Treaty interpretation: A tale of two stories

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This paper is a re-worked version of a paper prepared in the context of a Graduate Directed Studies Course on Indigenous Perspectives on Treaties with Professor John Borrows at the University of Victoria. It is also a draft chapter of my LLM Thesis in which I argue that the interpretation and implementation of Treaty One (1871) cannot take place without consideration of the Anishinabe perspective. This perspective is infused with historical, political and geographic context, as well as Anishinabe substantive and procedural law which informed the treaty negotiations.

Our genesis stories tell us that we have been here since out Creator created us. We have lived on our Mother the Earth for all of our time. This relationship between our Creator, our Mother, all other life forms, and ourselves forms the basis of all that we know to be true. This relationship forms the basis of our law.[1]

[1] Harold Johnson, *Two Families: Treaties and Government* (Saskatoon: Purich Publishing, 2007) at 16 [*Johnson*].

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I. Introduction

Since the signing of Treaty 1 in 1871, the Crown and the Anishinabe[2] have disputed the terms, understandings and obligations that arise out of the treaty. One hundred and forty years later, treaty implementation continues to be the subject of litigation and political tension. After seven generations, attempts to reconcile Crown and Anishinabe understandings of the treaty, to give effect to the treaty relationship and the spirit and intent of the treaties, have not been successful. Yet, treaties are the foundation for the Anishinabe-Crown relationship and the non-indigenous presence in Manitoba and in Western-Canada.

> The treaties are an integral part of the fabric of our Constitution. They form the bedrock foundation of the relationship between the Treaty First Nations and the Government of Canada. It is from the treaties that all things must flow in the treaty relationship. They represent the common intersection both historically and politically between nations. They created a relationship which is perpetual and unalterable in its foundation principles. The treaties are the basis for a continuous intergovernmental relationship.[3]

The general dissatisfaction with treaty implementation is rooted in the misunderstanding of interpretation. This misunderstanding results in large part from the lack of political will on the part of the Crown and the approach the Canadian Canadian courts have taken to treaty interpretation. According to the Supreme Court of Canada, neither contract rules nor international conventions are directly applicable to treaty interpretation. A *sui generis* approach has been applied, given the particular nature of treaties: "[t]reaties are sacred promises and the Crown's honour requires the Court to assume that the Crown intended to fulfill its promises."[4] Treaties are not "an empty shell."[5] The fundamental premise of treaty interpretation is articulated in the Nowegijick principle: "ambiguities in the interpretation of treaties and statutes relating to Indians are to be resolved in favour of the Indians and

[2] Anishinabe, which means "the people" in Anishinabemowin (Anishinabe language), is the terminology used by some Indigenous peoples also referred to as Ojibwa(y) or Chippewa.
[3] Office of the Treaty Commissioner, *Treaty Implementation: Fulfilling the Covenant* (Saskatoon: Office of the Treaty Commissioner, 2007) at vii [*Treaty Commissioner*].
[4] *R. v. Badger*, [1996] 1 S.C.R. 771 at para 47 [Badger].
[5] *R. v. Marshall,* [1999] 3 S.C.R. 456 at 52 [Marshall No.1).

aboriginal understandings of words and corresponding legal concepts in Indian treaties are to be preferred over more legalistic and technical constructions."

> The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing.[6]

The court has developed a set of interpretive rules, specific to treaty interpretation, that are largely modeled on statutory canons of construction. In my view, the application of treaty interpretation principles have not resulted in a complete understanding of the treaties and their implications. If anything, the Crown perspective has been given more emphasis and indigenous perspectives have been set aside. In order to understand the indigenous perspective on the treaty, the indigenous laws that formed part of the treaty agreement must be understood and valued.

This paper will canvas the Canadian legal system's approach to treaty interpretation in the context of historic treaties[7] and consider how these might be enhanced by the use of Anishinabe treaty interpretation principles. First, I will consider the principles of statutory construction which is the framework that is applied to treaty interpretation. Second, I will look at the Supreme Court of Canada's treatment of the canons of treaty interpretation, modified and applied over the years. Third, I will consider the Anishinabe legal perspective in relation to treaty and suggest some Anishinabe legal principles that may apply to the interpretation of Treaty One. In my view, there is room for indigenous law to be considered within the legal context that would inform the contextual analysis of a statute or a treaty. Although my project is focused on the negotiations of Treaty One specifically and I argue that

[6] *Badger*, *supra* note 4 at 52.

[7] Although many of the interpretive principles apply equally to historic and modern treaties, my focus is on the historic treaties. I argue in my work that we need to better understand the original treaty perspectives and laws that informed treaty making in order to honour the treaty relationship in the modern context.

interpretation of that treaty should take into consideration the Anishinbabe perspective and laws, this argument may be applied similarly to other treaties and in the context of other indigenous legal traditions, with appropriate modifications.

II. The Canadian "modern approach" to statutory construction

Statutory interpretation in Canada today follows a liberal interpretation model. As indicated by the Canadian *Interpretation Act*, [8] strict interpretation has given way to liberal interpretation, in which the application of legislation, liberally construed, is favoured. In the eyes of the Supreme Court of Canada, the preferred method of statutory interpretation, known as the modern principle, is that which was articulated by Dreidger:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[9]

Prior to the articulation and acceptance of the *modern approach*, statutory interpretation was founded primarily on the textual approach.[10] Statues were interpreted according to their plain wording and ordinary meaning. Where ambiguity or uncertainty arose, interpretation would draw upon principles of statutory construction. The textual approach yields a lot of faith in the perceptions of the judges interpreting the statute, the legislators and the drafters. It presumes: knowledge, linguistic and drafting competence, straightforward expression, orderly and economical arrangement, consistent expression and coherence.[11] It also falsely presumes that the interpreter will be impersonal and objective.

[8] *Interpretation Act*, R.S.C. 1985, c. I-21.
[9] As first articulated in Elmer A. Dreidger, *The Construction of Statutes* (Toronto: Butterworths, 1974), at p.67. It is the preferred approach of the SCC (as decided in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27.
[10] The textual analysis is based on the following maxims:
a) Ordinary meaning
b) Ejusdem generis (of the same kind) – list of words given same meaning
c) Expressio unius est exclusion alterius (the mention of one excludes the others)
d) In pari materia (same matter or subject) – use other legislation to englighten
e) Noscitur a sociis – determine by reference to the rest of the statute
f) Reddendo singula singulis (refers to the last)
g) Generalia specialibus non derogant (general does not detract from the specific) – new law should not be interpreted as repealing old law (unless explicit)
[11] Ruth Sullivan, *Sullivan on the Construction of Statutes: Fifth Edition* (Markham: LexisNexis Canada Inc., 2008) at Chapter 7 [Sullivan].

Dreidger found that words in isolation are virtually meaningless.[12] "The meaning of a word depends on the context in which it is used."[13] The modern principle is also referred to as the "words-in-total-context approach". Context is therefore a key element of the modern approach to statutory interpretation. Context includes the external context which "includes the historical setting in which a provision was enacted – the relevant social economic and legal conditions existing at the time of enactment."

