

# TREATIES AS A BRIDGE TO THE FUTURE

Judge D. Arnot\*

“What I trust and hope we will do is not for today or tomorrow only; what I will promise, and what I believe and hope you will take, is to last as long as that sun shines and yonder river flows.”

Lieutenant-Governor Alexander  
Morris August 18<sup>th</sup>, 1876 Treaty 6  
Negotiations at Fort Carleton.<sup>1</sup>

## The Question: The Solution

Many of the issues the Office of the Treaty Commissioner [hereinafter OTC]<sup>2</sup> deals with are complex and detailed. But the most common question asked is a simple one. People want to know if there is hope for a better relationship between Canada and the First Nations and whether there is hope for the self-sufficiency of First Nation communities. They want to know if there is hope for First Nations to share in the prosperity, peace and harmony that is the essence of Canada. Speaking as the Treaty Commissioner for Saskatchewan, I believe that there is hope despite that the issues facing First Nations and Canada are tremendously complex. The two parties are working together in Saskatchewan like never before. They are using the treaties as a policy platform on which to build a positive future. That gives me hope.

Over the last few decades, we have witnessed the invention and the widespread use of the Internet. Now, a space station orbits our planet on a permanent basis and satellites beam all manner of digital multimedia and information into our homes. We have the good fortune of living in a time when innovation leads to advancement.

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\* The 23<sup>rd</sup> Viscount Bennett Memorial Lecture, entitled *Treaties as a Bridge to the Future*, was delivered by Judge David M. Arnot. Judge Arnot was appointed Treaty Commissioner for Saskatchewan January 1<sup>st</sup>, 1997. He was appointed to the Provincial Court of Saskatchewan in 1981. He served previously as Director General of Aboriginal Justice and as Special Advisor to the Deputy Minister of Justice on Aboriginal Justice Issues from 1994 to 1997.

<sup>1</sup> A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Saskatoon: Fifth House Publishers, 1991) at 202.

<sup>2</sup> The OTC was formally created by an Order of the Governor in Council, effective January 1<sup>st</sup>, 1997 with a five-year mandate running to December 31<sup>st</sup>, 2001.

A time where the public expects that if a problem exists, we have the tools to invent a solution. This expectation, I believe, also extends to the invention of solutions on matters of public policy. Thus, when there is a societal problem, the automatic reflex is not only to seek a solution, but also to demand invention of new mechanisms to facilitate resolution. The spirit of invention, coupled with a willingness to construct new systems of dispute resolution, can be a potent force in improving public policy. The thesis I want to advance today is that inventing new things is not the *only* path to progress. You do not always have to invent a new method to solve a particular problem. There are other options. Sometimes the solutions already exist – but are awaiting implementation. I believe that through the efforts of the OTC, and the process my office is involved in, the treaties represent one of those options.

When I tell people that the treaties are a source of hope, I am often asked: “What do treaties signed in the 19<sup>th</sup> century have to do with 21<sup>st</sup> century realities?” To answer that question, I remind all that in 1982, upon the Constitution’s repatriation, the inclusion of Section 35.1 recognized and affirmed existing aboriginal rights and treaty rights. Through the *Constitution Act, 1982* treaty rights are guaranteed, like the other rights and freedoms that all Canadians enjoy.<sup>3</sup> Our Constitution is the primary law of the land and we all live under its auspices. The treaties *must* be honoured in adhering to the rule of law and in honouring the Constitution. Although we accept treaties because they are law, there is a more productive way of considering them. The treaties are a unique policy platform on which a harmonious future can be built.

### The Challenge

There is no question that the daily reality of most First Nation peoples is fraught with difficulties and problems. The Government of Canada, in its response to the Royal Commission on Aboriginal Peoples, reflected on the past and future place of treaties in Canada. In *Gathering Strength*, the government acknowledged that “treaties between the Crown and First Nations are the basic building blocks in the creation of our country”; and that a vision for the future should build on the recognition of the

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<sup>3</sup> Although not within the guarantee language of s.1, the Supreme Court of Canada in *Sparrow*, *infra* note 11 at 1106, held s.35 “should be given a generous and liberal interpretation in favor of aboriginal peoples.”

rights of Aboriginal peoples and on the treaty relationship.<sup>4</sup>

A vision of the future must be predicated on an understanding of today's reality. In Saskatchewan by 2013, one-fifth of the population of the province will be comprised of First Nation peoples; by the year 2045 one-third of the people in Saskatchewan will be First Nation.<sup>5</sup> People need to know that comparable data dramatically demonstrate in factual, quantitative, and economic form the huge disparity between First Nation communities and the rest of Canada. Although Canada usually ranks first in United Nations measures of development, First Nations in Canada, when measured by themselves, are ranked 47<sup>th</sup>, comparable to Poland and Bulgaria.<sup>6</sup>

From a health perspective, tuberculosis among Saskatchewan First Nation residents is 25 times the national average; further, the age-standardized death rate is 25% higher among Saskatchewan First Nation residents than the national average.<sup>7</sup> According to the Royal Commission on Aboriginal Peoples, every year that the social and economic circumstances of First Nation peoples remain as they are, the cost to Canadian society is \$7.5 billion.<sup>8</sup> The status quo is unacceptable and unsustainable.

