



## **TREATY GOVERNANCE FOR THE 21<sup>ST</sup> CENTURY: The Honourable Search for a Justice Society**

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# IT IS TIME FOR RENEWED, NATION-TO-NATION RELATIONSHIP

PRIME MINISTERS MANDATE LETTER TO MINISTERS, 2015

“No relationship is more important to me and to Canada than the one with Indigenous Peoples.

“ It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership.



Rt. Hon. Justin Trudeau, P.C., M.P.  
Prime Minister of Canada

# "A COUNTRY CANNOT BE BUILT ON A LIVING LIE"



"History has shown that that taking an adversarial approach is not only ineffective, it can be profoundly damaging.

Nowhere is this more obvious than in the government's relationship with First Nations.

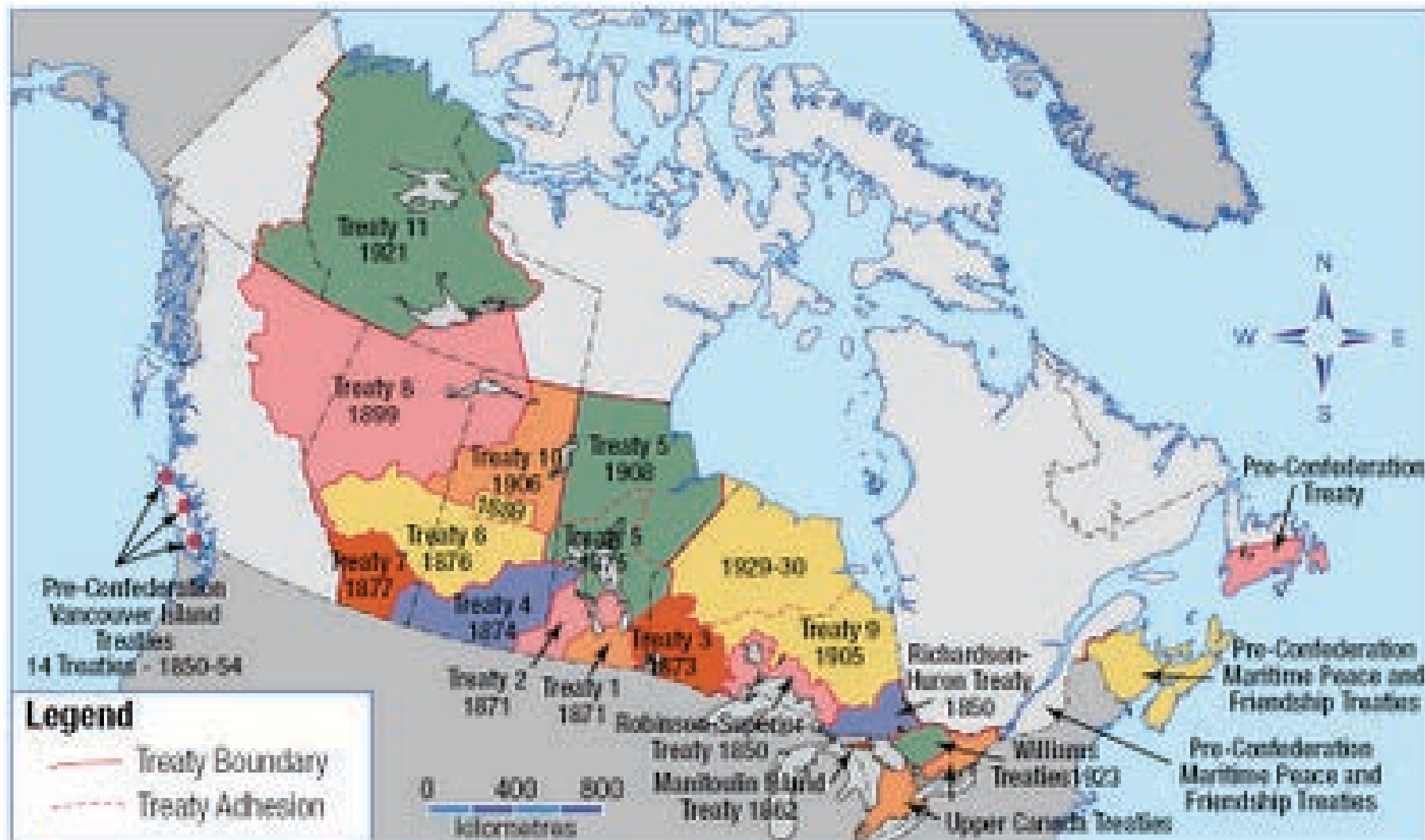
It is time for a renewed, nation-to-nation relationship with First Nations peoples:

One that understands that the constitutionally guaranteed rights of First Nations in Canada are not an inconvenience, but rather a sacred obligation;

