession, that is not inexorably pre-determined by the common law precedents, and that courts in other countries have rejected. In a Canadian context, in particular, the unanimous 1993 decision of the B.C. Court of Appeal in *Delgam Uukw* held that Crown grants by provincial governments were

not capable of extinguishing Aboriginal title.[xxvii]

The judgements of the High Court in *Mabo*, while judicially validating the title of non-Aboriginal Australians who had received fee simple grants, left uncertain the legal situation where lesser interests were granted. It would seem that a leasehold conferring exclusive possession would extinguish Aboriginal title, but pastoral leases, which are a common form of grant in many parts of Australia, are more problematic because they commonly included a clause protecting traditional Aboriginal rights of sustenance and were therefore not inconsistent, it could be argued, with the continued enjoyment of Aboriginal title. The Court was also ambiguous on the extinguishing effect of mineral and petroleum grants, an issue of great concern in the context of the Australian non-renewable resource sector. According to some commentators, production grants in the form of mining leases or oil and gas production licences were likely to have extinguished Native title, but exploration grants would not.[xxviii]

The *Mabo* judgements also raised another significant area of uncertainty regarding the extinguishing scope of past transactions. The Court referred to the *Commonwealth Racial Discrimination Act* of 1975, which came into force on 31 October of that year, as placing important restraints upon state or territory legislative power to extinguish common law Native title. Thus, where a grant of interest in land would extinguish Native title in circumstances where such a grant would not extinguish other non-Native interests, the effect would be discriminatory and the grant invalid. Discrimination might also arise where actions affecting Native title did not provide for the same procedural requirements as those affecting other interests in land, for example, prior consultation and the right to negotiate terms and conditions. The effect of this placed a cloud over a number of grants made since 1975.[xxix]

To address the implications of the *Mabo* decision, the Commonwealth government, after an extensive consultation process, issued a discussion paper in June 1993 and, in September, made public a detailed outline of proposed legislation designed, in the words of Prime Minister Keating, to "resolve the uncertainties created by *Mabo* while ensuring that Native title is treated with fairness and justice". In his statement the Prime Minister identified certain clearly drawn lines of policy and principle that were to be reflected in the legislation:

1. Ungrudging and unambiguous recognition of Native title in Australian law;
2. A fair, rigorous and efficient means for determining who has Native title, where, and what the key attributes of that title are in particular cases;
3. A just and workable regime under which dealings in land can go on, and which

provides clear processes within which our vital land base industries can operate;

4. The right of Aboriginal and Torres Straight Islander people to be asked about proposed actions affecting Native title land, but without any special veto or `locking-up' of the land;
5. Full security for people holding grants of interest in land provided by governments in the past, and at no cost to them;
6. Fair compensation for any extinguishment or impairment of Native title rights; and
7. An opportunity for the States and Territories to manage dealings in land which affect Native title so long as they meet with standards for recognition and protection of it set out in the Commonwealth legislation.

> These are the solid, principled foundations of our policy. They respond to the calls by industry for certainty and for clear rules under which land dealings can proceed. They respond to the equally legitimate demands by Aboriginal and Torres Straight Islander people for the rights accorded by the High Court decision to be respected in Australian land management. They respond to the calls by the States and Territories for recognition of their key role in dealings in land under a Federal system. And they respond, I am sure, to the wish of the wider Australian community ─ namely that *Mabo* be accepted, but also that it be made to work. (Statement by the Prime Minister, 2 September 1993.)

It is not my purpose in this paper to provide a detailed review of the proposed Australian legislation. It is both far-reaching and complex, encompassing as it does a judicial and administrative structure for adjudicating and resolving claims based on Native title. I intend to limit my discussion to a consideration of how the proposed legislation grapples with the issues of recognition and co-existence of Aboriginal title with Crown land and the role that extinguishment plays in the overall scheme, with a view to considering whether these recent Australian initiatives provide a model for real alternatives to extinguishment in the context of Canadian land claims settlements.

The proposed legislation would remove all the ambiguities of the *Mabo* decision regarding the extinguishing effect of past transactions. The legislation provides that, notwithstanding any other law (including the *Racial Discrimination Act*), past transactions affecting Native title will be validated. This validation will differ depending upon the nature of the interest granted. For freehold and for residential, pastoral and tourist leasehold grants, the validation will extinguish any Native title inconsistent with those grants. For mining interests and lesser interests over land, such as licences and permits, the validation will not extinguish the Native title but the Native title will be subject to the lease or licence for as long as it runs. The government commentary explaining the draft legislation argues that this approach "will preserve

Native title to the maximum extent possible consistent with the validation of past transactions". The legislation will also provide that the Native title holder is entitled to compensation from the maker of the grant for any extinguishment or impairment of the Native title by validation of the grant, such compensation to be as negotiated or determined in accordance with other provisions of the legislation.

Although this validation is quite sweeping, it still falls short of the blanket extinguishment effected in the Canadian agreements in James Bay and the Northwest Territories. That having been conceded, so far as past grants are concerned, the Australian legislative approach still represents a modified extinguishment model.

In relation to future grants, the legislation seeks to ensure that land management regimes recognize Native title by providing a much more limited scope for extinguishment. Thus, extinguishment of Native title would take place only where Native lands are compulsorily acquired by the Commonwealth, states or territories, under the same procedures and conditions as other rights or interests are compulsorily acquired, and subject to payment of compensation. Except in these exceptional circumstances, any grant made after 30 June 1993 will not extinguish Native title; rather, the Native title will become subject to the grant for the period of the grant and can be reasserted at the end of the grant by the Native title holders or their successors.

For grants or Crown action over land in which Native title exists that will affect that Native title (this would include, for example, the construction of a road or railway, the building of a school or other public building), this can be done only if the grant could be made or Crown action taken over freehold land and if it is made or taken in accordance with the legislation. The legislation provides for procedures to be followed before such a grant can be made that are designed to give effect to the concept of "a right to negotiate" rather than a veto. Under these procedures the relevant government will notify the Native title holders of the proposed grant, and those title holders will be entitled to negotiate with the government and/or the proposed grantee. Where the parties are unable to agree within three or four months (depending upon the type of grant) the issue of whether a grant is to be made is determined by a special tribunal. The tribunal will be able to determine not only whether the grant should go ahead, but also the conditions under which the grant should proceed. The tribunal, in addition to taking into account the normal grounds of objection that any title holder is able to put before a state or territory body, will be required to take into account a number of specific matters related to the interests of Native title

holders, in particular:

(a) the effect of the grant on the preservation and protection of the Native title and the ways of life, culture and tradition of the Native title holders together with the growth and development of the Native title holder's social, cultural and economic structure;

(b) the interests, proposals, opinions and wishes of the Native title holders in relation to the management, use and control of the land;

(c) the freedom of access by the Native title holders to the lands and their freedom to carry out rites, ceremonies and other activities of cultural significance on the lands in accordance with Native title holder's traditions;

(d) the preservation of sacred sites;

(e) the preservation of the natural environment, unless determined by another statutory process of environmental assessment to which the Native title holders have had satisfactory access;

(f) the economic and other significance to Australia and the State or Territory concerned; and

(g) the public interest. (Commonwealth of Australia, *Mabo: Outline of Proposed Legislation on Native Title*, September 1993, p. 12. The bill, with some changes, was passed as the *Native Title Act 1993* and became law on 1 January 1994.)

The legislation also provides for an alternative model of land management to deal with future grants involving a voluntary surrender by Native title holders of their Native title to governments, on terms and conditions acceptable to them, thereby exchanging Native title for a statutory title "which would facilitate their ability to put the land to commercial purposes".[xxx]

In proposing this alternative in its discussion paper, the Australian government stated:

> This would possibly have attractions from some perspectives in terms of substituting a better defined package of rights for Native title. But it would be wrong to compel such an exchange. (*Mabo, The High Court Decision on Native Title*, Discussion Paper, June 1993, p. 5.)

The new tribunal that would determine where the grants should be made over Native title land will be a non-judicial body but part of a larger process that will include the Federal Court, whose jurisdiction will be to determine claims to Native title and to compensation in respect of loss or impairment of Native title. The Federal Court will be assisted by mediators/assessors. As to the participation and representation of Aboriginal peoples, the commentary to the legislation states only that "To the extent possible, Aboriginal and Torres Straight Islander persons will be appointed as mediators/assessors... Mediators/assessors and members [those appointed to the non-judicial body to determine whether grants should be made] will be persons who have special

knowledge or skills in relation to one or more of the following: Aboriginal or Torres Straight Islander society; mediation of disputes; land management; or any other relevant areas as determined by the Minister".[xxxi]

From this summary of the Australian proposals, it is evident that even though extinguishment of Aboriginal title will have a very limited place in relation to future land management (being possible only in circumstances and under the same conditions as where other non-Aboriginal land can be compulsorily acquired), the rights and decision-making powers that the recognition of Native title will give Aboriginal peoples are quite circumscribed. Under the proposed legislation there are no Aboriginal lands in relation to which Aboriginal peoples can exercise a right of veto over grants. Moreover, there is no contemplation of areas of joint management or the establishment of structures in which non-Aboriginal governments and Aboriginal peoples have equal participation in determining land use. The singular lack of joint management structures is no doubt a reflection of the fact that in Australia there is no history of negotiated treaty making. Thus, even the process of recognition is initially being determined unilaterally by the government (albeit with consultation with Aboriginal organizations).

From a Canadian perspective, therefore, the Australian approach is doubly flawed in terms of both process and substance. The process by which recognition and accommodation are reached is a unilateral one with no recognition of government-to-government relationships. As to the substance, the rights that flow from recognition of Aboriginal title fall far short of those that have been recognized in Canadian land claims settlements in relation to what has been referred to as "settlement land", and there are no provisions for areas of joint management and shared jurisdiction. For these reasons the proposed legislation seems to hold little in the way of future directions for Canada in relation to the scope and content of retained Aboriginal rights. However, the one important thing the post-*Mabo* proposals show is that in terms of future management of lands and resources, extinguishment of Aboriginal title is not a necessary prerequisite to the achievement of certainty of third-party interests. It is remarkable that Australian federal policy makers have come to that conclusion in the short time since *Mabo* was handed down, considering the long struggle Aboriginal peoples have faced in Canada trying to convince the federal and provincial negotiators with whom they deal of this critical point. To that extent, at least, recent Australian experience supports a model of recognition, not extinguishment of Aboriginal title.

The New Zealand Experience

More so than the United States or Australia, New Zealand offers both historical and contemporary experiences that can inform Canadian endeavours to frame settlement agreements based on entrenchment rather than extinguishment of Aboriginal rights. The reason for this lies in the distinctive history of the relationship between the Maori and the *Pakeha* (the Maori word for non-Maori New Zealanders, a term commonly used in New Zealand), and it is from a brief review of some of that history that some important comparative lessons can be learned and applied.

The Maori ─ the Indigenous peoples of New Zealand ─ were organized on a tribal basis. The tribe (*iwi*) was made up of kinship groups (the *hapu*) which in turn comprised a number of extended families (the *whanau*). The principal land-holding unit was the *hapu*, whose rights were subject to the prevailing rights of the tribe. Professor Metge has summarized the traditional system of Maori land tenure:

> Under the Maori system of land tenure, rights of occupation and usufruct were divided among sub-groups and individuals, but the right of alienation was reserved to the group. Each *hapu* of the tribe controlled a defined stretch of the tribal territory... Within the *hapu*, *whanau*, nuclear families and individuals held rights of occupation and use over specific resources; garden plots, fishing-stands, rat-run sections, trees attractive to birds, clumps of flax and shell-fish beds... [T]he rights of individuals and lesser groups were always subject to the over-right of the greater group. (J. Metge, *The Maoris of New Zealand* [London: Routledge and Kegan Paul, 1976], p. 12.)

