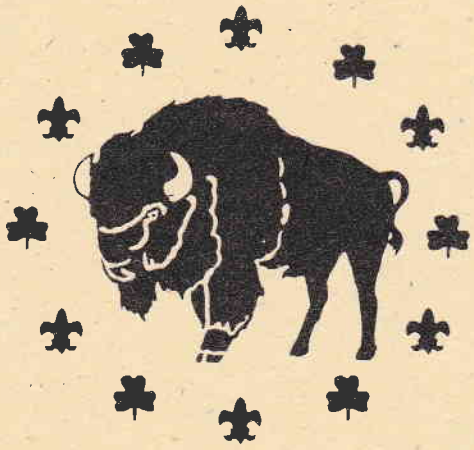
The First Peoples
Constitutional Review Commission

TREATIES:
A ROUTE TO COEXISTENCE

NCC Constitutional Review Commission Working Paper #2



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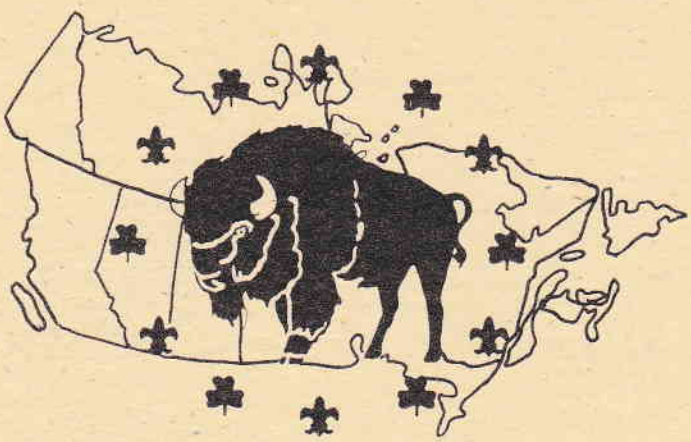

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A NOTE FROM THE COMMISSION

It deeply troubles us, as we are sure it does others, that some of our societies, like our languages, may die if we do not safeguard them from further harm. There are powerful interests which want to deny our societies the human right to rebuild themselves into self-sufficient, indigenous societies.

We must all respond to the communities' outcry for strong protection for their relatively small, but rich societies in North America. The steady growth of the aboriginal population throughout the Americas is at a rate higher than for all other peoples on the continent and this is a good sign for our future security and prominence. Together, in Canada, we are more than one million people belonging to distinct nations. Together we are simply too large a force to ignore. But more than this, our reasonable demand to exist as peoples with our own laws, cultures and languages is too powerful to deny.

Aboriginal peoples have strong allies in the neighbouring societies that share our lands. We believe that they too see no harm in negotiating a new, more enlightened relationship - a working relationship rooted in co-existence and respect.

Our challenge, as a Commission, is to echo what we have long heard and we will hear over the next few months as the constitutional dialogue unfolds. We will add our perspectives for a much better relationship that our children can build on together - without the penalties and ridicule our parents faced in their generation. At the end of this round, we must be able to say that we found a good way to guarantee strong and vibrant indigenous societies in our own homelands for centuries to come.

The following is a working paper of the Constitutional Review Commission of the Native Council of Canada. It has been drafted by the Commissioners to encourage discussion and increase understanding of treaty issues in Canada.

INTRODUCTION

Treaties have been the major route to accommodation in the relationship between Aboriginal and non-Aboriginal peoples in Canada since the days of first contact. Treaties were the formal mechanism by which Aboriginal and non-Aboriginal nations initially tried to define the terms of coexistence in North America. The treaty process holds the only secure source of credibility and consent among Aboriginal communities.

Treaties of peace and friendship were negotiated between Aboriginal and non-Aboriginal peoples in parts of Canada, as early as 1664. In addition, non-Aboriginal rights to lands in Quebec, Ontario, the Prairies and parts of British Columbia have been gained through treaty with the Aboriginal peoples of those areas. Any jurisdiction which Canadian governments claim over those lands today, is based on treaty rights. Those same treaties have established equally valid rights for the Aboriginal peoples of those lands.

