The Divided Indivisible Crown: A Provincial Perspective on Treaty Rights

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I have been asked to provide some comments about treaty rights from the prospective of the "Provincial Crown". I am happy to do so, but I start with the observation about the odd notion of the "Provincial Crown". The Crown is, of course, indivisible, there being but one "sovereign". The Crown in an aboriginal law context has long been considered to be the federal Crown – the Crown in right of Canada. I think that traditional view is overly simplistic and outdated and it must be recognized that the Provinces are key players in recognizing and respecting treaty rights.

Increasingly the relations between First Nations and the Crown are expressed with Crown representatives in right of the Provinces. In Part 1 of this paper I provide brief review of the evolution of the law from the enclave theory of First Nations as exclusive subjects of federal jurisdiction to the present where Provincial governments have extensive relations with First Nations in relation to the use and development of Crown lands which are administered and managed by Provincial Governments. In Part 2, I give five specific examples that I think illustrate that evolution.

Part 1 – Evolution of Provincial Government involvement in Treaty matters

When I started my work with Manitoba Justice it was frequently said – as if some kind of self-evident truism – that aboriginal peoples were "federal jurisdiction", and that the Province was very limited in what it could do in respect of aboriginal peoples. The Province was aware of the treaties; in the Prairie Provinces being the numbered Treaties.[2] But save for hunting rights, the treaties were really federal responsibility.

This philosophy extended so far that there was a line of thinking to the effect that Provincial legislatures had no authority to even mention First Nations in Provincial legislation. The Province was to blind itself to matters of Indian status. So Provincial legislation rarely ever even acknowledged that First Nations existed.

The thinking reflected the now-rejected "enclave" theory of First Nations' reserves. That theory stated that reserves were enclaves of exclusive federal jurisdiction, and provincial laws did not apply on reserve, except to the extent that they were incorporated by federal laws like the current s. 88 of the *Indian Act*. Public services – schools, health care, housing, income assistance – were provided (or not) by Canada. The legal regime for First Nations government was wholly federal, principally under the *Indian Act*. The Province had little to do, and so it did little.

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[2] Note the geographical boundary of Treaties 1, 2, 3, 4, 5 extend into Manitoba and that First Nations from those Treaties plus Treaties 6 and 10 have reserves in Manitoba.

My perspective is that the traditional thinking should be discarded, if it hasn't yet been. Two developments in the law are key to this kind of paradigm shift:

- The Supreme Court of Canada decision in *Cardinal* v. *Alberta*[3] (1974);
- The adoption of section 35 of the *Constitution Act, 1982*.

Cardinal ended the previously generally accepted enclave theory. Section 35 expressly recognized aboriginal rights and treaty rights and this constitution recognition applies to both the federal and provincial governments.

The case law has led to, or coincided with, an increase in activities between First Nations and provincial governments on and off reserve. Provinces can no longer avoid relationships with First Nations, citing federal responsibility.

a. Modern and Historic Treaties

Treaties may be characterized as either historic or modern. The principles of interpretation applying to historic treaties are not necessarily the same as those applied to modern treaties.

Historic Treaties

In Manitoba, the best examples of historic treaties are the so-called numbered treaties. First Nations in Manitoba include descendants of the signatories of treaties 1, 2, 3, 4, 5, 6 and 10. These treaties are characterized by the exchange of Crown promises to provide reserve lands, hunting and fishing rights, annuity payments and certain other promises in return for the First Nations agreeing to surrender all aboriginal rights, titles and privileges whatsoever to the land. Generally, the treaties were prepared in English by the Crown representatives and explained by interpreters. The Indian people who signed the treaties did not speak or read English. The Indian people may not have understood many of the concepts contained in these treaties. It might be said that there was an inequality of bargaining power involved in the negotiation of the treaties. Accordingly, because of that historical relationship, the courts have developed a series of principles to guide the interpretation of historic treaties. The following points illustrate the principles that the courts apply to the historic treaties:

- Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation.[4]

- Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories.[5]

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[3] *Cardinal v. A.G. (Alta.)* [1974] S.C.R. 695

[4] *R.* v. *Marshall*, [1999] S.C.J. No. 55 at para. 78; *R.* v. *Sundown*, [1999] 1 S.C.R 393 at para. 24; *R.* v. *Badger*, [1996] 1 S.C.R. 771 at para. 78; *Sioui, supra* note at 1043; *Simon* v. *The Queen*, [1985] 2 S.C.R. 387 at 404.