As Indigenous peoples, the Maori had a special relationship to their traditional territory. Paul McHugh has provided this description:

> The memories of forebears whose spirits roamed the ancestral land, and allegiance to living kin induced the Maori to keep their `flame burning' by remaining on the land. The Maori attachment to their traditional land is known as *turangawai*... *turangawai* remains a strong feature of modern Maori culture. Besides performing its strict function of giving a Maori rights to his tribal *marae* [*marae* is an open space associated with a meeting-house used for community assembly and is the site of a tribe's ceremonial activities], it has the larger role of symbolizing his identity as a Maori. It represents a selfless attachment to kin and ancestors and thus provides an individual with *mana* or social standing, among his own people by indicating pride and self-esteem in being Maori. *Turangawai* is an enduring feature of Maori society that has been greatly underestimated by the *Pakeha*. (P. McHugh, *Maori Land Laws of New Zealand* [Native Law Centre, University of Saskatchewan, 1983], p. 40.)

The beginning of colonial history in New Zealand was marked by the signing of the

Treaty of Waitangi in 1840. More so than any other treaty, ancient or contemporary, it establishes a relationship between Aboriginal peoples and colonial governments based upon the recognition of existing Aboriginal rights. The treaty was signed on February 6, 1840 by more than five hundred Maori chiefs. The treaty was written in both English and the Maori language, and the overwhelming majority of chiefs signed only the Maori version. The Preamble to the Treaty of Waitangi recites:

> the Queen...regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand, and anxious to protect that just Rights and Property...has deemed it necessary in consequence of the great number of Her Majesty's subjects who have already settled in New Zealand and the rapid extension of emigration both from Europe and Australia which is still in progress...to treat with the Aborigines of New Zealand for the recognition of Her Majesty's sovereign authority over the whole or any part of those islands.
>
> Her Majesty, therefore, being desirous to establish a settled form of Civil Government...has been graciously pleased to empower and to authorize William Hobson...Lieutenant-Governor of such part of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions. (Treaty of Cession between Great Britain and New Zealand, February 5, 1840.)

The Treaty of Waitangi contains three articles: the first in its English version gives the Crown sovereignty over New Zealand; the third gives the Maori full rights of British citizenship. The second article is a comprehensive recognition and guarantee of the Maori's Aboriginal rights. The English text states:

> Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand, and to the respective families and individuals thereof, the full, exclusive, and undisturbed possession of their Lands and Estates, Forests, Fisheries, and other properties which they may collectively or individually possess, so long as it is their wish and desire to retain the same in their possession but the Chiefs of the United Tribes, and the individual chiefs, yield to Her Majesty the exclusive right of pre-emption over such lands as the proprietors thereof may be disposed to alienate, at such prices as may be agreed upon between the respective proprietors and persons appointed by Her Majesty to treat with them in that behalf.

As comprehensive as this guarantee is in the English text, the Maori text is even broader in both the scope of what is protected and the extent of that protection. In a recent decision of the New Zealand High Court, Chilwell J. reviewed the Maori text:

> The Maori version translates into English as:
>
> This is the second.

> The Queen of England agrees and consents [to give] to the Chiefs, the Hapus, and all the people of New Zealand the full chieftainship [*Rangatiratanga*] [of?] their lands, their villages, and all their possessions but the Chiefs of the Confederation and all the other Chiefs give to the Queen the purchasing of those pieces of land which the owner is willing to sell, subject to the arranging of payment which will be agreed to by them and the purchaser who will be appointed by the Queen for the purpose of buying for her...

The Waitangi Tribunal, empowered by s.5(2) of the *Treaty of Waitangi Act* 1975, to have exclusive authority, in exercising any of its functions under the section, to determine the meaning and effect of the Treaty, has translated the crucial passage

> te tino rangatiratanga o rantou wenua o rantou kainga me o ratou taonga katoa

literally as

> the highest chieftainship of their lands, homes and prized possessions. (Finding of the Waitangi Tribunal on the Manukau Claim at p. 91)

The crucial word "taonga" was interpreted by the Waitangi Tribunal:

> "Taonga" means more than objects of tangible value. A river may be a taonga as a valuable resource. Its "mauri" or "life-force" is another taonga. We accept the contention of counsel for the claimants that the mauri of the Waikato River is a taonga of the Waikato tribes. The mauri of the Manukau Harbour is another taonga. (*Huakinu* v. *Waikato Valley Authority*, [1987] 2 N.Z.L.R. 188 at 204-5.)

The Waitangi Tribunal, which was established in 1975 to hear Maori claims and make recommendations for redress arising from policies and practices of the Crown made in violation of the treaty, has addressed the proper interpretation of article 2 in several of its reports. In the *Te Rio Maori Claim* it stated:

> ...while the English text is centred around `real estate rights' the Maori refers also to the protection of intangible things. The guarantee of `o ratou taonga katoa' or all things treasured by the ancestors has been taken to include language, custom and religion. (*Report of the Waitangi Tribunal on the* Te Rio Maori Claim, 1986 W.A.I. 6 at 4.3.5-9.)
> In its report on the *Orakei Claim*, the Tribunal offered this further interpretation:
>
> 11.5.21 The Maori text thus conveyed an intention that the Maori would retain full authority over their lands, homes and things important to them, or in a phrase, that they would retain their mana Maori. That of course is wider than the English text which guaranteed "the full, exclusive and undisturbed possession of lands, estates, forests, fisheries and other properties" so long as the Maori wished to retain them. The Maori text gave that and more.
>
> 11.5.24 The present case is concerned with land. It is plain that land, which is expressly

> referred to in both texts, is covered by the Treaty. The real question is the nature and extent of the interest in the land secured to the Maori. In the Te Atiawa Report (1983) we stressed that "rangatiratanga" and "mana" are related and that rangatiratanga denotes the mana not only to possess what one owns but, and we emphasize this, to manage and control it in accordance with the preferences of the owner. We thought the Maori text would have conveyed to Maori people that, amongst other things, they were to be protected not only in the possession of their fishing grounds (the subject matter of the Te Atiawa Claim) but in the mana to control them in accordance with their own customs and having regard to their own cultural preferences. Clearly the same understanding would have been held in relation to land.
>
> 11.5.28 In recognizing the "tino rangatiratanga" over their lands the Queen was acknowledging the right of the Maori people for as long as they wished, to hold their lands in accordance with longstanding custom on a tribal and communal basis." (*Report of the Waitangi Tribunal on the* Orakei Claim (1987) W.A.I. 9., pp. 132-35.)

The Maori text of article 2 of the Treaty of Waitangi probably comes as close as anything so far drafted to express the full dimensions of Aboriginal rights. The guarantee in article 2 of the Treaty of Waitangi encompasses the beneficial interest of Aboriginal peoples in all of their resources, whether owned collectively or individually, by the tribe, the clan or extended family; it recognizes the authority of the Aboriginal people to manage and control their territories in accordance with their own laws and their own cultural preferences; and it acknowledges that the relationship to their territory extends beyond the material and economic and extends into the spiritual, with its attendant responsibilities to respect and protect the life forces within the territory. It is a sad commentary on the poverty of our legal imagination that in the 150 years since the signing of the Treaty of Waitangi, the best we have been able to do so far in Canada is to describe Aboriginal title as "the rights, obligations and liabilities equivalent to fee simple". As the reports of the Waitangi Tribunal have demonstrated so clearly, this language leaves us "tongueless and earless" toward the Aboriginal world of meaning and significance.

In the early years of colonization the British government took the treaty seriously. It insisted that its representatives should observe the terms and conditions, and for a while, under the naval governors Hobson and Fitzroy, this was done. One of Hobson's first acts as governor was to create the office of the Protector of the Aborigines, a paid public official whose duty it was to be present at all land sales to ensure that transactions were lawful and reasonable and that a fair price was paid. The colonial governors that succeeded Hobson and Fitzroy brought with them a more aggressive approach to colonization. Thus, one of Captain George Gray's first acts as governor was to abolish the office of Protector of the Aborigines and to replace it with

another, the Commissioner for the Extinguishment of Native Title. Doubts about the validity and force of the Treaty of Waitangi, and whether it was possible to waive the Crown's pre-emptive right to permit private purchases of Maori land, were addressed in 1847 in the decision in *The Queen* v. *Symonds*, when the Chief Justice of New Zealand, William Martin, and Mr. Justice Chapman held that the treaty was valid and binding. The judgements in this case, which reviewed the historical nature of the relationship between Aboriginal peoples and the British Crown, constituted at the time the leading judicial pronouncement on Aboriginal rights in the Commonwealth. The affirmation of Aboriginal rights contained in the *Symonds* judgement was not, however, able to withstand the events of the next thirty years, which saw a direct and violent assault on Maoridom and Maori land rights.

In 1852 the British Parliament passed the *New Zealand Constitution Act*, granting settlers representative government. Although section 71 of that statute provided for districts to be defined where Maori law and custom would prevail, the power was never exercised. In 1859 the New Zealand legislature sought to repeal the Crown's right of pre-emption in order to speed up the purchase of Maori land, but the Colonial Secretary refused to sanction the bill on the grounds that it violated the Treaty of Waitangi.

In 1861 Gray was brought back from South Africa, where he had been sent in 1853, and reappointed governor. He found that Te Wherowhero, the Guardian of Auckland, had become Potatau, the First Maori King, in 1858 and that the Waikato people had prospered under Potatau and were involved in a flourishing agricultural and trade economy with the settlers of Auckland. In its report on the Manukau Harbour Claim, the Waitangi Tribunal described the state of the trading partnership between the Maori and the settlers at that time:

> The European has also brought schools and trade. Much land was gifted by the Waikato people for the endowment of missionary schools. Large areas of Waikato were cultivated for wheat, potatoes, maize and kumara. With missionary help the Waikato Maoris built and operated several flour mills. It is recorded that in 1858 in the Port of Auckland 53 small vessels were registered as being in native ownership and the annual ownership of native canoes entering the harbour was more than 1,700. At about that time the Waikato Maoris established their own trading bank. This was the golden age of Maori agriculture and growth. Peace and prosperity seemed assured. In fact it was short lived... (*Report of the Waitangi Tribunal on the* Manukau Claim, W.A.I.-8 1985.)

It was short-lived because in 1863 Governor Gray ordered the invasion of the Waikato and so started the Land Wars that lasted until 1872. The Waikato Maori were insisting on their rights

under the treaty and were not prepared to sell to settlers the lands on which they were prospering. The Maori King movement, which had emerged in the mid-1850s, was an attempt to retain Maori identity and self-determination within the framework of British sovereignty. To the settlers, however, the King movement impeded settlement and, more important, challenged British authority. The aims of this movement and the heightened Maori consciousness it promoted were seen to be incompatible with the government's need to extinguish Maori title more rapidly. The report on the Manukau Harbour Claim reviewed the historical accounts of the beginning of the Land Wars. The Tribunal concluded:

> As the finding shows, our researches reveal that the Manukau Maori people were attacked without just cause by British troops, their homes and villages ransacked and burned, their horses and cattle stolen. They were then forced to leave their lands and treated as rebels, all their property being confiscated in punishment for a rebellion that never took place...
>
> It can simply be said that from the contemporary record...all sources agree that the Tainui People of the Waikato never rebelled but were attacked by British troops in direct violation of Article II of the Treaty of Waitangi.

As a result of the *Suppression of Rebellion Act* and the *Land Settlement Act* of 1863, huge confiscations of land took place in the Waikato, the Bay of Plenty and elsewhere. Paul Temm, a member of the Waitangi Tribunal, has described the manner in which the fate of the Maori following dispossession mirrored that of other Aboriginal peoples.

> This was the beginning of the long debilitation of Maoridom because, deprived of their capital ─ the land ─ on which they had already built such prosperity, they were reduced to poverty, living in shacks and eking out a living as best they could. Sickness and disease were rampant. With no financial resources in the new cash economy in which they had to live, they became wage labourers and, for many, the poorest of the poor. Their mistake was in believing that the colonial government would keep its part of the bargain that was the Treaty of Waitangi. (P. Temm, *The Waitangi Tribunal, The Conscience of the Nation* [Auckland: Random Century, 1990], pp. 23-24.)

As a result of the outbreak of the Land Wars, the British government handed over to the New Zealand legislature full authority to deal with Maori land. The immediate product of that transfer of legislative jurisdiction was the passage of the *Native Lands Act* of 1865. Paul McHugh has described the overtly assimilationist objectives of this legislation.

