

THE CONSTITUTIONAL RIGHT OF AN ENRICHED LIVELIHOOD

.....

James (Sakej) Youngblood Henderson

One of the greatest challenges to the human mind is to comprehend and to gain access to those things we know exist but cannot see. Not everything that is real and useful is tangible and visible. ... Throughout history, human beings have invented representational systems — writing, musical notation, double-entry bookkeeping — to grasp with the mind what human hands could never touch. In the same way, the great practitioners of capitalism, from the creators of integrated title systems and corporate stock to Michael Milken, were able to reveal and extract capital where others saw only junk by devising new ways to represent the invisible potential that is locked up in the assets we accumulate.¹

A vision of the future should build on recognition of the rights of Aboriginal peoples and on the treaty relationship. ... These treaties between the [British] Crown and First Nations are basic building blocks in the creation of our country. ... The treaties between the Aboriginal peoples and the Crown were key vehicles of arranging the basis of the relationship between them ... The Government of Canada affirms that treaties, both historic and modern, will continue to be a key basis for future relationship.²

I. INTRODUCTION

In Canada the Indian treaties contain sacred prayers and visions of the Aboriginal nations and tribes, although some of these visions were written by the British negotiators in the form of promises, rights, and obligations. In whatever form, the treaties promise the future security of land, labour, and lifestyles, things that the treaty beneficiaries needed to generate a treaty economy based on economic and educational resources for an enriched life. Importantly, the treaties represent a secure imperial constitutional framework, in which basic economic rights are not only ensured, but are distributed within each Treaty nation according to its own laws.

Current government resource transfers to bands and Indians have been detached from treaty rights and economy and are inherently insecure moneys as compared to the constitutional rights in the treaties. These transfers sustain poverty, fool's gold, and dead capital, creating a cash flow, but not development. They do not create incentives or possibilities for sustained (much less sustainable) development.

Canadian governments have treated treaty rights as inherently unequal to imperial acts and the personal bonds of allegiance between

James Youngblood Henderson is Research Director, Native Law Centre of Canada, College of Law, University of Saskatchewan. Professor Henderson, a leading expert on treaty federalism, the constitution, and Aboriginal tenure, is author of numerous books and articles, including *The Mikmaq Concordat* (Halifax: Fernwood, 1997); (with M. Battiste), *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon, SK: Purich, 2000); and (with Benson and Findlay), *Aboriginal Tenure in the Constitution of Canada* (Scarborough, ON: Carswell, 2000). Guidance provided by *ababinilli*, *máheóo*, and *niskam*, although I assume full responsibility for my purposive, discursive and iterative interpretation.

the sovereign and overseas subjects. For undisclosed reasons, the colonial governments ignored the prerogative treaties with the Aboriginal nations in numerous ways, condemning most treaty beneficiaries to an unacceptable poverty and undignified existence. They have generated the context of poverty and the abysmal gaps which separate Aboriginal peoples from other Canadians. This situation must be improved and reformed — in short, changed for the better. We must do so in a world that offers, simultaneously, more and less resistance to change than before. Too long have Aboriginal peoples been the beneficiaries *and* victims of the vices and virtues of Canadian colonization.

Aboriginal peoples of Canada already possess the assets they need to make a sustainable treaty economy. These assets are held in defective administrative forms by federal, provincial, and territorial governments. Moreover, these governments take most of the tax revenue and all the surplus value. Treaty beneficiaries need to rethink Canada and take on the world, rediscovering and unleashing the economic potential in the treaty economy to create sustainable development and sustainable communities.

II. TREATY ECONOMY

Constitutional respect for treaties, the treaty order, and treaty federalism³ represents the minimum condition for economic development.⁴ Understanding the treaty economy and its relation to capital is an intellectual challenge for treaty beneficiaries faced with the task of comprehending the economic and legal structure hidden in the spirit and intent of the treaties. They cannot expect the federal government to accomplish this task. They have to gain access to legal consciousness and constitutional rights in order to unravel the hidden potential of the treaty economy and its promises of an enriched livelihood.⁵

The British sovereign's obligations to the enriched livelihood of treaty beneficiaries were vested in the negotiations and the written treaties. For their part, Aboriginal nations insisted upon the application of their traditions and principles in the conferences and treaties for ordering the new relationship and creating a multicultural society in their territories. By adapting themselves to Aboriginal legal traditions and diplomacy, European negotiators

secured alliances, while ensuring the interplay of a multiplicity of Aboriginal orders with European orders.

The Supreme Court of Canada has stated that, as written documents, the treaties recorded agreements that had already been reached orally, but they did not always record the full extent of the oral agreement.⁶ Sacred agreements derived from the oral exchange of solemn promises, and the Crown's honour requires the Court to assume that the Crown intended to fulfill its promises.⁷ The terms of federalism within these treaties were concerned with: protection of inherent Aboriginal rights; distribution of shared jurisdictions; territorial management; treaty economies, human liberties and rights; and treaty delegations. Unlike a legislative regime that asserts comprehensive authority, treaty federalism is a living process that creates jurisdictional and economic borderlines.

These imperial obligations were passed on to Canada in section 35(1) of the *Constitution Act, 1982*.⁸ Part of the supreme law of Canada with which federal and provincial law must be consistent under s. 52(1),⁹ they apply equally to male and female beneficiaries of treaty rights.¹⁰ This constitutional repositioning of the relationship between treaties and legislation inverts the paternalistic colonial perspective.

In addition, the Supreme Court of Canada has affirmed the treaties did not extinguish Aboriginal sovereignty or economy, but recognized that sovereignty. Nor did they abolish Aboriginal orders or lifestyles. In examining a 1760 treaty, Lamer J. in *Sioui* affirmed that the policy of Great Britain excluded all other Europeans in charters and claims from the territory inhabited by the Indian nations. The British sovereign considered Aboriginal peoples as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she acknowledged the obligation inhering in treaties.¹¹ Although the text of the treaties is primary in determining constitutional rights, the text is not exhaustive.¹² Certain unwritten visions or principles generate the internal architecture of the treaties and operate symbiotically with the text to create an interpretative treaty framework. The implicit processes buried in the intricacies of the treaties were designed to protect the Aboriginal economy as well as enrich the livelihood of treaty beneficiaries. Indeed, the promises of treaties

are the constitutional basis of the economic expectations of treaty beneficiaries.

Further, Aboriginal treaties with the British sovereign were negotiated in the context of existing Aboriginal economies and the vast trading and commerce network among Aboriginal nations.¹³ The British sovereign deliberately entered into treaties for the purpose of acquiring economic or trading rights in Aboriginal territory—and did not thereby limit the freedoms of Aboriginal nations.