The bleak statistics go on and on. Given our will to foster change as a society, we know that something needs to be done. But, I caution against a reflex action to invent a new solution. This is not a simple issue in terms of either magnitude or expense. I suggest that the conceptual framework for improvement and resolution is ultimately a matter of using the tools we already have.

My contention is that the historic treaties contain the public policy tools to

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<sup>4</sup> Canada, *Gathering Strength: Canada's Aboriginal Action Plan* (Ottawa: Minister of Indian Affairs and Northern Development, 1998) at 4.

<sup>5</sup> Federation of Saskatchewan Indian Nations, *Saskatchewan and Aboriginal Peoples in the 21<sup>st</sup> Century: Social, Economic and Political Changes and Challenges* (Regina: Federation of Saskatchewan Indian Nations, 1997).

<sup>6</sup> Federation of Saskatchewan Indian Nations, *Socio-economic Comparison Study* (Saskatoon: Federation of Saskatchewan Indian Nations, 1999) at 1 [unpublished].

<sup>7</sup> *Ibid.* at 3.

<sup>8</sup> Canada Royal Commission on Aboriginal People, *Report of the Royal Commission on Aboriginal People: A Twenty-Year Commitment*, vol. 5 (Ottawa: Supply and Services Canada, 1996) at 24.

enable First Nations to be self-reliant. The treaties are the right and proper starting point; but, by ignoring and failing to implement them, we failed to build the co-operative society that the signatories of the treaties envisioned. We are paying and continue to pay for that inattention.

Building First Nation self-sufficiency may not require a novel invention, but rather the realization that the treaties, signed more than 100 years ago, are an enduring innovation. If my position is correct, then treaties are Canada's bridge to the future. The possibility that potential solutions to First Nation issues are contained in century-old treaties is more than an intriguing concept. Today, those treaties are the foundation of the current discussions between the Government of Canada and the Federation of Saskatchewan Indian Nations [hereinafter FSIN].<sup>9</sup>

### **The Office of the Treaty Commissioner and the Saskatchewan Model**

The OTC, and the "made in Saskatchewan" process, is about learning to use the treaties as tools to foster change and enhance prosperity. The process is about coming together to discuss the tools the treaties provided and to determine how those tools can be utilized to restore First Nations' self-sufficiency. Why such a process is needed has been asked many times. It is desperately needed because there are currently three primary approaches to First Nations issues: co-operation, litigation and confrontation.

We have seen and know the outcomes of confrontation, whether it was the stand-off in Oka, the violence at Ipperwash, the blockades in British Columbia or the lobster dispute in New Brunswick. We also know the costs and outcomes of litigation wherein parties spend years embattled in courtroom disputes that yield little satisfaction for the antagonists. Canada needs a fair political process to deal with treaty issues. The process should promote co-operation and recognize our collective common interests. In the *Delgamuukw* decision, Chief Justice Lamer of the Supreme Court of Canada stated:

As was said in *Sparrow*, at page 1105, s. 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place." Those negotiations should also include other Aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements,

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<sup>9</sup> The FSIN represents all First Nations in the province of Saskatchewan. The FSIN recognizes 72 First Nations, while the Department of Indian Affairs recognizes 70 First Nations.

with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der peet*, supra, at page 31, to be a basic purpose of s. 35(1) – “the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.”<sup>10</sup>

A clear theme from the Supreme Court of Canada’s *Sparrow*<sup>11</sup>, *Delgamuukw*<sup>12</sup> and *Marshall*<sup>13</sup> decisions is that the best approach to implementing the treaty relationship, and dealing with treaties in general, is a political forum. The notion is that agreements negotiated on a level playing field, in good faith, will serve the interests of all Canadians.

### **The Saskatchewan Process**

I want to share with you the path taken by the FSIN and the Crown in Saskatchewan as an example of a co-operative model for dealing effectively with First Nation issues. I want to share this “made in Saskatchewan” process as it is beginning to yield positive results.