Each treaty signed in Canada has beneficiaries. In most cases, descendants and successor communities to the Aboriginal signatories are provided rights and protections that are found within the written and oral terms of the treaties. Canada and its non-Aboriginal descendants and successor communities, particularly provincial governments, acquired and hold powers, roles and recognitions of their jurisdictions over lands only because of the terms of the treaties.

The Aboriginal peoples of Canada view treaties, both historical and current, as the foundation upon which the terms of co-existence between Aboriginal peoples and non-Aboriginals are based. Since treaties result in rights, recognitions and responsibilities for all sides, any national agreement that sets out the relationship of Aboriginal peoples to Canada, if its contents add to or clarify Section 35(1) of the *Constitution Act, 1982*, will also result in the constitutional protection of both the Aboriginal components and the non-Aboriginal interests.

In this working paper, the Commission hopes to provide a basic understanding from an Aboriginal perspective of the history, development, and current and potential role of treaties in Canada. The treaty process is not "dead history", but is instead a process which can continue to define the relationship between Aboriginal and non-Aboriginal peoples of Canada.

WHAT IS A TREATY?

A treaty is a formal agreement between the Crown and Canada's Aboriginal people defining the relationship between both Nations. They may deal with Aboriginal title and land rights, as well as the sharing of power and resources. They may develop a means for two or more nations to live and work together in harmony, under mutually agreeable terms of co-existence.The rights contained in the treaties are now constitutionally protected by Section 35 of the *Constitution Act, 1982*. This means that the Parliament of Canada can no longer unilaterally extinguish or modify treaty or Aboriginal rights. Changes to these rights require the consent of the Aboriginal groups concerned.

The treaties can be categorized into three main groups: the pre-Confederation, post-Confederation and modern treaties. Each will be discussed in greater detail in this working paper.

WHO HAS A RIGHT TO TREATY AND TO TREATY RIGHTS?

The position of the Native Council of Canada (NCC) is that every Aboriginal person who is a descendant of individuals within communities (or groups) who entered treaty, or are descendants of those who lived in the geographic areas covered by treaties, have a right to treaty and to treaty rights.

The Constitutional Review Commission notes that there is a large treaty-oriented constituency of the Native Council of Canada that must be included in every phase of any process designed to develop or modify the treaty process or which addresses the issue of treaty rights. This constituency includes descendants of treaty populations (Indian or Métis) who were excluded from treaty by application of government policy: i.e. registration and enfranchisement under the *Indian Act*, including;

1) status Indians, including those who were re-instated under Bill C-31, who are not yet entered on treaty lists;

2) Indians and Métis who are descendants of those who lived in the geographic areas covered by treaty, but who have not been recognized as part of the treaty; and

3) Indian and Métis people who were formerly included on treaty lists, but were deleted upon enfranchisement, and who may or may not be seeking re-instatement under Bill C-31.

WHAT IS THE ROYAL PROCLAMATION OF 1763?

The Pontiac war in 1763 was an assertion of Aboriginal sovereignty and communal possession of the land against the expansion of settlement contrary to the treaties and the Royal instructions to the colonial governors of the day. The British Crown issued a Proclamation to establish territorial control and to correct admitted "frauds and abuses" against Aboriginal peoples who were allied with the Crown.

The Proclamation is now entrenched in Sections 25 and 35, of the *Constitution Act, 1982*. It includes the following provisions which are the basis of treaty rights and treaty making in the Canada today:

1) Aboriginal hunting grounds were to be preserved for the Aboriginal Nations;

2) Aboriginal peoples were to be protected from fraudulent land purchases;

3) the British Crown had not only the sole right, but was obligated to enter into treaty with the various nations of Aboriginal peoples who resided in the territories under their control;

4) Aboriginal lands would only be acquired by the British Crown through fair purchase using a process of public negotiations; and

5) Aboriginal nations' rights to self-government were recognized.