> Under Driedger's modern principle, the words to be interpreted must be looked at in their total context. This includes not only the Act as a whole and the statute book as a whole but also the legal context, consisting of constitutional law, common law and international law, and the external context, consisting of the conditions existing when the legislation was first enacted and… the conditions in which it operates from time to time. These contexts operate at every stage of interpretation. They influence the intuitive process by which ordinary meaning is established, and they are relied on both consciously and subconsciously in textual, purposive and consequential analysis.[14]

In Sullivan's list of contextual elements above, the legal context is restricted to constitutional law, common law and international law. The legal context, as applied to treaty interpretation, could be argued to incorporate both principles of common law and Anishinabe law as applicable to the interpretation of the Treaty. I agree with Dawnis Kennedy, an Anishinabe PhD candidate at the University of Toronto, who points out the Supreme Court of Canada's demonstrated unwillingness to consider indigenous laws within the aboriginal and treaty rights analysis.[15]

The purposive analysis[16] employed in statutory interpretation is a cornerstone of the modern approach and is now relied on even in cases where there is no ambiguity. "Today purposive analysis is a regular part of interpretation, to be relied on in every case, not just those in which there is ambiguity or absurdity."[17] The modern approach, although having a solid purposive approach is still highly weighted

[12] E.A. Dreidger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 2-4
[13] See *Sullivan, supra* note 11 at 353.
[14] *Sullivan, supra* note 11 at 358
[15] Dawnis Kennedy, "Reconcilliation without Respect? Section 35 and Indigenous Legal Orders", in *Indigenous Legal Traditions, Law Commission of Canada* (Ed.) (Vancouver: UBC Press, 2007) [Kennedy].
[16] The purpose of legislation can be established directly (legislative text, legislative history, other authoritative sources) or indirectly (context).
[17] *Sullivan, supra* note 11 at 257

towards the written text as a first locus and the legislator's intent as a secondary point of analysis.

According to Sullivan, the dimensions of the modern approach can be summarized as:

- textual meaning
- legislative intent (Dreidger: express, implied, presumed, declared)
- compliance with established legal norms (part of the "entire context" and intention of Parliament)

From a normativist perspective, "extra-textual norms play a significant role in determining the meaning and purpose of legislation, and they acknowledge the legitimacy of relying on such norms to test the acceptability of interpretations."[18] Economic, social, political and diplomatic considerations infuse statutory interpretation.

> Most judges would identify themselves as textualists or intentionalists; some few might accept the normativist label. In practice, however, nearly all judges are pragmatists. When confronted with an interpretation problem, they form impressions of what the statute says, what the legislature intended and what would be a good result having regard to relevant legal norms. These impressions are grounded both in the submissions of counsel and in judges' own knowledge and experience. In deciding how a text should be interpreted, they take all these impressions into account, giving each the weight that seems appropriate in the circumstances.
>
> …
>
> Judges are concerned by violations of rationality, coherence, fairness and other legal norms. The weight attaching to this factor depends on considerations such as:
>
> - the cultural importance of the norm engaged
> - its degree of recognition and protection in law
> - the seriousness of the violation
> - the circumstances and possible reasons for the violation
> - the weight of competing norms[19]

One of the foundational principles of statutory construction is parliamentary sovereignty. As applied, it is the assumption that legislatures create law and courts apply law. The statutory interpretation framework, employing textual analysis, refined by a purposive and contextual analysis as described, has been selected by the courts as the interpretive approach for treaties, as will be seen below. Although

[18] *Sullivan, supra* note 11 at 7
[19] *Sullivan, supra* note 11 at 8

the interpretation of treaties has been refined over the years, I view the interpretation of treaties by Canadian courts according to the canons of construction, to be weighted in favour of the Crown. The deference to the legislator in statutory interpretation is carried over in deference to the Crown position or to other "extra-textual" norms in treaty interpretation.

III. Judicial treaty interpretation: three generations[20]

Canadian Courts have struggled with treaty interpretation for three generations. Faced with various possible common law approaches under which to consider treaties, including international law, contract law and statutory construction, Canadian courts found that treaties with the Indians were not international treaties, and that international law principles, although they are helpful by analogy, are not determinative.[21] The strict application of rules of contractual obligations were also discarded. "Treaties may appear to be no more than contract. Yet they are far more. They are a solemn exchange of promises made by the Crown and various First Nations. They often formed the basis for peace and the expansion of European settlement."[22]

Given the unique character of the treaty agreements and their public nature, the court's approach was to develop a "new" and "*sui generis*" set of interpretive rules for treaties.[23] The Supreme Court of Canada found that "[t]he words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction."[24]

> 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. 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.[25]

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[20] Only in the last three generations, since the case of *White and Bob* has treaty interpretation reached beyond the "four corners" of the written text.

[21] *Francis* v. *The Queen*, [1956] S.C.R. 618 at 631.
Chief Justice Marshall of the US Supreme Court took at different approach in one of the early US treaty cases: "The Constitution, by declaring treaties… to be the supreme law of the land admits their rank (i.e., that of the Indian Tribes) among those powers who are capable of making treaties. The word "treaty" and "nation" are words of our own language… We have applied them to Indians as we have applied them to the other nations of the earth. They are applied in the same sense." *Worcester* v. *State of Georgia*, 31 U.S. 530, 6 Peters 515.

[22] *R. v. Sundown*, [1999] 1 S.C.R. 393 at para 24; see also R. v. *Badger*, [1996], 1 S.C.R. 771 at 76.

[23] *Sullivan, supra* note 11 at 513.

[24] *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 at para 29 [Mikisew Cree].

[25] Leonard R. Rotman, "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence" (1997) 46 U.N.B.L.J. 11-50 at 11.at 20 [Rotman – Taking Aim].

In my view, this sui generis approach taken is not a "new" or "unique" approach: it has adopted the framework of statutory interpretation. As I will show below, this body of treaty interpretation principles has morphed and shifted over the years. The reasonability and appropriateness of adopting the statutory interpretation framework over the international law[26] or contract law[27] models is problematic and motivated by interpretation that favours recognition of the validity of treaties and what the Crown claims to have "acquired" under them. But my purpose today is not to consider or critique this non-application of international law and contract law. Instead, I will discuss how the patchy application of statutory interpretation rules to treaty interpretation is not acceptable to achieve an understanding of the spirit and intent of treaties or to work towards treaty implementation.

The canons of Canadian treaty interpretation have their origin in the *R. v. Taylor and Williams* and *R. v. Nowegijick* cases of the early 1980's. In essence, the interpretive canons include the large, liberal and generous interpretation of treaties, with ambiguities resolved in favour of the aboriginal people, understood as construed by the aboriginal signatories, and interpreted flexibly, with the use of extrinsic evidence. They have been summarized, explained, refined. A compendium of principles governing treaty interpretation were articulated by Justice McLachlin (as she then was) in the *Marshall No.1* decision.[28] In my view, Justice McLachlin's characterization of the principles of treaty interpretation,

[26] For example, one could consider treaty interpretation using international law concepts of territorial sovereignty, vested rights, choice of law, etc.

[27] The law of "agreements or promises" can be distinguished because of the public nature and "relationship basis" of the Treaties but in some ways concepts such as good faith, misunderstanding, intention, mistake, unconsionability, implied terms, *contra proferentum*, as well as remedies such as specific performance and damages could potentially be seen to have application. I will not discuss the merits of applying these principles in the Treaty context.

