

Treaty Councils and Mutual Reconciliation Under Section 35

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I	INTRODUCTION	142
II	HISTORICAL OVERVIEW OF THE <i>ANISHINAABEG</i> AT THE NORTHWEST ANGLE	146
III	THE <i>OGITCHI-TAAUG</i> OF THE NORTHWEST	147
IV	THE DAWSON ROAD	149
V	THE “LAND-SHARING” NEGOTIATIONS: 1869-1873	150
VI	THE TREATY RELATIONSHIP	153
VII	NATION-TO-NATION RELATIONSHIP	156
VIII	LOYALTY AND FIDELITY WITHIN THE RELATIONSHIP	161
IX	RESOURCE SHARING AND DEVELOPMENT	163
X	PEACE AND GOOD ORDER WITHIN THE TERRITORY	167
XI	NON-DISCRIMINATORY APPLICATION OF CANADIAN LAW	169
XII	<i>MIINIGOZIWIN</i> AND SECTION 35 OF THE <i>CONSTITUTION ACT, 1982</i>	171

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XIII	INAAIZIWIN AND THE HONOUR OF THE CROWN	174
XIV	CONCLUSION	177

The author has undertaken a historical research project on the Treaty between the Queen and her ancestors, the Anishinaabeg of Lake of the Woods and Rainy Lake in northwestern Ontario. The focus in this article is the balancing of the legality and legitimacy of the Anishinaabeg social-political order today. The paper highlights how Section 35 cases on pre-contact rights and activities challenge the goal of protecting the inherent right to self-government of Aboriginal societies. Because of the problems with the status quo, the most important treaty right today is that the Queen's ear would always be available to the Anishinaabeg, in the form of the treaty councils established in the years following the October 3, 1873, treaty. Modern treaty councils should be the focus of a renewed treaty relationship with the Crown. The author, with her personal understanding of the oral tradition evidence of Treaty Three, insists that the parties must undertake reconciliation of the Anishinaabeg's pre-existing laws and institutions based on treaty principles solemnized in the treaty agreement.

I INTRODUCTION

My family comes from the shores of Rainy Lake (“Goojijiwininiwag”) which is now on the borders of Minnesota and Ontario. The *Ogitchi-Taaug*, who were both spiritual and political leaders of the Rainy Lake and Lake of the Woods’ *Anishinaabeg*, made treaties with both the United States in 1825 and the Queen of England in 1869-1873. As *Ogitchi-Taaug Mawintopinesse* explained to the Queen’s representatives in the fall of 1873, we were planted here by the Creator; the *Anishinaabeg* (also known as “Ojibway” or “Saulteaux Indians”) have been here since time immemorial.¹ I grew up in a powerfully spiritual place. It grounds me and my legal research about my treaty, also known as Treaty Three.

Before 1873, my family welcomed a French/*Anishinaabe* “half-breed” into our community, Nicholas Chatelaine. He is my great-great-grandfather on my mother’s side of the family (the Jourdain family). During the treaty-making years, French half-breeds helped the *Anishinaabeg* to better understand their relations and future with the Europeans. My great-great-

1. Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North West Territories on Which They Were Based* (Toronto: Belfords, Clarke & Co., 1991) at 59.

grandfather would be paid by the Queen of England to assist in translating the treaty to the Indians, in their language, *Anishinaabemowin*.

Presently, the Grand Council Treaty 3 (“GCT3”)² asserts that it holds an inherent self-governing authority over territory purported to be “ceded” or “surrendered” under treaty with the Queen. This “rights-approach” is considered by some to be a continuation of the pre-existing traditional government’s approach, led by *Ogitchi-Taaug*. Some *Anishinaabeg* and government officials believe that GCT3 is a corporate entity created in the 1970s as a political lobbying group. I am conflicted. I have attended fall and spring assemblies of the Grand Council and recognize remnants of a traditional government in the ceremony, kinship and efforts of the Chiefs, Elders, youth and women to build consensus.

