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The River Forks Here

Canada's attempt to execute the 1969 White Paper and Indigenous Peoples

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The international *Vienna Convention on the Law of Treaties* was signed on *May 5, 1969*. Canada is one of 93 participating countries (states) to the convention. It was critical for Canada to adhere to the convention in the interests of attracting global/international business, investment and for other dealings.

But Canada had its "red Indian problem"[1]

On *June 25 1969*, Jean Chrétien, current Prime Minister of Canada, as then Minister of Indian Affairs and Northern Development, announced the Statement of the Government of Canada on Indian Policy, known as the White Paper. The Policy called for a repeal of the *Indian Act* and the elimination of Federal responsibility for Status Indians. It proposed the closure of the Department of Indian and Northern Affairs, the transfer of federal responsibility to the provinces, *and the termination of the existing treaties*. Reserve lands were planned for transfer from the federal government to the bands or "first nations" to vest in the provinces.[2]

The late Honourable Pierre Elliott Trudeau, then Prime Minister of Canada, explained the intent of the White Paper as follows when it was introduced:

> "The road of different status has led to a blind alley of deprivation and frustration. This road cannot lead to equality. *The government will offer another road* that will gradually lead away from different status to full social, economic and political participation in Canadian life. This is the choice." [emphasis added]

The difficulty with Trudeau's philosophy coined "a just society" is that it ignored the fact that Canada is a land subject to joint sovereignty. While he and his successors may pursue such a government agenda for their people, they cannot lawfully impose such an agenda on the Indigenous Peoples. The Indigenous Peoples retain the right of self-determination, the right to pursue their own philosophies of governance and society as they see fit. This is *not* the same as having different status within one society. There are in fact two societies interacting. The law of the land between these societies is contained in the treaties between Her Majesty and the Indigenous Peoples and is international convention law. While Her Majesty's governments can offer good example, it cannot be imposed on the Indigenous Peoples.

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[1] Now deposed former authoritarian Indonesian President Suharto responded to Canadian Prime Minister Jean Chrétien's questioning him on Indonesia's dismal record on human rights by reminding the Prime Minster that he still had his "red Indian problem."

[2] The *First Nations Land Management Act* achieves this latter element of the Policy once the *Act* is implemented by the members of a band through ratifying a land code in accordance with the scheme, thereby creating "surrendered reserves" vesting in the province but remaining subject to residual municipal power under the "First Nation." See my paper, "Apple Cede: The First Nations Land Management Regime," webposted in various locations, including by the University of Alberta's Native Studies ejournal, *Pimohtewin*.

Being treaties entered into prior to the *Vienna Convention on the Law of Treaties* coming into force on January 27, 1980 with nations not recognized as states for purposes of the United Nations, the treaties Her Majesty entered into with the Indigenous Peoples attract the international customary law of treaties.

Canada remains obligated under the treaties made by Her Majesty with Indigenous Peoples. Although the *Vienna Convention on the Law of Treaties* only governs treaties between participating states (being also member states to the Charter of the United Nations[3]) made after the convention came into force, the convention is accepted as a codification of the international customary law of treaties.[4]

Her Majesty agrees with the contents of the *Vienna Convention on the Law of Treaties* since it was ratified by Canada on October 14, 1970. Her Majesty must also be taken to having accepted the underlying foundation of the international customary law of treaties upon which the convention is based.

Canada needed to find a way to keep the treaties from attracting application of the international customary law of treaties, as reflected by the *Vienna Convention on the Law of Treaties.* This sparked the 1969 White Paper.

The most recent step in the progression towards the objectives set out in the 1969 White Paper is the tabling Bill in the 1st Session, 37th Parliament, 49-50-51 Elizabeth II, 2001-2002 in the House of Commons of Canada, short title: *First Nations Governance Act*.

Indigenous Peoples must today actively choose their course and take the necessary steps, even if somewhat difficult and less defined, or allow themselves to be carried off down the increasing current that is the execution of the 1969 White Paper that ultimately leads to their execution as Indigenous Peoples.

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[3] Some treaties establish international organizations that are authorized to adopt resolutions or acts that are binding on all member countries. The members of such international organizations have agreed in a treaty to be bound by the resolutions. An example is the Charter of the United Nations, which allows the United Nations Security Council to make resolutions that are automatically binding on all United Nations member countries. The United Nations was created on June 26, 1945 with the declared purposes to maintain peace and security, to develop friendly relations among member states, to achieve international cooperation in solving international problems, and to be a centre for harmonizing the actions of the states and attaining their common goals. The International Court of Justice as established by the UN Charter is its principal judicial organ.

[4] Discussed in detail below.

An Indigenous person, whose Internet handle is "Northwind," made an Internet statement/posting the other evening:

> "The other day when I was in town and some sort of festivities were a happening. An individual approached and asked abruptly, 'What do ya think about the indian act being changed and all?' Well since this gentlemen asked I may as well answer him. 'I think nothing of it, so long as I have my own mind set, my own way of doing what I have to do, my own time, and to think for myself, I don't have a worry over any government changing their own laws.' "

Northwind is not accepting the offer to travel down another road. He is not stepping into the fine looking canoe laden with supplies and luxuries destined to be swept along and eventually upset in rapidly boiling waters leading to the inevitable end that the Canadian government has laid out, the Canadian government chuckling[5] all the time with delight at the knowledge of what will come to pass.

