

4

**Treaties**

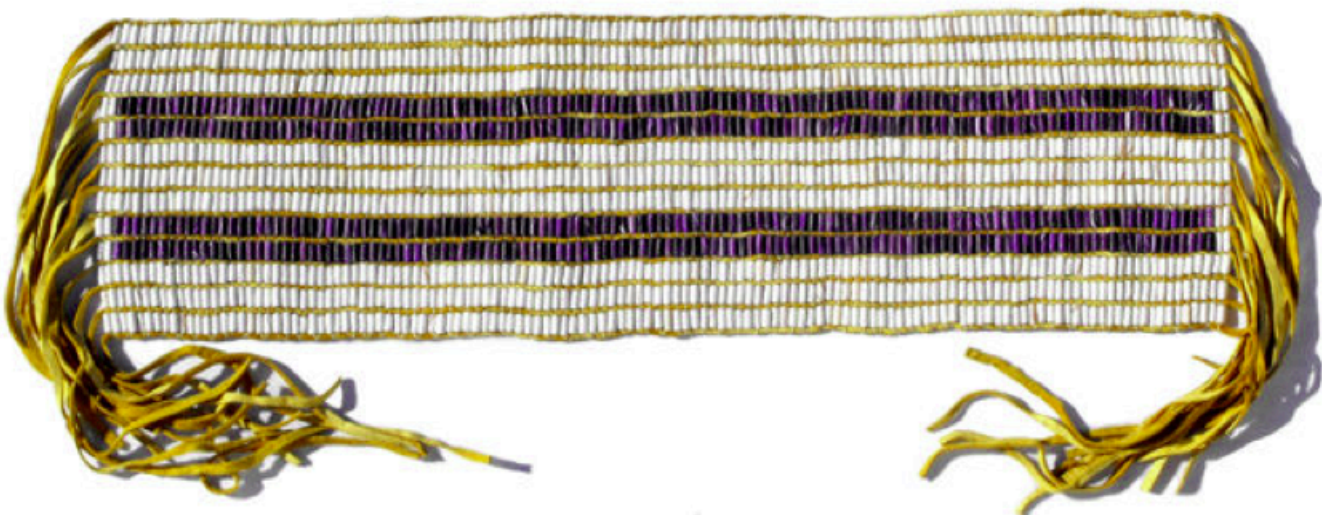
plum  
talk

it's  
our  
time

**The Vienna Convention on the Law of Treaties, 1969, defines a treaty as** “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” The Supreme Court of Canada, in *R. v. Sioui*, 1990, noted “What characterizes a treaty is intention to create obligations, the presence of mutually-binding obligations and a certain measure of seriousness. Section 35 of the Constitution of Canada recognizes and affirms rights arising from Treaties, however, as you will read later, there is often disagreement between the Crown and First Nations over the interpretation of treaties.

First Nations devised their own distinctive and creative ways to record a significant event like a treaty. One way was the oral transmission from generation to generation by the telling of stories by Elders and other members of the communities. Another way to record a significant event was by weaving a Wampum Belt as a visual record of an agreement. Wampum Belts commemorated events and agreements with other nations, told stories, and described customs, histories or laws. They are not a form of writing. Rather, wampum belts are visual symbols that serve a mnemonic or memory-boosting purpose—they help someone “read” a wampum belt by triggering and stimulating the reader’s memories of the significance and meaning of the details woven into the belt.

The Wampum Belt pictured below is known as the Kaswentha or Two Row Wampum Belt. This Belt is significant because it embodies the concepts and principles that were the basis of all the Haudenosaunee (Iroquois) agreements or treaties with other nations, including the Dutch, French, and English settlers. The Two Row Wampum Belt is a visual record and statement of the cultural, political, and economic sovereignty maintained by the Haudenosaunee in their treaty with representatives of the Dutch government in 1613 and the basis for later agreements with the Dutch (1645), French (1701) and English (1763-64). The handwritten copy of the Kaswentha was translated from Dutch by Dr. Van Loon.







## plain talk 4

The Two Row Wampum Belt contains two parallel rows of dark (purple) beads separated and surrounded by rows of light (white) beads. The white beads are considered to represent peace, friendship and respect. The two rows of dark beads represent two nations in separate vessels moving in a body of water like a river. The culture, traditions, laws and customs of First Nations peoples are symbolized in one of the dark rows. The culture, traditions, laws and customs of a European nation are symbolized in the other dark row. The meaning of the Two Row Wampum Belt is as follows:

We will travel the river together, side by side, but in our own vessel. Neither of us will make compulsory laws nor interfere in the internal affairs of the other. Neither of us will try to steer the other's vessel.

As long as the Sun shines upon this Earth, that is how long our Agreement will stand—as long as the Water still flows—as long as the Grass grows green at a certain time of the year. We have symbolized this Agreement and it shall be binding forever as long as Mother Earth is still in motion.

Treaties are part of the heritage of First Nations peoples, who entered into a variety of agreements with other First Nations for purposes like sharing lands for hunting and trapping long before the arrival of Europeans in North America. The most famous of these was the Great League of Peace—Kaianere'kó:wa or the Constitution of the Five Nations (the Seneca, Cayuga, Onondaga, Oneida and Mohawk people) to live together in peace by forming the Iroquois Confederacy or Haudenosaunee. The agreement was based on democratic ideas that respected the integrity and sovereignty of the member Nations. On October 21, 1988, the 100th Congress of the United States, Resolution 331, acknowledged the contribution of the Iroquois Confederacy to the development of the United States Constitution.

### **Beginnings of European-First Nations Interaction**

---

From time immemorial, Indigenous peoples lived and thrived throughout North America. The original peoples had adapted to the diverse landscape, geography and climate of the continent, and evolved complex cultures, languages, customs, religions, medicinal care and creation stories tied to their strong association and connection with the land. The different Indigenous nations were intimately familiar with the land they inhabited, land that supported them, and which, in turn, they revered and respected. The original inhabitants traded, waged war and made peace with each other, and acquired the skills, knowledge, tools and understandings appropriate to their environment, their customs, history and culture.

