THE DUTY OF CONSULTATION AND TREATY NO. 8

I. Introduction

A. Problems with Crown Implementation of Treaty Rights

- Parties to the recent treaties in Nunavut, the Yukon, Labrador and Nisga'a are confronting similar issues to First Nations that concluded their treaties long ago.

B. Unfulfilled Promises Under Treaty No. 8

- Treaty No. 8, covers a vast territory in north-eastern British Columbia, and then extends into northern Alberta, north-western Saskatchewan and southern portions of the Yukon and NorthWest territories.

- This part of the province remains one of the few areas in British Columbia subject to a treaty, modern or otherwise.

- Treaty No. 8 promises several types of rights, including the rights to hunt, fish and trap, to receive reserve lands based on their populations either in common or in severalty, and several others.

- Treaty 8 First Nations have regularly complained that their treaty rights have not been fulfilled and their treaty rights are not adequately accommodated by the Crown.

C. The McLeod Lake Example

- In 1982, McLeod Lake Indian Band sued Canada and British Columbia on the basis of unextinguished aboriginal title.

- In 1986, McLeod Lake brought proceedings against the two governments and several resource companies claiming that the First Nation was ready and willing to adhere to Treaty No. 8 as its traditional territories fell within the boundaries of the treaty. While Canada was willing to take that adherence British Columbia refused to convey any Crown lands to satisfy the right to treaty land entitlement, because the province took the position that McLeod Lake did not fall within the boundaries of Treaty No.8. .

- Canada has maintained that the western boundary of Treaty No. 8 follows the height of the land of the continental divide northwards, until it meets the 60th parallel of latitude.

- Because the textual description in the treaty references a physical feature ("the central range of the Rocky Mountains") which does not exist and which does not cross the 60th parallel, BC took the position that the western boundary is considerably further east, running along the height of land of the eastern slopes of the Rockies and then, along an imaginary line 200-kilometres due north to the 60th parallel.

- In 1999, the *McLeod Lake Indian Band Treaty No. 8 Adhesion and Settlement Agreement* settled this litigation, in part by agreeing to disagree. In exchange for the benefits under the agreement, McLeod Lake agreed not to litigate the issue of the western boundary of Treaty No. 8.

- Nonetheless, McLeod Lake finds itself in court again, this time disputing whether lands in severalty taken pursuant to Treaty No. 8 and the Adhesion Agreement are reserve lands under s. 91(24) of the *Constitution Act, 1867*. Both Canada and British Columbia deny that such lands are even s. 91(24) lands of federal jurisdiction, let alone lands reserved for Indians subject to the *Indian Act*. To my knowledge, that litigation is continuing before the B.C. Court of Appeal.

- And these are live issues for *other* First Nations in north-eastern British Columbia. Five First Nations have specific claims relating to the treaty land entitlement ("TLE") provision of Treaty No. 8. The nature of the TLE lands as reserves and the locaton of the western boundaru of Treaty No. 8 will again be put at issue at these tables.

- So even with a historic treaty such as Treaty No. 8, written without the complexity of modern land claim settlements such as the Nisga'a treaty, the Crown often resists implementing its promises. The question addressed in our paper is whether this resistance sanctioned by the courts or whether the courts have provided a different road map for the Crown to follow to implement treaty promises?

II. *Haida, Taku River* and Treaty Rights

A. Potentially Enhanced Status of Rights Under Treaty No. 8

- Recent signals from the Supreme Court of Canada in *Haida Nation v. British Columbia*, 2004 SCC 73 ("*Haida*") and *Taku River Tlingit First Nation v. British Columbia*, 2004 SCC 74 ("*Taku River*") suggest that treaty rights may be afforded greater protection than unproven aboriginal rights.

- In *Haida* and *Taku River,* the Supreme Court of Canada addressed the duty of consultation owed by the Crown (in this instance, a Crown in right of a province) to First Nations with aboriginal rights and title that have not been legally recognized. The Court took the opportunity to define the "duty of consultation" inherent to section 35 of the *Constitution Act, 1982*. As such, *Haida* and *Taku* have significant implications for First Nations that already enjoy treaty rights protected under section 35.

