

Treaty Relations as a Method of Resolving IP and Cultural Heritage Issues

(An Intellectual Property Issues in Cultural Heritage Community-Based Initiative)

Final Report

By

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IPinCH

Intellectual Property Issues in Cultural Heritage:
Theory, Practice, Policy, Ethics

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ABSTRACT

This case study examined the political relationship established between First Nations and Canada through historical treaties as a possible framework for the resolution of intellectual property and cultural heritage issues between Indigenous peoples and Canada with an expectation that the results might be of more general use. Based on a careful examination of published primary and secondary materials related to treaty negotiations in Central Ontario, the Prairies, the Northwest Territories and Vancouver Island in the 19th and early 20th centuries, the study applied historical, ethnohistorical and anthropological methods to identify aspects of these historic treaties that have resonance for current debates around topics such as property, ownership, and jurisdiction. The principle finding of this study, which registers in the information on all the treaties examined, is that the negotiated relationship is one in which the intent is for the governments of the settlers to provide benefits in addition to what people already have rather than impose a new system, and that in this regard, while it is a matter of justice, this principle must lie behind state actions whether or not it assumes to have sovereignty and jurisdiction over First Nations. This case study is understood to contribute to the wider objectives of the IPinCH project in three additional ways. First, the reports on the historical treaties add to the knowledge base of the project as a whole. Second, the analysis of the potential contributions of a treaty-based relationship broadens the critical understanding of intellectual property and cultural heritage and offers alternative ways to examine other case studies and other research emerging within IPinCH; thinking in terms of treaty relationships might offer an innovative approach to the resolution of intellectual property and cultural heritage issues. Finally, it is hoped that public dissemination of these findings may well offer some assistance to the parties now negotiating the so-called Modern Treaties as well as in the adjudication of disputes respecting areas of treaties that will be discussed in the research.

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SUMMARY REPORT AND ANALYSIS

by Michael Asch

OVERVIEW

This case study looked into the political relationship established between First Nations and Canada through historical treaties as a possible framework within which to consider issues associated with the IPinCH project and in particular matters respecting the appropriation or the taking of some thing without the consent of the owner. In this regard, the research focused on the jurisdictional arrangements whereby the rules as to what is “owned” and therefore what is “theft” are determined. Such arrangements may be imposed by one party on another as, for example, might be the case were one to decide that the Western legal system is the appropriate means to determine what is “owned” and what are the proper ways for one person to acquire something owned by another. Alternatively, jurisdictional arrangements may be the fruit of a negotiated arrangement between parties as, for example, through treaties. It is the latter frame within which this research is situated. That is, it asks whether there is something in the treaty relationship that established, even indirectly, a shared understanding of how the cultural heritage of Indigenous peoples would be treated by the Settlers and the governments they established?

Although it is designated a “case study,” this research differs from other IPinCH-supported initiatives in that it is not a community-based research project. Rather it relies on published primary and secondary sources to examine perspectives of the parties at the time treaties were negotiated (how I came to this method is discussed below). In that regard, the approach required that the sample of treaties be limited to those in which there was sufficient contextual information on this matter available as, for example, information in published transcriptions of what transpired during negotiations. As well, it was thought prudent to include treaties negotiated at different times and in different locations. Finally, given the limitations of the budget, it was also necessary to focus on treaties that were already the subject of interest for theses and dissertations of the students involved in this case study so that the researchers would be in a position to “voluntarily” fold the limited time available to fund this research into their own research foci.

Research for this project was conducted primarily in 2010 and 2011. I intended this report to be completed in that year. However, due to illness, it has been delayed until now.

PERSONNEL

The researchers, who principally included both Indigenous and non-Indigenous students, were asked to apply historical and anthropological methods, including the identification and analysis of relevant archival materials, published primary sources, published oral histories, and ethnographic materials, to distil aspects useful to the questions being addressed. Here are the researchers and their projects (including my own):

- Allyshia West (M.A.¹ Anthropology, completed 2010) on the Manitoulin Island Treaties negotiated between the Crown and the Anishnabek in 1836 (Treaty 45) and in 1862;
- Aimée Craft (M. A. Law, completed 2011) on Treaty 1 negotiated in Southern Saskatchewan between the Crown and the Anishinabe in 1871;
- Michael Asch on Treaty 4 negotiated principally in Saskatchewan in 1874 between the Cree and the Ojibwa and the Crown;
- Kelsey Wrightson (M.A. Political Science, completed 2010) on Treaty 6 (with additional information by Michael Asch) negotiated in 1876 principally in Alberta in 1876 with Cree and the Crown;
- Michael Asch on Treaty 11 negotiated between the Dene and the Crown in the Northwest Territories in 1921; and
- Neil Vallance (Ph.D. Law, in process) on the Vancouver Island Treaties negotiated between Governor Douglas (representing the Crown) and First Nations mainly on Southern Vancouver Island between 1850 and 1854.

In addition, Dr. Robert Hancock organized the administrative aspects of the project and compiled a bibliography of the materials.² I would also like to thank Dr. Marc Pinkoski and Ms. Siku Alooooloo for their contributions to this research. Included as attachments are the reports for each of the treaties researched by the students. As is readily apparent, these reports are derived from research undertaken

¹ All programs at the University of Victoria.

² Due to time and financial constraints, the bibliography was not annotated.

in conjunction with larger projects. In my case, the research for Treaty 4 will appear in a forthcoming book, and for Treaty 11 in a forthcoming article in *Ethnohistory*.

METHODOLOGY

Generally speaking, the method I adopted derives from the position on treaties outlined in the following passage from the Preface of the 1996 Supreme Court of Canada judgment in *R v Badger*:

Certain principles apply in interpreting a treaty. First, a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. Second, the honour of the Crown is always at stake; the Crown must be assumed to intend to fulfill its promises. No appearance of "sharp dealing" will be sanctioned. Third, any ambiguities or doubtful expressions must be resolved in favour of the Indians and any limitations restricting the rights of Indians under treaties must be narrowly construed. Finally, the onus of establishing strict proof of extinguishment of a treaty or aboriginal right lies upon the Crown.

Chief Justice McLaughlin suggests that this means that the goal of an interpretation is to: "choose from among the various possible interpretations of (that) intention the one which best reconciles the interests of both parties at the time the treaty was signed...." Furthermore, in seeking the common intention, "the integrity and honour of the Crown is presumed." That means that the Crown must be assumed to be acting in good faith, and that its representations are honest and truthful. Further, the Chief Justice asserts that, rather than interpreting words in a treaty text in a technical way, they text must be understood "in the sense they would have naturally held for the parties." Finally, the Chief Justice makes it clear that an interpretation must remain "sensitive to the unique cultural and linguistic differences between the parties" and that the words in a treaty text must be interpreted in a non-technical way. At the same time, although unstated, to arrive at a common intention of the terms of a treaty that reconciles the interests of both parties, it must be assumed that a valid treaty is the product of a meeting of the minds³ that results, at the least in large measure, in a shared understanding between the parties of the agreement reached.

³ When two parties to an agreement (contract) both have the same understanding of the terms of the agreement. Such mutual comprehension is essential to a valid contract:

<http://legal-dictionary.thefreedictionary.com/meeting+of+the+minds>

Generally speaking, the information available upon which to determine “common intention,” “mutual consent,” and shared understanding will include the written terms of a treaty, as well as the understanding of the terms as reported by the Indigenous party. Frequently this information is augmented by reports from Treaty Commissioners and various accounts of the negotiations, such as letters, newspaper reports and documents provided by members of the Crown’s party, reporters and others.

Where to begin when analyzing treaties? Often it is assumed that one begins with the text. However, there are problems with this approach in that the text may not faithfully reflect the full range of matters discussed, nor, in its simple meaning, may it reflect the complexities of the understandings reached. Finally, where there are differences between what was agreed to at a meeting and what is written down it would seem that privilege ought to go to the former as that better reflects the shared understanding than does a report of it written by one party. For these reasons, I chose not to begin with the written document.

Instead, this method begins with the understandings of First Nations as reflected in their explanations today as to what transpired at that time. A good example is the account of Treaty 4 provided by Elders today and documented in Cardinal and Hildebrand’s book *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations*. Ultimately, my rationale for taking this approach is that I am convinced that these sources represent a more accurate rendering of what transpired than does the treaty text. But, at this point in time, I cannot assume that others will see it that way. Therefore, I have chosen to correlate what is found in these depictions with information derived from what transpired at the time the treaties were negotiated. Thus, for example, I will seek to confirm that a promise First Nations spokespeople today tell us was made reflects what appears in the record of what took place when the treaties were negotiated. Hence, I have focused on those treaties for which there is good information on that matter, and, in all cases but one, that is reflected in the reports of the Commissioners and other ancillary materials of witnesses to the events. The exception is the Vancouver Island Treaties. However, I included these as there is much overlap between what our partners (if I may use that term) say transpired in those treaties and what transpired at others for which there is better information available.

Ethics Review

As this study involved library research, and was based on information already publically available, no ethics review was required.

FINDINGS

As is readily apparent, none of the chapters of this report speak directly to intellectual property and cultural heritage issues. After all, that was not the intent. However, when taken together, the reports do provide some direction for addressing them, for they establish a pattern of relationship over time and space that, in my view, gives us firm guidance. For that reason, and because of the intrinsic value of the information they contain, I ensured that detailed information was included respecting the negotiations process of each treaty examined here.

This summary report teases out from treaty studies answers to the question posed. To that end, I first establish that the common intent of the treaties examined here was to share, rather than to transfer authority, and that from the Crown's perspective sharing meant that in return for permission to settle in a particular area, the Crown would act in ways that were beneficial to Indigenous peoples. Next, I describe what I understand to be the implications of the Crown's intent for how governments are to act with respect to the cultural heritage of Indigenous peoples. Finally, I determine whether or not the Crown's claim to sovereignty and jurisdiction affects these obligations, a point I exemplify with reference to the responsibilities of museums regarding the First Nations objects that they hold.

Treaties and the Crown's Acquisition of Sovereignty and Jurisdiction

At first glance, treaties seem an inappropriate place to begin. It is true that between the 17th Century and the 1920s the British Crown (or later the Crown in Right of Canada) entered into hundreds of treaties with First Nations. It is also true that many of these treaties, which are called "historical treaties" to differentiate them from agreements reached through contemporary treaty (or "land claims") processes, dealt with jurisdictional arrangements, key of which is how the land and resources (including by implication cultural property) would be shared and how governmental relations between parties would be organized. Furthermore, it appears from the texts of the numbered treaties that there was agreement

by First Nations to voluntarily transfer sovereignty and jurisdiction to the Crown, for they all have clauses in the signed document that reads words along the line taken in Treaty 4:

The Cree and Saulteaux Tribes of Indians, and all other the (sic) Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen, and Her successors forever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say....⁴

A simple, straight-forward reading of this treaty text, of course, would leave us with no question to pose. The Canadian legal regime would be the one in which all would operate, and the treatment of the cultural heritage of those who signed these treaties would, by mutual consent, fall under the sovereignty and jurisdiction of the Crown. The problem is that our Indigenous partners do not agree with the interpretation of this or similar clauses and, from their point of view, there was no such surrender of sovereignty and jurisdiction. As Treaty 8 chief, Chief George Desjarlais, explained in testimony to the Royal Commission on Aboriginal Peoples (RCAP 1996: II, Part 2, ch. 4, s. 3.1):

We are treaty people. Our nations entered into a treaty relationship with your Crown, with your sovereign. We agreed to share our lands and territories with the Crown. We did not sell or give up our rights to the land and territories. We agreed to share our custodial responsibility for the land with the Crown. We did not abdicate it to the Crown. We agreed to maintain peace and friendship among ourselves and with the Crown.

The problem was and continues to be how to reconcile these views. Generally, the following four positions have been taken in an attempt to do so. First, it is argued that Indigenous peoples did not give informed consent to transfer sovereignty and jurisdiction because, due to cultural differences, they did not fully understand the implications of this clause. A second line of argument suggests that the Treaty Commissioners did not properly represent that the intent of the treaties was to transfer sovereignty and jurisdiction. A third contention is that Indigenous peoples were forced by circumstances to accept these

⁴ There is a similar clause in the template document for Vancouver Island treaties where it reads (Vallance, this volume. p. 53):

“Know all Men, We, the Chiefs and People of the “Teechamitsa” Tribe who have signed our names and made our marks to this Deed on the Twenty ninth day of one thousand Eight hundred and Fifty do consent to surrender entirely and for Ever to James Douglas the Agent of the Hudson’s Bay Company in Vancouver’s Island that is to say, for the Governor Deputy Governor and Committee of the same, the whole of the lands situate, and lying between Esquimalt Harbour and Point Abert including the latter, on the straits of Juan de Fuca and extending backward from thence to the range of mountains on the Sanitch Arm about ten miles distant.”

terms. Finally, some argue that Indigenous peoples simply misremember that they made such an agreement.

The problem with the first three explanations is that, if they hold true, there can be no treaty, for it would mean that the agreement was the product either of fraudulent representations or was not the product of a meeting of the minds on this basic point. The problem with the fourth line of argument is that it is highly unlikely that there would be mass amnesia amongst all First Nations at all times on such a fundamental point. That is, none of these are adequate. Therefore, one might be tempted to reject treaties as valid documents.

However, discarding the treaties altogether also presents a problem. First Nations, by and large, do not take the view that the treaties are invalid. Rather, over and over again, they describe them as honourable agreements with an intent to share. As Elder Jacob Bill said (quoted in Wrightson 2010: 33): “It was the will of the Creator that the White man would come here to live with us, among us, to share our lives together with him, and also both of us collectively to benefit from the bounty of Mother Earth for all time to come.” Thus, Aimée Craft comes to the view, regarding Treaty 1:

... that the Treaty was understood by the Anishinabe, not as a surrender of land but as an agreement to share the land and its resources – mother earth – in the following way: plots of agricultural land for the white settlers and continued use of the land for harvesting by the Anishinabe. Reserves would be set aside for the Indians, if and when they chose agriculture, although it was promised that they would never be compelled to farm⁵ (Craft 2011: 50).

Similarly, when it comes to jurisdiction, our Indigenous partners repeatedly tell us that the treaty relationship is one of “nation-to-nation” and therefore not of a kind in which one party has jurisdiction over the other. Here is an excerpt from the transcription of Treaty 4 confirming that this is a shared understanding:

We have two nations here. We have the Crees, who were here first, and we have the Ojibbeways (Saulteaux), who came from our country not many suns ago. We find them here; we won't say they stole the land, and the stones and the trees; no, but we will say this, that we believe their brothers, the Crees, said to them when they came in here: “The land is wide, it is wide, it is big enough for us both; let us live here like brothers,” and that is what you say, as you told us on Saturday, as to the Half-Breeds I see around. You say you are one with them; now we all want to be one (Morris 1880: 108).

⁵ According to Vallance (this volume), our partners on Vancouver Island equally did not take the view that the intent of the Crown was to seek surrender of their lands (p. 39).

Other evidence of this intent is the repeated use of terms such as “brothers” to describe the relationship between members of First Nations and settlers, as in the following passage (Morris 1880: 109), also from Treaty 4: “The red man and the white man must live together, and be good friends, and the Indians must live together like brothers with each other and the white man.”

At the same time, Treaty Commissioners often refer to the Queen as the Mother of both settlers and Indians, as when Treaty 4 Commissioner Alexander Morris refers to her as “...the Great Mother of us all... (Morris 1880: 96).” Similarly, here is what was said by the Treaty 1 Commissioner in those negotiations:

Your Great Mother cannot come here herself to talk with you, but she has sent a messenger who has her confidence. Mr. Simpson will tell you truly all her wishes.

When you hear his voice you are listening to your Great Mother the Queen, whom God bless and preserve long to reign over us. (Craft 2011: 24)

Craft quotes at length from this source to demonstrate that the language of Treaty Commissioners stressed the fact that all would be viewed and treated equally by the Crown:

The old settlers and the settlers coming in, must be dealt with on the principles of fairness and justice as well as yourselves. Your Great Mother knows no difference between any of her people.

Your Great Mother wishes the good of all races under her sway. She wishes her Red Children, as well as her White people, to be happy and contented. She wishes them to live in comfort.

Your Great mother, the Queen wishes to do justice to all her children alike. She will deal fairly with those of the setting sun, just as she would with those of the rising sun (Craft 2011: 25).

In fact, First Nations use the same turn of phrase, for at these negotiations, Chief Sheeship says that he is:

...thankful today that I have heard a message from our Great Mother, the Queen. The reason I got up from my seat was to come here and hear her voice. I am glad I have heard good tidings from my mother; and if I live till tomorrow, I will send a requisition to her, begging her to grant me wherewith to make my living (Craft 2011: 25f).

Yet, it is also clear from what the Treaty 1 Elders say that our Indigenous partners in that treaty did not cede sovereignty, as Craft’s statement above confirms (and as she argues in more detail in Chapter 3 of this volume).

So, the question is how to reconcile the notion that all are to share as equals under treaty with the idea that all are under the sovereignty and jurisdiction of the Queen; an apparent contradiction rendered transparent in the following passage in which Commissioner Morris juxtaposes these two positions:

MORRIS – Who made the earth, the grass, the stone, and the wood? The Great Spirit. He made them for all his children to use. It is not stealing to use the gift of the Great Spirit. The lands are the Queen's under the Great Spirit. The Chippewas (Saulteaux) were not always here. They come from the East. There were other Indians here and the Chippewas came here, and they used the wood and the land, the gifts of the Great Spirit to all, and we want to try to induce you to believe that what we are asking is for the good of all (Morris 1880: 102).

One way to reconcile this seeming contradiction is to argue that there was disagreement on the matter of whether or not the lands belonged to the Queen, in the first place, merely because she was represented as the common Mother. But if this was so, what could the phrase “the lands are the Queen's” mean? This brings us back to the matter of the “cede and surrender” clause. Another possibility is that Commissioner Morris (and perhaps other commissioners) were operating under the assumption that, based on colonial era reasoning such as the Doctrine of Discovery or the thesis of *Terra Nullius*, the Crown already had sovereignty and jurisdiction. But that explanation invites a question: if the Crown was already convinced that it held sovereignty and jurisdiction, why include a clause that restated this fact?

But these are not the only possibilities. Another that I have I have gravitated towards begins with Morris' argument in favour of Confederation, which he made as a Member of Parliament (and cabinet minister) in 1865. In the first of two relevant passages, Morris highlights what he sees as the options facing pre-Confederation Canada:

We have either to rise into strength and wealth and power by means of this union, *under the sheltering protection of Britain*, or we must be absorbed by the great power beside us (quoted in Talbot 2009: 47f – *emphasis mine*).

That is, the point of accepting the sovereignty of the British Crown is to provide military (and diplomatic) protection from the possibility that the United States, then engaged in outright warfare as its preferred method of “winning the West,” might also seek to annex, perhaps even invade, the nascent country of Canada. In that regard, Morris' comment recalls the justification provided in the Royal Proclamation of 1763 for the assertion of British sovereignty with respect to First Nations where it says:

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

The second passage from Morris' speech further clarifies what Confederation means as a practical matter. He says (quoted in Talbot 2009: 47):

We will have the pride to belong to a great country still attached to the Crown of Great Britain, in which, notwithstanding, we shall have entire freedom of action and the blessing of responsible self-government.

That is, there is no suggestion that there is a connection between accepting the Sovereignty of the Crown and the relinquishment of self-governance; an idea that again echoes the position of the Crown in the Royal Proclamation where it says that Indigenous peoples will not be "molested or disturbed in the Possession of such Parts of our Dominions and Territories" in which they now live. That is, it appears that the point of accepting the Sovereignty of the Crown is not to transfer governance rights, but rather to guarantee them. Therefore, the purpose of this clause in historical treaties may well have been to ensure that all know that the right of Indigenous peoples to jurisdiction over their lands is protected by the Crown, then the most formidable military force in the world, against the possibility that the United States might seek to assume sovereignty over the Canadian West by making war on Indigenous peoples living there.

To put it another way, we may assume that to have sovereignty is also to have jurisdiction.⁶ However, Morris is suggesting that this reading is not sufficiently nuanced, particularly in the context of the British Empire (and now Commonwealth). Here it is possible to accept, at one and the same time, that one comes under Crown Sovereignty and yet is free to act as though one had the same sovereignty and jurisdiction as an independent nation, as is the case between New Zealand and Canada. In this case, both countries hold that the Queen is its Sovereign, yet each acts as an independent actor with a government

⁶ According to *Black's Law Dictionary*, "Sovereignty" is: 1. Supreme dominion, authority, or rule; 2. The supreme political authority of an independent State; 3. The State itself. It goes on to exemplify the meaning as follows:

- *external sovereignty*. The power of dealing on a nation's behalf with other national governments.
- *internal sovereignty*. The power enjoyed by a governmental entity of a sovereign state, including affairs within its own territory and powers related to the exercise of external sovereignty.

The relevant definition in Oxford is "2. Supremacy in respect of power, domination, or rank; supreme dominion, authority, or rule."

"Jurisdiction," as Black's defines it, is "A government's general power to exercise authority over all persons and things within its territory; esp., a state's power to create interests that will be recognized under common-law principles as valid in other States." Or, as Oxford suggests, "2. Power or authority in general; administration, rule, control."

From this, it is possible to conclude that the two are inseparable. But, as Morris demonstrates, this is not actually the case, at least within the British Empire (or now Commonwealth). That is, it is possible to have Sovereignty (at least in a titular sense) vested in one party and jurisdiction in another.

that has no authority in the territory of the other. That this idea also applied to First Nations is indicated in the following statement made in 1837 by Sir Francis Bond Head, Lieutenant-Governor of Upper Canada and a key negotiator of Treaty 45:

Children – Your Great Father the Lieutenant Governor, as a token of the above Declaration, transmits to the Indians a Silk British Flag, which represents the British Empire. Within this flag, and immediately under the Symbol of the British Crown, are delineated a British Lion and a Beaver, by which it is designated that the British Peoples and the Indians, the former being represented by the Lion and the latter by the Beaver, are and will be alike regarded by their Sovereign so long as their Figures are represented on the British Flag, or, in other Words, so long as they continue to inhabit the British Empire (West 2010: 61).

This understanding suggests that a rationale for including a cession clause without raising the matter in discussions may well have derived from the fact that the rationale for accepting the titular sovereignty of the Crown would be sufficiently self-evident that it required no discussion. Furthermore, as I will discuss, this may have appeared particularly so given the other significant benefits that the Crown represented would accrue to our Indigenous partners as a result of forging this alliance.

Promises Made by the Crown

At least in the treaties negotiated by Commissioner Morris, the Crown promised that settlement would provide assistance and other benefits. In the written versions of the treaties these are finite and, in point of fact, sufficiently insubstantial as to appear more like “tokens” than genuine assistance. For example, with respect to agricultural implements Treaty 4 states:

It is further agreed between Her Majesty and the said Indians that the following articles shall be supplied to any band thereof who are now actually cultivating the soil, or who shall hereafter settle on their reserves and commence to break up the land, that is to say: two hoes, one spade, one scythe and one axe for every family so actually cultivating, and enough seed wheat, barley, oats and potatoes to plant such land as they have broken up; also one plough and two harrows for every ten families so cultivating as aforesaid, and also to each Chief for the use of his band as aforesaid, one yoke of oxen, one bull, four cows, a chest of ordinary carpenter's tools, five hand saws, five augers, one cross-cut saw, one pit-saw, the necessary files and one grindstone, all the aforesaid articles to be given, once for all, for the encouragement of the practice of agriculture among the Indians.

Yet, again, First Nations demur and advance a broader understanding of this aspect of the treaty. Here is how the Federation of Saskatchewan Indian Nations explains the promises (*Saskatchewan Indian* 1986: 10):

The Elders state that the Indians were promised Crown protection and assistance to develop and prosper. The promise is described in general terms, with reference to a continuing, and comprehensive, Crown responsibility, and also in specific terms with respect to economic development assistance.

Again, it appears from the historical record that the First Nations' interpretation reflects the general understanding, for here is what the Commissioner says (Morris 1880: 92):

What the Queen and her Councillors would like is this, she would like you to learn something of the cunning of the white man. When fish are scarce and the buffalo are not plentiful she would like to help you to put something in the land; she would like that you should have some money every year to buy things that you need. If any of you would settle down, she would give you cattle to help you; she would give you some seed to plant. She would like to give you every year, for twenty years, some powder, shot, and twine to make nets of. I see you here before me today. I will pass away and you will pass away. I will go where my fathers have gone and you also, but after me and after you will come our children. The Queen cares for you and for your children, and she cares for the children that are yet to be born. She would like to take you by the hand....

And in Treaty 6 negotiations, Morris puts it this way:

I cannot promise you that the Government will feed and support all of the Indians.... What I have offered you does not take away from your way of living, you will have it then as you have it now, and what I offer now is put on top of it. This I can tell you, the Queen's Government will always take a deep interest in your living.

In fact, here he takes matters one step further and, after discussing the matter at length, he makes this blanket promise (Morris 1880: 228): "In a national famine or general sickness, not what happens in everyday life, but if a great blow comes on the Indians they would not be allowed to die like dogs." It is reflected in the written text in the following words:

That in the event hereafter of the Indians comprised within this treaty being overtaken by any pestilence, or by a general famine, the Queen, on being satisfied and certified thereof by Her Indian Agent or Agents, will grant to the Indians assistance of such character and to such extent as Her Chief Superintendent of Indian Affairs shall deem necessary and sufficient to relieve the Indians from the calamity that shall have befallen them.

In this regard, I think it fair to conclude that the finite provisions contained in the written version must be read as an indication of the open-ended promise to ensure that First Nations will not suffer, but will benefit from our settlement on their lands. In short, then, there can be little doubt as to the accuracy of the representations of the Crown provided by our Indigenous partners, and thus of the shared

understanding on which they rely. The only question remaining is whether Morris was acting in good faith.

Were the Treaties Fraudulent?

In the first place, it is clear that in every case the Commissioners had the legitimate authority to negotiate on behalf of the Crown, and, at least in the case of Commissioner Morris, had the authority as well to exceed the written version of the treaties that they were given. I can say this with confidence in that the famine provision in Treaty 6 discussed above was not in the original document given to Morris, yet it was accepted by the Dominion Government as part of the agreement. It is also clear that, at least in the case of Commissioner Morris, there was no willful misrepresentation of the arrangements as he described them during negotiations. I can say this with confidence in the first place because the transcriptions of his words appear in the 1880 book he authored entitled *The Treaties of Canada* and, furthermore, he explicitly explained his reason for including these words as follows:

It is obvious that such a record will prove valuable as it enables any misunderstanding on the part of the Indians as to what was said at the conference to be corrected, and it moreover will enable the council better to appreciate the character of the difficulties that have to be encountered in negotiating with the Indians (Morris 1880: 83).

It does not seem reasonable to conclude that he would have volunteered what he said had he been willfully lying, especially when, as he explains, his reason for so doing is to ensure that the “Indians” recall these words properly. Another reason for trusting Morris’ representation is that the position he took was in keeping with a mature position on relations with Indigenous peoples in place at that time. This position, which was articulated first in the 1830s by the Aborigines Protection Society, saw that the only legitimate reason for settling on lands of Indigenous peoples was to benefit them. Here is how it was put in model legislation that the Society proposed in 1840, which said in part that it is:

1. The indefeasible rights of every people (not under allegiance to any other power) to the nature rights of man, comprehending,
 1. Their rights as an independent nation. That no country or people has a right by force or fraud to assume the sovereignty over any other nation.
 2. That such sovereignty can only be justly obtained *by fair treaty, and with their consent* (Aborigines Protection Society 1840: 14, emphasis added).
2. That no treaty or agreement with any aboriginal inhabitants of our colonies, on the part of the British Government, or by British subjects, shall be valid, *unless it secures an adequate reserve of*

territory for the maintenance and occupation of the aborigines and their posterity (Aborigines Protection Society 1840: 15, emphasis added).

That this view was still prominent in Canada at the time of the negotiation of the numbered treaties on the prairies is confirmed in the following statements made by Lord Dufferin, Governor-General at the time Morris negotiated Treaties 4 and 6:

1. "Speech at the Indian Reserve, Tuscarora" in 1874 (Dufferin 1882: 155f):
It is to be hoped that in the course of time a more settled mode of existence will gradually be extended among all the Indian subjects of the Canadian Government, but at the same time I wish it to be understood that it is by no means the desire of the Government unduly to press upon its Indian subjects a premature or violent change in their established habits. To have done this would have been, in my opinion, a great mistake.
2. "Speech at Government House, Victoria, BC" in 1876 (Dufferin 1882: 209-210):
The Provincial Government has always (erroneously) assumed that the fee simple title in, as well as the sovereignty over the land, resided in the Queen....
In Canada, no Government, whether provincial or central, has failed to acknowledge that the original title to the land existed in the Indian tribes and the communities that hunted or wandered over them.

... not until (we negotiate treaties) do we consider that we are entitled to deal with a single acre.

You must remember that the Indian population is not represented in Parliament, and, consequently, that the Governor General is bound to watch over their welfare and especial solicitude.

While I have confidence that Morris meant what he said when it came to treaty arrangements, I cannot have the same confidence with other Treaty Commissioners. And, furthermore, it is clear that Canadian governments have acted as though our Indigenous partners had agreed to a voluntary surrender of their sovereignty and jurisdiction through these treaties. Nevertheless, in such cases, it is my view that we need to read the words of Crown treaty negotiators as though they were speaking honestly because as the Supreme Court of Canada says: "the honour of the Crown is always at stake; the Crown must be assumed to intend to fulfill its promises. No appearance of 'sharp dealing' will be sanctioned."

Implications for Policy on Cultural Heritage

In my contribution to *First Nations Cultural Heritage and Law* (Bell and Paterson 2009), I addressed the issue taken up here as follows:

What could be more reasonable than a desire to ensure that you are the custodian of your own cultural heritage? And what could be more unreasonable than holding another people's cultural heritage, of ongoing significance to them, in your hands? (Asch 2009: 394).

Of course, this situation only exists because Canada has asserted sovereignty and jurisdiction over Indigenous peoples and their lands. For those of us who hold that this action is patently unjust, the information in this study confirms that this proposition also holds in areas where treaties were negotiated, and even in cases where there is a written clause purporting to surrender and cede sovereignty and jurisdiction to the Crown.

While it is right and just for Indigenous peoples to gain the same degree of control over their cultural heritage as do the Egyptians, that, unfortunately, is not likely to happen in the short term. This research, in my view, speaks as well to this context. As we know well, over the past decade and more many of those who examine cultural materials professionally and many of those who curate them have become sensitized to the issue. Among other initiatives, this has led to the work at the Glenbow Museum in Calgary to curate sensitively and cooperatively (see Bell 2009: 46). Often, acts such as these are represented by opponents as being a kind of "political correctness" and as reflecting a form historical revisionism when it comes to understanding Indigenous-Settler relations in this country.

This case study provides convincing evidence that, to the contrary, for centuries there have been those among the Settlers, including powerful figures such as Alexander Morris, who have taken an expansive view of Indigenous rights and of treaty making, what some opponents label as the product of historical revisionism by a powerful "aboriginal orthodoxy" lobby (e.g., Flanagan 2008). What is most pertinent here, for those taking this more expansive view, is that even though we (as Settlers) may claim sovereignty and even jurisdiction today, however unjustly, this does not justify an assumption that we have the right to act unilaterally. The reason for this is that in historical treaty-making we made certain promises about how we would treat one another and these promises hold whether or not we claim sovereignty and jurisdiction. Some of these promises are described above. To them, let me add the following, which I think well describes the overall attitude with which the parties approached the relationship.

It revolves around the word "kindness" as it appears in the Treaty 4 negotiations. Just prior to reaching agreement, Kanooses, spokesperson for the Cree, asks Morris for this assurance:

KAN-OO-SES: Is it true you are bringing the Queen's kindness? Is it true you are bringing the Queen's messenger's kindness? Is it true you are going to give the different bands the Queen's kindness? Is it true that you are bringing the Queen's hand? Is it true you are bringing the Queen's power?

MORRIS: Yes, to those who are here and those who are absent, such as she has given us.

KAN-OO-SES: Is it true that my child will not be troubled for what you are bringing him?

MORRIS: The Queen's power will be around him (Morris 1880: 117-118).

In the context of what the Commissioner has already said, I take Morris' words as confirming Kanooses' understanding that the promises are intended to establish an open-ended relationship, for, as I interpret it, to have the Queen's power around Kanooses' child is to say that the Queen will always treat those who belong to Kanooses' family and his descendants (writ large) in the way a loving mother treats her children. That is, it confirms that the Queen accepts the relationship that Indigenous peoples have already extended to her family and their descendants, for as one of the principal spokespersons for the Indigenous parties, the Gambler, says to the Commissioner earlier in the negotiations (Morris 1880: 100):

Look at these children that are sitting around here and also at the tents, who are just the image of my kindness. There are different kinds of grass growing here that is just like those sitting around here. There is no difference. Even from the American land they are here, but we love them all the same, and when the white skin comes here from far away I love him all the same. I am telling you what our love and kindness is.

So assertions of jurisdiction matter not, for what would be more unkind and therefore out-of-keeping with the relationship we established than to insist on unilateral control over cultural materials that are of on-going significance to Indigenous peoples? And what would not be more in keeping with that promise if, at least as a first step, all museums, like the Glenbow, established an advisory council, and, as well, ensured that sacred objects held by that institution were at the very least made available to "First Nation communities for use in traditional ceremonies that are vital for the survival of their cultures" (Bell 2009: 46).

As late renowned Cree leader Harold Cardinal asked in his 1969 book, *The Unjust Society*:

To the Indians of Canada, the treaties represent an Indian Magna Carta. The treaties are important to us, because we entered into these negotiations with faith, with hope for a better life with honour. We have survived over a century on little but that hope. Did the white men enter into them with something less in mind? Or have the heirs of the men who signed in honour somehow disavowed the obligation passed down to them? The Indians entered into the treaty negotiations

as honourable men who came to deal as equals with the queen's representatives. Our leaders of that time thought they were dealing with an equally honourable people (Cardinal 1999: 24).

The issue, then, is not so much one of forging a new path. We made promises long ago in keeping with an understanding that to live on these lands is to have a kind and respectful relationship with those already here. The problem is that we have failed to keep our promises. The question is whether we will begin to keep them now, so that, little by little, we can develop a regime in which whatever policies we adopt are in keeping with an understanding that there is nothing more reasonable than to begin accepting that Indigenous peoples must be the ultimate decision-makers respecting the disposition of their own cultural heritage.

One final point: the Gambler concluded his remarks on love and kindness with these words (Morris 1880: 100):

I am telling you what our love and kindness is. This is what I did when the white man came, but (referring to how the Hudson's Bay Company acted in surveying the land) when he came back he paid no regard to me how he carried on.

Thus, when Commissioner Morris says that First Nations will be treated with kindness, this definitely applies as a corrective to the manner in which the Hudson's Bay Company personnel acted. To me the implication is clear. We promised not to take things that belong to our treaty partners without first gaining their consent. To the extent that we have acted outside of this promise with respect to their cultural heritage, we have acted outside of this instruction. In that regard, amends may be required. But more to the point, it strikes me that the instruction tells us that in future we need to ensure that, regardless of what legislation might say, the ultimately authority for how to deal with the cultural heritage of First Nations ought to rest with them. Hence, whether or not we claim sovereignty and jurisdiction, we will need to constrain our actions so as to conform with the understanding that nothing "could be more reasonable than a desire to ensure that you are the custodian of your own cultural heritage."

REPORT 1:
INDIGENOUS AND SETTLER UNDERSTANDINGS
OF THE MANITOULIN ISLAND TREATIES OF 1836 (TREATY 45) AND 1862

by Allyshia West

This report, drawn from my MA research and thesis, provides a historical analysis of the Manitoulin Island treaties of 1836 (Treaty 45) and 1862. In it, I employ Asch's method (described above) for interpreting historical treaties. The objective of this method, which begins with Indigenous understandings of treaty, is to come as close as possible to describing the full meaning of the treaty as it was negotiated. To achieve this, Asch argues, the researcher must base her or his inquiry on the Indigenous understandings of the treaty, reconciling other records—transcripts of the negotiations, written records and third-party reports, for example—with these understandings. In this report, I provide an overview of the interpretation of the Manitoulin Island treaties, a subject explored at greater length in my thesis. I also cover some of the history of the Manitoulin Island treaties. I conclude with a statement on the utility of the interpretive method in anthropological theory for building relationships between cultures.

THE MANITOULIN ISLAND TREATY OF 1836 (TREATY 45)

Impetus for the Manitoulin Island Treaty of 1836 (Treaty 45) emerged from a new direction in British Indian policy. Up to the early 19th Century, British relations with Indigenous peoples had been dictated by the benefits wrought from military and trade alliances (Bleasdale 1974; Miller 2009; Surtees 1996). In 1828, however, a new direction in policy was imagined—one that can best be described as “acculturation and assimilation” (Patterson 1972: 89). It was a benevolent and paternalistic policy supported by the ideology that Indigenous peoples were “savages” in need of “civilization” (Surtees 1966: 87). The main proponents of this policy were Sir George Murray (provisional Lieutenant-Governor of Upper Canada), Sir James Kempt (Governor of British North America), and Sir John Colborne (Lieutenant-Governor of Upper Canada) (Scott 1914; Surtees 1966). The first realizations of this policy were settlement projects erected and administered by the colonial government at Credit River, Coldwater and the Narrows of Lake Simcoe, the River Thames, and Lake St Clair (Scott 1917: 2). The purpose of these settlement projects was to “civilize” the Indigenous peoples through the introduction of a settled existence and instruction in agriculture, industry, and English education. In joining the

settlement, Indigenous peoples would be provided with agricultural supplies and livestock. They would receive the enduring protection of their Great Father (the King). In 1836, a settlement project, in line with the policy of “acculturation and assimilation,” was imagined by Sir John Colborne for settling the Indigenous peoples of Lake Huron at Manitoulin Island (Scott 1917; Surtees 1966).

Although the Crown's objective of “acculturation and assimilation” (Patterson 1972: 89) clearly emanated from a profound sense of cultural superiority, we must consider the perspectives of the Indigenous peoples involved in order to generate a fuller understanding of the settlement projects. That is, we must attend to what was being communicated to the Indigenous peoples with respect to the settlement projects, not just the official policy discussed privately between colonial officials. Firstly, the settlement projects were not presented to the Indigenous peoples as forceful and deliberate instruments for replacing their culture. This can be evidenced in speeches from Crown representatives to Indigenous peoples in which the projects were presented as voluntary and as opportunities to learn the ways of colonial settlers. For example, in a speech appearing in “Indian Affairs, 1840–1867,” Lieutenant-Colonel Mackey (directed by Sir John Colborne) was recorded as addressing the following words to the Indigenous peoples of Lake Huron with respect to the proposed settlement at Manitoulin Island:

I am aware that you cannot all change your present mode of life immediately, but some of you have it in your power, and others will, in a short time, find it in their interest to join the settlement. You are all, without exception, invited. The Ottawas have a large island (the Great Maniyon), near Penetanguishene, on which the land is good, and where there is an abundance of fish. Should they wish to join the new settlement, their Father would be happy to hear of their occupying and settling themselves on it (July 1829 from Mackey, cited in Scott 1917:3) .

What may be gleaned from this speech is an offer of protection and an invitation to learn about settler ways. In this sense, Indigenous peoples did not approve the “civilization” policy drawn up by the colonial government, nor did they see the “civilization” as the objective of the settlement projects.

The settlement project at Manitoulin Island came about at a time of significance in terms of British Indian policy. While the majority of colonial representatives endorsed the policy of “acculturation and assimilation,” a small portion opposed this direction. The most notable of the opposition was Sir Francis Bond Head—Sir John Colborne's successor as Lieutenant-Governor of Upper Canada and Crown negotiator of Treaty 45 (Surtees 1966, 1986; Wightman 1982). Bond Head believed that contact between the two races would always be antagonistic and that Indigenous peoples were simply incapable of

“progress.” In a memorandum to his superior Lord Glenelg (the colonial secretary of Upper Canada), Bond Head contended “[t]hat the greatest kindness we can perform toward these intelligent, simple-minded People, is to remove and fortify them as much as possible from all communication with the Whites” (No 32. Sir F.B. Head to Lord Glenelg, 20 November 1836). He continues with the assertion that: “...our Philanthropy, like our Friendship...has more than decimated its Followers...” and adds: “We have only to bear patiently with them for a short Time, and with a few Exceptions, principally Half-castes, their unhappy Race, beyond our Power of Redemption, will be extinct.” Thus, Bond Head advised that Indigenous groups be allocated land where they could continue living separately and in accordance with their own ways. While Bond Head's scheme can be interpreted as carrying humanitarian motives, as he acknowledged the impact of settler encroachment, his motivation for negotiating this kind of land arrangement suited the political purpose of opening up land for European settlement (Surtees 1966, 1986; Wightman 1982).

Manitoulin Island was to become the realization of Bond Head's ideological position of isolation (Surtees 1966, 1986; Wightman 1982). He envisioned a location where all Indigenous peoples could live isolated from settler contact. Manitoulin Island was perceived of as an optimal location for this purpose because its rocky landscape was undesirable for the agricultural pursuits of whites (Surtees 1986). In a move entirely against the Crown's “civilization” policy and corresponding settlement projects, Bond Head negotiated Treaty 45 and 45 ½ with the Ottawas and Chippewas of the Manitoulin Island region. His objective with this treaty was to acquire more land in the areas surrounding Manitoulin Island for white settlement and to establish a location exclusively for Indigenous peoples.

During negotiations of Treaty 45, it was proposed that the Ottawas and Chippewas relinquish their specific title to the Manitoulin Island chain to allow for the migration of the Indigenous peoples in Upper Canada and the northern United States (Surtees 1986). It set up the island as a “refuge” in which Indigenous peoples were expected to come and settle. The treaty was unique in the sense that it was not about working out an arrangement for settlers to move onto the land. To the contrary, it excluded settler activity (Borrows 1992; Surtees 1986).

TREATY 45 — INTERPRETATION

In this section, I follow Asch's method for interpreting historical treaties. I begin by composing a statement on the Indigenous understandings of the treaty (extracted predominantly from a film by the Ojibwa Cultural Foundation [2008]), and articles from legal scholar John Borrows [1992; 1994] and historian Cecil King [1992]). I then seek to reconcile the Indigenous understandings with colonial/written accounts of the treaty. In the case of Treaty 45, I draw upon the correspondences between Sir Francis Bond Head and Lord Glenelg, recorded in the *British Parliamentary Papers* (1839).

With the conclusion of Treaty 45 in 1836, the Ottawas and Chippewas understood Manitoulin Island to be exclusively in their possession (Debassie n.d.; King 1992; Ojibwe Cultural Foundation 2008). They agreed to withdraw their respective claims to the island in order to allow for Indigenous peoples from surrounding areas and the northern United States to come and live with them, according to their traditional ways and isolated from settler encroachment. Cecil King (1992: 4) reported: "The Anishnabek believed that they were being asked to share their island with other Indian people under the auspices of the Crown." With the treaty, nothing was extinguished (Debassie n.d.; Ojibwe Cultural Foundation 2008). Ojibwe storyteller Esther Osche speaks of her ancestors' actions: "They did not surrender anything, they did not give up anything, they just said, 'we agree for the others to come.' This will be an exclusive aboriginal occupied area. No miners, no timber cutters, no settlers. Nobody will fight us for our fishery, nobody will interfere with our harvesting" (Ojibwe Cultural Foundation: 23). Similarly, a chief present at the treaty negotiations was quoted as saying: "...[I]t was said by our Great Father that this island was to be the exclusive property of the Indians and had given up his claim in our favour [sic]" (PAC RG 10, Vol. 117). Thus, the island was to be an "Anishnabe place" (King 1992: 13).

