TAKING AIM AT THE CANONS OF TREATY INTERPRETATION IN CANADIAN ABORIGINAL RIGHTS JURISPRUDENCE

Leonard I. Rotman*

> The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. ... How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.[1]

I. Introduction

The recent decision of the Supreme Court of Canada in *R.* v. *Badger* affirmed that the existence of a number of canons of Aboriginal treaty interpretation is an integral aspect of treaty jurisprudence.[2] The interpretive canons include the notion that treaties are to be given large, liberal and generous interpretations in favour of the Aboriginal peoples. Ambiguities in treaties are to be resolved in favour of the Aboriginals and the treaties ought to be construed as the Aboriginal signatories understood them. Also, treaties are to be interpreted in a flexible manner and extrinsic evidence should readily be used to determine the meaning and intent of treaties.[3] Although these interpretive canons have existed as an explicit part of Canadian Aboriginal rights law for almost twenty years, they have not always been followed during that time. In a number of situations courts have explicitly affirmed the use of these principles, yet subsequently abandoned or ignored them altogether in their judgments. The result of this practice has been a general confusion regarding the status of these principles in Canadian law and how they ought to be implemented by the courts.

These interpretive canons were introduced into Canadian law in the case of *R.* v. in 1979.[4] They were subsequently affirmed by the Supreme Court of Canada in a number of decisions, beginning with *Nowegijick* v. *R.*[5] By the mid-1980s, they

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*Of the Faculty of Law, University of Alberta

[1] *Worcester* v. *State of Georgia*, 6 Pet. 515 at 582 (U.S. 1832), M'Lean J.

[2] (1996), 133 D.L.R. (4th) 324 (S.C.C.).

[3] *Ibid.* at 331, Sopinka J. and at 340-1, Cory J.

[4] (1979), 55 C.C.C. (2d) 172 (Ont. Div. Ct.) [hereinafter *Taylor and Williams, Div. Ct.*], var'd (1981), 62 C.C.C. (2d) 227 (Ont. C.A.) [hereinafter *Taylor and Williams, C.A.*].

[5] (1983), 144 D.L.R. (3d) 193 (S.C.C.). See also *Dick* v. *R.* (1985), 23 D.L.R. (4th) 33 (S.C.C.); *Simon* v. *R.* (1985), 24 D.L.R. (4th) 390 (S.C.C.); *Derrickson* v. *Derrickson* (1986), 26 D.L.R. (4th) 175 (S.C.C.).

appeared to be well-entrenched in Canadian Aboriginal rights jurisprudence. These principles were favourably cited in the Supreme Court decision of *R. v. Horse* in 1988.[6] However, in this case the court not only failed to employ them in its assessment of the issues in dispute, it also departed from the very bases of their existence by advocating a prohibition on the use of extrinsic evidence other than where an ambiguity existed within a treaty. Although the Supreme Court expressly distanced itself from *Horse*'s interpretation of these principles in *R.* v. *Sioui*,[7] its subsequent decision in *R.* v. *Howard*[8] resulted in the same effects that had been produced by *Horse*. The Supreme Court's decision in *Badger* brings matters back full circle, insofar as it evidences a wholesale embracing and implementation of the principles of treaty interpretation, thereby returning them to the status they had originally enjoyed in *Taylor and Williams*.

This article suggests that these interpretive principles ought to be recognized as permanent and vital fixtures in Canadian treaty jurisprudence. Understanding these principles as integral elements of treaty jurisprudence requires, however, that the judiciary give more than token attention to them. While it is important to articulate these principles, it is equally important to apply them to factual situations if they are to have any meaningful effect. Paying lip-service to these principles while rendering decisions that ignore their theoretical premises, or abandoning them altogether, runs contrary to the premises underlying these doctrines and the intended purpose of including them as a part of treaty jurisprudence.

Part of the difficulty with the use of these principles is that while they are well-known, the reasons for their existence are not. Even where courts have explicitly supported their use, they have not clearly defined why these principles exist and what functions they serve. Simply affirming that treaties are to be given large, liberal and generous interpretations does not explain why such an interpretation is necessary or what obstacles are to be overcome using this premise. These canons reveal much about treaty relationships and the respective attitudes of the Crown and Aboriginal peoples towards treaties and treaty-making processes.

In order to secure the place of these interpretive canons as vital elements of Canadian Aboriginal rights jurisprudence, more substance must be given to them. This means explaining why these canons are necessary for the effective understanding of treaties as solemn and binding compacts. This article seeks to provide greater substance to these interpretive canons by illustrating the reasons for their existence

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[6](1988), 47 D.L.R. (4th) 526 (S.C.C.). The *Horse* decision will be discussed in greater detail below.

[7](1990), 70 D.L.R. (4th) 427 (S.C.C.).

[8][1994] 2 S.C.R. 299. The basis for the existence of these interpretive canons was also explicitly rejected by the Federal Court of Appeal's decision in *Eastmain Band* v. *Canada (Federal Administrator)*, [1993] 3 C.N.L.R. 55.

and how they facilitate arriving at culturally-appropriate understandings of Crown-Native treaties. It will examine the parties' respective attitudes towards treaty-making processes, the finalized agreements that stemmed from these processes, and how the parties interpreted these agreements once they had been concluded. The use of these interpretive canons in contemporary treaty case-law by Aboriginal litigants, the Crown and the judiciary will be better understood if the underlying bases of the canons are explored.

In attempting to provide greater substance and contextual understanding of these treaty canons, this article will discuss them, and the treaties to which they relate, in a general sense. It is beyond the scope of this work to address specific instances of Crown-Native treaty-making, or to engage in a sustained analysis of how the treaty canons may apply to particular treaties. These limitations should not, however, be regarded as a justification for generalizing about treaties and their interpretation. Treaties are time and context-specific and must be examined in light of the circumstances under which they arose, including the Crown's and the Aboriginal peoples' understandings of their terms. The ensuing discussion will demonstrate that the canons of treaty interpretation recognize the importance of context in treaty analysis, emphasizing the need to look beyond the written versions of treaties. One must observe their spirit and intent, which includes the substance of the negotiations between the Crown and the Aboriginal peoples leading up to the conclusion of the treaties.

II. The Background to the Contemporary Understanding of Crown-Native Treaties

Treaties between the Crown and the Aboriginal peoples were a fundamental part of early British diplomacy in North America. Even before the *Treaty of Albany*, the first formal treaty between Britain and the Aboriginal peoples of North America, was signed in 1664,[9] British-Aboriginal alliances had existed on a less formal basis for quite some time.[10] Although there is no firm definition of what constitutes a treaty in Canadian law, the parties' intentions, not their adherence to a certain protocol, is most relevant in ascertaining whether a valid treaty exists.[11] Justice Lamer, as he then was, stated in the *Sioui* case that a treaty exists where there is an agreement between Aboriginal peoples and the Crown that demonstrates "the intention to create

[9] "Articles between Col. Cartwright and the New York Indians", 24 September 1664, as reproduced in E.B. O'Callaghan, ed., *Documents Relative to the Colonial History of the State of New York*, Vol. III., (Albany: Weed, Parsons, 1853-61) at 67-8 [hereinafter *NYCD*].

[10] Alliances of a less formal nature existed between early British colonists and the Aboriginal peoples in Virginia. The early 17th century alliance between the Virginia colonists and the Powhatans is one of the more notable of these early alliances, owing to the legend of Pocahontas, daughter of Powhatan.

[11] See *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 at 648-9 (B.C.C.A.)

obligations, the presence of mutually binding obligations and a certain measure of solemnity."[12]

Early treaties between Britain and Aboriginal nations were a means of securing alliances and consolidating relations between diverse groups. From the British perspective, these alliances provided substantial economic, military and political benefits. They also enabled Britain to gain advantages over their European competitors. For the Aboriginal peoples, treaties yielded these same benefits as well as a basis for asserting their rights against the Europeans in the wake of European intrusions on their lands and interferences with their traditional ways of life.

Treaties were mutual compacts which recognized the independence of the European and Aboriginal nations that were parties to them. The very nature of the treaty-making process indicated the autonomy of the parties, since a nation did not need to treat with its own subjects.[13] A letter from Sir William Johnson, British Superintendent-General of Indian Affairs, to the Lords of Trade in 1764 indicates that he regarded the Aboriginals as autonomous peoples who would not relinquish their independence by submitting to British sovereignty:

> I have just received from Genl Gage a copy of a Treaty lately made at Detroit by Coll. Bradstreet with the Hurons and some Ottawaes & Missisagaes; these people had subscribed to a Treaty with me at Niagara in August last, but by the present Treaty I find, they make expressions of subjection, which must either have arisen from the ignorance of the Interpreter, or from some other mistake; for I am well convinced, they never mean or intend, any thing like it, and that they can not be brought under our Laws, for some Centuries, neither have they any word which can convey the most distant idea of subjection, and should it be fully explained to them, and the nature of subordination punishment etc, defined, it might produce infinite harm, but could answer no purpose whatever ... I am impatient to hear the exact particulars of the whole transaction, and I dread its consequences, as I recollect that some attempts towards Sovereignty not long ago, was one of the principal causes of all our troubles, and as I can see no motive for proposing to them terms, which if they attended to them, they most assuredly never meant to observe, and 'tis out of our power to enforce, I am apt to think it may occasion a necessity for being sufficiently watchful over their motives ...[14]

During his tenure as Superintendent-General of Indian Affairs, Johnson continually represented that he dealt with the Aboriginal peoples as independent

[12]*Supra* note 7 at 441.

[13]See R.L. Barsh & J.Y. Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley: University of California Press, 1980) at 270; P. Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995) 21 Queen's L.J. 173 at 197.

[14]"Sir William Johnson to the Lords of Trade", 30 October 1764, as reproduced in *NYCD*, *supra* note 9 VII at 674.

nations. This is illustrated by the "separate house" image conveyed in the following statement made by Johnson at the *Treaty of Niagara* in 1764:

> Brothers of the Western Nations, Sachems, Chiefs and Warriors; You have now been here for several days, during which time we have frequently met to renew and Strengthen our Engagements and you have made so many Promises of your Friendship and Attachment to the English that there now remains for us only to exchange the great Belt of the Covenant Chain that we may not forget our mutual Engagements.
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> I now therefore present you the great Belt by which I bind all your Western Nations together with the English, and I desire that you will take fast hold of the same, and never let it slip, to which end I desire that after you have shewn this Belt to all Nations you will fix one end of it with the Chipeweighs at St. Marys [Michilimackinac] whilst the other end remains at my house, and moreover I desire that you will never listen to any news which comes to any other Quarter. If you do it, it may shake the Belt.[15]

As the Crown's duly-authorized emissary, Johnson's representations to the Aboriginals are binding on the Crown. The conclusion is that if he treated with the Aboriginal peoples as autonomous nations, then Britain can be regarded as treating with them as autonomous nations.

Britain's recognition of Aboriginal land interests and its protection of the rights flowing from those interests in the *Royal Proclamation of 1763* may also be seen to recognize and affirm the autonomy of the Aboriginal peoples.[16] As the Royal Commission on Aboriginal Peoples has noted:

> [W]hile the Royal Proclamation asserted suzerainty over Aboriginal peoples living "under Our Protection", it also recognized that these people were "Nations" connected with the Crown by way of treaty and alliance. ... [T]he Proclamation acknowledged the retained sovereignty of Aboriginal peoples under the Crown's protection, and adopted measures to secure and protect their Territorial rights. This arrangement is the historical basis of the enduring constitutional relationship between Aboriginal nations and the Crown and provides the source of the Crown's fiduciary duties to those nations.[17]

The Proclamation affirmed the status quo with respect to Aboriginal peoples and their interaction with the Crown. The rights it spoke of were rights already in

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[15]*The Papers of Sir William Johnson*, Vol. 4, (Albany: University of the State of New York, 1921-65) at 309-10.

[16]*Royal Proclamation*, 1763 (U.K.), reprinted in R.S.C. 1985, App. II, No. 1.