The Proclamation was designed to address the three levels of government that existed in North America at the time (the British Crown, the Aboriginal Nations and the local colonial governments), and their relationship to each other.

The Royal Proclamation was a major victory for the Aboriginal people in the continuing fight to protect their land. As a formal description of Aboriginal/Settler/Crown relationship to the land, the Royal Proclamation is a central document in the history of sovereignty, land use, and the treaty process in North America. It clearly specified that Aboriginal people had possession of land that was not to be eroded by expanding settlement. It also provided the only formal process by which Aboriginal people can be deprived of that land.

The elements which were first embodied in negotiations with the Aboriginal nations of Atlantic and central Canada, and incorporated into the Royal Proclamation of 1763, are the only legal standards for Treaty negotiations.

WHAT ARE PRE-CONFEDERATION TREATIES?

Before European settlers came to North America, neighbouring communities, tribes, nations and confederacies would meet "to treat" with each other to develop political arrangements and to arrange for the use of particular parcels of land. A verbal agreement sealed by an exchange of gifts was all that was needed to settle the terms for temporary use or sharing of the land.

Title to the land was a critical issue to the French and the English in the 17th and 18th century in their competition for dominance in North America. Different tactics, strategies, and philosophies were used by the European nations to obtain the land settlers wanted.

The French simply assumed international sovereignty over the land without disturbing Aboriginal land ownership or sovereignty. They formed political, military, and physical alliances with the Aboriginal people, producing a growing population of mixed bloods biased in favour of their fathers.

The English were far more interested in establishing some form of legal relationship to the land. In 1701, a royal treaty placed the Five Nations and their hunting grounds under the "protection" of the Crown of England.

The first colonial treaties signed by Quaker settlers were declarations of brotherhood and mutual respect. It was implicitly understood that each party to the treaty would continue to govern themselves in their respective traditions. The treaties simply set down the basic framework for coexistence between colonial and Aboriginal peoples.

When tribes placed themselves under the "protection" of British sovereignty, their tribal territories, membership, hunting, and all other aspects of self-government were regulated by the Aboriginal peoples themselves. Control over their territories and peoples was assured to Aboriginal people in Eastern Canada during the pre-Confederation treaty-making process and was re-confirmed by the Proclamation of 1763.

WHAT ARE POST-CONFEDERATION TREATIES?

After Confederation, a series of treaties were signed between representatives of the Crown and Aboriginal peoples living on the Western Plains, in the North and in parts of what is now Ontario. Fourteen of the largest treaties are discussed here.

Technically, treaties are legal agreements between independent nations. The treaties were signed by the Crown because Canada wanted to "open up the west" to European immigrants, develop a transcontinental railway, allow for the creation and expansion of new western provinces, and link British Columbia with Eastern Canada. For Aboriginal people, the treaties are the "terms of union".

In signing these post-Confederation treaties, the Crown recognized the pre-treaty Aboriginal title, and fundamental legal and moral claim of Aboriginal people to the land. Aboriginal people had occupied and controlled the entire continent, including the Western territories which are presently included in post-Confederation treaties.

In the 10 years following Confederation, the Crown, recognizing pre-treaty Aboriginal title, entered into the following seven "Numbered" treaties:

Treaty #1 (1871) - Southern Manitoba
Treaty #2 (1871) - Southern Manitoba/ Saskatchewan
Treaty #3 (1873) - Southern Manitoba/ Northwestern Ontario
Treaty #4 (1874) - Southern Saskatchewan/Alberta
Treaty #5 (1875) - Mid-Manitoba
Treaty #6 (1876) - Southern and mid-Saskatchewan/ mid-Alberta (Extended in 1889)
Treaty #7 (1877) - Southern Alberta

After the railway was completed and European settlement began in the West, further post-Confederation treaties were signed between the Crown and Aboriginal peoples.