- The Court was careful to qualify its remarks to those circumstances in which a First Nation has potential but as yet unproven Aboriginal rights or title. The Court referred favourably several times to established section 35 rights.

- First Nations who hold treaty rights may be in a better position with respect to the degree of consultation owed to them by the Crown than those First Nations without treaty rights. The impact of such enhanced consultation obligations for resource development in the northeast of British Columbia could be significant, given that Treaty No. 8 rights to hunt, fish and trap have a commercial component as well as food, social and ceremonial aspects.[1]

- A closer look is worth taking.

B. The Source of Duty to Consult

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[1] An important aspect to the rights held by First Nations in British Columbia under Treaty No. 8 is that they differ somewhat from the rights held by First Nations under the other numbered treaties, including Alberta First Nations under Treaty No. 8. In previous decisions, the Supreme Court of Canada has been unequivocal about the nature of those rights: "the Indians ceded title to the Treaty 8 lands on the condition that they could reserve exclusively to themselves "their usual vocations of hunting, trapping and fishing throughout the tracts surrendered" (*R. v. Horsemen*, [1990] 3 C.N.L.R. 95 (S.C.C.) at 100). The result "leads inevitably to the conclusion that the hunting rights reserved by the treaty included hunting for commercial purposes" (*Horseman, supra,* emphasis added).

In British Columbia, that remains the law: Treaty No. 8 First Nations have a commercial treaty right to hunt and, presumably, to fish and trap guaranteed by the treaty. This right takes priority over other commercial rights that the Crown may authorize (*R. v. Vanderpeet,* [1996] 2 S.C.R. 507 and *R. v. Gladstone*, [1996] 2 S.C.R. 723). In contrast, in the provinces of Alberta, Saskatchewan and Manitoba, the law was modified by the *Natural Resource Transfer Agreements* of 1930, which extinguished the commercial aspect of the right, but expanded the area in which the rights could be exercised for food purposes (*Horseman, supra*, at 104).

- The Supreme Court of Canada located the duty to consult "in the honour of the Crown". The Chief Justice wrote that the Crown must act honourably "from the assertion of sovereignty to the resolution of claims and the implementation of treaties."[2]

- Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty and to define Aboriginal rights guaranteed by section 35.[3] The reconciliation process inherent to treaties implies a duty to consult and, if appropriate, accommodate.[4]

C. When the Duty to Consult and Accommodate Arises

- "The duty to consult and accommodate is part of the process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather it is a process flowing from rights guaranteed by s. 35 of the *Constitution Act, 1982*".

- If the Crown must respect unproven and undefined rights subject to treaty negotiations, the honour of the Crown surely must mandate that the Crown show the same (and arguably even greater) regard for the proven and defined rights under an existing treaty. [5]

- The key here is that the making of a treaty (i.e. "formal claims resolution") does *not* end the duty to consult. Rather, an existing treaty *continues* the process begun in treaty negotiations because reconciliation achieved and guaranteed under section 35 is an ongoing process.

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[2] *Haida, supra*, para. 17, emphasis added

[3] Ibid, para. 20

[4] Ibid, paras. 20 and 25, emphasis added. The Chief Justice left unsaid whether the reconciliation achieved under treaties protected by section 35 also gives rise to a fiduciary duty to consult. However, it seems plausible to argue that a commercial treaty right to hunt, fish or trap may be sufficiently specific to impose a fiduciary duty on the Crown. There may be as yet a fiduciary duty lurking out there for treaty First Nations. The Court certainly did not preclude a fiduciary duty imposing a duty to consult in the context of proven, defined Aboriginal interests under a treaty. That issue remains to be litigated

[5] Ibid, para. 32, emphasis added

- The Court said that the specific point in time at which the duty arises is when the Crown "has knowledge, real or constructive, of the potential existence of the Aboriginal right of title and contemplates conduct that might adversely affect it."[6]

- For those with proven, defined treaty rights, it follows that this point in time occurs whenever the Crown is contemplating resource development that may infringe treaty rights. Since the Crown is a party to Treaty No. 8, that the Crown has continuing and certain knowledge of the treaty and the rights contained therein should go without saying.