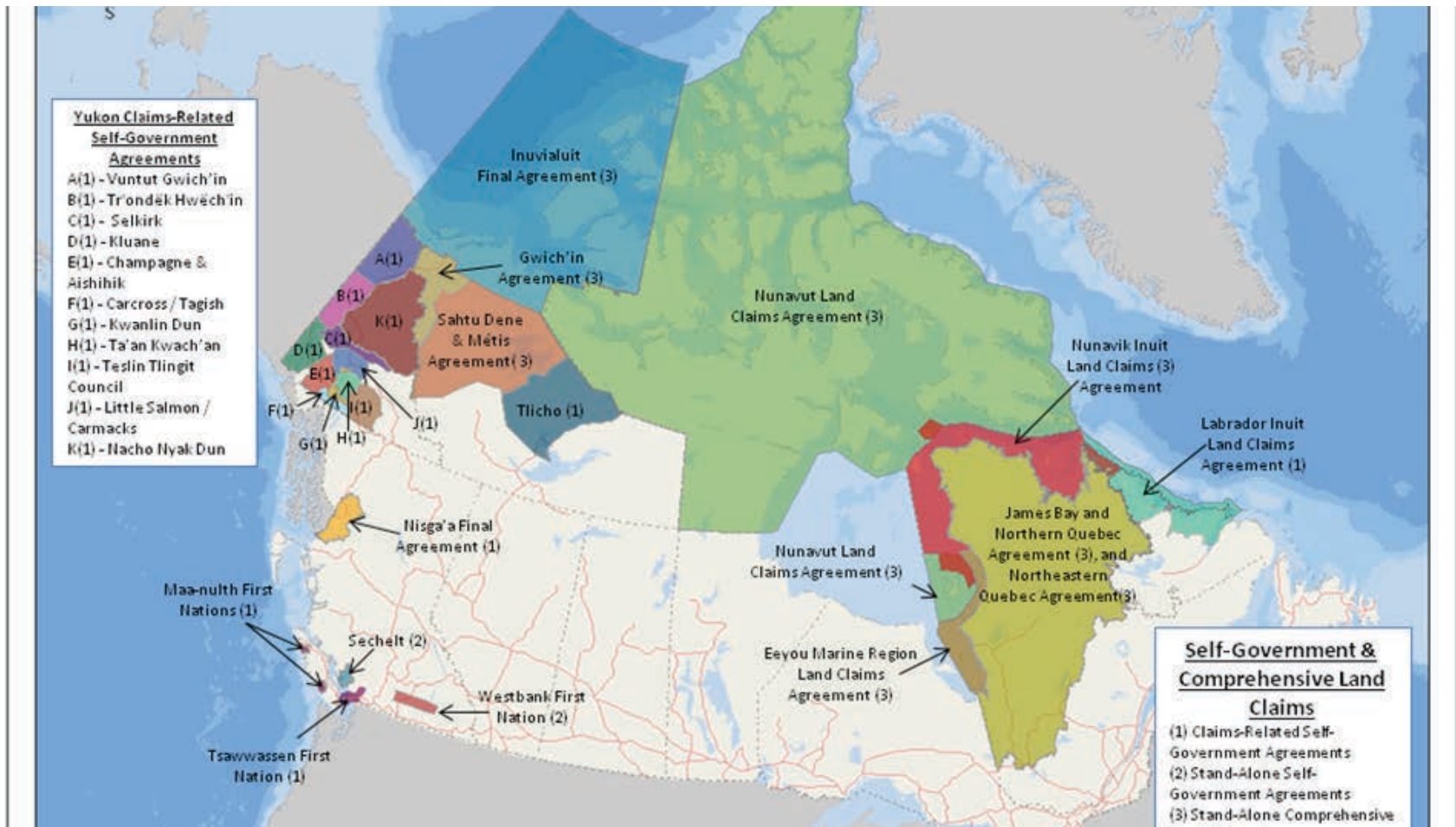
One that is based on

- the Recognition of rights,
- Respect,
- Co-operation &
- Partnership."

# THE NATION TO NATION RELATIONSHIP: TREATY FEDERALISM



# MODERN TREATIES EXTEND TREATY FEDERALISM



# RCAP ON TREATY FEDERALISM

“current constitution of Canada has evolved in part from the original treaties and other relations that First Peoples held with the Crown and the rights that flow from those relations.



The treaties form a fundamental part of the constitution and for many Aboriginal peoples, play a role similar to that played by the *Constitution Act, 1867* in relation to the provinces.”

“over time and by a variety of methods, Aboriginal people became part of the emerging federation of Canada while retaining their rights to their laws, lands, political structures and internal autonomy ...”

# TREATY FEDERALISM GENERATES PROVINICIAL FEDERALISM & CANADA

Indigenous Treaties with the King and Queen in North America are based on covenantal traditions between nations that has manages the structure of most legal transformations in British North America.

Imperial Treaties in UK law is based on the inherent sovereign and prerogative authority of the imperial monarch to make treaties with foreign nations.

The royal prerogative is a body of customary authority, privilege, and immunity possessed by and vested in the imperial Crown, recognized in common law as belonging to the sovereign alone.

Colonial Parliament had no power to make treaties, only to implement imperial treaties in s. 132 of *Constitution Act, 1867*.

Most Treaties delegated to the King and Queen the right of settlements within the reserved territory of the treaty nations.

The King delegated self-rule in these British settlement to created provincial governments.

The provincial government created the Federal Government of Canada and the division of powers.

Canada and provinces became decolonized in 1982 by the *Canada Act*.

