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Makivik Corporation
Société Makivik

BRIEF TO DIAND IN CONTEXT OF DIAND CONSULTATION WITH NUNAVIK INUIT REGARDING ISSUE OF CERTAINTY

POSITION OF NUNAVIK INUIT WITH RESPECT TO
ALTERNATIVES TO EXTINGUISHMENT OF ABORIGINAL RIGHTS OR TITLE IN
COMPREHENSIVE LAND CLAIMS AGREEMENTS AND TREATIES

Makivik Corporation
November 5, 1996

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I. Introduction

Makivik Corporation represents Nunavik Inuit (Inuit of northern Québec). Makivik's predecessor, the Northern Québec Inuit Association, was a signatory to the James Bay and Northern Québec Agreement executed on November 11, 1975. Nunavik Inuit also assert rights and jurisdiction in the areas offshore of Québec, and negotiations on these matters are underway with the Government of Canada. Nunavik Inuit are consequently in the position of having part of their Territories covered by treaty and part not yet subject to treaty.

Nunavik Inuit reject the policy of extinguishment as forming a basis for land claims settlements or treaty-making in Canada.

In our view, Aboriginal title includes ownership and jurisdiction over lands and resources within Nunavik Inuit traditional areas of use and occupancy. Aboriginal title and rights are enjoyed by Nunavik Inuit because of their historical and ancestral relationship to the land. It is this relationship with the land which forms the basis of Inuit cultural identity and the distinctiveness of their way of life. The comprehensive land claims process or treaty-making is simply one way through which Aboriginal peoples, in this particular case, Nunavik Inuit, agree to share their rights, titles, interests and jurisdiction with the Government of Canada.

II. Assembling Canada through Aboriginal/Crown treaties

Crown-First Nation treaties lie at the heart of the political development and territorial evolution of Canada. That process continues. Extinguishment of territorial and political rights of one of the partners in this enterprise, the Aboriginal peoples of Canada, had no place and has no place in that process.

Relations between the Europeans and the Aboriginal peoples are at the very foundation of the international and constitutional legal history of North America.

> *"Canada and the United States came into being, not simply through the activities of incoming European powers, but through a complex series of interactions among various settler groups and Aboriginal nations."* [1]

The earliest instructions and commissions to European explorers coming to the shores of what is now Canada mandated and required the establishment of peaceful relations with the indigenous peoples encountered. [2] The Aboriginal peoples themselves were willing to forge nation to nation or peoples to peoples relationships with the newcomers; such relationships were often expressed through treaty conferences and treaty instruments. [3]

Extinguishment of indigenous peoples' territorial rights and political and social structures was not the initial concept. Quite the contrary, Europeans depended upon the indigenous peoples to continue to be strong military and commercial partners controlling territories and resources for military and commercial imperatives. [4]

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1 Slattery, B., "Aboriginal Sovereignty and Imperial Claims" (1991) 29: 4 Osgoode Hall L.J. at 21; see also Asch, M., and Macklem, P., "Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow (1991) 29: Alta L.R. 498.

2 "Commission du Roy au sieur des Monts, pour l'habitation és terres de la Cadie, Canada, & autres en droits en la Nouvelle-France" (1603), in Marc Lescarbot, The History of New France, vol. 2 (Toronto: Champlain Society, 1911) 211 at 213; "Commission De Commandant en la Nouvelle France, du 15e. Octobre, 1612, par Mr. le Comte de Soissons, Lieutenant Général au dit pays en faveur du Sieur de Champlain" in Province du Bas-Canada, Ordannances des Intendants et Arrêts portant Règlements du Conseil Supérieur de Québec vol. 2 (Québec: P.E. Desbarats, 1806) 8 at 9; "Commission de Commandant en la Nouvelle France, du 15e. Février, 1625, par Mr. le Duc de Ventadour, qui en étoit Viceroi, en faveur du Sieur de Champlain" in Ibid. 11 at 12.

3 R. v. Sioui 1 S.C.R. 1052-1053, 1054.

4 Sioui supra.

It is inconceivable that the Europeans thought themselves so persuasive or the indigenous peoples they encountered so naive as to assume the treaty relationships established had for the purpose and as a result the extinguishment of indigenous peoples' continued existence as peoples, with the necessary continued entitlement, use and enjoyment of territories and natural resources. It is even more inconceivable that the Aboriginal peoples viewed the treaty process as one through which they extinguished their fundamental rights, the rights which distinguished them as peoples.

The idea of the necessity of extinguishing Aboriginal rights and titles arose in the 19th century and was an adjunct to that century's imperial rationalization and missionary zeal. Even during this period, however, it was only the Europeans who understood the ongoing treaty process to be one involving surrender of inherent rights to territory, resources and self-governance. The Aboriginal signatories continued to see the treaty process as one involving co-existence of political systems and institutions and sharing of lands and resources.

In the latter half of the 20th century, Canadian society and Canadian law have developed an increasing understanding of the true historic relationship, the legal foundations of that relationship and the legal effect of the treaty process.

The requirement for extinguishment of Aboriginal rights and titles is a remnant of European imperial and missionary zeal. It has no place in contemporary Canadian public policy and no validity in contemporary Canadian law. As Mr. Justice Brennan, speaking for the Australia High Court in Mabo v. Queensland stated in regard to the comparable situation in Australia:

> *"Although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies."* [5]

5 Mabo v. Queensland [1992] 107 A.L.R. 1 (H.C.) at 18.

III. Appropriateness of extinguishment

(i) Severing of an Aboriginal peoples' connection with its past through extinguishment

To require extinguishment of Aboriginal rights and titles is to require that an Aboriginal people be divorced from their cultural and spiritual centre. It is to deny Aboriginal peoples a physical and spiritual homeland.

The notion of *"wiping the slate clean"* through extinguishment is tantamount to asking Aboriginal peoples to re-invent themselves, their culture and their societies. As a result of extinguishment, it is suggested that the source of rights now must flow from land claims agreements or treaties, instruments often negotiated under pressure and involving concessions. The real source of Aboriginal peoples' right lies in their long-standing relationship with the land, their cultural traditions and connection with their ancestors.

Extinguishment of Aboriginal title, therefore, has a profound negative impact on Aboriginal peoples and on their perceptions of themselves as distinct peoples. It is an act of violence against Aboriginal peoples that should not be contemplated, let alone required.