The process consists of several forums - referred to as “tables” - working simultaneously. They include the Exploratory Treaty Table [hereinafter ETT], the Fiscal Relations Table, and the Governance Table. The ETT is a bilateral table where discussions between the First Nations and Canada are facilitated by the Treaty Commissioner. The Fiscal Relations and Governance Tables are tripartite negotiation tables, where the Government of Saskatchewan sits as a full participant. Together, these forums provide the basis for comprehensive discussions on treaties, Treaty First Nations’ governance and jurisdiction in the Saskatchewan.

The Government of Saskatchewan is present at the ETT in an observer capacity. Their observer status respects the bilateral and fiduciary treaty relationship between the First Nations and Canada. Provincial representatives monitor the discussions because the ETT has jurisdictional relevance to the Government of Saskatchewan in the areas of health, education and justice.

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<sup>10</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at 1123.

<sup>11</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

<sup>12</sup> *Supra* note 10.

<sup>13</sup> *R. v. Marshall*, [1999] 3 S.C.R. 456.

## **Role of the Office of the Treaty Commissioner**

The question the OTC must answer is whether the promises of the treaty relationship have been delivered. To answer that question, with any authority, the original parties are needed at the table. That is why the OTC and ETT were created. The mandate of the OTC is to facilitate a formal discourse and to discover common ground between the FSIN and Canada on treaty rights and jurisdiction in the areas of child welfare, education, shelter, health, justice, treaty annuities, hunting, fishing, trapping and gathering.

As Treaty Commissioner, I chair the bilateral treaty discussions, or ETT discussions, between the FSIN and Canada. The objectives are multifaceted. Most salient is building a forward-looking relationship that began with the signing of the treaties in Saskatchewan; but also, to reach a better understanding of each other's views on treaties, and to explore the requirements and implications of treaty implementation based on the views of both parties.

## **Principles of the Treaty Relationship**

Through the OTC, the FSIN and Canada are renewing their relationship. Reaching common understandings about the treaties and the treaty relationship is a step towards a shared approach on many of the issues needing resolution. The document, *Treaties as a Bridge to the Future*, presented by the OTC to the Minister of Indian Affairs and the Chief of the FSIN in 1998, details common understandings reached by the parties in the first eighteen months of the OTC's mandate. They include the principles that:

- Treaties create a fundamental political relationship between Treaty First Nations and the Crown.
- Treaties give shape to this relationship, establishing obligations and expectations on both sides.
- The treaties are solemn agreements. That acknowledgment is a fundamental treaty principle.
- The treaty relationship is founded on the ideas of mutual respect and mutual benefit. Both treaty partners hoped to gain something out of the treaties. They wanted to share the land peacefully and respect each other's ways of living.

- The parties of today agree that treaty-making reflected the principles of the honour of the Crown and the honour of Treaty First Nations in maintaining the treaty relationship. The parties acknowledge that the treaty relationship is one in which the parties expect to resolve their differences through mutual discussion and decision-making.
- Both parties agree that Canada and Treaty First Nations can enter into agreements whereby Treaty First Nations exercise governance and jurisdiction over their lands and people.
- The parties agree that the participation of the government of Saskatchewan is needed to reach agreements on First Nations' governance and jurisdiction issues.<sup>14</sup>

The parties were able to reach these common understandings for three principal reasons. First, the parties were asked to consider their interests – both short term and long term. The parties set aside their positions on treaty rights when the work began to focus on discovering common understandings and to reach consensus on the meaning of the treaty relationship. Thus, work at the ETT is approached as an interest-based discussion. Second, the First Nation Elders, present at all critical discussions conducted at the ETT, gave their wisdom, guidance and prayers, contributing greatly to the success of the first phase of our discussions. Third, the parties adopted the following principles to guide their discussions and work at the ETT:

- The principles of mutual recognition, mutual respect, reciprocity and mutual responsibility shall apply to the proceedings and the processes of the ETT.
- Discussions at the Treaty Table will always respect the principles of ethical and honourable conduct.
- The parties approach the Treaty Table as partners.
- The parties shall demonstrate in their discussions and deliberations mutual respect for each other and for the OTC.

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<sup>14</sup> Office of the Treaty Commissioner, *Statement of Treaty Issues: Treaties as a Bridge to the Future* (Saskatoon: Office of the Treaty Commissioner, 1998) at 63-68.