# TREATY FEDERALISM & CONSTITUTIONALISM

THE FOUR ORGANIZING PRINCIPLES CONSTITUTION ((1) CONSTITUTIONALISM AND THE RULE OF LAW; (2) DEMOCRACY; (3) RESPECT FOR MINORITY RIGHTS; AND (4) FEDERALISM.) ARE INTERWOVEN IN THREE BASIC COMPACTS:

- (1) ONE BETWEEN THE CROWN AND INDIVIDUALS WITH RESPECT TO THE INDIVIDUAL'S FUNDAMENTAL RIGHTS AND FREEDOMS [*CHARTER*];
- (2) ONE BETWEEN THE NON-ABORIGINAL POPULATION AND ABORIGINAL PEOPLES WITH RESPECT TO ABORIGINAL RIGHTS AND TREATIES WITH ABORIGINAL PEOPLES (*TREATIES*); &
- (3) A "FEDERAL COMPACT" BETWEEN THE PROVINCES." [*CONSTITUTION ACTS*]

DESCHAMPS J. IN A MINORITY DECISION IN *LITTLE SALMON/CARMACKS* (2010) AT PARA. \*.





# CONSTITUTIONAL REFORMS AFFIRM ABORIGINAL LEGAL TRADITIONS



# CONSTITUTIONAL SUPREMACY, 1982

Constitutional supremacy under s. 52(1) of the **Constitution Act, 1982** has replaced Parliamentary supremacy

makes all legal traditions and legislation be consistent with the constitution to be valid.

“The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Constitutional supremacy generates **entanglement** with Aboriginal and Treaty Rights

All parts of the Constitution has to be read together and judges by the honour of the Crown.



# CANADA ACT 1982, PART II, CONSTITUTION ACT, 1982 S. 35



“The existing aboriginal and treaty rights of the aboriginal Peoples of Canada are **hereby** recognized and affirmed.”

generates a *constitutional* division of powers between Aboriginal peoples and colonial Federal state.

Has to be read together with the constitutional powers of the exclusive power of federal government in s. 91(24) of Constitution Act, 1867 over “Indians and the lands reserved for Indians”

Has to be read together with constitutional powers of the provinces under s. 92 and 109 of Constitutional Act, 1867.

# ***CANADA ACT 1982, PART I, CHARTER OF RIGHTS AND FREEDOMS S. 25***



“The guarantee in this Charter of certain rights and freedoms shall not be construed as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the **Royal Proclamation** of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.”

# *CANADA ACT 1982, PART II, CONSTITUTION ACT, 1982 S. 35*



(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

# TREATIES ARE A FOUNDATION FOR A RENEWED NATION TO NATION RELATIONSHIP

Inform the nation-to nation relationship in that only nations can enter and negotiate treaties.

Almost all First Nations are created by Parliament under the federal Indian Act, rather than treaties.

Most existing Indian organizations have fashioned and form itself according to non-treaty boundaries of the provinces & territories



# TREATY FEDERISM AS THIRD ORDER OF GOVERNMENT, RCAP 1996

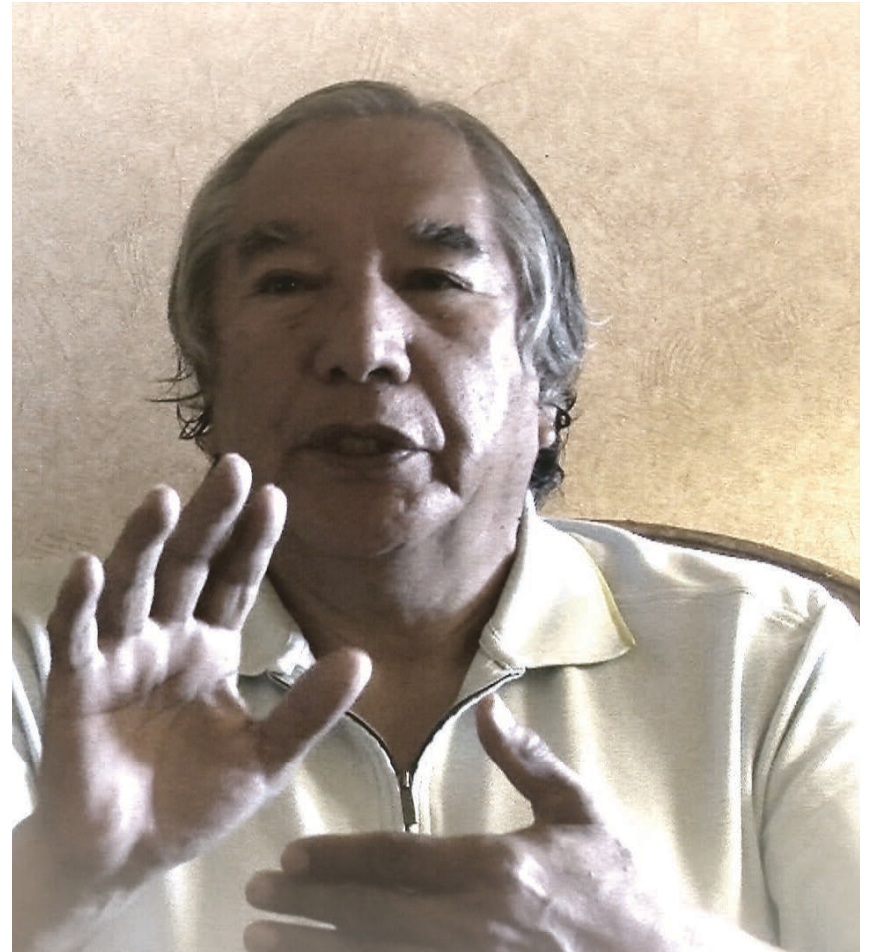


A profound need exists to restructure governmental institutions to reflect that the Treaty and Aboriginal nations are one of three distinct sovereign spheres of the government in Canada