He has chosen to stay in his well-used but proven canoe with only a few supplies. But he also has with him his hunting and fishing and other implements that he uses to sustain himself with.

He is on the course as pointed out to him by those who have travelled before him, setting out tobacco, respectfully, before starting out.

He does not know what he will eat a few days hence but he knows the gifts will be made to him and he thanks the Creator for them. He may not be wrapped in brightly-coloured, adorned cloth but he is warm and protected in his blanket/robe.

As he travels down the river, he is close to the Creator, at peace. He stops to visit others and is welcomed. And his grandchildren will someday sit and listen and know of his travels and what he learned on them.

And he will leave them his canoe and his hunting and fishing implements for them to use when it is their time and point out to them the course he took.

So, how 'bout you? What's your choice?

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[5] Robert Nault, Minister of Indian and Northern Affairs, appeared barely capable of containing himself in a recent nationally televised interview regarding the First Nations Governance Act bill responding to Assembly of First Nations' Chief Coon Come's references to challenging consultation on the bill and desires to pursue self-government under section 35 of the *Constitution Act, 1982*.

Understanding International Law

International law is very different from national or domestic legal systems. Law of a particular country is called "domestic law" or "municipal law."

International law consists of rules and principles that govern the relations and dealings between nations. There is no supreme international legislative body that passes laws to bind and be enforceable on all nations or states in the world. There are no comprehensive codes of international law or statutes to be found. International law research is *not* like domestic law research, which is a relatively simple exercise in comparison.

It is generally agreed among international legal and other scholars that there are four sources to consider in determining international law. Article 38 of the *Statutes of the International Court of Justice* (the "*ICJ statute*") provides guidance on the four recognized sources of international law. Article 38 of the *ICJ statute* sets out these sources and represents the accepted hierarchy of legal interpretation. The following is the order of importance, "persuasiveness" or priority of application of the four sources:

1. International Conventions;

2. International Customary Law;

3. General Principles of law recognized by civilized nations; and

4. Judicial Decisions and the teaching of highly qualified publicists.

Primary sources of international law

1. International Conventions

International conventional law derives from international agreements and may take any form that the contracting parties agree upon. Agreements may be made in respect to any matter but cannot conflict with rules of international law incorporating basic standards of international conduct or the obligations of a member state under the Charter of the United Nations.

International agreements create law binding on the parties to the agreement.

A treaty is an international convention. It is an agreement between countries that is binding in international law no matter what it is called. It can be called a "treaty", "convention", "protocol", "covenant", "agreement", "exchange of letters" and other.

A treaty only binds nations that are parties to it but a treaty can confer benefits on non-parties.

Treaty, as international convention, takes precedence, as between the parties, over international customary law.

There is a very important treaty on the law of treaties called the 1969 *Vienna Convention on the Law of Treaties*. It is regarded as representing international customary law on many treaty issues, especially the interpretation of treaties.

2. International Customary Law

International customary law is not written. It is essentially the body of international law rules, which have their source in the customary practice of nations. A rule is customary when nations follow certain practices generally and consistently out of a sense of legal obligation. It reflects nations' practice and there is recognition by nations that this practice is the result of a rule of international law (*opinio juris*).

While treaties only bind those nations that are parties to them, international customary law is binding on all nations.

"Practice" relates to official state practice and therefore includes formal statements by states. A contrary practice by some states is possible because if the contrary practice is condemned by other states or denied by the government itself the original rule is actually confirmed. "Practice" does not have to be completely uniform and consistent; it may be generally uniform and consistent.

Customs are derived from state diplomacy, practices of international bodies that demonstrate international attitudes and can as well include the internationally accepted activities of domestic agencies such as the Supreme Court of Canada and various legislatures.

International practices can be found documented in international law digests, collections of state papers, and in official publications of national governments and international organizations. There is a practice section in yearbooks of international law such as in the Canadian Yearbook of International Law[6]. Another example is the Digest of United States Practice in International Law.

This suggests why there have been changes to some books and publications published in Canada and the United States in the early 1900s. I have located reprints of government publications that contain new versions provided by the new publisher that differ significantly in legal effect from the original. Notably there was a lot of activity of this kind in and around 1969 - 1971. Such an effort is designed to change the evidence of the practice, specifically statements consistent with the treaties as being made with Indigenous Peoples and being international conventions, not just creatures of municipal/domestic law. As such, Canada hopes to undermine the laws to which Canada is bound, namely, the treaties.

Unlike a treaty, a nation does not have to formally accept a rule of international customary law before being bound by it. However, a nation may not be bound by a new rule of international customary law if the nation has consistently and expressly objected to the practice used to support the existence of the rule.