(ii) No other people are required to extinguish or abandon their rights in order to join or participate in the Canadian federation

No other example exists whereby Canadian citizens are required to extinguish or abandon their fundamental, constitutionally guaranteed rights in order to participate in the Canadian federation. In certain situations, Canadian citizens do enter into agreements with government not to exercise

certain of their constitutionally guaranteed rights. For example, some civil servants must undertake not to publicly criticize government policy or be involved in election campaigns while holding their position. This does not mean that the employees' freedom of speech is extinguished but, rather, that such freedom of speech is to be curtailed under specified circumstances and only for the life of the employment contract.

Aboriginal peoples, however, when entering into land claims agreements or treaties respecting their Aboriginal rights and interests, have been forced by government to agree to an extinguishment of their Aboriginal title. Government argues that such extinguishment does not simply last for the duration of the agreement or treaty, but has effect in perpetuity irrespective of whether government lives up to its obligations under the agreement or treaty.

(iii) Interference with effective enforcement of agreements or treaties

Under the normal law of contract, should either party cause a fundamental or material breach of the agreement, the other party has the right to cancel the contact *ab initio*. This principle is also found in international treaty law.[6] We believe that the principle should and does in law apply to Aboriginal/Crown treaties. Certainty the *sui generis* nature of these instruments should not act to deprive Aboriginal signatories of basic protections and remedies. [7]

Under the Crown's current position, in the case of an extinguishment of Aboriginal title, the scope of legal remedies available to the Aboriginal party

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6 Art. 60 of the *Vienna Convention on the Law of Treaties* Can. T.S. 1980 no 37; Simon v. The Queen [1985] 2 S.C.R. 387 at 404.

7 Simon supra.

in the case of a government breach of the agreement or treaty is extremely limited. More specifically, because after extinguishment it is argued that the Aboriginal party cannot regain its prior legal status, monetary damages may be the only remaining remedy for the Aboriginal party. There is, of course, the ancillary problem of pursuing a claim for monetary damages through the courts which in itself takes a tremendous amount of time and financial resources.

Perhaps more importantly, the possibility of an Aboriginal party involving a fundamental or material breach of an agreement or treaty and requiring its cancellation is in itself a deterrent to government to breach such instrument. Absent such a deterrent, however, there remains little to discourage government from breaching the agreement or treaty with an Aboriginal group in a fundamental or material manner.

(iv) Extinguishment as a contradiction of the constitutional protection afforded Aboriginal rights

A policy of extinguishment of Aboriginal title on the part of government is totally inconsistent with the protections afforded Aboriginal rights and interests in Part II of the *Constitution Act, 1982*. While the federal government has been attempting to pursue an ongoing constitutional process to identify, define and strengthen Aboriginal rights at the constitutional level, that same government has been pursuing a policy of extinguishment of these very Aboriginal rights through land claims agreements and treaties at the local and regional level with various Aboriginal peoples.

(v) Surrender and extinguishment of ill-defined rights and interests

The Courts have not yet formulated and indeed have been most reluctant to formulate any definitive statement of what Aboriginal rights and interests might be in Canadian law. Indeed, the ongoing constitutional process of defining and explicitly entrenching the Aboriginal rights to self-government

in Part II of the *Constitution Act, 1982* confirms that this is an ongoing process. While the representatives of the Aboriginal peoples in the constitutional process have taken enormous pains to articulate their assertions and aspirations, non-Aboriginal governments have been unable or unwilling to understand.

It should also not be forgotten that the Aboriginal peoples of Canada have undergone decades and, in certain cases, centuries of competing European claims and assertions, legislation purporting to discourage, extinguish and, in certain cases, criminalize Aboriginal culture and Aboriginal institutions; they have seen their younger generations battered by eurocentric and, at times, racist educational systems. It should come as no surprise, therefore, that Aboriginal peoples and Aboriginal communities are now in the process of re-discovering and re-instituting their social and political structures and institutions. But the process is primarily one of re-discovery not re-invention.

Quite aside, therefore, from the argument that inherent Aboriginal rights are simply not extinguishable, it would be absurd for an Aboriginal people party to a land claims agreement or treaty to agree to the surrender and the extinguishment of its Aboriginal title and rights in Canadian law when the full extent and scope of such rights are not defined in Canadian law. Such a situation makes it impossible for an Aboriginal people to appreciate exactly what is being surrendered or extinguished in exchange for the rights and benefits obtained or confirmed in the agreement or treaty and, therefore, impossible to evaluate the advantages or disadvantages of the process.

The inequity of the situation is clear. Through blanket extinguishment, government covers all angles obtaining extinguishment of rights whatever they may be. The Aboriginal peoples are cut-off from the advantage of a Canadian law evolving towards an increasing understanding of Aboriginal rights.

(vi) Extinguishment as unnecessary and excessive to achieve certainty

Government has confirmed that the main objective for it entering into land claims agreements or treaties is to obtain certainty with respect to the rights of the Aboriginal group involved and their territory.

From this, of course, flows the certainty necessary to facilitate development of the resources within the *'territory'* of the Aboriginal group. More particularly, it allows government to obtain clear title to lands within an area to which it wishes to grant development permits to private or public sector developers of resources. Certainty may be required in order for developers to obtain appropriate financing and other statutory approvals for particular development projects. The government also seeks to achieve the certainty of eliminating the possibility of injunctive relief being sought by an Aboriginal group with rights and interests in the area based upon Aboriginal title undefined by land claims agreements or treaty.

It is our view that it is unnecessary to extinguish Aboriginal title and rights in order for the government to achieve this certainty. Moreover, it is an excessive requirement inconsistent with the present status of Aboriginal title and rights under Canadian constitutional law. The finality of extinguishment prevents any type of natural evolution in the political relationships between Aboriginal peoples and governments as well as the evolution of Aboriginal self-government. It represents a static approach to rights which are dynamic and evolving in nature.

IV. The historical and legal basis for no extinguishment

(i) Sovereignty through the Aboriginal peoples

The purported legal imperative to extinguish Aboriginal title flows from misconceptions of the concept of sovereignty. From the outset and as the

early judicial observers understood, European assertions to sovereignty in regard to the New World, however inflated and unjustified, were part of inter-European colonial and commercial rivalry. In fact, European powers attempted to assert their underlying title as against other European Nations through the intermediary of Aboriginal peoples.