- Unlike First Nations with yet unproven Aboriginal interests who must outline their claims to make their *prima facie* case, treaty First Nations already have their claim outlined in their solemn treaty with the Crown.

- This principle is supported by the decision in *Taku* which provides an example of the circumstances in which a First Nation establishes a strong *prima facie* claim by being in treaty negotiation processes i.e. federal specific claims (let alone already having a treaty). [7]

- We would suggest this means that the duty to consult is triggered more readily for treaty First Nations than those without treaty.

D. The Scope and Content of the Duty to Consult and Accommodate

1. The "Spectrum" of the Duty to Consult

- The scope of the duty is "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title and to the seriousness of the potentially adverse effect upon the right or title claimed".[8] The first part of this test does not appear to be applicable to treaty First Nations because their rights are already reconciled and proven in the treaty.

- The second part of the test, however, is critical to all First Nations, treaty and non-treaty alike: the scope of the duty owed to the First Nation will depend on the seriousness of the potential infringement.

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[6] Ibid, para. 35. Interestingly, the Court cites the chambers decision in *Halfway River v. British Columbia*, [1997] 4 C.N.L.R. 45 (B.C.S.C.) for this principle, rather than the decision of the Court of Appeal.
[7] *Taku, supra*, paras. 21, 30 and 31
[8] *Haida, supra*, para. 39

- If a proven right and potential infringement is of high significance to the Aboriginal people and the risk of non-compensable damage is also high, "deep consultation" will be required.[9]

  - opportunity to make written submissions,
  - formal participation in the decision-making process and
  - provision of written reasons showing how First Nation concerns were considered and how they affected the ultimate decision.[10]

- Thus, there is a spectrum of consultation.[11]

- For those Crown-authorized activities which may infringe existing treaty rights, it is logical that "deep consultation" may more often be required than with unproven but potential aboriginal rights, given the solemn and explicit nature of the right expressed in the treaty.

- It is not much of a stretch to assume that the rights which were significant to the aboriginal people at the time of the treaty was made were likely included in the treaty. For Treaty No. 8, the historical archives demonstrate that the gravest concern for the aboriginal people was the preservation of their economy, built as it was on hunting, fishing and trapping. Thus, where those rights may be infringed, deep consultation is likely required.

2. Accommodation of Aboriginal Interests

- Accommodation may occur as a result of "good faith consultation." Accommodation means "seeking compromise in an attempt to harmonise conflicting interests and move further down the path of reconciliation."[12]

- Again, it is important to remember that treaty First Nations have proven, defined rights; there is usually no "pending final resolution".[13] Therefore, the likelihood of moving to accommodation would appear to be greater for treaty First Nations than for non-treaty.

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[9] Ibid, para. 44.
[10] Ibid, para. 44
[11] Ibid, para. 44
[12] Ibid, para. 49
[13] Some treaty First Nations nonetheless engage in ongoing claims negotiations, whether they are comprehensive claims, specific claims, or the outstanding issues negotiation in British Columbia. In those circumstances, the language in *Haida* about accommodation is critical for preserving lands and resources until those claims are settled.

- The Court suggested this may be the case at two points in the *Haida* judgment. First, the Court referred to its previous decision in *R. v. Sioui*, [1990] 1 S.C.R. 1025 wherein it stated "that the Crown bears the burden of proving that its occupancy of lands 'cannot be accommodated to reasonable exercise of the Huron's [treaty] rights."[14] This suggests that the onus shifts in the consultation process to the Crown to show how it will accommodate the reasonable exercise of the treaty right in question.[15]

- Second, the Court stated that the Crown must balance Aboriginal concerns reasonably with "other societal interests" when accommodating "as yet unproven Aboriginal rights and title."[16] The Court was careful to qualify this balancing in circumstances of unproven rights or title.