In turning to colonial accounts of Treaty 45, I begin with an investigation of Bond Head's conduct and approach during negotiations. Correspondence with Lord Glenelg demonstrates that he followed closely the proper protocol for treaty negotiations and showed concern that his actions were fair and honourable. He stated: "Your Lordship will at once perceive that the Document is not in Legal Form, but our Dealings with the Indians have only been in Equity, and I was therefore anxious to show that the Transaction had been equitably explained to them" (No. 31, Sir F.B. Head to Lord Glenelg, 29 August 1836). As well, Bond Head ratified the treaty with the wampum belt and showed clear understanding of the sentiments he evoked when doing so. He wrote: "An Indian's word, when it is formally pledged, is

one of the strongest moral Securities on Earth; like the Rainbow it beams unbroken when all beneath is threatened with Annihilation...Whenever the Belt is produced every minute Circumstance which attended in its Delivery seems instantly to be brought to Life..." (No. 32 Sir F.B. Head to Lord Glenelg, 20 November 1836). It is clear that Bond Head exemplified considerable knowledge of Indigenous ways of conducting political relations and he placed a priority on clear communication regardless of cultural differences. Thus, we cannot reasonably claim that the negotiation process was plagued by miscommunication.

In looking at Bond Head's correspondences, there is substantial evidence affirming the Indigenous claim that the island was established as a "refuge" for the exclusive use of the Indigenous peoples. For example, in a speech during negotiations (recorded by Bond Head and sent to Lord Glenelg), Bond Head stated: "Your Great Father who lives across the Great Salt Lake is your Guardian and Protector, and he only. He has relinquished his Claim to this large and beautiful Island on which we are assembled, in order that you may have a Home of your own quite separate from his White Children" (Sir F.B. Head to Lord Glenelg, 22 August 1837). Additionally, a Wesleyan missionary present at negotiations wrote: "Here the Ottawas and Chippewas, each of whom claimed the Manitoulin Island, relinquished the same, on condition that the Governor should secure it to both, and their Heirs for ever" (No. 1 Extract of a Letter from a Wesleyan Missionary). The written text of the treaty, appearing in Bond Head's correspondences, also affirms this claim: "I consider, that from their Facilities, and from their being surrounded by innumerable Fishing Islands, they might be made a most desirable Place of Residence for many Indians who wish to be civilized as well as to be totally separated from the Whites" (Sir F.B. Head to Lord Glenelg, 22 August 1837). The message is a clear one: Bond Head promised the Indigenous peoples a "home," separate from settlers.

In terms of the political relationship established, Treaty 45 was consistent with treaty making between the Crown and Indigenous peoples in the past. Through gift giving, utilization of kinship terms, and evocation of the two-row wampum belt, Sir Francis Bond Head conjured up the Ottawa and Chippewas long-established relationship with the Crown and therein indicated that no new relationship (for example, a relationship of assimilation) would ensue (Borrows 1992). In this way, the sovereignty of both parties was affirmed.

MANITOULIN ISLAND —1836 TO 1862

The signing of Treaty 45 sparked outrage among proponents of the “civilization” policy (Surtees 1966, 1986). A group named the *Aborigines' Protection Society*, as well as missionaries situated in Upper Canada, were bitter opponents. In their publication *Report on the Indians of Upper Canada* (1839), the *Aborigines' Protection Society* was intensely critical of Sir Francis Bond Head's policy of isolation and its effect upon the well-being of the Indigenous peoples. They argued that the denial of the Indigenous peoples of good agricultural land in exchange for “23,000 rocks of granite, dignified by the name of Manitoulin Island,” was contradictory to the “civilization” policy (Surtees 1986). In a letter to Lord Glenelg, the *Aborigines' Protection Society* argued for complete recognition of the rights of “civilized” Indigenous peoples. They asked Lord Glenelg to resume the policy of civilization and were successful in doing so. By extension, the settlement project, in line with the previously discussed policy of civilization, was assumed again by superintendent T.G. Anderson (Surtees 1966, 1986).

The settlement project on Manitoulin Island took hold in the summer of 1838 under the name *Manitowaning*. By all accounts, the settlement project was a failure and was characterized by a breakdown in the relationship between Indigenous peoples and the Crown (Bleasdale 1974; Borrows 1991; Surtees 1986). Manitowaning's schools and churches were not well attended, numerous Indigenous inhabitants left the island, and the farms set up for teaching the Indigenous peoples agriculture were abandoned. The Indigenous peoples learned some of the practices associated with settler ways, but it was on their own accord. Historian Ruth Bleasdale (1974: 152) makes this point quite eloquently:

Secure in the possession of fishing stations, sugar bushes and hunting rounds, the Ojibway of Manitoulin Island had no need of the white man's civilization. Certainly, the white man's houses were warm and the white man's doctor eased the toothache, but it was not necessary to accept everything which the white man offered. Frustrated in the wheat field or the blacksmith's shop, the Indian boy could escape to the forest. Without the immediate pressure of white settlement, the Indian felt no need to settle down in a permanent structure on a rectangular plot. It was the Island which belonged to the Indian, not the land marked off by the Indian agent.

What is clear from this quotation is the difference between the policy of “civilization” and the notion of a treaty relationship. The Indigenous peoples never agreed to their assimilation. Additionally, the settlement project – which demanded non-Indigenous presence on the island—was in itself an infringement upon Treaty 45 (Borrows 1994: 108).

MANITOULIN ISLAND TREATY OF 1862

In the years approaching 1860, Manitoulin Island was looking increasingly attractive to the colonial government in terms of industrial ventures. Increased immigration and the consequent desire for more land, as well as the development of industry in Toronto and Montreal, prompted authorities to look to Manitoulin Island as a site for industry, development, and White settlement (Bleasdale 1974; Surtees 1986; Wightman 1982). As well, the government policy of assimilation provided the ideological legitimization for seeking a land cession on Manitoulin Island. It was believed that the Indigenous peoples would benefit from the proximity of Whites (Borrows 1994; Surtees 1986; Wightman 1982). Furthermore, the Crown demonstrated less commitment to protect the Indigenous peoples from settler immigration because of its perceived inevitability (Journals of Assembly 1858, App 21, Part III; Surtees 1986; Wightman 1982). Consequently, in 1861, the colonial government began pursuing negotiations with the Indigenous peoples of Manitoulin Island for the purpose of opening the island for White settlement and industry. Their first attempts resulted in an abrupt dismissal by the Indigenous peoples. However, a treaty was signed by some Indigenous peoples in the Fall of 1862. The negotiations were headed by William McDougall, Superintendent General of Indian Affairs and William Spragge, Deputy Superintendent (Borrows 1992: 198-201; Surtees 1986; Wightman 1982: 43-46). The Treaty of 1862 is not regarded as honourable by many Indigenous peoples of Manitoulin Island because it was negotiated under threat and coercion (Beaudry n.d.; Borrows 1992).

There were two groups involved in the negotiation of the 1862 treaty: a) the Wikwemikong, who did not sign the treaty, and b) the treaty signatories. The Wikwemikong's position during negotiations was that in order to continue their way of life and ensure it for the next generations, the island must remain in Indigenous hands in the manner outlined in Treaty 45 (Borrows 1992: 192-205; Wightman 1982: 40-50). As such, they did not participate in final negotiations and do not perceive themselves as bound to the treaty. They believed that the treaty was negotiated under threat and coercion and, because of this, viewed the colonial government's conduct as contrary to the spirit of honourable treaty making (Borrows 1992: 192-205; Wightman 1982: 40-50). With respect to their political relationship with the colonial government, the Wikwemikong "continued to live according to the 1836 Treaty; thinking of themselves as engaged in a relationship with the Queen, but not required to live under the laws of the government" (Wightman 1982: 47). For those Indigenous communities who signed the treaty, the contract represented the opportunity to participate in some of the advantages of white settlement while

retaining control and sovereignty over their lives (Borrows 1992: 208). They observed the changes around them and believed that participation in these changes would secure them their livelihood. They did not perceive proximity to settlers as lessening their own sovereignty or way of life (208). Additionally, the treaty may have been perceived as a “good deal” in terms of monetary compensation, as an initial sale price and treaty annuity were a part of the final agreement (Ojibwe Cultural Foundation 2008).

In looking for corroboration of the Indigenous understandings of the Treaty of 1862 in written records, I turn to a transcript of the treaty negotiations found in the collection *Letters from Manitoulin Island, 1853-1870*. This transcript is a translation of the French transcript recorded by missionary France Chone. It confirms the Wikwemikong's claim to the eastern portion of the island. A chief named Jako uttered the following words: “Brother, understand my thoughts and those of my chiefs: We do not surrender any of our land. If there are among us some of contrary mind, their words are nothing, the majority alone must decide. Brother, if you offered me something of yours, I would accept it; but if you were offering me something that is already mine, I would not listen to you” (Letter #36: Chone to Scholastics, 12 November 1862: 212). McDougall, the Superintendent General of Indian Affairs, confirmed the Wikwemikong's claim: “For those of you who come from Wikwemikong, you shall have what you desire; you remain proprietors of your land from the middle of Manitowaning Bay to Atchitamaiganing at the entrance of the lake” (p. 215). This title is also confirmed in the written text of the Treaty of 1862. The specific clause reads:

That portion of the Island easterly of Heywood Sound and Manitoulin Gulf, and the Indians now residing there, are exempted from the operation of this agreement as respects survey, sale of lots, granting deeds to Indians, and payment in respect of moneys derived from sales in other parts of the Island. But the said Indians will remain under the protection of the Government as formerly, and the said easterly part or division of the Island will remain open for the occupation of any Indians entitled to reside upon the Island as formerly, subject, in case of dispute, to the approval of the Government (p. 215).

Thus, Wikwemikong's land title is affirmed.

For the signatories to the 1862 treaty, a land arrangement was agreed upon which secured tracts of land separate from white settlers. McDougall stated: “I will give you an authentic title that assures you forever the part of the island that you choose, far from where the Whites will settle” (Letter #36: Chone to Scholastics, 12 November 1862: 209). This aligns with the signatories' desire to continue their traditional way of life. Additionally, an initial payment for sale of the lands, as well as annual interest,

was to be paid to the signatories (p. 209). To both groups, the Wikwemikong and the signatories to the agreement, McDougall promised protection: “In a word, you will lack nothing, and you will be surrounded by the care of the great chief...” (pp. 208–209). The transcript of treaty negotiations shows that all groups (colonial government, Wikwemikong, and Indigenous treaty signatories) agreed to engage in peaceful, respectful relations.

To summarize the shared understandings of the treaty, the agreement promised separation between Indigenous peoples and settler activity. It did not constitute assimilation or the complete spread of industry or settlement over the island. Parts of Manitoulin Island were opened to settlers, but this certainly did not translate into European ownership of the island. The central and western portions of the island were to be shared through the arrangement articulated in the agreement. The east would be kept exclusively for the Wikwemikong.

CONCLUSION

My conclusion addresses the possibilities and limitations of anthropology's interpretive methodology in carrying out analyses similar to the one I have completed in this exploration of the Manitoulin Island treaties. The interpretive methodology developed in reaction to assertions that anthropologists could decipher “culture” through the application of scientific laws. It shies from producing definitive statements about culture in favour of hermeneutical descriptions (Geertz 1973). Interpretive anthropologists are concerned with anthropology's relationship with the colonial project and are cautious of their own privilege and position. They are sensitive to mechanisms of appropriation, exoticization, and other-ing. They argue that anthropologists are limited to producing representations of other cultures and that these representations are more reflective of their own society than the culture they study. Notable anthropologists who follow the interpretive methodology include Lila Abu-Lughod (1991), Arjun Appadurai (1992), James Clifford (1986; 1988), and Clifford Geertz and George Marcus (1986).

The treaty relationship represents a challenge to the interpretive methodology because it shows that two cultures can come to common understandings despite cultural differences (Asch n.d).

Misunderstanding, and the above-mentioned mechanisms of appropriation, exoticization, and other-ing do not always characterize intercultural communication. In fact, new relationships and shared truths and

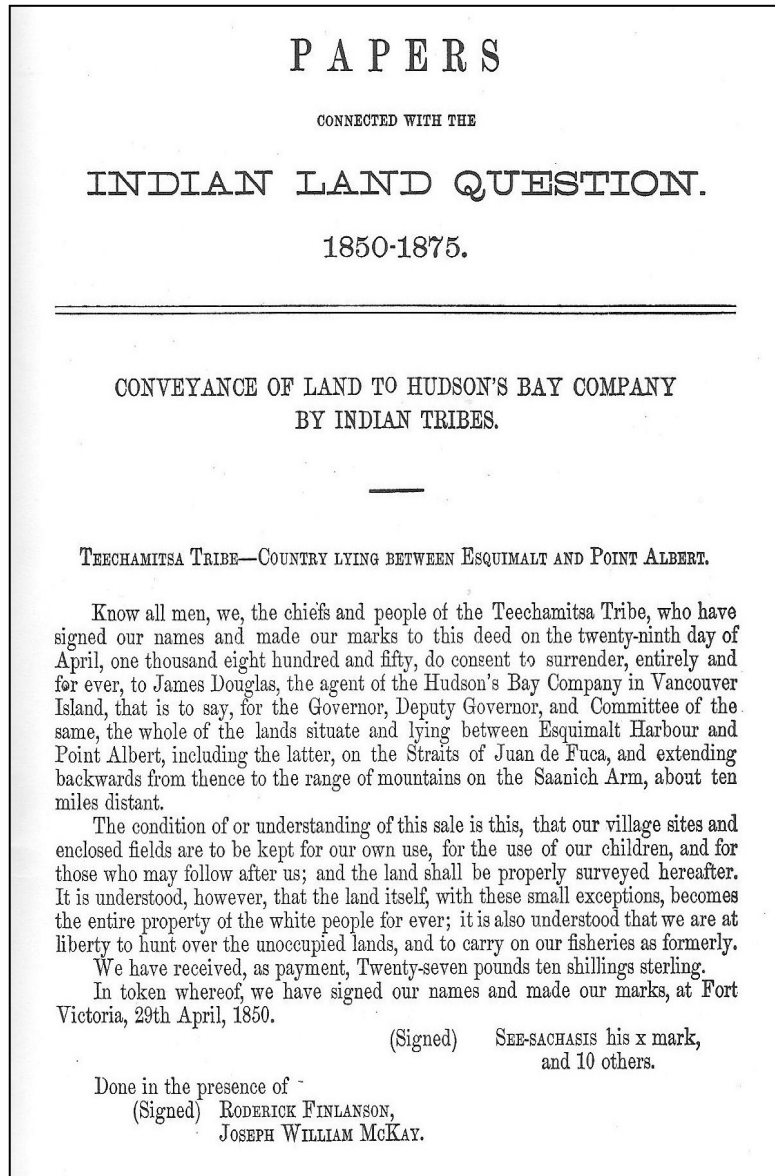
understanding can result from cultural contact. Revealed in treaty negotiations is a discussion about one another's truths and how we can work out an agreement that does not infringe upon them. The accomplishment of treaty shows that we can have relationships of equity.

When investigating historical treaties, as I have done with the Manitoulin Island treaties, the interpretive method can carry political implications (Asch n.d). It can have the effect of rendering null or diminishing the significance of the treaty by arguing on the side of miscommunication. Interpretivism is limited as a method for grasping the accomplishments of historical treaties, which clearly show that accurate communication across cultures can occur. As I have come to understand it, through my investigation of the Manitoulin Island treaties following Asch's methodology, the disintegration of the historical treaty relationship comes not from mechanisms of miscommunication, but rather, from our inability as non-Indigenous peoples to uphold our treaty obligations.

**REPORT 2:
THE FORMATION OF THE VANCOUVER ISLAND TREATIES
(ALSO KNOWN AS THE DOUGLAS TREATIES) OF 1850–1854**

by Neil Vallance

Between April 29 and May 1, 1850, James Douglas, a chief factor of the Hudson's Bay Company (HBC), acting as an agent of the Crown, entered into nine treaties with representatives of First Nations living on southern Vancouver Island. In 1851, two more were concluded at Fort Rupert, another two were made in 1852 at Saanich, and the final of the Vancouver Island treaties (often called the Douglas treaties) was made at Nanaimo in 1854. For over one hundred years, the document reproduced on the right (Anonymous 1875: 5), and its 13 sister documents, were accepted without question as true and accurate representations of these historic treaties. The written versions are nearly identical in format. In each, the wording of the first half resembles the language of conveyancing, while the promises enumerated in the second half are consistent with the language of treaties (Foster and Grove, 2008: 90-91; Haring, 1998: 191).



Since 1854, these treaties have existed in relative obscurity, receiving little public notice. As well, they have received only nominal attention in academic surveys of the historical treaties with the First Nations of Canada. For example, J.R. Miller's 2009 book, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* devotes a single page (p. 247) to the Vancouver Island Treaties. There are two reasons for this inattention. A first reason is the relatively small geographical area covered by the treaties, usually expressed as 3% of Vancouver Island. However, when expressed as 284,250 hectares (702,375 acres), the total is more impressive. This territory covers all of the City of Victoria, Greater Victoria (including the municipalities of Saanich, Esquimalt, View Royal, Langford, Colwood and Metchosin), the Town of Sooke, the City of Nanaimo, and the area around the communities of Port McNeil and Port Hardy. This real estate contains a combined population approaching one half million, with a value in the billions of dollars. While the non-Indigenous members of that population remain largely unaware of the treaties, First Nations are increasingly bringing unresolved treaty issues to public attention in various ways, including through confrontation. For example, on October 16, 2010, members of the Tsartlip First Nation in Saanich blocked a public road running through their reserve. According to Chief Ivan Morris, this was done because "the federal government has failed to live up to the terms of the Douglas treaty signed in 1852" (DeRosa 2010). This paper is in large part an attempt to ascertain those terms.

A second reason for the lack of attention to these treaties, especially in the academic literature, is the paucity of extant contemporaneous accounts of the formation of the treaties. The creation of the treaties was attended by virtually total silence in the historical record. Other than four reporting letters from Douglas to his superiors at the HBC in London, there are no substantive contemporaneous accounts of these agreements. The only European witnesses appear to have been HBC officials, none of whom kept minutes of the meetings. There are also no contemporaneous records of the words of the First Nations representatives.

As a result, it is hardly surprising that the growth of the literature on Vancouver Island treaty has been stunted. More importantly, the absence of contemporaneous accounts of the negotiations that led to the treaties has caused an inveterate over-emphasis on the written versions. To date there has been no book-length study of the treaties. There have been only seven articles and papers devoted mainly to the treaties (Duff 1969; Foster 1989; Foster 1995; Foster and Grove, 2008; D. Harris 2008a; Hendrickson 1988; Madill 1981). The books, which deal with the history of indigenous/settler relations in British

Columbia, focus on the mainland, and the Vancouver Island treaties are accorded a chapter at most (Arnett 1999; Banner 2007; Cail 1974; Fisher 1979; C. Harris 2002; Keddle, 2003; D.Harris 2008b; Lutz 2008; Marshall 1990; Tennant 1990). None of the cited literature contains a theoretical discussion of the treaties, but recent attempts have been made in this area by an archivist (Frogner 2010) and a Ph.D. student in English (Makmillen 2010). Only the contributions of Foster, Keddle, and Lutz have looked beyond the written versions.

It was long assumed that the eponymous Douglas treaties “show every evidence of his authorship” (Duff 1969: 6). Upon closer scrutiny, this assumption has been found wanting. It is now accepted that a template was supplied to Douglas by Archibald Barclay, Secretary of the HBC in London, who described it⁷ as “a copy with hardly any alterations of the Agreement adopted by the New Zealand Company in their transactions of a similar kind with the natives there.” In 1989, law professor Hamar Foster (1989: 635) identified the New Zealand precedent as “Kemp’s Deed,” entered into in June 1848 with the Ngai Tahu people of the North Island⁸. Recently, legal historian Douglas Harris pointed out a major difference between Kemp’s Deed and the form sent to Douglas: “Although the structure and content of Barclay’s template emulated the New Zealand deeds, the final clauses setting out the hunting and fishing rights were new” (D. Harris 2008b: 23). The origins of those “final clauses” is unclear.

It is now accepted that, as stated by the Supreme Court of Canada in *R. v. Morris & Olsen* (2006, at para. 24), “the treaty [in that case the North Saanich Treaty] was concluded orally” and “subsequently reduced to writing.” For the sake of clarity, in this paper the written versions are henceforth referred to as the Douglas Forms and the oral versions are referred to as the Vancouver Island Treaties.⁹ The Supreme Court went on to say that, “the oral promises made when the treaty was agreed to are as much a part of

⁷ Barclay, Archibald, 16 August 1850, letter to James Douglas, Fort Victoria Correspondence Inward, 1849-1858, BC Archives, A/C20, VI7, M430;

⁸ In 1999, historian Chris Arnett reproduced the text of the English language version in a footnote (Arnett 1999: 321-322).

⁹ It seems no longer appropriate to use the possessive adjective of “Douglas” to identify the treaties. Youngblood Henderson (2007: 417) has attempted to come up with an alternative, but his choice of “Lekwammen” is unfortunate, as the First Nations in Saanich, the Nanaimo area, and on the north end of the Island are not Lekwammen. A comprehensive geographic reference such as “Vancouver Island Treaties” has merit, except that Captain Vancouver was an envoy of British Imperialism. In the absence of a commonly accepted First Nations name for “Vancouver Island,” that descriptor may have to suffice as the lesser of two evils.

the treaty as the written words". In other words, the "treaty" consists of the "written words" plus any "oral promises." As the cession clause is clearly part of the "written words", the Court took for granted "...the surrender by the Saanich of their lands on Vancouver Island" (at para 17). However, in 1984 the B.C. Court of Appeal in the decision of *R. v. Bartleman* (at para 41) had adopted a more radical approach to the Douglas forms. The main judgement was written by Lambert, J.A., who disclosed that "I have examined, at the provincial archives, the foolscap notebook inscribed 'Register of Land Purchases from Indians', where the written components of the 11 Fort Victoria treaties were recorded" and concluded that "I do not think that the text of the land grant recorded in the "Register of Land Purchases from Indians" should be regarded as anything more than some evidence of what was generally agreed to."

Given that the Douglas Forms constitute some evidence of a surrender of territory, does the historical record provide any additional evidence? There are several documents relevant to the question, but they mostly contradict, rather than confirm, the presence of a surrender in the Vancouver Island Treaties. It has long been assumed that the promises made in the second half of the Douglas Forms were inserted to protect the now landless First Nations against the depredations of future white settlers. The relevant provisions are as follows: "our village sites and enclosed fields are to be kept for our own use, for the use of our children, and for those who may follow after us" and that "we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly". The Canadian courts and the academic literature both operate on the assumption that the underlying title vests in the Federal Crown and that the promises in the second half of the Douglas Forms are mere encumbrances against that title. The case law on the treaties has focussed entirely on the interpretation of the text of the Douglas Forms with respect to hunting and fishing. In each of *R. v. White and Bob* (1964), *R. v. Bartleman* (1984) and *R. v. Morris & Olsen* (2006), a treaty hunting right was raised as a defence to charges laid under provincial game regulations. The First Nation defendants were acquitted in each case. The case of *Saanichton Marina Ltd. v. Claxton* (1989) was a civil action launched to prevent the construction of a marina that would have prevented access to traditional fishing grounds. The plaintiffs' application was successful. However, not one of these decisions was based on First Nation accounts of the treaties. The first lawsuit testing the scope of "village sites" and "enclosed fields" has been commenced and is currently set for trial in 2014. The extent, if any, to which First Nations interpretations of the scope of these provisions will be taken into account remains to be seen.

Fortunately, accepting the proposition that the Vancouver Island Treaties do not cede the territory of the participant First Nations opens up the possibility of a completely different understanding of the words in the second half of the Douglas Forms. If these words set out only the responsibilities agreed to by Douglas (and the Crown) under the treaties, what were the corresponding obligations accepted by the First Nations? While Douglas' side of the bargain is represented uniformly by his strict adherence to the template wording, it should not be assumed that the understanding of the participating First Nations as to their obligations was similarly uniform. In the case of the Fort Victoria Treaties (i.e., the nine treaties finalized in the Fort Victoria area in 1850), my research indicates that the First Nations agreed only to the continued presence of the fort and its allied farms. In Saanich, the treaty agreement may have settled a dispute, allowing Douglas access to farmland and sufficient forest land to supply Douglas' sawmill (Poth 1983: 69). At Fort Rupert and Nanaimo, my research indicates that the First Nations granted to the Hudson's Bay Company only the right to continue their coal-mining operations. Considered in this light, the Hudson's Bay blankets and other trade items distributed to the First Nations can be interpreted not as consideration for the cession of their territory but rather as a concession of certain use and occupation rights. In other words, the Vancouver Island Treaties can be understood as agreements to allocate the use and management of certain land and resources between the parties. The next section of the paper provides a detailed examination of the few extant eyewitness accounts by Hudson's Bay Company officials, early white settlers, and First Nations elders of the formation of the Treaties.

A CLOSER LOOK AT THE TREATIES

Most of the secondary literature on the Vancouver Island Treaties uses selected quotes from primary documents to illustrate a narrative or to justify an argument, with the result that unselected parts of these documents receive no attention at all. As well, the practice of quoting snippets of documents does not allow for an appreciation of the implications of the document as a whole. To avoid these pitfalls, the following section reverses the emphasis: the major primary documents are reproduced in their entirety (as they relate to treaties), a running commentary on items of interest in each document is maintained via footnotes, and comments of a general nature are presented at the end of each major quotation. Admittedly, this format demands a high level of commitment and perseverance on the part of the reader, but hopefully the benefits outweigh the costs.

The Nine Fort Victoria Treaties (1850)

The first detailed analysis of the Fort Victoria Treaties is contained in a 1969 article by anthropologist Wilson Duff. According to him, the treaty documents reflect “the intimate knowledge” possessed by Douglas of the “local Indians” (Duff 1969: 6). While Douglas oversaw the building of Fort Victoria in 1843, he continued to reside at Fort Vancouver (on the Columbia River) and did not take up official residence in Victoria until June 1849, just after the creation of the Colony of Vancouver Island (Sage 1930: 121,149).¹⁰ Once in Victoria, Douglas wrote to Archibald Barclay, Secretary of the HBC in London¹¹, recommending that:

Some arrangement should be made as soon as possible with the native Tribes for the purchase of their lands, and I would recommend payment being made in the shape of an annual allowance instead of the whole sum being given at one time; they will thus derive a permanent benefit from the sale of their lands and the Colony will have a degree of security from their future good behaviour. I would also strongly recommend, equally as a measure of justice, and from a regard to the future peace of the colony, that the Indians Fisheries, Village Sites¹² and Fields, should be reserved for their benefit and fully secured to them by law.

The letter indicates that Douglas was already aware of the need to purchase the lands of the local First Nations. According to historian James Hendrickson (1988: 3), “how Douglas first became aware of the Company’s obligation to extinguish aboriginal title is unknown.” Douglas’ letter to Barclay is also the first demonstration of the former’s constant endeavour to strike a balance between the needs of the HBC, for whom he worked until 1858, the colony, and First Nations.¹³ Thus, an annuity provides a “permanent benefit” to First Nations and at the same time ensures “their future good behaviour.” Similarly, when “fisheries, village sites and fields” are “reserved”, the “future peace of the colony” is also enhanced. In December of that year, Barclay replied to Douglas¹⁴ with his instructions:

With respect to the rights of the Natives, you will have to confer with the Chiefs of the tribes on that subject; and in your negotiations with them you are to consider the natives as the rightful possessors of such Lands only as they occupied by cultivation, or had houses built on, at the time

¹⁰ The colony was the result of a charter of grant to the HBC (reproduced in Hendrickson 1980: 374-348). However, historian Margaret Ormsby (1979: xlv), notes that “At least twice a year he [Douglas] visited Fort Victoria to supervise the packing of the furs and the despatching of the regular ships.”

¹¹ Reproduced in Bowesfield, Fort Victoria Letters, 1846-1851, p.43

¹² The words “fisheries” and “sites” are spelled “fishere’s” and “sities” in the original letter.

¹³ Wherever possible the modern term “First Nations” is used instead of “Indians,” even though the latter term is historically correct. This is done not to be “politically correct” but to respect the designation chosen by the Indigenous parties to the Treaties.

¹⁴ Barclay to Douglas, 17 December, 1849, London Correspondence Book Outward, HBC Archives, reproduced in part in Hendrickson 1988: 4-5.

when the island came under the undivided sovereignty of Great Britain in 1846¹⁵. All other land is to be regarded as waste¹⁶, and applicable to the purpose of colonization. Where any annual tribute has been paid by the natives to the Chiefs, a fair compensation for such payment is to be allowed.¹⁷

In other colonies the scale of compensation adopted has not been uniform, as there are circumstances peculiar to each which prevented them all from being placed on the same footing but the average rate may be stated a £1 p. head of the tribe, for the interest of the chiefs, paid on signing the Treaty.¹⁸

A Committee of the House of Commons, which sat upon some claims of the New Zealand Company reported, in reference to native rights in general that 'the uncivilized Inhabitants of any Country have but a qualified dominion over it, or a right of occupancy only, and that until they establish among themselves a settled form of government and subjugate the ground to their own uses by the Cultivation of it, they cannot grant to individuals not of their own Tribe, any portion of it, for the simple reason that they have not themselves any individual property in it'.¹⁹

The principle here laid down is that which the Governor and Committee authorize you to adopt in treating with the Natives of Vancouver's Island, but the extent to which it is to be acted upon must be left to your own discretion, and will depend upon the character of the tribe and other circumstances. The natives will be confirmed in the possession of their lands as long as they occupy and cultivate them themselves, but will not be allowed to sell or dispose of them to any private person, the right to the entire soil having been granted to the Company by the Crown. The right of fishing and hunting will be continued to them....

The tenor of the letter is cautionary, warning Douglas at considerable and repetitive length that he is not to entertain any overly generous notions as to the nature and extent of "native rights" to land. Why was Barclay at such pains to lecture Douglas on the subject? Barclay appears to have taken to heart the conclusion of the Parliamentary Committee Report²⁰, "that the acknowledgment by the local authorities of a right of property on the part of the natives of New Zealand, in all wild lands in those Islands...was an error which has been productive of very injurious consequences" (p. xiii). It would appear that Barclay

¹⁵ Sovereignty was assumed to have occurred as a result of the Oregon Treaty of 1846, which divided the west coast of North America (south of Russian Alaska and north of Spanish Mexico) between Great Britain and the United States.

¹⁶ The term "waste" in this context meant "unimproved" land.

¹⁷ This statement has never been discussed in the literature, presumably because it had no application to Vancouver Island. However, it does disclose an awareness of colonial practices in certain (undisclosed) parts of the British Empire.

¹⁸ Again, this statement has been ignored in the literature, presumably because the source of his information is not known. It does disclose that Barclay had acquired some knowledge of such matters.

¹⁹ The internal quotation is from the 1844 *Report from the Select Committee on New Zealand*.

²⁰ *Report from the Select Committee on New Zealand; together with the Minutes of Evidence, Appendix, and Index*, Printed by the House of Commons, 29 July, 1844; reproduced in the Irish University Press series on Parliamentary Papers, 1968-9, Colonies, New Zealand, vol.2

was recommending that Douglas bypass a general purchase of territory in favour of First Nations being “confirmed” in the “possession” of only such land as they “occupy and cultivate”, but Douglas ignored his advice.

In May, 1850, Douglas reported to Barclay²¹ on the Fort Victoria Treaties:

I summoned²² to a conference, the chiefs and influential men of the Sangees [Songhees] Tribe, which inhabits and claims the District of Victoria, from Gordon Head on Arro Strait, to Point Albert on the Strait of De Fuca as their own particular heritage. After considerable discussion²³, it was arranged, that the whole of their lands, forming as before stated the District of Victoria, should be sold to the Company, with the exception of Village sites, and enclosed fields,²⁴ for a certain remuneration, to be paid at once to each member of the Tribe. I was in favour of a series of payments to be made annually, but the proposal was so generally disliked that I yielded to their wishes²⁵ and paid the sum at once. The members of the Tribe on being mustered were found to number 122 men or heads of families, to each of whom was given a quantity of goods equal in value to 17/Sterling²⁶, and the total sum disbursed, on this purchase £103.4.0 Sterling at Dept. price.²⁷

I subsequently made a similar purchase from the Clallum Tribe, of the country lying between Albert Point and Soke Inlet: in consequence of the claimants not being so well known²⁸ as the Songees, we adopted a different mode of making the payments, by dealing exclusively with the Chiefs, who received and distributed the payments while the sale was confirmed and ratified by the Tribe collectively. This second purchase cost about £30.0.8. I have since made a purchase from the Soke Tribe of the land between Soke Inlet and Point Therringham, the arrangement being concluded, in this, as in the preceding purchase with the chiefs or heads of Families, who distributed the property among their followers. The cost of this tract which does not contain much cultivable land²⁹ was £16.8.8.

²¹ Reproduced in Bowesfield 1979: 95.

²² It is not known how notice of the proposed conference was disseminated or how its purpose was described.

²³ A translator was used (see Joseph McKay's 1888 letter reproduced later in the paper). It is not known if the “discussion” took place partly or wholly in the Chinook trade jargon, possessing a very limited vocabulary in which to convey the complex terms of the agreement as described by Douglas (see Lang 2008).

²⁴ This is his first known reference to “enclosed” fields, an adjective repeated in the written versions of the Douglas Treaties. It is not yet known if the choice of the adjective was derived from a precedent or was conceived by Douglas. It should be noted that writing to Douglas in July, 1851, Barclay defined the extent of the “Fur Trade Reserve” as “the two square miles actually occupied by tillage, and enclosed, (quoted in Ormsby, 1979: lxxv, fn 6)

²⁵ This is the only term of the treaty that is explicitly the result of negotiation.

²⁶ Thus, the 17 shillings paid was less than the £1 average recommended by Barclay in his letter of instructions.

²⁷ According to Duff (1969) “Dept. price” refers to the wholesale cost charged to Company employees. The treaty documents show a total price of £309.10.0, representing the “retail” price charged to its ordinary customers, and a mark-up of 300%.

²⁸ By “not so well known” he means that HBC officers did not have the same degree of familiarity with the “tribes” beyond the immediate vicinity of the fort.

²⁹ It seems the “cost” was lower because the lack of “cultivable land” indicated lower agricultural potential, and indeed, Duff (1969) calculated that the HBC paid an average wholesale price of only 10/0 per man for this land (versus 17/0 for the Songhees land).

The Cowetchin³⁰ and other Tribes, have since expressed a wish to dispose of their lands, on the same terms; but I declined their proposals in consequence, of our not being prepared to enter into possession; which ought to be done immediately after the purchase, or the arrangement may be forgotten, and further compensation claimed by the natives.³¹

The lands purchased from the other Tribes embrace the seacoast and interior from Gordon Head on the Arro Strait, to Point Gonzales, and from thence running west along the strait of De Fuca, to Point Theringham a distance of about 44 miles, which includes the Hudsons Bay and Pugets Sound Company's³² reserves.

The total cost, as before stated, is £150.3.4. I informed the Natives that they would not be disturbed in the possession of their village sites and enclosed fields, which are of small extent, and that they were at liberty to hunt over the unoccupied lands, and to carry on their fisheries with the same freedom as when they were the sole occupants of the country.³³

I attached the signature of the native Chiefs and others who subscribed³⁴ the deed of purchase to a blank sheet,³⁵ on which will be copied the contract or Deed of conveyance, as soon as we receive a proper form³⁶, which I beg may be sent out by return of Post.

It is important to keep in mind that this letter was a private document, intended for Barclay, not for public dissemination. Douglas did not send copies of the treaty documents or even a report to the Colonial Office on such matters. There were no colonists clamouring for the news, and no newspaper to report the event. If missionaries, visiting ship's officers, or independent travellers were present, they left no record. Douglas restricted his report to issues of importance to his employers. In apparent order of priority, these were the "purchase" from three "tribes" of "the whole of their lands," an accounting of the "cost," confirmation that certain promises were conveyed to the "Natives", and documentation of the

³⁰ The Fort Victoria Journal (kept by Roderick Finlayson from 1846 to 1850) entry for May 1, 1850, notes that "Some furs & provisions were traded today from Kawitchins & others". The identity of the "other tribes" is not known.

³¹ This suggests that Douglas may have had prior knowledge (from sources unknown) of the consequences of the "purchase" of lands in advance of settlement.

³² The HBC formed a subsidiary to operate farms at various forts, including Victoria, to supply the wants of its dependents (see Mackie 1984). Presumably, title to these "reserves" would now vest in the companies free of any "Indian" interest.

³³ This sentence is similar to, but slightly more generous in its scope than, the wording used in the written Douglas Treaty documents.

³⁴ The words "signature" and "subscribed" refer to a column of Xs on a sheet of paper, with a transliterated name beside each X.

³⁵ The "deed of purchase" for the "Sangees" land was ultimately embodied in six separate documents, the "Clallum" in two documents, and the "Soke" in one document, for a total of nine "Fort Victoria Treaties."

³⁶ It is unclear why Douglas requested a "proper form." He may have believed Barclay to be in possession of, or able to acquire, such a "form," or he may have felt it more prudent to request a template that Barclay would find acceptable as to "form."

transaction. Other than the issue of payment, there is nothing in the letter to indicate the content of the “considerable discussion” which took place before the transaction was “arranged.”

There are three particular revealing statements by Douglas in the above letter. One is his comment that “Cowetchin and other Tribes” apparently “expressed a wish to dispose of their lands, on the same terms.” The wording makes it appear that the “Cowetchin and other Tribes” understood that the “terms” included an agreement to “dispose of their lands.” Douglas was careful to characterize the transaction in that manner in his report (and in all subsequent reports).

The second is his comment that the territory covered by the treaties “includes the Hudsons Bay and Pugets Sound Company’s reserves.” In 1888, Dr. James Helmcken, who had arrived in the Colony in 1850 as an employee of the HBC, commented on the treaties as follows:

My impression is, the whole thing had a twofold object. 1st to gain the good will of the Indians. 2nd to give a quasi title to the fur trade – for their claim of the ten mile belt around Victoria³⁷ – not granted them in the charter of grant.

Writing in 1930, historian Walter Sage discussed Douglas’ handling of the Fort Victoria Treaties, in which he “tried to play fair,” but “the main thing was that the Hudson’s Bay Company, and its adjunct, the Puget Sound Agricultural Company, obtained valuable lands which they could open for settlement if they wished or could hold as reserves” (Sage 1930: 161). Most of the best land made available at this time was sold to Company officials including Douglas (see Mackie 1984).

The third statement comes towards the end of his report, noting that he “informed” the First Nations that their village sites, enclosed fields, hunting and fishing would be protected. The wording gives the impression he was delivering a prepared statement, not reporting the results of a negotiation. This interpretation is reinforced by a retrospective account by Joseph McKay, written in 1888.³⁸ McKay, who had been a witness to all nine of the Fort Victoria Treaties and the two Saanich treaties, provided this account:

³⁷ This is a reference to the “Fur Reserve”, which was originally to be a “ten mile belt”, but upon survey Douglas was informed by Barclay that “...the utmost extent of land that the Hudson’s Bay Company will allow the Fur Trade Branch to occupy without paying for the same will be the two square miles actually occupied by tillage, and enclosed, and four square miles, together six, occupied by enclosures and as a cattle range prior to the Treaty with the United States” (quoted in Ormsby, 1979: lxxv, fn 6).

³⁸ Joseph McKay, letter to Dr. James S. Helmcken, 3 December, 1888, BCA, MS 1917, file 27.

The arrangements entered into with the Victoria, Sanich and Sooke Districts Indians respecting their claims on lands of those districts were made at the instance of the Home Government during Governor Blanshard's incumbency. Mr. Douglas was Land Agent for the Crown Lands of Vancouver Island. The then Secretary for the Colonies sent to Mr Douglas through A. Barclay Esqre.,³⁹ HBCo's Secretary, instructions as to how he should deal with the so called Indian Title. The instructions were embodied in a somewhat lengthy document which began by reciting the general views of the Home Government⁴⁰ in regard to the land rights of aborigines in the Countries where they might be found sojourning.

Mr. Douglas was very cautious in all his proceedings. The day before the meeting with the Indians, he sent for me and handed me the document above referred to⁴¹ telling me to study it carefully and to commit as much of it to memory as possible in order that I might check the interpreter Thomas⁴² should he fail to explain properly to the Indians the substance of Mr. Douglas' address to them. I remember one clause in the document in question distinctly stated that the Government did not admit that nomad tribes had any property in lands which they had not improved nor occupied for permanently industrial or useful purposes, and over which they had not established any form of government nor system of land tenure⁴³, but that where in the course of settlement by immigrants from the mother Country the intruders interfered materially with the sources of food supply on which the aborigenes had heretofore subsisted, then as a matter of expediency it were well to grant to them such considerations in the way of useful commodities as might allay present irritation and prevent breaches of the peace. It was recommended in a subsequent clause that sufficient land to support them be set apart for the use of the Indians and that the Indians be encouraged to cultivate and improve the same after the manner of civilized people. Mr Douglas made no purchase of the country from the Indians They were told that only such places as they had occupied and improved properly belonged to them, that in addition to their garden patches and village sites some of the lands contiguous to their Villages would be reserved to them and the rest of the country would be open for sale to white settlers.

Other former HBC officials, such as Joseph Trutch in 1870 (Anon 1875: Appendix B, p. 11), and Dr. James Helmcken (1888),⁴⁴ expressed similar views as to the lack of Indian title to land, but none of them were first-hand witnesses to the treaty process. Nonetheless, their denials of any First Nation interest in land were every bit as vehement as McKay's, and are indicative of the attitude of most settlers and local colonial officials after Douglas' retirement in 1864.

³⁹ This is a fascinating comment. It represents the only assertion from a contemporary of Douglas that Barclay was passing on instructions from the Colonial Secretary.

⁴⁰ Barclay's 1849 letter of instructions conveyed the views of the House Committee on New Zealand, not the views of the "Home Government."

⁴¹ Since the treaty template did not exist at the time of the Fort Victoria treaties, McKay is probably referring to a version of Barclay's instructions, which Douglas proposed to read to the assembled First Nations representatives.

⁴² This was probably Thomas Williams, aka Tomo Ouamtomy or Tomo Antione, a guide and interpreter employed by the HBC (Foster 1994: 63-66). Little is known of his abilities as a translator. It is also interesting that McKay was not chosen to be the translator, given that Chief David Latess, who knew McKay, described him as Douglas' translator. This would indicate that McKay was not completely fluent.

⁴³ This phrasing is very reminiscent of the wording employed by Barclay in his 1849 letter of instructions.

⁴⁴ Dr. James S. Helmcken, letter to Joseph McKay, 30 November, 1888, BCA, MS 1917, file 15.