Article XV (15) of the *Treaty of Utrecht (1713)* affirmed the freedoms of the Five Nations, the Haudenosaunee, and other Aboriginal nations who were “Friends” of the French Sovereign, including the Wabanaki Confederacy, the Mikmaw nation, and the Ojibwa Confederacy:

The Subject of France Inhabiting Canada and others shall hereafter give no Hindrance or Molestation to the Five Nations or Cantons of Indians, Subject to the Dominion of Great Britain; nor to the other Natives of America, who are Friends to the same. In like manner, the Subjects of Great Britain, shall behave themselves Peaceably toward the Americas, who are Subjects or Friends to France; and on both Sides, they shall enjoy *full Liberty of going and coming on Account of Trade*. As also the Natives of those Countries shall, *with the same Liberty, Resort, as they please*, to the British and French Colonies, for Promoting Trade on one Side, and the other without any Molestation or Hindrance, either on the Part of the British Subjects or of the French.¹⁴

Article XV ensured equal respect was accorded to Aboriginal nations and peoples by both British and French subjects, and made Aboriginal sovereignty, tenure, and rights a subject of the law of nations. Exempt from British or French regulation of trade and residence, Aboriginal nations were guaranteed full liberty of trading, in British law equivalent to an exclusive prerogative franchise vested in certain persons. In the eighteenth century, the terms “liberty” and “franchise” were interchangeable royal grants of exclusive economic rights,¹⁵ grants the courts have held that His Majesty was powerless to revoke.¹⁶ Similar liberties were affirmed in creating the border between the United States and British North America in the Jay Treaty and 1812 Treaty.

The Wabanaki Compact (1725) and the Mikmaw Compact (1752) affirmed the traditional lands and the free liberty of trade and harvesting of their land, placing these confederacies under the “Field of British liberties”, ensuring “[t]he Laws will be like a great Hedge about your Rights and properties — if any break this Hedge to hurt or injure you, the heavy weight of the Law will fall upon them and furnish their disobedience.”¹⁷ In the Treaty of Niagara (1764), the Ojibwa and Cree Confederacies likewise entered into relations with the British sovereign, and they were “assure[d] ... of a Free Fair & open trade, at the principal Posts, & a free intercourse, & passage into our Country” acquired by treaties, especially under the French territories acquired in the Treaty of Paris (1763).¹⁸

The 1817 treaty and the Victorian treaties, the Robinson treaties, and Treaties 1-11 extended the treaty relationship among the Ojibwa, Cree, Blackfoot and Denesuline chiefs in the western Indian country. Together these treaties created the ideal of thinking and living together on the land (*witaskêwin*).¹⁹

Nor do the Victorian treaties (1837–1901) establish any limitations on Aboriginal economies or trade. Maintaining the Aboriginal way of life, livelihood, and governance was a key aim of the Aboriginal Chiefs and Headmen in the treaty negotiations.²⁰ In a common section of the Treaties, the chiefs promised the Queen:

that they will maintain peace and good order between each other, and also between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians or whites, now inhabiting or hereafter to inhabit any part of the said ceded tract.²¹

Similar to other constitutional law in the British dominions, the treaties maintain the essential juridical framework of peace and order while promising to secure Aboriginal economies as well as a life of abundance.

The Victorian treaties secured the obligations of the Great Mother, the Queen, to create an enriched way of life for treaty beneficiaries and their descendants. The treaties promised them the bounty and benevolence of the Queen.²² Treaty Commissioner Archibald first met with more than a thousand Ojibwa citizens in the summer of 1871, opening negotiation of

the 1871 treaties by establishing expectations for and standards of the treaty by saying Her Majesty the Queen (“your Great Mother”) wishes them to be “happy and content and live in comfort”. She would like them to “adopt the habits of the “whites” or “white man” to “make them safer from famine and distress”, to “make their homes more comfortable”, and “live and prosper”. However, the Great Mother “has no idea of compelling you to do so.” She left the economic decision and lifestyles to their own “choice” and “free will”.²³

In Treaty 4, the treaty commission reaffirmed these standards. Treaty Commissioner Morris stated the Queen and her Councillors would like the Indians to “remain self-supporting by hunting, fishing, farming, construction and education”²⁴ and “to learn something of the cunning of the white man”.²⁵ Kamooses questioned: “Is it true you are going to give my child what he may use? ... Is it true that my child will not be troubled for what you are bringing him?”²⁶ The Treaty commissioner responded: “Yes, to those who are here and those who are absent, such as she has given us. ... The Queen’s power will be around him [the children].”²⁷ He stated:

The Queen cares for you and for your children, and she cares for the children that are yet to be born. ...The Queen has to think of what will come long after to-day. Therefore, the promises we have to make to you are not for to-day only but for tomorrow, not only for you but for your children born and unborn, and the promises we make will be carried out as long as the sun shines above and the water flows in the ocean.²⁸

During the negotiation of Treaty 6 (1876), Treaty Commissioner Morris “fully explained” to the Cree citizens they did not have to abandon their “present mode of living”. He promised that the treaty would not “interfere with your hunting and fishing ... through the country, as you have heretofore done.”²⁹ He assured the chiefs they could continue to govern and use the ceded lands: “What I have offered does not take away your living, you will have it then [after the treaty] as you have now, and what I offer now is put on top of it.”³⁰

Additionally, the Treaty Commission and the Chiefs were concerned with and negotiated for “a new life [which] was dawning upon them.”³¹ Treaty Commissioner Morris promised

the enriched life upon which the Aboriginal negotiators were insisting. He saw a “bright sky” ahead for their lives and the lives of their children. They would have homes, gardens, and farms of their own, and their children would be sent to school. He stated that the Queen:

wished to help you in the days that are to come, we do not want to take away the means of living that you have now, we do not want to tie you down; we want you to have homes of your own where your children can be taught to raise for themselves food from the mother earth.³²

These obliging and wonderful promises of the Treaty Commissioner prompted a very old man to question: “*Ahow Okeymow* (chief), I do not believe what you are saying. Does the Queen feel her breasts are big enough to care for us all? There are many of our people.” The treaty commissioner is said to have responded: “Yes, she has a large breast, enough so there will never be a shortage.”³³

In Treaty 7, the treaty commissioner reassured the Blackfoot Confederacy the purpose of the treaty was for them to relate to the Queen “as brothers and sisters, as one family”. The “Great Mother, the Queen” would hold them “in the palm of her hand, and protect them, and look after them just like a child” as long as the sun, river, and mountain last.³⁴ The Treaty commissioner said to Chief Bad Head, the head chief of the Blackfoot Confederacy: “The Queen promises that she will give you all the help required and will look after you and take care of you for as long as your people live.”³⁵ And to Chief Crowfoot, he stated: “[The Queen] will take the best care of you. Whatever you ask for will be given to you.”³⁶

In Treaty 8, the Indian elders also stressed the importance of maintaining the traditional Aboriginal way of life and livelihood.³⁷ Also, the official reports of the treaty commissioners made it clear that the intent of the treaties was not to interfere with the traditional Aboriginal way of life.³⁸ In *Badger*, Cory J. stated the purpose of Treaty 8:

[I]t is clear that for the imperial Sovereign guarantee to the Indians that they could continue their aboriginal rights of hunting and fishing to earn their livelihood was the essential element which led to their signing the treaties.³⁹

In *Horseman*, Wilson J. for the dissenting justices stated: "Hunting, fishing and trapping lay at the centre of their way of life."⁴⁰ The Commissioners' report to Canada dated September 22, 1899, states:

We assured them that the treaty would not lead to any forced interference with their mode of life, that it did not open the way to the imposition of any tax, and that there was no fear of enforced military service.⁴¹

Such promises of benevolence and enriched livelihood, then, create a constitutional right to abundance for treaty beneficiaries. The treaty negotiators and beneficiaries understood an enriched livelihood as a sufficient, sustainable, supplemental livelihood. The three purposes for entering into treaties with the British sovereign were to ensure that future generations (1) would continue to govern themselves and the territory according to Aboriginal teachings and law; (2) would make a living (*pimâchihowin*), providing for both spiritual and material needs; (3) would live harmoniously (*wîtaskêwin*) and respectfully with the treaty settlers.

