
Centre for International
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Canada in International Law at 150 and Beyond | Paper No. 5 – January 2018

Exploring the International Character of Treaties 1–11 and the Legal Consequences

Brenda L. Gunn



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CIGI Masthead

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About the Series

Marking 150 years since Confederation provides an opportunity for Canadian international law practitioners and scholars to reflect on Canada's past, present and future in international law and governance. "Canada in International Law at 150 and Beyond/Canada et droit international : 150 ans d'histoire et perspectives d'avenir" is a series of essays, written in the official language chosen by the authors, that provides a critical perspective on Canada's past and present in international law, surveys the challenges that lie before us and offers renewed focus for Canada's pursuit of global justice and the rule of law.

Topics explored in this series include the history and practice of international law (including sources of international law, Indigenous treaties, international treaty diplomacy, subnational treaty making, domestic reception of international law and Parliament's role in international law), as well as Canada's role in international law, governance and innovation in the broad fields of international economic, environmental and intellectual property law. Topics with an economic law focus include international trade, dispute settlement, international taxation and private international law. Environmental law topics include the international climate change regime and international treaties on chemicals and waste, transboundary water governance and the law of the sea. Intellectual property law topics explore the development of international IP protection and the integration of IP law into the body of international trade law. Finally, the series presents Canadian perspectives on developments in international human rights and humanitarian law, including judicial implementation of these obligations, international labour law, business and human rights, international criminal law, war crimes, and international legal issues related to child soldiers. This series allows a reflection on Canada's role in the community of nations and its potential to advance the progressive development of global rule of law.

"Canada in International Law at 150 and Beyond/Canada et droit international : 150 ans d'histoire et perspectives d'avenir" demonstrates the pivotal role that Canada has played in the development of international law and signals the essential contributions it is poised to make in the future. The project leaders are Oonagh Fitzgerald, director of the International Law Research Program at the Centre for International Governance Innovation (CIGI); Valerie Hughes, CIGI senior fellow, adjunct assistant professor of law at Queen's University and former director at the World Trade Organization; and Mark Jewett, CIGI senior fellow, counsel to the law firm Bennett Jones, and former general counsel and corporate secretary of the Bank of Canada. The series will be published as a book entitled *Reflections on Canada's Past, Present and Future in International Law/Réflexions sur le passé, le présent et l'avenir du Canada en matière de droit international* in spring 2018.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

About the Author

Brenda L. Gunn is a fellow with CIGI's International Law Research Program (ILRP). In this role, Brenda will explore comparative approaches and best practices for the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) internationally. Her work at CIGI will involve engaging Indigenous peoples on the topic through workshops, conferences and other fora.

Brenda is also an associate professor in the Robson Hall Faculty of Law at the University of Manitoba, where she teaches constitutional law, international law and advocacy for the rights of Indigenous peoples in international law. Prior to joining the University of Manitoba, Brenda worked at a community legal clinic in Rabinal, Guatemala, on a case of genocide submitted to the Inter-American Commission on Human Rights.

Brenda has also worked with First Nations on Aboriginal and treaty rights issues in Manitoba, and provided technical assistance to the UN Expert Mechanism on the Rights of Indigenous Peoples in the analysis and drafting of the report summarizing the responses to a survey on implementing UNDRIP. A proud Metis woman, Brenda is recognized for developing the key handbook in Canada on understanding and implementing UNDRIP.

Brenda has a B.A. from the University of Manitoba and a J.D. from the University of Toronto. She completed her LL.M. in indigenous peoples' law and policy at the University of Arizona and was called to the Bars of Ontario and Manitoba.

Introduction

Since at least the 1700s, many treaties have been concluded between Indigenous peoples and the British Crown across what is now known as Canada. When Indigenous peoples and the British Crown began entering into treaties with one another, both parties already had rich histories of entering into treaties with different parties. Treaties had long been recognized as fundamental in international relations, especially for developing peaceful cooperation among nations.¹ The content of these treaties varied, depending on the purpose of the agreement. Regardless of the specific content, Indigenous peoples have long claimed that treaties are nation-to-nation agreements that formalized and set “terms for the relationship between Indigenous peoples and Britain.”²

It is often assumed that treaties between Indigenous peoples and the British Crown are not international treaties. This assumption is based on three arguments: “either it is held that indigenous peoples are not peoples according to the meaning of the term in international law; or that treaties involving indigenous peoples are not treaties in the present conventional sense of the term, that is, instruments concluded between sovereign States...or that those legal instruments have simply been superseded by the realities of life as reflected in the domestic legislation of States.”³

In an early decision, the Supreme Court of Canada (SCC) concluded that treaties between Indigenous peoples and the Crown were not international treaties, but were *sui generis* treaties.⁴ This decision paved the way for the “domestication” of Indigenous-Crown treaties.

Building on this decision, Canadian courts have developed rules of interpretation that do not necessarily accord with international treaty law, nor with the true spirit and intent of the treaties.

Indigenous peoples have long protested the domestication of Indigenous-Crown treaties and claim that it fails to properly recognize the nation-to-nation nature of the treaties. In fact, “[f]or many indigenous peoples, treaties concluded with European powers...are, above all, treaties of peace and friendship, destined to organize coexistence in — not their exclusion from — the same territory and not to regulate restrictively their lives...under the overall jurisdiction of non-indigenous authorities.”⁵

This also includes treaties 1 to 11, a series of treaties made between the Canadian government and Indigenous peoples from 1871 to 1921: “indigenous parties to numbered treaties...consider that they are parties to treaties of peace, friendship and alliance and that they did not cede either their territories or their original juridical status as sovereigns.”⁶

International law has shifted from the initial recognition of Indigenous peoples’ sovereign nationhood, to international law being used as a tool to attempt to remove Indigenous peoples’ standing in international law, and, again, toward recognizing Indigenous peoples as subjects of international law.⁷ Most recently, the United Nations, in documents including the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration), has recognized the potentially international character of Indigenous-Crown treaties.⁸ However, Canadian law has yet to consider the ramifications of this international recognition. This paper explores the implications of the international character of Indigenous-Crown treaties for the Canadian law on interpreting treaties. The paper does not set out to prove that treaties 1 to 11 are, in fact, international treaties,⁹

1 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, 8 ILM 679 (entered into force 27 January 1980), Preamble [Vienna Convention].

2 Royal Commission on Aboriginal Peoples (RCAP), *Report of the Royal Commission on Aboriginal Peoples, Volume 2: Restructuring the Relationship* (Ottawa, ON: Canada Communication Group, 1996) [RCAP, “Restructuring”], online: <<http://data2.archives.ca/e/e448/e011188230-02.pdf>>; JR Miller, *Lethal Legacy: Current Native Controversies in Canada* (Toronto, ON: McClelland & Stewart, 2004) at 160.

3 UN Economic and Security Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Human Rights of Indigenous Peoples: Study on treaties, agreements and other constructive arrangements between States and indigenous populations, Final report by Miguel Alfonso Martínez, Special Rapporteur*, 51st Sess, UN Doc E/CN.4/Sub.2/1999/20 (1999) at para 115 [Martínez report].

4 *Simon v The Queen*, [1985] 2 SCR 387 at para 33 [Simon].

5 Martínez report, *supra* note 3 at para 117.

6 *Ibid* at para 122.

7 Jeff Cornassel, “Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse” (2008) 33 *Alternatives* 105.

8 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, UN Doc A/RES/61/295 (2007), Preamble, art 37(1) [UN Declaration].

