

# **Crown and Aboriginal Occupations of Land: A History & Comparison**

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## **EXECUTIVE SUMMARY**

This paper examines the historical context for the development and use of physical occupation and civil disobedience by the Crown and Aboriginal peoples to accomplish their objectives relating to land, treaty, and other rights. It also contains an inventory and short description of significant occupations, and reviews fundamental flashpoints that trigger such actions. Following this inventory best principles and practices for the peaceful and constructive resolution of Aboriginal occupations are outlined. The paper concludes by examining the conflict and resolution of a dispute in Clayoquot Sound in British Columbia to describe specific processes, outcomes, and best practices relating to occupations.

The first section of the paper deals with the historical context of occupations and blockades. It begins by reminding the reader that Aboriginal peoples occupied land prior to the arrival of people from other continents. It shows that during this period conflict could exist among various First Nations over land and resource use. As a result, Aboriginal peoples developed complex systems to avoid war and develop peaceful relations with their neighbours. To defuse conflict Aboriginal peoples pursued, *inter alia*, treaties, feasting, trade, negotiations, marriages, friendship, conferences, games, contests, dances, ceremonial events, and demarcations of land. The historical component of the paper also examines the impact of non-Aboriginal people's arrival in North America. Early Aboriginal–non-Aboriginal relationships followed many of the same protocols and values that Aboriginal peoples used to create peace. Among the most important of these values were treaties; Aboriginal peoples required their consent for non-Aboriginal occupation. Non-Aboriginal peoples agreed to follow this principle in the Royal Proclamation of 1763 and through their course of dealings. If non-Aboriginal peoples did not abide by these rules, Aboriginal peoples would reoccupy their lands. The paper then reviews how, through time, non-Aboriginal peoples began to exercise greater control over Aboriginal land and resources. In doing this they did not always secure Aboriginal consent. The historical section of the paper ends by making the point that, in many instances, non-Aboriginal

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\* Opinions expressed are those of the author and do not necessarily reflect those of the Ipperwash Inquiry or the Commissioner

occupations and blockades prevented Aboriginal peoples from accessing their land. This created the conditions for subsequent conflict.

The second section of the paper contains an inventory and brief description of major occupations and blockades in Canada through the past 30 years. It makes the point that the effect of non-Aboriginal occupation and blockades of Aboriginal land has resulted in Aboriginal people sometimes attempting to reoccupy their land through physical means. The thesis of this section is that Aboriginal blockades occur because of a failure to recognize and affirm Aboriginal land and resource rights *and* because of a failure to address the psychological effects of this denial. The paper makes these points by reviewing events at: Anishinabe Park, Moresby Island, Barriere Lake, Temagami, Old Man River, James Bay, Labrador, Oka, Lubicon Lake, Gustafsen Lake, Cape Croker, Mount Currie, Clayoquot Sound, Sun Peaks, Burnt Church, Grassy Narrows. The review reveals the scope and causes of disputes between Aboriginal peoples and others in Canada. It speaks of the trauma this causes people involved in these disputes. This section of the paper concludes by drawing on the insights of Harvard University Clinical Psychologist Dr. Judith Herman. Her work addresses the importance of developing a supportive social context to reduce and remedy conflict. This paper applies her ideas to occupations and blockades in Canada. Her work speaks to the importance of recognition and affirmation in recovering from individual and collective trauma in Canada.

The third section of the paper outlines best principles and practices for dispute resolution where conflicts are related to occupations. The paper suggests that guidance can be taken from section 35(1) of the *Constitution Act, 1982* because of this provision's charge to recognize and affirm Aboriginal rights. It suggests that recognition and affirmation is best accomplished by the termination of non-Aboriginal blockades and occupations of Aboriginal lands. Alternatively, consent is required to justly occupy Aboriginal land. The Supreme Court of Canada has developed helpful principles to assist in this result. Public officials could apply these principles in their work. The police, politicians, civil servants, developers, third parties, and others could take guidance from the court's calls to: deal with Aboriginal peoples in utmost good faith; avoid sharp dealing; cultivate a trust-like, rather than an adversarial, relationship; incorporate Aboriginal perspectives in decision-making procedures and outcomes; approach dispute resolution with a eye to reconciliation; learn Aboriginal languages and linguistic perspectives on issues; learn and practice Aboriginal cultural norms; interpret historic events as historic Aboriginal groups would have naturally understood them; avoid overly technical interpretations of ideas or events; interpret Aboriginal aspirations flexibly to avoid stereotypes; infringe Aboriginal and treaty rights as little as possible; engage in effective consultation with Aboriginal groups; reasonably balance Aboriginal interests in making calculations of the public good; provide compensation where Aboriginal economic interests are diminished. The paper suggests that the application of these principles should not be solely court-focused. They should be considered public obligations that bring the police, corporations, governments, and others into compliance with the spirit and intent of Canada's law dealing with Aboriginal peoples. The application of Canada's law by public officials could help end non-Aboriginal blockades, and thereby assist in terminating Aboriginal blockades.

The paper concludes by analyzing conflict at Clayoquot Sound in British Columbia to demonstrate best practices in reducing Aboriginal–non-Aboriginal conflict. Government and

forestry companies took account of Aboriginal peoples' perspectives and permitted their participation in land use and management. Important consequences flowed from this approach. First, a government Ombudsman demonstrated how the government had failed in its obligations to the Nu-Chah-Nulth of the area. Second, the government created a process that resulted in Aboriginal peoples managing their resources through an Aboriginal-controlled logging company. The government also incorporated Aboriginal laws and values in a scientific panel to decide how logging would continue in the Sound. Despite these breakthroughs the analysis concludes by identifying the downside of the approach at Clayoquot. Aboriginal peoples did not escape larger systemic forces that displace more traditional land and resource use. Problems are also present because Aboriginal peoples' future participation in decision making depends on government goodwill. Nevertheless, Clayoquot Sound offers a good example of how certain best principles for dispute resolution can find their way into practice.

The paper concludes by restating its general thesis: Aboriginal and non-Aboriginal peoples conflict over lands and resources because of the lack of recognition and affirmation of Aboriginal rights and perspectives. Following principles and practices that dismantle non-Aboriginal blockades in Canada will help in reducing conflict.

## INTRODUCTION

Aboriginal peoples have a pre-occupation. It is *of* land. They occupied land in North America prior to others arrival on its shores. Over the past 250 years Aboriginal peoples have been largely dispossessed of their lands and resources in Canada.<sup>1</sup> This dispossession has led to another Aboriginal pre-occupation. It is *with* land. It is crucial to their survival as peoples. Its loss haunts their dreams. Its continuing occupation and/or reoccupation inspires their visions.

Aboriginal peoples regard their traditional lands as sacred; it is integral to their culture and identity. They want to continue living on territories that have sustained them for thousands of years. Yet the Crown now claims occupation of traditional Aboriginal lands. When the Crown claims more land, this leads to conflict. Aboriginal peoples desire to hold onto their lands and resources to be more productive and preserve their ancient relationships. They struggle to resist further removal from their territories. They do not want the size of their territories further diminished. Therefore, Aboriginal peoples have attempted to protect and sustain their relationships to land and resources in many ways. They believe their previous occupation entitles them to present occupation. Yet others have unjustly settled their territories, and the Canadian legal system sanctions this result. This affects Aboriginal peoples' psyche. It strains their respect for law. It creates a desire for change and focuses their efforts on reoccupation. Aboriginal peoples have chosen different methods from an array of options to help others understand and recognize their continuing connection to lands and resources in Canada.

One of the ways Aboriginal peoples have tried to maintain their lands is through the continued physical occupation or re-emergent reoccupation of significant sites. Aboriginal peoples have

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<sup>1</sup> Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back*, vol. 1 of the *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services, 1996) at 137–200.

sometimes exercised civil disobedience as a response to the perceived and/or real loss of lands and/or resources. They do this by physically disrupting other's access to government offices or other tangible sites of conflict. This form of resistance or insistence usually occurs only if other avenues of relief are exhausted. Aboriginal peoples have sometimes employed occupations, reoccupations, and civil disobedience to influence the allocation of resources even if no land, resource, or treaty right was involved: issues such as education, health care, and taxation spring to mind. When Aboriginal peoples signed treaties with the Crown they received other legal entitlements such as education, health care, housing, exemptions from taxation, twine, ammunition, and other social and economic benefits. When the Crown fails to fulfill their obligations Aboriginal peoples may use their physical presence to positively influence legislative and policy choices. The history of physical pre-occupations, occupations and reoccupations is an important one in Aboriginal–Crown relations. Canada's response to Aboriginal occupation reveals values that lie at our society's core.

## I. OCCUPATIONS AND BLOCKADES IN HISTORICAL CONTEXT

Physical occupation of important sites to assert strongly held rights and assumed interests has a long history in Aboriginal communities.<sup>2</sup> In fact, it has a long history in non-Aboriginal communities too.<sup>3</sup> Land has passed from Aboriginal peoples to other Canadians through non-Aboriginal blockades and physical occupation. Sometimes treaties preceded non-Aboriginal occupation of land. Treaties attempted to secure the consent of Aboriginal peoples for non-Aboriginal settlement of land and resource use. At other times non-Aboriginal people occupied Aboriginal territories without Aboriginal treaties or consent. In such cases non-Aboriginal peoples might blockade Aboriginal access to important sites and refuse to leave until the government secured non-Aboriginal claims through treaty or some other act. The historic use of occupations and blockades by Aboriginal and non-Aboriginal peoples has significant consequences for the allocation of land and resources today. A brief review of this history will shed light on the continuing use of occupations and blockades in the present context.

### ABORIGINAL LAND AND RESOURCES: ABORIGINAL-TO-ABORIGINAL RELATIONS

In the time before others arrived in North America, Aboriginal peoples had well-developed systems to oppose those who threatened access to land and resources.<sup>4</sup> Direct occupation of land was only one of a range of options that Aboriginal peoples employed to secure their resources.<sup>5</sup> There were wider systems of diplomacy in use to maintain peace through councils and elaborate protocols.<sup>6</sup> For example, First Nations and powerful individuals would participate in such activities as smoking the peace pipe, feasting, holding a potlatch, exchanging ceremonial objects, and engaging in long orations, discussions, and negotiations. Diplomatic traditions among indigenous peoples were designed to prevent more direct confrontation. Inter-societal norms were developed to resolve conflict before people were placed in harm's way.<sup>7</sup> It is often easier to overcome disputes if each side's symbols and substantive concerns are acknowledged and reflected in diplomacy's process and product.

To formalize agreements, Aboriginal Nations might sometimes enter into treaties with one another. The purpose was to endorse accord that might flow from diplomatic exchanges. Treaties are a form of agreement that can be very productive as a method for securing peace. An important indigenous-to-indigenous treaty occurred between the Haudenosaunee<sup>8</sup> and the

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<sup>2</sup> J.V. Wright, *A History of the Native People of Canada* (Hull: Canadian Museum of Civilization, 1998).

<sup>3</sup> Ronald Wright, *Stolen Continents: The New World Through Indian Eyes*, 10th anniversary ed. (Toronto: Penguin Books, 2003).

<sup>4</sup> Yale Hart Richmond, Daniel K. Richter, and James H. Merrell, *Beyond the Covenant Chain: The Iroquois and Their Neighbors in Indian North America, 1600–1800* (Syracuse, N.Y.: Penn State University Press, 2003).

<sup>5</sup> William Cronon, *Changes in the Land: Indians, Colonists, and the Making of New England* (New York: Farrar, Straus and Giroux, 1983).

<sup>6</sup> Antonia Mills, *Eagle Down is Our Law: Witsuwit'en Feasts and Land Claims* (Vancouver: UBC Press, 1994).

<sup>7</sup> Jeremy Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples" (1995) 33 *Osgoode Hall Law Journal* 623.

<sup>8</sup> The Haudenosaunee are the Iroquois people of the Six Nations who live south, east, and west of Lake Ontario. The First Nations that make up the Haudenosaunee Confederacy are the Mohawks, Oneida, Onandaga, Cayuga, Tuscarora, and Seneca Nations. For further information about Haudenosaunee treaties see Francis Jennings, *The*

Anishinabek<sup>9</sup> in 1701 near Sault Ste. Marie.<sup>10</sup> The agreement was orally transacted and is recorded on a wampum belt (a memory device with shells forming pictures, sewn onto strings of animal hide and bound together). The 1701 belt has an image of a ‘bowl with one spoon.’ It refers to the fact that both Nations would share their hunting grounds in order to obtain food. The single wooden spoon in the bowl meant that no knives or sharp edges would be allowed in the land, for this would lead to bloodshed.<sup>11</sup> This agreement is still remembered by the two nations today.

Peace was also pursued through inter-societal activities between First Nations to bridge division and discord. These less formalized paths to peace should not be underestimated; they contain lessons about how to effectively overcome problems today. Understanding between groups grew as diverse peoples and individuals interacted with one another in social and economic affairs that partook of elements of each culture.<sup>12</sup> First Nations knew it was important to create a supportive social context to generate peace. The forging of personal ties was important, as friendship, intermarriage, and adoption helped to smooth tension.<sup>13</sup> Games, contests, dances, and other forms of recreation could bring whole groups together.<sup>14</sup> People would often learn one another’s language to facilitate communication across cultural and political lines. Sometimes new languages would be developed, such as Chinook on the west coast, to ease tension and encourage further communication and commerce.

Indigenous people from different Nations could sometimes congregate together for spiritual sustenance and form stronger bonds of belonging. One example of the development of indigenous-to-indigenous inter-societal activities occurred in the Great Lakes area through the ancient Feast of the Dead.<sup>15</sup> There would be times when the Anishinabek and the Wendat<sup>16</sup>

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*History and Culture of Iroquois Diplomacy: An Interdisciplinary Guide to the Treaties of the Six Nations and Their League* (Syracuse, N.Y.: Syracuse University Press, 1985).

<sup>9</sup> The Anishinabek live to the north of Lake Ontario and surround Lake Michigan and Lake Superior. They are also sometimes known as the Ojibway or Chippewa Indians. For a description of their treaties see Larry Nesper, *The Walleye War: The Struggle for Ojibwe Spearfishing and Treaty Rights* (Lincoln: University of Nebraska Press, 2002); Cary Miller, “Gifts as Treaties: The Political Use of Received Gifts in Anishinaabeg Communities, 1820–1832” (2002) 3*The American Indian Quarterly* at 221–245; Gilles Havard, *The Great Peace of Montreal of 1701: French Diplomacy in the Seventeenth Century*, trans. Phyllis Aronoff and Howard Scott (Montreal and Kingston: McGill-Queen’s University Press, 2001); Peter Schmalz, *The Ojibwa of Southern Ontario* (Toronto: University of Toronto Press, 1991).

<sup>10</sup> Victor Lytwyn, “A Dish with One Spoon: The Shared Hunting Grounds Agreement in the Great Lakes and St. Lawrence Valley Region,” *Papers of the 28th Algonquian Conference*, ed. David H. Pentland (Winnipeg: University of Manitoba, 1997) at 210–227.

<sup>11</sup> Paul Williams, “Oral Traditions on Trial,” in *Gin Das Winan Documenting Aboriginal History in Ontario*, ed. S. Dale Standen and David McNab, Occasional Papers of The Champlain Society, no. 2 (Toronto: The Champlain Society, 1996) at 29–34.

<sup>12</sup> Leo Waisberg, “The Ottawa: Traders of the Upper Great Lakes, 1715–1800” (master’s thesis, McMaster University, 1977) at 10, 20, 44, 47, 128–131.

<sup>13</sup> See Laura Peers and Jennifer S.H. Brown, “‘There is No End to Relationship Among the Indians’: Ojibwa Families and Kinship in Historical Perspective,” *The History of the Family—An International Quarterly* 4 (2000): 529–555.

<sup>14</sup> See generally Vernon Kintz, *The Indians of the Western Great Lakes* (Ann Arbor: University of Michigan Press, 1940).

<sup>15</sup> Harold Hickerson, “The Feast of the Dead among the Seventeenth Century Algonkians of the Upper Great Lakes,” *American Anthropologist* LXIII (February 1960) at 81–107.

would gather together at such feasts to ceremonially cement ties. The parties would exchange food and other gifts, trade goods, discuss common issues, and conduct important business. At the centre of these gatherings was the exhumation of bones from recently deceased ancestors from each Nation. These bones would then be re-buried in a common grave, symbolizing the mingling of the societies in this world and the next.<sup>17</sup> This powerful physical act of sharing and socio-cultural and/or spiritual bonding is an example of how indigenous peoples dealt with one another to overcome relational challenges.

If Aboriginal peoples were not successful in maintaining amity through such national and individualized efforts, then steps were sometimes taken to separate groups from one another. Boundaries and neutral zones could be developed to buffer more intense conflict. Patrols and checkpoints could be utilized to identify and warn those who found themselves straying close to territorial or resource use conflict. In Anishinabek society, peacekeeping warriors, or Ogijidah, could be used to patrol and monitor such sites of conflict, and perhaps even occupy a contested site.<sup>18</sup> This physical occupation could extend to village sites, along with hunting, fishing, and gathering locations, if others were not properly recognizing or affirming one party's rights.<sup>19</sup> As noted, these blockades—preventing others access to a locale—were only one tool Aboriginal peoples used to sustain important relationships to land and resources. Aboriginal peoples' occupation of areas to which they maintain or claim rights is not merely a modern phenomenon. Like other Nations and peoples of the world, Aboriginal peoples have participated in civil disobedience within the context of their own and others' cultural norms and legal values for a long, long time.

As a last resort, if other methods of conflict resolution failed, Aboriginal peoples would sometimes go to war over lands and resources. Most wars between indigenous peoples in Canada were not fought on the scale found in Europe during the same period. Conflict between Aboriginal nations in northern North America was often localized and based on Aboriginal justice systems that required that a life for a life.<sup>20</sup> However, there were rare occasions when armed conflict became more generalized and resulted in widespread violence and death. For example, there were catastrophic wars between the Haudenosaunee and Wendat in the 1640s. These battles led to the Wendat peoples near extermination and brutal dispersion from their traditional territories in southern Ontario.<sup>21</sup> This genocidal removal demonstrates why the failure of more peaceful methods of dispute resolution could be disastrous for entire peoples. The Wendat tragedy demonstrates the extreme consequences of armed confrontation if milder forms of conflict resolution break down. The failure of diplomacy and dispute resolution on this scale is

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<sup>16</sup> The Wendat are sometimes known as the Huron. They are an Iroquoian-speaking people who formerly lived between Lake Simcoe and Georgian Bay in southern Ontario. The Wendat were a group of our tribes that were known as the Attignawantan, the Arendarhonon, the Attigeeonongnahac, and the Tahontaenrat. These four groups originally lived in 18 to 25 villages on the eastern shores of Georgian Bay off Lake Huron, numbering some 18,000 to 40,000 inhabitants.

<sup>17</sup> Bruce G. Trigger, *The Children of Aataentsic: A History of the Huron People to 1600* (Montreal and Kingston: McGill-Queen's University Press, 1976) at 85–90.

<sup>18</sup> Elder Danny Musquah, Sauteaux Ojibway, oral history.

<sup>19</sup> Robert Doherty, *Disputed Waters: Native Americans and the Great Lakes Fishery* (Lexington: University Press of Kentucky, 1990) at 15–16.

<sup>20</sup> Vernon Kintz, *The Indians of the Western Great Lakes* (Ann Arbor: University of Michigan Press, 1940) at 64–69.

<sup>21</sup> In the following decades there were wars between the Anishinabek and Lakota/Dakota/Nakota beyond the western reaches of Lake Superior, which pushed the Lakota/Dakota/Nakota further out onto the Prairies.

a severe tragedy, brutally removing people from their ancient territories. Aboriginal peoples have long sought for ways to avoid such calamities, thereby placing indigenous law and diplomacy at the heart of Aboriginal experiences with others in North America.

## THE ARRIVAL OF NON-ABORIGINAL PEOPLES

When non-Aboriginal peoples ventured forth from their lands into North America, they encountered peoples with well-developed laws and duties related to land and resource use. In the first years of contact many non-Aboriginal peoples adapted themselves to the existing indigenous protocols.<sup>22</sup> Non-Aboriginal peoples would recognize Aboriginal land and resource use through many of the same institutions with which Aboriginal peoples were familiar: councils, feasts,

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<sup>22</sup> Emerson W. Baker and John G. Reid, "Amerindian Power in the Early Modern Northeast: A Reappraisal," *William and Mary Quarterly*, 3d ser., 61 (2004): 77–106; Gregory Evans Dowd, "'Insidious Friends': Gift Giving and the Cherokee-British Alliance in the Seven Years War," in *Contact Points: American Frontiers from the Mohawk Valley to the Mississippi, 1750–1830*, ed. Andrew R.L. Cayton and Fredrika J. Teute (Chapel Hill, N.C.: The University of North Carolina Press, 1998), 114–150; Mary A. Druke, "Linking Arms: The Structure of Iroquois Intertribal Diplomacy," in *Beyond the Covenant Chain: The Iroquois and Their Neighbors in Indian North America, 1600–1800*, ed. Daniel K. Richter and James H. Merrell (Syracuse, N.Y.: Penn State University Press, 1987); Lois M. Feister, "Linguistic Communication between the Dutch and Indians in New Netherland," *Ethnohistory* XX (1973): 25–38; William N. Fenton, "Structure, Continuity, and Change in the Process of Iroquois Treaty Making," in *The History and Culture of Iroquois Diplomacy: An Interdisciplinary Guide to the Treaties of the Six Nations and Their League*, ed. Francis Jennings et al. (Syracuse, N.Y.: Syracuse University Press, 1995); Michael K. Foster, "Another Look at the Function of Wampum in Iroquois-White Councils," in *History and Culture of Iroquois Diplomacy: An Interdisciplinary Guide to the Treaties of the Six Nations and Their League*, ed. Jennings et al., 99–114; Richard L. Haan, "Covenant and Consensus: Iroquois and English, 1676–1760," in *Beyond the Covenant Chain: The Iroquois and Their Neighbors in Indian North America, 1600–1800*, ed. Daniel K. Richter and James H. Merrell (Syracuse, N.Y.: Penn State University Press 1987), 41–57; Nancy L. Hagedorn, "'Faithful, Knowing, and Prudent': Andrew Montour as Interpreter and Cultural Broker, 1740–1772," in *Between Indian and White Worlds: The Cultural Broker*, ed. Margaret Connell Szasz (Norman, Okla.: Norman University of Oklahoma Press, 1994), 44–60; Nancy L. Hagedorn, "'A Friend to Go Between Them': The Interpreter as Cultural Broker during Anglo-Iroquois Councils," *Ethnohistory* XXXV (1988): 60–80; William B. Hart, "Black 'Go-Betweens' and the Mutability of 'Race,' Status, and Identity on New York's Pre-Revolutionary Frontier," in *Contact Points: American Frontiers from the Mohawk Valley to the Mississippi, 1750–1830*, ed. Andrew R.L. Cayton and Fredrika J. Teute (Chapel Hill, N.C.: University of North Carolina Press 1998), 88–113; Eric Hinderaker, "The 'Four Indian Kings' and the Imaginative Construction of the First British Empire," *William and Mary Quarterly*, 3d ser., LIII (1996): 487–526; Francis Jennings, "The Constitutional Evolution of the Covenant Chain," *American Philosophical Society, Proceedings*, CXV (1971): 88–96; Peter Marshall, "Colonial Protest and Imperial Retrenchment: Indian Policy, 1764–1768," *Journal of American Studies* V (1971): 1–17; Michael N. McConnell, "Pisquetomen and Tamaqua: Mediating Peace in the Ohio Country," in *Northeastern Indian Lives, 1632–1816*, ed. Robert S. Grumet (Amherst, Mass.: University of Massachusetts Press, 1996), 273–294; James H. Merrell, "'The Cast of His Countenance': Reading Andrew Montour," in *Through a Glass Darkly: Reflections on Personal Identity in Early America*, ed. Ronald Hoffman, Michel Sobel, and Fredrika J. Teute (Chapel Hill, N.C.: University of North Carolina Press, 1997), 13–39; Jon Parmenter, "*L'arbre De Paix*: Eighteenth-Century Franco-Iroquois Relations," *French Colonial History* 4 (2003): 63–80; Daniel K. Richter, "Native Peoples of North America and the Eighteenth-Century British Empire," in *The Eighteenth Century*, ed. P.J. Marshall, vol. 2 of *The Oxford History of the British Empire*, ed. Wm. Roger Louis (Oxford University Press, 1998), 347–364; Daniel K. Richter, "Cultural Brokers and Intercultural Politics: New York-Iroquois Relations, 1664–1701," *Journal of American History* LXXV (1988): 40–67; Anthony F.C. Wallace, "Origins of Iroquois Neutrality: The Grand Settlement of 1701," *Pennsylvania History* XXIV (1957): 223–235; Cynthia J. VanZandt, "Mapping and the European Search for Intercultural Alliances in the Colonial World," *Early American Studies* 1, no. 2 (2003): 72–99; Richard White, "'Although I am dead, I am not entirely dead. I have left a second of myself': Constructing Self and Persons on the Middle Ground of Early America," in *Through a Glass Darkly: Reflections on Personal Identity in Early America*, ed. Ronald Hoffman, Michel Sobel, and Fredrika J. Teute (Chapel Hill, N.C.: University of North Carolina Press, 1997), 404–418.

ceremonies, orations, discussion, treaties, intermarriage, adoption, games, contests, dances, spiritual sharing, boundaries, buffer zones, occupations, and war.<sup>23</sup>

In the early 1700s, for example, the French entered into treaties with the Anishinabek of the Great Lakes by using Anishinabek forms, wampum belts, and ceremony.<sup>24</sup> From 1693 until 1779, the peace and friendship treaties between the Mi'kmaq, Maliseet, Passamaquody, and the British Crown used similar principles grounded in indigenous protocols, procedures, and practices.<sup>25</sup> In 1764, when the British were able to assert an interest in North America after the Seven Years War, they used indigenous legal traditions to transact their business and bind themselves to solemn commitments.<sup>26</sup> The Hudson's Bay Company entered into agreements with Aboriginal people during the fur trade.<sup>27</sup>

If Aboriginal people's rights were not recognized, they would take direct action, and reoccupy areas recently claimed by others. Perhaps one of the earliest known examples of this occurring took place on the Great Lakes, on June 2, 1763. The story is recorded as follows:

The Indians used a clever plan to capture Fort Michilimackinac. They knew that the British king's birthday was on June 4. A Chippewa chief suggested to the fort commander that the Indians and the British join together in a celebration. As part of the celebration, some visiting Sauk Indians would play a ball game against the Chippewa outside the fort.

On June 4 the soldiers came out of the fort to watch the game. Chippewa women stood around the fort wrapped in their blankets. The Chippewa and the Sauk began their game of *baggataway*, which was similar to lacrosse.

At one point, the wooden ball was thrown into the fort. The players rushed in after it. As they passed through the gates of the fort, the players grabbed the weapons that the women were holding under their blankets! Once inside, the Indians easily took control of the fort.<sup>28</sup>

At this point violence ensued and the entire area once again fell under the control of the Aboriginal people.

The relative ease with which Aboriginal peoples could reoccupy their lands placed the British in a tenuous position after 1763. They had defeated the French in the Seven Years War, but the Indians threatened their power in North America.<sup>29</sup> The British were constrained to recognize

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<sup>23</sup> Robert Williams Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600–1800* (New York: Oxford, 1997).

<sup>24</sup> Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650–1815* (New York: Cambridge University Press, 1991).

<sup>25</sup> For a history, see generally William Wicken, *Mi'kmaq Treaties on Trial* (Toronto: University of Toronto Press, 2002); Thomas Issac, *Aboriginal and Treaty Rights in the Maritimes: The Marshall Decision and Beyond* (Saskatoon: Purich Publishing, 2001).

<sup>26</sup> John Borrows, "Wampum at Niagara: Canadian Legal History, Self-Government, and the Royal Proclamation," in *Aboriginal and Treaty Rights in Canada*, ed. Michael Asch (Vancouver: UBC Press, 1998).

<sup>27</sup> Arthur Ray, J.R. Miller, and Frank Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal and Kingston: McGill-Queen's University Press, 2000) at 1–31.

<sup>28</sup> JoEllen Vinyard, *Michigan: The World Around Us* (New York: Macmillan/McGraw Hill, 1992) at 101.

<sup>29</sup> Francis Jennings, *Empire of Fortune: Crowns, Colonies and Tribes in the Seven Years War in America* (New York: Norton, 1990); Seymour Schwartz, *The French and Indian War, 1754–1763: The Imperial Struggle for North America* (New York: Simon and Schuster, 1994).

Aboriginal political and military might; aspirations for the development of North America would be thwarted if they did not acknowledge indigenous rights. Therefore the British agreed to preserve Aboriginal peoples' possession of land and use of resources. They did this through the Royal Proclamation of 1763, the Treaty of Niagara of 1764, and subsequent agreements. The British approach committed the Crown to entering into treaties with Aboriginal peoples if their lands were to be occupied by non-Aboriginal people. Aboriginal actions and perspectives were important to this policy formulation. They persuaded the government to peacefully settle conflicts over land and resources in North America through treaties.<sup>30</sup> The Crown was bound to secure Aboriginal consent before occupying Aboriginal lands.

Since that time there have been over 500 treaties in Canada, with many of them drawing on some form of indigenous legal tradition, even in later eras when Aboriginal peoples enjoyed less political influence. Aboriginal laws, legal perspectives, and other indigenous frameworks have been present throughout the entire span of the treaty-making process in Canada. Since 1982, existing treaty rights have been recognized and affirmed in section 35 of the *Constitution Act 1982*, thus enjoying the highest possible status in Canada's legal order.<sup>31</sup> The continuation of treaty rights and obligations entrenches the continued existence of indigenous legal traditions in Canada.

Yet treaties are not the only area where indigenous traditions influenced the development of law in Canada and continue into the present day. When the British and Indians met in North America, diplomacy was not centralized, but diffuse.<sup>32</sup> The parties developed their own

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<sup>30</sup> J. Borrows, "Constitutional Law From A First Nations Perspective: Self Government and the Royal Proclamation" (1994) 28 *U.B.C. Law Review* 1.

<sup>31</sup> *Constitution Act, 1982*, Schedule B, to the *Canada Act, 1982*, (U.K.) 1982 c. 11.