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[6] The University of British Columbia Press describes that the Canadian Yearbook of International Law is issued annually under the auspices of the Canadian Branch of the International Law Association (Canadian Society of International Law) and the Canadian Council on International Law. The Yearbook contains articles of lasting significance in the field of international legal studies, a notes and comments section, a digest of international economic law, a section on current Canadian practice in international law, a digest of important Canadian cases in the fields of public international law, private international law, and conflict of laws, a list of recent Canadian treaties, and book reviews.

There is some international customary law, known as rules of *jus cogens*, which cannot be deviated from. No exceptions are permitted. An example of a *jus cogens* rule is the prohibition against genocide.

Resolutions of international organizations also evidence international customary law.

UN General Assembly resolutions are not legally binding but are merely recommendatory; they are opinions having varying degrees of support. Some resolutions and declarations are however influencing international customary law. Even if not actual international customary law, UN resolutions may serve to speed up developing international customary law.

Secondary sources of international law

3. General Principles of law recognized by civilized nations

Where international conventional law or international customary law does not apply, a general principle of law may be invoked. It is a rule of international law because it is a general principle common to the major legal systems of the world and is viewed as being appropriate for international claims.

This involves looking at the domestic laws of different nations to see if there are principles that are commonly being used in their legal systems. General principles may be procedural, evidentiary and principles of substantive law.

An example of a general principle accepted as a rule of international law is the principle of *estoppel*: if one party by its conduct has accepted a particular situation, the party cannot then later proceed to challenge the validity of that situation.

4. Judicial Decisions and the teaching of highly qualified publicists

International law also looks to judicial decisions of domestic courts and the writings of experts in the area. These are not in and of themselves international customary law, they only serve to point out what constitutes international customary law.

The International Court of Justice and other international judicial or arbitral decisions only bind consenting parties to the subject action. Although they do not bind future courts and tribunals, they may be influential.

To a much lesser degree, the decisions of municipal/domestic courts, such as the Supreme Court of Canada, may also prove influential. Municipal courts impact on international law in the following ways; they may

1. Give direction and interpretation to a nation's own international practice;

2. Function as persuasive or binding authority in the nation's application of international law; and

3. Establish international customary practice.

Academic writings may also be evidence of a rule of international law. Scholarly teachings and writings are useful as research aids and sources of law as they

1. Collect and preserve international principles derived from other sources;

2. Analyse and criticize international legal principles; and

3. Suggest alternative approaches and new principles of international law.[7]

What are the treaties Her Majesty entered into with Indigenous Peoples?

The treaties Her Majesty entered into with Indigenous Peoples are International Conventions, agreements that created law to which the Indigenous Peoples and Her Majesty, as parties to the agreement, are bound.

Difficulties can arise if ratification of a treaty relies on existing state legislation and that legislation is subsequently altered in a way that proves incompatible with the treaty. Sometimes the interpretation of obligations under a treaty may evolve to the extent that the existing state law is no longer adequate to give effect to those obligations. Problems can arise where a state is unwilling to effect necessary amendments to its own law to implement a treaty.

But this is not the case for Canada.

The actions and statements of Her Majesty's governments would have the Indigenous Peoples and perhaps the international community believe that the treaties with the Indigenous Peoples are not in force and remain to be implemented.

In the case of the treaties Her Majesty entered into with the Indigenous Peoples, binding treaty action has already been taken that brought the treaty into force years ago. All the necessary constitutional and other steps have been taken for the treaty to come into force. There is no need for new legislation to "implement" the treaties.

In addition to binding treaty action, Her Majesty also brought into force Section 35 of the *Constitution Act, 1982*, which reads as follows:

> "35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

Thus any and all necessary constitutional steps to continue the treaties in full force after the repatriation of Canada's constitution in 1982 has occurred.

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[7] Perhaps those people who have wondered why I have chosen to spend my time researching and writing on the subject of Indigenous Peoples rather than continuing to appear in domestic court actions will now understand my decision. It is as doing so that I may contribute most to the survival of Indigenous Peoples. See also my paper released in 2001, "In a perfect world … Modern day colonialism in Canada," webposted on various Internet websites.

The problem however is the role that Canada's municipal/domestic courts have played in attempting, consistent with the 1969 White Paper, to rid Canada of Her Majesty's obligations pursuant to the treaties as international law. It is important to remind that Canada's Prime Minister appoints Canada's superior court judges, such as the judiciary sitting as the Supreme Court of Canada.[8] Prime Minister Jean Chrétien is currently in his third term of office and reportedly contemplating seeking his fourth.

Canada's courts have produced bad domestic law in their interpretation and application of section 35 of the *Constitution Act, 1982*. Though I have dealt with this extensively elsewhere[9] and thus do not wish to repeat myself fully here, the Supreme Court of Canada's interpretation such as found in *Sparrow* and *Delgamu'ukw* is a minorities-based domestic legal framework within which minorities, in this case, sporting "Indian-ness" can plead their cases to the Crown's courts for protection.

The Supreme Court of Canada ignores that Her Majesty is subject to international covenant, the treaties, and ignores international customary law as to the treaties. The Supreme Court of Canada attempts rather, to establish a new domestic practice with the eventual goal of setting the example for other states to follow so as to enshrine a new international custom designed to undermine the priority international law found in the treaties.