9 See Janine Seymour, *Manitoo Mazina’igan: An Anishinaabe Legal Analysis of Treaty No. 3* (LLM Thesis, University of Manitoba Faculty of Law, 2016) [unpublished] (for a detailed exploration of the international character of Treaty 3).

but rather argues that the recognition of the potentially international character of Indigenous-Crown treaties in the UN Declaration indicates that these treaties may have an international character. The paper then recommends changes necessary to fully implement the UN Declaration in Canada.

After providing a brief background on the evolution of treaties in Canada with a focus on treaties 1 to 11, the paper analyzes Canadian law on Indigenous-Crown treaties against the backdrop of international treaty law. The paper provides a brief background on international treaty law, including the evolving understanding of Indigenous peoples as international subjects. The paper will not undertake a complete analysis of the capacity of Indigenous peoples to enter into treaties 1 to 11, but rather builds from the growing recognition in international law of the international character of these treaties. The paper concludes with recommendations for resolving disputes arising from Indigenous-Crown treaties, including how to begin to implement this understanding of the international character of Indigenous-Crown treaties. The question of the nature of these agreements, and the consequences, are important, as Canada works toward restoring the nation-to-nation relationship with Indigenous peoples.

Background on Historic Treaties in Canada

This section provides an overview of the history of negotiating treaties in Canada, with a particular emphasis on the framework provided in the Royal Proclamation of 1763¹⁰ and the 1764 Treaty of Niagara for negotiating treaties 1 to 11. The overview includes a brief outline of the main motivations for entering into treaties for both parties. It also discusses some of the current disagreements that exist regarding the scope and nature of treaties 1 to 11. To understand the nation-to-nation nature of Indigenous-Crown treaties, it is important to understand the historical context in which

these agreements were made.¹¹ The goal of this section is to look beyond the Crown's current contention that treaties 1 to 11 are "land surrender agreements in which the Indians gave up their claims to occupancy and use in return for gifts and annual payments."¹² This section demonstrates the basis for Indigenous peoples' understanding that these treaties constituted international treaties; in other words, the treaties are "pacts of friendship, peace, and mutual support; they did not constitute the abandonment of their rights and interests."¹³ This background sets the stage for the analysis of how to resolve these conflicts, in part through the use of international treaty law.

As Europeans arrived in North America, tension increased between the French and the English, as each sought to obtain greater control over North American territory. Indigenous peoples were secured as allies to provide economic, military and political benefits.¹⁴ The Royal Proclamation of 1763 demarcated the land and jurisdiction between Indigenous peoples and the Crown.¹⁵ John Borrows states that "while the Proclamation seemingly reinforced First Nation preferences that First Nation territories remain free from European settlement or imposition, it also opened the door to the erosion of these same preferences."¹⁶ The Royal Proclamation contained three key aspects related to Indigenous peoples' lands. These were as follows: "[1] colonial governments were forbidden to survey or grant any unceded lands; [2] colonial governments were forbidden to allow British subjects to settle on Indian lands or to allow private individuals to purchase them; and

10 *Royal Proclamation, 1763*, 3 Geo III, reprinted in RSC 1985, Appendix II, No 1.

11 John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver, BC: UBC Press, 1997) 155 at 156 [Borrows, "Wampum"]; John Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 UBC L Rev 1 at 10 [Borrows, "Constitutional"]; Aimee Craft, *Breathing Life into the Stone Fort Treaty: An Anishinabe Understanding of Treaty One* (Saskatoon, SK: Purich Publishing, 2013) at 23 [Craft, "Breathing Life"].

12 Miller, *supra* note 2 at 164–65.

13 *Ibid* at 165.

14 Borrows, "Wampum", *supra* note 11 at 157; Leonard Rotman, "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence" (1997) 46 UNBLJ 11 at 14.

15 Borrows, "Wampum", *supra* note 11 at 159; Borrows, "Constitutional", *supra* note 11 at 16.

16 Borrows, "Wampum", *supra* note 11 at 160; Borrows, "Constitutional", *supra* note 11 at 18.

[3] there was an official system of public purchases developed in order to extinguish Indian title.¹⁷

These principles reflected the pre-existing practice through which Indigenous peoples maintained control over their lands, but which worked against Indigenous preferences by creating a process through which the Crown gained access to Indigenous peoples' lands.¹⁸ While some claim that the Indigenous peoples were passive objects in a "unilateral declaration of the Crown's will," reading the Royal Proclamation in light of the Treaty of Niagara provides an alternative interpretation.¹⁹ As Sharon Venne notes, "The Royal Proclamation was never binding on Indigenous peoples: it bound the British Crown and its colonial agents to follow certain rules in relation to Indigenous peoples and lands."²⁰

With the issuance of the proclamation, the British aimed to negotiate a treaty setting out their relationship with Indigenous peoples.²¹ William Johnson described the purpose of the peace conference held in the summer of 1764 as follows: "At this treaty...we should tie them down (in the Peace) according to their own forms of which they take the most notice, for example by exchanging a very large belt with some remarkable [and] intelligible figures thereon. Expressive of the occasion which should always be shown to remind them of their promises."²²

Wampum belts recorded the promises exchanged.²³ At the gathering, the terms of the Royal Proclamation were read, and a mutual promise of peace and non-interference was agreed

on.²⁴ Presents were exchanged, representing the solemnity of the promises exchanged.²⁵

After the confederation of Canada, the British approach to treaty making with Indigenous peoples shifted from peace and friendship to large land cession. J. R. Miller argues that the Crown entered into treaties with First Nations when settlers were interested in exploring the lands for economic development, which would be key to providing revenue for Canada.²⁶ Harold Cardinal adds that "the treaties were the way in which the white people legitimized in the eyes of the world their presence in our country. It was an attempt to settle the terms of occupancy on a just basis, legally and morally to extinguish the legitimate claims of our people to title to the land in our country."²⁷

The Royal Proclamation and the Treaty of Niagara, and the relationship set out between the British Crown and the Indigenous peoples, were relied on and built on in the negotiations for future treaties, including treaties 1 to 11.²⁸ Eleven numbered treaties were made during a 50-year period, from Treaty 1 in 1871 to Treaty 11 in 1921. The territory covered by the treaties includes all of the provinces of Manitoba, Saskatchewan and Alberta, and parts of Ontario, British Columbia and the Northwest Territories.²⁹ The government set out to enter into these treaties with Indigenous peoples, believing that the Indigenous peoples would agree to surrender their land and maintain peace in exchange for "a small cash annuity, reserves of land, schools, agricultural assistance, and hunting and fishing supplies."³⁰ However, this was not the goal of Indigenous peoples.

From the Indigenous peoples' perspective, these treaties are "living agreements rather than as mere

17 Borrows, "Wampum", *supra* note 11 at 160; Borrows, "Constitutional", *supra* note 11 at 18.

18 Borrows, "Wampum", *supra* note 11 at 160; Borrows, "Constitutional", *supra* note 11 at 19.

19 Borrows, "Wampum", *supra* note 11 at 155; Borrows, "Constitutional", *supra* note 11 at 16; See Craft, "Breathing Life", *supra* note 11 at 22.

20 Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective" in Asch, *supra* note 11 at 185.