Of course, at the time McKay witnessed the Fort Victoria Treaties the template containing the quit-claim wording did not exist, so it is certain that the speech delivered by Douglas (as translated by Thomas) could not have consisted of a recitation of the template wording. As requested, Barclay in due course forwarded a template, entitled *Form of Agreement for purchase of Land from Natives of Vancouver's Island*, which provided blank spaces for insertion of the names of the tribes, a description of the land, the price paid, and the date of the agreement.⁴⁵ Douglas reproduced the wording of the template nearly verbatim in each subsequent treaty document, duly filling in the blanks. The written versions of all fourteen treaties (minus the names of the First Nations signatories) were first published in *Papers Connected With The Indian Land Question, 1850–1875*, printed in 1875 by the B.C. Government. Duff (1969) undertook an analysis of the information inserted in the blanks of each of the Fort Victoria treaties, but the focus of the present paper is a parsing of the wording of both template *and* insertions. This is best achieved by reproducing the Teechamitsa treaty document, as published (with signatures) in Duff, 1969. This is also the only treaty for which there is independent corroboration. Roderick Finlayson, one of the two witnesses, was also the keeper of the post journal.⁴⁶ His entry for April 29, 1850, noted that “In the evening the proprietors of the tract of Country lying between the headland and point McGregor were paid for their land, they are ten in number & got 3 Blkt 2 ½ pts each at which they appeared well satisfied”.

The template wording of this treaty is highlighted here in italics. Again, comments are relegated to footnotes and the end of the quoted text:

Know all Men, We, the Chiefs and People of the “Teechamitsa” Tribe who have signed our names and made our marks to this Deed on the Twenty ninth day of one thousand Eight hundred and Fifty do consent to surrender entirely and for Ever⁴⁷ to James Douglas the Agent of the Hudson's Bay Company in Vancouver's Island that is to say, for the Governor Deputy Governor and Committee of the same, the whole of the lands situate, and lying between Esquimalt Harbour and Point Albert including the latter, on the straits of Juan de Fuca and extending backward from thence to the range of mountains⁴⁸ on the Sanitch Arm about ten miles distant.

⁴⁵ The template is reproduced in Henderson, 1988: 6, and Arnett 1999: 34.

⁴⁶ Fort Victoria Journals, 1846-1850, HBC Archives Ref.# B.226/a/1 (Reel 1M149), also available online at <http://web.uvic.ca/~hist66/fortVictoria/>

⁴⁷ This is “quitclaim” language, where the grantor is not so much conveying “title” to the grantee as confirming to the grantee the surrender of such interest (if any) possessed by the grantor. It should be disclosed at this point that the author of this paper was a conveyancing and contract lawyer for over 30 years. More work needs to be done on the real property and contractual aspects of the treaty documents.

⁴⁸ This description is hopelessly vague from a conveyancing perspective, and leaves ample room for misunderstanding. For example, did the territory acquired end at the foot of the mountains, or their mid-point?

The condition of, or understanding of this Sale is this, that our village sites and Enclosed Fields are to be Kept for our own use, for the use of our children, and for those who may follow after us⁴⁹; and the lands shall be properly surveyed hereafter⁵⁰; it is to be understood however that the land itself, with these Small exceptions, becomes the entire property of the white people for Ever⁵¹; it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.

We have received as payment Twenty seven pound Ten Shillings Sterling⁵².

In token whereof we have signed our names and made our marks at Fort Victoria⁵³ 29 April 1850.

His mark

See-sachasis X

Hay-hay kane X

Pee Shaymoot X

Kalsaymit X

Coochaps X

Thlamie X

Chamutstin X

Tsatsulluc X

Hoquymilt X

Kamostitchel X

Minayiltin X⁵⁵

Done in the presence of

Joseph William Mckay

[signed] Roderick Finlayson⁵⁴

These eleven men must be considered as authors of the treaty, along with the hundreds of First Nations representatives whose names appear on the remaining thirteen treaty documents. The other eight Fort Victoria Douglas Forms are dated April 30th and May 1st, which indicates that the Teechamitsa were the first to sign, and the others followed their lead. Francis Paul Prucha, in his treatise on *American Indian Treaties*, quoted the following comment contained in an 1829 “set of regulations for dealing with the Indians”: “He who signs first, incurs a heavy responsibility; and it requires no ordinary degree of resolution in the man, who thus, in the presence of his countrymen, leads the way in sanctioning a

⁴⁹ Presumably this wording is intended to convey the idea of perpetuity. However, later in the document the same idea is expressed simply as “for ever.”

⁵⁰ It is unclear, grammatically, whether the “land itself” refers to the area of the “surrender,” or the village sites and fields “kept”, nor is there a time frame for the commencement of the survey, other than the vague “hereafter”. This caused enormous problems when the allocation and survey of reserves was delayed for decades.

⁵¹ How (if at all) this statement was translated to the First Nations is unknown.

⁵² According to Duff, this was paid in goods of equivalent value (at their retail value), namely HBC blankets.

⁵³ According to Duff, the meetings for all the Fort Victoria Treaties took place in front of the fort, not in the territory of the signatory First Nations.

⁵⁴ Finlayson and McKay were clerks at the fort.

⁵⁵ Finlayson’s journal entry notes that the men were only “ten in number.” There is no explanation for the discrepancy.

measure which many may regret after the presents are expended and the excitement of the moment has subsided” (1997: 211).

The Douglas Form, of course, stated that the First Nations were dealing solely with the HBC. First Nations representatives present at the meeting called by Douglas may well have understood the purpose of the meeting only in the context of their experience of dealings with the HBC over the previous seven years. Their first agreement with the HBC would have occurred in 1843, when Douglas obtained the permission of the local First Nations to build the fort on their land. This may have been understood by First Nations as a form of trade and commerce treaty, frequently entered into by the HBC and First Nations in other parts of North America (see Miller 2009). Historian John Lutz noted that, “On the third day after his arrival Douglas spoke to the ‘Samose’ (Songhees/Lekwungen): ‘and informed them of our intention of building in this place which appeared to please them very much and they immediately offered their services in procuring pickets for the establishment, an offer which I gladly accepted and promised to pay them a blanket...for every forty pickets of 22 feet by 36 inches which they bring’” (2008: 70). The Fort Victoria Journals make it clear that their relationship with the Company between 1846 and 1850 was largely commercial, supplying furs, fish, produce and labour. These interactions would have grown more numerous and complex as the HBC establishment gradually entered into “possession” of more land outside the perimeter of the fort.

Given that seven-year relationship, what might have been the understanding of the First Nations of the purpose and result of the meetings with Douglas in April and May of 1850? Law professor Sidney Haring noted (1998: 193) that “numerous other Indian nations had expressed a wish to sell their lands” and while such offers were “puzzling” by eastern Canadian standards, “[t]he Indian Nations’ motivations in offering these sales of relatively small areas of land are not difficult to discern: in the fur economy, any Indian nation with direct access to a post derived a trading benefit. It could control the access of other Indian nations to trade...”. Haring provided no source whatsoever for his opinion. However, there is one First Nations account, and it tells a very different story.

In 1934, Saanich Chief David Latess⁵⁶ gave an interview to Frank Pagett, a reporter for the *Victoria Daily Times* (Pagett 1934: 1), in which he claimed to be 105 years old,⁵⁷ with a resulting birth year of 1829. If accurate, he would have been 21 years old in 1850 when the first Vancouver Island treaty was signed. He lived with the Songhees for the first seven years of his life, but spent the balance of his life with the Tsartlip First Nation at Brentwood in Saanich. According to the reporter, Latess was “still mentally keen,” and was “looked after by a well-educated wife, half his age, who aided in interpreting the ancient’s vigorous statements,” although “the principal interpreter of Chief David’s reminiscences was his grand-nephew, Baptiste Paull.” The following extracts from the interview are relevant to the treaties:

It was not until the next year, in the spring months, that would be about March 1843, we had another word of the white men. Then messengers came to Brentwood from Mud Bay,⁵⁸ now Victoria, advising all to hasten southward to see the big vessel. So we ran. I was a big boy of fourteen years at the time, and was one of the first to arrive.... [his account of cattle swimming to shore from the ship is omitted]

When the first white men had put their cattle ashore they set about building themselves shelters and store buildings. Indians brought logs and James Douglas paid the chiefs for such work. I forget how long it took to build the fort and the other structures, but Douglas went away for a while. I’m not sure whether it was at his first visit that he arranged for the withdrawal of the Songhees to the other side of Victoria, but I think not. At the time I was resident at Brentwood with the Saanich Indians. I do well remember hearing that Douglas called a meeting⁵⁹ of the four sub-chiefs of the Songhees, heads of the groups living at Clover Point, at Cadboro Bay, at Cordova Bay and at Mud Bay. I remember the sense of wealth shared by the Mud Bay group when, after they had agreed to abandon Mud Bay and remove to the old Songhees reserve on the inner harbour,⁶⁰ Douglas gave the sub-chief a bale of fifty blankets for distribution among the families of the group. He also gave the other groups presents for waiving their rights of assembly at Mud Bay....

⁵⁶ There are several spellings of his name in the literature, but this version has been adopted for the paper.

⁵⁷ Latess did address the issue of incredulity concerning his age: “White people doubt my age can be 105 years. They see my bright eyes, they saw me move quickly until a few years ago, they heard me speak in council and address the tribes when long past ninety years old, and they said it was impossible for me to have known James Douglas. But I was a grown man when the big pow-wow was held in Beacon Hill.” However, historian John Lutz notes that “Later censuses suggest that Latesse may not have been old enough to witness the event himself and that this may be a secondhand account” (2008: 336 fn). More research is needed to resolve the issue, to the extent possible.

⁵⁸ Latess located Mud Bay where the Empress Hotel and the Union Club now stand. Grant Keddie (2003: 125) locates Mud Bay across the harbour within the “old” Songhees reserve.

⁵⁹ No date is given. If Douglas called the meeting, presumably it took place after his arrival in June 1849.

⁶⁰ Keddie (2003: 24) notes that as a result of a fire in 1844, Roderick Finlayson stated that “I wanted them [the Songhees] to remove to the other side of the harbour....This was the origin of the present Indian Reserve.” Keddie also noted the presence of a village “on the eastern shore adjacent to the fort”, which was “occupied mainly by Clallam visitors...married to Songhees people or had relatives among them,” and that “The houses of this village seem to have been removed in late 1849 or early 1850” (p. 27).

In the years around 1850 the Indians considered that there was lots of land and had no thought of or fear of extensive settlement by white men. The whites were welcomed, they provided a fine market for the large amount of fur which the tribesmen annually collected. The trade goods the whites gave in return for the furs were highly regarded. The whites at that time also had no idea of asking the Indians to give up their land. Areas proposed to be used by whites were limited and the gifts of blankets and trade goods were considered as annual dues as I shall show.

I was twenty-one when Governor Douglas gave a big party to the Indians of southern Vancouver Island. The entertainment took place at Beacon Hill on May 24, 1850,⁶¹ and was to celebrate the birthday of Queen Victoria. For weeks in advance the party was the talk of all encampments within eighty miles of Victoria. Invitations were sent to the Songhees, Saanich, Cowitchen, and other tribes and the gathering included men, women and children. The natives were seated in big circles, the chiefs forming the innermost line, the lesser braves being further to the rear, according to their relative importance or youth. The women and children hung around the outskirts of the circles of men, grouping themselves in eager clusters.⁶² Hudson's Bay men distributed hard biscuits smeared with molasses and also other foodstuffs. After all had eaten Governor Douglas addressed the crowd. He was dressed in a coat of blue with gold shoulder pieces and trimmings. He preceded his speech with a salute to the Great White Queen,⁶³ given with upraised hand. He stressed the desire of the white man to be friends with the tribes. He assured the chiefs that trade in furs with peaceful use of enough land to grow food were the only reasons for establishment of the settlement.

His statement was welcomed by the peace-loving tribes, whose view of white settlement, had it been voiced at all, would have been that there was lots of land and no harm could come from letting the whites have the use of some of it. It must be remembered that the Indians were great bargainers and they would not have had any idea of letting the whites use their land from year to year unless some equivalent trade or gifts be made each year.⁶⁴

It is not clear if Latess proposed that the gathering called to arrange the Songhees relocation, and the party called to celebrate the Queen's birthday, were later conflated by non-First Nations commentators into "the" treaty meeting. The two phrases most relevant to the present paper are that Douglas "assured the chiefs that trade in furs with peaceful use of enough land to grow food were the only reasons for establishment of the settlement" and that "their view of white settlement, had it been voiced at all would have been that there was lots of land and no harm could come from letting the whites have the use of some of it." Sadly, the First Nations view has rarely "been heard" to this day.

⁶¹ The *Fort Victoria Journal* entry for May 24, 1850 does not mention this "party," and makes no mention of First Nations at all. However, the entry for May 23 notes that "a large number of the natives are at present assembled here for the purpose of collecting camus."

⁶² This description gives a unique visual image of the arrangement of First Nations when meeting with Douglas.

⁶³ The reference to the "Great White Queen" is important as it indicates that Douglas informed the First Nations of the existence of an authority superior to him and the HBC.

⁶⁴ This of course is contrary to the report made by Douglas in May 1850. It is possible that in the minds of the First Nations the figure arrived at was for the first year.

There are obvious issues as to accuracy and credibility when an interview takes place 80 years after the events described. Regardless, the account of David Latess deserves serious consideration for the alternative point of view it offers. He also provided an account of the two 1852 Saanich Treaties, which is presented after the following brief account of the two 1851 Fort Rupert treaties.

The Fort Rupert Treaties

In August 1850, Barclay wrote to Douglas with further instructions: “I am also to state that the Governor and Committee consider it highly desirable that no time should be lost in purchasing from the Natives the land in the neighbourhood of Fort Rupert”.⁶⁵ Two treaties were made on February 8, 1851, at Fort Rupert on the northeast coast of the Island, where the HBC had commenced a coal mining operation. Later that month Douglas reported briefly to Barclay (reproduced in Bowesfield 1979: 157-158):

We have concluded an arrangement with the Chiefs of the Quakeolth Tribe for the purchase of the land about Ft. Rupert, extending from McNeill’s harbour to Hardy Sound, which the purchase also includes – The agreement was formally executed by all the chiefs, in consideration of a payment of Goods, amounting at Inventory prices to £64 Stg.

However, the Fort Rupert coal operation turned out to be uneconomical and was shut down after the new mines at Nanaimo opened in 1852. The Fort Rupert miners were transferred to Nanaimo in 1853, and by 1854 there were only 12 Europeans resident at Fort Rupert (Gough 1984). There is very little mention of Fort Rupert in the historical record for the rest of the Colonial period, and there appear to be no First Nations accounts of the treaties.

The Saanich Treaties

The next round of treaty-making occurred a year later, this time in Saanich. Douglas provided the following account to Barclay in March, 1852:⁶⁶

The steam saw Mill Company⁶⁷ having selected as the site of their operations, the section of land marked upon the accompanying map north of Mount Douglas,⁶⁸ which being within the limits of

⁶⁵ HBC Archives.

⁶⁶ HBC Archives Reel 1M11.G1/140

⁶⁷ This was not an HBC enterprise, although all the shareholders were HBC officers. Douglas owned two shares (Mackie, 1984: 204).

⁶⁸ Mount Douglas is just south of Cordova Bay.

the Sanitch Country, those Indians came forward with a demand for payment,⁶⁹ and finding it impossible, to discover among the numerous claimants, the real⁷⁰ owners of the land in question, and there being much difficulty in adjusting such claims, I thought it advisable to purchase the whole of the Sanitch Country, as a measure that would save much future trouble and expense. I succeeded in effecting that purchase in a general convention of the Tribe; who individually subscribed the Deed of Sale,⁷¹ reserving for their use, only the village sites and potatoe patches,⁷² and I caused them to be paid the sum of £109.7.6 in woollen goods which they preferred to money. That purchase includes all the land north of a line extending from Mount Douglas, to the south end of the Sanitch Inlet, bounded by that Inlet and the Canal de Arro, as traced on the map, and contains nearly 50 square miles or 32,000⁷³ statute acres of land.

It would appear that Douglas had no intention of entering into a treaty when the “Mill Company” began preparations to operate a sawmill in the territory of Saanich First Nations. In this instance, it was clearly the First Nations who took the initiative. Douglas cleverly used his authority as governor to instigate a treaty over the entire peninsula, which meant that the cost was borne by the HBC, not the shareholders of the Mill Company.

There are three First Nations accounts of this “convention”, but two of them are second and third generation versions respectively, likely based on the teachings of David Latess. The extant Latess version is contained in the same newspaper article mentioned above:

For some time after the whites commenced building their settlement they ferried their supplies ashore. Then they desired to build a dock where ships could be tied up close to shore. Explorers found suitable timbers could be obtained at Cordova Bay, and a gang of whites, Frenchmen and Kanakas were sent there to cut piles. The first thing they did was set a fire which nearly got out of hand, making such a smoke as to attract attention of the Indians for forty miles around. Chief Hotutstun of Salt Spring [Island] sent messengers to Chief Whutsaymullet, of the Saanich tribes telling him that the white men were destroying his heritage and would frighten away fur and game animals. They met and jointly manned two big canoes and came down the coast to see what damage was being done, and to demand pay from Douglas. Hotutstun was interested by the prospect of sharing in any gifts made to Whutsaymullet but also, indirectly, as the Chief Paramount of all the Indians of Saanich.

⁶⁹ Douglas does not disclose how the Saanich First Nation became aware of the fledgling enterprise, or what prompted them to come forward with a “demand” for payment.

⁷⁰ Alternatively, all the “claimants” may have had valid claims upon the resources of the “selected” area.

⁷¹ This seems to indicate that a Deed had been drawn up in advance, and that the First Nations representatives “subscribed” it in some fashion.

⁷² This is the only example given by Douglas of what he understood to be included within “enclosed fields.”

⁷³ This is the first description in which the area is expressed in acres, allowing a calculation of the cost per acre, which yields a figure of approximately 1 1/3 pence per acre. The HBC policy was to sell land to intending colonists at the rate of £1 per acre.

As the canoes rounded the point and paddled into Cordova Bay they were seen by camp cooks of the logging party, who became panic stricken. Rushing into the woods they yelled the alarm of Indians on the warpath. Every Frenchman and Kanaka dropped his tools and took to his heels, fleeing through the woods to Victoria. As they ran they spread the cry that the Indians were on the warpath.

Douglas hastened to meet the two chieftains and found that the party, with scarcely a weapon other than a few fish spears, were camping in harmony with the white members of the logging detachment. All that was asked was pay for trees cut and damage wrought, which Douglas promptly agreed was right and proper. He ordered two bales of blankets brought from the fort and gave each chief one of them. There was no suggestion that the compensation was for anything other than the timber. No suggestion of title to any land was involved in that matter.

Presumably this episode was the impetus for a second meeting to establish more formal arrangements between the HBC and Saanich First Nations, described by Latess as follows:

When Douglas met with Chief Hotutstun in 1852, and discussed with him and his sub-chiefs the allotment of lands to the Hudson's Bay Company, it was arranged that lands not needed by the natives might be occupied by the whites. The Indians were to have reserved to their use some choice camping sites, were to have hunting rights everywhere and fishing privileges in all waters, with certain water areas exclusively reserved to the use of the tribes.⁷⁴

In return for the use of meadowlands and open prairie tracts of Saanich, the white people would pay to the tribal chieftains a fee in blankets and goods. That was understood by us all to be payable each year. It was so explained to us by Joseph MacKay, the interpreter for Governor Douglas. The governor himself solemnly assured us that all asked to be ratified would entirely be to the satisfaction of the Indians. He stated that the only object of the writing was to secure the Hudson's Bay Company peaceful and continued use of land tracts suitable for cultivation. This was accompanied by a gift of a few blankets. We all understood that similar gifts would be made each year, what is now called rent.

I was unmarried and therefore considered too young to take part in those proceedings as a tribal representative, but I was present, in attendance upon my uncles, who were among the tribal elders. At that time I thought as did the Indians that the proceedings were just a pow-wow for the purposes of receiving a few trade goods. I say truly that I have no knowledge of payment of money as mentioned in papers supposed to have been signed by Chiefs Hotutstun and Whutsaymullet⁷⁵ and their sub-chiefs. I know of no act of signing such papers and believe that no such signatures were in fact made by those tribesmen.

Latess is certainly clear in his assertion that the treaty meetings did not include a cession of land as described in the Douglas Forms. There are many fascinating insights to be gleaned from his account, but for the purposes of this paper the most important are those that relate to the use and occupation of

⁷⁴ This description, in style if not in content, is reminiscent of the written treaty document.

⁷⁵ Hotutstun and Whutsaymullet were the first names listed on the written versions of the North Saanich and South Saanich treaties respectively.

land. For example, Latess noted that “When Douglas met with Chief Hotutstun in 1852, and discussed with him and his sub-chiefs the allotment of lands to the Hudson’s Bay Company, it was arranged that lands not needed by the natives might be occupied by the whites.” The lands “not needed” consisted of “meadowlands and open prairie tracts.” Latess neatly turned the usual assumption on its head by asserting that land would be shared with the whites on terms set by the Saanich First Nation. Similarly, in his clever paraphrase of the “promises” in the second half of the Douglas Forms, Latess expands their scope, making them unrestricted.

In 1983, a booklet was published, *Saltwater People, as told by Dave Elliott Sr.: A Resource Book for the Saanich Native Studies Program*, editor Janet Poth noted that, “The words in this book are all Dave’s. Over twenty hours of oral history on audio-tape have been transcribed then edited for the written word” (p. 3).

Elliott was “born May 17, 1910 on the Tsartlip Indian reserve in Saanich” and died August 5, 1985 (Poth 1983: 5). In his account he related the tree-cutting episode, but added a second cause of friction with the HBC:

There was another incident besides that, that already made things not exactly in a state of peace. An Indian boy crossing Douglas’ property had been shot and killed. Douglas’ property was in the area of Mount Douglas. He had a farm there, and this boy was crossing through. For what reason they shot the boy, I don’t know.

We weren’t in a state of war, but almost. After these loggers left Cadboro⁷⁶ Bay and went back to Victoria, our people just turned around and came home. That’s the way things stood when they got the message, or invitation to come into Victoria. Douglas invited all the head people into Victoria.

When they got there, all these piles of blankets plus other goods were on the ground. They told them these bundles of blankets were for them plus about \$200 but it was in pounds and shillings.

They saw these bundles of blankets and goods and they were asked to put X’s on this paper. They asked each head man to put an X on the paper. Our people didn’t know what the X’s were for. Actually they didn’t call them X’s they called them crosses. So they talked back and forth from one to the other and wondered why they were being asked to put these crosses on these papers. One after another, they were asked to put crosses on the paper and they didn’t know what the paper said.

⁷⁶ Both the Latess and the subsequent Bartleman account place the incident at Mount Douglas, which overlooks Cordova Bay, and indicates that Elliott was likely in error on this minor point.

What I imagined from looking at the document⁷⁷ was that they must have gone to each man and asked them their name and then they transcribed it in a very poor fashion and then asked them to make an X.

One man spoke up after they discussed it,⁷⁸ and said, “I think James Douglas wants to keep the peace.” They were after all almost in a state of war, a boy had been shot. Also we stopped them from cutting timber and sent them back to Victoria and told them to cut no more timber. “I think these are peace offerings. I think Douglas means to keep the peace. I think these are the signs of the cross.” He made the sign of the cross. The missionaries must have already been around by then, because they knew about the ‘sign of the cross’! “This means Douglas is sincere.”

They thought it was just a sign of sincerity and honesty. This was the sign of their God. It was the highest order of honesty. It wasn’t much later they found out actually they were signing their land away by putting those crosses out there. They didn’t know what it said on that paper.

I think if you take a look at the document yourself,⁷⁹ you will find out, you can judge for yourself. Look at the X’s yourself and you’ll see they’re all alike, probably written by the same hand. They actually didn’t know those were their names and many of those names are not even accurate.⁸⁰ They are not even known to Saanich People. Our people were hardly able to talk English at that time and who could understand our language? (Poth 1983: 69–73).

The account is basically consistent with the Latess version, with the addition of the shooting incident, and the interpretation of the X’s as crosses. However, the powerful imagery of placing the “crosses” is contradicted by Elliott’s own observation that the Xs were “probably made by the same hand.” He did not attempt to resolve the inconsistency. Elliott was clearly aware of, and unsettled by, the inconsistencies between the oral histories and the Douglas Forms. Elliott’s final comments also indicate that HBC officials may not have been overly scrupulous about verifying the status of the signatories as members of the Saanich First Nations.

In 2004, Janice Knighton wrote a master’s thesis entitled “The Oral History of the 1852 Saanich Treaty,” relying in part on the testimony made by Saanich elder Gabriel Bartleman before the Supreme Court of

⁷⁷ Here Elliott departed from the oral history account and made inferences based on his personal inspection of the document.

⁷⁸ Elliott clearly reverted to the oral history at this point.

⁷⁹ Once again Elliott departed from the oral history to make inferences based on his inspection of the treaty document. In fact, he contradicts the oral history, inferring that the Xs were not made by the First Nations representatives. Lambert, J.A., confirmed Elliott’s opinion in the 1984 case of *R. v. Bartleman*, which concerned the Saanich treaties. After examining all the treaties, Lambert concluded that, “This evidence tends to confirm that none of the crosses opposite the names of the Indians, with respect to any of the purchases, were made by the Indians.”

⁸⁰ It is very difficult to ascertain the accuracy of the transliterations of names on the written treaty forms.

B.C. in the 1987 case of *Saanichton Bay Marina Ltd., v. Louis Claxton et al.* Knighton quoted extracts from the court transcript, interspersed with her own comments. She related that “Gabe Bartleman was born and raised on the West Saanich reserve, a member of the Tsartlip First Nation. He was fluent in the Sencotn language, and understood the English language....” She reported that “It was the understanding held by Chief Latesse that was highlighted in court” and provided the following quotation: “At that time, the people recognized that Chief David Latesse came to understand some of what is called the ‘treaty,’ and that he tried the best he could to inform the people that he looked after. He didn’t use the word ‘treaty,’ he said they called it ‘James Douglas’ word’.” Knighton went on to state that, “There were gatherings that Gabe had attended, which Chief David Latesse arranged. At those meetings Chief Latesse spoke to the people about what James Douglas’ word was about.”⁸¹ The extracts provided by Knighton demonstrate that Bartleman’s account was very similar to David Elliot’s version. She confirmed that “Gabe stated that he heard that same story from many of the other people who are now deceased. Mr. David Elliott was one of those people” (pp. 8–12). Bartleman’s testimony is useful largely because it highlights the ongoing efforts of Latess to keep the Saanich Treaties alive in the minds of his people.

The Nanaimo Treaty

The 14th Vancouver Island Treaty, finalized with the Snuneymuxw First Nation in 1854, was motivated by a Crown desire to secure access to coal deposits near the present-day city of Nanaimo. On January 14, 1853, Barclay wrote to Douglas⁸² with these instructions:

The Governor and Committee think you should take an early opportunity of extinguishing the Indian claim in the Coal district. When this is done, and more correct and full surveys made of the Coal fields, as well as of the surface of the Country, the governor and Committee will purchase a portion of the Coal field and of the Harbour, so as to have access for a good shipping place, but by no means to monopolize the Coal field.

On April 19, 1853 Douglas replied⁸³ as follows:

I observe the request of the Governor & Committee, that I should take an early opportunity of extinguishing the Indian claim in the coal District, and I shall attend to their instructions, as soon as

⁸¹ Bartleman was of the opinion that Latess was not present at the treaty negotiations: “I don’t think that the Chief David actually, took place [*sic*], or was present when the treaty took place, but his father was one of the signers, I’m sure.”

⁸² HBCA A.6/30, fo.57-60d.

⁸³ HBC Archives A/C/20/Vi2A, pp. 132-144.

I think it safe, and prudent to renew the question of Indian rights, which always gives rise to troublesome excitements, and has on every occasion been productive of serious disturbances.⁸⁴

Douglas did indeed delay the matter for one and a half years, as the Treaty was not concluded until December 23, 1854. The Treaty document itself is unique. It consists only of a six-page list in ink of 159 names under the heading "Sarlequin Tribe." The form used in all the other treaties has either been lost or never existed. To the right of each name is the following: "his X mark" Pinned to the top of the list is a slip of paper with the following words in pencil: "Similar conveyance of country extending from Commercial Inlet 12 miles up the Nanaimo River made by the Sarlequin Tribe signed Squoniston and others."⁸⁵ Of course, the document itself does not contain a description of the territory "ceded," an issue that has been consistently ignored.

Douglas' report on the Treaty is contained in a December 26, 1854 addendum⁸⁶ to a December 25th letter written by him to Barclay, which is here reproduced in its entirety:

In my letter of yesterday's date I neglected to mention that I concluded a negotiation on the 23rd Inst. with the Nanaimo Indians for the purchase of the District claimed as their hereditary possession by that Tribe. This had been a long pending matter, and of difficult settlement, in consequence of the mineral character of the district purchased. There was on that account a strong disposition on the part of the Indians to make a good bargain, and I was of course obliged to allow them better sums than were given on the occasion of former purchases.⁸⁷

The District thus acquired extends from Dodds narrows in the Canal de Arro to a head land eight miles north of Colville Town, which is included with all Islands on the coast in the purchase. The coast line may in a rough estimate be given as 20 miles in length by 10 miles in breadth forming about 200 square miles

⁸⁴ It is not clear if "every occasion" refers to the previous thirteen treaties, or to multiple attempts to negotiate a treaty with the Snuneymuxw First Nation.

⁸⁵ The above description is based on a personal inspection of the treaty document. According to Duff (1969: 11), at the top of the first five Fort Victoria documents, "Douglas wrote in pencil a memorandum or prologue describing the territory of the group concerned. This was likely done in the presence of the Indians and served as the basis for the description to be written later into the body of the text,"

⁸⁶ HBC Archives B.226/b/14 fo.37-39d.

⁸⁷ The only White residents at Nanaimo at this time were the coal miners (all employees of the HBC) and their families, who lived in housing supplied by the Company (see Mackie 1984). In other words, there were no colonists. It would appear that on this occasion the negotiation over price centred on the mineral, not agricultural, potential of the land.

of country,⁸⁸ less a small reserve for village sites and cultivated fields which remain for the use of the Indians. The outlay made on that purchase was 668 Blankets valued about £270. The Indian Title being thus extinguished I have instructed Mr. Pemberton to prepare the Title Deeds for the 6,000 acres of land purchased at Colville Town by the Company at his earliest convenience.⁸⁹ The deed of sale was signed by every male adult member of the Tribe, chiefs as well as the common class of people and they all appeared perfectly satisfied with this arrangement.

The treaty is witnessed by three HBC officers and “James Douglas, Governor Vancouver Island”. It is the only treaty document signed by Douglas. It is possible to infer that he was signing not as a witness, but as representative of the Crown. On April 20, 1855, W.G. Smith from H.B.C. London, acknowledged Douglas’ report⁹⁰ and confirmed that, “The arrangements which you have made with the Indians of Nanaimo for the extinguishment of their rights is satisfactory.” The First Nations may have considered that only an “extinguishment” of their mineral “rights” occurred, as suggested in the first of the two accounts, which follow.

In 1933, local journalist Beryl Cryer published in the *Victoria Daily Colonist* (reprinted in Arnett 2007: 191) a story told to her by Snuneymuxw elders Quen-Es-Then (Joe Wyse) and his wife Tstass-Aya (Jennie):

On the Whusl-Whul reserve⁹¹ at Nanaimo live “Joe” Quen-Es-Then and his wife Tstass-Aya. They are a tall, thin, old couple, both speaking good English. Her husband is a good many years older, but, in spite of his great age, is remarkably alert....

“Now,” said Tstass-Aya, “My man, he can talk English, but I talk it better, so he will tell me, and I will tell you!”

“Well, one day a Hudson’s Bay man came to see my [Quen-Es-Then’s] father. ‘We want to talk to you and your people about this coal,’ he said. ‘We will have a meeting. You and all your people, and you must get another chief and his people, and on a certain day we will all talk this thing over.’

⁸⁸ No information has been found to explain the discrepancy in descriptions of the territory conveyed, between the penciled notation at the top of the Treaty document, and the description in Douglas’ letter. The latter covers a much larger area than the former.

⁸⁹ The conveyance was in fact prepared before the treaty and noted that 250 acres was to be “reserved for the future benefit of the Indians.”

⁹⁰ HBC Archives A.6/31 fo.135-1’36.

⁹¹ This is present-day IR 1, the so-called “town reserve” just south of the harbour.

So my father, Chief Sugnuston, called all his people, and he told another chief, whose name was Chief Schuna'h'un, to call his tribe, and together they went to the meeting. Now, you know where the big wharf is now where the steamers come? Well, down there is a rock in the water. In those old days it was part of the land, and at that place was a very big house.⁹² To that house there went all the Hudson's Bay men, and the two chiefs with their people."

Here Quen-Es-Ten interrupted, "I was at that meeting," he said. "I can remember all the people in that house, and lots outside, but I was only a small boy standing beside my father."

Then the Hudson's Bay men talked to the Indians. 'This coal that is here,' they said, 'is no good to you, and we would like it; but we want to be friends, so, if you will let us come and take as much of this black rock as we want, we will be good to you.' They told my father, 'The good Queen, our great white Queen over the water will look after your people for all time,⁹³ and they will be given much money, so that they will never be poor.' Then they gave each chief a bale of Hudson's Bay blankets and a lot of shirts and tobacco, just like rope! 'These are presents for you and your people, to show we are your good friends,' they said. The chiefs took the things, and they cut the blankets, which were double ones, in half, to make more, and gave one to every chief man, then the shirts, and to those who were left they gave pieces of the rope tobacco; so that every man in the tribes had a present."

"Now you know," said Tstass-Aya, "we think there was some mistake made at that meeting, or, maybe, the people could not understand properly what was said; but later, when our people asked for some of the money for their coal, the Hudson's Bay men said to them, 'Oh, we paid you when we gave you those good blankets!' But those two chiefs knew that the man had said, 'The Queen will give you money.'"⁹⁴ (Arnett 2007, p. 191-2)

The detailed description of the circumstances and locale of the meeting make it very likely that it was the meeting of December 23rd, 1854. There was no mention of a sale of land, just of coal, on the basis that "much money" would be paid for it over time.

The second account arose out of testimony before the Royal Commission on Indian Affairs for B.C., established in 1912 under an agreement entered into by federal representative J.A.J. McKenna and B.C. Premier McBride that was "to settle all differences between the Governments of the Dominion and the Province respecting Indian lands and Indian Affairs generally in the Province of British Columbia". The Commission was made up of two federal commissioners, two provincial commissioners, and a fifth to be chosen by the other four. The Commission held hearings around the province, and transcripts were made of the testimony of the examination of witnesses, generally First Nations representatives and

⁹² This a reference to the large Snuneymuxw village right on the harbour, vacated between 1861 and 1862.

⁹³ This wording seems to indicate that the Snuneymuxw people were informed that they were dealing with the Crown not the HBC, which was going to "look after your people for all time."

⁹⁴ This is consistent with Latess' claim that the distribution of blankets at treaty meetings was not to be considered a "one-time" event.

government officials. Submissions at Nanaimo included that of Nanaimo Band member Dick Whoakum, who was 83 years old at the time, and who would have been 24 years old when the Treaty was signed. He is in fact one of the signatories of the Treaty. In sworn testimony before the Royal Commission in 1913,⁹⁵ he recalled a meeting with James Douglas:

I want to tell you people that I was amongst the first people who found coal in Nanaimo....⁹⁶

Two months later, Sir James Douglas himself came over to see where the coal was. Sir James Douglas said "I will buy this coal" but he said "I will not buy anything but the coal". "All the wood and the land is yours". "The land where the coal is, is yours, and the land up the River is yours."⁹⁷

When the fishing season came we used all to go up the River to live. The Indians that used to live here, their main home was at Departure Bay, at other times they lived on the Island,⁹⁸ and on Nanaimo River.

The Indians of this band have three homes. They draw the salmon from Nanaimo River, and they go to Departure Bay for curing the herrings. I told Sir James Douglas that these three places were our land. Sir James Douglas said "I don't take any land away from you at all. All these three places where you live at different times are yours". The promise that Sir James Douglas made with us, is being broken. We are being pushed off our land.⁹⁹ They are now stopping the Indians from cutting the wood and from taking the fish....

After making his statement, Whoakum was questioned by one of the Federal Commissioners, J.A.J.

McKenna:

Mr. McKenna: What do your people want today?

A. What we want is to get the land back or to get some settlement.

Q. You say that you and some other Indians brought down furs to Victoria, and also coal. Before that time, were there no white men here?

A. No there were no white men before that.

Q. Then afterwards Sir James Douglas came out?

A. Yes.

Q. And you made treaty with Sir James?

A. Yes. He said "the land is yours".

Q. And then he paid your people some money?

A. There was no money paid.¹⁰⁰

⁹⁵ BC Archives AddMss 1056, Cowichan, pp. 51-53.

⁹⁶ In 1852, the presence of coal seams at Nanaimo harbour was made known to the HBC by members of the Snunymuxw First Nation.

⁹⁷ At that time, the known coal seams were confined to the harbour area, and did not extend to the Nanaimo River.

⁹⁸ The "island" is Gabriola Island, which is very close to Nanaimo.

⁹⁹ According to Joseph McKay, in his 1888 letter, the purpose of the treaty was compensation, because "The Nanaimos had to surrender their principal village sites to make room for the mining operations carried on there."

¹⁰⁰ Technically, Whoakum is correct, blankets, not money, were distributed. Alternatively, Whoakum may have meant that the blankets were distributed for some other purpose.

Q. The Chiefs agreed that the rest of the land was open to Sir James Douglas, and the other people to come in?

A. There was no white man here.¹⁰¹

Q. But they agreed to allow Sir James Douglas and the others to come in?

A. By and by the white men came over and made their home here.¹⁰²

Whoakum's statement is largely consistent with the accounts of Latess, (as corroborated by Elliott and Bartleman) and Wyse. Whoakum was adamant that the treaty was only to arrange for coal rights and did not contain a cession of land. McKenna's questions were blunt and Whoakum's answers were equally blunt. The answers disclosed a keen awareness of the implications of McKenna's line of questioning. The statement and exchange are important because they directly address the issue of the terms of the treaty, and the First Nation version is provided by an eyewitness under oath. For once there is no problem with the rule against hearsay, and Whoakum's statement was subject to cross-examination, thus satisfying the 'best-evidence' rule.

Douglas' report on the Nanaimo treaty is consistent with his previous reports, and the two First Nations accounts are consistent with the previous examples. In this particular document Douglas may have wanted to make it clear that he was acting in his capacity of colonial governor and not as an agent of the HBC, given that the HBC intended to acquire title to a major portion (over 6,000 acres) of Snuneymuxw territory immediately upon conclusion of the treaty. Use of the Douglas Form may have been deemed impractical given that the subsequent conveyance would have recorded the HBC as both grantor and grantee. The Nanaimo treaty is the last of the series.¹⁰³

CONCLUSIONS

It should now be apparent that the written versions were intended by Douglas to fulfill the immediate goal of consolidating HBC interests, and the near-term goal of protecting First Nations against the impending arrival of aggressive and land-hungry settlers. Cole Harris has acknowledged (2002, p.23) that "Douglas was often inclined to speak somewhat differently on the same subject to different audiences",

¹⁰¹ Presumably Whoakum understood McKenna's reference to "the other people" to mean settlers, none of whom had arrived in Nanaimo by 1854.

¹⁰² Again, Whoakum is careful to point out that "the others" arrived later and simply "made their home here."

¹⁰³ There is a distinct possibility that Douglas entered into a fifteenth (oral) treaty with the Cowichan First Nation in 1861 (see Foster and Grove 2008), but no written version exists. The reasons for discontinuing the Treaty process are not clearly understood.

listing the Colonial Office, the board of management of the Hudson's Bay Company, and the secretary of state for the colonies as examples. Harris should have added the First Nations to his list, as Douglas also tended to 'speak somewhat differently' when addressing First Nations.

The view of settlers as to First Nation land rights is well described by Dr. Helmcken in an 1886 letter to the editor of the *Victoria Daily Colonist* (Helmcken 1886: 2), prompted when "A despatch of Sir James Douglas dated March 25th, 1861, and the answer of the Duke of Newcastle thereto, was published in The Colonist, and are triumphantly held up by some as a proof that the Indians haeld a legal title to the land." In the 1861 letter Douglas provided an interesting retrospective account of his policy with respect to acquiring "the native rights in the land":

As the native Indian population of Vancouver Island have distinct ideas of property in land, and mutually recognize their several exclusive possessory rights in certain districts, they would not fail to regard the occupation of such portions of the Colony by white settlers, unless with the full consent of the proprietary tribes, as national wrongs; and the sense of injury might produce a feeling of irritation against the settlers, and perhaps disaffection to the government that would endanger the peace of the country.

Knowing their feelings on that subject, I made it a practice up to the year 1859, to purchase the native rights in the land, in every case, prior to the settelement of any district; but since that time in consequence of the termination of the Hudson's Bay company's Charter, and the want of funds, it has not been in my power to continue it.

This has been taken by modern commentators as an acknowledgement by Douglas that the Vancouver Island First Nations possessed aboriginal title. However, in 1886 Helmcken took a different view. He quoted verbatim from Douglas' letter and invited the reader to "Now observe: Sir James does not state that the Indians have a title to the land, but that the native Indians have distinct ideas of property in land, that is to say Indian ideas, not legal ones." Helmcken opined that "Can anything be more plain than that in this way Sir James made treaties of amity and friendship and paid for them as a matter of policy!" As far as Helmcken was concerned, "It matters not how the papers were made out; the Indians not having any legal right in the land could not give any conveyance of land."

Helmcken's interpretation of Douglas' policy is consistent with that of McKay, and also that of colonial administrator Joseph Trutch, who in 1870 averred that the "agreements" made with "various families of Indians" in 1850 were only "for the purpose of securing friendly relations" and "certainly not in acknowledgement of any general title of the Indians to the lands they occupy" (1875, Appendix B: 11).

These opinions of settlers and colonial officials provide important, if unintended, support to the First Nation accounts, as they are in agreement that the Vancouver Island Treaties did not contain a surrender of land. However, the categorization of the Treaties as mere expressions of “amity and friendship” empties them of any substantive content. It also ignores the issue of the intent and effect (if any) of the promises contained in second half of the Douglas Forms.

All the First Nations accounts consistently deny the outright cession of their territory. Nor, according to these accounts, were First Nations simply looking for a continuation of existing trade arrangements. First Nation accounts clearly show an understanding that the whites were no longer a temporary phenomenon – they were more than mere guests. Support for the First Nations’ understanding of the Vancouver Island Treaties is provided by an independent observer, Richard Mayne, a British naval lieutenant whose ship, the *Plumper*, was stationed at Esquimalt from 1857 to 1860. His published account (1862) described a visit to Salt Spring Island, adjacent to the Saanich Peninsula, in response to reports that “some Indians had been troublesome there.” He found that “the Indians had done nothing more than tell the settlers occasionally, as Indians do everywhere, that they (the whites) had no business there except as their guests, and that all the land belonged to them” (p. 164).

While acknowledging that “the process of making the treaties...was faulty by any standard”, Harring (1998: 192) went on to conclude that “Even the fact that the chiefs signed blank papers does not alter their validity, as long as the words that were eventually added fairly recorded their oral agreement.” Of course, this paper has demonstrated that the words recorded on the treaties do not fairly record the terms of the oral agreement on which the treaties were founded. Fortunately, the completed templates are not the Vancouver Island treaties. Therefore, the discrepancy may impugn the written versions, but does not affect the validity of the oral treaties. As for the written text of those treaties, the close analysis of the extant documents, both colonial and First Nations, undertaken in this paper has served to undermine the status of the templates, and to enhance the stature of the First Nations accounts. As a result, the written versions and the gloss upon them provided by Douglas’ reporting letters should no longer be privileged. While the literature on the treaties has gradually taken First Nations accounts more and more into consideration, it may be worthwhile to go one step further and reverse the usual order of presentation, so that future accounts begin with the First Nations versions and end with a consideration of the Douglas Forms as extrinsic documents. Adopting a reverse order would remove the priority of the

standard Eurocentric view and demonstrate equal respect for the First Nations point of view. Of course, all treaty sources should be subject to equal scrutiny from this point forward.

