THE NATURE AND LEGAL CAPACITY OF PIMICIKAMAK AND ITS GOVERNMENT

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Introduction

Pimicikamak is an indigenous Cree-speaking people whose traditional territory lies in the boreal forest of the Canadian Shield north of Lake Winnipeg. Pimicikamak Okimawin is the Cree term for its traditional government. This report was prepared by Taylor McCaffrey LLP, a Winnipeg law firm, in its capacity as legal counsel to Pimicikamak. The terms of reference for this report were originally defined in response to inquiries from the Government of Manitoba regarding the nature and legal capacity[1] of Pimicikamak and its government (referred to as "the questions"). As archival materials were gathered, oral history was reviewed, and drafting proceeded, it became evident that addressing the questions in a manner that would meet the needs of Pimicikamak and of Manitoba would be a significant undertaking. This report is based on a mix of archival research, cumulated oral history supported by focused inquiries, literature review, legal research and analysis directed to meeting those needs.

Legal Capacity

We were asked to first explain why the question of legal capacity arises. Legal capacity determines the scope of legal relationships and actions that a legal entity[2] can validly undertake. Leaving aside issues peculiar to governmental entities, such as jurisdiction, an adult "natural person" has the fullest possible legal capacity.[3] Groups of persons do not necessarily have the same legal capacity as a natural person. That is, the law generally does not recognize that groups of persons can engage in all of the legal acts that natural persons can. However, a group of persons may in some circumstances be regarded as a "corporation" by the municipal law of Canada, and many of these, such as business corporations, have the same legal capacity as a natural person,[4] usually but not

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1 The many meanings of the word "capacity" include "the attribute of persons which enables them to perform civil or juristic acts"; *Sargent* v. *Burdett*, 96 Ga. 111. This is the meaning intended by the term "legal capacity" used here. "Civil acts" mean acts that are "natural or proper to a citizen"; *Black's Law Dictionary*, 4th ed., West Publishing Co., St. Paul, 1968. "Juristic acts", which we take to be the focus of the questions, are acts that are "designed to have a legal effect, and capable thereof"; *id*.

2 By legal entities we mean to include real entities (*i.e.*, individual persons), artificial entities such as partnerships and corporations that are legally well defined and unincorporated groups and associations that often are not legally well defined.

3 An adult natural person has the legal capacity (sometimes called legal personality) to participate in a full range of legal relationships, including entering into contracts, owning property, and suing and being sued, in his or her own name.

4 Note that corporations do not have the same legal or political rights as natural persons. For example, a corporation does not have all of the legal rights of a natural person under the *Canadian Charter of Rights and Freedoms* and a corporation cannot vote in a political election.

always because they are incorporated under statutes[5] that formally assign that legal capacity to them. We will return to this issue below, and it will become evident that corporate status is a key issue in addressing the questions relating to legal capacity.

Context of the Questions

Historically, Canadian law concerning the status (including nature and legal capacity) of indigenous nations and of their traditional governments was not well-developed. It was overshadowed by the dominance of similar issues concerning the nature and legal capacity of Bands[6] and Band Councils,[7] both of which are creatures[8] of the *Indian Act*.[9] The fundamental distinctions between Indian nations and Bands have in recent times been blurred by widespread adoption of the term "First Nation", perhaps intended to signify both capacities, but almost invariably expressing in practical terms only the capacity of a Band.[10] Lacking explicit direction in the *Indian Act*, courts have accorded Bands a legal capacity less than modern corporations[11] but more than mere groups of individuals. For example, it appears that a Band can sue or be sued in its own name[12] and can enter into a contract.[13] But it cannot own land in its own name.[14] Bands

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5 *I.e.*, laws made by Parliament or a legislature.

6 Broadly, an Indian Band is a federal municipal entity with limited powers and capacity. (The term "municipal" is used here in the legal sense of a governmental entity whose powers are conferred (and can be amended or abolished) by some other governmental entity.)

7 Band Councils are legally distinct from Bands; see: *Mushkegowuk Council* v. *Ontario*, [1999] 4 C.N.L.R. 76; [200] 2 C.N.L.R. 79 (C.A.).

8 *I.e.*, Bands and Band Councils are created by authority of, and owe their continuing existence and powers to, the *Indian Act*. For most practical purposes, a Band Council operates as the agent of the Minister of Indian Affairs, has little independent capacity to represent the interests of its electors, and is largely controlled by the Minster's departmental bureaucracy. See, *e.g.*, M. Boldt, *Surviving as Indians: The Challenge of Self-Government*, University of Toronto Press, Toronto, 1993, (hereinafter, "*Surviving as Indians*"), especially pp. 109 *et seq*.

9 R.S.C. 1985, c. I-5.

10 "Although Indian tribes or nations existed prior to the first *Indian Act* coming into force, Indian bands operate under the Act, whereas a First Nation is self-defined and self-governing. For many of them, however, the term First Nation has been substituted for the words 'Indian band' and they continue to operate within the confines of the Act." K. Gilson, "Band Government: Providing Legal Advice within a Political Dynamic," (2001) *Isaac Pitblado Lectures*, p. 275, at p. 276.

11 *R.* v. *Peter Ballantyne Band*, [1987] 1 C.N.L.R. 67 (Sask. Q.B.).

12 *Clow Darling Ltd.* v. *Big Trout Lake Band* (1989), 70 O.R. (2d) 56 (Dist. Ct.); *Wewayakum Indian Band* v. *Canada*, [1991] 3 F.C. 420 (T.D.).

13 *Telecom Leasing Canada Ltd.* v. *Enoch Indian Band*, [1994] 1. C.N.L.R. 206 (Alta. Q.B.).

14 Gilson, K., *supra*, n. 10, at 276-7.

have limited powers that are expressly set out in or necessarily flow from[15] the *Indian Act*. In the absence of special federal legislation,[16] the nature and legal capacity of any one Band are identical with those of any other Band or Band Council.

As will be outlined further below, Pimicikamak is not a Band. Its nature and legal capacity, and those of its traditional government, are fundamentally different[17] from those of Bands and Band Councils. As noted above, they depend on factual circumstances of Pimicikamak and Pimicikamak Okimawin,[18] so that they may be different from those of other such entities. The questions must therefore be considered with reference not only to legal principles, but also to the factual context of Pimicikamak.

System of Law

Another initial consideration relates to the system of law within which the questions stand to be considered and answered – Pimicikamak law or Canadian municipal law. This is a legal, not a political, issue. Each of these systems of law must be considered in relation to the other and, for reasons that will be explained below, in relation to both Imperial law and English law.

Pimicikamak law[19] is mostly unwritten[20] traditional and customary law[21] and is based on a constitution[22] that is also largely unwritten.[23] Much of it derives from

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15 For example, a Band Council can enter into an employment contract; *Gamblin* v. *Norway House Cree Nation Band Council*, [2001] 2 C.N.L.R. 57 (F.C.T.D.).

16 *E.g.*, the *Cree Naskapi (of Quebec) Act*, S.C. 1984, c. 18.

17 The most fundamental differences arise because Pimicikamak and its government existed long before the *Indian Act*, so they obviously were not created by that (or any other) Act and their nature and legal capacity, whatever they may be, cannot derive from an Act of Parliament.

18 In particular, the nature and capacities of Pimicikamak and its government are based on their pre-existence as a distinct legal entity that was not lawfully extinguished before 1982 and now cannot be lawfully extinguished because its existence is a matter of existing aboriginal, and perhaps Treaty, rights. Note that "Okimawin" is often transliterated as "Okimowin".

19 Pimicikamak law is generally non-coercive, in the sense that there is no artificial penalty for breaking the law. On the other hand, because Pimicikamak law informs about what is spiritually necessary or temporally wise and appropriate to do or not do, acting contrary to it leads to its own sanctions in accordance with the traditional Law of Consequences.

20 In the last two decades, Pimicikamak has adapted its customary law to accommodate written laws; see *The First Written Law, 1996*.

21 In many contexts, "traditional law" and "customary law" may be used interchangeably. Here, "traditional law" means spiritual law, which is immutable and cannot be codified; and "customary law" is temporal, may be changed, and may be written.

22 The Pimicikamak constitution is ancient in its origins and uncodified. It mainly comprises a body of symbolic and Cree oral traditional law, and of Cree oral customary law. Much of the recent

the relationship with the land[24] and in particular the territory for which the Pimicikamak people have special responsibility.[25] The culture, language and the mode of thought[26] of Pimicikamak law are Cree. Pimicikamak law must be considered because without it Pimicikamak and Pimicikamak Okimawin would not exist. Canadian law is based on a constitution derived (though thought to now be severed) from English law, which also is based on a constitution of which a significant part is unwritten.[27] Its culture, legal languages and mode of thought are European, French and English, and Western. Pimicikamak law is not however "foreign" to Canadian law,[28] in particular by virtue of three historical events with legal and constitutional implications:[29] the Crown's assertion

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written Pimicikamak temporal law, *supra*, n. 20, (including *The First Written Law*, 1996, *The Pimicikamak Citizenship Law, 1999* and *The Pimicikamak Election Law*, 1999) may be regarded as constitutional.

23 Written laws are understood as integrated with the body of oral customary law; see the *Pimicikamak Citizenship Law, 1999*, s.2, which provides: "This Law, and every Law of the Nation, shall be interpreted together with traditional law, as a single holistic body of law, in accordance with its spirit and intent as understood by Cree people . . .".

24 Like many other indigenous peoples, Pimicikamak considered its people to be part of the land. The idea of one conceived as separate from the other was not a meaningful concept. See also: *Report of the Royal Commission on Aboriginal Peoples*, Ministry of Supply and Services, Ottawa, 1996, *("RCAP"*), vol. 2, part 2, ch. 4, s. 3.2.

25 In particular, this involves a spiritual responsibility to protect the land from harm. The exercise of this responsibility was the subject of traditional and customary law, and also of treaty relations that established rules for other peoples in this territory. Henday, traveling with one tribe through the territory of another, recorded the existence of sanctions for transgressing such rules: "I asked the Natives why they did not Hap [trap] wolves; they made the Answer that the Archithinue Natives would kill them if they trapped in their country . . ." L.J. Burpee, "Journal of a Journey Performed by Anthony Hendry: to Explore the Country Inland, and to Endeavour to Increase the Hudson's Bay Company's Trade, A.D. 1754 – 1755," *Transactions, Royal Society of Canada*, Ser. 3, vol. 1 (1907) sec. 2, p. 307 at p. 344; quoted in *Indians in the Fur Trade, their roles as hunters, trappers and middlemen in the lands southwest of Hudson Bay, 1660-1870*, University of Toronto Press, Toronto, 1974, ("*Indians in the Fur Trade*"), p. 90.

26 The fundamental difference between Cree thought and Euro-Canadian modes of thinking should be emphasized for non-Cree readers of this report. For a Euro-Canadian outline of this difference, see: R. Ross, *Dancing with a Ghost: Exploring Indian Reality*, (1992), Reed Books, Markham; note that much of Ross's experience involved the (related) Ojibwa people of northern Ontario.

27 More precisely, the constitution of the United Kingdom is uncodified. Canada's constitution is not fully codified: *Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at p. 75; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at p. 239.

28 See also: *Cherokee Nation* v. *Georgia* (1831), 5 Pet. 1; and further *infra*.

29 The constitutional implications include issues of paramountcy. That is, if a Pimicikamak law and a Canadian law conflict (cannot be reconciled), which is to apply? In the absence of a constitutionally valid codification such as the *Nisga'a Treaty*, the answer in any given situation may be derived from applicable legal principles, often with some confidence even in the absence of direct authority. For example, the *Pimicikamak Election Law* is paramount over the *Indian Act*

of sovereignty in what is now Canada; the making of Treaty #5; and the enactment of the *Constitution Act, 1982*[30] by the Parliament of the United Kingdom.[31] One consequence of these events is that much of Pimicikamak law is now an integral part of Canadian law.[32] As well, the law of aboriginal rights in Canada has been described as being "neither English nor aboriginal in origin: it is a form of inter-societal law that evolved from long-standing practices linking the various communities" and as being concerned with "the status of native peoples living under the Crown's protection, and the position of their lands, customary laws, and political institutions."[33]

In what follows, consideration of the questions begins within the context of Pimicikamak municipal law.[34] Some related aspects of international law will also be noted but the questions must ultimately be answered within the context of Canadian municipal law because the parties have and intend to pursue legal relations in the context of that body of law. Thus, in seeking answers to the questions, the focus will move from Pimicikamak municipal (pre-contact) law, to Pimicikamak as considered from the perspective of Canadian law following contact,[35] to Canadian municipal law as it is today.

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election provisions and even an express attempt by Parliament to over-ride it would be virtually impossible to justify in relation to section 35 of the *Constitution Act, 1982*. However, if Pimicikamak attempted to make a law that provided for a dictatorship, it would fail under Canadian municipal law as being repugnant to Canada's constitutional democracy.

30 Enacted as Schedule B to the *Canada Act 1982*, (U.K.) 1982, c. 11; ("the *Constitution Act, 1982*").

31 These three events and their consequences are considered in more detail below.

32 *E.g.*, as explained further below, with some possible exceptions, Canadian common law generally accepts pre-existing indigenous law as a fact, until validly amended or abolished. Conversely, from the Pimicikamak perspective, applicable Canadian law became internal to Pimicikamak municipal law by virtue of the Treaty relationship. *E.g.*, Treaty 5 includes an undertaking to abide by Canadian laws that, under Pimicikamak law, is a sacred promise; *infra*, n. 282.

33 B. Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727 at p. 737. Note that this is a statement of Canadian municipal law. It was quoted with approval by Lamer, C.J.C., in *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, at para. 42.

34 "Municipal law" here means the law internal to a state or nation without regard to law external to it.

35 *I.e.*, essentially English imperial law as applied to Canada by the Privy Council.

Legal Nature of Indigenous Nations

The legal nature of Pimicikamak[36] as an indigenous[37] nation within Canadian municipal law must be understood within the framework of an infrequently litigated but evolving body of law. In the latter half of the 19th century, colonial expansion,[38] advanced by maritime technology and fueled by trade, led to the development of a body of imperial law[39] concerned with rationalizing an understanding of indigenous societies from the perspective of colonizing powers.[40] The relationship of indigenous societies with their lands was a fundamental aspect of this understanding. The *Royal Proclamation of 1763* recognized aboriginal title to lands outside Quebec and the thirteen colonies,[41] under Imperial law.

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[36] Although we attempt in the spirit of the questions to address them separately in relation to Pimicikamak and Pimicikamak Okimawin, the inseparability of the concept of a nation from the concept of its government is a theme that runs through all the relevant case law and literature that will ultimately be reinforced by the conclusions to this report.

[37] The term "indigenous" is often used interchangeably with "aboriginal". *E.g.*, the *Concise Oxford Dictionary*, Clarendon Press, Oxford, 1968, defines "aboriginal" as "Indigenous, existing in a land at the dawn of history, or before the arrival of colonists . . ." "Indigenous", defined by the same work as "Native, belonging naturally," has a contrasting meaning in Canadian constitutional law: it conveys a timeless association with land under indigenous law, whereas "aboriginal" often invokes an emphasis on timing and an association with rights under Canadian municipal law.

[38] See, *e.g.*, "Occupation of the empty [sic] lands of the globe was violently accelerated by the fall of Napoleon [and the Treaty of Versailles, in 1871]. . . . The result was the most spectacular migration of human beings of which history has yet had record and a vast enrichment of the trade and industry of Great Britain. . . . News began to spread among the masses that fertile unoccupied [sic] and habitable lands still existed . . . Of the new territories Canada was the most familiar and the nearest in point of distance to the United Kingdom. . . . [From Lower Canada] there was a vast emptiness [sic] till one reached a few posts on the Pacific . . ." W.S. Churchill, *A History of the English Speaking Peoples*, Dodd, Mead & Co., New York, 1957, v. 4, *The Great Democracies*, Bantam edition, p. 76.

[39] By its nature, this was closely related in its origins with an emerging body of international law.

[40] *E.g.*, "The theory of aboriginal rights is by no means indigenous to Canada. . . . [It] has its foundations in 16th and 17th century interpretations of international law, was incorporated and further developed in British colonial policy and has had its fullest expression in the case law of the United States." P.A. Cumming & N.H. Mickenburg, eds., *Native Rights in Canada*, 2nd ed., General Publishing, Toronto, 1972, p. 14.

[41] *Royal Proclamation*, Geo. III, 7 October 1763; R.S.C. 1970, Appendices, p. 123. Pimicikamak lay within Rupert's Land, granted to the Hudson Bay Company, but came within the scope of the Proclamation that: "[A]ny Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them . . ." and "in case [lands] shall lie within the limits of any Proprietary Government [such as the Hudson Bay Company], they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose . . ."; *id*.

Imperial law, and Canadian law today, include Pimicikamak law. The legal nature of an indigenous nation is ascertained under Canadian law by first inquiring into its legal nature as a matter of its own law. In *Mabo* v. *Queensland*,[42] the majority of the Australian High Court said:[43]

> Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. The ascertainment may present a problem of considerable difficulty, as [the trial judge] perceived in the present case. It is a problem that did not arise in the case of a settled colony so long as the fictions were maintained [as they had been in Australia until this case] that customary rights could not be reconciled "with the institutions or the legal ideas of civilized society", *In re Southern Rhodesia*, [1919] A.C., at p. 233, that there was no law before the arrival of the British colonists in a settled colony and that there was no sovereign law-maker in the territory of a settled colony before sovereignty was acquired by the Crown.[44]

The leading cases on the legal nature of indigenous tribes in North America under English common law and colonial policy are two U.S. Supreme Court decisions in the 1830s that held Indian tribes to be cognizable by the common law as

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42 (1992), 175 C.L.R. 1. Quoted with approval by the Supreme Court of Canada in *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, at para. 40, per Lamer, C.J.C.

43 Note that in this passage the term "traditional" is not used as distinct from "customary"; *c.f. supra*, n. 21. In *R.* v. *Van der Peet*, *ibid.*, at para. 40, Lamer, C.J.C. said: ""[T]raditional laws" and "traditional customs" are those things passed down, and arising, from the pre-existing culture and customs of aboriginal peoples. The very meaning of the word "tradition" – that which is "handed down from ancestors to posterity" . . . – implies these origins for the customs and laws . . . ."

44 *Ibid.*, at para. 40.

political and legal entities.[45] In the first of these decisions,[46] Chief Justice Marshall, writing for the whole Court, described them as "domestic dependent nations"[47] and said:

> So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee Nation as a state, and the courts are bound by those acts.[48]

In the second of these cases,[49] the Chief Justice said, for the Court:

> The Indian nations had always been considered as distinct, independent political communities retaining their original natural rights as undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed, and this was a restriction which those

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45 The continuing relevance of the general principles articulated in these cases to Canadian common law today was acknowledged by the Supreme Court of Canada in *R.* v. *Van der Peet*, *supra*, n. , per Lamer, C.J.C.: "Although the constitutional structure of the United States is different from that of Canada, and its aboriginal law has developed in unique directions, I agree with Professor Slattery both when he describes the Marshall decisions as providing 'structure and coherence to an untidy and diffuse body of customary law based on official practice' and when he asserts that these decisions are 'as relevant to Canada as they are to the United States' ["Understanding Aboriginal Rights", *supra*, n. 33, at p. 739]. I would add to Professor Slattery's comments only the observation that the fact that aboriginal law in the United States is significantly different from Canadian aboriginal law means that the relevance of these cases arises from their articulation of general principles, rather than their specific legal holdings."

46 *Cherokee Nation* v. *Georgia*, *supra*, n. 28.

47 This terminology was intended to differentiate them from foreign nations that were, according to national policy of the United States of America that became part of its municipal law, independent of the United States.

48 *Cherokee Nation* v. *Georgia*, *supra*, n. 28, at p. 14. Note that under U.S. law, but not Canadian law, treaties required legislative ratification. In Canada, legislative sanction for Indian treaties was at best indirect until the Parliament of the United Kingdom enacted the *Constitution Act, 1982*, s. 35(1).

49 *Worcester* v. *Georgia* (1832), 6 Pet. 515.

> European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others."[50]
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> And further:
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> Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted: she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.[51]
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> And further again:
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> The very fact of repeated treaties with them recognises [their title to self-government], and the settled doctrine of the law of nations is that a weaker power does not surrender its independence - its right to self-government - by associating with a stronger and taking protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government and ceasing to be a state.[52]

The latter passage sets out the common law much as the Privy Council might have in relation to aboriginal nations in Canada at that date.[53] In the same case, Chief Justice Marshall declared the principle of aboriginal title (which is inextricably interwoven with aboriginal self-government), making reference to the *Royal Proclamation*, but viewing it also as arising from "the actual state of things" at common law.[54]

Initially, this U.S. jurisprudence was neglected in Canada. The Chief Justice of Upper Canada, John Beverley Robinson, in a series of decisions in land frauds

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50 *Ibid.*, at p. 559; approved in *R.* v. *Van der Peet*, *supra*, n. 42, at p. 527 per Lamer, C.J.C. Note also that, in the *Cherokee Nation* case, *supra*, n. 28, the U.S. Supreme Court held that the plaintiff nation was not entitled to maintain the suit, not by reason of any lack of legal existence or capacity (as a nation or, in a term there used almost interchangeably, a state) but because it was not foreign to the United States.

51 *Ibid.*, at pp. 548 -549; emphasis of the Supreme Court of Canada, per Lamer, C.J.C., quoting this passage with approval in *R.* v. *Sioui*, [1990] 1 S.C.R. 1025, at p. 1054.

52 *Ibid.*, at p. 560.

53 *C.f.* subsequent Privy Council decisions regarding other jurisdictions; *infra*, n. 382.

54 *Supra*, n. 49, at p. 520.

cases beginning in 1835,[55] declined[56] to recognize Indian tribes as legal as well as political entities. This line of cases has been strongly criticized for inconsistency.[57] All of them were decided without reference to the two directly applicable U.S. Supreme Court cases,[58] which would surely have had persuasive value.

More recently in Canada, the Royal Commission on Aboriginal Peoples expressed the view that:

> [T]he original nations have evolved over time, and barriers to their exercise of nationhood have arisen, but this has not changed their relationship to the Crown. The parties to the treaties must be recognized as nations, not merely as "sections of society". In entering into treaties with Indian nations in the past, the Crown recognized the nationhood of its treaty partners. Treaty making (whether by means of a treaty, an accord or other kinds of agreements) represents an exercise of the governing and diplomatic powers of the nations involved to recognize and respect one another and to make commitments to a joint future.[59]

The most recent guidance on the inter-related legal and factual nature of indigenous peoples in Canadian municipal law may be found in *R.* v. *Powley*,[60] in which the Supreme Court of Canada considered the phrase "the Indian, Inuit and Métis peoples of Canada."[61] The Court interpreted "peoples" in this phrase to mean "different groups that exhibit their own distinctive traits and traditions."[62] On this basis, the Court held,

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55 *I.e.*, *Jackson* v. *Wilkes* (1835), 4 U.C.K.B. (OS) 142; *Little* v. *Keating* (1842), 6 U.C.Q.B. (OS) 265; *Bown* v. *West* (1846), 1 E. & A. 117; *Byrnes* v. *Bown* (1850) 14 U.C.Q.B. 181; Dickson v. Gross (1852), 9 U.C.Q.B. 580; *Sheldon* v. *Ramsay* (1852), 15 U.C.Q.B. 105; *Young* v. *Scobie* (1853), 10 U.C.Q.B. 372; *Jones* v. *Bain* (1854), 12 U.C.Q.B. 550; *R.* v. *Baby* (1854), 12 U.C.Q.B. 346; *Totten* v. *Watson*, (1858) 15 U.C.Q.B. 392; *R.* v. *McCormick* (1859), 18 U.C.Q.B. 131; *Vanvleck* v. *Stewart* (1860), 19 U.C.Q.B. 489; *R.* v. *Great Western Railway Company* (1862), 21 U.C.Q.B. 555.

56 Absent some intercession of the Crown; see: *Jackson* v. *Wilkes*, *id*.

57 See: S.L. Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence*, 1998, University of Toronto Press, at p. 65: "Robinson's Indian law opinions are not consistent, nor is there a logical chain of development within them over time."

58 Harring notes that "neither he nor his brother judges ever cited [the two American cases] during Robinson's time on the bench [1829 to 1862]"; *ibid.*, pp. 325-326.

59 *RCAP*, *supra*, n. 24, vol. 2, part 1, para. 1.1, p. 18.

60 [2003] 2 S.C.R. 207.

61 *Constitution Act, 1982*, s. 35(2).

62 *R.* v. *Powley*, [2003] 2 S.C.R. 207, at para. 11. The Court said: "However, particularly given the vast territory of what is now Canada, we should not be surprised to find that different groups of Métis exhibit their own distinctive traits and traditions. This diversity among groups of Métis may enable us to speak of Métis "peoples", a possibility left open by the language of s. 35(2), which

without speculating on their number,[63] that distinct Métis peoples may exist within Canadian municipal law. The same principles, applied to Indians, leave no doubt that distinct Indian peoples do exist within Canadian municipal law. This decision provides new clarity in demonstrating not only the legal and juridical existence of distinct peoples within each of the three now-constitutional categories of indigenous peoples but also the fundamental connection between the historical roots of each of these peoples and their legal nature within Canadian municipal law.

Nature of Pimicikamak

Pimicikamak is both an indigenous people and an indigenous nation. These are reasonably well-defined concepts. The term "nation" has two related meanings: "a large body of people, associated with a particular territory, and sufficiently conscious of its unity to seek or to possess a government peculiarly its own";[64] and "an aggregation of persons of the same ethnic family, speaking the same language or cognate languages".[65] In the second sense, one might speak of the Cree nation,[66] for example. Self-evidently, Pimicikamak is a nation in the first sense. It is also a "people"[67] in the (singular) sense of "the entire body of persons who constitute a community or other group by virtue of a common culture, history, religion or the like."[68] More particularly, the Pimicikamak people is indigenous, in the sense of "originating in and characteristic of a particular land".[69]

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speaks of the "Indian, Inuit and Métis peoples of Canada."

63 "We would not purport to enumerate the various Métis peoples that may exist." *Ibid.*, at para. 12.

64 *I.e.*, the existence, or at least potential existence, of its own government is fundamental to the definition of a nation. In the case of Pimicikamak, like other indigenous peoples of Canada, it is also essential for its cultural survival as a people; see, *e.g.*, *Surviving as Indians*, *supra*, n. 8, especially, pp. 132 – 166.

65 *Webster's Encyclopedic Unabridged Dictionary of the English Language*, Random House, New York, 1996.

66 "The Cree are one of the most important tribes of the Algonquin family. They are naturally inhabitants of the forest. Their range was from the Rocky Mountains eastward north of the Great Plains, and hence north of Lake Winnipeg to the southern shore of Hudson Bay." J.B. Tyrell in *David Thompson's Narrative 1784 – 1812*, R. Glover, ed., Champlain Society, Toronto, 1962, n. 2 at p. 72.

67 The reasons of the Supreme Court of Canada in *R.* v. *Powley*, *supra*, n. 62, and the approach taken by the trial judge in that case ([1998] O.J. No. 5310 (P.D.)) applied to the facts concerning Pimicikamak support the conclusion that Pimicikamak is also a people for the purposes of s. 35 of the *Constitution Act, 1982*.

68 *David Thompson's Narrative 1784 – 1812*, *supra*, n. 65.

69 *Id.*

It can hardly be doubted that Pimicikamak existed as a distinct people before, and at the date of, contact.[70] The oral history[71] of its civilization and organization, post-contact records, and its survival to this day, all evidence this fact. Prior to and at the date of assertion of sovereignty by the Crown,[72] Pimicikamak was, like other indigenous nations, a sovereign[73] nation. For an unknown length of time before contact, Pimicikamak inhabited its traditional territory.[74] It succeeded in surviving in a prolific land with a harsh winter climate through a culture[75] centred on a body of

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[70] In support of much oral history to this effect, David Thompson is recorded as saying of Pimicikamak's neighbours to the immediate north and west, with whom he spent several years: "This section of the Stony Region [i.e., of the Canadian Shield] is called the Musk Rat Country [from his description, the region of the Rat River and Burntwood River watersheds] and contains an area of 22,360 square miles, of which, full two fifths of this surface is Rivers and Lakes, having phenomena distinct from the dry, elevated, distant, interior countries. The Natives are Nahathaway Indians, whose fathers from time beyond any tradition, have hunted in these lands; in conversing with them on their origin, they appear never to have turned their minds to this subject . . .". *David Thompson's Narrative 1784 – 1812*, *supra*, n. 66, at p. 91. Note that elsewhere in this same volume Thompson is recorded as stating that fur traders applied the term "Musk Rat country" to the entire Shield region; *ibid*., p. 57.