> This legislation had two broad aims: the first, to make Maori land accessible for settlement and the second, to legislate the `humane' objective of assimilation. These goals are tellingly reflected in the oft-quoted words of Henry Sewell, speaking as Minister of Justice in the legislative council in 1870:

> The object of the Native Lands Act was two-fold: to bring the great bulk of the lands in the Northern island which belong to the Maoris, and which, before the passing of that act, were *extra commercium* ─ except through the means of the old purchase system, which had entirely broken down, within the reach of colonization. The other great object was the detribalization of the Maoris ─ to destroy, if it were possible, the principle of communism which ran through the whole of their institutions, upon which their social system was based, and which stood as a barrier in the way of all attempts to amalgamate the Maori race into our social and political system. It was hoped by the individualisation of titles to land, giving them the same individual ownership which we ourselves possess, they would lose their communistic character, and that their social status would become assimilated to our own.

> English tenancy in common was the device chosen to facilitate the dual aims of allowing for the ready acquisition of Maori land and the assimilation of the Maoris. To this end, a Native Land Court (now known as the Maori Land Court) was established with three main functions: (1) to ascertain the owners of Maori land according to Maori custom; (2) to transmute any title so recognized into one understood English law; and (3) to facilitate dealings in Maori land and peaceful settlement of the colony. Title was generally determined on a *hapu* (kinship group) basis with the particular parcel of land being identified as belonging to a *hapu* consisting of named members. The court would then apportion to each individual an interest or share in the land. (P. McHugh, *Maori Land Laws of New Zealand*, p. 41.)

Under the 1865 Act, certificates of title were not to be issued to more than ten persons. The effect of this has been described by Paul Temm, a member of the Waitangi Tribunal.

> Although a piece of land might be owned by several hundred members of the tribe...the judges of the Court did as they were told and picked out certain individuals, who were recorded as owners. After the original owners died, the children and grandchildren of these `owners' then succeeded to their parent's or grandparent's share, and so Maori land came to be `owned' by selected families and not by the tribes that originally owned it. The true owners who were not chosen as one of the ten nominees were disinherited. The direct consequence of this policy was that it became easier to buy Maori land because the identified owners could be approached directly and invited, or cajoled (or sometimes forced by giving credit they could not repay) into selling to European buyers. But the real purpose of the policy was to destroy the influence of the tribe because, as had been demonstrated so plainly in the Waikato before the Land Wars, when a tribe decided not to sell its land, European land buyers could not get what they wanted. (Temm, *The Waitangi Tribunal*, pp. 103-104.)

McHugh has also traced the process of dispossession brought about by the 1865 legislation.

> The colonists believed that `the individualization of a Maori share in a block would enable him to stand on his own feet and either farm his land or sell it and do the

community a service'. The legislation, however, had the unfortunate and predictable result of encouraging the alienation of large quantities of Maori land because the protective power of veto formerly held by the tribal chief no longer existed. As a result, the individual Maori, finding himself with a marketable parcel of land, frequently found the transient, material temptations of the European world too much to resist. An 1891 Royal Commission commenting on the `individualization' legislation, declared:

> The alienation of native land under this law took its very worst form and its most disastrous tendency... The right to occupy and cultivate possessed by their fathers became in their hands an estate that could be sold. The strength which lies in union was taken from them. The authority of their leaders was destroyed, they were surrounded by temptation... But it was not only in the alienation of their land that the Maoris suffered. In its occupation also they found themselves in a galling and anomalous position. As every single person in a list of owners comprising perhaps over a hundred names had as much right to occupy as anyone else, personal occupation for improvement or tillage was encompassed with uncertainty.

Still, a portion of Maori land, however meagre, did remain in native hands. These lands had the legal status of tenancies in common, according to the provisions of the Native lands legislation. The European settler envisaged the individualization of title as being sufficient in itself to convert the Maori to the European methods of tenure and management. This ethnocentric assumption completely overlooked the traditional attachment of the Maori to their land.

As a result of the imposition of the tenancy in common, *turangawaewae* was transformed and over the years, in the wake of increasing urbanization, became dependent upon a Maori being listed on the memorial or list of owners issued by the court. Titles became crowded as the relatives of deceased kin took their place on the title instrument. The Europeans had expected the owners to conclude arrangements amongst themselves, and to opt in or out by selling their shares among themselves or to others. In fact, the cultural attachment to the land of successive generations continued and the titles became more and more crammed:

> This process has continued in each successive generation since original investigation of title, whenever succession orders are kept up to date, so that it is now not uncommon for blocks of land to be owned by thousands of shareholders disbursed throughout the country. Many descendants are unaware of their ownership except for tiny dividends received for lease, notification of seizure for delinquent rates, or compensation for expropriation. (McHugh, *Maori Land Laws*, pp. 41-43.)

The combined effect of purchase by the Crown, the *raupatu* (the confiscations following the land wars), and the operations of the Native Land Court has left the Maori with about two per cent of the land in New Zealand.

It is clear that the *Native Lands Act*, while appearing to respect Maori customary law, was

designed in fact ultimately to eradicate it.

> The thrust of these changes was not to preserve customary tenure but to assimilate the Maori. For instance, section 30 provided that succession to an owner's interests was to be `according to law as nearly as can be reconciled with native custom'. This proposed concession to custom was used by Fenton [the first Chief Judge of the Land Court] and his fellow judges as a device to impose English concepts. Fenton insisted that:
>
> > It will be the duty of the Court in administering this Act to cause as rapid an introduction amongst the Maoris, not only of English tenures but of English rules of descent as can be secured without violently shocking Maori prejudices.
>
> The effect of the Court's interpretation of custom was to begin the problem of fragmentation of those titles transmuted into English title. (McHugh, *Maori Land Laws*, p. 33.)

There are other ways in which the application of the *Native Lands Act* by the *Pakeha* judges of the Native Land Court undermined Maori customary law. Under the Act's objective of individualizing Maori land title, the tribal chief's power of veto disappeared and principles of descent in which the female line could take equally with the male were introduced, contrary to customary Maori law. The court made decisions in favour of a particular *hapu* regarding lands that were often used by several *hapu*, and it also provided a non-Maori legal forum in which false claims could be made in ways not possible under the customary *runanga* system, in which knowledgeable Maori elders determined land disputes.

It is not surprising, therefore, that the Maori see the *Native Lands Act* as a violation of article 2 of the Treaty of Waitangi, in which their rights to retain "all things treasured by the ancestors" was guaranteed; this necessarily included the right to retain and develop their customary forms of land tenure consistent with tribal values and *turangawaewae*.

In New Zealand, therefore, in the space of a mere twenty-five years, a treaty relationship based upon respect for Maoridom and the affirmation of Maori land rights was transformed into a legislative agenda whereby Maori rights were transmuted into a cumbersome form of common law tenure with the explicit objective of undermining the fabric of Maori collective identity and social order. Not surprisingly, the legal status of the Treaty of Waitangi itself went through a process of transmutation. In *Symonds* in 1847, the Chief Justice of New Zealand had looked to the treaty as an affirmation of fundamental principles of colonial law determining the relationship between the Crown and Aboriginal peoples. In 1877 Chief Justice Prendergast, in the case of *Wi Parata* v. *The Bishop of Wellington*, ruled that the treaty as a matter of law was a

simple nullity. The reason given was that the Maori did not have any kind of civil government or settled system of law capable of ceding sovereignty. This view was supported by the further reasoning that a treaty as a matter of international law could not give rise to legal rights enforceable in the courts unless ratified by legislation. As to the argument that the *Native Lands Act* had referred to "the ancient custom and usage of the Maori people", Chief Justice Prendergast ruled that a phrase in the statute cannot call what is non-existent into being.[xxxii]

Even though the extreme position of *Wi Parata* ─ which has analogies with the *terra nullius* doctrine in Australia to the extent it denied the existence of a Maori system of law and land tenure ─ was rejected by the Privy Council in its 1901 decision in *Nireaha Tamaki* v. *Baker*, the settlement and development of New Zealand continued without regard to the affirmation of Aboriginal rights in the Treaty of Waitangi. *Nireaha Tamaki* notwithstanding, the *Wi Parata* dismissal of the treaty continued to be relied upon in New Zealand. As late as 1971 the leading article in an issue of the *New Zealand Law Journal* was entitled "The Non-Treaty of Waitangi". Persistent demands by the Maori for recognition of the treaty as a founding constitutional document in New Zealand, to be respected as the act and deed of their *tupuna* [ancestors] were dismissed in this summary way:

> Considering only whether it is a binding legal document and ignoring any `spiritual' or emotional value it may have, it is submitted that the Treaty of Waitangi is worthless and of no effect. It is a non-treaty. Moreover, if people could desist from casting 130 years into the past for an emotional prop, and show even greater determination in grappling with the present day racial problems of our nation, it would also become, at long last, a non-issue. (Malloy, "The Non-Treaty of Waitangi" [1971] *N.Z.L.J.* 193 at 196.)

In fact, quite the reverse has taken place. The insistent demand by Maori, along with Aboriginal peoples in other parts of the world, for increased self-determination, has brought the Treaty of Waitangi into high legal profile in recent years. The work of the Waitangi Tribunal and an increasingly active role played by the New Zealand Court of Appeal have brought about legal recognition of the importance of the Treaty of Waitangi in both the historical and contemporary life of New Zealand. Significant New Zealand legislation now requires or permits decision makers to have regard to the principles of the treaty. For example, the *Conservation Act* of 1987 requires that the Act "shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi."

Even in cases where no such statutory reference has been made, New Zealand courts

have read into the legislation such a requirement. An important example of this is the decision of Chilwell J. in *Huakinu* v. *Waikato Valley Authority*. In that case the issue was the proper interpretation of the *Water and Soil Conservation Act* and whether a planning tribunal, in determining whether to grant an application to discharge dairy effluent into a river, was bound to give consideration to Maori objections that the discharge would damage the spiritual and cultural relationship of Maori people to the waters of the region. In reviewing the New Zealand authorities on the treaty, Chilwell J. concluded:

> This review of the authorities invites the conclusion that the Treaty is not part of the municipal law of New Zealand in the sense that it gives rights enforceable in the courts by virtue of the Treaty itself... The authorities also show that the Treaty was essential to the foundation of New Zealand and since then there has been considerable direct and indirect recognition by statute of the obligations of the Crown to the Maori people. Among the direct recognitions are the *Treaty of Waitangi Act* 1975 and the *Waitangi Day Act* 1976, both of which expressly bind the Crown. There can be no doubt that the Treaty is part of the fabric of New Zealand society. It follows that it is part of the context in which legislation which impinges upon its principles is to be interpreted... ([1987] 2 N.Z.L.R. 188 at 210.)

The *Huakinu* case is important in illustrating the contemporary approach of the New Zealand courts to the Treaty of Waitangi; moreover, its factual matrix also illustrates the importance of a model of retained Aboriginal rights in reflecting the significant aspects of the relationship between Aboriginal peoples and their lands and waters, which are not sufficiently comprehended by common law concepts of land tenure.

In his judgement, in order to give "some comprehension of the concept of spiritual values in regard to water as understood by Maori people in regard to specific water resources", Mr. Justice Chilwell reviewed the history of Maori objections to a series of decisions made by the Planning Tribunal.

> In the first of the *Minhinnick* decisions...the tribunal recorded that Mrs. Minhinnick gave evidence of the long association of her *hapu* with the area from the Manukau Harbour to the Waikato River. She said there are water qualities which are not technical but cultural and spiritual in origin; to the Maori people the water rights of the Waikato are sacred and a tangible symbol of their tribal identity. She said that their spiritual pride would suffer if values important to them were cast aside and if the waters of the Waikato River and Manukau Harbour were thrown together carelessly...
>
> Evidence of that kind caused the Tribunal to examine the principles and objectives of the *Water Act* before concluding that the Act was concerned with physical aspects of the environment and not purely metaphysical concerns. The Tribunal said:

> In that the Act specifically requires that environmental considerations be taken into account, some Maori traditional concerns are now specifically provided for. But some Maori concerns are cultural and spiritual; they go beyond the mere physical environment. We have concluded that there is nothing in the Act which would allow us to take those purely metaphysical concerns into account...