- The parties shall be guided by candour and good faith in both oral and written submissions to the OTC.
- The parties agree to the sharing of information and expertise without undue restrictions.
- The parties acknowledge the importance of flexibility and the necessity to avoid legal disputes.
- The parties acknowledge that First Nations have distinct perspectives and understandings deriving from their cultures and histories and embodied in First Nation languages.
- The parties acknowledge that Elders are keepers and transmitters of oral histories and, therefore, must play an integral role at the ETT.
- The parties agree that knowledge that is transmitted orally in the culture of First Nations must be accepted as a valuable resource along with documentary evidence and other sources.<sup>15</sup>

The agreement between the FSIN and Canada on what constitutes the foundational principles underlying the treaty relationship was catalyzed by the combination of the interest-based discussions, the Elders' involvement, and the guidelines for conduct. The OTC acts as an independent facilitator that referees the discussions, keeping the discussions focused and the parties mindful of the noble guidelines they have adopted.

The most innovative characteristic of the Saskatchewan Treaty Process is that the parties jointly and voluntarily created the OTC and the ETT process. The FSIN and the Government of Canada view the ETT as an impartial forum where the treaties can be explored honestly and where the necessary discussions can be held. The result: a new mechanism - at arm's-length from government - pioneering proactive public policy to resolve issues impacting First Nations. Presently, the talks are at a point where we are looking to the future and using public education to engender new attitudes towards First Nation self-sufficiency.

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<sup>15</sup> *Supra* note 14 at 6.



Another salient feature of the OTC process is flexibility. The original mandate from 1996 identified seven areas for discussion but allowed for the parties to raise other issues with the OTC. In 1999, at the insistence of the Elders, lands and resources were included in the ETT discussions. In the same year, the Minister of Indian Affairs and the Chief of the FSIN asked the OTC to coordinate and facilitate discussions between the Government of Canada and the Dakota and Lakota First Nations in Saskatchewan regarding a treaty adhesion request.<sup>16</sup>

Only one other organization in Canada deals with treaty issues, and that is the British Columbia Treaty Commission [hereinafter BCTC]. The substantial difference between the BCTC and the OTC is that in British Columbia, they are negotiating new treaties whereas in Saskatchewan the mandate is to explore the meaning of existing treaties in the contemporary context. The goal of the OTC is to determine how implementation of the treaty relationship can empower First Nations to become self-sufficient in modern society.

### **Honour of the Crown – Honour of First Nations**

Before treaty-making with First Nations, some legal precedents had been established that influenced the course of Crown negotiations with First Nations. One such precedent is the *Royal Proclamation* of 1763.<sup>17</sup> King George III issued the proclamation creating guidelines for the peaceful incorporation of territory into the purvey of the English Crown. This document is viewed by First Nations as the “Magna Carta” of Aboriginal rights as it protects First Nations’ lands and recognizes Aboriginal nations. It further states that the British government alone could acquire First Nations’ lands.

It is important to remember that the British tradition of acting honourably in respect of the sovereign was the backdrop for treaty negotiations. This ancient convention has its roots in pre-Norman England. At that time, anyone who was charged with speaking or acting on behalf of the king bore an absolute personal responsibility to lend credit to the king’s good name, and, should that person fail or cause embarrassment, they had to answer to the king with their life and fortune at

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<sup>16</sup> There are four Dakota and Lakota First Nations with reserve lands within the boundaries of Treaty Four and Treaty Six territories in Saskatchewan who have never negotiated or adhered to any treaty with the Crown. Research is also being conducted to assist the parties in dealing with treaty adhesion issues.

<sup>17</sup> R.S.C., 1985, App. II, No. 1.

stake. The Crown was not an abstract concept at that time, but a monarch whose power and prestige derived from the conduct of his or her advisors, captains and messengers.

The personal relationship between the sovereign and their ministers weakened as the medieval state grew complex and bureaucratic. The sovereign became insulated from the affairs of state. Evidence of this separation can be seen in the American Revolution in the 18<sup>th</sup> century. The American colonists, during the agitation preceding the revolution, appealed to “the honour of the Crown” to protect them from men they described as “the king’s evil ministers.” In so doing, they distinguished between the Crown, standing for just and honourable conduct, and susceptibility of the colonial government to corruption and misconduct. Invoking “the honour of the Crown” was and continues to be not merely an appeal to the sovereign as a person, but to principles of fundamental justice that exist independent of individuals and beyond politics.<sup>18</sup>

The Supreme Court of Canada’s unanimous rebuke of government privilege in *R. v. Guerin*<sup>19</sup> is the milestone in restoring a system of law based on principles of fundamental justice over the exercise of the individual discretion. In defining the “fiduciary duty” of the Crown, the Supreme Court restored the concept of holding ministers to a standard of fairness that demands forethought as to what conduct lends credibility and honour to the Crown, instead of what conduct can be technically justified under the current law. The Supreme Court clearly rebukes the notion that a minister’s motivation to act can be defended on the grounds of political expediency.<sup>20</sup> Fifteen years later in the first *Marshall* decision, Justice Binnie clearly outlines the principles that underly the concept of the honour of the Crown by succinctly recapitulating the salient cases as follows:

This appeal puts to the test the principle, emphasized by this Court on several occasions that the honour of the Crown is always at stake in its dealings with aboriginal people.... Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfill its promises. No appearance of “sharp dealing” will be sanctioned. This

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<sup>18</sup> For a full discussion, see D. M. Amot, “The Honour of the Crown” (1996) 60(1) Saskatchewan Law Review 339.