[28]

> 1. Aboriginal treaties constitute a **unique** type of agreement and attract **special principles of interpretation**: R. v. Sundown, [1999] 1 S.C.R 393, at para. 24; R. v. Badger, [1996] 1 S.C.R. 771, at para. 78; R. v. Sioui, [1990] 1 S.C.R. 1025, at p. 1043; Simon v. The Queen, [1985] 2 S.C.R. 387, at p. 404. See also: J. [Sákéj] Youngblood Henderson, "Interpreting Sui Generis Treaties" (1997), 36 Alta. L. Rev. 46; L. I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the Sparrow Justificatory Test" (1997), 36 Alta. L. Rev. 149.
>
> 2. Treaties should be **liberally construed** and **ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories**: Simon, supra, at p. 402; Sioui, supra, at p. 1035; Badger, supra, at para. 52.

illustrate the adoption of Canadian statutory interpretation principles, morphed to "suit" the aboriginal law context and applied with a high level of deference to Canadian concerns and interests. In addition, I would argue that McLachlin J. has re-characterized some of the principles elaborated in previous SCC cases and cast them in a more conservative light. This is evidenced by the application of the principles in the Marshall No. 1 decision, in a way that limited the extent of a commercial treaty right.

In the majority decision *in Marshall No.1* the Honour of the Crown is given an active role in treaty interpretation and the minority judgment sees it as a "guiding principle".[29] Many recent judgments of the SCC refer to the honour of the Crown but none aptly define or apply it.[30] Although the Supreme

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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**: Sioui, supra, at pp. 1068-69.

4. In searching for the common intention of the parties, the integrity and **honour of the Crown is presumed**: Badger, supra, at para. 41.

5. In determining the signatories' respective understanding and intentions, the court must be **sensitive to the unique cultural and linguistic differences between the parties**: Badger, supra, at paras. 52-54; R. v. Horseman, [1990] 1 S.C.R. 901, at p. 907.

6. The **words of the treaty must be given the sense which they would naturally have held** for the parties at the time: Badger, supra, at paras. 53 et seq.; Nowegijick v. The Queen, [1983] 1 S.C.R. 29, at p. 36.

7. A **technical or contractual interpretation of treaty wording should be avoided**: Badger, supra; Horseman, supra; Nowegijick, supra.

8. While construing the language generously, **courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic**: Badger, supra, at para. 76; Sioui, supra, at p. 1069; Horseman, supra, at p. 908

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: Sundown, supra, at para. 32; Simon, supra, at p. 402.

[29] Leonard R. Rotman, "Marshalling Principles From The Marshall Morass" (2000) 23 Dalhousie L.J. 5 at 28 [Rotman, Marshalling Principles].

[30] *Haida Nation*, *supra* note 28; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550; *Mikisew Cree, supra* note 24; *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220 [Marshall & Bernard]; *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686 [Sappier and Gray], *R. v. Morris*, [2006] 2 S.C.R. 915 [Morris], *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222 [Erminiseskin], *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 [Kapp], *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* 2010 SCC 43 [Rio Tinto], *Beckman v. Little Salmon/Carmacks First Nation* 2010 SCC 53 [Little Salmon Carmacks].

Court has found that the honour of the Crown applies both to treaty making and treaty interpretation,[31] the meaning and substance of the concept of the honour of the Crown remains somewhat of a mystery.

In the following paragraphs, I will build on some of the themes of treaty interpretation in Canadian law, in the context of the consideration of treaties, this "solemn exchange of promises made by the Crown and various First Nations." [32] I will not discuss how the interpretive principles apply to modern day exercise of treaty rights or ancillary rights[33] but will rather consider these principles in the context of the historic interpretation of treaties.

A. Liberal interpretation

The Supreme Court of Canada has found that the wording of the treaties must "be given a just, broad and liberal construction"[34] and "doubtful expressions resolved in favour of the Indians."[35] "It is always assumed that the Crown intends to fulfill its promises… any limitations which restrict the rights of Indians under treaties must be narrowly construed."[36]

In its original articulation, the reason for the resolution in favour of the Indians relates to concern about unequal bargaining power:

> The Courts must not assume that His Majesty's Commissioners were attempting to trick or fool the Indians into signing an agreement under false pretences… ambiguity should be resolved in favour of the Indian.[37]

In a modern context, Sullivan argues that:

> The Aboriginal entitlement to social justice follows from the need to uphold the honour of the Crown in its dealings with Aboriginal peoples. Seen from this perspective, the liberal

[31] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at para 19 [Haida Nation], *Badger, supra* note 4 at para 92; *Marshall No. 1, supra* note 5 at para 49.
[32] *Sundown, supra* note 22 at para 24.
[33] see for example *Sundown, supra* note 22; *R. v. Marshall*, [1999] 3 S.C.R. 533 [Marshall No.2]; *Marshall & Bernard, supra* note 29; *Morris, supra* note 29.
[34] *R. v. Sioui,* [1990] 1 S.C.R. 1025 at 1036.
[35] *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at 36
[36] *Badger, supra*, note 4 at 41.
[37] *R. v. Battisse* (1978), 84 D.L.R. (3d) 377 (Ont. Dist. Ct.).

> construction of legislation relating to Aboriginal peoples is in part an attempt to remedy injustice resulting from the Crown's past failures to live up to its commitments and to discharge its fiduciary responsibilities. From this perspective, there is no justification for treating it as a presumption of last resort.[38]

Although liberal interpretation is held as the standard for treaty interpretation, this maxim is interpreted more conservatively than one would think. The language used by the Court in the *Sioui* case reflects a pre-disposition to the interpretation that furthers euro-centric positions:

> Even a generous interpretation of the document… must be realistic and reflect the intention of both parties, not just that of the Hurons. The Court must choose from among the various possible interpretations of the common intention the one which best reconciles the Huron's interests and that of the **conqueror**.[39] (emphasis added)
>
> The reconciliation adopted by the Court (i) reflected the actual circumstances of the parties relative to each other at the time of the treaty, and (ii) accepted that the reconciliation must be consistent with the objectives of the British – expansion of 'the wealth, resources and influence of Great Britain", 'use of the newly conquered territories', 'the desire of the British conquerors to expand", 'the practical requirements of the British'.[40]

The concept of *resolution in favour of the Indians* has at times been narrowly applied, and restricted primarily to situations where ambiguity arises.[41] For example, in the *Horse*[42] decision, the Court disallowed the use of the minutes of the treaty negotiations in the absence of ambiguity. The *Horse* decision has been set aside, making way for consideration of the cultural and historical context and extrinsic evidence,[43] even in the absence of ambiguity,[44] although how that context is applied to the interpretation of treaties continues to deal primarily with ambiguity. "The use of extrinsic evidence

[38] *Sullivan, supra* note 11 at 513.
[39] *Sioui, supra*, note 33 at 1069.
[40] J. Timothy S. McCabe, *The Law of Treaties Between the Crown and Aboriginal Peoples* (Markham: LexisNexis Canada Inc., 2010) at 241-2 (all quoted from Sioui, supra note X at 1071).
[41] Rotman states: "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. The reason for this approach is that the Crown had opportunities to provide sufficient clarity when it drafted the treaties. 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." *Rotman, Taking Aim, supra* note 25 at 32
[42] *R. v. Horse*, [1988] 1 S.C.R. 187.
[43] including contemporaneous writings, Aboriginal oral history and the subsequent conduct of the parties, as well as the expert opinion evidence of historians and anthropologists. Sullivan, supra note 11 at 512
[44] see Binnie J's judgment in *Marshall No. 1, supra* note 5