This is how the French and British Crowns legitimated their claims in international law, in the St. Lawrence Valley as explained by the Supreme Court in Sioui:

> *"I consider that, instead, we can conclude from the historical documents that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations.*
>
> *The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations.*
>
> . . .
>
> *Further, both the French and the English recognized the critical importance of alliances with the Indians, or at least their neutrality, in determining the outcome of the war between them and the security of the North American* colonies. **8**

In the case of the British Crown, this is demonstrated by, first, the recognition in the Royal Proclamation of 1763 that the various Indian tribes or nations were in possession of their lands and, second, the fact the these

8 Sioui supra at 1052-1053, 1054.

tribes or nations were connected to the Crown and living under the Crown's protection. (Worcester at 548-549).

In law, European sovereignty opposable against other European powers was established, not by settling vacant lands (which they were not in any position to do), but by establishing special relationships with the indigenous peoples.

This is also how the English Crown legitimated their claims on the east coast through the Mig'maq Treaties of Peace and Friendship and on the North West Coast in negotiations with the Americans. [9] This is how the process was represented to the Aboriginal peoples.

Even in the case of the 19th century numbered treaties concluded in Manitoba and the then Northwest Territories, the Crown's representations at treaty conferences dealt with securing the continuation of a way of life, of taking nothing from the Indian Nations. In the words of Lieutenant-Governor Morris and his party during negotiations of Treaty No. 6 on August 23, 1876:

> *"I want the Indians to understand that all that has been offered is a gift, and they still have the same mode of living as before.*
>
> *It has been said to you by your Governor that we did not come here to barter or trade with you for the land*
> ...
>
> ...

9 On the basis of its consistent representations, Britain was of the opinion that a claim to title under international law in the area now called British Columbia was of dubious validity unless accompanied by purchase of territory or the receipt of sovereignty from the indigenous peoples, and relied upon this in its claim against the United States for the territory now known as British Columbia. [Statement of British Plenipotentiaries relative to the Territory West of the Rocky Mountains (1826); see also: J. White, "Boundary Disputes and Treaties", in Shortt & Doughty, eds., Canada and its Provinces, 1914, Vol. 8 at p. 852].

> *We have not come here to deceive you, we have not come here to rob you, we have not come here to take away anything that belongs to you ... "* **10**

During the period of negotiations between Britain and the United States over the establishment of borders and border crossing rights, Lord Dorchester explained the process to the Confederated Indian Nations in 1791 in the following terms:

> *"Brothers. You have told me, there were people who say that the King your Father when he made peace with the United States gave away your lands to them. I cannot think the Government of the United States would hold that language, it must come from ill-informed individuals. You will know, that no man can give what is not his own ...*
>
> *The King's rights with respect to your territory were against the Nations of Europe; these he resigned, to the States. But the King never had any rights against you but to such parts of the Country as had been fairly ceded by yourselves with your own free consent by Public convention and sale. How then can it be said that he gave away your lands?"* **11**

In the context of Inuit/Crown relations and Inuit territories, it is extremely interesting to note that the Crown's assertions of its underlying title and sovereignty as against competing European and American claims through the intermediary of Aboriginal peoples is a practice continued today by the Government of Canada with respect to the Arctic. In a speech to the House of Commons in 1985, Joe Clark asserted Canada's sovereignty in the Arctic through the Inuit people in the following terms:

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10 Alexander Morris, The Treaties of Canada with the Indians of Manitoba and the North-West Territories including the Negotiations on which they were based (Toronto: Belfords, Clarke, 1880) at 211, 212.

11 Lord Dorchester to the Confederated Indian Nations (15 August 1791) Archives of Ontario, F47, A-1 Letterbook 17; see also: Kent's Commentaries supra; Cherokee Nation v. Georgia 30 U.S. (5 Pet.) 1 (1831) at 17; Worcester v. Georgia supra at 552-559.

> *"Canada's sovereignty in the Arctic is indivisible. It embraces land, sea and ice. From time immemorial Canada's Inuit people have used and occupied the ice as they have used and occupied the land."* [12]

The treaty process was not historically seen as, and should not today been seen as, a vehicle for assertion of European sovereignty to the complete exclusion of Aboriginal peoples' or First Nations' sovereignty. The early Law of Nations did not require that result. Contemporary international law does not require that result. Canadian domestic law does not require the result. Only a mistaken and illegitimate federal policy once required that result.

The Courts have held that government policy cannot overrule law.

> *"Our laws cannot be so treated. The Crown may not by Executive action dispense with laws. The matter is as simple as that, and nearly three centuries of legal and constitutional history stand as the foundation for that principle."* [13]

(ii) Treaties as vehicles for co-existence

Treaty-making and treaties have been and should be the instruments for establishing the co-existence of sovereignties. This is not accomplished by obliterating the rights and identity of one of the parties to the treaty.

The treaty process is one of negotiating equitable arrangements with respect to sharing of land and resources, not a process of extinguishing the constitutionally guaranteed Aboriginal rights, titles, interests and jurisdiction

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12 Speech of Joe Clark, Canada, House of Commons Debates, vol. V (10 September 1985) at p. 6463.

13 R. v. Catagas (1977) 81 D.L.R. (3d) 396 at 401 (Man. C.A.).

which Aboriginal peoples have as a result of their historical relationship to the land.

Once alliances had been formed and treaties entered into, the relationship between the Aboriginal Peoples and the Colonial Power were conditioned by treaty arrangements. This process did not, however, entail a loss of all sovereignty by the Aboriginal nations. The Law of Nations recognizes the existence of arrangements by which nations, while retaining full internal sovereignty, may transfer their external sovereignty.

In Worcester, Marshall C.J. elaborated the law pertaining to the characteristics of the sovereignty possessed by the Indians of North America after they had ceded their territory. They were considered to be limited in their external sovereignty but maintained their internal sovereignty. Marshall C.J. characterized the Indian Nations *as "dependent allies"* or as *"domestic dependent nations"*. Yet Marshall C.J. emphasized that the fact of being domestic dependent nations did not involve a *"surrender of their national character"*. The Chief Justice asserted:

> *"Protection does not imply the destruction of the protected."* **14**

It is in this context that the pronouncement of the Supreme Court of Canada in Sparrow **15** to the effect that sovereignty and legislative power are vested in the Crown must be understood. Crown did not and does not eliminate the internal sovereignty of Aboriginal peoples. Crown sovereignty is not diminished through co-existing with the internal sovereignty of Aboriginal peoples. Quite the contrary, the legitimacy and effectiveness of governance is enhanced.