- The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed.[6]

- In searching for the common intention of the parties, the integrity and honour of the Crown is presumed.[7]

- In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties.[8]

- The words of the treaty must be given the sense that they would naturally have held for the parties at the time.[9]

- A technical or contractual interpretation of treaty wording should be avoided.[10]

- While construing the language generously, courts cannot alter the terms of the treaty by exceeding either what "is possible on the language" or realistic.[11]

- Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context.[12]

Modern Treaties

"Modern Treaties" are those negotiated and entered into in a modern context. Typically, they relate to arrangements negotiated in a formal fashion by government representatives and First Nation representatives around a modern negotiating table where each party is represented by trained negotiators, lawyers and experts who assist them in reaching an agreement. Modern treaties generally resemble modern commercial contracts, more so than do historic treaties. Examples of modern treaties include the recent Nisga'a Agreement in British Columbia (2000) and the Nunavut Land Claims Agreement with the Inuit (1993) that resulted in the creation of the Nunavut

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[5] *Marshall, supra* at para. 78; *Badger, supra* at para. 41 and 52; *R.* v.*Sioui,* [1990] 1 S.C.R. 1025 at 1035; *R.* v. *Horseman,* [1990] 1 S.C.R 901 at 930; *R.* v. *Simon,* [1985] 2 S.C.R. 387 at 402; *Nowegijick* v. *The Queen,* [1983] 1 S.C.R. 29 at 36.
[6] *Marshall, supra* at para. 14 and 78; *Sioui, supra* at 1068-9.
[7] *Marshall, supra* at para. 14 and 78; *Badger, supra* at para. 41; *Horseman, supra* at 908.
[8] *Marshall, supra* at para. 14 and 78; *Badger, supra* at para. 52-4; *Horseman, supra* at 912-3.
[9] *Marshall, supra* at para. 78; *Badger, supra* at para. 52; *Nowegijick* v. *The Queen,* [1983] 1 S.C.R. 29 at 36.
[10] *Marshall, supra* at para. 78; *Badger, supra* at para. 52; *Horseman, supra* note at 906; *Nowegijick, supra* at 36.
[11] *Marshall, supra* at para. 78; *Badger, supra* at para. 76; *Sioui, supra* at 1069; *Horseman, supra* at 908.
[12] *Marshall, supra* at para. 78; *Sundown, supra* at para. 32; *Simon, supra* at 402-3.

Territory. Subsection 35(3) of the *Constitution Act, 1982* expressly recognizes that "land claims agreements" may create treaty rights.[13]

In 1993 the Federal Court of Appeal considered the appropriate interpretation principles applicable to a modern treaty.[14] The court stated that:

> We must be careful, in construing a document as modern as the 1975 Agreement, that we do not blindly follow the principles laid down by the Supreme Court in analyzing treaties entered into in an earlier era. The principle that ambiguities must be construed in favour of the Aboriginals rests, in the case of historic treaties, on the unique vulnerability of the Aboriginal parties, who were not educated and were compelled to negotiate with parties who had a superior bargaining position, in languages and with legal concepts which were foreign to them and without adequate representation.
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> In this case, there was simply no such vulnerability. The Agreement is the product of a long and difficult process of negotiation. The benefits received and concessions made by the Aboriginal parties were received and given freely, after serious thought in a situation which was ... one of "give and take." All of the details were explored by qualified legal counsel. . .
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> Thus while the interpretation of agreements entered into with the Aboriginals in circumstances such as those which prevailed in 1975 must be generous, it must also be realistic, reflect a reasonable analysis of the intention and interests of all the parties who signed it and take into account the historical and legal context out of which it developed.

The Court emphasized that in the context of modern treaties, systematically interpreting ambiguities in favour of the Aboriginal parties "would distort the entire process of negotiating treaties" with the result that courts would effectively be renegotiating treaties to the continuous detriment of governments which are accountable to the public as a whole. The court concluded that when modern treaties are at issue, the aboriginal party must be bound by the informed commitment it made and stressed that it is in the interests of aboriginal peoples to have modern agreements interpreted "in such a way that the other signing parties will not feel themselves at the mercy of constant attempts to renegotiate in the courts."

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[13] Subsection 35(3) of the *Constitution Act, 1982* provides: "For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired."

[14] The court expressed no opinion on whether the James Bay and Northern Quebec Agreement actually was a treaty. *Eastmain Indian Band* v. *Canada (Federal Administrator)* (1993), 99 D.L.R. (4th) 16 (F.C.A.), leave to appeal to the S.C.C. refused.

b. Hunting Rights

As I said, the Province has traditionally cared about treaty hunting rights. Aboriginal law was for provincial government lawyers traditionally mostly hunting rights law, which in the Prairies involved considering the rights under the 1930 Natural Resources Transfer Acts, which are part of the *Constitution Act, 1930*. Paragraph 13 of the Manitoba Natural Resources Transfer Agreement[15] states:

> 13. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

Similar provisions are contained in the Alberta and Saskatchewan NRTAs.

The NRTAs reflected the views of the time, and par. 13 was Canada's way of respecting the terms of its treaties, by requiring the Province to respect treaty rights. The provision was needed, it was thought, on the basis that it would provide a constitutional protection of First Nation hunting rights; otherwise under the principle of Parliamentary supremacy, the Provincial legislature could lawfully restrict or even abolish treaty hunting rights.