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."[45]

Use of extrinsic evidence or "extra-textual evidence" is important in cases where treaties were confirmed orally but where not reduced to writing . Oral portions of treaty are considered to be a part of the treaty:[46]

> . . . if there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty, then such understanding and practice is of assistance in giving content to the term or terms.[47]

The Delgamuukw case speaks at great length on the value of oral history evidence and the adaptation of rules of evidence "in light of the evidentiary difficulties inherent in adjudicating aboriginal claims."[48]

> [T]he laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. [49]

In many cases, including all Marshall cases, oral history evidence was treated as fact not law. In other cases, even where it is just evidence of fact and where the aboriginal perspective would have modified the terms of the treaty, the case went no further than trial.[50] In practice, the words of the treaty continue to be the primary locus of the analysis.[51]

[45] *Rotman, Taking Aim, supra* note 25 at 45
[46] *R. v. Taylor and Williams*, [1981] 3 C.N.L.R. 114 (Ont. C.A.) at 120 [Taylor and Williams].
[47] *Ibid*. at p. 236: cited with approval in Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, at para. 87 [Delgamuukw], and R. v. *Sioui, supra* note 33, at p. 1045.
[48] *Delgamuukw, supra* note 46 at para 82.
[49] *Ibid.* at para 87.
[50] See *Re Paulette* [1976] 2 W.W.R. 193.
[51] Sullivan discusses a similar occurrence in the case of statutory interpretation: the context can be used to "create" ambiguity – often "backsliding" into plain meaning rule. *Sullivan, supra* note 11 at 16.

B. The "not too favourable" era

The Marshall decisions of the late 1990's[52] are characterized by their strong pronouncements on treaty interpretation. Both the majority and minority judgments adopt the same principles of interpretation and began their treaty analysis with the written text of the treaty but arrived at entirely different results.[53] Both Justice Binnie and Justice McLachlin (as she then was) found that:

> 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.[54]

They differ in their application of the principles and the ultimate result in the circumstances, namely whether or not a general commercial treaty right existed. In order to consider all possible intentions, Justice Binnie's majority decision affirms the principles of use of extrinsic evidence to garner the context and the oral terms of treaty.[55]

> Firstly, even in a modern commercial context, extrinsic evidence is available to show that a written document does not include all of the terms of an agreement… Secondly, even in the context of a treaty document that purports to contain all of the terms, this Court has made clear in recent cases that extrinsic evidence of the historical and cultural context of a treaty may be received even absent any ambiguity on the face of the treaty. Thirdly, 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.[56]

Nonetheless, Justice Binnie caveats any openness with this statement: "*generous rules of interpretation should not be confused with a vague sense of after-the-fact largesse*"[57] which may allow for a more restrictive interpretation analysis in future cases.

[52] The Supreme Court of Canada has been criticized for its judicial activism in the Marshall decisions. Following the first decision and political tension around aboriginal fishing, the court issued supplementary reasons, in answer to a motion for reconsideration, a rare occurrence. For more detail on the Marshall decision see Leonard Rotman, Marshalling Principles.
[53] *Marshall No.1, supra* note 5 at paras 1 and 5.
[54] *Ibid.* at 14 and 78.
[55] Note that in this case, the British drafted treaty did not reflect the British drafted minutes. The court is therefore still relying on the British perspective to get the historical context. In my view, this case illustrates the use of extrinsic evidence to further understand the British understanding of the treaty.
[56] *Marshall No. 1, supra* note 5 at paras 10-12.
[57] *Ibid*. at 14.

Justice McLachlin details her two step approach to treaty interpretation, beginning with the written words of the treaty and then moving to the context to determine the "common intention" of the parties.[58] In the result, Justice McLachlin agrees with the trial judge that "it was not within the common intention of the parties that the treaties granted a general right to trade".[59] In Rotman's view: "McLachlin J.'s comments about this treaty indicate that she favoured the British understanding of treaties over and at the direct expense of the Mi'kmaq understanding,"[60] whereas in Binnie's view, "[t]he facts that Britain 'held the pen' was not a justifiable reason for skewing the balance of British and Mi'Kmaq interests in ascertaining the common intention of the parties."[61]

In large part, McLachlin's compendium of principles draws upon Justice Cory's summary of treaty interpretation principles in *Badger*, decided only three years earlier. I note the "watering down" of some of these principles, in particular the shift from Cory's "solemn promises" and "sacred" nature of agreements to McLachlin's "unique agreements" in Marshall. Two years after the Marshall no 1 decision, under her newly formed court, Chief Justice McLachlin re-affirmed in the Mitchell decision[62] that the "unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples" advocated for in Delgamuukw "*does not negate the operation of general evidentiary principles".*[63]

> Evidence advanced in support of aboriginal claims, like the evidence offered in any case, can run the gamut of cogency from the highly compelling to the highly dubious. Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities. Placing "due weight" on the aboriginal perspective, or ensuring its supporting evidence an "equal footing" with more familiar forms of evidence, means precisely what these phrases suggest: <u>equal</u> and <u>due</u> treatment. While the evidence presented by aboriginal claimants should not be undervalued "simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case"

[58] *Ibid*. at 82-83.
[59] *Ibid*. at 91.
[60] *Rotman, Marshalling Principles, supra* note 30 at 14.
[61] *Ibid*. at 24.
[62] Mitchell v. M.N.R., [2001] 1 S.C.R. 911 [Mitchell v. M.N.R.].
[63] *Ibid*. at 38.

> (*Van der Peet*, *supra*, at para. 68), neither should it be artificially strained to carry more weight than it can reasonably support. If this is an obvious proposition, it must nonetheless be stated.[64]

I find McLachlin CJC's comments in the 2005 *Marshall and Bernard* decision, although not in the context of *treaty interpretation* but rather *aboriginal rights* analysis, illuminating in terms of the Supreme Court's general interpretive approach towards section 35 analysis. When considering aboriginal practices, the court requires that they be translated into common law property concepts:

> The Court must consider the pre-sovereignty practice from the perspective of the aboriginal people. But in *translating it to a common law right*, the Court must also consider the European perspective; the nature of the right at common law must be examined to determine whether a particular aboriginal practice fits it. This exercise in translating aboriginal practices to modern rights must not be conducted in a formalistic or narrow way. The Court should take a generous view of the aboriginal practice and should not insist on exact conformity to the precise legal parameters of the common law right. The question is whether the practice corresponds to the core concepts of the legal right claimed.[65] (emphasis added)

This is a marked departure from where the court stood 15 years earlier in *Sundown*:

> Treaty rights, like aboriginal rights, must not be interpreted as if they were common law property rights… Aboriginal and treaty rights cannot be defined in a manner which would accord with common law concepts of title to land or the right to use another's land. Rather, they are the rights of aboriginal people in common with other aboriginal people to participate in certain practices traditionally engaged in by particular aboriginal nations in particular territories.[66]

We can feel the tension in the court… LeBel J.(with Fish J.) in concurring reasons in the *Marshall and Bernard* case refused to consider aboriginal rights simply under the common law property lense:

> In my view, aboriginal conceptions of territoriality, land-use and property should be used to modify and adapt the traditional common law concepts of property in order to develop an occupancy standard that incorporates both the aboriginal and common law approaches.
>
> …
>
> The role of the aboriginal perspective cannot be simply to help in the interpretation of aboriginal practices in order to assess whether they conform to common law concepts of title. The aboriginal perspective shapes the very concept of aboriginal title. "Aboriginal law should not just be received as evidence that Aboriginal peoples did something in the past on a piece of

[64] *Ibid*. at 39.
[65] *Marshall & Bernard*, supra note 29 at para 35.
[66] *Sundown*, supra note 22 at 25.