- It may be that when the Crown is facing the accommodation of a treaty right in the face of a serious infringement, less weight (or none, as the case may be) should be given to other societal interests as the reconciliation of those interests has already occurred in the negotiation of the treaty.

3. No First Nation Veto

> This [consultation] process does not give Aboriginal groups a veto over what can be done with land pending final proof of claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.

- The Court limited the prohibition of an aboriginal "veto" to consultation respecting rights pending final proof of claim. The Haida Nation was claiming unextinguished aboriginal title after all. The Court reserved consent only for those First Nations with "established rights". This clearly distinguished the rights held by treaty First Nations to those without treaties.

4. Consultation and Regulatory Processes

- The Court left open to the government the ability "to set up regulatory schemes to address the procedural requirement appropriate to different problems at different

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[14] Ibid, at para. 50
[15] It should be remembered that such treaty rights in B.C. include commercial rights to hunt, fish and trap.
[16] Ibid, para. 50

stages, thereby strengthening the reconciliation process and reducing recourse to the courts."[17]

- The Court seemed to "nod its head" to the official consultation policy adopted by British Columbia in October 2002 as something that "while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision makers."[18]

- This is somewhat disturbing, because the B.C. Consultation Policy does *not* make any distinction between the consultation processes afforded to First Nations holding treaty rights as opposed to those First Nations with unproven claims of aboriginal rights. As this paper suggests, that distinction may be crucial in determining the level of consultation that the Crown owes to a treaty First Nation, let alone the duty to implement treaty promises after a treaty is made.

E. Implications of *Haida* and *Taku* for Implementation of Treaty No. 8

- For treaty First Nations there are promising implications in *Haida* and *Taku.* Throughout these decisions, the Court was careful to qualify its remarks to those circumstances in which the First Nation has potential but as yet unproven Aboriginal rights or title. The Court did refer several times to established section 35 rights in contrast to the interests of those with potential but unproven rights. It would appear from these references that those First Nations who hold treaty rights are in a better position with respect to the degree of consultation owed to them by the Crown than those without treaty rights.

- In the context of Treaty No. 8, those rights are arguably better than undefined or unproven Aboriginal rights, no matter how strong of a *prima facie* case there may be.

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[17] Ibid, para. 51
[18] Ibid, para. 51

III. *Mikisew Cree* and "Taking Up" Land Under Treaty 8

A. Background to the Appeal

- The actions of the Alberta government in another appeal currently reserved by the Supreme Court of Canada places in doubt the presence of any duty on the Crown to consult First Nations when taking up land under Treaty No. 8.

- On March 14th and 15th, the Supreme Court of Canada heard the appeal[19] of *Minister of Canadian Heritage v. Mikisew Cree First Nation*, 2004 FCA 66 ("*Mikisew*"). The issue in the appeal is whether the Federal Court of Appeal is correct in its finding that Treaty No. 8 permits the Crown to take up land for lumbering, mining, settlement and other purposes without having to consult with First Nations whose treaty rights to hunt, fish, or trap may be affected.

- What is striking about this case is that the primary argument adopted by the majority of the Federal Court of Appeal came not from Canada, but from the intervening Alberta government. The province was not present at the initial judicial review, but succeeded in obtaining intervener status on the appeal.

- Alberta raised the issue, for the first time on the record, that the Crown has no duty to consult when taking up land under Treaty No. 8.[20] This case is as much an example of a provincial government seizing the opportunity to further narrow its duty to implement treaty promises as it is about the federal government trying to justify its consultation process, however imperfectly.

- This decision is important to British Columbia, given the rapid oil and gas development of the north-east and the likelihood of two major pipelines traversing Treaty 8 territory: the Alaska natural gas pipeline and the Enbridge crude pipeline.

- It is also important to determine if the Crown is required to allow treaty rights such as hunting, fishing and trapping to be fully exercised, which is really another aspect of implementing Treaty No. 8.