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14 Worcester v. The State of Georgia supra at 552; The Cherokee Nation v. The State of Georgia supra at 17.

15 R. v. Sparrow supra at 1103.

(iii) The question of extinguishment before the Courts

While Canadian courts have been prepared to state that Parliament had the power to extinguish Aboriginal rights in the pre-1982 era, it is clear that the courts are very reluctant to find that extinguishment has occurred in a given case, especially unilateral extinguishment.

In Bear Island, [16] the Supreme Court of Canada found that there had been bilateral, consensual extinguishment on the facts of the case since the Teme-augama Anishnabay had accepted a reserve and some treaty payments and had thus adhered to the Robinson-Huron Treaty of 1850. In Horseman, [17] it was found that the Natural Resource Transfer Agreement *"limited" or "abrogated"* the treaty right to hunt for commercial purposes. The word *"extinguished"* was not used by the Supreme Court of Canada and subsection 35(1) was not at issue in the case.

There are no judgments dealing with an alleged extinguishment in the post-1982 era. The only definitive statement regarding the effect of subsection 35(1) on extinguishment is from Lambert J.A., dissenting in Delgamuukw[18] who stated unequivocally that *"in my opinion, s. 35 of the Constitution Act, 1982 prevents the extinguishment of Aboriginal rights. Legislation extinguishing Aboriginal rights is now unconstitutional whether*

16 Ontario (Attorney General) v. Bear Island Foundation [1991] 2 S.C.R. 570.

17 R. v. Horseman [1990] 1 S.C.R. 901.

18 Delgamuukw v. British Columbia (1993) 104 D.L.R. (4th) (B.C.C.A.).

it is enacted by Parliament or by a provincial legislature". [19] He was not contradicted on this point by the majority.

(iv) Honour of the Crown

Even in respect of the period prior to 1982, the honour of the Crown is very much involved when the courts examine whether treaty rights have been limited or abrogated by federal legislation.

In Wesley (1932), the Alberta Supreme Court, Appellate Division, held that provincial game legislation did not apply to the right to hunt under Treaty 7. In his judgment, McGillivray stated:

> *"It is satisfactory to be able to come to this conclusion and not to have to decide that the 'Queen's promises' have not been fulfilled. It is satisfactory to think that legislators have not so enacted that the Indians may still be 'convinced of our justice and determined resolution to remove all reasonable cause of discontent."* [20]

In Sikyea (1964) Johnson J.A. of the Northwest Territories Court of Appeal, in finding that the right to hunt under Treaty 11 could be *"taken away"* by the Migratory Birds Convention Act and Regulations, stated:

> *"How are we to explain this apparent breach of faith on the part of the Government, for I cannot think that it can be described in any other terms? This cannot be described as a minor or insignificant curtailment of these treaty rights, for game birds have always been most plentiful, a most reliable and a readily obtainable food in large areas of Canada. I cannot believe that the Government of Canada realized that in implementing the Convention they were at the*

19 Delgamuukw supra at 686.

20 R. v. Wesley [1932] 4 D.L.R. 774 at 790 (Alta. S.C.A.D.).

> *same time breaching the treaties that they had made with the Indians. It is much more likely that these obligations under the treaties were overlooked -- a case of the left hand having forgotten what the right hand had done. (p. 158)*
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> ...
>
> *In coming to this conclusion, I regret that I cannot share the satisfaction that was expressed by McGillivray J.A. in R. v. Wesley ..." (p. 162)* [21]

In rejecting Mr. Sikyea's appeal of this judgment, the SCC stated that:

> *"On the substantive question involved, I agree with the reasons for judgment and with the conclusions of Johnson, J.A., in the Court of Appeal. He has dealt with the important issues fully and correctly in their historical and legal settings, and there is nothing which I can usefully add to what he has written."* [22]

Three and a half months later, Cartwright J. of the SCC reversed his approval of the Court's decision in Sikyea and dissented from the Supreme Court's judgment in George (1965). In his dissent he stated that:

> *"We should, I think, endeavour to construe the treaty of 1827 and those Acts of Parliament which bear upon the question before us in such a manner that the honour of the Sovereign may be upheld and Parliament not made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty."* [23]

It is clear from the comments of the judges in these cases that they found that abrogation of the rights in question was incompatible with the honour

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21 R. v. Sikyea [1964] 43 D.L.R. (2d) 150 at 162 (N.W.T.C.A.).

22 R. v. Sikyea (1964), 50 D.L.R. (2d) 80 at 84 (S.C.C.).

23 R. v. George (1966), 55 D.L.R. (2d) 386 at 397 (S.C.C.).

of the Crown. Had a remedy been available for the breach of the treaty, the courts in the above cases would have been quick to apply it. Indeed, that is exactly what the Alberta Queen's Bench and the Manitoba Court of Appeal have done in Arcand[24] and Flett.[25] Those judgments have interpreted the Sikyea and George cases as having found limitations on the exercise of the right only and not any extinguishment.

Sparrow appears to confirm that rights which may have been at one time considered *"extinguished"* were only *"regulated"* and not extinguished. Ian Binnie in his article *"The Sparrow Doctrine: Beginning of the End or End of the Beginning?"*[26] has commented that *"there are few statutes or regulations that so clearly conflict with the survival of Aboriginal rights as the express prohibition against fishing contained in the Fisheries Regulations [at issue in the case at bar] ..."*. Since the Supreme Court held that the Fisheries Regulations did not extinguish Aboriginal rights, it would seem that little else could meet the test.

This view accords with the language used by the Supreme Court in Derriksan wherein it held that "the Fisheries Act and the Regulations thereunder which, so far as relevant here, were validly enacted, have the effect of subjecting the alleged [fishing] right to the controls imposed by the Act and Regulations".[27]

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24 R. v. Arcand [1989] 2 C.N.L.R. 110.

25 R. v. Flett [1991] 1 C.N.L.R. 140.

26 Queen's L.J. 217 at 227.

27 R. v. Derriksan (1976), 71 D.L.R. (3d) 159 at 160 (S.C.C.).

(v) Extinguishment is incompatible with contemporary norms of international law

Contemporary international legal instruments and drafts directly concerning indigenous peoples (ILO Convention 169; Draft Universal Declaration on the rights of Indigenous Peoples) or containing references to their rights (Convention on Biodiversity) all state principles which are incompatible with the concept of extinguishment of rights.