The effect of the NRTAs as judicially interpreted is to establish a number of rules about when First Nations' members have a right to hunt. First Nations members may hunt for food on unoccupied Crown land and other land where they have a right of access. However, if the rights do not apply, they do not apply at all, and all Provincial laws apply, including licence requirements, bag limits, seasons, etc:

> It is also clear that the Transfer Agreements were meant to modify the division of powers originally set out in the Constitution Act, 1867 (formerly the British North America Act, 1867). Section 1 of the Constitution Act, 1930 is unambiguous in this regard: "The agreements ... shall have the force of law notwithstanding anything in the Constitution Act, 1867 ...".
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> In addition, there was in fact a quid pro quo granted by the Crown for the reduction in the hunting right. Although the Agreement did take away the right to hunt commercially, the nature of the right to hunt for food was substantially

[15] The Manitoba Natural Resources Transfer Agreement can be found as a schedule to *The Manitoba Natural Resources Transfer Act* (C.C.S.M. c. N 30). The MNRTA was amended in 1938, 1948, 1951 and 1963. Each amendment is set out in a Schedule to an Act of the Manitoba Legislature. None of those amendments relates to paragraph 11 or paragraph 13 of the MNRTA.)

> enlarged. The geographical area in which the Indian people could hunt was widely extended. Further, the means employed by them in hunting for their food was placed beyond the reach of provincial governments. For example, they may hunt deer with night lights and with dogs, methods which are or may be prohibited for others. Nor are the Indians subject to seasonal limitations as are all other hunters. That is to say, they can hunt ducks and geese in the spring as well as the fall, just as they may hunt deer at any time of the year. Indians are not limited with regard to the type of game they may kill. That is to say, while others may be restricted as to the species or sex of the game they may kill, the Indians may kill for food both does and bucks; cock pheasants and hen pheasants; drakes and hen ducks. It can be seen that the quid pro quo was substantial. Both the area of hunting and the way in which the hunting could be conducted was extended and removed from the jurisdiction of provincial governments.[16]

Curiously, paragraph 13 does not even mention the treaties (unlike par. 11 discussed below which relates to treaty land entitlement). The Supreme Court concluded that whatever the actual content of the treaties, the constitutional effect was to "merge and consolidate" the terms of the treaties into paragraph 13. Put a bit differently, the Court determined that the terms of the treaties relating to hunting rights were legally changed by par. 13 from what was actually agreed in the treaties to what was actually in par. 13.

Consider the difference between par. 13 above and the hunting rights provision of Treaty 5[17] following:

> Her Majesty further agrees with Her said Indians, that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes, by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.

The effect of par. 13 is that with a stroke of the Constitutional pen:

- The hunting right applies throughout the Province, not just in the Treaty area;
- The right is limited to a right to hunt for food, and not for commercial purposes.
- The right is not expressly subject to regulation, whether by Canada or the Province.

The Court also affirmed a kind of enclave theory of First Nation hunting and fishing rights by noting that the Constitutional protection of the right applies only to the Province and not to Canada. After 1930, Parliament continued to have the right to make laws

[16] *R.* v. *Horseman, supra* at para. 59, 60.
[17] Treaty 5 (1875), including later adhesions applies to all of northern Manitoba

that restricted or extinguished hunting or fishing rights.[18] Paragraph 13 was analyzed as a transfer under which the transferor (Canada) imposed a condition on the transferee (the Province).

> That only provincial game laws were in the contemplation of the parties, and not federal enactments, is underscored by the words "which the Province hereby assures to them" in para. 13. As indicated by para. 11 of the agreement and para. 10 of the Alberta and Saskatchewan agreements, Canada, in negotiating these agreements, was mindful of the fact it had treaty obligations with Indians on the Prairies. These treaties, among other things, dealt with hunting by Indians on unoccupied lands. … It being the expectation of the parties that the agreement would be given the force of law by the Parliament of the United Kingdom (Paragraph 25) care was taken in framing para. 13 that the Legislature of the province could not unilaterally affect the right of Indians to hunt for food on unoccupied Crown lands. [19]

c. Treaty Land Entitlement

Paragraph 11 of the MNRTA relates to the commitment to meet land entitlement terms of the treaties.

> 11. All lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the Minister of Mines and Natural Resources of the Province, select as necessary to <u>enable Canada to fulfil its obligations under the treaties with the Indians of the Province</u>, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof.
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> (underlining added)

Note that the obligations under the treaties are said to be those of Canada, and obligations are placed on Manitoba to enable Canada to meet its treaty obligations.

Each of the numbered treaties contains a "per capita provision" to define the area of land to be set apart as reserve. In Treaty 5 it is as follows:

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of

[18] *Daniels v. White*, [1968] S.C.R. 517, *Elk v. The Queen*, [1980] 2 S.C.R. 166;
[19] Daniels v. White, supra (at p. 525)

> Canada, provided all such reserves shall not exceed in all one hundred and sixty acres for each family of five, or in that proportion for larger or smaller families...