<sup>32</sup> John Richard Alden, *John Stuart and the Southern Colonial Frontier: A Study of Indian Relations, War, Trade, and Land Problems in the Southern Wilderness, 1754–1775* (New York: Gordian Press, 1966); Matthew Dennis, *Cultivating a Landscape of Peace: Iroquois-European Encounters in Seventeenth-Century America* (Ithaca, N.Y.: Cornell University Press, 1993); Gregory Evans Dowd, *War under Heaven: Pontiac, the Indian Nations, and the British Empire* (Baltimore: Johns Hopkins University Press, 2002); Randolph C. Downes, *Council Fires on the Upper Ohio: A Narrative of Indian Affairs in the Upper Ohio Valley until 1795* (Pittsburgh, Penn.: University of Pittsburgh Press, 1940); Gilles Havard, *The Great Peace of Montreal of 1701: French-Native Diplomacy in the Seventeenth Century*, trans. Phyllis Aronoff and Howard Scott (Montreal and Kingston: McGill-Queen's University Press, 2001); Eric Hinderaker, *Elusive Empires: Constructing Colonialism in the Ohio Valley, 1673–1800* (Cambridge: Cambridge University Press, 1997); Wilbur R. Jacobs, *Wilderness Politics and Indian Gifts: The Northern Colonial Frontier, 1748–1763* (Lincoln, Neb.: University of Nebraska Press, 1966 [1950]); Francis Jennings, *The Ambiguous Iroquois Empire: The Covenant Chain Confederation of Indian Tribes with English Colonies from Its Beginnings to the Lancaster Treaty of 1744* (New York: W.W. Norton, 1984); Francis Jennings, *Empire of Fortune: Crowns, Colonies and Tribes in the Seven Years War in America* (New York: W.W. Norton, 1988); Francis Jennings et al., eds., *The History and Culture of Iroquois Diplomacy: An Interdisciplinary Guide to the Treaties of the Six Nations and Their League* (Syracuse, N.Y.: Syracuse University Press, 1985); Dorothy V. Jones, *License for Empire: Colonialism by Treaty in Early America* (Chicago: University of Chicago Press, 1982); James H. Merrell, *Into the American Woods: Negotiators on the Pennsylvania Frontier* (New York: W.W. Norton, 1999); D. Peter MacLeod, *The Canadian Iroquois and the Seven Years' War* (Toronto: Oxford, Dundurn Press, 1996); Jane T. Merritt, *At the Crossroads: Indians and Empires on a Mid-Atlantic Frontier, 1700–1763* (Chapel Hill, N.C.: University of North Carolina Press, 2003); Larry L. Nelson, *A Man of Distinction among Them: Alexander McKee and British-Indian Affairs along the Ohio Country Frontier, 1754–1799* (Kent, Ohio: Kent State University Press, 1999); William R. Nester, "Haughty Conquerors": *Amherst and the Great Indian Uprising of 1763* (Westport, Conn.: Praeger, 2000); Timothy J. Shannon, *Indians and Colonists at the Crossroads of Empire:*

protocols and ceremonies, and these were rarely solely European.<sup>33</sup> They attempted to create a social context that supported peace. Diplomacy was conducted by many actors, including orators, headmen, war chiefs, peace chiefs, civil leaders, village and colonial councils, missionaries, traders, speculators, traditionalists and dissidents, those with authority and those without.<sup>34</sup>

From the 1500s onward, many European individuals submitted themselves to indigenous legal orders.<sup>35</sup> For example, many traders and explorers adopted indigenous legal traditions and participated in their laws.<sup>36</sup> A perusal of the fur trade literature reveals that commercial transactions were often conducted in accordance with indigenous traditions.<sup>37</sup> The giving of gifts, the extension of credit, and the standards of trade were often based on indigenous legal concepts.<sup>38</sup> Traditionally, Aboriginal peoples in Canada did not transfer goods by conducting their relations with other people in a static way.<sup>39</sup> Relationships were continually renewed and reaffirmed through ceremonial customs.<sup>40</sup> The idea of trade terms being “frozen” through a contract, written on paper, was an alien concept.<sup>41</sup> The traders recognized this fact and conducted their affairs in accordance with indigenous laws.<sup>42</sup> In the more personal sphere, many of the early marriage

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*The Albany Congress of 1754* (Ithaca, N.Y.: Cornell University Press, 2000); J. Russell Snapp, *John Stuart and the Struggle for Empire on the Southern Frontier* (Baton Rouge: Louisiana State University Press, 1996).

<sup>33</sup> Dorothy V. Jones, “British Colonial Indian Treaties,” in, *Handbook of North American Indians*, ed. Wilcomb Washburn, 4 (1988) at 185.

<sup>34</sup> Ibid.

<sup>35</sup> David Murray, *Indian Giving: Economies of Power in Indian–White Exchanges* (Amherst: University of Massachusetts Press, 2000).

<sup>36</sup> Richard White, *The Middle Ground: Indians, Empires and Republics in the Great Lakes Region, 1650–1815* (Cambridge: Cambridge University Press, 1991).

<sup>37</sup> Lynda Gullason, “‘No Less Than 7 Different Nations’: Ethnicity and Culture Contact at Fort George-Buckingham House,” in *The Fur Trade Revisited: Selected Papers of The Sixth North American Fur Trade Conference, Mackinac Island, Michigan, 1991*, ed. Jennifer S.H. Brown, W.J. Eccles, and Donald P. Heldman (East Lansing/Mackinac Island: Michigan State University Press, 1994) at 117–142; Jennifer S.H. Brown, *Strangers in Blood: Fur Trade Company Families in Indian Country* (Vancouver: UBC Press, 1980); Denys Delâge, *Le pays renversé: Amérindiens et européens en Amérique du nord-est, 1600–1664* (Montreal: Boréal Express, 1985). Published in English as *Bitter Feast: Amerindians and Europeans in Northeastern North America, 1600–64*, trans. Jane Brierley (Vancouver: UBC Press, 1993); Daniel Francis and Toby Morantz, *Partners in Furs: A History of the Fur Trade in Eastern James Bay, 1600–1870* (Montreal and Kingston: McGill-Queen’s University Press, 1983); George T. Hunt, *The Wars of the Iroquois: A Study in Intertribal Trade Relations* (Madison, Wis.: University of Wisconsin Press, 1940); Harold A. Innis, *The Fur Trade in Canada: An Introduction to Canadian Economic History* (New Haven, Conn.: Yale University Press, 1930).

<sup>38</sup> Arthur J. Ray and Donald B. Freeman, “Give Us Good Measure:” *An Economic Analysis of Relations between the Indians and the Hudson’s Bay Company before 1763* (Toronto: University of Toronto Press, 1978) at 231–260, 285; Paul Thistle, *Indian–European Trade Relations in the Lower Saskatchewan River Region to 1840* (Winnipeg: University of Manitoba Press, 1986) at 33–50; Victor P. Lytwyn, *Muskegowuck Athinuwick: Original People of the Great Swampy Land* (Winnipeg: University of Manitoba Press, 2002).

<sup>39</sup> Bruce M. White, “A Skilled Game of Exchange: Ojibway Fur Trade Protocol,” *Minnesota History* (1987): 229.

<sup>40</sup> For a description of the rigorous formalities involved in Ojibway diplomatic relationships, see Peter Jones (Kahkewaquonaby), *History of the Ojibway Indians with Special Reference to their Conversion to Christianity* (London: A.V. Bennett, 1861) at 105–107, 111–128; and F. W. Major, *Manitoulin: The Isle of the Ottawas* (Gore Bay: Recorder Press, 1974) at 11–15. For an example of the formalities of treaty making in Haudenosaunee culture, see Jennings, *The History and Culture of Iroquois Diplomacy*, at 18–21.

<sup>41</sup> Wilbur R. Jacobs, *Wilderness Politics and Indian Gifts: The Northern Colonial Frontier, 1748–1763* (Lincoln: University of Nebraska Press, 1966).

<sup>42</sup> Arthur Ray, J.R. Miller, and Frank Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal and Kingston: McGill-Queen’s Press, 2000).

relationships between indigenous women and European men were formed according to indigenous legal traditions.<sup>43</sup> There were no priests or ministers in the Northwest to officiate at weddings until 1818, and this meant that governing laws were found in the various indigenous nations throughout the land.<sup>44</sup>

For example, in the first year of Canada's Confederation, the Quebec Superior Court affirmed the existence of Cree law on the Prairies and recognized it as part of the common law. In arriving at this position Justice Monk wrote:

Will it be contended that the territorial rights, political organization such as it was, or the laws and usages of Indian tribes were abrogated—that they ceased to exist when these two European nations began to trade with [A]boriginal occupants? In my opinion it is beyond controversy that they did not—that so far from being abolished, they were left in full force, and were not even modified in the slightest degree....<sup>45</sup>

The legal doctrine applied by Justice Monk is known as the doctrine of continuity.<sup>46</sup> While the common law's original application in Canada is problematic because it occurred without indigenous consent, it did recognize the continuity of Aboriginal customs, laws, and traditions, upon the Crown's assertion of sovereignty. Among the rights recognized by the Crown as continuing were Aboriginal rights to occupy and use their traditional territories and conduct civil affairs.

Through time, however, these diverse forms of reconciliation and resistance founded upon indigenous ideas and practices were attenuated. Interactions became more dependent on non-Aboriginal cultural norms as these groups grew stronger in North America. In such circumstances, some Aboriginal peoples found themselves increasingly adapting to non-indigenous institutions and ideas to maintain their land and resources.<sup>47</sup> Despite these adaptations, Aboriginal peoples never completely surrendered their approaches to conflict

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<sup>43</sup> Sylvia Van Kirk, *Many Tender Ties: Women in Fur-Trade Society, 1670–1870*, (Winnipeg: Watson & Dwyer, 1980).

<sup>44</sup> Daniel Williams Harmon, *Sixteen Years in the Indian Country: The Journal of Daniel Williams Harmon, 1800–1816*, ed. W. Kaye Lamb (Toronto: Macmillan, 1957). Daniel Harmon's journal describes such a fur trade wedding in December 1801:

Payet one of my Interpreters, has taken one of the Natives Daughters for a Wife, and to her Parents he gave in Rum & dry Goods &c. to the value of two hundred Dollars, and all the ceremonies attending such circumstances are that when it becomes time to retire, the Husband or rather Bridegroom (for as yet they are not joined by any bonds) shews his Bride where his Bed is, and then they, of course both go to rest together, and so they continue to do as long as they can agree among themselves, but when either is displeas'd with their choice, he or she will seek another Partner ... which is law here....

<sup>45</sup> *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75, 1 C.N.L.C. 70 (Que. S.C.) at 79.

<sup>46</sup> The continued existence of Aboriginal law as an important source of authority is illustrated in *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75, 1 C.N.L.C. 70 (Que. S.C.), aff'd 1 C.N.L.C. 165, 17 R.J.R.Q. 266 (Que. Q.B.); *R v. Nan-e-quis-a Ka* (1889), 1 Terr. L.R. (C.A.); *R. v. Bear's Shin Bone* (1899), 3 C.C.C. 329 (N.W.T.S.C.); *Re Adoption of Katie* (1961) 32 D.L.R. (2d) 686 (N.W.T.T.C.); *Re Kitchoalik*, [1972] 5 W.W.R. 203 (N.W.T.C.A.); *Mitchell v. Dennis*, [1984] 2 C.N.L.R. 84 (B.C.S.C.); *Casimel v. Insurance Co. of British Columbia*, [1992] 1 C.N.L.R. (B.C.C.A.); *Vielle v. Vielle* 1 C.N.L.R. 165 (Alta. Q.B.).

<sup>47</sup> Richard White, *The Middle Ground: Indians, Empires and Republics in the Great Lakes Region, 1650–1815* (Cambridge: Cambridge University Press, 1991).

resolution.<sup>48</sup> Non-Aboriginal peoples have never achieved absolute dominance over indigenous peoples in Canada. Aboriginal agency continues to exist. As such, Aboriginal legal perspectives and traditions continue to operate within Canada. In *Haida Nation v. British Columbia*, Chief Justice McLachlin wrote:

Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected.<sup>49</sup>

In *R. v. Mitchell*, Justice McLachlin wrote for a majority of the court: "European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights."<sup>50</sup>

These statements are strong endorsements of the need to determine, recognize, and respect Aboriginal rights in Canada. Indigenous legal traditions continue to exist as rights in Canada unless, as Chief Justice McLachlin noted: "(1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them."<sup>51</sup> Barring one of these exceptions, the practices, customs, and traditions that defined the various Aboriginal societies as distinctive cultures continue as part of the law of Canada today.<sup>52</sup> While Aboriginal peoples would strongly resist the limitations Chief Justice McLachlin placed on the continuity of their rights,<sup>53</sup> there are sound arguments that Aboriginal rights, obligations and conflict resolution procedures are compatible with the Crown's assertion of sovereignty. These principles will be explored in part 3 of this paper. Aboriginal peoples believe many of their rights were not surrendered by treaties and were not extinguished by clear and plain government legislation, if reconciliation is the lens through which the courts interpret the parties' relationships.<sup>54</sup>

As a result of Aboriginal peoples' perspectives on the doctrine of continuity, they believe that certain lands and resources claimed by the Crown are subject to Aboriginal rights. They believe

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<sup>48</sup> Vine Deloria Jr., and Raymond J. DeMallie, eds., *Documents of American Indian Diplomacy: Treaties, Agreements, and Conventions, 1775–1979* (Norman: University of Oklahoma Press, 1999).

<sup>49</sup> *Haida Nation v. B.C. (Minister of Forests)* 2004 3 S.C.R. 511 at para. 25.

<sup>50</sup> [2001] 1 S.C.R. 911 at para. 8.

<sup>51</sup> See B. Slattery, "Understanding Aboriginal Rights" (1987) 66 *Canadian Bar Review* 727.

<sup>52</sup> See *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, and *Mabo v. Queensland* (1992), 175 C.L.R. 1, at p. 57 (per Brennan J.), pp. 81–82 (per Deane and Gaudron JJ.), and pp. 182–83 (per Toohey J.).

<sup>53</sup> Gordon Christie, "Aboriginal Citizenship: Sections 35, 25 and 15 of *Canada's Constitution Act, 1982*" (2003) *Citizenship Studies* 481–495.

<sup>54</sup> See *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 at para. 31. More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that Aboriginals lived on the land in distinctive societies, with their own practices, traditions, and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights that fall within the provision must be defined in light of this purpose; the Aboriginal rights recognized and affirmed by s. 35(1) must be directed toward the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.

their pre-existing rights create existing Crown obligations to honour ancient legal entitlements. Aboriginal people were the pre-occupants of land, and in many locations they regard themselves as the rightful occupants of land in Canada today. Non-Aboriginal peoples do not always recognize this fact. The failure to determine, recognize, respect, and affirm Aboriginal pre-existing and present occupation of land can lead to conflict and blockades in contemporary settings. As a result, direct action by Aboriginal peoples to assert occupation has increased in intensity over the past 30 years.

## **ABORIGINAL AND NON-ABORIGINAL CONFLICT OVER LANDS AND RESOURCES**

In trying to understand the conflict between Aboriginal and non-Aboriginal peoples, one must appreciate the complexity of interests involved. Aboriginal and non-Aboriginal people often have conflicting objectives in the control and use of land and resources.<sup>55</sup> Divergent aspirations concerning land and resources exist among Aboriginal<sup>56</sup> and non-Aboriginal groups.<sup>57</sup> As implied

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<sup>55</sup> This work will use the word “land” instead of “property” to describe relationships and responsibilities in regard to the use, occupation, enjoyment, or ownership of the earth and its resources. The word “property” has specific legal meanings that contain many notions antithetical to First Nations’ understanding of land use. One must be careful not to apply “inappropriate terminology from general property law” to Aboriginal interests in land: *Guerin v. The Queen* (1985), 13 D.L.R. (4th) 321 (S.C.C.) at 339. The debate over whether the categorization of Aboriginal land rights as property is appropriate has been pursued in common law judicial and academic commentary. Those interested in pursuing this debate, which is outside of the focus of this paper, should refer to the following commentaries for an introduction: David W. Elliot, “Aboriginal Title,” in *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, ed. Bradford Morse (Ottawa: Carleton University Press, 1989) at 48–121; Peter A. Cumming and Neil H. Mickenburg, eds., *Native Rights in Canada* (Toronto: General Publishing, 1972); Robert A. Williams Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1989); Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989); Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown’s Acquisition of the Territories* (Saskatoon: Native Law Centre, 1979); John Hurley, *Children or Brethren: Aboriginal Rights in Colonial Iroquoia* (Saskatoon: Native Law Centre, 1986).

<sup>56</sup> There have been highly contested internal discussions inside Native communities about how land should be apportioned and used. For example, at the time the Trudeau Liberal government proposed that special Indian rights should be eliminated. See Sally M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda* (Toronto: University of Toronto Press, 1981). Two very different voices came forward. One voice suggested that Trudeau was right: see William Wuttunee, *Ruffled Feathers* (Calgary: Bell Books, 1971). The other voice argued that Trudeau’s proposal was wrong: see Harold Cardinal, *The Unjust Society* (Edmonton: Hurtig, 1969).

At a more general level, First Nation communities have alternated between following policies of co-operation and separation. There has not been widespread commentary on the internal differences First Nations people have concerning land. However, there is a small but growing literature on the internal complexity and objectives within First Nations politics: see generally Janet Silman, ed., *Enough is Enough: Aboriginal Women Speak Out* (Toronto: Women’s Press, 1988); Frank Cassidy and Norman Dale, *After Native Claims: The Implications of Comprehensive Claims Settlements for Natural Resources in British Columbia* (Lantzville: Oolichan Press, 1988); E.J. Dickson-Gilmore, “Resurrecting the Peace: Traditionalist Approaches to Separate Justice in the Kahnawake Mohawk Nation,” in *Aboriginal Peoples and Canadian Criminal Justice*, ed. Robert A. Silverman & Marianne O. Nielsen (Toronto: Butterworths, 1992) at 259; John Borrows, “Contemporary Traditional Equality: The Effect of the Charter on First Nations” (1993) 43 *University of New Brunswick Law Journal*.

<sup>57</sup> Broadly speaking, non-Native communities have fluctuated between pursuing policies of assimilation and segregation in relation to First Nations’ access to land. See John Tobias, “Protection, Civilization, Assimilation: An Outline History of Canada’s Indian Policy,” in *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies*, ed. Ian Getty and Antoine Lussier (Vancouver: UBC Press, 1990) at 29.

For non-Native examples of the different policies proposed to deal with issues of land allocation between Native and non-Native people, see Richard Daniel, *A History of Native Claims Processes in Canada 1867–1979* (Ottawa: Department of Indian and Northern Affairs, February 1980); Lloyd Barber, “Indian Claims Mechanisms”

in the previous section, the allocation of land and resources both between and within Aboriginal and non-Aboriginal groups is an issue that has engaged the inhabitants of what is now known as Canada for over 400 years. Throughout this period, allocations have been attempted in numerous ways. The parties have pursued treaties,<sup>58</sup> executive proclamations,<sup>59</sup> scrip,<sup>60</sup> unilateral legislation,<sup>61</sup> reserve and royal commissions,<sup>62</sup> segregation,<sup>63</sup> assimilation,<sup>64</sup> litigation, land claims processes,<sup>65</sup>

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(1973–1974) 38 *Saskatchewan Law Review* 11; Canada, *Statement of Government of Canada on Indian Policy* (Ottawa: Queen's Printer, 1969); Canada, *In All Fairness: A Native Claims Policy* (Ottawa: Queen's Printer, 1981); Canada, Report of the Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements* (Ottawa: Queen's Printer, 1988); Canada, *Comprehensive Claims Policy* (Ottawa: Queen's Printer, 1987); Canadian Bar Association, *Report of the Canadian Bar Association on Aboriginal Rights in Canada: An Agenda for Action* (Ottawa: Queen's Printer, 1988); British Columbia Task Force, *The Report of the British Columbia Task Force* (Vancouver: Queen's Printer, June 28, 1991); Canada, *Building a New Relationship with First Nations in British Columbia: Canada's Response to the Report of the B.C. Claims Task Force* (Ottawa: Department of Indian and Northern Affairs, 1991). The foregoing are examples of the variations in national policies; of course, there is even greater diversity among non-Native people who are not formally associated with the government.

<sup>58</sup> For an introduction to treaties between First Nations and non-Native people, see generally George Brown and Ron Maguire, *Indian Treaties in Historical Perspective* (Ottawa: Department of Indian and Northern Affairs, 1979), and Daniel G. Kuhlen, *A Laypersons Guide to Treaty Rights in Canada* (Saskatoon: University of Saskatchewan, 1985). For the text of many of these treaties, see *Canada: Indian Treaties and Surrenders, from 1680-1890* (Ottawa: Printer to the Queen's Most Excellent Majesty, 1891–1912; reprinted Toronto: Coles, 1971).

<sup>59</sup> An example of the most significant executive proclamation is The Royal Proclamation of October 7, 1763, R.S.C. 1985, App. II, No. 1. The Royal Proclamation allocates property between First Nations and settlers on a territorial basis.

<sup>60</sup> People of mixed Aboriginal and non-Native ancestry on the Canadian prairies were known as the Métis. The Crown severally limited its recognition of Métis land rights. Land allocation proceeded through the issuance of alienable certificates called scrip, which were to be redeemable for public lands. Since scrip was alienable, it was often traded for money, which left the Métis without a land base. For a description of the history of Métis land rights, see generally Don Purich, *The Métis* (Toronto: James Lorimer, 1988); Paul Chartrand, "Aboriginal Rights: The Dispossession of the Metis" (1991) 29 *Osgoode Hall Law Journal* 457; Thomas Flanagan, "The History of Métis Aboriginal Rights: Politics, People and Policy" (1990) 5 *Canadian Journal of Law and Society* 71.

<sup>61</sup> A familiar example of unilateral legislation is the *Indian Act* R.S.C. 1985, c. I-5, where an entire regime of land allocation in regard to Indians on reserves is promulgated. The federal *Indian Act* interacts with provincial legislation, policy, and regulation in the allocation of land. For example, lands in Quebec were set aside as Indian reserves through orders-in-council pursuant to statutes of the Colony of Canada (see *A.G. Canada v. Giroux* (1916), 30 D.L.R. 123 (S.C.C.) at 135) but are administered according to the provisions of the *Indian Act*.

<sup>62</sup> For example, in British Columbia First Nation land rights were allocated by a Reserve Commission without strong Aboriginal or federal government participation. This occurred between 1873 and 1910: see Robert Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia 1871–1913* (Vancouver: UBC Press, 1974). These reserves were adjusted and confirmed in 1913 through two Royal Commissions, the McKenna-McBride and Ditchburn–Clark Commissions. For a history of these Commissions, see *Dunstan v. Hell's Gate Ent. Ltd.* (1986), 22 D.L.R. (4th) 568 (B.C.S.C.). The most recent example of this process is found in the five-volume *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services, 1996).

<sup>63</sup> The allocation of land rights through segregation is illustrated by a communication from Lieutenant-Governor Sir Francis Bond Head where he recommended that all Indians in Upper Canada be sent to Manitoulin Island. He stated: "[I]t was evident to me that we should reap a very great benefit if we could persuade these Indians, who are now impeding the progress of civilization of Upper Canada, to resort to a place possessing the double advantage of being admirably adapted to them, and yet in no way adapted to the white population." PAC RG 10, vol. 391, Bond Head to Lord Glenelg, August 20, 1836.

<sup>64</sup> The allocation of land through assimilation is evidenced by Duncan Campbell Scott, the Deputy Superintendent of Indian Affairs in the 1920s, when he stated, "I want to get rid of the Indian problem.... Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and there is no Indian department." In Georges Erasmus, introduction to *Drum Beat: Anger and Renewal in Indian Country*, ed. Boyce Richardson (Toronto: Summerhill Press, 1989) at 11.

<sup>65</sup> Contemporary land claims settlements have occurred in Canada's North: see *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32.; *Cree-Naskapi (of Quebec) Act*, S.C. 1984, c. 18.; *Western Arctic (Inuvialuit)*

expropriation,<sup>66</sup> and war.<sup>67</sup> These interactions have been carried out in different circumstances, under a constantly shifting balance of power, with diverse objectives and motivations. These assorted dealings have occurred in villages, cities, council houses, and legislatures, on Canada's prairies, mountains, woodlands, and lakes. The issue of allocation continues to involve Aboriginal and non-Aboriginal people in discussions that attempt to settle ownership, occupancy, use, and enjoyment of land in Canada.

To summarize, Aboriginal peoples occupied North America for centuries prior to the arrival of non-indigenous people on their shores. Many Aboriginal peoples continue to occupy lands they have used for millennia despite grave disruptions in the intervening years. Aboriginal peoples' relationship with their lands and its resources is and always has been central to their survival as communities and integral to their distinctive cultures. Aboriginal peoples resist other's occupation of lands without their consent because it threatens their political, economic, and cultural survival.

Despite Aboriginal usage and English law recognizing this usage, there have been many attempts to undermine Aboriginal peoples' occupation of their lands. As noted by the Supreme Court of Canada in 1990: "For many years, the rights of the Indians to their aboriginal lands—certainly as legal rights—were virtually ignored."<sup>68</sup> Unfortunately, for many Aboriginal peoples, this pattern has continued, despite 15 years of political and legal action. Without recognition, Aboriginal peoples were and are removed from their lands in many ways. Aboriginal political, economic, and cultural power is disrupted to make it easier for non-Aboriginal peoples to strengthen their claims over Aboriginal lands. To assist in their removal, some non-indigenous peoples have regarded Aboriginal occupation of land as unworthy of recognition or protection. Legal theories

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*Claims Settlement Act*, S.C. 1984, c. 24, as am. S.C. 1988, c. 16, s. 1.; *Gwich'in Land Claim Settlement Act*, S.C. 1992, c. 53.; *Nunavut Land Claims Agreement*, S.C. 1993, c. 29, etc. For commentary on these various Agreements, see generally Wendy Moss, "The Implementation of the James Bay and Northern Quebec Agreement," in *Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada*, ed. Brad Morse (Ottawa: Carleton University Press, 1989) at 684; Andrew Thompson, "Land Claim Settlements in Northern Canada: Third Party Rights and Obligations" (1991) 55 *Saskatchewan Law Review* 127; John Merritt and Terry Fenge, "The Nunavut Land Claims Settlement: Emerging Issues in Law and Public Administration" (1990) 15 *Queen's Law Journal* 255. For a history and critique of the land claims process in a specific instance, see J.R. Miller, "Great White Father Knows Best: Oka and the Land Claims Process" (1991) 7 *Native Studies Review* 23.

<sup>66</sup> While First Nations would prefer consent in the allocation of land between themselves and non-Native people, there are many examples of Indian land being expropriated: see Bruce A. Clark, *Indian Title in Canada* (Toronto: Carswell, 1987) at 73–74. For example, section 35 of the *Indian Act*, *supra*, currently permits land allocation through expropriation. For judicial commentary on this section, see *Kruger v. R.* (1986), 17 D.L.R. (4th) 591 (F.C.A.) leave to appeal refused, 62 N.R. 102n (S.C.C.); *R. v. Stevenson*, [1986] 5 W.W.R. 737 (Man.Q.B.), leave to appeal refused [1987] 1 W.W.R. 767 (Man. C.A.).

<sup>67</sup> The allocation of rights to land between Native people and settlers through war is evidenced by Desmond Morton, *The Last War Drum* (Toronto: Hackett, 1972), which provides an account of the North-West Rebellion of 1885 and includes the interpretation that this rebellion was partly about Aboriginal loss of property. For other descriptions of military encounters where allocation of land was a significant issue, see generally Robert S. Allen, *His Majesty's Indian Allies: British Indian Policy in the Defence of Canada, 1774–1815* (Toronto: Dundurn Press, 1992); Francis Jennings, *The Invasion of America: Indians, Colonialism and the Cant of Conquest* (Toronto: W.W. Norton, 1975); Alanis Obomsawin, Director, *Kanehsatake: 270 Years of Resistance* (Montreal: National Film Board, 1993), documentary film. It is important to note here that it is generally agreed that Indians were not conquered in these wars: see Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 *Canadian Bar Review* 727 at 733.

<sup>68</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1103.

often diminish Aboriginal land holdings and deny Aboriginal ownership.<sup>69</sup> Historically the Crown, courts, Parliaments, and legislatures applied versions of these theories to discount Aboriginal rights to land and resources.<sup>70</sup> These historic presumptions continue to undermine Aboriginal peoples' occupation of their territories in the present day.<sup>71</sup>

The tangle of conflicting objectives in land allocations has fostered complex questions about the legitimacy and fairness of these distributions between the continent's original inhabitants and its more recent settlers.<sup>72</sup> This sometimes leads to physical occupations in contemporary circumstances when Aboriginal peoples' land rights and perspectives are not recognized.

Aboriginal peoples want an acknowledgement of their use of the entire continent of North America for their physical, spiritual, emotional, and social sustenance in the recent past.<sup>73</sup> They wish for an affirmation of their intimate knowledge of the land today.<sup>74</sup> Aboriginal societies have regard for more than the land's physical appearance, and they interact as relatives with the earth's animate and inanimate members.<sup>75</sup> They want others to affirm Aboriginal values, norms, customs, and laws to govern land and resource use.<sup>76</sup> These traditions taught Aboriginal people how to take from the land while respecting the interactions and interdependence of the non-human world. The ancient and enduring relationships are now profoundly restricted, and they want this trend reversed. Aboriginal territories have been reduced to such an extent that it threatens the maintenance of these relationships. This leads to situations where Aboriginal peoples sometimes desire to take back land that they regard as being rightfully theirs.

Certain treaties were signed in Canada because First Nations refused to acknowledge non-Aboriginal land claims. As noted above, prior to treaties being signed, Aboriginal people often

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<sup>69</sup> Maureen Davies, "Aspects of Aboriginal Rights in International Law", in *Aboriginal Peoples and The Law*, ed. Bradford W. Morse (Ottawa: Carleton University Press) at 16–47, 745–794; James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) at 58–99.

<sup>70</sup> See generally Dara Culhane, *The Pleasure of the Crown: Anthropology, Law and First Nations* (Vancouver: Talon Books, 1998).

<sup>71</sup> Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001).

<sup>72</sup> For an overview of first person accounts by Aboriginal peoples concerning their checkered history with non-Native people through different periods and the questions they have about the justice of their treatment, see Peter Nabokov, ed., *Native American Testimony: A Chronicle of Indian-White Relations from Prophecy to the Present, 1492–1992* (Toronto: Penguin Books, 1992).

<sup>73</sup> Now, in Canada, Aboriginal peoples have a land base that is 1 percent of Canada's total land mass. There are approximately 2,240 separate parcels of reserve land that make up a little less than 3 million hectares of land: see James Frideres, *Native Peoples in Canada: Contemporary Conflicts* (Scarborough: Prentice Hall, 1993) at 153.

<sup>74</sup> When non-Native people first came to this continent they relied upon Native people to guide them on the rivers and lakes and over the land. An interesting account of the "explorers'" reliance on First Nations to guide them through the country is found in Michael Bliss, "Guided Tour," *The Beaver* (February/March 1990): 16.

<sup>75</sup> While it is trite to observe that communities are not homogeneous in their conceptions of how to allocate land, there is sometimes a tendency to caricature First Nations' views about land when they are placed in a cross-cultural context. People focus on differences between the parties, rather than simultaneously turning their attention to the differences present within groups and to the similarity across groups at certain points. For example, much has been made of the individual versus collective orientation to land of non-Native and Native people. Such a categorization may hide as much as it reveals.

<sup>76</sup> See John Borrows, "With or Without You: First Nations Law (in Canada)" 41(1996) *McGill Law Journal* 629; John Borrows, "Living Between Water and Rocks: First Nations, Environmental Planning and Democracy" (1997) 47(4) *University of Toronto Law Journal*.

occupied sites claimed by non-Aboriginals to disrupt settlement and resource use activities. The Robinson-Huron Treaty of 1850 was preceded by Aboriginal occupation of rich mine sites that non-Aboriginal people coveted.<sup>77</sup> In 1889 First Nations blockaded an area near Fort Saint John and demanded a treaty to acknowledge their rights in the face of an increasing flow of miners. Treaty 8 followed this pattern.

Physical occupation and disruption of non-Aboriginal activities was important to the creation of Manitoba and the formulation of Métis rights. The Royal Commission on Aboriginal Peoples noted their use as follows:<sup>78</sup>

The first Riel Resistance began in 1869 with an ill-advised attempt by the government of Canada to open for Canadian and European immigration parts of the prairies it had purchased from the Hudson's Bay Company. The government had not consulted those who already lived in the area, most of whom were First Nations and Métis people, but sent surveyors to the Red River to prepare for a new system of land distribution, even before the transfer to Canada was complete. Métis people, who felt their land holdings threatened, ordered the surveyors to cease their activities and organized a common response with other residents to the incursions of the government of Canada. The newly formed provisional government, headed by Louis Riel, Jr., dispatched a delegation of Red River representatives to Ottawa to negotiate the terms of the area's entry into Canada.... In the meantime, a party of Canadian officials, including the new governor-designate, was intercepted by an armed Métis force and ordered to stay out of the territory....

The negotiations in Ottawa were tough, but persistence on the part of the Red River representatives, especially Abbé Ritchot, resulted in a deal. A statute of the Parliament of Canada (the *Manitoba Act*) and written and verbal promises to Ritchot from the prime minister's right-hand minister, Sir George-Étienne Cartier, met most of the demands of the Red River community:

- full provincehood rather than mere territorial status for Manitoba;
- guarantees for the French language and for Roman Catholic schools;
- protection for settled and related common lands;
- distribution of 1.4 million acres of land to Métis children "towards the extinguishment of the Indian title to the lands in the province" and (so Ritchot understood) to ensure the perpetuation of Métis communities in Manitoba; and
- amnesty for those who had participated in the resistance and formed the provisional government.

When Ritchot reported on the promises made to him at Red River, the provisional government's legislative assembly wholeheartedly endorsed the agreement.

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<sup>77</sup> Janet Chute, *The Legacy of Shingwaukonse: A Century of Native Leadership* (Toronto: University of Toronto Press, 1998), 130–137; Arthur Ray, J.R. Miller, and Frank Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal and Kingston: McGill-Queen's Press, 2000) at 37–38.