<sup>19</sup> *R. v. Guerin*, [1984] 2 S.C.R. 335.

<sup>20</sup> *Ibid.* at 388.

principle that the Crown's honour is at stake when the Crown enters into treaties with first nations dates back at least to this Court's decision in 1895, *Ontario, Province of v. The Dominion of Canada and Province of Quebec. In re Indian Claims* (1895), 25 S.C.R. 434. [and further that]...the terms and conditions expressed in those instruments [treaties] as to be performed by or on behalf of the Crown, have always been regarded as involving a trust graciously assumed by the Crown to the fulfillment of which with the Indians the faith and honour of the Crown is pledged [emphasis added].<sup>21</sup>

I believe, however, that "the honour of the Crown" is not limited to the interpretation of legislation, or the application of treaties. Rather, I propose that "the honour of the Crown" also refers to the same essential commitment that First Nations echo when they call for "justice".

The same high standard is embodied in the principles of the honour of First Nations. The FSIN and the Elders tell me that a personal, familial, and community commitment to honour the terms of the treaty agreement is the basis of the First Nations approach to the treaty relationship. According to the late FSIN Senator John B. Tootoosis, "In our Cree way our promises were made with the Creator that we would never break that oath. This was our way and it was just as binding as the oath the whitemen took in the name of the Queen."<sup>22</sup> Senator Tootoosis made this statement at the centennial commemoration of Treaty Number Six in 1976. Mirroring this sentiment, the Elders we have met with over the past three years recount the great responsibility placed upon the parties to uphold and honour the sacred nature of the treaties. Treaty Six Cree Elder Norman Sunchild states, "When [Treaty 6 First Nations] finally agreed to the treaty, the Commissioner took the promises in his hand and raised them to the skies, placing the treaties in the hands of the Great Spirit."<sup>23</sup> Treaty Six Elder Jacob Bill reminds that "... [the Elders] were spiritual and powerful Elders who were able to provide prophecies as to what would happen in the future ... they were advised to uphold the treaties ... they told us that it was very dangerous to breach treaties ... that something will happen if either of the treaty signatory nations breach the treaties."<sup>24</sup>

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<sup>21</sup> *Supra* note 13 at 496-497.

<sup>22</sup> N. Sluman and J. Goodwill, *John Tootoosis: Biography of a Cree Leader* (Ottawa: Golden Dog Press, 1982) at 12.

<sup>23</sup> H. Cardinal and W. Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000) at 7.

<sup>24</sup> *Ibid.* at 8.

In drawing a comparison between Aboriginal history in Canada and the emergence of the Crown in England, note that First Nations take exactly the same view of honour as the tribal people inhabiting Britain when the Normans arrived. Tribal leaders owed their status and authority to their honesty and good names. Treaties were made between peoples and were secured by personal honour. Each individual was personally bound to uphold the agreement, and to honour and renew the living relationship between the peoples that the treaty represented.

That concept of honour was the basis of the First Nation leaders' understanding in entering treaties with the British Crown. First Nations believed that they were bound as kin with British subjects and most crucially with the British sovereign. The treaty is therefore a perpetual connection modeled on the mutual respect and responsibilities shared within a family. Based on traditions and values, the sovereign assumes personal responsibility to foster respect in practice for the spirit of kinship and mutual benefit.

Treaty Four Sauteaux Elder Danny Musqua said, "We made a covenant with Her Majesty's government, and a covenant is not just a relationship between people, it's a relationship between three parties, you [the Crown] and me [First Nations] and the Creator."<sup>25</sup> Further, Treaty Six Cree Elder Alma Kytwayhat also said, "It was the [Queen] who offered to be our mother and us to be her children and to love us in the way we want to live."<sup>26</sup> The concepts of "the honour of the Crown" and "the honour of First Nations" are central to the relationship between Canada and the First Nations and essential to maintaining a positive relationship.