[71] Much of the oral history summarized in this report derives from sources too diverse to credit. It is subject to limitations inherent in the use of English; the language of oral history is of course Cree. It is also limited by the author's ability to conceptualize questions. A question to an elder typically evokes a story of personal experience (including perhaps the experience of being told a story by another). The story teller is responsible for telling the story accurately and the questioner is responsible for asking the right questions. Most of the questions were directed to or through Thomas Monias, who consulted particularly the late Sandy Beardy, Horace Halcrow, Charlie Osborne and Gideon McKay, and drew on recollections of stories learned in his youth (about 6 to 15) living with Elders now deceased, including Catherine Richard, George North, Frederick North and his wife Betsy, Louie North, Johnston Blacksmith and Mary North, McKay Scott, and especially his grandmother's brother, Edward Thomas. He explained: "My grandmother had no home. She lived with all these people for weeks at a time, moving from house to house, due to her expertise with medicines and midwifery." Some of their stories were recorded on audiotape in or about 1978.

[72] For Rupert's Land, this date is probably 1670; *infra*, n. 86.

[73] We use the term "sovereign" in relation to Pimicikamak in the factual sense that it derived its authority and jurisdiction from no temporal source other than itself. Use of this term is not intended to suggest that its remaining sovereignty is irreconcilable with the sovereignty of the Crown. Pimicikamak's Treaty relationship with the Crown affords a full rebuttal of any such notion.

[74] The term "traditional territory" here means the territory that, at the time of contact, others could access peacefully only by virtue of treaty relations with or other countenance of the Pimicikamak people.

[75] Here, culture has its anthropological meaning: "the sum total of ways of living built up by a group of human beings and transmitted from one generation to another," *Webster's Encyclopedic Unabridged Dictionary of the English Language*, *supra*, n. 65. In particular, culture includes the technologies that enable a people to survive in their particular environment.

traditional and customary law that balanced individual autonomy with collective rights.[76] In common with other indigenous peoples of North America,[77] it enjoyed a kind and degree of democracy[78] that European nations had rarely known. Neither the Cree nation nor any part of it was so constituted as to limit the sovereignty of the Pimicikamak people before the coming of the colonial powers:

> Prior to the coming of the white man and for a considerable period after his arrival, we lived as independent tribes. The tribe was a viable and organic structure through which power over whole territories was exercised. This power included the right to make laws and engage in war. Our tribes possessed other powers which evolved from the absolute ownership of land and these conditioned all aspects of our life: religious, social, medical, cultural, economic and political.[79]

As will emerge below, this people's future was to be influenced by the accident of their lands lying between but curiously isolated from two river, lake and portage routes that came to be the main trade highways of North America from the port of York Factory from the late 17th to late 19th centuries, one reaching to explore the west and north-west, the other connecting to the separately explored south and south-west.[80]

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[76] There is no contemporary written record depicting Pimicikamak society around the time of contact. However, Thompson spent considerable time with their northern neighbours; *supra*, n. 70. Of them he recorded: "The [Nahathaway] natives in their manners are mild and decent, treat each other with kindness and respect, and very rarely interrupt each other in conversation . . . . Those acts that pass between man and man for generous charity and kind compassion in civilized society, are no more than what is every day practised by these savages, as acts of common duty; is anyone unsuccessful in the chase, has he lost his little all by some accident, he is sure to be relieved by the others to the utmost of their power, in sickness they carefully attend each other to the latest breath decently . . ." [note: "the bottom of the page of manuscript has here been torn off."] *David Thompson's Narrative 1784 – 1812*, *supra*, n. 66, p. 81.

[77] It is widely mooted that the confederation of the original Thirteen Colonies into one republic was explicitly modeled on the Iroquois Confederacy as were many of the democratic principles which were incorporated into the U.S. Constitution itself. Scholars are divided on how direct this influence may have been.

[78] In the sense that its citizens governed themselves directly. In common with a few contemporary entities such as Swiss cantons, the whole people makes the ultimate determination of its temporal laws (though its processes obviously differ from those of the Swiss).

[79] The Indian Tribes of Manitoba, *Wahbung: Our Tomorrows*, Manitoba Indian Brotherhood (1971), p. xi.

[80] This circumstance made it possible for Pimicikamak to remain aloof from contact for many years. As will emerge below, this possibility ripened into fact as a matter of Pimicikamak choice, or what, in today's terms, might be regarded as national policy.

Geographically, Pimicikamak territory lay at the heart of the pre-contact Selkirk culture.[81] "Since the A.D. 1600s ended a mere 300 years ago, we might assume that archaeologists know a great deal about this recent time period. However, it is only in the last few years that the considerable complexity of late pre-contact culture history has become evident. . . . This [Selkirk] material culture is found from the southern edge of the forests north through the Churchill and the Reindeer river valleys to Reindeer Lake . . . [and] extends eastward through the forests of Manitoba, into northern Ontario . . . The best known Selkirk sites appear to have been located at major fisheries."[82]

Much of the pre- and post-colonial history of Pimicikamak territory[83] is accessible from oral history[84] and documentary archives respectively.[85] Prior to contact, the Pimicikamak people inhabited boreal territory in the heart of what came to be known as the Upland Cree area of Rupert's Land.[86] In the 1600s, Western knowledge included a broad understanding that this area lay within Cree territory.[87] But even in the 1700s (and

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81 D. Meyer, "People Before Kelsey: An Overview of Cultural Developments," in *Three Hundred Prairie Years, Henry Kelsey's "Inland Country of Good Report,"* Canadian Plains Research Center, Regina, 1993, ed. H. Epp, ("*Three Hundred Prairie Years*"), fig. 2, p. 59.

82 *Ibid.*, pp. 59 to 62.

83 For the purposes of this work it may suffice to summarize oral history as including Sipiwesk Lake, Cross Lake, the river between them, the Grass River, Pipestone Lake, the north-western part of the Outlet Lakes, the Minago River, and surrounding tributary lands in Pimicikamak territory during the period of contact. This work is concerned with contact, but beyond that is not concerned with territorial definition.

84 The Supreme Court of Canada has recognized the value of oral history as proof of historical facts from peoples with oral cultures, "on an equal footing with other types of historical evidence that the courts are familiar with . . ;" *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, per Lamer, C.J.C., at para. 87.

85 A full review of potentially relevant records was beyond the scope of this analysis. A great body of records, including especially the Hudson's Bay Company Archives, is in the custody of Manitoba Culture, Heritage and Tourism, Archives of Manitoba. Of course the records are not necessarily complete, not always accurate, and sometimes open to interpretation. See also: J. Craig, "Three Hundred Years of Records" in *The Beaver*, Hudson's Bay Company, Winnipeg, Autumn 1970, pp. 66 to 67. We did not systematically examine many records (*e.g.*, York Factory post histories, correspondence and pay-books) which may contain relevant information. There is a need for more definitive oral history and more archival research to complement the planned archaeological survey, *infra*, n. 249. However, the Hudson's Bay Company Archives comprise a remarkable body of information and we consider that our examination of its records was sufficient to support the conclusions.

86 This territory fell within the area, comprising all watersheds draining into the area inside Hudson Strait, that was the subject of a grant of trading and quasi-governmental authority from Charles II of England to the Governor and Company of Adventurers of England Trading into Hudson's Bay in 1670. For a consideration of uncertainties about this grant, see: *Native Rights in Canada*, *supra*, n. 40, at p. 139.

87 *Infra*, n. 103.

as will be seen in what follows, even later for Pimicikamak), the outside world knew little of the inhabitants of this region. "Except for the fur traders, Europeans knew almost nothing of the western Canadian interior until the nineteenth century, even though posts had been established on western Hudson Bay in 1683. It was not until 1801 that Sir Alexander McKenzie and others began to publish their descriptions of life in the West. By then, however, many changes had occurred among Indian groups. Epidemics, especially smallpox, had destroyed many bands . . ."[88] But contrary to popular belief, the fur trade itself did not impose much change on indigenous cultures.[89] Large-scale change in the 1700s relating to the alliance of the Cree with the Assiniboine (and their consequent estrangement from the rest of the Sioux) affected trade patterns with the new allies moving to control the middleman fur trade into York Fort and significant related movements of some southern and western Cree populations. By 1765, the Cree and, to their south, the Assiniboine had occupied territory further west and north of the parkland belt but Pimicikamak territory was unaffected.[90] By 1821, the Cree had withdrawn and the Ojibwa had expanded west around Lake Winnipeg and north to the Saskatchewan River but Pimicikamak remained unaffected by this movement.[91] Similarly, Pimicikamak apparently escaped the worst ravages of the smallpox epidemic that swept across the plains in 1781 and north into the woodlands and east as far as the Basquia population in 1782.[92] A second smallpox epidemic, in 1838, "did not have the same disastrous effect on the Cree as it did on their Assiniboine neighbours."[93] A generation later, Cree territory still surrounded Pimicikamak in what would become northern Manitoba and the southern bounds of Cree territory were more or less as Treaty #5

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88 D. Russell, "The Puzzle of Henry Kelsey and his Journey to the West," in *Three Hundred Prairie Years*, *supra*, n. 81, p. 74.

89 *E.g.*, "[T]he HBC and its products had entered into an already established Native trade network, not one that was created due to the existence of European traders. . . . Native trade centred around activities such as barter, gift giving, ceremonial exchanges and reciprocity, all designed to make items available to neighbouring groups, but also to establish social and political relations. . . . The political function of trade was most evident to secure military support and as a means to attain status and prestige among one's own band. The ideas of profit and personal gain were not dominant among Natives. . . . Evidence of the minimal effect of the fur trade can be noted in the relatively little change in the Native lifestyle." J. Dempsey, "Effects on Aboriginal Cultures due to Contact with Henry Kelsey," in *Three Hundred Prairie Years*, *ibid.*, p. 131, at p. 132.

90 See, *e.g.*, *Indians in the Fur Trade*, *supra*, n. 25, pp. 19 to 23, especially Fig. 9, "Tribal Distributions, ca. 1765," at p. 22.

91 *I.e.*, insofar as its neighbours were still all Cree; *ibid.*, pp. 99 to 104, especially Fig. 33, "Tribal Distributions in 1821," at p. 101.

92 *Ibid.*, p. 105 and Fig. 35, "Smallpox Epidemic, 1780-1781" at p. 107.

93 *Ibid.*, p. 187 and Fig. 44, "Smallpox Epidemic, 1837-1838" at p. 189, providing compelling evidence that the northward diffusion of this epidemic was arrested well south of Pimicikamak due to the first mass cowpox vaccination campaign, initiated by the Hudson's Bay Company; *ibid.*, pp. 188 to 189.

Commissioners would find them in 1875.[94] In other words, while the map of Indian tribal territories in the west was repeatedly transformed by tidal events over the two centuries from the mid-1600s to the mid-1800s during which colonial knowledge and the colonial record of indigenous peoples of the north-west slowly grew, the Pimicikamak people's occupation of its lands was essentially undisturbed,[95] as oral history says it had been since time immemorial.[96] In the 1870s, the first six of the numbered treaties,[97] swiftly followed by the *Indian Act*, effectively froze this map.[98]

Recently, Pimicikamak has been reviewing oral history with particular focus on its traditional governing institutions. However, these stand to be understood not only in terms of that oral research, but also in context of the documented ethnohistory of the aboriginal peoples of North America. Pimicikamak, like other Keiskatchewan[99]

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94 *Ibid.*, Fig. 42, "Tribal Distributions in 1860," at p. 184. See also: *infra*, n. 287.

95 This was the circumstance in which, beginning in 1828, the Hudson's Bay Company tentatively set out to eliminate the mobility of aboriginal families and tribes (*ibid.*, pp. 203 to 204), a policy that had little success until the 1870s when the Crown introduced the reserve system via the numbered treaties and implemented them in a manner not contemplated, at least in the Indian understanding of the treaties, with forced removal to reserves under *Indian Act* administration.

96 Exceptionally, oral history does identify a precise location where Pimicikamak successfully protected its territory by ambushing and killing some intruding Sioux (the date of this event is uncertain but was pre-contact).

97 The Plains Indians interest in treaties was motivated by starvation following extermination of the buffalo. The Plains Cree were reported to have petitioned in 1871: "Our country is getting ruined of fur bearing animals [*i.e.*, buffalo], hitherto our sole support, and now we are poor and want help – we want you to pity us. We want cattle, tools, agricultural implements, and assistance in everything when we come to settle – our country is no longer able to support us." W.J. Christie, Chief Factor of the Hudson's Bay Company, Cumberland District, dispatch to Lieutenant-Governor Archibald, 13 April 1871, *Sessional Papers*, 7, no. 22 (1872), at pp. 33 to 34. For Pimicikamak the opposite was the case: it was the colonists who needed help to survive; *infra*, n. 311 and related text; also oral history (pers. comm. A. Ross, Winnipeg, ca. 1978). It would be Manitoba Hydro, 100 years after the signing of Treaty #5 that by seizing control of the waterways that had since time immemorial transported and sustained the Pimicikamak people and operating them for profit would set in motion the devastation of that people's own means of subsistence.

98 *Supra*, n. 95. See also, *Indians in the Fur Trade*, *supra*, n. 25, Fig. 46, "Indian Land Cessions, 1871 – 1877," at p. 229.

99 For reasons we have been unable to identify, 17th and 18th century explorers and cartographers used "Keishkatchewan" (a Cree term, variously transliterated, meaning "fast flowing river") to refer to the Cree (now so-called) throughout much of their territory; *infra*, n. 144 and related text. See, *e.g.*,: "The River Kis.ca.che.wan" [identifiably the McKenzie River] on "A Draught Brought by Two Northern Indians Leaders Calld Meatonabee & Idotlyazee, of Ye Country to Ye Northward of Churchill River", post-1765, *Historical Atlas of Manitoba, A Selection of Facsimile Maps, Plans and Sketches from 1612 to 1969*, J. Warkentin & R.I. Ruggles, Manitoba Historical Society, 1970, p. 33, ("*Historical Atlas of Manitoba")*, p. 91; the "Keskatchewan River" (identifiably the Saskatchewan River) on "A Plan of Part of Hudson's Bay and Rivers Communicating with the Principal Settlements" 1768-1770, redrawn by R.I. Ruggles from two maps by A. Graham, *ibid.*,

peoples, existed autonomously,[100] not only within the wider Cree[101] culture, system of thought and government and those of the even wider Algonquian peoples, but also within a system of indigenous societies throughout North America.[102] So-called "Cree" territory included lands surrounding Lake Winnipeg, which was itself known to the French as Lac des Chritinaux (*i.e.*, in translation, Lake of the Cree).[103] The Cree had various terms for

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p. 95, with notations "Keskatchewanish"and "These dots show [William] Tomison's winter Path with Keskatchewan . . . Indians" toward and west of Lake Manitoba, and "Tents of Kiskachewans where Mr. [Matthew] Cocking was . . ." and "This is the Northern part of the Archithinue Country, where the Keskachewans resort after buffalo and to trade with the Archithinue Indians" along the South Saskatchewan River.

100 *Supra*, n. 79.

101 The word "Cree" is said to be of Canadian French origin, now incorporated into the English language, see, *e.g.*: *Webster's Third New International Dictionary of the English Language Unabridged*, Merriam-Webster, Springfield, 1986: "short for earlier Christenaux, Christeno, fr. CanF Christianaux, Christeno, prob. fr. Ojibwa Kenistenoag . . ." dating to 1744. In old French, "Christinaux" or "Cristinaux" meant "the Christened ones"; L.B. Parry, pers. comm. 2004. However, a footnote attributed to Tyrrell in *David Thompson's Narrative 1784 – 1812*, *supra*, n. 70, states, at p. 72: "Kristeno, the name by which this great tribe was usually known to the early traders, and of which the word Cree is a corruption, was the name which the Chippewa [i.e., Ojibwa] applied to them, and as the white people came in contact with, and learned to speak the language of, the Chippewa first, they naturally adopted the Chippewa name." See also: "Carte de L'Amerique Septentrionale", 1755, by Nicolas Bellin in *The Atlas of Abbe Clouet de l'Academie Royale de Rouen*, map 13, annotated "Cristinaux des Lacs" and "Les Cris ou Cristinaux" around Lake Winnipeg [not then so-named]; and "A Map of Canada and the North Part of Louisiana with the Adjacent Countrys", 1762 by Thomas Jefferys, annotated "KRIS OF THE LAKES" west, and "KRIS named also CHRISTINAU and KILLISTINS" east, of Lake Winnipeg. See also: "The French Canadians . . . call them 'Krees', a name which none of the Indians can pronounce; this name appears to be taken from 'Keethisteno' . . . which the French pronounce 'Kristeno', and by contraction Krees ('r', rough cannot be pronounced by any native). These people are separated into many tribes or extended families, under different names, but all speaking dialects of the same language, which extends over this stony region [Canadian Shield] and along the Atlantic coasts southward to the Delaware River in the United States . . . and by the Saskatchewan River westward to the Rocky Mountains . . . ." *David Thompson: Travels in Western North America 1784 to 1812*, V.G. Hopwood, ed., Macmillan, Toronto, 1971, p. 109.

102 *E.g.*, *Calder* v. *British Columbia (Attorney General)*, [1973] S.C.R. 313, per Judson, J. at p. 328: "[T]he fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries." Similarly see the majority opinion in *Mitchell* v. *M.N.R.*, [2001] 1 S.C.R. 911, at p. 926: "Long before Europeans explored and settled North America, aboriginal peoples were occupying and using most of this vast expanse of land in organized, distinctive societies with their own social and political structures."

103 See Royal Geographer Jean-Baptiste Franquelin's map " Carte de l'Amerique Septentrionalle", 1688, where "Lac des Chritinaux [Lake Winnipeg]" is shown as discharging to "Baye du Nord [Hudson Bay]" via "Riviere Bourbon [Nelson River]," with all the territory surrounding the lake and the between it and the Bay designated "PAYS DES CHRIS-TI-NAUX"; *Historical Atlas of Manitoba*, *supra* , n. 99, p. 49. For the origins of this concept, see his map "Carte Gnlle de la France Septentrionalle," 1678, *ibid.*, p. 39 and text p. 38. His 1699 map "Partie d'Amerique Septentrionalle" labels the territory around the lake "NATION ET PAIS DES CRICS OU CHRIS-

the peoples known to them. The original peoples – all of them – were anisiniwuk. To themselves, the Cree were nahayaway,[104] and also mikisiwiniwuk[105]. Among them, those of what came to be called the Swampy Cree region (which included Pimicikamak) were known as muskegowiniwuk.[106] Many of them were keiskatchewiniwuk, people of the fast-flowing river. Within these wider groupings, Pimicikamak[107] was the people whose territory was known by that name.[108]

Documentary records touching upon this people reach back to the mid-17th century.[109] The early records reveal an almost complete lack of knowledge of the interior of Rupert's Land[110] and there was apparently no potential for contact[111] with

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TINAUX;" *ibid*, p. 50. Notwithstanding uncertainties arising from the considerable geographic distortion of these maps, Pimicikamak was central within his understanding of this "nation et pais."

104 Cree: "those who speak the same language;" also nahayaway, or nahanaway, depending on dialect. *I.e.*, "Nahathaway" in the TH Cree dialect is the same word as "Nahayaway" in the Y dialect and both mean, in effect, "Cree;" (L.B. Parry, Edmonton, pers. comm., 2004). The Y dialect was spoken by the Pimicikamak people; the TH dialect was spoken, as Thompson confirmed, by the people to their north. Thompson applied the name Nahathaway particularly to the inhabitants of the specific 22,360 square mile area (around the Burntwood River and Southern Indian Lake) that he describes; *supra*, n. 70. His observations therefore confirm that the Pimicikamak people was dialectically distinct from its neighbours to the north. See also Tyrell's editorial note: "Nahathaway is one of several variants of the name applied by the Cree Indians to themselves, and is that form of the name which is commonly used by the Cree who live in the country around Ile à la Crosse and the upper waters of the Churchill river." *Ibid.*, p. 72. See also: D. Russell, "The Puzzle of Henry Kelsey and His journey to the West," in *Three Hundred Prairie Years*, *supra*, n. 81, at pp. 77 to 78.

105 Cree: "eagle people," a term used in ceremonial contexts.

106 Cree: "swamp people."

107 Cree: "river flows across." As detailed below, even before explorers and cartographers of the 18th century had direct experience of or information about the interior of Pimicikamak, they knew that the great river flowed across it.

108 Today: Pimicikamak (pim'i'chik'ə'mak) *n.* [< Cree *Pimicikamow*, flows across + -AK, people] **1**. the place where the river flows across **2**. the territory associated with that place **3**. the people that inhabited that territory since time immemorial **4**. [Const. law] the people that inhabited that territory at the time sovereignty was asserted by the Crown **5**. the nation comprised of that people inhabiting that territory *–adj.* of or about that place or that territory or that people or that nation.

109 See a map by Pierre Du Val, "Le Canada faict par le Sr de Champlain on sont La Nouvelle Angleterre, La Nouvelle Holande, La Nouvelle Svede, La Virginie etc. Avec les Nations voisines et autre Terres nouullement decouuertes suivant les Memoires de P. Du Val, Geographe du Roy", 1653. It identified Rupert's Land as "New Soutwalles" and designated it (or its southern part) without detail as "Kiristinous T[erritory];" in *Historical Atlas of Manitoba*, *supra*, n. 99, p. 33.

110 *E.g.*, unlike Jean-Baptiste Franquelin's map 14 years earlier (*supra*, n. 103), Guillaume De l'Isles map, "Carte du Canada et du Mississippi", 1702, shows "Lac des Assenipoils [Lake Manitoba]" discharging directly to "R de Bourbon [Nelson River]" and "Lac des Christinaux [Lake Winnipeg]" flowing to the south end of what came to be known as James Bay via "R Quichichoüe".

Pimicikamak in that century or much of the next.[112] The French,[113] active in exploring and trading[114] in the west in this period, apparently recorded no contact with Pimicikamak.[115] The written history and mapping[116] of exploration and contact in this region in the subsequent period derive largely from records[117] of their successful competitor, the Hudson's Bay Company.[118]

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[111] The date of contact is a question of fact; see: *R.* v. *Adams*, [1996] 3 S.C.R. 101.

[112] Until the mid-1700s, the policy of the Hudson's Bay Company in particular was to let the fur trade come to it on the coast of the Bay. See, *e.g.*, *The History of the Hudson's Bay Company 1670 – 1870*, vol. II, E.E. Rich, London, The Hudson's Bay Record Society, 1959.

[113] There was competition and even armed conflict between British and French in Rupert's Land west of Hudson Bay. The 1713 Treaty of Utrecht gave England control of Hudson Bay. York Fort changed hands several times, with the Hudson's Bay Company finally taking it in 1714. It should however be noted that the Crown's assertion of sovereignty in this region is based on settlement, not cession from France; see: *Walker* v. *Walker* [1919] A.C. 947; *A.G. for Alberta* v. *Huggard Assets* [1953] A.C. 420; *Baker Lake* v. *Minister of Indian Affairs* [1980] 1 F.C. 518; K. McNeil, *Common Law Aboriginal Title*, Clarendon Press, Oxford, 1989, pp. 267 – 268.

[114] It has been suggested that the French were better able than the English to bridge the cultural divide with aboriginal peoples of North America; see, *e.g.*, "In many Native American accounts of the loss of the French, what they talk about is the French understanding of their culture, the French desire to, to find out more about them and the French, what I can only describe as the ability to have a good time, which the English never really seemed to have mastered exactly. . . . [A]s soon as the French were expelled from North America . . . the relationship of trade suddenly was stripped of the ceremonial and ritual function and became really just a market, a market transaction which the Native Americans never really liked and didn't understand." M. Saxton, *Crossing the Continent*, MacNeil/Lehrer Productions, 2000, www.pbs.org/empireofthebay/ broadcast3.html.

[115] Maps of this period showed some details of Rupert's Land based on information provided by Indians. La Vérendrye recorded (in 1739) that during his expedition on the Saskatchewan River he had met Cree of the muskeg; L.B. Parry, pers. comm., (2004). A 1734 map prepared from data supplied by the La Vérendrye expedition, *Historical Atlas of Manitoba*, *supra*, n. 99, at p. 77, shows that, (using today's terms): "There are several rivers flowing from the northern end of Lake Winnipeg which the natives stated pass into Hudson Bay." *Ibid.*, at p. 76. The "natives" undoubtedly had access to information based on participation in the continent-wide system of inter-national relations and commerce. It was not necessarily accurately understood and mapped. The maps were refined over time, but continued to express major inaccuracies, especially as to the configuration of rivers north and west of Lake Winnipeg and the distance from the lake to Hudson Bay; *ibid.*, pp. 78 to 85.

[116] Maps of the period are particularly significant because they aggregated information from all available contemporaneous sources. However, for explorers and cartographers of this era, mapping of rivers was primarily concerned with travel rather than the flow of water. In some of the maps referenced below, portages are shown as if they are hydraulic connections. Some early maps have arrows to show the direction of flow.

[117] The Hudson's Bay Company records were archived in London in the 1930s. Even where documents are missing, the record seems remarkably complete due to redundancy; *e.g.*: *Historical Atlas of Manitoba*, *supra*, n. 99, p. 70: "Three other maps are mentioned in documents as having been prepared, but they have disappeared. One is a map made by Thompson, made in 1791,

The Hudson's Bay Company's early explorations were the subject of contemporaneous and continuing controversy.[119] Henry Kelsey[120] purportedly[121] explored the Nelson and Saskatchewan rivers in 1690 to 1692 on its behalf but there is no evidence[122] that he had contact with Pimicikamak.[123] In 1754, Anthony Henday[124] with a

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showing the details of the south trading route from York to Cumberland House. A list prepared in 1819 indicates it as missing from Hudson's Bay Company Archives. However, it is undoubtedly a generalized version of this map which Thompson placed on his 1794-1795 chart. The second missing map is Turnor's 1792 map of the Nelson river from York Fort to above Split Lake. It is likely a generalized version of this which Thompson placed on his 1794-1795 map [*infra*, n. 184]. The final map no longer extant apparently resulted from Peter Fidler's journey to the Rocky Mountains in 1792. . . . The detail was transferred by Arrowsmith onto his large map of North America of 1795-1796 [*infra*, n. 187], and so has been preserved."

118 Originally named "The Governor and Company of Adventurers of England Trading into Hudson's Bay" by its Charter, in 1670.

119 There were commercial as well as scholarly grounds for the controversy. "[A] British House of Commons Committee of 1749 was appointed 'To inquire into the State and Condition of the Countries adjoining to Hudson Bay, and all the Trade carried on there; and to consider how those Countries may be settled and improved, and the Trade and Fisheries there extended and increased; and also to inquire into the Right the Company of Adventurers trading into Hudson's Bay pretend to have, by Charter, to the Property of Lands, and the exclusive Trade into those Countries.'" *The Journal of Henry Kelsey (1691 – 1692)*, C.N. Bell, Dawson Richardson Publications, Winnipeg, 1928, p. 5. See also, *e.g.*,: *The Puzzle of Anthony Henday's Journal*, m/s of address to the Third North American Fur Trade Conference, Winnipeg, 6 May 1978, Glyndwr Williams, copy in Archives of Manitoba/Hudson's Bay Company Archives, PP 1978-20: "'It is one of the ironies of the history of the Canadian West that the journals of some of its most significant explorers – Radisson, Kelsey, La France, Pond – present ineluctable problems of reliability and even authenticity.'" Passage quoted from *The Beaver*, Autumn 1970.

120 A Nelson River dam whose operation has wreaked destruction in the Pimicikamak heartland for 40 years bears his name.

121 "It has been claimed for Kellsey that on this journey of 1691 or 1692 he reached the Saskatchewan country. . . . [T]here is nothing whatever in Kellsey's journal to support such a contention. . . . His distances and directions and descriptions of the country traversed, so far as they suggest anything, rather go to show that his route lay toward South Indian lake or Granville lake, on the waters of the Churchill." And further: "There is a note, however, on the margin of Hendry's [Henday's] journal, by Andrew Graham, afterward factor at York, in which the significant statement is made that Hendry was 'the first person who ventured inland'. This lends at least some colour to the argument, advanced by opponents of the company, that the whole story of Kellsey's journey was a fabrication." See: *Journal of Anthony Hendry, York Factory to the Blackfeet Country, 1754-55*, 1907, ed. L.J. Burpee, *Trans. R.S.C.*, s. II, p. 307; copy in Archives of Manitoba/Hudson's Bay Company Archives, PP1907-1. For an attempt to make sense of Kelsey's account of the journey, see: A. Ronaghan, "Reconstructing Kelsey's Travels" in *Three Hundred Prairie Years*, *supra*, n. 81, pp. 89 – 94.