21 Borrows, "Wampum", *supra* note 11 at 162; Borrows, "Constitutional", *supra* note 11 at 22.

22 Borrows, "Wampum", *supra* note 11 at 162; Borrows, "Constitutional", *supra* note 11 at 22.

23 Borrows, "Wampum", *supra* note 11 at 162; Borrows, "Constitutional", *supra* note 11 at 22.

24 Borrows, "Wampum", *supra* note 11 at 163; Borrows, "Constitutional", *supra* note 11 at 23.

25 Borrows, "Wampum", *supra* note 11 at 163; Borrows, "Constitutional", *supra* note 11 at 22.

26 Miller, *supra* note 2 at 146-47.

27 Harold Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton, AB: MG Hurtig Publishers, 1969) at 29.

28 Craft, "Breathing Life", *supra* note 11 at 34.

29 Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto, ON: University of Toronto Press, 2014) at 75.

30 John Leonard Taylor, "Canada's Northwest Indian Policy in the 1870s: Traditional Premises and Necessary Innovations" in Richard T Price, ed, *The Spirit of the Alberta Indian Treaties* (Edmonton, AB: University of Alberta Press, 1999) 1 at 3.

documents. The agreements created a permanent living relationship beyond the particular promises. This relationship was typically expressed in terms of kinship.³¹ The relationship was also sacred and required the parties to continue to meet “to renew the friendship, reconcile misunderstandings and share their wealth.”³² Discussing the negotiation of Treaty 6, Venne describes the pipe-smoking ceremony and what that meant for the treaty. To her, “[s]moking the pipe would signify to the Creator the intention of the parties to keep the terms of the agreement in a strong binding manner. The Indigenous peoples wanted this treaty to last as long as the earth would exist; this is the reason they smoked the pipe with the Commissioner.”³³ Indigenous diplomatic protocols were followed in negotiating and concluding many treaties.

The first numbered treaty was negotiated at the Hudson Bay Company post of Lower Fort Garry, known to many as the Stone Fort, over nine days in the summer of 1871.³⁴ Treaty 1 was between the Crown and the Anishinaabe of southern Manitoba.³⁵ From the Anishinaabe perspective, under the terms of Treaty 1, the Anishinaabe had agreed to share the land, and at no point during the negotiations did the parties discuss the concepts of land surrender or sale.³⁶ Rather, the “assurances of continued land use without interference constitute a recognition of Anishinaabe jurisdiction over and primary right of use of the resources and land.”³⁷ The Anishinaabe did not view the treaty as giving anything up; rather, they agreed to share in the land and resources together.³⁸

This idea of sharing the land and resources while maintaining independence was a common understanding of the spirit and intent of treaties 1 to 11. Treaty 3, for example, was negotiated by the Anishinaabe traditional governance structure of the

Grand Council.³⁹ It took several years to negotiate.⁴⁰ The Anishinaabe refused to enter into a treaty unless their demands were met, and they turned away the Crown negotiators several times.⁴¹ Treaty 7 was signed on September 22, 1877, after five days of negotiations between the British and the Blackfoot, Blood Peigan, Sarcee and Stoney peoples.⁴² The area covered by this treaty is the central area of Alberta.⁴³ The negotiation of the treaty was motivated by the desires of the British to increase settlement in their territories, and the Blackfoot peoples’ desire for security in the face of a food supply shortage and a recent smallpox outbreak that had reduced their numbers.⁴⁴ Similarly, elders’ oral history on Treaty 7 viewed it not “as an instrument for surrender at all,” but rather it was “most characteristically viewed as a peace treaty.”⁴⁵

However, these aspects of the treaty process are not recorded in the written text of the treaties. The written texts of treaties 1 to 11 were fairly formulaic, most of them containing similar promises. Discussing Treaty 6, Venne detailed 15 promises contained within the treaty in relation to health care, education, water, fishing, hunting and trapping, police, reserves, mountains, birds, social assistance, minerals, Indian Agents, farm instructors, treaty money and citizenship. The numbered treaties contained provisions for individual annuities to be paid, and formulas for the creation of reserves, generally providing for 160 acres per person. However, there are many examples of communities not receiving the lands they were promised. Venne argues that “at the treaty signing, the Chiefs understood they could reserve as much land as they wanted.”⁴⁶

The Crown viewed the treaties as “contracts — limited to specified rights and obligations,

31 James Youngblood Henderson, “Empowering Treaty Federalism” (1994) 58:2 Sask L Rev 241 at 248 [Henderson, “Empowering”].

32 *Ibid* at 248–49.

33 Venne, *supra* note 20 at 186.

34 Aimee Craft, “Living Treaties, Breathing Research” (2014) 26 CJWL 1 at 4.

35 *Ibid* at 5.

36 Craft, “Breathing Life”, *supra* note 11 at 109.

37 *Ibid* at 109.

38 *Ibid* at 110.

39 Grand Council Treaty 3, “We have kept our Part of the Treaty” (The Anishinaabe Understanding of Treaty 3, 3 October 1998) [unpublished] at 30, 51–52.

40 *Keewatin v Minister of Natural Resources*, 2011 ONSC 4801 at para 282.

41 Kathi Kinew, *Manito Gitigaan Governing in the Great Spirit’s Garden: Wild Rice in Treaty #3* (Interdisciplinary Doctorate Thesis, University of Manitoba, 1995) [unpublished] at 110.

42 John Leonard Taylor, “Two Views on the Meaning of Treaties Six and Seven” in Price, *supra* note 30 at 22, 35, 26 [Taylor, “Two Views”].

43 *Ibid* at 9.

44 *Ibid* at 26.

45 *Ibid* at 41–43.

46 Venne, *supra* note 20 at 197.

and restricted to the letter of the government version — that conveyed title to land in return for compensation.⁴⁷ The government’s view of the treaties is reflected in the written text, which stated that the Indigenous peoples “do hereby cede, surrender, and release 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 in the following limits.”⁴⁸

One particularly contentious area in the understanding of treaties 1 to 11 is the question of whether First Nations placed themselves under the jurisdiction and authority of the Crown when signing treaties. The Royal Commission on Aboriginal Peoples (RCAP) pointed out that “[t]he Crown has traditionally contended that treaty nations, by the act of treaty making, implicitly or explicitly accepted the extinguishment of residual Aboriginal rights and acknowledged the sovereignty and ultimate authority of the Crown, in exchange for the specific rights and benefits recorded in the treaty documents.”⁴⁹

However, James (Sa’ke’j) Youngblood Henderson argues that “every treaty emphasizes the lack of imperial or Eurocentric inheritance in North America and confirms Aboriginal autonomy and their right to self-determination.”⁵⁰

Discrepancies in the interpretation of the terms of the treaties relate to the different goals of signing the treaties: most First Nations wanted to protect their communities and cultures from settler infiltration, and the government wanted to open up the West for settlement. Tension remains regarding the specific terms and obligations of the treaties. Much work has been done over the past 100 years to try to identify the scope of the treaties. Following this overview of the history and process of treaty making, including the intentions of the parties, the next section discusses international treaty law as a lens through which to analyze these treaties.

47 Miller, *supra* note 2 at 160.

48 Taylor, “Two Views”, *supra* note 42 at 39.

49 RCAP, “Restructuring”, *supra* note 2 at 11.

50 Henderson, “Empowering”, *supra* note 31 at 247.

Indigenous Peoples’ Standing in International Law

Many in Canada seem to assume that Indigenous peoples in Canada never had the capacity to enter into international treaties or never were subjects in international law. This section provides a brief background on international law, including the early recognition of Indigenous peoples as actors of international law and the more recent recognition of Indigenous peoples as subjects of international law. The goal is not to prove that the Indigenous peoples who concluded treaties 1 to 11 with the Crown met the international standards to enter into treaties at the time the numbered treaties were concluded, but merely to demonstrate that the presumption that the treaties are not international is not well founded, given the past and current status of the international law of treaties with Indigenous peoples.