The right to an enriched livelihood is translated into Cree language and worldview as the concept and doctrines of life (*pimâtisiwin*), including the law that regulates the ability to make and sustain a living or livelihood (*pimâchihowin*).⁴² An enriched livelihood can be secured through harvesting natural resources, self-employment, and trade. Alternatively, an enriched livelihood could be secured by participation in the new knowledges, skills, technologies, and economies introduced by the Crown: business ownership, farming, paid jobs, and accumulated wealth, as well as through support of family, community networks, and government assistance.

III. *ULTRA VIRES* LEGAL REGIMES

The reasons that the treaties did not generate an enriched livelihood or happiness or wealth lie in the false assumptions and extralegal effects of colonization in Canada. As in Latin America, the colonialists created a parallel extralegal political economy that confiscated natural assets and trade for the immigrants. This paper economy produced the generative capital that created their wealth. This political economy and its legal

consciousness left Aboriginal peoples with dead capital, an inability to deploy its potential, and an inability to compete economically with colonialists. The *Final Report of the Royal Commission on Aboriginal Peoples* (RCAP)⁴³ sought to "clear away old misconceptions and open new vistas" in Canadian history.⁴⁴ RCAP discloses and displaces the false premises that created the *Indian Act* in the colonial legal era and caused public officials to ignore treaty rights and obligations. In addition, it reveals the constitutional framework of treaties within the unfolding era of constitutional supremacy.

The purpose of RCAP's historical analysis is to uncover why and how a nation-to-nation relationship of equality in the treaties was transformed into the dominated, subordinated, marginalized relationship of the colonial era. It revealed the key to the paradoxes in this relationship lay in the different ways imperial and Canadian legal thinking viewed Aboriginal sovereignty and treaties.⁴⁵ In the colonial era of Canada, RCAP establishes, the colonial politicians replaced the established treaty in imperial constitutional law with an extra legal or *ultra vires* regime of colonial law beyond the power of or without authority delegated by the imperial treaties.

As Aboriginal nationhood and treaty wealth was dismantled by *ultra vires* colonial legislation, lands reserved for the Indians were reduced to serve immigrant needs, and protected Aboriginal ways of life were deliberately destroyed by federal legislation. The *Report* affirms the findings of the *Report of the Select Committee of the House of Commons on Aborigines, 1837*, which documented the colonial government's abuses of its legislative power and its systematic disregard for Aboriginal and treaty rights. Upon this extralegal foundation the colonial legal regime was established and recognized. This foundation of abuse constructed Indians as children of the state who needed to be transformed by the higher civilization of the "white men" and has left a legacy of systematic discrimination experienced by treaty beneficiaries.

RCAP's historical analysis demonstrates the power of colonial representations by the power-hungry colonialists, most of British heritage, to create a legal and policy context in Canada, built on "living lies".⁴⁷ RCAP singles out the Indian Affairs branch of the federal government for severe criticism, denouncing its mismanagement, its complacent paternalism, and

its failure to fulfill its responsibility as a trustee for Aboriginal peoples.⁴⁷ In short, under the guise of responsible government, the colonialists created an *ultra vires* system based on false premises.

These false premises discriminated against imperial law, Aboriginal rights, and treaty rights, while favouring immigrant rights and manufacturing the disparity between Aboriginal and Canadian societies.⁴⁸ As a consequence, Aboriginal peoples were removed from their homelands, their nationhoods were suppressed, their Aboriginal and treaty rights were ignored, their governments were undermined, and their identities and cultures were smothered. Faced with the “Indian problem”, the colonialists, filled with notions of their own superiority, sought remedy by assimilating so-called racially and culturally inferior people, “civilizing” them by transforming them into British models of Christian farmers or traders.

In response to this history of colonial presumption, RCAP calls for the restoration of treaty rights and the enhancement of governing powers for Aboriginal peoples.⁴⁹ RCAP insists that the time has come for governments, courts, and the public to correct the false premises of colonization, and to reform all the laws, policies, and regulations based on them. In the colonial era, the most senior officials accepted these false premises as binding facts. In the courts, these false premises became integral parts of the Canadian legal system and were routinely applied. These false premises created the rule of recognition in the Canadian legal system, which specifies the criteria that determine what other laws should be recognized as part of the system or as valid law, discriminating against treaty rights.

According to RCAP, the treaty relationship between Aboriginal peoples and the Canadian government was “mired in ignorance, mistrust and prejudice. Indeed, this has been the case for generations.”⁵⁰ The commission’s findings situate the dishonoured treaties among the negative “ghosts” of Canadian history.⁵¹ For RCAP, the treaties are constitutional instruments that create and regulate the relationship with Canadian governments; they are “sacred”, and they create a “social compact”.⁵² They are the “bearers of ancient and enduring powers”⁵³ that created “treaty federalism” in Canada,⁵⁴ which “is an integral part of the Canadian constitution.”⁵⁵ These existing treaties are comparable to the

“terms of union where former British colonies entered Confederation as provinces.”⁵⁶

RCAP’s recommendations, and its vision of a multinational Canadian federation in which self-governing Aboriginal nations participate as equals, are based on the centrality of section 35 of the *Constitution Act, 1982*. Section 35 confirms the status of Aboriginal peoples as equal partners in the complex federal arrangements that make up Canada and provides the basis for recognizing Aboriginal governments as one of three distinct orders of government in Canada — Aboriginal, provincial, and federal — each sovereign within its several spheres, holding powers by virtue of inherent or constitutional status rather than by delegation. They share the sovereign powers of Canada, powers that represent a pooling of existing sovereignties.⁵⁷

RCAP identifies four basic, but interrelated, pillars to a reinvigorated constitutional relationship between Canadian governments and Aboriginal peoples: treaty, governance, lands and resources, and economic development. RCAP’s constitutional vision of returning to treaty principles establishes a new social compact in Canada respecting cultural diversity.⁵⁸ In *People to People, Nation to Nation*, a volume of RCAP highlights, the commission states that “an agreed treaty process can be the mechanism for implementing virtually all the recommendations in our report — indeed, it may be the only legitimate way to do so.”⁵⁹

RCAP concludes that the legacy of colonialism weighs heavily today upon Aboriginal people in the form of cultural stress, while distorting the perceptions of non-Aboriginal people, who remain ready to relegate Aboriginal people to the margins of Canadian society.⁶⁰ Canadian institutions, courts, and peoples are struggling to displace systemic discrimination, even in the wake of constitutional reforms. Indeed, the assumptions, practices, and singular viewpoints that are the legacies of colonialism are so common that systemic discrimination often appears as natural, neutral, and justified. And the overt and covert manifestations of colonialism have serious detrimental consequences not only for Aboriginal peoples but also for other races and ethnic peoples.