What category of treaty has emerged from the analysis undertaken in this paper? Historical treaties with Indigenous peoples are usually placed into one or more of three categories: commercial, peace and goodwill, and cession. In the long history of treaties in Upper Canada, commercial treaties were the earliest form, often followed by peace and goodwill treaties and finally by treaties of cession (Miller 2009: 4-5). The Vancouver Island Treaties are consistently viewed by the Canadian courts and academic commentators as treaties of cession, containing ancillary promises by the Crown. However, the First Nations parties to these treaties have just as consistently argued that no cession of land was effected. Support for this interpretation was provided by contemporaries of Douglas—such as Dr. John Helmcken and Joseph McKay—who argued that the words of conveyance were of no importance and that the sole purpose of the treaties was to secure peace and goodwill. Of course, these men were arguing from the premise that the First Nations had no title to cede. First Nations elders such as David Latess, Joe Wyse and Dick Whoakum attempted to explain that the treaties were less than absolute surrenders of land and more than goodwill gestures. Their version represents a new, fourth category: agreements to share the land and its resources with the newcomers.

Which of the four labels best describes the terms negotiated by the parties in the 1850s? The question is particularly difficult to answer, because the creation of the treaties was attended by almost complete silence in the historical record. Only one colonist, Walter Colquhoun Grant, had arrived on the Island, but there is no record of his attendance at the meetings. The only missionary in Victoria at the time was an Oblate Father, Timothy Lemphrit, but, again, there is no record of his attendance. British and American naval vessels and merchant ships often stopped at Victoria, but there are no ship log entries or letters by officers or passengers mentioning the meetings. The nearest newspaper was in the Oregon Territory, so no journalists were present. One might have expected such colourful events to have been memorialized by a painting or sketch, but there is nothing. However, the data presented in this paper indicates that the version of the First Nations elders is the most apt, in which case it may be time for judges and scholars to re-examine the categorization of the Vancouver Island Treaties and many of the other Colonial treaties with Indigenous peoples.

REPORT 3: THE STONE FORT TREATY (TREATY 1)¹⁰⁴

by Aimée Craft

*My ancestors entered into sacred treaties to protect our land, our languages and our culture. They also agreed to share this land and its resources with all newcomers.*¹⁰⁵

INTRODUCTION

In the summer of 1871, over 1,000 Indian men, accompanied by women and children, assembled at Stone Fort, near the present-day city of Winnipeg, to make a treaty.¹⁰⁶ They were joined by their Métis cousins and some of the local settlers, who all wished to know “the policy of the government” in relation to the “quieting of Indian title” in Manitoba and the adjoining timber districts:

“On that day, the Indians from all the sections of the country to which the invitation extended were found present to the number of about one thousand. A considerable body of half-breeds and other inhabitants of the country were also present, the treaty.¹⁰⁷ In addition, disputes over the regulation of and access to natural resources arose almost immediately after the treaty was made and continue to this day. According to the written text of Treaty 1, the Anishinabe agreed to “cede, release, surrender and yield up” certain lands, as described in the text, in exchange for 160 acres of reserve land per family of five, for farming, an annuity payment of \$3 per person,¹⁰⁸ schools and farm tools.¹⁰⁹ The Anishinabe have disputed the assertion that Treaty 1 is a surrender of their

¹⁰⁴ For a more complete review of the Stone Fort Treaty, and particularly the Anishinabe perspective on the Treaty, see Craft 2010).

¹⁰⁵ Elder Elmer Courchene - <http://www.trcm.ca/learning.php> - Share the Land

¹⁰⁶ I use the terms “made” or “making” treaty to reflect the Anishinabe understanding that the Treaty is about far more than the written text of the agreement or the signing of the document.

¹⁰⁷ “Owe *niiwin*, the fourth one. *Gi-giigidowin* [your word, promise or vow]. *Giishin gegoo ashodaman* [If you make a promise] your word becomes sacred. *Gishtwaa*. It means sacred. Your word is sacred. And a promise is a promise. You can’t take it back. And a Treaty is that. That’s a promise that they made not only to themselves but also to the Creator. That we would keep this as long as the sun shines, the earth is green and the waters flow. *Gi-gii-ganawendaamin* [We kept it – we keep it]. *Gaawiin gi-gii-biigwananziimin* [We did not break it]. We keep it. We didn’t break that. Those words are sacred. It was a promise that we, owe *gi-gii-izhi-ganawaabamaanaaning gi-gii-zhi-misidotamaamin* [that we looked at them that way, that way I understood it]... I want to believe that we were fair and honourable when our people sat before the Creator on mother earth and the people across from them would be as fair as they were. And those side deals and side promises, they took them to heart because they believed in them. So, it’s very very important” (Ken Courchene, in Pratt et al. 2011: 29).

¹⁰⁸ This amount was increased to \$5 per person per year in 1875.

¹⁰⁹ Treaty No. 1, 1871 (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationery, 1957).

traditional territory, almost since the time pen touched paper. Were there different understandings of the treaty?

In 1873, Molyneux St. John, one of the witnesses to the Treaty 1 negotiations and former Toronto Globe reporter, wrote to the Deputy Superintendent of Indian Affairs, William Spragge:

There is no difference of sentiment amongst them on this point however remote from one another, their demands and assertions are alike; in every case the cry has been the same and there is not a shadow of doubt that when they left the Grand Council at the Stone Fort, they were firmly impressed with the idea that the demands which they had made had been with a few exceptions, granted... When Treaty 1 was under negotiation the spokesmen of the several Indian Bands enumerated the gifts and benevolence which they required from Her Majesty's Representative in return for the surrender of the Indian Country. Some of these were accorded; some refused but in the natural desire to conclude the Treaty, His Excellency the Lieutenant Governor and Mr. Commissioner Simpson assumed, as it afterwards proved too hastily that their distinctions and decisions were understood and accepted by the Indians... So the Treaty was signed, the Commissioner meaning one thing, the Indians meaning the other.¹¹⁰

The treaty made at Stone Fort, a Hudson's Bay Company (HBC) fur trade post also known as Lower Fort Garry, was between the Anishinabe¹¹¹ of Southern Manitoba and the Crown. The terms of the treaty relationship were worked out over nine days, in both conditions of rain and shine. The Anishinabe camp housed over 100 tents, assembled in a semi-circle outside the fort, with the Chiefs' lodges at the centre. According to contemporary accounts, there was a relaxed and comfortable atmosphere in the camp as the Anishinabe continued about their activities and interactions, including cooking, visiting and gambling.

Of the followers it must be said that they are apparently very comfortable. Most of their lodges are of birch bark, but a considerable number have good tents. Each lodge or tent has a fire in front or inside, where the Indian women are ever-lastingly baking bread or making tea. Any number of horses and dogs roam through the camp, and along in the afternoons one or more large crowds gathered near the tents; the sound of a tambourine, or the noise of a person hammering a frying pan with a piece of wood, accompanied by two or three persons chanting in a low tone, proclaim that gambling is going forward. A near approach to one of these groups will show the gamblers playing the moccasin game, or some other, with the stakes – generally clothing – lying close at hand.¹¹²

¹¹⁰ M. St. John to W. Spragge, February 24 1873. RG10, 3598, 1447, C10, 104.

¹¹¹ The Anishinabe consist of three nation groups: the Ottawa, Potawatomi and Ojibway (Ojibwa, Ojibwe). The Ojibway are also known as the Chippewa (mostly in the United States) or Saulteaux (a name given to the Ojibway settled near the rapids in Sault-Ste. Marie). In Manitoba, the Ojibway generally refer to themselves as either Anishinabe or Ojibway. I employ the term "Anishinabe" to refer to these groups.

¹¹² *The Manitoban* (1871), Winnipeg, Provincial Archives of Manitoba (as transcribed by the Manitoba Treaty and Aboriginal Rights Research Centre, 1970: 6. (note: all references are to the TARR transcript pages).

The formal negotiations took place outside the fort, with the Treaty Commissioner and Lieutenant-Governor seated under an awning, facing the Chiefs¹¹³ who were seated in chairs. The “Indians moved to meet the Commissioner en masse.”¹¹⁴

In this paper, I consider the written record of the negotiations over Treaty 1 in order to glean how the Anishinabe may have understood the substance of their agreement with the Crown. First, I recall the important features of the treaty negotiations, as reported in the contemporaneous written record, with particular attention to the elements of the negotiations related to lands and the relationship between the Crown and the Anishinabe. Secondly, I then relate the negotiations to concepts of Anishinabe normative ordering, which explain the unique and distinct perspective that the Anishinabe had with respect to the treaty relationship that was developed in 1871.

Many factors contributed to the making of the treaty with the First Nations that lived in the area of Treaty One, referred to here simply as Southern Manitoba. The collision of the Anishinabe experience with the HBC for over a century and half, the recent influx of White settlers and the Red River Resistance, combined with the need of local First Nations communities to secure a future for their children and grand-children, resulted in particular circumstances that allowed for the making of a treaty of alliance between the Anishinabe and the Queen (as the embodiment of the Crown). Although I canvass only briefly the various factors that induced the Anishinabe to enter into treaty, these factors remain an important sub-text to understanding the negotiations that took place. Prior to Treaty 1, there was an established history of inter-nation¹¹⁵ and trade law that existed and was in effect, distinct from European or Canadian laws. I am not intending to expand on the extent of the Anishinabe legal system as it existed

¹¹³ The written text of the Treaty lists the following Chiefs as representatives of the Anishinaabe groups: *Mis-koo-kenew or Red Eagle* (Henry Prince): land on both sides of the Red River beginning at the South line of St. Peter’s Parish; *Ka-ke-ka-penais or Bird Forever*: land beginning at the mouth of the Winnipeg River above Fort Alexander; *Na-sha-ke-penais or Flying down bird*; *Na-na-wananaw or Centre of Bird’s Tail*; *Ke-we-tayash or Flying round*; *Wa-ko-wush or Whip-poor-will*: land on the Roseau River; and *Oo-za-we-kwun or Yellow Quill*: land on the south and east side of the Assiniboine river.

¹¹⁴ *The Manitoban*, p. 8.

¹¹⁵ I use the term “inter-nation” rather than “international” to avoid the connotations associated with international law.

at the time of treaty. Rather, I attempt to extricate from the written record¹¹⁶ reflections of Anishinabe law.¹¹⁷

The contemporaneous written record of the Treaty negotiations includes speeches, official correspondence and reports of the negotiations prepared by Lieutenant-Governor Adams Archibald and Treaty Commissioner Wemyss Simpson.¹¹⁸ Commissioner Simpson resigned after the negotiation of Treaties 1 and 2 and was replaced by Alexander Morris, who negotiated Treaties 3, 4, 5 and 6. Morris was responsible for the implementation of Treaty One, including the negotiation and inclusion of the “outside promises” into Treaty 1 in 1875. His report on *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* is helpful in understanding some of the context and parts of the treaty negotiations, including the relationships that were developing in the West.¹¹⁹ In reference to Treaty 1, Morris relies on Archibald’s dispatches and Simpson’s report of negotiations “embracing as it does a full and graphic narrative of the proceedings which took place at the negotiation of these treaties, and of the difficulties which were encountered by the Commissioner, and the mode in which they were overcome.”¹²⁰ The newspaper *The Manitoban* also closely followed the treaty talks and published reports on the negotiations for four consecutive weeks.¹²¹ The newspaper reports extensively detail

¹¹⁶ *The Manitoban* newspaper reported on the Treaty 1 negotiations, attempting to relay the (translated) words of the Indian Chiefs and the Commissioners at Treaty. Although somewhat helpful, what has been recorded or “transcribed” in *The Manitoban* is a nuanced account of what was said, through the lenses of the interpreters and the reporter’s European/Colonial perspective. The reporter often dismissed the perspectives that were brought forward by the Chiefs. “Several chiefs and warriors having spoken with a good deal of flourish and vehemence without uttering anything worth noting – pretty much as members of Parliament sometimes do... A good deal of parley ensued, in the course of which the Indians made new and extravagant demands, while the Commissioner and His Excellency reasoned with them, and refused to give way any more... Another meeting and more speechifying – the Indians continuing their extravagant demands as before” (*The Manitoban* 1870: 30; 1871: 23, 37).

¹¹⁷ I acknowledge that this project cannot achieve a fulsome understanding of the Anishinabe legal perspective, which would require an extensive project relating to the oral history relating to the Treaty and Anishinabe law.

¹¹⁸ Note that the Treaty Commissioner, Wemyss Simpson, had worked for the HBC for 23 years and his cousin, George Simpson was a Governor of the HBC. It is reported that Simpson witnesses the Robinson-Huron treaty negotiations.

¹¹⁹ According to Morris, the goal of his report was to “preserve, as far as practicable, a records of the negotiations on which they were based, and to present to the many in the Dominion and elsewhere, who take a deep interest in these sons of the forest and the plains, a view of their habits of thought and speech, as thereby presented, and to suggest the possibility, nay, the certainty, of a hopeful future for them.”

¹²⁰ Morris 1991: 32.

¹²¹ *The Manitoban*. In the last issue, the reader was encouraged to preserve copies of the treaty account “inasmuch as it is the only narrative of a Canadian Indian treaty to be found in the files [sic] of any Canadian newspaper, and in after years the description will certainly be regarded as very valuable” (p. 39).

parts of the negotiations as observed by an anonymous reporter, who relied on one of the treaty facilitators, Hon. James McKay, as an informant. This publication “despite its limitations and obvious bias, provides an adequate notion of the ebb and flow of discussion, the unease of the Indians, and the evolution of their determination to force concessions from the government. Unfortunately the account becomes sketchy near the end...”¹²² I also rely on the oral history of Treaty 1, in some cases as it has been told to me, and in others as it has been recorded and/or written in books, including a recent volume on treaty perspectives as told by Manitoba Elders.¹²³ Of course, reliance on any of the versions of the negotiations must take into account the specific challenges of bilingual and bicultural translation. Other limitations include gaps in the record resulting from the priority and weight placed on particular events or words, and the particular perspective, background and biases of each account.¹²⁴

Not unlike the reports of the negotiations themselves, I do not detail the entirety of the negotiation, with two notable exceptions : treaty promises relating to education and health. Rather, the aim of this paper is to better understand the Anishinabe normative world and how that shaped the understanding and negotiation of the treaty relationship, focussing on the concepts of legal relationships between the Anishinabe, the Creator, the land, and the Crown. As explained by Harry Bone:

The first three concepts, the Creator, the land, and the people were intrinsic to our belief systems prior to our relations with the newcomers. They were stated by our leaders of the past echoed down to the Treaty negotiations and passed on to us from our Elders.

THE NEED TO SECURE ALLIANCE

Following the Métis uprising in Manitoba in 1869–1870, in which the Métis citizens of Red River protested the purchase of Rupert’s Land and its transfer to Canada, it was clear that the Indigenous populations in Western Canada were a strong force that the Government of Canada had much difficulty controlling from afar. There was significant Indian unrest following the end of the HBC rule and the Red

¹²² Hall 1984: 324.

¹²³ See, for example, Pratt et al. 2011).

¹²⁴ For example, I have identified a gap in Commissioner Simpson’s report where he refers to “questions and answers”, which took up a considerable period of negotiation time and which are not detailed in the written record, nor, to my knowledge, evidenced in the oral history. Here’s the relevant passage: “Next morning the Indians, through one of their spokesmen, declared in presence of the whole body assembled, that from this time they would never raise their voice against the law being enforced. After the order of release, the Chiefs and spokesmen addressed us, questions were asked and answered, and some progress made in the negotiations. Eventually, the meeting adjourned till this morning at ten o’clock” (Morris 1991: 34).

River uprising. Louis Riel's list of grievances had included a demand for Indians treaties. Treaty Commissioner Alexander Morris describes this context as follows:

The predecessors of Canada – the Company of Adventurers of England trading into Hudson's Bay, popularly known as the Hudson's Bay Company – had for long years, been eminently successful in securing the good-will of the Indians – but on their sway, coming to an end, the Indian mind was disturbed. The events, that transpired in the Red River region, in the years 1869-1870, during the period when a provisional government was attempted to be established, had perplexed the Indians. They moreover, had witnessed a sudden interruption into the country of whites from without.¹²⁵

The Anishinabe were well aware of changing circumstances and the need to negotiate a peaceful agreement in relation to the land. Despite past treaties,¹²⁶ the Anishinabe land tenure in what had recently become the Province of Manitoba was not as secure as the Indians would have liked.¹²⁷ The Indians "were full of uneasiness, owing to the influx of population, denied the validity of the Selkirk Treaty, and had in some instances obstructed settlers and surveyors."¹²⁸

Tensions were evident between First Nations and settlers at this time, particularly in relation to land issues. In 1868, for example, the Portage band had warded off settlers who were taking timber from their lands. Hon. James McKay¹²⁹ was sent to negotiate a three-year agreement with Chief Yellow Quill, later known as the Rat Creek Treaty, in anticipation of a full Treaty.¹³⁰ During the winter prior to Treaty, Chief Moosooks of High Bluff wrote to the Lieutenant-Governor, complaining that settlers had been cutting wood in his territory.¹³¹ He included with his letter a written warning and posted notices on the land forbidding the cutting of wood by settlers:

Whereas the Indians' title to all lands west of the fifty mile boundary line at High bluff had not been extinguished and whereas these lands are being taken up and the wood thereon

¹²⁵ Morris 1991: 9.

¹²⁶ See, for example, the Selkirk Treaty, negotiated in 1817, which allowed for white settlement of the river lots along the Red River, in exchange for an annual rent of 100 pounds of tobacco to each nation. After Selkirk's death, the treaty was not renewed and payments ceased, the land having been sold back to the HBC by Selkirk's successors in 1836.

¹²⁷ Peguis notes also that in 1859 fellow Chiefs Makasis, Ke-kisimakirs, and Wa-waskasis all sent letters to the Aborigines Protection Society in London and to Mr. Isbister about the land question in the West. A full account of this was published in the *Nor'Wester*, June 1, 1861.

¹²⁸ Morris 1991: 25-26.

¹²⁹ "James McKay, a member, at that time, of the Executive council of Manitoba, and himself a half-breed intimately acquainted with the Indian tribes, and *possessed of much influence over them.*" (Morris 1991: 25, emphasis added). McKay was influential in securing Treaty One and many of the later treaties.

¹³⁰ Alexander Morris to the Minister of the Interior. August 18, 1875. RG 10, 3624, 5217-1. C10, 109.

¹³¹ Chief Moosooks to A. Archibald, December 17, 1870. Archibald Papers, M.G.12.A1, P.A.M.

cut off by parties who have no right or title thereto, I hereby warn all such parties that they are fringing on lands that as yet virtually belong to the Indians.¹³²

Indians further west restricted all access to their territories: “the natives around Riding Mountain (the finest region in the country) have distinctly forbidden anyone to approach their territory until the treaty has been consummated.”¹³³ Those in the immediate area of settlement, such as Chief Peguis and his son Henry Prince, published an “Indian Manifesto” in the *Nor’Wester* newspaper to the effect that anyone who cultivated Indian land would have to make annual payment as acknowledgement of the Indians’ title to the land.

The settlers were uneasy about the uncertainty that reigned in the absence of a treaty with the Crown.

Amongst the settlers, also, an uneasy feeling existed, arising partly from the often-repeated demands of the Indians for a treaty with themselves, and partly from the fact that certain settlers in the neighborhood of Portage la Prairie and other parts of the Province, had been warned by the Indians not to cut wood or otherwise take possession of the lands upon which they were squatting. The Indians, it appeared, consented to their remaining on their holding until sufficient time had been allowed for my arrival, and the conclusion of a treaty; but they were unwilling to allow the settlers the free use of the country for themselves or their cattle.¹³⁴

The hope was that a treaty would be concluded speedily.

When the news reached the people of the Settlement that the Indian Commissioner had arrived, everyone breathed the more freely, more especially as the Indian tribes for the last few months have been evidently restless, and it was taken for granted that a permanent [sic] treaty would be entered upon at once, and peace and comfort secured.¹³⁵

At the idea of a temporary and tentative Treaty, *The Manitoban* published an editorial that bemoaned delay and uncertainty: “The Indians are confident that now a permanent treaty is to be made, and are ready to make it; why then not make it at once, and have done with it?... Why keep the Settlement in suspense; why place the lives of the people in jeopardy by such tardiness; and why leave the great impediment to immigration removed?”¹³⁶

¹³² Chief Moosoos to A. Archibald, Dec 17 1870. MG 12 AI P.A.M.

¹³³ *The Manitoban*, Saturday July 29, 1871.

¹³⁴ Morris 1991: 27.

¹³⁵ *The Manitoban*, Saturday July 22, 1871.

¹³⁶ *The Manitoban*, Saturday July 22, 1871.

Upon his appointment and arrival in Western Canada, Adams Archibald, the Lieutenant-Governor of Manitoba and the Northwest Territories, met with the Anishinabe in the fall of 1870. The Anishinabe were requesting a Treaty as they were anxiously awaiting the opportunity to discuss the land issues in the face of continuing settler encroachment.¹³⁷ Commissioner Simpson reported that “the Indians were anxiously awaiting my arrival, and were much excited on the subject of their lands being occupied without attention being first given to their claims for compensation.”¹³⁸ Archibald had promised to make a Treaty with them the following year and sent them home with ammunition “to enable you to gain a livelihood during the winter by hunting.”¹³⁹ Knowing that relations with the Indians was an issue of great significance to Canada, the Commissioners undertook the “work, of obtaining their good will, by entering into *treaties of alliance* with them.”¹⁴⁰ As indicated by Commissioner Morris in his report to The Right Honourable Earl of Dufferin: “One of the gravest of the questions presented for solution by the Dominion of Canada [upon the transfer of Rupert’s Land], was the securing the alliance of the Indian tribes, and maintaining friendly relations with them.”¹⁴¹

In 1871, Mr. Wemyss McKenzie Simpson was appointed as Indian Commissioner by the Privy Council of Canada because of “the necessity of arranging with the bands of Indians inhabiting the tract of country between Thunder Bay and the Stone Fort, for the cession, subject to certain reserves such as they should select, of the lands occupied by them”.¹⁴² As Simpson explained to the Indians gathered at the Stone Fort:

It is now nearly thirty years since I came first among you, and I have taken a great deal of interest in you ever since.... Within the last four years I have sat in Parliament of the Queen, in Ottawa, and ever since I have held that position, I have tried to impress on the Government of the Queen the great necessity that existed for her to treat with all her Red subjects, and make some kind of arrangement by which they would understand exactly the position they held in this Territory for the future.¹⁴³

¹³⁷ Morris 1991: 25.

¹³⁸ Morris 1991: 37.

¹³⁹ Morris 1991: 27.

¹⁴⁰ Morris 1991: preface.

¹⁴¹ Morris 1991: 9, 10.

¹⁴² Morris 1991: 25.

¹⁴³ *The Manitoban*, p. 12.

Despite his assurances that he had “been present at a great many Indian treaties in Canada”, Simpson had been unsuccessful at securing the Treaty with the Anishinabe at North-West Angle in July of 1871.¹⁴⁴ Under pressure to make treaty during the summer of 1871, Simpson continued on to Manitoba where he met with the Lieutenant-Governor of Manitoba, Adams Archibald, and other officials, including James McKay. Collectively they agreed to treaty with the Indians for lands beyond the boundaries of the Province “as were required for immediate entry and use...”¹⁴⁵ Simpson issued proclamations to meet on July 25th at Lower Fort Garry and August 17th at Manitoba Post. Knowing that these treaties would set the stage for the future treaties that would open up western Canada to settlement, and the national railway, Simpson was determined to enter into treaty fairly. In a letter from Lieutenant-Governor Archibald to the Secretary of State, he explained:

I look upon the proceedings, we are now initiating, as important in their bearing upon our relations to the Indians of the whole continent. In fact, the terms we now agree upon will probably shape the arrangements we shall have to make with all the Indians between the Red River and the Rocky Mountains. It will therefore be well to neglect nothing that is within our power to enable us to start fairly with the negotiations.¹⁴⁶

At the first day of negotiations, Lieutenant-Governor Archibald opened the discussion by recalling his promise of the previous fall to enter into a treaty with the Queen:

I was charged by your Great Mother, the Queen, to tell you that she had been very glad to see that you had acted during the troubles [referring to the Red River Resistance] like good and true children of your Great Mother. I told you also that as soon as possible you would all be called together to consider the terms of a treaty to be entered into between you and your Great Mother. I promised that in the spring you would be sent for, and that either I, or *some person directly appointed to represent your Great Mother*, should be here to meet you, and notice would be given you when to convene at this place to talk over *what was right to be done*.¹⁴⁷

Henry Prince, the son of Chief Peguis, who had entered into the Selkirk Treaty on behalf of his band, had been the most insistent to have the Treaty made. He and his members, from St. Peter’s Indian Settlement, were the most numerous group present at Treaty. Prince recalled his loyalty to the Queen and recounted his refusal to participate in the Red River Rebellion the previous year: “[A]ll last winter I

¹⁴⁴ Treaty 3 was later made with these same bands by Commissioner Morris in 1873.

¹⁴⁵ Morris 1991: 26.

¹⁴⁶ Morris 1991: 32.

¹⁴⁷ Morris 1991: 27, emphasis added.

worked for the Queen... My people had nothing to do with it and no dark-skinned man had anything whatever to do with it.”¹⁴⁸

Based on the uncertainty of title and relationships between settlers and Indians in relation to land, the consensus was that issues of land and access to resources needed to be dealt with, on an urgent basis. Given the need for clarity, negotiations were entered into, largely based on Anishinabe protocols and practices, as had been employed in past treaty relationships, including with the fur trade companies. The Treaty 1 negotiations build on existing relationships with the HBC and fur traders, as will be detailed below.

BUILDING ON SOLID FOUNDATIONS: RELATIONSHIPS AND PROTOCOLS

For over a century and a half, the Anishinabe had interacted with the fur traders and developed systems of kinship and trade grounded in Anishinabe values and customs. The HBC adopted the Anishinabe systems of kinship and reciprocity and conducted its trade relationships in accordance with Anishinabe protocols. Treaty Commissioner Simpson relied on the existing relationship and the physical location of the Fort to ensure fruitful negotiations.¹⁴⁹ Similarly, Commissioner Robinson had used the services of the HBC in his negotiations with the Anishinabe of Lake Huron and Lake Superior in 1850:

I have much pleasure in acknowledging the valuable assistance afforded me by all the officers of the Honorable the Hudson’s Bay Company resident on the lakes; and the prompt manner in which their Governor, Sir George Simpson, kindly placed their services at my disposal.¹⁵⁰

The fact that the Treaty negotiations took place at an HBC fort indicates a continuance of the relationship developed with the HBC.

The past relationship with the HBC and the location of the negotiation, along with the assistance of HBC officers, informed Anishinabe expectations in relation to how they were to be treated in the negotiations and in the relationship of alliance that was being formed. In a sense, the Treaty 1 negotiations were

¹⁴⁸ Notes of an interview between the Lieutenant Governor of Manitoba and Henry Prince, Miskookenew, Chief of the Saulteux (sic) and Swampies. September 13, 1870. Archibald Papers, MG12.A1 P.A.M.

¹⁴⁹ Note that the July 1871 unsuccessful attempts at negotiating with the Anishinabe at North-west angle did not take place at an HBC fort.

¹⁵⁰ Morris 1991: 21.

riding on the coattails of the HBC relationship. In addition to building on the existing relationships with the HBC, the demonstrated practices of negotiation of treaties between the Crown and the Anishinabe informed the making of Treaty 1. Each of the treaties between the Anishinabe and the Crown set the table for the negotiations, building upon the principles established in the Royal Proclamation of 1763. For example, the Niagara treaty was conducted, at least in part, in accordance with Anishinabe protocols and laws. This continued in later treaty making. In particular, the non-interference and mutual assistance that are illustrated by the Covenant Chain Belt and the Two Row Wampum Belts help further understand the perspective that the Anishinabe brought to the Treaty.

The mutual reliance of the treaty parties on Anishinabe protocols, or procedural law, invoke substantive Anishinabe legal principles that informed the development of the Treaty 1 relationship. Below are some of the protocols or procedural norms employed in the Treaty 1 negotiations that invoked elements of substantive Anishinabe laws. Whether or not the application or extent of those laws was known or understood by the Crown representatives, they informed the Anishinabe understanding of the normative obligations resulting from the invocation and adherence to protocols.

WAITING FOR THE OTHERS

While the negotiations were set to begin on July 25th, they did not commence until two days later, due to the late arrival of some of the bands. Although some preliminary discussions took place with those who had arrived, those present would not agree to negotiate without the others, as they were not empowered to speak for them. For example, “Henry Prince said that he could not then enter upon any negotiations, as *he was not empowered to speak or act for those bands of Indians not then present.*”¹⁵¹ Once all of the bands were represented, the negotiations began¹⁵²:

The Indians were informed as to what they had been called together for, and told that the Government of the Dominion were now ready to commence negotiations for extinguishing the Indian title to the lands in the Province. On the part of the Indians, it was stated that they were not ready to open a Treaty, as a large number of the tribes – those from the upper country – were not present.¹⁵³

¹⁵¹ *The Manitoban* at p. 35.

¹⁵² Morris 1991: 27.

¹⁵³ *The Manitoban*, July 29, 1871 – special correspondence of the Manitoban, Lower Fort Garry, July 26, 1871.

Simpson equates the delay with jealousy between the bands in relation to their communication with the Crown:

Amongst them, as amongst other Indians with whom I have come in contact, there exists great jealousy of one another, in all matters relating to their communications with the officials of Her Majesty and in order to facilitate the object in view, it was most desirable that suspicion and jealousy of all kinds should be allayed.¹⁵⁴

In my view, a more robust understanding of this protocol suggests that the Anishinabe that first arrived at the Stone Fort adhered to principles of autonomy of each band and non-interference in the other's affairs. This non-interference can be equated with a respect for the jurisdiction of each band. Henry Prince explained that when he did things he did them for the benefit of all Indians but acknowledged the limits of his jurisdiction by explaining that his authority extended only "as far as Fort Garry":

Whatever I do, I do it for all the Indians. I have done it always for all the Indians ever since my father spoke form them (at Lord Selkirk's treaty). When I want to speak about my father I speak loud, and am always glad to speak about him, but whenever I get to say anything, my voice only goes as far as Fort Garry.¹⁵⁵

Decisions were made by process of consultation with those affected within the band. For example, with "regard to the reserve, the Indians themselves are always consulted as to where they will want it – whether all in one place, or in several."¹⁵⁶ Where decisions had to be made which would have an impact beyond the band, the Chiefs met in council:

In their manner of expressing themselves, indeed, they make use of a great deal of allegory, and their illustrations may at times appear childish enough, but, in their actual dealings, they are shrewd and sufficiently awake to their own interests, and, if the matter should be one of importance, affecting the general interests of the tribe, they neither reply to a proposition, nor make on themselves, until it is fully discussed and deliberated upon in Council by all the Chiefs...¹⁵⁷

At one point in the negotiation, when asked whether they wanted reserves in one place or several, Chief Kasias responded that the "chiefs must consult with each other and would reply next morning".¹⁵⁸ When one chief stated at the negotiations that he would enter into the treaty if the annuity were increased, he was immediately corrected by the other chiefs. The Chief then clarified that "he only spoke for his own

¹⁵⁴ Morris 1991: 38.

¹⁵⁵ *The Manitoban*, p.43

¹⁵⁶ *The Manitoban*, p. 21.

¹⁵⁷ Canada, Parliament, Sessional Papers, 1867-68, no. 81, p. 28.

¹⁵⁸ *The Manitoban*, p. 21.

camp fire.” These protocols were recognized and accepted by the Commissioners, who agreed to wait two days for the others to arrive, all the while feeding those who had assembled.

REMOVING THE DARK CLOUD

Once the Commissioners had made their opening remarks on the first day, the second day commenced with an expression of discontentment that would shadow the negotiations. Morris observed that the Indians, “on being asked to express their views, “stated that there was a cloud before them which made things dark, and they did not wish to commence the proceedings till the cloud was dispersed.”¹⁵⁹ Four of their men had been imprisoned at the fort for breach of contract for failing to fulfill their terms of employment with the HBC. Chief Ayee-ta-pe-pe-tung explained:

I can scarcely hear the Queen’s words. An obstacle is in the way. Some of my children are in that building (pointing to the jail). That is the obstacle in the way which prevents me responding to the Queen’s words. I am not fighting against law and order; but I want my young men to be free, and then I will be able to answer. I hold my own very sacred, and therefore, could not work while my child is sitting in the dark.”¹⁶⁰

Morris wrote that the “Lieutenant-Governor, as a matter of favour, ordered the release of these prisoners, *and the sky became clear.*”¹⁶¹ Although Archibald explained to the Secretary of State in a letter that he made it clear that he was releasing the four men as a favour, on behalf of the Queen,¹⁶² there is an adherence to a protocol of starting things “in a good way,” with no ill feeling towards the other and in respect of each other’s responsibilities and jurisdiction over their own people. The Anishinabe asserted that imprisonment was not part of their law. The Lieutenant-Governor, pushing back against this strong assertion, released the prisoners as a matter of favour, but not without first confirming that the Anishinabe did not disregard White law.

Let us finish this Treaty fairly, and then everything will go on in your own way. We are going to make a treaty with the Queen, and want to clean everything away from the ground that it may be clean. We are going to work and will work better if every obstacle is cleared away. I am not defying the law, but would wish to have the Saulteaux at present in jail, liberated.”¹⁶³

The Lieutenant-Governor responded:

¹⁵⁹ Morris 1991: 30.

¹⁶⁰ *The Manitoban*, 19.

¹⁶¹ Morris 1991: 31, emphasis added.

¹⁶² Morris 1991: 34.

¹⁶³ *The Manitoban*, p. 19.

I stated that the Queen knew no distinction between her subjects. If a man does wrong, whether white man or an Indian, he had to suffer for it. If a white man makes a bargain with an Indian and does not fulfil it, the Queen will punish the white man. If, on the other hand, an Indian does wrong to an Indian or white man, the law is the same; he will be punished. I wish you to understand that all men, whether white or Indian, must obey the law.¹⁶⁴

The Lieutenant-Governor asked if the Indians “were under the impression that they were liable to the law”.¹⁶⁵ The report indicates that Ayee-ta-pe-pe-tung “made a predatory flourish about Indian lands, and then came to the point...” It is interesting that the Chief raised land issues in response to what is evidently a jurisdictional question. The Lieutenant-Governor then granted the release “as a matter of favour, not as a matter of right.”¹⁶⁶ This can be seen as one example of mutual recognition of difference in the area of criminal law, but jurisdiction over land may have been explicitly excluded by the Chief in his response.

Gifting and Feasting

It is customary for the Anishinabe to give gifts to secure relationships or when they ask something of another. As had been the practice of the HBC over the years, and of the Crown in past negotiations with the Anishinabe in the context of the treaty negotiation, gifts were presented at Treaty One. In his correspondence to the Secretary of State, several months after the Treaty negotiations, Simpson explained:

“I fear we shall have to incur a considerable expenditure for presents of food, etc., during the negotiations; but any cost for that purpose I shall deem a matter of minor consequence.”¹⁶⁷

“All the collateral expenses, therefore, of this year, including dresses, medals, presents to the Indians, etc., etc., will not appear in the expenses attending during future payments.”¹⁶⁸

While waiting for the other bands to arrive on the first and second day, an opening ceremony was conducted with dancing and drumming, to call on the spirit to guide the proceedings and to establish the parameters of the negotiation. A correspondent for *The Manitoban* described the scene:

¹⁶⁴ *The Manitoban*, pp. 19-20.

¹⁶⁵ *The Manitoban*, p. 19.

¹⁶⁶ *The Manitoban*, p. 20.

¹⁶⁷ Morris 1991: 32.

¹⁶⁸ Morris 1991: 42.

In the meantime, much of the Indians had arrived, gathered inside Fort Garry to go through some war dances. The performances, between ribbons, feathers, paint and clothing, exhibited all the colors of the rainbow. There were two orchestras, half women and half men, one set playing for one style of dancing, and the other for another and very different one. The Band and performers were all seated on the grass, and the Commissioner, Lieut.-Governor and party, and a great crowd formed the spectators. Some of the chiefs and braves were in the most fashionable of dress – that is, dressed as little as possible; having merely breechclouts on; others had buffalo horns, etc., on their heads, while bears' claws, and similar remembrances were plentifully scattered through the group. They danced, told tales of their war prowess and battle wounds by turns and finally on sly old brave drew down the applause and laughter of the audience and performers by gravely narrating this experience of a similar scene on the Missouri, where the Ogimow, as a grand finale, gave his red brother to drink the strongest tea out of the biggest description of kettle. There was no resisting the shout of laughter which followed this hint, and we have no doubt the Commissioner satisfied the cravings of the painted warrior.¹⁶⁹

The dance was meant as an introduction to the parties, in accordance with Anishinabe custom, and the role and reputation of the "Chiefs and braves." The "sly old brave" told the story of hosting which was a clear indication as to how the Anishinabe expected to be treated in the negotiations—as they had been in the past—with provisions made for them for the duration of the negotiations. While waiting for all of the bands to arrive, the Commissioners fed those who were assembled, at significant cost. They also provided food during the entirety of the negotiations, recognizing that if they were not feeding those assembled, that they would likely leave to hunt and gather.

The Anishinabe cannot let another go hungry; the Anishinabe feed their guests. The Anishinabe demanded the same of the Commissioner who had invited them to the treaty negotiations:

Is it not the wish of our Great Mother that her children should be fed on more than one kind of provision? Is it her wish that this day her children should go to the hunting ground to bring in fresh meat?

The Commissioner took the hint, and promised to slay some oxen.

The conference then adjourned for a couple of hours.¹⁷⁰

The adherence to the protocol of feasting one's guests has a deep normative resonance with the Anishinabe. It entailed a respect for the Anishinabe who had been invited to the negotiations, and the

¹⁶⁹ *The Manitoban*, p. 8.

¹⁷⁰ *The Manitoban*, p. 26.

obligations that the Crown had in hosting the negotiations. It confirmed that there was a relationship with the Crown and that the matter was being taken seriously.

The Pipe

Although the written record does not contain an explicit reference to a pipe ceremony, the pipe and the tobacco were recognized by the Commissioner as being important to decision making. When the Commissioner asked the Anishinabe to select their spokesmen or “representatives of the tribe”, he “promised to send some tobacco to the camp, so that they might smoke over this matter and arrive at a decision that evening.”¹⁷¹ The pipe and the pipe ceremony are very sacred to the Anishinabe. The pipe ceremony is conducted to ensure peaceful dealings, secured either between humans or between the Anishinabe and the spirit.

The knowledge shared by the Elders tell us about the Creator’s laws and sacred teachings. In the seven principles, the first belief is that there is only one Creator; the second belief is that we have a sacred special relationship with the land; the third belief is that we are all human people; the fourth belief is that we have a language; the fifth belief is that we have our culture and traditions through ceremonies; the sixth belief is that we have a history; and the seventh belief is that we are able to look after ourselves through our own forms of government. What this means is that the pipe is pointed in the seven directions during ceremony – to the Creator, to the land, to the people, and the four directions as represented by our languages, cultures, history and government. Each of these directions also have a specific teaching.¹⁷²

The Anishinabe would not have entered such important negotiations without relying on the pipe to provide guidance and connection to spirit. By invoking the spirit, a solemn pledge to uphold any of the commitments made would have been confirmed. Individuals were charged with the responsibility to remember every detail of what was agreed to. Simon Dawson had advised Ottawa about the Anishinabe and their ability to recall details of agreements and to observe their commitments.

At these gatherings it is necessary to observe extreme caution in what is said, as, though they have no means of writing, there are always those present who are charged to keep every word in mind. As an instance of the manner in which the records are in this way kept, without writing, I may mention that, on one occasion, at Fort Frances, the principal Chief of the tribe commenced an oration, by repeating, almost verbatim, what I had said to him two years previously...

¹⁷¹ *The Manitoban*, p. 15.

¹⁷² Harry Bone, in Pratt et al. 2011: 111-112.

For my own part, I would have the fullest reliance as to these Indians observing a treaty and adhering most strictly to all its provisions, if, in the first place it were concluded after full discussion and after all its provisions were thoroughly understood by the Indians, and if, in the next, it were never infringed upon by the whites, who are generally the first to break through Indian treaties.¹⁷³

The promise and agreement of treaty was made with the creator as a third party to it and therefore cannot be breached; this is the foundation for the Anishinabe assertion that the treaty cannot be “thrown out” or reneged on.

Although serious trouble has from time occurred across the boundary line, with Indians of the same tribes, and indeed of the same bands as those in Manitoba, there is no reason to fear any trouble with those who regards themselves as subjects of Her Majesty. Their desire is to live at peace with the white man, to trade with him, and, when they are disposed, to work for him; and I believe that *nothing but gross injustice or oppression will induce them either to forget the allegiance which they now claim with pride, or molest the white subjects of the sovereign whom they regard as their Supreme Chief.*¹⁷⁴

Adherence to these protocols can be seen to have invoked substantive expectations and obligations from the Anishinabe perspective. From ceremonial and behavioural protocols, such as waiting for all of the parties to arrive, releasing prisoners, feasting, offering tobacco and smoking the pipe, substantive principles of Anishinabe law became part of the treaty negotiations. The Anishinabe approached treaty in accordance with their normative obligations of non-interference in each others affairs, respect for territory and jurisdiction and obligations in relation to the sacred nature of agreements made in ceremony. In addition, normative obligations related to the Queen’s adoption into a kinship role of mother informed the expectations that the Anishinabe had about how the negotiations would be conducted (fairly) but also substantively in terms of the obligations of love, kindness and care.

The Queen’s Words and Promises

The Anishinabe, particularly those further east, and as early as the 18th century, had relationships of alliance with British Kings. After Queen Victoria’s young ascension to the throne at the age of eighteen, she became the first female monarch to negotiate a treaty with Indians in what is now known as Canada. Although she was Queen at the time of the Robinson Superior Treaty (1850), Robinson Huron Treaty (1850) and Manitoulin Island Treaty (1862), these were concluded by the Treaty Commissioners on

¹⁷³ Canada, Parliament, Sessional Papers, 1867-68, no. 81, p. 28.

¹⁷⁴ Morris 1991: 43, emphasis added.

behalf of the Queen.¹⁷⁵ At the Treaty 1 negotiations, both the Commissioners and the Anishinabe referred extensively to the Queen as mother to the Anishinabe. As stated in the text of the treaty itself, the agreement was made “between Her Most Gracious Majesty the Queen of Great Britain and Ireland... and the Chippewa and Swampy Cree Tribes of Indians... inhabitants of the country within the limits hereinafter defined and described.”¹⁷⁶

At the Treaty 1 negotiations, much reference was made to the Queen in kinship terms, as a relative: the “Great Mother,” by both the Crown representatives and the Anishinabe.

Your Great Mother cannot come here herself to talk with you, but she has sent a messenger who has her confidence. Mr. Simpson will tell you truly all her wishes.

If you have any questions to ask, ask them, if you have anything you wish the Queen to know, speak out plainly.