In its finding on the Manukau claim, the Waitangi Tribunal turned its mind to the unsuccessful arguments of Mrs. Minhinnick. The tribunal expressed the view that metaphysical concern is relevant to the provisions of the Treaty of Waitangi; that the failure of government to provide for it, in enactments such as the *Water Act* is inconsistent with the principles of the Treaty. The reasoning is based essentially upon the finding that the Maori text of the Treaty guarantees to the Maori people the ownership of all their *taonga*. Concerning matters metaphysical the Tribunal said at pp.78-79:

> The values of a society, its metaphysical or spiritual beliefs and customary preferences are regularly applied in the assessment of proposals without a thought as to their origin. Some societies make rules about noise on Sunday while others protect sacred cows. When Maori values are not applied in our country but western values are, we presume our society is monocultural. In our multicultural society the values of minorities must sometimes give way to those of the predominant culture, but in New Zealand, the Treaty of Waitangi gives Maori values an equal place with British values, and a priority when the Maori interest in their *taonga* is adversely affected...
>
> Here, *wai maori* (fresh water) is also the life giving gift of the Gods (*te wai ora o Tane*) and is also used to bless and to heal. Separate water streams are used for cooking, drinking and cleaning (which explains why no Maori will wash clothes in a kitchen). Waste water is purified by return to the earth, ritualistic purification or, with the exception of water containing animal waste, by mixing with large quantities of other pure water.
>
> *Wai mataitai* (salt water) is separate (*te wai ora o Tangaroa*). It provides food but its domestic use is limited. Conceptually, each water stream carries its own *mauri* (life force) and *wairua* (spirit) guarded by separate *taniwha* (water demons) and having its own *mana* (status). Of course the waters mix. The *mauri* of the Waikato River flows to the *mauri* of the sea, but on its landward side the *mauri* of the Waikato is a separate entity. The Maori objection is to the mixing of waters by unnatural means, the mixing of two separate *mauri*, and the boiling processes that discharge `dead' or `cooked' water to living water that supplies seafood.
>
> This objection, like so many Maori customs, has a sound environmental basis. When the temperature of the water is increased, even slightly, there are ecological consequences on marine plant and fish life.
>
> But the ancient Maori was also a developer of the earth and an exploiter of its resources which necessitated modifications to the natural world. *Tohunga* (priests) were trained to cope and placate necessary spiritual infringements and perform

> purificatory rites. They both caused and cured *mate maori* (psychosomatic illness caused by intentional or unintentional breaches of sacred laws) and fixed the *utu* or *koha* (payment, satisfaction or accord) necessary to restore the *mana* of the offended persons or the *atua* (gods) present in all natural life. Development was achieved through *tohunga* who had to ensure that it could be done with harmony and balance, equity and justice in accordance with ancient lore....
>
> For reasons such as those, the Tribunal considered the Maori values ought to be provided for in planning legislation and it recommended...that the applicable principles to be provided in a range of integrating planning statutes should include consideration of the relationship of Maori people and their values, culture and traditions to any lands, water or resources, and the protection of Maori lands and fishing grounds. Specifically, the Tribunal recommended that existing legislation be amended forthwith to enable Regional Water Boards to take into account Maori spiritual and cultural values when considering water right applications. (2 N.Z.L.R. 219-222.)

Chilwell J. concluded that the Planning Tribunal was required to consider the objection to the water application on the statutory ground that "the grant of the application would prejudice [the objectors'] interests or the interests of the public generally" and that these phrases included Maori spiritual and cultural values and therefore they "cannot be excluded from consideration if the evidence establishes the existence of spiritual, cultural and traditional relationships with natural water held by a particular and significant group of Maori people".[xxxiii]

In this way, through the vehicle of a broad statutory reference to "interests", the court was able to read in Maori spiritual and cultural values in relation to water. However, as Mr. Justice Chilwell himself acknowledged in his references to the Waitangi Tribunal reports, this special relationship to water is one of the things the Maori regard as having been guaranteed by the Treaty of Waitangi. The Maori view this as one of their *taonga*, a prized possession treasured by the ancestors. It is a spiritual and cultural relationship that links them to the flow of the rivers and the life-forces within them upon which they and their ancestors have depended. Respecting that relationship should not have to depend on statutory interpretation by a non-Maori court. It is a measure of the extent to which the Treaty of Waitangi was devalued in New Zealand that the courts have had to go through the tortuous route of reintroducing the promises and guarantees of the treaty through the back door of statutory interpretation. The treaty itself, as explained by the Waitangi Tribunal, provides a wide front door to recognition.

As the reports of the Waitangi Tribunal have shown, the Aboriginal rights of the Maori include their *taonga* ─ their prized possessions. As the tribunal found, "a river may be a *taonga* as a valuable resource. Its `*mauri*' or `life-force' is another *taonga*." This concept of *taonga*, of

prized possessions treasured by the ancestors, is a vital and central concept not only for the Maori; it also expresses something of great importance for Aboriginal peoples in Canada that would be reflected in the model of retained Aboriginal rights outlined earlier in this paper. The answer to the question, "What are those things treasured by the ancestors that give contemporary shape and meaning to the life of a First Nation?" will help identify the language and form in which Aboriginal rights can be defined in a modern land claims agreement.

In the same way as the life-force in a river is a *taonga* for the Maori, to be respected and protected, so for the Gitksan and Wet'suwet'en the salmon that migrate through and spawn in their rivers and lakes have a life-force that has to be respected and protected. The `first salmon' ceremonies, which the Gitksan and many other Aboriginal peoples practise, reflect a ceremonial and cultural expression of that respect, and Aboriginal peoples see their participation in management of the fisheries as a contemporary expression of their responsibilities to the salmon and the rivers, which have been passed on by their ancestors and cannot be surrendered or extinguished.

While a right to participate in the management of the fisheries can be seen as flowing from the economic significance of the fisheries to Aboriginal peoples, what distinguishes this management responsibility from that exercised by non-Aboriginal governments is the interplay of spiritual, cultural and social relationships that make the salmon not simply an economic resource, not simply an important part of the food chain, but part of a genealogy in which the salmon and the Aboriginal peoples are inseparably linked. When a Gitksan chief is told, upon assuming his or her hereditary title, to "walk slowly on the breath of your ancestors", this entails maintaining respect for the life-forces in the rivers and on the lands of the Gitksan and Wet'suwet'en territories, which is part of the responsibilities inherent in chieftainship. The responsibilities that flow from this respect, which is embedded in a people's language and how they see themselves in the world, cannot be the subject of a right granted by a non-Aboriginal government, which has neither the language nor the culture to express that respect. If we start with the languages of First Nations, however, it is possible to construct language understandable to non-Aboriginal people in which meaning is given to Aboriginal rights and responsibilities that have contemporary references. The work of the Waitangi Tribunal in pouring content into the Maori text of the Treaty of Waitangi illustrates the beginnings of such a bicultural approach.

Although a large number of claims have been filed with the Waitangi Tribunal, New

Zealand has not yet embarked upon anything similar to the comprehensive claims process in Canada. Indeed, members of the Waitangi Tribunal have referred to the Canadian experience of comprehensive claims agreements as being a decade in advance of the situation in New Zealand. However, in one area, that of fishing rights, the New Zealand government has entered into a comprehensive agreement with the Maori in which the question of alternatives to extinguishment is addressed specifically.

One of the issues that has arisen in New Zealand is whether the Treaty of Waitangi is the sole source of Maori fishing rights or whether the treaty is declaratory of existing Aboriginal rights that survive the treaty. In the 1986 case, *Te Weeti*, in considering the proper interpretation of section 88(2) of the *Fisheries Act* of 1983 (which provides that "nothing in this Act shall affect any Maori fishing rights"), Williamson J. held that "the treaty was signed in 1840 but obviously the rights to be protected by it arose from the traditional possession and use enjoyed by Maori tribes prior to 1840".[xxxiv] His Lordship was of the view that the treaty was essentially declaratory of these customary rights and that the rights protected under 88(2) were "Aboriginal title" rather than "treaty rights", in that they were non-exclusive subsistence rights. The decision was important in that it was the first time the doctrine of Aboriginal title had been applied by a New Zealand court and it suggested that rights may exist independent of the treaty unless expressly extinguished by statute. Moreover, these rights would be justiciable, unlike rights arising under the treaty, which required incorporation and recognition in municipal statute law before they could be enforced in the courts.

The issue was discussed further a year later by Greig J. in *Ngai Tahu Maori Trust Board* v. *A.G.*, in which the Maori challenged ─ on the basis that it violated the principles of the Treaty of Waitangi ─ the government's introduction of a quota management system of fisheries under which commercial fisheries would have been allocated to non-Maori. Under this system, individual quotas became the property right of the person to whom they were allocated and could be transferred by sale, lease or licensing. The argument in *Ngai Tahu* was to the effect that fishing rights under the treaty extended beyond subsistence fishing and included some commercial fishing; therefore a quota management scheme that did not take these rights into account contravened the provisions of the treaty. In granting an interim injunction, Greig J. viewed section 88(2) as having a more far-reaching effect than that envisaged in *Te Weeti* of carrying the treaty obligation into municipal law, thus making the right under the treaty

obligation enforceable directly. The effect of this is that section 88(2) would impose an active and enforceable obligation on the Crown to have regard to Maori fishing rights.

The scope of the fishing rights in the treaty was also discussed extensively by the Waitangi Tribunal in its 1988 report on the *Muriwhenua Fishing Claim*. The Tribunal rejected the argument of the Fishing Industry Association that the treaty was merely declaratory of Aboriginal title and that the only rights protected were those in existence in 1840 and were limited to subsistence activity. The Tribunal commented that

> The [Aboriginal rights] doctrine, it was claimed, upheld fishing rights but not exclusive rights, recognized fishing grounds but not zones, and was directed to sustain traditional lifestyles, not to the pursuit of western forms of trade. We were given to understand that the Treaty had therefore to mean the same... The trouble is it doesn't. Among other things `exclusive' would need to be changed and Lord Normanby would need to recall his instructions. He clearly envisaged that Maori would profit from the value and development of those properties they had retained. (*Report of the Waitangi Tribunal on the* Muriwhenua Fishing Claim, 1988 WAI-22.)

Based on extensive evidence placed before the Tribunal of long-standing traditions of customary fishing methods and traditional fishing grounds and the extent to which Maori fishing had been undertaken in coastal waters, the Tribunal concluded that the Maori right to fish, as reflected in the treaty and protected by section 88(2), went well beyond subsistence rights and incorporated a right to the commercial development of the fishery.

The Tribunal found that the Crown must "bargain for any public right to the commercial exploitation of the in-shore fisheries" and that the quota management system was in fundamental conflict with the treaty's principles and terms because it apportioned to non-Maori Zealanders the "full, exclusive and undisturbed possession of the property and fishing that to Maori was guaranteed by the Treaty". The Tribunal went on to say that the quota management system need not be in conflict with the treaty and could be beneficial to both parties if some arrangement or agreement could be reached between the Crown and the Maori.

The litigation concerning the interpretation and application of section 88(2) and the recommendations of the Waitangi Tribunal in the Muriwhenua claim led to the 1989 enactment of the *Maori Fisheries Act*, which was designed to provide an interim solution to the fisheries dispute. Under the Act, ten per cent of commercial fishing quotas for each species were to be assigned to the Maori over four years, and ten million dollars was to be provided to assist Maori participation in the commercial fishery industry. The Act also contained the first statutory

incorporation into municipal law of an element of the Maori text of the treaty, in that it provided expressly that the Act was intended to make "better provision for the recognition of *rangatiratanga* [chiefly authority] and of the right in relation to fisheries as secured by Article II of the Treaty". The Act created a Maori Fisheries Commission which, in discharging its terms of reference in allocating quotas and assistance to Maori, is required to have regard to Maori custom and economic and social considerations. In establishing *taiapure* [local fisheries] the legislation seeks to provide a mechanism by which fishing areas linked to particular *iwi* [tribes] and *hapu* [sub-tribes] could be controlled by those Maori most closely connected with the fisheries.[xxxv]

The ten per cent quota levels established by the *Maori Fisheries Act* were not seen by the Maori as a sufficient recognition of their treaty rights, and there was further litigation before the courts. In the 1992 decision in *Te Runanga o Muriwhenua* v. *A.G.*, the president of the Court of Appeal, Sir Robin Cook, in an interlocutory judgement, stated that the expression "Maori fishing rights" in section 88(2) of the *Fisheries Act* 1983 was a reference to treaty rights but that the application of those rights requires that "the realities of life in present day New Zealand" be taken into account in a "balancing and adjusting exercise". His Honour thought that

> The question becomes whether the provisions of the *Maori Fisheries Act* 1989 are a sufficient translation or expression of traditional Maori rights in present day circumstances. (*Te Runanga o Muriwhenua* v. *A.G.*, Judgement of the Court of Appeal, 22 February 1990, at 38.)