122 The evidence of his travels is enigmatic at best. In 1926, a handwritten volume, now known as *The Kelsey Papers*, inscribed *Henry Kelsey His Book, Being ye Gift of James Hubbard in the year of our Lord 1693*, came to light. It purports to set out (not in chronological order) Kelsey's subsequent record of his travels. As if these circumstances were not sufficiently obscure, the

company of Cree[125] traveled[126] to what is now known as The Pas[127] and from there up the Saskatchewan into present-day Alberta. It appears he traveled north of Pimicikamak territory[128] but there is no map of his journey.[129]

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record of his 1690 expedition is set out in verse (almost but not quite following the rigid form known as iambic pentameter); it is reproduced in *Three Hundred Prairie Years*, *supra*, n. 81, at p. 218. This is preceded by "A Journal of a voyage & Journey undertaken by henry Kelsey through Gods assistance to discover & bring to a Commerce the Naywatame poets in Anno 1691." Aside from juxtaposition with the strange verse in this volume, "poets" here has nothing to do with poetry: "The great difficulty in identifying the Naywatame Poets has been that their name seemingly only occurred in Kelsey's journal. Although most investigators realized that the word Poet was the equivalent of the Cree *pwat*, or Sioux, many chose to ignore this." D. Russell, *supra*, n. 88, at p. 82.

123 Kelsey's journal identifies the peoples he met as: "the Nayhaythaway Indians, the Home Indians, the Stone Indians, the Eagles Brich Indians, the Mountain Poets and the Naywatame Poets." *Supra*, n. 88, at p. 77. While the term "Nayhaythaway" is applicable to all Cree peoples, his use of it tends to confirm that the Cree whom he contacted used this dialectical form. David Thompson's description of the "Nayhaythaway Indians," especially their distinct dialect and their territorial area and location, places them as Pimicikamak's neighbours to the north and west; *supra*, n. 104.

124 Henday's name was widely misspelled as "Hendry" (see, *e.g.*, *supra*, n. 121) but his "signature of [a letter to Isham] clears up the matter of how Henday spelled his name. For a long time it was thought that his name was 'Hendry'." *Behold the Shining Mountains, Being an account of the travels of Anthony Henday, 1754-55, The First White Man to enter Alberta*, J.G. MacGregor, Applied Arts Products, Edmonton, 1954, ("*Travels of Anthony Henday*"), p. 42.

125 "One of the remarkable things about Henday's trip to the interior was that he travelled with a band of Crees, partly through the country of the Assiniboines and that of the Blackfeet. . . . In Henday's time . . . the Crees were traders who were on good terms with their customers, the Assiniboines and the Blackfeet. It was partly this that made Henday's journey possible. . . . Before leaving their families the Crees would appoint a rendezvous, possibly five of six hundred miles further east at the edge of the prairies, at which it was proposed to meet their families when they returned from the Bay. During the course of the summer the older men and the women and children would move across the face of the country by easy stages to this rendezvous. . . . When the younger men returned from the Bay and were reunited with their families, the whole band of Crees, consisting of possibly one or two thousand, would start working back so as to be in their homeland again by the time winter set in. While the Hudson's Bay officials had only a vague knowledge of the homeland of these Indians, they were aware of this annual practice." *Ibid.*, p. 36.

126 This venture reflected a fundamental change in policy, *c.f.* n. 112. However, the company's new inland focus lay along the Nelson and to its north and west; *e.g.*: "[By the 1790s, Chief Factor] Colen . . . was taken up with the trade of the Factory's immediate hinterland to the south and the west – the area between the Nelson and Churchill Rivers. He had ordered the building of two posts in the Nelson River system: Split Lake House at the mouth of the Burntwood River in 1790 and Chatham House on Wintering Lake the following year. The two HBC posts were the only opposition which the North West Company traders met in the whole territory north of Cumberland House [on the Saskatchewan River]." See: W. Sinclair, *David Thompson's Journey of Discovery from Sepiwesk Lake to Reindeer River, and then to York Factory, 1793*, manuscript, March 2, 1993, pp. 29 to 30; Archives of Manitoba/Hudson's Bay Company Archives, e.235/2, p.5.

An early map[130] of the region made by Andrew Graham[131] purportedly in 1768 to 1770[132] shows "Pemochicimo Lake"[133] connected to the Pine River[134] and the Keskatchewan River[135] north of Lake Winnipeg.[136] In 1772 to 1773, Matthew Cocking

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127 Variously, in that period, *e.g.*: "Basquiau" or "Basquiaw"; see, *e.g.*, Arrowsmith's 1795 map, *infra*, n. 187. In origin it appears this was La Verendrye's term for the Saskatchewan River on the plains (c.f., "Pasquawayinawak" for the Plains Cree), L.B. Parry, Edmonton, pers. comm. 2004; *c.f.* also "Opasquayak Cree Nation" reserve near The Pas, Manitoba.

128 It is difficult to trace Henday's route from his journal. Burpee, *supra*, n. 121, pp. 308 – 309, attempts to make a case for a route that would pass through Pimicikamak territory. In brief, his case was that, after Knee Lake, Henday traversed a large lake he called "Christianaux" that could not be Lake Winnipeg, and that it may be the same lake that Matthew Cocking later called "Pimochickomow". From description, (Burpee identified it only as "an unmapped lake") it could be Sipiwesk Lake or Bear Lake. If so, Henday was lost but did not say so. This case is at best speculative. Hearne's map, made 22 years later, shows the "normal water connections" between York Fort and The Pas bypassing Pimicikamak; *Historical Atlas of Manitoba*, *supra*, n. 99, pp. 97 and 96.

129 MacGregor says: "Henday set out from York Factory with his band of natives. They ascended the Hayes River, the Nelson, and the Saskatchewan Rivers to The Pas." . . . And later: "[T]hey . . . retraced the course they had taken the previous summer . . . ;" *Travels of Anthony Henday*, *supra*, n. 124, p. 17. The path from York Factory to The Pas using these rivers (as now named – the usage MacGregor evidently intends) is the trade route that passes south of Pimicikamak.

130 Maps from this era are particularly useful in determining contemporary European knowledge as they tend to reflect careful collection of that knowledge (much of it derived from Indian sources) of the depicted lands and sometimes of the peoples of those lands.

131 "A Plan of Part of Hudson's Bay and Rivers Communicating with the Principal Settlements", *Historical Atlas of Manitoba*, *supra*, n. 99, p. 95. "This is a composite map prepared from two manuscript maps drawn by Andrew Graham, the Factor at York Fort. It records the most complete configuration of the waterways of the Manitoba area to that date and . . . is the earliest and most complete [contemporaneous] study on the geography of Manitoba." *Ibid.*, p. 94.

132 *Id*. As noted *infra*, n. 135, Graham attributed a significant part of the information depicted on this map, including all of the information concerning Pemochicomo Lake and Pine River, to Cocking's expedition which returned in 1773, several years later than the date ascribed to the map.

133 This map "records the most complete configuration of the waterways of the Manitoba area to that date"; *ibid.*, p. 94. This part of it is based on Matthew Cocking's journal of his trip to the forks of the Saskatchewan River in 1772 – 73, *ibid.*, pp. 94 and 95. "Pemochicimo Lake" seems to represent a combination of Sipiwesk Lake and Cross Lake; see also, *infra*, n. 140. The entire map is seriously distorted, reflecting limitations on European knowledge of the inland waterways in its time (see, *e.g.*, *infra*, n. 135 and n. 136).

134 *I.e.*, the Minago River; *infra*, n. 138 and n. 140.

135 At this date, this would refer to the upper Nelson River. The hydraulic connection to Lake Winnipeg is not shown. The lake is depicted as discharging to Hudson's Bay via the "Hays River." The mapmaker attributed his information regarding the hinterland to [Mathew] Cocking, [William] Tomison and "Indian reports." *Historical Atlas of Manitoba*, *supra*, n. 99, p. 95.

traveled inland to the Saskatchewan River.[137] His route included a river he identified as the Minahage[138] or Pine river[139] (today the Minago River),[140] which lies in the south-west corner of Pimicikamak territory but his journal does not mention contact with the inhabitants.[141] A map made by Andrew Graham in 1774[142] describes a region west and south of Hudson's Bay[143] as "Keskachewan's resort prior to European Settlement".[144]

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136 Lake Winnipeg, designated as "Frenchman's Lake or Little Sea", was shown as aligned roughly east-west; *id*.

137 Archives of Manitoba/Hudson's Bay Company Archives, Search File, "Cocking, Matthew", m/s, I.M. Spry, p. 1. "In 1772 Cocking volunteered to go in land. His journey took him in an Indian canoe, which he had no idea how to steer, up the Hayes and Fox Rivers and down the Minago to the Saskatchewan."

138 Mineaguk: "Big [Jack Pine] trees."

139 *Journal of Anthony Henday*, *supra*, n. 121, p. 309.

140 *Id*. See also: Spry, *supra*, n. 137. Identification of this river as the Minago is depicted on Graham's map in a highly distorted but topologically accurate way (if one neglects the omission of the portage to Moose Lake; an accurate sketch map of the Pine [Minago] River from Moose Lake to Cross Lake was drawn by Ah chap pee Bungle boys son on June 12, 1809; *infra*, n. 203). Graham based this part of the map on information he attributes to Cocking; *supra*, n. 131. "Pemachicomo Lake", which could be Cross Lake or Sipiwesk Lake or both, is shown as flowing into the Steel and Hayes Rivers system and expressly not the Nelson River, the mouth of which is shown. This fundamental error underscores the ambiguity of Cocking's report as interpreted by Graham at the time.

141 A portage connects South Moose Lake (which connects to Cedar Lake and the Saskatchewan River) with the Minago River, which runs into Cross Lake. The Minago River is in Pimicikamak traditional territory; several ceremonial sites are nearby.

142 *Historical Atlas of Manitoba*, *supra*, n. 99, p. 67: "Until 1774, the Hudson's Bay Company did not support the policy of building fur trading posts inland and to meet, first the competition of French traders, and later that of other British traders."

143 Now known as Hudson Bay; historically it was called "Hudson's Bay."

144 See: *A Country so Interesting: The Hudson's Bay Company and Two Centuries of Mapping, 1670 – 1870*, R.I. Ruggles, McGill-Queen's University Press, London, plate 6, p. 130.

Samuel Hearne's 1776 map[145] shows the "Keiskatchawan River"[146] from Cumberland House[147] to Basquia,[148] and gives the same name to a disconnected reach south from Split Lake[149] that does not extend as far as Sipiwesk Lake.[150] This map shows the northern route he took, twice, in 1774 and 1775 from Split Lake to Cumberland House, via the "Grass River"[151] through the northern edge of Pimicikamak territory to "Cranberry Carrying Place"[152] and thence[153] to Cumberland House. With the exception of the Grass River and the stub of the Nelson river south of Split Lake, Pimicikamak territory is blank.

A 1778-1779 map by Philip Turnor[154] shows the "Saskashawan River to "Sea Lake or Lake Win-e-peg"[155] and notes "Saskashawan Branches falling over to Port Nelson" on the east channel of the Nelson River, which is blank from there to its

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145 "Map of Some of the Principal Lakes, River's Leading from YF to Basquiaw", 1776, *Historical Atlas of Manitoba*, *supra*, n. 99, p. 97.

146 See also: *Historical Atlas of Manitoba*, *ibid.*, p. 70: "[Hearne's] map . . . depicts the Nelson River to Split Lake . . . which Hearne termed the Keiscatchewan river in this vicinity." As will be seen below, geographical names are a significant intercultural and temporal issue. The colonists assigned names according to their own views and understanding. Then and now, like other great rivers in Cree territory, the Nelson River was and is known in Cree as Kichi Sipi, or Great River. *C.f.*, *e.g*, Kichi Sibi (the Ottawa River) in Eastern Canada, see Canadian Museum of Civilization, www.civilization.ca/archeo/archeoe.asp. See also: Missi Sipi (*i.e.*, the Missisippi; Ojibwa: Great River) in central USA.

147 *I.e.*, before its intersection, not shown on the map, with Lake Winnipeg.

148 Now Opasquia and The Pas.

149 Named Tatassquiough Lake on the map.

150 *I.e.*, it was by this date known or surmised that the Saskatchewan River flow finished up in the Nelson River, but particulars of the connection through Pimicikamak territory were evidently not known. Split Lake is correctly depicted for the first time as discharging into Hudson's Bay via the lower Nelson River and a portage ("The summer carrying-place upwards of 3 miles"; *i.e.*, not a hydraulic connection) is shown from the Keiscatchawan to the Steel River and "Hay's [now Hayes] River." The Fox River is incorrectly shown as hydraulically connecting the Steel River to Split Lake.

151 Of the same name today.

152 Now Cranberry Portage.

153 Via a route marked "This is the track Joseph Frobisher goes which leads to the Athepuscow [*i.e.*, Athabasca] Indns [sic] Country;" *Historical Atlas of Manitoba*, *supra*, n. 99, p. 97.

154 "A Chart of Rivers and Lakes Falling into Hudson's Bay according to a survey taken in the year 1778-1779", *ibid.*, p. 99.

155 This map shows a different Cross Lake on the Saskatchewan River west of Lake Winnipeg, between "Ceader Lake" and "Lake Win-e-peg"; *infra*, n. 201.

connection , noted "Saskashawan", adjacent to "Tesquiau Lake"[156] on "Nelson's River". In this period, the Nelson River came to be known to some as the Saskatchewan River.[157]

The Pimicikamak rivers and lakes do not appear on Cook's map of the world first published in 1784.[158] The blank areas in this map, including Pimicikamak, are credited with inspiring David Thompson's career[159] as the pre-eminent geographer, explorer, surveyor and cartographer of North America.[160]

About 1791, "An Accurate Map of the Territories of the Hudson's Bay Company in North America"[161] attributed to John Hodgson[162] again shows a stub of the Saskatchewan River flowing into "Tesquia Lake"[163] but is blank between that lake and the exit of the south trade route from the east channel of the Nelson River below Norway House.

In 1792, David Thompson's teacher Philip Turnor noted in his journal: "1792 Aug^{t} 14th. . . at this place the little Grass river joins the Sas-katch-a-wan no

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156 *I.e.*, Split Lake.

157 *Ibid.*, map by David Thompson, 1794, plate 16, p. 140. In the first of several compilations, *David Thompson's Narrative of his Explorations in Western North America 1784 – 1812*, *supra*, n. 66, its editor, J.B. Tyrrell, states, in a footnote at p. lxvi: "In applying the name "Saskatchewan River" to that portion of the Nelson River above Split river, Thompson was doubt less following the usage of the natives and employees of the Hudson's Bay Company of that time. There is ground for believing that the name Saskatchewan was originally applied to that portion of the Nelson river which flows from Lake Winnipeg to Split lake, rather than to the great river above Lake Winnipeg to which the name is now applied." A large map by Thompson titled "Map of the North-West Territory of the Province of Canada from actual Survey during the years 1792 to 1812", applies the name "Saskatchewan River" to the North Saskatchewan River from its headwaters in the Rocky Mountains and the Nelson River to Hudson's Bay (showing only the east channel of the Nelson north of "Lake Winipeg", but two channels connecting Cross Lake and Sipiwesk Lake making it look like a single lake); *ibid.*, in the end pocket.

158 This map shows Port Nelson River, Ceader lake, the Elbow River and Hudson House, and Lake Winipig; Captain James Cook, *Third Voyage*, Richard Phillips, London, 1809, part of which is reproduced in *David Thompson's Narrative 1916*, *supra*, n. 157, facing p. lx.

159 See also: *The Stargazer*, Winnipeg Free Press, July 29, 2004, p. A9.

160 See, *e.g.*: "[Cook's map] shows the interior and west of North America as almost completely blank, an area of ignorance comparable to the unknown reaches of the South Seas and the Pacific Ocean charted by Cook in his three world voyages. By the time he was twenty, in 1790, Thompson had conceived and begun his life's major work of bringing all that immense region into the realm of human knowledge." *David Thompson: Travels in Western North America 1784 to 1812*, *supra*, n. 101, p. 4.

161 *Historical Atlas of Manitoba*, *supra*, n. 99, p. 105.

162 Identified as "Likely Prepared by John Hodgson. 1791" and "Original map likely drawn by John Hodgson;" *ibid.*, p. 104.

163 *I.e.*, Split Lake; *supra*, n. 156.

European has been up the Sas-katch-a-wan [i.e., Nelson] between this and the South track to Cumberland House".[164] Tyrrell's footnote[165] says: "Here we have the definite statement that no European had travelled the Nelson river between the mouth of Grass river and the mouth of the Echimamish river, a distance of about one hundred and eighty miles." [166] These statements confirm an absence of European incursion through the heart of Pimicikamak territory prior to 1792.

In 1791, William Hemmings Cook established Chatham House[167] on Wintering Lake, which is tributary to the Grass River, in Pimicikamak territory.[168] His first journal entry[169] notes: "reached the place appointed by the Indian Chief[170] for our winter Residence". He left in spring of 1792[171] and returned with David Thompson[172] later that year.[173] Although there is no Post History, there is a House Journal for Chatham House.[174] There is also an account book.[175] Cook's archival biography[176] notes

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164 *Journals of Samuel Hearne and Philip Turnor*, J.B. Tyrrell, ed., Champlain Society, Toronto, 1934, (Philip Turnor's Journal 1792), p. 568.

165 *Id*.

166 The Grass River enters the Nelson a few kilometers south of (i.e., upriver from) Split Lake. It is part of the traditional wintering territory of the Pimicikamak people. The Echimamish River enters the East Channel of the Nelson River a few kilometers south of Sea Falls. The main Pimicikamak waterways, including Sipiwesk Lake, Pipestone Lake, and the upper Nelson River and Cross Lake between them, lie between these two points.

167 Archives of Manitoba/Hudson's Bay Company Archives, [Chatham House] *Post Journal 1791 & 2*, W. Cook, B.32/a/1.

168 *Supra*, n. 83.

169 Dated August 5, 1791.

170 From context, this appears to refer to an Indian (to whom he ascribes the status of Chief) he brought with him from York Fort.

171 He left on May 25, 1792, "leaving Ja^{s} Spence in charge of House"; *supra*, n. 167.

172 He was then 22 years old; this was the beginning of Thompson's first major foray. "The late J.B. Tyrrell, himself an outstanding geographer, explorer, and historian, intimately familiar with Thompson's work and the areas he surveyed, called Thompson 'the greatest practical land geographer who ever lived'." *David Thompson: Travels in Western North America 1784 to 1812*, *supra*, n. 99, p. 5. An employee of the Hudson's Bay Company, he joined, a few years later (at the expiry of his contract), its rival, the more exploratory North West Company. "Thompson mapped the West while working as a fur trader, at first halfheartedly encouraged to survey by the Hudson's Bay Company, later more generously supported by the North West Company." *Id*. In 1792, he was an official representative of the colonial government (which the Hudson's Bay Company continued to be until 1870).

173 *Infra*, n. 178. By Thompson's account, Cook was at Chatham House through the winter of 1792 to 1793.

174 W. Cook, *YF Chatham House Journal 1791 & 2*, Archives of Manitoba/Hudson's Bay Company Archives, B.32/a/1. It discloses a significant volume of fur trade: "Men finished packing – find

"1791 – 1794 Master, Chatham House, York [District].[177] The records show that this post did not last, and disclose no effective contact with Pimicikamak.

On October 8, 1792, David Thompson arrived at Sipiwesk Lake[178] in Pimicikamak territory having traveled up the Nelson River.[179] He built Sipiwesk House at a now unidentified site,[180] over-wintered, and left after break-up[181] in the spring of

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my trade amounting to upwards of 2000 Beaver . . ."

175 *Chatham House Nelson River Account Book 1791 – 2*, Archives of Manitoba/Hudson's Bay Company Archives, B.32/d/1, [in William Hemmings Cook's handwriting].

176 Archives of Manitoba/Hudson's Bay Company Archives, biographies, Cook, William Hemmings. See also: Dictionary of Canadian Biography, vol. VII, 1836 to 1850, Cook, William Hemmings, biography by I.M. Spry, p. 206. Spry notes: "After three years at this and other outposts in the area, Cook went back to England." He later returned, but not to Chatham House.

177 Citing: Archives of Manitoba/Hudson's Bay Company Archives, A.32/5, fo. 17; B.32/a/1. Neither supports the 1794 date.

178 " . . .On September 28 he reached Split lake, and on September 30 the 'Saskatchewan River'. A little farther upstream William Cook with one of the canoes turned up Grass river to Chatham House. Thompson with the other canoe kept on up the main stream and on October 8 [1792] arrived at a rocky point on the west side of Sipiwesk lake, where he built a trading post. During the winter he took twenty-eight lunar observations for longitude. However, this proved to be a poor place for either fish or game, and on several occasions he was obliged to go to Chatham House, which was only about thirty miles away, and seek provisions from his friend William Cook." *Ibid.*, p. lxvi.

179 Not then so-called; *supra*, n. 157. The reason for Thompson's diversion to this location remains obscure. "Colen had instructed Thompson to explore the Nelson River and the proposed route to Athabaska. He was to accompany the men and canoes to Chatham House at which William Hemmings Cook was to afford him every assistance. Thompson was then to proceed from Chatham House to Lake Athabaska. . . . The natural course would have been for Colen to send Thompson up the Burntwood River, possibly to the region of the Canadians' post at Pukkatawagan Lake on the Churchill River, to winter there, midway between York Factory and Lake Athabaska, and to get into relations with natives who might act as guides for the remainder of the way to Athabaska. Instead, while instructing Thompson to explore for the route, Colen had actually sent him under Cook out of the way up the Nelson River to Sipiwesk Lake. Thompson wintered there and undoubtedly supported Cook in opposing the Canadians that were nearby." W. Sinclair, *David Thompson's Journey of Discovery from Sepiwesk Lake to Reindeer River, and then to York Factory, 1793*, *supra*, n. 126, p. 6.

180 Subsequently, Tyrrell described its situation in a footnote of the first edition of Thompson's narrative: "The place where 'Seepaywisk House' appears to have stood is now [date uncertain] covered with a grove of poplars, with a forest of spruce in the background. Two rocky points project into the lake and form a snug little harbour for small boats. Looking towards the south-west, Sipiwesk lake, dotted with dark green islands, extends away to the distant horizon." See: *David Thompson's Narrative 1916*, *supra*, n. 157, p. lxvi.

181 Oral history from Pé-pé-sa-ban, *infra*, n. 311, records that Thompson's visit to Sipiwesk Lake was known to the Pimicikamak, who called him "ogakimatow" (one who sneaks around), one of several, known as "ogakimatowak", whom an elder (Gideon McKay) compared with surveyors and

1793.[182] In his map[183] dated 1794-1795,[184] Thompson showed nothing of the Nelson River between the East Channel north of Playgreen Lake and the northern part[185] of Sipiwesk Lake. Interestingly, he does not show Sipiwesk House on this map, though it was certainly within the part of Sipiwesk Lake depicted.[186]

"A Map Exhibiting All the New Discoveries in the Interior Parts of North America", dated 1795 (with additions in 1796), by English cartographer Aaron Arrowsmith,[187] shows, with the exception of the Grass River and the north part of Sipiwesk Lake,[188] Pimicikamak territory as empty.[189]

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said that people avoided him, and that there was no contact with him. It was thought that contact with the ogakimatowak could lead to insanity and to becoming a Wihtigow, a giant cannibal.

182 A notation in the Sipiwesk House Post History (Archives of Manitoba/Hudson's Bay Company Archives, *Post Histories*, Post Sipiwesk (MB), Seepewisk, Seepaywisk House, Sepawisk) "1794 House to be abandoned this season, goods to be transferred to Cross Lake" does not confirm that the House was occupied at that date. The notation may indicate abandonment of the potential for future reoccupation. Tyrrell's subsequent edition of David Thompson's narrative indicates that Sipiwesk House was a one-winter post that he established in October 1792 and left in the spring of 1793: "In the following [after 1792] spring, when the river was clear of ice, he started from Seepaywisk House, and descended to the lower end of the lake, carried over Cross Portage, surveyed Susquagemow (Landing) lake, carried over Thicket Portage, and entered Chatham (Wintering) lake, where, on a long point extending northward into the lake, the Company had a post." See: *David Thompson's Narrative 1916*, *supra*, n. 157, p. lxvii.

183 The quality of this map is remarkable, especially by comparison with others of the period, reflecting the facts that it was based on personal observation, and that Thompson meticulously used astronomical instruments and observations to determine and map his position.

184 "Map of the Rivers and Lakes above York Fort with the communication of Port Nelson River with Churchill River including part of Churchill River", 1794-1795; *Historical Atlas of Manitoba*, *supra*, n. 99, p. 101. Note that Sipiwesk Lake is not named on this map, but its location and northern end are readily recognizable. As to other sources of information on this map, see also: *supra*, n. 117.

185 That is, it does not show the remainder of the lake. This tends to confirm that David Thompson's visit to Sipiwesk Lake was limited to its northern part; see also *supra*, n. 182.

186 See also: *Journals of Samuel Hearne and Philip Turnor*, *supra*, n. 164, where Tyrrell says, at p.568: "The two places [Sipiwesk House and Chatham House] were about twenty miles apart in a straight line." Given the well-defined location of Chatham House, this confirms that Sipiwesk House was located in the north eastern part of the lake.

187 The relevant part of this map is reproduced in *Historical Atlas of Manitoba*, *supra*, n. 99, p. 133.

188 The south part of Sipiwesk Lake, all of Cross Lake, the Nelson River between them, Pipestone Lake, Kiskitto and Kiskittogisu Lakes, the Minago River, and the Grass River south of Chatham House, are not shown.

189 See: *David Thompson's Journey of Discovery from Sepiwesk Lake to Reindeer River, and then to York Factory, 1793*, *supra*, n. 126, p. 3. Arrowsmith's information no doubt included the same source. A footnote states: "Aaron Arrowsmith was given access to the rich treasury of information of the HBC map collections but the knowledge of the West was never transcribed completely into

At this time another but also fleeting incursion came from the south. For almost a year in 1795 to 1796,[190] the Hudson's Bay Company placed a trading post ("Apsley House"[191]) at Cross Lake.[192] It was not a success. The Cross Lake Post Journal[193] records only occasional visits[194] in the fall of 1795 by local Indian "canows" to trade meat or furs, most often for "brandey".[195] The Post History is annotated 'Cree name: PEMICHIKAMOW – "flowing across"' by the archivist.[196] The post was unsuccessful[197] and was abandoned the following spring.[198]

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map form because of the discrepancy of time between event and map depiction. Arrowsmith's 1795 map, with additions in 1796, represents the accumulated experience of Western exploration [at that time] in map form."

190 The first entry in the *Cross Lake Post Journal*, *infra*, n. 192, is dated July 1 and the last is May 26.

191 Archives of Manitoba/Hudson's Bay Company Archives, *Post Histories*, Post Cross Lake.

192 Archives of Manitoba/Hudson's Bay Company Archives, *Cross Lake Post Journal*, 1795/6, B268/a/1. An annotation dated 17th May, 1934, notes: "It seems practically established beyond doubt – though nowhere definitely stated – that this is a Journal of Cross Lake. It also seems certain that the date of the Journal is 1795/96, for 29th February is mentioned – therefore it is a Leap Year – and there is no other Leap Year in which the New Year's Day occurs on a Friday between 1768 and 1836." The note is initialed "RLG", presumably Richard Leveson Gower, the first archivist; see: D.A. Simmons, *'Custodians of a Great Inheritance': An Account of the Making of the Hudson's Bay Company Archives, 1920 – 1974*, thesis, U. of Manitoba/U. of Winnipeg, 19 May, 1994, at p. 73.

193 Although archived and annotated as the Cross Lake Post Journal, the entries from July 1 to August 30, 1795, evidently relate to another post (likely Jack River House, see a barely discernable title inside the cover, overwritten in pencil of unknown provenance: "Jack River House Transferred to Cross Lake"). Contrary to the annotation noted *supra*, n. 192, the Journal does in fact "definitely state" in the text that the balance of it is the Journal of Cross Lake House. The entry for August "31th" says: ". . . embark in 2 Canows for the Cross Lak padled till 6 p m then Pot ope". *Ibid*, at p. 4. The entry for September 5th says: ". . . thes day Arived at the Cross Lak Hows brought all her". *Id*. By September 12th, they were "employed poting on the Roff of the Howse". *Id*. Presumably the writer was the Post Manager, identified in the Post History as James Tate.