When you hear his voice you are listening to your Great Mother the Queen, whom God bless and preserve long to reign over us.¹⁷⁷

Given the significance of kinship relationships amongst the Anishinabe and given that the extensive reliance by both parties on the mother/child relationship in the negotiations, we must question what the expectations were of that relationship. What were the responsibilities of the mother towards her children and what were the parameters of that relationship? What were the normative expectations of the Anishinabe in relation to the Queen? How might it have differed from a relationship with a “father”, such as the Kings¹⁷⁸ and fur traders, who had forged earlier kinship relationships with the Anishinabe?¹⁷⁹

¹⁷⁵ The Robinson Superior and Robinson Huron treaties were made between the Honourable Williams Benjamin Robinson on behalf of the Queen and the Ojibway. The Manitoulin Island Treaty was made between the Honourable Williams McDougall, Superintendent General of Indian Affairs and William Spragge, Deputy Superintendent General of Indian Affairs “on the part of the Crown” and the Ottawa and Chippewa Chiefs. Reference is made to “the Crown” throughout the treaty document, rather than to the Queen.

¹⁷⁶ Treaty 1, 1871.

¹⁷⁷ *The Manitoban*, p. 30.

¹⁷⁸ At the Selkirk Treaty negotiations, medals and chiefs coats of arms from Upper Canadian Indian Department “and offered with the explanation that they were from the King himself” (p. 45).

¹⁷⁹ After the Treaty was made and reserves were being selected, Lieutenant-Governor Morris had some difficulties with the Portage Band who threatened to go to the “Grand Father” with their complaints, referencing the US president.

When Archibald opened the negotiations, he expressed to the Anishinabe that their mother was pleased with their behaviour the previous year, in particular, the fact that they had not participated in the Red River Resistance. Their “good conduct” was referred to in the text of the Treaty:

And with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians, parties to this treaty, She hereby, through Her Commissioner, makes them a present of three dollars for each Indian man, woman and child belonging to the bands here represented.¹⁸⁰

Archibald then introduced Simpson as the Chief who would act on behalf of the Queen. Archibald stated that when Commissioner Simpson was speaking, that the Anishinabe would be listening to the Queen: “When you hear his voice, you are listening to your Great Mother the Queen.”¹⁸¹ And the Chiefs agreed: “in hearing the Commissioner this evening, I feel that we have heard the Queen’s voice.”¹⁸² This relationship of kinship with the Queen is what secured the attendance of the Anishinabe and their participation in the negotiations. Chief Sheeship was:

thankful today that I have heard a message from our Great Mother, the Queen. The reason I got up from my seat was to come here and hear her voice. I am glad I have heard good tidings from my mother; and if I live till tomorrow, I will send a requisition to her, begging her to grant me wherewith to make my living.¹⁸³

Once the relationship of kinship was established, the Anishinabe were guaranteed that as the children of the Queen, they would not be treated differently than their mother’s other children, including her other indigenous children:

[...] in laying aside these reserves, and in everything else that the Queen shall do for you, you must understand that she can do for you no more than she has done for her red children in the East. If she were to do more for you that would be unjust for them. She will not do less for you because you are all her children alike, and she must treat you all alike.”¹⁸⁴

This equal treatment of children was not limited to concepts of equality between the Queen’s red children but extended also to her white children.

The old settlers and the settlers coming in, must be dealt with on the principles of fairness and justice as well as yourselves. Your Great Mother knows no difference between any of her people.¹⁸⁵

¹⁸⁰ Treaty 1, 1871.

¹⁸¹ Morris 1991: 12.

¹⁸² *The Manitoban*, pp. 14-15.

¹⁸³ Chief Shee-ship (Fort Alexander) in *The Manitoban*, *supra* note 117, p. 16.

¹⁸⁴ Morris 1991: 29.

¹⁸⁵ *The Manitoban*, p. 29.

Your Great Mother wishes the good of all races under her sway. She wishes her Red Children, as well as her White people, to be happy and contented. She wishes them to live in comfort.¹⁸⁶

Your Great mother, the Queen wishes to do justice to all her children alike. She will deal fairly with those of the setting sun, just as she would with those of the rising sun.¹⁸⁷

The relationship established was one characterized by “that kindness of heart which distinguished her dealings with her red children...”¹⁸⁸ The Anishinabe believed that the Queen wished for what was best for them: “Indians in both parts have a firm belief in the honor and integrity of Her Majesty’s representatives, and are fully impressed with the idea that the amelioration of their present condition is one of the objects of Her Majesty in making these treaties.”¹⁸⁹ The purpose of the meeting at the Stone Fort was explained as a discussion relating to matters of interest to both parties. They were “to deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and to the said Indians of the other...”¹⁹⁰

The role of the mother, in accordance with Anishinabe laws, is to love the child unconditionally and to be kind and understanding. In accordance with the sacred teaching of *Abenonjji Kakikwe Win*—roughly translated as “the teachings that are given to a child, that will last forever and which can only be given by a woman”—the teachings that the mother gives to the child enable the child to lead *mino-bimadiziwin* (a good life). In reference to what the Anishinabe law of kindness entails, Ken Courchene explains:

ji-minode’ed Anishinaabe [the people should have good hearts]. Truly your heart, your kindness. And he talked about that. The work that he does, not so much for himself but he wants to do his very best to ensure that there is a future for his child and grandchild. And he has that in his heart. And that the third law, that kindness.¹⁹¹

The mother is responsible for her child’s immediate well-being but is also responsible to ensure that the child is able to lead a good life into their adulthood. In return, the child must listen to, care for, and respect their mother.

¹⁸⁶ *The Manitoban*, *supra* note X, p. 10.

¹⁸⁷ Morris 1991: 28.

¹⁸⁸ Morris 1991: 40.

¹⁸⁹ Morris 1991: 42.

¹⁹⁰ Treaty 1, 1871.

¹⁹¹ Ken Courchene, in Pratt et al. 2011: 28-29.

When Wa-sus-koo-koon (Rat Liver), one of the representatives of the Indians between Pembina and Fort Garry, reminded the Commissioner and Lieutenant Governor to ensure that the Indians were fed during the negotiations, he relied on the benevolence and good wishes of their “great Mother,” which would require that they be fed well during the negotiations and beyond. The Queen’s “equal treatment” of her children “from east to west” was considered by the Anishinabe as an expression of the relationship of sustenance and reliance that was developed in their treaty alliance. Chief Ka-kee-ga-by-ness, representative of the Winnipeg River Anishinabe, illustrated the principles of reciprocity, mutual obligation and equality that applied to their relationship with their mother and also with regard to her other children.

I salute my Great Mother, and am very much gratified at what I heard yesterday. I take all my Great Mother’s children here by the hand and welcome them. I am very much pleased that myself and children are to be clothed by the Queen, and on that account welcome every white man into the country.¹⁹²

The principle of equality between all is fundamental to Anishinabe law.

The seventh law, *nashke imaa gaa-gii-waakaabiyang* [look at how we sat in a circle]. *Bebakaan* [All differently]. We got to sit in this way. Everyone is different and yet equal. And we always had that belief, that difference is not to segregate someone is higher or lower.¹⁹³

The relationship between the mother and her children is an illustration of the kinship relationship that governed the development of Treaty One.

While European treaties borrowed the form of business contracts, Aboriginal treaties were modeled on the forms of marriage, adoption and kinship. They were aimed at creating living relationships and, like a marriage, they required periodic celebration, renewal, and reconciliation... they were intended to grow and flourish as broad, dynamic relationships, changing and growing with the parties in a context of mutual respect and shared responsibility.¹⁹⁴

The Anishinabe would never abandon their promise to their mother, that is to share the land with her other children, and in turn, she would treat them with kindness, listen to their needs and requests, and help them lead *mino-bimadiziwin* (a good life). The expectation that she would “grant me wherewith to make my living” and her express wish to have her Red children “happy, contented... to live in comfort”

¹⁹² *The Manitoban*, p. 20.

¹⁹³ Ken Courchene, in Pratt et al. 2011: 30.

¹⁹⁴ Royal Commission on Aboriginal Peoples 1996: 130.

met the normative expectations of the relationship from an Anishinabe perspective. This is the relationship of treaty.¹⁹⁵

THE LAND QUESTION

In essence, the Crown viewed the Treaty as a transfer of land— land that was under the control¹⁹⁶ of the Anishinabe and which was greatly desired by settlers and the Crown. The Anishinabe also viewed the treaty as being related to land but from an entirely different perspective in which relationships rather than possession dictated use of land. In contrast with the “swamp and muskeg” that had been acquired from the Indians in the East, the area of Treaty 1 was highly desirable to the settlers for the purposes of agriculture. Archibald wrote to the Secretary of State that this is “magnificent territory we are appropriating here” and that annuities paid to the Indians might have to increase in consequence. This is contrary to the Commissioner’s opening statement that he could not offer any more to the Anishinabe than what the Queen had made available to her red children in the east.¹⁹⁷

The treaty negotiations were muddled by two land concepts that were being discussed concurrently – the surrender of land for the entire treaty area and the setting aside of reserves for the Indians—neither of which could be related to Anishinabe concepts of land tenure. The conceptual distinction between the entirety of the land, which included the traditional territory of each of the bands present, and the reserves that would be set aside for Indian agriculture is a significant one. In a sense, the idea of the kindness, understanding, unconditional love and non-interference required of a mother were in direct conflict with the view that the Crown would be purchasing the majority of Anishinabe lands and reserving only small areas for Indian farming. In addition, there are some questions about the incompatibility of worldviews in relation to the ability to own land.

As will be shown below, assurances of continued use were made in relation to the whole of the land whereas promises to set aside reserves for agricultural use were made for those who would want to shift

¹⁹⁵ The relationship to the Queen continues to be invoked post-treaty. It was invoked by Morris in his efforts to implement the Treaty when he became Lieutenant-Governor. Many Elders continue to assert that a treaty was never made with Canada but directly with the Queen of England.

¹⁹⁶ The word “control” is used as a compromise between the concepts of ownership and jurisdiction from a western perspective and the view of belonging to the land and use of the land from the Anishinabe perspective.

¹⁹⁷ Morris 1991: 29.

to an agricultural lifestyle (although the Queen promised not to force the Indian to farm). From the Anishinabe perspective, the land relationship being proposed was one where they would continue to use the land for their traditional activities of hunting, trapping, fishing and harvesting, with shared use by the settlers for agricultural purposes, with a promise to have selected lands set aside for their farms, should they choose to engage in agriculture. This was in keeping with Anishinabe laws related to land that allowed for and encouraged (and possibly obligated?) shared use of land for sustenance and non-interference with another's use of land for a specific purpose.

The Selkirk Treaty

Half a century earlier, many of the same bands involved in the Treaty 1 negotiations had participated in the negotiation of the Selkirk Treaty. This treaty experience was influential in the Anishinabe understanding of agreements with settlers for use of land. In particular, the concept of an annual rent in exchange for the use of land and retained jurisdiction by the Anishinabe, as affirmed in the Selkirk Treaty, were concepts that carried over into the Anishinabe negotiations at Treaty 1. Signed in 1817, the Selkirk Treaty was made in light of disputes between the incoming settlers and the Indian population over use of land, setting aside two miles on each side of the Red and Assiniboine Rivers for settlers in exchange for an annual payment to the Indian signatories. Lord Selkirk, who acted for the Crown in negotiating the treaty, noted Indian "resentment against my settlers for having taken possession of their lands without their consent or any purchase from them."¹⁹⁸ He therefore decided to treat with the Indians, but not in terms of a sale or surrender but rather a "gift." He reasoned that:

If a large quantity of goods were offered for the purchase it might be said that the temptation of immediate advantage had induced them to sacrifice their permanent interests. I would therefore propose to them merely a small annual present in the nature of a quit rent or acknowledgement of their right: - and having specified what I intend to give in this way I would leave it to themselves to specify the boundaries of the lands which they agree to give up on that consideration and to appropriate to me for the exclusive use of the settlers.¹⁹⁹

Chief Peguis affirmed that:

We never sold our land to the said Company, nor to the Earl of Selkirk; and yet the said Company mark out and sell our lands without our permission. Is this right? I and my people do not take their property from them, without giving them great value for it, as furs and

¹⁹⁸ Lord Selkirk to Commissioner S.B. Coltman, July 17, 1817. Fort Douglas. Selkirk Papers (SP) C.4.v.II 3809.

¹⁹⁹ Lord Selkirk to Commissioner S.B. Coltman, July 17, 1817. Fort Douglas. Selkirk Papers (SP) C.4.v.II 3809.

other things... I got nothing for my land... And will another Company take in land for five miles on each side of the great road to be made between this place and Canada without me and my brother Chiefs. I speak loud: listen!"²⁰⁰

Land Negotiations

In the opening statements to Treaty 1 negotiations made by both the Lieutenant-Governor and the Commissioners, assurances were made that Indians could continue to use their traditional territories for hunting, trapping, fishing and other harvesting, as they had done in the past. Parts of the land would be used by settlers for agriculture. Assurances were made that Indian ways of life would be sustained and that hunting could continue, as it had in the past and that Indians would not be confined to reserves.

When you have made your treaty you will still be free to hunt over much of the land included in the treaty. Much of it is rocky and unfit for cultivation, much of it that is wooded is beyond the place where the white man will require to go, at all events for some time to come. Till these lands are needed for sue you will be free to hunt over them, and make all the use of them which you have made in the past. But when lands are needed to be tilled or occupied, you must not go on them any more. *There will still be plenty of land that is neither tilled nor occupied where you can go and roam and hunt as you have always done, and if you wish to farm, you will go to your own reserve where you will find a place ready for you to live on and cultivate.*²⁰¹

In the face of assurances that Anishinabe ways of life would continue, and that opportunities to farm would be made available to them, if so desired, the Anishinabe "declared that they would never again raise their voice against the enforcement of the law..."²⁰²

Although some Anishinabe negotiators, such as Henry Prince, demonstrated knowledge about concepts of sale and acquisition of land, others defined their relationship to the land very differently. For example, Ay-ee-ta-pe-pe-tung speaks to the Commissioners about his "ownership" and his view that rather than owning it, he was *made of the land*.

When first you began to travel from Fort William you saw something afar off and this is the land you saw. At that time you thought I will have that some day or other; but behold you see before you the lawful owner of it. I understand you are going to buy this land from me. Well God made me out of this very clay that is besmeared on my body. This is what you say you are going to buy from me.²⁰³

²⁰⁰ Nor'Wester Feb 14. 1869. Extract from an address from Peguis to the Great House Across the Water.

²⁰¹ Morris 1991: 29, emphasis added

²⁰² *The Manitoban*, p. 31.

²⁰³ *The Manitoban*, p. 2.

Others relayed their view that they had a sacred responsibility towards the land and that the future of the land was intimately linked to the future of the Anishinabe children: “The land cannot speak for itself. We have to speak for it; and want to know fully how you are going to treat our children.”²⁰⁴ The Crown had indications of this special relationship to land. Chief Ayee-ta-pe-pe-tung, “a tall old brave, who was naked all but the breech-clout, and had his body smeared with white earth... spoke well, and in a very talkative and vehement manner, constantly flourishing an eagle’s wing which he holds.”²⁰⁵ He explained that his land was a gift from creation and that he could not give an answer as the future of his grandchildren was dark, based on the proposal before him.

I am not going to say much. It is proposed that we should give answer. Today I must give it. You (addressing His Excellency) know me. When you first found this country, you saw me on my property... I belong to the Little Camp Fire at the Portage. When you first saw me, you did not see anything with me. You saw no canopy over my head – only the house which Creation had given me. This day is like a darkness to me; I am not prepared to answer. All is darkness to me how to plan for the future welfare of my grandchildren.²⁰⁶

Lieutenant-Governor Archibald responded that “[t]here is a dark cloud before us too, because we do not know what you want. There is the same dark cloud before you, because you do not know what we want. What we desire is to rend these clouds asunder.”²⁰⁷ Treaty Commissioner Morris later said: “The Indians have a strong attachment to the localities, in which they and their fathers have been accustomed to dwell, and it is desirable to cultivate this home feeling of attachment to the soil.”²⁰⁸

Despite these incongruences in worldviews, Archibald and Simpson assured the Anishinabe that the Queen did not wish to interfere with their way of life. As seen above, the Queen wished for the happiness of her children but would not force them nor interfere in their ways:

She would like them to adopt the habits of the whites – to till land and raise food, and store it up against a time of want. She thinks this would be the best thing her Red Children to do that it would make them safer from famine and sickness, and make their homes more comfortable. But the Queen, though she may think it good for you to adopt civilized habits,

²⁰⁴ *The Manitoban*, p. 35.

²⁰⁵ *The Manitoban*, p. 19.

²⁰⁶ *The Manitoban*, p. 15.

²⁰⁷ *The Manitoban*, p. 15-16.

²⁰⁸ Morris 1991: 288.

has no idea of compelling you to do so. This she leaves to your own choice, and you need not live like the white man unless you can be persuaded to do so with your own free will.²⁰⁹

Reserves

The Queen proposed to set aside, in perpetuity, land for the Indians to cultivate, “should the chase fail,” in the form of Reserves:

Your Great Mother, therefore, will lay aside for you ‘lots’ of land to be used by you and your children forever. She will not allow the white man to intrude upon these lots. She will make rules to keep them for you, so that as long as the sun shall shine, there shall be no Indian who had not a place that he can call his home, where he can go and pitch him camp, or if he chooses, build his house and till his land.²¹⁰

The Indians were then asked to select the lands that they would want as reserves but “when their answer came it proved to contain demands of such an exorbitant nature, that much time was spent in reducing their terms to a basis upon which an arrangement could be made.”²¹¹ The Commissioner used the implied threat of overwhelming settlement of Anishinabe lands to encourage the Anishinabe to agree to the allotment of 160 acres per family of five:

We told them that whether they wished it or not, immigrants would come in and fill up the country that every year from this one twice as many in number as their whole people there assembled would pour into the Province, and in a little while would spread all over it, and that now was the time for them to come to an arrangement that would secure homes and annuities for themselves and their children.²¹²

The confusion continued throughout the negotiations. Some “expressed a desire to know a little more of what the Queen intended for the Indians.”²¹³ The Commissioner tried to explain the proposed terms of the treaty in relation to the reserves, following which “Hon. Mr. McKay, at the request of the Governor and the Indians, also entered into very full explanations in Indian.”²¹⁴ There is no indication on the record as to whether the words of McKay were translated back to the Commissioner or any of the unilingual English speakers. It is unclear if McKay was translating the Commissioner’s words or if he was going beyond the words of the Commissioner.

²⁰⁹ *The Manitoban*, p. 10.

²¹⁰ *The Manitoban*, pp. 28-29.

²¹¹ Morris 1991: 39.

²¹² Morris 1991: 34.

²¹³ *The Manitoban*, p. 20.

²¹⁴ *The Manitoban*, p. 20.

On the third day of negotiations, the Indians were asked if they would accept terms “same as those given Canadian Indians already treated with,” namely “a small annuity to each family, to last as long as the sun shines, as much land as is allowed to their brethren in Canada, the reserves to be chosen by the Indians themselves. If they were satisfied with these general terms, the Commissioner said he was ready at once to proceed to details.”²¹⁵ There was no mention in the general terms of the surrender of land. It quickly became apparent that there were incompatible understandings of what would be reserved exclusively for the Indians: “much difficulty was experienced in getting them to understand the views of the Government – they wishing to have two-thirds of the Province as a reserve.”²¹⁶ “A Portage Indian said that what puzzled his band was that they were to be shut up on a small reserve, and only get ten shillings each for the balance. They could not understand it.”²¹⁷ Archibald expressed his concern in a letter to the Secretary of State, finding that “the Indians seem to have false ideas of the meaning of a reserve. They had been led to suppose that large tracts of grounds were to be set aside for them as hunting grounds, including timber lands, of which they might sell the wood as if they were proprietors of the soil. I wished to correct this idea at the outset.”²¹⁸

The initial reserve selection was rejected by the Commissioner on July 29th: “If all these lands are to be reserve, I would like to know what you have to sell?” In response, Cochrane and McKay “by request of His Excellency and the Commissioner, addressed the Indians, showing them that their demands were so preposterous, that, if granted, they would have scarcely anything to cede, and urging them to curtail their demands.”²¹⁹ The Lieutenant-Governor also urged the Indians to agree, stating that if refused, the offer would not present itself again. In his view, this agreement, with annuities was superior to what had been offered in the United States to the Indians for only 20-year periods, not in perpetuity. He explained that 160 acres mean a quarter of a square mile, entered into explanations with diagrams and reminded the Indians that “instead of having only the quantity now held by Christian Indian families, (3 chains) they should have three times as much, and more reserved to them under the treaty.”²²⁰ He then asked that the Indians provide an answer by the Monday, the next day being Sunday at which time negotiations would be postponed. *The Manitoban* reports that the “Commissioner also spoke in further

²¹⁵ *The Manitoban*, p. 21.

²¹⁶ Morris 1991: 31.

²¹⁷ *The Manitoban*, p. 31.

²¹⁸ Morris 1991: 33.

²¹⁹ *The Manitoban*, p. 26.

²²⁰ *The Manitoban*, p. 28.

elucidation of the benefits to be conferred on the Indians, by entering into the proposed treaty,” without explaining what other “benefits” were being proposed in addition to what had just described.

His Excellency also strongly urged on the Indians the advisability of accepting the terms. Their Mother the Queen wished to benefit them – wished to place her red subjects on the same footing as the white, and even went further, in giving to her red subjects what she did not give to the others, an annual bounty to last as long as the sun shone. In the East, the Indians, the Queen’s subjects, were living happy and tranquil, enjoying all the rights and privileges of white men, and having homes of their own. What had made them happy the Queen was willing to give her Indian subjects here, and no more. They might at once and forever dismiss from their heads all nonsense about large reserves; for they could not and would not be granted. The matter must be looked at by them like men of common sense, who see the Queen trying to save a home for them; if they refuse her offer, it will not be made to them again. His Excellency further reminded them that the terms offered them were better than those under which white men came to settle and made themselves comfortable homes. In the United States reserves were sometimes given and sometimes withheld, while the annuities generally terminated after 20 years. The annuities offered the Indians in this negotiation would last as long as the sun shines.²²¹

The Indians were hesitant to accept the treaty conditions. Lieutenant-Governor Archibald wrote that: “A general acquiescence in the views laid down by Mr. Simpson and myself was expressed but it was quite clear, by the proceedings of to-day, that *our views were imperfectly apprehended*.”²²² This was confirmed by a request made by Ka-ma-twa-kau-ness-noo, who “wanted to know how the Indians spoken of were dealt with—wanted to hear the ins and outs of everything.”²²³ Chief Ayee-ta-pe-pe-tung wanted to understand with more certainty what was being offered.

Ay-ee-ta-pe-pe-tung stated that he did not yet thoroughly understand the limits of the territory about to be treated for.

Hon. Mr. McKay, by direction of the Commissioner, defined the limits of the Province.

Ay-ee-ta-pe-pe-tung (to Commissioner) – When you got up, you looked at me hard, and if I used any improper language, I did not mean to be incourteous. I want, first, to see what you are offering; and then I’ll tell you my offer.²²⁴

On the fifth day of proceedings, the Indians were still hesitant. Henry Prince presented a copy of his father’s will and stated “we have been already four days in this negotiation, and it seems as though it will

²²¹ *The Manitoban*, p. 27.

²²² Morris 1991: 34.

²²³ *The Manitoban*, p. 21.

²²⁴ *The Manitoban*, p. 25.

not be brought to a decision.”²²⁵ In response, the Commissioner stated that he was “quite ready to finish up matters that day. The delay rested with the Indians altogether.”²²⁶ He explained that the terms proposed were now “more favourable than any before offered for Indian land by the Government of Canada.”²²⁷

We have offered here terms which have been accepted by all the Indians in the East, who are ten times as numerous as these here. Is the Indian in this country so much better than the Indian of the Lake of the Woods, or Lake Superior, that he must receive better terms? Is the Indian of this Province better than the Indian in Minnesota or elsewhere in the States? We are, in fact, offering here better terms than are offered to the Canadian Indians, and to those of the United States, and our Indians will not, unless they are foolish, receive the offer we make them.²²⁸

Ay-ee-ta-pe-pe-tung explained that this is his property. He could not see benefit for his children and therefore does not see how he can enter into treaty.

God gave me this land you are speaking to me about, and it kept me well to this day. I live at the end of the Settlement, in a clean place (unsettled); and as I travelled through the Settlement, I looked on nothing but my property! I saw pieces of land high up (meaning bridges) and these are my property! When I went into the houses by the wayside, these too I considered my property – (laughter). I have turned over this matter of a treaty in my mind and cannot see anything in it to benefit my children. This is what frightens me. After I showed you what I meant to keep for a reserve, you continued to make it smaller and smaller. Now, I will go home today, to my own property, without being treated with. You (the Commissioner) can please yourself. I know our Great Mother the Queen is strong, and that we cannot keep back her power more than we can keep back the sun. If therefore the Commissioner wants the land, let him take it. The old brave continued in this strain a long time, and wound up by saying: Whenever the President of the United States authorizes a man to come and treat with Indians, he brings with him heaps of goods to give over to them as a present. Let the Queen’s subjects go on my land if they choose. I give them liberty. Let them rob me. I will go home without treating.²²⁹

In response, the Lieutenant-Governor espouses the Lockean views of the day and the natural use to which the land should be put, agriculture: “God, he said, intends this land to raise great crops for all his children, and the time has come when it is to be used for that purpose.”²³⁰

The time has come when this land must be cultivated. White people will come here and cultivate it under any circumstances. No power on earth can prevent it. The Queen wants

²²⁵ *The Manitoban*, p. 29.

²²⁶ *The Manitoban*, p. 29.

²²⁷ *The Manitoban*, p. 30.

²²⁸ *The Manitoban*, p. 31.

²²⁹ *The Manitoban*, p. 30.

²³⁰ *The Manitoban*, p. 30.

her red subjects to have a home, and offers them good ones, and offers them, besides, advantages which she does not give to her white subjects. If a white man comes here to cultivate a farm, he gets nothing from the Government, whereas the Indians are not only promised farms, but also get a bounty from the Government.²³¹

He also explained that the Anishinabe do have a right to the land given that the Crees had inhabited the area first and moved west with the buffalo herds:

Some hundred years ago he [God] gave the Crees liberty to come into the country, and at that time your grandfathers were not her, but were wandering on Lake Superior. When the buffalo went westward, the Crees went with them; and the Chippewa, finding the land unoccupied, came in and stopped here, but they have no rights to the land beyond that.²³²

Ay-ee-ta-pe-pe-tung questioned the Commissioner: "You say the white man found this country, and that we were not the first Indians in it. What is the name of the first Indian found along the sea coast?"²³³ The commissioner said he was "afraid some evil bird was whispering in Council. The Commissioner again showed the Indians that they were unwise in not closing with the terms offered"²³⁴:

The Commissioner argued the point, showing that what the Indians were offered that and their descendants would get every year, and that whether they took it or not the white men would come in and take up land, and that without the treaty the Indians would in the long run be left without any land to cultivate.²³⁵

When Wa-sus-koo-koon asked what would happen if there were more children, the Lieutenant-Governor assured him that they would be provided for further West. When reserves became too small, they would be sold and the Indians would acquire land elsewhere. After a two-hour break in the negotiations, Chief Kasias "came forward with an attendant gaily painted, wearing eagles' feathers, and something like a blue waterfall on top of his head".²³⁶ In his view, he could not see how he would be enriched by what was being offered by the treaty:

My chief has listened to the terms offered, but does not see that he can be enriched by them. My chief says he is not going to speak about the land he has a right to; but as soon as offers are made by the Commissioner and accepted by the other chiefs, he will accept the same.²³⁷

²³¹ *The Manitoban*, p. 31.

²³² *The Manitoban*, p. 30-31.

²³³ *The Manitoban*, p. 31.

²³⁴ *The Manitoban*, p. 31.

²³⁵ *The Manitoban*, p. 31.

²³⁶ *The Manitoban*, p. 32.

²³⁷ *The Manitoban*, p. 32.

Similarly, “Wa-sus-koo-koon and the chiefs for whom he spoke came forward, and the invariable ceremony of shaking hands with His Excellency and the Commissioner having been gone through, the brave harangued the crowd, protesting that he could not live on ten shillings if he were to settle down. He also complained of the insufficiency of reserves. Look, he said, at the farmers with all their property; they spent a great deal of money before getting to be as they are. We want the reserve we have asked for and cannot take your terms.”²³⁸

Ay-ee-ta-pe-pe-tung said that he “would take a winter to think over the matter before entering into a treaty.”²³⁹ At this point in time, “Hon. Mr. McKay made an eloquent speech in Indian explaining matters.”²⁴⁰ There is no description of what he says, whether it was ever translated for the Commissioner and Lieutenant-Governor. What McKay said in the Anishinabe language is not documented. McKay’s words may have prompted Ay-ee-ta-pe-pe-tung to revise his position and may explain the subsequent request for more money. The Commissioner again addressed the Indians and threatened to break up negotiations unless they can come to a close the following day.

From Commissioner Simpson’s perspective, the matter of reserves had been clarified, although there is no detail on the record as to what was said or done, beyond showing the Indians diagrams of lots that they would acquire, in order to induce them to reduce their reserve selection.

When the subject of reserves came up, it was found that the Indians had misunderstood the object of these reservations, for their demands in this respect were utterly out of the question ... on further explanation of the subject, the Indians appeared to be satisfied, and willing to acquiesce in our arrangements as hereinafter mentioned; and having given them diagrams showing the size of the lots they would individually become possessed of, and having informed them of the amount of their annuity, it was finally settled that they should meet on Monday, the 31st, and acquaint me with their decision.²⁴¹

The confusion about the concept of reserves continued after the Treaty, in particular in relation to reserves selections. In 1876 when Morris, Provencher (Indian Commissioner), and McKay visited the Portage band and spoke on the topic of treaty, “they did not understand its extent, and claimed nearly

²³⁸ *The Manitoban*, p. 32.

²³⁹ *The Manitoban*, p. 32.

²⁴⁰ *The Manitoban*, p. 32.

²⁴¹ Morris 1991: 36.

half of the Province of Manitoba under it.”²⁴² Morris reported Yellow Quill as stating that he “did not understand the extent of the reserve.”²⁴³

Ending the Negotiations

On the last day of negotiations, it was clear that the Indian’s uncertainty with respect to the land question had not been attenuated. Henry Prince spoke of his confusions and the questions that remained. He recalled his father’s dying words, requesting that he retain part of the land. This may be in reference to all the lands that were retained by the Anishinabe in the Selkirk Treaty. Prince also claims that he will speak for the land as it cannot speak for itself.

I would like to have the proposition made, turned over and over before me. How are we to be treated? The land cannot speak for itself. We have to speak for it; and I want to know fully how you are going to treat our children. My father settled some of his children in the Indian settlement. Are you now going to make a reserve for them outside that, or what are you going to do? I cannot see through it. Then again, it is said. The Queen wishes the Indians to cultivate the ground. They cannot scratch it – work it with their fingers. What assistance will they get if they settle down? Again, I wish to say that nearly the last words my father said before dying were – There is the line – keep it; and we want to retain it.²⁴⁴

In response, the Lieutenant-Governor made a lengthy statement “showing that the Queen was willing to help the Indians in every way”²⁴⁵ In addition to the reserves and annuities, he promised that the Queen “would give them a school and a school master for each reserve, and for those who desired to cultivate the soil, ploughs and harrows would be provided on the reserves.”²⁴⁶ There was yet not agreement on the terms of the treaty. Chief Wa-sus-koo-koon “insisted on having the reserve he had specified before.”²⁴⁷ Other Chiefs made speeches and “extravagant demands”, which were reported in the Manitoban in the following way:

A good deal of parley ensued, in the course of which the Indians made new and extravagant demands, while the Commissioner and His Excellency reasoned with them, and refused to give way any more... Another meeting and more speechifying – the Indians continuing their extravagant demands as before.²⁴⁸

²⁴² Morris 1991: 129.

²⁴³ Morris 1991: 139.

²⁴⁴ *The Manitoban*, p. 35.

²⁴⁵ *The Manitoban*, p. 35.

²⁴⁶ *The Manitoban*, p. 35.

²⁴⁷ *The Manitoban*, p. 37.

²⁴⁸ *The Manitoban*, p. 37.

Henry Prince, Grand Oreilles, Kasias and Wa-sus-koo-koon came forward and Wa-sus-koo-koon made known the views of the Indians:

I am going to state the wants of all the Indians – not including those of the Portage. First, in the early part of every spring, we want all the children to be clothed with fine clothes! In the fall of the year they are to be clothed from head to foot with warm clothing! Whenever an Indian wants to settle, a house is to be put up for him fully furnished, and a plough, with all its accompaniments of cattle, etc. complete, is to be given him! We want buggies for the chiefs, councilors and braves, to show their dignity! Each man is to be supplied with whatever he sees for hunting, and all his other requirements, and the women in the same way!! Each Indian settling on the reserve is to be free from taxes! If you grant this request, continued the brave with utmost gravity, I will say you have shown kindness to me and to the Indians.²⁴⁹

In this circumstance, the Chiefs had met and agreed in council in their approach to the negotiations (with the exception of the Indians from the Portage, as noted). They had seen the division that was being created amongst them by the pressure applied by the Commissioner and the Lieutenant-Governor.

The Commissioner mocked the Chiefs in his response to their requests, saying that he would rather be an Indian if those were the terms agreed to. The record indicates that laughter followed. In the Anishinabe culture, humour is often used to diffuse tense situations. It is most probable that the Anishinabe were laughing at the idea of the Commissioner becoming Anishinabe:

I am proud of being an Englishman. But if Indians are going to be dealt with in this way, I will take off my coat and change places with the speaker, for it would be far better to be an Indian. (This sally was too much even for Indian gravity, and there was a general roar of laughter in which Wa-sus-koo-koon himself joined in as heartily as any).²⁵⁰

As stated earlier, the record of the negotiations at this point becomes very brief. There are other speeches that are not described, either in form or content. Before the end of the day's proceedings – "the Portage chief and his followers left, formally bidding the Lieut.-Governor and the Commissioner goodbye".²⁵¹ He was not alone in his desire to bring the negotiations to an end, despite the premise of the negotiations being that the Indians had wanted to make a treaty with the Crown:

The other Indians were also thinking of leaving, but Hon. Mr. McKay asked them to stay over one more night and meet the Commissioner again next day, promising that in the

²⁴⁹ *The Manitoban*, p. 37.

²⁵⁰ *The Manitoban*, p. 37-38.

²⁵¹ *The Manitoban*, p. 38.

interval he (McKay) would try and bring the Commissioner and the Indians closer together.²⁵²

It is unclear what James McKay said or did during the evening, but the Chiefs remained and signed the treaty the following day.

ANISHINABE RELATIONSHIP TO THE LAND

Much of Anishinabe law is related to kinship and land.²⁵³ Legal relationships exist between various animate beings. According to John Borrows, he

was aware there was much we could learn from that which was hidden by the rocks, soil, grass, and trees that piled one upon another throughout our territory. We can't properly exercise our agency or make the best choices without remembering the land.²⁵⁴

The Anishinabe have a special relationship with the land. The Anishinabe do not own the land. We belong to the land.

Iwe daabishkoo gichi-gamiin, zaaga'iganiin, ziibiwan daabishkoo gimiskwiyaab giwiiyawing bezhigon. Bezhigon nibi eteg omaa akiing, daabishkoo miskwi owe dinong. Dago owe gitigan baabishkoo wiinizisan.

The oceans, the lakes, the rivers, it's similar to a blood vein in your body. It's like that. It's like the water on earth is its blood. And the plants like hair. Also, the ground is the same as your flesh.²⁵⁵

Amii aanish imaa gaa-bagidinind Anishinaabe gaa-ozhichigaadeg owe aki... gii-ikidowag e-gii-ozhiyaad amii ono Anishinaaben, azhahki egii aabajidood. Amii wenji miskoizid awe Anishinaabe gii-ikidowag, wedi miinawaa gii-ozhichigaazo bezhig.

This is where the Anishinaabe was placed eather was built/created... The Creator was very mystical. It was said that the Creator made the Anishinaabe. He used the dirt. That is why the Anishinaabe is red, they said.²⁵⁶

Prior to the treaty (and for some time after), the Anishinabe were dispersed over the land and used the land in a seasonal rounds model—hunting and trapping in the winter in more remote areas and spring and summer gatherings for fishing and berry picking, sugaring, etc. The areas used by certain groups for particular purposes were recognized and respected by others, often subject to an annual allocation

²⁵² *The Manitoban*, p. 38.

²⁵³ See Johnston 2006.

²⁵⁴ Borrows 1997: 72, *supra* note 112.

²⁵⁵ Francis Nepinak, in Pratt et al. 2011: 18.

²⁵⁶ Mark Thompson, in Pratt et al. 2011: 21.

based on resource conditions. The land, independent of the resources found within it, was of no great value to the Anishinabe. Where land was no longer productive for harvesting, it would not be used. Simple ownership without use was meaningless.

In their treaty negotiations, the Anishinabe did not surrender the land. It was not in their ability to do so, as they did not own it. Although they had a vague understanding of British or Canadian concepts of ownership, they were not bound by them. Their relationships were directly with the land and the creator:

[T]erms such as cede, surrender, extinguish, yield and forever give up all rights and titles appear in the written text of the treaties, but discussion of the meaning of these concepts is not found anywhere in the records of treaty negotiations.²⁵⁷

The Anishinabe did not distinguish between the lands and the resources that were found thereon, as did the white men. A Chief at the Treaty 3 negotiations explained to Commissioner Morris:

*The sound of the rustling of the gold is under my feet where I stand; we have a rich country; it is the Great Spirit who gave us this; where we stand upon is the Indians' property and belongs to them.*²⁵⁸

The Anishinabe perspective on lands and the lawful obligations that they had towards the land and to share with others in the bounty of the land cannot be translated in to a common law property concept.

"So the second law is that, the earth itself, mother earth, the grandmother."²⁵⁹

This earth is bountiful and rich. *Gii-manaajichigewag aaniish* [The people used to be respectful]. The people were respectful. They only took what they needed, everything in moderation. That's the way the spirits of the people were. So that was important for us to know that. That's the sixth law.²⁶⁰

The relationship to the land cannot be understood in isolation from the Anishinabe practices of treaty making and relationship building. This mutuality of caring and respect for each other's well-being, through the bounty of the land is reflective of the relationship the Anishinabe have with their land:

The Indian concept of land ownership is certainly not inconsistent with the idea of sharing with an alien people. Once the Indians recognized them as human beings, they gladly shared with them. They shared with Europeans in the same way they shared with the

²⁵⁷ RCAP 1996 *supra* note 93.

²⁵⁸ Morris 1991: 62, emphasis in original.

²⁵⁹ Courchene, in Pratt et al. 2011: 28.

²⁶⁰ Ken Courchene, in Pratt et al. 2011: 29.

animals and other people. However, sharing here cannot be interpreted as meaning (that) the Europeans got the same rights as any other native person, because the Europeans were not descendants of the original grantees, or they were not parties to the original social contract. Also, sharing certainly cannot be interpreted as meaning that one is giving up his rights for all eternity.²⁶¹

Harold Johnson has expressed the Cree understanding of relationship to land how the treaties did injustice to that perspective:

Our oral histories do not indicate that we agreed to separate ourselves from our Mother the Earth, but they are consistent with our understanding of our role as humans under the laws of the Creator, which mandates that we should be kind and generous and share the bounty of the earth with each other, with the animal nations, the plant nations, and with you *Kiciwamanwak*.

The misunderstanding between us, *Kiciwamanwak*, is the difference between the written text of the treaty and our oral histories. If we go to the original paper the treaties are written on, the first thing we notice is that large parts of it were pre-written, with spaces left for the Treaty Commissioner to fill in. These spaces that are filled in include our names and which articles of agricultural equipment would be supplied. The important terms about the relationship with our Mother the Earth were pre-written. Can you, *Kiciwamanwak*, in good conscience, insist upon these terms that were likely not mentioned and, even if they were, not likely understood, and were definitely not negotiated.²⁶²

Although the concept of reserves of land set aside for the Indians was discussed at length, there is no conclusive indication on the record that the differing views elaborated above, were ever really reconciled. In fact, at the last day of the negotiations, Chief Ay-ee-ta-pe-pe-tung was prepared to have the land taken from him, rather than enter into a treaty he was not comfortable in signing:

I have turned over this matter of a treaty in my mind and cannot see anything in it to benefit my children. This is what frightens me. After I showed you what I meant to keep for a reserve, you continued to make it smaller and smaller. Now, I will go home today, to my own property, without being treated with. You (the Commissioner) can please yourself. I know our Great Mother the Queen is strong, and that we cannot keep back her power no more than we can keep back then sun. If therefore the Commissioner wants the land, let him take it.²⁶³

Today, the term reserve is translated to the Anishinabe word *ishkonigan*. This may have been used as a term to explain the concept of reserve at the treaty negotiations. Harry Bone, an Anishinabe Elder from Manitoba explains the concept of reserve as land that was set aside for ourselves, not leftovers.

²⁶¹ Little Bear 1986: 247.

²⁶² Johnson 2007: 41-42.

²⁶³ *The Manitoban*, *supra* note 11, p. 30.

Ishkonigan does not mean 'leftover' to us, ishkonigan means gigii-mii-ishkonaamin in other words 'we left this land aside for ourselves' not leftover. Leftover is kind of a loose meaning and has a different connotation. For us, the Elders told us that, gigii-mii-ishkonaamin – meaning we left some part of that land for ourselves, that is what it means. Gigii-mii-ishkonaamin – in other words, here is the land, its not left over and that is not that the intent was, set aside, we set aside for ourselves this land.²⁶⁴

At the close of the negotiations, Chief Ayee-ta-pe-pe-tung stated that he would take a winter to think over the matter before entering into a treaty. In his view, a matter of this importance should be discussed again, after having given it some thought and discussed it with the others impacted by it (the other Anishinabe of his territory and the land, plants and animals).

On the eighth day, following extensive negotiations, the Chiefs decided that no treaty could be made and that they would leave. The Commissioners strongly encouraged them to think over the terms of the treaty and to meet the following morning, on the 9th day. The Commissioner sent James McKay,²⁶⁵ referred to above, to converse with the Indians. The following morning, the treaty was signed, with no further terms negotiated, nor any explanation on the record of what had transpired to change the collective minds of the Chiefs.

All the Indians met His Excellency and the Commissioner today in better humour. The Commissioner said he understood they were disposed to sign the treaty...This gave general satisfaction, and the treaty was soon signed, sealed and delivered, with all due formality. The ceremony was witnessed by a large crowd of spectators.²⁶⁶

It is interesting to note that the Chiefs that negotiated treaty one do not speak in terms of "one mind", rather they explicitly acknowledge the autonomy of the various groups that are represented at the treaty making. This contrast with many of the subsequent treaty negotiations where the concept of unity is invoked regularly, including in the Treaty 3 negotiations.²⁶⁷ What was understood by the Anishinabe flowing from these negotiations? Many theories about the treaty have been espoused by historians, lawyers, political scientists and ethnohistorians. Early analyses point to deceit and manipulation. Treaty analysis has historically raised questions of inept translation of words and concepts that led to misunderstanding. More recently, authors

²⁶⁴ Harry Bone, in Pratt et al. 2011: 77.

²⁶⁵ McKay confirmed that "[t]he Indians told me they would not have come into the Stone Fort Treaty but for him, and I know it is the case" (Morris 1991: 138).

²⁶⁶ *The Manitoban*, p. 39

²⁶⁷ See Morris 1991: Chapter 4.

such as Jean Friesen²⁶⁸ have found that faced with a difficult situation, the Anishinabe made the best deal they could and that they surrendered the land but retained some jurisdiction over resources. While I agree with Friesen that the Chiefs, faced with a difficult situation, were forced to negotiate, I take a different view about the resulting agreement.