In 1989, the International Labour Organization (ILO), having recognized the need to update the Indigenous and Tribal Populations Convention of 1957 (No. 107), adopted ILO Convention 169 *"with a view to removing the assimilationist orientation of earlier standards"*, as stated in the preamble of Convention 169. One of the motives behind the revision of Convention 107 was the recognition of *"the aspirations of these [Indigenous and Tribal] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions within the framework of the States in which they live ..."*.

Part of ILO Convention 169 is entirely dedicated to lands.

Article 13 states *that "in applying the provisions of this part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned, of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use ..."*.

Article 14 concerns the recognition of the rights of ownership and possession of Indigenous and Tribal peoples over the lands which they traditionally occupy, and provides that special measures be taken in order to safeguard their right to use lands *"not exclusively occupied by them but to*

which they have traditionally had access for their subsistence and traditional activities". Paragraph 2 of the same Article 14 specifically states that *"Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession".*

Article 15 deals with the rights of Indigenous and Tribal peoples to the natural resources pertaining to their lands, and includes the right to participate in the use, management and conservation of these resources. It is worth noting that under the terms of Article 13, paragraph 2, the use of the term *"lands"* in Article 15 includes *"the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use".* Article 15 provides for cases in which the State retains the ownership of mineral or sub-surface resources pertaining to lands but even in those cases, governments must establish consultation procedures *"with a view to ascertain whether and to what degree their interests would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands".* It is also provided that the peoples concerned shall participate, wherever possible, in the benefits of such activities, and that they shall receive compensation for any damage they might sustain as a result of such activities.

Article 17 provides for the establishment of procedures for the transmission, by Indigenous and Tribal peoples, of land rights among their members. [28] Control over renewable and non-renewable resources and an adequate territorial base are indeed considered as pre-requisites for the ongoing development of indigenous peoples.

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28 *Report of the Meeting of Experts to review the experience of countries in the operation of schemes of internal self-government for Indigenous peoples*, p. 8, E/CN.4/1992/42 (25 nov. 1991).

Similar provisions are found in the U.N. Draft Declaration on the Rights of Indigenous Peoples.

Articles 1 and 2 state that Indigenous peoples have a right to the full enjoyment of all human rights and they are free and equal to all other peoples. It follows as a logical consequence that they have the right to self-determination (Art. 3). In addition, such right must be taken to have its full meaning under international law, otherwise, indigenous peoples cannot be equal to all other peoples.

Under the terms of Article 7(c): the dispossession of the lands, territories and resources of Aboriginal peoples is assimilated to ethnocide and cultural genocide.

Article 26 provides for the recognition of ownership, development and control of lands and territories, including *"the total environment of the lands, air, waters, coastal seas, sea-ice, flora, fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interferences with, alienation of or encroachment upon these rights"*.

V. Certainty

(i) Objectives of land claim agreements and treaties

It appears that government and Aboriginal peoples have differing objectives in pursuing land claims agreements or treaties.

The objectives of Aboriginal peoples in entering into land claims agreements or treaties with government would appear to be centered upon maintaining and protecting their distinct cultural and political identities, achieving recognition and affirmation of special Aboriginal rights and interests and defining the economic and political relationships and the arrangements for sharing of land resources and jurisdiction as between Aboriginal peoples and the Government of Canada.

In short, it is to achieve certainty as to their position in the Canadian Confederation, certainty as to the protection and security of their rights and certainty as to their futures that Aboriginal peoples embark upon treaty-making.

The federal government's objectives appear to relate to clarifying the Crown's title and jurisdiction so as to facilitate political and economic development within territories over which Aboriginal rights and titles are asserted, to protect the interests of third parties, to assist Aboriginal peoples in their political and economic development and to compensate for past wrongs.

It is our position that the objectives of both Aboriginal peoples and non-Aboriginal governments can be met without the need to resort to surrender and extinguishment of Aboriginal title and rights. We believe that suitable alternatives exist to extinguishment.

(ii) Nunavik Inuit approach

Our approach does not call for surrender and extinguishment of Nunavik Inuit Aboriginal rights and title but, instead, for confirmation of Aboriginal title and rights and voluntary suspension of assertion and enforcement in law of those rights and title by Nunavik Inuit as long as the Government of Canada or any political or legal entity under its control or supervision,

causes no fundamental or material breach of the final Nunavik Inuit Offshore Agreement or of any legislation implementing that Agreement.

There are a number of principles underlying our approach. First, the undertaking to provide certainty should be mutual and reciprocal.

Our approach provides for the consideration for the Nunavik Inuit providing certainty to government and the conditions upon which that certainty is provided. The consideration is the recognition by Canada of Nunavik Inuit rights in addition to the rights and benefits contained in the Final Agreement. The condition for providing certainty is that Canada respect and continue to respect its obligations under the Final Agreement and cause no fundamental or material breach of the Final Agreement.

In return, Nunavik Inuit agree to suspend the assertion of property rights, agree to exercise political rights in conformity with the Final Agreement and agree to permit access to and use of the lands and waters within the Nunavik Marine Region by Canada and to recognize sovereignty and jurisdiction in Canada provided that it is exercised in a manner consistent with the terms of the Final Agreement.

No rights are surrendered or extinguished but the exercise of rights are circumscribed by the Final Agreement. Certainty is provided by Nunavik Inuit, however, only as long as there is no fundamental or material breach of the Final Agreement by Canada. Should such breach occur, the undertaking to provide certainty would be suspended or possibly revoked.

To avoid issues between the parties as to what constitutes material or fundamental breach, our text would designate certain specific breaches as *"material"* or *"fundamental"*.

Our proposal confirms that the Nunavik Inuit undertaking to provide certainty does not absolve Canada of its fiduciary obligations and duties towards them and that the undertaking not to assert rights does not apply to recourses in virtue of the fiduciary obligation or duties.