<sup>78</sup> See Royal Commission on Aboriginal Peoples, *Perspectives and Realities* (Ottawa: Supply and Services, 1996), Chapter 5 at 2.1.

The *Manitoba Act, 1870* was enacted by the Parliament of Canada (and the next year given constitutional status by the British Parliament in the *Constitution Act, 1871*). Louis Riel and many Métis believed the Métis-related provisions of the *Manitoba Act*, supplemented by the other promises, to be the equivalent of a treaty. However, the Red River Métis were soon given indications that their ‘treaty’ with Canada would not be fully honoured....

The Métis believe, and historical events corroborate, that the bargain struck in 1870 between representatives of the government of Canada and the Red River delegation intended that the Aboriginal title to the land occupied by Manitoba Métis would be surrendered in return for land grants and other measures to preserve a Métis nation with a cohesive land base. It is clear that this did not happen. Since the government failed to live up to its part of the bargain, it is not surprising that the Manitoba Métis deny their forebears ever surrendered their Aboriginal title to land....

In 1884 the Saskatchewan Métis persuaded Louis Riel to leave his exile in Montana and move with his family to Batoche, in the heart of Saskatchewan Métis country, to organize negotiations with the government of Canada. The negotiations proved fruitless, and Riel persuaded his people once more to form a provisional government with himself at the helm and to establish a military force of plainsmen skilled in the arts of the buffalo hunt, with the legendary Gabriel Dumont as adjutant. The plains peoples, who had been placed in similarly desperate straits by the buffalo famine, were also preparing for violent confrontation, if necessary, under the strong leadership of Big Bear and Poundmaker.

The federal government reacted by sending a powerful military expedition to the Northwest in the spring of 1885, and the stage was set for disaster. Although Métis and Indian forces met with some success in early skirmishes, government troops scored a decisive victory at Batoche. After Riel’s surrender, they went on to crush the Indian resistance. Big Bear and Poundmaker were both sentenced to three years’ imprisonment. Louis Riel, after a dramatic and controversial trial and an unsuccessful appeal, was hanged for treason at Regina on 16 November 1885....

Litigation is currently under way on behalf of the Métis populations of Manitoba and Saskatchewan for vindication of what they believe to have been the suppression of their constitutional rights to land and resources. The Métis’ actions in this era illustrate how and why Aboriginal peoples would occupy land and erect blockades. The government’s actions during this time demonstrate how and why they would occupy land and erect blockades. The situation as a whole shows the historic depth of such actions. Aboriginal peoples will often resort to physical action to prevent others from unjustly assuming rights to access and control their ancient lands, and the Crown will often respond with a show of force.

## **NON-ABORIGINAL OCCUPATIONS AND BLOCKADES**

As the Métis example demonstrates, non-Aboriginal people have used physical occupations and land blockades to take Aboriginal land since their first encounters in North America. There are many examples of non-Aboriginal people physically occupying land to prevent Aboriginal access to

tribal territories. Non-Aboriginal blockades have been a longstanding problem in Canada. The British sometimes recognized this problem and took steps to protect Aboriginal lands and resources. As noted, the Royal Proclamation of 1763 was designed to prevent non-Aboriginal peoples from blocking Aboriginal peoples from their territories. The Crown took this action because non-Aboriginal occupation of Aboriginal lands was a very significant concern in North America.

After the Seven Years War ended, the Proclamation “reserved” lands west of the Appalachian height of land as Indian Hunting Grounds. These lands were not included in any colony. Non-Aboriginal individuals were expressly forbidden from settling Indian lands—because of “great Frauds and Abuses” that were committed by them. The Crown reserved to itself exclusive rights to negotiate cessions of Indian title. In practice, the Proclamation often failed to stifle expansionist ambitions of non-Aboriginal settlers and speculators. Settlers flooded over the Appalachians and physically occupied Aboriginal land contrary to British law. Civil disobedience was practised by non-Aboriginal people through blockades and occupation of land contrary to British and Aboriginal law. In Canada this process was also evident prior to signing certain treaties and after treaties had been signed. The desire for westward expansion was a primary reason the 13 American colonies rebelled against the British in 1776. Colonists wanted to get their hands on Indian lands, and it was often difficult to restrain them despite the policy reflected in the Royal Proclamation.

This same problem was present in what became Canada. For example, on the Bruce Peninsula in Ontario, settlers physically occupied Aboriginal lands to which they were not entitled prior to the Anishinabek of the area entering into treaties. Prior to the signing of a treaty in the 1850s, a Crown negotiator told the Indians that they must agree to the terms proposed because he could not stop non-Aboriginal occupation of their land. Superintendent W.G. Anderson spoke the following words regarding non-Aboriginal occupation:

After talking nearly all day yesterday and nearly all last night on the subject of your reserve, you have concluded not to cede your land to the Government for your benefit...

You complain that the whites not only cut and take timber from your lands but that they are commencing to settle upon it and you can't prevent them, and I certainly do not think the Government will take the trouble to help you while you remain thus opposed to your own interest—the Government as your guardian have the powers to act as it pleases with your reserve, and I will recommend that the whole excepting the part marked on the map in red be surveyed and sold for the good of yourselves and your children.

The money once secured in your Great Mothers strong box will be safe to you for future generations Whereas, if it is not sold the trees and land will be taken from you by your white neighbours and your children will then be left without resource.<sup>79</sup>

Crown officials often lacked the will or resources to restrain non-Aboriginal occupation of Aboriginal land. There are numerous other examples of similar non-Aboriginal occupations. Throughout southern Ontario, rights to hunt and fish reserved to the Indians through treaties were diminished as farmers and merchants physically blocked Aboriginal peoples from their

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<sup>79</sup> PAC RG 10, v. 213, pp. 126, 356–7. “T.G. Anderson, Superintendent of Indian Affairs, responding to the Owen Sound and Saugeen Indians,” August 2, 1854.

traditional hunting and fishing sites. Rich farmlands and hunting grounds, used and occupied by the Indians for centuries before non-Aboriginal people arrived in Canada, were removed from Indian use by similar processes.<sup>80</sup>

Private land in British Columbia was almost entirely taken up through non-Aboriginal occupation of Aboriginal lands, as settlers were permitted and indeed encouraged to take up Indian lands through “pre-emption.”<sup>81</sup> There was no Aboriginal consent. Statutes were passed by the colonial legislature of British Columbia that permitted non-Aboriginal people to “legally” register land in their own names if they “occupied” Aboriginal land for a certain period and made small “improvements,” such as building a house or clearing the bush.<sup>82</sup> Disturbingly, pre-emption was a right denied to Aboriginal peoples in the same period. This double standard permitted non-Aboriginal people to physically occupy Aboriginal land to the detriment of its original owners. Occupations and physical blockades were the primary mode of non-Aboriginal settlement in the Province of British Columbia. This form of physical removal of Aboriginal people created a province, despite the existence of Aboriginal use and occupation prior to the arrival of settlers in these traditional territories. British Columbia’s experience shows that blockades and occupations can be effective, even if their morality and legality is sometimes questionable.

As we search for the causes and effects of Aboriginal–non-Aboriginal conflict, it is important to remember that physical blockades and occupations of land were an important and prominent part of non-Aboriginal settlement throughout Canada. Non-Aboriginal peoples have used blockades and physical occupations against Aboriginal peoples to great effect. Non-Aboriginal peoples have used physical occupation to secure lands and resources in far greater numbers than Aboriginal peoples have employed this device. They also seem to have been quite successful in transferring much Aboriginal land to non-Aboriginal people. Given this history, it is passing ironic that Aboriginal blockades and occupations have received the lion’s share of attention in the past few years when the predominant use of this device in Canadian history has been by non-Aboriginal peoples to occupy Aboriginal lands. Non-Aboriginal occupations and blockades have been a significant problem for Aboriginal peoples throughout Canadian history. They continue to present problems today.

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<sup>80</sup> Michael Thoms, “Ojibway Fishing Grounds: A History of Ontario Fisheries Law, Science and the Sportmen’s Challenge to Ojibway Treaty Rights, 1650–1900” (Ph.D. diss., University of British Columbia, 2004).

<sup>81</sup> Indians tried to resist this injustice through blockade and occupation. In 1864 Chief Klatsassin led what has come to be known as the Chilcotin War in the interior of British Columbia. Aboriginal peoples in the area refused to allow non-Aboriginal people to survey what they regarded as their land. The Chief and other Indians allegedly attacked and killed 13 surveyors planning a road to the Cariboo gold fields from the head of Bute Inlet. The Chilcotin physical occupation of lands that were attempting to be charted by Canada ended when Llatsassin and four other Chiefs arrived at Quesnel to negotiate a treaty with a promise of safe conduct and were seized, tried, and hanged.

<sup>82</sup> See An Ordinance to further define the law regulating the acquisition of Land in British Columbia, 1866 (B.C.), 29 Vict., No. 24, s. 1, which provided:

The right conferred ... on British Subjects or aliens ... of pre-empting and holding land in fee simple unoccupied and unsurveyed and unreserved Crown lands in British Columbia, shall not (without the special permission of the Governor first had in writing) extend or be deemed to have been conferred on ... any Aborigines of this Colony or the Territories neighbouring thereto.

A further amendment passed by the Legislative Council on April 22, 1870, extended the denial to “any of the Aborigines of this Continent.”

## II. INVENTORY/DESCRIPTION OF OCCUPATIONS IN CANADA

In the face of the prevalence of non-Aboriginal use of occupations and blockades (to prevent Aboriginal peoples from accessing their land and resources), however, there are a few examples of Aboriginal peoples physically occupying places to assert their land, treaty, or other rights and interests against non-Aboriginal people. Sometimes occupations have ended peacefully; at other times, they have ended in violence. However, the fact that they end in peace or in violence does not necessarily indicate that they were a failure or a success. There could be larger objectives behind an occupation or blockade indicative of success. Thus, in considering the question as to whether occupations and blockades work for Aboriginal peoples, one should always be attentive to the specific context in which they occur as well as the larger milieu in which they are embedded. As has been noted, non-Aboriginal blockades and occupations certainly seemed to be effective to transfer Aboriginal land to non-Aboriginal people. The reverse cannot be said to be true: Aboriginal blockades and occupations have not generally resulted in the transfer of land to Aboriginal people. Nevertheless, whether an occupation or blockade has been successful depends on the protestor's goals, and the response and goals of the government.

Having noted the need for careful contextualization of occupations and blockades, however, it is clear that they can sometimes work either as a political strategy to achieve specific goals and/or in the larger sense as a means (or expression) of self-determination. A short inventory of recent notable Aboriginal occupations will note their causes and effects, failures and success. The following inventory is neither exhaustive nor intended to be representative of every kind of protest. However an overview of recent occupations does reveal their scope. It also shows how Aboriginal perspectives, laws, and values are often overlooked in the resolution of disputes. The real and/or perceived lack of recognition is a cause of blockades and can exacerbate tension in sensitive situations.

Non-recognition over a prolonged period generates heated feelings in Aboriginal societies. This anger and resentment can often simmer for many years, making it difficult to moderate relationships. Eventually something occurs to ignite action and physical conflict is the result. The precise moment a conflict breaks out into a blockade or occupation is not always subject to precise scientific calibration. There usually is some egregious act of non-recognition that creates the flashpoint. The examples below will show the range of acts that could be characterized as constituting non-recognition.

Unfortunately, there are multiple layers of ignorance and denial about Aboriginal rights that generate an atmosphere where conflict can grow. Misunderstanding also fuels the problem; many do not appreciate the degree of individual and collective traumatization Aboriginal peoples have experienced. The failure to recognize the problem's depth leads people to underestimate the impact continued denials have in their lives. Rejection and non-recognition preserves the status quo and leads to frustration on the part of Aboriginal peoples. When others seemingly "do nothing" in response to Aboriginal peoples, this feeds the conflict until a detonation point is reached.

The Royal Commission on Aboriginal Peoples made similar observations almost 10 years ago, when it identified unjust and inequitable allocations of land as a primary cause for conflict. The Commissioners wrote:

Land is absolutely fundamental to Aboriginal identity. [It] is reflected in the language, culture and spiritual values of all Aboriginal peoples. Aboriginal concepts of territory, property and tenure, of resource management and ecological knowledge may differ profoundly from those of other Canadians, but they are no less entitled to respect. Unfortunately, those concepts have not been honoured in the past, and Aboriginal peoples have had great difficulty maintaining their lands and livelihoods in the face of massive encroachment.

This encroachment is not ancient history. In addition to the devastating impact of settlement and development on traditional land-use areas, the actual reserve or community land base of Aboriginal people has shrunk by almost two-thirds since Confederation, and on-reserve resources have largely vanished. The history of these losses includes the abject failure of the Indian affairs department's stewardship of reserves and other Aboriginal assets. As a result, Aboriginal people have been impoverished, deprived of the tools necessary for self-sufficiency and self-reliance.

Aboriginal peoples have not been simply the passive victims of this process. They have used any means at their disposal to halt the relentless shrinkage of their land base. From an Aboriginal perspective, treaties were one means to that end. But Aboriginal people insist that the Crown has failed to uphold those agreements and has generally broken faith with them. And since the nineteenth century, they have continuously protested—to government officials, to parliamentary inquiries, and in the courts—what they see as the resulting inequity in the distribution of lands and resources in this country.

...[C]onflict over lands and resources remains the principal source of friction in relations between Aboriginal and other Canadians. If that friction is not resolved, the situation can only get worse....<sup>83</sup>

As this quote acknowledges, Aboriginal peoples in Canada have lost too much land. This lack of a sustainable land base, combined with non-recognition, is a principal source of friction in Aboriginal–non-Aboriginal relations in Canada.

Aboriginal peoples do not want to lose any more land. Aboriginal peoples resist further encroachment on their lands because of the large quantity already lost. A certain amount of land is needed to survive as cultures. There is conflict when the number of acres dips precariously below that needed for their support. Aboriginal peoples also resist further diminishment of their territories because of their feelings for the land and how it has been lost. Thus, conflict ignites for at least two reasons: First, physical disputes erupt because of historical and contemporary political “facts” as they relate to Aboriginal land loss. Second, flashpoints are also sparked because of the psychological “facts” or feelings Aboriginal peoples have about the circumstances underlying their loss. Dispute resolution has to be attentive to physical facts and psychological feelings.

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<sup>83</sup> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, *Restructuring the Relationship* (Ottawa: Supply and Services, 1996) at Chapter 4.

If governments and Aboriginal peoples merely rely on corporeal facts to address Aboriginal issues, peace will not be readily forthcoming. Courts and commissions that only address physical facts will ultimately fail to ease tensions. There must be greater attention paid to the feelings Aboriginal peoples and others have about how they perceive the loss of their lands.

Unfortunately, courts are not generally good at addressing this aspect of the disputes. They are too narrow in their focus. While remedying historically verifiable injustices and losses is a necessary condition to calming troubled relations between Aboriginal peoples and the Crown, it is not sufficient. Processes must be developed that deal with the psychology of the situation that leads to conflict. Commissions of inquiry, legislative actions, and Cabinet decisions can better incorporate these wider considerations.<sup>84</sup>

The following brief inventory of Aboriginal occupations demonstrates that the lack of recognition and acknowledgement of Aboriginal perspectives and historical rights to land and resources is a major flashpoint for conflict with the Crown and others.

### **ANISHINABE PARK**

This inventory begins in 1974, when members of the Ojibwa Warrior Society occupied Anishinabe Park in the northwestern Ontario town of Kenora. Members of the American Indian Movement (AIM) participated in the occupation.<sup>85</sup> They had been active in protests over lands and resources in the United States in the late 1960s and early 1970s. The blockade was erected because of discrimination Aboriginal peoples faced in matters such as health care, medical and dental services, and housing. Aboriginal peoples also claimed ownership of the Park and their protest was meant to highlight failures to recognize their lands and resources. They felt pushed out of their territories by non-Aboriginal occupations. In particular, the Park had been purchased by the Department of Indian Affairs as a camping area for the Anishinabek but was sold to the

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<sup>84</sup> One must be careful to note that Commissions of Inquiry are not sufficient to deal with pressing problems faced by Aboriginal peoples. While they have had some impact, there have been numerous commissions dealing with Aboriginal justice that have failed to bring about wider change. See: *Royal Commission on the Donald Marshall Jr. Prosecution* (Halifax: Government of Nova Scotia, 1989); *Report of the Osnaburgh/Windigo Tribal Council Review Committee*, Prepared for the Attorney General (Ontario) and Minister Responsible for Native Affairs and the Solicitor General (Ontario) (Toronto: Government of Ontario, 1990); Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice*, Report No. 34 (Ottawa: Law Commission, 1991); Aboriginal Justice Inquiry, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (Winnipeg: Province of Manitoba, 1991); *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta* (Edmonton, Alberta: The Task Force, 1991); Judge Patricia Lynn and Representatives of FSIN, Saskatchewan and Canada, *Report of the Saskatchewan Indian Justice Review Committee* (Regina: Saskatchewan Justice, January 1992); Judge Anthony Sarich, *Report on the Cariboo-Chilcotin Justice Inquiry* (Victoria, British Columbia: Attorney General of British Columbia, 1993); *Bridging the Cultural Divide: Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Supply and Services, 1996).

<sup>85</sup> At Wounded Knee, South Dakota in 1975, a gun battle killed three men in the conflict between indigenous people of the Pine Ridge reserve and law enforcement agencies such as the FBI.

town of Kenora “without compensation with the natives” for development as a tourist area.<sup>86</sup> The failure to recognize Aboriginal land rights was a flashpoint for resistance.<sup>87</sup>

The Aboriginal occupation of the Park led to a conflict with the Ontario Provincial Police (OPP). Threats were made by Aboriginal people to burn the nearby pulp mill and bomb the hydroelectric station if their rights to the Park were not acknowledged. Feelings ran high in the area at the time. News media, Quakers, and Jean Chrétien, the federal Minister of Indian Affairs, also had a role in the conflict and expressed great concern. The blockade was eventually dismantled after the government made promises to settle the issue through negotiation.

Following the blockade some protesters decided to walk to Ottawa to make their claims more widely known. On September 30, 1974, approximately 1,000 people arrived on Parliament Hill in Ottawa to complete a march begun in Vancouver on September 14. People involved in the demonstration demanded Aboriginal and treaty rights recognition, fair and independent land claims processes and settlements, and the dismantling of the *Indian Act* and Department of Indian Affairs. When the caravan arrived on Parliament Hill it encountered barricades, armoured Royal Canadian Mounted Police (RCMP), and armed National Guardsmen. Once again, Aboriginal peoples encountered a blockade—this time by the police. For the protestors, it seemed as if no one was interested in talking with them and acknowledging their grievances. The subsequent clash with riot police resulted in the tear-gassing of the crowd, the hospitalization of nine officers and protesters, and the caravan’s retreat from the Hill. Deep emotional wounds were created by this fracas. Some Aboriginal people, who noted the violent response to the caravan, stored these memories as kindling for later confrontations.

## **MORESBY ISLAND, QUEEN CHARLOTTE ISLANDS, BRITISH COLUMBIA**

For thousands of years the Haida used and occupied Haida Gwaii, the Queen Charlotte Islands, off the west coast of British Columbia. Creation stories speak of their genesis in the area. They believe they were there during the last ice age. They have oral histories about villages that once stood on lands now covered by the Hecate Strait during that time. They were on Haida Gwaii when the Spanish arrived. They later greeted English, Russian, and American explorers. Throughout this period they traded, socialized and sometimes fought with other indigenous nations on the mainland of North America. The Haida existed as a highly organized society in

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<sup>86</sup> Olive Patricia Dickason, *Canada’s First Nations: A History of Founding Peoples from Earliest Times* (Toronto: McClelland & Stewart, 1992) at 392.

<sup>87</sup> Lyle Ironside of the Ojibway nation travelled to South Dakota in the summer of 1973 to join Crowdog’s support camp for Wounded Knee. In the years that followed, Ironside remained at the centre of actions for Native rights. He participated in the office occupations in Kenora and Ottawa and the armed occupation of Anicinabe Park. He remembers Anicinabe Park as “a sort of Ojibway unity conference, where they wanted the opinions of the old people.” Ironside was acquitted of weapons charges arising from the occupation of Anicinabe Park. When asked about the effect of Anicinabe Park on the people with power, he said, “They didn’t give a shit. They were elected people but they didn’t give a shit about what was happening with the people in Kenora because they never even showed their damn ass in the park except for the pow-wow. Like they didn’t give a fuck at all because they figured here was only reservation people all getting together and they don’t really have no say with the Department of Indian Affairs and the provincial government of Ontario and the federal government. It’s just one of those big get-togethers of something that’s not going to prove fuck-all.” James Sherret, “Up in Ontario, March 29, 2004,” online: <http://www.upinontario.com/mt/archives/000111.html> (accessed June 28, 2005).

1846 when the Oregon Boundary Treaty was drawn to divide Canada from the United States in the Pacific Northwest.

British Columbia has never recognized Haida rights and title to their islands. There has never been any treaty, agreement, or other act of acknowledgement of Haida rights by the Crown. In fact, British Columbia claimed the Queen Charlotte Islands as their own, and issued grants, tenures, licenses, permits and collected royalties for lands and resources on Haida Gwaii. The Haida regard these governmental acts as unjustified examples of non-Aboriginal occupation of lands they legally own. The physical occupation of Haida Gwaii by non-Aboriginal people blocks Haida access to their lands and resources. This is a flashpoint for conflict between the parties.

In 1973 the Haida initiated negotiations with the federal government for a declaration acknowledging their ownership of Haida Gwaii. As part of these negotiations it was proposed that Gwaii Haanas be protected from development to conserve its natural beauty. In the mid-1970s, seemingly in response to the possibility for protection, the B.C. government initiated a land use planning forum under the Ministry of Forests, ostensibly to determine the future of Gwaii Haanas. This process proved to be a disappointment to the Haida as there was no recognition of their rights forthcoming through the forum. “In fact, government allowed logging to proceed at full pace while a seemingly endless series of land use planning meetings continued for several years.”<sup>88</sup> Finally, in the mid-1980s, as a result of frustration with the process, a blockade was set up to prevent further logging on Gwaii Haanas. This action attracted national and international attention and a strong public campaign developed in the mid-1980s to preserve Gwaii Haanas as a National Park. A cross-country caravan was initiated, similar to the one that, 10 years earlier, had travelled across Canada to secure support for Haida rights.

Delays and procedural wrangling built a sense of frustration among the Haida and their supporters. It is once again easy to see that the flashpoint for the blockade was the failure to seriously recognize Haida rights and feelings for their land, despite federal and provincial processes. At the time of the blockade, Miles Richardson, president of the Haida Nation, proclaimed the reason for the occupation:

There will be no logging on the area that the Haida people have designated that are not to be touched. This is Haida land.... It's time, that in the exploitation of resources, and in the management of these islands, that the people who are here sharing these lands with us *respect*, equally with everyone else, the aspirations and values of the Haida Nation. These are our homelands, we have been here for thousands of years and we intend to be here for thousands more.<sup>89</sup>

There was a court action that tested the right of Aboriginal people to Moresby Island, but it proved inconclusive.<sup>90</sup> It did not address the underlying issues in the conflict. Aboriginal peoples

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<sup>88</sup> See Great Wild Spaces, online: <http://66.102.7.104/search?q=cache:YQx5ObL7E4oJ:www.spacesfornature.org/greatspaces/moresby.html+blockade+Moresby+Island&hl=en> (accessed June 28, 2005).

<sup>89</sup> See CBC Archives, news, online: [http://archives.cbc.ca/IDC-1-73-1238-6854/politics\\_economy/aboriginal\\_treaty\\_rights/clip4](http://archives.cbc.ca/IDC-1-73-1238-6854/politics_economy/aboriginal_treaty_rights/clip4) (accessed September 13, 2005).

<sup>90</sup> *West Forest Prod. V. Collinson*, [1985] B.C.W.L.D. 4340, subsequent proceeding, [1986] B.C.W.L.D. 609, [1986] B.C.W.L.D. 2365 (B.C.S.C.).

were looking for acknowledgement of their rights but they did not find it before the courts. Courts are not usually effective vehicles for long-term settlements. More was required to turn down the heat created by Haida occupation. A process was needed that addressed the specific land use in question and the feelings generated by the proposed land use. This process developed in 1986 when a group of leaders, led by Vancouver lawyer and future B.C. Supreme Court Chief Justice Bryan Williams, proposed the preservation of the area. The Social Credit government of Bill Bennett responded by establishing the Wilderness Advisory Committee (WAC) to evaluate the validity of protecting Gwaii Haanas.<sup>91</sup>

“Subsequent to this, in 1987 the federal minister for National Parks, Tom McMillan with the strong assistance of Ottawa-based Sierra Club conservationist Elizabeth May, put considerable pressure on British Columbia to preserve the area. In addition to the Haida First Nations and the Islands Protection Society, other important contributions were made by Vicki Husband of the Sierra Club, Paul George and Ken Lay of the Western Canada Wilderness Committee, and Colleen McCrory of the Valhalla Society. This intense campaigning led to an agreement between Prime Minister Brian Mulroney and B.C. Premier Bill Vander Zalm that the area would be protected. Part of the protection package was a substantial buy out by government of timber rights valued at \$37 million.”<sup>92</sup> Clearly, a flashpoint was defused through the involvement of all interested parties in addressing the technical and emotional reasons for protecting the land from further logging.

In 1988 the governments of British Columbia and Canada signed the South Moresby Agreement, thereby designating the area as a national park. This was followed in 1993 by the Gwaii Haanas Agreement, setting out the terms of co-operative management between the Haida Nation and the Government of Canada. In 2000 the *Gwaii Haanas National Park Reserve* was re-designated by regulation under Schedule 2 to the *Canada National Parks Act*.<sup>93</sup> The Gwaii Haanas occupation is noteworthy because it shows how peaceful resolutions can be achieved by providing a degree of recognition for Aboriginal perspectives on the land and resources. Acknowledgement reduced conflict. While there were elements of the deal that were unsatisfactory for the Haida, the conflict was contained by an appropriate level of recognition.

## ALGONQUINS OF BARRIERE LAKE

The Algonquins of Barriere Lake (one of ten Algonquin communities in Canada) have struggled to have their lands and resources acknowledged or protected by Canada or the Province of Quebec. Barriere Lake is on the shores of Rapid Lake, Quebec, on the bank of the Cabonga Reservoir, 134 kilometres north of Maniwaki. The community has over 500 members on a 28-hectare reserve. The reserve was formed in 1961 on land where the band was already settled. The Barriere Lake people, *Mitchikanibikok Inik*, claim that their traditional territory has never been acknowledged, which covers part of the headwaters of the upper Ottawa River in northwestern Quebec, beyond the reserve.

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<sup>91</sup> Great Wild Spaces, *supra*, online: <http://66.102.7.104/search?q=cache:YQx5ObL7E4oJ:www.spacesfornature.org/greatspaces/moresby.html+blockade+Moresby+Island&hl=en> (accessed June 28, 2005).

<sup>92</sup> *Ibid.*

<sup>93</sup> RSC 2000, c. 32.

In 1988 the Algonquin camped on Parliament Hill to protest a provincial proposal to clear resources from their territory. Ottawa is within Algonquin traditional territory, and they urged the federal government to assist them in implementing conservation strategies to protect their traditional territories.<sup>94</sup> The Algonquin action was to send the message that they did not like the provincial government physically occupying Algonquin land and preventing access to their traditional territories. The provincial decision to physically occupy Algonquin land and log the area was a flashpoint for the protest. In response to these attempts to be heard the Algonquin were charged with trespassing and their tents were seized on September 28, 1988. The seizing of their possessions and the failure to constructively listen to their pleas compounded the conflict they had with the federal and provincial governments. A cycle was initiated; further direct action resulted.

In 1989, the Algonquin's actions on Parliament Hill were followed by a blockade of a road through the La Verendrye Wildlife Reserve in Quebec, which was under pressure from clear-cut logging. The Algonquin slowed traffic and asked motorists to sign a petition supporting conservation efforts in the area. In six hours they received 1,400 signatures. They were also protesting Regulations for hunting in the area that did not make any provision for Aboriginal hunting. In response, Canadian Pacific Forest Products, owners of Canadian International Paper Company, applied for and received an injunction from the courts ordering the Algonquins to dismantle their blockades. The Algonquin resisted.<sup>95</sup> Unfortunately, the protests and blockades brought the Algonquins of Barriere Lake into direct conflict with the Sûreté du Québec (provincial police force). This further fanned their frustration. In their words: "Relations with the police deteriorated and in October 1989, the SQ, equipped with riot gear and batons, forcefully stormed a logging blockade set up by the Algonquins near Le Domaine in the middle of the La Verendrye Wildlife Reserve."<sup>96</sup>

Despite these problems the Algonquins of Barriere Lake entered into a Trilateral Agreement with the Canadian federal government and the Quebec provincial government in 1991. The purpose of the Agreement was to develop an integrated resource management plan (IRMP) for the traditional Barriere Lake territory. Unfortunately, implementation of the Agreement broke down. On September 15, 1991, Quebec Superior Court Judge Rejean Paul was appointed by the Quebec government as mediator in the conflict. His report supported many of the Algonquin claims. There have been numerous other actions over the years to create sustainable logging within the territory and protect the Algonquin way of life.<sup>97</sup> The dispute is still ongoing, and has not been successfully resolved to the satisfaction of the Algonquins or the governments. However, the Trilateral Agreement remains an important process that many want to see revived to acknowledge the Algonquins of Barriere Lake legitimate place relative to their lands and resources. If pursued properly the Agreement could enable the parties to address the technical and psychological aspects of the conflict. It contains the elements of recognition necessary to defuse further conflict, if sincerely acted upon.

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<sup>94</sup> Ottawa is also claimed to be within the traditional territory of the Algonquin Nation.

<sup>95</sup> See Chief Jean-Maurice Matchewan, "Mitchinkanibikonginik Algonquins of Barriere Lake: Our Long Battle to Create a Sustainable Future," in *Drum Beat: Anger and Renewal in Indian Country*, ed. Boyce Richardson (Ottawa: Summerhill Press, 1989) at 137–166.

<sup>96</sup> See the website of the Algonquins of Barriere Lake: <http://www.algonquinnation.ca/barrierelake/logging.html> (accessed September 13, 2005).

<sup>97</sup> There was some internal dissension relating to the legitimacy of customary and elected leaders that was successfully mediated and resolved.

## TEMAGAMI ANISHINABE

The Temagami Anishinabe are another group who feels their lands and resources have not been appropriately recognized by the federal and provincial governments, thereby generating conflict. To combat these issues, Chief Gary Potts filed land cautions in 110 townships within their traditional territories (N'Daki Menan) in 1973, asserting Temagami ownership of portions of their traditional territories. They claimed that the land was unsurrendered Indian land as a result of being left out of the Robinson-Huron Treaty in 1850 and subsequent adhesions. The cautions were filed to prevent further non-Aboriginal occupation of their land. The cautions stopped mining but not logging.

In 1978 Ontario sued the Temagami in the Supreme Court of Ontario, asking for a declaration that Ontario had clear title to the land in question and that the Anishinabe had no interest therein.<sup>98</sup> The case dragged on for years. At trial, Mr. Justice Steele eventually found that the Temagami “had no aboriginal right to the land, and that even if such a right had existed, it had been extinguished by the Robinson-Huron Treaty of 1850, to which the Temagami band was originally a party or to which it had subsequently adhered.”<sup>99</sup> He wrote that the Temagami “failed to prove that their ancestors were an organized band level of society in 1763; that, as an organized society, they had exclusive occupation of the Land Claim Area in 1763; or that, as an organized society, they continued to exclusively occupy and make aboriginal use of the Land Claim Area from 1763 or the time of coming of settlement to the date the action was commenced.”<sup>100</sup> The court’s decision did not resolve the issue.