After 1877, the following treaties were signed:

Treaty #8 (1899) - Northern Alberta/Northeastern B.C./Southern N.W.T./ Northern Saskatchewan
Treaty #9 (1905) - Northern Ontario
Treaty #10 (1906)- Northern Saskatchewan/Alberta
Treaty of 1908 - Northern Manitoba
Treaty #11 (1921)- Northwest Territories
Treaty of 1923 - Ontario (north of Toronto)
Treaty of 1929 - Northern Ontario

WHAT ARE MODERN TREATIES?

Modern treaties are the land claims agreements which are currently being negotiated by Aboriginal peoples and the federal and provincial governments.

The land claims process is an attempt to resolve the outstanding claims of Aboriginal people. The rights determined by this process are constitutionally protected as treaty rights within the meaning of Section 35 of the *Constitution Act, 1982.* It is in this sense, that modern land claims agreements can be seen as modern treaties.

There are two federal government policies that deal with these entitlements: the specific and the comprehensive claims policies. The specific claims process deals with claims of *Indian Act* bands in areas where treaties have already been signed, but where some of the provisions of those treaties have not been respected or implemented. These "treaty land entitlement" cases are often being settled without any respect of the fact that status under the *Indian Act* and "treaty entitlement" are different concepts that are not legally related.

The comprehensive claims policy is directed at Aboriginal people living in areas where treaties were never made or where treaty entitlement was never given. Such areas include the Northwest Territories, the Yukon Territory, British Columbia, Southern Quebec and Labrador. In the Northwest Territories, Treaties 8 and 11 were signed with the Aboriginalpeople, but their treaty entitlement was never received. In this area, the comprehensive claims process is the means by which this treaty entitlement is being renegotiated.

A comprehensive claims agreement can establish membership, jurisdictions, financial relationships, decision-making structures, and dispute-resolution mechanisms.

Under a land claims agreement, Aboriginal people receive specified benefits and rights from the Crown. In return however, we are currently being required to "extinguish" or give up all our original rights, claims, titles and interests, if any, to land and water in Canada for all future generations. This includes Métis or half-breed scrip. Claimant groups have suggested policy alternatives to "extinguishment" but to no avail. This current policy of "extinguishment" under the comprehensive claims process is unacceptable to Aboriginal people.

In addition to the elements of a traditional treaty, Aboriginal groups can negotiate an implementation plan and self-government agreements within the comprehensive claims process. The difficulty is that current government policy prevents either of these elements from being constitutionally enforced. As a result, the federal government can unilaterally control when and how these elements are actually implemented. Aboriginal negotiators are insisting that implementation and self-government elements be constitutionally protected, as a treaty, along with the rest of the agreement.

WHAT IS THE RELATIONSHIP BETWEEN THE TREATIES AND THE INDIAN ACT?

It is commonly thought that the *Indian Act* determines who is a treaty Indian, and what treaty rights they have. In fact, there is virtually no legal connection between the *Indian Act* and Indian treaties. The *Indian Act* defines who is a "status Indian" for the purposes of the *Indian Act*, but is *not* concerned with treaties or treaty rights. Many people who are not "status Indians" are nevertheless "treaty Indians" because their ancestors were members of communities which signed treaties. Some of these non-status treaty Indians were once status or are the children or grandchildren of people who were once status, but lost status under the provisions of the old *Indian Act*. Others were simply left off or struck off the Indian Register by mistake.

The first *Indian Act* which grouped together several federal laws dealing with Indians and their lands was passed in 1876, without the input or consent of Aboriginal people. It was designed to provide the laws by which Indian reserves and "official" bands (bands recognized as "bands" under the *Indian Act*) would be administered.

The *Act* was amended by Bill C-31 in 1985. Under Bill C-31, an Indian woman no longer loses status upon marrying a man who is not registered under the *Indian Act*. Furthermore, many people can apply to regain lost status. It is important to note, however, that most non-status Aboriginal people are still not eligible to be registered as status Indians. Many others who may be eligible have chosen not to apply for status.