The goal of such a new international custom is to execute the Indigenous Peoples as to their international status and thereby relieve colonial governments of their continuing international obligations pursuant to treaties with Indigenous Peoples. Instead would be a legal foundation of only domestic/domestic law dealing with minorities comprised of remnants of the former Indigenous Peoples.

As the result of the bad law declared by Canada's domestic courts, advisors and lawyers who advocate for a "constitutionalization of rights" approach and pursue section 35 Constitution Act, 1982 remedies for Indigenous Peoples, are calling for a domestication of Indians, enfranchisment of Indians or assimilation of Indians.

By pursuing further application of Supreme Court of Canada section 35 laws, such as adequacy of consultation on the *First Nations Governance Act* bill, is to agree and assist Canada to achieve the goal of the new international custom above described.

Under the domestic, minorities approach, which is the approach encouraged by the United Nations as their member states attempt to preserve their colonial foundations, the avenue of redress is clear – the domestic courts – and short terms results can be "won" thereby making the advisors and lawyers money and according them "successes" which they can capitalize on for further income and reputation. Everyone feels good for the time being.

These same lawyers fall into the trap of agreeing to "exhaust domestic remedies" in the local domestic courts before attempting to proceed internationally. This is based on the scheme established through the

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[8] For further discussion, see my paper released 2001, "In a perfect world … Modern day colonialism in Canada." Also, Charles Moore, "Charter silences Canadians Appointed judges, not the people, rule our country," Western Catholic Reporter, June 17, 2002 p. 25: "Canadian law is no longer exclusively changeable by Parliament or provincial legislatures. In effect, the rule of law no longer applies in Canada, but is rather subject to the whim – and political ideology – of as few as five politically appointed and democratically unaccountable Supreme Court judges."

[9] Including in my 1997 book, *Gustafsen Lake: Under Siege* and my 2001 paper, "In a perfect world … Modern day colonialism in Canada."

United Nations member states that courts/tribunals established through the United Nations will not address any allegations until the member state's courts have first been approached and remedy thereunder exhausted.

But the very course of acceding to that approach is to accept that the Indigenous Peoples are in reality only present-day remnants, i.e. minorities, whose rights are appropriately within the jurisdiction of the domestic court structures of member states. There may be an ultimate solution or "win" at the international level but it will be only a "win" in the context of being a minority whose rights as such have been trampled upon by the majority.

The price is the sounding of the death knell for the Indigenous Peoples.

The treaties between the Indigenous Peoples and Her Majesty serve to permit Her Majesty an incorporeal possession regarding the lands owned by the Indigenous Peoples. Her Majesty's subjects are fond of summarizing possession as, "Possession is nine-tenths of the law," meaning that possession is good against all the world except the true owner. Providing that Her Majesty remains in compliance with the treaties, Her Majesty continues to have an incorporeal possessory legal right regarding the lands of the Indigenous Peoples, which serves as the foundation for Her constitution and sovereign base for Her subjects in the lands of the Indigenous Peoples.

The Indigenous Peoples are however, the true owners of the lands and as such, Her Majesty's incorporeal possession remains subject to the rights of the Indigenous Peoples as the true owners, provided Her Majesty is not in breach of treaty.

Further, provided that Her Majesty is not in breach of treaty, by entering into the aforementioned treaties the Indigenous Peoples agreed in the presence of the Creator, to share, to live side-by-side, and thereby was created before God, joint sovereignty in the lands known as Canada.

The Indigenous Peoples' sovereignty over the lands derives from being the owners of the lands and Her Majesty's sovereignty over the lands derives thereunder by agreement with the Indigenous Peoples pursuant to the treaties. This is to be for as long as the sun shines and as long as the grass grows and as long as the rivers flow.

Simply put, as Her Majesty's language used in the treaties clearly supports,[10] the intention between the parties to the treaties, being international convention law, is that Her Majesty and her successors receive an estate in the lands owned by the Indigenous Peoples for payment of annual rent in the form of annuities, sharing in the profits from the use of the land by Her Majesty's subjects and other consideration, generally referred to meeting health, education and economic development needs, all without interference with the Indigenous Peoples' pursuits of life.

The treaties entered into with Indigenous Peoples that continue to bind Canada in international convention law do not deprive the Indigenous Peoples of their sovereignty but rather confirm it. Any interference with their sovereign rights of governance, association and self-determination are unlawful.

[10] The specific interpretation of the treaties is not set out in detail here due to the length of the analysis and supporting evidence but will be released at a subsequent Treaty 1 – 11 Council meeting schedule for the near future.

Examples of such unlawful interference abound in the *Indian Act*, its predecessor and related legislation and in the bill, *First Nations Governance Act*.

How is International Law Enforced?

Just as there is no international legislature that can enact rules of international law binding on all countries, there is no international court before which a nation can be compelled to appear without its consent. How to resolve violations of international law remains an important question.

Repeated violations of international law are often not held to negate international customary law provided the

1. violations are responded to by protests or condemnations by other nations or international organizations; and

2. accused nation either denies the facts of its questionable conduct or appeals to exceptions or justifications contained in the rule itself.