RCAP urges reconciliation and rapprochement based on a “great cleansing of the wounds of the past”,⁶¹ which can only come from public acceptance of the government’s responsibility for past wrongs. Only with this acceptance can

a new context be created for healing and for a new beginning.⁶² In response to RCAP, Canada's "Statement of Reconciliation" affirms:

Sadly, our history with respect to the treatment of Aboriginal people is not something in which we can take pride. Attitudes of racial and cultural superiority led to a suppression of Aboriginal culture and values. ... We must recognize the impact of these actions on the once self-sustaining nations that were disaggregated, disrupted and even destroyed by the dispossession of traditional territory.... We must acknowledge that the result of these actions was the erosion of the political, economic, and social systems of Aboriginal peoples and nations.⁶³

In its Aboriginal Action Plan, Canada has affirmed that treaties provide the constitutional basis for the legal relationship and expressed willingness to continue to implement treaty-making to establish integrated processes regionally to address treaties, governance, and jurisdiction:

A vision of the future should build on recognition of the rights of Aboriginal peoples and on the treaty relationship. ... These treaties between the [British] Crown and First Nations are basic building blocks in the creation of our country. ... The treaties between the Aboriginal peoples and the Crown were key vehicles of arranging the basis of the relationship between them ... The Government of Canada affirms that treaties, both historic and modern, will continue to be a key basis for future relationship.⁶⁴

IV. FOOL'S GOLD AND DEAD CAPITAL

Governmental resource transfers — "fools' gold" — to bands and Indians, as I suggested earlier, have been detached from treaty rights.⁶⁵ That Canadian policy is to provide a basic level of programs and services to all Canadians has obscured its special obligations. Yet as a matter of constitutional supremacy, Canada has recognized that treaty beneficiaries have constitutionally protected rights in addition to access to basic programs and services enjoyed by residents in treaty territories. Transfer payments should be consistent with other equalization payments and the supplemental payments required for the treaty economy and its rights and obligations. Yet transfers are insecure moneys as compared

to the constitutional rights in the treaties. They have created intractable poverty — poverty that is manifest as vast differences in power, social and economic status, and the psychology of inferiority and resignation.⁶⁶ These policies have abandoned Aboriginal youth to placate the middle aged, adding to one of the great injustices of Canada: the failure of Canadian education to provide the youth with knowledge and skills.⁶⁷

Consistent with colonial ideology, Canadians have viewed Indians as a burden on the national treasury and economy, understanding reserves as "pockets of poverty" and blights on the economic landscape. This ideology conveniently overlooks the enormous conditional land transfer that the treaties made to Canada's wealth and economy. It also neglects the continuing federal transfer payments for Indians that act as indirect subsidies to provincial economies.

The registered Indian economy is an underdeveloped, unbalanced, dependent economy — dependent on net inflows of money from transfer payments. It is concentrated in government services (15.2%), wholesale and retail trades (14.6%), manufacturing (10.3%) and accommodation and food and beverage (9.4%). The Indian economy is underrepresented in financial and insurance services and manufacturing and enjoys little circulation of goods and services; most expenditures of transfer payments are made directly to the provincial economy. Treaty beneficiaries have remained poor, most at or below the national poverty line, with average personal incomes of on-reserve Indians about \$12,000 each year, with at best only 47% working in the labour force in the service (tertiary) sector.⁶⁸ Treaty beneficiaries in major western cities are four times more likely to live below the poverty line than other residents. Besides low rates of employment and low incomes, the Indian economy reflects socio-economic correlates of under-development, such as low rates of educational attainment (75% dropout rate in secondary school), low life expectancy, poor housing and health conditions.

The Aboriginal population is young and growing at twice the national rate of Canada. A vast part of the economically active population continues to lack the barest access to the resources and opportunities of production — technical or professional education, credit, and the prospect of a decent, long-term job in an organization run on the basis of merit. RCAP estimated that more than 300,000 jobs would

need to be created for Aboriginal people between 1991 and 2016 to accommodate growth in the Aboriginal working-age population and to bring employment levels among Aboriginal people up to the Canadian standard.⁶⁹

Almost every modern problem hits Aboriginal peoples hardest, including: unemployment; incarceration rates (5–6 times higher than the national average), and urban crime (4 times higher); family violence and violence generally, including violent deaths; suicides (8 times higher); alcohol and drug abuse; numerous ailments linked to living standards and nutrition; fetal-alcohol syndrome; poor pre-natal care and child development; diseases and death rates. Unable to equalize economic opportunity for Aboriginal peoples, Canada's transfer payments have instead provided billions of dollars for an ineffective, costly, debilitating, and totalitarian federal bureaucracy and cadre of experts.⁷⁰

The *Final Report* of RCAP argued that a rebalancing of political and economic power for Aboriginal peoples is essential to pave the way toward prosperity.⁷¹ Rejecting federal bureaucrats' and experts' solutions, it gave an urgent warning to Canadians and Canadian governments about the effects of the existing transfer programs:

Currently on the margins of Canadian society, they will be pushed to the edge of economic, cultural and political extinction. The government must act forcefully, generously and swiftly to assure the economic, cultural and political survival of Aboriginal nations.⁷²

In a recent ruling on Canada's human rights record, the United Nations Committee on Economic, Social and Cultural Rights, a human rights body that monitors state-party compliance with the International Covenant on Economic, Social and Cultural Rights, stressed "the gross disparity between Aboriginal peoples and the majority of Canadians."⁷³ After carefully considering the submissions not only of Aboriginal peoples, but also of the Department of Indian Affairs, the Privy Council Office, Justice Canada and the Department of Foreign Affairs, the Committee concluded:

There has been little or no progress in the alleviation of social and economic deprivation among Aboriginal people. In particular, the Committee is deeply concerned at the shortage of adequate housing, the

endemic mass unemployment and the high rate of suicide, especially among youth in the Aboriginal communities.⁷⁴

In 1999, the United Nations Human Rights Committee condemned Canada's human rights record with respect to Aboriginal peoples.⁷⁵

Despite the resurgence in Aboriginal capacity in the past thirty years, the gap between Aboriginal and general Canadian life opportunities remains disturbingly wide. While Canada regularly ranks first on the United Nations Human Development Index, registered Indians living on-reserve would rank 63rd and registered Indian and off-reserve would rank 47th applying the UN criteria of education, income, and life expectancy. Aboriginal youth are especially vulnerable.

And the picture of poverty obscures the perception of Aboriginal capacity. Strategies for building on Aboriginal capacity have been set out in RCAP and in subsequent forums. They include supporting community-led initiatives that mobilize Aboriginal people in diverse situations to deal with their own issues; creating space for Aboriginal institutions that provide sustained, effective leadership in accord with the culture of the community; promoting partnerships and collaboration among Aboriginal people, the private sector and public institutions to break down isolation and barriers to productive relationships; and recognizing the authority of Aboriginal nations to negotiate the continuing place of Aboriginal peoples in Canadian society, whether on their traditional lands or in the city.

In this context, the treaty economy faces formidable challenges: it lacks access to equity and debt capital, especially in its land and resources; it lacks business and marketing development in treaty-wide, national, and international markets; and innovation initiative, workforce training, and experiences in a knowledge-based economy. The current situation follows patterns revealed by Hernando de Soto's analysis of Latin underdevelopment in *The Other Path*,⁷⁶ and in his popular book *The Mystery of Capital*.⁷⁷

In *The Other Path*, de Soto identified the barriers to private sector growth that had been invisible to others. The key barrier, he argued, has long been weak institutions. The institutions that allow markets to function efficiently are derived from the legal imagination in the developed world, including contract law, financial markets, property rights, and respected judicial

systems. These institutions and this imagination are too often lacking in Latin American states and other zones of poverty. While vibrant markets exist for local products and transactions in the poverty zones, the absence of a solid institutional framework means that the full potential of each nation's entrepreneurs goes untapped. De Soto firmly believes that people anywhere, when empowered and unrestricted, can build institutions to create a strong economy.