In my view, the Anishinabe laws relating to land and use of land strongly informed the negotiations. Whether Anishinabe normative values or legal principles were understood by the Crown is unknown, but there are hints in the record that they did have an understanding that the Anishinabe were approaching land issues differently from an acquisition and possession of land model. A review of the written and oral record reveals that the Anishinabe agreed to share the land with the settlers and allow them to use the land they desired for agriculture and for the Anishinabe to continue to use their territory for their traditional activities. Neither would interfere with one another. On the question of reserves, these would be lands that would be kept separate and could be used by the Anishinabe, should they choose to farm. Neither traditional harvesting nor farming were mutually exclusive, the result being that the Anishinabe would continue to use the land of Treaty 1, along with the settlers, in a spirit of equality and non-interference. This is what the Elders refer to as a “sharing treaty”.

Friesen aptly points out that natural resources not mentioned in Treaty 1 and Treaty 2 but are mentioned in all other numbered treaties and in the Robinson and Douglas treaties. In her view, the Anishinabe drew a distinction between land and natural resources. She further finds that once the continuing use of resources was confirmed in the opening speeches—i.e., what was to be retained by Anishinabe treaty signatories—the discussion moved to what would be given. According to Friesen the Chiefs made the best deal possible given the circumstances. I would propose an alternative perspective to this one, in which land and resources are captured under one concept—mother earth—with whom the Anishinabe have a direct relationship. The land has no value independent of its resources, which are placed on the land in order to be shared. Use of resources in areas under the jurisdiction (or use) of another group would be requested.²⁶⁹ If someone travels through Anishinabe territory, they are entitled to feed themselves. This is the way of the Anishinabe. But he cannot take more than he needs. He must

²⁶⁸ Friesen 1991: 141, 1986; Miller 2009; 162; Hall 1984; Ray et al. 2000.

²⁶⁹ Tanner et al. 2009.

also share their catch with the Anishinabe. As my *Mishomis* Henry²⁷⁰ put it: “If I take three fish, how do I share it with you? I give you two and I keep one for myself. I know that I will catch more fish but I do not know that you will not go hungry”:

We had a basic understanding and belief that it was to be shared. I remember the many political discussions about that and about rice, wild rice and the harvesting of rice, and how in this area, we liked to believe that this was ours. And some elders from the back said, this is the Creator’s garden. That’s the Creator’s garden. It doesn’t belong to one tribe, it belongs to the ones that believe in the spirit of the gift that we call wild rice.²⁷¹

The settlers’ use of land was perceived as generally limited to agriculture, as had been agreed to in the past with Selkirk, and as was explained in the opening statements to the Treaty One negotiations. When asked to clarify the concept of reserves, the Lieutenant-Governor explained that:

reserves did not mean hunting grounds, but merely portions of land set aside to form a farm for each family. A large portion of the country would remain as much a hunting ground as ever after the Treaty closed.²⁷²

Assertions made by the Chiefs from various Treaty One bands confirmed the view that natural resources, such as game and fish, had not been given up in the Treaty. According to Chief Asham, it was “understood thoroughly and distinctly in regard about game that no Indian was to be prohibited killing or catching for is (sic) on purpose any kind of game all year round.”²⁷³ Leaders from the Fort Alexander Band argued that:

the Indians under Treaty were permitted to enjoy all privileges of hunting and fishing for their own use and benefit in perpetuity without payment of any licence or fee for game, fish, nets, or hunting implements.²⁷⁴

Chief Naskepenais at the Brokenhead Reserve stated:

we have no intention of rebelling against or defying the laws of the land but merely to state that as fishing regulations are against the conditions of “treaty” we cannot accept of them and shall therefore not consider ourselves bound to observe these laws by abstaining from taking fish for their own use.²⁷⁵

²⁷⁰ Henry’s grandmother, Clara Letander, attended the Treaty 1 negotiations (1871) at Stone Fort as a young child.

²⁷¹ Ken Courchene in Pratt et al. 2011: 28.

²⁷² *The Manitoban*, p. 22.

²⁷³ Chief William Asham to the Superintendent-General of Indian Affairs. May 8, 1892. RG10, 3692, 14069, C10, 121.

²⁷⁴ William Pennyfather, Joseph Kent, Peter Kent, Joseph Henderson, Robert Henderson, Chief and Councillors Fort Alexander to the Department of Indian Affairs. December 1890. RG20, 3788, 43856, C10, 138.

²⁷⁵ Chief Naskepenais to Department of Indian Affairs. June 17, 1893. RG10, 3755, 30979-4, C10, 133.

Chief Naskepenais also stated:

When we made Treaty with the Government we sold our lands of course, but we did not sell our fish, this commodity we reserved for our own exclusive benefit. The fish then being clearly our own we cannot but come to the conclusion that we can sell it to whomsoever we choose without paying license.²⁷⁶

When Chief Yellow Quill was warned not to kill deer, he “neither admitted nor denied the charge but merely laughed and said if he was starving and saw a Deer he would certainly shoot it and that if the Government wanted to prevent them killing Game they must feed them as they had nothing to live on... it was the old story with them that when they agreed to let the Government have the land they did not give them the Game and unless they were allowed to kill Game they would starve.”²⁷⁷

It is my view that the Treaty was understood by the Anishinabe not as a surrender of land but as an agreement to share the land and its resources—mother earth—in the following way: plots of agricultural land for the white settlers and continued use of the land for harvesting by the Anishinabe. Reserves would be set aside for the Indians, if and when they chose agriculture, although it was promised that they would never be compelled to farm. Treaty Commissioner Simpson, in an 1871 speech at Fort Garry, stated:

The Government will give to the Indians, reserves amply sufficient. The different bands will get such quantities of land as will be sufficient for their use in adopting the habits of the white man, should they choose to do so. I would remind them that a large section of the country beyond here is of a rocky swampy character, and such as they need not expect to see inhabited by white settlers. Not in the lifetime of the present generation will farming settlements of white men be seen in such quarters as Fort Alexander, for instance; and in treating with the Indians from such districts, the Government are in fact giving them presents – not purchasing from them land of great value.²⁷⁸

OUTSIDE PROMISES

Almost immediately following the making of the Treaty, the Anishinabe complained about the non-implementation of the treaty promises and identified promises that had not been included in the written text of the Treaty. The Indians constantly corresponded and met with the Lieutenant-Governor and

²⁷⁶ Chief Naskepenais, Robert Raven, John Raven, Wiassasing, Enecoo to the Department of Indian Affairs. January 15, 1889. RG10, 3788, 43856, C10, 138.

²⁷⁷ F. Ogletree to E. McColl. March 28, 1885. RG10, 3692, 14069.

²⁷⁸ *The Manitoban*, August 5, 1871.

when the Minister of Interior, David Laird, came to Manitoba they “pressed their demands on him.”²⁷⁹ When Lieutenant-Governor Morris attended the locations of the bands to pay them, in some cases, the money was not accepted.²⁸⁰ Others prepared to visit Ottawa, and some petitioned the Governor General, the Earl of Dufferin. A list of the “outside promises”²⁸¹ had been appended as a memorandum²⁸² to the treaty but had not made its way into Simpson’s official report of the negotiations and were, therefore, never ratified by the Privy Council. Morris noted:

When Treaties, Numbers One and Two, were made, certain verbal promises were unfortunately made to the Indians, which were not included in the written text of the treaties, nor recognized or referred to, when these Treaties were ratified by the Privy Council. *This, naturally, led to misunderstanding with the Indians, and to widespread dissatisfaction among them.*²⁸³

In 1874 the Portage band sent messengers with tobacco twice to Qu’appelle to tell Indians there not to make treaty with the Crown.²⁸⁴

In the face of this uncertainty, the Privy Council agreed to consider the memorandum as part of the Treaty and raised the annuity to \$5 in exchange for the abandonment of all claims relating to verbal promises other than those contained in the memorandum. In 1875, Treaty Commissioner Alexander Morris proceeded to re-negotiate the treaty with the bands to include the items listed in the memorandum. In exchange, “any Indian accepting the increased payment, thereby formally abandoned

²⁷⁹ Morris 1991: 129.

²⁸⁰ Morris 1991: 40.

²⁸¹ Based on the notes of the negotiations, the outside promises, as recorded in 1871 were included in the text of the Treaty. This included the following items:

- Chief dress.
- Dress for 2 braves and councillors per Chief
- Chief and councillors – buggy (except Yellowquill)
- Bull for each reserve, a cow for each chief, a boar for each reserve, a sow for each Chief “and a male and female of each kind of animal raised by farmers, these when the Indians are prepared to receive them.”
- “Plough and harrow for each settler cultivating the ground”
- “These animals and their issue to be Government property, but to be allowed for the use of the Indians, under the superintendence and control of the Indian Commissioner.”
- Raised annuity to \$5 (\$20 for chiefs and clothes every 3 years) in exchange for abandoning “all claim whatever against the Government in connection with the so-called “outside promises,” other than those contained in the memorandum attached to the treaty.”

²⁸² Memorandum of things outside of the Treaty that were promised at the Treaty at the Lower Fort, signed the 3rd day of August, A.D. 1871 by Simpson, Archibald, St. John and McKay.

²⁸³ Morris 1991: 126, emphasis mine.

²⁸⁴ Morris 1991: 128.

all claims against the Government, in connection with the verbal promises of the Commissioners, other than those recognized by the treaty and the memorandum referred to.”²⁸⁵ Chief YellowQuill referred to these negotiations as “the second treaty.”

These outside promises were acknowledged and included in the Treaty because they formed part of the official record. They are another written form of Treaty. The complaints of the Chiefs would lead us to believe that there were far more than the outside promises that didn’t work their way into Simpson’s report? Chief Wa-quse wrote to Lieutenant-Governor Morris:

They don’t follow the agreement at all, it is not for three dollars a head that I would have sold my land. I dindt (sic) sold neither signed the treaty before they had promised me what I asked but now they don’t even give us enough to eat.²⁸⁶

Molyneux St. John recognized that there was more to the agreement than one was led to believe from the written text:

You will observe in this that there are several matters not spoken of in the Treaty, or mentioned in the outside promises... It had been palpable from the first that the present unsatisfactory state of the relationship was inevitable, and Mr. Commissioner Simpson though always seeking to hide over any difficulty in the hopes that time would exercise its usual influence in such cases; has always expressed his regret at having allowed signing of the first Treaty to be rushed as it was, when as subsequent events have shown it was so necessary to have a perfect understanding. The full demands of the Indians cannot of course be complied with but there is nevertheless a certain paradox in asking a wild Indian who has hitherto gained his livelihood by hunting and trapping to settle down on a Reservation and cultivate the land without at the same time offering him some means of making his living. As they say themselves ‘We cannot tear down trees and build huts with our teeth; we cannot break the Prairie with our hands nor reap the harvest when we have grown it with our knives.’²⁸⁷

CONCLUSION

One might be inclined to read the Treaty and focus in on the following words: “The Chippewa and Swampy Cree Tribes of Indians and all other Indians inhabiting the district hereinafter described and defined do hereby cede, release, surrender and yield up to Her Majesty the Queen and successors forever all the lands included within the following limits...” But that is too limited a reading of the treaty.

²⁸⁵ Morris 1991: 127.

²⁸⁶ September 30. 1874. RG10, 3598, 1447, C10, 104.

²⁸⁷ M. St. John to W. Spragge, Deputy Superintendent General of Indian Affairs. February 24 1873. RG10, 3598, 1447, C10, 104.

The text of the treaty also says “Indians have been notified and informed by Her Majesty’s said Commissioner that it is the desire of Her Majesty to open up to settlement and immigration a tract of country...and to obtain the consent thereto of her Indian subjects inhabiting the said tract, and to make a treaty and arrangements with them so that there may be peace and good will between them and Her Majesty, and that they may know and be assured of what allowance they are to count upon and receive year by year from Her Majesty’s bounty and benevolence.”

It is clear both from the written text of the treaty, the historical record, and the verbal statements made at the treaty negotiations that the Crown wished to settle western Canada with the consent of the Indigenous inhabitants. The policy was to make treaties with the Indigenous people, on behalf of the Queen, and to assure peace and goodwill between them, in exchange for the Queen’s ‘bounty and benevolence’. While on the first day the Commissioners stated that the terms would be the same as for the Indians in the East, by the fifth day, they made terms that were better than those already arrived at in previous treaties.

On behalf of the Anishinabe, the Chiefs pledged strict observance of the treaty, to maintain peace and not to molest Queen’s other subjects:

And the undersigned Chiefs do hereby bind and pledge themselves and their people strictly to observe this treaty and to maintain perpetual peace between themselves and Her Majesty’s White subjects, and not to interfere with the property or in any way molest the persons of Her Majesty’s white or other subject.²⁸⁸

In regards to implementation of the treaties today, one of the primary problems is the approach the Canadian legal system has taken to treaty interpretation. According to the Supreme Court of Canada, neither contract rules nor international conventions are directly applicable to treaty interpretation. A *sui generis* approach has been applied, given the particular nature of treaties: “[t]reaties are sacred promises and the Crown’s honour requires the Court to assume that the Crown intended to fulfill its promises.”²⁸⁹ Treaties are not “an empty shell.”²⁹⁰ The fundamental premise of treaty interpretation is articulated in the Nowegijick principle, outlined in legal discourse, such as the following:

²⁸⁸ *Treaty 1, 1871.*

²⁸⁹ *R. v. Badger*, [1996] 1 S.C.R. 771 at para 47 [Badger].

²⁹⁰ *R. v. Marshall*, [1999] 3 S.C.R. 456 at 52 [Marshall No.1].

The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing.²⁹¹

As we have seen above, the negotiations were held in accordance with Anishinabe protocols, including respect for jurisdiction, non-interference, creating kinship ties, feasting, dancing and ceremony. These protocols engaged a system of Anishinabe normative values and principles that had substantive resonance in the agreement arrived at in treaty. The relationship between the Anishinabe and the Queen, a relationship termed as one of mother to child by both parties at the negotiations entailed normative obligations from the Anishinabe perspective that differed from the obligations of a father towards the child (as had been the case with fictive kinship relationships with past kings and fur traders). The Queen was viewed as committing to love her Anishinabe children unconditionally, and to act with kindness and caring. Following the use of protocols, other Anishinabe normative understandings informed the treaty negotiations. One such example is the Anishinabe view in relation to land. Neither an owner nor seller, the Anishinabe used the land and cared for it, as it would a mother.

The conclusions that may flow from this better understanding of the Anishinabe normative perspective are the following. First, the Anishinabe adopted the Queen as their mother and her other children as their siblings. They had reciprocal obligations towards them in the nature of sharing. In particular, they were obliged to share in their lands. Second, the mother had an obligation of love, kindness and caring towards her Anishinabe children which entailed listening to their wants and providing for their needs, in order for them to have a good life. Third, the understanding of the Anishinabe was that land and resources together formed Mother Earth. This entailed an undivided relationship in which the Anishinabe retaining continued jurisdiction and access to the resources for harvesting, subject to sharing with the settlers, for a limited purpose.

²⁹¹ *Badger*, *supra* note 181, para 52.

The treaties are presumed to have been negotiated in good faith. Their provisions were to be implemented faithfully. Morris argued that:

the provisions of these treaties must be carried out with the utmost good faith and the nicest exactness. The Indians of Canada have, owing to the manner in which they were dealt with for generations by the Hudson's Bay Company, the former rules of these vast territories, and abiding confidence in the Government of the Queen, or the Great Mother, as they style her. This must not, at all hazards, be shaken.²⁹²

How then are the two treaty perspectives to be reconciled? Treaties are agreements between two parties in which neither perspective should be privileged over the other. Morris expressed the following wish in his closing words to his compendium on the numbered treaties:

Instead of the Indians melting away, as one of them in older Canada, tersely put it, "as snow before the sun," we will see our Indians population, loyal subjects of the Crown, happy, prosperous and self-sustaining, and Canada will be enabled to feel, that in a truly patriotic spirit, our country had done its duty by the red men of the North-West, and thereby to herself. So may it be.²⁹³

The treaty is a relationship. In Anishinabe law, relationships never end. They are constantly re-defined, re-examined and re-negotiated. They must be tended, fuelled, nurtured or simmered. They morph and evolve over time. The treaty is a relationship. The Anishinabe do not end relationships. As Elder Elmer Courchene describes it, "the fire is lowered, until the next time we meet. We have not finished our work. Our work is never done. Things change, we change. We will discuss this again."²⁹⁴ As Borrows notes:

Traditionally, First Nations did not allocate property in the exercise of their treaty decision-making powers by conducting their relationship with other people in a static way. Relationships were continually renewed and reaffirmed through ceremonial customs. Renewal and re-interpretation were practised to bring past agreements into harmony with changing circumstances. First Nations preferred this articulation of treaty-making to exercise their powers of self-government because it was consistent with their oral tradition. The idea of the principles of a treaty being "frozen" through terms written on paper was an alien concept.²⁹⁵

To look at the treaties as one isolated moment in time, independent of the past or the future, is not in keeping with the Anishinabe perspective on Treaty. The treaty was a relationship developed on the basis of respect and was intended to last, as they understood it, "as long as the grass grows, the sun shines and the rivers flow." Therefore, the fire could be lowered post-negotiation, only to be tended at a later

²⁹² Morris 1991: 285.

²⁹³ Morris 1991: 297.

²⁹⁴ Elmer Courchene, personal communication, June 2010.

²⁹⁵ Borrows 1992: 12, 179 at 191.

date, with changes in circumstances over the years. The relationship would need tending. This reinforces that the treaty text, although illustrative of parts of the negotiations, and certainly illustrative of the Canadian perspective, is not determinative of the extent of the rights, obligations, responsibilities and relationships that were confirmed in Treaty 1. The rights and obligations that flowed from the negotiations were to be seriously considered and thought over. Shortly after the agreement on Treaty 1, Archibald noted that the Indians:

recollect with astonishing accuracy every stipulation made at the Treaty, and if we expect our relations with them to be of the kind which it is desirable to maintain we must fulfill our obligations with scrupulous fidelity.²⁹⁶

Among the Anishinabe, there are many prophecies. One in particular expresses the change in the earth that is palpable today:

Ji-naagadawaabamangitiwaa ongo gaa-bi-dagoshinowaad. Gi-gii-bakwenimaanaanik gi-dakiinaan owe ginookomisinaan. Nashke dash gaa-doodamowaad. Noongom da-gekise. Gaawiin gaye ginezha aazha aanish gii-dibaajimo ongo gaa-bawajigewaad, dibaajimo ako aadizookaanag.

We shared our grandmother with them. But look at what they did to our grandmother. It will change today. It will not be long now, as it was shared by the ones who have visions that the spirit helpers are sharing [with us].²⁹⁷

Hopefully, a better understanding of Anishinabe normative values and principles will assist in rebuilding the treaty relationship and honouring its original spirit and intent in all ways that it was understood.

²⁹⁶ Archibald Papers, despatches to Secretary of State, 12, 17 February 1872.

²⁹⁷ Ken Courchene, in Pratt et al. 2011: 45-46.

REPORT 4: TREATY 4

by Michael Asch

INTRODUCTION

Of this, there can be no doubt: to knowingly move onto land belonging to others without their permission is theft. We may seek to be immigrants, we may seek a political arrangement to establish our right to govern over part or all of those lands, or we may seek a means to share jurisdiction. But we may not just move in. That is simply wrong. And, indeed, when looked at from this perspective, arguments that seek to deny the principle of temporal priority to the situation in Canada amount to no more than justifications to avoid calling ourselves “thieves.”

While there is considerable truth in describing what we have done as theft, that is not the whole story. By and large, from the outset we have recognized that Indigenous peoples were living in societies, and that, as a consequence, we are required to gain their assent to settle on their lands. This recognition was articulated as policy forcefully in the Royal Proclamation of 1763, where it states that:

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

Furthermore, the Royal Proclamation introduced a specific set of rules to give us the security that all parties consented to these arrangements. That is, it insisted that agreements be drawn between representatives of our highest political office, the Crown, and confirmed in a public gathering of members of that community. That is:

We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement: but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to

be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie....

This institution remained in place for over a century and a half, so that even in 1921, when Treaty 11 was negotiated, the treaty states:

And whereas, the said Indians have been notified and informed by His Majesty's said commissioner that it is His desire to open for settlement, immigration, trade, travel, mining, lumbering and such other purposes as to His Majesty may seem meet, a tract of country bounded and described as hereinafter set forth, and to obtain the consent thereto of His Indian subjects inhabiting the said tract, and to make a treaty.

Following this process, between 1763 and 1921 we negotiated literally hundreds of agreements that are referred to as “the historical treaties.” These include treaties of political alliance (peace and friendship treaties) and compacts (Miller 2009: 4f) to permit trading and other commercial activities on Indigenous territories in what are now Ontario, Québec, Nova Scotia, New Brunswick, Prince Edward Island, and parts of Newfoundland (RCAP 1996: II, map 483). Among these are the “territorial treaties” (Miller 2009: 5) through which we obtained consent to settle on much of the land mass of what is now Canada, including all of Ontario, Manitoba, Saskatchewan, and Alberta as well as portions of British Columbia and the Northwest Territories.

What this indicates is that, notwithstanding any assumption we may have had about the sovereign status of Indigenous political communities or whether we believed that, for some reason or another, they had come “under our Protection,” we have long accepted that the principle of temporal priority applies when it came to our settlement on their lands. Treaties, then, offer us a way of seeing the recognition of that principle as the basis for the legitimacy of our settlement here and not in opposition to it. “Treaty rights,” then, in contrast to “Aboriginal rights” mean (to use rights discourse) those rights Indigenous peoples have that flow from agreements we made with them. The question is: what were the terms on which permission was granted? Or, to put it another way: what did we promise in order to gain permission to settle on these lands”? Or, to put it in rights terms: what are the treaty rights we guaranteed to them in return for *the treaty right they guaranteed to us* to legitimate our permanent settlement on these lands? That will be the subject of this chapter.

The Numbered Treaties

This report examines this question through analysis of Treaty 4, one of the numbered treaties negotiated at the time of Confederation. It was negotiated in 1874, principally at Fort Qu'Appelle (now in Saskatchewan) between:

Her Most Gracious Majesty the Queen of Great Britain and Ireland, by Her Commissioners, the Honourable Alexander Morris, Lieutenant Governor of the Province of Manitoba and the North-West Territories; the Honourable David Laird, Minister of the Interior, and William Joseph Christie, Esquire, of Brockville, Ontario, of the one part; and the Cree, Saulteaux and other Indians, inhabitants of the territory within the limits hereinafter defined and described by their Chiefs and Headmen, chosen and named as hereinafter mentioned, of the other part.

It covers much of south central Saskatchewan as well as small portions of Manitoba and Alberta. Typical of these treaties, it acknowledges that negotiations are intended to gain permission before settling on these lands. Here is what the text says:

And whereas the said Indians have been notified and informed by Her Majesty's said Commissioners that it is the desire of Her Majesty to open up for settlement, immigration, trade and such other purposes as to Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty and arrange with them, so that there may be peace and good will between them and Her Majesty and between them and Her Majesty's other subjects, and that Her Indian people may know and be assured of what allowance they are to count upon and receive from Her Majesty's bounty and benevolence.

The simple question, then, is what is the shared understanding of the terms offered to “the said Indians” to “obtain the consent” for fulfilling “the desire of Her Majesty to open up for settlement, immigration, trade and such other purposes as to Her Majesty may seem meet?”

Choosing Treaty 4

The principle reason for choosing Treaty 4 for this investigation is that there is much evidence of what transpired from contemporaneous sources. The following sources are key:

- 1) A shorthand report of the proceedings recorded by the secretary (M. G. Dickieson) to Commissioner Morris (the lead Commissioner) and published in his 1880 book, *The Treaties of Canada*, with the explicit intent to serve as a record of the negotiations:

It is obvious that such a record will prove valuable as it enables any misunderstanding on the part of the Indians as to what was said at the conference to be corrected, and it moreover will enable the council better to appreciate the character of the difficulties that have to be encountered in negotiating with the Indians. (Morris 1880: 83)

Dickieson's report covers 38 pages in this book, and is declared by Morris to be an "accurate shorthand reports of the proceedings...."

- 2) The report of a second commissioner, Commissioner Laird;
- 3) A lengthy magazine article by F. L. Hunt, a reporter who attended the negotiations; and
- 4) Communications between Morris and the Government contained in the Morris (1880) book, including the "Order in Council" that set up the Commission.

Furthermore, there is much information from contemporary sources as to how our partners understand the terms of this treaty. These include:

- 1) "Proclamation and Convention of Treaty 4 First Nations," adopted by Treaty 4 Chiefs Council in 1999;
- 2) "Statement of Elders" recorded in the early 1980s and deposited at the Provincial Archives of Alberta (Treaty 4 Elders 1983);
- 3) A summary of a document entitled "Elders Interpretation of Treaty 4," originally produced for the Federation of Saskatchewan Indian Nations and appears on their website; and
- 4) Statements by named Elders that originate in a series of Treaty Elders Forums that were initiated jointly by the Federation of Saskatchewan Indian Nations, Canada, and the Province of Saskatchewan (as observer) and reproduced in a book by Harold Cardinal and Walter Hildebrandt entitled *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations*.

From this information, I have gleaned the following as the shared understanding of Treaty 4.

SHARING OR EXTINGUISHMENT?

The case for the common intention of Treaty 4 being "extinguishment" originates in the "cede and surrender" clause in the treaty text, which reads:

The Cree and Saulteaux Tribes of Indians, and all other the (sic) Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen, and Her successors forever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say:- (and then specifies the landmass included within the treaty).

The Indigenous Elders and leaders of Treaty 4 do not agree. Treaty 4 Elder Danny Musqua put it as follows:

We agreed to the relationship, a perpetual land-use agreement between us (First Nations) and them (the Crown) in Treaty 4, that (settlers) would harvest the land for the purposes of agriculture, sow crops and we, along with that (would learn agricultural skills); they would give us the technology to also do that ourselves. (Cardinal and Hildebrandt 2000: 66)

Here is what the contextual information says. Commissioner Laird reports that the Indigenous parties were read a translation of the written treaty during negotiations (Laird 1874: 4, 5) and also, at their insistence, at its conclusion, noting that it was “read and explained to them” (Laird 1874: 7). There is evidence to confirm this in the short-hand transcription which spells out the terms that were conveyed in detail on the third day (Morris: 1880: 92-93), an assertion that these terms were repeated on the next (Morris 1880: 96), and then, by reference to a comparison with another treaty, on the afternoon of the sixth (Morris 1880: 204-209). *However, on none of these occasions is there evidence that the contents of the extinguishment clause were mentioned. Nor does it indicate that the Commissioners even broached this matter at any other time, much less that the Indigenous parties had agreed to it.*

It may well be that both parties already assumed that the Crown had sovereignty, and thus it was not necessary to address the matter during negotiations. Certainly, the written text took that view for it identified the Indigenous party as “Her Indian subjects.” It is also clear that Commissioner Morris held it as well, for he addressed the leadership as “the Queen’s subjects” (e.g., Morris 1880: 93, 94). However, there is nothing in the transcription to confirm that the Indigenous party shared this view. On the contrary, on the few occasions when they refer to the Queen, they speak of her as though she did not have sovereignty over them. Thus, while the Commissioner says (Morris 1880: 102) that “The lands are the Queen’s under the Great Spirit,” a spokesperson for one of the Indigenous parties (probably the Gambler, a Salteaux spokesman) states (Hunt 1876: 179) that “We own the land; the Manitou (or Great Spirit) gave it to us.”²⁹⁸ This tends to confirm the position of Treaty 4 Elders and leaders who take the view that (Treaty 4 Chiefs Council 1999:1) “Our forefathers entered into Treaty exercising all the powers of sovereignty and nationhood.” On this point, then, there appears to be no shared understanding and the parties entered into negotiations agreeing to disagree on this point.

However, the transcription indicates that, whether or not they considered the Indigenous parties to be “subjects of the Queen,” the Commissioners negotiated with them as members of autonomous political communities equal in standing to that of the settlers. That is, when it comes to identifying individuals, Morris is careful to use terms designating settlers and Indigenous peoples as “equals” in status as when

²⁹⁸ This may well be a shorthand version of the following remark by *The Gambler* as reported in the transcription (Morris 1880: 104): “The Indians were not told of the reserves (for the Hudson’s Bay Company) at all. I hear now, it was the Queen gave the land. The Indians thought it was they who gave it to the Company....”

he uses the word “men” to describe all the participants in the negotiations (Morris 1880: 99). Also, he uses the word “friend” or “friends” to describe the relationship between members of the Indigenous and Settler communities after negotiations as when he says, respecting the Lake of the Woods treaty: “the white *man* and the red *man* made *friends* forever” (emphasis mine) (Morris 1880: 88). He also uses terms designating kin of the same generation and gender to describe members of these communities after negotiations as when he uses the following language to describe the relationship he seeks in Treaty 4 (Morris 1880: 109): “The red man and the white man must live together, and be good friends, and the Indians must live together like brothers with each other and the white man.” In fact, he only invokes a generationally hierarchical arrangement (Mother to Child) in designating the relationship intended between the Indigenous community and the Queen, but even in that case equates the relationship to that between the Queen and Settlers, as when he says: “she cares for you as much as she cares for her white children...” and “...the Great Mother of us all...” (Morris 1880: 96).²⁹⁹ It is a relationship that, with one exception, he never uses to describe his own relationship with First Nations, even though he makes it clear he represents her.³⁰⁰ In this, he follows the relationship between the parties found in that portion of the treaty text cited above describing the “Chiefs and Headmen” as having the same status to conclude a treaty on behalf of their peoples as do the Commissioners on behalf of the Crown.³⁰¹ In other words, these sources support the understanding that the Indigenous parties were (Treaty 4 Chiefs Council 1999: 2) “autonomous nations.” There is no hint in the negotiations that the treaty agreement would change this status.

Furthermore, Commissioner Morris declared repeatedly (and daily on the first five days) that negotiations are with the Crown (Morris 1880: 88, 90, 91, 97, 109), and that they could take his words as coming from “the Queen” herself. Typical is his statement on day 2 that (Morris 1880: 15): “What I want

²⁹⁹ Also see Morris 1880: 92, 107.

³⁰⁰ Indeed, even in the case where he uses the term “father,” Morris is speaking as though he were the Queen (Morris 1880: 95).

³⁰¹ If this is not sufficiently clear, here is the text to which I am referring:

ARTICLES OF A TREATY made and concluded this fifteenth day of September, in the year of Our Lord one thousand eight hundred and seventy-four, between Her Most Gracious Majesty the Queen of Great Britain and Ireland, by Her Commissioners, the Honourable Alexander Morris, Lieutenant Governor of the Province of Manitoba and the North-West Territories; the Honourable David Laird, Minister of the Interior, and William Joseph Christie, Esquire, of Brockville, Ontario, of the one part; and the Cree, Saulteaux and other Indians, inhabitants of the territory within the limits hereinafter defined and described by their Chiefs and Headmen, chosen and named as hereinafter mentioned, of the other part.

is for you to take the Queen's hand, through mine, and shake hands with her forever." He also represents himself as her "messenger" (Morris 1880: 88) and her "servant" (Morris 1880: 97), as well as someone "high in her Councils" and "trusted by her," someone the First Nations are fortunate to have as her negotiator (Morris 1880: 96).³⁰² In short, the record substantiates Elders' assertion that Morris and the First Nations shared the understanding that Treaty 4 was negotiated with the Queen and not with the Dominion of Canada. There is no hint in the transcript that the Commissioner conveyed the possibility that the status of the Indigenous parties as one who negotiates directly with the Queen would be altered by the treaty agreement.

In sum, there is virtually nothing in the transcription that supports an interpretation of the extinguishment clause as resulting in the political subordination of the Indigenous parties to the Government of Canada. Rather, it is more consistent with the evidence to conclude that the shared understanding of Treaty 4 is that it resulted in a direct political alliance with the Queen. In this sense, it put the Indigenous parties in the same jurisdictional relationship with the Crown as other autonomous political entities within the Empire, such as Canada and New Zealand. That is, "brothers to each other" and "children of the Queen." And just as Canada's jurisdiction did not extend to its "brother" New Zealand, so did it not extend to this new partner (newly adopted child of the Queen and brother of Canada), Treaty 4 First Nations. As I have come to understand it, that is the political relationship Elder Musqua evokes with these words:

The Queen has adopted (First Nations) as children ... a joint relationship will come out of that. And so we have a joint relationship with the Crown because the Queen is now our mother (Cardinal and Hildebrandt 2000: 34).

Thus, it is clear that, notwithstanding how we now read the cede and surrender clause, there is no indication in the contextual materials to sustain the view that there was any voluntary transfer of Indigenous sovereignty and jurisdiction.

³⁰² He uses Dominion to describe where Mr. Christie lives (Morris 1880: 88), and Government in relation to alcohol control (Morris 1880: 93), as well as to differentiate between it and the Hudson's Bay Company (and in that regard appears to conflate Government with the Queen) (Morris 1880: 93). While he does not specify to which government he is referring, it is clear from the context that he means the Dominion Government (Morris 1880: 111). Canada is not mentioned at all.

Sharing the Land or Taking It Over?

The “extinguishment” clause also suggests that the common intention was that the Indigenous parties would “surrender” their rights, titles and privileges with respect to the land itself. Their contemporary Elders and leaders disagree. They suggest their forbearers (Elder Kay Thompson, quoted in Cardinal and Hildebrandt 2000: 62f): “... didn’t give the land, they didn’t say, we give you this land. They just gave permission to use the land.” This permission, it is explained, does not expressly limit the economic activities of the settlers, except with respect to the use of the land itself in regard to which it specifies that the grant limits its right to food production, including both farming and ranching (Cardinal and Hildebrandt 2000: 22); a restriction referred to commonly by the phrase (Treaty 4 Elders 1983: 4; Cardinal and Hildebrandt 2000: 42, 22): “the depth of the plow....” More specifically, these sources are clear that no permission was granted for economic activities respecting the subsurface. This position, which is repeated by Elder Gordon Oakes (Cardinal and Hildebrandt 2000: 42, 22, 64), is expressed in these categorical terms in the Proclamation:

We retain our inherent birthright and interest in all arable and non-arable lands, mines and minerals and royalties derived there from and all other natural resources that were bestowed on us by the Creator for our livelihood (Treaty 4 Chiefs Council 1999: 2).

It can be inferred from the context that the shared understanding of the terms did not exclude the building of either a telegraph line or a railway line, even through these activities used the surface of the land in non-agricultural ways.

The transcription and other sources provide little information on this matter. However, what there is clearly supports Elder Thompson’s interpretation in that at least two times during the negotiations Commissioner Morris says his request is to share in the use of the land. The first took place on day four of the negotiations:

MORRIS – Who made the earth, the grass, the stone, and the wood? The Great Spirit. He made them for all his children to use. It is not stealing to use the gift of the Great Spirit. The lands are the Queen’s under the Great Spirit.³⁰³ The Chippewas (Saulteaux) were not always here. They come from the East. There were other Indians here and the Chippewas came here, and they used the wood and the land, the gifts of the Great Spirit to all, and we want to try to induce you to believe that what we are asking is for the good of all (Morris 1880: 102).

³⁰³ It is, of course, a point on which the Indigenous party disagreed (Hunt 1876: 179).

As I take it, this means that, even though the Commissioner claims that the Crown has the underlying title to the land, the settlers are only requesting that we join those already here in using the gift of the Creator. Other than the assertion that the Queen is the custodian of these lands, it is a representation that dovetails with the understanding of Elder Musqua:

Because, if any man owns a piece of the Earth, then he no more respects Mother Earth. He no longer respects the Earth, because he believes he can do what he wants with that Earth and he can destroy it, he can do what he wants. That's the reason why we don't own the Earth, because it belongs to all the people. For the purposes of that we cannot own the Earth. We are willing to share it (Cardinal and Hildebrand 2000: 62).

The second instance comes in the Commissioner's opening remark on day five in which he emphasizes that his interest is in sharing land, not owning it:

We have two nations here. We have the Crees, who were here first, and we have the Ojibbeways (Saulteaux), who came from our country not many suns ago. We find them here; we won't say they stole the land, and the stones and the trees; no, but we will say this, that we believe their brothers, the Crees, said to them when they came in here: "The land is wide, it is wide, it is big enough for us both; let us live here like brothers," and that is what you say;" and that is what you say, as you told us on Saturday, as to the Half-Breeds I see around. You say you are one with them; now we all want to be one (Morris 1880: 108).

The treaty text also suggests that the Indigenous parties agreed to restrict their economic activities associated with foraging to certain lands, and, by permitting its practice, to come under the legislative authority of the Government of Canada. The clause reads:

And further, Her Majesty agrees that Her said Indians shall have right to pursue their avocations of hunting, trapping and fishing throughout the tract surrendered, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining or other purposes, under grant or other right given by Her Majesty's said Government.

The Commissioner does mention the first restriction, explaining that (Morris 1880: 96): "you will have the right of hunting and fishing just as you have now until the land is actually taken up." But, he modifies this as follows:

We have come through the country for many days and we have seen hills but little wood and in many places little water, and it may be a long time before there are many white men settled upon this land (Morris 1880: 96).

At the same time, there is no indication in the transcription that he mentions that these activities will be subject to regulation by "the Government of the country" (unless he means by the Indigenous governments already in place), nor does it indicate that the subject of subsurface rights was discussed.

Fixed Terms Or Open-Ended Sharing Relationship?

The written treaty declares that the common intention was that the Crown would fulfill certain specific and fixed commitments, such as providing Treaty 4 First Nations with a certain number of farm implements, a school, and a one-time allocation of reserved land of a certain size. On the other hand, the Elders and leaders of the Indigenous parties today suggest that, while these are specified, they were merely a tangible expression of a larger commitment to ensure that they would benefit, not suffer, economically as a consequence of settlement. It is often expressed using the phrase (Treaty 4 Elders 1983: 2): “What I (The Queen) offer you is on top of what you have;” and that, in particular, the offer of ammunition and fishnets in perpetuity was intended as support for their foraging activities (Treaty 4 Elders 1983: 2) and the offer of cattle, ploughs and other productive tools was intended to support those who chose to take up agriculture (Cardinal and Hildebrandt 2000: 66). Underlying these specific promises, then, was the intent by the Queen to do what she could to ensure the economic well-being of Treaty 4 First Nations and in that regard her intention was to provide assistance in times of need so that they would be “free from hunger” (Treaty 4 Elders 1983: 2, 3) and to secure that “you will be as wealthy as they (e.g., Settlers) are” (Cardinal and Hildebrandt 2000: 47), and, perhaps most important of all, that their economic security would not require that they change their way of life (Treaty 4 Elders 1983: 2). As well, among the other promises found in the written text, the Elders and leaders say that, as a token of “good faith” and as an assurance that “the treaty would never be broken,” the Queen pledged to give every citizen of the Treaty 4 First Nations a gift of \$5.00 annually, in perpetuity (Treaty 4 Elders 1983: 4).

There is much in the transcription that supports the position that the Crown was making a broader commitment, through the treaty, to the economic well-being of Treaty 4 First Nations. For one, Commissioner Morris referred repeatedly to the Queen’s concern about the current economic situation of the Indigenous parties, and of her desire to assist them (Morris 1880: 88, 92, 94, 95, 113, 117, 118). Here are some examples (Morris 1880: 88):

The Queen loves her Red children; she has always been friends with them; she knows it is hard for them to live, and she has always tried to help them in the other parts of the Dominion.

Then, in the midst of outlining the commitments specified in the text, Morris (1880: 92) says: “The Queen cares for you and for your children, and she cares for the children that are yet to be born. She would like to take you by the hand and do as I did for her at the Lake of the Woods last year” (i.e., in

Treaty 3). And then on day 5 when it appeared that negotiations would fail, Commissioner Morris makes the following appeal:

The Queen and her Councillors may think that you do not want to be friends, that you do not want your little ones to be taught, that you do not want when the food is getting scarce to have a hand in yours stronger than yours to help you. Surely you will think again before you turn your back on the offers.... (Morris 1880: 113).

Indeed, he intimates that the Queen has already provided economic security to those who made treaties:

More than a hundred years ago, the Queen's father said to the red men living in Quebec and Ontario, I will give you land and cattle and set apart Reserves for you, and will teach you. What has been the result? There the red men are happy; instead of getting fewer in number by sickness they are growing in number; their children have plenty. The Queen wishes you to enjoy the same blessings.... (Morris 1880: 95).

"All we can do," he concludes, "is to put money in your hands and promise to put money in the hands of those who are away, and give you money every year afterwards, and help you to make a living when the food is scarce" (Morris 1880: 118). There are many other pledges of a global nature to the effect that the terms of Treaty were offered with the best interests of the First Nations in mind and in a loving spirit (Morris 1880: 90, 92, 95, 97, 104, 107, 109, 117).

Just prior to reaching agreement, Kanooses, spokesperson for the Cree, asks for this assurance (Morris 1880: 117-118):

KAN-OO-SES: Is it true you are bringing the Queen's kindness? Is it true you are bringing the Queen's messenger's kindness? Is it true you are going to give the different bands the Queen's kindness? Is it true that you are bringing the Queen's hand? Is it true you are bringing the Queen's power?

MORRIS: Yes, to those who are here and those who are absent, such as she has given us.

KAN-OO-SES: Is it true that my child will not be troubled for what you are bringing him?

MORRIS: The Queen's power will be around him.

In the context of what the Commissioner has already said, I take Morris' words as confirming Kanooses' understanding that the promises are intended to establish an open-ended relationship, for, as I interpret it, to have the Queen's power around Kanooses' child is to say that the Queen will always treat those who belong to Kanooses' family and his descendants (writ large) in the way a loving mother treats her children. That is, it confirms that the Queen accepts the relationship that, as *The Gambler* explains, Indigenous peoples have already extended to her family and their descendants when he says to the Commissioner (Morris 1880: 100):

Look at these children that are sitting around here and also at the tents, who are just the image of my kindness. There are different kinds of grass growing here that is just like those sitting around here. There is no difference. Even from the American land they are here, but we love them all the same, and when the white skin comes here from far away I love him all the same. I am telling you what our love and kindness is. This is what I did when the white man came, but (referring to how the Hudson's Bay Company acted in surveying the land) when he came back he paid no regard to me how he carried on.

CONCLUSION

I think the evidence clearly shows that, on the balance of probabilities, the interpretation of the terms of Treaty 4 offered by our Indigenous partners today more accurately reflects the agreement we reached than does the version transmitted to us through the written text. That is, in order to gain their permission to settle on lands we recognized as belonging to them, we asked only to share the land with them (not to take it over as by purchasing it). In return, we promised to do our utmost to ensure that our presence on these lands would result in benefits to them, and certainly would cause them no harm. Furthermore, whether or not we believed we had sovereignty, we treated our partners as independent political actors with their own leaders and with a right to make the final decision on our request, and there is nothing in the evidence to substantiate the proposition that we even requested, much less that they accepted, that the terms of the treaty were such that it would change this political relationship. In fact, as mentioned above, there is some support for this view even in the text of the treaty. Put succinctly, but perhaps too mechanically, the agreement was this: Our Indigenous partners would share the land with us and we would treat them like our own brothers and sisters. Morris put the relationship in these words, which have been quoted back to us on many occasions:

The Queen has to think of what will come long after today. Therefore the promises we have to make to you are not for today only but for tomorrow, not only for you but for your children born and unborn, and the promises will be carried out *so long as the sun shines above and the water flows in the ocean*. (Morris 1880: 96, emphasis added).