Through the interpretation of section 35 of the *Constitution Act, 1982*, Canada is attempting to say there are established justifications to limit Her Majesty's responsibilities under the treaties.

There are some ways in which international legal disputes can be settled peacefully.

Dispute Settlement

Minor international legal disputes are usually resolved by diplomatic negotiations between the governments of the nations involved. They may also be settled through the mediation or the 'good offices' of a third party (such as the UN Secretary-General) or within the framework of an international organization. The nations involved may also agree to refer the dispute to a particular person for arbitration, such as a statesman or jurist, or agree to set up and be bound by a decision by a special arbitral or judicial body[11].

Coercive Measures

The principal means of enforcement of international law is based on self-help. Where there is a breach of international law, subject to the next paragraph, the injured nation may take all measures available to it to enforce its rights, resort to war being ultimate self-help.

Article 2(3) of the United Nations Charter limits this for member states: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." In the case of an armed attack by another country, the use of force in self-defence, including collective self-defence, is still permissible for the UN member states, provided the laws of war are adhered to.

[11] The International Court of Justice at the Hague (the 'ICJ' or 'World Court') is a permanent judicial body for the settlement of disputes between members of the United Nations but only by their consent. The World Court is thus not currently an option for Indigenous Peoples.

Thus Canada is precluded today from initiating war with the Indigenous Peoples.

Member states of the UN may resort to means of enforcement such as,

1. retorsion, which injures the other nation through actions such as terminating economic aid and severing diplomatic relations; and

2. reprisal, which would be illegal but for it qualifying as a response to a previous illegal act of the other nation.

Sanctions can also be collectively imposed by UN member states under Chapter VII of the United Nations Charter by the Security Council, which can also authorize military operations by the forces of United Nations Members to maintain or restore international peace and security.

Protest

Protest is very important. Protest prevents a change to international customary law applicable to the treaties. Lobbying however, is not protest. Lobbying is the activity of minorities within domestic/domestic laws. Lobbying may be performed by groups such as Canadian Christian religious groups but cannot be performed by the Indigenous Peoples without being perceived as being the actions of only present-day remnants of former peoples, i.e. minorities.

What can be done to enforce Her Majesty's obligations?

> "We all know the story of the man who sat beside the trail, and then the trail grew over, and he could never find his way again. We can never forget what has happened, but we cannot go back. Nor can we just sit beside the trail. Our old way of life is gone, but that does not mean we should just sit back and become imitation white men."[12]

Should you come upon a large bull moose you should be prepared to fight it with more than your bare hands. Minister of Indian Affairs and Northern Development, Robert Nault, with the full weight of support of Canadian Prime Minister Jean Chrétien behind him, is like a big stomping bull moose before he charges, staring and pawing at the ground, lowering his rack, taunting you, and there you are, about to run right up and use your fists on him.

You really need a hunting rifle, you need to use a proper weapon to down that bull moose, survive and bring something to your family to eat. Otherwise you are gone and your children are soon gone because you are not there to hunt to feed them.

You were given a loaded rifle but have forgotten how to use it properly. It's gotten rusty through misuse and not being taken care of and is in danger of falling apart. It's slung on your shoulder. You've been carrying it a long while.

[12] Plain Cree Chief Poundmaker.

You need to relearn how to use it and take care of it properly and clean it up before you can use it – it's there for your survival. Without it, you have only your bare hands and those can only be used to beg, not to provide for yourself and your family.
Canada wants you to be impatient, to run into your last battle, which Canada has already anticipated and stacked the deck to win.

You need to be careful and strategic and play a new game, not their game.

What's their Game?

Her Majesty's governments are attempting to defeat the treaties, which law She cannot terminate or remove Herself from under, in order to relieve Her Majesty of Her outstanding obligations thereunder. This is being done in three ways:

1. By consent, the parties to the treaties replace, modify or terminate the treaties.

2. By extinction of the Indigenous Peoples who are parties to the treaties, either by physical death or by legal change of the Indigenous nations to present-day remnants of former Indigenous Peoples constituting minorities within Her Majesty's constitutional, domestic legal environment.

3. By establishing new international customary law of dealing with Indigenous Peoples through a pioneered scheme of domestic/municipal aboriginal and treaty rights based on the Canadian example within the section 35 framework of the *Constitution Act, 1982* whereby justification for infringement of such a right where a valid object exists can be lawful provided the government is clear about what it is doing to the right, consults and pays compensation where it is considered fair to do so. To this end, Supreme Court of Canada justices and others are visiting other parts of the world, such as Israel[13], to encourage governments to come on board with Canada in order to broaden the practice so that over time it can be fully implemented internationally[14].

The treaties Her Majesty entered into with the Indigenous Peoples brought peace to the land. But on the home front, Canada has never been the benevolent peacekeeper and has chosen a path of subterfuge and deception. Canada strives to eliminate the Indigenous Peoples in a coup orchestrated through Her courts and Her Queen's Counsels rather than simply honouring Her debts and obligations under the treaties. Her Majesty's Honour is severely tarnished because Her government still covets what is owned by the Indigenous Peoples.

Her Majesty's governments are creating instability and uncertainty for third parties in Canada.