[17]Canada, Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment*, (Ottawa: Minister of Supply and Services, 1995) at 11 (Co-Chairs Rene Dussault & Georges Erasmus). See also R.N. Clinton, "The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict Over the Management of Indian Affairs" (1989) 69 Boston U. L. Rev. 329 at 381.

existence, not rights newly granted.[18] The wording of the document bears out this conclusion, as does the following statement from Secretary of State Lord Egremont to the Lords of Trade in a letter of 5 May 1763:

> The second question which relates to the security of North America, seems to include two objects to be provided for; The first is the security of the whole against any European Power; The next is the preservation of the internal peace & tranquillity of the Country against any Indian disturbances. Of these two objects the latter appears to call more immediately for such Regulations and Precautions as your Lordships shall think proper to suggest &ca.
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> Thô in order to succeed effectually in this point it may become necessary to erect some Forts in the Indian Country with their consent, yet his Majesty's Justice and Moderation inclines him to adopt the more eligible Method of conciliating the minds of the Indians by the mildness of His Government, *by protecting their persons & property, & securing to them all the possessions rights and Privileges they have hitherto enjoyed & are entitled to most cautiously guarded against any Invasion or Occupation of their hunting Lands, the possession of which is to be acquired by fair purchase only,* and it has been thought so highly expedient to give the earliest and most convincing proofs of his Majesty's gracious and friendly Intentions on this head, that I have already received and transmitted the King's commands to this purpose to the Governors of Virginia, the two Carolinas & Georgia, & to the Agent for Indian Affairs in the Southern Department, as your Lordships will see fully in the inclosed copy of my circular letter to them on this subject.[19]

The notion that the Aboriginal peoples dealt with Britain as independent nations is also illustrated in representations made by the Aboriginal peoples themselves. The statement of the Onondaga and Cayuga Indians to the Governors of New York and Virginia on 2 August 1684 is indicative of this understanding:

> Wee have putt our selves under the great Sachim Charles that lives over the great lake, and we do give you Two White Drest Dear Skins to be sent to the great Sachim Charles That he may write upon them, and putt a great Redd Seale to them ... And you great man of Virginia, meaning the Lord Effingham Governr of Virginia ... lett

[18]See *e.g. R.* v. *Koonungnak*, [1963-64] 45 W.W.R. 282 at 302 (N.W.T. Terr. Ct.): "This proclamation has been spoken of as the 'Charter of Indian Rights.' Like so many great charters in English history, it does not create rights but rather affirms old rights. The Indians and the Eskimos had their aboriginal rights and English law has always recognized these rights." See also *Calder* v. *British Columbia (A.G.)* (1973), 34 D.L.R. (3d) 145 at 200 (S.C.C.); *Hamlet of Baker Lake* v. *Canada (Minister of Indian Affairs and Northern Development)* (1979), 107 D.L.R. (3d) 513 at 541 (F.C.T.D.); *Guerin* v. *R.* (1984), 13 D.L.R. (4th) 321 at 335 (S.C.C.).

[19]"Lord Egremont to the Lords of Trade", 5 May 1763, as reproduced in *NYCD*, *supra* note 9 VII 519 at 520-1 [emphasis added]. See also A.C. Hamilton, *A New Partnership* (Ottawa: Minister of Public Works and Government Services Canada, 1995) at 7: "The Royal Proclamation of October 7, 1763 recited the legal principles of that day. It did not make new law."

your freind that lives over the great lake know that we are a ffree people uniting our selves to what sachem we please, and do give you one beavor skinn.[20]

That the Aboriginal peoples considered themselves independent actors, notwithstanding their alliances with particular European nations, is also indicated in the statement of the Ojibway Chief Minavavana to English trader Alexander Henry at Michilimackinac in 1761, "Englishman, although you have conquered the French, you have not yet conquered us. We are not your slaves. These lakes, these woods and mountains, were left to us by our ancestors. They are our inheritance; and we will part with them to none."[21]

In addition to recognizing the autonomy of the parties involved, the treaties also solidified the relationship between the Crown and Aboriginal peoples at strategic points in North American history.[22] The mutuality of the treaty-making process between the Crown and the Aboriginal peoples is illustrated by the use of both British and Aboriginal practices such as the use of written parchment copies, the recording of agreements on wampum belts,[23] and the exchange of presents.[24] As the basis

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[20]"Proposition of the Onondaga and Cayuga Indians", 2 August 1684, as reproduced in *NYCD, supra* note 9 III, 417 at 417-8.

[21]D.V. Jones, *License for Empire: Colonialism by Treaty in Early America* (Chicago: University of Chicago Press, 1982) at 71.

[22]See B. Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L.J. 681 at 684: "[T]he numerous treaties concluded between First Nations and colonial governments played an essential role in determining the various parties' expectations and actions, and moulding their understanding (and misunderstanding) of the other parties. These treaties necessarily figure prominently in any historical account of Aboriginal-European relations."

[23]Wampum belts are made from beads fashioned out of shells, which were pierced and sewn into patterns on animal hides. Chief Jean-Maurice Matchewan of the Barriere Lake Indian Government, explained the significance of wampum in the following manner:

> Wampum belts were used by Indian nations in eastern North America to record agreements and laws, long before the coming of the white man. Wampum is a cylindrical bead, purple or white in colour, made from the hard shell of the clam. Woven together, the wampum form designs that symbolize actual events. It takes years to make a wampum belt and, once made, it is handed down from generation to generation, along with the memory of what it records.

See "Mitchikanibikonginik Algonquins of Barriere Lake: Our Long Battle to Create a Sustainable Future", in B. Richardson, ed., *Drumbeat: Anger and Renewal in Indian Country* (Toronto: Summerhill Press, 1993) at 141.

In "The Quest of the Six Nations Confederacy for Self-Determination" (1986) 44 U.T. Fac. L. Rev. 1 at 9, D. Johnston gave the following explanation of the symbolism of wampum: "Each design carried with it a universe of meaning. Wampum belts were integral both to spiritual ceremonies and council meetings. Moreover, they were the medium of international communication." See also R.A. Williams, Jr., "The Algebra of Federal Indian Law: The Hard Trail of Decolonization and Americanizing the White Man's Indian Jurisprudence" (1986) Wisc. L. Rev. 219 at 291; W.R. Jacobs, *Dispossessing the American Indian: Indians and Whites on the Colonial Frontier* (New York: Charles Scribner's Sons, 1972) at 41-9.

of the origins and continuation of Crown-Native relations, the treaties were the building blocks of the modern Canadian state.

Despite the importance of treaties, they were not always afforded a significant amount of respect in law. In the late 19th and early 20th centuries, the treaty rights of the Aboriginal peoples of Canada were not viewed by the courts as inalienable rights in the common law tradition. Rather, they were regarded as simple promises existing at the sufferance of the Crown. The comments made by Lord Watson in the Privy Council's decision in *Attorney-General of Ontario* v. *Attorney-General of Canada: Re Indian Claims* (the *Robinson Treaties Annuities* case) shows this attitude: "Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities ... beyond a promise and agreement, which was nothing more than a personal obligation by its governor".[25]

While this attitude may have prevailed from the latter stages of the 19th century until quite recently, during the formative years of Crown-Native relations the treaties were represented to the Aboriginal peoples as solemn obligations of a binding nature.[26] The speech of Sir William Johnson after the signing of a treaty with the

[24]Britain had previously reserved the use of formally written treaties on parchment for its relations with independent, sovereign powers. Meanwhile, the Aboriginals' practice of representing agreements on belts of wampum, which were highly valuable and required great skill to make, demonstrated the sanctity with which they viewed their alliances with Britain. As Jacobs, *supra* note 23 explains at 42:

> Grains from Delaware Indian "Penn Wampum Belts," obtained from the Indians by the Penn family, were approximately one-fourth of an inch wide and three-eighths to one-half inch in depth. According to X-ray reproductions, the perforations were between one-eighth and one-sixteenth of an inch in diameter. The grains were laced together with native fibre and deerskin, cut into narrow strips, and made into necklaces, bracelets, strings, belts, girdles, and collars. Each grain had its known value, the black or purple being worth twice as much as the white.
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> Making of wampum beads was difficult. For one thing, before the natives obtained awls from Europe, they had to bore out the shell currency with sharp stones. The English, observing the value placed on wampum beads, made imitation porcelain beads, which were sold to the Indians at what was probably a handsome profit.
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> Since wampum was made near the seashore, inland tribes travelled as many as six hundred miles to trade skins and pelts for this precious commodity.

[25][1897] A.C. 199 at 213. Lord Watson's remark was explicitly referred to in at least two subsequent treaty cases. See *R.* v. *Wesley*, [1932] 4 D.L.R. 774 at 788 (Alta. C.A.): "In Canada the Indian treaties appear to have been judicially interpreted as being mere promises and agreements. See *A.G. Can.* v. *A.G Ont.* (Indian Annuities case), [1897] A.C. 199, at 213." See also *R.* v. *Sikyea* (1964), 43 D.L.R. (2d) 150 at 154 (N.W.T.C.A.), Johnson J.A.: "While this [Lord Watson's statement] refers only to the annuities payable under the treaties, it is difficult to see that the other covenants in the treaties, including the one we are here concerned with, can stand on any higher footing."

[26]These formative years span the period from contact until shortly after the signing of the *Treaty of Niagara* in 1764.

Ohio Indians in 1765 demonstrates the Crown's representations of the solemnity of treaties to the Aboriginal peoples:

> Children the Shawanese, Delawares & Mingos, You have now subscribed to the Treaty before me confirming the Articles signed by the Delawares before, the greatest part of which will equally concern you all.
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> It remains that I desire you will consider that what you have signed is a solemn thing, and Engagement between the English which will always appear against those who violate it, so that you must not compare it with any little transactions amongst yourselves, which are often soon forgotten. No, this can't be forgotten, it will remain upon record, & your People shall have coppys of it for their private satisfaction.
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> Think seriously then of what you have done, repeat it often amongst yourselves, & where any doubt or difference may happen to arise observe the Article by which you have engaged to come to me, or those sett over you by the King for an Explanation or to Obtain Justice. — If you act differently your Breach of Faith will be publickly known, & you must expect nothing but ruin, but if on the contrary you take due notice of what has passed & observe your engagements the King will esteem you, his Subjects will consider you as Friends, your Wives & Children may rest in security, whilst you pursue your Hunting & enjoy your own Trade. — Think of this, never Deny, Alter or Evade what you have now agreed to & consider what I have now said as a proof of my Friendship for all Indians, who in gratitude to His Majesties forgiveness are resolved to lead peaceable lives & never to disturb the Public Tranquillity.[27]

Judicial understanding of treaties as solemn commitments between the Crown and Aboriginal peoples in Canada did not truly develop until the British Columbia Court of Appeal's decision in *R.* v. *White and Bob* in 1964.[28] Although treaties received paramountcy over provincial legislation through the application of section 88 of the *Indian Act*,[29] it was not until the constitutional entrenchment of treaty rights in section 35(1) of the *Constitution Act, 1982*[30] that treaties were afforded the same treatment at law that they had received during the formative years of Crown-Native relations. Shortly after the constitutionalization of treaty rights in section 35(1), the judiciary increasingly recognized the existence of various impediments to previous courts' interpretations of treaty rights that are endemic to Aboriginal treaties. This change in judicial attitude resulted in a greater acceptance of the canons of Aboriginal

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[27]"Sir William Johnson to the Lords of Trade", July 1765 as reproduced in *NYCD*, *supra* note 9 at 756.

[28]*Supra* note 11.

[29]R.S.C. 1985, c. I-5. Under section 88, provincial laws of general application that affect "Indianness" are applicable to Aboriginal peoples by referential incorporation, subject to the terms of treaties and federal legislation dealing with the same subject matter. Provincial laws of general application that do not affect "Indianness" apply to Aboriginal peoples *ex proprio vigore* (of their own force) and are subject only to normal paramountcy rules. See *Dick*, *supra* note 5.

[30]Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

treaty interpretation that had been developed in American Aboriginal rights jurisprudence and introduced into Canadian law in *Taylor and Williams*.[31]

The Canadian judiciary recognized that treaties between representatives of the Crown and Aboriginal nations ought not to be governed by the ordinary principles of interpretation that are applicable to other agreements, such as private contracts or international treaties.[32] Greater emphasis began to be placed on methods of construing treaties that would give a more accurate portrayal of the compacts between the Crown and Aboriginal peoples so that the promises made therein would be recognized and enforced by the courts. The interpretive canons were intended to accomplish this task.

III. Principles of Aboriginal Treaty Interpretation

The notion that courts ought to articulate a means of treaty interpretation that would give a more accurate picture of the agreements reached between the Crown and the Aboriginal peoples developed only after treaties between the parties were recognized at law as meaningful and enforceable documents intended to govern relations between them. This development was accompanied by the realization that Crown-Native treaty-making was coloured by significant differences in the parties' languages, cultures, concepts and world views. This resulted in vastly different understandings by the Crown and the Aboriginal peoples of the nature of the bargains. Not only were the languages used by the groups quite different, but the manners in which they were used were equally dissonant.

The Crown's representatives were generally quite deliberate in their use of language, at least in the written version of treaties. This tendency accorded with the fact that Britain tended to view the treaties exclusively in light of the written documents. The Aboriginal peoples, in contrast, viewed the nature of the agreements as being comprised of the entire treaty-making process.[33] Thus the British viewed the parchment handed over to the Aboriginal signatories as the entire treaty, but the Aboriginal peoples saw the parchment copy of the treaty as a mere account of the treaty. For the Aboriginals, the parchment version was simply one aspect of the

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[31] *Supra* note 4.

[32] The *sui generis* nature of Aboriginal treaties was first set out by the Supreme Court of Canada in *Simon*, *supra* note 5.