In 1986 Ontario planned construction for the Red Squirrel logging road into the Temagami wilderness area but it was temporarily stopped by further court action and lobbying. On June 1, 1988, the Temagami blockaded Red Squirrel Road until December 1988 when they were removed pursuant to a court injunction. In 1989 the Ontario Court of Appeal upheld the decision of Justice Steele “on the assumption that [if] an aboriginal right existed, ... [it] had been extinguished either by the Robinson-Huron Treaty or by the subsequent adherence to that treaty by the Indians, or because the treaty constituted a unilateral extinguishment by the sovereign.”<sup>101</sup> The Supreme Court of Canada finally rejected the case in 1991, holding that the “right was in any event surrendered by arrangements subsequent to that treaty by which the Indians adhered to the treaty in exchange for treaty annuities and a reserve....[Therefore] the aboriginal right has been extinguished.”<sup>102</sup>

There is great trauma in being told that you don’t rightfully hold territories you feel have been correctly passed to you through the generations. This decision did not take account of the “Aboriginal perspective of the meaning of the right at stake.”<sup>103</sup> Furthermore, it did not take a “large, liberal, and generous” approach to the characterization of the right at issue. Nor did the decision “choose from among the various possible interpretations of the common intention [at

<sup>98</sup> *Ontario (Attorney General) v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 (Ont.S.C.).

<sup>99</sup> *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570.

<sup>100</sup> *Ontario (Attorney General) v. Bear Island Foundation* (1984), 49 O.R. (2d) (Ont. S.C.) 353 at 373.

<sup>101</sup> *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570.

<sup>102</sup> *Ibid.*

<sup>103</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1112.

the time the treaty was made] the one which best reconciles” the Anishinabek interests and those of the British Crown.<sup>104</sup> The failure to find any acknowledgement for the Temagami’s claim is indicative of the manner in which Aboriginal rights have most often been treated in Canadian courts. The lack of acknowledgement and recognition of their views with regard to lands and resources creates a flashpoint for conflict that does not disappear just because a court issues an opinion. This has been a problem more generally. In many of the cases reviewed through this inventory, courts have not done a particularly good job conveying their reasons for decision to Aboriginal peoples. Judges could be more effective in writing judgments that address Aboriginal views, even if they eventually disagree with them. It may be that judges need more experience with Aboriginal people or issues to effectively write in ways that diminish conflict. Decisions remain unpersuasive when they do not readily engage those affected.

While the Temagami lost in court there was a brief negotiation period with the Crown because the Supreme Court of Canada ruled that the “Crown has failed to comply with some of its obligations under this agreement, and thereby breached its fiduciary obligations to the Indians.”<sup>105</sup> Negotiations held the potential to address the larger issues in the conflict, and take the parties beyond the specific technicalities of the dispute. These negotiations lasted until 1995 when Premier Mike Harris had them unilaterally terminated. In 1995 the government lifted the cautions against the land and mine staking began.<sup>106</sup> This hurt those who had tried so hard to make their history, views, and feelings known. Land claims negotiations to set aside land for the Temagami have been ongoing for the past five years, though at a slow pace, but with no present success. The Red Squirrel logging road was reopened in June 2005. It does not appear that the fiduciary obligation noted by the Supreme Court of Canada has been fulfilled. The Temagami remain in a situation where their traditional territories are not recognized as being within their influence or control. One hopes that the bitterness engendered by this clash can be addressed through further negotiation so as not to detonate another round of unproductive encounters. The potential for further physical acts remains because of the lack of official recognition of Temagami rights in their traditional territories.

## **PEIGAN LONEFIGHTERS SOCIETY**

Oldman River is a tributary of the South Saskatchewan River and flows through traditional Peigan territory in southern Alberta. The Peigan are a part of the Blackfoot Confederacy and have occupied the land and used the river for thousands of years. The river is sacred to many Peigan people and carries their medicines and teachings. It can be exceedingly difficult to get courts or governments to give serious treatment to something that is considered sacred by one group. There is sometimes a tendency to discount spiritual practices and expressions in the public sphere. Many Peigan feel they have had this experience. Nevertheless, the Peigan persisted in speaking of the river as their Creator, and regarded any diversion or alteration of the river’s natural course as desecration. Furthermore, some Peigan people also believed they had continuing legal rights and responsibility for the river. Alberta, on the other hand, felt it had

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<sup>104</sup> *R. v. Sioui*, [1990] 1025 *per* Lamer J. at 1069; *R v. Marshall*, [1999] 3 S.C.R. 456 at para. 15.

<sup>105</sup> *Ibid.*

<sup>106</sup> See Chief Gary Potts, “Last Ditch Defence of a Priceless Homeland” in *Drum Beat: Anger and Renewal in Indian Country*, ed. Boyce Richardson (Ottawa: Summerhill Press, 1989) at 203–228.

exclusive rights to the river believing that the Peigan surrendered it in 1877 through Treaty 7.<sup>107</sup> The Peigan did not regard the treaty in the same light. They argued that the treaty only created a relationship of peace and friendship, which was to be for as long as the “rivers flow.”<sup>108</sup>

For many years the Alberta government planned on building a dam on the Oldman River. They wanted to harness and change the river’s flow for agricultural irrigation purposes. Construction of the dam began in earnest in August 1990. The Peigan saw the dam’s erection as a non-Aboriginal blockade of their sacred resource. A group of Peigan people, called the Peigan Lonefighters, began to redirect the river using an excavator. Their goal was to render the dam useless and release the river from containment in the reservoir. However, in the midst of this confrontation, on September 7, police surrounded the Lonefighters’ camp and Milton Born With a Tooth fired retaliatory shots that resulted in his arrest. As a consequence of his actions, he served four months in pretrial custody and was sentenced to one and one-half years for weapons-related offences. Despite the legal drama behind the case, the Peigan still claim that the reservoir land and water is theirs.

The underlying issues that created the conflict have not been addressed by the parties. These issues include the arrest and subsequent jail time of Milton Born With a Tooth, the halting of the protest through force, and the building of the dam. The Supreme Court of Canada was not asked to address the issue of Aboriginal rights to the Oldman River when considering procedures to guide its development and use.<sup>109</sup> The issues at the heart of the Oldman River conflict lie simmering beneath the surface and could erupt at some future time, despite the facade of peace that prevails. Many Peigan people regard the reservoir as theirs, and others still think of the dam as contrary to their values and teachings.

Flashpoints have the potential to flare when Aboriginal history and psychology remains unacknowledged, and actions are proposed that further diminish Aboriginal access to land and resources. The unfinished business between the government and the Peigan is evident in the words of Milton Born With a Tooth after his release from jail:

You know, the only time we can unite is when we can be a part of something special—and saving the earth is something special. That’s when you get back to common sense and not being how this system wants you to be: confused. That’s when you get back to earth and you’re able to see solutions, and not see color or sexes, just see life as it is meant to be seen.

And it’s not hard. The enemy realizes it’s not hard and that’s why it tries so damn hard to confuse us all the time, and that’s why it’s willing to spend billions of dollars to keep us that way. You can really see it when people are more worried about the system [that] they forget the earth. I’d rather ... appreciate what it is I’m doing rather than being paid to do it, or have to worry about it all the time, and take Tylenol and all this other bullshit just to

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<sup>107</sup> Alberta also relied on the provisions of the Natural Resources Transfer Agreement, which gave the province the constitutional right to resources within its borders.

<sup>108</sup> Treaty Seven Elders and Tribal Council, with W. Hildebrandt, Sarah Carter, and Dorothy First Rider, *The True Spirit and Intent of Treaty Seven* (Montreal and Kingston: McGill-Queen’s University Press, 1996).

<sup>109</sup> *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3.

calm my guilt about what it is I'm doing. You wonder why there is all this alcoholism, suicide and all that? It's very simple, somebody makes it like that, making you miserable.<sup>110</sup>

The feelings and facts represented by this statement are not easily erased. They demonstrate the multi-layered motivations underlying the conflict over the Oldman River. The fact that these sentiments were not addressed through the confrontation does not bode well for the future.

## JAMES BAY CREE

The James Bay Cree have occupied lands and used the waters flowing into the eastern coast of James Bay and lower Hudson's Bay for thousands of years. Their livelihood, social organization, spiritual practices and beliefs are closely related to this ecosystem. When Canada was first settled by non-Europeans, James Bay was considered to be a part of Rupert's Land and part of the Hudson's Bay Company through a Royal Charter. The James Bay Cree saw things differently. They wondered how the land could belong to another when they had never surrendered it. When Canada became a Dominion in 1867 there were provisions within the *British North America Act, 1867* that required Indian rights to be settled in the area prior to development.<sup>111</sup> In 1868 the Imperial Parliament passed the *Rupert's Land Act*, and the Hudson's Bay subsequently surrendered its so-called rights to the land to the Canadian government.<sup>112</sup> Again, the Cree would later wonder how the Hudson's Bay had any land to surrender to the Crown when it had been in Cree possession all along. In 1870 there was an Imperial Order-in-Council that required the government to secure surrender of Indian title in Rupert's Land before it could be taken up by others. No land surrender occurred in James Bay in the years following this order. In 1898 and 1912, when Quebec's boundaries were extended over the area, Aboriginal title remained unextinguished. This history exemplifies non-recognition of Aboriginal rights, and creeping non-Aboriginal occupation of Aboriginal lands, which created the conditions for future conflict.

On April 30, 1971, Quebec Premier Robert Bourassa proposed developing hydroelectric power in northern Quebec. This decision angered many Cree. Hydro-Quebec was given the authority by the provincial government to divert major rivers in the area, thereby harnessing power through a series of dams, dikes, reservoirs, and power stations. The James Bay Cree and Inuit of northern Quebec opposed the project, arguing that it would damage the environment and destroy traditional livelihoods. They also maintained that the proposed project lands belonged to them. To the Cree, the government's decision seemed contrary to law. It felt like a further non-Aboriginal occupation or blockade of traditional territories. The proposed action also threatened the James Bay Cree's way of life. On November 15, 1973, the Cree and Inuit went to court and obtained an injunction to stop the construction at James Bay, although it was overturned a week later in the Quebec Court of Appeal.<sup>113</sup> However, the pressure from the short-lived injunction

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<sup>110</sup> From the transcript of an interview heard on Vancouver Co-op Radio, see NativeNet, online: <http://www.native-net.org/archive/nl/9202/0112.html> (accessed September 14, 2005).

<sup>111</sup> *Constitution Act 1867*, 30 & 31 Victoria, c. 3, section 146.

<sup>112</sup> *Rupert's Land Act*, 1868 31-32 Victoria, c. 105 (U.K.).

<sup>113</sup> *Kanatewat v. James Bay Dev. Corp.* (1974), Que. R.P. 38; reversed (1979), (C.A.) 166; leave to appeal dismissed (1975), 1 S.C.R. 48; see also Boyce Richardson, *Strangers Devour the Land* (New York: Alfred Knopf, 1985) at 242-259.

created an atmosphere that allowed for the negotiation of a land claim settlement signed on November 11, 1975.<sup>114</sup>

As part of the Agreement, the Cree received certain monetary and social benefits but many of their lands were flooded and their traditional livelihoods were destroyed. Furthermore, the federal and Quebec governments were slow in implementing the Agreement, and disputed aspects of the treaty. The destruction of Cree land through the widespread flooding combined with the bitterness caused by the government's failure to properly implement the treaty were further flashpoints for conflict.

Therefore, when the provincial government announced Phase 2 of the James Bay project (called the Great Whale Project) the Cree vigorously protested the decision before the national and international media. In 1992, as a result of this pressure, a major potential recipient of the project's power (New York State) cancelled its hydroelectric contract with Quebec. This hurt the Quebec government because it represented a major loss of future revenue and dimmed their reputation in political circles. The provincial government had to rework environmental standards at the behest of the federal government. The difficulties caused by this protest led Premier Jacques Parizeau to postpone construction of the Great Whale Project.

Litigation and protest dragged on for the better part of a decade. Finally, negotiation broke the impasse. A deal was signed between the Quebec government and the James Bay Cree on February 7, 2002, to allow for further hydro development in northern Quebec.<sup>115</sup> The Cree received \$3.5 billion over 50 years and were able to negotiate greater control within their territory. Some hail the Agreement as a major breakthrough and an international benchmark in the settlement of indigenous rights. Others have decried its existence, arguing that it completes the process of assimilation and causes the destruction of land, water, and the traditional Cree way of life. The recent election among the James Bay Cree ousting the supporters of the deal creates uncertainty for the future.

The lessons to draw from this confrontation are that the 1975 acknowledgement of Aboriginal rights created a settlement that satisfied some Aboriginal people engaged in the conflict. However, the failure to follow through with this recognition and abide by the terms of the signed Agreement created a flashpoint for further conflict. The continuing dissatisfaction by some James Bay Cree over the most recent Agreement illustrates the conflict between environmental destruction and traditional ways of life, even if larger implementation issues are addressed. This larger conflict in lifestyle and values is another flashpoint. This conflict is much harder to address, given the issue's underlying dichotomies. The recognition of one way of life seems to directly and negatively impact on the other way of life. On the one hand, building the dam destroys the traditional livelihood and territories of the Cree, and conflicts with their spiritual views. On the other, failure to expand infrastructure and secure access to markets through hydroelectric industrial development seems to undermine profit and diminish the confidence business and investors will place in a government. The underlying psychology of these value and lifestyle divergences must also be addressed to reduce future conflict.

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<sup>114</sup> Richard Salisbury, *A Homeland For the Cree: Regional Development in James Bay, 1971–1981* (Montreal and Kingston: McGill-Queen's University Press, 1986) at 53–63.

<sup>115</sup> The Paix Des Braves Settlement, as it has come to be known, gives \$3.5 billion over 50 years plus a share of the benefits from natural resources taken from Cree land.

## INNU OF LABRADOR

For thousands of years the Innu followed the caribou through their seasonal migrations. Each year they travelled thousands of kilometres, from the Arctic tundra, to the St. Lawrence River, to the Davis Strait. The Innu have never ceded their lands or resources but they are claimed under Crown ownership by the governments of Quebec, Newfoundland, and Labrador. There are over 16,000 Innu living in Nitassinan (eastern Quebec and Labrador). They are located in 13 different communities (two in Labrador and eleven in Quebec)—Utshimassit, Sheshatshiu, Pakuashipi, La Romaine, Natashquan, Mingan, Uashat, Maliotenam, Betsiamites, Les Escoumins, Mashteuiatsh, Schefferville, and Kawawachikamach.

There was very little non-Aboriginal occupation of Innu territories in the first 400 years of European contact. The Norse, Basque, Spanish, Portuguese, French, and English did not linger on Innu lands to any great degree. As we saw from the James Bay scenario, however, Quebec began to slowly expand its boundaries over Aboriginal (including Innu) territories during the past 100 years without Aboriginal consent. Newfoundland also exercised jurisdiction over Innu land and resources in Labrador without Innu involvement. These actions would lead to future conflict.

Innu lifestyles began to change in the 1930s and 1940s as they were partially incorporated into the cash economy. Change also occurred because some communities were relocated from traditional encampments to government-sponsored settlements without Innu consent. “The official rationale was that relocation was in the best interests of the people themselves, but what lay behind these words was an overriding concern about the cost of administering programs—a long-time concern of officials dealing with Aboriginal people.”<sup>116</sup> In the 1950s mines were opened in western Labrador and restrictive game laws were introduced, which blocked Innu access to their resources. In 1969 the Churchill Falls dam in Labrador flooded vast sections of traditional Innu hunting lands. This flooding occurred without notice to most Innu hunters and caused them to lose their trapping and hunting equipment. The flooding of an important watershed was an unprecedented non-Aboriginal occupation of Innu land. It blocked Aboriginal use. Despite these disruptions, a number of Innu people continued to retrace portions of their historic migrations each year to hunt caribou. They continued to occupy as much of the land as they could.

In 1967 the Canadian government allowed low-level flying to occur over Innu territory, with a large increase in the number of flights in the early 1990s. The Innu experience many adverse effects from low-level flying. They argued that the flights disturb wildlife and people and would ultimately destroy their way of life. One spokesperson for the Innu, Pierre Ashini said: “The noise they make is probably twice as loud as thunder, and the planes fly so fast there is no warning of their approach. Children are so frightened by the noise they stick close to their parents, which affects their independence. The noise also affects caribou, and Elders say the

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<sup>116</sup> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol. 1, *Looking Forward Looking Back* (Ottawa: Supply and Services, 1996), Chapter 11.

animals are miscarrying and dying for no apparent reason.”<sup>117</sup> The Innu people have been seriously traumatized by frequent over-flights of fighters and medium-range bombers that can generate noise levels of 130 decibels. In response, the Innu Nation tried to stop the increase in the flights through political and legal channels.<sup>118</sup> After failing to secure their goals through environmental assessment reviews, political lobbying, and the courts, the Innu took direct action. They physically occupied runways on military bases in Labrador to protest low-level flying.

The Innu have also protested the establishment of a mine in Voisey’s Bay, where rich deposits of nickel were found in 1993. The Innu believe this land and its resources is theirs until shared through treaty, which has not occurred. Yet, non-Aboriginal occupation of the site seems to be taken for granted by the courts and governments, and Aboriginal occupations or blockades were regarded as illegitimate. In 1997, the Innu and the Inuit joined together to protest this development. The Inuit have signed a land claims agreement resolving many of their concerns. The Innu are still in negotiations.

In the absence of treaties, an environmental assessment was important in de-escalating the tension in the territory. The environmental assessment process was somewhat successful. The Innu and the governments had learned from their negative experiences with similar processes when dealing with low-level flying. The Innu felt they had had no control over earlier processes in judging the impact of low-level flying. As a result, when dealing with Voisey’s Bay, the Innu negotiated a Memorandum of Understanding with the federal and Newfoundland governments for the conduct of the assessment that recognized many of their interests. The recognition of Innu rights and acknowledgement of their interests through the Memorandum and treaty negotiations successfully defused the conflict. The conflict over low-level flying remains.

## **OKA AND KANESATAKE, QUEBEC**

There is an ongoing debate about whether the lands of the upper St. Lawrence Valley around Montreal are the traditional territories of the Haudenosaunee Confederacy.<sup>119</sup> The Mohawks of the Confederacy regard the land as their own. The Province of Quebec takes a contrary view and claims the land is not subject to Mohawk title. Thus, there are competing notions about the rightful use and occupation of the land between Aboriginal peoples and others in the area. This uncertainty generates confusion and causes periodic conflict. The most high-profile disturbance in recent years occurred at Oka and Kanésatake, where an armed confrontation occurred between the police and Mohawk people about the use and ownership of an area of land called “The Pines.”

Oka is a Quebec municipality that is intermixed with Mohawk lands in the community of Kanésatake. Kanésatake is located on the north shore of the Lake of Two Mountains where it meets the Ottawa River, 53 kilometres west of Montreal. The lands set aside for the Mohawks are not “Indian reserve” lands under the *Indian Act*. The surface area of Kanésatake is 1,142

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<sup>117</sup> Linda Caldwell, *Windspeaker*, June 1995, online: <http://www.ammsa.com/classroom/CLASS1LOWLEVEL.html> (accessed September 16, 2005).

<sup>118</sup> *R. v. Ashini*, [1989] 2 C.N.L.R. 119 (Nwfld. Pr.Ct.).

<sup>119</sup> James Pendergast, “The Confusing Identities Attributed to Stadacona and Hochelaga,” *Journal of Canadian Studies* 32 (1998): 149–167; Darlene Johnston, “Litigating Identity: The Challenge of Aboriginality” (master’s thesis, Faculty of Law, University of Toronto, 2003).

hectares. There are nearly 1,960 people in Kanesatake, with approximately 1,347 residents on the actual territory of the Mohawk.<sup>120</sup>

In the early days of New France, the Sulpicians were granted land in the area by the King of France in order to bring the Mohawks of Kanesatake to the Catholic religion. The seigniorship was created by successive grants from the King of France in 1717, 1718, 1733, and 1735. These grants purported to convey land to the ecclesiastics of the Seminary of St. Sulpice, forming part of the seigniorship, with a full proprietary title, but on the condition that they should take care of a certain mission they had founded among the Indians. This land was known as the Seigneurie of Lake of Two Mountains. The Mohawks always regarded the land as theirs, while the Sulpicians held that the land had been granted to them. Through the centuries the Sulpicians sold much of the land to non-Aboriginal people. In 1912, a decision of the judicial committee of the Privy Council, the *Corinthe* decision, found in favour of the Sulpicians against the Mohawks.<sup>121</sup> The Mohawks did not regard the decision as determinative.

In 1977 the Mohawks of Kanesatake filed a claim with the Office of Native Claims of Canada regarding land. The government financed research for the claim's further development but the case was denied upon final submission because it was held that the claim did not meet the "criteria" of the Specific Claims branch. This did not resolve the issue for the Mohawks, and they continued to strive for recognition of their asserted rights.

In March of 1990 there was an attempt by Oka's municipal employees to clear some land to build condominiums and expand a golf course. This was a flashpoint for further conflict. The Pines, as the proposed development area was called, is connected to a Mohawk burial ground. The municipal workers encountered Mohawk resistance in their attempt to clear the area. The Mohawks set up a blockade to prevent further development and to protest the municipality's occupation of the site as contrary to their rights to land in the area. They felt as if non-Aboriginal people had already claimed occupation of most of their land, and that this remaining piece needed to be preserved. Not surprisingly the mayor of Oka took a different view of the matter and submitted the question to the courts. An injunction was granted by the Superior Court to allow municipal employees to continue their work, thus setting the stage for further conflict. In response Mohawk protesters reinforced barriers to prevent bulldozers from breaking ground for the golf course.

On July 10, 1990, the mayor of Oka wrote and requested help from the provincial police, the Sûreté du Québec, to enforce the Quebec Superior Court's injunction. The mayor also asked for intervention because he believed there was criminal activity by some Mohawks at the blockade. The mayor's action and police presence further escalated tension. On July 11, 1990, the protestors reinforced their positions around the blockade. In order to dismantle the blockade a police SWAT team fired tear gas and concussion grenades at the barricade in an attempt to create confusion among the Mohawks. Police actions did create confusion, and in the ensuing firefight bullets were exchanged. Sadly, when the smoke cleared, Marcel Lemay from the Sûreté du Québec was dead, mortally wounded by a Mohawk bullet.<sup>122</sup> The development further

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<sup>120</sup> See Kanesatake Fact Sheet, online: [http://www.ainc-inac.gc.ca/nr/prs/m-a2000/00146\\_fsa\\_e.html](http://www.ainc-inac.gc.ca/nr/prs/m-a2000/00146_fsa_e.html) (accessed September 19, 2005).

<sup>121</sup> *Corinthe v. Le Séminaire de Saint-Sulpice*, [1911] 21 C.B.R. 316.

<sup>122</sup> A coroner's report into the shooting death of Marcel Lemay concluded that the shot was fired by a Mohawk warrior, but the report failed to identify the killer and no one was charged with Lemay's murder.

intensified the conflict as other Aboriginal peoples from across the continent joined the Mohawks in their protest. It also strengthened the resolve of the government. To attempt to contain the situation the Sûreté du Québec established their own blockades to restrict access to Oka and Kanesatake. As in other conflicts noted here, non-Aboriginal blockades once more became visibly physical, demonstrating the material power of non-Aboriginal society to block Aboriginal peoples from their lands. Mohawks at Kahnawake, in solidarity with the Kanesatake Mohawks, blockaded the Mercier Bridge between the Island of Montreal and the South Shore suburbs at the point where it passed through their territory.<sup>123</sup> At the peak of the crisis, the Mercier Bridge and Highways 132, 138, and 207 were all blocked, causing enormous traffic jams and frayed tempers in the city.

On August 14, Premier Robert Bourassa called upon the army for support. This was an exceptionally rare event in Canadian history, and demonstrated the high level of conflict at Oka. The municipal, federal, and provincial governments justified their actions by saying they were trying to keep law and order in the province, in particular the enforcement of the injunction against the blockade. Mohawk protestors also justified their actions by reference to law and order, asking for an acknowledgement of their rights to occupy land in the area.

On August 29, the Kahnawake Mohawks dismantled the barricades at the Mercier Bridge, defusing tension among commuters and leaving the Kanesatake Mohawks isolated. After 78 days, on September 26, the blockades were removed at Kanesatake and many of the Mohawk leaders were arrested, but none was ever convicted.

In March of 1991, the Kanesatake Mohawks and the federal government agreed on an agenda for negotiations. In 1994 a Memorandum of Understanding over land purchases was signed by the Mohawks and the federal government. In 1997 the Mohawks established their own police station, and the federal government made land purchases in the name of Kanesatake. On December 21, 2000, a new land governance agreement was signed between Kanesatake and the federal government. Unfortunately, there are many aspects of the dispute that remain unresolved, including the status of the burial ground/golf course.

The events at Oka also had an impact on a wider scale. The Oka confrontation prompted the calling of a Royal Commission on Aboriginal Peoples to investigate the general situation of Aboriginal peoples in Canada. The Final Report was handed down in 1996 and contained over 441 recommendations. Aboriginal people were generally disappointed with the federal government response to the Report. There was no widespread acknowledgement of Aboriginal rights. However, the government released a policy document, "Gathering Strength," and a subsequent Inherent Rights Policy that contained some elements of the Royal Commission's final recommendations. The events at Oka also seemed to bring Aboriginal peoples to the constitutional negotiating table when the Charlottetown Accord was being developed in 1992. The leaders of four national Aboriginal organizations worked with First Ministers to debate and draft a series of amendments to the Constitution, including provisions dealing with Aboriginal rights. While the Charlottetown negotiations failed to gain acceptance from the wider Canadian population in a nationwide referendum, in the short term Aboriginal peoples seemed to gain a greater rate of participation in Canadian affairs in the immediate aftermath of Oka.

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<sup>123</sup> See Nationmaster.com: <http://www.nationmaster.com/encyclopedia/Oka-crisis> (accessed September 19, 2005).

## LUBICON CREE

The Lubicon Cree claim 10,000 square kilometres of land as their traditional territory in northern Alberta, east of the Peace River and north of Lesser Slave Lake. The Government of Alberta claims the same territory. The Lubicon Lake Indian Band land claim is over 100 years old; Alberta's claim is of more recent vintage. However, the Lubicon people have lived in the territory for thousands of years, whereas non-Aboriginal people have only showed up in the area, in any numbers, during the past 40 years. The reasons for the divergent perspectives relates to the Lubicon's status as beneficiaries of Treaty 8. The band did not sign Treaty 8 with government agents in 1889 because the treaty commissioners decided not to visit them. The Lubicon were hard to reach because they were not on the main rivers of northern Alberta where the negotiators travelled.

There is a dispute as to whether the Lubicon were eventually added to Treaty 8 as its beneficiaries by subsequent adhesions.<sup>124</sup> In 1908 the government was aware that Lubicon's ancestors had not entered into treaty.<sup>125</sup> In 1939 the federal government visited Lubicon Lake and determined that the Lubicon people were entitled to a reserve. They agreed to set aside 65 square kilometres of land for a reserve in 1940, but the Second World War intervened and the land was never surveyed or reserved. In the meantime an apparently mean-spirited government administrator arbitrarily struck Lubicon people off band registration lists.<sup>126</sup> In 1954, oil was discovered in their territory, and in 1979, an all-weather road was completed to take advantage of the oil and gas potential of the area. Large quantities of oil were removed from the territory during the 1980s while the Lubicon's claim remained unsettled. This massive non-Aboriginal occupation of the territory made it more difficult for the Lubicon to pursue their traditional hunting and fishing activities. Alberta's development activity had effects on the Lubicon similar to a blockade. The presence of roads, machinery, and police enforcement of provincial rights made it difficult for the Lubicon to access the resources they had relied upon for thousands of years. Aboriginal peoples like the Lubicon know what it is like to be the subject of a blockade, since they have dealt with analogous impediments throughout their territory for over 20 years.

Throughout the period of non-Aboriginal occupation there were numerous negotiations to recognize a measure of Lubicon rights, but they all failed to yield a settlement. In 1978 Bernard Ominiyak was elected as Lubicon Chief and he brought a higher profile to the dispute. The Lubicon took political action and also filed claims in court to press their case. Politically, the Lubicon attempted to bring pressure on the provincial government by securing federal government support for their position. Legally, the Lubicon asked for an injunction to slow provincial development on the lands surrounding their community on the theory that they still possessed Aboriginal title. The provincial government retroactively amended legislation to defeat their case, and the Lubicon failed in their application to have their claim recognized in the

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<sup>124</sup> Thomas Flanagan, "Adhesion to Canadian Indian Treaties and the Lubicon Lake Dispute," *Canadian Journal of Law and Society* 7, no. 2 (1992): 185 at 199.

<sup>125</sup> H.A. Conroy, to the Deputy Superintendent of Indian Affairs, February 10, 1909, NAC RG 10, v. 3999, file 206, 070-31, cited in Flanagan, *Ibid.*

<sup>126</sup> John Goddard, *Last Stand of the Lubicon Cree* (Vancouver: Douglas & McIntyre, 1991). See also E. Davie Fulton, *Lubicon Lake Indian Band Inquiry: Discussion Paper* (Ottawa: Government of Canada, 1986).

Canadian courts.<sup>127</sup> With the failure to achieve results in Canadian courts, the Lubicon took their case to the United Nations Human Rights Committee.<sup>128</sup>

Roadblocks were set up on October 19, 1988, to protest the lack of progress in settling their claim. They remained in place for five days before being dismantled by the Royal Canadian Mounted Police (RCMP), after the government received an injunction for their removal. Twenty-seven people were arrested for failing to abide by the court injunction. The charges against the accused were later dropped to facilitate a negotiated resolution of the land claim, but despite brighter moments, there has been no success in this matter thus far.

One of the difficulties in resolving the Lubicon Lake issue is the tripartite nature of negotiations. Federalism can be an underlying cause of conflict in circumstances where one of the parties disagrees with a particular approach and holds the other parties hostage.<sup>129</sup> In the Lubicon case, a factor that compounds conflict is that, while the federal government has constitutional responsibility for “Indians, and Lands reserved for Indians” under section 91(24) of the *Constitution Act, 1867*, the provincial government controls land and resources within the Lubicon’s traditional territory by virtue of the *Natural Resources Transfer Agreement of 1930*. There have been times in the dispute when the provincial government has been allied with the federal government, though not with the Lubicon, and other times when one of the governments has supported the Lubicon but the other level of government has taken a contrary position. Since all three parties have not aligned their interests in the last 75 years, the Lubicon land issue remains unresolved. This problem suggests a structural defect in Canadian federalism, where an Aboriginal rights-bearing party remains at the mercy of federal–provincial agreement in order to defuse conflict.

When Aboriginal peoples’ issues are squeezed between federal and provincial interests, this puts inordinate pressure on their relationships. This pressure is likely to weigh most heavily on Aboriginal peoples because they have fewer political avenues within federalism to relieve the resultant strains. Furthermore, Aboriginal peoples have fewer socio-economic resources to withstand or resist prolonged federal–provincial wrangling. When the conflict between the interests of the federal and provincial governments remains unresolved over a prolonged period, Aboriginal issues can quickly erupt into a full-blown crisis.

Mechanisms are needed to address structural inadequacies within Canada’s federal structure as they relate to Aboriginal issues. Aboriginal peoples need more opportunities to discuss and coordinate responses to pressing problems. There are few regularly scheduled events that bring Aboriginal leadership into conversation with federal and provincial politicians and upper-level civil servants. Stress could be reduced between the parties through annual First Ministers meetings with Aboriginal leaders to address outstanding national issues. Annual provincial–Aboriginal political summits could address outstanding provincial issues.

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<sup>127</sup> *Ominayak v. Norcen*, [1985] 3 W.W.R. 193 (Alta. C.A.), aff’d, [1985] 1 S.C.R.

<sup>128</sup> In March 1990, the United Nations Human Rights Committee concluded that “historical inequities” and “more recent developments” have endangered the way of life and the culture of the Lubicon Cree. The Committee ruled that “so long as they continue,” these threats are a violation of the Lubicon’s fundamental human rights. The issue remains unresolved.

<sup>129</sup> See, generally, J. Anthony Long and Menno Boldt, *Governments in Conflict? Provinces and Indian Nations in Canada* (Toronto: University of Toronto Press, 1988).

## GUSTAFSEN LAKE

In 1995 Aboriginal peoples and supporters camped on private lands to engage in a Sundance Ceremony at Gustafsen Lake, near 100 Mile House in British Columbia. The Sundance had been conducted on the land since 1989 with the permission of Lyle James, who owned the ranch on which the Sundance was convened. On June 13, 1995, a number of Aboriginal people fenced off the camp, blocking cattle from the area. When Lyle James arrived with an eviction notice, arriving with a group of ranch hands, conflict erupted over the Indian's rights within the territory when they refused to leave.

There were unconfirmed reports of stray gunfire in the area after June 13 that resulted in an increase in police presence. The Sundance was then held on the site from July 2 until July 12. On July 19 Aboriginal people at the camp released a press statement claiming that they were defenders of the land around the encampment. They also made statements that they were preparing to resist police assaults.