In the *Mystery of Capital*, de Soto argues that implicit legal consciousness and infrastructure create capital. Capital is not money, which is but one of the many forms in which it travels.⁷⁸ It is hidden value. Capital is a product of the cognitive skill to grasp abstract and extrinsic potentials of assets or money and to deploy new production or investments. As Adam Smith and Karl Marx stated: "capital is metaphysical"; it is surplus value. The hidden value is embedded in consciousness and needs to be represented and captured or monetarized. The legal system is where capital is captured. Property and contracts give efficiency to the capturing of capital to create economic growth and organize an economy in Europe and North America. As the French post-structuralist Michel Foucault comments, the horizon of possibility only exists in the abstract and it is directed by representations as the way of handling things.⁷⁹

De Soto reveals the market and economic development live in an invisible world of representation constructed by the legal consciousness, representation of paper and plastic that creates intangible rights to assets and a parallel life where surplus value is collected. This invisible process of the mind is taken "so completely for granted that they have lost all awareness of its existence."⁸⁰ Although the legal structure and its mechanisms are huge:

nobody sees it, including the Americans, Europeans, and Japanese who owe all their wealth to their ability to use it. It is an implicit legal infrastructure hidden deep within their property systems — of which ownership is but the tip of the iceberg. The rest of the iceberg is an intricate man-made process that can transform assets and labor into capital. This process was not created from a blueprint and is not described in a glossy brochure. Its origins are obscure and its significance buried in the economic subconscious of Western capitalist nations. How could something so important have slipped our minds? It is

not uncommon for us to know how to use things without understanding why they work.⁸¹

Thus, de Soto attempts to explain how to correct the economic failures of poor countries, noting that in the last decade, ever since Russia, post communist countries, and the Latin American states began to build capitalism without capital, they have shared the same political, social, and economic problems: glaring inequality, corruption, underground economies, pervasive Mafias, political instability, capital flight, flagrant disregard for the law.⁸² These failures have nothing to do with deficiencies in cultural or genetic heritage; these are failures to grasp the implicit operation of legal consciousness in constructing the representation of the markets and economies. The legal consciousness cannot work its economic magic unless it is born from a shared understanding or consensus. In Latin America and the post communist states, the official law doesn't have such a shared understanding; thus extralegal relations and shared values are developed and used by the black market.

One of the great dilemmas of modern thought is that few have really thought about these representations in relation to poor people. Instead, modern thought develops predatory models of development that are centred on the pursuit of profits by the affluent few and the consumption of infinite resources in a finite planet. These economic models impoverish the majority of the peoples, damage the environment and health of the peoples, and create grey markets. These models establish external debt as an instrument of political domination and hierarchical forms of national oppression under the authoritarian Bretton Woods institutions,⁸³ rather than complementary relationships and participatory democracy that express the present and future well-being of peoples. These predatory models have widened the gap in wealth, power, and resources among peoples, where 80 percent of planetary resources are consumed by 20 percent of the population.

According to de Soto, Latin American states keep indigenous peoples and *campesinos* poor by depriving them of basic security of property and labour, real security being more important than the amount of money people possess. A society with weak courts, deeply disputed property rights or intrusive and arbitrary state agencies not only discourages people from building wealth, but also from working enough to feed themselves

adequately. What the “poor” countries lack are not the assets necessary to economic success, but the consciousness and framework in which those assets can rightfully be called capital. For example, 92 percent of Indonesians live in houses, but the government has no idea who owns what, so they cannot assign any title to the property.⁸⁴ Also, since the “Spanish conquest” of the Indigenous nations, Peru has titled and retitled its national land-holding 22 times, and none of the property rights systems has worked.⁸⁵

De Soto argues the problem isn't lack of government or bureaucracy or paperwork.⁸⁶ They have the form of Eurocentric governance but not the imaginative or institutional structures that generate and capture capital. To acquire title to a piece of land on a sand dune in Egypt, for example, it takes 77 bureaucratic procedures, the involvement of 31 agencies, and 5 to 17 years.⁸⁷ And no guarantee exists that the next ministry to process the paperwork won't revoke the deed. With so much red tape and so little certainty, is it any wonder that entrepreneurs and investors don't see much potential in bureaucratic regimes? This situation also creates the context for criminality. For example, in the hinterlands of Colombia or Russia today, the only jobs worth having are in the mafia or black market because they have their own legal system and enforcement machinery as well as cash flows! No one outside the black market — not the rich, the government, or people — actually receives capital or benefits.

De Soto sees a direct relationship between ineffective law and marginality. Those who do not work within the law, those who live and work in what he calls the “extralegal” sector,⁸⁸ only have “dead capital”. These marginalized people have enterprises, own assets, homes and cars, but do not own them in a sufficiently valid legal form for those assets to perform other functions that we call capital. These extralegal assets have a physical life, not a financial or investment life. Though indigenous, community-based systems provide for the basic needs of the legally marginalized and generate money, they cannot generate or capture capital. To create capital, the legal system has to discover, recognize, and affirm the law of the peoples or communities. The real law of a marginalized community is discovered by talking to people, by having democratic institutions that listen to the

poor and rich, and by having limited, honest, and effective bureaucracies.

Poor and excluded communities develop their own systems of property and commercial transactions of varying degrees of sophistication. But, because these systems apply only in those communities of individuals, they do not provide a basis for wide-ranging business exchanges between individuals in different communities or who are unknown to each other. This retards business development and the division of labour that usually stimulates and accompanies rapid economic growth.

The challenge for many developing countries, according to de Soto, is to integrate the poor, the excluded and their laws and industry into the main economy by creating a pervasive legal framework that enables them to turn their assets into capital, so, their countries' rates of growth increase. Doing so requires creative compliance and adaptations to property law to incorporate the varied forms of informal contract in various communities. It also requires vastly improved registration and administration of property transactions. In other words, the rule of law needs to expand its applicability — rather than be protected in the form in which we currently find it. De Soto shows that this was the challenge taken up and met last century in the United States and other countries in which capitalism has now become “popular” and in which citizens' standards of living are the highest in the world.⁸⁹

De Soto's theory of capital is consistent with the arguments of Salish-Kootenai economist Ron Trosper and law professor Russel Barsh that the persistence of Native American poverty in the United States is due to Bureau of Indian Affairs' over-regulation, insecurity, and uncertainty, and not inadequate financial or human capital.⁹⁰ Aboriginal worldviews, laws, and economies were highly articulated systems of required generosity. The modern challenge is how to relate such teaching and wisdom to today's issues in economic development. The ideas of capturing capital, extralegal economies, and “forced generosity” in the standard models of externalities in economic theory suggest that (in theory) many externality problems can be solved if participants share and recycle net returns. Here, the treaties enter into economic development and may be able to reassert sharing and creativity as tools of economic transformation.

V. TREATIES AS TOOLS OF TRANSFORMATION

Canada does not appear to understand the relationship between the treaties, the *ultra vires* colonial regimes, and economic development. It accepts the *ultra vires* regime as valid, fails to comprehend the constitutional and economic dimension of the *ultra vires* regimes, and misunderstands the need to reform these regimes so that *sui generis* assets can develop into productive capital. Economic activism under the treaties, as in fiscal policy everywhere, must be rule-bound and performance-oriented. Put simply, for economic development to occur treaty beneficiaries need to be and feel secure in their treaty tenure and rights so that they can start investing in improvements.