194 The *Cross Lake Post Journal*, *supra,* n. 192, which recorded particulars of every trade visit, discloses little trade. There were only 10 visits by Indians to the end of 1795, a total of about 18 canoes. They are not identified, but even if all were Pimicikamak, this would tend to confirm Pimicikamak oral history that, though visited by some, Cross Lake was not the centre of their homeland. See also *infra*, n. 247.

195 This may identify the proximate cause of complaints in the *Cross Lake Post Journal* about drunken Indians, including, *infra*, n. 197.

196 Archives of Manitoba/Hudson's Bay Company Archives, RG3/4A/7.

197 The *Cross Lake Post Journal* entry for May 24 [1796; *supra*, n. 192] is an extraordinary outburst in both content and length among the otherwise dispassionate and laconic daily records: "Tusdeay Wind S E asmall bress Clowdey Mild weather at a 11 a m 2 Conows of Indians Arived brought 28 bever on of them got rigin the Indians all drunk and very Trublsum Misecam eskem and all his young fellows is ben her above amonth they ar ben mor expences then All the rest of the Indians that is ben her thes yer – Indians is killed no Skins thes yer that is worth to spek of it is not

In 1797, in an effort to improve relations with Churchill Factory, Chief York Factor Colen ordered the Nelson River traders "not to penetrate beyond Split Lake".[199] However, European knowledge of Pimicikamak territory began to expand in the first decade of the 19th century. An Indian "beads on a string" map made in 1806[200] shows Cross Lake[201] as "Pim mit chik oo mow" and Sipiwesk Lake as "Seepawisk".[202] In 1809, Peter Fidler[203] traveled down the Nelson River, and sketch-mapped[204] shorelines

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Seprising the Canedians is Wested a Canowe Cargo of goods and is got bot 4½ bunels of furs it canot be thowght that I can pay for the goods If I had not given encoregment in the fall I showld had nothing – the Canedian Mastr Told Me him Self it was not for the profetts that they cam to this pless it was to kep the ——— Compney from sepleying the nored with men and canows [obliterated] PS excus Me for what I hav menchened". The following day: ". . . the Men gating redey to embark to morrow if weather and helth permits . . .". Two days later the Journal ends. The Post History notes "1796 Competition from two Canadian Houses, sixteen Frenchmen in the area"; it would be over 50 years before another Post Manager was appointed, and then only for one year; *supra*, n. 191.

198 There was apparently no further over-winter occupation for the next 80 years, *i.e.*, until immediately after the Treaty was signed; *infra*, n. 213 and n. 302.

199 *Saskatchewan Journals and Correspondence, 1795 – 1802*, The Hudson's Bay Record Society, vol. XXVI, London, 1967, p. lxvi. For the next 80 years, only the southern route to York Fort, leaving the Nelson River at Sea River Falls just north of Norway House, was available, until it too was closed by the rise of the Red River trade route (*infra*, n. 232); see also *Indians in the Fur Trade*, *supra*, n. 25, Fig. 39, "Fur Trade Provision Supply Network in the Early Nineteenth Century," at p. 129.

200 Cha Chay Pay Way Ti's Map of the Waterways of a Part of Northern Manitoba, 1806; *Historical Atlas of Manitoba*, *supra*, n. 99, p. 143; the original is in Fidler's journal, *infra*, n. 204, fo. 14.

201 The identification of Cross Lake seems unambiguous on this map, even though the name is different. On the other hand care is needed in interpreting some accounts that mention Cross Lake, as present-day Cross Bay on Cedar Lake, just above Great Falls on the main Saskatchewan River route to Cumberland House, was known as "Cross Lake" in this era; see, *e.g.*, *supra*, n. 154; see also, Peter Fidler's notes, *infra*, n. 204, fo. 2, and sketch map, fo. 3.

202 See also: s*upra*, n. 144, plate 22, p. 246; re-drawn by Peter Fidler based on Cha Chay Pay Way Ti's map, see p. 66.

203 Fidler also recorded an 1807 map by Thomas McNab showing Cross Lake; Archives of Manitoba/Hudson's Bay Company Archives, *Journals of Exploration and Survey*, E.3/3, fo. 49d; and an 1809 map showing Pine River from Moose Lake to Cross Lake by Ah Chappee Bungee Boys-son; *ibid*., E.3/4, fo. 11.

204 These sketch maps appear in his daily journal; Archives of Manitoba/Hudson's Bay Company Archives, *Journals of Exploration and Survey*, P. Fidler, 1809, E.3/4. These sketches were evidently unknown to Arrowsmith who published numerous revisions to his Map of North America (*supra*, n. 187) but as late as 1814 showed the upper Nelson (not named) inaccurately and with only arbitrary features; see two sections from Andrew Arrowsmith's Map of North America ("A Map Exhibiting all the New Discoveries in the Interior Parts of North America . . ."), *Historical Atlas of Manitoba*, *supra*, n. 99, p. 141.

along his route through Pimicikamak territory from "Play Green" via the west channel[205] through Cross Lake and Sipiwesk Lake[206] to Split Lake and Hudson's Bay.[207] This was a transient presence in Pimicikamak territory. He entered Cross Lake on June 12, 1809. On June 13 he passed through Duck Lake and stopped at "Laughton Leith's House".[208] He left Sipiwesk Lake for Split Lake on June 14. Fidler's detailed sketch maps were not reflected in maps published in the next few years.[209] Two undated regional maps both show Cross Lake and Sipiwesk Lake as a single lake (designated "Cross Lake")[210] possibly following a "Map of the North-West Territory of the Province of Canada from actual Survey during the years 1792 to 1812" by no less a cartographer than David Thompson that shows Cross Lake and Sipiwesk Lake as a single lake with the southern part labeled "Cross Lake".[211] We found no documentary record of European presence[212] in Pimicikamak after 1812 until 1849 when a transient post was established at Cross Lake.[213] A more continuous presence began in 1868, initially as a summer outpost.[214]

The Hudson's Bay Company's burst of inland exploratory activity in the second half of the 18th century had, apparently, largely and perhaps wholly bypassed Pimicikamak. The relatively limited incursions into or through its territory occasioned

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205 This may have been the first exploration and mapping of the west channel of the Nelson River; Fidler calls it "a new way to Nelson River"; *ibid.*, fo. 4.

206 One of Fidler's sketch maps identifies "Sepawisk House" and notes a location at Lat. 54° 59' 40", Long. 116° 4' 30"; *ibid.*, fo. 6. Unfortunately these measurements (especially, as expected for technical reasons relating to accuracy of long-term time-keeping, the longitude) are so inaccurate as to be of no absolute value, though they may be useful relative to other identifiable features. However, the sketch map details may enable the location to be identified when Manitoba Hydro draws down the water level at Kelsey.

207 *Ibid.*, fo. 14 (microfiche ser. I, 4M103, fo. 1 to 10).

208 This record suggests but does not definitively establish an ongoing non-Pimicikamak presence in the heart of Pimicikamak territory. We did not find other records concerning Laughton Leith or this house, though the Company later employed others named Leith in the north.

209 *E.g.*, *supra*, n. 204 and *infra*, n. 211.

210 *Supra*, n. 144, map 1, p. xv, map 3, p. xvii; both unattributed. In fact the two lakes are separated by some 15 km of river and significant falls.

211 See: *David Thompson's Narrative 1916*, *supra*, n. 157, (pocket). The original source of the information is not identified, but could not have been Thompson; *supra*, n. 218.

212 Of course, this does not imply that no such record exists, and certainly does not mean there was no such presence.

213 Cross Lake Post History, *supra*, n. 191; "1849 Appointment made to Post", ref. B.239/k/1. This too appears to have been brief: "1849-1850 E. McGillivray, Postmaster", ref. B.239/k/2, p. 458.

214 *Id*. The next references are "1869-1884 Outpost of Norway House, wintering station established 1875", ref. B.154/e/13; and "1869 Cuthbert Sinclair, Interpreter", refs. B.154/k/1, fo. 21, & B.239/k/3, pp. 417, 443. "Wintering station" implied the beginning of year round occupancy.

little if any recorded contact.[215] The recorded colonial presence in Pimicikamak territory from 1670 to 1790 comprised two excursions across its north-western extremity without evidence of contact with the local people in 1774 and 1775 and one winter without evidence of contact in 1792/3.[216] Sipiwesk House remained but records show it was not in fact established as a trading post[217] and there appears to be no record of it ever being occupied after the spring of 1793.[218]

Anomalously, one map includes Pimicikamak territory in a broad belt of Rupert's Land interior shaded as "essentially known" by 1795, but it lacks supporting evidence and, given the weight of evidence to the contrary, does not appear to be authoritative in this respect.[219]

While there is inconsistency in terminology and often confusion in geography, the pre-treaty, contemporary records thus tend to confirm oral history: there was little if any real contact[220] between the explorers[221] and Pimicikamak before the end

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215 As late as 1907, Burpee could write that: "Both the Nelson river and the Hayes route have been carefully surveyed in recent years, but no officer of the Geological Survey has ever yet traversed the country between Oxford Lake and the Nelson." *Supra*, n. 121, p. 308.

216 *Supra*, n. 181. There was also possibly an undocumented transit somewhere in its south in 1754, *supra*, n. 128, and brief forays into its north-eastern extremity in the early 1790s, *supra*, n. 167 and n. 182.

217 Note that the editor of *David Thompson's Narrative 1916* states, without citing authority, that it was established as a trading post; *supra*, n. 180. That may have been the regional Chief Factor's intention, but it was evidently not carried into effect; *infra*, n. 218. The attempt was soon abandoned: Archives of Manitoba/Hudson's Bay Company Archives, York Fort Post Journal, *A Diary of Occurances at York Fort, Hudson's Bay North America by Joseph Colen Chief Factor*, 1793 to 94, B.239/a/96, fo. 48, p. 48: "July 26th [1794] . . . the Split Lake and Sepawisk Settlements are obliged to be abandoned this Season – for reasons before assigned."

218 David Thompson did not return to Sipiwesk Lake; "John Harper was not sent back there as planned, Thompson also engaged Harper to accompany him as far as the native could guide him. Harper was then to return to Sipiwesk House." W. Sinclair, *David Thompson's Journey of Discovery from Sepiwesk Lake to Reindeer River, and then to York Factory, 1793*, *supra*, n. 126, p. 8. "Thompson was, however, unable to find the natives whom he had expected to meet. He then turned back and made his way down the Burntwood and Nelson Rivers to York factory, where they arrived on July 21 [1793]." *Ibid.*, p. 9. The Post History, *supra*, n. 182, records no other Post Manager.

219 *A Country so Interesting: The Hudson's Bay Company and Two Centuries of Mapping, 1670 – 1870*, *supra*, n. 144, Fig. 4, "Retreat of the Unknown: European Knowledge of Canadian territory in 1795," p. 73. The authorship, date and sources for this map are unspecified but it may be modern and approximate, and depict only that the Saskatchewan River was by then presumed to cross the territory between Lake Winnipeg and Split Lake.

220 *I.e.*, contact within Pimicikamak territory; according to oral history Pimicikamak individuals traveled widely, including north to Hudson's Bay, and west to the Rocky Mountains. However, Hudson's Bay Company records of the Assiniboine and Cree middlemen who controlled the fur trade into the hinterland of York Fort through its heyday from 1714 to 1775 do not disclose any

of the 18th century and indeed, before the making of Treaty #5.[222] From the colonial government's perspective in this period, Pimicikamak territory seems to have been a relatively unexplored and little known land that lay between the northern[223] (Port Nelson River) and southern[224] (Hayes River)[225] trade routes west from York Fort through Rupert's Land. A definite date of contact with Pimicikamak is thus elusive except to observe that it was likely not earlier than 1792[226] and certainly not later than 1875.[227] In

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identifiable participation by Pimicikamak Cree (under that name, or any other of the often confusing names recorded). See: *Indians in the Fur Trade*, *supra*, n. 25, pp. 51 to 61. Note too that analysis of the origins of canoe traffic to York Fort in six regions from 1756 to 1761, the smallest fraction (6%) came from a region that included not only Pimicikamak but also Basquia and David Thompson's Nahathaway, whose territory the northern trade route traversed, *ibid.*, Figure 20 at p. 62, suggesting little if any Pimicikamak participation at that time.

221 The Hudson's Bay Company at this time employed the explorers and, by virtue of the *Royal Proclamation*, *supra*, n. 41, it was the colonial government. Its archives show that the fur trade routes bypassed most of Pimicikamak territory, following the Hayes River to the south of Pimicikamak and the Nelson and Burntwood or Grass Rivers to the north. David Thompson's brief venture to Sipiwesk Lake and over-wintering of 1792 – 93 is the only documented expedition into Pimicikamak prior to the 19th century. A modern map by G. Matthews titled "Thompson's Journeys" in *David Thompson: Travels in Western North America 1784 to 1812*, *supra*, n. 99, pp. 50 & 51, illustrates how his journeys in 1786, 1792, 1793, and 1797 surrounded Pimicikamak. Note that this map shows him as traveling to the south-west end of Sipiwesk Lake; but the narrative record shows that he stayed near the north-east end of the lake, *supra*, n. 180 and n. 182;. This is confirmed by Thompson's 1795 map, which shows only the north part of Sipiwesk Lake, *supra*, n. 184.

222 Although we found no identifiable record of it, oral history plausibly asserts that trade took place. Trade contacts would likely have been made with Cree middlemen; *supra*, n. 220.

223 This route led via the Nelson and Burntwood rivers (or later the Grass River) and "Cranberry Carrying Place [Cranberry Portage]" to Cumberland House on the Saskatchewan River; see, *e.g.*, *supra*, n. 187.

224 This route led via the Hayes, Hill and Eachawamahmus rivers to the East Channel of the Nelson River [Jack River] at Sea River Falls near Norway House; see, *e.g.*, *supra*, n. 184.

225 Most references in historical or contemporary sources to the "Nelson-Hayes route" appear to be generic and are potentially misleading as the two rivers empty quite separately into Hudson's Bay; there is no hydraulic connection between them. However, some such references can be identified as meaning specifically the southern route. The portage connection from the Hayes River via the Fox River to Split Lake appears to have been used occasionally to bypass the lower Nelson in accessing the northern route.

226 Detailed research may evidence contact by the French, possibly as early as the 1630s, though neither oral history nor the records examined support this.

227 Note that assertion of sovereignty in Rupertsland in 1670 through the Hudson's Bay Company Charter rather than contact established the date for purposes of defining constitutionally protected aboriginal title; see *R.* v. *Delgamuukw*, *supra*, n. 84, per Lamer, C.J.C., Cory and Major, JJ, concurring, at para. 145: "Finally, from a practical standpoint, it appears that the date of sovereignty is more certain than the date of first contact. It is often very difficult to determine the precise moment that each aboriginal group had first contact with European culture. . . . I conclude

practical terms, Pimicikamak was apparently sheltered from the effects of contact[228] for several generations after they were apparently felt by its neighbours to the north, south and west.[229]

Treaty #5 itself was made at the instance of such neighbours. In 1874, the Rossville[230] Indians caused a letter[231] to be sent to Lieutenant-Governor Alexander Morris asking if the government was going to make a treaty with "Indians of Rossville and Nelson R."[232] Some months later, James Setter wrote to Morris stating that "Nelson and Norway House Indians asked him if Morris had answered their petition".[233]

The circumstances surrounding the signing of Treaty 5 will be dealt with below.[234] Shortly after the Treaty was signed,[235] the government of Canada instituted a

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that aboriginals must establish occupation of the land from the date of the assertion of sovereignty in order to sustain a claim for aboriginal title." See also, *infra*, n. 524.

228 This is not intended to imply complete isolation. For example, Pimicikamak oral history depicts relationships to the south and out-migration to the north-west around this time, and wide-spread travel.

229 This circumstance may have spared the Pimicikamak people somewhat the introduced diseases that ravaged their neighbours: *e.g.*, "Mr. [William] Tomison informed me that the Small Pox had destroyed most of the Indians Inland. The whole tribe of W'Basqiou Indians/their former assistants/ are extinct, except 1 Child, and that of the several Tribes of Assinnee Poet, Pegogamaw and others bordering on Saskatchewan River he really believed not one in fifty have survived." Matthew Cocking at York Fort, letter to Samuel Hearne, August 16, 1782, Archives of Manitoba/Hudson's Bay Company Archives, B.239/b/42, p. 15d. See also: "I believe never Letter in Hudson's Bay conveyed more doleful Tidings than this. Much the greatest part of the Indians whose Furrs have been formerly & hitherto brought to this Place are now no more, having been carried off by that cruel disorder the Small Pox. . . . [T]he whole tribe of U'Basquiou Indians . . . are extinct except one Child." Cocking M., Letter from York Fort, August 1782, *Cumberland House journals and Inland journals, 1779-82*, ed. E.E. Rich, Hudson's Bay Record Society, London (UK), 1952, p. 297-9. The same may be true of subsequent epidemics of influenza, measles and scarlet fever; regarding which see, *e.g.*: A.J. Ray, *Diffusion of diseases in the western interior of Canada*, 1830-1850. Geogr. Rev., 1976; v. 66, p. 139; and P. Hackett, *A Very Remarkable Sickness: Patterns of Disease Diffusion in the Petit Nord, 1670 – 1846*, University of Manitoba Press, Winnipeg, 2002.

230 *I.e.*, Norway House.

231 *Calendar of the Alexander Morris Papers*, Lieutenant-Governor's Collection, 1872 – 1877, #783, June 25, 1874.

232 Their concerns related to loss of local employment as "tripping to York Factory carried on by Hudson's Bay Co. will cease after this summer . . .". *Id*. The reason was that the trade route via York Fort had been displaced by the Red River.

233 *Ibid.*, #874, November 27, 1874. "Nelson" here apparently refers to the Nelson River in the vicinity of Norway House, and not to Nelson House, whose inhabitants adhered to an expanded Treaty #5 in the summer of 1909. See also text quoted *supra*, at n. 232.

234 See under heading: The Nature of Pimicikamak Okimawin, *infra*.

process of disaggregating[236] the national elements of aboriginal peoples and suppressing their national institutions[237] for which, more than a century later, the Minister of Indian Affairs formally apologized.[238] Thus were civilizations of great antiquity brought to their knees,[239] not so much by armed force, destruction of their means of subsistence or even disease as by written laws[240] and administrative practices. This process fragmented Cree (and other) peoples and largely paralyzed their governing institutions, suppressing much of the natural adaptation that would be expected to have occurred otherwise (this being not only in the nature of governments generally, but also of the essence of traditional governments). In consequence, Pimicikamak governance, like that of other indigenous peoples in Canada, was relatively inactive and adapted less to colonial change than might have been expected for more than a century.[241] In the 20th century, new transportation links resulted in the growth of additional municipalities in Pimicikamak territory.[242]

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235 The *Indian Act* of 1876 did little (other than the institution of reserves, which became the model for apartheid and the concept of concentration camps) to give effect to treaties; indeed it did not even mention the then-existing Treaties, though it dwelled upon the concept of the "non-treaty Indian".

236 The term "disaggregated", used by the Minister of Indian Affairs, was technically accurate to describe suppression of the corporate character of an indigenous body politic and corporate (*i.e.*, corporation aggregate). See: *Statement of Reconciliation*, issued on January 8, 1998, by Minister Jane Stewart.

237 For Pimicikamak as for others, this suppression extended not only to the institutions themselves but also to the language and so the concepts in that language that imbued the institutions with life and legitimacy. Thus the forcible suppression of the Cree language, particularly in residential schools, gave rise to a generation for whom the oral history of Pimicikamak governance had been effectively buried.

238 *Id*.

239 Yet many of them, and their systems of government, survived.

240 In the United States of America, military force had a larger role than in Canada. Dispossession of resources and epidemic introduced diseases had significant roles in both.

241 This does not imply that Pimicikamak governance was static in this period. To the contrary, it existed within and was influenced by the wider context of peoples of North America that experienced change just as did those of other continents. "The extent to which the M'teowuk Lodge tradition radically impacted governance when it went through revolutionary change from the middle 1700s to the later 1800s is well known throughout the extended Cree Nation. The spiritual practices of the Cree merged with the ethno-botanical practices of the Ojibwa at this time and the result was the rapid Mide Lodge adaptation everywhere the Algonquian-related peoples put up these top secret medicine lodges, from the southern Potowatomi to the far northern and eastern Naskapi Cree, to the western Soto and Cree of the mountains, to the southern Cheyenne. The Goose Dance [was] central to these lodges during the Pehonan-Mitewewin annual gatherings all along the North Saskatchewan River to The Pas virtually to Hudson's Bay. Governance [was] shaped to a large extent by these traditions as well." L.B. Parry, Edmonton, pers. comm., (2004). The M'teowuk Lodge and the Goose Dance were among the cultural and governance institutions that were outlawed by Canadian policy and law and forcefully suppressed by the residential school program, for which the government of Canada later apologised; *infra*, n. 495 and related text.

242 *I.e.*, the "Bayline" communities, Pikwitonei, Thicket Portage and Wabowden.

Many Pimicikamak citizens now migrate to (and return from) cities such as Brandon, The Pas, Thompson and Winnipeg.[243] Operation of the Lake Winnipeg, Churchill and Nelson Rivers hydro-electric project disrupts and endangers access to much of Pimicikamak traditional territory.[244] Nevertheless, the Pimicikamak people retains its coherence and its attachment to its traditional territory,[245] and the population of its traditional territory remains predominately Pimicikamak.[246] Oral history recounted by Pimicikamak elders tells that prior to European contact, Pimicikamak civilization centred on Sipiwesk Lake.[247] Much of the shoreline of this lake is now being eroded by hydro-electric energy operations,[248] and there has been no systematic intervention to arrest the ongoing destruction of the remains of Pimicikamak civilization.[249] There is reason, however, to believe that many cemeteries, village sites and artifacts have not yet been destroyed,[250] and Pimicikamak has proposed a comprehensive archaeological survey of Sipiwesk Lake[251] to begin in 2004 and be completed in 2005.[252]

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[243] According to oral history, part of Thompson is within Pimicikamak territory; the greater part of it is in Nisichawayasihk territory.

[244] *E.g.*, "The hydroelectric project is a focus of grievance because it impedes the [Pimicikamak] Crees' ability to hunt and to heal themselves on the land. The project is seen as a source of displacement and dispossession. It is an obstruction to identity." R. Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity*, University of California Press, Berkeley, 2003, p. 65.

[245] This relationship is reconfirmed by Article 15 of the Northern Flood Agreement in part, although the named beneficiary is the Cross Lake Band. Article 15.4 recognizes equivalent rights for other permanent residents.

[246] C. Ross, pers. comm., 2003.

[247] *I.e.*, according to oral history (Horace Halcrow, Gideon McKay), the shores of Sipiwesk Lake provided locations for large Pimicikamak summer settlements where resources, especially fish, could sustain higher-density populations; in the fall and winter, families moved out to their traditional locations in the hinterland. See also *infra*, n. 297 and related text.

[248] Massive shoreline erosion began after water levels on Sipiwesk Lake were changed by operation of the Kelsey dam in and after the mid-1960's and continue to the present; J. Osborne, personal communication, 2002. See also: "Entire islands disappear, along with burial sites and historic camps occupied by the Cree for thousands of years"; R.F. Kennedy Jr., 'Hydro is breaking our hearts', Winnipeg Free Press, July 15, 2004, p. A13.

[249] See: D. Dul, Manitoba Culture Heritage and Tourism, letter to J. Kovnats, Manitoba Hydro, dated 27/02/2002, recommending a comprehensive archaeological survey of Sipiwesk Lake shores, at p. 2: "I would suggest offering . . . a general archaeological survey of [Sipiwesk] lake, designed to locate, assess and make recommendations for mitigating those sites that can provide direct and tangible links to the community's past."

[250] C.G. Hill & B. Hewitt, *Archaeological Reconnaissance of Six Selected Sites: Sipiwesk Lake 2003*, Manitoba Culture Heritage and Tourism, at p. 10: "An archaeological survey of Sipiwesk Lake would likely identify between 200 and 250 sites, many of which will also need to be recorded, mitigated and protected."

[251] *Pimicikamak's Proposed 04/05 and 05/06 Action Plan for Implementation of the NFA*, 28/07/04,

The right to exist as a people is perhaps the most fundamental aboriginal right.[253] This right, like other aboriginal rights, is communal and "grounded in the existence of a historic and present community . . ."[254] Pimicikamak citizenship is inclusive in nature.[255] However, even in the absence of a systematic ancestral analysis of the Pimicikamak citizenry it seems clear not only that essentially all have aboriginal ancestry but also that most are biological descendants of the Pimicikamak people as it existed at the time of contact.[256] Most fundamentally, the history of the Pimicikamak people plainly demonstrates the existence of a historic and present community.

Reception of English Law

Before considering the nature of Pimicikamak's government, it may be convenient to introduce the concept of reception, which underlies Canadian municipal law. Canadian common law is founded on English law. Conceptually, English law was "received" in colonies[257] now forming Canada as settlement spread through the land.[258] Received law[259] was given effect by the courts of Canada from whose decisions the ultimate appeal lay until 1949 to the Judicial Committee of the Privy Council in England.

Program 35.

252 Recently Manitoba Hydro proposed to fund the first year of this program; *April 1 2004 – March 31 2005 Cross Lake Action Plan for Implementation of the NFA*, July 15, 2004, program A9, Sipiwesk Archaeology.

253 It is also a fundamental human right. The right of a people to exist as a people is protected by the prohibition of genocide in international law; *Convention on the Prevention and Punishment of the Crime of Genocide*, 12 January 1951. See also: *Surviving as Indians*, *supra*, n. 8.

254 *R.* v. *Powley*, *supra*, n. 60, at para. 24.

255 See *The Pimicikamak Citizenship Law, 1999*, ss. 3 to 8, 24 to 26. Pimicikamak has occasionally embraced as citizens persons who do not have Pimicikamak or even Cree ancestry, for example by adoption.

256 *C.f.*, "Self-identification, ancestral connection, and community acceptance are factors which define Métis identity for the purpose of [an individual] claiming Métis rights under s. 35." *R.* v. *Powley*, *supra*, n. 60. The *Pimicikamak Citizenship Law, 1999*, provides for all three of these factors.

257 The common law distinguishes a conquered colony from a settled colony, Canada being regarded as the latter. The questions are not affected by this distinction. See also P.G. McHugh, *The Common-Law Status of Colonies and Aboriginal "Rights": How Lawyers and Historians Treat the Past*, (1992) 61 Sask. L. Rev. 393, at p. 402: "The effect of the common-law status of a colony on the status and rights of the Indigenous peoples in that territory is one of the reddest herrings in the scholarship of Aboriginal rights."

258 The principle was that the settlers "carried with them their own inalienable birthright, the laws of their country." See: *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75, at p. 78.

259 Note that, following reception, the municipal law of an imperial possession (such as Canada) took on a distinct (though parallel) existence; see *Calvin's Case* (1608), 7 Co. Rep. 1a, 77 E.R. 377 (K.B.).

The common law doctrine of reception was usually confirmed by statute[260] and provinces such as Manitoba formally received English law[261] upon entering Confederation.[262] However, the reception of English law did not displace the laws of indigenous peoples unless the latter were held to be incompatible with fundamental principles of the former.[263]

Origins of Pimicikamak Okimawin

As noted above,[264] self-government is fundamental to the existence of a nation.[265] Today, there is little controversy over the existence of a right of self-government on the part of indigenous nations in Canada,[266] arising out of the fact of the existence of such governments[267] prior to the assertion of sovereignty by the Crown. We must therefore consider the facts concerning the prior existence of the Pimicikamak government.[268]

In the governance systems of peoples in what came to be known after contact as the Swampy Cree region of what is now central Manitoba, "decisions were

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260 *E.g.*, the first enactment of the Upper Canada legislature provided that in all cases relating to property and civil rights resort was to be had to the laws of England; S.U.C., 32 Geo III, 1792, c.1, s.1.

261 *E.g.*, "The Court of Queen's Bench in Manitoba shall decide and determine all matters of controversy relative to property and civil rights, according to the laws existing, or established and being in England, as such were, existed and stood on the fifteenth day of July, one thousand eight hundred and seventy, so far as the same can be made applicable . . ." *An Act respecting the Court of Queen's Bench in Manitoba*, S.M. 1874, Cap. 12, s. I.

262 Nothing in the formal statutory enactments detracted from earlier reception at common law of applicable English law.

263 *E.g.*, in *Connolly v. Woolrich*, *supra*, n. 258, decided in 1867, Monk, J. of the Quebec Superior Court upheld the legal validity of a marriage contracted in Hudson's Bay Company territory according to Cree customary law.