Some of the Aboriginal people who occupied the camp were not from the area, further complicating the conflict about land use and ownership. The Gustafsen Lake incident seems different from other occupations outlined in this paper because people from outside the traditional territory largely initiated it. Most of the people occupying the site were not pre-occupants. Some local Aboriginal people from the area were not supportive of the protestors while others maintained neutrality toward the conflict.<sup>130</sup> As a press release from the Caribou Tribal Council Treaty Society noted:

On behalf of our entire membership, we do not sanction this event in anyway. First and foremost, it is the anniversary of an event that hurt our community members in so many ways, and kept our people from enjoying what the Creator has provided for our use and our care. The Ts'peten area has always been a special place to our people as it provides much of our traditional foods and medicines as well as being a recreation area to be enjoyed, and continues to this day.

Members of the standoff fired shots on our members fishing at the Gang Ranch/Churn Creek fishing site as well as firing shots at the people of High Bar First Nation. Also an Elder (who was part of the Sundance, and who asked the group to respect the wishes of the Band to leave the area) and her family were also fired on at their home in Lac La Hache.

...The "warriors" at that Standoff were not protecting the land on behalf of the Secwepemc people of this area; rather they saw an opportunity to participate in a demonstration of sovereignty.... It was not a "sovereignty" stand, rather it was more to do with an individual who wanted to live in the area.

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<sup>130</sup> News Release, Cariboo Tribal Council Treaty Society, September 2, 2005, online: <http://www.turtleisland.org/discussion/viewtopic.php?p=6013> (accessed September 19, 2005).

The “warriors” under Wolverine’s direction did not, at that time, respect the wishes of the four chiefs of the Cariboo Tribal Council, nor the wishes of the Elders that they “leave the area”. There was a meeting, which the Stand off group attended, with the chiefs and one held with the community Elders where the group was asked to “leave the area”, but they chose not to and had to be removed by the RCMP.

We do not believe that people who practice Aboriginal Sovereignty should be doing so to the detriment of other Aboriginal people.

As indicated by the statement above, there can be different agendas and perspectives within Aboriginal communities about the causes and objectives relating to occupations and blockades. Not all Aboriginal people support the use of civil disobedience and force to promote their position. Furthermore, among those who do support the use of civil disobedience there can be differing views about how best to exercise their rights to protest. In some circumstances, the differences can even go so far as to pit local Aboriginal people against Aboriginal peoples from other territories.

Conflict can be ignited when dissident groups who are a minority within an Aboriginal collective take action that is contrary to broader Aboriginal consensus on an issue. One should not assume unanimity within Aboriginal groups when they take action.

Within this context, the Gustafsen Lake took a turn for the worse when, on August 18, shots were fired on an RCMP Emergency Response Team by camp protesters. An exchange of gunfire took place a week later on August 24 when shots were fired at an RCMP helicopter by camp protesters.

On August 25 and 26 there were attempts to mediate the dispute by the Grand Chief of the Assembly of First Nations, Ovide Mercredi, which ended without success. The protestors accused Mercredi of being a government collaborator and did not accept his offer to help with further mediation. By that time the police had blocked media access to the camp, and through August and into September reports from the camp were filtered through the RCMP.<sup>131</sup>

On September 5 armoured personnel carriers became a prominent part of the attempt by police to dismantle the occupation. There was a dispute about a so-called firefight on September 11 between police and the protesters. Finally, the occupation ended on September 17, 1995, when the protestors surrendered. The Royal Canadian Mountain Police arrested 18 Aboriginal people for their role in the blockade. During the month-long standoff, at least 400 RCMP officers were present at Gustafsen Lake.

After the conflict ended the protesters were tried in court from July 8, 1996, until May 20, 1997. A B.C. jury convicted 14 Aboriginal people and 4 non-Aboriginal supporters of 60 offences, including weapons possession and mischief. The case involved 86 witnesses and 278

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<sup>131</sup> S. Lambertus, *Wartime Images, Peacetime Wounds: The Media and the Gustafsen Lake Standoff* (Toronto: University of Toronto Press, 2004).

submissions of evidence. On May 20, 1997, after 185 days at trial, three of leaders of the dispute were convicted as follows:

Mr. Ignace was convicted of mischief, possession of a weapon for a purpose dangerous to the public peace, discharging a firearm at a police officer with intent to prevent the arrest of a person, and using a firearm in committing the assault of police officers. He received a sentence of four and one half years incarceration and a lifetime prohibition against possessing any firearm, ammunition or explosive substance.

Ms. Franklin was convicted of mischief and received a sentence of twelve months incarceration to be served in the community followed by eighteen months on probation.

Mr. Pitawanakwat was convicted of mischief and possession of a weapon for a purpose dangerous to the public peace and received a sentence of three years incarceration and a lifetime prohibition against possessing firearms, ammunition or explosive substances.<sup>132</sup>

It may be more difficult to draw general lessons from the Gustafsen Lake standoff than from other events examined here. Its flashpoint and result are more difficult to analyze. Gustafsen Lake seems unique and appears to be motivated by somewhat different background circumstances than other occupations and blockades. The main Aboriginal protagonists did not have a direct historical connection to local lands, as was the case in other occupations and blockades. The ambiguity and sometimes opposition of local Aboriginal people is also significant. There were some similarities to other occupations and blockades: The Aboriginal people involved viewed British Columbia's occupation of the land as immoral and illegal. Furthermore, when resistance was encountered the protestors pushed back, further escalating the conflict. However, an additional cause was present at Gustafsen that was not present in other conflicts: people assumed responsibility for Aboriginal land that was not historically their land, such that they initiated the conflict without stronger local support. If similar feelings grow in other places, and Aboriginal peoples more generally try to occupy land that is not part of their traditional territories, this will intensively escalate conflict.

## **CHIPPEWAS OF THE NAWASH**

The Chippewas of the Nawash Unceded First Nation is located four hours northwest of Toronto on the Bruce Peninsula, on the western shores of Georgian Bay. They were present on these lands when their ancestors signed treaties throughout the territory.<sup>133</sup> The Chippewas of Nawash have had the experience of their lands being occupied by non-Aboriginal people for the past 150 years. When treaties were signed, they were promised the right to hunt and fish throughout the

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<sup>132</sup> *R. v. Ignace* (1998), 156 D.L.R. (4th) 713.

<sup>133</sup> John Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self Government" (1992) 30 *Osgoode Hall Law Journal* 391.

territory where non-Aboriginal people settled.<sup>134</sup> However, through time, individuals and governments impeded or blocked their access to the land and resources necessary to effectively carry out these activities. Fortunately, despite these incursions, the relationship between the residents of Cape Croker and the others on the peninsula has been relatively peaceful. The Anishinabek people of the peninsula have continued to exercise their treaty rights on unoccupied Crown land and on private lands where there has been little settlement.

However, the situation began to change in the 1980s as more severe restrictions were placed on the Chippewas' treaty activities. Aboriginal rights to fish in the Great Lakes were blocked by government enforcement. The government was encouraged in this position by fishing lobbyists, such as the Ontario Federation of Anglers and Hunters. However, Aboriginal peoples believed that fisheries regulations were contrary to their treaty rights. When Howard Jones and Francis Nadjiwon from Cape Croker were charged with commercial fishing contrary to government regulations, this presented an opportunity to test the issue before the courts. In 1993 the case of *R. v. Jones and Nadjiwon* was decided.<sup>135</sup> The question it considered was whether the terms of licences issued by the Ministry of Natural Resources unjustifiably infringed Aboriginal rights to fish for commercial purposes. The court, under Justice David Fairgrieve, found that the treaties signed by the Chippewas of the Nawash positively reserved Aboriginal rights throughout the territory to engage in a subsistence commercial fishery.<sup>136</sup> The decision generated a greater awareness of Aboriginal rights at Cape Croker.

With an increased desire to protect their rights, the community decided to turn their attention to an Aboriginal burial ground in Owen Sound. These lands were reserved as burial grounds under their treaty but houses had been built upon them. The fact that these lands were subject to non-Aboriginal occupation did not prevent the community from taking action. As a result, on December 3, 1993, community members from Cape Croker Indian Reserve occupied a lot on 6th Avenue West in the city of Owen Sound. The press release from the Chippewas of the Nawash gave the following reason for the occupation:

“These reserve lands contain the remains of our dead,” says Chief Akiwenzie of the Chippewas of Nawash. “They were reserved as Indian lands in the treaty of 1857, but were never protected by the Department of Indian Affairs. As a result, they were illegally sold and are now the sites of modern houses. For all the desecration these grounds have suffered, they are still sacred to us. They are still Indian Land. We have waited for over 100 years for them to be restored to us. We will not wait any longer.

Over the years the burial ground at 6th Avenue West in Owen Sound has been disturbed in a most sacrilegious way. Graves were looted, artifacts [including a corpse] were sent to museums, and the soil from the 6th Avenue West site was used to make bricks for construction in Owen Sound.

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<sup>134</sup> Peggy J. Blair, “Solemn Promises and Solum Rights: The Saugeen Ojibway Fishing Grounds and *R. v. Jones and Nadjiwon*” (1996–1997) 28*Ottawa Law Review* 125–143; Peggy J. Blair, “Taken for ‘Granted’: Aboriginal Title and Public Fishing Rights in Upper Canada,” *Ontario History* 92, no. 1 (2000): 31–55.

<sup>135</sup> *R. v. Jones and Nadjiwon*, [1993] 3 C.N.L.R. 182 (Ont. Prov. Div.).

<sup>136</sup> *Ibid.*

The Department of Indian Affairs has known of the Band's concerns for over a year and of Nawash's six point plan for correcting the situation [only the survey was done, confirming the land is Nawash's]:

1. A full and proper apology from Canada.
2. A survey to confirm the lands identified by the Band are those reserved in the 1857 Treaty.
3. The restoration of the land to its original state [including removal of the houses built there].
4. Fair compensation to the present occupants of the land.
5. Provision of a fund to restore, protect and maintain the burial grounds.
6. The erection of a monument recognizing these lands are Native burial grounds.

Darlene Johnston, land claims researcher and Nawash Band member, said, "Sure the Department of Indian Affairs has said they will prosecute the current occupants if they cannot come to a settlement. But it's time we, as a First Nation, stood up and defended our lands ourselves. It should be us who take the heat for court action—not the federal government. But it should be the federal government who funds the court action. Trouble is, they won't. Taking our white neighbours to court won't make us very popular in the area. But then we've never been very popular here anyway."

Chief Akiwenzie said, "It is time for non-Native governments to truly recognize our right to self-government and back off enough to let First Nations assert their own jurisdiction and authority. That's mostly what this occupation is all about. We are symbolically taking back our land and honouring those who have become part of it."

The Saugeen Ojibway do not believe the Department of Indian Affairs is acting in their best interests and therefore demand the following:

1. Immediate control of the process of returning the lands to reserve status, including no further monetary offers without Nawash approval.
2. A commitment to remove the structures currently desecrating the burial grounds.
3. A commitment to restore, protect and maintain the burial grounds.
4. A commitment to fund a monument recognizing these burial grounds as unceded territory.

Until Nawash is satisfied the other governments recognize the First Nation's jurisdiction and authority over these lands, the sacred fire of the vigil will not go out.<sup>137</sup>

The flashpoint at Cape Croker for the occupation of land was the continued denial by some municipal officials that the area was a burial ground.

Professor Darlene Johnston and Chief Ralph Akiwenzie helped the community become more generally aware of the problem in the municipality in relation to the burial site. The fact that

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<sup>137</sup> See Dibaudjimoh on the Web: <http://bmts.com/~dibaudjimoh/page21.html> (accessed June 29, 2005).

officials would not acknowledge ancestral human remains on the site when it was set aside as a reserve in a treaty for that reason was a flashpoint for the Nawash occupation. Once again, one sees that lack of recognition and acknowledgement function as flashpoints for occupations. The occupation remained in place for a week, and was resolved when federal officials intervened and negotiated to meet Nawash demands.

## **LILLOOET, MOUNT CURRIE BAND**

The Lil'wat people are part of the larger Stl'atl'imx Nation. This Nation is located 160 kilometres north of Vancouver on Route 99, beyond Squamish and Whistler, British Columbia. They are sometimes called Interior Salish people, and their language is divided into two groups: Upper Lillooet and Lower Lillooet. There are over 2,000 community members that live within their territory on 10 reserves (2,929.6 hectares) around Mount Currie, near Pemberton, British Columbia. British Columbia claims it owns the land in the Pemberton Valley, even though it is the traditional territory of the Lil'wat Nation. This has created conflict. The Lil'wat have lived on their lands for thousands of years. In 1911 the Lillooet tribe, near Pemberton, British Columbia, made the following declaration:

We claim that we are the rightful owners of our tribal territory, and everything pertaining thereto.

We have always lived in our country; at no time have we ever deserted it, or left it to others. We have retained it from the invasion of other tribes at the cost of our blood. Our ancestors were in possession of our country centuries before the whites came. It is the same as yesterday when the latter came, and like the day before when the first fur trader came.

When settlers from other nations came to Canada they used and occupied Lil'wat land and resources without Aboriginal consent. There were no treaties or agreements that gave others rights to the territory. Nevertheless, gold seekers flooded the area in the late 1850s and a few stayed in the area after the fever had passed, engaging in farming, logging, and commerce.

Over the last 150 years roads and railways have penetrated Lil'wat territories. In 1947 a provincial highway was built in the area, with a portion running through the Mount Currie Indian Reserve. The province claims it holds title to the land over which the road proceeds while the Mount Currie Band claims that the land is part of the reserve. One can see the heart of the conflict, which is similar to most described in this paper: non-Aboriginal non-recognition of Aboriginal land use and occupation, leading to non-Aboriginal occupation and displacement of Aboriginal peoples in their territories. The Lil'wat have been the victims of a century-long creeping blockade.

After years of patience, in July 1990, the Lil'wat set up a roadblock on the Duffy Lake Road (Lillooet Lake Road) to protest clear-cut logging and other activities they said were destroying the land and leaving them impoverished. An injunction was issued to prevent them from blocking the road and 63 people were subsequently arrested, charged, and imprisoned for

refusing to recognize or obey the injunction.<sup>138</sup> Most of the protesters refused to recognize the court's jurisdiction, but the court dismissed their arguments. In February 1991 the Lil'wat blocked another road to prevent logging by the company Interfor. The protesters stated that the location of the roadblock, Ure Creek, was an ancient burial site.

The flashpoints for conflict in each instance were provincial decisions to further extract resources from lands that an Aboriginal group viewed as its own. An evaluation of the success or failure of the blockade depends on whose perspective one takes in its measure. On the one hand, it could be said the Lil'wat were not successful because provincial land use and resource extraction continued unabated within the territory. The police and courts were successful in resolving the conflict through force, by issuing injunction and contempt orders against the protestors. On the other hand, while a facade of peace was restored by the legal system, it may be an exaggeration to say the law was successful in resolving the dispute. The underlying conflict remains. The law was important in removing the blockade, but the larger issues of land use and ownership remain unresolved, and lie in waiting to break the area's peace at some future date.

## CLAYOQUOT SOUND

The Nu-Chah-Nulth people of Clayoquot Sound in British Columbia are located on the western shores of Vancouver Island. They have resided there for thousands of years and live as the Tla-o-qui-aht, Toquat, Ahousaht, Hesquiaht, and Uclelet. They comprise 43 percent of the total population of the area, but they hold only 0.4 percent of the total land area because the provincial government regards itself as being the legal owner of the territory. The Nu-Chah-Nulth have never surrendered their lands or resources to the federal or provincial government through treaties or other agreements.

Despite Aboriginal claims of ownership, for many years the provincial government has leased land in Nu-Chah-Nulth territory to resource extraction companies. There has been historical resistance to provincial alienation for decades, revealing how non-Aboriginal actions have blocked Nu-Chah-Nulth access to their territories. The most recent wave of activity began in 1984 when the Tla-o-qui-aht and Ahousaht Bands declared a Tribal Park on Meares Island. The Nu-Chah-Nulth felt they had endured one too many encroachments. The bands took action. They blocked access to the island, along with a group called Friends of Clayoquot Sound.

The declaration and blockade was in response to MacMillan Bloedel's intention to log the area. In response, MacMillan Bloedel served an injunction on non-Native protesters and the Tla-o-qui-aht and Ahousaht bands applied for a counter-injunction. In 1985 the Tla-o-qui-aht and Ahousaht injunction was granted by the British Columbia Supreme Court, though logging continued elsewhere in the Sound.<sup>139</sup> Subsequently an unknown logging road was discovered in Sulphur Pass in the Sound and blockades were erected in the summer of 1985. Fletcher Challenge, another logging company with interests in the Sound, asked for and was granted an injunction, and 35 people were arrested, including Earl George, Ahousaht hereditary Chief. Charges against

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<sup>138</sup> *B.C.(A.G.) v. Andrew and Mount Currie Indian Band*, [1991] 4 C.N.L.R. 3 (B.C.C.A.); *British Columbia (Attorney General) v. Mount Currie Indian Band*, [1992] 1 C.N.L.R. 70 (B.C.S.C.).

<sup>139</sup> *MacMillan Bloedel v. Mullin; Martin v. The Queen in right of British Columbia* (1985), 3 W.W.R. 577 (B.C.C.A.); leave to appeal to S.C.C. refused (1985), 5 W.W.R. lxiv.

Earl George were eventually dropped. In 1989, 10 protesters were jailed for the Sulphur Pass blockades. After such high-profile confrontations and arrests, Premier Vander Zalm declared logging in Clayoquot Sound a disgrace and formed the Sustainable Development Task Force for Clayoquot Sound. Furthermore an international campaign for the boycott of MacMillan Bloedel was undertaken by supporters of the protestors in the Sound.

In April 1993, the Government of British Columbia released a plan that involved logging the Sound without Nu-Chah-Nulth input. First Nations were opposed to the plan. This was a flashpoint for further conflict. The Nu-Chah-Nulth set up blockades to prevent access to the forest and disrupt plans for it being logged. The support group Friends of Clayoquot Sound set up the Clayoquot Peace Camp in solidarity with First Nations in the area. The protest attracted 12,000 people in an attempt to halt clear-cut logging of Clayoquot Sound's rainforests.

The dispute soon turned ugly. An injunction was sought and obtained in the British Columbia courts and people were soon charged for violating the terms of the order as they continued to protest. By the end of the summer of 1993, 856 people had been arrested and charged for violating the terms of the injunction.<sup>140</sup> This is an exceptionally large number of people. In making its finding of contempt, the court said "an organized and determined group of people had acted in concert for the purpose of obstructing the plaintiff's lawful operations and that, in so doing, they willfully and flagrantly defied the several orders of this court."<sup>141</sup> Given that the Aboriginal title issue is unresolved and that non-Aboriginal people may be using Aboriginal land in British Columbia, it is interesting to reflect on what the courts are willing to regard as wilful and flagrant defiance of law.

To ease tension and attempt to solve the problem B.C. Premier Harcourt appointed the Clayoquot Sound Scientific Panel to draft "world-class" logging practices for the Sound, incorporating First Nations traditional knowledge. In 1994 an Interim Measures Agreement was signed with Nu-Chah-Nulth, creating a Central Regional Board with approval power over resource development in Clayoquot. The release and adoption of the Scientific Panel recommendations by the government helped defuse the conflict at Clayoquot. The protestors enjoyed a degree of success as a result of the blockade: MacMillan Bloedel had major contracts cancelled as a result of the negative media attention, and Interfor was convicted under the Forest Practices Code for violations of the law. The number of logs cut also fell dramatically in the Sound and the area was eventually declared to be a UN Biosphere.<sup>142</sup> This dispute will be analyzed in greater detail below, to draw more general lessons than those contained in these brief excerpts about the causes and effects of Aboriginal occupations and blockades in Canada.

## **SUN PEAKS**

The Secwepemc Nation consists of 17 bands located in south-central British Columbia. Their traditional territories are found in the Columbia River valley on the east slope of the Rocky

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<sup>140</sup> See Friends of Clayoquot Sound, online: <http://www.focs.ca/1newsroom/sprnl20031.html> (accessed June 29, 2005).

<sup>141</sup> *MacMillan Bloedel Ltd. v. Simpson*, 1992 CanLII 1593 (BC S.C.). See also *MacMillan Bloedel v. Simpson*, [1996] 2 S.C.R. 1048.

<sup>142</sup> See Friends of Clayoquot Sound, online: [http://www.focs.ca/history\\_focs/timeline.html](http://www.focs.ca/history_focs/timeline.html) (accessed June 29, 2005).

Mountains, to the Fraser River on the west, and from the upper Fraser River in the north, to the Arrow Lakes in the south.<sup>143</sup> The Secwepemc, or Shuswap as they are known in English, have lived in this area for thousands of years. The Secwepemc people first encountered non-Aboriginal people in their lands in 1858. Most of these early non-Aboriginal visitors were nomadic, and they only briefly passed through the territory in search of fur and gold. The Secwepemc were complimentary of these first visitors and in 1910 they wrote:

They did not interfere with us nor attempt to break up our tribal organizations, laws, customs. They did not try to force their conceptions of things on us to our harm. Nor did they stop us from catching fish, hunting, etc. They never tried to steal or appropriate our country, nor take our food and life from us. They acknowledged our ownership of the country, and treated our chiefs as men. They were the first to find us in this country. We never asked them to come here, but nevertheless we treated them kindly and hospitably and helped them all we could. They had made themselves (as it were) our guests.<sup>144</sup>

It wasn't until the end of the century that a greater number of non-Aboriginal people moved to and permanently settled in Secwepemc territory. These later settlers took up land without a treaty or agreement and their occupation blocked Aboriginal access to important resources. The Secwepemc people regarded these actions as contrary to law and morality, and unsettling to their ancient ways. The settlers who occupied their lands, and the government who supported them, were regarded as guests who did not follow a proper sense of civilized order. The Secwepemc penned their displeasure in a petition to Sir Wilfrid Laurier in 1910. The Chiefs wrote:

Soon [the settlers] saw the country was good, and some of them made up their minds, to settle it. They commenced to take up pieces of land here and there. They told us they wanted only the use of these pieces of land for a few years, and then would hand them back to us in an improved condition; meanwhile they would give us some of the products they raised for the loan of our land. Thus they commenced to enter our "houses," or live on our "ranches."... The whites made a government in Victoria—perhaps the queen made it. We have heard it stated both ways. Their chiefs dwelt there. At this time they did not deny the Indian tribes owned the whole country and everything in it. They told us we did. We Indians were hopeful. We trusted the whites and waited patiently for their chiefs to declare their intentions toward us and our lands.... They said a very large reservation would be staked off for us (southern interior tribes) and the tribal lands outside of this reservation the government would buy from us for white settlement. They let us think this would be done soon, and meanwhile until this reserve was set apart, and our lands settled for, they assured us we would have perfect freedom of traveling and camping and the same liberties as from time immemorial to hunt, fish, graze and gather our food supplies where we desired; also that all trails, land, water, timber, etc., would be as free of access to us as formerly. Our chiefs were agreeable to these propositions, so we waited for these treaties to be made, and everything settled. We had never known white chiefs to break their word so we trusted. In the meanwhile white settlement progressed. Our chiefs held us in check. They said, "Do nothing against the whites. Something we did not understand retards them from keeping their promise. They will do the square thing by us in the end."

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<sup>143</sup> See the Secwepemc Nation website: <http://www.secwepemc.org/secwho.html> (accessed September 21, 2005).

<sup>144</sup> Memorial to Sir Wilfrid Laurier, Premier of the Dominion of Canada, from the Chiefs of the Shuswap, Okanagan and Couteau Tribes of British Columbia, presented at Kamloops, B.C., August 25, 1910.

...What have we received for our good faith, friendliness and patience? Gradually as the whites of this country became more and more powerful, and we less and less powerful, they little by little changed their policy towards us, and commenced to put restrictions on us. Their government or chiefs have taken every advantage of our friendliness, weakness and ignorance to impose on us in every way. They treat us as subjects without any agreement to that effect, and force their laws on us without our consent and irrespective of whether they are good for us or not. They say they have authority over us. They have broken down our old laws and customs (no matter how good) by which we regulated ourselves....They have knocked down (the same as) the posts of all the Indian tribes. They say there are no lines, except what they make. They have taken possession of all the Indian country and claim it as their own. Just the same as taking the "house" or "ranch" and, therefore, the life of every Indian tribe into their possession. They have never consulted us in any of these matters, nor made any agreement, "nor" signed "any" papers with us. They "have stolen our lands and everything on them" and continue to use "same" for their "own" purposes. They treat us as less than children and allow us "no say" in anything. They say the Indians know nothing, and own nothing, yet their power and wealth has come from our belongings. The queen's law which we believe guaranteed us our rights, the B.C. government has trampled underfoot. This is how our guests have treated us—the brothers we received hospitably in our house.

After a time when they saw that our patience might get exhausted and that we might cause trouble if we thought all the land was to be occupied by whites they set aside many small reservations for us here and there over the country. This was their proposal not ours, and we never accepted these reservations as settlement for anything, nor did we sign any papers or make any treaties about same. They thought we would be satisfied with this, but we never have been satisfied and never will be until we get our rights. We thought the setting apart of these reservations was the commencement of some scheme they had evolved for our benefit, and that they would now continue until they had more than fulfilled their promises but although we have waited long we have been disappointed. We have always felt the injustice done us, but we did not know how to obtain redress. We knew it was useless to go to war. What could we do?... For a time we did not feel the stealing of our lands, etc., very heavily. As the country was sparsely settled we still had considerable liberty in the way of hunting, fishing, grazing, etc., over by far the most of it. However, owing to increased settlement, etc., in late years this has become changed, and we are being more and more restricted to our reservations which in most places are unfit or inadequate to maintain us.... We have also learned lately that the British Columbia government claims absolute ownership of our reservations, which means that we are practically landless. We only have loan of those reserves in life rent, or at the option of the B.C. government. Thus we find ourselves without any real home in this our own country.

In a petition signed by fourteen of our chiefs and sent to your Indian department, July, 1908, we pointed out the disabilities under which we labor owing to the inadequacy of most of our reservations, some having hardly any good land, others no irrigation water, etc., our limitations re pasture lands for stock owing to fencing of so-called government lands by whites; the severe restrictions put on us lately by the government re hunting and fishing; the depletion of salmon by over-fishing of the whites, and other matters affecting

us. In many places we are debarred from camping, traveling, gathering roots and obtaining wood and water as heretofore. Our people are fined and imprisoned for breaking the game and fish laws and using the same game and fish which we were told would always be ours for food. Gradually we are becoming regarded as trespassers over a large portion of this our country. Our old people say, "How are we to live? If the government takes our food from us they must give us other food in its place." Conditions of living have been thrust on us which we did not expect, and which we consider in great measure unnecessary and injurious. We have no grudge against the white race as a whole nor against the settlers, but we want to have an equal chance with them of making a living. We welcome them to this country. It is not in most cases their fault. They have taken up and improved and paid for their lands in good faith. It is their government which is to blame by heaping up injustice on us. But it is also their duty to see their government does right by us, and gives us a square deal. We condemn the whole policy of the B.C. government towards the Indian tribes of this country as utterly unjust, shameful and blundering in every way. We denounce same as being the main cause of the unsatisfactory condition of Indian affairs in this country and of animosity and friction with the whites. So long as what we consider justice is withheld from us, so long will dissatisfaction and unrest exist among us, and we will continue to struggle to better ourselves....

The Secwepemc did not consent to other people occupying their land. While Prime Minister Laurier received this petition with interest, his government did not take action to address the underlying issues of concern to the Secwepemc. After the petition, people continued to take their land without consequence. Subsequent governments did not do any better than Laurier. The Secwepemc people have persisted in their protest of others using their lands and resources without obtaining their consent.<sup>145</sup>

In the fall of 2000 people from the Secwepemc Protection Centre Defenders (SPCD) formed and struck a camp on Skwelkwek'welt at the entrance to the Sun Peaks Ski Resort to protest a proposed expansion of the ski hill. Sun Peaks Resort is a multi-million-dollar year-round resort owned by a large multinational hotel corporation. The proposed expansion was a flashpoint for conflict. A good number of the people at the camp were from the nearby Neskonlith and Adams Lake Indian Bands, approximately 50 kilometres east of the City of Kamloops. From November 2000 to December 2001, the protesters from the Secwepemc Protection Centre occupied the camp.

On August 24, 2001, a highway roadblock in and out of the Sun Peaks Resort was erected, hindering the operation of an excavator at the construction site of a golf course. The roadway is a paved two-lane road in and out of Sun Peaks Resort. It is used year round by tourists, workers, and residents. It is also used by police, ambulance, and emergency workers. It is marked with highway signage and maintained by provincially contracted maintenance crews. For all practical purposes, it is the only roadway in and out of the resort. The Neskonlith Band claimed the Sun Peaks Resort is situated on their reserve lands and that the land was included in the Neskonlith

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<sup>145</sup> Chief Parrish travelled to England to petition the British government. He is intercepted by the High Commissioner of Canada and persuaded to return home without meeting anyone.

Indian Reserve by way of an agreement in 1862 between Colonial Governor Douglas and their Chief Neskonlith. They said they did not consent to Sun Peak's development. Once again, we see the pattern of competing ideas of rightful occupation.

An injunction was issued to prevent protests on the road leading into the resort. The courts are very bad at recognizing or affirming Aboriginal occupation. They seem much better equipped and disposed to recognize and affirm non-Aboriginal land claims. This diminishes Aboriginal peoples respect for the courts. As a result, many protestors failed to abide by the injunction and were arrested and charged with contempt of court.<sup>146</sup> There were also charges of intimidation and mischief.<sup>147</sup> One of the leaders of the protest, Arthur Manuel, said one of the main reasons for the protests is the lack of acknowledgement of their rights and title. He is quoted as saying: the "sentences are directly linked to the failure of the Canadian government's Aboriginal Title land policies." He also decried the absence of "good-faith negotiations" related to Aboriginal title in B.C. as was mandated by the Supreme Court of Canada's *Delgamuukw* decision, which legally recognized the existence of Aboriginal Title in Canada.<sup>148</sup> The people who protested the development claim exclusive land and ownership rights to the land around the resort. They say they have a colour of right defence to their protest, meaning that they honestly believed that their acts were completely lawful in the circumstances.<sup>149</sup> The courts have not accepted these arguments in the Sun Peaks case.<sup>150</sup> It is no surprise that one of the major causes of the dispute, a failure to recognize or accommodate the Secwepemc claim either legally or psychologically, is a flashpoint for conflict in the southern interior of British Columbia.

## BURNT CHURCH

Aboriginal people on the Atlantic coast witnessed waves of people from across the ocean visit their territories over the last one thousand years. The first visitors were from Scandinavia, and they were later followed by people from Spain, France, and Great Britain. Early Europeans came to utilize the aquatic resources of this rich maritime environment but did not settle the land. In the early 1600s, the Mi'kmaq, Maliseet, and Passamaquody Indians sailed the oceans of the region in distinctive sea-going canoes.<sup>151</sup> A century later they were sailing European shallots and had wide dominion over trade in the area.<sup>152</sup> They also had productive social relations with the French until 1670 when the English defeated and later removed the Acadians in the region.<sup>153</sup> A tumultuous period set in as the English sought to challenge indigenous land and resource use in

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<sup>146</sup> *Sun Peaks Resort Corp. v. Billy*, 2001 BCSC 1056; *R. v. Billy*, 2003 BCSC 55.

<sup>147</sup> *R. v. Manuel et al.*, 2004 BCSC 1475; *R. v. Billy et al.*, 2004 BCSC 1474.

<sup>148</sup> Kim Petersen, "I Take This as Genocide," *The Dominion: Canada's Grass Roots Newspaper*, September 30, 2004.

<sup>149</sup> *R. v. Pena* (1997), D.L.R. (4<sup>th</sup>) 372, [1997] B.C.J. No. 1405 (S.C.); *R. v. Roche* (1990), 90 Nfld. & P.E.I.R. 199, [1990] N.J. No. 395 (P.C.); *R. v. Ashini*, [1989] 2 C.N.L.R. 119 (Nfld. P.C.); *R. v. Potts*, [1990] O.J. No. 2567 (C.J.-Prov. Div.) at 9-10; *R. v. Penashue* (1991), 90 Nfld. & P.E.I.R. 207, [1991] N.J. No. 356 (P.C.).