His Honour went on to state that

> The *Maori Fisheries Act* 1989 might be seen as an interim measure, planned to operate until at least 1993, and thereafter falling for review if necessary in the light of experience of its working in the meantime... So far as it goes, the 1989 Act is a significant advance. Possibly the Treaty and the statutes are met by this step at this stage ─ provided that it is plain to all concerned that...it is not necessarily an ultimate solution." (at 39.)

Following the release of the Court of Appeal judgement, the Maori and the Crown agreed that there should be discussions between them to ensure that the evolution of the quota management system, including the term of quota, met both conservation and Treaty of Waitangi principles. They agreed further that all court proceedings should stand adjourned to allow discussions to continue. The Crown agreed that no further species would be brought within the quota management system pending agreement or court resolution. In August of 1992 representatives of the Crown and Maori met to discuss their differences with a view to settling

outstanding claims and treaty grievances in relation to fisheries; on August 27 an agreement was reached on a proposal for settlement. The preamble to the resulting Deed of Settlement provides as follows:

A. By the Treaty of Waitangi the Crown confirmed and guaranteed to the Chiefs, Tribes and individual Maori full, exclusive and undisturbed possession and *te tino rangatiratanga* of their fisheries;

B. Section 88(2) of the *Fisheries Act* 1983 provides: "nothing in this Act shall affect any Maori fishing rights";

C. There has been uncertainty and dispute between the Crown and Maori as to the nature and extent of Maori fishing rights in the modern context as to whether they derive from the Treaty and/or common law (such as by customary law, Aboriginal title or otherwise) and as to the import of section 88(2) of the *Fisheries Act* 1983 and its predecessors;

D. Maori have claimed in proceedings in the High Court and in various claims to the Waitangi Tribunal that the Quota Management System introduced by legislation in 1986 is unlawful and in breach of the principles of the Treaty of Waitangi or has no application to Maori fisheries including commercial fisheries and obtained interim relief from the High Court and Court of Appeal declaring that the Crown ought not take further steps to bring the fisheries within the Quota Management System;

E. At a national *hui* [traditional meeting] in June 1988 at Wellington the Maori principals were given a mandate by Maori claiming rights and interests in the fisheries of New Zealand to secure a just and honourable settlement of the claims with the Crown;

F. On 20 December 1989 Parliament enacted and brought into force the *Maori Fisheries Act* 1989, one purpose of which is `to make better provision for the recognition of Maori fishing rights secured by the Treaty of Waitangi.' The Act provided that quota totalling ten percent of the total allowable commercial catches for all species then subject to the QMS should be transferred by the Crown to the Maori Fisheries Commission created under that Act in instalments over the period to 31 October 1992;...

H. There remain disputes between Crown and Maori as to the nature and extent of Maori fishing rights and interests and their status and the litigation between the plaintiffs and the Crown are still outstanding;...

J. The Crown and Maori wish to resolve their disputes in relation to the fishing rights and interests and the Quota Management System and seek a just and honourable solution in conformity with the principles of the Treaty of Waitangi;

K. The Crown recognizes that traditional fisheries are of importance to Maori and the Crown's treaty duty is to develop policies to help recognize use and management practices and provide protection and scope for exercise of *rangatiratanga* in respect of traditional fisheries;

L. The Crown and Maori wish by entering into this settlement deed to affirm that they consider the completion and performance of this Settlement Deed to be of the utmost importance in the pursuit of a just settlement of Maori fishing claims;

M. The Crown and Maori wish to express their mutual and solemn acknowledgement

> that the settlement evidence by this Settlement Deed marks the resolution of an historical grievance. (Deed of Settlement, 23 September 1992.)

Under the terms of the settlement, now commonly referred to as the Sealord Agreement, the Crown will pay the Maori, in three yearly instalments, a total of one hundred and fifty million dollars to be used for the development and involvement of Maori in the New Zealand fishing industry, including the acquisition of a half-share in a major fishing business (Sealord Fisheries) with about twenty-five per cent of all commercial fish quota. The Crown undertakes to introduce legislation authorizing allocations of twenty per cent of any new quota issued as a result of extending the quota management system to fish species not included as of the settlement date to the Maori Fisheries Commission for distribution to Maori. The Crown undertakes also to cause Maori to participate in the fisheries statutory bodies, so as to reflect the special relationship between the Crown and Maori, and will introduce legislation amending the *Maori Fisheries Act* to reconstitute the Maori Fisheries Commission as the Treaty of Waitangi Fisheries Commission, which will be accountable to Maori as well as to the Crown in order that Maori have better control of their fisheries guaranteed by the treaty. The Crown will repeal section 88(2) of the *Fisheries Act* and at the same time amend the Act to empower the making of regulations "recognizing and providing for customary food gathering and the special relationship between the *tangata whenua* [the people of the land ─ the Maori people] and those places which are of customary food gathering importance...to the extent that such food gathering is not commercial...".

In return, the Maori endorse the quota management system and acknowledge that it is a lawful and appropriate regime for the sustainable management of commercial fishing in New Zealand, agree to discontinue the fisheries litigation, and undertake not to recommence proceedings in respect of the fishing rights and interests.

The Deed of Settlement contains two provisions dealing with the issue of extinguishment of fishing rights:

5.1 **Permanent Settlement of Commercial Fishing Rights and Interests**

> Maori agree that this Settlement Deed, and the settlement it evidences, shall satisfy all claims, current and future, in respect of, and shall discharge and extinguish, all commercial fishing rights and interests in Maori whether in respect of sea, coastal or inland fisheries (including any commercial aspect of traditional fishing rights and interest), whether arising by statute, common law (including customary law and Aboriginal title), the Treaty of Waitangi, or otherwise, and

whether or not such rights or interests have been the subject of recommendation or adjudication by the Courts or the Waitangi Tribunal.

5.2 **Non-Commercial Fishing Rights and Interests**

The Crown and Maori agree that in respect of all fishing rights and interests of Maori other than commercial fishing rights and interests their status changes so that they no longer give rise to rights in Maori or obligations on the Crown having legal effect (as would make them enforceable in civil proceedings or afford defences in criminal, regulatory or other proceedings). Nor will they have legislative recognition. Such rights and interests are not extinguished by this Settlement Deed and the settlement it evidences. They continue to be subject to the principles of the Treaty of Waitangi and where appropriate give rise to Treaty obligations on the Crown. Such matters may also be the subject of requests by Maori to the Government or initiatives by Government in consultation with Maori to develop policies to help recognize use and management practices of Maori in the exercise of their traditional rights.

The intent and effect of section 5.2 are far from clear. Indeed, in court proceedings initiated by some Maori opposed to the Sealord Agreement, the president of the New Zealand Court of Appeal, after referring to the "apparently conflicting provisions about customary or traditional food gathering, some speaking of regulations to recognize and provide for this, others seeking to say that there will no longer be any legislative or regulatory recognition", went on to state that the deed was "a most unusual documents and, perhaps even designingly, obscure in some major respects".[xxxvi]

The intent and effect of section 5 of the Deed of Settlement are set out more clearly in the *Treaty of Waitangi (Fisheries Claims) Settlement Act* 1992 which gives legislative sanction to the Deed of Settlement. Section 9 of the Act provides as follows:

9. Effect of Settlement on commercial Maori fishing rights and interests ─
It is hereby declared that─

(a) All claims (current and future) by Maori in respect of commercial fishing─
(i) Whether such claims are founded on rights arising by or in common law (including customary law and Aboriginal title), the Treaty of Waitangi, statute, or otherwise; and
(ii) Whether in respect of sea, coastal, or inland fisheries, including any commercial aspect of traditional fishing; and
(iii) Whether or not such claims have been the subject of adjudication by the courts or any recommendation from the Waitangi Tribunal, ─ having been acknowledged, and having been satisfied by the benefits provided to Maori by the Crown under the Maori Fisheries Act 1989, this Act, and the Deed of Settlement referred to in the Preamble to this Act, are hereby finally settled; and accordingly
(b) The obligations of the Crown to Maori in respect of commercial fishing are hereby fulfilled, satisfied, and discharged; and no court or tribunal shall have jurisdiction to

inquire into the validity of Maori in commercial fishing, or the quantification thereof, the validity of the Deed of Settlement referred to in the Preamble to this Act, or the adequacy of the benefits to Maori referred to in paragraph (a) of this section; and

(c) All claims (current and future) in respect of, or directly or indirectly based on, rights and interest of Maori in commercial fishing are hereby fully and finally settled, satisfied, and discharged. (*Treaty of Waitangi (Fisheries Claims) Settlement Act*, 1992, section 9.)

Section 9, while acknowledging Maori claims founded on rights of commercial fishing, provides that both these claims, together with Crown obligations to Maori in respect of commercial fishing, are satisfied by the benefits provided under the *Maori Fisheries Act* and the Deed of Settlement and are "finally settled", and that all Maori claims based on rights and interests in commercial fishing, as well as the obligations of the Crown to Maori in respect of commercial fishing, "are hereby fulfilled, satisfied, and discharged". Of particular interest, based upon Maori objections, is that the language of section 5.1 of the Deed of Settlement ─ that the Deed "shall discharge and *extinguish* all commercial fishing rights" ─ is not repeated in the legislation. This suggests that the language of extinguishment in the Deed is legally unnecessary. Also, neither the Deed nor the legislation uses the traditional North American language of surrender and cession of rights to the Crown. This is important because it demonstrates that effecting a final settlement that takes the form of exchanging Aboriginal and treaty commercial fishing rights for legislatively defined rights can be accomplished without the language of surrender and extinguishment. However, because section 9, like the Canadian agreements in the Northwest Territories, exchanges Aboriginal and treaty rights for rights granted by the state, it can be ─ and to many Maori is ─ regarded as a kinder and gentler form of extinguishment.

Section 9 deals with Maori commercial fishing rights and interests. Section 10 of the settlement legislation addresses the effect of the settlement on non-commercial fishing rights:

10. Effect of Settlement on non-commercial Maori fishing rights and interests ─ It is hereby declared that claims by Maori in respect of non-commercial fishing for species or classes of fish, aquatic life, or seaweed that are subject to the Fisheries Act 1983 ─

(a) Shall, in accordance with the principles of the Treaty of Waitangi, continue to give rise to Treaty obligations on the Crown; and in pursuance thereto

(b) The Minister, acting in accordance with the principles of the Treaty of Waitangi, shall ─

(i) Consult with tangata whenua [people of a given place] about; and

(ii) Develop policies to help recognize ─

use and management practices of Maori in the exercise of non-commercial fishing rights; and

(c) The Minister shall recommend to the Governor-General in Council the making of regulations pursuant to section 89 of the Fisheries Act 1983 to recognize and provide for customary food gathering by Maori and the special relationship between tangata whenua

and those places which are of customary food gathering importance (including tauranga ika and mahinga mataitai), to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade; but

(d) The rights or interests of Maori in non-commercial fishing giving rise to such claims, whether such claims are founded on rights arising by or in common law (including customary law and Aboriginal title), the Treaty of Waitangi, statute, or otherwise, shall henceforth have no legal effect, and accordingly ─

(i) Are not enforceable in civil proceedings; and

(ii) Shall not provide a defence to any criminal, regulatory, or other proceeding, ─

except to the extent that such rights or interests are provided for in regulations made under section 89 of the Fisheries Act 1983. (Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, section 10.)

Section 10 of the settlement legislation, as with section 5.2 of the Deed of Settlement, is intended to be an affirmation of Maori non-commercial fishing rights. As such, it offers a New Zealand model of an alternative to extinguishment. It must be recognized, however, that the affirmation of non-commercial fishing rights in the Deed of Settlement and section 10 takes place within a framework that would see the scope and content of these rights, and the management regime within which they would be exercised, being defined through legislation and government regulation. Quite clearly the purpose of section 10 in excluding judicial enforceability of any non-commercial fishery rights and interests, except to the extent that such rights and interests are provided for in legislation and regulations, is to avoid the litigation that characterized the commercial fishery dispute before the Deed of Settlement.