[33] See *e.g.* the statement made by the Indian Chiefs of Alberta in Indian Association of Alberta, *Citizens Plus* (Edmonton: Indian Association of Alberta, 1970) at 8: "In our treaties of 1876, 1877, 1899 certain promises were made to our people; some of these are contained in the text of the treaties, some in the negotiations, and some in the memories of our people. Our basic view is that all these promises are part of the treaties and must be honoured."

larger treaty-making process.[34] This included the spirit and intent of the agreement,[35] as well as its relationship to existing and future agreements.[36] When the Aboriginal peoples handed over a wampum belt commemorating a treaty, they did so to signify the solemnity of the agreement and to provide an account for future generations. Wampum belts were merely mnemonic devices; they did not constitute the entirety of the agreement between the parties.[37]

Because of these differences, the Crown and the Aboriginal peoples tended to also have different understandings of the nature of the agreements themselves.[38] Consequently, when the written terms of a treaty failed to include a substantive guarantee that had been promised during negotiations, or to account for an assurance of protection, such as the recognition and protection of Aboriginal hunting and fishing

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[34]*Ibid.* at 26.

[35]See Hamilton, *supra* note 19 at 7; D. Opekokew & A. Pratt, "The Treaty Right to Education in Saskatchewan" (1992) 12 Windsor Y.B. Access Just. 3 at 34-5; Grand Chief D. Marshall Sr., Grand Captain A. Denny, Putus S. Marshall of the Executive of the Grand Council of the Mi'kmaw Nation, "The Covenant Chain" in Richardson, *supra* note 23 at 75.

The Privy Council has recognized the importance of looking beyond the written terms of treaties in *New Zealand Maori Council* v. *A.-G. of New Zealand*, [1994] 1 A.C. 466 at 475 (P.C.), where, in relation to the *Treaty of Waitangi* signed with the Maori people in 1840, Lord Woolf explained:

> Both the Act of 1975 and the State-Owned Enterprises Act 1986 refer to the "principles" of the Treaty. In their Lordships' opinion the "principles" are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty. (Bearing in mind the period of time which has elapsed since the date of the Treaty and the very different circumstances to which it now applies, it is not surprising that the Acts do not refer to the terms of the Treaty). With the passage of time, the "principles" which underlie the Treaty have become much more important than its precise terms.

[36]See Hamilton, *supra* note 19 at 6; J. Borrows, "Negotiating Treaties and Land Claims: The Impact of Diversity Within First Nations Property Interests" (1992) 12 Windsor Y.B. Access Just. 179 at 191-2:

> 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 to the Odawa.
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> Therefore, to convey the meaning of the treaties, First Nations sovereignty was exercised through the spoken word and Wampum belts, and not through written statements. The reception of presents was also a part of the traditional ceremonial and oral nature of treaties. The gathering for presents provided an opportunity to meet in council and exchange words and material goods to reaffirm or modify previous agreements according to changing conditions. This explains why First Nation leaders would travel such long distances to receive a few trinkets that were monetarily of trivial value.

[37]See P.C. Williams, *The Chain* (LL.M. thesis, Osgoode Hall Law School, 1982) at 165 [unpublished].

[38]See S.Y. Henderson, "Empowering Treaty Federalism" (1994) 58 Sask. L. Rev. 241 at 254-5 [hereinafter "Treaty Federalism"].

rights "as carried on formerly", the Crown did not consider these elements to be a part of the treaty. The Aboriginal signatories however viewed the promises made during treaty negotiations as being as integral to the nature of the agreement between the parties as was the parchment version of the treaty. Not surprisingly, when disputes of this nature occurred, the Crown would inevitably look to the written treaty, whereas the Aboriginal signatories would recount the nature of the negotiations between the parties. The competing Crown and Aboriginal conceptions of the written treaties and their role in the treaty-making process were not only the roots of the problems of treaty interpretation, but effectively prevented the appropriate resolution of disputes until those differences were recognized and respected.

The written versions of treaties demonstrate the preciseness with which the Crown's representatives drafted them. The Crown's understanding of the extent of the land interests to be surrendered by the Aboriginal peoples under the numbered treaties is reflected by its use of boilerplate phraseology that was intended to be all-encompassing. The numbered treaties contemplated that the Aboriginal peoples would: "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".[39]

In other situations, the Crown's representatives made use of vague terms to achieve the same effect. This practice was generally reserved for laws and regulations to be applied in the future that would impede the rights expressly reserved to the Aboriginal peoples in the treaties. The wording of Treaty No. 3 is illustrative of this technique:

> Her Majesty further agrees with her said Indians, that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by her Government of her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes, by her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.[40]

In contrast to the practices of the Crown's representatives, the Aboriginal peoples tended to be far less deliberate in their use of terms and concepts. As long as the Aboriginals were guaranteed that their traditional ways would remain uninterrupted, they were content to treat with the Crown. This practice was consistent with the

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[39]These exact words may be found in each of Treaties 3-7, as reproduced in A. Morris, *The Treaties of Canada with The Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (Toronto: Belfords, Clarke, 1880).

[40]Treaty No. 3, as reproduced, *ibid.* at 323. Identical wording was used in each of Treaties 5 and 6, while virtually identical sentiments were included within Treaties 4 and 7. See *ibid.* at 346 and 353, and at 333 and 369.

Aboriginal use of language and concepts generally. The differences in the importance of precision in measurement to Aboriginals and Europeans, for example, is illustrated by the following description provided by a Mi'kmaq court worker in Nova Scotia:

> Now time is usually divided in the Micmac world according to the positioning of the sun. Now if you are a Micmac person being examined or cross-examined on the witness stand, the lawyer might say, "Well, did you see this happen at seven o'clock in the morning?" And the Native person would answer to me, "Yes, no", he would say, "Wej kwap niaq" which means the sun has just risen. And so I would turn around and I would give that statement to whoever was asking the questions. And then the Prosecutor not being satisfied with this answer, would say, "yeh, but ... was it seven o'clock in the morning?" And the Native person would say, "Well, you know the sun had risen." And simply because seven o'clock in the morning in the summer and seven o'clock in the winter are different in the sense that the sun rises at different times. So he would find difficulty in answering — answering the question. And sometimes he would eventually say, "Yes, it was seven o'clock in the morning" just to get out of that situation.[41]

To account for the different understandings of treaties by the Crown and the Aboriginal peoples, and to arrive at a more accurate account of the nature of the bargains requires appreciation of the circumstances existing at the time that treaties were signed. Aboriginal treaties were a response to the co-existence of European and Aboriginal nations in North America. The changes in the tenor of these agreements from the first compacts of peace and friendship to the modern land claim agreements are the result of a variety of political, economic, military, social and legal changes that have affected Crown-Aboriginal relations. The circumstances under which particular treaties were signed no longer exist. These circumstances provided the bases upon which the parties entered into treaty negotiations and shaped the nature of their participation in the treaty-making process. The need to ascertain the parties' intentions, as well as the circumstances in which the treaties were negotiated and signed, provided the impetus for the creation of special rules interpreting Crown-Aboriginal treaties.

The creation of these interpretive canons changed the complexion of treaty interpretation. Instead of only focusing on the Crown's understanding of the events, as evidenced by the written copies of the treaties, written notes, diaries and official correspondence, Aboriginal comprehension of the agreements were also to be examined. Aboriginal understandings were obtained through evidence of the signatories' awareness of the terms of the agreement and the historical events and circumstances surrounding treaty-making. Initially, when the main purpose of the

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[41] As reproduced in Manitoba Aboriginal Justice Inquiry, *The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba: Public Inquiry into the Administration of Justice and Aboriginal People*, vol. I, (Winnipeg: Queen's Printer, 1991) (Commissioners: A.C. Hamilton & C.M. Sinclair) at 34. Refer to the discussion of *Ontario (A.G.)* v. *Francis* (1889), [1870-1890] 2 C.N.L.C. 6 (Ont. Ch.). See text accompanying note 99.

treaties was to secure British-Aboriginal alliances, differences in language and methods of diplomacy were the primary obstacles between the groups. Once Britain increasingly began to use treaties as a means of securing the surrender of Aboriginal land, conceptual and cultural distinctions between the two groups concerning the concepts of "land" and "ownership" exacerbated the problem. The growing disparity in bargaining power between the groups also had a significant effect upon the nature of treaty negotiations and agreements.[42] This inequality was the result of Britain becoming more firmly entrenched economically and militarily, while the Aboriginal peoples were devastated by disease and warfare.

The treaties were written in English and often translated by the Crown's representatives. The combination of all these factors resulted in concern that traditional interpretations of the parchment versions of the treaty did not give a full and accurate account of what actually transpired during negotiations.[43] The unique nature and background of Indian treaties, reflected in the documents themselves and in the negotiations leading up to them, indicate that resorting unreflectively to common law principles of contract law or to international law does a disservice to both the *sui generis* nature of those agreements and to the differing understandings of treaties held by the Crown and Aboriginal peoples.[44]

The notion that conventional methods of interpretation are inappropriate in the context of Aboriginal treaty interpretation does not mean that all common law concepts must be discarded by implication.[45] What is required, though, is a conscious retreat from the mechanical implementation of common law principles in

[42]The courts have not always been mindful of this fact as the decision in *R.* v. *Howard*, *supra* note 8 demonstrates. In *Howard*, the Supreme Court held that in the 1923 *Williams Treaty* the Hiawatha First Nation had relinquished its hunting and fishing rights that had been affirmed in an 1818 treaty — the same treaty that was the subject in *Taylor and Williams*, *supra* note 4, discussed below. See also the discussion of *Howard* in J. Bakan, B. Ryder, D. Schneiderman & M. Young, "Developments in Constitutional Law: The 1993-94 Term" (1995) 6 Sup. Ct. L. Rev. (2d) 67 at 85-9. At page 89, the authors state that the Supreme Court's decision in *Howard* "represses the fact that the Canadian state has a great deal more economic, political and coercive power at its disposal than do Aboriginal peoples" and that the court's decision "ignore[s] the power dynamics in the colonial relationship between First Nations and the Canadian state."

[43]See the discussion in the section entitled "Large, Liberal, and Generous Interpretation" below.

[44]A useful source of Canadian Indian treaties and accounts of the negotiations leading up to them is Morris, *supra* note 39.

[45]Note the comments made by Wallace J.A. in *Delgamuukw* v. *British Columbia* (1993), 104 D.L.R. (4th) 470 at 572 (B.C.C.A.): "One must not be asked to drop all Western legal thought at the door in identifying aboriginal rights and characterizing their content and implications. They are unique. That does not mean that useful comparison and analogy is impossible. After all, these rights receive their recognition and protection through the common law".

this situation.[46] The creation of special canons of treaty interpretation reflects the notion that, while some of the principles underlying common law precepts are germane to analyses of Aboriginal treaties and may be appropriately used, others are not. For example, the *contra proferentum* rule from contract law, which holds that ambiguities in a contract are to be construed strictly against its framer, may be appropriately used in the context of treaty interpretation because of the power relations between the groups.[47] At the same time, the parol evidence rule, which restricts the use of evidence extrinsic to the document, is inappropriate because of the different perceptions of the treaties held by the Crown and the Aboriginal peoples, as well as cultural, conceptual and linguistic differences between the groups.

The judicial origins of these canons of treaty interpretation may be traced to the United States Supreme Court's decision in *Worcester* v. *Georgia* in 1832.[48] Since that time, Aboriginal rights jurisprudence has responded to the *sui generis* nature of the treaties by formulating more precise interpretive guidelines for their interpretation. The process took longer in Canada than in the United States, where these principles were firmly entrenched prior to the end of the 19th century. Until the decisions in *Taylor and Williams*[49] and *Nowegijick*,[50] the Canadian judiciary had not formulated principles of treaty interpretation to match those that had been developed in American Aboriginal rights jurisprudence. While these Canadian decisions may not have cultivated a new approach to Aboriginal treaty analysis, they did initiate a reversal of fortune from the majority of previous Canadian judicial determinations on the nature of Indian treaties.[51]

Although the unique nature of Indian treaties had previously been recognized in Canadian Aboriginal rights jurisprudence,[52] *Taylor and Williams* consolidated a premise of uniqueness with a method of treaty interpretation similar to the American canons of treaty construction. As Trainor J. explained:

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[46]In opposition to this idea, see *Pawis* v. *R.* (1979), 102 D.L.R. (3d) 602 (F.C.T.D.) and S. Grammond, "Aboriginal Treaties and Canadian Law" (1994) 20 Queen's L.J. 57, which apply contract law directly to their analyses of aboriginal treaties. Note also R.W. McInnes, "Indian Treaties and Related Disputes" (1969) 27 U.T. Fac. L. Rev. 52 at 64.

[47]See S.M. Waddams, *The Law of Contracts*, 2nd ed., (Toronto: Canada Law Book, 1984) at 345-61.