From the time of their first arrival in North America, European nations worked out a number of different arrangements with the Indigenous nations. European explorers and settlers, unfamiliar

with the different conditions in North America, owed their very existence to the expertise of the Indigenous peoples.

The earliest arrangements were peace and friendship treaties and informal trading agreements between English, French, Portuguese, Irish, Spanish, Basque, and Breton fishermen and First Nations of the east coast (primarily Mi'kmaq and Maliseet). However, Europeans sought to increase their wealth and influence in North America by establishing colonies and encouraging settlement by their own nationals. By the 1700s both the British and French became the dominant colonial powers.

To strengthen their commercial interests (a significant part of which was the fur trade), the British and the French developed various types of agreements and alliances with First Nations. For example, from 1725 to 1779, the British entered into a number of "Peace and Friendship" treaties with the Mi'kmaq, Maliseet, and Passamaquoddy peoples in what are now New Brunswick and Nova Scotia. The British colonial administration expected that these treaties would end hostilities between the British and the First Nations and establish ongoing peaceful relations. Included in these treaties were assurances that First Nations could continue to trade with the British, and hunt, fish, and observe traditional customs and religious practices. No First Nations land was surrendered in these treaties.

The British and French colonial powers expanded their influence from the east coast into the interior of North America by exploiting and developing the long-established First Nations trade routes. What followed were conflicts with each other and First Nations, the building of European forts and posts, and the forging of various alliances and agreements with First Nations.

Military conflicts between the French and British (also involving their First Nations allies) were common, reaching a critical point in 1760. French colonial efforts ended when Montréal, the last French colony on the St. Lawrence River, fell to the British. To consolidate British power, and to ensure peaceful relations with First Nations, the British created a series of treaties between themselves (known as "The Crown") and First Nations communities.

## Later Treaties

---

In 1763, a document titled the **Royal Proclamation** contained a number of significant provisions. It integrated the French territories into the new Province of Québec. The *Royal Proclamation* also specified that future negotiations with First Nations were to be between First Nations and representatives of the British crown, not with private individuals, and that these negotiations would take the form of written treaties. Furthermore, many view the *Royal Proclamation* as the first legal instrument unilaterally issued by the Crown that recognizes the fundamental rights of First Nations to their lands and resources, and their sovereignty.



## plain talk 4

The American War of Independence and the creation of the United States of America resulted in the British assigning land to a flood of immigrant British loyalists from the new United States of America and to First Nations allies of Britain who lived in the new country during the American War of Independence. The need for more land caused the British to exert greater pressure on First Nations. By the 1830s, First Nations found themselves forced into small remnants of their original territories that were economically unsustainable, with limited opportunities for growth, and increasingly losing access to medicinal plants and food, and hunting and fishing grounds. From 1871 on, the Canadian government signed treaties with First Nations for the development of farming and resource exploitation in the west and north of the country. These particular treaties have come to be known as the Numbered Treaties associated with Northern Ontario, Manitoba, Saskatchewan, Alberta and parts of the Yukon, the Northwest Territories and British Columbia.

### **The Numbered Treaties (1-11) – 1871-1921**

---

As required by the Royal Proclamation of 1763, the British Crown, through their representatives of the Dominion of Canada, were obliged to enter into formal treaty processes before they could expand westward. The British Crown and First Nations interpreted the meaning and intention of treaties in drastically different ways.

The British Crown considered the Treaties to be an exchange for the surrender of Indigenous Rights and Title to land, so settlers from foreign lands could occupy lands within the colonial territories that the British laid claim to. In return, the British Crown guaranteed Indigenous Nations certain Treaty and Inherent Rights in perpetuity.

Indigenous Nations that signed these Numbered Treaties believed they were entering a trust relationship with the British Crown; Indigenous Nations were to share and co-exist with settlers from foreign lands. Therefore, Indigenous Nations never agreed to the sale of their lands and resources. Instead, they agreed to share their indigenous lands, to the depth of a plough, as stated in the following quote:

At the time, the government said that we would live together, that I am not here to take away what you have now...I am here to borrow the land...to the depth of a plough...that is how much I want. (Senator Allan Bird, Montreal Lake Cree Nation, Treaty 6).

Based upon First Nations oral histories and written documentation, including that of the actual written text of the Treaties, First Nations assert that the British Crown made the following promises when the Treaties were negotiated and signed, which have come to be known as First Nations Treaty and Inherent Rights:

- The Treaty & Inherent Right of First Nations to maintain their own systems of governance, including selection of leadership and control over own citizenship, trade and spiritual beliefs;
- Treaty annuity or annual payments under the terms of certain treaties.
- The Treaty & Inherent Right to Education;
- The Treaty & Inherent Right to Health;
- The Treaty & Inherent Right to Child Welfare;
- The Treaty & Inherent Right to Shelter;
- The Treaty & Inherent Right to Justice;
- The Treaty & Inherent Right to Hunting, Fishing, and Trapping; and
- The Treaty & Inherent Right to Land and Resources.

### Modern Treaties in Canada—1975-2002

---

Modern Treaties are also known as comprehensive land claims agreements. A Standing Senate Committee on Aboriginal Peoples report states that “Treaties are solemn agreements that set out promises, obligations, and benefits for both the Aboriginal peoples and the Crown in right of Canada.”