REPORT 5: TREATY 6

by Kelsey Wrightson

For the Elders, what is at issue is not whether or not treaties exist, but whether a mutually acceptable record of them can now be agreed upon and implemented. They remain confident that if the fundamental values identified by them guide any future process and if *tapwewin* (truth) is the basis for arriving at an agreement on a mutually acceptable record of the treaties, the parties, with good faith, ought to be able to succeed in reaching such an agreement (Cardinal, 2000: 59).

CONTEXT: WHAT IS READ TO UNDERSTAND TREATY?

Treaty is read through three main sources: oral history, first hand accounts, and the text of treaty. Elders in the Treaty 6 area have shared their knowledge through multiple interviews, and have come together collectively to create a written record of the oral history of Treaty 6 and 7 in the book, *Treaty Elders of Saskatchewan* (Cardinal and Hildebrandt 2000). This is an extensive and thoroughly examined documentation of the common understanding of the Treaty 6 relationship. While the book includes many different narratives from many different Elders, these histories all indicate a consistent and shared understanding of treaty. Additionally, Sharon Venne (1997) has written extensively on the perspective of Cree Elders on treaty negotiation. Her research has included cultural contextualization of the Treaty 6 text in relation to Cree belief systems and philosophy. She has also spent time speaking with Elders and documenting oral history at the Onion Lake Meeting in 1998.

Second to the oral history, first hand documentation of the negotiation is used for analysis. In the case of Treaty 6, Commissioner Morris's book, *The Treaties of Canada with the Indians of Manitoba and the Northwest Territories* (1880), provides a first-hand account and record of the negotiation process. Morris was a government official who was present at the negotiations of the Treaties numbered 1 through 7. At the time of the Treaty 6 negotiations, Morris was an appointed judge in Manitoba as well as the Lieutenant Governor of the North-West Territories. As the Chief Commissioner in the negotiations of Treaties 3 through 7, Morris collected short hand dictations of the negotiation as well as letters pertaining to the context and practice of the negotiations. These writings are a unique insight into the

treaty process from the perspective of the Crown negotiators and Dominion representatives. First published in 1880 as a record of the negotiation process, this writing gives a “living” perspective of government negotiators on both the context and the process of negotiation. Including these multiple perspectives enables a richer analysis of the historical and cultural context and content of Treaties 1 through 7, indicative of a common intention of the historic treaties that cannot be read when analysis is limited to the text of treaty. Both the oral narratives and Morris’s first-hand accounts of the treaty context and negotiation contrast with readings of the Treaty 6 text as a finite and complete reflection of treaty. As such, the text of Treaty 6 does not reflect the full and final agreement of treaty, as it was commonly understood. Instead, the text of treaty is an articulation of a particular perspective on treaty which was shared with the Crown, but not the common intention of numbered treaties as there were understood and agreed upon by all parties.

Finally, the text of treaty is read but not relied upon as the finite and complete understanding of treaty as this leads to a partial or flawed understanding of the relationship, as it was commonly understood. Rather, the text of treaty exemplifies the manner in which the shared understanding of treaty as articulated in the oral history and first hand accounts was later re-articulated to the Crown by Crown-representatives. Indigenous parties were not party to this version of treaty in the same way that they fully participated in the negotiated common intention. As Michael Asch (2010) explains, it is more reasonable to rely on the common intention of treaty found in the oral history, as this is the interpretation of treaty that was shared by Indigenous and settler negotiators, rather than what was re-articulated after the completion of treaty. Legal precedent is moving towards inclusion of oral history and supportive documentation in interpreting the treaty (*Delgamuukw v. British Columbia*, 1997). However, the written form of the treaty remains the prioritized version in Canadian political and legal practice. In disputes over land, mining, and oil development, the written version of the numbered treaties is read as a finite and exclusive document of sale. Rather than beginning and ending my analysis of Treaty 6 with the written text, which was the version of the treaty that was delivered by the negotiators to the Dominion Government and the Queen, the use of Morris’s text and the oral history of the Elders indicates a common intention of treaty that is divergent from the written text.

TREATY 6

The area of Treaty 6 extends across the central portions of present-day Alberta and Saskatchewan. The Indian inhabitants of this area are mainly Cree with some Assiniboine, Saulteaux, and Chipewyan peoples. When the treaty was signed in 1876, there were no provinces; however, in current geographical terms, Treaty 6 extends from Alberta into Saskatchewan. It comprises more than 260,000 square miles, and the Federal Government recognizes seventeen First Nations in Alberta and twenty-eight First Nations in Saskatchewan. Treaty 6 was negotiated and signed in two locations. There were two signings at Fort Carlton on August 23rd and August 28th, and then a third signing at Fort Pitt on September 9th. At the negotiations in Fort Carlton, more than 2,000 Indigenous men, women, and children gathered to take part in the process, representing about a tenth of the population of the prairies. The first signing of Treaty 6 took place in 1876; however, bands continued to sign into the treaty in the decades that followed, with the most recent signing being that of the Cochin band in 1958.

The negotiations that took place as part of Treaty 6 were congruent with a longstanding tradition of settler and Indigenous relations negotiated through treaty. Between 1871 and 1875, the first five of the numbered Treaties were signed. These Treaties were also negotiated under Commissioner Morris, who was the chief negotiator for Treaties 3 through 7. Though predated by the Robinson Treaties and the Peace and Friendship Treaties with the MicMaq, the numbered Treaties were unique in that they contained more explicit provisions and articulated a relationship based on explicit sharing of land and resources. This is in contrast to the relationship of co-existence articulated in and through peace and friendship treaties (Miller 2009).

Across Northern Alberta and Saskatchewan, a range of contemporary debates over recognition of Indigenous rights, the forced placement of Indigenous peoples onto reserve, policing practices, health care and subsurface mining rights are related to interpretations of Treaty 6, particularly those that see the treaty as a document of surrender. However, issues such as water rights and mining practices remain bound up with treaty interpretations (Chopra 2007; Statt 2003). The dominant policy interpretation of Treaty 6 relies solely upon the text of the treaty as a legally binding document. This interpretation reads the relationship in a light favourable to the power holder, namely settler society and the provincial and federal governments. Relying solely on the text, Treaty 6 is read as a document subordinating Indigenous rights beneath Crown assertions of sovereignty and extinguishing Indigenous land claims. These text-

based interpretations rely heavily on the term “to cede and surrender.” Contemporary contestation of this interpretation seeks to include the “spirit and intent” of the treaty. This response to a singular reading of the treaty text often relies on conjectures of dark dealings and purposefully misleading negotiations to negate the validity of the text of Treaty 6 as a document of sale. However, the argument that there were two distinct versions of Treaty 6 as understood by two distinct parties negates the possibility of a mutually understood relationship between treaty parties that is coherent with the original intent of the negotiators. This portrayal of two mutually exclusive versions of treaty runs counter to the assertions of the continuing existence and legitimacy of the agreement by contemporary Treaty 6 Elders.

While the variety of perspectives that came to the treaty negotiation table, Treaty 6 was not an irresolvable or a misinterpreted product of cross-cultural incomprehensibility. Instead, not only was Treaty 6 the product of a conversation between treaty parties, but it was a practice of complex cultural negotiation in which the perspectives of all parties were mutually understood. Thus, this analysis of Treaty 6 begins from the premise that there was an agreement reached between parties in the form of the common understanding of Treaty 6.

I begin my analysis of Treaty 6 considering the oral history of the agreement. Approaching Treaty 6 starting with the oral history of Treaty 6 reveals a different conceptualization than articulated in the text of Treaty 6. Sharon Venne, a Cree academic, has conducted extensive research, recording and analyzing the oral history of the Treaty 6 area (Venne 1997). Much of her research is further supported by Cardinal and Hildebrandt (2000), who provide a detailed and thoughtful articulation of this oral history and help clarify the common intentions of Treaty 6. This interpretation of the treaty, as articulated by Treaty 6 Elders, is further reinforced by the work of Commissionaire Morris, who wrote extensively about the Treaties that he was involved with settling. In *The Treaties of Canada*, Morris (1880) included letters that were written prior to the negotiations, which give further context of the treaty negotiations from the perspective of Crown representatives as they entered the negotiation process. Further, he extensively documented the process of treaty making with Indigenous peoples, including with Treaty 6 representatives. This included an account of the ceremonial practices, as well as the various demands that were entertained by the negotiators and the shorthand dictation of the proceedings. Drawing on the multiple perspectives presented in these materials in the interpretation of Treaty 6 allows us to

move beyond reliance on the static text of treaty and come to a fuller and more complex understanding of this agreement.

CONTEXT OF TREATY 6

Despite some characterizations of pre-contact North America as a vast empty land where interactions between autonomous and isolated groups was based in outright war and conflict, this is not an accurate understanding of either pre-contact North America or the years leading up to Treaty 6 (Borrows 1999; *Delgamuukw v. British Columbia* 1997; Flanagan 2000). The assumption that treaty talks took place in a political and social vacuum, where European systems of governance and legal authority took automatic precedence over an undeveloped Indigenous legal and social system, encourages and substantiates racist and ethnocentric understandings of the historical context of Treaty 6 and influences contemporary practices of making and interpreting treaties with Indigenous peoples. Basing interpretation of Treaty 6 on the premise that Indians were primitive savages without any form of social organization reinforces the justifications for past and present occupation of land and practices that continue the subordination of Indigenous people both in Canada and globally. As Milloy (1998: xiv) notes, these assumptions of inherent primitivism are summarily false: “Far from being the romantic and wild raiders of the plains, the Cree and other natives of the plains were engaged in a series of well-structured, inter-tribal relationships which were designed to ensure their security, to assist them in meeting the challenge of plains existence and to facilitate the acquisition of the good things of the world.” This approach to Treaty 6 recognizes that all parties understood the prior existence of settler and Indigenous political, economic, and social systems.

The Crown and First Nations representatives did not enter treaty talks in a context that was completely devoid of political and legal practices. Rather, both settlers and Indigenous peoples entered into a rich political and international system of relations that was recognized by all parties. As such, the treaty relationship was not entered through the imposition of a settler political relationship upon the cultural blank slate of primitive Indigenous peoples. Rather, “the early treaty process was but a part of the larger set of inter-societal encounters, some friendly, others hostile, through which Indigenous and non-Indigenous participants generated norms of conduct and recognition that structured their ongoing relationship” (Macklem, 2001: 137). Treaty was a well-known concept across pre-contact North America. Prior to European contact, the Treaty 6 peoples had long used treaty as a way of organizing their existing

relationships, and building new relationships with peoples both within and outside of their territories. Entrance into the lands of other nations was long attained through treaty.

The tradition of treaty making with European newcomers also has a long history in Canada. At the time of the numbered treaties, there was a long history of treaty making between Indigenous and settler populations, beginning before the Royal Proclamation of 1763. Thus, treaty practices undertaken in Canada, inscribed in the so-called “historic treaties” completed between 1763 and 1923, reflected the complicated and deeply rooted relational system already practiced between different First Nations as well as between Indigenous and settler peoples. Written in an 1874 report regarding the land act, “there is not a shadow of doubt, that from the earliest times, England has always felt it imperative to meet the Indians in council” (Berger 1991: 144). Indigenous peoples have not forgotten the implications of the long history of treaty in Canada for both understanding the historic treaties and the ramifications for contemporary practice. As Les Healy of the Kainai Nation stated in his testimonial to Canada’s Royal Commission on Aboriginal Peoples (RCAP):

The concept of treaty, *inaistisinni*, is not new to the Blood Tribe. *Inaistisinni* is an ancient principle of law invoked many times by the Bloods to settle conflict, make peace, establish alliances or trade relations with other nations such as the Crow, the Gros Ventre, the Sioux, and, more recently, the Americans in 1855 and the British in 1877. *Inaistisinni* is a key aspect of immemorial law, which served to forge relationships with other nations. *Inaistisinni* is a sacred covenant, a solemn agreement, that is truly the highest form of agreement, binding for the lifetime of the parties. So solemn is a treaty that it centres around one of our most sacred ceremonies and symbols, the Pipe. (RCAP, 1993)

Despite the already well-established political and legal structures indigenous to the Treaty 6 area, after first contact with settler cultures the time leading up to the first signing of Treaty 6 in 1876 was characterized by changes in the political, social and economic climate of the area. The Cree first made contact with settlers in the 1640s and within 30 years most First Nations in the Treaty 6 area were in contact with traders and fur trappers, or were participating in the fur trade actively themselves. During the 1700s, the plains economy shifted greatly with the increased availability of the gun and the horse. The fur trade built up along long-standing and deep connections between different Indigenous nations while also forging new familial ties and opening the space for cultural and linguistic exchange and understanding. By 1772, Cree were making buffalo pounds on the plains to draw buffalo into large corrals to be slaughtered for sale and trade. This extensive meat-trading network took advantage of the

new trade networks with settler populations as well as working along the Indigenous trading networks, such as the Cree with the Mandan-Hidatsa (Milloy 1988: 47).

In, and through, these new economic practices and interactions, settler negotiation parties were forced to confront stereotypes of Indigenous peoples as “savage” and “barbarian” with the reality of the highly organized groups and political organizations that they found. Reciprocally, Indigenous people also addressed their legal norms and practices in the face of an increasingly dynamic world and through interactions with newcomers. Robert A. Williams (1999) uses the term “jurisgenesis” to explain this dynamic era of interaction and creation of legal meaning. Robert Cover explains “jurisgenesis” as a time of interaction and reciprocal sharing of meaning, resulting in the negotiation of new legal and normative practices. The settler and Indigenous parties were coming together to define a *nomos*, or the normative world that they would share. He notes that “This world was held together by the jurisgenerative force of the common interpretative commitments to a law created and shared by the different peoples of Encounter era North America” (Williams (1999: 28). Following in the long tradition of cooperation and economic interaction, treaties reflected the needs of both parties to understand and negotiate with the other. Thus, neither party entered into the negotiation with the presumption of *terra nullius* or empty land. The land, and the peoples who occupied the land, were recognized as having long standing political and economic systems, and longstanding relationships with each other.

SHARED UNDERSTANDING

The negotiation of Treaty 6 was thus initiated in an already rich political context, where Indigenous peoples and a growing settler polity were forging new meanings of law and new understandings of each other. While the Indigenous and settler parties brought their own particular perspectives to the treaty negotiation table, this did not mean that the negotiations were incomprehensible or premised on deceptive practices. In contrast, coming to a shared understanding of treaty was an explicit goal of treaty making. The process of coming to that shared meaning is exemplified through the contestation and negotiation of meaning that took place. The debate over meaning, and the reluctance of some Chiefs to sign onto treaty, illustrates the degree to which all parties were intensely aware of the process of negotiating the shared meaning of the common understanding of treaty.

According to Commissionaire Morris' writings, Mr. McKay, a translator who worked for the Treaty Commission, spoke to the Indian party with the intention of asserting the need for clarity and transparency in the negotiation. Morris stated that there was no intention for deception in the negotiation but asserted the need for each party to understand the perspective of the other:

Before we rise from here it must be understood, and it must be in writing, all that you are promised by the Governor and Commissioners, and I hope you will not leave until you have thoroughly understood the meaning of every word that comes from us. We have not come here to deceive you, we have not come here to rob you, we have not come here to take away anything that belongs to you, and we are not here to make peace as we would to hostile Indians, because you are the children of the Great Queen as we are, and there has never been anything but peace between us. What you have not understood clearly we will do our utmost to make perfectly plain to you. (Morris 1880: 131).

Given the complex economic, political and social relations that defined the interactions between Indigenous people and settler populations, to think that the practice of treaty was either one-sided or an imposition of one party upon another is analytically flawed. Instead, interpretation of the treaties must take into consideration that treaty was a negotiated understanding of the relationship fully agreed upon by all parties.

Authority to Enter

It is also important to understand who the treaty parties were, and how they understood each other. In particular, I am interested in how authority to enter into the treaty negotiation is granted. This authority to enter into the negotiations includes not only the authority to enter granted by those who are being represented but also the manner in which the authority was recognized by other parties.

The key Crown negotiator was Commissionaire Morris, who already had experience negotiating Treaties 1 through 5. At the time of the Treaty 6 negotiations, he was the Lieutenant Governor of the Northwest Territories and, in his negotiating capacity, was considered a representative of the British Crown. As such, he had a dual role, alternating between the authorized representative of the Queen and British Crown interests and representative of the Dominion Government of Canada. This is a complex positioning in which the Morris' power as a representative of Canada was derived directly from the Queen. Thus, though the Dominion of Canada was party to the negotiation of Treaty 6, the authority to negotiate remained vested with the Queen. This has been a structural constraint on both the historical situation of Treaty 6 and the contemporary interpretation of the treaty practices in Alberta. Historically,

despite the dual position that Morris had as representative of Queen and Dominion Government, the structural constraint resulting from the power to negotiate residing with the Crown reinforced Morris's articulation of the relationship between First Nations and the Dominion of Canada as being that of equals. The Dominion Government derived its powers from the British Crown, and the Crown recognized the First Nations as sovereign negotiation parties. As such, First Nations were not understood to be subordinate beneath Crown or Dominion negotiation parties.

The Indigenous negotiators of Treaty 6 viewed themselves, and were recognized by the Crown and by Canada, as autonomous negotiators in entering the treaty relationship. This exemplifies the principle of equality of standing as the initial point from which the relationship of treaty was negotiated. The practice of equality of standing in relation to the authority to enter into treaty is exemplified in the kinship terminology and practices that Elders use to describe the relationship: "The First Nations concept of family is seen as the organizing conceptual framework through which the relationships created by treaty are to be understood" (Cardinal 2000: 18). This kinship terminology of "brothers" relates First Nations as equals to Dominion representatives while the phrase "children of the Queen" evokes a relationship of care. In invoking kinship terminology in his address of the negotiation parties, Morris was careful to articulate a relationship that would make the Crown equal to the First Nations. In his dictation of the Treaty 6 negotiation, Morris began the negotiation with an important introduction:

My Indian bothers, Indians of the plains, I have shaken hands with a few of you, I shake hands with all of you in my heart. God has given us a good day, I trust his eye is upon us, and that what we do will be for the benefit of his children. What I say, and what you say, and what we do, is done openly before the whole people. You are, like me and my friends who are with me, children of the Queen. We are of the same blood, the same God made us and the same Queen rules over us. (Morris 1880: 124).

In addressing the First Nations participants as "brothers" Morris reinforced the understanding of the relationship as one between autonomous equals. Though it can be argued that saying that the Indians were "children of the Queen" is a linguistic phrase representing the subordination of the Indigenous peoples, it was not subordination to the Dominion government. Indeed, in this phrasing, Morris maintains the equality between the negotiators. According to Cree beliefs, the Creator instilled the authority to negotiate in the Indigenous nations. The Queen did not give this authority to negotiate to First Nations, but merely recognized it. While acknowledging that Morris's power to negotiate came from the Queen, the First Nations were recognized, and recognized themselves, as autonomous negotiators because of both the unique relationship to the Creator, and through the kinship terminology

employed. As autonomous negotiation parties recognized by the Crown representatives and contingently by the Dominion government, the First Nations were recognized as having the inherent right to negotiate their own Treaties as sovereign and independent nations. The position of Indigenous negotiators as independent parties to treaty exemplifies the foundations of a nation-to-nation relationship between the First Nations negotiators and the Crown representative.

The treaties, through the spiritual ceremonies conducted during the negotiations, expanded the First Nations sovereign circle, bringing in and embracing the British Crown within their sovereign circle. The treaties, in this view, were arrangements between nations intended to recognize, respect, and acknowledge in perpetuity the sovereign character of each of the treaty parties, within the context of rights conferred by the Creator to the Indian nations (Cardinal 2000: 41).

WHY NEGOTIATE THE TREATIES

Analysis of the reasons for negotiation of treaty begins with the premise that all treaty parties were interested in the conclusion of treaties. The Taylor Report on Treaty 6, written in 1985, argues that the Treaties were negotiated and concluded faster than the government desired in response to growing Indian pressures (Taylor (1876), 1985: 2). Both the Indigenous and Crown negotiators had prior precedent for entering into treaty within their own systems of relations. Additionally to these precedents set for treaty negotiation, the Taylor Report cites four main reasons for entrance into the treaty, while a letter written to Lieutenant-Governor Archibald on April 13th 1871 by W.J Christie, HBC Chief Factor for the Saskatchewan District discusses four key concerns that representatives of the Plains Cree had raised. Broadly speaking, these issues can be divided between political and economic interests, as discussed below.

Political Reasons

From the Crown's position, there was already precedent for entering into treaty relations with Indigenous peoples of the prairies, as Treaties 1 through 5 had already been signed. However, prior to this, the Royal Proclamation of 1763 laid out a legal precedent for entering into treaty as a way of attaining agreement between Indigenous and settler populations. The Royal Proclamation was never binding on Indigenous peoples, but instead, dealt with the rules, the framework, and the structure in

which relations would take place between the Crown and the Indigenous peoples from the perspective of the Crown. Sharon Venne writes that:

It was the codification of the norms of customary international law for entering into treaties. International law required that a sovereign enter into formal agreements with another people's sovereign prior to entering lands occupied by those peoples" (Venne 1997: 185).

Nearly one-third of the text of The Royal Proclamation was devoted to British-Indigenous relations and set the precedent for Indigenous and settler relations based on treaty. The Proclamation enshrined the protection of Indigenous lands, clearly stating that Indigenous people had inalienable right to the land. As such, the Proclamation laid out both the necessity for entering into relations given the blanket right of Indigenous peoples to the land and that treaty was the acceptable mode of by which settler peoples could enter land. The Proclamation states:

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

While the underlying sovereignty of the Crown is assumed in the Proclamation, entrance into Indian Territory is only allowable when a relationship is first entered into with Indigenous peoples. This relationship was deemed legitimate both in how it was conducted, and whom it was conducted with. In other words, the legitimacy of the relationship was based in the negotiation of a shared treaty as a relationship between the Indigenous peoples and the Crown negotiators as opposed to settlers or private citizens. The Proclamation further states:

We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement: but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians...

Since the 1763 Proclamation, the tradition of treaty making had been used to establish relations, so as westward settlement continued the conduct of treaty negotiation was a natural extension of this practice. Though the Crown did not see Indian title as the equivalent of ownership, there remained a need to clarify whatever claim the Indigenous peoples had to the land as established through the Royal Proclamation of 1763. The government was using treaty as the means to solidify the Crown's claim to title by legislating the relinquishment of Indigenous title.

For Indigenous negotiators, there was a precedent for entering into treaties with other First Nations in the area as a means of historically gaining access to each other's land and to form binding contracts regarding the sharing of these lands and resources. Harrin (1998: 251) notes that:

Such arrangements were familiar to them and traditionally had been regulated through First Nations law, generally without any conflict. For example, the family and clan trapping, hunting, and fishing territories in the north and existed for generations.

Further, the Treaty 6 nations recognized treaty as a practice that had been pursued between other First Nations and settlers, most recently in the numbered treaties 1 to 5. Treaty was also a document that recognized the prior Indigenous jurisdiction and clarified land-sharing agreements between the parties in the area.

While treaty was the form through which both Indigenous and Crown negotiators clarified relations, Treaty 6 was meant to address specific needs of both parties. In part, the need to enter into treaty was a result of confusion over the jurisdiction. Indigenous peoples recognized their own claim to the land.

Venne (1997: 185) argues that:

Prior to entering into treaty, the Chiefs requested that the Crown and its Settlers not enter their territory without concluding an agreement. It was the Indigenous peoples who had the jurisdiction in this area and told the Crown that their jurisdiction must be respected.

However, early in 1876, Indigenous people had heard that the Hudson's Bay Company had sold lands to the British Crown. The First Nations never acknowledged that the HBC had any jurisdiction over them, nor did they acknowledge that the HBC had the ownership of the land. As such, they could not have the ability to sell it to the Crown. Given that First Nations did not accept HBC claims to ownership, Indigenous jurisdiction was maintained despite the sale of the land. The agreement between the HBC and the Crown was an invalid way of gaining access to Indigenous lands both in the Indigenous and settler legal systems. Because of the lack of treaty in the Treaty 6 area, there was a recognized need to enter Treaty on behalf of both participants to both recognize prior Indigenous ownership, and clarify the starting point of what was to be new relationship between settler and Indigenous peoples.

From the government's perspective, there was also a need to legitimate and define the jurisdiction over land in order to both define the settler relations to Indigenous peoples and establish legal jurisdiction.

Macklem (2001: 152) notes that "European powers initially saw fit to enter into treaties with Aboriginal

people in part to legitimate their claims of territorial sovereignty.” This expression of legitimacy also translated into a congruent exertion of material power in the territory. Mr W. J. Christie expressed concern over the lack of jurisdictionally clarified control in the area. Referencing laws that were meant to protect the lives of Indigenous peoples, including laws restriction on the use of strychnine and the prohibition of spirituous liquors, he said “that without any power to enforce these laws, it is almost useless to publish them here” (Morris 1880: 102). Without jurisdictional clarity, there would be no control.

Another motive for entering into Treaty 6 was the increasing pressure of settlers moving westward. The entrance of new settlers into traditional territory necessitated the clarification the relationship between settlers and First Nations, and provisions and protection for both settler and Indigenous populations. The First Nations were well aware of the threat posed both the increase of settlers in the region. Chief Mistahwas was quoted by Morris as saying “My heart is full of gratitude, foolish men have told us that the Great chief would send his young men to our country until they outnumbered us, and that then he would laugh at us” (Morris 1880: 104). Indigenous peoples were not unaware of the encroachment on their territory, and they demonstrated clear jurisdiction over the land in their interactions with the first newcomers. In a letter written by Morris, in the time leading up to the negotiation of Treaty 6, he told a story of a land speculator who ran directly into First Nations claiming a right to their territory:

A few weeks since, a land speculator wished to take a claim at the crossing on Battle River and asked the consent of the Indians, one of my Saulteaux friends sprang to his feet, and pointing to the east, said: "Do you see that great white man (the Government) coming?" "No," said the speculator. "I do," said the Indian, "and I hear the tramp of the multitude behind him, and when he comes you can drop in behind him and take up all the land claims you want; but until then I caution you to put up no stakes in our country" (Morris 1880: 105)

Although the settler-Indigenous relationship was not characterized by the widespread conflict of the American “Indian Wars,” the need to establish a peaceful relationship through Treaty was intended to prevent these conflicts. The conflict in the United States created a fear that similar conflicts would emerge in Canada, and would not only endanger the settler population, but also prevent the steady development and settlement westward. The Red River Rebellion and the Cypress Hills Massacre were not deeply troubling to the Canadian government as a harbinger of race wars such as the Indian Wars in the United States. However, it was troubling in its impact on national sovereignty and as a potential disruption to Western settlement (St. Germain 2009: 179). Given that other treaties had already been

settled, and noting that there had been a rapid increase in population from miners and other settlers, Mr. W. K. Christie, Chief Factor of the Saskatchewan District, wrote to the government in early 1876 recommending that a treaty with the Indians of that country be made as it is essential to peace, if not the actual retention of the country (Morris 1880: 101). In his letter to the government, W. H Christie wrote that he was “earnestly soliciting, on behalf of the Company’s servants, and Settlers in this district, that protection be afforded to life and property here as soon as possible, and that Commissioners be sent to speak with the Indians on behalf of the Canadian Government” (Morris 1880: 102).

Conflict was also a concern for Indigenous peoples in the area, who were aware of increasing encroachment of settler populations and influenced with rumours of conflict in the Red River area. In his documentation of the treaty negotiations, Morris stated that he was aware of the rumours that were circulating amongst the First Nations, and the fear of conflict between settler and Indigenous peoples. Morris assuaged these fears by assuring the First Nations that the troops were for the protection of everyone: “I was aware that they had heard many exaggerated stories about the troops in Red River, I took the opportunity of telling them why troops had been sent, and if Her Majesty sent troops to the Saskatchewan, it was as much for the protection of the red as the white man, and that they would be for the maintenance of law and order” (Morris 1880: 101). Prior to treaty, there was no force of law to protect the settlers, so provisions had to be made to both provide for the Indians in times of starvation, and protect the settlers from attacks by Indigenous peoples. Treaty 6 was the means established to protect all the parties and secure a peaceful relationship. For the part of the First Nations participants, treaty rested upon their agreement to maintain these peaceful relations with the new settlers and the Dominion Government. Thus, treaty rested on the First Nations participants continuing to refrain from hostile action in the maintenance of law and order.

Pre-contact, treaty was used between Indigenous groups to establish a relationship that would allow groups to enter and hunt in each others’ lands. The Treaty 6 relationship was meant to clarify the same for the new settlers, ensuring that all parties were protected and that all involved recognized the unique circumstances of the relationship. This indicates that all the parties involved in the area recognized the value of treaty to ensure that a peaceful relationship could be pursued. Treaty was a tool to protect both parties by establishing the limits and the terms of the interaction.

ECONOMIC INTERESTS

There were also important economic aspects with regard to signing into Treaty. While some aspects of this can be seen explicitly, there are aspects that are only revealed when looking obliquely at some of the practices contingent to the signing of Treaty. First, it's important to understand that Indigenous culture at the time of Treaty 6 did not have the same divide between cultural and economic practices that has been imposed upon them in the contemporary legal interpretations of rights (*R. v. Van der Peet*, 1996; Borrows 1997). In other words, economic practices were inherently intertwined with the cultural practices of the time, and thus both needed to be continued in order for Indigenous peoples to survive in the manner negotiated in the common understanding of treaty. While the Dominion government was interested in preventing conflict, like the Indian Wars in the United States, there was also widespread recognition that settler encroachment was changing the lives of Indigenous peoples. Though there is some debate as to whether the Indigenous people were actually starving, there was a noticeable decline in the buffalo and this posed a threat to the traditional livelihood of Indigenous peoples who relied on the hunt for their supply of meat and trade goods.

Treaty 6 came at a time that was in deep flux, where there were "social and ecological changes on the frontier that would permanently alter their economies and social orders" (Harrin 1998: 257). Prior to 1876, the primary interaction between settler and Indigenous populations was in the context of the mercantile system along trade routes. These interactions were largely mediated through highly mobilized traders who moved goods east and west. In reflection of the lack of wild beaver and the decline of buffalo population, these trading relationships were changing and the trade routes were being stressed by the lack of resources. With the increase in settler populations, rather than trade routes, the domestic economy was increasingly sedentary and there were more stable populations that supported increasing agriculture and settled economic systems.

The increasing inflow of settlers of the area in combination with the massive decrease of buffalo, key for trade and subsistence, was altering Indigenous life on the plains. These changes were not unknown or unobserved by the negotiators. Both the settler and the Indigenous parties recognized that the situation was economically tenuous for the continued self-sufficiency of all parties. For Indigenous people, the inability to continue to provide a living from the fur trade and to continue to hunt buffalo was a pressing

reality. For the settler negotiators, the westward spread of settlers and telegraph and railway lines were of pressing interest. All the parties realized the economic stakes that were at play in the negotiation.

For both parties, these economic concerns were also tied directly to cultural practices, and the ability to continue, or pursue, a particular way of life. Thus, in negotiation, Indigenous leaders were making requests that would ensure the continued existence and traditional rights of their peoples. Holding back reserve lands meant ensuring the ability to continue hunting and trapping and maintaining traditional cultural practices. However, requests such as for Crown care in times of famine and for being taught agricultural practices exemplify a desire for the balance between living a traditional life and participating in the actively changing economy of the area. For Indigenous negotiators, the ability to continue to be economically self-sufficient was indistinct from the continued cultural presence of their peoples.

However, settler policy regarding the changing plains economy had a different orientation. Treaty was necessary to build the settler economic systems westward. For example, Chief Poundmaker was blocking access to Cree lands and restricting the stringing of telegraph lands across the territory. Without a settlement of treaty, plans for a trans-Canada railroad and settlement of the area would be stalled (Harrin 1998). However, these interests did not preclude the possibility of economic cooperation or the maintenance of Indigenous ways of life that were protected as part of the Treaty 6 negotiation. It is at this nexus between common intention of Treaty 6, as articulated through oral history and the Morris accounts, and the subsequent policy practices after Treaty 6 was signed that confusion over settler interpretation of the treaty becomes important. If a reading of Treaty 6 is conflated with the policies that fell from the Dominion Government in the time following the signing, instead of as protecting the traditional practices of the Indigenous people in the Treaty 6 area, the economic policy subversively expressed through treaty can be read as an economic extension of the philosophies expressed in the Indian Act of 1876. According to Harrin (1998: 259), "The end of the plains economy supported by the buffalo commons fit two dominion objectives: farmers could not occupy plains ranged by buffalo, and Indians could not carry out their nomadic hunting activities on a plains devoid of game." Thus, according to Harrin, the economic interests of treaty were based in a legalized paternalistic relationship between settlers and Indigenous peoples and the goal was the eventual assimilation of Indigenous peoples into the new settler economy.

Amendments to Indian Policy after 1876 deeply affected the interpretation of Treaty 6 by the settler government. However, imposing settler economic systems upon Indigenous peoples was never part of the original understanding of treaty provisions. In fact, it was expressly invalidated by the protection to Indigenous ways of life and Morris's promises that "nothing would change" as a result of treaty. Morris (1880: 146) writes that "The Government will not interfere with the Indian's daily life, they will not bind him." Take the example of the buffalo, and the lack of protection of the buffalo that was integral for the maintenance of Indigenous ways of life. According to Harrin, the absence of buffalo from Treaty 6 was a reflection of Crown intention to force assimilation of Indigenous peoples:

Unsettling within this whole context is the possibility that the dominion government deliberately failed to take action because it understood the destruction of the buffalo would force the Indians onto reserves... As in so many critical matters in Indian policy, there is no direct evidence that the dominion government intended to wait idle while the buffalo were exterminated. Yet there can be no doubt that Canadian authorities were aware of the American policy of extermination of the buffalo. (Harrin 1998: 261)

While this may be a valid interpretation of the Dominion government policy, this policy should not be conflated with the conditions of the negotiators at the time of Treaty 6. The provision to protect buffalo represents an important legal and political intersection. While some tribes specifically requested that laws protecting the buffalo be included in Treaty 6, others felt that the inclusion of buffalo in treaty was giving the Crown legal control over something that was not part of their jurisdiction. Asking for government control over the buffalo would be crossing the line into the traditional hunting and fishing rights that were protected by treaty, but not resulting from treaty. In other words, it was giving the Dominion jurisdictional precedence over an area that was reserved for Indian control.

The Dominion government did not have the same overt policy as the American government regarding the practiced extermination of the buffalo. However, after the signing of treaty Dominion policy reflected an orientation to the assimilation of the Indigenous population into the settler culture by forcing them into certain economic practices. Around the time of the Northwest Rebellion, "the Indian Department had determined that its Indian policy was too expensive and only created Indian dependency, and so it decided to cut rations to starvation levels to force Indians to work as small farmers" (Harrin 1998:243-244). This economic warfare caused a serious increase in Indian-settler violence across the prairies and acted as a watershed moment in the Northwest Rebellion of 1880. These shifts in Indian policy served to further destroy Indian way of life. Encouraging cultural assimilation through economic practices, such as the extinction of the buffalo and the encouragement of farming,

shifted when the “the complete destruction of tribal economies created a permanent famine, requiring permanent ‘assistance in the time of famine’” (Harrin 1998: 252). To further alienate and destroy all economic resilience in the Indigenous communities, in 1881 the Indian Act was amended to make the purchase of agricultural produce from Indians without a permit an offense. In 1941 the Indian Act was amended again to make it an offence to purchase furs and wild animals from Indians without a permit, again restricting the ability of Indian hunter and trappers to compete or cooperate with non-Indians.

However, these policies must not be conflated to the agreement of Treaty 6 as it was commonly understood. At the time of signing Treaty 6 in 1876, there was explicit recognition of the need to protect Indigenous ways of life that tied economic interests and self-sufficiency with the cultural continuity of Indigenous peoples. Morris, in his own transcripts of the negotiation, repeatedly stressed that Indigenous ways of life, including practices of hunting and fishing, were not to change as a result of signing treaty. Crown interests in securing jurisdiction over the lands in order to ensure the protection of economic pursuits such as farming and rail lines were not hidden in the Treaty 6 negotiation process. This interest in protecting settlers and the settler economy, read in congruence with the practices of shared schooling and provisions for farming implements at the request of First Nations, does not reflect these subversive tactics of forced assimilation later attributed to Indian policy. Instead, this understanding of sharing the land reflected the degree to which all parties agreed upon the connection between the ability of Indigenous peoples to be economically self-sufficient and to be culturally self-sufficient. In other words, the continued economic resilience was an integral part of the cultural practices, and was protected through treaty. As such, the common understanding of Treaty 6 was a complicated negotiation of what it meant for both parties to share the land, while ensuring that Indigenous ways of life, including hunting and fishing rights, would be protected. This tied together economic self-sufficiency with the continued cultural practices of Indigenous peoples.

THE CONTENT OF TREATY 6

Sacred Relationship

To begin an understanding of the content of treaty, it is important to consider the nature of the relationship mutually agreed to as part of Treaty 6, especially with regard to the mutually understood form of certainty of the relationship. Choosing to enter into treaty was a sacred act on the part of the

Indigenous peoples who signed into Treaty 6. The sacred nature of this relationship did not begin with the Peace Pipe ceremony, but with the very decision to enter into treaty as a relationship with settler peoples. Cardinal (2000: 31) notes that “The first principle affirmed by the treaties was the joint acknowledgement by the treaty-makers of the supremacy of the Creator and their joint fidelity to that divine sovereignty. This was in part the meaning of the ceremonies conducted by the First Nations during the treaty ceremonies where they used the pipe and the sweetgrass.” However, the sacredness of the treaty was also clearly articulated by Morris who participated in the Peace Pipe ceremony and affirmed the sacredness of Treaty 6, and also regularly referenced “God” as a party to the negotiation. By evoking the term God in his address to the Indigenous parties, Morris showed that he also recognized the sanctity of the relationship. Thus, all participants shared the understanding of the importance of Treaty as a sacred relationship.

Longevity

Given that Treaty was understood to be a binding compact by both parties, the longevity of Treaty 6 was never in question for the Elders:

“Of the many things the government representations promised, he raised his hand in the name of God. The white man would in turn care for the Indians, the children of God. ‘As long as his spirit, the sun, and the river, as long as these two things are moving, that is how long the promises are good for,’ said the government official. Those were their terms of the Queen” (McLeod 1999).

In recent decades, the length of time that the treaty was meant to last has also come under scrutiny and debate as an issue regarding the content of treaty. The written text of Treaty 6 states that the lands will be ceded and surrendered “forever,” which has been interpreted as the full and final relinquishment of any Indigenous claim to the land. In the oral history of Treaty 6, the duration of the Treaty is often quoted as lasting “as long as the sun shines, the grass grows, and the rivers flow.” This version is mirrored in Morris’s own writings. According to Sharon Venne (1997), in the Cree legal system, this is not an accurate phrasing in two ways and there is another interpretation of the length of time the treaty was to last. First, in her understanding, the Elders did not want to connect treaty to grass growing because the medicines for the people came from the land, and the Elder’s did not want to give their medicines to non-Indigenous peoples. Second, rivers could change direction or dry up. Instead, Venne (1997) argues that it should read that “the Treaty will last as long as the sun shines and the waters flow.” The waters in

this context are to be understood as the waters that flow from a woman, meaning that the treaty was to last as long as Aboriginal women give birth to Indigenous men.

Elder Jim Myo builds on this interpretation by connecting the sacred act of treaty to the ability to continue practices Indian lifeways: “When that is gone, that is a sign that our treaties are gone because our treaties are part of our cultural and spiritual traditions and our Indian laws” (Cardinal 2000: 37). According to Elder Peter O’Chiese, there would be no inclusion in treaty of items that would threaten the ability to create and perform the Ceremonies of the Peace Pipe. Both the provisions regarding the grass and the rivers, and the exclusion of items connected to the Peace Pipe, maintain the cultural integrity of First Nations participants in the Treaty agreement. Thus, the ability to continue with the culturally congruent care of First Peoples, and continuing to produce new generations, are fundamental aspects of treaty content.

This does not suggest that Indigenous people did not want longevity in the treaty contract. Indeed, the rituals that began the treaty negotiation, and the Elder’s stories at Onion Lake in 1997 indicate Indigenous peoples both desired and expected that Treaty 6 would continue for a very long time. In contemporary discourse, Elders continually assert the validity of the treaty, as it was a binding agreement between the Crown, themselves, and Mother Earth. However, Venne’s description of the length of time treaty was meant to last indicates the terms of the treaty inherently protected First Nations continued existence and connections to the land. In other words, it is a more nuanced perspective that continues to protect the cultural and social independence of Indigenous peoples as part of the treaty terms.

CEDE AND SURRENDER VS. SHARING

The final aspect of analysis of the content of Treaty 6 relies heavily on the two principles of equality of standing and certainty in order to understand the nature of the relationship. The use of the terms “ceding” and “surrendering” as a concept and practice contained in treaty text is one of the most important and controversial aspects of the Treaty 6 content in historical context, contemporary interpretation, and legal implications. According to the written version of Treaty 6 (paragraph 8):

The Plain and Wood Cree Tribes of Indians, and all other the Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the

Government of the Dominion of Canada, for Her majesty the Queen and Her successors forever, all their rights, titles and privileges, whatsoever, to the lands included within the following limits.

The presence of these terms in the written text of Treaty 6 has been interpreted as meaning the full and final relinquishment of Indigenous rights and jurisdiction to the Crown and the government of Canada. However, contemporary debate over the presence and the use of the terms “cede and surrender” does not reflect the nature of the agreement at the time of adhesion in 1876. This section of analysis first negates the reading of Treaty 6 as a document of sale. Second, this reading asserts that the common understanding of Treaty 6 was a relationship of sharing. According to Elder Jimmy Myo, the common intention regarding the use of the land as a relationship of sharing is as follows:

We got no business to give it up, we got no business to sell that land. We got no business to lease that land. We got no business to make any kind of deal on that land, but when the White man came to make a deal with us, the old people knew that we could try to treat them like our own relatives, so that they could use that land at the certain amount of... like Gordon [Oakes] said, the depth of the plough. That was the only part that they let them use. Other than that, below the depth of a plough was supposed to be negotiated after like he said, but it never was; they never did negotiate that right up to date they haven't done anything. That's why we hear our Elders keep on saying we didn't let the White man take more than this much. That's about six inches, the depth of a plough. We did not give up the land, we did not sell the land. Those are the things that was told to us, by the Elders never to say: we sold, we lease, we give up, anything like that (Cardinal 2000: 63).

While Elder Myo articulates an understanding of the relationship as one of sharing, which will be explored further, it has been argued that the use of these terms is a result of cross-cultural miscommunication (St. Germain 2009; Taylor 1999). The root of this cross-cultural misunderstanding is based in the assertion that the practice or concept of selling the land was unknown to Indigenous cultural experiences at that time of the negotiation of Treaty 6. However, to attribute contestation over the use of these terms to a matter of cross-cultural miscommunication is not only untrue, but it would also nullify the treaty as a shared agreement between parties. Arguing that there was no Indigenous understanding of the terms “cede and surrender” denies the complexity of Treaty 6 as a mutually understood agreement.