> land. It is more than evidence: it is actually law…" (John Borrows, "creating and Indigenous Legal Community" (2005), 50 McGill L.J. 153 at 173).[67]

The "not too favourable" interpretation of treaties is further qualified in the *Ermineskin* decision where, Rothstein J. for the Court states that: "ambiguous treaty promises must be interpreted in a manner most favourable to the Aboriginal signatories… does not mean that an interpretation that is favourable but unrealistic is to be selected."[68] We see in these decisions the difficulty that the McLachlin court has with understanding and placing value on indigenous perspectives. Justice McLachlin consistently recalls the importance of common law evidentiary and property principles, which, when combined with restrictive text centered interpretations do not lend themselves well to indigenous legal understandings. A tension exists in cases where the aboriginal perspective, rather than being considered as "favourable" is viewed by the court as "unrealistic". It is a question of differing views at odds with each other and interpreted in a way that is seen by many aboriginal participants as leaning in the favour of non-aboriginal society.

C. "Common intention" explained

What is that Justice McLachlin meant by "finding the common intention" between the parties? Can this be achieved? What type of evidence and consideration of that evidence is required in order to glean these common intentions? In the 2005 Mikisew Cree decision, Justice Binnie, for the court, confirmed the following excerpt from the Badger decision:

> "the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing."[69]

This is a departure from the McLachlin "watered down" list in *Marshall No.1* which had hardened the language of understanding into "common intent". In a further attempt to clarify the "common intent",

[67] *Marshall & Bernard*, supra note 29 at 127 and 130.
[68] *Ermineskin*, supra note 29.
[69] *Mikisew Cree, supra* note 24 at para 29.

Justices Deschamps and Abella, for the majority in *Morris*, explain the *Marshall* decision to mean placing the treaty promises in their historical, political and cultural context.

> The language of the Treaty stating "we are at liberty to hunt over the unoccupied lands" exemplifies the lean and often vague vocabulary of historic treaty promises. McLachlin J., dissenting on other grounds, stated in *R. v. Marshall*, [1999] 3 S.C.R. 456 ("*Marshall No. 1*"), at para. 78, that "[t]he 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". *This means that the promises in the treaty must be placed in their historical, political, and cultural contexts to clarify the common intentions of the parties and the interests they intended to reconcile at the time*.[70] (emphasis added)

As applied in *Morris*, the consideration of the historical, political and cultural contexts, and a move beyond the text of the treaty into the intentions of the parties, resulted in a finding that the intention of a hunting clause as the protection of the Tsartlip way of life.[71]

> It is of the essence that the purpose to which these matters is directed be kept in mind. The Court has made clear that the "bottom line", i.e. the objective of the generous approach and discernment of the historical context, is determination of the intention of the parties at the date of the treaty.[72] (emphasis in original)

I agree with Rotman that: "[i]n striving towards these common intentions, it is not sufficient to look only for any overlap between Crown and Aboriginal perspectives."[73] He argues for consideration of the circumstances and the context leading up to and informing the aboriginal understanding of treaties:

> 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 people's understandings of their terms… 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.[74]

[70] *Morris, supra* note 29 at para 18.
[71] *Ibid*. at para 33: "This evidence reveals that the weapons, means of transportation and illuminating devices used in hunting have become more modern. But changes in method do not change the essential character of the practice, namely, night hunting with illumination. What was preserved by the Treaty and brought within its protection was hunting at night with illuminating devices, not hunting at night with a particular *kind* of weapon and source of illumination. This conclusion is dictated by the common intentions of the parties to the Treaty, as distilled from the context in which the Treaty was entered into. The purpose of the hunting clause was to preserve the traditional Tsartlip way of life, including methods of gathering food. It was, in addition, designed to benefit the settlers, whose interests at the time lay in friendship with the Indian majority on Vancouver Island."
[72] *McCabe, supra* note X at 238.
[73] *Rotman, Taking Aim, supra note 25* at 36.
[74] *Ibid*. at 13.

IV. Interpretation and Understanding

Shorty after the *Badger* decision, Leonard Rotman expressed optimism regarding the interpretive principles and their ability to get at the aboriginal understandings of treaty.

> 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.[75]

Rotman further suggested that "these interpretive principles ought to be recognized as permanent and vital fixtures in Canadian treaty jurisprudence." In an odd foreshadowing of the Marshall No. 1 decision, he distinguished between the articulation of the principles and their application: "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."[76] Rotman's post-Marshall commentary remains optimistic and views the decision as not altering the law of treaty interpretation, but merely giving "practical effects to those interpretative canons. Perhaps the true legacy of the Marshall case lies in its recognition that the spirit and intent, rather than merely the literal terms, of a treaty are worthy of judicial recognition and implementation."[77] I was and am less optimistic than Rotman, especially in light of more recent cases such as *Marshall and Bernard* and *Sappier and Grey*.

As we have seen, the approach to treaty interpretation draws largely on the principles of statutory interpretation. In particular, the rejection of the textual approach and the adoption of the liberal construction premise and the contextual analysis have marked treaty interpretation in the Canadian

[75] *Ibid*. at 23.
[76] *Ibid*. at 11.
[77] *Rotman, Marshalling Principles, supra* note 30 at 46.

legal context. According to Dickson C.J. (dissent) in *Mitchell v. Peguis Indian Band*, the fundamental concern underlying the interpretation principles established in *Nowegijick* is social justice:

> The *Nowegijick* principles must be understood in the context of this Courts' sensitivity to the historical and continuing status of aboriginal peoples in Canadian society… It is Canadian society at large which bears the historical burden of the current situation of native peoples and, as a result, the liberal interpretive approach applies to any statute relating to Indians, even if the relationship thereby affected is a private one. Underlying *Nowegijick* is an appreciation of societal responsibility and a concern with remedying disadvantage, if only in the somewhat marginal context of treaty and statutory interpretation.[78]

The modern approach to statutory interpretation, discussed above, considers the words of the legislation, in their total context. Part of the context consists of the legislator's intent. One could speculate that in the current treaty analysis, the Crown's intent with respect to treaty has morphed into a substitute for the legislator's intent. Privileging the text of the treaty gives undue weight to the Crown perspective and puts the Crown signatory in the privileged position of the "legislator":

> Governments and courts in Canada have historically viewed treaties with Aboriginal peoples from a positivist, literal perspective, while many Aboriginal peoples see treaties as being more holistic and sacred documents.[79]