Some of Canada’s modern Treaties from lands claims:

- 2008 - Nunavik Inuit Land Claims Agreement
- 2008 - Tsawwassen First Nation Final Agreement
- 2006 - Maa-nulth First Nations Final Agreement
- 2005 - Labrador Inuit Land Claim Agreement
- 2005 - Carcross/Tagish First Nation Final Agreement
- 2004 - Kwanlin Dun First Nation Final Agreement
- 2003 - Kluane First Nation Final Agreement
- 2003 - Westbank First Nation Self-Government Agreement
- 2002 - Ta’an Kwach’an First Nation Final Agreement
- 2002 - Tlicho Agreement (signed on August 25, 2003)
- 1999 - Nisga’a Final Agreement
- 1998 - Tr’ondëk Hwëch’in Final Agreement
- 1998 - Tr’ondëk Hwëch’in Self-Government Agreement
- 1997 - Little Salmon/Carmacks Final Agreement
- 1997 - Little Salmon/Carmacks Self-Government Agreement
- 1997 - Selkirk First Nation Final Agreement
- 1997 - Selkirk First Nation Self Government Agreement
- 1993 - Sahtu Dene and Métis Comprehensive Land Claim Agreement - Volume I
- 1993 - Sahtu Dene and Métis Comprehensive Land Claim Agreement - Volume II
- 1993 - Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon



## plain talk 4

- 1993 - Vuntut Gwitchin First Nation Final Agreement (effective date 1995)
- 1993 - Vuntut Gwitchin First Nation Self-Government Agreement (effective date 1995)
- 1993 - Champagne and Aishihik First Nations Final Agreement (effective date 1995)
- 1993 - Champagne and Aishihik First Nations Self-Government Agreement (effective date 1995)
- 1993 - Teslin Tlingit Council Final Agreement (effective date 1995)
- 1993 - Teslin Tlingit Council Self-Government Agreement (effective date 1995)
- 1993 - Nacho Nyak Dun First Nation Final Agreement (effective date 1995)
- 1993 - Nacho Nyak Dun First Nation Self-Government Agreement/ (effective date 1995)
- 1993 - Nunavut Land Claims Agreement
- 1992 - The Gwich'in (Dene/Métis) Comprehensive Land Claim Agreement
- 1986 - Sechelt Indian Band Self-Government Agreement
- 1984 - The Western Arctic Claim The Inuvialuit Final Agreement
- 1978 - The Northeastern Quebec Agreement
- 1975 - James Bay and Northern Quebec Agreement and Complementary Agreements (effective date 1977)

### Education Agreements:

---

- 1998 - Mi'kmaq Education Act
- 2006 - First Nations Jurisdiction over Education in British Columbia Act

### Agreements Under Negotiation:

---

#### Alberta

- 2003 - Blood Tribe Governance and Child Welfare Agreement-In-Principle

#### British Columbia

- 2001 - Draft Nuuchahnulth Agreement-In-Principle
- 2003 - Lheidli T'enneh Agreement-In-Principle
- 2003 - Sliammon Agreement-in-Principle
- 2003 - Sliammon Treaty Negotiations Summary of Draft Agreement-In-Principle
- 2001 - Draft Sliammon Agreement-In-Principle
- 2005 - Yekooche First Nation Agreement-In-Principle

#### Manitoba

- 2001 - Sioux Valley Dakota Nation Comprehensive Agreement-In-Principle
- 2001 - Sioux Valley Dakota Nation Tripartite Agreement-In-Principle
- 1999 - Manitoba Denesuline Memorandum of Understanding

### Northwest Territories

- 2001 - The Deh Cho First Nations Interim Measures Agreement
- 2001 - The Deh Cho First Nations Framework Agreement
- 2003 - Déline Self-Government Agreement-In-Principle for the Sahtu Dene/Métis of Déline

### Ontario

- Canada - Akwesasne Process and Schedule Agreement
- 2009 - Algonquins of Ontario - Framework For Negotiations Agreement and Consultation Process Interim Measures Agreement
- Anishinabek Nation Agreement-in-Principle with Respect to Governance
- 1998 - Anishnaabe Government Agreement-In-Principle

### Quebec

- 2007 - Agreement Concerning a New Relationship Between the Government of Canada and the Cree of Eeyou Istchee
- 2004 - Agreement-in-Principle of General Nature between the First Nations of Mamuitun and Nutashkuan and the Government of Quebec and the Government of Canada
- 2001 - Joint Presentation - Renewed Relationship between the Mohawks of Kahnawake and the Government of Canada
- 1999 - Micmac Nation of Gespeg Self-Government Negotiation Framework Agreement

### Nova Scotia

- Mi'kmaq - Nova Scotia - Canada Framework Agreement
- Terms of Reference for a Mi'kmaq-Nova Scotia-Canada Consultation Process

### Saskatchewan

- 2000 - Athabasca Denesuline Memorandum of Understanding
- 2001 - Meadow Lake First Nations Comprehensive Agreement-In-Principle
- 2001 - The Meadow Lake First Nations Tripartite Agreement-In-Principle

### Interpretations and Perspectives

---

The history, interpretation and implementation of treaties have been, and continue to be, contentious and controversial. Critics have made some compelling arguments that all treaties are potentially flawed and subject to re-examination. This quote summarizes some of the complexities of dealing with the content and meaning of treaties and of resolving treaty disputes:





## plain talk 4

[http://firstpeoplesofcanada.com/fp\\_treaties/fp\\_treaties\\_two\\_views.html](http://firstpeoplesofcanada.com/fp_treaties/fp_treaties_two_views.html)

The Canadians (British) and the First Nations were at the same meetings, listened to the same speeches (translated) and signed the same pieces of paper. Yet they had (and still have) two totally different concepts of what the treaties were about, and what each side was promising. The differences in understanding are rooted in two totally different worldviews, and two totally different concepts of land ownership and two colliding purposes.

There are five types of challenges with understanding what treaties really mean, largely because of differences in worldviews held by the Europeans and First Nations.

The first challenge has to do with the **meaning and symbolism** of the word “land.” There is a profound difference between “sharing land” (the view of the First Nations) and “owning land” (the view of the Europeans).