264 *Supra*, n. 64.

265 For this reason, we have little or no doubt that Pimicikamak's right to self-government would be held to enjoy constitutional protection pursuant to section 35(1) of the *Constitution Act, 1982*.

266 For a recent review, see M. Morellato, "The Existence of Aboriginal Governance Rights within the Canadian Legal System", (2003), www.fngovernance.org/pdf/Existence_governqance.pdf.

267 *E.g.*, "History, and a review of the authorities, persuade me that the aboriginal peoples of Canada . . . had legal systems prior to the arrival of Europeans on this continent and that these legal systems, although diminished, continued after contact." *Campbell* v. *British Columbia*, (2000), 189 D.L.R. (4th) 333, (B.C.S.C.), per Williamson, J. at p. 355.

268 Under Canadian municipal law, the existence today of a legally-recognized Pimicikamak government with inherent jurisdiction depends first upon these facts; *id*.

arrived at consensually and became binding on the community".[269] Oral history[270] confirms that Pimicikamak governed itself as an organized society, and describes key elements of the Pimicikamak government as the eskuteskaywin.[271] The issue for consideration here is concerned with the nature of that government at that time. As we are considering indigenous government with an unwritten constitution[272] and laws under inherent jurisdiction,[273] this is essentially a question of fact although the answer will have legal implications. Obviously, the answer cannot be found by examining modern-day activities; nor is it likely to be found by examining the period following enactment of the first *Indian Act*[274] in 1876, when indigenous government was suppressed or displaced by an appointed Chief and Council, the *Indian Act*, Indian agents and statutory Band governments.

In the window between contact[275] and the effective suppression of Pimicikamak indigenous governance,[276] the most significant externally-evidenced governmental activity involved the making of Treaty #5.[277] From the Pimicikamak perspective, this action had constitutional consequences and could be validly undertaken

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269 K. Dunlop, "Aboriginal Child Welfare, New Players, New Processes, New Practices," (2001) *Isaac Pitblado Lectures*, p. 119, at p. 125, noting that "Okimowin refers to decisions made by headmen in council . . ." or what we would call laws.

270 The available body of evidence could no doubt be expanded by a systematic effort. We are advised that considerable oral history has been taped (J. Osborne, pers. comm. 2004) but did not have time to review it within this mandate.

271 It consisted of the kisaywin, and the eskwayawin (today: the Women's Council) which was primarily concerned with local administration.

272 "Constitution" here has its ordinary meaning in law and public administration; *i.e.*, "the system of fundamental principles according to which a nation, state, corporation, or the like, is governed," *Webster's Encyclopedic Unabridged Dictionary of the English Language*, *supra*, n. 65. In the case of Pimicikamak, these principles are mandated by traditional and customary law.

273 Inherent jurisdiction is simply jurisdiction that was not granted by any temporal entity, as distinct from municipal jurisdiction that was. Pimicikamak cannot claim any source of municipal jurisdiction; *ergo*, its jurisdiction to make its own laws is inherent. This is separate from the issues of the scope and continued existence of its jurisdiction.

274 *Indian Act*, S.C. 1876, c. 18.

275 *I.e.*, at earliest, late in the 1700s; at latest just before the Treaty in 1875; *supra*, 227 and related text.

276 The *Indian Act*, *supra*, n. 274, and administrative suppression of indigenous governance pursuant to it, took effect in 1876, one year after the signing of the Treaty.

277 We are not aware of evidence of interaction at a governmental level before the treaty meeting in 1875. Interaction with the earlier "proprietary government" of the Hudson's Bay Company was limited or non-existent due to the brevity of its pre-treaty presence in Pimicikamak; *supra*, n. 182 and n. 190.

only in conformity with its own legal system.[278] We may therefore obtain insight into the nature of Pimicikamak Okimawin at that time from a consideration of its role in making the Treaty.

At the date of reception,[279] Pimicikamak Okimawin had been in existence since "time whereof the memory of man runneth not to the contrary,"[280] according to oral history and records as outlined above. Applicable[281] English law was certainly received no later than when the Crown made treaty[282] with Pimicikamak.[283] In 1875, Lieutenant-Governor Alexander Morris and a Métis trader, James McKay, embarked in the *Colville*, a Hudson's Bay Company steamer,[284] and proceeded to Berens River and thence to the head of Lake Winnipeg where they "descended the Nelson River to Norway House" and thence to Grand Rapids,[285] at each location obtaining signatures[286] to Treaty #5.[287] In

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278 That this legal system continued after Confederation cannot be doubted; *e.g.*: "[T]he most salient fact, for the purposes of the question of whether a power to make and rely upon aboriginal law survived Canadian Confederation, is that since 1867 courts in Canada have enforced laws made by aboriginal societies." *Campbell* v. *British Columbia*, *supra*, n. 267,

279 In colonies that were settled (as distinct from conquered) English law is generally taken to have been received upon settlement. Precisely which laws were received at what place at what date may occasion debate, but it can hardly be doubted that applicable laws of England were received in the territories (possibly including parts of Pimicikamak territory) to the extent they were "settled" by the Governor and Company of Adventurers of England Trading into Hudson's Bay before the date of Treaty #5. The *Royal Proclamation* of 1763 was arguably itself an assertion of English law in that territory.

280 This classic phrase is now usually condensed as "time immemorial".

281 Applicability was in principle a question. Courts rarely questioned the applicability of English common law, as distinct from statutes, in settled territory; see, *e.g.*, *Uniacke* v. *Dickson* (1848) 2 N.S.R. 287 (Ch.). For an exception, see *Connolly* v. *Woolrich*, per Monk, J, *supra*, n. 263, at p. 78: "Yet, they took with them only so much of these laws as was applicable to the condition of an infant colony."

282 Similar to other numbered treaties, Treaty 5 contains a promise to "in all respects, obey and abide by the law"; *supra*, n. 32, p. 347.

283 *I.e.*, September 24, 1875.

284 The Company was an interested party: "The Hudson's Bay Company . . . kindly placed their propeller steamer, the *Colville*, at the service of the Commissioners, and the Board in London, in view of the public service rendered by its use by the Commissioners, eventually declined to make any charge for its employment." A. Morris, *The Treaties of Canada with the Indians*, Bedfords Clark, Toronto, (1880); facsimile edition, Coles, Toronto, 1979, ("*The Treaties of Canada with the Indians*"), p. 144.

285 The uncertainties of communication may be illustrated by the account of Commissioner Thomas Howard who reported to Morris that, when he returned to Grand Rapids to pay the treaty annuity on August 26 of that year, "the Chief at once expressed his astonishment at my saying that the treaty had been made last year, and said he had only a talk then with the Governor preliminary to making the treaty this year, and that they were only then prepared to be treated with." Letter dated October 10, 1876, reproduced in *The Treaties of Canada with the Indians*, *ibid*, pp. 159 to 160.

making treaty with what he called the "distinct band"[288] of "the Wood or Pagan Indians of Cross Lake".[289] Morris, as the representative of the Crown authorized in that behalf, accepted (regardless of what he knew of it) the existence of both Pimicikamak and its government and intended to deal with Pimicikamak through its duly appointed representative.[290] This was essential to the validity of the Treaty.[291] If not made with the

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286 Consonant with Pimicikamak oral history that the Treaty was, in their eyes, an adoptive relationship (and thus intrinsically based on sharing resources), there was no real negotiation of treaty terms. Indeed, the document had already been signed in Berens River, though it obviously was changed after that. Morris recorded that: "The terms of [Treaty #5] were identical with those of Treaties Numbers Three and Four, except that a smaller quantity of land was granted to each family of five, being one hundred and sixty, or in some cases one hundred acres to each family of five, while under Treaties Numbers Three and Four the quantity of land allowed was six hundred and forty acres to each such family." . . . "The Indians gratefully accepted of [sic] the offered terms . . .;" *ibid*., pp. 145 and 148.

287 *The Lake Winnipeg Treaty, Number Five*, text reproduced in *The Treaties of Canada with the Indians*, *ibid*., p. 342. Pimicikamak lay at the northern extremity of the original boundaries of Treaty #5 (the northern extremity was "the north end of Split Lake" showing that the Treaty Commissioners had some grasp of the northern extent of Pimicikamak, *ibid*., p. 344, though whether Pimicikamak then included Split Lake is unclear) and thus no people north of Pimicikamak adhered to it at that time. Indeed, Pimicikamak's inclusion in the original Treaty #5 was not only an extension of the instructions proposed to the Privy Council, p. 150 – 151 to include Norway House south of Pimicikamak (explained at p. 151), but seems to have come as a surprise ("We found that there were two distinct bands . . .", p. 148). To the west of Pimicikamak, the Commissioners obtained the following year the adhesions of the Pas, Cumberland and Moose Lake bands on the Saskatchewan River, *ibid*, p. 350. To the east, Indians from Oxford House were refused adhesion (though they must have been as badly afflicted by loss of employment in trade as those of Norway House); letter from Commissioner J.L. Reid to Lieut.-Governor A. Morris dated October 14, 1876, *ibid*. p. 166, at p. 167. Aside from local geographic details such as uncertainty about Split Lake mentioned above and exclusion of Bear Lake, the conduct of the Treaty Commissioners in 1875 and 1876 indirectly but clearly defined an understanding of Pimicikamak territory in close conformity to the account of oral history.

288 Writing in 1971, in *Native Rights in Canada*, *supra*, n. 40, Cummings and Mickenberg said, at p. 54: "Historically, it also seems clear that the Government did not consider the Indians to be independent nations at the time the original treaties were made, and in the Commissioner's reports . . . both the Government representatives and the Indian negotiators indicate that they considered the Indian peoples to be subjects of the Queen." This may have been the desire of the Government and the view of some "Indian negotiators". Disaggregation certainly proved to be the policy of the Canadian government for many years. But it was open to Pimicikamak to differ and it is notable that two years earlier Morris had by his own account treated with southern Ojibwa expressly as a "nation" and not as mere subjects; *infra*, n. 293.

289 Morris, A., dispatch to the Minister of the Interior, October 11, 1875; in *The Treaties of Canada with the Indians*, *supra*, n. 284, p. 148. It is noteworthy that he evidently did not know their Cree name and had a mistaken view of where they then lived.

290 Oral history confirms that Morris was not well-informed as to subtleties of the government he was dealing with, see further below. However, his account of the Treaties (including the account of an "election" of a "Cross Lake" "Chief" whom he then "accepted") shows that he was concerned to

nation, or if made only with some individuals without authority of its government,[292] the Treaty could be void in respect of the nation.[293] Morris recorded that on the day the Treaty was made at Norway House, the "Christian Indians of Norway House" and the "Wood or Pagan Indians of Cross Lake" with neither "Chiefs" nor "head men" were present.[294] The bands thereupon "elected their Chiefs by popular vote in a most business-like manner, and the Chiefs, after consulting the bands, selected the headmen."[295] While this account confirms his interest in the authority of the representatives,[296] oral history provides a different and evidently more realistic account, as follows.

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deal with persons with authority treat on behalf of the peoples within the treaty territory.

291 Another aspect of this question had earlier been considered by the Attorney-General of the United States, who provided an opinion that Indian tribes had the requisite independence to enter into valid treaties; (1828) 2 Op. Att.-Gen. 110.

292 In his first dispatch to the Secretary of State for the Provinces, dated July 30th, 1871, Indian Commissioner W.M. Simpson evinces a concern about authority of the representatives of the "Indians of Manitoba" (at that time a much smaller province): "For some time a doubt has existed whether the Chief, nominally at the head of the Indians of the Indian settlement, possessed the good will and confidence of that band; and I thought it advisable to require that the several bands of Indians should select such Chiefs as they thought proper, and present these men as their authorized Chiefs, before anything was said as to the terms of a treaty [Treaty #1]." *The Treaties of Canada with the Indians*, *supra*, n. 284, at p. 38.

293 The Lieutenant Governor was well aware of the distinction between dealing with a nation and dealing with groups that he termed "bands" or with mere subjects of the Queen. In his dispatch dated October 14th, 1873, concerning Treaty #3, he records "The [Grand Council of the] nation had not met for many years, and some of them had never before been assembled together." See *The Treaties of Canada with the Indians*, *supra*, n. 284, at p. 47. He continued: "I told them . . . that I would return and report that they had refused to make a reasonable treaty, that hereafter I would treat with those bands who were willing to treat . . . This brought matters to a crisis." *Ibid.*, at pp. 48 – 49. Later, Morris recorded that he had said, on October 2, "I think the nation will do well to do what the Chief [Blackstone (Shebandowan)] has said. I think he has spoken sincerely, and it is right for them to withdraw and hold a Council [the Grand Council] among themselves." *Ibid.*, at p. 64.

294 "[W]e met the Indians in a large store-house of the Hudson's Bay Company [in Norway House], and asked them to present their Chiefs and head men. The absence of these non-existent figures led to purported instant "elections." *Ibid.*, at p. 148.

295 *Ibid.*, n. 284, at p. 148. It is clear from the circumstances (including geography, see *infra*, n. 297), that no popular election of a Cross Lake Chief could have occurred, and oral history confirms that no election did occur, in Norway House on that day. No body of "electors" was present. Pimicikamak had no "Chief" until after the Treaty was made, and its spokesperson was not "elected."

296 In fairness to Lt.-Gov. Morris, the evidence shows him as a conscientious person. He had to make the best of his instructions in circumstances as he found them. He could not in a few days bridge a deep linguistic and cultural divide. He was dependent on others, who had their own interests and may not themselves have been well informed, for his understanding of the peoples with whom he was dealing. See also *Native Rights in Canada*, *supra*, n. 40, at p. 122: "This [misunderstanding about terms of Treaties #1 and #2, with peoples with whom there was far greater familiarity than

In summer, Pimicikamak families each had their traditional locations, mostly on the shores of Sipiwesk Lake.[297] Each had a kisayman.[298] Té-pas-té-nam[299] was one such, and was the most respected of them. He was the best hunter, the most knowledgeable about many things, a medicine man, and a spiritual leader, seen as close to the creator.[300] For these reasons he had temporal as well as spiritual authority.[301] For the past several years, many families gathered in the fall at Cross Lake for trading,[302] and the kisaymanak[303] would meet in council.[304] In the fall of 1875, Té-pas-té-nam came to Cross Lake early to choose a good place for his family to camp for the gathering. He met two Pimicikamak men, George Garrioch and Proud McKay, one of whom spoke some English and both of whom knew somewhat of the white man's ways and had been given white man's names.[305] They had come from Norway House and brought news that white men were coming to Norway House with whom his people could establish a relationship. Té-pas-té-nam went to Norway House by canoe with them and some members of his

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the Pimicikamak] serves to illustrate some of the difficulties which were encountered in the attempt to negotiate formal treaties between the Government and a non-literate people whose advisors were neither disinterested nor legally trained."

297 Sipiwesk Lake was about 100 km long with more than 3000 km of shorelines; see also *supra*, n. 248. Travel to Cross Lake involved paddling some 50 km upstream (south); travel to Norway House involved an additional 100 km, with several portages in each reach.

298 The kisayman was respected, respect being perhaps the most fundamental constitutional principle of Pimicikamak.

299 This transliteration is from local sources based on oral history; transliterated as "Tapastanim" in the Archives of Manitoba/Hudson's Bay Company Archives, *Post Histories*, *supra*, n. 191. No attempt has been made to adopt a single standard for the roman orthography of Cree words in this report and, where the source was in writing, the original spelling has been used in each case.

300 Ki-say-man-to.

301 He did not have authority because he was a leader; he was a leader because he had authority. He was Aski Okimow. In this, Pimicikamak was typical of Indian societies: "In the absence of formal institutional positions or 'offices' to legitimate [sic] their status leaders in traditional Indian societies had to earn and legitimate their status and influence by establishing a reputation for generosity, service, wisdom, spirituality, courage, diplomacy, dignity, loyalty, and personal magnetism." *Surviving as Indians*, *supra*, n. 8, p. 119.

302 At the date of the Treaty, having had only an intermittent presence since 1795, the Hudson's Bay Company traded at Cross Lake as an outpost of Norway House. The company established a wintering station at Cross Lake within a month of the date of the Treaty. See: Archives of Manitoba/Hudson's Bay Company Archives, *Post Histories*, Post Cross Lake (1794-) (MB).

303 Often but inadequately referred to as "headmen."

304 In Cree, eskuteskawin; *infra*, n. 523. Undoubtedly, the council was m'teowuk (midewin); *supra*, n. 241.

305 Presumably they had been baptized.

family.[306] Upon arrival at the treaty meeting, those present naturally looked to him as spokesperson. He was the only person who could speak for the whole Pimicikamak people. He was told that, in order to participate in the treaty meeting, he should be baptized[307] with a new name[308] and he did so. At the treaty meeting he made his mark on the document.[309] Upon returning to Cross Lake, Té-pas-té-nam showed a suit of clothes and said "the white man told me I am now a chief." He told the council he had agreed on their behalf to adopt those who were sent by the Queen into the Pimicikamak people and allow them to use Pimicikamak lands.[310] He said this was the will of the creator. He had said he would identify a place where the Pimicikamak people and the adopted settlers could live together at Cross Lake. The council and the people accepted this without demur,[311] [a consensus that continued to this day].

Oral history thus tells that, under the Pimicikamak traditional system of governance, Té-pas-té-nam had undoubted authority to enter into the Treaty on behalf of the nation.[312] It is unquestioned[313] that Té-pas-té-nam bound the entire Pimicikamak

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306 It was known that the white men possessed marvelous technologies but were unable to survive without aid. Oral history recounts that Té-pas-té-nam believed that Queen Victoria's "children" were lost and hungry. He wanted to offer to adopt them and believed that great rewards would follow.

307 This is apparently confirmed by Morris: "The Chief of the Pagan band, who has, however, recently been baptized . . ."; *The Treaties of Canada with the Indians*, *supra*, n. 284, at p. 148.

308 Donald Ross.

309 The Treaty record shows "TA-PAS-TA-NUM (or Donald William Sinclair Ross)" made his mark as "Chief". George Garriock and Proud McKay are shown as "Councillors"; see *The Treaties of Canada with the Indians*, *supra*, n. 284, p. 348. Oral history tells that Garriock and McKay were not part of the kisaywin and had no authority to treat. The Band Council did not yet exist. The annuity paylists record no Councillors until August 11, 1877, when the name Proud McKay appears. He was replaced by George Garrioch on August 11, 1878.

310 Oral history recounts that he returned to select lands where the Queen's children could live and be fed and protected. *C.f.*, *supra*, n. 306.

311 This is the writer's compilation from translated accounts. This history was told many times, in Cree, usually around a fire, by Pé-pé-sa-ban (transl.: "streak of dawn"; a.k.a. Matilda Monias) to her grandson Thomas Dennis Monias as a teenager and again when he was 23. She raised him and educated him in traditional ways. She died aged 109 in March, 1975. She heard the history of Té-pas-té-nam from her grandfather, who knew him. The history was independently confirmed by the late Sandy Beardy.

312 There is no indication from oral history that either George Garriock (whose name but not mark appears on reproduction of the Treaty document) or Proud McKay (whose name and mark appear on it) was in fact a member of the council though they are recorded on the document as "Councillors;" see *The Treaties of Canada with the Indians*, *supra*, n. 284, at page 348. See also, *supra*, n. 309.

313 It is unquestioned in Pimicikamak municipal law; see also, *infra*, n. 319; see however, *infra*, n. 316.

people (including even those who were neither at Norway House nor at Cross Lake[314] and so could not have been consulted).[315] That is, he spoke on behalf of Pimicikamak because of his authority within Pimicikamak Okimawin. However, his authority did not arise from an election[316] at Norway House[317] or anywhere else; it arose from the customary authority of the kisaywin to arrange the affairs of the nation and, from his customary authority, as the most respected of the ki-say-man-ak,[318] to speak for the kisaywin.

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[314] *I.e.*, the great majority of the population according to oral history.

[315] The Treaty itself provides that the subscribing "Chiefs," "on behalf of all other Indians inhabiting [Treaty 5 territory] do hereby solemnly promise and engage to strictly observe this treaty . . . ;' see *The Treaties of Canada with the Indians*, *supra*, n. 284, at p. 347. Plainly this undertaking could not bind any such Indians other than those lawfully represented by the signatories. We are not aware of any evidence corroborating that these "Chiefs" (according to oral history an office unknown to Pimicikamak until that day) in fact purported to represent other peoples in that territory. This concept would have been foreign to their culture and incompatible with their fundamental principle of autonomy. The conduct of the Lieutenant-Governor following signature of Treaty 5 at Berens River on September 20, 1875 (namely, obtaining subscription to the Treaty on behalf of the Norway House Indians and on behalf of Pimicikamak five days later, and subsequent adhesions) showed that he thought it prudent not to rely upon this concept. Other Crown representatives, also, sought and obtained further adhesions. The quoted text appears in Treaties 2 to 7, and appears to have been introduced by Morris's predecessor, Lieutenant-Governor Adams G. Archibald, lead signatory to Treaties 1 and 2. Treaty #1 provides instead, "the undersigned Chiefs do hereby bind and pledge themselves and their people strictly to observe this treaty . . ."

[316] The significance of the fictitious election in Norway House may relate to the prescription in the *Royal Proclamation*, *supra*, n. 41, 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." The Treaty Commissioners did not treat with Pimicikamak in its territory and, for this reason, a "public Meeting or Assembly" of its people as called for by the *Royal Proclamation* did not take place. Thus the validity of Treaty 5 in Canadian municipal law may, in respect of Pimicikamak, be open to question; see also *supra*, n. 313.

[317] This is confirmed by the observation that no significant or representative body of Pimicikamak "electors" was present at Norway House.

[318] We have reproduced Cree terms as variously provided and spelled and have not attempted to render their orthography consistent.

It follows[319] that Pimicikamak Okimawin had the authority and capacity[320] in 1875 to speak for, and to bind, the Pimicikamak people in nation-to-nation relations[321] and to deal with rights to their lands. Having recognized Pimicikamak Okimawin for the purpose of making the Treaty, the Crown implicitly continues to rely upon its historical authority and capacity to reconcile the Crown's assertion of sovereignty with Pimicikamak's prior existence in its traditional territory.[322] It follows too, that Pimicikamak was a body politic, within the meaning of that term in political-science: "a people regarded as a political body under an organized government."[323]

Today, Pimicikamak Okimawin continues to be the traditional government[324] of the Pimicikamak nation.[325] As with any government, there have been

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319 Notwithstanding the weight of evidence to the contrary, theoretically it might be possible to claim that Pimicikamak's subscription to Treaty #5 was unauthorized, but it seems unlikely that such a claim will ever be made. In 1971, the Chiefs of all Bands in Manitoba asserted: "It is the position of the Manitoba Indian people [sic] that the treaties as negotiated in the context of their time and as they exist today, are in fact, unconscionable agreements . . . The terms of the treaties were unconscionable in that they did not ensure fair and equitable treatment to us and must rank in history as one of the outstanding swindles of all time." *Wahbung: Our Tomorrows*, *supra*, n. 79, p. xii. But even though the treaties were regarded as swindles, there was no call to abrogate them.

320 As a Minister of Indian Affairs, the Hon. Ron Irwin, said (July 24, 1996): "We didn't question your capacity when we made Treaty [#3] with you."

321 "In entering into nation-to-nation treaties with them, the Crown has already acknowledged their self-governing nation status." *RCAP*, *supra*, n. 24, vol. 2, part 1, p. 47, citing *Worcester* v. *State of Georgia*, *supra*, n. 49.

322 This recognition had complex implications. "As a matter of Canadian constitutional law, Aboriginal peoples also have the inherent right of self-government within Canada. This right stems from the original status of Aboriginal peoples as independent and sovereign nations in the territories they occupied. This status was recognized and recast in the numerous treaties, alliances and other relations maintained with the incoming French and British Crowns. This extensive practice gave rise to a body of intersocietal customary law that was common to the parties and eventually became part of the law of Canada." RCAP, *supra*, n. 24, vol. 2, ch. 3, s. 2.1. See also: "The Government of Canada recognizes the inherent right of self-government as an existing right within section 35 of the *Constitution Act, 1982*"; *Aboriginal Self-Government*, Federal Policy Guide, (1995). That is not the same thing as recognizing that Pimicikamak has that right. The Pimicikamak view is that the status and authority of Pimicikamak Okimawin as its traditional government arises from the self-determination of the Pimicikamak people. Accordingly, it does not look for (nor consider to be seemly) expressions of external recognition beyond those that are inherent in its Treaty relations. It does look for respect based on the Treaty relationship. See: Pimicikamak Cree Nation, *A New Relationship – Standards and Structures*, (1998). See also: "Aboriginal peoples are entitled to identify their own national units for purposes of exercising the right of self-determination. For an Aboriginal nation to exercise the right of self-determination, it does not have to be recognized as a nation by the federal government or by provincial governments." *RCAP*, *supra*, n. 24, vol. 2, ch. 3, s. 2.1.

323 *Supra*, n. 65.

324 Active suppression by church and state effectively drove Pimicikamak spiritual traditions

adaptations over time, especially in the last generation. Following a revival of grass-roots interest in self-government in the early 1990's, the Council of Elders[326] invited the Women's Council to take an expanded role in the nation's government, and both invited the youth to establish a Youth Council[327] in the form of a traditional council.[328] Recognizing that the traditional councils could not exercise executive functions of the nation effectively in the modern world, the Band Council of the Cross Lake Band was, as an interim measure, legitimized to act as that executive authority.[329] This arrangement ended in 1999.[330] The role of the Council of Elders in making and overseeing customary law continues in principle,[331] but in the early 1990s the nation undertook an extensive public debate that focused on how it should make temporal laws in writing and in English[332] in accord with its traditional principles of consultative democracy[333] and consensus decision-making.[334] The result was ultimately expressed in a written law[335]

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underground and stripped its government of much of its spiritual authority so that the governing councils now embody broad temporal but diminished spiritual authority, and spiritual law, though still valid and respected, is not widely known among the residential school generation.

325 The governing principle continues to be consensus; see *supra*, n. 269 and related text, and see *infra*, n. 331.

326 While courtesy may accords the title "elder" with age, under customary law there is no strict rule as to who is an Elder; it is a matter of respect especially for the capacity to speak with both humility and authority.

327 Traditionally, the age of youth begins when a person takes up responsibilities at the end of childhood and ends when a young woman bears a child or a young man proves himself a man in the hunt or otherwise, as by vision quest. Today, the boundaries may seem less well-defined, but the distinction continues to be socially determinable.

328 The three "traditional" councils are autonomous and govern their own affairs under customary law. The authority of each within its sphere is inherent, not delegated. For example, the role of the Women's Council in supervising elections derives from the traditional (and continuing, in other ways) role of women, the givers of life, in selecting leaders. The *Pimicikamak Election Law, 1999* recognizes this role.

329 This consensus emerged in 1995.

330 This arrangement was inverted by the *Pimicikamak Election Law*, 1999; see, particularly, s. 26, which provides: "Notwithstanding the *Indian Act* and Regulations thereunder, the Chief and Council of the Nation shall be, *ex officio*, the Chief and Council of the Band." After some initial reluctance, and efforts to characterize it as Band custom pursuant to the *Indian Act*, which it clearly is not, INAC *de facto* accepted the operation of this provision. Accordingly, there has been no *Indian Act* election for the Cross Lake Band since 1997.

331 National policy, made by the Four Councils by consensus, has the character of customary law.

332 This involved a Pimicikamak constitutional amendment affecting customary, but not traditional, law. Customary law is amended by adopting a new custom through consensus.

333 In common with certain other Pimicikamak constitutional principles, democracy is mandated by traditional law; subject to this constitutional principle, its particular application may be mandated by customary or temporal law.

334 Previously, customary law was oral; while passed on particularly by elders, its application and

that was itself made in the mandated manner. It provided formally for written laws to be proposed by not less than three quarters of the Executive Council plus the Chief of the Nation, and to then require approval by the Council of Elders by consensus[336] and by the Women's Council by consensus,[337] followed by acceptance in a general assembly of citizens by consensus.[338] In practice, these steps are preceded by extensive public consultation.[339] Other significant recent constitutional measures included written definition of Pimicikamak citizenship[340] and extension of the franchise[341] to all citizens over 18 regardless of residence.[342]

Two decisions of the Supreme Court of Canada touch upon issues of aboriginal self-government under Canadian municipal law but neither provides much guidance on these issues, though both underscore the essential role of the historical facts.[343] In *Pamajewon*,[344] two persons charged with gaming asserted as a defence that the Band had an aboriginal right to self-government (and thus to regulate high-stakes gaming). The Supreme Court of Canada found that there was no evidence in support of

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adaptation were integral to everyday life and fundamental to Pimicikamak participatory democracy.