These provisions relating to *"Certainty"* appear as subsection 2.18 of the draft Nunavik Inuit Offshore Agreement as follows:

> *"2.18 Certainty*
>
> *2.18.1 Nunavik Inuit and Her Majesty the Queen in Right of Canada agree to provide mutual comfort through certainty as provided in this subsection.*
>
> *2.18.2 In consideration for and conditional upon the continuance of:*
>
> *(i) the recognition by Canada of the Nunavik Inuit aboriginal title, rights and jurisdiction in and to the Nunavik Marine Region; and*
>
> *(ii) the rights and benefits contained in the Final Agreement in favour of Nunavik Inuit;*
>
> *Nunavik Inuit hereby provide certainty to government:*
>
> *(a) by agreeing to suspend the assertion and enforcement in law as against Canada or their*

aboriginal property rights in and to lands and waters anywhere within the Nunavik Marine Region where Canada claims sovereignty or jurisdiction, provided that such suspension may not be invoked against Nunavik Inuit for purposes of prescription, limitations or laches;

(b) by agreeing to exercise their internal sovereignty, right to self-determination and rights to self-government in conformity with the provisions of the Final Agreement; and

(c) by agreeing to permit access to and use of the lands and waters anywhere within the Nunavik Marine Region by Canada and those authorized by Canada consistent with the terms of the Final Agreement and to recognize the sovereignty and jurisdiction of Canada exercised in a manner consistent with the terms of the Final Agreement;

as long as and insofar as the Crown in Right of Canada or any political or legal entity under its control or supervision cause no fundamental or material breach of the Final Agreement and of any legislation implementing the Final Agreement.

2.18.3 For the purposes of the Final Agreement, fundamental or material breach shall include but not be limited to breaches of:

[TO BE PROVIDED]

In addition, fundamental or material breach would be found in the case of deliberate and persistent violation of obligations which destroys the very object and purpose of the Final Agreement.

2.18.4 Nothing in this subsection shall constitute or be construed as constituting a waiver of the Crown's fiduciary obligations and duties towards Nunavik Inuit or a recognition or agreement by Nunavik Inuit that the Crown's fiduciary obligations and duties towards them do not continue or cannot be asserted or enforced in law.

VI. Preliminary comments of Makivik on Letter of DIAND Minister of August 1, 1996 and document attached entitled "Proposed Principles for the Achieving of Certainty through Comprehensive Land Claims"

First, with respect to the text itself of the Minister's letter of August 1, 1996, we believe that the Minister should be referring to contemporary treaties rather than comprehensive land claims.

We note that the first paragraph informs us that Canada has taken into account the views expressed in the Hamilton Report *A New Partnership* and in the interim report of the Royal Commission on Aboriginal Peoples entitled *Treaty making in the Spirit of Co-existence.* It is not a little surprising that he Minister does not also confirm that Canada has taken into account the views of the Courts and, in particular, the Supreme Court of Canada on these matters.

The fact of the matter is that the Supreme Court of Canada since R. v. Sparrow [1991] 1 S.C.R. 1075, has provided considerable direction as to the scope and meaning of section 35 of the Constitution Act, 1982 and the purposive interpretation to be given to that constitutional provision.

The Supreme Court has again recently examined the scope of the protections provided by section 35(1) and the appropriate behaviour of the Crown in a series of decisions released during the latter part of this year. *In Dorothy Marie Van Der Peet v. Her Majesty the Queen*, a unanimous decision of the Court rendered on August 21, 1996, Chief Justice Lamer, writing for the Court, devoted a substantial portion of his Reasons to examining the purpose and scope of section 35.

At page 14 of his Reasons, the Chief Justice deals with the general principles applicable to legal disputes between Aboriginal peoples and the Crown. This, of course, would include a dispute over whether surrender

and extinguishment is a *sine qua non* for concluding a treaty. The Chief Justice writes:

> *Before turning to a purposive analysis of s. 35(1), however, it should be noted that such analysis must take place in light of the general principles which apply to the legal relationship between the Crown and aboriginal peoples. In Sparrow, supra, this Court held at p. 1106 that s. 35(1) should be given a generous and liberal interpretation in favour of aboriginal peoples:*
>
> > *When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous and liberal interpretation of the words in the constitutional provision is demanded [Emphasis added by the Chief Justice]*

The Chief Justice refers to the importance of the Crown's fiduciary obligations to Aboriginal peoples and the honour of the Crown. At pages 14-15 he writes:

> *... The Crown has fiduciary obligation to aboriginal peoples with the result that in dealings between the government and aboriginals the honour of the Crown is at stake. Because of this fiduciary relationship, and its implication of the honour of the Crown, treaties, s. 35(1), and other statutory and constitutional provisions protecting the interests of aboriginal peoples, must be given a generous and liberal interpretation: R. v. George, [1996] S.C.R 267, at p. 279. This general principle must inform the Court's analysis of the purposes underlying s. 35(1), and of that provision's definition and scope.*
>
> *The fiduciary relationship of the Crown and aboriginal peoples also means that where there is any doubt or ambiguity with regards to what falls within the scope and definition of s. 35(1), such doubt or ambiguity must be resolved in favour of aboriginal peoples. In R. v. Sutherland, [1980] 2 S.C.R. 451, at p. 464, Dickson J. held that paragraph 13 of the Memorandum of Agreement between Manitoba and*

> *Canada, a constitutional document, "should be interpreted so as to resolve any doubts in favour of the Indians, the beneficiaries of the rights assured by the paragraph". This interpretive principle applies equally to s. 35(1) of the Constitution Act, 1982 and should, again, inform the Court's purposive analysis of that provision.*

Under this section of his Reasons dealing with the purposive analysis of section 35(1), the Chief Justice specifically addresses the distinction to be made between Aboriginal rights protected by the common law prior to the enactment of section 35(1) and Aboriginal rights now recognized and affirmed in section 35(1). The Chief Justice writes at page 16:

> *In identifying the basis for the recognition and affirmation of aboriginal rights it must be remembered that s. 35(1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law: Calder v. Attorney-General of British Columbia, [1973] S.C.R. 313. At common law aboriginal rights did not, of course, have constitutional status, with the result that Parliament could, at any time extinguish or regulate those rights: Kruger v. The Queen, [1978] 1 S.C.R. 104, at p. 112; R. v. Derrickson (1976), 71 D.L.R. (3d) 159 (S.C.C.), [1976] S.C.R x; it is this which distinguished the aboriginal rights recognized and affirmed in s. 35(1) from the aboriginal rights protected by the common law. Subsequent to s. 35(1) aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the justificatory test laid out by this Court in Sparrow, supra.*

Another and very important aspect of the Van der Peet decision of the Supreme Court of Canada its the Court's direction that we must seek reconciliation between pre-existing Aboriginal rights and the sovereignty of the Crown. This reconciliation is not achieved by denying either the Aboriginal rights or the sovereignty of the Crown. Surely the treaty process and the treaty instruments resulting are the concrete manifestation of this

reconciliation and as such must not require denial, abandonment or extinguishment of Aboriginal rights or Crown's sovereignty.