Instead of constitutional reforms and institution building, Canada ponders structural change to lessen poverty and dependency. It ponders the implications of the transformation and searches for evidence and measures, and determines to regulate such innovations. It searches for new fiscal relationships in resource transfers, fiscal authority, resource revenue sharing, and incentives for enhancing resource revenue capacity. It has agreed to fiscal levels reasonably comparable to the relevant local, regional, or national standard.⁹¹ Canada is pondering the reform of the on-reserve welfare system from passive to active case-management and to increased employment. Yet these policy options have failed in the past; in the future, instead of creating an economy, they will maintain dependency on fool's gold and dead capital.

These fiscal reforms will not generate a treaty economy. They perpetuate the top-down choice by government "picking winners", the old search for finding the "right sectors" to rise to lead the Indian economy toward higher productivity. In the special circumstances of natural resource development, they may work, but even then at great risk of degenerating into favouritism and dogmatism.

Treaty beneficiaries need to rediscover and unleash the economic potential in the treaties to create sustainable development and sustainable communities. Bringing the treaty economy to life and renewing the rights to an enriched livelihood requires us to go beyond looking at our treaty assets as they are to actively thinking about them as the capital they could be. As de Soto urges, it requires a process of rethinking or

representing the treaty assets in a form that can be used to initiate a treaty economy and additional production.

To paint a picture of the Canada that treaty people envision in treaty economy, they need only turn to the ideals of a good life embedded in Aboriginal languages and traditional teachings. The Iroquois Great Law sets out rules for maintaining peace — "*Skennen kowa*" — between peoples, going beyond resolving conflicts to actively caring for each other's welfare. The Objjwa seek the spiritual gift of "*pimatziwin*" — long life and well-being — which enable a person to gain wisdom. The Cree of the northern prairies value "*miyowicehtowin*" — having good relations. Aboriginal peoples across Canada and around the world speak of their relationship with the natural world and the responsibility of human beings to maintain balance in the natural order. Rituals in which we give something back in return for the gifts that we receive from Mother Earth reinforce that sense of responsibility.

Treaty beneficiaries face a struggle to achieve a treaty economy. RCAP states that this involves re-establishing the economic provisions in the historical treaties; the freedom for Aboriginal people to manage their own economies; and a fair share of the land and resource base that sustained Aboriginal economies in the past.⁹² It is important to see creating a treaty economy as a complicated process that requires cultural visions, skilled leadership, agreement on development plans, and many years of persistence to make this a reality. What is required of treaty beneficiaries is to mobilize their inner visions, strengths, and abilities.

Reforms must be based on our constitutional rights, rather than the colonized *Indian Act* regime. If reforms are proposed that are too distant from the treaties, they will be objected to as utopian. If the proposals adhere too closely to the *Indian Act*, they will be objected to as viable but insignificant. Thus, all proposed programmes must be grounded in Aboriginal and treaty rights, or they will be viewed by Canadians as either illusory or trivial. Using the treaty as an institution of transformation must take place one step at a time and cumulatively. Any change worth considering can be presented as addressing issues that are both close to the constitutional order and distant from it. What matters are the direction and commitment, and their effects on the people's

understanding of their interests, identities, and issues.

Economic reform means deciding whether to be a trustee of stagnation and administer scarcity or to create a treaty economy by coordinating dynamism and broadening economic opportunity and empowerment. Faced with the choice between passive resignation to poverty and active resistance to it, the temptation of many communities may be great to hedge their bets and split the difference. It is a bad escape: it will irritate without overcoming, and tantalize without satisfying. To implement the right to an enriched livelihood and to create a treaty economy, I argue for a course of decisive and innovative action.

The treaty economy looks to a new way of organizing and deepening political, economic, and cultural freedoms. Development policies and programs should be designed and delivered by treaty-based institutions. Treaty-wide institutions and law with a horizon larger than a particular community or reserve are essential to the treaty economy.

They can build on the example of the Native Law Centre as a vital institution and instrument of transformation in Canada. Over the last twenty-five years, it has educated Aboriginal peoples, provided a research and publishing centre, and transformed the Canadian legal system by demonstrating the myth of Aboriginal inferiority. It has effected significant change in a context where change is actively resisted. For instance, Canadian courts and lawyers have been trained not to expand the rule of law but to defend the system as they found or were taught it. The courts have the ability to suppress innovation legally. They are notorious for their reluctance to accept even the smallest changes in traditional procedures. They assert the role of law is to maintain stability of the *status quo* or the received precedents. However, constitutional reforms created partially by Aboriginal lawyers have required courts and law to become transformative of Aboriginal and treaty rights. Constitutional analysis has become a conversation between legal technicians and the larger civic body. This conversation should not only inform the citizenry about its legal present, but also invite a process of ongoing constitutional and institutional revision, by articulating alternative interpretative principles and negotiations to create a new future.

Under constitutional litigation, Aboriginal lawyers and lawyers for Aboriginal peoples are thus renewing the concept of the treaty right to an enriched livelihood and its relations to capturing capital and economic development. It requires imagination in conception and boldness in execution. Like any serious, transformative program, it will provoke disagreement and conflict. However, it can also help trigger the organization and alignment of treaty constituencies and political groupings capable of sustaining a treaty economy.

Guided by transformational principles, the courts are beginning to acknowledge errors of the past regulatory policies and to remedy the legacies of those errors. The Supreme Court of Canada has affirmed that Aboriginal tenure (or title) and rights are constitutional rights.⁹³ The courts have affirmed that the federal and provincial governments have to take these *sui generis* rights seriously; even if the judiciary had not specifically affirmed them and millions of dollars have been spent on environmental and economic assessments, they have a duty to consult and negotiate with the Aboriginal titleholders.⁹⁴ The Court has affirmed that the commercial right to treaty fishery is a constitutional right.⁹⁵ The Court affirmed that existing fishing regulations cannot ignore the treaty fishery, thus creating a half a billion dollar allocation for the treaty fishery.⁹⁶ The Federal Court has affirmed that treaty beneficiaries of Treaty 8 are not subject to any federal or provincial taxation.⁹⁷ These decisions create the context for treaty economy.

The treaties should be approached as a factory of ideas, capacities, and ambitions. They reveal a treaty economy that demands changes of institutions and practices. Institutions house economies; ideas live in practice and experience. The institutional reform based on the treaties is an important dimension to healing and revitalizing treaty beneficiaries. The establishment of treaty institutions throughout the public and private sector will create room for initiative and approaches that are essential to the treaty economy. Institution-building is an integral part of reforms in education and culture, health and social services, economic development, and housing.

The treaties can confront the federal and provincial monopolies and bottlenecks, which contribute to unnecessarily low expectations and helplessness in the face of external events. The

treaty economy exemplifies and encourages motivated, sustained, and cumulative innovation — constitutional and institutional arrangements of government and economy and treaty beneficiaries. Treaty beneficiaries will need to work with the private sector and non-profit organizations and other partners, as appropriate, to design and implement the treaty economy within the treaty territory for a just and innovative postcolonial Canada.