335 *Supra*, n. 20.

336 Consensus is a traditional Pimicikamak constitutional principle.

337 Approval by consensus of the Women's Council was omitted from the original law but was regarded as a requirement of traditional law and was actually obtained in each case. It was formally added by a written amendment in 1999.

338 This multi-consensus process might seem to be so cumbersome as to be unworkable, but it appears to work well. In practice it begins by popular demand, followed by grassroots consultation before a law is drafted and formally proposed. A former Harvard professor of anthropology who lived in Cross Lake for two years studying its government advised, "This is the most democratic form of government I have ever seen." R. Niezen, pers. comm., 1999.

339 Consultation is a traditional constitutional principle.

340 *The Pimicikamak Citizenship Law, 1999*. Among other things, this law redefines the electorate. It meets the objective verifiability test set out in *R*. v. *Powley*, *supra*, n. 60.

341 Electors for the Executive Council have not only a right but a responsibility to vote; see *The Pimicikamak Election Law, 1999*, s. 17 & 18. Voter participation in Executive Council elections has been high in comparison with other elections in Canada.

342 *The Pimicikamak Election Law, 1999*, s. 4. This reform was contemporaneous with (and took effect before) a similar reform to the *Indian Act* ordered by the Supreme Court of Canada; see *Corbiere* v. *Canada (Minister of Indian Affairs)*, [1999] 2 S.C.R. 203.

343 *E.g.*; "If the Shawanaga First Nation and Eagle Lake Band had some rights of self-government which existed in 1982 (I am prepared to assume that they did), the right of governance asserted must be viewed like other claimed aboriginal rights; it must be given an historic context." *R*. v. *Pamajewon*, Osborne J.A. in the Court of Appeal (1994), 21 O.R. (3d) 385, (Ont. C.A.), at p. 400; cited by L'Heureux-Dube, J., (concurring), [1996] 2 S.C.R. 821. See also *Mitchell* v. *M.N.R.*, *supra*, n. 102.

344 *R*. v. *Pamajewon*, [1996] 2 S.C.R. 821.

that defence.[345] In *Delgamuukw*,[346] the Supreme Court of Canada concluded that errors in determining facts at trial made it impossible for the court to decide whether the *Constitution Act, 1982* protected a right to self-government in that particular case.[347] However, the Court directed that:

> Since the purpose of s. 35(1) is to reconcile the prior presence of aboriginal peoples in North America with the assertion of Crown sovereignty, it is clear from this statement that s. 35(1) must recognize and affirm both aspects of that prior presence – first, the occupation of land, and second, the prior social organization and distinctive cultures of aboriginal peoples on that land.[348]

Of this, Morellato[349] notes:

> Logic dictates that the constitutional recognition and affirmation of the "prior social organization and distinctive cultures of aboriginal peoples" as described in the above passage would include the protection of those "distinctive cultures" as distinct cultures. These cultures necessarily embody how aboriginal peoples govern themselves. Yet, those who deny the existence of inherent governance rights effectively ignore this critical passage in Delgamuukw, including the meaning of s. 35(1) of the Constitution Act 1982 as prescribed by the Supreme Court of Canada. That is, they effectively deny the affirmation in s. 35(1) of the social organization and distinctive cultures of aboriginal peoples prior to the assertion of Crown sovereignty. They also deny what is clearly patent today: the continued existence of distinctive aboriginal cultures and governments in 2003 whose rights do not depend on Crown grants or delegated authority.[350]

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345 Also, in *Delgamuukw* v. *British Columbia*, *supra*, n. 84, Lamer, C.J., said, at para. 170: "[T]he appellants [in the *Pamajewon* case] advanced the right to self-government in very broad terms, and therefore in a manner not cognizable under s. 35(1)." See further, n. 353, *infra*.

346 *Supra*, n. 84.

347 "The broad nature of the claim at trial also led to a failure by the parties to address many of the difficult conceptual issues which surround the recognition of aboriginal self-government. The degree of complexity involved can be gleaned from the *Report of the Royal Commission on Aboriginal Peoples*, which devotes 277 pages to the issue. That report describes different models of self-government, each differing with respect to their conception of territory, citizenship, jurisdiction, internal government organization, etc. . . . In these circumstances, the issue of self-government will fall to be determined at trial." *Ibid.*, at para. 171.

348 *Ibid.*, at para. 141.

349 *Supra*, n. 266.

350 *Ibid.*, at pp. 2 – 3 [original emphasis].

It is important to recognize that the issue of whether an aboriginal or treaty right is constitutionally protected by section 35 of the *Constitution Act, 1982* is not directly involved in the questions before us,[351] which concern the nature and legal capacity of the Pimicikamak people and its traditional government,[352] as distinct from constitutional protection of the latter.[353] Generally, as will be elaborated below, the municipal law of Canada, based on the common law of England, accepts as historical fact that aboriginal nations were self-governing upon reception of English law (alternatively referenced as the date of contact) and examines the facts of each specific case to determine whether the right to that government was subsequently lawfully extinguished.

Scope

While there is little case law on point,[354] the pre-contact sovereignty of Pimicikamak and thus the scope of its government were evidently unlimited.[355] However, its sovereignty and thus scope are now limited in significant ways.[356] The Royal Commission on Aboriginal Peoples concluded that "Aboriginal peoples . . . retained their ancient constitutions so far as these were not inconsistent with the new relationship."[357] The treaty relationship is not compatible with some powers, such as the

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[351] The reason this distinction is important is that most of the case law touching on self-government is concerned with the issue of constitutional protection, which is a different question; *infra*, n. 353.

[352] These form part of the subject matter of aboriginal rights that were recognized and affirmed but not created by s. 35 of the *Constitution Act, 1982*: "[L]ong before the 1982 enactment of s. 35, aboriginal rights formed part of the unwritten principles underlying our Constitution." *Campbell* v. *British Columbia*, *supra*, n. 267, per Williamson, J. at p. 351.

[353] The Supreme Court of Canada has always been careful to distinguish the constitutional issue of protection under s. 35(1) from the common law issue of existence. Most recently, in *R.* v. *Powley*, *supra*, n. 62, at para. 45, the Court explicitly stated: "Although s. 35 protects "existing rights", it is more than a mere codification of the common law. Section 35 reflects a new promise: a constitutional commitment to protecting practices that were historically important features of particular aboriginal communities." Correspondingly, the "integral to a distinctive culture" test enunciated in *R.* v. *Van der Peet*, *supra*, n. 50, while plainly met by the facts concerning Pimicikamak, is not required to be met in establishing the existence at common law, as distinct from the constitutional protection, of indigenous governments in Canada.

[354] Distinguish cases concerned with the scope of rights that may enjoy constitutional protection; *supra*, n. 353.

[355] *I.e.,* from the perspective of Imperial law; and see *supra*, n. 79 and related text. For example, prior to contact there was no authority that could lawfully constrain Pimicikamak from establishing its own defence force and making war as it deemed appropriate. Indeed, it did so; *supra*, n. 96.

[356] *I.e.*, in particular, by its Treaty relationship with the Crown and by constitutional developments flowing from that Treaty relationship. For example, clearly Pimicikamak could not now lawfully raise an army and make war on Canada or, for that matter, on the Sioux; *c.f.*, *supra*, n. 355.

[357] Royal Commission on Aboriginal Peoples, *Partners in Confederation: Peoples, Self-Government and the Constitution*, Canadian Government Publishing, Ottawa, (1993), at p. 23; cited by Binnie, J., in *Mitchell* v. *M.N.R.*, *supra*, n. 102, at p. 980.

power to make war on the Crown,[358] that clearly existed within the scope of its pre-contact authority. There is little authority on the extent of such limitations. One senior counsel for Justice Canada recently opined[359] that infringement of the right of self-government[360] might be constitutionally justifiable[361] in relation to:

- international matters, such as defence, trade, and relations with foreign nation states;
- the protection of basic human rights;
- the protection of the health, safety, well-being and security of all Canadians;
- protection of the environment; and
- overall management of the economy.[362]

The old argument that all legislative powers are distributed to Parliament and the Provincial legislatures (leaving no scope for aboriginal jurisdiction) was held to be wrong in *Campbell* v. *British Columbia*[363].

> I have . . . concluded that the *Constitution Act, 1867* did not distribute all legislative power to the Parliament and the legislatures. . . . [It] did not purport to, and does not end, what remains of the Royal prerogative or aboriginal and treaty rights, including the diminished but not extinguished power of self-government which remained with the Nisga'a people in 1982.[364]

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358 By Treaty 5, Pimicikamak citizens are bound "to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen." See *The Treaties of Canada with the Indians*, *supra*, n. 284, p. 347. While there are differences between the aboriginal understanding of the Treaty and the English text, there appear to be no differences on the issue of peace.

359 Clearly, this view was personal and intended to be illustrative rather than definitive.

360 By necessary implication, the right of self-government may extend to such matters.

361 Note that this would not necessarily mean that these matters are outside the scope of self-government today. If correct, it would mean that the exercise of an existing aboriginal or treaty right to self-government in respect of these matters could in some circumstances be lawfully subject to infringement by the federal Crown.

362 T.A. Saunders, "Walking the Tightrope Blindfolded: The Legitimacy and Uncertainty of Striving for Balance in the Context of the Rights of Aboriginal People," (2001) *Isaac Pitblado Lectures*, p. 41, at p. 55.

363 *Supra*, n. 267.

364 *Ibid.*, per Williamson, J. at para. 180. That is, the Court adopted the inherent, rather than the contingent or delegated, rights theory of self-government. This decision was not appealed. For a summary of these theories, see, *e.g.*: *An Overview of Aboriginal Self-Government*, The Scow Institute, (2003), www.scowinstitute.ca/rp1SelfGov.PDF.

In its policy guide on implementation of the inherent right and the negotiation of aboriginal self-government, the government of Canada, having officially recognized the inherent right to self-government: "The Government of Canada recognizes the inherent right of self-government as an existing aboriginal right under s. 35 of the Constitution Act, 1982. It recognizes, as well, that the inherent right may find expression in treaties . . ."[365] It is prepared to negotiate jurisdiction that is commensurate with the above view; Canada's policy is that it will not negotiate: "powers related to Canadian sovereignty, defence and external relations, such as international/diplomatic relations and foreign policy, national defence and security, security of national borders, international treaty making, immigration, naturalization and aliens and international trade; and other national interest powers, such as management and regulation of the national economy, including bankruptcy, insolvency, trade and competition policy, intellectual property, currency, maintenance of law and order and criminal law."[366] The resulting jurisdiction would then be municipal, not inherent.[367] Pimicikamak has proceeded on the basis that, while negotiated harmonization of administration is possible and desirable, its jurisdiction is a constitutional matter that cannot be derogated except by treaty made with lawful authority.[368]

Continuity

Does Pimicikamak Okimawin continue to exist today? Plainly, the aboriginal perspective of Pimicikamak as a people is that it does, both as a matter of fact and as a matter of self-determination.[369] Self-determination is asserted not only by virtue

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365 Minister of Indian Affairs and Northern Development, *Aboriginal Self-Government: Federal Policy Guide – The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Public Works and Government Services Canada, 1995), p. 7.

366 *Id*.

367 Indeed, as the oxymoronic title of the policy document *id.*, suggests, the policy of the Government of Canada is to not recognize that any nation has the inherent right of self-government until negotiated municipalization of that right is complete.

368 Procedural requirements today may differ from those in effect at the time of Treaty #5 or even of the Northern Flood Agreement (*infra*, n. 393 and related text) but ultimately national decision-making continues to rest on the survival-based principle of consensus. Note that while the government of Canada seeks to impose referendums (without lawful authority that we can discern) the aboriginal perspective of Pimicikamak views referendums as dangerous (in that they may divide a people against itself for generations) and unlawful; see, *e.g.*, *Pimicikamak NFA Implementation Law, 1997*, preamble and s. 4.

369 The term self-determination is used here in the internal sense, defined by the Supreme Court of Canada as "a people's pursuit of its political, economic, social and cultural development within the framework of an existing state." See: *Reference re Secession of Quebec*, *supra*, n. 27, at para. 126. The Court also said, at para. 130, "There is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a "people" to achieve a full measure of self-determination."

of Pimicikamak customary law; it is also a fundamental human right[370] under international law.[371] The *International Covenant on Civil and Political Rights*,[372] to which Canada is a signatory, states that, "All peoples have the right of self-determination."[373] It requires Canada to respect and to promote the realization of that right.[374] The question of what is a people for the purpose of the Covenant is a matter of international law, not Canadian municipal law, though cognizable by the Canadian courts.[375] Since 1982, the UN has recognized indigenous peoples as such, and has recognized their right to attend UN proceedings without registering as non-governmental organizations.[376]

However, international human rights are not themselves a part of Canadian municipal law.[377] In practical terms, the questions arise from the enforced hiatus in the exercise of governance.[378] They involve Pimicikamak Okimawin's existence from the current perspective of Canadian municipal law. The key legal

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370 The right of an indigenous people to decide how it makes decisions, and its right to determine who is part of it, may be the most fundamental elements of this right of self-determination; C. Brown, Human Rights Watch, New York, pers. comm., 1997.

371 Governmental respect for this right may have significant implications within the municipal law of Canada. In *Reference re Secession of Quebec*, *supra*, n. 27, the Court said, at para. 130, "A state whose government . . . respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity." At para. 135, the Court further noted, without needing to decide, that a right to secede might arise where "the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated."

372 Relied upon in *Reference re Secession of Quebec*, *ibid.*, at para. 118. The Supreme Court of Canada noted that "The existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond "convention" and is considered a general principle of international law." *Ibid.*, at para. 114.

373 The *International Covenant on Civil and Political Rights*, (to which Canada acceded on 19 May 1976) Part I, Art. 1, Para. 1. See also the *International Covenant on Economic, Social and Cultural Rights*, Part I, Art. 1, Para. 1.

374 *Ibid.*, Para. 3.

375 In *Reference re Secession of Quebec*, *supra*, n. 27, at para. 125, the Court referred to the question whether a people exists "within the definition of public international law . . . ." For an analysis of the development of international usage relating to indigenous peoples, see: R. Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity*, *supra*, n. 244, at pp. 29 *et seq*.

376 Pimicikamak Okimawin representatives attended such United Nations proceedings within the past decade, and Pimicikamak established, for a time, a continuing presence for this purpose.

377 See: *Francis* v. *The Queen*, [1956] S.C.R. 618, at p. 621; *Baker* v. *Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817. However, Canadian courts may, and do, refer to fundamental principles of international law and may find them persuasive in interpreting the municipal law of Canada.

378 *Supra*, n. 237 and related text.

principle from that perspective derives from the common law of England and has been called "the doctrine of continuity".[379] The common law presumed continuity of rights[380] and this presumption continues within Canadian municipal law and applies to indigenous legal systems. In *Mitchell* v. *M.N.R.*, the Supreme Court of Canada said:

> "English law, which ultimately came to govern aboriginal rights, accepted that aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment by cession, conquest or legislation . . ."[381]
>
> And further:
>
> "[C]ustomary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them . . . . Barring one of these exceptions, the practices, customs and traditions that defined the aboriginal societies as distinctive cultures continued as part of the law of Canada . . . ."[382]

Within the Canadian municipal legal system, the concept of continuity is complex and aspects of it have even been called paradoxical: "[T]he law of aboriginal rights is concerned in some way with 'inter-systemic' continuity: common law Aboriginal rights derive, in part, from the continuity of Aboriginal customary legal systems, or at least elements of them, within non-aboriginal legal systems."[383] Correspondingly, the continued existence of Pimicikamak Okimawin is based not only on the legal presumption of continuity of rights but also on the fact of continuity of elements of its customary legal system[384] including its customary government.[385]

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379 B. Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title*, Native Law Centre, Saskatoon, (1983), at p. 10.

380 In *Calder* v. *British Columbia*, *supra*, n. 102, per Hall, J., it was observed that, following the Crown's assertion of sovereignty, a legal right "could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation . . ." Judicial respect for the legislature is a significant though not the sole source of the doctrine of continuity. The doctrine of recognition, based on a contrary assumption, "is wrong in law, [and] unworkable as well." K. McNeil, *Common Law Aboriginal Title*, *supra*, n. 113, p. 177.

381 *Supra*, n. 102, per McLachlin, C.J.C. at p. 926.

382 *Ibid.*, n. 102, at p. 927, per McLachlin, C.J.C.: See also: *In re Southern Rhodesia* [1919] AC 211 (P.C.); *Adeyinka Oyekan v Musendiku Adele* [1957] 1 WLR 880; [1957] 2 All ER 788 (P.C.); *Mabo* v. *Queensland (No 2)* (1992), 175 C.L.R. 1 (H.C.A.).

383 M.D. Walters, "The 'Golden Thread' of Continuity," (1999) 44 McGill L.J. 711, at p. 714.

384 Note that this implies also continuity of Pimicikamak as a people and of its relationship with its traditional territory.

385 *E.g., supra*, n. 328 and related text.

The Supreme Court of Canada has held that continuity of practices, customs or traditions is also a requirement for constitutional protection of aboriginal rights and has spoken to standards for demonstrating this requirement:[386]

> Where an aboriginal community can demonstrate that a particular practice, custom or tradition is integral to its distinctive culture today, and that this practice, custom or tradition has continuity with the practices, customs and traditions of pre-contact times, that community will have demonstrated that the practice, custom or tradition is an aboriginal right for the purpose of s. 35(1).
>
> The concept of continuity is also the primary means through which the definition and identification of aboriginal rights will be consistent with the admonition in *Sparrow* . . . that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time". The concept of continuity is, in other words, the means by which a "frozen rights' approach to s. 35(1) will be avoided. . . . The evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights.
>
> I would note that the concept of continuity does not require aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions and those which existed prior to contact. It may be that for a period of time an aboriginal group, for some reason, ceased to engage in a practice, custom or tradition which existed prior to contact, but then resumed the practice, custom or tradition at a later date. Such an interruption will not preclude the establishment of an aboriginal right. Trial judges should adopt the same flexibility regarding the establishment of continuity that . . . they are to adopt with regards to the evidence presented to establish the prior-to-contact practices, customs and traditions . . . .[387]

In other words, continuity of the right and continuity of the people having that right are requirements for constitutional protection as an existing aboriginal or treaty right, but continuity of exercise of the right is not a requirement for existence or even for constitutional protection of a right. This principle received its most recent and strongest affirmation from the Supreme Court of Canada in *R.* v. *Powley*.[388] Pimicikamak's revival

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386 Presumably the standard for establishing continuity at common law is at most not higher than the standard for constitutional protection purposes as the Supreme Court of Canada has repeatedly emphasized that s. 35 of the *Constitution Act, 1982* invokes a higher threshold than the common law; *e.g.*, *supra*, n. 353.

387 *R.* v. *Vanderpeet*, *supra*, n. 50, per Lamer, C.J.C., at paras. 63 – 65.

388 "Aboriginal rights are communal rights: They must be grounded in the existence of a historic and

of its indigenous governance based on traditional principles and customary law and institutions plainly evidences these elements of continuity as required for protection under section 35(1) of the *Constitution Act, 1982*,[389] and therefore certainly meets the continuity requirements for establishing the existence of the right at common law.

It should be noted that traditional Pimicikamak governance was not entirely suppressed post-1876.[390] For example, tribal resource management boundaries were maintained and adjusted[391] during the 20th century under customary law (not, as some provincial resource managers now appear to believe, under provincial law); and the Northern Flood Agreement[392] was entered into in 1977 through consensus decision overseen by the Elders mandating its signing under authority of traditional law[393] and not (as some federal officials now appear to believe), by referendum; the referendum under NFA Article 2 was a prerequisite for Canada's ratification and was not a valid way for Pimicikamak to authorize an agreement trenching, as it expressly does,[394] on aboriginal and Treaty rights.[395]

Extinguishment

The issue of continuity may be seen to be related to the issue of extinguishment. But, generally, continuity of a right is a question of fact and extinguishment of a right is a question of both fact and law.

Given that Pimicikamak can establish the fact of pre-contact existence of its own form of government exercising inherent jurisdiction, and the fact that its present form of government derives from the pre-contact government, our inquiry can now shift from the perspectives of Pimicikamak law and Imperial law to the perspective of

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present community, and they may only be exercised by virtue of an individual's ancestrally based membership in the present community." . . . "There was never a lapse; the Métis community went underground, so to speak, but it continued." S*upra*, n. 62, at paras. 24 and 27.

389 See also, *supra*, at n. 351.

390 This fact is not necessary to the continued existence of the right of self-government at common law, nor even to its constitutional protection; *supra*, n. 387.

391 See, *e.g.*, Affidavit of Gideon McKay, July 3, 2003.

392 An agreement between the Northern Flood Committee representing five Bands and Canada, Manitoba and Manitoba Hydro, dated December 16, 1978.

393 See also, *supra*, n. 368.

394 NFA Preamble paragraph G speaks of Canada's commitment to ensuring that "the special rights of Indians, including those arising from Treaty 5, are adequately protected," and the substance of the NFA is concerned with mitigatory, remedial and compensatory measures given that the hydro-electric project was expected to infringe rights, including those arising under Treaty #5.

395 *A fortiori*, this referendum was not a valid way to authorize the Band to modify the treaty relations of the nation. See also *supra*, n. 368.

Canadian law. The remaining question in determining the legal nature of Pimicikamak Okimawin from this perspective is whether Pimicikamak's right of self-government was validly extinguished since the Crown's assertion of sovereignty, either by surrender or by valid act of lawful authority. The courts have held that, once established as a past fact with the requisite continuity, the onus of proving extinguishment lies on whoever asserts it. To our knowledge, no-one has asserted that Pimicikamak's right of self-government has ever been lawfully extinguished. Proof of any such assertion would face an onerous if not impossible burden. Even accepting without demur the English written version, nothing in Treaty 5 suggests that the right of self-government was thereby extinguished by surrender to the Crown.[396] Indeed reason protests at the idea.[397] It could hardly have been intended that Pimicikamak government collapse upon signing Treaty #5; nor could it reasonably be thought that Té-pas-té-nam had authority to, let alone did, extinguish[398] the very government whose existence underpinned not only that authority but also the nation's capacity to perform treaty terms.[399]

While Canadian governmental administration under the *Indian Act* has systematically suppressed Pimicikamak governance with considerable effect from 1876 to the present day, the courts have clearly held that even lawful and long suppression does not amount to extinguishment.[400] The standard required by the courts is that legislation must show a "clear and plain intention" to extinguish such rights.[401] There is

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396 It would take clear and express language in the Treaty to extinguish such a right, and nothing of this kind is to be found in Pimicikamak's treaties with the Crown.

397 See *Worcester* v. *Georgia*, *supra*, n. 49, at p. 554, wherein the United States Supreme Court rejected such an interpretation of a treaty with the Cherokee to this effect, saying: "It would convert a treaty of peace covertly into an act, annihilating the political existence of one of the parties." See also: *RCAP*, *supra*, n. 24, vol. 2, ch. 3.9; "When the treaties accorded mutual recognition and described specific and mutual rights and obligations, the treaty nations were not intending to cede their sovereignty, but to exercise it."

398 In the United States there is a parallel doctrine to Canadian jurisprudence regarding interpretation of treaties, insofar as extinguishment of rights is concerned, known as the reserved rights doctrine. Under this doctrine, treaties are "not a grant of rights to the Indians, but a grant of rights from them [and] a reservation of those not granted." *United States* v. *Winans*, (1905) 198 U.S. 371, at p. 381.

399 In *Worcester* v. *State of Georgia*, *supra*, n. 49, Justice McLean said: "Is it essential that each party shall possess the same attributes of sovereignty to give force to the treaty? This will not be pretended; for, on this ground, very few valid treaties could be formed. The only requisite is, that each of the contracting parties shall possess the right of self-government, and the power to perform the stipulations of the treaty."

400 "'[E]xisting' means 'unextinguished' rather than exercisable at a certain time in history." *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, at p. 1092, per curiam.

401 See *R.* v. *Sparrow*, *ibid.*, *R.* v. *Gladstone*, [1996] 2 S.C.R. 723.

no legislation that shows a clear and plain, or any, expressed intention to extinguish Pimicikamak's right of self-government.

In summary, Pimicikamak governed itself long before and at the time of the assertion of sovereignty by the Crown. It has continuously maintained the right to do so ever since. The right has never been surrendered or otherwise lawfully extinguished. Simply, Pimicikamak's right of self-government is legitimately exercised.[402]

Corporate Capacity

We next consider legal capacity and the effect on it of the reception of English law in Canada, because upon reception English law was applicable to determine the legal capacity of Pimicikamak and Pimicikamak Okimawin under Canadian law at or after that date. Without limiting their generality, the questions implicitly raise a key legal issue: does Pimicikamak or its government have the legal capacity of a "body politic and corporate" or corporation?[403] It may be useful to explain this concept and its significance at this point.

As outlined below, a corporation is an artificial legal person, comprising one or more legal persons collectively, that has a separate legal personality independent of the persons of whom it is comprised.[404] Legal capacity determines the legal relationships and actions that an entity can undertake. The highest legal capacity is that of a "natural person". For example, a natural person has the legal capacity to enter into contracts, and to sue and be sued, in his or her own name. While a corporation consists of a group of persons, groups of persons do not necessarily have the same capacity as a natural person. That is, the law does not generally recognize that groups of persons have the legal capacity to engage as a group in all of the legal acts that a natural person can. However, a corporation has a legal capacity separate and distinct from those of the persons who comprise it.[405] Many corporate entities (including some governmental entities and most modern business corporations) have the same legal capacity as a natural person. Usually, they have this capacity because they were incorporated by or under statutes that expressly grant it to them.

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402 This fact is evident to any observer. *E.g.*, Report of the Independent Election Observer, 1999. However, the exercise of the right has been administratively obstructed. Some governmental representatives have at times adopted an adversarial stance to Pimicikamak Okimawin, but none has to our knowledge attempted to advance any assertion, let alone a coherent one, that Pimicikamak's right of self-government never existed or was surrendered, or has been lawfully extinguished.

403 "Body politic and corporate" is early terminology, no longer required, but still in legal use, for what is now more usually called a "corporation."

404 This statement is intended as a summary explanation rather than a definition.

405 *R.* v. *Arnaud* (1846) 9 Q.B. 806; *Salomon* v. *Salomon & Co Ltd.*, [1897] A.C. 22 (H.L.).

There is of course no question of Pimicikamak or Pimicikamak Okimawin ever having been incorporated by or under a statute. As will appear below, while statutory incorporation is now so usual that many assume it is the only way, it was not always so.[406] The legal capacity of Pimicikamak and its government within the Canadian municipal legal system must ultimately be determined in light of common law considerations.[407] The main question about legal capacity of any group of individuals is: does it have the corporate capacity of a natural person? For a body politic, this question may be restated to ask: is it "a body politic and corporate"? In light of the matters reviewed above, it is clear that Pimicikamak is a body politic.[408] The central and inter-related issues are: is it also a body corporate, and does it or its government have the legal capacity of a natural person?

The Corporation at Common Law

In order to consider the legal capacity of Pimicikamak and of Pimicikamak Okimawin under Canadian law today, it is necessary to review laws of England that became part of the common law of Canada relating to corporate capacity under the doctrine of reception. As a practical reality, modern day Canadian business corporations are exclusively created by or under express authority of its Parliament or a provincial legislature. However, this practical reality does not reflect the common law that, as outlined below, continues to exist. To understand the situation at the relevant period[409] we must first review the origins of and key developments in the law of corporations in England.

The legal concept of the body corporate or corporation[410] in English law is older than Parliament. Writing in the 1760's, Blackstone ascribed it to the Romans.[411] Other scholars find that the concept arose independently in England, as in other civilizations.[412] Early English corporations were governmental, such as boroughs and

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406 *Infra*, under heading The Corporation at Common Law.

407 Common law is the law developed over time by the courts. As outlined below, a considerable body of English common law continues to be part of the laws of Canada.

408 *Supra*, at n. 65.

409 *I.e.*, upon reception of English law.

410 A body corporate is today more usually referred to as a "corporation" and the terms are used interchangeably.

411 "The honour of originally inventing thefe [*sic*; and following, "f" was commonly used where the modern spelling uses "s"] political conftitutions entirely belongs to the Romans." Blackstone, *Commentaries on the Laws of England* (1765-1769), Oxford, Clarendon Press, 1st Ed. (Bl. Comm.), Book 1, p. 468.