There is a historical basis for recognizing Indigenous negotiations with state governments as treaties that are valid in international law.⁵¹ Indeed, until relatively recently, European nations took no issue with recognizing the international standing of many Indigenous peoples, engaging consistently in treaties of alliance, cession and protection, which often resulted in benefits for both parties.⁵² Europeans regarded Indigenous peoples as sufficiently autonomous to enter into such treaties.⁵³ Throughout the sixteenth to the nineteenth centuries, Europeans signed

51 Robert A Williams, *Linking arms together: American Indian treaty visions of law and peace, 1600–1800* (New York, NY: Oxford University Press, 1997); David H Getches, Daniel M Rosenfelt, & Charles F Wilkinson, *Cases and Materials on Federal Indian Law*, 6th ed (St. Paul, MN: West Publishing, 2006); Russel L Barsh & James Henderson, *International Context of Crown-Aboriginal Treaties in Canada: Final Report* (Ottawa, ON: RCAP, 1995); Martínez report, *supra* note 3.

52 Eric Kades, “History and interpretation of the great case of Johnson v. M’Intosh” (2001) 19 L & Hist Rev 67 at 94; Williams, *supra* note 51 at 20.

53 D’Arcy G Vermette, *Beyond Doctrines of Dominance: Conceptualizing a Path to Legal Recognition and Affirmation of the Manitoba Métis Treaty* (LLD Thesis, University of Ottawa, 2012) [unpublished] at 149.

many treaties grounded in both European and Indigenous legal principles.⁵⁴

During this period, international law recognized the sovereignty of Indigenous peoples to enter into “bilateral governmental relations, to exercise power and control over their lands and resources, to maintain their internal forms of self government free of outside interference.”⁵⁵ For example, Francisco de Vitoria (1486–1547), who was among the early contributors to international law, focused on “establishing the governing normative and legal parameters” in relation to Spanish-Indian relations.⁵⁶ De Vitoria held that Indigenous peoples in the Americas were rational human beings who were the true owners of their lands.⁵⁷ Indigenous peoples were subject to the laws of “neither pope nor foreign rulers.”⁵⁸ This recognition meant that “neither emperor nor pope” could legitimately assert dominion over the world.⁵⁹ De Vitoria recognized Indigenous autonomy and the illegitimate tactics of trying to decimate their respective title to the lands they occupied in the Americas. Viewed as rational human beings, Indigenous peoples were capable of treaty making. However, it should be noted that, under de Vitoria’s arguments, Indigenous peoples could lose their rights through a conquest, following a just war (as determined by European values).⁶⁰

De Vitoria’s conclusions on the standing of Indigenous peoples were codified in the Spanish Royal Law shortly after its publication, and were subsequently adopted by the Royal Council of Spain. Finally, they were adopted by the Holy See; the RCAP described this adoption as a rejection of the notion that “infidel nations were not legitimate, their rulers could not be recognized, and their lands could be taken without compensation.”⁶¹ Writing in the 1600s, Hugo Grotius built on de

Vitoria’s work, accepting that Indigenous peoples had the capacity to enter into treaties, a belief that was grounded in natural law applicable to all peoples.⁶² As noted by Barsh and Henderson, Grotius espoused the distinction between political jurisdiction and a dominion arising from tenure; he argued that discovery did not transfer the full title “without actual possession...nor furnish a just cause for acquisition of territory by conquest.”⁶³ He also rejected the doctrines of *vacuum domicilium* and *terra nullius*, which were used to deny the sovereignty of Indigenous groups later on.⁶⁴

After the Treaty of Westphalia in 1648,⁶⁵ international law began to shift to a position in which the European signatories to that treaty recognized one another as nation-states, which eventually became the legal framework for the law of nations: “European theorists transformed the concept of natural law from a universal moral code for humankind into a bifurcated regime comprised of the natural rights of individuals and the natural rights of states.”⁶⁶ In the mid to late 1700s, the writings of Emer de Vattel and L. F. L. Oppenheim demonstrated that international law began to refocus its attention on nation-states and European-centric notions of governance. This led to the idea of the sovereignty of the state, from which there should be no outside interference, and the principles of nation-states as free, independent and equal. Oppenheim continued to develop these ideas, leading international law to limit subjects to states.⁶⁷ This shift from nationhood to nation-state impacted Indigenous peoples’ recognition as international legal subjects. Meeting the requisite standard of civilization as gauged by the Western measuring stick was the means to achieve statehood. Qualified states would then be able to operate under the law of nations. This positivist school of international law ensured that the law of nations would become a legitimizing force for colonization and empire, rather than a liberating one for Indigenous peoples.⁶⁸ International law

54 Maureen Davies, “Aspects of Aboriginal Rights in International Law” in Bradford W Morse, ed, *Aboriginal peoples and The Law: Indian, Metis and Inuit Rights in Canada* (Ottawa, ON: Carleton University Press, 1989) 16 at 24.

55 Williams, *supra* note 51 at 9.

56 James Anaya, *Indigenous Peoples in International Law*, 2nd ed (New York, NY: Oxford University Press, 2004) at 16.

57 *Ibid* at 17.

58 Barsh & Henderson, *supra* note 51 at 71.

59 Anaya, *supra* note 56 at 18.

60 Anaya, *supra* note 56.

61 Barsh & Henderson, *supra* note 51 at 79.

62 Anaya, *supra* note 56; See also O Dorr and K Schmalenbach, eds, *Vienna Convention on the Law of Treaties* (Berlin, Germany: Springer-Verlag, 2012) at 3.

63 Barsh & Henderson, *supra* note 51 at 102.

64 *Ibid*.

65 *Treaty of Westphalia*, 24 October 1648, 1 Parry 271, 1 Parry 119.

66 Anaya, *supra* note 56 at 20.

67 Anaya, *supra* note 56.

68 *Ibid*.

is now law made by states for states.⁶⁹ It should be noted that there were dissenting voices at the time of this shift in international law.⁷⁰

However, de Vattel did note that a state does not lose its independence or sovereignty by placing itself under the protection of another, so long as self-government is retained.⁷¹ And so, even in 1763, the language in the Royal Proclamation referring to “the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection” can be viewed as reiterating the independence of Indigenous peoples, and as setting out Britain’s role as protector in the peace and friendship relationship.

Over the past 20 years, there has again been a shift in international law to recognizing that treaties concluded with Indigenous peoples may, in fact, be international treaties. In 1999, UN Special Rapporteur Miguel Alfonso Martínez concluded a study on Indigenous treaties and found that “the indigenous and non-indigenous parties mutually bestowed on each other (in either an explicit or implicit manner) the condition of sovereign entities in accordance with the non-indigenous international law of the times.”⁷² In his study, Martínez was particularly concerned with assertions that these treaties are not international treaties “simply because of the widely-held rationale that indigenous peoples are not ‘States’ in the current sense of the term in international law, regardless of their generally recognized status as sovereign entities in the era of the Law of Nations.”⁷³

Martínez was critical of the “process of retrogression, by which [Indigenous peoples] have been deprived of (or saw greatly reduced) three of the four essential attributes on which their original status as sovereign nations was grounded, namely their territory, their recognized capacity to enter into international agreements, and their specific forms of government.”⁷⁴ He concluded unequivocally that “[i]n establishing formal legal relationships with peoples overseas, the European parties were clearly aware that they

were negotiating and entering into contractual relations with sovereign nations, with all the international legal implications of that term during the period under consideration.”⁷⁵ He concluded that there was no “sound legal argument to sustain the argument that [Indigenous peoples] have lost their international juridical status as nations.”⁷⁶