The Treaty economy has to be a productivity program. Treaty beneficiaries need to reshape governmental and economic arrangements and to generate innovations in the treaty economy. According to Professors Cornell and Kalt, governing institutions need to perform three essential tasks: (1) create legitimate and respectful institutions and strategies by matching them with cultural values; (2) effectively implement strategic choices by fair procedures and just legal environment; and (3) establish and maintain a political environment that is safe and predictable for entrepreneurial talents, investment and development.⁹⁸

The indispensable reform in the treaty economy is an enriched investment in treaty education and training in a knowledge-based economy. RCAP argued that a national Aboriginal university that specializes in research and capacity building in economic development is the best approach.⁹⁹ The Aboriginal MBA program at the University of Saskatchewan has a similar potential to be an interdisciplinary centre of the treaty economy. Both models offer methods of renovating the bureaucratic regime, a process of strengthening the skills for shared discussion and solutions to problems, and creating animating programs and partnerships with government and private sectors. The treaty economy must be viewed as a process of turning the idea of production into practices of continuous learning and of generating skills at co-operation, innovation, technology, and investment.

NOTES

1. Hernand de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000) at 7. Hernando de Soto is currently President of the Institute for Liberty and Democracy (ILD) headquartered in Lima, Peru. This Institute is considered one of the most important think tanks in the world. In 1999, de Soto was chosen as one of the five leading Latin American innovators

- of the century by *Time* magazine in its special May issue on “Leaders for the New Millennium”. In January 2000, the German development magazine, *Entwicklung und Zusammenarbeit*, identified de Soto as one of the most important development theoreticians of the last millennium.
2. Canada, “Gathering Strength — Canada’s Aboriginal Action Plan”, Minister of Indian Affairs and Northern Development, Ottawa, 1997, catalogue no. R32-189-1997E at 10 and 17.
 3. J.Y. Henderson, “Empowering Treaty Federalism” (1994) 58 Sask. L. Rev. 241 at 246–69.
 4. “Intergovernmental compacts in Native American law: models for expanded usage” (1999) 112 Harvard L. Rev. 922; “Tribal businesses and the uncertain reach of tribal sovereign immunity: a statutory solution” (1992) 67 Washington L. Rev., 113.
 5. J.Y. Henderson, “First Nations Legal Inheritance” (1996) 23 Man. L.J. 1; J. Borrows, “With or Without You: First Nations Law (in Canada)” (1996) 3 McGill L.J. 629; J.S. Milloy, *The Plains Cree: Trade, Diplomacy, and War, 1790–1870* (Winnipeg: University of Manitoba Press, 1988).
 6. *R. v. Badger*, [1996] 2 C.N.L.R. 77 (S.C.C.) [hereinafter *Badger*] at para. 52.
 7. *Ibid.* at paras. 41 and 47; *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1063; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at 40.
 8. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
 9. *Ibid.*
 10. s. 35(4), *ibid.*
 11. *Sioui*, *supra* note 7 at 1054, citing *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515 at 548–49 (1832).
 12. *Re Reference by the Governor General in Council Concerning Certain Questions Relating to the Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 32.
 13. See “Understanding Aboriginal Economies” in Canada, *Final Report of the Royal Commission on Aboriginal Peoples*, 5 vols. (Ottawa: Minister of Supply and Services, 1996) vol. 2 780–788 [hereinafter *Report*]; “Aboriginal-Hudson’s Bay Company Relations before 1800” in A.J. Ray, J. Miller, F.J. Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal & Kingston: McGill-Queen’s University Press, 2000). [hereinafter *Bounty and Benevolence*]
 14. (31 March 1713) F.G. Davenport, *European Treaties Bearing on the History of the United States and Its Dependencies* (Washington, D.C.: Carnegie Institute, 1917–37).
 15. Sir M. Hale, *Prerogatives of the King* (London: Selden Society, 1976) at 201, 227–40 (Liberties or franchises were “jurisdictions, franchises, and exemptions” derived from the sovereign by express grant or charter or in the presumption of usage as well as all royal grants of exclusive rights to capture beast (*ferae naturae*).)

16. J.A. Chitty, *Treatise of the Law of the Prerogatives of the Crown: And the Relative Duties and Rights of the Subject* (London: Joseph Butterworths & Son, 1820) ("A franchise is defined to be a royal privilege or branch of the royal prerogative subsisting in the hands of a subject, by grant from the King [...]. [I]t is a clear principle that the King cannot by his mere prerogative diminish or destroy immunities once conferred and vested in a subject by royal grant. [T]he King cannot take away, abridge, or alter any liberties, or privileges granted by him or his predecessors, without the consent of the individual holding them" at 119, 121, 125, 132).
17. Míkmaq Compact; UK Public Records, Colonial Office Records, Nova Scotia "A", vol. 1 at 699–700.
18. Letter of Johnson to Gage, 19 Feb 1764" in Flick, ed., *The Papers of Sir William Johnson*, vol. 4 (Albany: The State University of New York, 1925) at 328.
19. H. Cardinal and W. Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000) at 39–42.
20. E.g., *Badger*, *supra* note 6 at 90 (para. 39), 97–99 (paras. 55–57) ("The promise that this livelihood would not be affected was repeated to all the bands who signed the treaty").
21. Treaties Nos. 1–11 in *Indian Treaties and Surrenders* (Ottawa: Queen's Printers, 1891); facsimile editions reprinted by Coles Publishing Company in Toronto, 1971, and by Fifth House Publishers (1992) [hereinafter *Treaties*]; (Ottawa: Queen's Printers, 1966); R.A. Reiter, *The Law of Canadian Indian Treaties* (Edmonton: Juris Analytica, 1995), pt. 3; (Ottawa: Queen's Printers, 1966).
22. *Bounty and Benevolence*, *supra* note 13.
23. As reported by A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based, and other Information Relating Thereto* (Toronto: Belfords, Clarke, 1880) commencing at 28 [hereinafter *Treaties of Canada*].
24. *Treaties of Canada*, *ibid.* at 92–3, 96 (11 September 1874).
25. *Ibid.*
26. *Ibid.*
27. *Ibid.*
28. *Ibid.* at 92 (11 September 1874) and 96 (12 September 1874).
29. *Ibid.* at 184.
30. *Ibid.* at 211, Jackes Report of Proceedings (18 August 1876).
31. *Ibid.* at 185. See generally S. Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal & Kingston: McGill-Queen's University Press, 1990) at 1–78.
32. *Ibid.*, Morris as interpreted by translator Erasmus to Cree, reported by Jackes, *supra* note 23 (27 August 1876).
33. Lazarus Roan interview (30 March 1974) in R. Price, *The Spirit of the Alberta Indian Treaties* (Toronto: Butterworths, 1979) at 161. See also John Buffalo interview, *ibid.* at 121.
34. Pat Weaselhead statement (5 March 1976), *ibid.* at 128.
35. Camoose Bottle interview (24 October 1973) *ibid.* at 131.
36. *Ibid.* at 132.
37. Treaty 7 Elders, *supra* note 19; Treaty 8 Elders in L. Hickey, R.L. Lightning & G. Lee, findings in "T.A.R.R. Interview with Elders Program" in *The Spirit of the Alberta Indian Treaties*, *supra* note 33 at 103–12 (The main points made by most elders concerned hunting, fishing, and trapping and how rights to pursue their traditional livelihood were not given up and were even strongly guaranteed in the treaty to last forever: *ibid.* at 106).
38. Report of Commissioners for Treaty 8 (Winnipeg, Man., 22 September 1899), reprinted (Ottawa: Queen's Printer, 1966) at 6, cited in *R. v. Horseman*, [1990] 1 S.C.R. 901 at 929 [hereinafter *Horseman*].
39. *Badger*, *supra* note 6 at 90–91 (paras. 39–40).
40. *Horseman*, *supra* note 38 at 911.
41. *Treaties of Canada*, *supra* note 23 at 132–33.
42. *Treaty Elders*, *supra* note 19 at 43–47.
43. *Report*, *supra* note 13.
44. Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Supply and Services, 1993) at 50.
45. *Report*, *supra* note 13, vol. 1 at 259.
46. *Ibid.* vol. 2(1) at 1.
47. *Ibid.* vol. 1 at 354–356; vol. 2(2) at 425, 487, 552, 555–56.
48. *Ibid.* vol. 1 at 247.
49. *Ibid.* at 180, 181, 187, 236, 376, 603, 608, 609, 610, 611, 612, 616; vol. 2(1) 327, 328; vol. 3 at 7, 60, 73, 74, 75, 87, 96, 355, 357; vol. 4 at 8, 19, 57, 148, 149, 404.
50. *Ibid.* vol. 2(1) at 38.
51. Royal Commission on Aboriginal Peoples, *People to People, Nation to Nation, Highlights from the Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services Canada, 1996) at 4–5.
52. *Report*, *supra* note 13, vol. 2(1) at 20 (social contract) and 52 (sacred compact).
53. *Partners in Confederation*, *supra* note 44 at 36.
54. *Report*, *supra* note 13, vol. 2(1) at 194.
55. *Ibid.* vol. 2(1) at 20–1 and 194.
56. *Ibid.* at 21, 22 and 194–95.
57. *Ibid.* Conclusion 20 at 244.
58. *Ibid.* at 10, 15, 17–21, 74, 83, 167, 307; vol. 5 at 149, 158.