[48]*Supra* note 1.

[49]*Supra* note 4.

[50]*Supra* note 5.

[51]See *e.g.* *R.* v. *Sikyea*, *supra* note 25, aff'd [1964] S.C.R. 642, where it was held that general federal legislation could remove Aboriginal hunting and fishing rights even in the absence of a demonstrated intention by Parliament to do so. See also *R.* v. *George* (1966), 55 D.L.R. (2d) 386 (S.C.C.); *Daniels* v. *R.*, [1968] S.C.R. 517; *R.* v. *Derriksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.).

[52]See *Francis* v. *R* (1956), 3 D.L.R. (2d) 641 at 652 (S.C.C.); *White and Bob*, *supra* note 11 at 617-8; *Pawis*, *supra* note 46 at 607.

> In interpreting the treaty, as favourably as possible to the Indians, these considerations should have been followed:
> (1) The words used should be given their widest meaning in favour of the Indians.
> (2) Any ambiguity is to be construed in favour of the Indians.
> (3) Treaties should be construed and interpreted so as to avoid bringing dishonour to the Government and Crown.[53]

Upon the further appeal of *Taylor and Williams* to the Ontario Court of Appeal, MacKinnon A.C.J.O. affirmed the principles of treaty interpretation that had been formulated by Trainor J. He also emphasized the importance of contextual appraisals of the treaties. As he explained:

> Cases on Indian or Aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect.[54]

Meanwhile, in the *Nowegijick* case, Dickson J., as he then was, sanctioned the ain thrust of the decision in *Taylor and Williams* by holding that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian."[55]

The *Taylor and Williams* and *Nowegijick* decisions solidified and entrenched an expansive approach to interpreting the treaties in order to arrive at contextually and culturally appropriate understandings of them. Achieving such understandings of Crown-Native treaty negotiations, and the bargains ultimately made therefrom, is facilitated by embracing a "large, liberal, and generous interpretation" of the Aboriginal treaties — the overreaching theme which unites the various canons of treaty interpretation.

(a) Large, Liberal and Generous Interpretation

The large, liberal, and generous interpretation of Aboriginal treaties is rooted in the recognition that literal readings of the written versions of the treaties do not always provide accurate accounts of the agreements reached between the parties. Indeed, in some instances, after negotiations were concluded and treaty terms were agreed upon, the Aboriginal peoples affixed their signatures to blank pieces of paper, upon which

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[53] *Taylor and Williams, Div. Ct., supra* note 4 at 176.

[54] *Taylor and Williams, C.A., supra* note 4 at 232.

[55] *Nowegijick, supra* note 5 at 198.

the treaty's terms were filled in later.[56] In other instances, treaties were written up prior to negotiations between the parties and points agreed upon that had not been included in the previously-prepared parchment versions were simply left out so that new documents would not have to be prepared.[57] In these latter instances, the Aboriginal signatories were falsely assured that the written treaty presented for signing was representative of the agreement that had been reached.

In a related difficulty, there are examples of the written version of treaties omitting, intentionally or otherwise, significant points of agreement between the Crown's representatives and the Aboriginal signatories.[58] For instance, Treaties One and Two (the Stone Fort and Manitoba Post Treaties) were agreed to and signed by Chippewa and Swampy Cree Indians in 1871. However, the written version of the treaties, ratified by the Privy Council, did not include certain terms that had been agreed upon. The Crown's representatives had made certain promises in addition to those included in Treaty One and had attached to the treaty a memorandum indicating

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[56]See *White and Bob*, *supra* note 11 at 651, Norris J.A., where he quotes the reply of Governor Douglas to the Colonial Secretary on 16 May 1850 showing how the treaty was completed: "I attached the signatures of the native Chief's and others who subscribed the deed of purchase to a blank sheet on which will be copied the contract or Deed of conveyance, as soon as we receive a proper form, which I beg may be sent out by return Post. The other matters referred to in your letter will be duly attended to." See also the dissenting judgment of Sheppard J.A., *ibid.* at 622: "The practice was to pay the Indians the purchase price against their signature by mark on blank paper to be filled in later as a deed. In 1854 the Saalequun tribe so surrendered their lands on Commercial Inlet, 12 miles up the Nanaimo River. For that surrender no deed was made up but the signatures or marks were obtained on blank paper against payment (ex. 8)." Refer as well to *R.* v. *Bartleman* (1984), 12 D.L.R. (4th) 73 at 80 (B.C.C.A.): "It is particularly noteworthy that [James] Douglas said that he attached the signatures of the native chiefs and others who subscribed the deed of purchase to a blank sheet. The written words were to be added later, as soon as the proper form was sent out from London." See also, *ibid.* at 81: "[I]t is readily apparent from the spacing of the texts, in relation to the location of the names, in both of the February, 1852, Saanich purchases, that the names of the heads of families who were parties to the agreement were recorded, with the crosses opposite their names, before the texts of the documents were written in."

[57]See *Taylor and Williams, Div. Ct.*, *supra* note 4 at 178. Note also the contents of a letter from S.J. Dawson, who had been commissioned to negotiate Treaty No. 3 and acted in a similar capacity in many other treaty negotiations, to H. Reed, Deputy Minister of Indian Affairs in 1895, Public Archives of Canada, RG10, Vol. 3800, file 48, 542, as quoted in W.E. Daugherty, *Treaty Research Report, Treaty #3*, (Ottawa: Treaties and Historical Research Centre, Indian and Northern Affairs, Canada, 1981) at 64:

> I was one of the commissioners appointed by the Government to negotiate a Treaty with the Saulteaux tribe of the Ojibbeway Indians and as such was associated with Mr. W.M. Simpson in 1872, and subsequently acted in the same capacity with Lieut. Governor Morris and Mr. Provencher in 1873. The Treaty was practically completed by myself and Mr. Simpson in 1872, and it was the draft we then made that was finally adopted and signed at the Northwest Angle of the Lake of the Woods in 1873.

[58]See P.A. Cumming & N.H. Mickenberg, *Native Rights in Canada*, 2d ed., (Toronto: Indian-Eskimo Association of Canada, 1972) at 62.

these additional promises.[59] This fact was later corroborated by Alexander Morris, the Crown's chief negotiator.[60] When the Aboriginal signatories repeatedly asserted that the Crown had made promises in addition to those recorded in the treaty, a revision of the treaties incorporating some of these additional terms was prepared and signed in 1875.[61]

What is interesting about the revision to these treaties is that the Crown steadfastly denied that the Aboriginal signatories could claim anything outside of the terms of the original treaties. The Crown maintained that its agreement to provide for some of the promises made in the memorandum was based entirely upon its benevolence rather than out of any binding obligation. The relevant part of the revision reads:

> 1st. That the written memorandum attached to Treaty Number One be considered as part of that Treaty and of Treaty Number Two, and that the Indian Commissioner be instructed to carry out the promises therein contained in so far as they have not yet been carried out, and that the Commissioner be advised to inform the Indians that he has been authorized so to do.
>
> 2nd. That the Indian Commissioner be instructed to inform the Indians, parties to Treaties Numbers One and Two, that, while the Government cannot admit their claim to anything which is not set forth in the treaty and in the memorandum attached thereto, which treaty is binding alike upon the Government and upon the Indians, yet, as there seems to have been some misunderstanding between the Indian Commissioner and the Indians ... the Government out of good feeling to the Indians and as a matter of benevolence, is willing to raise the annual payment to each Indian under Treaties Numbers One and Two from three dollars to five dollars per annum and make payment over and above such sum of five dollars, of twenty dollars each and every year to each Chief, and a suit of clothing every three years to each Chief and each head man ... on the express understanding, however, that each Chief or other Indian who shall receive such increased annuity or annual payment shall be held to abandon

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[59]The attachment of a memorandum would appear to indicate that these treaties had also been prepared prior to the negotiations with the Chippewa and Swampy Cree representatives. If Treaties One and Two had been written up after the conclusion of negotiations, then the memorandum would have been incorporated into the written versions. As Morris, *supra* note 39, notes at 126, "a memorandum was found attached to it [Treaty One] signed by Mr. Commissioner Simpson, His Hon. Governor Archibald, Mr. St. John and the Hon. Mr. McKay, purporting to contain their understanding of the terms upon which the Indians concluded the treaty." The terms of the memorandum are set out *infra* note 62.

[60]*Ibid.* at 126.

[61]See Morris's explanation for the revision of Treaties One and Two relating to the need for revising the terms of the original treaties, *ibid.* at 31: "In consequence of misunderstandings having arisen, owing to the Indians alleging that certain promises had been made to them which were not specified in these treaties, a revision of them became necessary, and was effected in 1875".

all claim whatever again the Government in connection with the so called "outside promises" other than those contained in the memorandum attached to the treaty.[62]

In addition to these problems with the actual text of written treaties, complications of interpretation abounded. Differences between Aboriginal and British cultures resulted in difficulties in the treaty negotiation process. The English language and concepts implemented in treaties were not always understood by the Aboriginal peoples in the same manner that they were by the Crown's representatives. Attempts at translation by the Crown's representatives, or persons appointed by the Aboriginal peoples for that task, were also affected by these problems. The peace and friendship treaties of the Maritimes from the late 17th and 18th centuries are examples of the profound effect of such a lack of common understanding.[63]

The nuances of language and the different cultural understandings of land use and "ownership", as well as the concepts of "dominion" and "sovereignty" included in treaties, should raise yellow flags to those interpreting the meaning of these documents. Contemporary evidence suggests that treaties which make use of these and other like terms may not have been adequately understood by the Aboriginal peoples.[64] The fact that Aboriginal peoples ostensibly agreed to the terms of the treaties by affixing their marks or totems to the documents should not, therefore, automatically be taken as an indication of their understanding and acceptance of the

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[62]*Ibid.* at 339. The memorandum had included the following provisions at *ibid.* 126-127:

> For each Chief that signed the treaty, a dress distinguishing him as Chief.
> For braves and for councillors of each Chief, a dress: it being supposed that the braves and councillors will be two for each Chief.
> For each Chief, except Yellow Quill, a buggy.
> For the braves and councillors of each chief, except Yellow Quill, a buggy.
> In lieu of a yoke of oxen for each reserve, a bull for each, and a cow for each Chief; a boar for each reserve, and 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.
> A plough and a 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.
> The buggies to be the property of the Indians to whom they are given.
> The above contains an inventory of the terms concluded with the Indians.

[63]See the discussion in W.C. Wicken, "The Mi'kmaq and Wuastukwiuk Treaties" (1994) 43 U.N.B.L.J. 241; D.N. Paul, *We Were Not the Savages: A Micmac Perspective on the Collision of European and Aboriginal Civilizations* (Halifax: Nimbus, 1993).

[64]A case in point is *Re Paulette and Registrar of Titles (No. 2)* (1973), 42 D.L.R. (3d) 8 (N.W.T.S.C.) especially at 14-71.

treaties' terms.[65] Rather, the Aboriginals' signing of treaties is to be viewed in light of the cultural and linguistic factors by which observers may legitimately question whether the treaties were truly understood and therefore agreed to at the time they were signed.[66]

While cultural and linguistic differences were major factors throughout the history of Crown-Native treaty-making, the growing disparity in bargaining power between the groups following the British conquest of New France in 1760-61 also had a significant effect on treaty negotiations and agreements. This change in the political situation in North America was accompanied by a corresponding shift in the way in which Britain used the treaties. They were originally perceived as agreements of peace and friendship, but later used as documents to obtain the surrender of Aboriginal land rights.[67] The change in the Crown's attitude toward treaties with the Aboriginal peoples reflects the change in the nature of power relations between these groups. When Aboriginal military power waned, the Crown became less willing to recognize Aboriginal autonomy.[68] Also, when unscrupulous practices by the Crown's representatives are added to the mix, the need for large, liberal and generous interpretations of Crown-Native treaties becomes evident. Such things included obtaining the signature of persons without sufficient authority to sign treaties on behalf of particular nations or appointing non-recognized persons as chiefs for the sole purpose of enabling them to sign treaties.[69]

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[65]See Hamilton, *supra* note 19 at 52: "People explained that there are no words in their Aboriginal languages to convey foreign concepts like 'extinguishment' or 'surrender.' They said they had to use words at the time of ratification that described a concept of surrendering one's very being, one's identity. It is hard to quarrel with that."

[66]See *R.* v. *Horseman*, [1990] 1 S.C.R. 901 at 907, Wilson J.