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[13] See Marvin Kurz, "Wanted: law and order," The Globe and Mail, June 22, 2002, p. A15: "I recently joined a group of lawyers with an interest in human rights on a mission to Israel and the West bank. Led by former Ontario premier Bob Rae, we met with a wide array of people – both Jewish and Arab – including Supreme Court judges, prosecutors, defence counsel, human-rights advocates and political leaders. We were frequently surprised to see the ways in which Canadian legal standards have already dug deep roots in a corner of Middle Eastern law. … Israel itself has a strong culture of human rights; society as a whole is engaged in an ongoing dialogue about the issue, including the rights of minorities… also like Canada, the Israel legal system has led the way in promoting minority rights."

[14] A special invitation conference by British Columbia Chief Justice Allan McEachern to selected participant judges, lawyers and legal scholars from throughout the world was held May 9 - 11, 2001. The Honourable Chief Justice Beverly McLachlin of the Supreme Court of Canada has visited the Middle East to advocate for a section 35 approach to the problems there.

What Indigenous Peoples can do

Proceeding with more litigation under section 35 of the *Constitution Act, 1982* using the same principles of law as set out by the Supreme Court of Canada, including challenging the adequacy of consultation, simply furthers Canada's execution of the 1969 White Paper and of you. The more Indians go into court on that basis, the more evidence is available to establish a new practice, new international customary law that undermines the treaties.

The issue is also *not* the need to implement and bring into force the treaties. The treaties are already in full force and effect. Her Majesty must still however fulfill Her obligations and satisfy Her significant outstanding debts under them.

There may be recourse for intentional interference with the Indigenous Peoples' inherent right to self-government[15] and the ability to nullify the *Indian Act* and all such legislation, including the bill, *First Nations Governance Act*, which unlawfully and seriously impede upon sovereignty.

The bill, *First Nations Governance Act* seems attractive to the uninformed, including some native groups, as "a straightforward, sensible outline for making the 625 odd bands with their 2,000 reserves, more democratic, accountable, and effective."

Opposition to the bill, *First Nations Governance Act* is being spun as simply coming from power-driven chiefs worried about erosion to their power base and intrusion on their wayward management styles.

There is the pressing need to publish the treaties and their meanings, setting out errors of Canada's actions and representations globally so as to prevent the establishment of new international norms such as is being attempted.[16]

There is the need to educate on the facts:

- You are Indigenous peoples with whom She has entered into treaties.
- You are *not* mere domestic minorities of Canada solely governed by Her.
- You and She hold joint sovereignty over lands known as "Canada."

Work to establish the presence of an observer at the United Nations, acting as a messenger for the Indigenous Peoples but not being held out as one person who can bind the Indigenous Peoples.

Do not be lulled and satisfied by a forum for talk only, such as the new Permanent Forum on Indigenous Issues, which had its first inaugural meeting in May 2002 in New York, USA. United Nations structures are notorious for being places for allowing people to vent, serving to channel peoples' efforts and "make work" exercises but little else.

[15] This is not the federal policy but on the basis of international law.

[16] See for example the Declaration of Indigenous Peoples June 14, 2002 served on Her Majesty as represented by the Governor General and notice provided to certain government embassies located in Ottawa.

In the case of this forum, where topics discussed included the integration and mainstreaming of indigenous issues throughout the United Nations system, the forum could serve as a vehicle for speeding up the process of putting new customary international law in place that would undermine the treaties. It could also serve to be the ultimate in "consultation."

The Permanent Forum on Indigenous Issues needs to be clearly understood. It is strictly a vehicle for the member states of the United Nations. As such, it is a place where notice and demand can be made to the member states of the UN. The Forum can pass those notices and demands, such as a Notice of Breach of Treaty, on to the member states together with recommendations for how to respond. The forum should *not* however be confused as being a body acting in the best interests of or as representing the Indigenous Peoples, despite the physical appearances of those appointed to the Forum.

Put world and Canada's banks and other financial institutions on notice of the debt owed by Her Majesty to the Indigenous Peoples.

The bill, *First Nations Governance Act*, does not apply to Indian moneys; understand that all moneys owed under the treaties, including moneys used to deliver payments in kind such as medical and educational services, are Indian moneys.

Regarding land, to Treaty Commissioner Morris' suggestion the government would "give" land to the Cree for farming, for example, Plains Cree Chief Poundmaker protested:

> "This is our land! It isn't a piece of pemmican to be cut off and given in little pieces back to us. It is ours and we will take what we want."

Chief Poundmaker's point is accurate and is reflected in the terms of the treaties.[17]

Her Majesty's subjects in consort with Her Majesty's representatives have exceeded the permissions granted by the Indigenous Peoples in the treaties, especially in their removal of resources from the lands.

The tendering of rent in such amounts as the amount of the original annuities not augmented nor increased is unconscionable and does not promote the main objects of the treaties.

There has not been an increase in consideration paid to Indigenous Peoples of proceeds from their lands and resources and annuities being rents payable by Her Majesty in consideration for Her incorporeal possession regarding those lands since 1892[18], or if there has been same credited to the Indigenous Peoples, they remain unable to attain same from Her Majesty's representatives.