WHAT IS THE RELATIONSHIP BETWEEN THE TREATIES AND SECTION 91(24) OF THE CONSTITUTION ACT, 1867?

Section 91(24) of the *Constitution Act, 1867* (previously known as the *British North America Act*) states that the federal government has exclusive jurisdiction to legislate for "Indians, and Lands reserved for the Indians".

The Supreme Court of Canada has declared that the word "Indian" in Section 91(24) includes the Inuit even though Inuit are not "Indians" within the meaning of the *Indian Act*. The Supreme Court has never been asked to decide whether Métis or non-status Indians are Section 91(24) "Indians".

Most Aboriginal peoples' organizations, however, say that all Aboriginal peoples (Indian, Métis and Inuit) are "Indians" within the meaning of Section 91(24) whether or not they are registered as status Indians under the *Indian Act*. This argument is supported by Section 35(2) of the *Constitution Act, 1982*, which defines "Aboriginal peoples" as the "Indian, Inuit and Métis peoples" of Canada.

Questions are often raised about what happens when treaty rights, such as hunting, conflict with provincial laws. The Supreme Court of Canada in the Dick case of 1984, has ruled that such laws do not apply to Aboriginal people if the result would be to "impair" the "Indianness" or "Aboriginality" of Section 91(24) Indians. Without defining the term, the Court said the exercise of treaty rights is an element of "Indianness". In the Simon Case of 1985, the Supreme Court dismissed a charge against an Indian man who demonstrated he was a descendent of a treaty community.

An Aboriginal person who has a connection by descent to a treaty is therefore a "treaty Indian" regardless of whether s/he is a status Indian within the meaning of the *Indian Act*. The treaty rights of any such person are protected under the Canadian constitution and that person is exempt from the application of almost all provincial laws when pursuing traditional activities within his/her treaty area.

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WHAT IS THE RELATIONSHIP BETWEEN THE TREATIES AND SECTION 35 OF THE CONSTITUTION ACT, 1982?

Section 35(1) of the *Constitution Act, 1982*, recognizes and affirms the "existing aboriginal and treaty rights of the aboriginal peoples". Section 35(3) clarifies that "treaty rights includes rights that now exist by way of land claims agreements or may be so acquired".

A serious difficulty still remains, however, in the narrow application of federal treaty policy to the constituency of the NCC.

There is a concern that the word "existing" will maintain a status-quo of treaty rights which was imposed by legislation and policy on April 17, 1982. Those treaty rights, which provincial or federal legislation had tried to limit, might be interpreted as the only rights which survive under the current "existing" wording. If this legal interpretation were accepted, then only those people who had their treaty rights recognized prior to April 17, 1982 would have access to the benefits of constitutional protection. The NCC and the CRC reject this line of reasoning as legally flawed and politically unacceptable.

For treaties to remain a valid mechanism for negotiating the terms of coexistence between Aboriginal and non-Aboriginal peoples in Canada, a number of interpretative standards must be established:

1) treaty and treaty rights must apply to all Aboriginal people in Canada who are descendants of pre- and post-Confederation treaty communities (but not just to *Indian Act* Bands);

2) the negotiation of new or modern treaties (or land claims agreements) must conform to the continuing existence of Aboriginal rights and title to land; and

3) the terms of these treaties must be interpreted in the "spirit and intent" of the original treaty process and be modified to meet modern conditions.

WHAT IS THE SPIRIT AND INTENT OF TREATIES?

To be workable, treaties must be interpreted liberally rather than strictly as technical, legal documents drafted by the Crown. Canadian courts have declared that treaties are unique agreements between the Crown and Indian Tribes or Nations since the signing of these documents includes not only the written words, but also the oral negotiations. They should be interpreted as the original signatories of the treaties understood them. Therefore, all forms of relevant information should be admissible as evidence to prove the precise scope of the treaties.