The meaning of “land” to First Nations is expressed in this quote from *Canada in the Making*:

The concept of land ownership was completely alien to the Native peoples. From an Aboriginal cultural and spiritual perspective, land cannot be bought or sold. They saw themselves as the spiritual guardians of the land, not its actual owners. Land was considered a gift from the Creator or Great Spirit, and its resources were to be used for survival purposes only. Thus, the concept of ‘surrendering’ land was one that caused great confusion within Aboriginal communities...

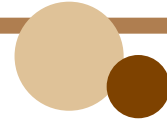
As stated in [http://firstpeoplesofcanada.com/fp\\_treaties/fp\\_treaties\\_two\\_views.html](http://firstpeoplesofcanada.com/fp_treaties/fp_treaties_two_views.html):

First Nations believed they were merely giving the new settlers the right to use some of their lands for farming. First Nations people are certain they had no thought of giving up all title to their land, nor could they even comprehend the concept of extinguishment of all title and all rights to their land forever.

The second challenge concerns the **form** or **process** of the treaties. Europeans used written statements to formalize agreements, while First Nations relied on verbal or oral forms as their “documents.” In signing treaties with Europeans, First Nations were using a foreign medium—a written document—with implications that the First Nations could not possibly have been aware of or understood. As expressed in *Treaties & Cultural Change*:

First Nations had an oral tradition. They passed down important information by the spoken word during important ceremonies and at celebrations. What was said was what was important to them, not what was written on paper.

Although First Nations had no written tradition, some First Nations had developed the Wampum Belt—a visual form of telling a story, recording an agreement and serving a range of other



ceremonial functions. Wampum Belts are also discussed in Plain Talk 12 Pre-Contact.

The third challenge has to do with the **relationship** of the signers. First Nations saw themselves as sovereign and distinct peoples who were entering a relationship with other sovereign and distinct peoples, the Europeans. From the perspective of the First Nations, there would be respect for the traditions, cultures, religions and customs of both signatories to the treaties. However, it was clear that the Europeans viewed the treaties as the beginning of the assimilation of First Nations into the worldview and customs of the Europeans, a position of the European nations that would have profound consequences on the future health, stability, and integrity of First Nations peoples and communities.

The fourth challenge concerns the **scope** of the treaties, in what might be termed a **literal** versus a **spirit and intent** character. Europeans took a very literal understanding of the treaties, meaning that the obligations and responsibilities were limited to the terms that were specified and laid out in the treaties. First Nations, on the other hand, had a wider and broader understanding and perspective of the terms outlined in the treaties. For First Nations, the treaties were only a starting point. First Nations saw verbal obligations, responsibilities or statements made by the original European negotiators as inherent components of the treaties—honour and honesty were valued. Treaties were seen as living and dynamic agreements that continued to develop and unfold as the circumstances of both signatories changed and evolved.

The fifth challenge has to do with **language**. Professional, experienced translators know well that serious errors can be made when translating an idea, a statement, even a word, from one language into another. For example, a word in one language may not have a precise counterpart or may have a variety of counterparts in another language. Because of the very nature and complexities of languages, it's rare for any translation to be absolutely perfect and an exact copy. These potential errors can be magnified when translation is conducted by people who are not trained in the subtleties of languages and who may be unaware of the influence that context can have on translated words, phrases or concepts. The translation minefield can be made even more treacherous when a document is written by only one side and in that side's language, but must be understood and accepted by someone speaking another language.

After the creation of the Dominion of Canada in 1867, treaties continued to be signed with First Nations, with the role of the European nations assumed by the Government of Canada. By necessity, this Plain Talk can provide only a brief overview of the topic of treaties by focusing on the nature, history and problems encountered. A huge volume of material is available in hard copy in various archives and on the Internet for people who wish to learn more.

Both Manitoba and Saskatchewan have produced excellent resources devoted entirely to the critical topic of treaties: The Manitoba Treaty Education Initiative Tool Kit, developed by the Treaty



## plain talk 4

Relations Commission of Manitoba (TRCM); and the Saskatchewan Treaty Kit K-12, developed by the Office of the Treaty Commissioner. Both resources should be consulted for definitive and extensive coverage of treaties and treaty relationships.

The theatre offers an excellent arena for exploring delicate and controversial issues. Governor General Award-winning playwright Ian Ross has written a wonderful, funny, and insightful play about treaties. Titled ***Kinikinik***, the play explores the issues concerning treaties. The playwright uses a willow branch as a symbol for land. Two characters, a Wolf and a Beaver, compete for possession or ownership of the willow. A third character, a Turtle, leads the Wolf and Beaver through the discovery that it's not easy to resolve possession of the willow. The characters discover that a verbal agreement might not be sufficient. They also discover that a written agreement like a treaty could be unfair if the agreement is created by only one side and in language that might not be completely understood by the other party. Whether read out loud by a group, or performed by an amateur or professional theatre group, ***Kinikinik*** is a powerful exploration of the intricacies of the creation, implementation, and interpretation of treaties.

Kinikinik (© 2010 Treaty Relations Commission of Manitoba) is included on the USB stick provided with this Kit or can be downloaded at <http://www.trcm.ca/>

Treaties, as agreements between sovereign entities like nations, invariably establish a relationship between the nations. The phrase "we are all treaty people" springs from the work of the Treaty Relations Commission of Manitoba. ***We are all treaty people*** is a concise statement that both First Nations and Canadians are integral partners in every treaty, and that we all have the responsibility to ensure that treaties be honoured and respected. It is unfortunate that Canadian governments have consistently failed First Nations by ignoring or not fulfilling their treaty commitments. By acknowledging and implementing its treaty obligations, Canadian governments could make significant steps in reversing and resolving a range of inequities endured by First Nations. This is especially deplorable given Canada's endorsement of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2010. (More information on UNDRIP can be found in the Tool Kit.)