However, I also witness the issues created by a parallel colonial system of managing a distinct group of people, separate and apart from their culture and language: the band council.³ To root out this colonial intrusion, our First Nations will need to reassert the principles of treaty-making that our ancestors had required of the Europeans when formalizing a nation-to-nation treaty relationship that was to exist “for ever.”⁴

One of the road-blocks is that Section 35 within the *Constitution Act, 1982*⁵ incorporates few known *Anishinaabeg* treaty rights.⁶ Rights, under the status-quo must be clarified through government agreement or court order. When negotiating “governance” through bi-lateral agreement, I witnessed federal governments and provincial authorities condemn any “inherent”

2. The Grand Council has an informative, but dated website: <<http://www.treaty3.ca>>.

3. I was a former Councillor of Couchiching First Nation and I understand the limitations of what can be done under the *Indian Act*, R.S., 1985, c. I-5 [*Indian Act*].

4. Morris, *supra* note 1 at 67. Lt. Governor Alexander Morris’ promise was affirmed by Lord Denning, see: *The Queen v. Secretary of State for Foreign and Commonwealth Affairs, ex parte: The Indian Association of Alberta, Union of New Brunswick Indians, Union of Nova Scotian Indians*, [1981] 4 C.N.L.R. 86 (Eng. C.A.) [*Secretary of State for Foreign and Commonwealth Affairs*].

5. Schedule B of the *Canada Act, 1982* (U.K.), 1982, c.11 [*Constitution Act, 1982*]. The wording of s. 35 is: “[t]he existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada are hereby recognized and affirmed.”

6. Treaty Three rights have rarely been in litigation after *St. Catherine’s Milling and Lumber v. The Queen* (1888), 14 A.C. 46 (P.C.), aff’g (1887), 13 S.C.R. 577, aff’g (1886), 13 O.A.R. 148 (Ont. C.A.), aff’g (1885), 10 O.R. 196 (Ont. Chancery) [*St. Catherine’s Milling*]. See for example, *R. v. Bombay*, [1993] O.J. No. 164 (Ont. C.A.): Treaty right to fish can be infringed by Ontario regulation if it meets the *Sparrow*, *infra* note 15, test. *R. v. Pamajewon*, [1996] 2 S.C.R. 821 [*Pamajewon*]: Eagle Lake First Nation—a beneficiary of Treaty Three—must prove an Aboriginal right to self-government under the *Van der Peet*, *infra* note 10, analysis., *Keewatin v. Ontario (Ministry of Natural Resources)*, [2006] O.J. No. 3418 (Ont. S.C.J.) [*Keewatin*] where the Court found that the division of powers argument, which is related to the treaty right of the Crown to take up land within the “Keewatin lands” in Treaty Three, would go ahead under an “advanced costs” order against the defendant, the Ministry of Natural Resources (Ontario).

quality because of an “exhaustive” division of constitutional powers, despite the federal government’s claims to adopt an inherent rights approach.⁷ Because of this, federal “self-government” policy holds little promise of protecting key institutions of the *Anishinaabeg* of Treaty Three.

I witnessed a specific example of this when the GCT3 created *Manito Aki Inaakonigewin*, a resource and land-use law in 1997.⁸ Shortly, thereafter the federal government unilaterally pulled “self-government” funding from this organization. As a rationale for this move, Canada argued that the *Anishinaabeg* illegitimately created a law without any “statutory” basis.⁹ To legitimize their actions, Canada asked the Grand Council to ratify support of their self-government initiative through the First Nations. This was instructed to be through “band council resolutions” authorized under *Indian Act* legislation. I suspect that our local Member of Parliament (Kenora District), Robert Nault, who was then Indian Affairs’ Minister at the time, did not appreciate the internal contradiction in his request.

My focus in this article is the balancing of “legality” and “legitimacy” of authority over the *Anishinaabeg*.¹⁰ Courts focus Section 35 on pre-contact rights and activities rather than the social-political order of the Aboriginal societies, such as that of the *Anishinaabeg*.¹¹ This questions the legality of our existing *Anishinaabeg* institutions in the Canadian constitutional order.