In Manitoba, at least 27 First Nations have been determined to have had unfulfilled treaty land entitlement under the per capita provision of the relevant treaty. Until TLE claims were addressed by agreements resulting from negotiations in the 1990s and following, there was significant uncertainty as to the way in which the unfulfilled entitlements would be met. The date for determining populations to apply to the per capita provision and the principles for identified appropriate areas of land are not expressly set out in the treaties, and since lands have been settled and third party interests established on Crown lands, the issues have become more complex. The complexity is added to as a result of the division in the Crown – First Nation reserve lands are administered by the Crown in right of Canada, but unoccupied Crown lands are since 1930 administered by the Crown in right of Manitoba.

Paragraph 11 is the basis on which Manitoba has participated in the negotiations of treaty land entitlement settlement agreements. In those negotiations, First Nations have asserted as a precept that they negotiate with Canada because the treaties are between Canada and the First Nations. The Province was to be involved as a kind of necessary nuisance. In Manitoba, the nuisance nature of the involvement of the Provincial Government was noted in the form of the negotiations agreed: the double bilateral process. In the first seven TLE settlement agreements in Manitoba, Canada and the First Nations signed one agreement and Canada and Manitoba signed a companion agreement.[20] This was to reflect the First Nation view that it is to look to Canada to fulfill the treaty terms.

The 1997 Treaty Land Entitlement Framework Agreement started as double bilateral negotiations but the final negotiated agreement was a three party agreement: First Nation, Canada and Manitoba.[21] From my perspective this reflected the issues and matters raised in the negotiations. These issues are predominantly provincial issues, because of the Province's administration and control of Crown lands. Issues of eligibility of land selections were prominent and difficult in the negotiations and remain difficult in implementation. Some of the key issues relate to: methods of resolving third party interests in Crown land, Provincial highways, water interests, mineral interests, forestry interest, lodges and outcamps and municipal issues. The Province is the lead Crown party on these issues and they are the difficult ones. From my perspective, Canada's key responsibility relates to the commitment to set lands apart as reserve and, of course, making necessary financial payments for compensation and implementation, but otherwise the principal issues arise between the First Nations and the provincial government.

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[20] Seven individual First Nation Manitoba TLE agreements take this double bilateral form: (Treaty One First Nations – Swan Lake, Long Plain, Roseau River) (Island Lakes Tribal Council First Nations – Garden Hill, Wasagamack, Red Sucker Lake, St. Theresa Point)

[21] The Manitoba TLE Framework Agreement was entered into May 29, 1997 between the Treaty Land Entitlement Committee of Manitoba, Inc. (representing 19 Manitoba TLE First Nations), Her Majesty the Queen in right of Canada and Her Majesty the Queen in right of Manitoba

A three-party agreement also helps with implementation by clearly providing inter-party privity – each of the three parties has a contractual relationship with the other parties. This contractual arrangement need not cloud the key historical and constitutional relationship between the First Nations and Canada.

d. End of the Enclave Theory[22]

The 1974 *Cardinal*[23] case has turned out to be a considerably more significant legal event than was considered at the time.

The underlying legal theory is that maintaining good relations with the Indians required the Imperial government to set policy and remove potential for petty local government interference. This was particularly important because of the roles played by the Indians in the English-French wars and later the English-US wars. This concept carried over into Confederation. It seems uncontentious that in 1867 Parliament assumed legislative authority over "Indian and lands reserved for the Indians" as an extension of the policy that the Imperial Crown, not colonies or provinces should deal directly with Indian matters.

Imperial or federal government responsibility is manifested through obvious examples such as the negotiation and conclusion of the numbered treaties, the establishment of reserves and the recognition and legislative framework for Indian governments through the *Indian Act* and later the provision of local services through the Department of Indian Affairs and Northern Development.

As recently as 1974, the prevailing constitutional wisdom was that First Nation reserves were enclaves of exclusive federal territory, juridically outside of the Province. It was thought that Provincial laws applied only because of s. 88 of the *Indian Act* and its predecessor provisions. Professor Laskin, before appointment to the Bench, stated in his constitutional law text:

> There is no doubt by that Parliament alone has authority to regulate the lives and affairs of Indians on a reservation and, indeed, to control the administration of a reservation; provincial laws are inapplicable on a reservation (save as they may be referentially introduced through federal legislation).[24]

Starting with *Cardinal* v. *Alberta* in 1974, some surprising Supreme Court decisions have turned this conventional wisdom upside down.

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[22] My comments in this section are drawn in part from: "Enclaves No Longer: An Overview of the Limits on Federal Responsibilities to First Nations People and the Development of a Principled Role for Provincial Governments" a paper I prepared for the August 2005 CBA Canadian Legal Conference and Expo in Vancouver.

[23] *Cardinal v. A.G. (Alta.)* [1974] S.C.R. 695

[24] Able, Albert S.; Laskin's Canadian Constitutional Law (4th ed.); The Carswell Company Limited;\ Toronto; 1973, at p. 523.