### **Dealing with Change**

Long before the treaties were negotiated, First Nations occupied North America. They maintained distinct societies with their own cultural, political, economic and social traditions of their own. Those traditions included treaty-making and alliance building with other First Nations. When treaties were negotiated in Saskatchewan with the Crown, they were rooted in the massive changes occurring in the late 19<sup>th</sup> century in Western Canada. Buffalo herds were disappearing, fur prices were declining and First Nations were suffering from the impact of smallpox and other diseases. At the same time, settlement was accelerating along the Saskatchewan River. Treaties were seen as a way for the government to further open Western

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<sup>25</sup> *Supra* note 23 at 32.

<sup>26</sup> *Ibid.* at 34.

Canada for settlement and to demonstrate its sovereignty in light of pressures from the United States to extend the American border northward into Canada. In this light, it is evident that both the Canadian government and the First Nations had compelling reasons to sign treaties.

Although the treaties were signed in good faith, there were serious misunderstandings about what those treaties meant. In fact, the modern conception of the treaties as solely written documents illustrates one of the most fundamental problems with the treaty relationship. While the government is most comfortable with written documents, stemming from long-standing European traditions, First Nations are an oral culture where the spoken word carries the most weight and understanding.

Another serious problem is that when the treaties were concluded, the Canadian government did not enact laws to implement the treaties' provisions. Instead the government relied on policies guided by the *Indian Act*. Those policies, aimed at "civilizing and assimilating", often resulted in stripping rights from the First Nations. This approach created a number of long standing grievances. Understanding those grievances today is important in helping to appreciate the current reality.

It is important to note that several First Nations in Saskatchewan were quite self-sufficient at the turn of the last century. In addition to traditional hunting and gathering, they had developed successful farming techniques. But under the authority of the *Indian Act* they had their farmland confiscated and the self-sufficiency of those First Nations disappeared.<sup>27</sup> The *Indian Act* was also applied to deny First Nations freedom of religion. Under a prohibition of spiritual practices, Chief Thunderchild and a number of his Band members were convicted and imprisoned for practicing traditional ceremonies.<sup>28</sup>

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<sup>27</sup> See generally S. Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal: McGill-Queen's University Press, 1990).

<sup>28</sup> See generally K. Pettipas, "Severing the Ties That Bind: Government Repression of Indigenous Religious Ceremonies on the Prairies" (Winnipeg: University of Manitoba Press, 1989) at 176-179. In addition, consider the following excerpt from the *Indian Act*, R.S.C. 1927, c.98, s.140:

Every Indian or other person who engages in, or assists in celebrating or encourages either directly or indirectly another to celebrate any Indian festival, dance or other ceremony of which the giving away or paying or giving back of money, goods or articles of any sort forms a part, or is a feature, whether such a gift of money, goods or articles takes place before, at, or after the celebration or dance of which the wounding or mutilation of the dead or living body of any human being or animal forms a part or is a feature, is guilty of an offence and is liable on summary conviction to imprisonment for a term not exceeding six months and not less than two months.

Some other fetters placed on First Nations included: a permit system that forced Aboriginals to obtain consent to buy, sell or lease everything from livestock to tools; and, a pass system requiring permission of the local Indian Agent to travel outside their reserves.<sup>29</sup> Until 1951 First Nations could not engage a lawyer in claims against the Crown nor could First Nations vote in federal elections until 1960. All this without mentioning the horrific abuse suffered in residential schools.

Through the last century, the *Indian Act* governed all aspects of the lives of First Nations applying a swath of restrictions not visited upon other Canadians. But only with an understanding of the historical failures can we begin to bridge the past collectively and look towards a bright, common future. Recognizing this unfairness, the treaty parties are now looking beyond the *Indian Act*.

The talks the OTC is currently facilitating concern the nature of the five treaties in Saskatchewan. The goal is to understand each other's views of the treaties using written and oral records of the events between 1874 and 1906. By establishing common ground, the parties can move to the next step of implementing the treaty relationship by exploring concepts like self-government and encouraging the increased self-sufficiency of First Nation peoples.

### **Self-Government**

Although there was an agreement to share land for the benefit of all, the First Nations never signed away the right to govern themselves. There are several areas of authority First Nations believe they retained at the time the treaties were negotiated. The quest for self-government is designed to ensure those areas are returned to the First Nations' purvey.