<sup>150</sup> *R. v. Manuel et al.*, 2004 BCSC 1475.

<sup>151</sup> Olive Dickason, *Canada's First Nations: A History of Founding Peoples from the Earliest Times* (Toronto: McClelland & Stewart, 1992) at 107.

<sup>152</sup> *Ibid.*

<sup>153</sup> For descriptions of Mi'kmaq-Crown relations in this period see William Wicken, "Re-examining Mi'kmaq-Acadian Relations 1635-1755," in *Vingt an apres, Habitants et marchands: Lectures de l'histoire des XVIIe et XVIIIe siecles canadiens*, ed. Sylvie Departie et al. (Montreal and Kingston: McGill-Queen's University Press, 1998); William Wicken, "Heard It from My Grandfather: Mi'kmaq Treaty Tradition and the Syliboy Case of 1928" (1995) 44 *University of New Brunswick Law Journal* 146.

the area. Wars intermingled with treaties signed between 1693 and 1779 to establish peace and friendship between the groups.<sup>154</sup> The Mi'kmaq lived in accordance with these treaty promises for over 200 years, though they eventually faded from public memory in the rest of the population.<sup>155</sup>

In 1999 the treaties suddenly came to wide public attention once again as one case went before the Supreme Court of Canada, which issued two judgments.<sup>156</sup> The *Marshall* case, as the decision(s) came to be known, dealt with the Mi'kmaq treaty right to fish for commercial purposes.<sup>157</sup> The case caused considerable conflict and controversy because the government and non-Aboriginal fishers were not prepared for the court's conclusion, that treaties protected a right to commercially fish in the area.<sup>158</sup> They were not prepared for the Supreme Court's recognition and affirmation. Angry words and harsh condemnation came from commercial fishers in the decision's wake. Physical unrest and violence soon followed.

In October 1999, 150 non-Native fishermen took to the water and destroyed approximately 3,000 Native lobster traps that Aboriginal people had set in New Brunswick's Miramichi Bay as a result of the decision.<sup>159</sup> Some non-Aboriginal protestors did not regard the decision as applying to lobsters; others felt Aboriginal actions could upset the delicate ecological and economic aspects of the region's fishery. They set out to blockade Aboriginal access to the resource. Aboriginal peoples resented non-Aboriginal reaction to the court's validation of their rights. Many considered that they had a right to enter the fishery, subject to their own laws and regulations dealing with allocation and conservation, and thus they did not apply to the government for fisheries licences.

Beginning in early May 2000, officers from the Department of Fisheries and Oceans (DFO) became aware that members of the Burnt Church First Nation community were setting lobster traps not carrying DFO tags. Following orders from their superiors, DFO officers seized a large number of traps not identified with DFO tags and removed them from the water. This action infuriated Burnt Church fishermen and further escalated the conflict. On August 22, 2000, a Fisheries officer was injured by a rock thrown during a confrontation with Mi'kmaq fishermen. On August 29, Fisheries officials launched a raid on Native lobster traps, resulting in two Native boats being swamped and sinking. On September 12, 2000, 16 Aboriginal people, including the Burnt Church Band Chief, were arrested, and four native were boats seized. On September 21, 2000, the Fisheries Minister, Herb Dhaliwal, closed the lobster fishery on Miramichi and gave the Mi'kmaq and Maliseet a 24-hour deadline to remove their traps. On September 23, 2000, three non-Native people were arrested and firearms seized after shots were fired on the water. Fisheries officials later removed about 800 traps. On May 4, 2001, Rayburn Joseph Dedam, a Native man arrested during the previous year's violence, pled guilty to an assault charge

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<sup>154</sup> William Wicken, "The Mi'kmaq and Wuastukwiuk Treaties" (1994) 44 *University of New Brunswick Law Journal* 241.

<sup>155</sup> *R. v. Syliboy*, [1929] 1 D.L.R. 307 (N.S.Co.Ct.).

<sup>156</sup> Thomas Issac, *Aboriginal and Treaty Rights in the Maritimes: The Marshall Decision and Beyond* (Saskatoon: Purich Publishing, 2001).

<sup>157</sup> *R. v. Marshall*, [1999] 3 S.C.R. 456 and *R. v. Marshall*, [1999] 3 S.C.R. 533.

<sup>158</sup> Ken Coates, *The Marshall Decision and Native Rights* (Montreal and Kingston: McGill-Queen's University Press, 2000).

<sup>159</sup> See [http://www.nben.ca/aboutus/caucus/archived\\_caucuses/ffa\\_archive/fishery/timeline.htm](http://www.nben.ca/aboutus/caucus/archived_caucuses/ffa_archive/fishery/timeline.htm) (accessed June 29, 2005). Information in this paragraph taken from this source.

stemming from confrontation between Natives and Fisheries officers. On May 29, 2001, two Native men from Burnt Church, Clifford Larry and Jason Barnaby, were fined \$1,000 each for obstructing Fisheries officers in June 2000. In August of 2001, the Federal Fisheries Department announced a limited fall food fishery for Natives in waters off Burnt Church reserve. In September of that year there were reports that at least 30 gunshots had been fired during a weekend duel between non-Native fishermen in about 50 boats and Native fishermen in 10 boats. Fortunately, no one was physically hurt. In February 2002, John David Dedam, a Native fisherman, was sentenced to three years in prison for aggravated assault for attacking a Fisheries officer on Miramichi Bay in August 2000. On August 1, 2002, an Agreement-in-Principle, worth about \$20 million over two years, was reached between Ottawa and Burnt Church regarding the Native lobster fishery.

When analyzing the conflict it seems apparent that the failure of the governments to recognize Aboriginal fishing rights under the treaties was a major cause of the conflict following the *Marshall* decision. Furthermore, some non-Aboriginal fishermen also had difficulty recognizing Aboriginal rights to area resources. The use of direct action by non-Aboriginal fishermen, combined with the support by the Canadian government for a minimal interpretation of the treaty, increased the pressure on the east coast. The historical and psychological facts of recognition and denial incensed some Aboriginal people and contributed to the conflict. Much more needs to be done by governments to anticipate and address the underlying divergence of views and values regarding Aboriginal land and resource use in the region.

## **GRASSY NARROWS**

This brief review of occupations and blockades ends with attention to an area close to the Anishinabe Park region where this inventory began. Asubpeeschosesewagong or Grassy Narrows is situated 80 kilometres north of Kenora, Ontario, and is home to the Anishinabek people of Treaty 3. Treaty 3 was an agreement between the Crown and First Nations transacted in October 1873. The Crown entered into the treaty to secure open passage to the west and to develop an area of 55,000 square miles to the north and west of Lake Superior.<sup>160</sup> Anishinabek people entered the treaty to preserve their culture and guarantee their livelihood from traditional lands.<sup>161</sup> One indigenous representative at the negotiations expressed Anishinabek aspirations in the following terms: “[I]t is riches that we ask so that we may be able to support our families as long as the sun rises and the water runs.”<sup>162</sup> First Nations also wanted to ensure they could continue to follow their decision-making protocols within their territories.<sup>163</sup> In 1875 a Métis adhesion to the treaty was also formulated and accepted.<sup>164</sup>

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<sup>160</sup> Treaty 3 covers an area that includes the watershed of Lake Superior to the north-west angle of the Lake of the Woods, and from the American border to the height of land from which the streams flow toward the Hudson’s Bay.

<sup>161</sup> It has been written that First Nations of Treaty 3 entered into the agreement for: a “better future for Indian people in a world in which the white man was an increasingly significant factor. One goal emphasized the physical and cultural survival of the Indian people; the other goal emphasized improved material well-being.” J.E. Foster, “The Saulteaux and the Numbered Treaties: An Aboriginal Rights Position,” in *The Spirit of the Alberta Indian Treaties*, ed. Richard Price (Montreal: Institute for Research on Public Policy, 1980) at 163.

<sup>162</sup> Alexander Morris, *The Treaties of Canada with the Indians* (Toronto: Coles Publishing Company, 1971) at 61, 75.

<sup>163</sup> Chief Ma-we-do-pe-nais said: “All this is our property where you have come. We have understood you yesterday that Her Majesty has given you the same power and authority as she has, to act in this business; you said the Queen gave you her goodness, her charitableness in your hands. That is what we think, that the Great Spirit has planted us

For over 125 years, since Treaty 3 was signed, Aboriginal people in the territory have attempted to maintain traditional relationships and develop healthy economies. This has been a great challenge, and government actions have sometimes made their goals more difficult. The Grassy Narrows community provides an example of these difficulties. The community was forcibly relocated to its present site in the 1960s by Indian Affairs to bring them closer to Kenora. In 1972 the community discovered that many of their people were dying because of mercury poisoning to the fish that made up their diet. They received compensation for the effects of this poisoning from the federal government and the Reed Paper Company in the 1980s. Grassy Narrows has also experienced the permanent flooding of some sacred sites, and fluctuating water levels have added to the devastation of their lands caused by industrial and/or clear-cut logging operations. Despite these challenges, the band has survived. Band membership in Grassy Narrows is approximately 1,000 with an on-reserve population of approximately 700. The community claims its traditional land use area is approximately 2,500 square miles outside the reserve's 14 square miles.

Grassy Narrows wants greater recognition of rights within its traditional territories. As with the other examples noted in this paper, recognition has been difficult to secure. Governments and business leaders sometimes act as if there is no need to deal with Aboriginal people's feelings because of their narrow interpretations of their treaty obligations. This narrow reading does not sufficiently take account of Aboriginal peoples' perspectives on the meaning of their rights that are at stake. Treaty 3 gave the Indians the right to "pursue their avocations of hunting and fishing" throughout their traditional territories, subject to certain limitations. Limitations have been construed broadly, while the basic right to hunt and fish has been interpreted narrowly. This approach to treaty interpretation, while it may benefit governments for a time, eventually leads to open conflict.

On September 2003, community members set up a roadblock at the Abitibi Consolidated access road on Highway 671 (approximately 5 kilometres from Grassy Narrows). They claimed they were never properly consulted about the licence granted to Abitibi Consolidated for clear-cutting activities on Grassy Narrows' treaty lands. They also claimed that clear-cutting infringes their inherent treaty rights to hunt, fish, and trap in their traditional territories. Some assert Aboriginal rights to the area, claiming that Treaty 3 is illegitimate because the Crown did not negotiate with honour in 1873. The issues at Grassy Narrows have not been resolved, and the blockade remains in place. Non-Aboriginal blockades also persist, through regulations, business licences, and land registry systems. The recent two-year-long standoff portrays, as with the other examples, the problems present in dealing with occupations in Canada. Each side believes the other side does not recognize their rights to the land. However, the provincial governments have the advantage because they have more money and political power within Canada's federal structures. They

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on this ground where we are, as you were where you came from. We think where we are our property. I will tell you what he said to us—is when he planted us here; the rules that we should follow—us Indians. He has given us rules that we should follow to govern us rightly.... I want to talk about the rules that we had laid down before. It is four years back since we have made these rules. The rules laid down are the rules that they wish to follow—a council that has been agreed upon by all the Indians. I do not wish that I should be required to say twice what I am now going to lay down." Ibid. at 59–60.

<sup>164</sup> John Leonard Taylor, "An Historical Introduction to Métis Claims in Canada," *Canadian Journal of Native Studies* 3, no. 1 (1983) at 156; David T. McNab, "Hearty Co-operation and Efficient Aid: The Métis and Treaty No. 3," *Canadian Journal of Native Studies* 3, no. 1, 1983) at 139; Wendy Moss, *Métis Adhesion to Treaty No. 3* (Ottawa : Native Council of Canada, 1979) at 32–33.

have the support of the courts. If Aboriginal peoples had the fiscal, political, and legal resources available to provincial governments, it would be easier for them to secure recognition of the factual and psychological aspects of their dispute.

## **INVENTORY: SUMMARY AND FURTHER ANALYSIS**

There are many issues that can lead to occupations and blockades, as is evident from the foregoing inventory. However, it is not an overly complex task to identify some of the most prominent and frequent reasons for conflict leading to occupations and blockades. Aboriginal people want their land and resource rights recognized, and they want their feelings toward them acknowledged. If others are going to share their land and resources, they would like to consent to this use. As noted at the outset of this paper and in the examples above, Canada has not yet adequately settled underlying issues relating to occupation of land. Aboriginal peoples have long-standing grievances about non-Aboriginal peoples occupying land and blocking them from using ancient territories and resources. The failure to recognize or affirm this problem is a significant irritant.

At the same time, when Aboriginal peoples assert their occupation and block public access to land, this in turn creates non-Aboriginal grievances about resource use. Non-Aboriginal peoples do not generally approve of Aboriginal peoples blocking access to lands and resources. When Aboriginal people feel and assert ownership, and these feelings or facts are diminished or denied, this obviously creates tension. These tensions become a flashpoint for occupations and blockades.

The Royal Commission on Aboriginal People provides support for this proposition. They observed: “It is nevertheless essential for Canadians to understand that these are not new problems. The basic difficulty—given the change in power relationships between Aboriginal people and other Canadians over the past century or more—has been that, until very recently, governments have either ignored or failed to address the basic issues.”<sup>165</sup>

It seems obvious that recognizing and affirming Aboriginal rights and perspectives would reduce conflict of the kind described above. This requires the development of a social context and policy framework that does not rely upon the courts or legislatures alone. They are too narrow or slow to deal with the problems examined herein. While these institutions may be helpful in setting wider rules for engagement, they have not generally been helpful in this regard thus far. In fact, as the foregoing examples demonstrate, courts and legislatures are often a part of the problem. Their decisions and statements largely support non-Aboriginal occupations and blockades, and diminish or deny Aboriginal occupation in Canada. When non-Aboriginal officials and others make statements that, from an Aboriginal perspective, are regarded as conspicuously egregious, this is a flashpoint for conflict. Not many people would appreciate being told their land is not their own. When non-Aboriginal people take actions that assume ownership of areas Aboriginal people regard as their own, this prompts civil disobedience.

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<sup>165</sup> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, *Restructuring the Relationship* (Ottawa: Supply and Services, 1996) at Chapter 4.

As noted, statements or actions are particularly inflammatory for Aboriginal people when they come in the form of the denial or diminishment of the importance of Aboriginal people's most closely held views. This situation occurred in Anishinabe Park, Haida Gwaii, Barriere Lake, Temagami, Oldman River, James Bay, Labrador, northern Alberta (Lubicon), Oka, Southern Ontario (Nawash), north of Vancouver (Mount Currie), Vancouver Island (Clayoquot), the Interior of British Columbia (Sun Peaks), Atlantic Canada (Burnt Church) and Northern Ontario (Grassy Narrows). In each instance a court, legislator, corporation, or individual made statements and/or engaged in actions that denied or diminished Aboriginal rights and feelings about land and resources. It seems a simple point to make, but the preceding inventory shows that the failure to recognize and affirm Aboriginal occupation is a prime underlying reason for Aboriginal–non-Aboriginal conflict in Canada.

To add fuel to the fire, Aboriginal peoples feel as if the denial of their rights and perspectives has gone on for generations. The failure to recognize sometimes seems interminable. Too often there is a tendency to deny that Aboriginal peoples have faced acute trauma in their territories by being cut off from their resources and denied effective political or legal remedies or redress. Yet many Aboriginal peoples have experienced severe suffering at the hands of the Canadian state. It has been painful and harrowing. Governmental interference was evidenced through the suppression of Aboriginal institutions of government,<sup>166</sup> the denial of land,<sup>167</sup> the forced taking of children,<sup>168</sup> the criminalization of economic pursuits,<sup>169</sup> and the negation of the rights of religious freedom,<sup>170</sup> association,<sup>171</sup> due process<sup>172</sup> and equality.<sup>173</sup> When those who continue to benefit from Aboriginal losses, by enjoying their lands, do not acknowledge these facts, this is an underlying cause and a flashpoint for conflict. Examples of this point are repeatedly embodied in the examples described and analyzed above.

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<sup>166</sup> *Logan v. Styres* (1959), 20 D.L.R. (2d) 416 (Ont. H.C.) (upholding forcible eviction of traditional Haudenosaunee government).

<sup>167</sup> For example, Joseph Trutch, in denying Aboriginal title in B.C. observed: "The title of the Indians in the fee of the public lands, or any portion thereof, has never been acknowledged by Government, but, on the contrary, is distinctly denied." *British Columbia, Papers Connected with the Indian Land Question, 1850–1875* (Victoria: Government Printer, 1875) at Appendix 11.

<sup>168</sup> John S. Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879–1986* (Winnipeg: University of Manitoba Press, 1999).

<sup>169</sup> Aboriginal people are constantly charged with criminal offences for hunting and fishing in traditional economic pursuits. Some high profile cases are *R. v. Syliboy*, [1929] 1 D.L.R. 307 (N.S. Co. Ct.); *Simon v. The Queen* (1985), 24 D.L.R. (4<sup>th</sup>) 390 (S.C.C.); *R. v. Horseman* (1990), 1 S.C.R. 901 (S.C.C.); *R. v. Cote* (1996), 138 D.L.R. (4<sup>th</sup>) 185 (S.C.C.); *R. v. Badger* (1996), 133 D.L.R. (4<sup>th</sup>) 324 (S.C.C.); *R. v. Marshall*, [1999] 2 S.C.R. (S.C.C.).

<sup>170</sup> *Thomas v. Norris*, [1992] 2 C.N.L.R. 139 (B.C.S.C.) (Aboriginal spirit dancing not protected by Charter); *Jack and Charlie v. The Queen* (1985), 21 D.L.R. (4<sup>th</sup>) 641 (S.C.C.) (taking fresh deer meat for Aboriginal death ceremony not protected).

<sup>171</sup> Many bands were kept apart or relocated to prevent their association because of a government fear they would organize to resist impingements of their rights.

<sup>172</sup> A Crown fiduciary duty has recently been articulated in an attempt to cure violations of Aboriginal rights stemming from differences in the way Aboriginal people hold and access their rights. Significant cases in this regard are *Guerin v. The Queen* (1984), 13 D.L.R. (4<sup>th</sup>) 321 (S.C.C.); *Kruger v. The Queen* (1985), 17 D.L.R. (4<sup>th</sup>) 591 (F.C.A.); *Blueberry River Indian Band v. Canada* (1995), 130 D.L.R. (4<sup>th</sup>) 193 (S.C.C.). For a fuller discussion see Len Rotman, *Parallel Paths* (Toronto: University of Toronto Press, 1996).

<sup>173</sup> *Canada (A.G.) v. Lavell*, [1974] S.C.R. 1349 (invidious distinctions in *Indian Act* on basis of sex upheld).

In his work *Nineteen Eighty-Four*, George Orwell wrote: “He who controls the present, controls the past. He who controls the past, controls the future.” Canadian courts and legislatures seem to control historical interpretations of the past. These institutions test Aboriginal history and feelings against their standards of proof and legislative directives. They measure Aboriginal claims against non-Aboriginal socio-political values and economic priorities. They often ignore or diminish Aboriginal perspectives. This stance places them in a good position to control the future. Unfortunately, this approach has led to conflict. Regrettably, non-recognition will likely lead to further conflict if Aboriginal peoples are not given some measure of control over interpretations of the past. A contributing cause of occupations and blockades is the denial that something in the past has happened or has any significance.

Dr. Judith Herman, Clinical Professor of Psychiatry at Harvard Medical School and Training Director of the Victims of Violence Program at Cambridge Hospital has recognized this point. She has written about how the denial of past atrocities is a cause of present dysfunctions. Her book *Trauma and Recovery* links literature and clinical studies involving women who have experienced domestic violence to the literature involving those who are veterans of combat and victims of political terror. Her work identifies parallels between private terrors such as rape and public traumas such as post-traumatic stress syndrome. One of the major contributions of Dr. Herman’s research is that it places individual experiences of loss in a broader political frame. She argues that psychological trauma is best understood and remedied through a broader social context. This insight leads her to develop strategies for dealing with trauma that are attentive to wider societal responses. In this regard Dr. Herman observes:

[W]hen traumatic events are of human design, those who bear witness are caught in the conflict between victim and perpetrator. It is morally impossible to remain neutral in this conflict.

It is very tempting to take the side of the perpetrator. All the perpetrator asks is that the bystander do nothing. He appeals to the universal desire to see, hear, and speak no evil. The victim, on the contrary, asks the bystander to share the burden of the pain. The victim demands action, engagement, and remembering....

In order to escape accountability for his crimes, the perpetrator does everything in his power to promote forgetting. Secrecy and silence are the perpetrator’s first line of defense. If secrecy fails, the perpetrator attacks the credibility of his victim. If he cannot silence her absolutely, he tries to make sure that no one listens. To this end, he marshals an impressive array of arguments, from the most blatant denial to the most sophisticated and elegant rationalization. After every atrocity one can expect to hear the same predictable apologies: it never happened; the victim lies; the victim exaggerates; the victim brought it on herself; and in any case it is time to forget the past and move on. The more powerful the perpetrator, the greater is his prerogative to name and define reality, and the more completely his arguments prevail.

The perpetrator’s arguments prove irresistible when the bystander faces them in isolation. Without a supportive social environment, the bystander usually succumbs to the temptation to look the other way. This is true even when the victim is an idealized and valued member of society. Soldiers in every war, even those who have been regarded as heroes, complain

bitterly that no one wants to know the real truth about war. When the victim is already devalued (a woman, a child), she may find that the most traumatic events in her life take place outside the realm of socially validated reality. Her experience becomes unspeakable....

To hold traumatic reality in consciousness requires a social context that affirms and protects the victim and that joins the victim and witness in a common alliance. For the individual victim, this social context is created by relationships with friends, lovers, and family. For the larger society, the social context is created by political movements that give voice to the disempowered.<sup>174</sup>

It is usually easier to deny that something has happened than to face the consequences of the past in the present. This response has been documented in many countries.<sup>175</sup> Herman's point regarding denial or forgetfulness helps explain why Aboriginal grievances rise to the point of conflict. There is little awareness in Canada's official history of the lived experience of trauma by Aboriginal peoples, and how this continues to consume present generations. There is a tendency to take the side of the Canadian government when viewing Aboriginal claims, much as it is often easier to take the side of the perpetrator in other situations of abuse. "All the perpetrator asks is that the bystander do nothing." Preserving the status quo in conflict relations between Aboriginal peoples and the state can be like "doing nothing" in Herman's analysis. Aboriginal peoples often face situations where they are told the thing they complain of never happened.<sup>176</sup> They might be told they never owned the land they claim,<sup>177</sup> or never occupied it sufficiently to prove continuing legal title.<sup>178</sup> They are often told they are lying or exaggerating, or that their views are incomplete, such that their testimony cannot be believed.<sup>179</sup> Sometimes Aboriginal peoples are told that they have brought the grievance on themselves, and therefore are to blame for the current tragedies they encounter.<sup>180</sup> They might encounter views that if they would have acted earlier they would have been able to receive appropriate assistance at the time, but that now other subsequent claims are insurmountable.<sup>181</sup> Finally, Aboriginal people may be told that, in any case, it is time to forget the past and move on, that past injustices can't be cured today.<sup>182</sup> These reactions to Aboriginal claims are flashpoints for occupations. Many of the examples provided above demonstrate the applicability and power of Herman's thesis.

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<sup>174</sup> Judith Herman, *Trauma and Recovery* (New York: Basic Books, 1992).

<sup>175</sup> Erna Paris, *Long Shadows: Truth, Lies and History* (New York: Bloomsbury, 2000); Iris Chang, *The Rape of Nanking: The Forgotten Holocaust of World War II* (New York: Penguin, 1997); Samatha Power, *A Problem from Hell: America in the Age of Genocide* (New York: Basic Books, 2002); Anthony Hall, *The American Empire and the Fourth World* (Montreal and Kingston: McGill-Queen's University Press, 2003).

<sup>176</sup> These messages are examined in an influential series of books. See Henry Reynolds, *Why Weren't We Told: A Personal Search for the Truth About History* (Toronto: Penguin Books, 2000); Henry Reynolds, *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia* (Toronto: Penguin Books, 1995); Henry Reynolds, *The Law of the Land* (Toronto: Penguin Books, 2003).

<sup>177</sup> This is British Columbia's defence to the Haida land title case.

<sup>178</sup> *R. v. Bernard, R v. Marshall*, [2005] SCC 43.

<sup>179</sup> *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911.

<sup>180</sup> *Sawridge Band v. Canada*, [1995] 4 C.N.L.R. 121 (F.C.T.D.).

<sup>181</sup> *Chippewas of the Sarnia Band v. Ontario* (A.G.), (2000), 51 O.R. (3d) 641; (2000), 195 D.L.R. (4th) 135; (2000), [2001] 1 C.N.L.R. 56 (Ont. C.A.).

<sup>182</sup> Prime Minister Pierre Trudeau, quoted in Peter Cumming and Neil Mickenburg, *Native Rights in Canada*, 2d ed. (Toronto: Indian-Eskimo Association, 1972) at Appendix IV.

What Dr. Herman says is required to overcome this situation is a social context that affirms and protects the victim, and reconnects them with healthy relationships in the present. What is required is action, engagement, and remembering. Aboriginal peoples seek a process of active engagement, so that others can recognize and affirm their experiences. In order to effectively engage, Aboriginal peoples require safety in telling their stories. They want their grievances to be taken more seriously and not shuffled off to courts or backroom committees, commissions, or inquiries. Aboriginal peoples require a social context that is supportive of their perspectives so that they can recover from their trauma and thereby recover Canada.

However, a supportive social context is hard to generate. It is not widely present in Canada in relation to Aboriginal land rights. It is difficult to sustain mainstream political movements that give voice to Aboriginal dispossession. The usual response to Aboriginal peoples making known their traumatic experiences is to deny they occurred. Others may concede that something bad happened but may then proceed to argue that the situation is not as serious as claimed. Some observers of Aboriginal affairs may say the situation was once serious, but now the trauma has faded into the past. As noted, these reactions can create the conditions for conflict. Many Aboriginal took these messages from the harsh responses encountered at Anishinabe Park, Barriere Lake, Temagami, Oldman River, James Bay, Labrador, Lubicon Lake, Oka, Mount Currie, Vancouver Island (Clayoquot), Sun Peaks, Burnt Church, and Grassy Narrows. The reactions Herman describes and their applicability to the foregoing conflicts seem to flow from a common desire to see, hear, and speak no evil. This must be addressed if we want to avoid future blockades; Aboriginal peoples require recognition and acknowledgement.

As Herman observes, Aboriginal peoples require a supportive social context to heal from the traumas they encounter. Yet it may be asked: Where are the “safe” places within society for Aboriginal peoples to raise their concerns? Most Aboriginal peoples do not view going to court as safe. Their testimony and history is subject to discrediting cross-examination and harsh burdens of proof.<sup>183</sup> It is often felt to be unsafe to raise these issues in the political sphere. Aboriginal peoples are outnumbered in the political process, and their votes alone could not carry their concerns. Some political parties are regarded as displaying outright hostility to any acknowledgement of Aboriginal peoples’ particular circumstances in Canada. The media is also thought of as being largely hostile because of the perceived bias of certain editorial boards and the absence of Aboriginal perspectives in newspaper columns or electronic media newsrooms. Aboriginal people often feel that they generally face the same negative social context in corporations, unions, churches, and other mainstream social organizations.

The tension and lack of safety Aboriginal peoples feel in having their ideas heard in the official circles of the Canadian state often leads Aboriginal peoples to take matters into their own hands. Blockades and occupations may not be regarded as physically safe but, ironically, they are regarded as being psychologically safe by some Aboriginal peoples. This is explained by the solidarity felt in the presence of a community that acknowledges and agrees that something is wrong and that steps must be taken to combat the wrong. As long as Aboriginal peoples feel that

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<sup>183</sup> John Borrows, “Listening for a Change: The Courts and Oral Traditions” (2001) 39 *Osgoode Hall Law Journal* 1.

their rights are being denied or inappropriately diminished, they will continue to take direct action when they are not heard.<sup>184</sup>

Obviously, more appropriate places other than blockades must be found for Aboriginal peoples to share and mourn the trauma they have experienced. As Dr. Herman counsels, when a supportive social context is established, those who have experienced trauma can then move on to remember and mourn their losses, followed by the reconnection with their significant relationships (land and people). This can reduce conflict and breed the conditions for peace. While Dr. Herman makes certain to indicate that these stages of recovery are not firm, but rather individual in nature, and can intermingle sequentially, it is important to note that failure to provide appropriate forums for these feelings can be a flashpoint for conflict.

### **III. BEST PRACTICES & PRINCIPLES: TAKING SECTION 35(1) OUT OF THE COURTS**

Measures can be taken to avert confrontation in ways that draw upon the above insights. Recognition and affirmation should lie at the heart of actions designed to create a supportive social context for Aboriginal peoples. The strongest step that could be taken to defuse conflict is for the Crown to cease occupying and blockading Aboriginal peoples' access to traditional land and resources. The Crown could act by removing itself from Aboriginal lands or seeking consent from Aboriginal peoples for its use of those lands. The Crown could also remove regulations that block Aboriginal peoples from hunting and fishing in their traditional territories. The Crown's termination of its claims would not be inconsistent with Canadian law. It would be in harmony with the policy underlying the Royal Proclamation of 1763 and the spirit of section 35(1) of the *Constitution Act, 1982*. There are no technical obstacles that would prevent the Crown taking this action. Parliaments and legislatures have authority to alter their land rights. Courts are also empowered to overturn land rights when they are based on arbitrary deprivation, as Aboriginal people have experienced.

The Crown's title is a tremendous burden upon Aboriginal title.<sup>185</sup> The Crown's title creates uncertainty for investors who desire to do business with Aboriginal peoples. People turn away from working with Aboriginal peoples because of the Crown's suffocating restrictions on Aboriginal occupation. Aboriginal peoples would enjoy great material and cultural benefits if the Crown removed itself from Aboriginal lands. The wealth and pride Aboriginal peoples could enjoy under such circumstances would greatly facilitate peace.

Where the Crown wishes to retain access to lands it has blockaded, it could negotiate with Aboriginal peoples for consent to its occupation. In addition to giving the Crown rights, these negotiations should contemplate instances where the Crown would cede, release, and surrender

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<sup>184</sup> Some readers may think that Aboriginal issues have already received sufficient attention in public policy treaties. For example, there have been treaty negotiations in many places throughout British Columbia for the past 10 years. It should be noted however that treaty negotiation seems to have dramatically reduced recourse to physical occupations. Some may think there are too many resources devoted to litigation involving Aboriginal issues. However, when Aboriginal peoples are involved in land claims litigation, there seem to be fewer blockades.

<sup>185</sup> It is recognized that Aboriginal title is often considered a burden upon Crown title, but if Aboriginal peoples land rights existed first, then there is logic to considering Crown title as the one creating the burden.

its claim to Aboriginal land and resources. Alternatively, the Crown could agree to modify its purported interest over Aboriginal lands and resources by allowing Aboriginal peoples to hold Crown rights in abeyance, as the Crown required of Aboriginal peoples in the Nisga'a agreement. Negotiations will not produce peace if Aboriginal peoples are the only party required to surrender or modify their rights.

*It must be remembered that indigenous peoples are not the only beneficiaries under the treaties. Non-indigenous peoples can also have treaty rights.* Both groups can be recipients of the promises made through the negotiation process. Both can receive treaty rights. The mutuality of indigenous and non-indigenous peoples as treaty beneficiaries is often overlooked because it is most often indigenous peoples striving to assert their rights. Yet there are a number of potential inheritors of treaty rights beyond indigenous nations, bands, and individuals. In historic treaties, the British and Canadian Crown certainly received many benefits. Their citizens were able to peacefully settle and develop most parts of the country on a footing of consent. Non-indigenous Canadians trace many of their rights to do certain things in this country to the consent that was granted to the Crown by indigenous peoples in the treaty process.