At page 17 of his Reasons the Chief Justice writes:

> *More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginal 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 which 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 towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.*

And at page 27 of his Reasons the Chief Justice concluded on this point:

> *The Canadian, American and Australian jurisprudence thus supports the basic proposition put forward at the beginning of this section: the aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. The content of aboriginal rights must be directed at fulfilling both of these purposes; the next section of the judgment, as well as that which follows it, will attempt to accomplish this task.*

Very recently the Supreme Court of Canada has rendered judgment in *George Weldon Adams v. Her Majesty the Queen* (judgment rendered October 3, 1996) in which the scope and purpose of section 35(1) was again examined. Of great interest is the treatment in the Reasons again of the Chief Justice writing for himself and seven justices (concurring reasons were given by the Honourable Madam Justice L'Heureux-Dubé) in which the Chief Justice refers to the "noble" purpose section 35(1) in preserving

the important features of Aboriginal societies and the fact that this overrides in significance any legal approval by the Crown. The Chief Justice writes at page 19 of his Reasons:

> *... Section 35(1) would fail to achieve its noble purpose of preserving the integral and defining features of distinctive aboriginal societies if it only protected those defining features which were fortunate enough to have received the legal approval of British and French colonizers.*

The notion of "wiping that slate clean" through extinguishment is tantamount to asking Aboriginal peoples to reinvent themselves, their culture and their societies. As a result of extinguishment, it is suggested that the source of rights now must flow from land claims agreements or treaties, instruments often negotiated under pressure and involving concessions. The real source of Aboriginal peoples' right lies in their long-standing relationship with the land, their cultural traditions and connection with their ancestors.

All this is precisely what the Supreme Court has directed cannot happen in the light of the constitutional affirmation and protection of Aboriginal rights established through Section 35(i).

In the second paragraph of his letter, Minister Irwin states that he is enclosing a set of principles that "might serve as a basis for a new legal technique for achieving certainty". Our comment here is that abandonment by the Crown of an insistence upon surrender and extinguishment should not be characterized as a "new legal technique". The fact of the matter is that insistence upon surrender and extinguishment was not a "legal technique" but a blunt political weapon, the unconstrained exercise of sovereignty that was never legal, never legitimate and never appropriate.

Further in this paragraph of the Minister's letter, he talks of the need to preserve the objective of achieving certainty for all residents and users of areas subject to comprehensive land claims. This denies the primary purpose of treaty making which is to recognize and affirm an Aboriginal people's interest and place in its territory and to provide security for that Aboriginal people. Once again, the Minister's preoccupation appears to be with the non-Aboriginal residents and users of the traditional territories of Aboriginal peoples. While it is important to be equitable and fair towards non-Aboriginal occupants of Aboriginal territories, the Minister should be reminded that the treaty process is about recognizing Aboriginal rights and titles, establishing a secure relationship between Aboriginal peoples and the Crown and reconciling Aboriginal rights and Crown sovereignty. These should be the preoccupation of the Minister of Indian and Northern Affairs.

Finally, in his second paragraph, the Minister states that the proposed approach would only be applicable to unsettled comprehensive land claims and would not lead to the reopening of existing treaties or land claims agreements. If, as we certainly hope is the case, the federal Crown has finally acknowledged that surrender and extinguishment was an unjust policy, and the result of unconstrained exercise of sovereignty and considerable imbalance in the powers of the treaty partners, existing treaties or land claims agreements should be reopened and restructured in the light of a more legitimate and appropriate technique for achieving certainty and security.

With respect to the seven (7) individual principles listed by the Minister in the document accompanying the August 1 letter entitled "Proposed Principles for the Achievement of Certainty through Comprehensive Land Claims", the following are our comments:

1. The treaty would be negotiated within the existing constitutional and underlying legal framework of Canada.

This statement is fine as it goes. The question is what is the existing constitutional and underlying legal framework of Canada? We remind you that this context includes principles of international law which the Supreme Court has directed can be applied by analogy in the area of Aboriginal rights and treaties (*Simon* v. *The Queen* (1985) 2 S.C.R. 387; *R.* v. *Sioui* (1990) 1 S.C.R. 1025). Aboriginal Crown treaties are not exclusively governed by Canadian domestic law. The Supreme Court of Canada, and the Constitution (see for example paragraph 11 g) of the *Charter of Rights and Freedoms*) make reference to international law as a relevant body of law. As the Supreme Court has stated recently in the *Van der Peet and Adams* case, the Aboriginal rights referred to in section 35 of the Constitution Act, 1982 must be understood in terms of Aboriginal occupation of Canadian territory prior to the arrival of the Europeans and, therefore, certainly prior to the establishment of the constitutional and legal framework of Canada.

Another concern here lies with the fact that Aboriginal peoples may negotiate treaties in future so as to include self-government provisions which later may require constitutional entrenchment through re-arrangement of the underlying legal framework of Canada in order to be properly accommodated legally and constitutionally. Would Principle No. 1 preclude this?

2. The treaty would contain recitals acknowledging the Aboriginal party's use and occupation of lands and resources in the treaty area and referring to the recognition and affirmation of the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada contained in s. 35 of the Constitution Act, 1982.

First, there should be reference here not only to the Aboriginal party's use and occupation of lands and resources in the treaty area but also to the Aboriginal party's interests in the lands and resources and the Aboriginal party's jurisdiction in the treaty area. Second, we should be careful of this general reference to the recognition and affirmation found in section 35 of the *Constitution Act*, 1982. The fact is that in our experience in treaty negotiations, while the federal negotiators are prepared to have a general statement declaring what the Constitution contains, they are more than reluctant to relate the general statement to the specific situation of the Aboriginal people and the Aboriginal territory at issue. In other words, Canada is very reluctant to acknowledge that section 35 actually relates to any particular Aboriginal party or Aboriginal territory. The Crown should not be permitted to appear to be doing more than in fact it is prepared to do.

3. The parties would express clearly their intention to enter into a treaty within the meaning of s. 35 of the *Constitution Act* to achieve certainty respecting ownership and use of lands and resources.

Again, this principle should refer not only to ownership and the use of lands and resources but also jurisdiction over those lands and resources.