Further, interpreting the treaty context according to European or Canadian documents further perpetuates the bias in favour of the Crown:

> 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. 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.[80]

This one sided Eurocentric interpretation was acknowledged by Justice Dickson: "To impose an impossible burden of proof would, in effect, render nugatory any right to hunt that a present day… Indian

[78] *Mitchell v. Peguis indian band*, [1990] 2 S.C.R. 85 at para 15.
[79] Thomas Isaac and Kristyn Annis, *Treaty Rights in the Historic Treaties of Canada* (Saskatoon: Native Law Centre University of Saskatchewan, 2010) at p.3.
[80] *Rotman ,Taking Aim, supra* note 25 at 47.

would otherwise be entitled to invoke based on this Treaty." [81] Dickson J. further commented that the 1920's *Syliboy* case[82]: "reflects biases and prejudices of another era in our history. Such language is not longer acceptable in Canadian law and, indeed, is inconsistent with a growing sensitivity to native rights in Canada."[83]

A. Indigenous Understandings of Treaty: Seven Generations of Implementation

In past years, scholars and courts viewed the treaties through theories of vulnerability, confusion about words, technical meanings, misunderstanding and power imbalances. [84] Today, the general view is that looking at the written text of a treaty does not do justice to the complexity of the issues and interactions that existed at the time the treaties were negotiated, yet generally, courts have reverted to the written text as the starting point of the analysis. Many continue to argue that the social and political contexts must be taken into account, including the indigenous perspectives.[85] The unique perspective that indigenous people brought to treaty negotiations, as skilled negotiators and diplomats is widely documented. The treaties were complex diplomatic agreements between nations which rested on existing understandings of laws, politics and trade.

[81] *Simon v. The Queen*, [1985] 2 S.C.R. 387.
[82] (1928), 50 C.C.C. 389, [1929] 1 D.L.R. 307
[83] *Simon, supra* note 80.
I would speculate that Justice Dickson would be fundamentally disappointed with the backwards turn that treaty interpretation has taken in Canadian common law. I wonder how he, having spent most of his life in Manitoba, would feel about how Treaty One - the treaty under which he received benefits and obligations – is being interpreted in Canadian courts today.
[84] 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 in 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 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. *Jones v. Meehan,* 175 U.S. 1 (1899) at 11.
[85] See Janna Promislow, "One Chief, Two Chiefs, Red Chiefs, Blue Chiefs: Newcomer Perspectives on Indigenous Leadership in Rupert's Land and The North-West Territories", in Hamar Foster, Benjamin L. Berger, and A.R. Buck, *The Grand Experiment: Law and Legal Culture in British Settler Societies* (Vancouver: UBC Press, 2009) in which the author moves beyond the Treaty record into the relationships that precede and shape the Treaty. In particular, Promislow looks to the HBC trading practices and their relationships with the indigenous trading partners (including kinship and ceremonial elements, similar to Jean Friesen's work) to illustrate the symbolic acts of recognition that overlapped the fur trade and the treaty negotiations.

> The protocols and ceremonies of this indigenous North American language of diplomacy were rarely European because it was a language grounded in indigenous North American visions of law and peace between different peoples. The hierarchal, feudal symbols of seventeenth- and eighteenth-century European diplomacy simply did not translate well on the North American colonial frontier.[86]

Harold Cardinal suggests that:

> To the Indians of Canada, the treaties represent an Indian Magna Carta. The treaties are important to us, because we entered into these negotiations with faith, with hope for a better life with honour…
>
> …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.[87]

Sidney Harring finds that the Indians had their own reasons and agendas that informed the negotiations, some of which were legal in nature.[88]

> A final source of misunderstanding about the treaties lies in the fact that the relationship created by treaty has meaning and precedent in the laws and way of life of the Indian nations for which there are no equivalents in British or Canadian traditions.[89]

A recent attempt at infusing indigenous law into the interpretation of the numbered treaties is found in Harold Johnson's *Two Families*. Johnson's words are strong and describe the general sentiment amongst indigenous people about the treaty relationship, while reflecting indigenous legal principles. Johnson describes the conflict of laws that arises from the treaty negotiations and suggests that according to Cree law, there is an obligation to *share* in the bounty of the Earth:

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

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[86] Robert Williams Jr., *Linking Arms Together* (New York: Routledge, 1999) at 31.
[87] Harold Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: Hurtig, 1969) at 28-29.
[88] Sidney L. Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1998) at 241.
[89] Canada, Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples*. Volume 1, *Looking Forward Looking Back* (Ottawa: Canada Communication Group, 1996) at 128. http://www.collectionscanada.gc.ca/webarchives/20071115053257/http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html

> The misunderstanding between us, *Kiciwamanwak*, is the difference between the written text of the treaty and our oral histories. If we go to the original paper the treaties are written on, the first thing we notice is that large parts of it were pre-written, with spaces left for the Treaty Commissioner to fill in. These spaces that are filled in include our names and which articles of agricultural equipment would be supplied. The important terms about the relationship with our Mother the Earth were pre-written. Can you, *Kiciwamanwak*, in good conscience, insist upon these terms that were likely not mentioned and, even if they were, not likely understood, and were definitely not negotiated.
>
> The Commissioner's oral promises were different from the written text of the treaties.[90]

Johnson suggests that the relationship of sharing that was forged between the "families" and the Creator at the time of treaty is a covenant[91] that cannot be breached and cannot be voided, regardless of action or inaction:

> The treaties are forever. We cannot change them because the promises were made, not just between your family and mine, but between your family and mine and the Creator. There were three parties at the treaty. When my family adopted your family, we became relatives, and that cannot be undone. A bond far stronger than any contractual obligation holds us together. Your law of contract and treaty allows for breach and remedy. The Creator's law does not allow for any breach whatsoever. Failure to comply had consequences, and no matter how severe the failure, the promise never becomes null and void; the consequences just keep getting greater and greater.[92]

Whether on the indigenous side, or the Crown's side, often the parties have a strained relationship, mostly in relation to the implementation of the Crown's obligations, both in the past and present. It is clear that to date, that "common intention" is difficult to discern from the treaty perspectives because one side of the treaty story is written and given effect and the other is largely ignored. First Nations

[90] Harold Johnson, *Two Families: Treaties and Government* (Saskatoon: Purich Publishing, 2007) at 41-42 [*Johnson*].
[91] *Treaty Commissioner, supra* note 3 at 5: "The treaties with the Crown are sacred covenants, made among three parties – the First Nations and an undivided Crown, as sovereign nations, and the Creator. In their view, a permanent relationship of mutual respect and sharing was thus established. The unwavering conviction of the Treaty First Nations is that the treaties include not only the written texts recorded by the Crown and the oral agreements made at the time of each treaty, but also their very spirit and intent, and that the treaties govern every aspect of their relationship with the Crown, and, through the Crown, with all non-First Nations peoples. In this view, the treaties are holistic in their relevance to all dealings between the Parties and have political, legal and sacred status. It is through these agreements with the Crown that the First Nations gave their consent to sharing their territories with newcomers from overseas and their descendants, and that a unique and eternal relationship between the First Nations and the Crown was forged.
[92] *Johnson, supra* note 95 at 29.

generally view the treaty as a sacred relationship, neither dependent on the written copy, nor formalized in its terms.