It would seem, however, that judicial intervention is not completely pre-empted in so far as it is provided that non-commercial fishing rights continue to give rise to treaty obligations binding on the Crown; therefore, if the Crown in enacting regulation did not take these principles properly into account, this could be the subject of court challenge. Further, the minister of fisheries is required to act in accordance with the principles of the treaty in consulting with the Maori and developing policies for the management regime of non-commercial fishing rights. A failure to observe these principles would also be justiciable. Furthermore, it would appear that while non-commercial fishing rights are not enforceable in the court (except to the extent they are provided for in the regulations), they could still be the subject of claims before the Waitangi Tribunal. This is in contrast to the situation for commercial fishing rights, because the settlement legislation provides specifically that the Tribunal shall no longer have jurisdiction to make any finding or recommendation in respect of commercial fishing.

The resolution of the Maori fisheries claim bears the hallmark of the distinctive New Zealand interplay between the Waitangi Tribunal, the courts and the legislature and the revitalization of the Treaty of Waitangi. In the Canadian context it is unlikely that First Nations would allow the definition of fishing and other resource rights and the shaping of management regimes to be left to government regulation, or that they would accept such a broad exclusion of justiciability. The Canadian experience with the comprehensive land claims settlements signed so far has proceeded ahead of New Zealand in defining both the content and management context of harvesting rights. Moreover, in the Canadian process of settlement, and in the model I have suggested, recognition and the contemporary definition of Aboriginal rights will take place within the framework of negotiated land claims agreements.

There is one final point to be made regarding the relevance of the recent New Zealand experience with the Sealord Agreement in the search for Canadian alternatives to extinguishment. The agreement has given rise to considerable divisiveness among Maori. This was caused in part by the speed with which the Deed of Settlement was signed and ratified, due in large measure to the fact that shares in the Sealord company had been put up for sale and, if not taken up by Maori as part of the agreement, would likely have been sold (along with the 26 per cent of all commercial fish quota) to overseas purchasers. As the president of the Court of Appeal observed, "the Sealord opportunity was a tide which had to be taken at the flood".[xxxvii] But many Maori were concerned not only about the speed with which the process of settlement was reached but also about the substance of the agreement, in particular that Maori rights to commercial fisheries under the Treaty of Waitangi were made the subject of a final settlement and were deemed to be "discharged and satisfied", giving rise to no further legal enforceable obligations. The realization that this was extinguishment under another name has given rise to considerable concern that future generations of Maori may have been deprived of their treaty rights by the sealed agreement. In July 1993, at the eleventh session of the UN Working Group on Indigenous Peoples in Geneva, a representative of the National Maori Congress explained the divisive consequences of the Sealord Agreement.

> Early this year, the South Island tribes completely withdraw from Congress indicating (amongst other things) their protest over public comments made by Congress denouncing the `Sealords Fisheries deal' as a breach of the Treaty of Waitangi. While some would promote the view that Sealords was a positive attempt at reaching a mass treaty settlement of fisheries claims, there are many others who consider that the price paid in treaty terms was too high. Amongst the Congress membership, there were both supporters

> and non-supporters of the agreement. Overall, however, Congress members were not satisfied with the integrity of the agreement or the process used to obtain `free and informed consent'.
>
> The name Sealords will forever be an emotionally-charged word in our vocabulary. Sealords has set treaty settlement standards which deserve very careful consideration. It assumes, inter alia, the following:... ─ that this generation has a right to bind future generations to inherit as their circumstances an inability to lodge treaty fisheries claims...
>
> For those who witnessed the actual signing of the Sealords Agreement, it was both poignant, exciting and tragic. Our Kaumatua elders were bused and flown into Wellington from all parts of the country, made to wait in the lobby of Parliament all day and very late in the afternoon were presented with a verbal report on the final outcome of the negotiations with the Crown. Without actual copies in their hands, they were asked to sign and many did, and have subsequently been challenged by their communities for signing without consulting with their own local people. Sealords has simply shifted the consideration of both the treaty right to fisheries and the resultant human rights issues away from the Waitangi tribunal to the courts.
>
> Government is now moving towards a similar mass-settlement approach to outstanding treaty land claims. Congress is concerned that the process will cause even further divisiveness amongst our members. (Statement of National Maori Congress, International Committee, July 1993, Geneva, Switzerland.)

In another commentary, the implications of the agreement ─ giving up Maori rights of self-government in relation to the fisheries ─ are also identified as deeply troublesome:

> The land marches of this century may become fish marches in the future if new generations of Maori demand the return of tino rangatiratanga [chiefly authority] over their seas...
>
> Tino rangatiratanga over fisheries means more than just a property right. It involves control of the fishery and guardianship for future generations. Dissenting iwi [tribes] say all these principles are threatened in the Sealord deal so a `full and final settlement' is an absurd notion. ("Who are the Sea Lords Now?", *Mana* No. 1 [Jan./Feb. 1993], pp. 26-27.)

The grave concern about the implications for future generations of agreements that surrender and extinguish Aboriginal and treaty rights has already sowed the seeds of divisiveness among First Nations in Canada. In the Northwest Territories the federal government's insistence on extinguishment clauses in land claims agreements has led to a fragmentation of the original unified position of the Dene Nation, as reflected in the Dene Declaration and the proposed Dene Agreement in Principle. This not only has undermined the strength of their bargaining position but has negative effects on the collective struggle of the Dene toward decolonization.

One of Canada's most thoughtful and influential Aboriginal statesmen, the late George

Manuel, who as the first President of the World Council on Indigenous Peoples had both a national and an international perspective, would no doubt have seen developments in the Northwest Territories and New Zealand, provoked by the demands of governments for extinguishment and surrender of rights, as strongly supportive of his abiding belief that it was far better to pass on to the next generation the struggle for the recognition of their Aboriginal rights than to pass on a final settlement that deprived them of their inheritance.

An International Law Perspective on the Resolution of Land Claims

It is fitting that this last section of the paper addresses contemporary developments in international law and their relevance to a model of land claims settlement built upon retained Aboriginal rights. The United Nations proclaimed 1993 as the International Year of Indigenous People. It followed the celebratory activities ─ understandably disavowed by Indigenous peoples themselves ─ that marked the five-hundredth anniversary of Christopher Columbus's first voyage to the Americas. Significantly, the first legal discourse on the relationship of international law to the rights of Indigenous peoples can be traced to events following that voyage.

The treatment of the Indigenous peoples of the Americas by the early Spanish colonizers provoked intense debate regarding the legal and moral legitimacy of colonization. One of the principal protagonists in that debate was Francisco De Victoria. In his treatise, "On the Indians Lately Discovered", published in 1532, he developed as part of international law some of the basic principles of Aboriginal rights. De Victoria asserted that the original inhabitants of the Indies possessed natural, legal rights as free and rational persons. By virtue of these natural rights they "were true owners, alike in public and in private law, before the advent of the Spaniards among them". Furthermore, "Just like Christians...neither their princes nor private persons could be despoiled of their property" without just cause.[xxxviii] The principles developed by Victoria ─ (1) that Aboriginal peoples have legal rights to their lands, and (2) that these are pre-existing rights that survive the assertion of European sovereignty ─ were affirmed as common law principles by the U.S. Supreme Court in the nineteenth century (in *Worcester* v. *Georgia*, 1832) and in this century by the Privy Council (in *Amodu Tijani* v. *Southern Nigeria*, 1921) and the Supreme Court of Canada (in *Guerin*, 1984).

Therefore, although there is a long history connecting Aboriginal rights to principles of international law, it is fair to say that, as a result of the ideological and economic impact of

colonialism, the development of international law became concerned increasingly with the relationship between the colonizing states themselves, while the rights and interests of indigenous populations became re-characterized as a `domestic concern'. It is only within the last twenty years that the rights of Indigenous peoples have re-emerged on the international law agenda. Charting the course of that re-emergence demonstrates its importance in conceptualizing new models for lands claims agreements within Canada.

The re-emergence of indigenous rights as a concern of international law has taken place in the context of the post-Second World War recognition and protection of human rights under the aegis of the United Nations. In highly significant ways, however, this re-emergence, while a product of this process, is also a response to the limitations of such an approach for Indigenous peoples. The international formulations of standards of human rights, including the Universal Declaration of 1948, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights of 1966, focus principally on the rights of the individual within the classical liberal rights theory of western law. The assumption behind these declarations has been that group rights would be taken care of automatically as a result of protecting the rights of individuals. Even though these covenants generally guarantee the right of peoples to self-determination and assure to persons belonging to ethnic, religious or linguistic minorities their rights to enjoy their own culture, religion and language, under the Optional Protocol to the International Covenant on Civil and Political Rights, the principal forum for enforcement of the covenants ─ the Human Rights Committee ─ has jurisdiction to deal only with communications from individuals.[xxxix]

Professor Ian Brownlie has described the limitation of the classical formulations of human rights standards, based upon the model of protecting individual rights in addressing collective or group rights.

> Certain claims by groups which are not on their face unreasonable have involved subject matters not adequately covered by the usual prescriptions for individuals... [One] type of claim involving group rights is the claim to have adequate protection of land rights in traditional territories. The view that in certain societies there is a special connection between the people and the lands and waters of a region was articulated in the course of the Mackenzie Valley Pipeline Inquiry by the communities affected, and accepted by the Report compiled by the Commissioner, Mr. Justice Thomas R. Berger, and published in 1977. That is not, of course, the end of the matter, since the land rights question may, and usually does, involve issues of title, historic justice and restitution. The central point, however, is the claim of rights directly related to exclusive rights in respect of specific

> areas. This sets the land rights issue, and the concept of traditional ownership of a group, apart from the usual prescription of human rights on the basis of individual protection. (Ian Brownlie, *Treaties and Indigenous Peoples* [Oxford: Clarendon Press, 1992], p. 39.)

Professor Brownlie draws upon the Australian experience to demonstrate how Aboriginal land rights legislation may be in danger of falling afoul of human rights obligations arising under major international conventions. In *Gerhardy* v. *Brown*,[xl] the issue was the meaning of discrimination under the *Commonwealth Racial Discrimination Act* of 1975, which implements the International Convention on the Elimination of All Forms of Racial Discrimination of 1966. Section 8 of the Act exempted its application to "special measures" under article 1, paragraph 4 of the Convention. That article provides:

> 4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

At issue in *Gerhardy* v. *Brown* was whether the access to land provisions of the *Pitjantjatjara Land Rights Act* of 1978 were racially discriminatory under the Commonwealth Act and the Convention. Their effect was to prevent any person other than a Pitjantjatjara entering Pitjantjatjara lands in South Australia without a permit. The High Court of Australia held that there was no conflict between the Land Rights Act and the Commonwealth Act on the ground that the Act, including its permit provisions, was a "special measure" within the meaning of article 1, paragraph 4 of the Convention and section 8 of the Act. However, the Court held that but for article 1, paragraph 4, the provisions would have been discriminatory because they made a distinction between Pitjantjatjara and non-Pitjantjatjara based on membership in a race. The Court rejected the argument that the Act principally recognized traditional Aboriginal ownership and gave it effect within the general legal system and was therefore not discrimination based on race.

The *Gerhardy* case has been criticized for its approach to the definition of discrimination and the fact that the Court did not consider whether the differentiation between Pitjantjatjara and non-Pitjantjatjara had a reasonable cause related to a legally relevant basis for differential treatment, specifically the recognition of the traditional ownership rights of a distinctive tribal

group.[xli] Even though the land rights legislation was upheld as "a special measure", this approach to the issue of indigenous land rights is premised upon securing "adequate advancement" for "groups requiring protection", and these measures are seen in the nature of affirmative action to remain in place only until the protected group is assured equal enjoyment or exercise of individual human rights. There is scant recognition within this concept for the acknowledgement of indigenous rights as themselves a form of human rights distinctive to indigenous populations based on their historical, cultural and economic relationship to their territories.