4. The parties would agree that the treaty sets out all of the s. 35 land and resource right that the Aboriginal party will be able to exercise, or alternatively that the treaty sets out all of the Aboriginal party's s. 35 land and resource rights.

This is a very important provision. The first phrase that is up to the word "exercise" in the second line, appears to reflect the approach being put forward by Makivik at the offshore/Labrador treaty negotiating table under reserve of the comments above that the treaty should also set out jurisdictional issues. Makivik, in the offshore/Labrador treaty negotiations, has argued that certainty can be achieved by the treaty establishing what Aboriginal rights may be exercised and by the Aboriginal party undertaking not to assert or exercise rights beyond those identified. The caveat, of course, is that this undertaking would hold only as long as the Crown honours its side of the bargain and there is no material breach to the treaty. Another approach might be to stipulate what rights would <u>not</u> be exercised with the residual rights being exercisable.

The alternative set out at principle 4 is not acceptable. Having a treaty set out an exhaustive list of the Aboriginal party's section 35 lands and resource rights is tantamount to extinguishment through definition. Any right that is not identified in the treaty would cease to exist. Such an approach effectively creates a strait-jacket upon an Aboriginal people's right under Section 35 and precludes them from enjoying any future expansion and growth of Section 35 rights. This is not consistent with the stated intention of Canada to abandon its surrender and extinguishment policy.

5. In order to provide certainty for the existing and future land and resource rights, titles and interests of residents and users of the treaty area, the treaty would include assurances that no claims based on Aboriginal rights could be asserted and that the Aboriginal party would respect all Crown dispositions.

First, the Minister should be as concerned if not more concerned with respect to certainty for the land and resource rights and interests of the Aboriginal peoples in the treaty area. Second, while the treaty could include assurances that no claims based on Aboriginal rights could be asserted, this would be subject once again to continuing respect of the treaty provisions and its obligations by the Crown and it being clearly stated that such assurances would only hold as long as there was no material breach of the treaty. As to the Aboriginal party respecting all Crown dispositions, this would be subject to the specific terms of the treaty and should be worked out through negotiations. Our central concern here remains the lack of clarity with respect to written Aboriginal parties to a treaty would be able to enforce treaty rights againts the Crown in case of fundamental breach of a treaty by the Crown.

In fact, proposed Principles Nos. 5 and 7 suggest that the Aboriginal party would not be able to base a legal claim for breach of the treaty upon Aboriginal rights and title. Such a proposed approach, if intended, is unacceptable to Makivik because this would remove any incentive upon the Crown to respect the treaty. At a more fundamental level, under the normal law of contract, should either party cause fundamental breach of the agreement, the other party has the right to cancel this contract *ab initio*. There is absolutely no reason why an Aboriginal/Crown treaty *qua contract* should be treated differently from any other contract under law. To do otherwise, would result in a situation where the Crown obtains "certainty" under a treaty notwithstanding whether the Crown in future respects all the terms of the treaty. On the other hand, the Aboriginal party to the treaty achieves "certainty" only insofar as the Crown acts in good faith and in fact complies with all the terms and conditions of the treaty.

6. The treaty would set out clearly whatever rights the Crown and others would have to use the land and resources the Aboriginal party would own, and the Aboriginal party as owner would have the residual property rights. The rights of the Aboriginal party to use Crown land and resources would also be set out clearly, and the Crown as owner would have the residual property rights. Where the Crown has granted fee simple ownership, the owner would have the residual property rights.

This principle appears to reflect the land selection model, that is, it appears to assume that certain portions of the treaty area would be reserved or designated as Aboriginal lands and the residual portion of the territory would be recognized as Crown lands. Rather than establish this hierarchy and accept a land selection model, Makivik prefers to pursue an approach which recognizes that both Aboriginal peoples and the Crown have co-existing interests in the territory and that the treaty process is aimed at clarifying how the parties are to co-exist and cooperate. Principle No. 6 talks more of a Land selection model than of an approach to achieving certainty. Makivik does not accept the Land selection model suggested herein.

7. The parties would provide appropriate assurances to each other that they would act in accordance with the treaty.

This principle appear to reflect the approach being put forward by Makivik at the offshore/Labrador treaty negotiations and is helpful. It is interesting that the Minister feels that it is important to specifically provide for these assurances.

With respect to the final paragraph on page 2 of the principles, again the area of jurisdiction has been omitted. The goal of treaties is surely to

resolve not only differences concerning rights to lands and resources but also differences as to the exercise of jurisdiction.

As to the suggestion that the treaty should establish an effective process for addressing future disputes arising out of interpretation and should contain workable provisions for amending the treaty, we see no problem.

With respect to the suggestion that the treaty should also set out whatever warranties and indemnities the parties consider necessary, we would suggest that in principle the warranties and indemnities being put forward by the Crown in treaty negotiations are not appropriate for a treaty process and are relics of commercial dealings. When challenged, federal negotiators and provincial negotiators admit that they cannot warrant the behaviour of third parties or citizens under their jurisdiction and are not prepared to indemnify the Aboriginal people for the behaviour of such parties. Surely the same problem confronts Aboriginal authorities negotiating treaties.

VII. Conclusion

In this Brief, we have argued that insistence upon extinguishment of Aboriginal rights and titles is tantamount to demanding that Aboriginal peoples be deprived of their physical and spiritual homeland and their identity as distinct peoples. It is tantamount to asking them to abandon their history and re-invent themselves in the context of a federal government policy, which itself is under criticism and review.

We have demonstrated that insistence upon extinguishment is totally inappropriate public policy and has no historical or legal basis.

In addition, we have demonstrated that extinguishment of Aboriginal rights and title is not necessary for the declared purpose - certainty. Indeed, the consequence of

imposing extinguishment is more likely to be political and social destabilization rather than secure, long-lasting political relationships forged through a just treaty-process.

Political stability, legal equity and secure mutual undertakings by Aboriginal and non-Aboriginal societies will result in certainty. Mutual respect will result in certainty. Requiring Aboriginal peoples to abandon their aboriginality is no basis for establishing a secure and certain future for territories or peoples.

We propose that appropriate and mutual certainty can be attained through reciprocal treaty undertakings as to how rights and powers are to be exercised and as to how duties and obligations are to be fulfilled. As long as the parties act in good faith they shall enjoy *"certainty"*. If they fail to act in good faith, entitlement to *"certainty"* is forfeited.