There are two reasons why Treaty 6 cannot be interpreted as a document of cede and surrender. The first is because Indigenous peoples recognized the concept of sale but did not recognize it as part of the Treaty 6 provisions. In other words, there was no settler conspiracy to deceive or trick Indigenous peoples into agreeing to a practice of land surrender that they did not understand. Indigenous peoples

were not unfamiliar with the Western conception of land sale. The Cree were concerned about the HBC selling the land prior to Treaty 6 negotiations even being entered. Part of the intention behind entering treaty was to clarify the jurisdiction over the land. Thus, there was an understanding shared between Indigenous negotiation parties of what it meant to lose possessory and jurisdictional rights to the land. After hearing that the HBC had sold land to the Crown in 1870, First Nations expressed concern over this sale. Chief Sweet Grass approached negotiators as early as 1870, saying “I shake hands with you, and bid you welcome. We heard our lands were sold and we did not like it; we don’t want to sell out lands; it is our property, and no one has a right to sell them” (Morris 1880: 102). Chief Sweet Grass’s statement indicates that there were understandings of what it meant to sell the land conceptually and that the parties involved did not want to sell the land. Thus, dispute over the provision to “cede and surrender” or the sale of the land cannot be relegated to cross-cultural misunderstandings.

The second reason Treaty 6 cannot be interpreted as a document of cede and surrender is because the Morris transcripts of the treaty talks, and contingent documents, conspicuously do not mention “surrender” of the land, nor was the concept explained or mentioned in letters by MacKay, Commissioner Morris or the transcripts of negotiations. The Elders, who say that the concept of surrender or selling the land was never explained, reiterate the lack of examination or use of the terms in negotiation. Elders say that in the negotiations, *atawagiwa*, the Cree word for “sale,” was never used. Rather, it was repeatedly stated by Morris that the Crown did not come to take anything from the Indigenous people, or to change their way of life:

We have not come here to deceive you, we have not come here to rob you, we have not come here to take away anything that belongs to you, and we are not here to make peace as we would to hostile Indians, because you are the children of the Great Queen as we are (Morris 1880: 131).

As such, sale was never part of the conditions of Treaty 6. Instead, the opposite, or the continuation of Indigenous lifeways, was constantly reinforced.

Not only was there no explanation of the practice of selling, and no explicit reference to the terms “cede and surrender” as contained in the written record of the Treaty negotiation, but Cree conceptualizations of land ownership only allows cession to take place under certain circumstances. These circumstances and practices of Cree land sale were not present in the negotiation or agreement to Treaty 6. According to Venne (1997), in Cree culture land cannot be sold for exclusive use because it is Mother Earth and cannot be separated from the people who live on the land. To sell the land would be to sell something

that was integral to the Cree nation. You cannot separate the land from the people. Further, the legal and political role of women constrains understandings of treaty with regard to the “sale” of the land. Prioritization of the written form of Treaty 6, and taking the terms “cede and surrender” to mean the transfer of the jurisdictional and possessory rights to the Crown, is effectively critiqued when read cogently with the role of women in Cree legal and political life.

Women were conspicuously absent at the treaty negotiation talks on all sides of the negotiation process. In a Eurocentric interpretation, this might be attributed to the role of women in Cree society as being lesser to that of men, or that women lacked the authority to enter into relationships with other parties because they held the same inferior status as non-Indigenous women at the time. However, Venne (1997) argues that the unique position of women in Indigenous society, and the conspicuous lack of women at the treaty talks, indicates how Indigenous peoples understood Treaty 6. According to Venne (1997: 189), “when Elders speak about the role of women at the treaty, they talk about the spiritual connection of the women to the land and to treaty-making.” The Creator gave women the ability to create life, and as such, women are linked to Mother Earth, and thus central to land practices. Because of this unique ability to create, men are the helpers of women who sit beside the Creator in recognition of this unique power. According to these legal practices, when women remained absent from political discussions, Indigenous possessory and jurisdictional authority over land was not in question. In other words, the absence of women meant that relinquishing authority over the land was never part of the Treaty 6 negotiation.

As such, the importance of the role of women in the Treaty 6 negotiation talks has ramifications in the contestation of the “sale” of the land, or the terms “cede and surrender” in the written form of Treaty 6. The implications of the use of “cede and surrender” has meant the loss of jurisdictional and possessory authority for the First Nations parties to Treaty 6. However, the role of women in Cree life and the lack of Indigenous women in the treaty negotiation process, establishes limits in the interpretation of the treaty as a document of sale or transference of authority. Many arguments against the prioritization of the written version and the “cede and surrender” clause ignore the role of women in Cree life. If the absence of women at the negotiation tables and the importance of women as holders of land claims are acknowledged, the terms of Treaty 6 are necessarily limited.

Thus, given that the Indigenous parties fully understood the concept of land sale, but that the sale, or the terms cede and surrender, were not present in the negotiation, Treaty 6 as it was commonly understood cannot be understood as a finite transfer of the land. Further, Indigenous practices and conditions for the sale of land were not present in the negotiations or agreements of Treaty 6. Rather than a document of sale, then, Treaty 6 was commonly understood to be a relationship of sharing. The written text of Treaty 6, and the contemporary interpretation of this agreement that emphasizes the clause to “cede and surrender,” articulates an understanding of this treaty as the outright transferral of jurisdictional authority from the Indigenous peoples to the Crown. However, “according to the Elders at the Onion Lake meeting, the leaders in 1876 agreed to set aside the areas outside their reserves for white people to share as they needed for agricultural use” (Venne 1997: 37). In other words, the land relationship was based on a practice of sharing common lands outside of reserves, not surrendering as was contained in the written form of the treaty. Thus, instead of the sale of the land, the treaty relationship was based on a complex relationship of sharing in which the cultural practices of each party would be preserved; they would each be able to live off the land and continue to practice their lifeways, but they would also share the resources. According to Elder Jacob Bill, “It was the will of the Creator that the White man would come here to live with us, among us, to share our lives together with him, and also both of us collectively to benefit from the bounty of Mother Earth for all time to come” (Cardinal 2000: 7).

According to Treaty 6 Elders, the Indigenous relationship to the land was tripartite—having spiritual, physical, and economic dimensions—and the relationship of sharing with the settler population reflected these three areas as well. With regard to the spiritual aspect, sharing did not mean the conflation of lifeways; rather, each group would be able to maintain their own distinct practices and relations. According to Elders, the relationship to the land was a spiritual connection and the ability to maintain this spiritual connection was a fundamental aspect to the Treaty 6 agreement. As Elder Jimmy Myo notes, “We hear from old people how powerful our spiritual life is, and that's what is going to help us. We have to pray like an Indian, believe in our way of life.... When that is gone, that is a sign that our treaties are gone because our treaties are part of our cultural and spiritual traditions and our Indian laws” (Cardinal 2000: 37). In other words, the treaty agreement rests on the ability of Indigenous peoples to continue to practice their spiritual connection to the land. However, the ability of settler populations to continue their own practices was also protected. As such, the spiritual connection to the land, in

whatever form or practice it consisted of, was shared, but maintained the differences between treaty parties.

Physically, the provisions regarding reserve land reflected the complicated negotiation of how sharing of physical space would occur. In order to ensure this balance between maintaining Indigenous traditional ways of life while participating in new relationships with the growing settler populations, Treaty 6 stipulated that some lands would be shared, but other tracts of land were to be set aside and reserved for Indigenous people to live without interruption or intrusion from settlers. According to Elder Lazerus Roan, the only land that was included in the treaty talks was the arable land. Indigenous peoples requested reserve lands as a means of protecting their land and culture, and the choice of these land tracts was theirs. This is reinforced in Morris's dictation of the negotiation where Morris stated, "you can have no difficulty in choosing your reserves; be sure to take a good place so that there will be no need to change; you would not be held to your choice until it was surveyed" (Morris 1880: 133). Additionally, Indigenous peoples were able to set aside as much land as they wished for reserve lands.

This reserve land was meant to enable Indigenous peoples to maintain their traditional practices while allowing for an increase of settlers and agricultural development in the area. According to Peter Erasmus (1976), Chief Poundmaker expressed concern over the reserve process. He is quoted as saying, "This is our land! It isn't a piece of pemmican to be cut off and given in little pieces back to us. It is ours and we will take what we want" (Erasmus 1976: 244). Given these reservations, Morris stated that he addressed his speech according to the fears Indians had expressed, in particular, the belief that First Nations would be forced to live only on the reserves, would have to give up their traditional hunting practices, and would be conscripted in war. Morris expressly and repeatedly explained that he, and the Crown government, did not want to interfere with the present way of living, but instead, assist First Nations to begin farming and participate in the burgeoning settler economic systems in the prairies (Morris 1880: 111).

The economic aspect of the tripartite relationship to the land is closely entwined with the spiritual and physical aspects. From the Indigenous perspective, the physical occupation of reserves was meant to be the means to sustain Indigenous peoples both economically and culturally: "The proposed reserves, guaranteeing some lands exclusively to them, not only offered the prospects of a new economic future in

agriculture, but also addressed the unease they had known in the face of unauthorized Canadian expansion into the Northwest” (St. Germain 2009: 107). Through the relationship of sharing commonly agreed upon through treaty negotiation, each party was to benefit from the land in their own ways.

The Elders believed that each of the parties to the treaties wanted to provide the basis upon which their respective peoples would be afforded the opportunity to benefit and grow from the wealth that would be created by their treaty relationship and their agreement to share the land (Cardinal 2000: 62). There was no explicit intention on behalf of Crown negotiators to force Indigenous peoples to participate in settler economies. However, Morris was not unaware of the importance of the decrease of buffalo in the area. He, like the Chiefs involved in treaty talks, expressed concern over the ability of the land to continue to provide the resources necessary to maintain Indigenous populations, especially with the decline of the buffalo. Morris “impressed strongly on them the necessity of changing their present mode of life, and commencing to make homes and gardens for themselves, so as to be prepared for the diminution of the buffalo and other large animals, which was going on so rapidly” (Morris 1880: 111). However, unlike in the United States, this expressed concern was not aligned with the destruction of the buffalo as a matter of government policy. Rather, in congruence with Morris’s assertion to not provide continued or day-to-day support to the Indigenous peoples, the self-sufficiency of the First Nations was prioritized in the negotiation of Treaty 6. As such, the agreement over the relationship to the land explicitly included provisions for the spiritual and economic protection of all treaty parties.

The settler representatives did not dictate the mode of this self-sufficiency. Provision of farming implements and hunting tools was not imposed upon the Indigenous groups, but requested by them, indicating that there was always the intention to grow economically together, and interact, but maintain the distinction between the groups. This provision reflects a special understanding of the economic context of Treaty relations:

The Indigenous peoples wanted to learn agriculture, and the Crown promised to appoint a farm instructor. In order to allow Indigenous people to become self-sufficient in agriculture, the Crown also promised to supply equipment on a yearly basis. Indigenous peoples became so successful at farming that the government of Canada, pressured by non-Indigenous farmers, restricted the sale of Indigenous produce (Venne 1997: 201).

In other words, contained within Treaty 6 were the provisions necessary for Indigenous peoples to come into an economic relationship with settler populations while maintaining their own cultural practices. Morris had a positive view of the willingness of First Nations to participate in agriculture as a means of continuing their independence. He said that the Indians “did not wish to be fed every day, but to be helped when they commenced to settle, because of their ignorance how to commence, and also in case of general famine” (Morris 1880: 112). This willingness to take an active role in their own economic interests and livelihood encouraged Morris to include provisions in Treaty 6 based on the protection from famine and the provision of tools, which had not been included in the previous five numbered treaties.

Thus, both Morris and the First Nation negotiators exemplified the good intentions regarding intended economic and cultural self-sufficiency of Indigenous peoples. It has been argued that the provision of farming implements and the move to agricultural practices was a subversive assimilative attempt on behalf of settler representatives. From the perspective of the Dominion Government:

the settlement of the Plains Cree would open the door to the colonization of the Prairie West. Reserves were also the critical framework for the delivery of other promised treaty services, including agricultural assistance and schools, and were envisaged by the Canadian policymakers as the crucible in which the transformation of the Crees from hunters to agriculturalists was expected to take place. (St. Germain 2009: 107).

However, this policy of transformation was not explicit in the negotiation of Treaty 6. Only in the subsequent political and policy interpretations of Treaty 6, based only on the text of treaty, were undercurrents of economic policy as assimilation by other means apparent.

One of the most important sites that exemplified the practice of the sharing relationship is the nature of the gift or exchange relationship that took place both within treaty and prior to the signing of Treaty 6. When examining the interpretation of the terms ‘cede and surrender’ in the debate over whether the land was sold to the representatives of the Crown through Treaty 6, there is a great deal of focus on the provisions within the treaty that are interpreted as part of an exchange, subsequently indicating sale. The argument remains that the provisions contained within Treaty 6 that pertain to providing Indigenous peoples with supplies, financial aid, and education, represent the finite sale of the land to settler representatives (Flanagan 2000: 144). However, this reading of treaty as a document of sale of land to the Crown is contradicted by Morris’s characterization of the exchange that took place. Morris (1880:

114) explains, “what was offered was a gift as they still had their old mode of living.” To be a sale would mean that the Indigenous people were to give up or relinquish some of their land and their practices. Both Morris’ writings and the oral history of Treaty 6 Elders attest that during the negotiation there was an emphasis on what would be given by the Crown with much less discussion on what would be given in exchange by the Aboriginal communities. As such, the common intention of Treaty 6 does not contain the explicit provisions for a quantifiable sale of the land.

In framing the exchange relationship in Treaty 6 as a practice of gift giving, Commissioner Morris invoked a long-standing practice in Indigenous culture and in Indigenous-settler relationships. The principle of the exchange of gifts follows the pattern of early interactions with the HBC, where the exchange of gifts was used to validate and solidify political alliances. In Treaty 6, the provisions stating that the Chief and the Headsman would receive annual payments from the government signified the sharing of lands and solidified the constant renewal of the relationship between Crown and First Nations. Morris framed the exchange relationship in such a way that Indigenous people would be “retaining their old mode of tradition with the Queens gift in addition” (Morris 1880: 141). Both parties agreed to this framework because Indigenous ways of life were not to change, but the relationship with the settler communities would be a positive addition to First Nations ways of life. This is congruent with the shared understanding at the time of Treaty 6 regarding the reliance of First Nations upon the Crown. The inclusion within treaty of these provisions to protect Indigenous ways of life and practices also meant a regulation of the practices and forms of support that would be received by the government, and the particular circumstances in which this support would be deemed necessary:

The Government will not interfere with the Indian's daily life, they will not bind him. They will only help him to make a living on the reserves, by giving him the means of growing from the soil, his food. The only occasion when help would be given, would be if Providence should send a great famine or pestilence upon the whole Indian people included in the treaty. We only looked at something unforeseen and not at hard winters or the hardships of single bands, and this, both you and I, fully understood (Morris 1880: 146).

In the negotiation process, there were no requests for the continued support or the reliance of Aboriginal people on the state. Indigenous peoples did not want to rely on the Canadian government for their daily life, but only in times of famine. While the buffalo herds were diminishing during the time the treaty was being negotiated, Venne quotes Elder John B. Tootoosis reminding people to never believe that they were starving at the time of treaty, and thus, reliance on the government was not only

unwanted but unforeseeable at the time (Venne 1997). This is reinforced by John Buffalo (1975), who said that though some people were surviving by eating horsemeat, this did not pressure the First Nations into signing treaty. However, provisions in Treaty 6 were meant to preserve the ability of Indigenous peoples to maintain their self-sufficiency. This was reflected in Morris' understandings of Treaty:

I cannot promise however, that the Government will feed and support all the Indians; you are many, and if we were to try to do it, it would take a great deal of money, and some of you would never do anything for yourselves. What I have offered does not take away your living, you will have it then as you have now, and what I offer now is put on top of it. This I can tell you, the Queen's Government will always take a deep interest in your living (Morris 1880: 130).

Given that the First Nations ways of life were not to change and there was no continued reliance on the government, Treaty 6 could not have been understood as the transference of the blanket ownership of land to settlers in exchange for selected Indian reserves. Rather, the money, provisions, and education included in treaty were considered gifts to ensure peaceful relations between Indigenous and settler communities and to ensure the longevity of a good relationship between these two groups based on sharing the land, not ownership of the land.

The provisions for education of First peoples also exemplify this unique relationship of sharing, as it was understood and written into Treaty 6. While education regarding the economic practices of settler economies, including agriculture, was part of the negotiation, the Chiefs also negotiated universal access to education for all, regardless of age or sex: "The Chiefs and Elders wanted their young people to be able to cope with the newcomers, and believed the most successful way would be for the children to understand their ways" (Venne 1997: 194). This was intended to be entirely voluntary for the communities, not the forced programs of re-education, or moving children off the reserve to be re-educated and assimilated into settler practices. The goal behind these provisions was that First Nations youth would learn English and settler ways, and in exchange, settler youth would also learn the ways of the First Nations. Because this was voluntary, the treaty protected the Indigenous practices of education while ensuring that there was a relationship between the treaty parties.

It was soon after Treaty 6 was signed that the Dominion Government policy regarding Indian education shifted. Morris agreed to the provision of schools at the request of the First Nation negotiators, however, the role of education shifted along with the Dominion policies. Prior to the signing of the First *Indian Act*, Indian policy was largely based on the need for peaceful co-existence. However, "around 1876, government officials singled out education as 'the primary vehicle in civilization and advancement of the

Indian Race'. Catholic schools were already present in many regions of the province, and their number and enrolment increased in the 1880s when the Department of Indian Affairs assumed part of their operating cost" (Woolford 2005: 57). This shift changed the dynamic of the relationship between settler and Indigenous peoples, but this shift was external to the signing of Treaty 6. Thus, provisions for education, as read within the context of Treaty 6, were to maintain the good and open relations between First Nations and settler peoples.

CONCLUSION

A full understanding of Treaty 6 begins with the premise that the common understanding of this agreement continues to be relevant and holds legitimacy today. Contemporary Elders living in the Treaty 6 jurisdiction continually rearticulate this strong stance for interpreting treaty at it was commonly understood between parties at the time of negotiation. While contemporary conflict in the Treaty 6 area reveals the divergent interpretations of this treaty, these interpretations remain based on problematic assumptions that either assume the precedence of the written version of the agreement as the "real" or "true" version, or, alternatively assert that there are two completely divergent understandings of treaty based on mutually exclusive understandings that can never be reconciled. Both of these positions result in an understanding of the treaty that is not congruent with the understanding of this agreement by Treaty 6 First Nations treaty signers. While it is important to understanding the history of the relationship between Indigenous and settler peoples in this area, the policies that were implemented after the signing of Treaty 6 were antithetical to this understanding of the treaty agreement. As such, despite a long and painful history of relations between parties in the Treaty 6 area, the common intention of the treaty as a binding and shared agreement between settler and Indigenous peoples cannot be forgotten.

REPORT 6: TREATY 11

by Michael Asch

INTRODUCTION

Treaty 11 was negotiated principally during the summer of 1921. The Crown was represented by one Commissioner, Mr. H. A. (Henry Arthur) Conroy, a civil servant with long experience in the North. His negotiating team included Bishop Breynat of the Mackenzie, who as Conroy explains, “has considerable influence with the Indians in the North,” as well as a small detachment of RCMP, and, at least for a portion of his voyage, a medical doctor. Negotiations that summer took place with Dene leaders, some of whom were ultimately designated as “Chiefs” and/or “Headmen,” in eight major communities along or near the Mackenzie River, including Fort Providence (where Conroy records that 258 Dene were present and the treaty signed 27 June), Fort Simpson (247, 11 July), Fort Wrigley (78, 13 July), Fort Norman (208, 15 July), Good Hope (210, 21 July), Arctic Red River (171, 26 July), Fort McPherson (219, 28 July), and Fort Rae (443, 22 August). The final stage of treaty negotiations took place at Fort Liard in June of 1922, with the Crown represented by Commissioner Thomas William Harris, who was appointed Commissioner after the death of Commissioner Conroy, and included 150 Dene (Canada 1957[1926]: 3-5, 11).

The record of what transpired during negotiations is extremely rich. It includes (but is not limited to): transcripts of interviews with eyewitnesses to the negotiations in each of the eight communities, recorded in the late 1960s and early 1970s by various interlocutors, including anthropologist and noted Northern expert, June Helm; sworn affidavits by a number of non-Dene eyewitnesses organized by Bishop Breynat in the 1930s and including one by the Bishop himself attesting to certain of the verbal promises made by the Commissioner, but not found in the written treaty;³⁰⁴ and transcripts of witnesses in *Re Paulette (Re Paulette and Registrar of Land Titles (NO. 2))* (1973) 42 D.L.R. (3d) 8, in which the subject of what occurred during the negotiations was at issue as well as the assessment of these by the presiding judge, William Morrow, Chief Justice of the Supreme Court of the Northwest Territories.

³⁰⁷ According to Fumoleau (1973: 277) the number of affidavits for Treaties 8 and 11 combined was 49. I have no report of the number that refer to Treaty 11, and were made by individuals “who could swear to the authenticity of Treaty promises.”

Detailed excerpts, as well as the full texts of many of the interviews referred to above and other communications, are found in historian and Oblate priest René Fumoleau's authoritative 1973 book entitled *As Long as This Land Shall Last: A History of Treaty 8 and Treaty 11 1879-1939*. In addition, I refer to interviews I undertook in Wrigley, one of the Dene communities visited by the Commissioner, in the spring of 1970 with two members who were present at those negotiations. One is Julian Yendo, who was named Chief and whose name appears in Slavey syllabics on the written treaty. The other is Philip Moses whose uncle (referred to as "Old Moses" or "Old Man") was the Elder who directed Yendo during negotiations. I will refer to an observation made by Edward Hardisty, then Chief at Wrigley (and who as a four-year-old child was present at the negotiations) who acted as my translator.

As Fumoleau makes clear, the Government of Canada chose to negotiate a treaty in 1921 principally to extinguish any Dene interests in land in order to freely pursue the development of large oil deposits recently discovered in the region. However, transfer of a material interest was not the only motivation, jurisdiction was also a matter of concern. Conroy writes in that same year that once a treaty has been concluded, "Definite jurisdiction will be obtained over these people who are now outside of all authority, barring the Mounted Police" whose ability to perform their duties, he observes, is limited because they only have two command posts along roughly 4000 kilometers of the Mackenzie River Valley (quoted in Fumoleau 1973: 159).

It is, therefore, clear that the success of Conroy's mission rests on obtaining the agreement of the Dene on two provisions in the written text. The first, which pertains to land as property, is the clause that states:

AND WHEREAS the said Commissioner has proceeded to negotiate a treaty with the Slave, Dogrib, Loucheux, Hare and other Indians inhabiting the district hereinafter defined and described, which has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the said Indians do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for His Majesty the King and His Successors forever, all their rights, titles, and privileges whatsoever to the lands included within the following limits.... (Canada 1957[1926]: 6)

It is, as Justice Morrow put it, a text that uses (*Re Paulette* at p. 32): "about as complete and all-embracing language as can be imagined":

The second clause pertains to land as jurisdiction. It states that:

AND His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the Country acting under the authority of His Majesty. (Canada 1957[1926]: 6)

That is, it provides, in language as sweeping as appears in the “cede and surrender” clause, that the Dene have ceded jurisdiction in that they agree that the Crown has final authority to govern their economic activities on their land. Evidence that the Dene understood the implications of this provision is found in the Report of the 1959 Nelson Commission looking into Dene grievances concerning Treaties 8 and 11 that states “...some bands expressed the view that since they had the right to hunt, fish, and trap over all of the land in the Northwest Territories, the land belonged to the Indians” (Fumoleau 1973: 214). Finally, it is also clear that the Government of Canada instructed the Commissioner to obtain voluntary consent to these clauses without making any “outside” promises, that is, without any agreements that do not appear in the text as written.

While there is substantive evidence indicating that Dene in this region sought to negotiate a treaty on the heels of the completion of Treaty 8 with their relatives and neighbors just to the south, there is little information from Dene themselves as to their motivation for desiring one. However, it is well reported by government officials and others that the Dene faced a number of hardships in the period between 1910 and the treaty signing. Among these were a scarcity in fur bearers due to an influx of white trappers who were over-trapping the land and the effects of Western diseases like the epidemic of Spanish influenza of 1918 on their health (Fumoleau 1973: 131, 133).

At the same time, the evidence shows that the Dene approached negotiations guardedly, and were particularly concerned with whether the treaty contained provisions pertaining to the cession of land as property and/or as jurisdiction. It is a sensibility that Dene eyewitnesses at Fort Norman put this way:

The Indians had feelings that the White people were going to take over something, that the White people were not giving the money away for nothing. They must be buying something, either the land or the people. That's how the Indians felt. So they just kept asking the White people what the money was for (Fumoleau 1973: 180).

Their concerns on this point reflected their general understanding of the consequences of such land cessions in the south:

I am an Indian I don't read, I don't write ... but still I know what you've done outside (ie in the provinces). You put Crees on reserves and the country's so small, it didn't last long, they didn't

have nothing to hunt (Chief Lefoin of Fort Providence, quoted by Victor Lafferty) (Fumoleau 1973: 170).

In addition, their concerns were heightened by their knowledge that, soon after the signing of Treaty 8, governments began to impose regulations on economic activities, notwithstanding that those Dene were of the view that they had not ceded jurisdiction, a situation that led to a boycott of the treaty ceremony at Fort Resolution the previous year. It is therefore no surprise that all reports indicate that Dene leaders were active participants and “very apt in asking questions” (Fumoleau 1973: 197) nor that “here (Fort Providence), as in all the other posts where the treaty was signed, the questions asked and the difficulties encountered were much the same” (Canada 1957[1926]: 3).

In sum, it is clear that Commissioner Conroy was faced with a very difficult task: his instructions were to obtain agreement to a blanket cession of ownership and jurisdiction over the land from people who understood that other treaties contained such provisions, but were not of a mind to agree to them, for as Jimmy Bruneau (of Fort Rae) put it “... a person must be crazy to accept five dollars to give up his land” (Fumoleau 1973: 193).

LAND AS JURISDICTION

I begin this discussion with the following excerpt from the Commissioner’s report:

The Indians seemed afraid, for one thing, that their liberty to hunt, trap and fish would be taken away or curtailed, but were assured by me that this would not be the case, and the Government will expect them to support themselves in their own way, and, in fact, that more twine for nets and more ammunition were given under the terms of this treaty than under any of the preceding ones; this went a long way to calm their fears (Canada 1957[1926]: 3).

It is a position that certainly diverges from what is written in the treaty, a dissonance he suggests he reconciled when he adds: “I also pointed out that any game laws made were to their advantage, and, whether they took treaty or not, they were subject to the laws of the Dominion” (Canada 1957[1926]: 3). It is, I think it fair to say, an explanation that does not overlap well with the language of the clause in the written agreement, for it suggests that, even if the Crown claims jurisdiction over the Dene, governments will only regulate hunting in a manner favourable to them (as for example, enacting regulations that would restrict hunting and trapping by non-Dene) rather than in any manner it sees fit.

Dene eyewitness accounts concur with the Commissioner's assertion that their freedom to hunt, fish, and trap would not be "taken away or curtailed," but do not confirm that he also pointed out that they were (in his view) already "subject to the laws of the Dominion." Rather, they report that he used virtually the same language in each community, putting it this way at Fort Providence: "Your hunting rights will not be taken away from you" (Fumoleau 1973: 170); this way at Fort Simpson "Finally, they took Treaty and the Treaty party told them that they could carry on hunting as they wished" (Fumoleau 1973: 175); like this at Fort Norman: "You can do whatever you want. We are not going to stop you, just do what you were doing before" (Fumoleau 1973: 180); and this at Fort Rae:

They will not be closed for you. As long as the river flows and the sun rises from east to west in this land of yours nothing will be closed. You can continue on hunting, fishing, and trapping the way you always have done.... Your children after you will also continue on living your ways of life. It will not be closed for you nor for your children (Fumoleau 1973: 193).

Finally, in my interview, Philip Moses reports that his father's brother "asked the treaty party about everything. The old man asked all the questions. He asked about game laws and all that." The reason, he continues, is that:

The old man, he wanted to make sure that no laws would be made about what they used to do. Move around, hunt here and there. The commissioner said there wouldn't be any changes so long as the sun rises up (Moses 1970).

The Dene position is confirmed in the affidavits sworn by non-Dene in the 1930s, including the one by the Bishop. That is, they all state categorically that:

They were promised that nothing would be done or allowed to interfere with their way of making a living as they were accustomed to and as their antecedents had done (Fumoleau 1973: 216).

And that:

They were guaranteed that they would be protected in their way of living as hunters and trappers from White competition, they would not be prevented from hunting and fishing, as they had always done, so as to enable them to earn their own living and maintain their existence (Fumoleau 1973: 216).

And finally:

It was only after the Royal Commissioner had recognized that the demands of the Indians were legitimate and had solemnly promised that such demands would be granted by the Crown; and also after the Hudson Bay Company officials, the Free Traders, and the Missionaries with their Bishops, who had the full confidence of the Indians, had given their word that they could fully rely on the promises made in the name of King George, that the Indians accepted and signed the treaty (Fumoleau 1973: 216).

The statement strongly implies that, contrary to what he writes in his Report, the Commissioner did not claim that governments had the authority to regulate Dene subsistence activities either before or after treaty-making.

Further confirmation of this comes from Justice Morrow's judgment where it states:

Throughout the hearings before me there was a common thread in the testimony -- that the Indians were repeatedly assured they were not to be deprived of their hunting, fishing and trapping rights. To me, hearing the witnesses at first hand as I did, many of whom were there at the signing, some of them having been directly involved in the treaty making, it is almost unbelievable that the Government party could have ever returned from their efforts with any impression but that they had given an assurance in perpetuity to the Indians in the territories that their traditional use of the lands was not affected (*Re Paulette*: p. 33).

Thus, I think it fair to surmise that the Dene had every reason to be confident that their position had been accepted by the Crown and that, in particular, whether or not the government assumed that they were under Canadian jurisdiction, their "liberty to hunt, trap and fish would not be taken away or curtailed", much less that the written agreement would contain a phrase that subjected them to regulation by "the Government of the Country acting under the authority of His Majesty" without restriction. The disjunction is between the written (and signed) document and what was actually negotiated.

LAND AS PROPERTY

The cession of land as property is the singular reason the Government of Canada chose to negotiate Treaty 11. Yet, there is no indication in Commissioner Conroy's Report, in the information available to me from Bishop Breynat, or from any other source that this topic was addressed during negotiations in any of the communities. Indeed, the only record we have that it was broached are the portmanteau statement by the Commissioner that, at least at Fort Providence, "I had several meetings with them, and explained the terms of treaty" (Canada 1957[1926]: 3), and the signatures of the Chiefs and Headmen in each community that they had signed the treaty agreement in the presence of certain witnesses after the terms had been "first interpreted and explained" (Canada 1957[1926]: 9).

Similarly, it appears from Dene eyewitnesses that the topic was not broached at all, for, as John Farcy reports regarding Fort Providence, "there was nothing said about the land" (Fumoleau 1973: 170).

However, this is not the most felicitous way in which to interpret his words. Philip Moses also says that at Wrigley “nothing about land was said at the treaty” (Moses 1970). However, he soon adds:

The Old Man heard these rumors about treaties, that people had a hard time after that. Old Man wanted to see if they were after land or something. But they said “no.”

In other words, it is not that nothing was said about land, but rather that when Dene raised the matter the Commissioner said it was not subject of negotiations. That understanding is corroborated by Dene in other communities.³⁰⁵ That is, as Julianne André reports at Arctic Red River, in one community after another the Dene negotiators asked for and received strong assurances that the treaty was not about ceding the land:

They (the Indians) said, “This is our land, we were born here, it is our land and no one will take it from us.” This white man (The Commissioner) and a Hudson Bay Clerk told us ... this land is your land as long as you live and no one will take it from you. The people said, “Are you sure no one will take this land?” and the white people said, “Yes, we will not take your land” (Fumoleau 1973: 184).

Thus, Justice Morrow concludes that:

... notwithstanding the language of the two treaties (ie Treaties 8 and 11) there is sufficient doubt on the facts that aboriginal title was extinguished that such claim for title should be permitted to be put forward. (*Re Paulette*, p. 40).

Rene Fumoleau sums up the findings succinctly in this way:

Most official documents indicate that Treaty 11 was a cession of land. The Indians of the Mackenzie District contest this interpretation. They do not believe that their fathers ever intended to surrender the land to the Government (Fumoleau 1973: 214).

Justice Morrow goes so far as to suggest that the intent of extinguishing this title may have been deliberately masked, for he says “the important phrase in respect of the surrender of the land,” by which “the Indians were left nothing,” was “camouflaged to some extent” by its position as “one of the preambles,” in the text (*Re Paulette*, p. 32). In other words, as with terms respecting hunting and fishing, the evidence substantiates that the Dene position prevailed, and thus that they exited negotiations believing that the written text reflected a shared understanding that they had not ceded their property rights in land.

³⁰⁵ There is one exception to note: Louis Norwegian of Fort Simpson, said that he (*Re Paulette* at p. 16): “heard no mention of reserves but he did hear mention that once they took treaty the Government would receive the land.”

DENE DUE DILIGENCE

The interviews also show that Dene leaders sought in two different ways to ensure that the text of the treaty, which they could not read, reflected the agreement they had reached verbally. First, they requested an explanation as to the reason they were receiving benefits (or, in their phrasing, receiving money), if it was not for the sale of their land. In each community for which there is evidence, they received the same assurance: it was intended to symbolize the establishment of a relationship of peace and friendship between them, not to transfer ownership and jurisdiction; thus at Fort Providence eyewitnesses report that “On the last day... the commissioner said: ‘This money you are accepting will be a token of peace between us and we shall be friends’” (Fumoleau 1973: 170f) and at Wrigley “The commissioner of the Treaty party told the people when he was paying out the Treaty money that as long as the sun rises and sets, and the river flows, there would be no changes in the lives of the people” (Fumoleau 1973: 177). It is also reported that Bishop Breynat underlined this rationale, stating to Dene at Fort Providence that the reason for the treaty was to enable “the white man and the Indians ... to live side by side on this land till the end of the world, and that (if they agreed) from hereafter things would be good for the Indians” (Fumoleau 1973: 169). It is, in effect, a paraphrase of the clause in the treaty, as cited above, that to ensure:

...there may be peace and goodwill between them and His Majesty's other subjects, and that His Indian people may know and be assured of what allowances they are to expect and receive from His Majesty's bounty and benevolence.

Second, the Dene insisted that the Commissioner’s verbal assurances on these matters be confirmed by other means. In some communities, as in Fort Providence, they requested that his words be written down because as Chief Lemoin says “You people say things like that but you lie, so you better put it down on paper” (Fumoleau 1973: 170). In others, as in Fort Norman, they requested the verbal assurance of Bishop Breynat, whom they knew and trusted, to vouch for the veracity of the Commissioner, and were told by him that “the white people were not lying” and that “they would keep their promise. They are telling the truth” (Fumoleau 1973: 181). At Fort Rae, Dogrib Chief Monfwi, part of the same community that had negotiated Treaty 8 at Fort Resolution, went further. As Jimmy Bruneau reports, he insisted that a map be drawn to confirm the boundary of the territory within which the Crown recognizes their community’s ownership and jurisdiction, saying that “I will not accept the Treaty until I have a copy in my hand. I will accept the Treaty only when this area of land is given to the Dogrib band” (Fumoleau 1973: 194). It is a matter on which Chief Monfwi persisted, for the next day:

The Chief again asked the Commissioner for the paper and the map, before he signed the treaty. This time, the Commissioner handed the paper (Treaty documents) to Chief Monfwi and showed the marks on the map and said: "You sign the paper you keep a copy of it and I will keep a copy of it too." (Fumoleau 1973: 249).

Not satisfied with this alone, Henry Black reports that Chief Monfwi also asked Bishop Breynat to confirm that the map represented what had been agreed to verbally, to which the Bishop replied that he was thankful to the Chief because no one had ever made such a good deal on a boundary line before (Fumoleau 1973: 194). Then, Noel Sotchia reports that the Chief asked the Bishop and the storekeepers who were present to initial the document, at which point, according to Jonas Lafferty, Bishop Breynat stated "I will write my name on the paper and there will be no restrictions. I will read the paper to you" (Fumoleau 1973: 195). Then, Lafferty continues, the interpreter read what the Bishop wrote as: "No restrictions as long as the sun rises, and as long as the river flows downstream." It is only after hearing those words that Chief Monfwi agrees to the treaty saying to the Bishop: "Because of your word, I will take the Treaty" (Fumoleau 1973: 195).

SUMMARY AND CONCLUSIONS

This case study looked into the political relationship established between First Nations and Canada through historical treaties as a possible framework within which to consider issues associated with the IPinCH project, such as those related to intellectual property rights and cultural heritage, and in particular matters respecting the appropriation or the taking of some thing without the consent of the owner. This necessitated that the research focus on the jurisdictional arrangements whereby the rules as to what is "owned" and therefore what is "theft" are determined, and in this regard, focused in particular on the role that treaty-making might play in establishing such arrangements in Canada. The study asks whether there is there something in the treaty relationship that established, even indirectly, a shared understanding of how the cultural heritage of Indigenous peoples would be treated by the Settlers and the governments they established?

Unlike many other IPinCH-supported initiatives, this study is not a community-based research project. Rather it relies on published primary and secondary sources to examine perspectives of the parties at the time treaties were made. This approach required that the sample of treaties be limited to those in which there was sufficient contextual information available on this matter, as, for example, information in published transcriptions of what transpired during negotiations. It was thought prudent to include

treaties negotiated at different times and in different locations, and this shaped the selection of treaties to be included. Finally, given the limitations of the budget, it was also necessary to focus on treaties that were already of interest to the students involved in this case study so that they could “voluntarily” fold their work into this larger study.

Research for this project was conducted primarily in 2010 and 2011. The researchers, in addition to myself, included Indigenous and non-Indigenous graduate students. They were asked to apply historical and anthropological methods, including the identification and analysis of relevant archival materials, published primary sources, published oral histories, and ethnographic materials, to distil aspects useful to the questions being addressed.

There are a number of different ways to approach the interpretation and analysis of treaties between Indigenous peoples and the Crown. Here we adopted one that may well be novel. It was to begin with the Indigenous understandings of the agreement and then check that against the historical record as presented by Commissioners of the Crown and other settlers, and also against the written text of the treaty that was transmitted to Ottawa. It showed, in case after case, that the Indigenous understandings more closely aligned with the historical record than did the document shared with Ottawa. On that basis, we concluded that the understandings of Indigenous peoples today is a more accurate reflection on what transpired and therefore what the agreements entail than the texts of treaties.

Findings

None of chapters of this report speak directly to intellectual property and cultural heritage issues. That was not their intent. However, the reports, when taken together, do provide some direction for addressing these issues, for they establish a pattern of relationship over time and space that in my view gives us firm guidance. Reviewing these studies, we come to two major conclusions, outlined below.

First, I find that the historical record provides no evidence from the transcripts or other sources to substantiate the proposition that the Indigenous parties agreed, through treaties, to cede their authority to govern themselves and their lands to the Crown (that is, to cede their jurisdiction), notwithstanding what appears in the treaty texts. Rather, the treaty agreements appears to reflect a relationship akin to that between Canada and New Zealand; that is, brothers to each other and children of the Queen. The

“cession” of sovereignty amounts to nothing more than an agreement to enter into an alliance with the Crown and Canada while retaining political autonomy. In this regard, it parallels the relationship between Canada and the Crown as explained by Morris in 1865, during the debate on Confederation where he says that (given expansionism below the border) “We have either to rise into strength and wealth and power by means of this union, *under the sheltering protection of Britain*, or we must be absorbed by the great power beside us” (quoted in Talbot 2009: 47f, emphasis added). He further argues that even if we agree to go under that protection “We will have the pride to belong to a great country still attached to the Crown of Great Britain, in which, notwithstanding, *we shall have entire freedom of action and the blessing of responsible self government*” (quoted in Talbot 2009: 47, emphasis added).

This is a concept that Sir Francis Bond Head, Lieutenant-Governor of Upper Canada, articulated in his address to First Nations associated with Treaty 45 (Manitoulin Island) in 1837:

Children – Your Great Father the Lieutenant Governor, as a token of the above Declaration, transmits to the Indians a Silk British Flag, which represents the British Empire. Within this flag, and immediately under the Symbol of the British Crown, are delineated a British Lion and a Beaver, by which it is designated that the British Peoples and the Indians, the former being represented by the Lion and the latter by the Beaver, are and will be alike regarded by their Sovereign so long as their Figures are represented on the British Flag, or, in other Words, so long as they continue to inhabit the British Empire (West 2010: 61).

My second conclusion is that, in return for permitting settlement on their lands, the Crown promised to provide economic assistance and other benefits, particularly when and if the Indigenous parties wished to take up agriculture as well as advantage of Western schooling. Transcripts and other documents make it clear that these benefits were not to be proffered on a one-time basis, but rather that the Crown was making a pledge to initiate a partnership based on mutual aid. As Crown Treaty Commissioner Alexander Morris stated during Treaty 4 negotiations (Morris 1880: 92):

What the Queen and her Councillors would like is this, she would like you to learn something of the cunning of the white man. When fish are scarce and the buffalo are not plentiful she would like to help you to put something in the land; she would like that you should have some money every year to buy things that you need. If any of you would settle down, she would give you cattle to help you; she would give you some seed to plant. She would like to give you every year, for twenty years, some powder, shot, and twine to make nets of. I see you here before me today. I will pass away and you will pass away. I will go where my fathers have gone and you also, but after me and after you will come our children. The Queen cares for you and for your children, and she cares for the children that are yet to be born. She would like to take you by the hand....

And in Treaty 6 negotiations, Morris put it this way:

I cannot promise you that the Government will feed and support all of the Indians.... What I have offered you does not take away from your way of living, you will have it then as you have it now, and what I offer now is put on top of it. This I can tell you, the Queen's Government will always take a deep interest in your living.

Furthermore, the Crown promised to ensure that, were harm to come to Indigenous peoples, it would "have their back." Thus as Morris said (Morris 1880: 228): "In a national famine or general sickness, not what happens in every day life, but if a great blow comes on the Indians they would not be allowed to die like dogs." This promise is reflected in the written text of Treaty 6 in the following words:

That in the event hereafter of the Indians comprised within this treaty being overtaken by any pestilence, or by a general famine, the Queen, on being satisfied and certified thereof by Her Indian Agent or Agents, will grant to the Indians assistance of such character and to such extent as Her Chief Superintendent of Indian Affairs shall deem necessary and sufficient to relieve the Indians from the calamity that shall have befallen them.

What, then, are the implications of these findings for cultural heritage policy? In the first place, it is clear that Canada has not followed the terms of the treaties faithfully. One result of this is that Canada has assumed it has jurisdiction over material cultural property, such as artifacts as well as the physical remains of those who lived here prior to the establishment of the state. However, while it would be my strong desire that Canada recognizes that it does not have jurisdiction, it is hard to imagine that the Canadian state will eschew this assertion, at least in the near future. So the practical question is how to work to implement the kind of relationship envisioned in the treaties; and in that regard I find the second finding helpful. Underneath the specifics of the treaties discussed in this report, there lies an organizing principle, which I have come to describe as "kindness," by which I mean "having a gentle, sympathetic, or benevolent nature; ready to assist, or show consideration for, others."³⁰⁶ Elsewhere (Asch 2009: 394), I addressed the issue taken up here as follows:

What could be more reasonable than a desire to ensure that you are the custodian of your own cultural heritage? And what could be more unreasonable than holding another people's cultural heritage, of ongoing significance to them, in your hands?

³⁰⁶ OED definition of "kind," accessed online 15 April 2010.

Or put in another way, the question becomes: “What could be more unkind than holding another people’s cultural heritage of ongoing significance to them, in your hands?” Taking this approach, assertions of jurisdiction matters not. What counts is acting with kindness and therefore relinquishing unilateral control over these materials.

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