# CONSTITUTIONAL CONVENTION ON TREATY RIGHTS IN *CHARLOTTETOWN* *ACCORD*, 1992

35.6 (1) The treaty rights referred to in subsection 35 (1) shall be interpreted in a just, broad and liberal manner taking into account their spirit and intent and the context of the specific treaty negotiations relating thereto.\*\*\*

(6) Nothing in this section abrogates or derogates from any rights of the Aboriginal peoples of Canada who are not parties to a particular treaty.





# TREATY IMPLEMENTATION IN *CHARLOTTETOWN ACCORD*

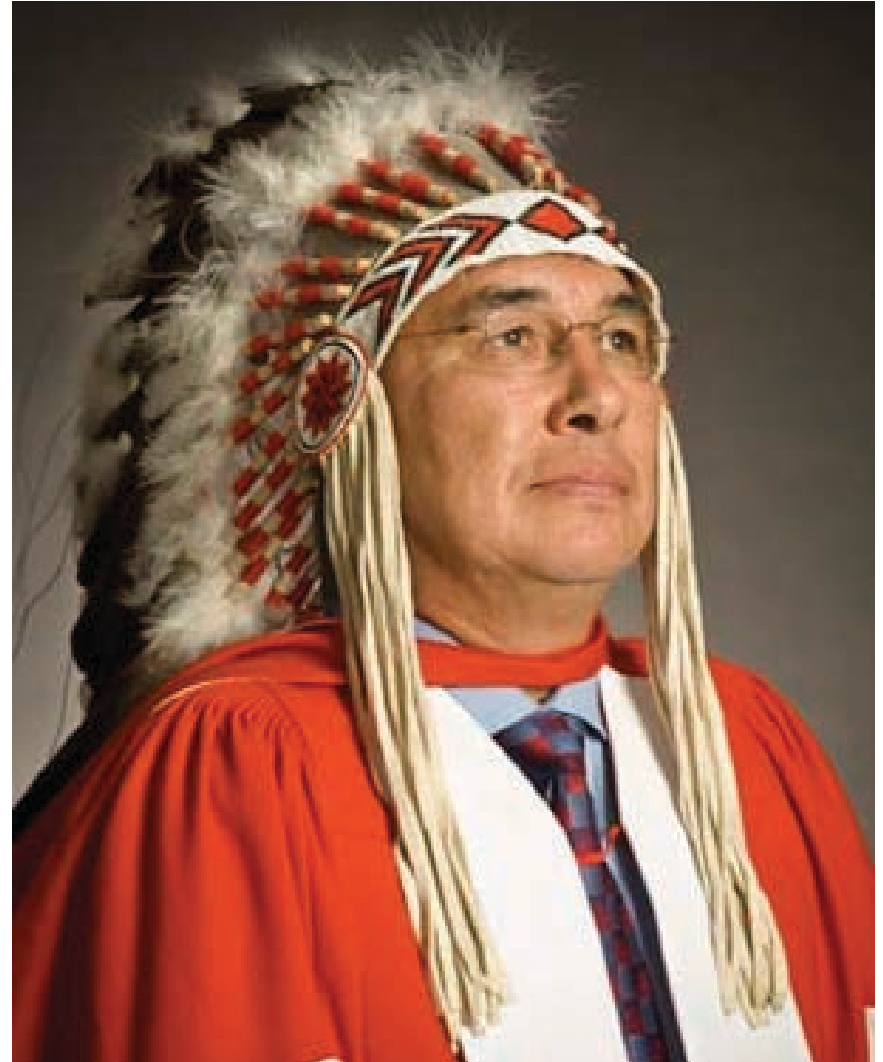


35.6(2) The government of Canada is committed to establishing treaty processes to clarify or implement treaty rights

# GLOBAL CONSENSUS ON TREATIES UNDRIP 2007

371. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.



# SELF DETERMINATION IN UNDRIP 2007



*Article 5* Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

# INDIGENOUS LAND RIGHTS IN UNDRIP

## Article 26.2

Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

## Article 32.1

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources

# REBUILDING THE NATION- TO NATION RELATION



Minister of Justice and  
Attorney General of Canada  
Jody Wilson-Raybould

Unfinished business of  
Canada confederation

Deconstruct our  
colonial legacy

Need to achieving  
reconciliation lies at the  
heart of a strong  
Canada

# INDIAN ACT IS NOT ORGANIZED AROUND INDIGENOUS NATIONS

“Although strengthening the nation-to-nation relationship is the goal, practically speaking the administration of Indigenous affairs in Canada is not organized around Indigenous Nations. “

For the most part, it is organized around an imposed system of governance.