Since NCC constituents have been greatly affected by current treaty policy, the NCC has in the past supported a constitutional amendment which proclaims a liberalized "spirit and intent" approach to treaties and treaty-making. If the original spirit and intent of most treaties were renewed, then the rights of many NCC constituents to treaty would be clarified. It is this kind of equity of access to treaty and treaty rights that have become a priority of NCC's treaty constituents.

As a guide to the modern interpretation of treaties, a constitutional amendment of "spirit and intent" of treaties would serve several useful purposes. It would increase the visibility of treaty rights and thereby encourage a faster government response in developing more appropriate laws and policies. This would both eliminate unnecessary conflict with existing laws, and signal the Canadian public that treaties are more than historic documents.

Such an amendment would codify and protect current liberal judicial views from later depreciation.

The impact of the meaning and role of "spirit and intent" on the NCC's treaty constituents raises several issues which must be resolved:

1) Which treaties are treaties within the meaning of Section 35?

2) Who has access to treaty rights?

3) What is the duty of the Crown to implement the terms of a treaty within a reasonable time?

4) The unilateral termination or so-called "supercession" of treaty or access to treaty rights.

5) To confirm Aboriginal title where the treaty has been consistantly breached by the Crown.

6) The general issue of the renewal of the basic treaty relationship where that mechanism is the most viable for a mutually negotiated agreement between Aboriginal people and non-Aboriginal governments in relation to land and self-government regarding new or long-standing claims.

IS A NATIONAL TREATY AN OPTION FOR CONSTITUTIONAL CHANGE?

The CRC believes that Aboriginal peoples are in a unique position to offer Canadians a way out of the current constitutional dilemma. By using the special amending procedure contained in Part II of the *Constitution Act, 1982*, it may be possible to achieve a new statement on the essential makeup and direction of Canada through a national treaty. Such a treaty would state articles or principles of Confederation that set out the essential framework for political union, as has been suggested by many, including Premier Ghiz of Prince Edward Island. In this sense, a national treaty is one of the few ways to address Aboriginal and Québec-based demands for bilateral, people-to-people negotiations. This treaty could accommodate what both Aboriginal peoples and Québecers are seeking, namely recognition as inherent constituents of Confederation, and to see this recognition have legal affect on all other provisions of the Constitution.

A national treaty offers the possibility of satisfying four major objectives:

1) to establish Aboriginal peoples and their inherency as the centre piece of Confederation;

2) to meet the procedural demand for bilateral negotiation without in any way reducing the political or legal interests of others;

3) to achieve a fundamental recognition of both Aboriginal and French-Canada's distinctiveness;

4) to set the stage for a more legitimate exercise of broad national deliberation on substantive amendments to the Constitution without threatening to isolate any of Canada's constituent elements, particularly Aboriginal peoples and Québec;

Treaty making, for the Aboriginal community, is a more workable process for reform. Aboriginal organizations see it as a better alternative than the general amending formula currently set out in the Constitution. We propose that the concept and scope for a potential national treaty or covenant be discussed with Aboriginal peoples as a matter of high priority to ensure that we do not become overwhelmed by federally or provincially sponsored models for constitutional change. The CRC agrees that these government models are based on a status quo that excludes input from Aboriginal peoples over the direction and content of change and threatens to isolate us, as well as French-Canadians, from a realistic solution to the "national unity" crisis we all face.

We hope that the previous pages have given you some food food for thought. As Aboriginal people, we are eager to help solve the constitutional dilemma that faces Canada, but we cannot be expected to do that at the cost of our identity or our cultures. Treaty making has been and is a traditional Aboriginal activity designed to accommodate change and develop co-operative terms of co-existence. If the information on these pages serves to stimulate ideas and dialogue on the potential of treaty as a mechanism to achieve mutual understanding between Aboriginal and non-Aboriginal people in Canada, we will have accomplished our purpose.