59. *People to People, Nation to Nation*, *supra* note 51 at 51.
60. *Report*, *supra* note 13, vol. 3 at 586.
61. *Ibid.* vol. 1 at 7.
62. *Ibid.* vol. 1 at 7–8.
63. Canada, “Gathering Strength — Canada’s Aboriginal Action Plan”, Minister of Indian Affairs and Northern Development, Ottawa, 1997, catalogue no. R32-189-1997E, p. 4.
64. *Ibid.* at 10 and 17.
65. These transfer payments include INAC contributions and expenditures of other government agencies.
66. Canadian Human Rights Commission, *Annual Report 2000* (Ottawa: Government Services, 2001).
67. *Report*, *supra* note 13, vol. 3 at 440; 2000 Report of the Auditor General of Canada, Indian and Northern Affairs Canada — Audit of Elementary and Secondary Education, Chapter 4, para. 4.44.
68. *Aboriginal post-Census survey, 1991* states Aboriginal peoples owned or operated about 20,000 formal businesses, but more than half are located on reserves and three-fourths have only one employee. The local businesses are concentrated in business and personal services (25%), retail/wholesale trade (18.8%), primary natural resources (16.9%), and construction (15.1%).
69. *Report*, *supra* note 13, vol. 2 at 775.
70. *Report*, *supra* note 13, vol. 5 at 23–54. The total annual cost of the Aboriginal peoples’ economic marginalization amounts to one percent of the gross national product, *ibid.* at 3.
71. *Ibid.* at 1–2.
72. *Ibid.*, vol. 2 at 557.
73. Concluding Observations of the UN Committee on Economic, Social and Cultural Rights, (4 December 1998) E/C.12/1/Add.31 at para. 17. It also affirmed the *Report*, *ibid.* at para. 18.
74. *Ibid.* at para. 17.
75. Concluding Observations of the Human Rights Committee, Canada, Human Rights Committee, 65th Session (7 April 1999) CCPR/C/79/Add.105 paras. 7–8. The Committee “recommends that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2)”.
76. H. de Soto, *The Other Path: The Invisible Revolution in the Third World* J. Abbott, trans. (New York: Harper & Row, 1989).
77. *Supra* note 1.
78. *Ibid.* at 43.
79. *Ibid.* at 221.
80. *Ibid.* at 8.
81. *Ibid.* at 8.
82. *Ibid.* at 9.
83. Particularly the World Bank, International Monetary Fund (IMF), General Agreement for Tariffs and Trade (GATT) and the World Trade Organization (WTO). For example, de Soto states when money is passed from First World nations or these institutions to the head of state of a Third or Fourth World nation, it is glorified charity. It will not really help the Indigenous poor. They have to be brought into the system and given access to the leveraging tools that create capital.
84. *Ibid.* at 161.
85. *Ibid.* at 169.
86. This approach is different from Samuelson’s argument in RCAP that the key to economic development is effective self-government: *Report*, *supra* note 13, vol. 2 at 833.
87. *Mystery of Capital*, *supra* note 1 at 20.
88. Economic activity that falls outside of governmental accounting is known by various names: shadow, informal, hidden, black, underground, gray, clandestine, illegal and parallel: J.J. Thomas, *Informal Economic Activity* (Ann Arbor, University of Michigan Press 1999) at x. Definitional and behavioural approaches divide the extralegal economy into four components: the criminal, irregular, household and informal sectors.
89. Chapter 5.
90. R.L. Trosper, “Traditional American Indian economic policy” (1995) 19(1) *American Indian Culture and Research Journal* 65–95; “Who is subsidizing whom?” in F.J. Lyden and L.H. Legters (eds.), *American Indian Policy: Self-Governance and Economic Development for American Indians*. (Westport, CT: Greenwood Press, 1994); “Mind sets and economic development on Indian reservations” in S. Cornell, and J. Kalt (eds.), *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development*. (Los Angeles, CA: American Indian Studies Center, University of California, 1992); “Multicriterion decision-making in a tribal context” (1988) 16(4) *Policy Studies Journal* at 826–42, reprinted in F.J. Lyden and L. H. Legters (eds.), *Native Americans and Public Policy*. (Pittsburgh, PA.: Pittsburgh University Press, 1992) at 223. See also, R.L. Barsh and J.Y. Henderson, “Tribal Administration of Natural Resource Development” (1975) 52(2) *North Dakota L. Rev.* 307; R. L Barsh, *Aboriginal Self-Government in the United States A Qualitative Political Analysis*, RCAP Paper Number 10, revised October 1993.
91. W.J.R. Austin, “Self-government and fiscal relations: fundamental changes in the relationship” (2000) 48 *Can. L. J.* 1232.
92. *Report*, *supra* note 13 at vol. 2, ch. 5.
93. *Delgamuikw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 112, (1998), 153 D.L.R. (4th) 193.
94. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project* 2002 BCCA 59 and *Haida Nation v. B.C. and Weyerhaeuser*, 2002 BCCA 147.
95. *R. v. Marshall*, [1999] 3 S.C.R. 533.

-
96. A. Auld, "Federal strategy for native fishery, reserves placed at \$500 million" *National Post* (30 January 2001).
97. *Benoit v. Canada*, 2002 FCT 243.
98. S. Cornell and J. Kalt, "Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations" in *What Can Tribes Do?*, *supra* note 89.
99. *Report*, *supra* note 13 at vol. 2, ch. 5, recommendation 2.5.7, vol. 3 ch. 5.