In a decision written by Martland, J. in *Cardinal*, the Supreme Court of Canada rejected the "enclave" theory and found, despite the dissent of Laskin, J. and Hall and Spence, JJ., that s. 91 (24) did not exclude the application of provincial laws to reserves:

> As indicated earlier, the appellant starts from the proposition that, prior to the making of the Agreement, Indian Reserves were enclaves which were withdrawn from the application of Provincial legislation, save by way of reference by virtue of Federal legislation. On this premise it is contended that s. 12 should not be construed so as to make Provincial game legislation applicable within Indian Reserves.
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> I am not prepared to accept this initial premise. Section 91(24) of the British North America Act, 1867, gave exclusive legislative authority to the Canadian Parliament in respect of Indians and over lands reserved for the Indians. Section 92 gave to each Province, in such Province, exclusive legislative power over the subjects therein defined. It is well established, as illustrated in Union Colliery Company v. Bryden [[1899] A.C. 580], that a Province cannot legislate in relation to a subject matter exclusively assigned to the Federal Parliament by s. 91. But it is also well established that Provincial legislation enacted under a heading of s. 92 does not necessarily become invalid because it affects something which is subject to Federal legislation.

Kruger v. The Queen[25] and *Dick v. The Queen*[26] later confirmed that Provincial laws could apply to Indians and on reserves of their own force, not merely because of referential incorporation under s. 88 of the *Indian Act*.

e. Section 35 of Constitution Act, 1982

Before 1982, legal arguments for protection of aboriginal rights or treaty rights needed to be structured on some then-cognizable legal theory. Frequently challenges to Provincial legislative or executive action would be framed as a division of powers question; the allegation being that the Provincial law was actually a law about Indians or Indian lands and thus *ultra vires* the Provincial legislature. Section 35 provides direct protection of aboriginal or treaty rights and per s. 52(1) of the *Constitution Act, 1982,* any law, whether federal or provincial that is inconsistent with the Constitution of Canada is of no force or effect.

It is my perspective that generally there is no compelling basis for legal challenges to Provincial laws alleged to infringe treaty or aboriginal rights to be made on a division of powers, section 91(24) basis. It is better, and more principled, I suggest, for arguments

[25] [1978] 1 S.C.R. 104
[26] [1985] 2 S.C.R. 309

to be made on a section 35 basis. The concern is illustrated by two Supreme Court of Canada cases arising out of British Columbia: the *Kitkatla*[27] and *Morris*[28] cases.

Kitkatla involved the challenge by the First Nation to a site alteration permit under the B.C. Heritage Conservation Act issued to a forest company that would allow for the harvest of timber cut blocks that may include culturally modified trees of historic cultural significance to the First Nation. One of the main arguments by the First Nation was that the Provincial law which restricted the harvest of CMTs without a permit was *ultra vires* the Legislature on the grounds that the law was in respect of Indians and lands reserved for the Indians and thus exclusively federal jurisdiction under s. 91(24) of the *Constitution Act, 1867*. The Court did not accept the argument, applying a pith and substance analysis the Court found that the law fell within provincial jurisdiction relating to "property and civil rights" (92(14) of the *Constitution Act, 1867*). The law was found not to single out aboriginal peoples or impair their status or condition as Indians and thus was not in pith and substance related to Indians or Indian lands.

Although for some reason no section 35 argument was made in that case, the Court noted that provincial laws would not apply to infringe an aboriginal right:

> In any case, it should be remembered that the Act cannot apply to any aboriginal heritage object or site which is the subject of an established aboriginal right or title, by operation of s. 35(1) of the *Constitution Act, 1982* and by operation of s. 8 of the *Heritage Conservation Act* (and, by implication, s. 12(7) of that Act which states that a permit does not grant a right to alter or remove an object without the consent of the party which has title to the object or site on which the object is situated). [29]

In *R. v. Morris*, the Court determined that B.C. hunting laws that restricted hunting at night were inconsistent with the treaty rights of the Tsartlip First Nation and that although the law was intended for the legitimate objective of public safety nonetheless Provincial laws that affect the exercise of treaty rights impair Indianness as "(t)reaty rights to hunt lie squarely within federal jurisdiction over "Indians, and Lands reserved for the Indians".[30] Further, s. 88 of the Indian Act, originally enacted when the enclave theory prevailed, may actually restrict the application of Provincial laws by the operation of the paramountcy doctrine. The opening words of s. 88 "Subject to the terms of any treaty" thus may prevent the application of provincial laws that would otherwise apply of their own force

> But as the opening words of this provision demonstrate, Parliament has expressly declined to use s. 88 to incorporate provincial laws where the effect would be to infringe treaty rights. And this Court held in *R. v. Côté*, [1996] 3 S.C.R. 139, at para. 86, that one of the purposes of s. 88 is to accord "federal statutory protection to

[27] *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)* [2002] 2 S.C.R. 146
[28] *R. v. Morris*, [2006] 2 S.C.R. 915
[29] *Kitkatla* supra, at par. 71
[30] *R. v. Morris* at par. 43

> aboriginal treaty rights". Thus, on its face, s. 88 cannot be used to incorporate into federal law provincial laws that conflict with the terms of any treaty.[31]

I am concerned about the potential relationship between *Morris* and the dictum of the Court in the *Badger* and *Sundown* cases.[32] In the 1999 *Sundown* decision, the Court said