Since 1971 there has been increasing understanding of the distinctive concerns of Indigenous peoples and the different approaches this requires in the conceptualization of human rights. In that year the United Nations Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed a special rapporteur to study the problem of discrimination against indigenous populations. The special rapporteur, Mr. Martinez Cobo, presented his report in 1983, highlighting the need to approach the question of indigenous rights from the perspective of collective, rather than individual rights and the importance of recognizing both political rights of self-determination and land rights. In the view of the special rapporteur,

> Self-determination in its many forms must be recognized as the basic pre-condition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own fate...
>
> It must be recognized that indigenous peoples have a natural and inalienable right to retain the territories they possess, to call for the return of land of which they have been deprived and to be free to decide as to their use and development. (J.M. Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, UN Doc. E/CN.4/Sub 2/1986/Add 1-4.)

In 1982 the United Nations Economic and Social Council authorized the Sub-Commission to establish a Working Group on Indigenous Populations. The Working Group is composed of five members of the Sub-Commission. Its mandate is in two parts:

1. To review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations...to analyze such materials, and to submit its conclusions to the Sub-Commission, and

2. To give special attention to the evolution of standards concerning the rights of indigenous populations, taking account of both the similarities and differences in the situations and aspirations of indigenous populations throughout the world.

In 1987 Madam Erica Daez of Greece, a professor of international law and the chair/rapporteur of the Working Group, was authorized to prepare a draft Universal Declaration on the Rights of Indigenous Peoples. Madam Daez tabled a draft of the declaration in 1988; it has been since revised and rewritten by the Working Group. In a manner unique in international institutions, delegates from Indigenous peoples throughout the world participate in the two-week annual sessions of the Working Group on an equal footing with the representatives of governments. At its eleventh session in 1993, the Working Group approved a final draft of the Declaration, which has now been referred to the Sub-Commission.

Because the central purpose of the draft Declaration is to provide minimum universal standards pertaining explicitly to the human rights of Aboriginal peoples, it provides a principled framework against which national policies and laws can and must be measured. Several provisions of the draft Universal Declaration on the Rights of Indigenous Peoples have a direct bearing on the subject matter of this paper. They are set out below:

> *Recognizing* the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies...
>
> *Considering* that treaties, agreements and other constructive arrangements between States and indigenous peoples continue to be matters of international concern and responsibility...
>
> *Believing* that this declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field.
>
> *Solemnly proclaims* the following United Nations Declaration on the Rights of Indigenous Peoples.
>
> **Article 25**
>
> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.
>
> **Article 26**
>
> 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 and fauna and other resources which they have traditionally owned or 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.

Article 33

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards. (Draft Universal Declaration on the Rights of Indigenous Peoples, in *Discrimination Against Indigenous Peoples: Report of the Working Group on Indigenous Populations on Its Eleventh Session*, E. Daez, Chairperson/Rapporteur, E/CN.4/Sub 2/1993/29, 23 August 1993.

What we see reflected in these provisions are Indigenous peoples' own conception of their rights expressed as "the right to maintain and strengthen their distinctive spiritual and material relationship" with their territories, coupled with recognition of their own laws, land-tenure systems and institutions for land and resource management. It is precisely this model of recognition that I advocated in Part 2 of this paper. In stark contrast, a land claims policy that countenances the extinguishment of those rights that are central to the maintenance and strengthening of Aboriginal peoples "distinctive spiritual and material relationship" with their territories runs counter to the minimum universal standards reflected in the draft Declaration. By building upon a model of recognition, Canada will not only be pursuing a path being advanced as a contemporary statement of international law but will in the process be providing the measure by which other Indigenous peoples may appeal to their governments for the recognition of their rights.

There is one other important initiative emanating from the United Nations that in many ways parallels and complements the work being done on the draft Universal Declaration on the Rights of Indigenous Peoples. In 1988 the Economic and Social Council, on the recommendation of the Commission on Human Rights, appointed Mr. Miguel Alfonso Martinez (a member of the Working Group) as special rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, with the mandate to prepare an outline of a study on the potential utility of treaties, agreements and other constructive arrangements between indigenous populations and governments for the purpose of ensuring the promotion and protection of the human rights and fundamental freedoms of indigenous populations. Mr. Martinez, in preparing his outline, had this to say about the purpose and utility of such a study.

The ultimate purpose of the study is to offer elements concerning the achievement, on a

> practical level, of the maximum promotion and protection possible, both in domestic and international law, of the rights of indigenous populations and especially of their human rights and fundamental freedoms.
>
> To be precise, the Special Rapporteur conceives this study as a possible contribution to a most significant multi-faceted process currently taking place in the world today, both at the State level and at the international level (bilateral or multi-lateral). This process is advancing towards the creation of juridical standards negotiated and approved by the interested parties and aimed at promoting and protecting more effectively all rights and liberties of indigenous populations, in order to secure solid, durable and equitable bases for the current and, in particular, future relationships between these populations and States. (Sixth Report of the Working Group on Indigenous Populations, E/CN.4/Sub 2/1988/24, 24 August 1988, Annex III, p. 3.)

In 1989 Mr. Martinez was given a mandate to undertake the study. His first progress report of 25 August 1992 addresses several of what he regards as critical considerations relevant to his study. Because those same considerations are also critical to the issues in this paper, they bear close scrutiny.

At the very outset of his progress report, Mr. Martinez articulates the importance of understanding the treaty-making process within a bilateral and bicultural framework and the impediments to the development of that framework, having regard to the inherent biases of the one-dimensional and Eurocentric analyses that are the legacy of colonialism.

> This legacy from the colonial period is still very much present in numerous studies in this field and constitutes the basic problem of academic anthropology, whose substance is determined and nursed both by those historical conditions present at its emergence and the Western intellectual tradition and ideology. In this connection, it should be noted that the most notable paradox of academic, scientific anthropology resides, precisely, in its claim to universality while actually being partial. This is due to the inherent partial nature of all specific anthropological discourses designed by living societies so as to conceptualize their own vision of human-kind, human sociability and spirituality as well as the place of human beings in nature...
>
> For this reason, all attempts to explore and understand the motivations, constructions and aspirations of indigenous peoples with respect to juridical manifestations such as treaties, agreements and other consensual arrangements must be done in the light of what has been termed as `contemporary epistemological awareness', which favours a decentered view on culture, society, law and history.
>
> Also needed, in this respect, are scientific contributions which start from the basis that each society/culture has its own rationality and coherence in terms of which its modes of thought and action must be interpreted.
>
> It goes without saying that this contemporary epistemological awareness is a prerequisite

> for attaining the pluralistic dimension conceived by the Special Rapporteur as inherent in this study. (Miguel Alfonso Martinez, *First Progress Report*, E/CN.4/Sub 2/1992/32, 25 August 1992, paras. 32-40.)

The Special Rapporteur identifies in particular the need to approach the analysis of treaties and agreements with Indigenous peoples within a framework that recognizes the existence of legal and social systems other than those of the modern state.

> In light of the objectives assigned to this study, a major challenge is thus to gain an understanding about legal systems of entities other than the modern state.
>
> While political anthropology has fostered reflection on the evolution and destiny of the State, legal anthropology has questioned the reduction of the state of law to the law of the State. Hence, their importance for issues of particular relevance to the study and to the Special Rapporteur's work toward a better understanding of indigenous political and legal systems; in particular, of traditional ways of assuming obligations, exercising societal authority and interpreting their own norms and customs and the provisions of treaties and other juridical instruments... On this premise, and given the prevalence of knowledge about the dominant State-based system, the specific indigenous conceptions of time and space, of the individual and the group, of their relationship with the land and, last but not least, of the significance and the role of authority and law, merit a most serious review. (Martinez, *First Progress Report*, paras. 77, 80.)

In his progress report, Mr. Martinez considers some of the essential differences between indigenous discourses on these matters and those of the modern, western, state-based societies. Some of these differences are those I identified earlier in this paper. The importance of Mr. Martinez's articulation is that it demonstrates the need for international law standards and domestic agreements that are intended to reflect those standards, that recognize and respect the different ways Indigenous peoples conceive of their place in the world. Mr. Martinez's statement of the differences in relation to the origins of law, the concepts of time and indigenous relationships to land are worth repeating.

> ...Modern society can perceive the individual as the maker of the law, thus affirming humanity's power over law... Traditional societies, however, tend to see themselves as heteronomous...conceiving of an ideal order instituted by a non-human instance (whether deity or spiritual being), they affirm that their foundation lies outside of society itself, hence the impossibility of a division between the visible and the invisible world, as well as the prevalence of custom in its prescriptive sense ─ the re-enactment, from generation to generation, of what is considered to be true because it has passed the test of time.
>
> The concept of time is therefore another important element distinguishing modern from traditional discourses on human-kind, especially the role attributed to myths in making the world intelligible (or `prefiguring' it) through classifications based on metaphors and

> analogies. Here, respect for tradition expresses a concept of time undivided. Indeed, the notion of progress inherited from Western Enlightenment philosophy is based on the assertion that the past is different from the present and future, and that the future is intrinsically better than the past and present. However, and for most obvious reasons, such notions are far from self-explanatory and have yet to be accepted by many indigenous peoples...
>
> It has often been stated that indigenous peoples ignore notions of appropriating or alienating land. Indeed, the prevalence of the principle of land guardianship over that of its ownership (in the established legal sense) must be accounted for when discussing indigenous forms of land occupancy and land use ─ without succumbing, however, to vague references to `primitive communism'.
>
> While traditional culture/societies tend to consecrate and to socialize the land (whereas modernity views it as a simple commodity) it should be stressed that the absence of a system of private land holdings does not equal some sort of primeval collectivism. The latter term is too imprecise (and too tainted by early evolutionist thinking) to express the intricate modalities of indigenous land use...
>
> Contrary to Western notions of land ownership, traditional societies tend to model their forms of land use on their social relations. Thus, they do not conceive (as in modern Western legislation) of an objective link between owner and property. Such a conception is further contradicted by the spiritual relationship which for most indigenous peoples exists between human beings, the natural and the supernatural world.
>
> Finally, in this connection, the principle of reciprocity...should be taken into account, due to the bilateral nature of the juridical instruments under study. (Martinez, *First Progress Report*, paras. 83-84, 90-91, 94-95.)

In understanding the indigenous discourse on treaties and other arrangements, the Special Rapporteur calls special attention to questions of indigenous protocol regarding encounters and dealings with outsiders, indigenous modes of accommodating outsiders or newcomers, and the importance of the oral transmission of history, which allows us to reconstruct the purposes and understanding of treaties from the indigenous perspective. Finally, in a related point, the Special Rapporteur alerts us to the need "to bear witness to the ways in which indigenous peoples conceive of their own histories as well as the fundamental role of elders and traditional leaders in transmitting and interpreting such historical knowledge". (paras. 106 and 113)

Martinez's articulation of the crucial importance of constructing a framework for the analysis of treaties and agreements that incorporates the experience and understanding of Indigenous people reflects the same critical inquiry that I have suggested must be the model for building modern bridges of accommodation in comprehensive land claims agreements in

Canada. By bearing witness in comprehensive agreements to the ways in which Indigenous peoples conceive of their own histories, by defining Aboriginal rights to land in ways that respect Indigenous peoples' relationships to their territories, by affirming contemporary forms of reciprocity and sharing of lands and resources, and by providing for the exercise of indigenous diplomatic protocol, Canadian land claims agreements as modern treaties will place Canada firmly on the path along which evolving standards of international law are progressing.

Conclusion

The concept of extinguishment ─ the legal counterpart to a cluster of discredited social and intellectual theories that have discriminated against Aboriginal peoples ─ has played a central role in their dispossession not only in Canada but in other parts of the world. Its pervasive historical and legal inexorability have for too long all but eclipsed any alternative vision of a different foundation upon which a new relationship between Aboriginal peoples and non-Aboriginal governments can be built. Alternative visions of recognition and respect are, however, possible once we acknowledge and respect the fact that Aboriginal rights are not vestigial remnants of lost cultures but are central to the way Aboriginal peoples see their place in the world; while grounded in histories from past millennia, they have contemporary meaning and constitute the inheritance of future generations. The shift from extinguishment to recognition and respect for Aboriginal rights is not simply one of moral imperative. Section 35 of the *Constitution Act* recognizes and affirms Aboriginal rights, the very antithesis of their extinguishment. The evolving international human rights standards reflected in the draft declaration on indigenous rights points unequivocally toward recognition and unambiguously condemns the policies of extinguishment and all that they represent.