[67]See F. Cassidy & R.L. Bish, *Indian Government: Its Meaning in Practice* (Lantzville, B.C.: The Institute for Research on Public Policy and Oolichan Books, 1989) at 13. Whether these treaties actually involved the "surrender" of land is a disputed matter. See *e.g.* L. Little Bear, "Aboriginal Rights and the Canadian 'Grundnorm'" in J.R. Ponting, ed., *Arduous Journey, Canadian Indians and Decolonization* (Toronto: McClelland and Stewart, 1986) at 243; Daugherty, *supra* note 57 at 64; R. Price, ed., *The Spirit of the Alberta Indian Treaties* (Edmonton: Pica Pica Press, 1987); R. Fumoleau, *As Long As This Land Shall Last* (Toronto: McClelland and Stewart, 1976); H. Cardinal, *The Unjust Society* (Edmonton: Mel Hurtig, 1969) especially at 28-43; M. Jackson, "The Articulation of Native Rights in Canadian Law" (1984) 18 U.B.C. L. Rev. 255 especially at 262-3.

[68]In fact, once the Aboriginal peoples lost their coercive edge following France's defeat, Britain became unwilling to acknowledge that it had recognized Aboriginal independence in the past.

[69]See *e.g. Re Paulette*, *supra* note 64 at 15:

> When ... the recognized leader, went home to eat, an Indian by the name of Antoine was left. He took the treaty and became the chief — the white man made him chief. Once Antoine took the money, this witness testified the Commissioner said everybody had to take the treaty after that, Antoine was given a medal, the people took the money, and the people being "kind of scared" felt they had to keep Antoine on as chief after that.

Despite the need to understand treaties in a manner which recognizes the context within which they were negotiated and signed, the vast majority of cases dealing with Aboriginal treaties interpreted them according to the literal meaning of the words and disregarded context. Not all interpretations of treaties adhered strictly to this method of analysis, though. Sedgewick J.'s judgment in the *Robinson Treaties Annuities* case is an early and notable recognition of the need for contextual appraisals of treaties:

> Had the rights of the Indians been in question here — were their claims to the increased annuities disputed — did that depend upon some difficult question of construction or upon some ambiguity of language — courts should make every possible intendment in their favour and to that end. They would with the consent of the Crown and of all of our governments strain to their utmost limit all ordinary rules of construction or principles of law — the governing motive being that in all questions between Her Majesty and "Her faithful Indian allies" there must be on her part, and on the part of those who represent her, not only good faith, but more, there must not only be justice, but generosity. The wards of the nation must have the fullest benefit of every possible doubt.[70]

Much later, in the British Columbia Court of Appeal's decision in *White and Bob*, Norris J.A. held that an Aboriginal treaty "ought to be given its widest meaning in favour of the Indians".[71] This interpretation was necessary as a result of the treaty negotiation process and the different understandings of the meaning of Aboriginal treaties by the Aboriginal and non-Aboriginal parties. From these statements it is clear that the use of large, liberal and generous interpretations of Aboriginal treaties, though not yet fully articulated, has started to infiltrate Canadian Aboriginal rights jurisprudence. With the development of this interpretive canon

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See also *ibid.* at 16:

> Those Indians who had either taken part in the treaty negotiations or who had been present while the negotiations were under way and heard parts or all of the conversation, seemed to be in general agreement ... that up to the time of treaty the concept of chief was unknown to them, only that of leader, but the Government man was the one who introduced them to the concept of chief when he placed the medal over the Indian's head after he had signed for his people ...

[70] *Ontario* v. *Canada and Québec: In re Indian Claims*, [1896] 25 S.C.R. 434 at 535 [hereinafter *Robinson Treaties Annuities, S.C.C.*]. See also *Ontario (A.G.)* v. *Francis*, *supra* note 41; *R.* v. *Padjena and Quesawa* (1930), [1911-1930] 4 C.N.L.C. 411 (Ont. Div. Ct.) at 412-3; *R.* v. *Cooper* (1968), 1 D.L.R. (3d) 113 at 115 (B.C.S.C.); *R.* v. *George*, *supra* note 51 at 396-7, Cartwright J.: "We should, I think, endeavour to construe the treaty of 1827 and those Acts of Parliament which bear upon the question before us in such manner that the honour of the Sovereign may be upheld and Parliament not made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty." See also the findings of Culliton C.J.S. in *R.* v. *Johnston* (1966), 56 D.L.R. (2d) 749 at 752 (Sask. C.A.): "In the interpretation of the clauses of a treaty, one must first look to the words used and give to those words the ordinary meaning that would be attributed to them at the time the treaty was made. To do so, too, it is proper and advisable to have recourse to whatever authoritative record may be available of the discussions surrounding the execution of the treaty."

[71] *Supra* note 11 at 651.

came the articulation of further canons of treaty interpretation — such as the principle of resolving ambiguities in favour of the Aboriginal peoples — which falls under the general rubric of a "large, liberal and generous interpretation".

(b) Ambiguities to be Resolved in Favour of Aboriginal Peoples

A key aspect of a large, liberal and generous interpretation of Aboriginal treaties is that where ambiguities exist, they are to be resolved in favour of the Aboriginal peoples. The basis for this canon of construction is similar to the rationale behind the use of the *contra proferentum* rule in contract law.[72] After the issuance of the *Royal Proclamation of 1763*, power relations between the Crown and Aboriginal peoples greatly favoured the former. Since the Crown drew up the treaties, in its own language in accordance with its legal system, implementing uniquely British concepts, this interpretive canon prevents the Crown from relying upon an ambiguity to its advantage.[73] The reason for this approach is that the Crown had opportunities to provide sufficient clarity when it drafted the treaties.[74] Additionally, the fact that the majority of evidence accepted by the courts is usually derived from the Crown and its representatives lends further support to the use of this interpretive canon.[75]

In *Taylor and Williams*, the appellants appealed their conviction for taking bullfrogs from unoccupied Crown land during closed season which was contrary to section 74 of the Ontario *Game and Fish Act*.[76] The appellants were members of the Mississauga tribe that had signed a treaty with the Crown, comprised of a provisional agreement and minutes, in 1818. The agreement had provided for the

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[72]See *supra* note 47.

[73]See the reference to *Jones* v. *Meehan*, 175 U.S. 1 (1899) *infra* note 95.

[74]Note the statement made in *Leech Lake Band of Chippewa Indians* v. *Herbst*, 334 F. Supp. 1001 (D. Minn. 1971) at 1005.

[75]See *e.g.* Wicken, *supra* note 63 at 249-50:

> Generally, Europeans were not privy to discussions among sakamows and elders, and thus would not have known of community debates which preceded and followed a treaty signing. ... Because of this lack of interaction between the Mi'kmaq and European colonial officials, we do not know what Mi'kmaq and Wuastukwiuk delegates were told by English officials about the treaty. This in turn forces reliance upon European documentation and European interpretations to understand the treaty's meaning. Indeed, researchers have tended to accept that the English versions of treaties reflect how the Mi'kmaq and Wuastukwiuk understood them. As research on late 19th century treaties signed between Western Native people and the Canadian government has shown, however, there could be a significant difference between the written English document and how Native negotiators understood it.

See also: Price, *supra* note 67; Fumoleau, *supra* note 67; Daugherty, *supra* note 57 at 64. On the use of First Nations' oral evidence, see C. McLeod, "The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past" (1992) 30 Alta. L. Rev. 1276.

[76]R.S.O. 1970, c.186.

Crown's purchase of land, but did not refer to a release of the tribe's Aboriginal hunting and fishing rights:

> And the said Buckquaquet, Pishikinse, Pahtosh, Cahgahkishinse, Cahgagewin and Pininse, as well for themselves as for the Chippewa Nation inhabiting and claiming the said tract of land as above described, do freely, fully and voluntarily surrender and convey the same to His Majesty without reservation or limitation in perpetuity.[77]

The tribe's oral tradition held that there was no restriction or limitation on their right to hunt and fish within the area covered by the 1818 agreement and that those rights were exercised both prior and subsequent to 1818. This assertion was not disputed by the Crown. Furthermore, when Chief Bucquaquet expressed to the Superintendent General of Indian Affairs that he did not wish to surrender his people's hunting and fishing rights on the lands to be surrendered, the Superintendent replied "The Rivers are open to all & you have an equal right to fish and hunt on them."[78]

The 1818 agreement did not specify whether the Aboriginal peoples were to have continued access to the lands in question, or whether their right to hunt and fish on those lands ceased with the surrender. Trainor J.'s analysis of the treaty, and the negotiations surrounding it, led him to find that the treaty did not include a surrender of the tribe's hunting and fishing rights. As he explained:

> In my view, having regard to the following matters: the circumstances of the parties at the time of the execution of the provisional agreement; the Aboriginal rights of the Indians and the *Royal Proclamation of 1763*; the tradition of the appellants; the use of the lands by the appellants prior to and subsequent to the provisional agreement; the rules of construction with respect to Indian treaties, including the heavy onus on the Crown; and the fact that a specific reserve was not created, the treaty, being comprised of the provisional agreement and the minutes, specifically reserved to the appellants their rights to hunt and fish on unoccupied Crown lands of the area.[79]

In addition to finding that the treaty's silence on hunting and fishing rights ought not be read to remove those rights, Trainor J. also held that the Superintendent's assurance to Chief Bucquaquet that "you have an equal right to fish and hunt" did not specify to which of the various chiefs and tribes the Superintendent was referring. Consequently, Trainor J. determined that the ambiguous term ought to be interpreted in the Aboriginals' favour and that it applied to all the treaty signatories.[80] At the Ontario Court of Appeal, MacKinnon A.C.J.O. explained the basis for this finding in the following manner:

> From the treaty it can be seen that there was no reservation established for the Indians. It is clear, on the other hand, that both parties expected the Indians to

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[77]*Taylor and Williams, C.A., supra* note 4 at 230.

[78]*Taylor and Williams, Div. Ct., supra* note 4 at 178.

[79]*Ibid.*

[80]*Ibid.* at 178-9.

> remain on the lands conveyed ... If the Indians were to remain in the area one wonders how they were to survive if their ancient right to hunt and fish for food was not continued.[81]

The notion of resolving treaty ambiguities in favour of the Aboriginal peoples led both courts in *Taylor and Williams* to incorporate the "reserved rights doctrine". This doctrine is premised upon the notion that treaties did not grant rights to Aboriginal peoples, but merely recognized and affirmed pre-existing rights.[82] Based upon this fundamental premise, the reserved rights doctrine holds that any Aboriginal rights which are not specifically extinguished by treaty remain in full force and vigour, including those rights which are not included in the treaty. The reserved rights doctrine has been described by the American scholar Felix Cohen as "perhaps the most basic principle of all Indian law."[83] It can be seen as a cousin to both the interpretive canon that requires treaty ambiguities to be resolved in favour of the Indian parties and the *contra proferentum* rule.

Another close relative of these doctrines is the "clear and plain" test for demonstrating the extinguishment of Aboriginal rights. In some of its more prominent decisions, the Supreme Court of Canada has held that Aboriginal rights can only be extinguished when a clear and plain intention of the Crown to extinguish those rights exists.[84] The onus of proof rests with the party claiming extinguishment. In the absence of such an extinguishment, the rights remain in existence. Crown contentions of rights extinguishment must be put to a strict test due to the imbalance of power. Consequently there must be a clear and precise

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[81]*Taylor and Williams, C.A.*, *supra* note 4 at 235.

[82]See *e.g.* *United States* v. *Winans*, 198 U.S. 371 (1905). The *Royal Proclamation of 1763* (U.K.), reprinted in R.S.C. 1985, App. II, No. 1, states that the Aboriginal interests in all lands "not having been ceded to, or purchased by Us" remain the possession of the Aboriginal peoples until such time as they may be interested in surrendering those interests. This is a clear example of the practical application of the reserved rights doctrine and the Crown's recognition of it. The doctrine is also consistent with the common law doctrine of continuity — under which local law and pre-existing rights of a "conquered" or "settled" people are presumed to continue in the absence of any acts to the contrary by a competent authority — in that where the Aboriginal peoples did not expressly relinquish their rights through the signing of treaties, those rights remain in existence. On this latter point, see Henderson, "Treaty Federalism", *supra* note 38 at 267-8.

[83]F.S. Cohen, *Handbook of Federal Indian Law* (Albuquerque: University of New Mexico Press, 1971) at 122:

> Perhaps the most basic principle of all Indian law, supported by a host of decisions ... is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.* Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. ... What is not expressly limited remains within the domain of tribal sovereignty. [Emphasis in original].

[84]See *e.g.* *Calder*, *supra* note 18 at 210; *R.* v. *Sparrow* (1990), 70 D.L.R. (4th) 385 at 401 (S.C.C.)

understanding of what is part of a treaty, what is not, and what rights are to be extinguished. If no such understanding exists, the benefit of doubt goes to the Aboriginal peoples. The relative positions of the Crown and the Aboriginal peoples also require that treaties be construed as the Aboriginals understood them.