First Nation representatives explained at the ETT that responsibility for children and families were to remain the responsibility of the chiefs. First Nations retained, they assert, responsibility for education in all areas excepting those where outsiders can contribute special skills and knowledge. The representatives concurrently maintain First Nations' responsibility for transmitting to future generations their

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<sup>29</sup> See generally the excellent research of C. Backhouse, *Colour-Coded A Legal History of Racism in Canada 1900 - 1950* (Toronto: University of Toronto Press, 1999). Backhouse details the prohibition of Aboriginal spiritual practices, a host of other impediments placed on Aboriginals plus a chapter on the Mohawk's claim of sovereignty in the Great Lakes.

social and cultural organization, spiritual beliefs, and the skills and knowledge related to hunting, fishing, trapping and gathering. First Nations expected to retain both the authority and the capacity to govern their own people according to their laws and systems of justice. First Nations agreed to respect the laws of the Crown and in return they understood that the Crown would respect their authority to govern their own lands and people. Instead First Nation communities watched as their authority and self-reliance eroded to where they became more wards of the state than stewards of their own governance. However, a milestone was reached on May 27<sup>th</sup>, 2000 when the FSIN, Canada and the Saskatchewan government signed a framework agreement to move self-government talks from the exploratory stage to the more formal negotiating phase.

The three parties are now working towards having an agreement in principle on self-government for Saskatchewan First Nations by January 2002. The self-government negotiations revolve around determining how First Nations' authority can be restored today. But it is a practical matter of mapping out details on jurisdiction and implementation. What is notable is that through the Saskatchewan process, treaty-based principles like self-governance can be revitalized and applied in workable and productive capacities. This energizing of historic principles demonstrates the ETT's role in advancing the treaty relationship such that a framework for formal negotiations emerges and proceeds.

### **Making a Living**

Self-government is not the only treaty concept that has application in modern-day Canada. The treaties also address a common concern of First Nations and all other Canadians – making a living. The Cree concept of *pi ma chi hoo win* means “making a living.” It influenced treaty negotiations as First Nations sought assurances from the Crown that the pursuit of their traditional ways would continue in the future. First Nations anticipated dramatic changes with settlement and wished to secure the economic security of future generations. The treaties envisioned two methods of ensuring First Nations' livelihoods:

- The continuation of the traditional practices of hunting, fishing, trapping and gathering.
- Participation in other economic activities, such as farming.

When the treaties were negotiated, First Nations were aware that the land would be shared with the newcomers. To balance competing claims for resources they sought

assurances from the Crown that they would remain free to hunt, fish, trap and gather within their traditional territories, thereby guaranteeing access to traditional means of support in the future.

As a corollary to this, treaties are instruments of peace and stability – key factors in fostering political and economic development. Both First Nations and the Crown saw treaties as addressing the future by determining how to subsist alongside European settlers. Treaties were to ensure a positive future for First Nation children, their progeny and for the newcomers and their offspring. Treaties can be fairly described as creating blueprints for harmony in the relations between the newcomers and the First Nations. Harmony is a major component of the underlying spirit and intent that the treaty parties envisaged at the time they entered into the agreements.

### **Public Education**

While the ETT is a powerful forum for engaging the issues confronting First Nations, it is not the OTC's only public policy lever. The parties have entrusted the OTC to provide public education about treaties. We, in Saskatchewan are building and delivering new public education programs. The driving concern behind fulfilling this mandate is the general public's lack of understanding of First Nations and treaty issues. Recent polling by the Angus Reid Group on behalf of the OTC indicates that 78% of people in Saskatchewan people are not knowledgeable about the treaties, but want a better understanding.<sup>30</sup> The same study illustrates that 68% of Saskatchewan's population believes an improved understanding of treaties will improve relations between First Nations and other communities. Public education on treaties is a potent tool for building new understandings, partnerships and bridges to the future.

Pursuant to furthering public understanding of the treaties and treaty related themes, the OTC cultivates and maintains contacts with leaders in business and education. Through these contacts our office updates individuals, groups and organizations about the developments at the ETT. Additionally, these contacts provide valuable feedback on the contemporary social issues that impact the treaty relationship in Saskatchewan.

The OTC's efforts to raise treaty awareness in Saskatchewan are concentrated

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<sup>30</sup> Angus Reid Group, "Public Education Study: Research Findings" submitted to the Office of the Treaty Commissioner, March 19, 1999 [unpublished].



in the hands of the Treaty Awareness Speakers Bureau. Thirty volunteers drawn from First Nations communities and Saskatchewan at large travel the province to educate a wide variety of audiences including service clubs, business groups, school classes and university students. Their message is informative for those who are interested in the treaties, in First Nation issues and Saskatchewan's future. In the first six months of their operation, Speakers Bureau volunteers spoke to 106 different community groups, reaching a total audience of more than 5,000 people. But the Speakers Bureau's role is not to only present information in one direction. Hence, the OTC also benefits from the volunteers' experiences. Our volunteers repeat the questions asked and recount the issues that cause concern. This is a tremendously important source of raw public opinion data and helps determine where future educational efforts should be focused. The volunteers' front-line experiences keeps the OTC abreast of what the general population thinks the real issues are.