Grand Council Chief Madahbee of the Anishinabek Nation, in a letter to the Prime Minister of Canada, has expressed his dismay at the federal government's continuing efforts to erode First Nations treaty and inherent rights.

November 21, 2012

Dear Prime Minister Harper:

Over the past couple of years it has become increasingly apparent to the Anishinabek First Nations that the federal government is on a path to dissolving First Nation treaty and inherent rights through infringing legislation. We have received copies of several letters from First Nation organizations like the Assembly of First

Nations, the Chiefs of Ontario and other political organizations across the country, opposing federal legislation that impacts First Nations. At the Anishinabek Nation we have sent numerous letters and presented our reasons for objection to the various federal standing committees on legislation that the Government of Canada seems determined to ram through parliament.

During the Harmonized Sales Tax legislation process, First Nations in Ontario unified to oppose the federal and provincial objective to combine taxation policies and eliminate the provincial retail sales tax exemptions for First Nation citizens. The very next year the federal Ministry of Revenue began taking First Nation working-class citizens to court on income tax policies, despite their treaty right not to be taxed within their own territories. Nearly every legislation or policy impacting First Nations which the federal government has introduced over the past couple of years will either eliminate First Nation treaty rights or minimize the Crown's treaty and fiduciary responsibilities to First Nations in Canada. I cannot make myself any more clear: all lands and resources in Canada belong to First Nations' people and no amount of legislation will take that fact away.

Some of the Bills we oppose include: Bill S-2 (Matrimonial Real Property), Bill S-6 (First Nations Election Act), Bill C-10 (Crimes Bill), Bill S-8 (Safe Drinking Water), Bill C-27 (Financial Transparency Act), Bill C-45 (Jobs and Growth Act, specifically sections amending the Indian Act and Fisheries), and Bill C-428 (Private Member's Bill, specifically to amend the Indian Act). I wish to put it on record again that the Anishinabek First Nations oppose, reject and dismiss each and every bill that encroaches on First Nations' treaty and inherent rights. Making sweeping changes that will impact First Nations (through legislation) without inclusion of First Nations in the development of these bills is contrary to a Nation-to-Nation relationship. The resolve of our citizens will be known across the country and we will bring national attention to the colonial approach Canada continues to push for in relation to First Nation territories and First Nation citizens' rights.

First Nations have a unique legal and historical relationship with Canada as established through treaties and alliances during times of war and peace. We have remained a loyal ally over many decades, only to watch our children get siphoned into residential schools and our land exploited for the betterment of Canada and to the detriment of First Nations. As the Grand Council Chief of the Anishinabek Nation I have limited authority as mandated by our leadership. However I am in a position to remind Canada that First Nations will not sit quietly while funding to education is frozen, funding to health is cut, and land claims are held hostage to surrender clauses while mining companies are fast-tracked to exploit our lands in order to keep Canada listed as one of the wealthiest countries in the world. First Nations socio-economic indicators continue to represent human rights issues comparable to those of many oppressed populations throughout the world. I cannot, nor would I ever attempt to, control or stop First Nation citizens if they ever decide to have their voices heard in a free and democratic society. The reputation of Canada is





## plain talk 4

darkened by First Nation realities in Canada. Let us work together to make Canada a better country by engaging in meaningful dialogue that does not include a hidden agenda to assimilate and municipalize First Nations through oppressive legislation and policies.

Grand Council Chief Madahbee of the Anishinabek Nation

Assembly of First Nations National Chief Atleo offers some observations about treaties and treaty rights.

I'd like to reflect on the promise of section 35 and the potential, to assess where First Nations are now and then set out what I see as the constructive steps to an essential path forward.

But first... before we get into too much detail, I want to begin with a story—a story from my peoples—the Nuuchahnulth. I grew up surrounded by stories and they continue to shape my perspective and those of our Nations across this country. Here is a very brief version of the important story of Bear:

*A man made a fish trap and placed it in the river. The man checked his trap every day. Each day he found it had been emptied of fish and the trap wrecked in the process. Each day, he repaired the trap and tried again. And yet each day, he found the same result. One day, he decided to wait and to see who was destroying his trap. Sure enough the man saw Bear break his trap and take all of the fish. Man confronted Bear asking why he was doing this. Rather than explain in words, Bear suggested the man accompany him so that he could show him why he was taking the fish. After walking for many hours, Man grew tired, so Bear put him on his shoulders and carried him the great distance to the Bear village. When they finally arrived, Bear gave the fish to the people of his village. The man stayed and observed the way they prepared the fish and all of the many good uses made of the fish. After some time, Bear told the man he would take him back to his river but first the man must meet the chief of the village. At this meeting, an agreement was struck between the man and the Bear Nation. If the man was willing to share the bounty of his catch, there would always be plenty of fish for both the Man's Nation and the Bear Nation. When Bear returned the man to the river, sure enough the trap was full and half of it went to the Bear Nation and in the agreement, the trap was never destroyed again and both Nations protected the river to yield fish for all in perpetuity.*

These stories are the foundation of our Indigenous belief systems and tell critical lessons of our philosophy and perspective on sustainability, on sharing, on respect and the importance of protocol. All of this helps explain our approach and our analysis.

So we look at the achievement of section 35 and what has followed. The Supreme Court of Canada stated that the principle purpose of section 35 was to fulfill the promise of reconciliation between Indigenous peoples (and our rights) and the rest of Canada—not so dissimilar to our story of Man's experience with Bear and the need for them to reach an agreement. Our question is then: **has section 35 fulfilled that promise of reconciliation?**

To gauge the effect of section 35, we need to look at how Aboriginal and Treaty rights have been dealt with before and after it was enshrined in the Constitution.

As we all know and have painfully experienced in the past—Indigenous rights have been vulnerable. This is partly because they involve obligations of the Crown—the federal and provincial governments—so they're highly dependent on the Crown's good faith—the HONOUR of the Crown. And they're also vulnerable because our peoples became a minority in Canada.