An increase in rent is overdue and demands need to be made.

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[17] See footnote 11. above.

[18] Attorney General for the Dominion of Canada v. Attorney General for Ontario; Attorney-General for Quebec v. Attorney-General for Ontario, [1897] A.C. 199; (1896, C.R. [11] A.C. 308 (JCPC).

Understand “full and final satisfaction,” a legal principle. It means when someone owes you money or services, if you accept a lesser amount or payment, it could stand to satisfy the whole amount owing if you accept it that way. So it is necessary to specifically say, “No,” it is not accepted in full and final settlement.

You thus need to evidence this and can do so by action taken contemporaneously with or near in time to the acceptance of payments and take warning and respond to and deny statements such as the following Canada recently made referring to treaty annuities:

> “ ‘But now five dollars is mainly a symbolic payment.’ "[19]

Consider the main object of the treaties in terms of the payments to be made reflecting the actual benefits intended to be provided to the Indigenous Peoples that the following as but examples illustrate:

> "The system of annual payment in money I regard as a good one, because the recipient is enabled to purchase just what he requires when he can get it most cheaply, and it also enables him to buy articles at second hand from settlers and others that are quite as useful to him as are the same things when new. The sum of $3 does not appear to be large enough to enable an Indian to provide himself with many of his winter necessaries, but as he receives the same amount for his wife or wives and for each of his children, the aggregate sum is usually sufficient to procure many comforts for his family which he would otherwise be compelled to deny himself..."[20]

> " ‘You can imagine 126 years ago, five dollars would have taken you quite far’, says Trevor Sutter, of the federal department of Indian and Northern Affairs. ‘In fact you'd probably be able to buy a horse and some supplies for the year.’ ”[21]
> “Much to the chagrin of Commissioner Simpson, the Ojibway had demanded *economic development resources*, including farm animals, horses, wagons, and farm tools and equipment. *These demands were agreed to by the Commissioners*"[22]

What is the fair market value of the above today? How much money is reasonably sufficient today to cover transportation, equipment, supplies for the year, economic development resources, health and education needs and “many comforts”?

What is owed since 1892? What is the interest and lost opportunity costs from not having use of that amount?

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[19] Webposting by CBC Saskatchewan Jun 17 2002 05:10 PM EDT, statement made by Trevor Sutter, Department of Indian Affairs and Northern Development in Saskatoon.

[20] Report of the Indian Affairs Branch of the Department of the Secretary of State for the Provinces, 1871, pp. 27-32. Simpson to Secretary of State for the Provinces, November 3, 1871.

[21] See footnote 25. above.

[22] PAC RG10 vol. 3596, file 1258, "Memorandum of Articles Outside of the Treaty Nº1 which were promised at the Stone Fort 3 August 1871 to Chiefs and their counsellors" signed by Wemyss Simpson, Indian Commissioner.

Where is your census and listing of Indigenous people, by Indigenous Peoples not just band numbers and lists, entitled to receive payments?

Demand a full accounting of all Indian Moneys held by Her Majesty in trust.

Where is your central record of the councils being held of the Indigenous Peoples, preserved for seven generations hence?

The Indigenous Peoples have patiently awaited Her Majesty's full compliance with the treaties and for Her Majesty to be Honourable and Fair. In doing so, they are not to be construed in any way as having waived Her Majesty's requirement to full compliance. The Indigenous Peoples have repeatedly put Her Majesty and Her governments on notice of breach of treaty and called upon Her Honour.

Her Majesty has a duty of fairness in Her dealings with Indigenous Peoples. This requires that She provide to all of the Indigenous Peoples all that She has promised any of them.

Her Majesty cannot without your cooperation step away from the treaties. That would undermine Her sovereignty and cause too much damage to too many. All of the third party interests, the sub-interests of estates She has established beneath Her estate in the lands granted by the Indigenous Peoples, the subleases to Her leasehold interest if you will, all depend on the treaties.

This directly concerns those third parties, wherever in the world they may be located. It is only fair and considerate that they be made aware of the facts.

And that is all I have to say.

Janice G.A.E. Switlo

Appendix: Example International Customary Law on Treaties

The reader's attention is specifically drawn to Article 64 and Article 71 of Part III of the *Vienna Convention on the Law of Treaties*. Article 64 is the crux of the execution of the 1969 White Paper, including the role of the Supreme Court of Canada in its decisions as assisted by lawyers acting for Indigenous Peoples, all as explained above.

The following are excerpts from the *Vienna Convention on the Law of Treaties*[23]:

Article 64 Emergence of a new peremptory norm of general international law (jus cogens)
If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

Article 71 Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law
1. In the case of a treaty which is void under article 53 the parties shall:
(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and (b) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Article 26 Pacta sunt servanda
Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27 Internal law and observance of treaties
A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

Article 29 Territorial scope of treaties
Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

[23] See part III of the *Vienna Convention on the Law of Treaties*, as discussed above, a codification of the international customary law of treaties. Although the writer includes some brief footnotes below, the reader is encouraged to consider the effect of the application of these representations of international customary law vis-à-vis Her Majesty's responsibilities under the treaties entered into with Indigenous Peoples. The writer's analysis thereof is for another time given the length of this paper and the time commitment for delivering it.