The potentially international character of Indigenous-Crown treaties has most recently been recognized in the UN Declaration: “Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character.”⁷⁷ The UN Declaration affirms that “Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.”⁷⁸

As well, article XXIV of the American Declaration on the Rights of Indigenous Peoples recognizes that “Indigenous peoples have the right to the recognition, observance, and enforcement of the treaties, agreements and other constructive arrangements concluded with states and their successors, in accordance with their true spirit and intent in good faith and to have the same be respected and honored by the States. States shall give due consideration to the understanding of the indigenous peoples as regards to treaties, agreements and other constructive arrangements.”⁷⁹ References to the spirit and intent of the treaties and to giving due regard to Indigenous peoples’ understanding of the treaties, taken with the recognition in the UN Declaration, highlight a need to reconsider the position in Canada that these treaties are merely domestic instruments that are not subject to international law. The American Declaration continues, “When disputes cannot be resolved between the parties in relation to such treaties, agreements and

69 *Ibid.*

70 *Ibid.*

71 *Ibid.*

72 Martínez report, *supra* note 3 at para 186.

73 *Ibid* at para 55.

74 *Ibid* at para 105.

75 *Ibid* at para 110.

76 *Ibid* at para 265.

77 UN Declaration, *supra* note 8, Preamble.

78 *Ibid*, art 37.

79 OAS, General Assembly, *American Declaration on the Rights of Indigenous Peoples*, AG/RES 2888 (XLVI-O/16) (2016), art XXIV.

other constructive arrangements, these shall be submitted to competent bodies, including regional and international bodies, by the States or indigenous peoples concerned.”⁸⁰ Given this past and present recognition of Indigenous peoples’ capacity to enter into treaties, the next consideration is what the requirements are to enter into an international treaty.

International Treaty Law

If the position that international law is beginning to “re-recognize” Indigenous-European treaties as having an international character is accepted, the ramifications of this recognition need to be explored. It is beyond the scope of this paper to go through each treaty to prove its international character, but there are increasing indications that treaties 1 to 11 meet many (if not all) of the requirements for international treaties. This section describes some of the international legal principles on treaties that should apply in Canada when the nature and scope of treaties 1 to 11 are interpreted. The ramifications of the international character of treaties is an important consideration because “he who violates his treaties, violates at the same time the law of nations; for, he disregards the faith of treaties, — that faith which the law of nations declares sacred; and so far, as depends on him, he renders it vain and ineffectual. Doubly guilty, he does an injury to his ally, he does an injury to all nations, and inflicts a wound on the great society of mankind.”⁸¹ Once a brief overview of the international requirements for concluding a treaty is completed, the following section discusses the ramifications of these requirements for the Canadian law on interpreting treaties.

The presumption or modern interpretation of international law, which claims that Indigenous peoples do not have standing in international law to conclude treaties, presents a challenge to the consideration of treaties 1 to 11 as international treaties. Writing in the 1960s, Arnold Duncan

McNair noted that “according to the modern doctrine of international law, an agreement made between a State and a native chief or tribe cannot be regarded as treaty in the international sense of the term, nor can it be said that such an agreement produces the international legal effects commonly produced by a treaty.”⁸² In support of this proposition, he cited the *Island of Palmas* arbitration, which held

As regards *contracts between a State or Company such as the Dutch East India Company and native princes or chiefs of peoples* not recognized as members of the community of nations, they are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties. But on the other hand, contracts of this nature are not wholly void of indirect effects on situations governed by international law; if they do not constitute titles in international law, they are none the less facts of which that law must in certain circumstances take account.⁸³

McNair explained further that Indigenous peoples (or native chiefs) are not states or international organizations and, thus, do not have the capacity in international law to conclude treaties.⁸⁴

However, McNair’s analysis did not end there. He noted also that this description represented “modern doctrine” and that, in the past, the agreements had been described as treaties and had been recognized in courts, including US courts, as treaties.⁸⁵ He continued to acknowledge that the Treaty of Waitangi made between Maori people in Aotearoa/New Zealand and the British Crown had been recognized as an international treaty.⁸⁶ Thus,

80 *Ibid.*

81 Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, ed by Béla Kapossy & Richard Whitmore (Indianapolis, IN: Liberty Fund, 2008) at s 221.

82 Arnold Duncan McNair, *The Law of Treaties* (Oxford, UK: Clarendon Press, 1961) at 52.

83 *Island of Palmas Case (United States v The Netherlands)*, Award, 4 April 1928, 2 RIAA 829 (PCA) at 858 [emphasis in original].

84 McNair, *supra* note 82 at 53.

85 *Ibid* (McNair noted that in the United States, “until that Indian Appropriations Act of 3 March 1871, agreements made with Indian tribes were regarded as treaties” at 53).

86 *Ibid* at 54. See also Matthew Palmer, *The Treaty of Waitangi in New Zealand’s law and constitution* (Wellington, NZ: Victoria University Press, 2008) and also Paul McHugh, *Aboriginal societies and the common law: A history of sovereignty, status, and self-determination* (New York, NY: Oxford University Press, 2004).

this paper moves forward on the presumption that treaties 1 to 11 could be international treaties and provides some explanation of the legal requirements and consequences of the international character of these treaties.

While international law does not prescribe the form or procedure for concluding international treaties, other factors enter into the determination of whether a valid treaty exists.⁸⁷ It has long been recognized in international law that for a valid treaty to be concluded, “it is essential that contracting parties have power over the subject-matter, that consent be reciprocally and regularly given, and that the object of the treaty be possible and lawful under the accepted principles of international law.”⁸⁸ There is no requirement for treaties to be written, but it is rare to find oral agreements.⁸⁹ There is no specific form required for a valid treaty, but, rather, it is “customary in case of formal treaties to make out and sign under seal.”⁹⁰ In concluding a treaty, “to insure execution and observance, it was customary at one time to give important treaties a special sanction by oath, the pledge of securities, the delivery of hostages, or a guarantee.”⁹¹ Samuel B. Crandall noted that “the oath was but a survival of the religious ceremonies of the ancient peoples with which the conclusion of a peace or an alliance was usually accompanied, such as the pouring of libations, the offering of sacrifices, and the invocation of the deities to witness the transaction.”⁹² As discussed above, the negotiation of treaties 1 to 11 often involved Indigenous legal and spiritual protocols, including smoking the pipe to invoke the Creator into the treaties, which indicates that treaties 1 to 11 followed many of the international requirements to conclude a treaty.

While calling something a treaty is not sufficient to make it a treaty in international law, “treaty” is a legal term of art meant to connote a binding agreement between parties, and, in fact, the term was used for more important acts (as opposed to the term “convention,” which was for less

important acts).⁹³ McNair asserted that the term “treaty” is usually “reserved for the more solemn agreements such as treaties of peace, alliance, neutrality, arbitration.”⁹⁴ It does seem that the only justification for not recognizing the international character of Indigenous-Crown treaties is entrenched in racism, the belief that Indigenous peoples are “fierce savages whose occupation is war.”⁹⁵ Against the background of this shift in international law toward recognizing the essential peoplehood of Indigenous peoples, denouncing racist doctrines and accepting the international character of Indigenous-Crown treaties, the next section discusses the international law on interpreting treaties and the Canadian jurisprudence.