(c) Treaties Construed as the Aboriginal Peoples Understood Them

It is beyond dispute that Aboriginal treaties were not only written in a language that was foreign to Aboriginal peoples in Canada, but that they were written entirely by the Crown's representatives. As a result of these facts, there is a *prima facie* inference that the subtleties and nuances of language and the cultural subjectivity of interpretation may have resulted in the text of written treaties having a different meaning than the terms agreed to by the parties during their negotiations.[85] The fact that treaties were sometimes prepared in advance and later not altered to reflect changes made during treaty negotiations also supports this conclusion.[86] Evolving or changing perceptions of the nature of the treaties and the rights they protect, as well as the change in the position and needs of the parties involved in the treaty-making process, have also had a profound effect upon the modern interpretation of treaties.

To combat these problems and those arising from the vague language and references used in Aboriginal treaties, the interpretive principle that treaties are to be construed as the Aboriginal peoples understood them was developed.[87] This canon of construction does not mean that only Aboriginal understandings of a treaty are relevant in ascertaining its meaning. Rather, this canon recognizes that Aboriginal understandings, which have long been neglected in treaty interpretation, play a vital role in obtaining a well-rounded, contextual understanding of treaties. Such an endeavour necessitates the reception of evidence beyond the written texts of the treaties themselves. As Wilson J. explained in *R.* v. *Horseman*:

> These treaties were the product of negotiation between very different cultures and the language used in them probably does not reflect, and should not be expected to reflect, with total accuracy each party's understanding of their effect at the time they

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[85]See B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 730 [hereinafter "Understanding Aboriginal Rights"]; Jackson, *supra* note 67 especially at 262-3.

[86]See *supra* notes 56-7. It should be noted that some wampum belts prepared by Aboriginal peoples and presented at treaty negotiations were also prepared in advance of the final agreements being reached. Often, though, new wampum belts were presented at the conclusion of treaty negotiations to illustrate the nature of the agreement reached.

[87]Note the comments made in *Ontario (A.G.)* v. *Francis*, *supra* note 41 at 9, where the terms of the *Robinson-Huron Treaty* of 1850 held that a reserve was to be established for "Shawenakishick and his band, a tract of land now occupied by them and contained between two rivers, called Whitefish and Wanabitaseke, seven miles inland." See the discussion of *Francis*, *infra* note 98.

> were entered into. This is why the courts must be especially sensitive to the broader historical context in which such treaties were negotiated. They must be prepared to look at that historical context in order to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time.[88]

Interpreting treaties in the manner that the Aboriginal peoples understood them also requires that the treaties not be interpreted in a technical or legalistic manner that would tend to benefit the Crown. As the *Report of the Select Committee on Aborigines, 1837* concluded, "a ready pretext for complaint will be found in the ambiguity of the language in which their agreements must be drawn up, and in the superior sagacity which the European will exercise in framing, in interpreting, and in evading them."[89]

The idea that Aboriginal treaties ought to be construed as the Aboriginal peoples understood them was developed in accordance with the notion that treaties, as mutual compacts between the Crown and Aboriginal peoples, ought to be interpreted in a manner that is consistent with the understandings of the parties at the time the treaty was signed. As indicated in the *Sioui* decision, when interpreting the nature of an agreement between the Crown and Aboriginal peoples, it is necessary to strive towards the common intention of the parties and not merely rely upon the understandings possessed by one of the groups.[90] In striving towards these common intentions, it is not sufficient to look only for any overlap between Crown and Aboriginal perspectives. If, for example, one party adopts a broad understanding of a treaty and the other adopts a narrow understanding, the only commonalities that may exist would be tantamount to adopting the narrow understanding. Such a result is not in keeping with the desire to achieve an accurate representation in the present day of the parties' understandings of old agreements.

The construction of treaties in a technical manner based on European law cannot accurately be said to have been a part of this common understanding either.[91] Since the Aboriginal peoples often could not read or write English, using the technical

[88] *Supra* note 66 at 907. This topic will be discussed further in the section entitled "The Use of Extrinsic Evidence" below.

[89] *Report of the Select Committee on Aborigines, 1837*, Vol. I, Part II, (Imperial Blue Book, 1837 nr VII. 425, Facsimile Reprint, C. Struik (Pty) Ltd., Cape Town, 1966) at 80.

[90] See *Sioui*, *supra* note 7 at 463.

[91] For this reason, the courts have rejected such interpretations as inappropriate and inconsistent with maintaining the honour of the Crown. See *Simon*, *supra* note 5 at 402; *R.* v. *Batisse* (1978), 84 D.L.R. (3d) 377 at 384 (Ont. D.C.); *R.* v. *Ireland*, [1991] 2 C.N.L.R. 120 at 128 (Ont. Gen. Div.): "It is clear that treaties with Indians should be given a liberal interpretation in favour of the Indians. Treaty provisions should not be whittled down by technical excuses; the honour of the Crown is at stake. They are to be construed 'not according to the technical meaning of the words, but in the sense that they would naturally be understood by the Indians': *Simon*, *supra* at 402."

meaning of the terms of treaties favours the Crown's understanding over those of the Aboriginals.[92] In order to achieve a more equitable understanding of what was being communicated by the Crown and what was understood by the Aboriginals, the courts have started to rely on the content of treaty negotiations. As well, historical records and oral evidence documenting the Aboriginal peoples' interpretation and understanding of the words or concepts used in the treaties are utilized.

The notion that a technical construction of Aboriginal treaties should not be used to the disadvantage of Aboriginal peoples was first articulated by the United States Supreme Court in *Worcester* v. *Georgia*. As Marshall C.J. explained in relation to the *Treaty of Hopewell* between the United States and the Cherokee nation:

> Is it reasonable to suppose that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language should distinguish the word "allotted" from the words "marked out." ... [I]t may very well be supposed that they might not understand the term employed, as indicating that, instead of granting, they were receiving lands. If the term would admit of no other signification, which is not conceded, its being misunderstood is so apparent, results so necessarily from the whole transaction; that it must, we think, be taken in the sense in which it was most obviously used.[93]

In his concurring judgment, M'Lean J. held that the interpretation of treaties must be consistent with the Aboriginal peoples' understanding of their terms.[94] Later, in *Jones* v. *Meehan*, the United States Supreme Court elaborated upon this principle by stating that:

> In construing any treaty between the United States and an Indian tribe, it must always be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is

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[92]Opekokew & Pratt, *supra* note 35 at 28.

> For the Indian parties who did not have the ability to read and write, the real treaty *must have been* the oral agreement. The paper document may have been perceived as having equal importance to the Crown's representatives as the ceremonial exchanges of wampum or the smoking of tobacco to signify the solemnity and finality of the agreement; but it could not have been considered as the agreement itself.

See also Slattery, "Understanding Aboriginal Rights", *supra* note 85 at 734-5 note 27: "The written texts of these treaties must be read with a critical eye. Usually, they were accompanied by extensive oral exchanges, which may have constituted the true agreement. The written version was translated orally to the Indians in a process that allowed ample opportunity for misunderstanding and distortion."

[93]*Supra* note 1 at 552-3. See also *ibid.* at 553-4.

[94]As illustrated in the introductory quote to this article, *supra* note 1.

> that imparted to them by the interpreter employed by the United States; ... [T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.[95]

In Canada, the statement made in *Worcester* v. *Georgia* was cited, with approval, by Norris J.A. in *White and Bob*.[96] The United States Supreme Court's analysis in *Jones* v. *Meehan* has been affirmed in a number of Canadian cases.[97] The interpretation of treaties as the Aboriginal peoples understood them has played an important role in the resolution of many Aboriginal treaty cases, particularly where vagueness exists. In *Ontario (A.G.)* v. *Francis*,[98] the main point in dispute was the precise location of a reserve established under the terms of the *Robinson-Huron Treaty* of 1850. The treaty set aside the reserve in question in the following manner: "Sixth, Shawenakishick and his band, a tract of land now occupied by them and contained between two rivers, called Whitefish and Wanabitaseke, seven miles inland."[99] The vagueness of this provision establishing the reserve was noted by Ferguson H.C.J. who explained the difficulty of declaring the boundaries of the reserve as the plaintiff requested in these terms:

> The words in the schedule of the treaty are certainly very meagre for this purpose. I may first dispose of the concluding words "seven miles inland" by saying that after hearing the evidence that was given in regard to the Indians' understanding, or rather want of understanding, of the meaning of the word "mile" ... and the evidence as to the word in their language used by them indiscriminately to signify the measure or distance or any other measure such, for instance, as a bushel; counsel very properly, I think, abandoned any contention resting upon the use of these words.[100]

Since the treaty was vague about the precise location of the reserve and the Aboriginal peoples did not understand imperial measurements,[101] the court's determination of the reserve's boundaries was established by the Aboriginals' understanding of where the reserve was to be located:

> I find that it is shown by the evidence, that the band at the time of the treaty were in occupation ... of the parcel of land embraced by the nine marks — immovable marks

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[95]*Supra* note 73 at 11.

[96]*Supra* note 11 at 652.

[97]See *e.g. Robinson Treaties Annuities, S.C.C.*, *supra* note 70 at 535; *Padjena and Quesawa*, *supra* note 70 at 412-13; *Cooper*, *supra* note 70 at 115; *Nowegijick*, *supra* note 5 at 198; *Mitchell* v. *Peguis Indian Band* (1990), 71 D.L.R. (4th) 193 at 201 (S.C.C.); *Sioui*, *supra* note 7 at 435. See also *Daniels*, *supra* note 51 at 14; *Johnston*, *supra* note 70 at 752.

[98]*Supra* note 41.

[99]*Ibid.* at 9.

[100]*Ibid.* at 13.

[101]*Ibid.* at 17-18: "They did not and do not know what is meant by a mile, or a league, or the difference between the two measures, nor indeed any measure that to us would be a measure at all."

> — mentioned by the witness Mongowin the present chief ... and after hearing all that was said by the witness, and all the remarks of counsel, one cannot entertain any doubt but that this tract of land was what these Indians honestly thought they were getting as their reserve, and in my opinion the evidence shows that it is the tract of land they did get as their reserve.[102]

A similar situation occurred almost one hundred years later in *R.* v. *Bartleman*, where there was a question as to the area upon which the Saanich tribe was allowed to hunt under the terms of the *North Saanich Indian Treaty of 1852.*[103] The accused was a member of the Tsartlip Band and a descendant of at least one of the 1852 treaty signatories. He had been convicted for unlawfully using rim-fired ammunition when hunting for big game, contrary to provincial game legislation. At trial, and upon initial appeal, it was determined that the accused was hunting on lands outside the geographical limits of the treaty and that the area where he had shot a deer was not unoccupied land within the meaning of the treaty. The accused was unaware that the property he was hunting on was privately owned. Moreover, there were no signs indicating that he was on private property or that hunting on the land was prohibited.

Bartleman maintained that the *North Saanich Treaty* allowed him to hunt on unoccupied Crown lands. The treaty stated that the Saanich people were to have continued access to hunt on unoccupied lands and to carry on their fisheries as they had previously. Furthermore, correspondence between James Douglas, chief factor of the Hudson's Bay Company at Fort Victoria, and Archibald Barclay, the Company's secretary, indicated that treaties to be negotiated with the Aboriginal peoples residing on Vancouver Island were to preserve the Aboriginal peoples' ability to hunt on unoccupied lands and to fish "with the same freedom as when they were the sole occupants of the country."[104] The land upon which Bartleman shot the deer was admitted by the Crown to be within traditional Saanich hunting grounds. The Crown also accepted that Saanich oral tradition held that the 1852 treaty bestowed a right to hunt on unoccupied lands in all their traditional hunting locations. Because of that belief, the Saanich people had continued to hunt on their traditional hunting grounds.

In allowing the appeal and setting aside Bartleman's conviction, Lambert J.A. followed the method of analysis used in *Taylor and Williams*. His judgment was also consistent with the reserved rights doctrine: " [T]he treaty itself confirmed all the traditional hunting rights; and ... did not set aside the hunting rights outside the ceded land, leaving them to be dealt with at some other time, in some other way."[105]

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[102] *Ibid.* at 16-17.

[103] *Supra* note 56.

[104] *Ibid.* at 79.

[105] *Ibid.* at 89.