Article 30 Application of successive treaties relating to the same subject-matter
1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between States parties to both treaties the same rule applies as in paragraph 3; (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another State under another treaty.

Article 31 General rule of interpretation
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 39 General rule regarding the amendment of treaties
A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.

Article 41 Agreements to modify multilateral treaties between certain of the parties only
1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
(a) the possibility of such a modification is provided for by the treaty; or (b) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

Article 47 Specific restrictions on authority to express the consent of a State[24]
If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.

If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.

Article 54 Termination of or withdrawal from a treaty under its provisions or by consent of the parties
The termination of a treaty or the withdrawal of a party may take place:
(a) in conformity with the provisions of the treaty;[25] or

[24] Think of this in the context of allegations of any deal purporting to undermine the treaties having been made through the bribing of chief and council.

[25] There is no termination provision in the treaties: “for as long as the sun shines …”

(b) at any time by consent of all the parties after consultation with the other contracting States.

Article 56 Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal[26]
1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Article 57 Suspension of the operation of a treaty under its provisions or by consent of the parties
The operation of a treaty in regard to all the parties or to a particular party may be suspended:
(a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties[27] after consultation with the other contracting States

Article 58 Suspension of the operation of a multilateral treaty by agreement between certain of the parties only
1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:
(a) the possibility of such a suspension is provided for by the treaty; or (b) the suspension in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.
Article 59 Termination or suspension of the operation of a treaty implied by conclusion of a later treaty
1. A treaty shall be considered as terminated if all the parties[28] to it conclude a later treaty relating to the same subject- matter and:
(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

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[26] *Ibid*.

[27] This is why attempting to obtain agreements with bands or “first nations” does not serve to terminate Her Majesty’s obligations under the treaties to the Indigenous Peoples.

[28] *Ibid*.

(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

Article 60 Termination or suspension of the operation of a treaty as a consequence of its breach
1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State, or

(ii) as between all the parties;

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(a) a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

Article 61 Supervening impossibility of performance
1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Article 62 Fundamental change of circumstances
1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Article 63 Severance of diplomatic or consular relations
The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Article 69 Consequences of the invalidity of a treaty
1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed; (b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty.

Article 70 Consequences of the termination of a treaty
1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.
Article 72 Consequences of the suspension of the operation of a treaty
1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:
(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension; (b) does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

PART VI MISCELLANEOUS PROVISIONS

The miscellaneous provisions include the establishment of the Depository of Treaties but this is only for those treaties entered into between UN member States being parties to the convention after its coming into force.

About the Author:

Janice G.A.E. Switlo obtained her five-year Bachelor of Commerce (B. Com) degree from the University of British Columbia and her Bachelor of Law (LL.B) from Osgoode Hall Law School in Toronto, Ontario. She was a member of the Law Society of British Columbia from 1987 to 1997; she remains called to the BC Bar. Janice joined the International Bar Association in 1992; her practice interests include the IBA's Human Rights Institute, Indigenous peoples, access to justice and the independence of the judicial system. She is also a member of the Canadian Council on International Law and a member of the International Commission of Jurists (Canadian Section).

Janice is former Department of Justice legal counsel for Revenue Canada and for the Canadian Department of Indian Affairs and Northern Development. She has also acted as in-house counsel to an Indian band and advised a territorial government on Aboriginal affairs. She has been defence counsel for traditional Indigenous people charged with hunting offences. She was defence counsel for the 1995 Gustafsen Lake stand-off accused until her injuries in an earlier motor vehicle accident prevented her from continuing. After leaving the trial, she began writing her book, *Gustafsen Lake: Under Siege*, which was published in 1997.

She is also the author of numerous treatises on Indigenous peoples rights, including

"*Trick or Treaty*," (1995) the renowned expose on the British Columbia Treaty Process and Canadian land claims policy;

"*Apple Cede: Canada's solution to decisively exterminate aboriginal title*" (1999), an analysis of the Canadian First Nations Land Management Regime; and

"*In a perfect world: modern day colonialism in Canada" (*2001), representing years of self-funded research that is paving the way for innovative strategy.

In 2001 Janice was honoured to address survivors of residential schools in Edmonton, Alberta and in Kamloops, British Columbia and in 2002 she has been kept busy advising on treaty unity matters and assisting university students, researchers, technicians and activists.

Janice's focus is on access to justice for Aboriginal peoples and preservation and enforcement of their rights domestically and internationally. Through her work she endeavors to educate and empower Aboriginal peoples. She provides strategic advice on current political, legal and policy objectives and developments.

Her efforts have earned her recognition: Marquis' *Who's Who in the World* has listed her biography since 1999, "inclusion in which is limited to those individuals who have demonstrated outstanding achievement in their own fields of endeavor and who have, thereby, contributed significantly to the betterment of contemporary society". Her biography is also referenced in *Who's Who in America*, *Who's Who in Finance and Industry*, *Who's Who in the West* and *Who's Who in American Law*.

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