7. See Indian and Northern Affairs Canada, Federal Policy Guide, *Aboriginal Self-Government: The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Minister of Public Works and Government Services, 1995), online: <http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html>.

8. A copy is available online at the Grand Council Treaty #3’s website: <http://www.treaty3.ca/pdfs/grandchief/general/MAI_unofficial_consolidated_copy.pdf>. *Manito Aki Inaakonigewin* has been the subject of past papers of mine. The spirit of the law is undoubtedly embedded with *Anishinaabeg* understanding and worldview. However, the practical use of the law has become revenue-generation for the GCT3.

9. A media report on the conflict between Grand Chief Leon Jourdain and Robert Nault, Kenora-area MP and Minister of Indian Affairs at the time, can be found online: Wawatay News, <<http://www.wawatay.on.ca/index.php?module=pagesetter&func=viewpub&tid=1&pid=1062>>.

10. I borrow this from Mark D. Walters, “Constitutionalism and Political Morality: A Tribute to John D. Whyte, The Morality of Aboriginal Law.” (2006), 31 *Queen’s L.J.* 470 at para. 51 (Q.L.) [Walters, “Constitutionalism”]:

And yet Canadian Aboriginal law remains a form of Canadian law about Aboriginal peoples rather than a form of law of Aboriginal peoples, and troubling questions remain about its basic structure and form. The morality of Aboriginal law, like the morality of law generally, implies (if we follow Fuller) an understanding of law as a reciprocal enterprise between institutions and peoples premised upon mutual respect; it involves common commitment to a narrative about constitutional ordering that secures the necessary links between (in the words of the Supreme Court of Canada) “legality and legitimacy.”

11. See most recently in *R. v. Sappier, R. v. Gray*, 2006 SCC 54 (7 December 2006) [*Sappier and Gray*]. Also see *Pamajewon*, *supra* note 6; *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*]; and, *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220.

We must prove these institutions fit within the borders defined by Section 35 jurisprudence.¹² The urgency of this most important goal arises from the fact that the *Indian Act* band will never be a legitimate place for *Miinigoziwin*, the laws the Creator has given us. Additionally, our people suffer because of the lack of legitimacy in the “legal” institutions forced upon us.

This paper contains my *Anishinaabeg* perspective of Treaty Three, known to us as *Manidoo Mazina’igan*, the sacred paper.¹³ The treaty principles, key imperatives of both parties, are what founded the “protective” alliance between the *Anishinaabeg* and the Queen, and may be more important than the items and activities enumerated in Canada’s *Articles of Treaty*.¹⁴ I believe that the *Manidoo Mazina’igan* incorporates archived and reported accounts of the context, legal history and agreement made with the *Anishinaabeg* of Rainy Lake and Lake of the Woods. Because these promises were not written in Canada’s *Articles of Treaty*, they are incorrectly regarded by Canada as “outside promises” to the *Anishinaabeg*;¹⁵ however, the following principles are fundamental to mutual reconciliation and constitutional re-ordering: nation-to-nation relationship; loyalty and fidelity within the relationship; peace and good order within the territory; resource sharing and development; non-discriminatory application of Canadian law; *Anishinaabeg* authority over their people in respect to their laws or *Miinigoziwin*; and protection of the *Anishinaabeg* way of life, *Inaadiziwin*.

The seven treaty principles would ensure the successful conclusion of the treaty with the *Anishinaabeg*. The breach of each of these principles by

12. Patrick Macklem, “Ethnonationalism, Aboriginal Identities, and the Law” in Michael D. Levin, ed., *Ethnicity and Aboriginality: Case Studies in Ethnonationalism*. (Toronto: University of Toronto Press, 1993) at 11:

First Nations claims to autonomy are made in and against a political and legal system that historically saw human relations from the vantage point of the legal imagination of the colonizing power, a system that demanded that political and legal institutions and borders conform to the best interests of the colonizing power and not threaten the basic organizing categories of the colonial legal imagination.