While Lambert J.A. found that there were a number of possible interpretations of the treaty agreement, he adhered to the interpretation that was consistent with Saanich oral tradition and the Saanich peoples' understanding of the treaty at the time it was signed. As he explained:

> None of the ceded lands, with the possible exception of North Saanich and Sooke, in the 11 Fort Victoria treaties, was itself big enough to sustain a hunting or foraging economy for even a comparatively small number of people. Every tribe hunted over the land of other tribes. Every tribe knew that every other tribe was making a similar treaty. ... [T]here would have been no protection at all for a hunting and fishing economy for any tribe if its rights to hunt and fish over the neighbouring land of the other tribes were all being extinguished. ... [I]t is almost inconceivable that Douglas could have explained to the Indians that all their rights to hunt and fish would continue as before, and that rights to hunt in the particular treaty area would be guaranteed by the treaty, but that rights to hunt outside that area would not be guaranteed but would depend on what the future held in store. And it is equally inconceivable that the Indians would have willingly accepted such an agreement.[106]

From these cases, it may be seen that adhering to Aboriginal understandings of the meaning and intent of treaties does not corrupt the nature of the agreements nor result in an unacceptably biased vision of those treaties. Rather, looking to Aboriginal understandings of the treaties in addition to those held by the Crown provides a reliable and accurate method by which the judiciary may conceptualize the nature of the agreement that was signed between the parties.[107] As the *Bartleman* case indicates, in ascertaining the meaning and intent of treaties between Aboriginal peoples and the Crown, the Aboriginal understanding of the treaties must also include the reasonable expectations of the Aboriginal peoples in light of the various historical, political, social and economic factors in existence at the time that the treaties were signed. Such an analysis must not, however, allow treaty promises or the rights existing under the treaties to be frozen in time or restricted to the method in which those rights were exercised at the time the treaties were signed. Analysis of Aboriginal understandings and expectations must remain flexible enough to reflect the changing circumstances under which the treaties continue to operate. It must also provide for the evolution of Aboriginal treaty rights.[108]

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[106] *Ibid.* at 90.

[107] See also the debate over resolving ambiguities in favour of Aboriginal understandings in *Mitchell*, *supra* note 97, and the discussion of the case in L.I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) at Chapter XIII [hereinafter *Parallel Paths*].

[108] See the principles of treaty interpretation enunciated by the Supreme Court of Canada in *Badger*, *supra* note 2. See also the method of analysis in *Sioui*, *supra* note 7, where the Supreme Court paid particular attention to the context in which the treaty in question was signed in order to ascertain its status in law and subsequent effects.

(d) Treaties Interpreted in a Flexible Manner

Treaties are living, evolving documents. Consequently, the Supreme Court of Canada has held that treaties should "be interpreted in a flexible way that is sensitive to the evolution of changes."[109] Where treaty rights had not been extinguished prior to 17 April 1982, they received constitutional protection and affirmation under the *Constitution Act, 1982*.[110] Both the rights and obligations existing under treaties are also of a continuing nature.[111] While treaty rights continue, they are not restricted to the manner or method in which they were exercised at the time the treaty was signed. For example, where particular hunting practices recognized by a treaty may have been exercised only with a bow and arrow at the time a treaty was signed, that does not preclude the contemporary use of a shotgun or other weapon in the exercise of those same hunting rights. The notion that treaty rights may be exercised only in the manner in which they existed at the time of the treaty is called "frozen rights" theory. This theory has been expressly rejected on a number of occasions, most strikingly by the Supreme Court of Canada in the *Sparrow* case.[112]

In *Sparrow*, the Supreme Court rejected previous analysis of the meaning of "existing" Aboriginal and treaty rights. Rather than finding that the word "existing" meant existing in the form they took on 17 April 1982, the Court's unanimous decision held that the concept of "existing" Aboriginal and treaty rights excluded rights which had been extinguished prior to that date, but included all other rights in their full and original form.[113] In essence, this means that all rights which had not been extinguished prior to 17 April 1982, including rights which had been all but extinguished through governmental regulation, were given constitutional affirmation and protection in their full and complete form prior to their regulation. This statement holds true insofar as the constitutional guarantee in section 35(1) protects Aboriginal and treaty rights, not their regulation.[114]

The court's finding in *Sparrow* does not mean that existing Aboriginal and treaty rights regulated prior to 17 April 1982 reverted to their unregulated form on that date. It simply means that any regulation of an existing Aboriginal or treaty right prior to 17 April 1982 does not receive the benefit of the protection given to that right by section 35(1). In imparting protection to Aboriginal and treaty rights, section 35(1) severs any existing regulation of those rights. Thus, the regulation may not have

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[109] *Simon*, *supra* note 5 at 403.

[110] *Supra* note 30, s.35.

[111] *Town of Hay River* v. *R.* (1979), 101 D.L.R. (3d) 184 at 186 (F.C.T.D.).

[112] *Supra* note 84.

[113] *Ibid.* at 396-7.

[114] B. Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982-3) 8 Queen's L.J. 232 at 243, 264.

constitutional protection, but may nevertheless be deemed valid, under the *Sparrow* test for the justification of the infringement of Aboriginal rights.[115]

The Supreme Court's rejection of the frozen rights theory in *Sparrow* was based, in part, on Slattery's observation that "the word 'existing' ... suggests that the rights in question are affirmed in a contemporary form rather than in their primeval simplicity and vigour".[116] This reference is pointedly directed at the exercise of Aboriginal rights, not their regulation by the Crown. The court's adoption of Slattery's approach suggests its agreement with the protection of Aboriginal rights rather than their regulation.[117] As the *Sparrow* court explained, "Far from being defined according to the regulatory scheme in place in 1982, the phrase 'existing Aboriginal rights' must be interpreted flexibly so as to permit their evolution over time."[118]

The court's judgment in *Sparrow* demonstrates its recognition that judicial emphasis on temporal considerations as the sole determinants of the nature of Aboriginal and treaty rights is misguided. Time-based methods of inquiry are entirely incapable of recognizing rights that, while no less important than long-practised rights, are of newer genesis. Aboriginal and treaty rights, as dynamic, evolving rights, ought not to be restricted to their "primeval simplicity and vigour", but must be allowed to adapt to changing circumstances. This fact was ignored by the majority of the Supreme Court of Canada in the recent case of *R.* v. *Van der Peet*, an Aboriginal fishing rights case in which the appellant, a member of the Sto:lo nation, was charged with selling ten salmon for $50 while fishing under the authority of an Indian food fishing licence.[119]

The appellant claimed that she possessed an Aboriginal right to sell fish. In establishing a framework for the analysis of the right claimed by the appellant, Lamer C.J.C., for the majority, emphasized the importance of adopting a purposive approach to section 35(1). This purposive approach entailed giving section 35(1) a generous and liberal interpretation in favour of the Aboriginal peoples, which he found stemmed from the fiduciary nature of Crown-Native relations. This approach was

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[115]For an analysis of the *Sparrow* justificatory test and how it has been modified by recent Supreme Court of Canada decisions, such as *R.* v. *Gladstone*, [1996] 4 C.N.L.R. 65 (S.C.C), see K. McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples be Justified?" (1997) 8 Const. Forum 33.

[116]Slattery, "Understanding Aboriginal Rights", *supra* note 85 at 782.

[117]See *Sparrow*, *supra* note 84 at 397: "Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate 'frozen rights' must be rejected." Indeed, the guarantee in section 35(1) refers to Aboriginal and treaty rights themselves, not their regulation.

[118]*Ibid.* at 397.

[119][1996] 2 S.C.R. 507.

intended to inform the court's analysis of the purposes underlying section 35(1), as well as its definition and scope.[120] Thus, any doubt or ambiguity as to what ought to properly fall within section 35(1) was to be resolved in favour of the Aboriginal peoples.[121] The Chief Justice's decision in *Van der Peet* may be seen as bringing the canons of treaty interpretation into the Aboriginal rights realm.

However, Lamer C.J.C.'s judgment held that an Aboriginal activity could only be considered to be an Aboriginal right if it were an element of a practice, tradition or custom integral to the distinctive culture of the Aboriginal group claiming the right that could be traced to pre-contact practices.[122] This conclusion is inconsistent both with the generous and liberal interpretation of rights endorsed by the Chief Justice and with the fiduciary nature of Crown-Native relations. If the fact of European settlement created the cultural and physical need for the Sto:lo people to engage in the sale or barter of fish, then that activity ought to be recognized as a protected Aboriginal right regardless of whether it was induced by European influences.

The notion that treaties must be interpreted in a flexible manner applies equally to the continued sustenance of rights as discussed in *Van der Peet*. A contextually appropriate understanding of Aboriginal or treaty rights, such as fishing rights, must include the means necessary for the realization of those rights. Where an Aboriginal group has a recognized right to fish, protecting that right would necessitate, for example, preventing the building of a marina upstream so that the fishing stock is not destroyed.[123] To hold otherwise would render any protection of the right in question meaningless.

In *Van der Peet*, Chief Justice Lamer canvassed this issue in relation to Aboriginal fishing rights. He distinguished between "primary" and "incidental" Aboriginal rights, holding that incidental rights which "piggyback" on primary rights are not deserving of constitutional protection.[124] Lamer C.J.C.'s analysis of

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[120] *Ibid.* at 536-37.

[121] *Ibid.* at 537.

[122] *Ibid.* at 539.

[123] See *Saanichton Marina Ltd.* v. *Claxton* (1989), 36 B.C.L.R. (2d) 79 (C.A.). For an informative commentary on this case, see H. Foster, "The Saanichton Bay Marine Case: Imperial Law, Colonial History, and Competing Theories of Aboriginal Title" (1989) 23 U.B.C. L. Rev. 629.

[124] According to the Chief Justice, "primary" rights are those rights that are essential elements of a practice, tradition or custom integral to the distinctive culture of the aboriginal group claiming the rights. "Incidental" rights may be practices associated with the primary rights (although they need not be), but are neither a part of them nor are they otherwise integral to the distinctive culture of the Aboriginal group exercising the right.

The judiciary's compartmentalization of Aboriginal practices into "integral" rights and "incidental" rights demonstrates a profound inability or reluctance to recognize that Aboriginal rights ought to be

"incidental" rights in *Van der Peet* appears to contradict the Supreme Court's unanimous judgment in *Simon* v. *R.*, where the court held that the treaty right of an Aboriginal person to hunt included the ability to engage in "those activities reasonably incidental to the act of hunting itself, an example of which is travelling with the requisite hunting equipment to the hunting grounds."[125]

The flexible interpretation of Aboriginal treaties articulated by the Supreme Court in cases such as *Simon* or, for that matter, the generous and liberal interpretation of Aboriginal rights argued for by Lamer C.J.C. in *Van der Peet*, requires that so-called "incidental" rights be protected because they are vital to the exercise of the rights that are explicitly protected.[126] Where seemingly extraneous matters are vital to the adequate exercise of Aboriginal or treaty rights, they must be included as parts of those rights. These sentiments would appear to accord with Lamer C.J.C.'s professed adherence to giving section 35(1) a generous and liberal interpretation in favour of Aboriginal peoples in *Van der Peet.*

The notion that Aboriginal and treaty rights ought to be read to include those practices which are necessary to the exercise of the fundamental rights in question illustrates the proposition that those rights encompass more than the bare rights themselves.[127] A strict interpretation of Aboriginal treaties would ostensibly preclude such incidental rights from receiving constitutional protection. Allowing for the flexible interpretation of Aboriginal treaties, as articulated by the Supreme Court, requires that these incidental rights be afforded the same protection where they are necessary to the exercise of the rights that are explicitly dealt with in the treaties. To ascertain whether there is a need to provide protection to these "incidental" rights requires discovering their existence and connection to the rights described in the treaties. Often, this necessitates the reception of evidence extrinsic to the written terms of the treaties themselves.

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understood as broad, theoretical constructs. This notion is recognized in L'Heureux-Dube J.'s dissenting judgment in *Van der Peet*, *supra* note 119 at 592-94, where she states that Aboriginal rights are notionally incapable of being encapsulated by particular practices, traditions or customs, but are more abstract and profound concepts from which specific practices, traditions or customs are derived. The compartmentalization of Aboriginal rights in the manner exhibited by the majority judgment in *Van der Peet* deflects attention away from what ought to be the true issue at hand, namely the ability of Aboriginal peoples to determine the precise methods by which they will make use of or implement their larger, abstract rights.

[125]*Simon*, *supra* note 5 at 403.

[126]*Supra* note 119 at 513.

[127]See the discussion on this point in the "Conclusion" below.

(e) The Use of Extrinsic Evidence

The use of extrinsic evidence in the interpretation of Aboriginal treaties is premised entirely upon the notion that the written versions of treaties are not generally sufficient to provide a contextual understanding of the agreement between the parties. The problems associated with relying exclusively upon the written text of these treaties has been illustrated throughout this article.[128] The use of extrinsic evidence serves as a check upon the variety of difficulties of interpretation and helps to achieve accurate understandings of the nature of the bargains entered into at the time the treaties were signed. It allows for the admission of evidence as to the context of treaty negotiations, as well as Aboriginal understandings of what was agreed upon through the reception of oral history, written accounts by treaty negotiators and other seemingly secondary material. Cases such as *Taylor and Williams* and *Bartleman* demonstrate the usefulness of extrinsic evidence as an aid in the judicial interpretation of Aboriginal treaties.