> …provincial legislation that relates to conservation and that passes the justificatory standard set out in Sparrow…could validly restrict the building of hunting cabins. Badger…specifically considered the ability of the Alberta government to legislate pursuant to the provisions of para. 12 of its NRTA… Badger held that both Treaty No. 8 and the NRTA specifically provided that hunting rights would be subject to regulation pertaining to conservation… Thus, provincial laws that pertain to conservation could properly restrict treaty rights to hunt provided they could be justified under Sparrow.[33]

These cases may thus lead to the incongruous outcome that Provincial governments and legislatures in the Prairie Provinces may be able to enact laws that restrict the exercise of treaty hunting but those in other provinces possibly may not.

f. The Crown's Duty of Consultation

The consultation principles arising under s.35 of the *Constitution Act, 1982* are articulated most thoroughly in four Supreme Court of Canada cases: *R. v. Sparrow,*[34] *Delgamuukw v. British Columbia*[35] and *Haida Nation v. British Columbia (Minister of Forests),*[36] and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*.[37]

The *Haida Nation* and *Mikisew Cree*, the Supreme Court of Canada considered the question of when the duty of consultation was triggered:

> But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of

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[31] Ibid at par. 45
[32] *R.* v. *Badger*, [1996] 2 C.N.L.R. 77 (S.C.C.) and *R.* v. *Sundown*, [1999] 2 C.N.L.R. 289 (S.C.C.).
[33] *Ibid* at para. 38
[34] R. v. Sparrow, [1990] 1 S.C.R. 1075.
[35] Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010.
[36] Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511. A companion case to Haida Nation – Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), [2004] 3 S.C.R. 550 – was decided at the same time as Haida Nation.
[37] Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388.

> the Aboriginal right or title and contemplates conduct that might adversely affect it.[38]

The source of the duty of consultation is the "honour of the Crown."

> The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people.[39]

The scope of consultation varies with the circumstances.

> The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.[40]

While the treaties with express hunting rights clauses recognize the right of the Crown to take up land, the taking up clause is to be exercised in a manner consistent with the honour of the Crown:

> [T]he honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights).[41]

The duty of consultation applies to the level of government that is making the decision or taking the action. The Supreme Court in *Haida Nation* rejected an argument by the Province of British Columbia that the duty of consultation and accommodation rests

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[38] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, at para. 33 referring to para. 34 of Haida Nation.
[39] *Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 S.C.R. 511 at para. 32.
[40] *Delgamuukw, supra* at para. 168.
[41] *Mikisew Cree First Nation, supra* at para. 57.

solely with the Federal Government.[42] In my view, this makes perfect sense because the duty of consultation should attach to the level of government that is charged under the Canadian Constitution with making the decision or taking the action in question.

Part 2 – Provincial Involvement in Treaty Relations

The Provincial Government has increasing become more involved in matters relating to treaties, reflecting, I believe, the evolution of the legal principles referred to in Part 1. In this Part I refer to five specific areas where this evolution is demonstrated.

a. Recognition of aboriginal and treaty rights in Provincial legislation

In 2000, the Manitoba Legislature amended *The Interpretation Act* of Manitoba to provide an express recognition of aboriginal and treaty rights:

> **Aboriginal rights protected**
>
> 8 No Act or regulation is to be interpreted so as to abrogate or derogate from the aboriginal and treaty rights of the aboriginal peoples of Canada that are recognized and affirmed by section 35 of the *Constitution Act, 1982.*

An amendment of this nature had been recommended by the Aboriginal Justice Inquiry[43] in its report issued in 1991. This provision had again been recommended by the Aboriginal Justice Implementation Commission[44] that had been established by the Government in 1999.

The statement provides a clear statutory recognition of aboriginal or treaty rights by the Manitoba Legislature. There may be only a modest legal effect, since aboriginal and treaty rights are protected by the Constitution, but the statutory recognition that all laws are to be interpreted in a manner consistent with aboriginal and treaty rights means that constitutional remedies and processes need not necessarily be invoked for legal protection of the rights to be respected.

b. Recognition of NFA as modern treaty

Another recommendation of the Aboriginal Justice Inquiry and the AJIC was to recognize the Northern Flood Agreement as a modern treaty.

On December 15, 2000, Eric Robinson, Manitoba Minister of Aboriginal and Northern Affairs, formally recognized the NFA as a modern treaty by a Ministerial statement in the Legislative Assembly:

> … for the first time in the history of this House, the Government of Manitoba recognizes that the Northern Flood Agreement is a modern day treaty and expresses

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[42] *Haida Nation* at par. 57-59
[43] The Report of the Aboriginal Justice Inquiry is available on line at www.ajic.mb.ca/volumel/toc.htm
[44] The Report of the Aboriginal Justice Implementation Commission is available on line at: www.ajic.mb.ca/volume.html

> its commitment to honour and properly implement the terms of the Northern Flood Agreement as recommended by the commissioners of the Aboriginal Justice Inquiry in 1991. As part of this recognition, the Government acknowledges the comprehensive implementation agreements negotiated in good faith and signed with four NFA First Nations as one method of addressing and implementing the terms of the NFA.[45]