13. For more detail, see Sara J. Mainville, *Manidoo Mazina’igan: An Anishinaabe Perspective of Treaty 3* (LL.M. thesis, University of Toronto, 2007).

14. I will refer to the *Articles of Treaty* as the agreement signed by the Queen’s representatives and the Chiefs. A copy of the *Articles of Treaty* referred to in this paper can be found online: <http://www.ainc-inac.gc.ca/pr/trts/hti/guid/tr3_e.html>.

15. “To the Hon’ble Minister Campbell, Senator” Ottawa, Nov. 7, 1877” from David Mills, Minister of Interior. RG 10, Vol. 2028, File 8908. It is most interesting that Daugherty, in his research for Indian and Northern Affairs Canada remarked that the *Anishinaabeg* signed the treaty after having it “explained to them in their own language.” His conclusion was that they should have objected to any missing terms “but they apparently failed to do so.” Wayne E. Daugherty, “Treaty Research Report: Treaty Three (1873)” in *Treaties and Historical Research Centre, Self Government* (Ottawa: Indian and Northern Affairs Canada, 1986), specifically at “Administration of Treaty 3” just below n. 22 [pages are not numbered in this document].

Canada is not the focus of this paper. My focus is on how these principles will help meet the transformative process of Section 35 highlighted in *Sparrow*¹⁶ and *Delgamuukw*.¹⁷

II HISTORICAL OVERVIEW OF THE ANISHINAABEG AT THE NORTHWEST ANGLE

The *Ogitchi-Taaug* were respected *Anishinaabeg* who participated most in negotiations with the British; for the most part they were hereditary Chiefs.¹⁸ The *Anishinaabeg* settlement and *Midewewin* assemblies of *Anishinaabeg* along Rainy Lake were likely reasons for the *Ogitchi-Taaug*'s leadership position.¹⁹ The Grand Chief is the most revered *Ogitchi-Taaug* and, historically, resided in the Rainy Lake area.²⁰ The *Anishinaabeg* government is recorded by some historians as an affiliation of "northern Ojibway" who may have migrated to the Rainy Lake region.²¹

16. *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [*Sparrow*].

17. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [*Delgamuukw*].

18. Kathi Avery Kinew, *Manito Gitigaan Governing in the Great Spirit's Garden: Wild Rice in Treaty #3*, (D.Phil. dissertation, University of Manitoba, 1995) at 109 [unpublished]. See also Leo Waisberg & Tim Holzkamm, "We Have One Mind and One Mouth. It Is the Decision of All of Us; Traditional Anishinaabe Governance of Treaty #3." (Kenora, Grand Council Treaty #3, October 2001) [unpublished]. Found at the Grand Council Treaty #3, online: <<http://www.treaty3.ca>> [Waisberg & Holzkamm, "One Mind"]:

For four generations prior to the Treaty, the principle leader, Grand Chief of the Council, was known as "Nittum" or "the Premier" of the Bear do-dem or clan. This dynasty was started by an Odawa who emigrated from Lake Michigan to Grand Portage and to Rainy Lake, the latter of which became the headquarters of his family for generations.

19. Waisberg & Holzkamm, "One Mind", *ibid.*:

The territory included in Treaty #3 in 1873 was governed by a Grand Council of Anishinaabe Chiefs. By tradition the Grand Council met annually in spring or early summer on Rainy River near Couchiching Falls. This civil leadership was responsible to other political ranks and ultimately to the constituent families. Decision making was by consensual democracy and acquisition of excessive power by individuals was discouraged.

20. *Ibid.* See also Leo Waisberg & Tim Holzkamm, *Agency Indian Reserve 1: Selection, Use and Administration* (A Draft Report Prepared for Grand Council Treaty #3, 19 September 2000) [unpublished and on file with the author] [Waisberg & Holzkamm, *Agency Indian Reserve*].