> First Nations viewed the "treaties as a series of agreements and renewals that were relationship-based rather than individual agreements that were document-based. Thus, the Aboriginal understanding of treaties included oral promises or collateral representations made during treaty negotiations, not simply the final, written parchment copy. This more inclusive view is often referred to as the "spirit and intent" of the agreement.[93]

B. Drawing on Anishinabe legal principles

The historical record and oral histories are rich with indications of the application of indigenous legal principles to various interactions, amongst indigenous people and in their interactions with others. The application of these normative principles continues in many indigenous communities today. In order to interpret the treaty, I would suggest that Anishinabe ways of understanding, reflective of renewal, respect, responsibility, reciprocity and sharing, which are rooted in Anishinabe laws, are fundamental to viewing Treaty One from the Anishinabe perspective.

Justices Hamilton and Sinclair, Co-Chairs of the Aboriginal Justice Inquiry of Manitoba, found that:

> There were and are Aboriginal laws. There were and continue to be Aboriginal governments with lawmaking powers and with provisions to enforce those laws. There were and are Aboriginal constitutions that are the supreme "law of laws" for some Aboriginal peoples and their nations.[94]

In John Borrows' view, Canada has three legal traditions: common law, civil law and indigenous law, although he acknowledges that this is not a universally held view[95]:

> There is a debate about what constitutes 'law' and whether Indigenous peoples in Canada practiced law prior to European arrival. Some contemporary commentators have said that Indigenous peoples in North America were pre-legal. Those who take this view believe that societies only possess laws if they are declared by some recognized power that is capable of

[93] John Borrows and Leonard R. Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary, 3rd Ed.* (Markham: LexisNexis Canada Inc.: 2007) at 302.
[94] A.C. Hamilton and C.M. Sinclair, *The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba, Vol. 1* (Winnipeg: Queen's Printer, 1991) at 22.
[95] McLachlin CJC, in *Mitchell* v. *M.N.R.*, found that indigenous laws "survived the assertion of sovereignty, and were absorbed into the common law as rights", unless they fell into 3 exceptions: incompatibility with Crown sovereignty, surrender through treaty, government extinguishment. Mitchell v. M.N.R., supra note 61 at paras 9 and 10.

> enforcing such a proclamation. They may argue that Indigenous tradition is only customary, and therefore not clothed with legality.[96]

Borrows argues that Indigenous legal systems pre-date British or Canadian Law and continue to co-exist with (or exist alongside) Canadian law.[97] Reported recognition of indigenous laws in Canadian courts dates back to the same year as confederation. In the *Connolly* v. *Woolrich* case, Cree customary marriage was recognized as binding and valid, thereby impacting the distribution of an estate.

> Will it be contended that the territorial rights, political organization, such as it was, or the laws and usages or the Indian tribes were abrogated - that they ceased to exist, when these two European nations began to trade with the aboriginal occupants? In my opinion, it is beyond controversy that they did not - that so far from being abolished, they were left in full force, and were not even modified in the slightest degree, in regard to the civil rights of the natives." [98]

Indigenous legal traditions have survived multiple attempts at suppression by the Canadian state.

> Indigenous legal orders have at different times been understood from within Canadian law as having never existed at all, as having been wholly displaced by Canadian law, or as existing only within and according to the terms set by Canadian law. Canadian law's tendency to deny the existence and significance of Indigenous legal orders demonstrates disrespect for these legal orders."[99]

In the fur trade era, the commercial treaty relationships between indigenous people and the fur traders were informed by indigenous laws and customs.[100] In the early settlement period, the settler to Anishinabe relationship, rested in large part on Anishinabe law.

> Canadian history tells us that at times, settler societies demonstrated respect for Indigenous legal orders. History holds accounts of settler societies, the Crown, and, later, the Canadian state acting in accordance with Indigenous peoples' ways of law making, relation building, and renewal. In particular, many Indigenous –settler treaty relationships are understood , at least to some, to be relations wholly or partially created by and governed through Indigenous law. According to such understandings, treaty relations affirm the continued co-existence of Indigenous and Canadian legal orders.[101]

[96] John Borrows, *Canada's Indigenous Constitution* (Toronto: Univeristy of Toronto Press, 2010) at 12 [Borrows, "Indigenous Constitution"].
[97] See John Borrows generally and particularly, Borrows, "Indigenous constitution", supra note 105.
[98] *Connolly* v. *Woolrich* (1867), 17 R.J.R.Q 75 (Qué. S.C.).
[99] *Kennedy, supra* note 15 at 78.
[100] *RCAP, supra* note 94.
[101] *Kennedy, supra* note 15 at 78.

John Borrows writes: "Anishinabek law was all about relationships."[102] It is not codified, but is taught.

> "Law has a special meaning to Aboriginal people. The "law," to Aboriginal people, means rules that they must live by and it reflects their traditional culture and values. For instance, the Ojibway worldview is expressed through their language and through the Law of the Orders, which instructs people about the right way to live. The standards of conduct which arise from the Law of the Orders are not codified, but are understood and passed on from generation to generation. Correct conduct is concerned with "appropriate behaviour, what is forbidden, and the responsibility ensuring from each." The laws include relationships among human beings as well as the correct relationship with other orders: plants, animals and the physical world. The laws are taught through "legends" and other oral traditions."[103]

Much of the law is related to kinship and land.[104] Legal relationships exist between various animate beings.

> He was aware there was much we could learn from that which was hidden by the rocks, soil, grass, and trees that piled one upon another throughout our territory. We can't properly exercise our agency or make the best choices without remembering the land.[105]

The seven teachings or traditional values of the Anishinabe are wisdom, love, respect, bravery (or courage), honesty, humility and truth.[106] All of these characteristics or ways inform how the Anishinabe govern themselves and illustrate how the Anishinabe approached treaty negotiations. Today in gatherings, deliberations or assemblies, there is a specified code of behaviour. Respect for others and self would require us to sit together, in a spirit of respect, to listen to each other without interruption, to feast together to confirm the relationship that binds us, and to take the time to understand and deliberate.[107] This is the protocol that was observed by the Anishinabe at the negotiation of treaties.

> Indigenous legal orders are directed, first and foremost, towards supporting the efforts of indigenous peoples to maintain good relations: relations with communities, relations between

[102] John Borrows, *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010) at 8.
[103] *Hamilton and Sinclair, supra* note 103 at 45.
[104] See also Darlene Johnston, *Ipperwash Inquiry. Respecting and Protecting the Sacred* (Toronto: Government of Ontario, 2006).
[105] *Borrows, Drawing out law, supra* note 112 at 72.
[106] Edward Benton-Banai, *The Mishomis Book* (St.Paul, Minnesota: Indian Country Press, 1979) at 64.
[107] "Impossible though it is to arrive at "the whole truth" in any circumstance, as Aboriginal people are aware, they believe that more of the truth can be determined when everyone is free to contribute information, as opposed to a system where only a chosen number are called to testify on subjects carefully chosen by adversarial counsel, where certain topics or information are inadmissible, and where questions can be asked in ways that dictate the answers." In Hamilton and Sinclair, supra note X at 36.