This statement may be more than just symbolic. While, in my view, the statement does not change the content of the commitments in the Agreement, the application of the principles of "honour of the Crown" likely means that the recognition of the NFA as a treaty by the Government of Manitoba would be construed, as a matter of law, as a statement that the Crown in right of Manitoba would be honour-bound to govern itself in its NFA activities on the basis that the NFA is a treaty. The Crown would therefore be expected to conduct itself in NFA implementation activities on the basis that the NFA is a treaty. This would apply to all Government departments and Government agents.

c. Resource Management Boards

The Government of Manitoba has entered into a series of Resource Management Agreements with First Nations. The initial agreements are part of broader agreements relating to adverse effects of hydro-electric development in northern Manitoba. More recently, other agreements have been developed that are not linked to hydro adverse effects settlements.

The objective of the Resource Management Agreements is to provide for a continuing mechanism for representatives of the Manitoba Government and the communities to come together to understand priorities and objectives for land use and resource management over a defined Resource Management Area. In each agreement a Resource Management Board is established consisting of an equal number of members appointed by each of Manitoba and by the First Nation. The Board has a responsibility to consider land use and resource management planning, and may consider matters relating to the use and management of natural resources in the RMA.

Until land use or resource management plans are developed and adopted, the Province has committed in the RMAs that dispositions of lands and resources are to be considered by the Boards and decisions about the proposed disposition are made on the advice of the Board. While the decisions of the Boards are not binding on Provincial decision makers the Agreements require a formal process for the Province to advise of reasons for not accepting a decision of the Board, and providing an opportunity for the Board to reconsider the decision.

The Resource Management Agreements are not designed specifically as a method of respecting treaty rights, but the Agreements reflect the evolution of the relationship

[45] Hansard, Legislative Assembly of Manitoba, available at: www.gov.mb.ca/legislature/hansard/2nd-37th/vol_09/h09.html

between the Crown and aboriginal peoples, which I think reflects a practical application of the honour of the Crown.

d. The East Side Traditional Lands Planning and Special Protected Areas Act

Since 2000, the Government of Manitoba has engaged the 16 First Nations on the east side of Lake Winnipeg in an extensive planning process, the Wabanong Nakaygum Okimawin[46] (WNO) planning process. The objective of the process is to develop a broad area plan for the east side of Lake Winnipeg. The east side was chosen for the initiative for two primary reasons[47]:

1. The east side of Lake Winnipeg is a unique region of the province because it contains a vast expanse of undeveloped, contiguous, boreal forest. The need for sustainable planning in this area has been reinforced by the recent Manitoba Climate Change Task Force Report. This report stated that Manitoba is at risk of losing both the southern and northern edges of the boreal forest to climate change.

2. The east side of Lake Winnipeg is a unique region with communities that do not have access to the transportation networks and economic opportunities that most Manitobans take for granted. The need for planning in this regard has also been reinforced by the Climate Change Task Force Report that highlighted the dramatic effects of climate change on winter road and food distribution systems for communities in this, and other, remote and northern regions.

In April 2007 the WNO First Nations and Manitoba entered into a "government-to-government" Accord under which the Government of Manitoba and the First Nations "agree to work together in a spirit of mutual recognition, respect and reconciliation to achieve the objectives and goals of the East Side Broad Area Land Use Planning Initiative."[48] The Accord also sets out a list of principles that are agreed to apply to the relationship between the First Nations and the Provincial Government, including:

> 1.3 the planning area is within Treaty 1, Treaty 3 and Treaty 5; therefore the Province is bound by the terms of those Treaties and principles of treaty interpretation as enunciated by the courts;
>
> 1.4 in addition to their treaty rights, the First Nations peoples living within the planning area have aboriginal rights that are inherent as First Nations peoples and as the original inhabitants of the area;

[46] Cree and Ojibway words meaning: "East Side of the Lake Governance"
[47] The WNO initiative is described on the Manitoba Conservation page of the Government of Manitoba website at: www.gov.mb.ca/conservation/wno/phase1/index.html
[48] A copy of the Accord is posted on the Manitoba Conservation page of the Government of Manitoba website at: www.gov.mb.ca/conservation/wno/pdf/accord_april_3_2007.pdf

The Accord also sets out a commitment to a process for decision making for Crown lands in the east side Planning Area that includes a commitment to consultation with the First Nations.

> 3.10 Until the applicable First Nations land use plans are developed and adopted or resource management agreements are in place, the Province, before deciding on a proposal for an allocation or disposition of Manitoba Crown land or resources for an activity in the Planning Areas, will consult meaningfully with any First Nation Government whose aboriginal or treaty rights may be adversely affected by the proposal and will accommodate the reasonable concerns of the First Nation Government about the effects.

In June 2009, the Legislative Assembly adopted *The East Side Traditional Lands Planning and Special Protected Areas Act*[49]. The Act provides as statutory basis for the development and adoption of plans for areas traditionally used by east side First Nations. Plans are developed by First Nation planning councils and submitted to the provincial Minister of Conservation for adoption. Approved plans are to be taken into account in making any decisions. Regulations may be made to give effect to specific elements of approved plans.

e. Province as party to consultation about decisions that may affect treaty rights or aboriginal rights.