Although it is generally accepted that the use of extrinsic evidence is permissible, and even necessary, to provide an appropriate understanding of the background to the treaty, the case of *R.* v. *Horse* marked a notable exception to this general practice.[129] Those accused in *Horse* were treaty Indians who had been charged with using a spotlight for the purposes of hunting wildlife, in contravention of section 37 of the Saskatchewan *Wildlife Act.* The accused had been hunting on private farm lands without permission from the owners at the time they were charged. They claimed that the terms of Treaty No. 6 allowed them to hunt for food on private land without permission. The accused maintained that they were allowed to hunt over lands taken up for settlement under a "joint use concept" by which the lands, upon settlement, came to be used jointly by the settlers and the Aboriginal treaty signatories. In support, they relied upon the record of negotiations between the Crown's representatives and the Aboriginal signatories chronicled by the Crown's chief negotiator, Alexander Morris.[130] They relied, in particular, upon the following passage:

> [Chief Tee-Tee-Quay-Say said at 215:] " We want to be at liberty to hunt on any place as usual".
>
> [Lieutenant Governor Morris replied at 218] "You want to be at liberty to hunt as before. I told you we did not want to take that means of living from you, you have

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[128]Note, in particular, the instances where the Aboriginal signatories to treaties signed their names to blank pieces of paper on which the treaty terms were filled in later or where terms were left out of treaties, as with Treaties One and Two, all of which are discussed above.

[129]*Supra* note 6.

[130]See Morris, *supra* note 39.

it the same as before, only this, if a man, whether Indian or Half-breed, had a good field of grain, you would not destroy it with your hunt''.[131]

The Crown, meanwhile, relied upon the written terms of Treaty No. 6 itself, which stated that ''the said Indians shall have the right to pursue their avocations of hunting and fishing throughout the tract surrendered ... saving and excepting such tracts as may from time to time be required or taken up for settlement.''[132]

Estey J., for the court, expressed reservations about the use of the passages relied upon by the accused in interpreting the treaty.[133] He held that the treaty was not ambiguous as to where the Aboriginals could hunt. He found that the treaty expressly excepted hunting on lands ''taken up for settlement''.[134] Consequently, he held that extrinsic evidence was not to be used where an ambiguity did not exist in a treaty or where the effect of including such extrinsic evidence would be to alter the terms of a treaty by an addition or deletion from the written agreement.[135] In reaching this conclusion he distinguished the earlier Supreme Court of Canada precedents in *Nowegijick* and *Simon.*

Estey J.'s limitation of the use of extrinsic evidence in the interpretation of Aboriginal treaties may be seen to be premised upon his exclusive reliance on common law interpretations of Aboriginal treaties and the rights contained within them. His adherence to exclusively common law-based methods of interpreting treaties is evidenced by his invocation of the parol evidence rule and a major text on the common law of evidence in support of his assertions. Estey J.'s judgment in *Horse* demonstrates his willingness to accept the written terms of Aboriginal treaties at face value without considering the special circumstances under which treaties were negotiated and signed. Differences in power, language, culture and their associated conceptualizations were dismissed by him as having no negative effect upon the accuracy of the written documents that were produced.[136] For the reasons discussed earlier, such an assertion simply cannot be accepted.[137]

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[131]*Horse*, *supra* note 6 at 536-7.

[132]Morris, *supra* note 39 at 353.

[133]*Horse*, *supra* note 6 at 537.

[134]*Ibid.*

[135]*Ibid.*

[136]Presumably, and incredibly, Estey J.'s reliance upon the written versions of the treaties also applied to treaties whose terms were written in after the Aboriginal signatories had affixed their marks to blank pages.

[137]Curiously, Estey J. did not adhere to his own exhortation about the use of extrinsic evidence in *Horse*. After declaring that such evidence was to be used only where there was an ambiguity in the treaty — and after he declared that no such ambiguity existed in Treaty No. 6 — he cited the Morris text and its discussion of treaties other than Treaty No. 6 to support his notion that the treaty did not provide the appellants with the rights they had claimed. See *Horse*, *supra* note 6 at 542.

Retreating from the tenor of judgments such as *Horse* requires that the judiciary understand and accept, without reservation, the need to look beyond the written text of treaties and towards a contextual appraisal of their meaning. This method of interpretation necessitates the reception of evidence of treaty negotiations and of both parties' understandings of those negotiations. To arrive at a more accurate picture of what actually transpired also requires that the extrinsic evidence used be critically appraised. What have traditionally been described as "secondary" sources by the courts, namely governmental records and the correspondence of governmental officials, are tainted by a variety of problems.[138] Their function was to report on the success, or lack thereof, of governmental endeavours to conclude the treaties, not to try to understand Aboriginal perspectives on what transpired during treaty negotiations. Furthermore, their understandings and characterizations of Aboriginal societies and cultures were generally permeated with European value-laden biases.

To arrive at a more well-rounded, as well as contextually and culturally appropriate understanding of Aboriginal treaties, it is imperative to understand the limitations inherent in these sources as well as the courts' traditional bias against evidence generated by the Aboriginal peoples. Government records and correspondence, and Aboriginal oral evidence ought to be afforded the same stature and importance as the written versions of the treaties. Furthermore, written accounts of treaties and their negotiation should not be favoured over oral accounts, as the law of evidence is want to suggest. Such an exercise of cultural relativism runs contrary to the canons of treaty interpretation discussed herein and is based upon the misconceived notion that written sources are inherently more accurate or reliable than oral accounts. Obtaining a more well-rounded and accurate account of what transpired simply cannot be achieved without the reception of evidence from the descendants of the Aboriginal peoples who were party to those treaties. The Supreme Court of Canada's recent decision in *Badger* explicitly recognized the importance of using extrinsic evidence to achieve a well-rounded understanding of Indian treaties.[139]

The *Badger* case concerned three Treaty No. 8 Indians who were charged under the Alberta *Wildlife Act* while hunting moose on privately owned land within the boundaries of lands that had been surrendered under the treaty. The treaty, signed in 1899, provided the right to hunt over the territories surrendered, save for lands that had been taken up for settlement, mining, lumbering, trading or other purposes. However, in 1930, the federal government promulgated the Alberta *Natural Resource*

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[138]These sources have been distinguished by the judiciary from what it has considered to be primary sources, namely the written treaties themselves. It is suggested here that these other sources, which also include Aboriginal accounts and understandings, ought to be considered as having the same stature and importance as the written versions of the treaties.

[139]*Supra* note 2.

Transfer Agreement, 1930 (hereinafter "NRTA"),[140] whose terms overlapped with the guarantees made in Treaty No. 8. In addition to transferring authority over lands and resources from the federal government to the province, the NRTA provided for the application of provincial game laws to the Aboriginal peoples.[141] The NRTA allowed for Aboriginal hunting for food during all seasons on all unoccupied Crown lands and any other lands to which the Aboriginal peoples had a right of access. The key question before the court in *Badger* was whether the appellants had a right of access to the private lands they were hunting on when they were charged. More specifically, the court had to determine whether the lands were "taken up" in the manner contemplated by the treaty.

To ascertain whether the lands on which the appellants had been hunting were, in fact, "taken up", the court held that it had to account for the perspective of the Aboriginal signatories at the time of the treaty. The mere fact that the lands were privately owned was not sufficient to deem them off-limits for Aboriginal hunting. Justice Cory found that evidence led at trial indicated that in 1899, the Treaty No. 8 Indians would have understood that land was "taken up" when it was put to a use incompatible with hunting. While they would not have understood the concept of private ownership, they would have understood that lands were "taken up" when buildings or fences were erected, or the lands were visibly being used as farms. The presence of abandoned buildings would not necessarily signify that lands were "taken up" so as to prohibit the exercise of treaty hunting rights.[142] Justice Cory also found that the oral history of the Treaty No. 8 Indians revealed a similar understanding of the treaty and its promises.[143] Thus, he concluded that interpreting the treaty according to the Aboriginals' understanding of its terms entailed that the geographical limitation to be imposed on treaty hunting rights was to be based on the concept of "visible, incompatible land use".[144]

In addition to looking to Aboriginal understandings to ascertain which lands were not covered by treaty hunting rights, Cory J. also considered Aboriginal understandings of conservation in his judgment. He cited such understandings in existence at the time Treaty No. 8 was signed to buttress his conclusion that the Aboriginals would have understood and accepted the form of regulation on their hunting rights that was imposed by the Alberta *Wildlife Act* and rendered applicable

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[140] S.C. 1930, c. 3.

[141] *Ibid.* s. 12.

[142] *Badger*, *supra* note 2 at 345.

[143] *Ibid.* at 347-8.

[144] *Ibid.* at 345.

by section 12 of the NRTA.[145] The court in *Badger* may, therefore, be seen to have found that any limitations on the promises contained in Treaty No. 8 had to be understood in conjunction with the Aboriginal peoples' understanding of the treaty. In so doing, the Supreme Court appears to have quieted the argument against using extrinsic evidence made in *Horse* while indicating its complete embrace of the canons of Aboriginal treaty interpretation discussed herein.[146]

IV. Conclusion

This article has attempted to provide some concrete illustrations of how the canons of Aboriginal treaty interpretation ought to function in practice. It has also sought to demonstrate why these principles are needed in Canadian Aboriginal rights jurisprudence. The unique nature of Crown-Aboriginal relations generally, as well as treaty relationships between the groups, demonstrate the need for a purposive, or pro-active, implementation of these treaty canons, as indicated in the *Badger* decision. It could be argued that the Crown's fiduciary obligations to Aboriginal peoples, which shape and inform the understanding of treaty rights in section 35(1) of the *Constitution Act, 1982*, provide a constitutional imperative to ensure that these canons are properly implemented, insofar as they foster the best interests of the Aboriginal peoples.[147]

From this discussion of Aboriginal treaties, it becomes evident that treaties are many-faceted agreements which are dependent upon a number of factors not duly evident from an acontextual analysis of their terms. Just as Aboriginal treaties are comprised of more than the mere content of the Crown's written accounts — that is, more than the written parchment copy — treaty rights also transcend the bare rights

[145] *Ibid.* at 352. It is suggested that determining, on the one hand, that the Aboriginal signatories understood that conservation was a legitimate basis for limiting treaty hunting rights and concluding, on the other, that implementing Crown legislation for that purpose would be understood as an instrument of conservationist purposes by the Aboriginal is a more complicated link than Justice Cory suggests in *Badger* and requires more evidence than that provided in his judgment.

[146] The *Badger* decision is also noteworthy in that the majority decision reversed the precedent established in the *Horseman* case, *supra* note 66, where it was held that the NRTA extinguished or replaced Treaty No. 8 hunting rights. Rather than finding that the NRTA's contemplation of Aboriginal hunting rights superseded those in Treaty No. 8, the majority judgment determined that the NRTA only modified the treaty rights where they came into conflict with the NRTA. See *Badger*, *supra* note 2 at 342-3. Sopinka J.'s minority judgment in *Badger* did side with *Horseman*'s findings on this matter however: see *ibid.* at 332, 361.

[147] For greater discussion of the Crown's fiduciary duty to Aboriginal peoples, see L. Rotman, *Parallel Paths*, *supra* note 107; L. Rotman, "Provincial Fiduciary Obligations to Aboriginal Peoples: The Nexus Between Governmental Power and Responsibility" (1994) 32 Osgoode Hall L.J. 735; L. Rotman, "Hunting for Answers in a Strange Kettle of Fish: Unilateralism, Paternalism and Fiduciary Rhetoric in *Badger* and *Van der Peet*" (1997) 8 Const. Forum 40; P.W. Hutchins, D. Schulze, & C. Hilling, "When Do Fiduciary Obligations to Aboriginal Peoples Arise?" (1995) 59 Sask. L. Rev. 97.

described in the treaties. The description of a treaty right, standing alone, cannot encapsulate the full range and extent of the right. For example, the right to hunt entails more than the tracking and killing of an animal; it also encapsulates the entire process leading up to and including that right, which includes any ceremonial and traditional practices associated with that activity. Without looking to these other associated practices, the full nature of the hunting right belonging to the Aboriginal peoples exercising it cannot be ascertained.

The principles underlying the canons of Aboriginal treaty interpretation have been demonstrated to account for those elements of treaty rights which are not necessarily forthcoming from traditional, domestic contract or international law interpretations.[148] They look to the background and circumstances of the treaties — including the events giving rise to them and the understandings that the respective parties had at the time they were signed — in order to achieve a well-rounded, culturally-appropriate understanding of the nature of the agreements. They should, therefore, be entrenched as vital elements of Canadian Aboriginal rights jurisprudence in a manner that is consistent with the important place of Crown-Native treaties within Canadian law, as recognized by their inclusion in section 35(1) of the *Constitution Act, 1982.*

[148]Generally, judicial and academic implementation of contract or international law principles in treaty analysis has not been sensitive to the *sui generis* nature of Crown-Aboriginal treaties or why those agreements differ from domestic contracts or international law treaties. Thus, the primary problem with the use of contract and international law principles in treaty analysis is not their inapplicability, but the method in which they have been implemented.