> communities, and relations with the other beings of creation. Indigenous laws work to structure the roles and the responsibilities of Indigenous people in terms of these relations.[108]

I would suggest that treaty interpretation principles, based on indigenous ways of approaching treaties be infused into the interpretation of treaties. These might include the following:

Principle of treaty interpretation: apply indigenous legal principles to the understanding of the treaty

Principle of treaty interpretation: acknowledge that the treaty is a relationship which does not begin or end with the text.

Principle of treaty interpretation: consider the relationships and responsibilities that were created by the treaty

Principle of treaty interpretation: look beyond common law concepts of property

Although these principles may seem somewhat evident in their nature or in part reminiscent of the treaty interpretation principles elaborated by the courts, read together with the indigenous legal perspectives and ways of understanding treaties, they might result in a better implementation of the treaty. They are not necessarily limited to application in the court context but may be helpful in re-defining the relationships that were created by treaty. They may at least help to find the "common ground that opens the way for further discussion." [109]

V. Conclusion

The legal status of treaties in Canada was established in 1964 in the *White and Bob* decision. Until then, the application of treaty rights was "at the pleasure of the Crown". One might wonder why the treaties took so long to be recognized[110] and why they existed at the pleasure of only one of the parties. This is in stark contrast with the understanding that indigenous people have of treaty rights and obligations, most often viewed as sacred obligations. Further, the interpretation of treaties according to common

[108] *Kennedy, supra* note 15 at 101.
[109] *Treaty Commissioner, supra* note 3 at 33.
[110] in the case of the Douglas treaty at issue in *White and Bob*, over 130 years.

law treaty interpretation principles, derived from a body of common law relating to statutory interpretation does not do justice to the *sui generis* nature of the treaty agreements. In my view, the application of the treaty interpretation principles has been highly problematic and has excluded many important elements fundamental to the understanding of the treaties. The principles have been applied narrowly by some courts and there has been a disregard for the purpose of the large and liberal interpretation, which is to better understand the spirit and intent of the treaties.

If one accepts that treaty interpretation principles benefit from the statutory interpretation framework, this approach could be modified in its application and carry over the legislator's intent by considering *each party's interests and intent*. This may have a different result from drawing out the *understanding*s of the parties not necessarily their *intentions*. Just as statutory interpretation draws on legislative debate, legislative histories and social science evidence; the interpretation of treaties should take into account contextual elements that illustrate the Anishinabe perspective, including Anishinabe legal principles.

Alternatively, one could consider the speeches at the negotiations as the preamble to the treaty and rely on them to define the legislator's intent. But is any of this possible within the Canadian legal system? Will it achieve the goals of reconciliation and treaty implementation?

> The court process is the default process for determining treaty rights. It suffers because, among other institutional disadvantages, it is not designed to answer the large questions implicit in a treaty implementation process. It is designed to answer particular issues, such as whether a First Nation person has a defence to a penal charge or if lawful consent was given in a surrender of reserve land. Courts seldom have the occasion to consider a treaty relationship in a holistic fashion. They have repeatedly said these issues should be dealt with in a fair political process.[111]

Is there anything preventing courts from adopting what Sullivan calls a purposive approach (distinguished from the purposive analysis), where "the purpose or mix of purposes indentified by the interpreter is the primary concern and other indicators of legislative intent, including the words of the

[111] *Treaty Commissioner, supra* note 3 at 151.

text, are subordinate"?[112] Will Kymlicka is of the view that: "For better or worse, it is predominantly non-aboriginal judges and politicians who have the ultimate power to protect and enforce aboriginal rights, and so it is important to find a justification of them that such people can recognize and understand."[113] Would it be possible for judges to arrive at an understanding of the fundamental cultural, linguistic, social, political and conceptual approach of indigenous people? Can they achieve the deeper knowledge that Borrows refers to?

> Judges who are called upon to evaluate the meaning, relevance, and weight of the evidence they receive must appreciate the cultural difference in the intended meanings behind these messages if they are to draw appropriate inferences and conclusions. Additionally, judges must master the implicit symbolic aspects of these messages to comprehend their veracity and value… Without this deeper knowledge, common law judges will have a difficult time understanding and acknowledging the meanings Aboriginal people give to the facts they present.[114]

As we have seen above, there is a different approach to the treaties, both historically and today, between the parties to the treaties. In particular, Treaty One remains to be fully understood from the Anishinabe perspective. The Anishinabe perspectives on lands, the lawful obligations that they hold towards the land, and duties to share with others cannot be translated in to common law property concepts, nor can they be understood in isolation from the Anishinabe practices of treaty making and relationship building. To look at the treaties as isolated in time, independent of the past or the future, is not in keeping with the Anishinabe perspective. The treaty was a relationship developed on the basis of respect and was intended to last "as long as the grass grows, the sun shines and the rivers flow."

> The Encounter era treaty tradition recalls the long-neglected fact in [...] history that there was a time in our national experience when Indians tried to create a new type of society with Europeans on the multicultural frontier of colonial North America. Recovering this shared legal world is crucial to the task of reconstructing our shared understandings of the sources and the nature of the rights belonging to Indian peoples...[115]

[112] *Sullivan, supra* note 11 at 259.
[113] Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Oxford University Press, 1989) at 54.
[114] John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002).
[115] *Robert Williams Jr., supra* note 91 at 9.

Specific claims, although limited in their scope, continue to arise with respect to specific breaches of the treaty by the Crown. And there are more complaints about treaty implementation that fall outside the scope of the specific claims policy, established by the federal Crown. More fundamentally, there is a different understanding about the nature of the promises and the fulfillment of obligations. There are different systems of law that are being employed in the interpretation of the Treaty. To date, the Anishinabe legal principles have not been given appropriate consideration in the interpretation of treaties by courts[116] or by federal and provincial governments.

In my thesis, I will argue that a better understanding can be achieved not only through the interpretive lenses provided by archives and western readings of those archives, but by considering the Anishinabe perspective on treaty. This perspective, informed by contextual factors, includes a body of substantive and procedural Anishinabe legal principles that helped make the treaty. It is not acceptable to consider the subsequent interpretation and implementation of the treaty only in terms of Canadian common law. The Anishinabe law underlying the negotiations and the subsequent formation of the treaty agreement must be recognized and considered in the interpretation and implementation of the treaty. The project that I propose, attempts to forge a better understanding of the Anishinabe laws which shaped the making of Treaty One.

One must remember that treaties are agreements between two parties in which neither perspective should be privileged over the other. Why then should interpretation and implementation of treaties be approached only in accordance with one of the systems of law that secured the original treaty relationship. Is it fair to ask the courts to shoulder the burden or treaty recognition, understanding and

[116] I will not comment on the process of getting indigenous laws to be considered and brought into evidence within Canadian Courts. This is a task for another paper.

implementation?[117] Is this not a political exercise that should be taking place across Canada in relation to all treaties and with all indigenous people? Would it not be more fruitful to consider the spirit and intent of treaties, proactively, in order to consider how Canada's continued presence in indigenous territories can be justified?[118] Is part of the solution for proper implementation of treaty relationships an investment in the better understanding of the diverging views on the treaties, informed by the context and the procedural and substantive laws that secured the making of those treaties?

[117] Rotman would suggest that it is possible. "The notions 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. What is required, though is a conscious retreat from the mechanical implementation of common law principles in this situation."

[118] See James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press: 2005).

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