With respect to Indians this is through “bands”, which are creatures of federal statute under the *Indian Act*.

“The Indian Act being the antithesis of self-government as an expression of self-determination



“Simply put, we need to move beyond the system of imposed governance.”

# UNDRIP WILL BREATHE LIFE INTO ABORIGINAL AND TREATY RIGHTS



“That for Indian, Inuit and Metis peoples we can and will breathe life into section 35 of Canada’s Constitution, which recognizes and affirms existing Aboriginal and treaty rights, by embracing the principles or minimum standards articulated in the United Nations Declaration on the Rights of Indigenous peoples and guided by the dozens of court decisions that provide instruction.”

# TREATY GOVERNANCE IN NATION-TO-NATION RELATIONSHIP





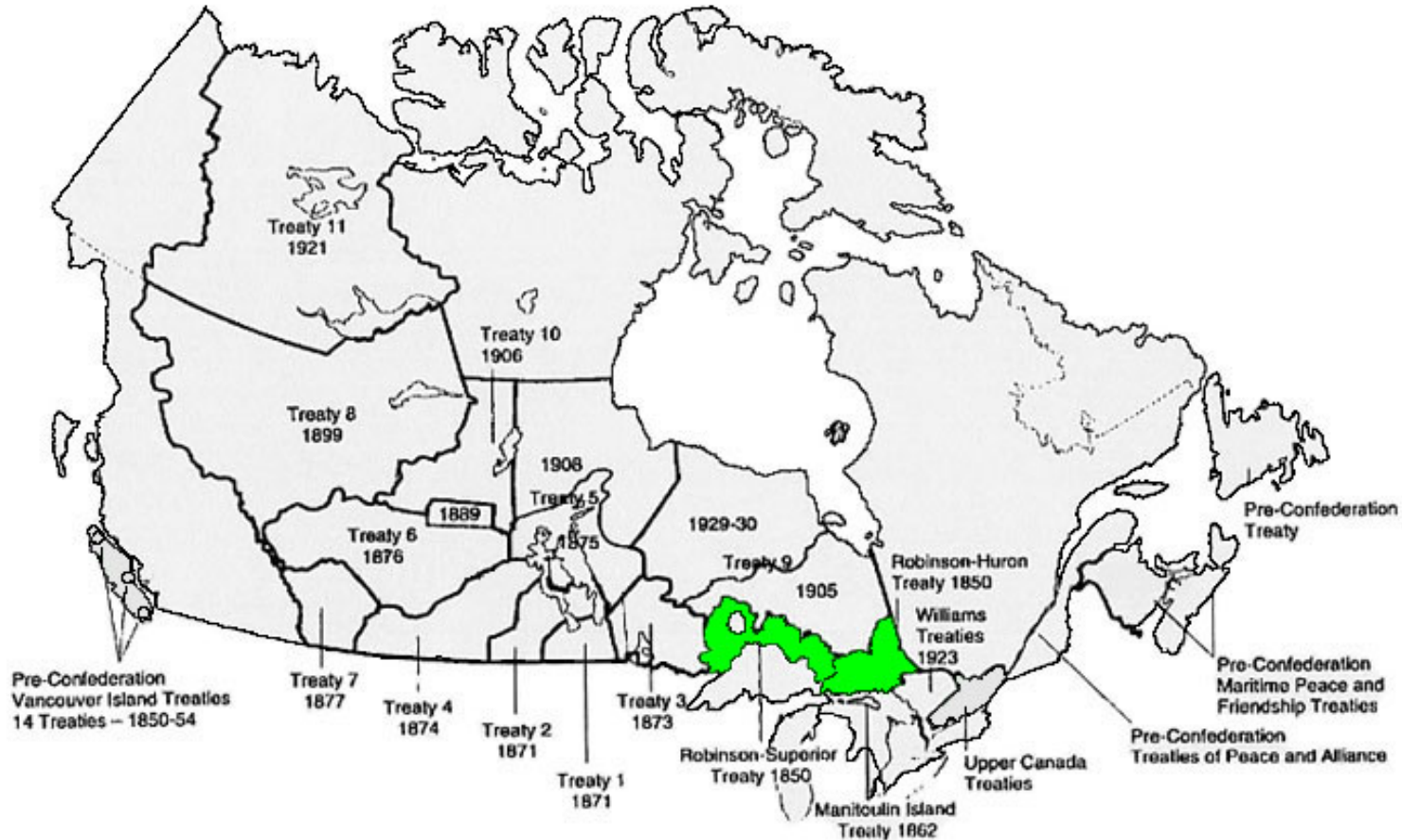
# RESERVED LANDS OF NATIONS AND TRIBES: ROYAL PROCLAMATION, 1763

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, **should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.**

We do, with the Advice of our Privy Council strictly enjoin and require, that **no private Person** do presume to make any **purchase** from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement;

but that, **if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us**, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie

# RESERVED ABORIGINAL TERRITORY PURCHASED BY TREATY BY THE KING OF QUEEN



# TREATIES CONDITIONALLY TRANSFERRED JURISDICTION OVER TERRITORY TO QUEEN; LANDS WAS NOT PURCHASED OR EXTINGUISHED

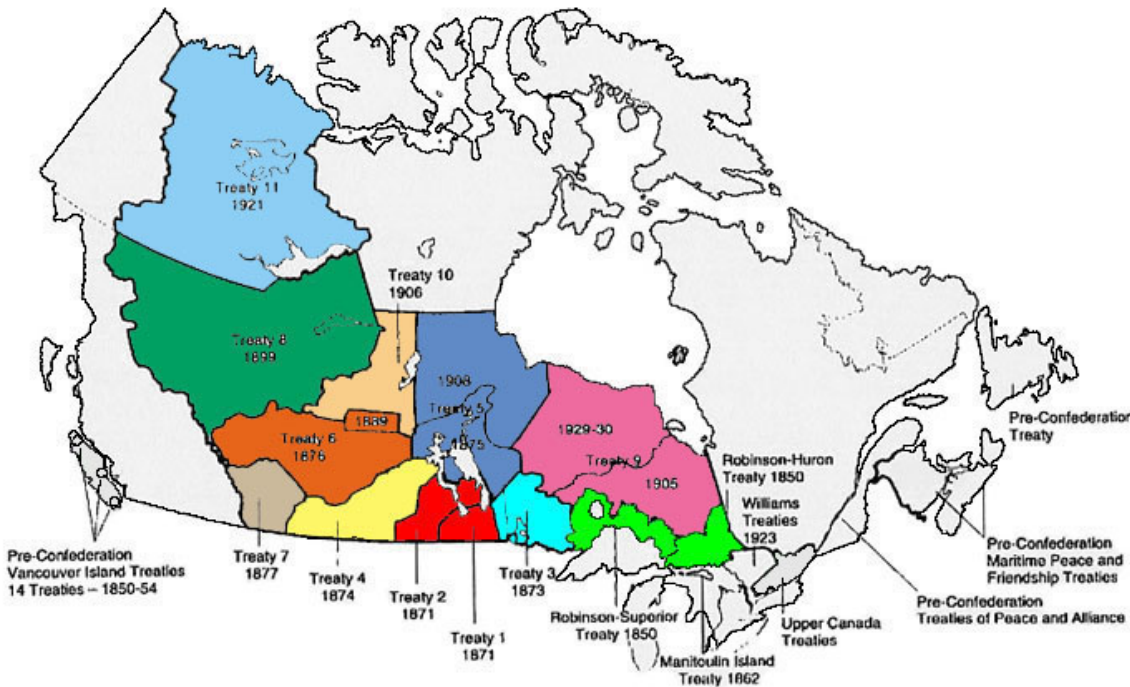
The written text says Indians inhabiting the land:

“[...] do hereby ceded, release, surrender and yield up to the Government of Canada for Her Majesty the Queen and her successors forever, all their rights, title and privileges whatsoever to their land”

Wording reflects the concept of sharing the land or trust and fiduciary obligations

No women touched the treaty, so no landholders were involved in treaty negotiation or signing treaty

Not a purchase required by the Royal Proclamation of 1763



# VICTORIAN TREATIES TRANSFORM INDIGENOUS GOVERNANCE OF CEDED LAND INTO VESTED TREATY GOVERNANCE

Aboriginal sovereignty, governance, and laws exist before the treaties

Victorian Treaties affirmed Aboriginal sovereignty, governance and land in the ceded territories

They are the heart of renewing an honourable nation-to-nation relationship with United Kingdom & Canada

A renewed nation-to-nation relationship needs to restore treaty governance system over the ceded lands in Treaties



# INDIAN CHIEFS & HEADMEN AUTHORIZED BY INDIANS TO NEGOTIATE & SIGN TREATIES

Queen needed the consent of the authorized chiefs to establish treaties protected as their land reserved to them in the *Royal Proclamation, 1763* which is part of Constitution of Canada



“Whereas all the Indians inhabiting the said country ... made **certain Chiefs and Headmen** who should be authorized on their behalf to conduct [treaty] negotiations and to sign any treaty [with Her Most Gracious Majesty, the Queen of Great Britain and Ireland] to be found thereon, “

# TREATY GOVERNANCE AFFRIMED BY QUEEN IN TREATIES

## TREATY CHIEFS & HEADMEN

**“TO BECOME  
RESPONSIBLE TO HER  
MAJESTY FOR THE  
FAITHFUL  
PERFORMANCE BY  
THEIR RESPECTIVE  
BANDS AND SUCH  
OBLIGATIONS AS  
SHOULD BE ASSUMED  
BY THEM ...”**



# TREATY CHIEFS AGREE THAT TREATY IS SUPREME LAW OF THE CEDED TERRITORY

Chief and  
Headmen  
“do hereby  
solemnly  
promise and  
engage to  
strictly  
observe this  
treaty” ...