In addition to the Speakers Bureau, our Internet site<sup>31</sup> provides information about the OTC and the history of treaties in Saskatchewan. The library and archives section of the web site are a virtual resource centre where visitors can peruse copies of the original treaty manuscripts, read biographies of the individuals involved in the original negotiations, and view archival photographs.

In addition, our office has created a treaty display. This display contains historical photographs, artifacts, contemporary artwork, plus descriptions of key historical events. The content of the Treaty Awareness Display can be adapted for a variety of display venues. We are showcasing the display in high traffic locations like museums and schools.

As commissioner, I write newspaper columns about contemporary and historical treaty issues that are provided to all members of the Saskatchewan Weekly Newspaper Association. Past article topics have included an evaluation of public opinion on the treaty relationship - as determined by the Angus Reid poll - and the positive steps taken by the ETT.

Publishing is another important public education tool, and the OTC has recently released two books about treaties. As asserted earlier, the FSIN and the Government of Canada agree that to fully understand the meaning of treaties, both oral and

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<sup>31</sup> [www.otc.ca](http://www.otc.ca). The site offers a host of on-line documents, historical records, contact information for the OTC and a great number of links to other treaty-related websites.

written histories need to be taken into account. Combining both histories reveals the full picture of the parties intentions at the time of treaty-making. The OTC commissioned two research projects to help the parties understand each other's views about the treaties. The first, based on oral history, is titled *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations*;<sup>32</sup> the other volume, based on written and archival sources, is *Bounty and Benevolence: A History of Saskatchewan Treaties*.<sup>33</sup> These works are important political histories that provide a context for discussions at the ETT by establishing both the spirit and intent of the treaties. Public education is the first step in changing attitudes about First Nations and the treaty process. To this end, the OTC expanded its public education program to include curriculum development programs. Individual curriculum units are being developed so students can learn more about the history and nature of treaties. Though a long-term enterprise, which will likely take a generation to yield positive results, the OTC hopes that our children will be equipped to discuss treaties and First Nation issues with a sophistication absent today.

This type of public education is an important step towards informing public attitudes about a crucial issue that faces all of Canada. But if people are to be familiarized with the issues, if positive attitudes are to be cultivated, the OTC's current public education initiatives are only the beginning. Much more, and on a grander scale, must be done. Yet it should be emphasized that the OTC, independent from government, has an advantage in delivering effective public education programs as a neutral and credible source of information on treaties.

## Conclusion

Sitting with representatives of the FSIN and the Governments of Canada and Saskatchewan, I sense good faith, sincerity and mutual respect. When the parties first met, I communicated my understanding of their positions. I knew, however, that the gulf between their positions would be difficult to bridge. By encouraging the parties to articulate their concerns we were able to find shared interests, common ground, and consensus. Recognizing shared interests, the representatives at the ETT conduct themselves with honour, and with a commitment to discovering viable solutions. Simultaneously upholding the honour of the Crown and the honour of

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<sup>32</sup> *Supra* note 23 at 19.

<sup>33</sup> A.J. Ray et al., *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal: McGill-Queen's University Press, 2000).

First Nations rests upon our collective capacity as Canadians and First Nations in a responsible society to act from principle. That principle entails a willingness to place justice and honour ahead of the interests of persons and parties. The message must be clear: the treaty relationship must be acknowledged now and into the future. Canada has demonstrated its commitment to fairness by consulting with First Nations on the nature of the treaty relationship. Similarly, the FSIN has demonstrated a strong commitment to this process. This co-operative spirit demonstrates a willingness to restore an essential element of the original treaty relationship – that the parties will resolve differences through mutual discussion. That spirit also demonstrates to me the possibilities of a forum where issues are addressed peacefully and productively. The OTC, through the Saskatchewan process, is a model for the other provinces to consider. This model advocates co-operation and measures success in tangible results and public education rather than in fleeting front-page headlines. The Saskatchewan model is a productive means of resolving issues and an effective tool for educating the public. These critical components provide a solid foundation on which to build a better future for all First Nations and for all Canadians.

Saskatchewan is a leader in developing innovative public policy instruments, such as Medicare in the past and the OTC today. In improving relations with First Nations, Saskatchewan is again taking a leadership position that beckons all of Canada. I ask Canadians to consider the core values of citizenship that they collectively hold – for their answers reflect the same values grounded in our constitution. I ask you to consider whether those values have been reflected in our past relationship with First Nations. The challenge today is to ensure that those values become central to our future relationship so that First Nations and the treaties can take their rightful place in our country. Based on the proper recognition and implementation of the treaty relationship, there is hope for the First Nations to share in the prosperity, peace, and harmony that is the essence of the Canadian state.