As the Supreme Court of the United States recognized in the *Winans* case, “treaty rights are a grant of rights *from* the Indians, not *to* the Indians.”<sup>186</sup> There are two important implications that flow from this view of treaties. The first is that indigenous peoples have rights and jurisdiction until those rights are expressly given up in treaty negotiations. This is known as the reserved rights notion of treaties. The reserved rights doctrine has also been expressed in Canadian law.<sup>187</sup> The doctrine means that anything not agreed to or expressed in the treaty remains vested in indigenous populations, and cannot be claimed by the non-indigenous governments as a general right that flows from the treaty negotiations. It thus reinforces historic Aboriginal occupation. The reserved rights doctrine highlights the inherent nature of Aboriginal rights. It builds upon the fact that when the Europeans arrived in North America, the Indians were there first, living in organized societies and occupying their lands as they had done for centuries.<sup>188</sup>

The second important implication that flows from a reserved rights view of the treaties is that non-indigenous peoples received or can receive rights in Canada from, among other sources (such as implied rights, Crown sovereignty, positive law, and so on), a grant to the Crown by the Indians. This means that in those areas of the country where treaties have been signed, people live there in part because of the permission granted to the Crown by the Indians. Non-indigenous peoples settled the country because indigenous peoples granted this right to them through treaties. Where there are no treaties, there has been no permission for subsequent non-Aboriginal settlement. This must be fixed to bring Canada in line with its legal obligations to Aboriginal peoples.

Yet, the notion that non-indigenous peoples might trace certain rights to land or governance through the treaties is, for many, still an emergent concept. Because people have not been exposed to indigenous understandings of the treaties, or have not had the time to learn about them, they are only now considering them in this light.

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<sup>186</sup> *United States v. Winans*, 198 US 371 (USSC).

<sup>187</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

<sup>188</sup> *R. v. Van Der Peet*, [1996] 2 S.C.R. 607.

For example, Professor Noel Lyon, who taught for 30 years at Queen's Law School, illustrated this point after listening to First Nation Elders in Saskatchewan. He said:

Over the last couple of days as I've listened to the Elders, I have begun to understand that what I've learned about Aboriginal peoples and their situation in Canada has largely come from written sources, from books, and there are a lot of things that were embedded in my legal education that I haven't overcome. The most important one, I think, is that law school indoctrinated me with the belief that the Crown is all powerful, and I think that's a real problem, because I think legal education [has] a tendency to regard the Crown almost in the way that the First Nations people regard the Creator—as being the source of all things. And from that flows the proposition that the treaties are seen by the non-Aboriginal community as just another body of laws that define the status and rights of Aboriginal peoples, rather than seeing the treaties as a nation-to-nation partnership, intersocietal law.... It had never occurred to me until Elder Crowe said this yesterday or the day before, that the right of the “white” people to be on this land is founded in the treaty.<sup>189</sup>

Professor Lyon's comments are important because they demonstrate that some may still only weakly understand the mutuality upon which Canada is built. Though courts have recognized the reserved rights nature of treaties, and while Canadian governments are once again speaking as if treaties are reciprocal agreements, people outside of these circles may not fully appreciate that they too are beneficiaries. This situation can change through greater attentiveness to Canada's legal principles in dealing with Aboriginal rights.

The application of Canada's law by public officials could help end non-Aboriginal blockades, and thereby assist in terminating Aboriginal blockades. There are principles within Canada's legal framework that can be of great assistance in accomplishing this goal. Such action may help to generate further political movement. For some time, the courts have interpreted language requiring recognition and affirmation when considering Aboriginal rights and governmental obligations under section 35(1) of the *Constitution Act, 1982*. Section 35(1) reads: “The existing Aboriginal and Treaty Rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.” The Supreme Court of Canada has developed helpful principles of recognition and affirmation in dealing with Aboriginal and treaty rights. Important insights may be drawn from the jurisprudence of section 35.

Some of the court's principles can create mechanisms for engaging Aboriginal people and ensuring their perspectives are heard. Taking cues from section 35(1), however, does not mean that every Aboriginal rights issue should be court focused. Officials other than judges should recognize and affirm Aboriginal rights in the broader public domain. In fact, primary responsibility for recognition must be taken out of the courts. Courts can be costly, narrow, adversarial, biased, and ill equipped to deal with the issue's psychological aspects. The courts have also made some grave mistakes in their jurisprudence; not everything they say should be

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<sup>189</sup> Peace and Order Treaty Symposium, October 2001 [on file with author].

applied.<sup>190</sup> Careful analysis should inform and precede their use. Nevertheless, the court's principles could be considered and adapted for their use by police, civil servants, mayors, premiers, legislators, businesses, unions, and so forth. People who work with the court's principles will find that they do not ignore or discredit Crown and wider public interests. If non-Aboriginal perspectives were jettisoned in considering Aboriginal issues, this could lead to further confrontation as resentment could build within the non-Aboriginal community. Fortunately, the court's principles for dealing with Aboriginal issues do not naturally lead to this negative result; if anything they sometimes lean too far in favour of non-Aboriginal perspectives. Despite these flaws, section 35(1) provides some guidance in addressing Aboriginal peoples' experience of non-recognition.

What can section 35(1) offer non-court actors who want to prevent and/or resolve conflict? Perhaps most importantly it can assist in building a supportive social framework for approaching Aboriginal issues, just as Dr. Herman directs. Cases involving conflicts with Aboriginal peoples over lands and resources could attract the same special principles of interpretation the courts have used in their work.<sup>191</sup> While many of these principles were developed by the courts in the treaty context, and thus apply to obligations the Crown has voluntarily assumed, extending them more broadly would assist public officials in better understanding Aboriginal perspectives and further reduce conflict.

## INTERPRETATIVE PRINCIPLES

One of the overarching principles in section 35(1) is that Aboriginal peoples should be treated "with the utmost good faith," evincing a resolve to uphold the Crown's "honour."<sup>192</sup> No appearance of sharp dealing should be countenanced.<sup>193</sup> The relationship of the Crown to Aboriginal peoples should be trust-like, rather than adversarial.<sup>194</sup> Aboriginal rights and perspectives could be liberally construed and doubtful expressions resolved in favour of the indigenous group.<sup>195</sup> These principles have often been very helpful in assisting the court in resolving disputes; they hold the same promise for others.

Reconciliation could also be a part of any approach to conflict. The Supreme Court has written that determinations of occupation involving Aboriginal peoples require that account be taken of the "aboriginal perspective while at the same time taking into account the perspective of the common law" and that "[t]rue reconciliation will, equally, place weight on each."<sup>196</sup> Peace would be more likely to occur in situations involving Aboriginal peoples if police forces,

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<sup>190</sup> See generally the articles in Ardith Walkem and Halie Bruce, *Box of Treasures or Empty Box: Twenty Years of Section 35* (Penticton, B.C.: Theytus Books: 2003).

<sup>191</sup> *R. v. Sundown*, [1999] 1 S.C.R. 393, at para. 24; *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 78; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1043; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 404. See also: J. [Sákéj] Youngblood Henderson, "Interpreting *Sui Generis* Treaties" (1997) 36 *Alberta Law Review* 46; L. I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the Sparrow Justificatory Test" (1997) 36 *Alberta Law Review* 149, per *R. v. Marshall*, [1999] 3 S.C.R. 456 at para. 78.

<sup>192</sup> *Haida Nation v. B.C. (Minister of Forests)*, [2004] 3 S.C.R. 511.

<sup>193</sup> *Mitchell v. Peguis Indian band*, [1990] 2 S.C.R. 85; *R. v. Badger*, [1996] 1 S.C.R. 77, at para. 41.

<sup>194</sup> *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 1984 at p. 386.

<sup>195</sup> *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at p. 36.

<sup>196</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 148, quoting *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 50.

municipalities, developers, civil servants, and others approached their tasks in this spirit of reconciliation. Part of their task should be to determine the Aboriginal perspective on the conflict, and place equal weight on that perspective in making decisions relative to Aboriginal peoples. In many of the occupations and blockades described earlier, this spirit and approach was not evident. Armed with knowledge of these principles, however, people can choose to change their approach. Included in this change is the fact that the Aboriginal perspective on the occupation of their lands should be gleaned from their traditional laws because of their relevance to establishing answers to questions about occupation.<sup>197</sup> These laws contain principles that could be used as criteria or standards that measure the most appropriate way to resolve disputes. Once Aboriginal perspectives and law are understood and applied, reconciliation could then be attempted by choosing from among the various possible interpretations of the conflict a common aspiration that best reconciles the interests of both parties.<sup>198</sup> One caution must be inserted at this point regarding the too frequent misuse of reconciliation by the courts. Courts have been known to state high principles but their application of the same are often gravely disappointing to Aboriginal peoples. Reconciliation has been interpreted as requiring that the Aboriginal perspective, right, or interest must give way in the face of other interests. Thus, instead of crafting decisions that truly draw on the values of each party, reconciliation can sometimes be a hypocritical cover that submerges Aboriginal peoples' interests. Other public officials must avoid this pitfall to effectively wage peace with Aboriginal peoples.

The principles in section 35 could also provide guidance if the section's counsel was followed to develop sensitivity to the unique cultural and linguistic differences between the parties.<sup>199</sup> There would be great benefit in more fully understanding the cultural framework and protocols of Aboriginal groups. Conflict would be reduced if people learned about particular Aboriginal histories, stories, songs, dances, art, values, and other cultural manifestations. This would help others to see things through an Aboriginal lens. There would be more peace if police, developers, civil servants, politicians, and others tried to learn the Aboriginal language of the people with whom they want to cultivate healthy relations; this could build stronger bridges between the parties. Language often structures thought, and linguistic knowledge would facilitate access to Aboriginal perspectives on their lands and resources.

Section 35(1) also contains counsel to interpret historic events that may be in dispute "in the sense which they would naturally have been understood by the Aboriginal group."<sup>200</sup> Applying this insight could help the parties avoid using overly technical language in their communications.<sup>201</sup> When Aboriginal claims are not interpreted in a static or rigid way, or frozen in some stereotypical past, this allows the parties to achieve a contemporary reconciliation that is fully alive to the aspirations of present communities.<sup>202</sup> It is too often the case that narrow, legalistic interpretations of events stand in the way of making progress. Technical language can be used to hide the real issues. Parties must speak plainly to one another, and not hide behind legal categories that can frustrate the parties dealing justly with one another.

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<sup>197</sup> *Delgamuukw*, *Ibid.*, *Vanderpeet*, para. 41.

<sup>198</sup> *R. v. Sioui*, [1990] 1 S.C.R. 1025, at pp. 1068–1069.

<sup>199</sup> *R. v. Badger*, [1996] 1 S.C.R. 771 at paras. 52–54; *R. v. Horseman*, [1990] 1 S.C.R. 901 at p. 907.

<sup>200</sup> *Badger*, *ibid.*, at para. 53; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36.

<sup>201</sup> *Badger*, *ibid.*; *Horseman*, *supra*; *Nowegijick*, *ibid.*

<sup>202</sup> *Sundown*, [1999] 1 S.C.R. 393, at para. 32; *R. v. Simon*, [1985] 2 S.C.R. 387, at p. 402.

Interpreting statutes relating to Indians in a way that resolves ambiguities and “doubtful expressions” in favour of the Indians could also create a supportive social context.<sup>203</sup> As La Forest J. stated in *R. v. Mitchell*, “in the interpretation of any statutory enactment dealing with Indians, and particularly the *Indian Act*, it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them.”<sup>204</sup> The Supreme Court has also equally applied these principles to cases involving third parties.<sup>205</sup> The courts have rejected the contention that these principles should be limited to cases involving solely the Crown and Native peoples, stating that “[i]t is Canadian society at large which bears the historical burden of the current situation of native peoples and, as a result, the liberal interpretative approach applies to any statute relating to Indians, even if the relationship thereby affected is a private one.”<sup>206</sup> The application of the court’s direction to governments and third parties would be a major breakthrough for Aboriginal–non-Aboriginal relations if the law were followed as outlined by the Supreme Court of Canada.

Parties should take advantage of the fact that these approaches to dealing with Aboriginal conflict were developed by the Supreme Court of Canada.<sup>207</sup> The development of a supportive social context can be embraced because it is Canada’s law. Police, civil servants, developers, politicians and others need not be defensive in applying the above principles. They could assertively articulate these approaches and persuasively justify them because they are recognized at the highest levels of our society. They could proclaim that any other approach would breach their duties and obligations to uphold the law in Canada. When people cloak themselves in the fabric of the law to protect Aboriginal historic Aboriginal occupation and interpret present assertions of rights, as suggested here, then peace will stand a greater chance of flourishing throughout the country.

The best way to resolve occupations and blockades is to prevent them before they begin. The principles outlined in this section are aimed at this result. They speak to how principles of recognition and affirmation can be developed and achieved.

## **INFRINGE AS LITTLE AS POSSIBLE**

Despite the need to expand and protect Aboriginal land and resource use there may be occasions when it becomes necessary to further diminish Aboriginal resources. These occasions should be the exception rather than the rule. They should occur very infrequently. Every other alternative should be pursued before arriving at this result. If there is a need to reduce Aboriginal resources, however, after applying the above principles, and doing all that can be done to appropriately recognize and affirm Aboriginal interests, the Supreme Court can also provide further guidance. Their counsel has been to infringe Aboriginal interests as little as possible. If the infringement is proposed in a situation where Aboriginal rights are involved, this engages the legal obligations of

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<sup>203</sup> *Opetchesah Indian Band v. Canada*, [1997] 2 S.C.R. 119 at para. 76, citing *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Mitchell v. Peguis Indian Band*, 1990, [1990] 2 S.C.R. 85.

<sup>204</sup> *Nowegijick*, *ibid.*, at p. 143.

<sup>205</sup> *Opetchesah*, *ibid.*

<sup>206</sup> *Mitchell at v. Peguis Indian Band*, 1990, [1990] 2 S.C.R. 85 at p. 109.

<sup>207</sup> The court has not always appropriately applied these principles, despite their high language. This doesn’t mean officials can not be more consistent and operationalize these broader aspirations in specific cases.

the Crown. If Aboriginal rights are not involved this would still be a politically astute position to take to avoid confrontation. Of course, when Aboriginal rights are involved, infringing as little as possible will require a narrower range of options for the Crown. When Aboriginal rights are not involved the Crown will have greater scope and discretion to make judgments regarding their actions (i.e., they will have wider latitude to allow for others to take action). However, even if the Crown can do whatever it wants relative to Aboriginal aspirations to the contrary, wisdom's course would dictate that restraint be used. Bringing out the "big guns" and accentuating Aboriginal peoples' loss or relative powerlessness could be a recipe for further confrontation. Yet this is what sometimes happens when Aboriginal peoples are on the losing side of the policy debate or resource allocation decision. One seems to see disproportionate responses that serve to provoke Aboriginal people to assert their interests in more direct and potentially violent ways.

## CONSULTATION

Related to the issue of infringing Aboriginal interests as little as possible is the idea of consultation. Consultation has become an important principle for alleviating tension with Aboriginal peoples when decisions will potentially impact their interests. Consultation can occur on a spectrum, from merely informing a group of finalized plans on one end, to full veto power on the other. There are many groups and institutions that engage Aboriginal peoples and they could develop consultation practices to assist them in their work. These groups include, *inter alia*, the police, corporations, the federal government, provincial government, municipalities, universities and colleges, museums, administrative agencies, and so on. One example of a consultation agreement is the Grand River Notification Agreement between the Six Nations of the Grand River in Ontario and surrounding municipalities. The Agreement's participants include the federal and provincial governments, the Counties of Brant and Haldimand, the City of Brantford, the Six Nations of the Grand River, the Mississauga of New Credit, and the Grand River Conservation Authority. Under the Agreement, the parties must inform each other of a number of proposed activities, such as matters relating to provincial highway corridors, adoption or amendment to an official plan and/or zoning bylaw, that could have an impact on the local environment. Those parties notified then have the opportunity to consider the potential impact of any activity and whether to participate in a formal consultation or review process. The Agreement does not address land claims and is not legally binding.

Other paths to consultation are possible. Some elements of consultation are drawn from a report by Kevin Head, Nancy Kleer, and Larry Innes to the Canadian Environmental Assessment Agency.<sup>208</sup> Further principles are also outlined in the cases of *Haida Nation v. British Columbia* (Ministry of Forests),<sup>209</sup> and *Taku River Tlingit First Nation v. British Columbia* (Project Assessment Director).<sup>210</sup> These principles include:

1. Engage Aboriginal people in consultation before a decision-making process is underway.

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<sup>208</sup> See Kevin Head, Nancy Kleer, and Larry Innes, *Incorporating First Nations' Needs into the Canadian Environmental Assessment Act*, submitted to the Canadian Environmental Assessment Agency by the Innu Nation, March 31, 2000, online: [http://www.ceaa-acee.gc.ca/013/001/0002/0004/0004/innu2\\_e.htm](http://www.ceaa-acee.gc.ca/013/001/0002/0004/0004/innu2_e.htm) (accessed June 29, 2005).

<sup>209</sup> [2004] 3 S.C.R. 511.

<sup>210</sup> [2004] 3 S.C.R. 550.

2. Where a decision-making process is conducted in Aboriginal territories, agreements must be reached on the conduct of the decision-maker with the affected Aboriginal groups. Such involvement should provide roles for Aboriginal groups that are equal to those of other governments and stakeholders.
3. Aboriginal groups should be given statutorily protected rights for consultation to appoint a majority of panel members in a decision-making review where their rights would be substantially affected.
4. The definition of the problem or issue addressed should be changed to include Aboriginal perspectives on the problem or issue.
5. Aboriginal knowledge should be given full consideration.
6. There should be a set of regulations or guidelines for panels, responsible authorities, and proponents on the ethical use of Aboriginal knowledge.
7. There should be options for governments or proponents to support communities who wish to contribute their knowledge directly to the process, instead of having it incorporated into the proponent's own research program, as many proponents either lack the trust of the communities, or simply don't have a clue what they're doing in this regard.
8. Financing for Aboriginal consultation should be considered and a general fund should be available for Aboriginal groups to participate in the consultation process.
9. Decision-making procedures should be amended to provide opportunities for more community meetings and provide for less formal meeting opportunities.
10. Decision-making proceedings should be amended to provide for community meetings after the panel report has been released.
11. Putting forward proposals which are not finalized
12. Informing of all relevant information
13. Not promoting an outcome
14. Showing a willingness to change plans
15. Making every "reasonable effort" to accommodate Aboriginal rights, interests, and perspectives in the making of a decision.
16. Establishing reasonable timelines for Aboriginal people to be able to respond.

17. Allow for flexibility and changes in response to consultation process to avert or minimize harm.
18. Finding a new status quo where proven Aboriginal rights would be affected.
19. Accommodating the results of Aboriginal consultation through compensation, recognition, and/or allocation of resources or land to Aboriginal people.
20. In the case of Aboriginal people raising unproven rights decision-makers could find an interim accommodation pending final resolution.

## **BALANCE ABORIGINAL CONCERNS REASONABLY WITH OTHER SOCIETAL INTERESTS**

Best practices to avoid occupations and blockades should occur on a case-by-case basis and take into consideration the strength of the Aboriginal claim, the nature of the potential infringement, and the conduct of the parties. In the case of *Haida Nation v. British Columbia (Ministry of Forests)*, 2004 SCC 73 at paragraph 39, the court summarized this point as follows:

The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

When determining an Aboriginal claim's strength and its potential to infringe Aboriginal rights, each side is to act reasonably. The Crown may not engage in "sharp dealing" nor act without honour. Aboriginal peoples also have obligations to act in good faith. They can not frustrate the Crown's attempts to work with Aboriginal people, nor take unreasonable positions to thwart government actions taken in good faith. Neither party should put forward unreasonable positions and the Crown may (and in some case must) balance societal interests. Where the Crown has evidence that suggests an Aboriginal right will be adversely affected by its actions, the Crown has a duty to accommodate the asserted right. The *Haida* decision noted, at paragraph 47: "Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim."

The Law Commission of Canada has identified one means of determining Aboriginal–societal balance through a concept called participatory justice. While not limited to Aboriginal dispute resolution the Law Commission identifies some best practices as follows:<sup>211</sup>

### **Early Intervention**

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<sup>211</sup> Law Commission of Canada, *Transforming Relationships Through Participatory Justice* (Ottawa: Law Commission of Canada, 2003) at Chapter 8.

- Early intervention aims at providing assistance when a problem first arises....

### **Accessibility**

- Processes should be easily accessible, user-friendly and not overly bureaucratic. This includes giving consideration to location (a place that is considered unthreatening and welcoming to potential users) and ensuring that all potential users are guaranteed anonymous or confidential access to information about the service.

### **Voluntariness**

- Genuine voluntariness in entering dispute resolution processes must include full information about this process and about alternatives and all the assistance necessary for an informed choice.
- Currently, there exist many disincentives to the use of participatory processes. Cost recovery mechanisms do not always provide sufficient recognition of the uncertainty of participating in a mediation. More must be done to reflect on the invisible obstacles both in the criminal and non-criminal systems that prevent parties from choosing participatory processes. More must be also done to create incentives for adopting participatory processes.

### **Careful Preparation**

- Intake processes should build in adequate time for preparation of the parties to the dispute and for the possibility of discerning fear and a history of violence.

### **Opportunities for Face-to-Face Dialogue**

- Face-to-face dialogue should be offered as one of a range of strategies that parties may use to resolve conflicts. Under circumstances in which face-to-face dialogue is inappropriate or is rejected by one or more of the parties, there must be sufficient flexibility to enable a dialogue to take place—through shuttle diplomacy, conference call or video-conferencing—if the parties believe this to be constructive.

### **Advocacy and Support**

- Participatory processes should welcome friends, family and supporters (whether or not they are legal representatives), who may serve an important function offering emotional and intellectual support to participants. It is important that participatory processes remain within the ultimate control of the disputants and that this clarification be made to disputants and their representatives.

### **Confidentiality**

- The assurance of confidentiality usually provided for processes working toward agreed outcomes is critical to their efficacy. However, there are many cases when the outcome of the process ought to be made public.

- The issue of confidentiality must be discussed. It may be helpful to include discussing and signing a written statement at the beginning of a participatory process, explaining the importance of treating disclosures as confidential among participants.
- In addition, it is important that the legal profession and tribunals recognize the importance of confidentiality in these processes. Courts should continue to demonstrate respect for the confidentiality of such processes and resist pressure to reopen agreements other than in exceptional circumstances.
- In addition, emphasis should be placed on the need to ensure that the private discussions that take place within these processes do not spread throughout the wider community, introducing embarrassment and possibly mistrust into the process and undermining the continuation of such processes.

### **Fairness**

- The principles of participatory processes require that the parties themselves ultimately make the decisions regarding what they can accept as “fair.”

### **Relevant and Realistic Outcomes**

- Agreements reached in participatory processes must reflect the available resources of the communities or be within the means of the individual disputants. Compliance and durability are important indicators of both the efficacy and the credibility of participatory processes. Where possible, compliance and durability should be monitored.

### **Efficiency**

- Programs should ensure that participants clearly understand what is expected of them in advance and that meeting time is used effectively.

### **Flexibility and Responsiveness**

- Participatory processes should foster a spirit of responsiveness and respect for the unique circumstances of each conflict. The assumption of self-determination that lies at the heart of participatory processes for individuals and communities alike means that affected persons can and must be trusted to make decisions over the design details of their own conflict resolution process—such as who should be present, how long the meeting should last, what will be discussed, and what types of solution or outcomes should be considered.

The above principles deserve broad consideration because they suggest procedural and substantive details necessary to achieving balance. They could have huge effects in preventing or dismantling blockades. Early intervention would help ensure that issues do not unnecessarily build because they can address differences and misunderstanding before people’s ideas become more hardened. Making dispute resolution accessible for those who take physical action in the assertion of their rights could demilitarize certain disputes. If the only accessible way to make a

point is felt to be on a blockade, more could be done to search for accessible, credible alternatives. Many have been critical of the slow pace at which Aboriginal claims wind their way through government claims commissions and processes. These criticisms require further attention. Voluntariness is a key feature of dispute resolution related to occupations and blockades. Voluntariness is related to the availability of full information and degree of choice available to those who find themselves with a dispute. If Aboriginal peoples had more information and broader options through which to direct their concerns, this could greatly reduce conflict. Adequate preparation is obviously necessary if one is going to address a potential or actual physical confrontation. Preparation includes understanding Aboriginal peoples side of the story, which following the approach of section 35(1) can help to generate. With this preparation, face-to-face dialogue is an important way to defuse conflict because it is consistent with many Aboriginal traditions centred on relationship building. In fact, some disputes are generated because there has been no face-to-face contact between Aboriginal peoples, and those with whom they have a dispute. Aboriginal peoples will also be less likely to take to blockades if they have advocates and supporters in mainstream institutions they feel they are up against. This raises the question about whether organizations such as the police, Parliament, legislatures, municipalities, corporations, and so forth can hire, tolerate, and fully incorporate people within their organizations whose role it is to advocate for and support Aboriginal peoples' issues. Confidentiality is important because it creates a level of trust between the parties. Finally, if organizations have support staff which are fair, efficient, flexible, and responsive to an Aboriginal constituency, this can also help build bridges of understanding and thereby reduce conflict. These principles, while general in their thrust, should not be overlooked because within them are nested the points needed to build an effective, responsive bureaucracy to deal with Aboriginal issues. Section 35(1) suggests the need for societal balance, and the Law Commission of Canada gives greater detail about how appropriate balance might be operationalized.

## **COMPENSATION**

The court's interpretation of section 35(1) can also be of guidance in addressing Aboriginal disputes because it reminds us that they can include a significant economic component. There will be some instances where the best practice to peacefully and constructively resolve an Aboriginal occupation will involve compensation. The actions of the police, Parliament, legislatures, corporations, municipalities, or others may diminish the economic value of an Aboriginal resource. If this is the case disputes will more likely avoided if compensation is available. For example, if the Crown infringes land held pursuant to Aboriginal title, fair compensation will ordinarily be required.

Aboriginal lands have been held to include an inescapable economic component, which suggests that compensation is relevant to the question of justification. The amount of compensation payable will vary with the nature of the particular Aboriginal title affected, and with the nature and severity of the infringement and the extent to which Aboriginal interests were accommodated. The amount and type of compensation may also not be easily converted into monetary values. Thus, the police, Parliament, legislatures, corporations, municipalities, or others must be prepared to compensate through other forms that may have socio-cultural, spiritual, or other dimensions. Without attention to these broader matters, disputes may be irreconcilable. Many treaties also provided for

compensation to the Aboriginal people in the form of money or goods, and these terms have not been fulfilled or modernized. Best practices could include providing such compensation in accordance with the lawful obligations assumed in the treaties. In the mid-1990s Parks Canada invested \$4 million in acquiring title to additional lands, such as Bruce Peninsula and Grasslands National Parks, as well as paying private sector and Aboriginal compensation to remove impediments to Park establishment.

Appropriate consultation with the Aboriginal group that is owed compensation can help uncover the appropriate remedy for the particular loss faced by them.<sup>212</sup>

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<sup>212</sup> Sometimes the resolution of disputes, occupations, and blockades will involve the need to gather more information to understand more about the situation. The appropriate gathering of information could be a key to a non-Aboriginal institution understanding how to defuse a volatile occupation or blockade. Best principles and practices for dealing with research involving Aboriginal people could take guidance from the *Ethical Guidelines for Research* published by the Royal Commission on Aboriginal Peoples (the media could also take guidance from these principles in researching stories regarding Aboriginal stories). These principles are as follows:

- Aboriginal peoples have distinctive perspectives and understandings, deriving from their cultures and histories and embodied in Aboriginal languages. Research that has Aboriginal experience as its subject matter must reflect these perspectives and understandings.
- In the past, research concerning Aboriginal peoples has usually been initiated outside the Aboriginal community and carried out by non-Aboriginal personnel. Aboriginal people have had almost no opportunity to correct misinformation or to challenge ethnocentric and racist interpretations. Consequently, the existing body of research, which normally provides a reference point for new research, must be open to reassessment.
- Knowledge that is transmitted orally in the cultures of Aboriginal peoples must be acknowledged as a valuable research resource along with documentary and other sources. The means of validating knowledge in the particular traditions under study should normally be applied to establish authenticity of orally transmitted knowledge.
- In research portraying community life, the multiplicity of viewpoints present within Aboriginal communities should be represented fairly, including viewpoints specific to age and gender groups.
- Researchers have an obligation to understand and observe the protocol concerning communications within any Aboriginal community.
- Researchers have an obligation to observe ethical and professional practices relevant to their respective disciplines.
- The Commission and its researchers undertake to accord fair treatment to all persons participating in Commission research.

## **Guidelines**

### ***Aboriginal Knowledge***

In all research sponsored by the Commission, researchers shall conscientiously address themselves to the following questions:

#### ***Principles***

- Are there perspectives on the subject of inquiry that are distinctively Aboriginal?
- What Aboriginal sources are appropriate to shed light on those perspectives?
- Is proficiency in an Aboriginal language required to explore these perspectives and sources?
- Are there particular protocols or approaches required to access the relevant knowledge?
- Does Aboriginal knowledge challenge in any way assumptions brought to the subject from previous research?
- How will Aboriginal knowledge or perspectives portrayed in research products be validated?

#### ***Consent***

- Informed consent shall be obtained from all persons and groups participating in research. Such consent may be given by individuals whose personal experience is being portrayed, by groups in assembly, or by authorized representatives of communities or organizations.
- Consent should ordinarily be obtained in writing. Where this is not practical, the procedures used in obtaining consent should be recorded.

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- Individuals or groups participating in research shall be provided with information about the purpose and nature of the research activities, including expected benefits and risks.
  - No pressure shall be applied to induce participation in research.
  - Participants should be informed that they are free to withdraw from the research at any time.
  - Participants should be informed of the degree of confidentiality that will be maintained in the study.
  - Informed consent of parents or guardian and, where practical, of children should be obtained in research involving children.

#### ***Collaborative Research***

- In studies located principally in Aboriginal communities, researchers shall establish collaborative procedures to enable community representatives to participate in the planning, execution and evaluation of research results.
- In studies that are carried out in the general community and that are likely to affect particular Aboriginal communities, consultation on planning, execution and evaluation of results shall be sought through appropriate Aboriginal bodies.
- In community-based studies, researchers shall ensure that a representative cross-section of community experiences and perceptions is included.
- The convening of advisory groups to provide guidance on the conduct of research shall not pre-empt the procedures laid down in this part but shall supplement them.

#### ***Review Procedures***

- Review of research results shall be solicited both in the Aboriginal community and in the scholarly community prior to publication.

#### ***Access to Research Results***

- The Commission shall maintain a policy of open public access to final reports of research activities. Reports may be circulated in draft form, where scholarly and Aboriginal community response at this stage is deemed useful for Commission purposes.
- Research reports or parts thereof shall not be published where there are reasonable grounds for thinking that publication will violate the privacy of individuals or cause significant harm to participating Aboriginal communities or organizations.
- Results of community research shall be distributed as widely as possible within participating communities, and reasonable efforts shall be made to present results in non-technical language and Aboriginal languages where appropriate.

#### ***Community Benefit***

- In setting research priorities and objectives for community-based research, the Commission and the researchers it engages shall give serious and due consideration to the benefit of the community concerned.
- In assessing community benefit, regard shall be given to the widest possible range of community interests, whether the groups in question be Aboriginal or non-Aboriginal, and also to the impact of research at the local, regional or national level. Wherever possible, conflicts between interests within the community should be identified and resolved in advance of commencing the project. Researchers should be equipped to draw on a range of problem-solving strategies to resolve such conflicts as may arise in the course of research.
- Whenever possible research should support the transfer of skills to individuals and increase the capacity of the community to manage its own research.

#### ***Implementation***

- These guidelines shall be included in all research contracts with individuals, groups, agencies, organizations and communities conducting research sponsored by the Commission.
- It shall be the responsibility, in the first instance, of all researchers to observe these guidelines conscientiously. It shall be the responsibility, in ascending order, of research managers, the Co-Directors of Research, and the Commission itself to monitor the implementation of the guidelines and to make decisions regarding their interpretation and application.
- Where, in the opinion of the researcher or the research manager, the nature of the research or local circumstances make these guidelines or any part of them inapplicable, such exception shall be reported to the Commission through the Co-Directors of Research, and the exception shall be noted in the research contract or contract amendments as well as in any publication resulting from the research.

Royal Commission on Aboriginal Peoples, *Ethical Guidelines for Research* (Ottawa: Supply and Services, 1993).