412 "[T]he corporation existed in England long before the Roman law-books were known in that country." R.L. Raymond, *The Genesis of the Corporation*, (1906) 16 Harv. L. Rev. 1, at p. 5.

ecclesiastical corporations;[413] these are classic examples of bodies politic and corporate. They arose as a matter of custom that was recognized by the common law, and were not incorporated by any act of external authority. For example, the sovereign[414] came to be recognized as a corporation sole[415] at common law.[416] Similarly, the Parliament of the United Kingdom is[417] a corporation aggregate at common law,[418] consisting of the Crown, the Lords Spiritual and Temporal, and the Commons.[419] At common law, there "was no rule that the corporation must have some definite and authoritative commencement. There was no rule that the corporation must be erected, set up, made, by act of the sovereign power."[420] Existing entities that conformed to contemporary legal understanding were accepted as common law corporations, by definition.[421] Halsbury[422] quotes, from a later source,[423] the earliest recorded (English) definition of a corporation:

> [A]n artificial body composed of divers constituent members like the human body, and that the ligaments of this body politic or artificial body are the franchises and liberties thereof which bind and unite all its members together, and the whole frame and essence of the corporation consist therein.[424]

The underlying policy was that:

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413 *Ibid.*, at p. 6.

414 *I.e.*, the Queen in her official capacity.

415 *I.e.*, consisting of only one person; as distinct from a corporation aggregate, consisting of more than one person.

416 See, *e.g.*: 1 Bl. Comm. 469; Bacon, *A New Abridgement of the Law*, (1832) vol. II, 253; Stephen, *New Commentaries on the Laws of England*, (1868) vol. III, 127.

417 It apparently has been so since an indeterminate date - perhaps in the reign of Charles II (1660 – 1685) when it achieved a continuing existence no longer subject to the whim of the Crown.

418 Sheppard's *Abridgement*, vol. 1, p. 431; judicially approved in *Chisholm* v. *State of Georgia* (1793) 2 U.S. 419 (S.C.).

419 Halsbury, *The Laws of England*, (1909), vol. VIII, 314; citing Cowell's *Interpreter* (1672). See also: "The constituent parts of the Parliament are the King's majesty, the Lord's [*sic*] Spiritual, the Lord's Temporal, and the Commons. The King and these three Estates together form the great corporation or body politic of the Kingdom." *Chisholm* v. *State of Georgia*, *ibid.*, per Wilson, J., at p. 461.

420 R.L. Raymond, *supra*, n. 412, at p. 13.

421 *Id.*: "[T]he oneness of the borough was definitely recognized in practice by the king and by others, by the community long before this rule of law was thought of. And this recognition came by common consent as something required by the necessities of the case."

422 Halsbury, *The Laws of England* (1909), Vol. VIII, p. 301.

423 *R.* v. *London Corporation* (1692), Skin. 310.

424 *Smith's (Sir James) Case* (1691) Carth. 217.

> "[A]s all perfonal[425] rights die with the perfon; and, as the neceffary forms of invefting a feries of individuals, one after another, with the fame identical rights, would be very inconvenient, if not impracticable ; it has been found neceffary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to conftitute artificial perfons, who may maintain a perpetual fucceffion, and enjoy a kind of legal immortality. These artificial perfons are called bodies politic, bodies corporate, (corpora corporata) or corporations . . . ."[426]
>
> And, continuing in a much later edition:
>
> These artificial persons are called bodies politic, bodies corporate, (*corpora corporata*,) or corporations: of which there is a great variety subsisting, for the advancement of religion, of learning, and of commerce; in order to preserve entire and forever those rights and immunities, which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct.[427]

By the mid-16th century, English law was recognizing that a corporation, distinct from its members, acts only in its corporate capacity.[428] A corporation was understood to arise in four ways,[429] one of which was by common law.[430] Subsequently, the consent of the sovereign came to be required.[431] However, the sovereign's consent[432] was deemed to be implied for corporations that arose by custom under common law[433] and ancient entities whose corporate character was said to arise by prescription.[434]

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425 *Sic*; see, *supra*, n. 411.

426 1 Bl. Comm. 455.

427 Blackstone, *Commentaries on the Laws of England*, (1897) Rees Welsh, Philadelphia, Book 1, at p. 467.

428 *Fulmerston* vs. *Steward* (1554) 1 Plowd. 101.

429 Some 300 years later, Halsbury identified five ways: "by common law, by royal charter, by authority of Parliament, by prescription, or by custom . . .", citing *Byrd* v. *Wilford* (1596), 2 Croz. Eliz. 464 as authority for the latter; *The Laws of England* (1909) Butterworth, London, vol. VIII, p. 313. Earlier commentaries subsumed "custom" within "common law"; see Blackstone: "common law being nothing elfe but cuftom," 1 Bl. Comm. 460.

430 *The Case of Sutton's Hospital* (1612), 10 Co. Rep. 23a, at p. 29b.

431 "When this rule of law was established, therefore, it really meant: recognition of corporations cannot continue without the king's express consent. The sovereign's act was not creation, but permission." R.L. Raymond, *supra*, n. 412, at p. 14.

432 The sovereign's consent is sometimes referred to as "royal assent."

433 "The crown's *implied* consent is to be found in corporations that exist by force of the *common law*, to which our former kings are supposed to have given their concurrence. Of this sort are the sovereign himself, and also all ecclesiastical corporations sole, such as bishops, parsons and other incumbents of churches; who by common law have been held, (as far as our books can show us,) to

By the end of the 18th century, the corporation aggregate came to be more specifically defined as: "a collection of many individuals united into one body under a special denomination,[435] having perpetual succession[436] . . . and vested by the policy of the law with the capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive, according to the designs of its institution, or the powers conferred upon it, either at the time of its creation, or at any subsequent period of its existence."[437] The common law corporation aggregate continued to be recognized by English law at least until 1875.[438] English law as of or before that date, including

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have been corporations *virtute officii*. Stephen, *New Commentaries on the Laws of England*, (1868) vol. III, 129; emphasis in the original. See also Stephen's source in Blackstone, "[T]he king's confent is abfolutely neceffary to the erection of any corporation, either impliedly or expreffly given. The king's implied confent is to be found in corporations which exift by force of the common law, to which our former kings are fuppofed to have given their concurrence ; common law being nothing elfe but cuftom, arifing from the univerfal agreement of the whole community." 1 Bl. Comm. 460.

434 "Another method of implication, whereby the king's confent is prefumed, is as to all corporations by prefcription, fuch as the city of London, and many others [citing 2 Inft. 330], which have exifted as corporations, time whereof the memory of man runneth not to the contrary ; and therefore are looked upon in law to be well created." 1 Bl. Comm. 460-461. See also, R.L. Raymond, *supra*, n. 412, at p. 15, "The sovereign's act was not creation, but permission. . . . Nevertheless, from the time this rule of law became established the permission was given in form as though it were creation. . . . This made it necessary to account by some theory for the corporations already existing which had never been expressly incorporated. It was said that such were corporations by prescription."

435 *I.e.*, a name. At common law, the name can be implied from the nature of the entity; see *President and College of Physicians* v. *Salmon* (1701), 1 Ld. Raym. 680. Also at common law, a corporation may have more than one name by prescription; *Knight* v. *Wells Corporation* (1696), 1 Ld. Raym. 80.

436 However, in the evolving law of corporations even this basic policy of the law was not inviolable. In Canada, as late as the mid-19th century a statute provided for a maximum corporate lifetime of 50 years; see: *An Act to Provide for the Formation of Incorporated Joint Stock Companies, for Manufacturing, Mining, Mechanical or Chemical Purposes*, S.C. 1850, c. 28.

437 Kyd, *On Corporations* (1793), vol. I, p.13, cited in Halsbury, *The Laws of England*, (1954) vol. 9, p. 4.

438 See *Ashbury Railway Carriage and Iron Co.* v. Riche (1875) L.R. 7 H.L. 653, wherein a company incorporated by statute was held not to have the (unchallenged) rights of a common law corporation. In *Communities Economic Development Fund* v. *Canadian Pickles Corp.*, [1991] 3 S.C.R. 388, at pp. 403-404, the Supreme Court of Canada expressly noted that this case formed part of the common law in Canada. See also *London County Council* v. *Attorney-General* [1902] A.C. 165 (H.L.) per MacNaghten L.J. at pp. 169-170.

common law relating to corporations,[439] was certainly received in much of what is now Canada, including Pimicikamak territory, within that time period.[440]

The term "common law corporation" had by this time come to include all corporations that arose by the royal prerogative[441] as distinct from statute. In Canada, as elsewhere, statutory law in the 19th and 20th centuries developed the modern business corporation,[442] and the common-law corporation and in particular those that might arise by custom or prescription all but vanished from the minds of the legal profession. However, no statute of Canada has abolished existing common-law corporations[443] nor has any statute[444] abolished the common law relating to corporations[445] or codified that law.[446] In 1916, the Privy Council on appeal from the Supreme Court of Canada[447] clearly contemplated that the common-law corporation still existed in Canada and that such a company has the capacity of a natural person.[448] In Manitoba,[449] latter-day legislators evidently consider that the common-law corporation continues to exist at least in principle.[450] In 1991, in reviewing the law of common law corporations,[451] the Supreme Court of Canada relied on the 1613 *Sutton's Hospital Case*.[452]

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439 Note that the specific issue is the corporate status of aboriginal entities, which would appear to be part of federal common law; see *Roberts* v. *Canada*, [1989] 1 S.C.R. 322.

440 In Pimicikamak traditional territory, English common law was certainly received not later than its entry into Treaty #5 in 1875; *supra*, n. 282 and related text.

441 *I.e.*, using Halsbury's rubric, those arising by common law, by royal charter, by prescription, or by custom (to which may be added, in later terminology, by letters patent).

442 There has been a trend to the registry model, but with little consistency. The United Provinces of Canada reverted to the royal prerogative model by *An Act to Authorize the Granting of Charters of Incorporation to Manufacturing, Mining and Other Companies*, S.C. 1864, c. 23. The *Corporations Act*, R.S. 1970, c. C-32, governs letters patent corporations, which have common law powers.

443 In England, common law corporations arising by custom or prescription continue to exist to this day. The City of London is an example.

444 *E.g.*, the *Canada Business Corporations Act*, R.S. 1985, c. C-44.

445 C. Young, internal communication.

446 *I.e.*, there is no corporations-law analogy to the *Criminal Code*, R.S. 1985, c. C-46, which by codification eliminated the common law as an ongoing source of law concerning crime in Canada.

447 *Bonanza Creek Mining Company Limited* v. *The King* [1916] 1 A.C. 566 at p. 578, distinguishing *Ashbury Railway Carriage and Iron Co.* v. *Riche* and *Sutton's Hospital Case*, *supra*, n. 438 & n. 430.

448 *Ibid.*, at p. 577, per Viscount Haldane, for the Court.

449 This is not to suggest that the subject matter is governed by this law; clearly it is not.

450 *The Development Corporations Act*, C.C.S.M., c. D60, s. 37(2) provides "The corporation . . . has the general capacity and powers of a common law corporation . . ."; *The Communities Economic Development Act*, C.C.S.M., c. C155, s. 26(2) provides "The fund . . . has the general

In a leading case on the application of the common law of England in this period to governmental entities in the New World, *Chisholm* v. *State of Georgia*,[453] the United States Supreme Court held that the State of Georgia, though never incorporated, was a body corporate at common law. In his reasons, Justice Iredell stated:

> The only law concerning corporations, to which I conceive the least reference is to be had, is the common law of England on that subject. . . . The word 'corporations', in its largest sense, has a more extensive meaning than people generally are aware of. Any body politic (sole or aggregate) whether its power be restricted or transcendant, is in this sense 'a corporation'. The King, accordingly, in England is called a corporation . . . . So also . . . is the Parliament itself. In this extensive sense, not only each State singly, but even the United States may without impropriety be termed 'corporations'.[454]

Justice Iredell contrasted pre-existing bodies politic and corporate having inherent jurisdiction with ordinary corporations whose origins and the rules that govern them are defined by another authority:

> The differences between [ordinary] corporations, and the several States in the Union, as relative to the general Government, are very obvious in the following particulars. 1st. A corporation is a mere creature of the King, or of Parliament . . . . It owes its existence, its name, and its laws . . . to the authority which create [*sic*] it. A State does not owe its origin to the Government of the United States, in the highest or in any of its branches. It was in existence before it. It derives its authority from the same pure and sacred source as itself: The voluntary and deliberate choice of the people. 2nd. A corporation can do no act but what is subject to the revision either of a Court of Justice, or of some other authority within the Government. A State is altogether exempt from the jurisdiction of the Courts of the United States, or from any other exterior authority, unless, in the special instances where the general Government has power derived from the Constitution itself. 3rd. A corporation is altogether dependant on that Government to which it owes its existence. Its charter may be forfeited by abuse. Its authority may be annihilated, without abuse, by an act of the Legislative body. A State, though subject in certain specified particulars to the authority of the Government of the United States, is in every other respect totally independent upon [*sic*] it. The people of the

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capacity and powers of a common law corporation . . .".

451 *Communities Economic Development Fund* v. *Rudy Vincent Maxwell*, [1991] 3 S.C.R. 388.

452 *Supra*, n. 430.

453 (1793) 2 U.S. 419.

454 *Id.*, at p. 447.

> State created, the people of the State can only [*sic*] change, its Constitution. Upon this power there is no other limitation but that imposed by the Constitution of the United States; that it must be of the Republican form.[455]

Obviously, the limitations upon Pimicikamak are entirely different from those upon one of the United States, arising as they do from its own Constitution and from its Treaty relationship[456] with Canada[457] and its constitution.[458] However, the principles concerning common law corporations are applicable to Pimicikamak's situation.[459]

Legal Capacity of Pimicikamak without Government

As noted above,[460] Pimicikamak as a people is inextricably tied to its government. Anticipating our conclusion,[461] this relationship may be fundamental to its legal capacity. In order to explain this, we will first consider the Pimicikamak people, as an aggregation of individuals distinct from their government (which for convenience we will refer to as "Pimicikamak-minus"),[462] in relation to the definition of a corporation

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455 *Id.*, at p. 448. Note also that the order of the Court was effectively reversed by the 11th amendment to the U.S. Constitution, an outcome that takes nothing away from the persuasiveness of the reasons.

456 *Supra*, n. 356 and related text.

457 Note that Canada is not regarded as a body corporate under Canadian municipal law; nor is Manitoba. However, the Crown in Right of Canada; and the Crown in Right of the Province of Manitoba partake of the status of the Crown as a corporation sole under common law.

458 *E.g.*, *supra*, n. 29.

459 Canadian case law on point is unsatisfactory. In *Doe ex dem. Jackson* v. *Wilkes* (1835), 4 U.C.K.B. (O.S.) 142, Indian nations that had received a grant of land by the Lieutenant Governor, under military seal, "were by this grant made a corporate body and enabled to take and hold a corporate capacity, though no corporate name was expressly given to them . . ." per Robinson, C.J., at pp. 145-146; but see also an inconsistent decision by the same judge two decades later, *Sheldon ex rel. Doe* v. *Ramsey* (1852) 9 U.C.Q.B. 105. In *R.* v. *McCormick* (1859) 18 U.C.Q.B. 131, at p. 136, he again spoke of an Indian nation holding land "in a corporate capacity or otherwise". By reason of inconsistency and other defects (see *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence*, *supra*, n. 55) this line of cases from Chief Justice Robinson does not in our view secure an authority for common-law corporate status for an Indian nation in Canada. Note too that these and others of his "Indian law" cases involved disputes between parties who in essence claimed to have implemented mutually superior schemes for stealing Indian land. As Harring, n. 55, at p. 77, points out: "No case decided by Robinson actually had an Indian as a party."

460 *Supra*, n. 64.

461 *Infra*, at heading Legal Capacity of Pimicikamak Okimawin.

462 This is a legal abstraction. It corresponds more or less to a situation where Pimicikamak had

aggregate at common law that was authoritative under English common law at the time of its reception in Canada and thereafter.[463] That is, could it, following the assertion of sovereignty by the Crown, have reasonably been described as:

- a collection of many individuals . . .[464]
- united into one body . . .[465]
- under a special denomination . . .[466]
- having perpetual succession under an artificial form . . .[467]
- vested by the policy of the law . . .[468]
- with the capacity of acting in several respects as an individual . .[469]
- particularly of taking and granting property . . .[470]

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ceased to exercise, and lost its right to, self-government.

463 Kyd, *On Corporations*, *supra*, n. 437.

464 The "collection" was the collective body of the Pimicikamak people, who had since time immemorial aggregated themselves according to their own law. The individuals were the citizens of the Pimicikamak nation. Their collective identity defined who they were as a matter of customary law that would meet the "objectively verifiable" test set out in *R.* v. *Powley*, *supra*, n. 62, at para. 29.

465 By definition, the nation is that body into which its citizens are united. They were united by a common language, culture and collective means of survival, and relationship to their land. As with other aboriginal peoples, the attachment of the people to the land had, and still has, a spiritual dimension that is fundamental to their relationship with each other.

466 The denomination (*i.e.*, name), Pimicikamak, has remained constant. While it has been transliterated variously (*e.g.*, *supra*, n. 196 and related text), the roman-orthography transliteration "Pimicikamak" is almost universally used. Pimicikamak is sometimes referred to as Pimicikamak Cree Nation, a recent exercise in Canadian political correctness that is disapproved by many (and is a curious mix of Cree, slang French, and English). However, the common law allows multiple corporate names; see *College of Physicians* v. *Butler* (1632), W. Jo. 261; *Knight* v. *Wells Corpn.* (1696), 1 Ld. Raym. 80.

467 The nation, a concept of human devising, seen as mandated by the Creator, continues as an entity unchanged by changes (through birth, death, admission, expulsion, renunciation) in the individuals of which it is comprised; in these aspects and others it is analogous to the Crown.

468 As we have seen, *supra*, nn. 433 and 434, the policy of the law in respect of common law corporations was that the sovereign's consent was implied for customary and especially governmental entities that had corporate attributes, because this served the public interest. There is a direct analogy between Pimicikamak and the "one-ness of the borough"; *supra*, n. 421.

469 This criterion plainly raises the issue of how the nation can act as a collective entity. In the absence of its government, the most sanguine answer would be: with considerable difficulty. See also: *infra*, nn. 470, 471, 472, 475 and 476.

470 For a critique of early case law regarding Indian nations in Canada holding real property, see *supra*, n. 459. Modern statutes that provide for registration of title to real property generally

- of contracting obligations . . .[471]
- of suing and being sued . . .[472]
- of enjoying privileges and immunities[473] in common . . .[474]
- of exercising a variety of political rights . . .[475]

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authorize it only in the name of a person or corporation. As a matter of administrative procedure, if Pimicikamak were to acquire real property and seek to register it under *The Real Property Act*, R.S.M. 1988, c. R30, the Land Titles Office might decline to do so in the name of Pimicikamak without direction from a court as to its corporate status. However, it is difficult to conceptualize dealings in real or personal property by Pimicikamak as a corporation aggregate distinct from its government; as a matter of practicality if not principle, Pimicikamak acquires and disposes of property through the executive acts of Pimicikamak Okimawin.

471 Pimicikamak contracted obligations by Treaty #5. We have not looked for other historical examples. Pimicikamak has also contracted obligations in recent years. However, in all cases we are aware of it has done so through the executive acts of Pimicikamak Okimawin.

472 Pimicikamak has sued, and has been sued (as Pimicikamak Cree Nation). Note that in *Wewayakum Indian Band* v. *Canada*, *supra*, n. 12, Addy J. held, at p. 430, in a decision that may apply *a fortiori* to an indigenous nation suing in its own name, that the authority of a Band to sue in the name of Band members "need not be subject to any special rules, laws or procedures other than those prescribed by the traditions, customs and government of the particular band." However, even assuming that existing traditions or customs provided guidance, giving instructions regarding legal action necessarily involves executive acts of the nation's government.

473 Privileges and immunities were normal aspects of the 17th and 18th century corporate world. The terms have no precise meaning in the corporate context (it has more currency today in the field of international and especially diplomatic relations). An exclusive right to trade in a certain area (see *supra*, n. 119) may be an example of a corporate privilege. Incurring debts without liability on the part of its shareholders may be an example of a corporate immunity.

474 Privileges and immunities enjoyed by Pimicikamak in common under the municipal law of Canada include communal hunting rights and their incidents such as immunity from prosecution. Though others enjoy identical privileges and immunities in the case of Treaty #5, Pimicikamak entered Treaty #5 as a distinct collective entity (whether regarded as a nation or a Band, *supra*, n. 290) by act of its own representative. Its privileges and immunities under this Treaty are in principle distinct from and independent of those of other entities. Note that, with the exception of a beneficial interest in reserve lands, Bands as constituted by the *Indian Act* do not possess or exercise Treaty rights and the Act bestows upon a Band and its Council no capacity or authority to accept, advance, amend or protect such rights. To validly do so, a Band Council would presumably need to establish that it was the legitimate or mandated representative of an indigenous people at common law, and thus under indigenous law – potentially a significant challenge given the colonial foundations, third-world politics and often oppressive record of Band Councils under the *Indian Act*; see *Surviving as Indians*, *supra*, n. 64, pp. 117 *et seq*.

475 Pimicikamak exercises political rights as a nation and also as a party to Treaty 5; however, this usually occurs only through national policy or executive acts of its government. A recent exception was the blockade of Manitoba Hydro vehicles by direct action of citizens in the spring of 1998 that led to the new treaty undertakings of Canada, Manitoba and Manitoba Hydro on May 8, 1998.

- more or less extensive according to the designs of its institution or the powers conferred upon it,[476] either at the time of its creation[477] or at any subsequent period of its existence?[478]

As outlined in the foregoing text and footnotes,[479] prior to the assertion of sovereignty by the Crown, prior to contact, and prior to reception of English law, Pimicikamak demonstrated (and continues to demonstrate) many attributes that are typical of a body corporate by custom.[480] There are several difficulties, however, in seeking to derive an unambiguous answer to the question of whether Pimicikamak-minus could properly be viewed as a common law corporation. To summarize: first, as outlined above, the common law of Canada is less than clear on this question;[481] by contrast, the case law in the United States is clear, but it derives from decisions of Chief Justice Marshall[482] whose influence on modern Canadian jurisprudence remains uncertain[483] (although U.S. and Canadian law on this issue purportedly reflected the same body of English common law). Broadly, the U.S. concept of nations and states as corporate entities[484] diverges from the British and Canadian view wherein it is the government, not the people, that has corporate status.[485] Aboriginal aspects of these two bodies of law

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476 Pimicikamak's political rights arose by "the designs of its institution" as a sovereign nation and, by virtue thereof (as subsequently limited; *supra*, n. 356 and related text) it was and is mandated to exercise all of the powers deemed necessary or advisable for its own survival and prosperity as a people. However, this too is difficult if not impossible to conceptualize in practical terms in the absence of its government.

477 *I.e.*, in legal terms, time immemorial.

478 Pimicikamak's formerly unlimited powers have, as noted above, been limited to a degree since assertion of sovereignty by the Crown and acceptance of a treaty relationship with the Crown, *supra*, n. 356, but to our knowledge none of its powers were subsequently conferred.

479 *I.e.*, *supra*, nn. 464 to 476.

480 Or by prescription; but note that one theory of the corporation by prescription is based upon the legal fiction of a lost charter. The fiction would be particularly transparent in the case of an indigenous nation.

481 *Supra*, n. 55 and n. 58 and related text; see also n. 459.

482 *Cherokee Nation* v. *Georgia*, s*upra*, n. 28; *Worcester* v. *Georgia*, *supra*, n. 49; and *Chisholm* v. *Georgia*, *supra*, n. 418.

483 These cases may be persuasive but are not conclusive in Canadian municipal law. Note particularly, that Chief Justice Lamer's broad embrace of the principles set out in these decisions in *R.* v. *Van der Peet* was qualified by the observation that "aboriginal law in the United States is significantly different from Canadian aboriginal law", *supra*, n. 45.

484 See, *e.g.*, *Chisholm* v. *Georgia*, *supra*, n. 418.

485 This distinction did not go unremarked by the United States Supreme Court: "The Parliament form [*sic*] the great body politic of England! What, then, or where, are the People? Nothing! No where! [*sic*] They are not so much as even the 'baseless fabric of a vision!' From legal contemplation they totally disappear!" *Ibid.*, per Wilson, J., at p. 461, having noted, at p. 456,

have long pursued different paths; U.S. law[486] built upon tribal governments as they were and are[487] while Canadian law after 1865 focused almost exclusively on Bands as defined under and legally created by the *Indian Act* and only recently has refocused to inquire into the facts of indigenous nations and their governments.[488] Second, notwithstanding the analogy to the "one-ness of the borough"[489] it is not clear that the Crown's dealings with Pimicikamak can be said to have assented, even impliedly,[490] to Pimicikamak-minus as a corporate entity.[491] Third, and most fundamentally, several important elements of corporate capacity[492] cannot be realized, or even conceptualized, for Pimicikamak-minus due to the absence of its government. Except for this third head of difficulty, common law corporate status of Pimicikamak-minus might then turn upon the modern policy of the law of Canada on aggregation versus disaggregation of aboriginal peoples.[493]

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that "Under [the Constitution of the United States] there are citizens, but no subjects." Canada's citizens were British subjects until 1977; see the *Citizenship Act*, S.C. 1974-75-76, c. 108, s. 31. Like the United States, Pimicikamak has citizens, not subjects.

[486] Thus, in overview: "[U.S.] Federal law recognizes sovereign authority in Indian tribes to govern themselves; an authority greater in many respects than that of the states. Indian tribes are subordinate and dependent nations, protected by the doctrine of sovereign immunity." Cornell University, Legal Information Institute, *Indian Law: An Overview*, http://www.law.cornell.edu/topics/indian.html.

[487] The U.S. Secretary of the Interior administers identification of legitimate tribal governments from the perspective of U.S. municipal law, subject to review by the U.S. courts like other administrative functions, and U.S. law explicitly embodies this identification, *e.g.*, "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362. There is inevitably a legitimate concern for the potential for spurious claims. Such claims are reviewable by the United States courts; see, *e.g.*, *Nato* v. *State of Utah*, D. Utah, D. Ct. No. 2:01-CV-802-J, August 8, 2003: "[I]t was not error for the district court to inquire into Nato [Indian Nation]'s status, and it was correct in determining Nato had no recognized status [as a sovereign indigenous government]. The record reveals no qualifying facts as dictated by 28 U.S.C. § 1362."

[488] As noted, *supra*, n. 353, these inquiries are mainly motivated by, and thus are influenced by, issues arising from s. 35 of the *Constitution Act, 1982*.

[489] *Supra*, n. 421.

[490] Consent might require no more than the sovereign's passive acceptance of the corporate entity in the realm, but this would presume knowledge (or at least not a legitimate state of ignorance) of it.

[491] A strong case for implied consent of the sovereign would arise from the making of Treaty 5 but for the anomaly that Lieutenant-Governor Morris (representing the sovereign) apparently was unaware he was dealing with a nation. He was well aware of the distinction, for only two years earlier he had made Treaty 3 with the Anishinaabe people expressly as a nation (having threatened to make treaty with individual "bands" separately if this failed). See, *The Treaties of Canada with the Indians*, *supra*, n. 284, pp. 47 - 49.

[492] *Supra*, nn. 469 - 472, 475 and 476.

[493] As a matter of public policy, distinct from constitutional context, this might well be viewed as an issue of fundamental human rights; *e.g.*, *supra*, n. 374 and related text.

The record of Crown policy and executive and administrative actions reveals systematic ethnocide[494] directed at Canada's aboriginal peoples. The public position of the government of Canada on this subject was articulated in 1998 as follows:

> Sadly, our history with respect to the treatment of Aboriginal people is not something in which we can take pride. Attitudes of racial and cultural superiority led to a suppression of Aboriginal culture and values. As a country, we are burdened by past actions that resulted in weakening the identity of Aboriginal peoples, suppressing their languages and cultures, and outlawing spiritual practices. We must recognize the impact of these actions on the once self-sustaining nations that were disaggregated, disrupted, limited or even destroyed by the dispossession of traditional territory, by the relocation of Aboriginal people, and by some provisions of the *Indian Act*. We must acknowledge that the result of these actions was the erosion of the political, economic and social systems of Aboriginal people and nations. Against the backdrop of these historical legacies, it is a remarkable tribute to the strength and endurance of Aboriginal people that they have maintained their historic diversity and identity. The Government of Canada today formally expresses to all Aboriginal people in Canada our profound regret for past actions of the federal government which have contributed to these difficult pages in the history of our relationship together.[495]

In practice it remains uncertain whether this apologetic statement marked an end to the disaggregation or provides a public relations screen for its continuation.[496]

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494 As a matter of civil discourse, Pimicikamak Okimawin generally avoids using this term and the equivalent term "cultural genocide." However, the Hon. Eric Robinson, now Minister of Culture, Heritage and Tourism in the Manitoba government publicly described governmental treatment of Pimicikamak as cultural genocide on several occasions in the 1990s. In 2002, the Hon. Warren Allmand, President of the International Centre for Human Rights and Democratic Development and himself a former Minister of Indian and Northern Affairs in the government of Canada, publicly denounced the government of Canada's continuing attempts to suppress Pimicikamak Okimawin as cultural genocide.