Before section 35, the federal Crown had much more latitude to infringe or extinguish our rights. Provinces could also infringe on Aboriginal rights, but Treaty rights were more secure because of section 88 of the Indian Act, which makes provincial laws subject to the terms of Treaties.

Section 35 ushered in a major shift in the legal landscape.

First Nations—and indeed all Canadians—should applaud the insight and accomplishments of the leaders who went before us ensuring that section 35 was enshrined in the Constitution. The very fact that they pressed for and won a seat at the table is a remarkable achievement. That they secured recognition and affirmation for Aboriginal and Treaty rights is extraordinary.

But it was clear that there wasn't the time during those talks, nor was there the political will on the part of Canada, to fully clarify those rights. Our leaders of the day saw that work as the next step.

**And still today, section 35 represents unfinished business—perhaps the greatest piece of unfinished business in this nation.**

Recognizing and implementing Aboriginal and Treaty rights takes us back to the very founding of this country—a country founded on our lands and politically on peaceful agreements based on respect, recognition, sharing and partnership.

Since 1982, successive governments have shown little interest in the real and hard work of reconciliation. There has been talk, but we know the equation of empty initiatives: talk minus action equals zero.

First Nations though are not standing still—are not waiting. We're taking action. For decades now we've been putting forward positive plans for progress and change, plans aimed at



## plain talk 4

breathing life into the promises we made to one another and plans that will ensure a better future for our children.

Government's response has often been limited, narrow, piecemeal and unilateral. In the absence of the honour of the Crown, much of the ground that's been broken has been through the courts.

The first test was the *Sparrow* decision in 1990. The Crown argued for a narrow interpretation—that section 35 was an “empty box” that only contained what the Crown was willing to put into it.

The Court took a strong stance **against** this position, highlighting the words “*recognized and affirmed*” in section 35. They stated that British policy had always respected Indigenous rights. The Court spoke about the importance of section 35 as a statute and a symbol, saying: (and here I'm quoting excerpts from the decision): “*section 35(1) ... represents the culmination of a long and difficult struggle ... for the constitutional recognition of aboriginal rights... (and) ..... provides a solid constitutional base upon which subsequent negotiations can take place.*”

They ruled that section 35 is a “*solemn commitment that must be given meaningful content,*”; that the words “recognized and affirmed” compel action based on a generous and liberal interpretation.

There have been many important Supreme Court judgments since *Sparrow*. A few stand out because they help give shape to the content of section 35. The 1996 *Badger* decision consolidated the requirement for broad, liberal interpretive principles for treaties based on the honour of the Crown. The 1999 *Marshall* decision affirmed a constitutionally protected Treaty right to trade.

The 1997 *Delgamuukw* decision set out a number of significant principles. It ruled that Aboriginal title—the inherent Aboriginal right to land or territory—is distinct from other forms of Aboriginal rights like hunting and fishing. *Delgamuukw* also set out a test for proving Aboriginal title that gives the Aboriginal perspective equal weight, and it reaffirmed the importance of consultation.

**It also stated—and this is very important—that the underlying purpose of section 35 is to reconcile the sovereignty of the Crown with the reality of Indigenous nations, the original, self-governing peoples of this land.**

It's worth noting that in *Delgamuukw*, the Court did not issue a binding ruling on Aboriginal title. Chief Justice Antonio Lamer instead urged the parties to negotiate, concluding with his now-famous phrase: “***Let's face it, we are all here to stay.***”

The other two key cases worth noting briefly are the *Haida* decision in 2004 and the *Mikisew* decision from 2005.

In *Haida*, the court said that the honour of the Crown does not permit the Crown to run roughshod over asserted rights simply because they're unproven. The Court also held that once a right had been asserted, the Crown was obliged to meaningfully consult and accommodate.

In *Mikisew*, the court applied the *Haida* doctrine to a Treaty context. The Crown argued that Treaties extinguished rights and there was no duty to consult. The Supreme Court disagreed: the honour of the Crown was at stake because ongoing Treaty rights, like the right to hunt and fish, could still be negatively impacted.

So all of this creates an important direction and affirmation for us and certainly a compelling call for sincere engagement and for reconciliation.

The decisions reinforce what First Nations have always held—we have a say and we will have a say—in any development in our traditional territories and the potential for economic benefits.

This is especially notable when we remember that Canada is largely a resource-based economy. Five billion dollars of investment and activity is anticipated in the coming decade in resource activity which will take place in and around First Nations traditional territories. To be blunt, this development will not proceed without the full participation of First Nations. We exist. We have leverage and we must be dealt with upfront and honestly.

Let me circle back now to my key question at the beginning: has section 35 fulfilled that promise of reconciliation?

Clearly, the answer is no. But, equally so, it's still the avenue through which we can and must achieve reconciliation.

Our relationship with Canada has always included core economic aspects—and so too now—action is required in the economic interest of First Nations and all of Canada.

Let me make four points here on the path ahead and the challenge before us:

- Reconciliation will only be achieved when First Nations' right to self-determination is reconciled with Canada's assumed authority;
- Reconciliation will only be achieved when First Nations receive a fair share of the economic benefits from our traditional territories and participate as partners in development;
- Reconciliation will only be achieved when we can fully exercise and implement our inherent rights and responsibilities to our citizens and our lands; and finally,
- We must move forward based on mutual understanding, respect, and consent. Recall the story of Man and Bear—a simple story indeed but with profound applications for us all.





## plain talk 4

To actively engage in this work, we must bring full commitment and full engagement.

We cannot rely on the courts for clarity and change. The real path to change is as—the justices have also affirmed—through negotiation and reconciliation. This is the work that I have been speaking about for over three years now. This was the idea behind the Crown-First Nations Gathering held last January.