International Law on Interpreting Treaties

Much law exists on interpreting treaties. The easiest place to turn to understand the international rules on treaties is the Vienna Convention, which was concluded in 1969.⁹⁶ The Vienna Convention codified much of the existing international treaty law, which was mostly customary international law at the time. Even though the Vienna Convention’s application is restricted to treaties between states and even though it does not apply retroactively, many of the interpretative principles existed before the convention. The Vienna Convention is referenced here to the extent that it represents broader principles of international treaty law that can be used to guide the discussion on interpreting treaties 1 to 11.

The preamble of the Vienna Convention sets out the pillars of treaty law: free consent, good faith and *pacta sunt servanda*.⁹⁷ *Pacta sunt servanda* is also affirmed in article 26: “Every treaty in force is binding upon the parties to it and must be

87 McNair, *supra* note 82 at 6.

88 Samuel B Crandall, *Treaties, Their Making and Enforcement*, 2nd ed (Washington, DC: John Byrne & Company, 1916) at 3.

89 McNair, *supra* note 82 at 7.

90 Crandall, *supra* note 88 at 5.

91 *Ibid* at 9.

92 *Ibid*.

93 John Westlake, *International Law*, 2nd ed (Cambridge, UK: University Press, 1910) at 290, cited in Crandall, *supra* note 88 at 7.

94 McNair, *supra* note 82 at 22.

95 *Johnson v McIntosh*, 21 US (8 Wheat) 543 at 590 (1823).

96 *Vienna Convention*, *supra* note 1.

97 *Ibid*, Preamble.

performed by them in good faith.” It is recognized that “the legal duty of parties to perform the treaty in good faith necessarily includes the good faith interpretation of the respective treaty obligations.”⁹⁸ Article 26 includes the “duty not to defeat the object and purpose of a treaty.”⁹⁹ The preamble encourages the peaceful resolution of treaty disputes. These are the guiding principles that influence the interpretation of all treaties.

The Vienna Convention contains three main articles related to interpreting treaties. Article 31 sets out that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” This provision contains the components of good faith and ordinary meaning, as determined by the specific context of the treaty.¹⁰⁰ This article reflects existing customary international law and generally accepted principles drawn from international judicial and arbitral practice developed since the late nineteenth century.¹⁰¹ The textual interpretation is to focus on the natural and ordinary meaning.¹⁰² Through this process, the goal is to give “effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances.”¹⁰³ However, it should be noted that this ordinary meaning is merely a starting point for interpretation, and “cannot be allowed to obstruct the essential quest in the application of treaties, namely to search for the real intention of the contracting parties.”¹⁰⁴ Interpreting treaties 1 to 11 necessitates identifying the intention of the parties at the time the treaty was concluded, including the actual promises made and agreements reached.

This textual reading should not be done in the abstract, but should take “into account as context other provisions of the same treaty and provisions of similar treaties, considering the manner in which a treaty has been applied, the historical development of the particular area of

law, the nature and purpose of treaty clauses, the supplementary value of preparatory work or the harmonization of different language versions of a treaty.”¹⁰⁵ The Harvard Draft Convention on the Law of Treaties also emphasized that interpretation should achieve the “general purpose which the treaty is tended to serve,” which was determined in part by considering the “historical background of the treaty, *travaux préparatoires*...the circumstances of the parties at the time the treaty was entered into...and the conditions prevailing at the time interpretation is being made.”¹⁰⁶ Applying these principles to treaties 1 to 11 means that interpretation must not be limited to the text, but must take into consideration the broader context in which the treaties were negotiated.

Interpretation is not limited to the past agreement, but can also take into account the subsequent or current consensus of the parties.¹⁰⁷ While there is a general preference for interpreting treaties according to the intention of the parties at the time the treaty was concluded, the dynamic approach to interpretation is an exception that is used when the parties would have expected the terms to change through time.¹⁰⁸ Interpreting treaties 1 to 11 in a dynamic fashion would permit an evolution of the promises for the current modern economic, social and cultural realities.

However, this textual approach is limited when the agreement is not written, or, at least, if not all the agreement is contained within the written text.¹⁰⁹ This is where the second provision regarding interpreting treaties in the Vienna Convention in article 32 may be useful. Article 32 deals with ambiguities that may remain after the methods laid out in article 31 are used, or any manifestly absurd or unreasonable result they might cause. This provision allows for materials outside the treaty to be considered in the interpretation of the treaty: “any material that was not *stricto sensu* part of the negotiating process, but played a role because it covers the substance of the treaty and the negotiators were able to refer to

98 Dorr & Schmalenbach, *supra* note 62 at 445.

99 *Ibid* at 446.

100 *Ibid* at 541.

101 *Ibid* at 522.

102 *Ibid* at 527.

103 McNair, *supra* note 82 at 365.

104 *Ibid* at 366.

105 Dorr & Schmalenbach, *supra* note 62 at 526.

106 Harvard Research on International Law, *Draft Convention on the Law of Treaties* (1935) 29 AJIL Supp 657 at 661.

107 *Vienna Convention*, *supra* note 1.

108 Dorr & Schmalenbach, *supra* note 62 at 534.

109 Paul Reuter, *Introduction to the Law of Treaties* (London, UK: Pinter Publishers, 1989) at 74.

it, can thus be introduced into the process of interpretation as other 'supplementary means.'¹¹⁰

When interpreting treaties, outside material may be considered, but it "must directly relate to the treaty under consideration, it must be part of its negotiation process and purport to shed light on its substance."¹¹¹ There are several factors that are relevant to determining whether external materials are relevant. These include "its cogency, its accessibility, its direct relevance for the treaty terms at issue, the consistency with other means of interpretation...the number of parties involved in the evolution of the particular material...the more the material actually reflects a growing agreement, even a common intention of the negotiating parties, the higher its interpretative value will be."¹¹²

This provision is useful as it allows for evidence beyond the text of treaties 1 to 11, including the oral promises, to be used in interpreting the treaties and in ascertaining the true spirit and intent of the treaties. The rule on supplemental means of interpretation works with the rule of liberal construction, which is connected to the idea that the parties must act in good faith in applying the treaty.¹¹³ A final consideration is article 33 of the Vienna Convention, which relates to multilingual treaties. This is potentially relevant to treaties 1 to 11 because, while the written texts were in English, there were Indigenous languages, laws and protocols involved in concluding the treaties. The general principle is that neither language is superior to the other.¹¹⁴ Where there is a divergence between the two texts, "it is permissible to interpret one text by reference to another."¹¹⁵ This means that the Indigenous perspective on the treaties that is found in oral histories must be used to determine the scope of treaties.

Following this overview of international treaty interpretation principles, the next consideration is how Canadian jurisprudence on interpreting treaties measures up. The different understandings of treaties have led to disputes, which Canadian courts have sought to resolve by interpreting

the treaties. The RCAP noted that "the original meaning — or, as it is often described, the spirit and intent — of treaties has become obscure."¹¹⁶ The RCAP found that "the policies of the government of Canada, over time, ignored and marginalized the treaties, despite the continued insistence of treaty nations that the treaties are the key to all aspects of the relationship."¹¹⁷ Many First Nations contend that the Crown has failed to uphold its treaty obligations. Thus, despite the development of interpretative principles by the Canadian courts, many treaty disputes remain. This is where international treaty law may be of assistance.