Provincial decision making processes have been changed greatly by the development of the duty of the Crown to consult with aboriginal peoples as reflected in the case law relating to s. 35 of the *Constitution Act, 1982*. Because decisions relating to the use of lands and resources are predominantly provincial, not federal, decisions, Provincial governments are much more affected by the duty of consultation.

The Government of Manitoba has adopted an Interim Policy for Crown Consultation with First Nations, Metis Communities and Other Aboriginal Communities and accompanying Guidelines. The Policy is to be applied by all Provincial Government departments and agencies.

> The interim policy is a reflection and recognition of Section 35 of the Constitution Act, 1982 and the case law that has developed in this area. The interim guidelines are a reflection of Manitoba's experience to date along with feedback received from Aboriginal organizations from across Manitoba on the draft Policy and Guidelines for Crown Consultations with Aboriginal Peoples. Discussions will continue at various levels and over time to ensure the policy and guidelines reflect the most current case law and experience[50]

The Policy Statement in the Interim Provincial Policy is as follows:

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[49] C.C.S.M. c. E3

[50] From the Manitoba Aboriginal and Northern Affairs page of the Government of Manitoba website at

> The Government of Manitoba recognizes it has a duty to consult in a meaningful way with First Nations, Métis communities and other Aboriginal communities when any proposed provincial law, regulation, decision or action may infringe upon or adversely affect the exercise of a treaty or aboriginal right of that First Nation, Métis community or other aboriginal community.[51]

The Government has applied the policy in engaging with aboriginal communities about a number of potential government decisions, including those relating to the licensing of hydro-electric projects, forest management plans, mining projects.

The Government has established an Interdepartmental Working Group to provide advice and assistance to government officials by bringing together departmental staff who have gained experience and expertise in this area. The IDWG advises departments, branches, regions and government decision-makers on policies and procedures for Crown-Aboriginal consultations.

For major projects the standard practice adopted by the Manitoba Government has been to establish a consultation steering committee to provide advice and direction to the Manitoba officials who act as consultation teams to consult directly with the communities.

In some cases a written consultation plan or protocol is developed between the Manitoba consultation team and the community representatives. The plan will describe the way in which the consultation will take place – information sharing, community meetings, involvement of project proponents, etc. In developing a consultation plan communities have sometimes identified rights and interests that the communities consider may be affected by the contemplated decision. In those cases we have taken the approach that reasonable assertions by communities as to what their treaty or aboriginal rights may be considered in the consultation process, without necessarily seeking to agree on the full description and scope of treaty rights or aboriginal rights. The consultation process thus allows for First Nations to express concerns about how an activity might affect its view of treaty rights, and the Manitoba team will consider those concerns in good faith in making decisions, without the Government of Manitoba and the First Nation necessarily needing to agree in advance with whether an interest amounts in law to an aboriginal right or a treaty right.

As an example, here is a list of interests identified by a First Nation as potentially being affected by a resource-development project for inclusion in a consultation plan or protocol:

i) hunting, fishing, trapping and gathering activities, including conducting activities reasonably incidental to the activities of hunting, fishing, trapping and gathering such as the building and use of cabins, campsites, and landing sites;

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[51] The Interim Provincial Policy and Guidelines may be found on the Aboriginal and Northern Affairs page of the Government of Manitoba website at http://www.gov.mb.ca/ana/pdf/interim_aboriginal_consultation_policy_and_guidelines.pdf

ii) practices and customs that are integral to the distinctive culture of the First Nation, including the conduct of political, social (including recreational), ceremonial, cultural, spiritual and economic ways of life;

iii) the use and preservation of sacred, cultural, burial and spiritual sites;

iv) the preservation of wildlife, waterfowl, fish and their respective habitats, including their respective nesting, spawning and calving areas and their migration routes, in order that hunting, fishing, trapping and gathering activities will be able to be continued;

v) the use of water;

vi) the right pursuant to section 13 of the *Manitoba Natural Resources Transfer Agreement*, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the NDFN may have a right of access;

vii) land entitlement interests under Treaty No. , including rights to reserve lands under the per capita provision, as set out in Manitoba Treaty Land Entitlement Framework Agreement dated May 29, 1997… .[52]

Concluding Comments

Notably, in each of the five subject areas I refer to in Part 2 the federal government has no real involvement. The interests extend beyond First Nation reserves and reflect that First Nation interests under the treaties, and in practice, are not limited to reserves. Issues of resource management, environmental protection and economic development opportunities increasingly intersect more significantly with Provincial Governments and so Provincial Governments may be expected to continue to take an increasingly leading role in relationships with First Nations on behalf of the indivisible Crown.

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[52] This list is paraphrased from a list of First Nation rights and interests set out in a June 2009 "Consultation Protocol" between Manitoba and the Northlands Denesuline First Nation relating to mineral exploration activity in lands traditionally used by NDFN.