For us, this was a first step that set another precedent on the difficult road to reconciliation. The purpose was to re-set the relationship on the proper footing of recognition and respect so that we could build on other important steps including the residential schools apology, and the endorsement of the United Nations Declaration on the Rights of Indigenous Peoples and begin the work of advancing First Nation economic interests and investing in the success of communities and children for a better future for all.

Important commitments were made to advance practical pieces of work on fiscal relations, policy reform, the economy and education. But clearly change does not come easily and all of these efforts are hampered by what First Nations see as ongoing unilateral attempts to affect our rights and intensified pressures on our lands and resources.

Current policies and approaches too often only serve to stall negotiations. It prevents First Nations from benefiting from their collective rights. It impedes the economic and political development that would take us forward to become fully self-governing nations.

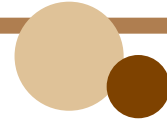
The *Constitution* is the highest law in Canada. We cannot pick and choose which sections and clauses we decide to respect and implement. If we believe in our *Constitution*, and if we believe in the promises we made to one another in the early days of this nation, it is incumbent upon us to find the way forward.

It's clear that the current federal policies, fiscal arrangements and negotiation processes are not up to the task.

We can find a path forward—a path that starts with our earliest relations—the Royal Proclamation, the Treaties of Peace and friendship, the pre-confederation and numbered Treaties—the absolute foundation of Canada's growth and progress as a Nation to section 35 and to the standards set out in the United Nations Declaration on the Rights of Indigenous Peoples.

The work of recognizing and implementing First Nations rights and governments requires a broad-based approach on many fronts.

First and foremost, First Nations need to be directly and fully involved in any process of change. This is consistent with our historic relationship as partners in Confederation and as Treaty partners, and it is consistent with the spirit of section 35. It is high time that the



government stops trying to do things **for** us and starts doing things **with** us.

We can start by conducting a full review or audit of current federal policies and processes to assess their consistency with section 35. Section 35 calls for “recognition and affirmation” of Aboriginal and Treaty rights. But current policies and processes are based on denial, diminishment and extinguishment.

A section 35 audit would compel changes across a number of areas. The Comprehensive Claims policy is a first order of business and essential to addressing some of the nation’s most pressing economic and environmental issues in the west.

It must be fundamentally reformed to recognize rights as opposed to deny and extinguish rights. Recognition will enable settlement and it will create the possibility for expeditious, fair resolution. Endless negotiation causes wasteful expense and escalates frustration for all. It is high time we got on with the reality of our rights and paved a way—away from conflict—to fairness and prosperity. This is in everyone’s interests... and where legal and moral imperatives have not yet been sufficient to compel action—surely the economic imperative makes this just common sense for any government of any stripe to be compelled to resolve.

The federal government’s existing self-government policy would also not survive a section 35 review. It needs to be repealed and replaced by processes that move to recognize First Nation governments—approaches that discard the hubris of the Crown purporting to grant or prescribe self-government.

Instead, we need approaches that implement First Nation Treaty and inherent rights. On a Treaty-by-Treaty or nation-to nation basis, we must set out a new course—one of commitment, of dedicated energy and of focus to achieve resolution. This new course would give life to a lasting relationship of mutual respect and prosperity.

We can look at a range of practical steps that implement rights and make irrelevant once and for all the legislation and the bureaucracy that has been built up around the failed colonial approaches of the past. Yes—the Indian Act and the Indian Act bureaucracy must be fundamentally and finally eliminated. But here too any attempt to tinker or impose will not work.

Instead, we’ve set out the steps that build on the important work of RCAP and suggest the need for clear, stable fiscal relationships, nation re-building among First Nation communities and capacity building and changes to the federal Government machinery—all of which would in turn give life to and support the recognition and implementation of rights and respectful, mutually supportive governmental relationships.

Let me just break that down a little with some examples that illustrate the kind of things that I mean.



## plain talk 4

To transform current self-government approaches—new mechanisms or protocols are needed—designed with First Nations—to set out the criteria and procedures to be agreed at a rate and pace acceptable to First Nations.

First Nation governments must be enabled to plan and develop their internal governance systems through constitutional development, and oversee all key functions including citizenship, justice, economic development, health, education and social services.

Moving forward, we must transform the current paternalistic relationship with the current department of aboriginal affairs to give way to specific roles that maintain, monitor and uphold the honour of the Crown.

Specific steps advanced by First Nations include setting a “Code of Conduct for the Honour of the Crown.” The Supreme Court of Canada has repeatedly told governments in a succession of cases—from Sparrow, to Taku River—that the Crown must act honourably in its dealings with First Nations. First Nations and the federal Crown could jointly develop a code of conduct for the honour of the Crown. This would enable us to monitor the Crown’s conduct and identify violations. “Good faith” negotiations are prescribed in law and must become the standard approach to negotiation.

Canada continues to not even have a policy or approach to implement or monitor its Treaty relationship with First Nations, even though the treaties are the founding documents of this country. This is essential and a requirement for the implementation of the spirit and intent of the treaties.

By “spirit and intent,” I am referring to the First Nations understanding of the Treaties, and respecting and recognizing that perspective.

Our peoples have always passed on our perspective through stories and teachings and now there is mounting additional evidence. Last February, I took part in a conference in Treaty 9 territory, around the James Bay area. I learned about the newly discovered diaries of the Government Treaty Commissioner, who led the negotiations with the First Nations. These diaries had been hidden for 100 years.

The diaries contain details on the Treaty-making discussions, including oral promises made by the Treaty partners that are not explicit in the written Treaty. The diaries show that the Crown promised First Nations that they would maintain their right to hunt, fish and trap, and retain their economy and their livelihoods anywhere across their lands and waters.

There is no doubt that this was the pattern for many Treaty negotiations across the country. This has tremendous implications in terms of the rightful sharing of resources and the right of First Nations to govern themselves.