495 *Statement of Reconciliation*, *supra*, n. 238.

496 The federal government recognizes self-government as an existing aboriginal or treaty right but does not recognize any nation as having that right until it agrees to limit and effectively municipalize the right. The Crown thus effectively uses disaggregation as a bargaining chip to force renegotiation of an existing aboriginal and Treaty right with the objective of extinguishing it and substituting other, lesser rights. As well, since 2001, the government of Canada has responded to Pimicikamak's efforts to remove the Northern Flood Agreement from Band politics and thus distance it from Canada's effective control (see *Surviving as Indians*, *supra*, n. 8, and see the preamble and section 14 of the *Pimicikamak NFA Implementation Law, 1999*) by seeking to minimize or eliminate Pimicikamak's involvement and has achieved a degree of cooperation from the other two Crown parties after threatening them with legal sanctions if they dealt with Pimicikamak.

Inconsistently with the government's public position, Crown officials continue efforts to disaggregate Pimicikamak, undermining its capacity and sometimes even denying its existence.[497] Pimicikamak's common-law corporate capacity could contribute to reconciling its indigenous aggregate identity (i.e., its legitimacy in the eyes of its own citizens)[498] within the Canadian municipal legal system (i.e., its ability to function effectively in today's context). Common-law corporate capacity is important to its survival.[499] The deep roots of its corporate character, arising before the common law of corporations was received[500] in Canada, provide a basis for the policy of the law to acknowledge aggregation rather than to facilitate disaggregation. The policy of the law

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497 This is consistent with a more general policy of ongoing assimilation: "[T]he Canadian government is moving constitutionally, legislatively, and administratively to bring an end to Indian status and Indian policy through a process of institutional assimilation." And: "Despite the DIAND's pitiful status and record, . . . the government's announced policy of dismantling the DIAND, ostensibly to make way for Indian self-government, carries profound implications for Indians whose affairs it administers. . . . [T]he federal government's primary purpose in dismantling the DIAND . . . is not to empower band/tribal councils; it is to structurally integrate Indian affairs into the generic federal and provincial government departments." And further: "[T]he transfer of authority from the DIAND to band/tribal councils, because it is being carried out within colonial political and bureaucratic structures, is not a devolution of powers to Indian *peoples*. Rather, the structures serve to concentrate devolved powers in the hands of a small Indian ruling *élite class*, thus continuing a century-old DIAND colonial pattern in which the mass of Indians are trapped outside the decision-making process. Government 'of, by and for the people' is not built into this colonial model." *Surviving as Indians*, *supra*, n. 8, at pp. 109 and 129.

498 Having this capacity in its own right arising from its own people, history and culture is seen as fundamental to a sense of legitimate identity. *C.f.* legislated identity, *e.g.*, "Once the Treaty came into force on May 11, 2000, the [Nisga'a Tribal] Council ceased to exist and the Nisga'a Nation, contemplated by the Treaty, came into being legally . . ."; *Campbell* v. *British Columbia*, *supra*, n. 267, at p. 341; see also *Nisga'a Final Agreement Act*, S.C. 2000, c. 2.

499 The issue is cultural survival rather than physical survival, although the two are of course related. See, *e.g.*, *Surviving as Indians*, *supra*, n. 8. For constitutional implications, see *R.* v. *Sparrow*, *supra*, n. 400, at p. 1099 per Dickson, C.J.C. See also numerous references to the "viability of the communities" in the Northern Flood Agreement, *supra*, n. 392. Recent research suggests that cultural survival is related to economic survival: "What is it that accounts for successful economic development when it occurs in Indian Country? Our research turns up a very consistent pattern. . . . To be sure, more resources are better than fewer resources. But just having resources is not the key – or even a key . . . If resources are not the key to economic development in Indian Country, what are the keys? The relatively successful tribes in the U.S. all have three indispensable ingredients in common. These are: (1) sovereignty, (2) capable governments, and (3) a match between the type of government a tribe has and that tribe's cultural norms regarding legitimate political power. . . . I must stress that it is a conclusion based on case after case. There are no successful cases where federal planning and management has produced sustained economic development in Indian Country. The only thing that is working is self-determination -- *i.e.*, *de facto* sovereignty." J.P. Kalt, Harvard Project on American Indian Economic Development, J.F. Kennedy School of Government, Harvard University, *Statement to the United States Senate*, September 17, 1996. [Emphasis added.]

500 Arising indeed before the earliest days of the common law.

could also deem the consent of the Crown to be implied in reconciling the pre-existence of an aggregate aboriginal people with the assertion of sovereignty by the Crown, particularly in light of the policy of the British Crown at the time.[501] However, it may not be necessary to resolve these issues because they assume a very different aspect when Pimicikamak is viewed, as it must be in fact as well as in law, as an aggregate that is self-governing.

Nature of Pimicikamak Okimawin

The nature of the Pimicikamak government, in the context of Canadian municipal law, is *sui generis*.[502] As described above,[503] it partook of Algonquian[504] traditions and specifically the midewin[505] lodge. Naturally, Pimicikamak law had regard to such historical and cultural relationships, but there is no indication that those relationships were or are dependent in any constitutional sense. Indeed Algonquian systems of governance tend to be characterized by such a high and general regard for autonomy[506] that this is itself a constitutional principle. The nature of Pimicikamak governance today stands therefore to be determined primarily as a question of fact.[507] Based on observation, inquiry and experience, we can summarize some of its characteristics as follows:

- Pimicikamak Okimawin is an aboriginal government that exercises inherent jurisdiction.[508]

- Pimicikamak Okimawin is a constitutional government,[509] based upon the rule of law,[510] and premised upon traditional

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501 *Supra*, n. 51 and quoted text.

502 *I.e.*, of its own kind, unique, not able to be defined by reference to others. As Pimicikamak citizens explain, "ekosi maka anema" or, in colloquial translation, "it is what it is."

503 *Supra*, n. 304 and related text.

504 In particular, Cree and Ojibwa traditions.

505 Midewin translates as "heart."

506 *I.e.*, autonomy of nations as between themselves, autonomy of communities within nations, and personal autonomy of individuals within a nation and its communities. Ross, *supra*, n. 26, at p. 12, quotes Dr. Clare Brant: "The Ethic of Non-Interference is probably one of the most pervasive of all the ethics by which Native people live. It has been practised for twenty-five or thirty thousand years, but it is not very well articulated. . . . This principle essentially means that an Indian will never interfere in any way with the rights, privileges and activities of another person."

507 *Supra*, n. 268.

508 *Supra*, n. 273.

509 *Supra*, n. 22.

constitutional principles of spiritual law,[511] respect for autonomy,[512] participatory democracy,[513] consensus,[514] transparency[515] and accountability.[516]

- Pimicikamak Okimawin has traditional and customary laws.[517] Some of them are constitutional in character.[518]

- Constitutionally, the Creator or Kici Manito is the source of its traditional laws.[519] The people is the source of customary laws.[520] Customary laws may change from time to time and some are made in writing.[521]

- Pimicikamak Okimawin is in a significant sense a single entity,[522] the Four Councils,[523] now comprised[524] of the Aski Okimow[525] and

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510 *Supra*, n. 19.

511 *I.e.*, law that derives from the Creator and is not subject to codification or amendment; *supra*, n. 21.

512 *Supra*, n. 506

513 *Supra*, n. 78, n. 334 and n. 339. See also: *The Pimicikamak Election Law, 1999*, s. 6(a).

514 *Supra*, n. 331, n. 336, n. 337 and n. 338. See also: *The Pimicikamak Election Law, 1999*, s. 5, which provides: "The nation is governed through consensus." See also: *ibid.*, s. 14.

515 See: *The Pimicikamak Election Law, 1999*, s. 13, "Every elected officer of the Nation has a duty to make publicly available, by practical means, public information about matters affecting the Nation."

516 Pimicikamak officials are accountable to fiduciary standards. See, *e.g.*,: *The Pimicikamak Election Law, 1999*, s. 12, "Every officer of the Nation who exercises a decision-making authority on behalf of the Nation has a fiduciary duty to make that decision with informed regard to the best interests of the Nation as a whole." See also, s. 4, "'officer of the Nation' includes Chiefs, Councillors and any other person who is elected or appointed to any office for the benefit of the Nation." The Aski Okimow and members of the Executive Council are also bound by a Code of Conduct; *ibid.*, s. 104.

517 *Supra*, n. 21 and related text.

518 *E.g., supra*, nn. 22, 20, 330, 332, 337, 340, 342, and related text.

519 *Supra*, n. 21.

520 *Supra*, n. 78.

521 *Supra*, n. 332 and related text.

522 Thomas Monias, Secretary to the Councils, explained this with a diagram showing the four governing Councils as four fires on a circle at the cardinal points. Viewed from inside the circle, there are four fires in different directions. Viewed from a distance outside the circle, there is one fire and one direction.

523 In Cree, eskuteskawin or "sitting fire;" sometimes referred to in English as the Council of Fire. A

the members of each of the four governing Councils of the nation: the kisaywin,[526] the eskwayowin,[527] the Youth Council[528] and the Executive Council.[529]

- The Four Councils is the plenary governing body of the nation.[530] It governs having regard to traditional and customary (including written[531]) laws. It establishes national policy.[532] It functions

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ceremonial staff (sa-ska-win, "cane"; *c.f.*, sa-ska-a, "light a fire") was laid in the centre to signify that the Council was in session. From observation, the Four Councils functions as a single entity, by consensus.

524 Pre-contact, it comprised the kisaywin and the eskwayowin. As noted above (*supra*, n. 227) the Supreme Court of Canada in *R.* v. *Delgamuukw*, *supra*, n.84, used the date of assertion of sovereignty by the Crown to set the benchmark for constitutionally protected aboriginal title. This contrasted with other decisions that used the date of contact in cases dealing with the personal exercise of aboriginal rights. As self-government is an attribute of aboriginal title, we have used the date of assertion of sovereignty by the Crown as the benchmark here.

525 See *supra*, n. 301; now, by necessity given the size and geographic dispersal of the nation, elected as provided in *The Pimicikamak Election Law, 1999*, and referred to in English (not in translation) as "Chief of the Nation" or, blurring distinctions from the *Indian Act* system, "the Chief". See *Surviving as Indians: The Challenge of Self-Government*, *supra*, n. 8, pp. 117 *et seq*. for a critical view of such elected leadership. "Aski Okimow" is the formally appropriate title.

526 As an entity: "the Council of Elders" or, in recent usage, "the Elders' Council". Its autonomy and role under traditional law continue; see: the *Pimicikamak Election Law, 1999*, s. 7.

527 As an entity: "the Women's Council". Its autonomy and role under traditional law continue; see: the *Pimicikamak Election Law, 1999*, s. 8.

528 The Youth Council is a recent addition to modern-day Pimicikamak Okimawin; precedent for a role of youth in the nation's government is seen in the traditional role of the pumbatowak or dacimowak, the messengers who were the communication system of the nation in and beyond its traditional territory. In practical terms the new stature of the Youth Council is based on public recognition that youth dominate national demographics and represent the future of the nation. Notwithstanding its recent incorporation into Pimicikamak Okimawin, the Youth Council is viewed as an autonomous traditional council with inherent jurisdiction under traditional law; see: *The Pimicikamak Election Law, 1999*, s. 9.

529 The Executive Council is a modern addition based on the executive role of the original traditional councils and recognition that today this role requires professional politicians with modern as well as traditional education. However, like the Aski Okimow and the traditional councils, this is a voluntary role. Under s. 26 of *The Pimicikamak Election Law, 1999*, the members of the Executive Council "shall be, *ex officio*, the Chief and Council of the Band"; this role is remunerated.

530 The plenary policy-making (but not executive) jurisdiction of the Four Councils derives from that of the kisaywin, *supra*, n. 304 and related text.

531 *Supra*, n. 20; although syllabics were known to the Cree before contact, contrary to the popular view that they were devised by Rev. James Evans, who taught them at Fort Edmonton in the 1840s but denied that he had created them (L.B. Parry, pers. comm., 2004), we have no evidence that Pimicikamak laws were made in writing before the 1990s. More generally: "Aboriginal laws did

orally.[533] The Secretary to the Councils is responsible for communication between the Four Councils and the world including particularly written and English-language communication.

- The three "traditional" Councils are autonomous.[534] Their constitutional responsibilities are uncodified.[535] They have special roles in governance[536] but no executive responsibilities.[537]

- The members of the Executive Council are elected for a term of up to 5 years[538] by Pimicikamak citizens over the age of 18.[539] Its functioning is similar to a Cabinet.[540]

- Collectively, the Executive Council and its members exercise the entire executive authority of Pimicikamak Okimawin,[541] in

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not emanate from a central print-oriented law-making authority similar to a legislative assembly, but took unwritten form. Lord Denning, in *R.* v. *Secretary of State for Foreign and Commonwealth Affairs* [[1982] 2 All E.R. 118] at p. 123 likened aboriginal laws to "custom": "These customary laws are not written down. They are handed down by tradition from one generation to another. Yet beyond doubt they are well established and have the force of law within the community." *Campbell* v. *British Columbia*, *supra*, n. 267, at p. 355, per Williamson, J.

532 In practice, the Four Councils establish national policy in broad traditional terms – *i.e.*, orally in Cree – and interface with the non-Cree world only through the office of the Secretary to the Councils.

533 Usually, but not invariably, in Cree.

534 *Supra*, nn. 526 to 528.

535 However, some are written; see, *e.g.*, s. 9 of *The First Written Law, 1996*, providing for the role of the Council of Elders in approving a proposed written law. Note that the Women's Council had a similar role as a matter of unwritten customary law. It was added to the *First Written Law* by s. 123 of *The Pimicikamak Election Law, 1999*.

536 Some are set out in written laws; *e.g.*, the Women's Council has policy-making and judicial responsibilities for many aspects of Executive Council elections pursuant to ss. 4, 32, 33, 35, 36, 49 to 51, 70 to 73, 87, 103, 105, 106, 109, 110, 114 to 118 and 121 of *The Pimicikamak Election Law*, 1999.

537 The Four Councils and the traditional councils have neither mandate nor capacity for executive governance.

538 The *Pimicikamak Election Law, 1999*, s. 30.

539 *Ibid.*, s. 4.

540 The Aski Okimow assigns areas of responsibility to members of the Executive Council from time to time.

541 *Supra*, n. 537.

> accordance with traditional law, customary law including written laws, and national policy.[542]

Legal Capacity of Pimicikamak Okimawin

We have noted above that the existence, or at least potential existence, of its own government is fundamental to the definition of a nation and that, in the case of Pimicikamak, like other indigenous peoples of Canada, its traditional government is also essential for its cultural survival as a people.[543] Having outlined difficulties that arise under Canadian municipal law in ascribing corporate legal capacity to an indigenous nation without its own government, we may now consider Pimicikamak's situation as an indigenous nation that has and exercises an aboriginal right to self-government.

Although this section is headed "Legal Capacity of Pimicikamak Okimawin," in a fundamental sense Pimicikamak Okimawin cannot be distinguished from Pimicikamak and *vice versa*. This is so not only because its own government is central to the definition of a nation. Under the Pimicikamak constitution, the Pimicikamak people governs itself through a form of direct democracy: the nation's laws[544] are made by the nation.[545] In contrasting its legal capacity with Pimicikamak-minus we will use the term Pimicikamak Okimawin here to refer to the nation including expressly its right and capacity of traditional government.

We therefore consider separately the circumstances of Pimicikamak Okimawin in relation to the common law definition of a corporation aggregate. Pimicikamak Okimawin is:[546]

- a collection of many individuals . . .[547]

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542 This mandate is subject to the prerogatives of the Aski Okimow acting alone, and of the traditional councils acting together by consensus, to call an election of the Executive Council at any time; see: s-s. 30(b) and 30(c) of *The Pimicikamak Election Law, 1999*.

543 *Supra*, n. 64.

544 Strictly, its temporal laws.

545 This is not only the constitutional principle. It is also the practical reality, as participation in both formulating draft temporal laws and signifying consensus in adopting temporal laws is open to all citizens; in the case of written laws see *The First Written Law, 1996*, s. 22; the role of the Executive Council (s. 19) in adopting a written law is a formality. *C.f.*, *e.g.*, Canada's laws (which are made by the Sovereign, by and with the advice and consent of the Senate and the House of Commons of Canada) or laws of the United States of America (which are made by the Senate and the House of Representatives).

546 As footnoted, *infra*, n. 547 to n. 558.

547 The individuals are Pimicikamak citizens. These are defined by and under the *The Pimicikamak Election Law, 1999*, sections 34 to 37 of which require the registrar to maintain a Citizenship Registry. Prior to 1999, citizenship was determinable under customary law. Both would meet the

- united into one body . . .[548]
- under a special denomination . . .[549]
- having perpetual succession under an artificial form . . .[550]
- vested by the policy of the law . . .[551]
- with the capacity of acting in several respects as an individual . .[552]
- particularly of taking and granting property . . .[553]
- of contracting obligations . . .[554]
- of suing and being sued . . .[555]

"objectively verifiable" test set out in *R.* v. *Powley*, *supra*, n. 62, at para. 29.

548 Pimicikamak Okimawin is united into a body that is different from and more coherent than that of, for example, the citizens of Canada. In the case of Pimicikamak Okimawin, the people is the sovereign law-making authority, comprised not of subjects but of citizens. Constitutionally, Canada's citizens remain subjects of the Sovereign and the Sovereign makes their laws; see also *supra*, n. 485. The distinct positions of the Aski Okimaw, the traditional chiefs, and the members of the Councils within the Pimicikamak Okimawin are not incompatible with corporate unity; see Halsbury, *The Laws of England*, 3rd ed., (1954), vol. 9, at p. 5: "A corporation aggregate may be either a mere body, composed of constituent parts no one of which differs essentially from another; or it may be a body with a head or other distinct member, the existence of which is essential to the vitality, so to speak, of the body as a whole."

549 The denomination is "Pimicikamak", *supra*, n. 466. The name "Pimicikamak Okimawin" is used in speaking of Pimicikamak with specific reference to its governance. At common law, a corporation must have a name; see *River Tone Conservators* v. *Ash* (1829), 10 B. & C. 349; but it need not be written and may simply derive from the nature of the corporation; see *President and College of Physicians* v. *Salmon* (1701), 1 Ld. Raym. 680.

550 Pimicikamak Okimawin is an artificial form of human devising that continues in perpetuity notwithstanding changes (*supra*, n. 467) in the individuals of which it is comprised.

551 The policy of the law was (and apparently still is) to give effect to the corporate character of such entities; *supra*, under heading The Corporation at Common Law. It is exemplified by the Crown's continuing acceptance of such entities of the Parliament of the United Kingdom and indeed itself as common law corporations. The policy of the law today will be considered further below.

552 Pimicikamak Okimawin has full capacity to act in many respects as an individual, see *infra*, nn. 553 to 557.

553 Prior to contact, and to some extent to this day, personal property was shared. In common with other indigenous nations, its capacity to take and grant property was the foundation of the fur trade and an essential source of food for traders and explorers. Today Pimicikamak Okimawin acquires and disposes of personal property and holds a leasehold interest in land. It does not own land in fee simple. Observations, *supra*, n. 470, regarding the registration of title to real property apply to Pimicikamak Okimawin.

554 *Supra*, n. 471.

555 Pimicikamak Okimawin has sued and been sued (*sub nom* Pimicikamak Cree Nation); *supra*, n.

- of enjoying privileges and immunities in common . . .[556]
- of exercising a variety of political rights more or less extensive according to the designs of its institution or the powers conferred upon it . . .[557]
- either at the time of its creation or at any subsequent period of its existence.[558]

We see from the above definition[559] and footnotes[560] that Pimicikamak, considered in its actual character wherein its indigenous government is intrinsic to the nation, exhibits all of the defining characteristics of a common law corporation. Aside from the involvement of the whole people, there is a striking correspondence with the Parliament of the United Kingdom, which, as noted above, is a corporation aggregate at common law, by custom.[561] Each is governmental in character. Each evolved over time and neither was created or endowed by an external source of authority. Each points to the Creator as the ultimate source of its legitimacy. Each had absolute sovereign power. Each has, by virtue of treaties with other nations, now limited its own sovereignty.

In considering the nature and capacity of Pimicikamak at common law, a central issue remains: Royal assent.[562] As outlined above, the policy of the law was to

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472. In distinguishing the powers, rights and prerogatives of the nation and its government from those of the Band and its Council, Pimicikamak Okimawin is the only entity with authority and capacity to defend and advance the collective aboriginal and (other than reserve land) Treaty rights of its people.

556 *Supra*, n. 474.

557 Pimicikamak Okimawin has political rights "according to the designs of its institution" as an indigenous nation and, by virtue thereof (as subsequently limited; *supra*, n. 356 and related text) has all of the powers deemed necessary or advisable for survival and prosperity as a people.

558 One view of the making of *The First Written Law, 1996*, might be that the people thereby conferred upon Pimicikamak Okimawin the new power of making laws in writing. However, this view illustrates the paradoxical consequences of attempting to consider Pimicikamak Okimawin as an entity separate from the nation: it would amount to the people conferring new powers on itself. It is more consonant with the true nature of Pimicikamak to view that power as one that always existed (and in some measure was exercised) and that Law as merely defining a new customary process that was acceptable for making a modern written law in English, *i.e.*, a way of exercising the power that had not been used before.

559 *Supra*, n. 463 and related text.

560 *Supra*, nn. 547 to 558.

561 *Supra*, n. 419.

562 In focusing on this issue, which arises from the common law of England, it is not intended to reject the argument that Pimicikamak is a body corporate *sui generis* (*i.e.*, aggregated under its own law) and that the present municipal common law of Canada embraces this attribute as it does others. However, in light of our conclusion regarding Royal assent, *infra*, under heading Legal Capacity of

regard that assent as implied in relation to entities[563] that evolved corporate personalities. As noted above,[564] there are difficulties in relying upon this ancient doctrine based on the Crown's historical dealings with Pimicikamak. As a practical example, it is easy to infer assent where the Sovereign was for centuries in daily constitutional discourse with a Parliament whose legal personality was well understood; it is more difficult where the Sovereign's representative has a single contact with a nation of whose name and very existence he appears careless and uninformed.[565] Prior to 1982, this difficulty would in our view have required to be resolved by decision of a court of competent jurisdiction.

In that year, however, Her Majesty, Queen Elizabeth II, acting in her capacity as the Sovereign of Canada, personally proclaimed the *Constitution Act, 1982*[566] as the highest law of the land, thereby providing a statutory resolution to this problem.[567] By this Act, Her Majesty "recognized and affirmed" "existing aboriginal and treaty rights of the aboriginal peoples of Canada."[568] As outlined above, Canadian courts have since elaborated the meaning of the phrase "existing aboriginal and treaty rights of the aboriginal peoples of Canada." Applying that jurisprudence to Pimicikamak, it is clear that one of the existing rights to which it refers is the right of the Pimicikamak people to have its own government. "Its own government" here is not open-ended; it means that the government that Pimicikamak has, with its existing attributes[569] including its corporate character, was recognized and affirmed by the Sovereign in 1982.[570] Quite

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Pimicikamak Okimawin, it was not necessary to pursue this argument in this report.

563 This was especially so for entities that exercised public functions; see, *e.g.*, "[C]orporations were for a long time limited to endeavors strictly for the public." R. L. Raymond, *supra*, n. 412, at p. 14. See also, regarding Roman law: "In no sense did the group-form originate in the necessities of private commercial initiative; it was developed from the agencies called into existence for the more convenient exercise of the political and religious functions of the state." A.K. Kuhn, *A Comparative Study of the Law of Corporations*, Columbia University Press, New York, 1912, at p. 29.

564 Under the heading "Legal Capacity of Pimicikamak without Government."

565 Presumably one might try to make a case that the government of Canada has had many dealings with Pimicikamak Okimawin since that time, and certainly it has had some dealings with it in recent years. However, much evidence suggests that the government of Canada chose to create and then to deal almost exclusively with the Band as an element of the policy of disaggregation and assimilation.

566 *Supra*, n. 30.

567 In Ottawa, on April 17, 1982.

568 *Supra*, n. 30, section 35(1).

569 Or at the least, certainly all those that are integral to Pimicikamak's distinctive culture today and have continuity with the practices, customs and traditions of pre-contact times; *infra*, n. 571.

570 It continues to be recognized and affirmed today; "The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning." *Interpretation Act*, R.S., c-I23, s. 10.

aside from its constitutional effect,[571] this express statutory recognition and affirmation removes the need for the common law to find implied Royal assent.[572] Pimicikamak Okimawin – that is, Pimicikamak considered together with its government, as it must be – is therefore a body politic and corporate under Canadian municipal law.[573]

Summary

In conclusion, the nature and legal capacity of Pimicikamak and of Pimicikamak Okimawin[574] may therefore be summarized as follows:

- It is a people in all senses – the plain English meaning,[575] the dictionary senses,[576] international usage,[577] and Canadian municipal (constitutional) law;[578]
- It is legitimately within Canada[579] by virtue of its Treaty relationship[580] with the Crown;
- It has a traditional territory[581] with which it continues to have a special relationship and for which it continues to have a special responsibility;[582]

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[571] *I.e.*, viewed as an ordinary statute. By contrast, the constitutional effect is that, to the extent that this right is integral to Pimicikamak's distinctive culture today and has continuity with the practices, customs and traditions of pre-contact times, both of which conditions we conclude are clearly met, the Crown may interfere with it only as justified, to the minimum degree necessary to achieve a compelling legislative purpose, after bona fide and meaningful consultation and making compensation for the interference. See *R.* v. *Van der Peet*, *supra*, n. 592.

[572] To examine the case for implied assent would thus be beyond the mandate of this report.

[573] The corporate name is Pimicikamak but it may use other names, including Pimicikamak Okimawin; *supra*, n. 466.

[574] It is evident from the foregoing analysis that there is no distinction between the legal personality of Pimicikamak and that of Pimicikamak Okimawin; see also *supra*, n. 466.

[575] *Supra*, n. 50.

[576] *Supra*, n. 108.

[577] *Supra*, n. 371.

[578] *Supra*, n. 62.

[579] Correspondingly, it has been said that, "All Canadians have Treaty rights." J. Miswagon, 2000.

[580] The Treaty relationship is defined by Treaty #5 on September 24, 1875, as modified in 1977 by the Northern Flood Agreement, *supra*, n. 392, as further modified by Crown Party proposals on May 8, 1998 that were accepted on May 13, 1998.

[581] *Supra*, n. 74.

[582] *Supra*, n. 25.

- It is a self-determining,[583] self-governing,[584] democratic,[585] sovereign[586] nation[587] with its own constitution[588] and laws;[589]
- It is a body politic and corporate from the perspective of Canadian municipal law with a legal personality that includes the capacity[590] of a corporation at common law;[591]
- Its traditional government is integral to its distinctive culture today and has continuity with the practices, customs and traditions of pre-contact times;[592]
- Since 1982, the Crown could not infringe upon Pimicikamak's traditional government without justification, which would require a substantial and compelling legislative objective, bona fide and meaningful consultation, minimization of impacts, and compensation.[593]

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583 In the internal sense; s*upra*, n. 369.

584 *Supra*, n. 402 and related text.

585 This is independently validated; *e.g.*, *supra*, n. 338 and n. 402; and L. Freed, Aboriginal Accountability Coalition, pers. comm. 1999.

586 *Supra*, n. 73.

587 *Supra*, n. 59; and *c.f.*, *supra*, n. 50 and related text.

588 *Supra*, n. 22.

589 *Supra*, n. 19 and related text.

590 *Supra*, n. 3 and related text.

591 *Supra*, n. 427 and related text.

592 *C.f.*, the words of Lamer, C.J.C. in *R.* v. *Van der Peet*, quoted *supra*, at n. 387.

593 *Supra*, n. 353; and see *R.* v. *Sparrow*, *supra*, n. 400, and *R.* v. *Van der Peet*, *supra*, n. 42, paras. 135 to 138.