- Generates theory of Aboriginal originalism – reliance of Aboriginal intent in reading and understanding treaties

# TREATY GOVERNANCE BASED STRICTLY ON TREATY



**THE CHIEFS,  
ON THEIR  
OWN  
BEHALF  
AND ON  
BEHALF OF  
ALL OTHER  
INDIANS  
INHABITING  
THE TRACT  
[TERRITORY]  
WITHIN  
CEDED**

“DO HEREBY SOLEMNLY  
PROMISE AND ENGAGE TO  
CONDUCT AND BEHAVE  
THEMSELVES AS GOOD AND  
LOYAL SUBJECTS OF HER  
MAJESTY THE QUEEN.

THEY PROMISE AND  
ENGAGE THAT THEY WILL  
IN ALL RESPECT OBEY AND  
ABIDE BY THE LAW”



# THE CHIEFS PROMISE THE QUEEN TO GOVERN THE TRANSFERED TERRITORY

THAT THEY WILL **MAINTAIN  
PEACE AND GOOD ORDER**

BETWEEN EACH OTHER, &

ALSO BETWEEN THEMSELVES  
AND OTHER TRIBES OF  
INDIANS, &

BETWEEN THEMSELVES AND  
**OTHER OF HER MAJESTY'S  
SUBJECTS**, WHETHER INDIAN,  
HALF-BREEDS, OR WHITES,  
NOW INHABITING OR  
HEREAFTER **INHABIT ANY PART  
OF THE SAID CEDED TRACT**



# CRIMINAL JURISDICTION OVER INDIANS IS PART OF TREATY GOVERNANCE

AND THEY [THE TREATY CHIEFS] WILL **AID AND ASSIST** THE OFFICERS OF HER MAJESTY IN BRINGING TO JUSTICE AND PUNISHMENT

## ANY INDIAN

- ❖ offending against the stipulation of this treaty, or
- ❖ infringing the laws in force in the country so ceded.



# TREATY GOVERNANCE REGULATES ECONOMIC AVOCATIONS OF INDIANS

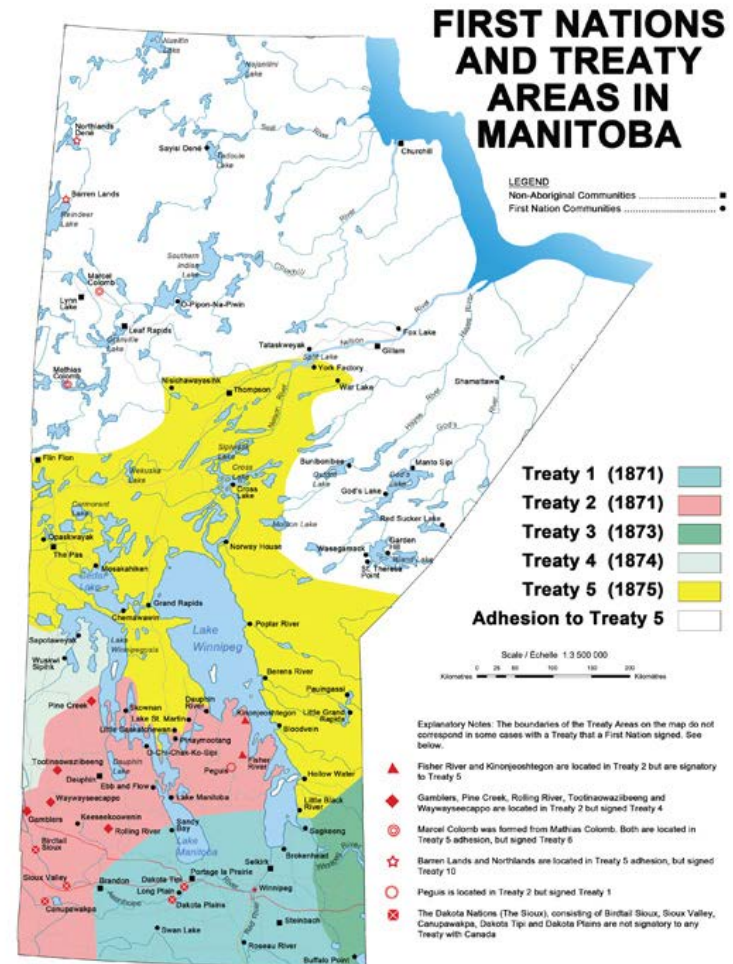
“HER MAJESTY FURTHER AGREES WITH HER SAID INDIANS THAT THEY, THE SAID INDIANS, SHALL HAVE RIGHT TO PURSUE THEIR AVOCATIONS OF HUNTING AND FISHING **THROUGHOUT THE TRACT SURRENDERED ...**”



# TREATY ECONOMIC RIGHTS CAN BE REGULATED

“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”

*SCC in Badger*: the exercise of this regulatory power is limited to protect and conserve the animals and fish to fulfill the treaty avocations within the ceded territory.