DEFINITIONS OF TERMS

The purpose of these definitions is to provide assistance to the readers of these working papers. They are not intended to be legal definitions.

ABORIGINAL: The first peoples of an area. Canadian Aboriginal people are defined in the Constitution of Canada as being Indian, Inuit and Metis.

ABORIGINAL RIGHT: The rights of the first peoples of an area to use, and occupy and govern land and its resources. It includes the right to hunt, fish, gather and to govern themselves. This right is from the Creator and is not granted by any government.

ABORIGINAL TITLE: The right of first peoples to own and care for their land. This right is from the Creator and is not granted by any government.

ACCORD: An agreement between governments or nations.

ACT: A law of a government.

AMENDMENT: A change.

AMENDING FORMULA: An agreed process for changing something.

ABOLISH: To put an end to something.

AGENDA: A list of the things to be talked about at a meeting.

AUTONOMOUS: To be self-governing.

BAND: A community of status Indians which is recognized under the *Indian Act.*

BAND COUNCIL: The government of an Indian band as recognized under the *Indian Act.*

B.N.A. ACT: The *British North America Act, 1867.* A law of the British Crown, passed in 1867, which made Canada a country.

CONFEDERATION: The joining of the British Colonies to form Canada.

CONSTITUTION: The rules used by a country or government to govern itself. It is usually in a written form. It sets out which levels of government have the rights to make laws on what subjects.

CABINET: A special group of members of a government who have been chosen by the government leader to manage the government.

CHARTER OF RIGHTS AND FREEDOMS: The part of the *Constitution Act, 1982* which describes the rights of citizens.

COVENANT: An international law, a treaty among nations.

DELEGATE: To give power or responsibility to another.

DEVOLVE: To pass power or administrative authority from one level of government to another.

ENTITLEMENT: A right to benefits as spelled out in a law.

ENTRENCH: To put words in the constitution that can only be changed through special steps that are spelled out in the constitution.

EXTINGUISHMENT: When Aboriginal people give up all their original rights, titles and interests in a piece of land for other rights and benefits etc., as laid out in an agreement.

FEDERATION: When several provinces join together to form one government for some purposes, but they continue to be self-governing over their own affairs

FIDUCIARY The relationship which exists when one trusts in or relies on another.

IMPLEMENT: To carry out or put into place.

INDIGENOUS: Something or someone which lives or occurs naturally in a region, it was not moved there.

INHERENT RIGHT: A right which comes from the person who has it, or from the Creator, but which does not come from another person or government.

JURISDICTION: The power or right to make and enforce laws in a given territory.

LEGISLATION: The written laws of a country.

MANDATE: The responsibility or right which is given to someone to do something.

MANDATORY: Something which must be done.

MEMORANDUM OF AGREEMENT: A written agreement between two or more governments on a particular subject.

MUNICIPAL GOVERNMENT: The government of a village, county, town, or city.

ORIGINAL JURISDICTION: The power given by the Creator to the Aboriginal People to rule on the land and to live according to their laws and customs.

PATRIATION: To bring the constitution of a country under that country's direct control.

SOVEREIGN: The greatest or highest power over a land or people.

SOVEREIGNTY: Power that flows from the Creator, a Constitution or a monarch.

SELF-DETERMINATION: The right of people to decide how they will be governed.

SELF-GOVERNMENT: Having the right to govern oneself.

TREATY: An agreement between two Sovereigns.

TREATY RIGHTS: The rights which flow out of a treaty.

TRUST: A trust relationship in law is when someone holds title to land or other property for the benefit of someone else.

The Constitutional Review Commission

The Constitutional Review Commission was established by the Native Council of Canada in June, 1991 as a non-political forum for independent advice and consideration. The Commission is comprised of Aboriginal members from all regions of Canada with a wide range of Aboriginal and constitutional expertise and experience.

For more information contact the Clerk of the Commission, Ms. Debra Wright, at:

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