Early on in its jurisprudence, the SCC held that "while it may be helpful in some instances to analogize the principles of international treaty law to Indian treaties, these principles are not determinative. An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law."¹¹⁸ In support of this proposition, the SCC cited earlier decisions, including *R v Francis*, where the court was asked to determine whether the Indian Act¹¹⁹ provisions related to treaties extended to the Jay Treaty.¹²⁰ Referring to section 87 of the Indian Act, the court decided that "'treaty' in this section does not extend to an international treaty, such as the *Jay Treaty* but only to treaties with Indians which are mentioned throughout the statute."¹²¹ Now, perhaps, the idea that Indian treaties are not international treaties can be extrapolated from the definition provided by the court: "A treaty is primarily an executive act establishing relationships between what are recognized as two or more independent states acting in sovereign capacities."¹²² However, given the developments in international law described above, the presumption that treaties 1 to 11 are not international treaties, as well as the application of the court's interpretative principles, needs to be revisited.

The SCC developed a number of principles to assist in treaty interpretation on the basis that

110 Dorr & Schmalenbach, *supra* note 62 at 580.

111 Dorr & Schmalenbach, *supra* note 62.

112 *Ibid* at 577.

113 McNair, *supra* note 82 at 385.

114 *Ibid* at 432.

115 *Ibid* at 433.

116 RCAP, "Restructuring", *supra* note 2 at 11.

117 *Ibid* at 10.

118 Simon, *supra* note 4 at para 33.

119 *Indian Act*, RSC 1985, c I-5.

120 *Francis v The Queen*, [1956] SCR 618.

121 *Ibid* at 631.

122 *Ibid* at 625.

new rules were necessary because international treaty law was not determinative. Many of these rules align with the international treaty interpretation rules discussed above. In *R v Marshall*, Justice McLachlin (as she then was) summarized the principles developed by the court:

1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation.
2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories.
3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed.
4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed.
5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties.
6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time.
7. A technical or contractual interpretation of treaty wording should be avoided.
8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic.
9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context [citations omitted].¹²³

¹²³ *R v Marshall*, [1999] 3 SCR 456 at para 78 [*Marshall*], citing *R v Sundown*, [1999] 1 SCR 393 at paras 24, 32; *R v Badger*, [1996] 1 SCR 771 at paras 41, 52, 53, 76, 78 [*Badger*]; *R v Sioui*, [1990] 1 SCR 1025 at 1068–69, 1035, 1043; *Simon*, *supra* note 4 at 402, 404; *R v Horseman*, [1990] 1 SCR 901 at 907–08 [*Horseman*]; *Nowegijick v The Queen*, [1983] 1 SCR 29 at 36.

In addition, the SCC clearly stated that “where a treaty was concluded verbally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written terms.”¹²⁴ The SCC was particularly concerned with balancing Indigenous and Crown perspectives on the terms of the treaties, but the court warned that liberal interpretations and the inclusion of Indigenous peoples' perspectives should not “be confused with a vague sense of after-the-fact largesse.”¹²⁵ To this end, the court did permit extrinsic evidence where an ambiguity exists.¹²⁶ These principles, in and of themselves, do not contradict international treaty law, and, in fact, they may accord with international treaty law. Principles that relate to extrinsic evidence and identifying the original intent are particularly well aligned with international treaty law. However, the court's application of them in several cases may be contrary to international treaty law.

While it appears that the SCC has developed “liberal and generous” rules of interpretation, in practice, the interpretation of historic treaties has led to inequitable results unaligned with the understandings of Indigenous peoples.¹²⁷ Leonard Rotman notes that “[i]n a number of situations courts have explicitly affirmed the use of these principles, yet subsequently abandoned or ignored them altogether in their judgments.”¹²⁸ One of the dominant reasons these principles have failed to address shortcomings in the written text is an implicit belief in European cultural superiority (sometimes disguised in phrases such as those in which Indigenous peoples are portrayed as not understanding the terms of the treaty), which translates to the failure to give full and equal weight to Indigenous perspectives on the terms of the treaties.¹²⁹

¹²⁴ *Marshall*, *supra* note 123 at para 12.

¹²⁵ *Ibid* at para 14.

¹²⁶ *R v Horse*, [1988] 1 SCR 187 at para 35 [*Horse*]; Gordon Christie, “Justifying Principles of Treaty Interpretation” (2000) 26 *Queen's LJ* 143 at 192.

¹²⁷ See Christie, *supra* note 126 at 187; Claire Hunter, “New Justification for an Old Approach: In Defence of Characterizing First Nations Treaties as Contracts” (2004) 62 *UT Fac L Rev* 61 at 64; Rotman, *supra* note 14 at 25.

¹²⁸ Rotman, *supra* note 14 at 11.

¹²⁹ Christie, *supra* note 126 at 196.

One example where the SCC failed to apply these principles and acted contrary to international treaty law was in *R v Horse*, where the issue was whether the terms of Treaty 6 included the right to hunt for food without permission on privately owned land, contrary to the Saskatchewan Wildlife Act.¹³⁰ The appellants argued that they could hunt on the privately owned land as per the “joint use” principle, where “upon the settlement of these lands, the Indian right to hunt was not extinguished but rather the lands came to be used jointly by the Indian and the settler.”¹³¹ To support their argument, the appellants wished to introduce the transcripts of the negotiations surrounding Treaty 6 written by Alexander Morris.¹³² Justice Estey, for the majority, stated that there had to be ambiguity in the text in order to accept extrinsic evidence, and the terms of Treaty 6 were not ambiguous.¹³³ He also found that extrinsic evidence could not “be invoked where the result would be to alter the terms of a document by adding to or subtracting from the written agreement.”¹³⁴ This decision is troubling as it demonstrates the court’s “willingness to accept the written terms of Aboriginal treaties at face value without considering the special circumstances under which treaties were negotiated and signed.”¹³⁵ Power imbalances, language barriers and cultural differences were dismissed as having no effect on the primacy of the written text.¹³⁶ The court’s failure to appreciate the limitations of the written text and the manner in which the court clearly preferred one side’s interpretation of the treaty over the other’s were contrary to international treaty law, as discussed above.

The SCC’s application of these principles was very limited in *Horseman*, where the court had to interpret Treaty 8 to determine whether the commercial right to hunt, provided for by the treaty, had been extinguished by the Alberta Natural Resources Transfer Agreement, 1930.¹³⁷ The SCC found that while an interpretation of Treaty 8 “leads inevitably to the conclusion that the hunting

rights reserved by the treaty included hunting for commercial purposes,” the Natural Resources Transfer Agreement of 1930¹³⁸ effectively modified those rights.¹³⁹ Justice Cory, for the majority, noted that “[a]lthough the agreement did take away the right to hunt commercially, the nature of the right to hunt for food was substantially enlarged.”¹⁴⁰ The court accepted that while “it might well be politically and morally unacceptable in today’s climate to take such a step as that set out in the 1930 agreement without consultation with and concurrence of the native peoples affected,” this modification of the treaty occurred prior to constitutionalizing Aboriginal and treaty rights in section 35 of the Constitution Act, 1982.¹⁴¹ Thus, the power of the “federal government to unilaterally make such a modification is unquestioned.”¹⁴² It is a general principle of international treaty law that treaties can only be modified or amended by agreement of the parties.¹⁴³ Under international treaty law, one party is not permitted to unilaterally change the terms of the treaty. This would also be contrary to the principles of good faith.

A final issue with the SCC’s interpretation of treaties arises from the court’s decision in *R v Badger*, where the court had to determine whether the Crown could interfere with the treaty right to hunt within the Treaty 8 rights.¹⁴⁴ This was the first opportunity in 14 years for the court to examine the impact of section 35 of the Constitution Act, 1982 specifically on treaty issues.¹⁴⁵ Three treaty Indians “were hunting for food upon lands falling within the tracts surrendered to Canada by the Treaty.”¹⁴⁶ Justice Cory found that Treaty 8 contained two limits on the right to hunt: a geographic limit and a limit contained in the government’s ability to regulate for conservation purposes.¹⁴⁷

¹³⁰ *The Wildlife Act, 1998*, SS 1998, c W-13.12; *Horse*, *supra* note 126.