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[19] *Mikisew Cree v. Sheila Copps, Minister of Canadian Heritage* (S.C.C. Docket 30246)
[20] *Mikisew Cree, supra*, at paras. 3 to 7

B. Summary of the Decision

- The facts of the *Mikisew Cree* case are relatively simple. The Mikisew Cree of Wood Buffalo National Park in northern Alberta challenged a decision by the federal Minister of Heritage to permit a winter road to cross through the Wood Buffalo National Park. The First Nation said it was not consulted properly and that the road would infringe its treaty rights guaranteed under Treaty No. 8. In the court of first instance, the Mikisew were successful. The Federal Court Trial Division held that the Minister did not adequately consult the Mikisew Cree and quashed the Minister's permit approving the road.

- However, a majority of the Federal Court of Appeal completely reversed the decision of the court below. In a 2 to 1 decision, the Federal Court of Appeal held that the Crown was not required to consult when "taking up" lands under Treaty No. 8.

- The relevant portion of Treaty No. 8 is as follows:

> And Her Majesty the Queen hereby agrees with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

- The majority held that the Indians' right to hunt for food was circumscribed by both geographic limitations and by specific forms of government regulation. He held that putting land to use as a winter access road is clearly visibly incompatible with hunting on the land, thus satisfying the geographic limitation test set out by the Supreme Court of Canada in *R. v. Badger*.[21]

- The majority went on to observe that Treaty No. 8 specified that lands may be taken up for settlement, mining, lumbering, trading or other purposes. He concluded that a road is "another purpose" for which land may be taken up under Treaty No. 8. Unless the Crown takes up so much land that no meaningful right to hunt remains, taking up land for a purpose express or necessarily implied in the treaty itself cannot be considered an infringement of the treaty right to hunt.

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[21] *R. v. Badger*, [1996] 2 C.N.L.R. 77 ("*Badger*")

- Where a limitation expressly provided for by a treaty applies, there is no infringement of the treaty or section 35 of the *Constitution Act*[22] and, thus, the Minister was not obliged to consult with the Mikisew Cree before approving the road project.[23]

C. Analysis of Decision

- This decision might be taken to mean that all activities which can be classified as "taking up" land under Treaty No. 8 are no longer subject to the duty to consult. Given that the ancillary activity of building a winter road is covered by the "taking up" provision of the treaty, practically all activities might fall under this rubric, including large pipeline projects like the Alaska and Enbridge pipeline projects planned to pass through British Columbia.

- However, such a wide application of the technical interpretation of Treaty No. 8 in the *Mikisew Cree* decision would be imprudent to assume, for several reasons.

- First, the test in *Badger* is more sophisticated. In *Badger*, the Supreme Court of Canada found that the Indians who signed the treaty in 1899 would have understood the Crown's right to "take up" land in relation to their own rights to hunt, trap and fish. In other words, the land taken up by the Crown would have to evidence "manifestations of exclusionary land use" or be visibly incompatible with hunting, trapping or fishing before such rights would be curtailed.[24] The Indians' understanding of the Crown's right to "take up" was based on promised of "limited interference with Indians' hunting and fishing practices".[25]

- Furthermore, the degree to which land is "unoccupied" at a particular time must be explored in a case-by-case basis.[26] What would need to be demonstrated for every instance that the Crown says it is "taking up" land is that such a taking up is visibly incompatible with the treaty right to hunt, fish and trap.

- Third, in *Halfway River*, the British Columbia Court of Appeal held that the Crown's ability to "take up" land cannot be viewed as a separate or independent right, but rather act as a limitation or restriction on the Indians' right to hunt, fish

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[22] Ibid, at para. 21
[23] *Mikisew Cree, supra* at paras. 2, 8 to 24
[24] *Badger, supra* at paras. 53 and 54
[25] Ibid, at para. 20
[26] Ibid, at para. 53

or trap.[27] The Crown continues to have a duty to consult where the Crown-authorized "taking up" would be incompatible with the treaty right and, thereby, infringe that right.[28]