# TREATY RIGHTS & THE TAKING UP CLAUSE

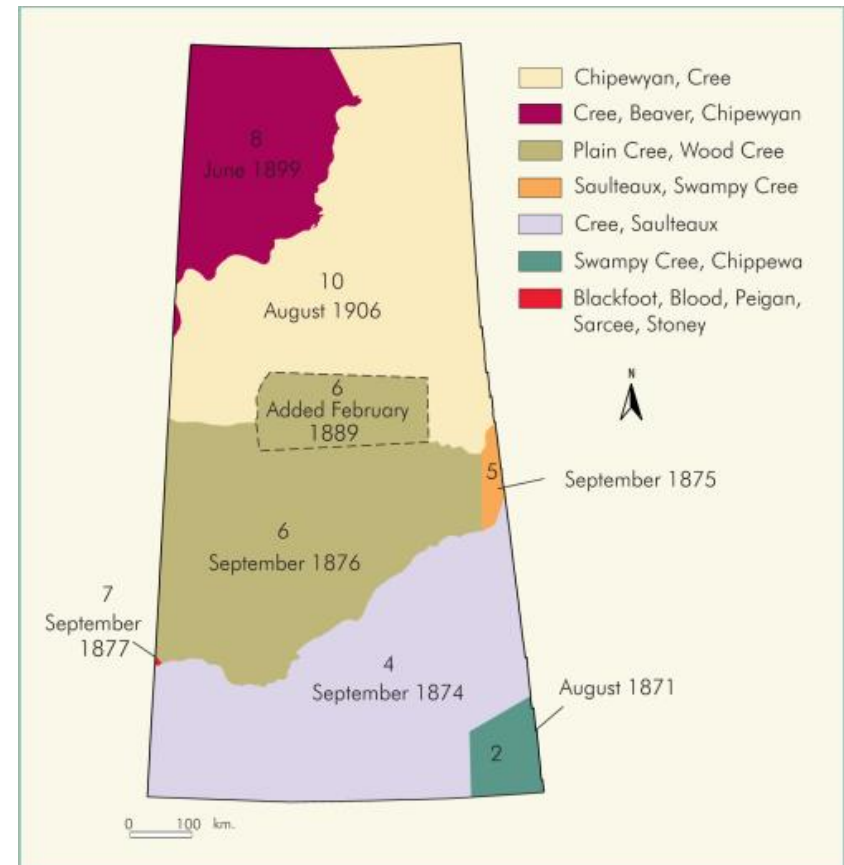
“AND SAVING AND EXCEPTING SUCH TRACTS AS MAY BE REQUIRED OR TAKEN UP FROM TIME TO TIME FOR **SETTLEMENT, MINING, TRADING OR OTHER PURPOSES** BY HER GOVERNMENT OF CANADA [OR GOVERNMENT OF COUNTRY]; OR BY ANY OF HER MAJESTY'S SUBJECTS DULY AUTHORIZED THEREFOR BY THE SAID GOVERNMENT.”

**SCC in *Mikisew & Grassy Narrows***: the honour of Crown requires consultations with the treaty holders about the land to be taken up and explaining any adverse affects on treaty governance and harvesting of the ceded territory.

Applies to both federal and provincial Crowns.

No infringement of governance or rights is acknowledged in treaties.

If infringement of rights occurs, fiduciary duties generated on the Crown and fair compensation is required.



# TAKING UP CLAUSE AND TREATY RESERVES

Treaties provided for tracts of land set aside for the exclusive benefit of the treaty families

“Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, ... and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada”

Treaty families were promised that they could continue their way of life, and that they would not be forced to live on reserve lands.

“Then, as the white men are coming in and settling in the country, and as the Queen wishes the Indians to have lands of their own, we will give one square mile, or 640 acres, to each family of five; but there will be no compulsion to force Indians to go into a reserve. He who does not wish to go into a band can get 160 acres of land for himself, and the same for each member of his family.”

- Treaty commission in Treaty 8, C. Mair, Through the MacKenzie Basin (Toronto: William Briggs, 1908) at 57



# VICTORIAN TREATY RESERVES



- Treaty clearly anticipates at least two streams of Treaty Indians
- : those who choose to live with a family or larger group on reserve land and those who choose to live in the ceded territory
- the two groups simply have different treaty rights in relation to land based on choice or self-determination
- a liberal construction of the document should place emphasis on the element of individual choice.
- The general objectives of the treaty land provisions is protection, security, of a fair portion of the land surrendered for specific families and individuals, and creation of a resource with the ceded territory for economic self-sufficiency.

# TREATY RIGHTS OF COLONISTS

“AND THEY [THE TREATY CHIEFS] WILL NOT MOLEST THE PERSON (TORTS) OR PROPERTY OF ANY INHABITANTS OF SUCH CEDED TRACT

OR

THE PROPERTY OF HER MAJESTY THE QUEEN,

OR

INTERFERE WITH OR TROUBLE ANY PERSON PASSING OR TRAVELLING THROUGH THE SAID TRACT, OR ANY PART THEREOF” (MOBILITY RIGHTS)





# HONOURABLE CONSTITUTIONAL RECONCILIATION REQUIRES RENEWED, NATION-TO-NATION RELATIONSHIP

- Under constitutional supremacy
  - create authentic Canadian Federation by united Treaty Federalism and Provincial Federalism
  - harmonize existing legislation and common and civil law traditions with Indigenous law
  - Create honourable government for Aboriginal peoples of Canada
  - Establish Queen's Treaty Council to implement treaty rights according to constitutional division of powers
  - Create Aboriginal Attorney General to protect and sustain constitutional rights of Aboriginal peoples of Canada
- Elected Treaty Delegates to Canadian governments to give voice to treaty rights and implementation