In this paper I have tried to rise to the challenge of providing the legal contours of a new model of recognition for land claims agreements and modern treaties, one in which the concept of extinguishment is exiled from the negotiating table and the final text. I have suggested that we stand in need of bridges of accommodation upon which to lay the secure foundation of agreed definitions of a broad spectrum of Aboriginal rights, the content of which will reflect the relationship of Aboriginal peoples to all of their territories and the range of rights and responsibilities they will continue to have in different parts of those territories. I have mentioned that this accommodation must take into account the historical and contemporary realities of

non-Aboriginal settlement and development, the establishment of a strong economic base for First Nations, and the need for a new relationship between Aboriginal and non-Aboriginal governments for the management and conservation of lands and resources for future generations. I have argued that the resistance of non-Aboriginal governments to anything except the most limited changes to the extinguishment model ─ whether based upon legal considerations flowing from the inalienability of Aboriginal title except to the Crown or policy considerations relating to certainty for past and future transactions ─ are not insuperable obstacles to a new model based upon recognition. The restraint upon alienability, which has long been an attribute of common law Aboriginal title, arose out of a particular constellation of historical circumstances that no longer prevail. Its replacement in modern agreements with carefully drafted provisions, designed to protect the interests of future generations and secure their rightful place within their territories, can provide far greater protection than doctrines that give the Crown a monopoly on the acquisition of Aboriginal land. The understandable desire for certainty is one that Aboriginal peoples themselves share, and for them and for others who look to land and resources as the basis for personal and economic security, agreements that contain clearly defined rights affecting particular lands will achieve far more in the way of certainty than blank extinguishment clauses ever have.

My review of the recent experience of three other countries ─ the United States, Australia and New Zealand ─ that have confronted the task of concluding settlements with Aboriginal peoples, while revealing no blueprint on which a new Canadian model of recognition can be fashioned, provides important lessons, both negative and positive. In the United States the *Alaska Native Claims Settlement Act* sought to extinguish all Aboriginal rights and provide Aboriginal peoples in Alaska with the same land and resource rights and the same corporate structures to administer them as everyone else, in order to facilitate and accelerate participation of Aboriginal peoples in the mainstream Alaskan and U.S. economy. This settlement has, over the last twenty years, failed to fulfil the aspirations of many Aboriginal communities in Alaska and has led to increasing demands for the restoration of some Aboriginal rights and of tribal forms of government. The Alaskan experience teaches us that whatever else the stroke of a legislative pen may accomplish, the extinguishment of Aboriginal peoples' aspirations to maintain the rights that uniquely respect and recognize their distinctiveness cannot be effected so easily.

The Australian experience in the pre-*Mabo* period, even before the Australian courts

recognized common law Aboriginal title, demonstrates that legislative schemes can be designed to acknowledge Aboriginal land entitlements, can include language that endeavours to respect and reflect traditional Aboriginal relationships to land, even when that entitlement is expressed in the form of non-Aboriginal land tenure, and can seek to build elements of Aboriginal decision making into the way in which land title is held. Explicit respect for the way Aboriginal peoples perceive their relationship to their lands, as well as the forms and process of decision making regarding those lands, are integral parts of the model I have put forward.

In the aftermath of *Mabo*, the federal government of Australia has drafted a legislative response that, in the words of Prime Minister Keating, is intended to provide both "ungrudging and unambiguous recognition of Native title in Australian law" and "full security for people holding grants of interest in land provided by governments in the past". While these provisions rely upon the concept of extinguishment as a critical part of the validation of past transactions, they would limit extinguishment of Aboriginal title to situations in which the Australian and state governments can expropriate the private property of non-Aboriginal Australians. The significance of the recent Australian developments is that after two hundred years of non-recognition of Aboriginal title, within the short space of one year, the Australian federal government has demonstrated a greater commitment to a recognition model ─ at least in regard to future grants of land and resources ─ than what has been demonstrated thus far by its Canadian counterpart. What the Australian proposals lack is the larger context of government-to-government treaty making, in which the reconciliation of co-existing jurisdictions for the administration of lands and resources is an integral part of the accommodation of co-existing entitlements.

My review of developments in New Zealand revealed that in sharp contrast to Australia, the early colonial history of that country was founded upon a treaty, the Maori text of which explicitly recognizes shared jurisdictional authority, as well as the Aboriginal rights of the Maori to their lands and resources and "all things treasured by the ancestors". That early recognition disappeared over the course of the next century, however, under the accumulated weight of increased non-Maori (or Pakeha) settlement, judicial revisionism and legislated suppression. I have described how the recognition principles embodied in the Treaty of Waitangi have re-emerged in recent years through the work of the Waitangi Tribunal, and treaty principles now constitute an essential part of the framework of Maori-Pakeha relationships. The recently

concluded Sealord Agreement on fisheries is the first New Zealand experience with a large-scale settlement agreement, and while recognizing continuing non-commercial Maori fishing rights, it also provides that the obligations of the Crown to Maori in respect of commercial fishing rights under the treaty are "fulfilled, satisfied and discharged". I have suggested that this language is a more benign formulation of extinguishment and that the vigour of dissenting Maori voices on the Sealord settlement provides compelling evidence that full and final settlements based upon extinguishment of Aboriginal rights may in reality sow the seeds of renewed claims by future generations of Aboriginal peoples.

My review of the comparative experience in these three countries with common colonial origins reveals that the Canadian experience with modern Aboriginal rights settlements is not only the most extensive in terms of the geographical scope of the settlements, and the most broad-ranging in terms of the subject matter of the settlements, but also the most inclusive in terms of providing a framework for negotiated settlements rather than legislated ones. Canada is also the only country that has constitutionally entrenched Aboriginal and treaty rights. Canada is thus uniquely situated to forge a new relationship with Aboriginal peoples; moreover, by embracing unambiguously the principle of recognition of Aboriginal rights and discarding extinguishment once and for all as a necessary part of reaching just and lasting settlements, Canada can provide a model for the full measure of justice for Aboriginal peoples.

By negotiating narrative and normative arrangements that affirm Aboriginal rights along the contours of the model I have outlined, Canada has the momentous opportunity to be the first state built on the foundation of colonialism to acknowledge the obligations of that legacy, by incorporating in modern treaties the principles of the draft Universal Declaration on the Rights of Indigenous Peoples and, in the words of the United Nations Commission on Human Rights establishing the study on Treaties, to demonstrate the "achievement, on a practical level, of the maximum promotion and protection possible, both in domestic and international law, of the rights of indigenous populations".[xlii] Given that such modern treaties would have constitutional affirmation under section 35(3) of the *Constitution Act, 1982*, Canada would not only be demonstrating a commitment to decolonization in the context of its supreme domestic law, but would also be providing a powerful precedent in the development of a new world order for all Indigenous peoples in their continuing struggles to outdistance the long and terrible shadow of the last five hundred years.

Notes

[i] The team preparing the paper consists of Paul Joffe, Dick Spaulding, Chris Tennant and Mary Ellen Turpel.

[ii] *Black's Law Dictionary*, 8th edition (St. Paul: West Publishing Co., 1990).

[iii] *R.* v. *Sparrow* [1990] 1 S.C.R. 1075 at 1099.

[iv] *Delgam Uukw* v. *A.G. British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.) at 157.

[v] Indian and Northern Affairs Canada, *Federal Policy for the Settlement of Native Claims*, 1993, p. i.

[vi] See, for example, the decision of the Supreme Court of the State of Vermont in *Vermont* v. *Elliott*, 616 A. 2d 210 (1992).

[vii] John Hurley, "Children or Brethren: Aboriginal Rights in Colonial Iroquoia", doctoral dissertation, Cambridge University, 1985; Paul C. Williams, "The Chain", LL.M. thesis, Osgoode Hall Law School, York University, 1982; Francis Jennings, *The Ambiguous Iroquois Empire: The Covenant Chain Confederation of Indian Tribes with English Colonies* (New York/London: W.W. Norton & Co., 1984); Francis Jennings, William N. Fenton, Mary A. Druke, and David Miller, ed. *The History and Culture of Iroquois Diplomacy* (Syracuse, New York: Syracuse University Press, 1985).

[viii] Jack Stagg, *Anglo-Indian Relations in North America to 1763 and an Analysis of the Royal Proclamation of 7 October 1763* (Ottawa: Department of Indian Affairs and Northern Development, 1981).

[ix] [1973] S.C.R. 313.

[x] See also *James Bay and Northern Quebec Native Claims Settlement Act* S.C. 1976-77, c.32 s.3(3).

[xi] See also *Western Arctic (Inuvialuit) Claims Settlement Act* S.C. 1984, c.24 c.3(3).

[xii] *Comprehensive Land Claims Policy* (Ottawa: Department of Indian Affairs and Northern Development, 1987), p. 6.

[xiii] *U.S.* v. *Shoshone Tribe* 304 U.S. 111 (1938); *Miami Tribe of Oklahoma* v. *United States* 175 F. Supp. 926 (1959).

[xiv] *R.* v. *Van der Peet*; *R.* v. *Gladstone*; *R.* v. *N.T.C. Smokehouse*, B.C. Court of Appeal unreported reasons for judgement, June 25, 1993.

[xv] *Re Paulette* [1973] 42 D.L.R. (3d) 8.

[xvi] *R.* v. *Sparrow* [1990] 1 S.C.R. 1075 at 1113.

[xvii] *Sparrow*, p. 1105.

[xviii] Mary Mackenzie (Chief Gyolugyet), Transcript of Proceedings, *Delgam Uukw* v. *A.G.B.C.*, vol. 5, p. 334.

[xix] Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements*, (Ottawa: Department of Indian Affairs and Northern Development, 1985), p. 41.

[xx] *Living Treaties: Lasting Agreements*, p. 52.

[xxi] Vuntut Gwich'in First Nation Final Agreement, section 5.10.2, quoted earlier in this paper.

[xxii] *Living Treaties: Lasting Agreements*, p. 62.

[xxiii] Gwich'in Final Agreement, section 18.1.2, quoted earlier in this paper.

[xxiv] Berger, *Village Journey*, chapter 7.

[xxv] *Mabo* v. *State of Queensland*, p. 101.

[xxvi] *Pitjantjatjara Land Rights Act*, 1981, No. 20 (S.A.) 54.

[xxvii] *Delgam Uukw* v. *A.G.B.C.*, [1993] 5 W.W.R. 97 (B.C.C.A.) at 166-172.

[xxviii] R. Bartlett, *The Mabo Decision* (Butterworths, 1993), pp. xx-xxii.

[xxix] *Ibid.*

[xxx] *Mabo: Outline of Proposed Legislation on Native Title*, p. 10.

[xxxi] *Mabo: Outline of Proposed Legislation on Native Title*, p. 25.

[xxxii] *Wi Parata* v. *The Bishop of Wellington* [1877] 3 N.Z.Jur (N.S.) 72.

[xxxiii] [1987] 2 N.Z.L.R. 188 at 223.

[xxxiv] [1961] 1 N.Z.L.R. 535.

[xxxv] A. Frame, "A State Servant Looks At The Treaty" (1990) *N.Z.U.L.R.*, 82 at 92.

[xxxvi] *Te Runanga O Wharekauri Rekohu* v. *Attorney General*, Reasons for Judgement, N.Z.C.A., 3 November 1992 at 11.

[xxxvii] *Te Runanga O Wharekauri Rekohu* v. *Attorney General*, Reasons for Judgement, N.Z.C.A., 3 November 1992 at 13.

[xxxviii] Robert Williams, "The Medieval Renaissance Origins of the Status of the American Indian in Western Legal Thought", 57 *Southern California Law Review* 1 at 71.

[xxxix] D. Sanders, "Remembering Deskaheh: Indigenous Peoples and International Law", in *International Human Rights Law: Theory and Practice*, ed. Cotler and Eliadis (1992), p. 496.

[xl] (1985) 57 ALR 472.

[xli] See Brownlie, *Treaties and Indigenous Peoples*, pp. 43-45.

[xlii] Sixth Report of the Working Group on Indigenous Populations, E/CN.4/Sub 2/1988/24, 24 August 1988, Annex III, p. 3.