- Fourth, in *Mikisew Cree* itself, there is a vigorous dissent by Madam Justice Sharlow. She relied extensively on the decision in *Halfway River,*[29] to conclude that even where the Crown imposes a geographic limitation on the treaty right through a taking up, "the 'taking up' could be a prima facie infringement of the Treaty 8 hunting rights but must be justified according to the test in [*R. v. Sparrow,* [1990] 1 S.C.R. 1075]."[30]

D. What the Supreme Court of Canada might do

- As noted above, the Mikisew Cree appealed the decision to the Supreme Court of Canada, which heard the appeal on March 14th, 2005. The court reserved judgment and, to date[31], the reasons for judgment have not been released. However, the questions posed by some of the justices at the hearing may give some indication as to where their judgment may lead:[32]

- From comments made to counsel during the hearing, it would appear that the Supreme Court of Canada may not be receptive to the Federal Court of Appeal's approach (and, by extension, the arguments advanced by Alberta) that no consultation is required when taking up land under Treaty No. 8.

- Some members of the Supreme Court appeared to accept that consultation was required even on a taking up – the theoretical issue for them was more a question of whether to adopt the analytic framework set out in *Haida* or the one from

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[27] Ibid, at para. 136

[28] Ibid, at para. 192

[29] It is important to understand the law as it exists in British Columbia and as it was expressed in the minority decision in the Federal Court of Appeal. As discussed above, Mr. Justice Finch of the British Columbia Court of Appeal held that the taking up provision does provide the Crown with a right but that right, even if it is a constitutional right of the Crown's, can no more trump the constitutional treaty rights of First Nations under Treaty 8 than can the Crown's other constitutional rights in the Constitution without justification (as cited by Sharlow J.A. in *Mikisew* at para. 123). Sharlow J.A. picks up this reasoning from the *Halfway* case to conclude that even where the Crown imposes a geographic limitation on the treaty right through a taking up, "the 'taking up' could be a *prima facie* infringement of the Treaty 8 hunting rights but must be justified according to the test in *Sparrow*" (at para. 125). In our view, this is a correct interpretation of the Constitution and of the principles hitherto expressed in the case law.

[30] *Mikisew Cree*, supra, at para. 125

[31] As of June 9th, 2005

[32] The following comments from members of the court were taken from the CPAC broadcast of the hearing; recordings of the broadcast may be obtained from CPAC.

Sparrow. So long as some consultation is required, the court's judgment will likely square with Mr. Justice Finch's decision in *Halfway* and, as such, will not represent a change in the law in British Columbia.

- Regardless, this case illustrates again the resistance of the Crown to implement treaty promises, and to use technical interpretations of a historic treaty to avoid duties imposed on the Crown as a matter of law because the Crown made such promises.

- That tendency must be a troubling one to other First Nations entering into modern treaties which are highly complex, technical documents.

IV. Conclusions

- The past experience of Treaty 8 First Nations in British Columbia shows that the Crown, particularly in right of the province but also at times in right of Canada, has a dubious track record of implementing fully its promises made under Treaty No. 8. It should be clear from the discussion in this paper that the Crown's resistance to implement treaties generously is not sanctioned by the courts.

- The question now, in this post-*Haida* world, is whether the Crown will implement treaties better, given the clear articulation of the concept of the honour of the Crown, interwoven in which is the continuing nature of the reconciliation under section 35 achieved by treaties.

- Treaty First Nations should expect governments to seek to accommodate treaty rights to a greater degree than one might expect governments to accommodate aboriginal rights. This would mean, logically, that treaties ought to be implemented more fully and treaty promises less often ignored or broken.

- However, continual resistance by the Crown in acknowledging its treaty obligations in the court room clearly references an equal reticence to implement all of its promises on the ground.

- Such resistance is not supported in the case law, nor does it provide an incentive for First Nations to enter modern treaties with the Crown. Those First Nations negotiating modern treaties and land claim agreements may want to look at the experience of their cousins who entered the so-called "historic" treaties with the Crown to understand better what to expect after their treaties were signed.