Clearly, we need to come back to the real intention of Treaty, which means honouring the relationship of mutual respect and of a fair share of resource development.

Now is the time for all Canadians to learn the truth about our peoples, our Treaties and our historic and sacred nation-to-nation relationship so we can move forward in partnership.

First Nations are standing firm on our rights and our Treaties. It has been suggested that First Nations must choose between economics or rights—this is a false choice. It is only through recognizing and implementing our relationship to the lands, waters and resources as well as to other governments that we will achieve justice and progress.

We need a new approach to implementing the Treaties and all modern agreements. The work I'm describing requires a fundamental shift. It needs to be supported by changes to the existing bureaucracy and machinery of government.

Don't get me wrong: we're not calling for **more** bureaucracy. The bureaucracy at Aboriginal Affairs alone is already costing us more than a billion dollars, yet the results as the Auditor General pointed out for over a decade have been dismal. What we need a fundamentally different approach as I am suggesting here.

A more efficient, effective and leaner relationship aligned with the principles of section 35.

Rather than an entire Department (a department that outspends every other federal department in legal costs by the way raking up over \$100 million in legal fees last year alone), First Nations have put forward a number of ideas for a better approaches including entities like a smaller Ministry of First Nations-Crown Relations, an Office of a Treaty Commissioner and a First Nations Auditor-General—entities not to make decisions and programming to be imposed on our peoples but rather entities to respect and implement our relationship and our respective responsibilities and accountabilities.

All of these efforts are about realizing the promise of section 35, a promise that our Elders and leaders worked tirelessly to achieve. We need to honour their achievement by honouring that promise.

The clock is now ticking, with increasing pressure on lands and resources and increasing frustration and tension. We have seen the tragedies that explode when patience runs out.

We all know the cycle: promises made, promises broken, anger builds, confrontation—then an embarrassed government sets up a task force or commission. It makes recommendations, and new promises are made. First Nations are fed up with this vicious circle. And you should be too.

We all want to believe that Canada is fair and just. But the situation of First Nations is a deep





## plain talk 4

scar on our national soul. It was never intended to be this way.

We made a promise to each other in those early days of contact, a sacred vow to share in the beauty and riches of this land, a vow based on mutual respect, mutual recognition, partnership and sharing.

While the Supreme Court itself said, succinctly, in the Sparrow decision: *“We cannot recount with much pride the treatment accorded to the native people of this country.”*

We do have positions of strength to build on—and I believe that section 35 remains a key cornerstone of this work—when we add the residential schools apology and the endorsement of the United Nations Declaration—we can move forward through new ways of coming together as we did with the Crown last January.

It is time for Canada to honour its promises and work with us to chart a new path forward. Canada has the potential to set the model for such relations around the world—recognizing and honouring relationships for the mutual benefit of all – but we have much work to do.

This is an era of opportunity. First Nations are the youngest and fastest growing part of the population. We are the future of this country. Strong First Nations make a stronger Canada. If we work together we can raise First Nations education and employment levels up to those of the Canadian average. That alone will add literally billions to the country’s economy and save a billion more in costs related to our poverty and poor health.

It’s time for change. Now is our time. First Nations are pushing and pursuing every opportunity for cooperation. We know there are ways we can work together that benefit all and honour the promise we made to one another.

First Nations want to be full partners in designing a collective future—for our communities and the country as a whole.

I invite all of you to join with us, with First Nations, on this new national dream towards a better, stronger Canada. We can create a brighter future, in the same way that our ancestors came together with a vision of a nation founded on mutual respect, partnership and sharing.

Section 35 and other steps have set our path and this is a tremendous advantage—the road ahead is long and it is difficult—but it is a road we must travel together. When we think again of Bear, we realize that it is story principally about achieving relationship-success—a story of reconciliation with tremendous economic and sustainability benefits for all involved. Its wisdom speaks powerfully to us today and of our work together.

I’ll close by recalling the words of Chief Justice Lamer, that **“we are all here to stay.”** I would add

to those wise words that we are all in this together and together we can succeed.

Kleco, Kleco!

National Chief Shawn Atleo

---

## References

Borrows, John. "Canada's Indigenous Constitution." Toronto: University of Toronto Press, 2010.

Borrows, John "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government," in *Aboriginal and Treaty Rights in Canada*, ed. Michael Asch. Vancouver: UBC Press, 1997, 155.

Canada in the Making: Aboriginals: Treaties & Relations: [http://www.canadiana.ca/citm/themes/aboriginals1\\_e.html](http://www.canadiana.ca/citm/themes/aboriginals1_e.html)

Canada. Standing Senate Committee on Aboriginal Peoples. (May 2008). *Honouring the Spirit of Modern Treaties: Closing the Loopholes, Special Study on the implementation of comprehensive land claims in Canada, Interim Report.* [www.senate-senat.ca](http://www.senate-senat.ca)

First Nations in Canada: <http://www.aadnc-aandc.gc.ca/eng/1307460755710/1307460872523>

First Nations Treaties in Canada: <http://suite101.com/article/first-nations-treaties-in-canada-a103415>

Kinikini: A Treaty Play by Ian Ross, Treaty Relations Commission of Manitoba: 2010.

Prince Albert Grand Council. eCulture: <http://eculture.pagc.sk.ca/eculture.php?pid=Overview&tp=slnk&language=&ver=>

The Manitoba Treaty Education Initiative Tool Kit, developed by the Treaty Relations Commission of Manitoba (TRCM).

The Saskatchewan Treaty Kit K-12, developed by the Office of the Treaty Commissioner.

Treaties & Cultural Change: [http://firstpeoplesofcanada.com/fp\\_treaties/fp\\_treaties\\_two\\_views.html](http://firstpeoplesofcanada.com/fp_treaties/fp_treaties_two_views.html)

Treaties with Aboriginal People in Canada: <http://www.aadnc-aandc.gc.ca/eng/1100100032291/1100100032292>