¹³¹ *Horse*, *supra* note 126 at para 31.

¹³² *Ibid.*

¹³³ *Ibid* at para 35.

¹³⁴ *Ibid.*

¹³⁵ *Rotman*, *supra* note 14 at 46.

¹³⁶ *Ibid.*

¹³⁷ *Horseman*, *supra* note 123 at para 40.

¹³⁸ *Alberta Natural Resources Act, SA 1930*, c 21.

¹³⁹ *Horseman*, *supra* note 123 at para 52.

¹⁴⁰ *Ibid* at para 65.

¹⁴¹ *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11; *Horseman*, *supra* note 123 at 67.

¹⁴² *Horseman*, *supra* note 123 at 67.

¹⁴³ *Vienna Convention*, *supra* note 1, art 39.

¹⁴⁴ *Christie*, *supra* note 126 at 167.

¹⁴⁵ *Ibid* at 166.

¹⁴⁶ *Badger*, *supra* note 123 at para 22.

¹⁴⁷ *Ibid* at para 40.

The SCC found that one of the complainants had a treaty right to hunt on the relevant parcel of land, as it was not being used, and concluded that the right to hunt could still be “circumscribed by a form of government regulation which is permitted under the Treaty.”¹⁴⁸ Justice Cory held that the infringement of treaty rights should meet the same test for justification as the test for limiting Aboriginal rights that was set out in *R v Sparrow*.¹⁴⁹ This is another example where the SCC permitted the government to change the terms of the treaty without the consent of the government’s treaty partner. A justified infringement could also be viewed as a failure of the Crown to uphold its treaty obligations, which is against the fundamental treaty principles. This is completely contrary to international treaty law, as discussed above.

The unilateral modification of treaties, the failure to fulfill obligations in the treaty and the infringement of treaty rights all may constitute breaches of a treaty under international law. It is important to note that an arm of the government — executive, legislative, judicial or administrative — can breach a treaty.¹⁵⁰ If a state is found to have breached a treaty, the other party is entitled to a remedy, which can include “a right of unilateral abrogation, retaliatory suspension of performance of corresponding provision of a treaty; a right to receive reparation and to institute arbitral or judicial proceedings; a right to take certain non-forcible measures to secure reparation; a right to invoke sanctions, if any, stipulated in the treaty; [and] a right in certain circumstances to prosecute individuals.”¹⁵¹ However, it is beyond the scope of this paper to further consider how these remedies may apply to breaches of treaties 1 to 11.

148 *Ibid* at para 68.

149 *R v Sparrow*, [1990] 1 SCR 1075; *Badger*, *supra* note 123 at para 73.

150 *McNair*, *supra* note 82 at 550.

151 *Ibid* at 540.

Conclusion

This paper has attempted to demonstrate that there are plausible arguments to be made that treaties 1 to 11 met the standard for international treaties when they were concluded. However, even if that supposition is not accepted, there are strong reasons why the international character of the treaties should be recognized today, consistently with the UN Declaration and the American Declaration. This recognition has been called for since at least the RCAP.¹⁵²

Moving forward, this means that Canadian jurisprudence on interpreting treaties needs to be revisited in light of international treaty law. Potentially, the most radical implication could be that Canadian domestic courts no longer have jurisdiction to deal with conflicts that arise between the treaty partners. It might be more appropriate for an international dispute mechanism to be developed, and there have been such propositions in the past.

It is recognized that national courts will often be engaged in the interpretation of treaties.¹⁵³ International law does permit state parties to designate domestic courts to interpret treaties, but if the court commits an error or fails to give effect to the treaty, the court’s judgment may be part of the breach of a treaty.¹⁵⁴ The question is more likely one of what rules apply. If Canadian courts continue to interpret the treaties, that does not mean that domestic law applies: “the fact that different entities are called upon to interpret the treaty does not in principle affect the manner in which the interpretation must be performed.”¹⁵⁵ However, it is important to note the issue of bias or the competence of Canadian judges to fully appreciate Indigenous peoples’ perspectives on the treaty. Further, the UN Declaration notes that treaties are of international concern, which may mean international oversight in the future.

Assuming that Canadian courts maintain jurisdiction, there are several changes that need to be made in their approach to interpreting

152 RCAP, “Restructuring”, *supra* note 2 at 11.

153 *Dorr & Schmalenbach*, *supra* note 62 at 530.

154 *McNair*, *supra* note 82 at 345–46.

155 *Reuter*, *supra* note 109 at 74.

the treaties. Specifically, the SCC's decision to allow the Crown to unilaterally modify the terms of the treaties must be revisited. Finally, a reconsideration of the "justified infringement" analysis, as developed by the courts, is also needed, as this analysis is similar to a unilateral modification of the terms of the treaty.

Part of the recognition of the international character of treaties 1 to 11 includes the idea of "treaty federalism." Under a treaty federalism approach, Indigenous peoples are not fully subsumed within the Canadian system, but remain self-determining: "each Aboriginal nation and the Crown is bound only by what it has agreed to in the treaties."¹⁵⁶ This approach is in line with recognizing the international character of treaties because it presumes that "each First Nation began its relationship with the imperial Crown as an independent power in international law, exercising comprehensive authority over the territory and people."¹⁵⁷ Henderson argues that "any Crown authority over First Nations is limited to the actual scope of their treaty delegations. If no authority or power is delegated to the Crown, this power must be interpreted as reserved to First Nations, respectively, and is protected by prerogative rights and the common law since neither can extinguish a foreign legal system."¹⁵⁸ Recognizing the international character of treaties 1 to 11 and promoting treaty federalism could renew the original nation-to-nation relationship between Indigenous peoples and the Crown, as promised by the current federal government.

¹⁵⁶ Henderson, "Empowering", *supra* note 31 at 269.

¹⁵⁷ *Ibid* at 251.

¹⁵⁸ *Ibid* at 268.


ON CANADA'S PAST, PRESENT AND FUTURE
IN INTERNATIONAL LAW

REFLECTIONS

RÉFLEXIONS

SUR LE PASSÉ, LE PRÉSENT ET L'AVENIR DU CANADA
EN MATIÈRE DE DROIT INTERNATIONAL

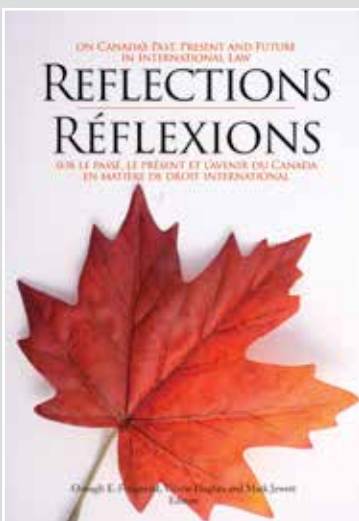
Oonagh E. Fitzgerald, Valerie Hughes and Mark Jewett,
Editors



Marking 150 years since Confederation provides an opportunity for Canadian international law practitioners and scholars to reflect on Canada's rich history in international law and governance, where we find ourselves today in the community of nations, and how we might help shape a future in which Canada's rules-based and progressive approach to international law gains ascendancy. These essays, each written in the official language chosen by the authors, provide a critical perspective on Canada's past and present in international law, survey the challenges that lie before us and offer renewed focus for Canada's pursuit of global justice and the rule of law.

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