## OBLIGATIONS

The development of a supportive social context through section 35 as outlined above would be more likely to happen if people viewed it as more than a rights-granting provision. It should be noted that most people consider rights to be the focus of section 35(1) of the *Constitution Act*, and to a degree that is true. Interestingly, however, section 35(1) is not in the *Charter of Rights and Freedoms*, but is found in Part II of the *Constitution Act, 1982*. This placement gives the section a whole different focus. Thus, while section 35(1) has a rights and freedoms component, it goes much further. It has a governmental component. Government obligations fall much more strongly under its purview. Whenever an Aboriginal right is recognized, a reciprocal government obligation is affirmed. Rights incorporate correlative obligations. Aboriginal rights cannot be affirmed without simultaneously entrenching government obligations. This aspect of section 35 needs more attention from non-court actors because it has positive consequences for further reducing conflict.

If the recognition and affirmation of government obligations were seen as a part of section 35(1), this could encourage greater peace. It could provide a healthier social context. As it stands, governments have a hard time recognizing their lawful obligations under section 35(1) because they have left too much for the courts. Yet, there have been many governmental obligations created under section 35(1) that seem to have escaped broader conceptual analysis. The list of government obligations under section 35(1) is broad and deep:

- Conservation (Sparrow)
- Safety (Sparrow)
- Economic and Regional Fairness (Gladstone)
- Measuring Historic Reliance on Resource for Aboriginal and Non-Aboriginal People (Gladstone)
- Structuring Discretion (Adams)
- Giving Priority (varies with nature of right) (Gladstone)
- Allocating Resources to Aboriginal Peoples (Delgamuukw)
- Aboriginal People Participating in Development of Resources (Delgamuukw)
- Government Reducing Economic Barriers for Aboriginal Peoples (Delgamuukw)
- Compensation (Delgamuukw)
- Accommodation (Haida)
- Administrative Law Procedural Safeguards (Haida)
- Legislative Dispute Resolution Legislation (Haida)
- Preservation of heritage sites—legislative (Kitkatla)
- Mitigation Strategies (Taku)
- Prevention and Remedying of “historic injustice suffered by Aboriginal Peoples at the hands of colonizers” (Cote)
- Federalism, Democracy, Rule of Law, Protection of Minorities (Quebec Secession)
- Not Violating Aboriginal Individual’s Charter Rights (Corbiere)
- Minimal Impairment of Aboriginal Rights (Osyoos)

These obligations are extensive and varied. A greater focus on government obligations when considering issues of occupation could facilitate the recognition and affirmation of Aboriginal rights. It could build bridges of understanding for Aboriginal perspectives. Such an approach would re-characterize our understanding of section 35(1) in the following way: “The existing Crown and Treaty obligations of the Crown in right of Canada and the provinces, are hereby recognized and affirmed.” This broader re-characterization of section 35(1) has not yet occurred.

Governmental difficulty in recognizing its obligations and role in creating conflict has led to the problems described earlier in this paper. Government officials often lack a deeper knowledge of Canada’s history or ignore this dimension of their job. There is insufficient information about the reasons for present conflicts with Aboriginal peoples. From their actions it sometimes appears as though governments do not consider themselves as possessing significant obligations toward Aboriginal peoples. Yet the law of obligations is a firmly established central axis of the law. Involuntary obligations are created through statute and tort law. They articulate standards of conduct that ensure others are not harmed through unreasonable behaviour. Voluntary obligations are recognized through the law of contract and statutory codes. The provincial and federal Crowns have both involuntary and voluntary obligations they must comply with to maintain their honour. If governments do not recognize and affirm these obligations toward Aboriginal peoples, they risk further conflict.

One important question that arises from placing obligations in this analytical framework is how one encourages, monitors, and enforces involuntary and voluntary Crown obligations. In tort law, involuntary obligations are often encouraged through standards of care that require reasonable behaviour. Behaviour is monitored and enforced by a legal system that has well-developed criteria for recognizing when it has departed from a reasonable standard. Insurance is often taken out to compensate groups or individuals who are harmed by those who fail to meet appropriate standards. In applying these insights to involuntary obligations that the government has toward Aboriginal peoples, Aboriginal peoples might often feel as though they are the victims of a rogue tortfeasor. Some governments seem unwilling to take reasonable care and ensure that Aboriginal and treaty rights are recognized and affirmed. Aboriginal peoples thereby experience harm. There is no insurance Aboriginal peoples can purchase to compensate against this harm. The entity with the involuntary obligation often does not seem to want to admit to their obligation.

The Crown also has many voluntary obligations they owe to Aboriginal peoples. They have assumed these through agreements in treaties, interim measures, and contracts, and through executive proclamations and legislative provisions. Voluntary obligations are generally easier to encourage, monitor, and enforce because their adherents freely and consciously make them. One would expect that the Crown’s conscious choice to undertake obligations in their relations with Aboriginal peoples would make them easier to enforce. However, this has not been Aboriginal peoples’ experience. As this paper has demonstrated through a broad inventory of disputes, treaty obligations are denied or diminished, executive obligations are avoided, and legislative mandates are often circumvented.

Aboriginal peoples continue to ask themselves: how can we get the government to honour their obligations by recognizing and affirming our rights? The remainder of this paper will address

this question by identifying best principles and practices for the settlement of Aboriginal–non-Aboriginal disputes.

#### IV. BEST PRINCIPLES APPLIED TO BEST PRACTICES: A CASE STUDY—CLAYOQUOT SOUND, BRITISH COLUMBIA

A more detailed account of a case study dealing with blockades best demonstrates how recognition can occur in a practical manner. Unfortunately, of the 16 prominent examples of conflict inventoried above, only 4 seemed to end somewhat positively and provide a form of recognition: Haida Gwaii, James Bay, Cape Croker, and Clayoquot Sound. The Clayoquot Sound experience perhaps provides the best lens through which to illustrate best practices in overcoming conflict because of the detailed literature available. Conflict was successfully defused at Clayoquot because governmental obligations *and* Aboriginal perspectives were recognized and affirmed.

This section of the paper examines the impact of the Nu-Chah-Nulth First Nations' blockade on forest practices in Clayoquot Sound, Vancouver Island, British Columbia. In looking at the Clayoquot example, one sees the positive results that can flow from protest and subsequent First Nation involvement in decision making. Through a combination of alliances and public policy initiatives, the Nu-Chah-Nulth people accomplished some of their objectives in protecting and sustaining their relationship with the surrounding forests. While it should be noted that the agreement on forest use was reached after 10 years of protest, there is cause for hope that the agreement's fundamental principles will persist. This creates hope that compromise can be reached to bring down blockades and help people work together.

#### THE BACKGROUND

First Nations seem to have positively influenced the way forests are utilized as a result of their actions in protesting the clear-cutting of Clayoquot Sound in the early 1990s. While First Nations land use and resource management was marginalized prior to this dispute, its aftermath exemplifies an alternative path.<sup>213</sup> However, one should not conclude from this case study of Clayoquot Sound that blockades are always or even usually successful in achieving peace. The failed efforts at Anishinabe Park, Barriere Lake, Temagami, Oldman River, Labrador, Lubicon, Oka, Mount Currie, and Sun Peaks are examples of the problems encountered in this regard.<sup>214</sup> As a result of non-Aboriginal occupations, it is often exceedingly difficult for Aboriginal groups to effectively exert their preferences over land and resource use.<sup>215</sup> Almost since the formation of the original

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<sup>213</sup> The potential destruction of the forests surrounding First Nations threatens more than just indigenous communities. The network of life that the forest sustains is equally imperilled, including the local non-Native and non-human communities. Inadequate forest protection can also harm relationships of provincial and national trade. The great danger in forest resource extraction is that wood stocks can be drawn down to a level far below efficient investment returns. Subsidies and low stumpage rates may contribute to and encourage this depletion. See William Freudenberg, "Addictive Economies: Extractive Industries and Vulnerable Localities in a Changing World Economy," *Rural Sociology* 57, no. 3 (1992): 305.

<sup>214</sup> For a discussion of the Lubicon's efforts, see Larry Pratt and Ian Urquhart, *The Last Great Forest: Japanese Multinationals and Alberta's Northern Forests* (Edmonton: NeWest Press, 1994), particularly at 110–126. For a discussion of the Temagami situation see Gary Potts, "Last Ditch Defence of a Priceless Homeland," in *Drum Beat: Anger and Renewal in Indian Country*, ed. Boyce Richardson (Toronto: Summerhill Press, 1989) at 203.

<sup>215</sup> Patricia Marchak, *Logging the Globe* (Montreal and Kingston: McGill-Queen's University Press, 1995), 94–95, 105–107.

colony in British Columbia, First Nations have been denied substantial ownership or management rights over their traditional territories.<sup>216</sup> Aboriginal title and management over their lands has been inexorably displaced by Crown title and corporate licensing to the point where First Nations sometimes have a hard time claiming ownership of a single tree on the reserve lands they occupy.<sup>217</sup> The forests continue to provide, but their wealth no longer flows to the peoples who have enjoyed their use for millennia. However, in the past 10 years there has been some movement away from the marginalization of First Nations in the management and use of the forests in British Columbia. The British Columbia Treaty Commission is supervising the recognition and transfer of, among other things, forest land rights for First Nations.

In the negotiation of treaties between First Nations, the province, and the federal government, there is always the concern that certain interests will be impaired before treaties are actually signed. This problem led those who designed the treaty process to provide for the signing of Interim Measures Agreements. These agreements allow the parties to settle on temporary solutions to alleviate a conflict, to (theoretically) avoid the compromise of any party's long-term rights. The implementation of an Interim Measures Agreement in Clayoquot Sound following the blockade provided the impetus for Nu-Chah-Nulth participation in forest planning in the area.

As noted earlier, the Nu-Chah-Nulth people are five tribes composed of the Tla-o-qui-aht, Toquat, Ahousaht, Hesquiaht, and Uclelet. They make up 43 percent of the total population of the area, but they hold only .4 percent of the total land area. In April of 1993 the *Clayoquot Sound Land Use Decision* was released, which contained very scant references to Nu-Chah-Nulth rights.<sup>218</sup> First Nations were opposed to the plan. They blocked access to the forest and prevented its logging. Chief Francis Frank announced: "I am here to set the record straight, we have never expressed support for this decision."<sup>219</sup> The Land Use Decision basically allowed logging to go ahead as before without any recognition of their interests. The Nu-Chah-Nulth argued that this prejudiced their continuing relationship with the land at a time when they had elevated expectations from court decisions and political pronouncements.

The protest of the *Clayoquot Sound Land Use Decision* had two important consequences for the Nu-Chah-Nulth. First, the provincial Ombudsman agreed that the province had failed in its duty to consult the Nu-Chah-Nulth in a meaningful and timely manner. As such, on November 12, 1993, he recommended that the government meet with the Nu-Chah-Nulth representatives and sign an Interim Measures Agreement to deal with their rights. Forty-three days later the parties had an Agreement that created a co-operative forest management area, economic development opportunities, and joint management processes for land use decisions. This gave the Nu-Chah-Nulth advisory capacity in forest decision making. While a step in the right direction, Nu-Chah-Nulth power was limited; Cabinet still had the final decision.

A second and more substantial result of the Nu-Chah-Nulth objection to the *Clayoquot Land Use Decision* was the creation of The Scientific Panel for Sustainable Forest Practices for Clayoquot

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<sup>216</sup> Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia 1849–1989* (Vancouver: UBC Press, 1989).

<sup>217</sup> Jack Woodward, *Native Law* (Toronto: Carswell, 1989) at 221.

<sup>218</sup> (Victoria: Queen's Printer, 1993).

<sup>219</sup> *Vancouver Sun*, May 1, 1993.

Sound.<sup>220</sup> This was an innovative response to protest and conflict. Its philosophy should be applied in other situations where Aboriginal people and the Crown have conflicting objectives in land and resource use. The panel's goal, as defined by then Premier Harcourt, was "to make forest practices in Clayoquot not only the best in the province, but the best in the world."<sup>221</sup> It was the creation of this panel and its subsequent report that demonstrates an important way that conflict during occupations can be defused. Blockades came down because First Nations were given the opportunity to inject their values into land use plans and practices. Furthermore, the process led to First Nation involvement in resource use. MacMillan Bloedel formed a logging company called Iisaak Forest Resources with First Nations in the area. First Nations own the controlling portion of shares in Iisaak. MacBlo later sold their share of Iisaak to logging giant, Weyerhaeuser, but First Nation control remained. Environmentalists negotiated a Memorandum of Understanding with Iisaak, and it became the first Forest Stewardship Council eco-certified major license holder in Canada. In 2000, Clayoquot Sound was designated a UN Biosphere Reserve.

## **THE SCIENTIFIC PANEL FOR SUSTAINABLE FOREST PRACTICES IN CLAYOQUOT**

The operative principles of the scientific panel were judged to be "based on sound ecological science, a holistic philosophy ... and a respectful acknowledgement of the Nu-Chah-Nulth's rightful role in decision-making regarding forest use."<sup>222</sup> This acknowledgement helped to create a supportive social context for the resolution of the dispute. It was a form of recognition that was welcomed by First Nations in the area. This endorsement does not mean that the work of the panel is perfect. In fact, the report suffers from limited terms of reference. Furthermore, the panel did not go far enough in addressing some issues even within its mandate.<sup>223</sup> However, the affirmation of Nu-Chah-Nulth science was at least a partial fulfillment of this report's potential to change forestry practices by including First Nations in forest planning processes.

The inclusion of the Nu-Chah-Nulth perspective assisted the panel in justifying the development of an inclusive and holistic ecosystem approach to forest management. The Nu-Chah-Nulth concept for traditional ecosystem management is called "ha huulhi."<sup>224</sup> Their views allowed the panel to more fully support ecological planning, which some actors otherwise regarded with suspicion.<sup>225</sup> In this regard the panel incorporated Nu-Chah-Nulth values, including the statement: "long term ecological and economic sustainability are essential to long term harmony."<sup>226</sup> As a result, the panel adopted some excellent recommendations concerning sub-regional, watershed, and site level planning.<sup>227</sup>

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<sup>220</sup> Premier Mike Harcourt announced the creation of this panel on October 22, 1993.

<sup>221</sup> The Scientific Panel for Sustainable Forest Practices in Clayoquot Sound, *Progress Report 2: Review of Current Forest Practices in Clayoquot Sound*, May 10, 1994, at 4.

<sup>222</sup> Herb Hammond and Alix Flavelle, "Major Points from an Initial Analysis of the Reports of the Scientific Panel for Sustainable Development in Clayoquot Sound," *International Journal of Ecoforestry* 11, no. 2/3 (1995): 79 at 81.

<sup>223</sup> *Ibid.*, at 79–80.

<sup>224</sup> The Scientific Panel for Sustainable Forest Practices in Clayoquot Sound, *Report 3: First Nations' Perspectives Relating to Forest Practice Standards in Clayoquot Sound*, March 1995 at 51.

<sup>225</sup> Jeffrey Vincent and Clark Binkley, "Forest-Based Industrialization: A Dynamic Perspective," in *Managing the World's Forests*, ed. N. Sharma (Dubuque, Iowa: Kendall-Hunt Publishing, 1992).

<sup>226</sup> The Scientific Panel for Sustainable Forest Practices in Clayoquot Sound, *Report 3* at 6.

<sup>227</sup> The Scientific Panel for Sustainable Forest Practices in Clayoquot Sound, *Report 5: Sustainable Ecosystem Management in Clayoquot Sound, Planning and Practices*, April 1995.

In particular, the panel recommended a hierarchical approach to planning, which maintained that ecosystem integrity hinges on proper planning at all three levels mentioned above. Sub-regional plans consider issues and resources that span large areas.<sup>228</sup> They would be conducted for a group of contiguous watersheds of 40,000 to 60,000 hectares considering a period of 100 years. Watershed plans would be done for a single watershed of 5,000 to 35,000 hectares and also consider a period of 100 years.<sup>229</sup> Reserve and logging areas would be identified at this level and a rate of cut would be set. Finally, site level plans would be produced for local sites and activities, usually of 1 to 100 hectares, considering a period of 10 years.<sup>230</sup> Working units are identified at the site level, as well as visual landscape management plans, and public consultation mechanisms for continual monitoring and review.

This ecosystem-based planning approach was a major philosophical and practical change for forest planning, and was one result of the dismantling of the blockade.<sup>231</sup> The ecosystem approach abandoned the annual allowable cut (AAC) system as an administrative input in administering the forests, and replaced it with a watershed-area-based rate of cut.<sup>232</sup> Under this approach time frames for management were extended, and reserve areas and buffers were created that focused on the number of trees left after logging, rather than on the number of trees that could be taken by logging.<sup>233</sup> Clearly, this system is more sensitive to the continued existence of a wide variety of forest uses after commercial logging has taken place.<sup>234</sup>

As briefly noted, the articulation of ecosystem goals for forest management was assisted by the complimentary uses of the Nu-Chah-Nulth phrase “Everything is one.” This philosophy contributed to a framework for an ecosystem-based resource usage. The approach has been described by Haiyupis in the following terms: “Respect is the very core of our traditions, culture and existence. It is very basic to all we encounter in life.... Respect for nature requires a state of stewardship with a healthy attitude. It is wise to respect nature. Respect for the Spiritual.... It is not human to waste food. It is inhuman to over-exploit. ‘Protect and Conserve’ are the key values....”<sup>235</sup>

While the report was a great breakthrough, nowhere else in the Scientific Panel’s reports were such philosophies and ethics discussed. These values were not referenced elsewhere and thus an

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<sup>228</sup> Ibid. at 162–166.

<sup>229</sup> Ibid. at 166–172.

<sup>230</sup> Ibid. at 172–175.

<sup>231</sup> Hammond and Flavelle, “Major Points,” 79 at 82.

<sup>232</sup> *Report 5*, supra, at 80–89.

<sup>233</sup> Recommendations included:

Limit the area cut in any watershed larger than 500ha in total area to no more than 5% of the watershed area within a 5 year period

In primary watersheds of 200-500ha in total area, limit the area cut to no more than 10% of the watershed area within a 10 year period (Ibid. at 81.)

<sup>234</sup> However, some would argue that too much weight is still being given to commercial logging interests because of the following recommendation:

On cutting units without significant values for resources other than timber, or without sensitive areas...retain at least 15% of the forest. (Ibid. at 86.)

Some would argue that this rate of retention is much too low, especially where these watersheds are intact. See Hammond and Flavelle, “Major Points,” 79 at 84.

<sup>235</sup> *Report 3*, supra, at 6.

important source of innovation was lost. Despite the tentative reference to First Nation values, the presence of First Nations had an important effect on forest management by expanding the debate to include underlying, non-market-based, philosophies and goals.

Aboriginal peoples and forests can depend on each other for their health and vitality.<sup>236</sup> First Nation communities may rely on forests because they feed important elements of their social, economic, and spiritual character.<sup>237</sup> They are a source of shelter, food, medicine, identity, spiritual sanctuary, and trade.<sup>238</sup> Similarly, forests may rely on humans, as stewards and custodians, particularly to protect them from other humans who would overextend their use.<sup>239</sup> Many First Nations believe they have “original instructions” to protect the lands they live with.<sup>240</sup> These instructions include defending the land against overuse.<sup>241</sup> This relationship has sometimes nourished a strong interdependency between indigenous peoples and their surroundings.<sup>242</sup> These values have, to a limited extent, influenced resource planning in Clayoquot Sound.

However, the presence of First Nations in forest planning at Clayoquot Sound goes beyond a philosophical approach. First Nation input had an important effect on the Scientific Panel in their choice of silvicultural systems, the preservation of non-commercial values, the planning framework for the Sound, and the monitoring of watershed activities.<sup>243</sup> The inclusion of First Nations in further forest use decisions involved the following recommendations:

1. Including First Nations representatives at the onset of planning
2. Respect traditional values, spirituality and ha hualhi, and provide for the traditional resource use and subsistence needs of the Nu-Chah-Nulth in forest planning and management
3. Incorporate First Nations forest management practices, which are founded in traditional values and ecological knowledge, and which arise as a result of treaty negotiations, in forest inventory, planning and management

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<sup>236</sup> The Nu-Chah-Nulth phrase “hishuk ish ts’awalk” (everything is one) expresses the idea of mutual dependence. The idea of mutual reliance is found in other First Nation cultures. See Ivan DeFaveri, “Contemporary Ecology and Traditional Native Thought,” *Canadian Journal of Native Education* 12 (1984): 1.

<sup>237</sup> Frank Cassidy and Norman Dale, “The Forests: The Leading Resource Sector,” in *After Native Claims: The Implications of Comprehensive Claims Settlements for Natural Resources in British Columbia* (Lantzville, B.C.: Oolichan Press, 1988) at 86–87.

<sup>238</sup> Caludia Notzke, *Aboriginal Peoples and Resource Use in Canada* (North York: Captus Press, 1994) at 81–110.

<sup>239</sup> For example, see Frank T. Seleie, “Statement to the Mackenzie Valley Pipeline Inquiry,” in *Dene Nation: The Colony Within*, ed. Mel Watkins (Toronto: University of Toronto Press, 1977) at 14–17.

<sup>240</sup> For a sampling of these stories see George Blondin, *When the World Was New: Stories of the Sahtu Dene* (Yellowknife: Outcrop, 1990); Jack Funk and Gordon Lobe, *...And They Told Us Their Stories: A Book of Indian Stories* (Sask: Sask. District Tribal Council, 1991); Steve Wall and David Suzuki, *Wisdom of the Elders* (Toronto: Stoddard, 1993); Steve Wall and Harvey Arden, *Wisdom Keepers: Meetings With Native American Spiritual Elders* (Hillsboro, OR: Beyond Words Pub., 1990).

<sup>241</sup> See Robert A. Williams Jr., “Large Binocular Telescopes, Red Squirrel Pinatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World” (1994) 95 *West Virginia Law Review* 1133.

<sup>242</sup> An excellent series of articles concerning First Nations’ interdependency with their environments is found in Julian Inglis, ed., *Traditional Environmental Knowledge: Concepts and Cases* (Ottawa: International Development Centre, 1993). See also Gary Potts, “Growing Together From the Earth,” in *Nation to Nation: Aboriginal Sovereignty and the Future of Canada*, ed. D. Engelstad and J. Bird (Toronto: Anansi, 1992) at 199.

<sup>243</sup> Hammond and Flavelle, “Major Points,” 79 at 83.

4. Recognize the importance and potential of the concept of tribal parks and sacred sites reserves in land use planning
5. Recognize and take steps to minimize the impact of forest practices on marine ecosystems
6. Planning inventories (and mapping projects) undertaken in Clayoquot Sound for ecosystem management must be done in full consultation and full participation of the Nu-Chah-Nulth
7. All ongoing ecosystem management activities must incorporate monitoring programs for impacts on biodiversity, soil, water quality, fisheries, and marine systems, with full consultation and participation by the Nu-Chah-Nulth
8. In full consultation with the Nu-Chah-Nulth, impacts of present and ongoing forest activities must be evaluated
9. All phases of restoration activities in damaged ecosystems must be undertaken in full consultation and with active participation of the Nu-Chah-Nulth.<sup>244</sup>

These recommendations have at their heart First Nation involvement, and have the potential to change the way forests are used. They are a great example of what can be done when Aboriginal peoples' perspectives are recognized and affirmed. They illustrate what a supportive social context can look like. Though this list is only a sampling from the report, one can see that significant opportunities were created for better forest management practices. The fact that practices in the Sound will have to meet the approval of people who are concerned with preserving other significant forest values other than commercial logging, bodes well for the health of the system.

## **UNRESOLVED CHALLENGES FOR FIRST NATIONS INPUT AT CLAYOQUOT**

Despite positive language and plans for the wiser use of Clayoquot Sound forests, aspects of the report reveal more work needs to be done. In particular, in reading Reports 3 (First Nations Perspectives) and 5 (Ecosystem Management), one sees that the panel did not fully integrate Nu-Chah-Nulth values and allow them to influence the most fundamental practices of logging.

For example, when the Scientific Panel discussed harvesting and transportation systems in the Sound, First Nation values were not mentioned and did not influence these processes. This represents a lost opportunity for changing how "on-the-ground" logging occurs. Industry yarding methods were left mostly untouched. The panel found that "most of the cable yarding equipment currently used in the Sound can be adapted to a variable-retention silvicultural system."<sup>245</sup> While variable retention systems of management represent partial change, using old equipment and existing work requirements seriously undermine First Nations values. First Nations would have preferred a more labour-intensive form of logging in the Sound. This would have created greater employment opportunities and also protected a larger number of individual trees in the log removal process.<sup>246</sup> However, technological change is not considered in this respect, presumably because this would undermine the company's competitive position. In particular, such changes might have made labour costs higher and thus have been unprofitable from the corporation's perspective. However, the fact that this argument is not even articulated, and current technology is left in place,

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<sup>244</sup> *Report 3*, supra, at 48–54.

<sup>245</sup> *Report 5*, supra, at 113.

<sup>246</sup> The successful harvesting of forest lands through this method is described in *Gull Bay Development Corp. v. The Queen* (1984) 84 D.T.C. 6090.

shows the report's lost potential. It weakens First Nations' impact on forest use. It also demonstrates how First Nations are caught by larger systemic factors that favour capital-intensive operations.

The report's second shortcoming relates to Aboriginal peoples' role in decision making. While the report has many references to First Nations' input, the panel's recommendations did not make it clear *how* First Nations would participate in decision-making processes.<sup>247</sup> This has been a source of continuing friction in the area. All the report notes is that "several models for participation are useful to consider."<sup>248</sup> The panel did not recommend any particular form of participation. The parties did not have the advantage of the court's developing principles regarding consultation outlined above. The panel's lack of attention to ongoing participation is a troubling point for First Nations' potential influence over forestry. Given the current allocation of power, wealth, and authority, it is difficult for First Nations to convince others to adopt different priorities.

Finally, the report is flawed because it paid insufficient attention to legal mechanisms available to implement its recommendations. It could have benefited from many of the suggestions outlined in the previous section of this paper. Without appropriate legal procedures to encourage, monitor, and enforce First Nations' participation, there is little incentive for forest companies and governments to account for First Nation proposals. This is a particular problem in British Columbia, where forest companies and others have sometimes violated legal provisions with scant reproof.<sup>249</sup> As such, the report's implementation is too dependent on the goodwill of those administering the policy process. As the report stands, the substance of many recommendations could be quietly swept aside. It would have been preferable to see a recommendation urging procedural rights and remedies.

Despite these problems, the report has helped create peace in the Sound, although there are other factors that contribute to this result. Currently, treaty negotiations have absorbed the Nu-Chah-Nulth efforts to hold their place within their territory. There have been few physical occupations or blockade protests in the area because of the presence of negotiated alternatives. The Nu-Chah-Nulth had some success as a result of their protest and had certain of their interests recognized in the report that allowed them to address larger land use issues in their wider territory. This focus on other priorities has meant the implementation of the Scientific Panel's report has not received the attention it might have, if it was the only item on the table. Nevertheless, First Nations are having a small influence over the way forests are actually utilized in Clayoquot Sound. The Interim Measures Agreement was an important step in this regard, and while these still have their problems, there is a greater measure of forest protection present because of their existence.<sup>250</sup> Furthermore, the fact that the presence of First Nations allows a scientific panel to more fully support ideas of ecological planning, which are still regarded with suspicion by some actors, is a significant step in reducing conflict.

## CONCLUSION

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<sup>247</sup> For example, see R4 of *Report 3*, supra, at 50:

All decision-making process relating to ecosystem use and management in the Clayoquot Sound Decision Area must be undertaken in full consultation with the Nu-Chah-Nulth.

<sup>248</sup> *Report 5*, supra, at 155.

<sup>249</sup> Minister of Forests, Minister of Environment, *British Columbia Forest Practices Code, Discussion Paper* (Victoria, November 1993) at 7–9.

<sup>250</sup> For example, the *Clayoquot Interim Measures Agreement* restricts harvest rates by 300,000 cubic metres a year.

The Royal Commission on Aboriginal Peoples observed that the expansion of the Aboriginal land and resource base is the best mechanism for building healthy relationships within Aboriginal communities and with the larger society. Expanding the land and resource base of Aboriginal people would not just be about honouring past obligations or paying a moral debt to Aboriginal people. The Royal Commission noted that such actions were part of “laying a firm consensual foundation for a new relationship between Aboriginal and non-Aboriginal Canadians, one of fair sharing of Canada’s enormous land mass, of mutual reconciliation and of peaceful co-existence.”<sup>251</sup> Without such recognition it may prove impossible to build lasting accommodation between the parties. To overcome this problem it was the Commission’s belief that Aboriginal peoples and governments had to negotiate and address their differences in a spirit of co-operation and good faith.

While the principles described above are preferable to physical stand-offs or litigation, they must be supplemented by a much broader approach. While necessary, they are not sufficient. Much more could be done to recognize and affirm Aboriginal peoples place in Canada, with a secure land and resource base, without the need to resort to negotiation. This change is attitudinal. Recognition and affirmation need not be contingent upon negotiation when what is needed is the political will to acknowledge the lands and resources Aboriginal peoples already possess. Yet, governments and others may sometimes hide behind the law or negotiation to protect their interests though they may hear that such an approach is unjust, immoral, and contrary to the spirit and intent of Canadian law, which should accept and protect all peoples in Canada. Only when people pay attention to these larger emotional and psychological issues will lasting change occur.

Some might argue that emotion or psychology should play no part in the resolution of disputes. To be sure, this is a debatable point. However, there is a developing clinical and philosophical literature that asserts that judgments cannot be made without emotion. Those who make this point argue that human reason is not separate from emotion but intertwined. Studies by scholars such as Antonio Damasio have observed that emotions are vital to human intelligence; they do not “get in the way of” rational thinking; they are essential to rationality.<sup>252</sup> Nick Humphrey has added to this debate by developing the social nature of intelligence that also connects with human emotion.<sup>253</sup> Martha Nussbaum, Professor of Law and Ethics at the University of Chicago, has made a similar point.<sup>254</sup> Professor Jennifer Nedelsky has made contributions to this debate in the Canadian context.<sup>255</sup> Thus, while it main seem dangerous to address the emotional aspects of conflict between Aboriginal and non-Aboriginal people, and allow emotions to interact with our reason, nevertheless there is a body of literature that suggests that if we fail to acknowledge these aspects, we will make less than fully informed judgments.

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<sup>251</sup> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, *Restructuring the Relationship* (Ottawa: Supply and Services, 1996) at Chapter 4.

<sup>252</sup> Antonio Damasio, *The Feeling of What Happens: Body and Emotion in the Making of Consciousness* (New York: Harcourt Brace, 1999); Antonio Damasio, *Descartes’ Error: Emotion, Reason and the Human Brain* (New York: Putnam, 1994).

<sup>253</sup> Nicholas Humphrey, *The Mind Made Flesh: Essays from the Frontiers of Evolution and Psychology* (Oxford: Oxford University Press, 2002); Nicholas Humphrey, *The Inner Eye* (Oxford: Oxford University Press, 2002).

<sup>254</sup> Martha Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge: Cambridge University Press, 2003).

<sup>255</sup> Jennifer Nedelsky, “Embodied Diversity and the Challenges to Law” (1997) 42 *McGill Law Journal* 91–117.

There are many reasons for Aboriginal peoples resorting to physical occupations and blockades to assert their interests. This paper has contextualized and analyzed the development and use of physical occupation and civil disobedience by Aboriginal peoples to accomplish their objectives relating to land, treaty, and other rights. The inventory and short description of significant occupations and flashpoints that trigger many such actions has revealed the reasons for engagement in such action. The reference to principles related to section 35(1) of the *Constitution Act, 1982* suggested ways that recognition and affirmation could be pursued by the police, politicians, corporations, civil servants, and so on. This approach to best principles and practices for the peaceful and constructive resolution of Aboriginal occupations was supplemented by a more detailed description and discussion of the dispute at Clayoquot Sound in British Columbia to reveal the processes, outcomes, and best practices of a relatively successful resolution of a conflict. It is the position of this paper that unresolved issues involving Aboriginal land and resources result from non-recognition and the failure to affirm Aboriginal occupation. As long as Aboriginal peoples feel that their rights are being denied or inappropriately diminished, they will likely continue to take direct action when they are adversely affected.<sup>256</sup>

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<sup>256</sup> Some readers may think that Aboriginal issues have already received sufficient attention in public policy treaties. For example, there have been treaty negotiations in many places throughout British Columbia for the past 10 years. It should be noted however that treaty negotiation seems to have dramatically reduced recourse to physical occupations. Some may think there are too many resources devoted to litigation involving Aboriginal issues. However, when Aboriginal peoples are involved in land claims litigation, there seem to be fewer blockades.