21. William Warren, *History of the Ojibway People*, (St. Paul: Minnesota Historical Society Press, 1984) at 83-84. See, specifically the reference to "Ko-je-je-win-in-e-wug" which is likely "the people" of present-day Couchiching. The name Couchiching has been explained to me as where the lakes narrow or tunnel, which is a simpler explanation than given by Warren: the people were called Ko-je-je-win-in-e-wug based on the "numerous straits, bends, and turnings of the lakes and rivers they occupy."

In the contact period (1790-1869), the *Anishinaabeg* Grand Council would meet near my community in Rainy Lake.²² The settlement later became populated by hundreds of *Anishinaabeg* every spring for *Midewewin* assemblies and spring fishing settlements.²³

By the 1850s the fur trade was not as lucrative as previous years, but settlement and westward expansion by the United States called for the British to develop the “Dawson Road” for British travellers heading west.²⁴ The extreme and dangerous nature of the waterways required *Anishinaabeg* guides for various British expeditions and the *Ogitchi-Taaug* were authoritative on whether or not guides would be provided to the British.²⁵ This often depended on the British following the *Anishinaabeg* rules and protocol.

III THE OGITCHI-TAAUG OF THE NORTHWEST

The highest ranked chief in the early 1800s was known widely as “Premier” or *Nittum* and would hold spring councils under his leadership into the 1860s.²⁶ “The Premier” was referred to in Hickerson’s research of Hudson’s Bay reports in the years 1790 to 1804.²⁷ For example, the Premier was found in the Red River area in 1790 with “20 young men.” In 1822-1823, Dr. John McLoughlin of the Hudson’s Bay Company noted the Premier and his band were around Rainy Lake, and that the Premier was trapping south of the border, within “American territory.” Denied the asserted sovereignty of the Europeans on either side of the border,²⁸ the *Anishinaabeg* maintained their kinship and trade relationships with “Minnesota” based tribes. This trans-national society did not follow British or U.S. arrangements²⁹ in their trading relations because they did not authorize an invisible line dissecting their

22. Waisberg & Holzkamm, “One Mind”, *supra* note 18.

23. Tim E. Holzkamm, Leo G. Waisberg & Joan A. Lovisek, “Stout Athletic Fellows”: The Ojibway During the ‘Big Game Collapse’ in Northwestern Ontario 1821-1871” in D.H. Pentland, ed., *Papers of the Twenty-Sixth Algonquian Conference* (Winnipeg: University of Manitoba, 1995) at 169.

24. Canada, Department of Public Works (30 April 1872), *Sessional Papers*, No. 6 (1873) at 128.

25. Henry Y. Hind, *Narrative of the Canadian Red River Exploring Expedition of 1857 and the Assiniboine and Saskatchewan* (New York: Greenwood Press, 1969).

26. Waisberg & Holzkamm, “One Mind”, *supra* note 18.

27. Harold Hickerson, *Land Tenure of the Rainy Lake Chippewa at the Beginning of the 19th Century* (Washington: Smithsonian Press, 1967) at 53.

28. Grace L. Nute, *The Voyageurs Highway: Minnesota’s Border Lake Land* (St. Paul: Minnesota Historical Society, 1965) at 15-16: “After the War of 1812 the convention of 1818 between the United States and Great Britain settled the boundary line west of the Lake of the Woods and provided for a joint survey along the line of the old canoe route in the region lying between Lake Superior and the Lake of the Woods.”

29. Hickerson, *supra* note 27 at 53.

territory. The *Anishinaabeg* utilized the association developed with both the American and British forts.³⁰ Moreover, the alliance between the Minnesota tribes and the *Anishinaabeg* was an important knowledge-base for treaty-making after the 1857–1869 Dawson Road development.³¹

GCT3 researchers have reported that the “the Premier” was the precursor to the Grand Chief, or *Ogitchi-Taaug* today.³² His grandson, also “named” Premier, signed with his *makwa do-dem* on the *Selkirk Treaty* in 1817.³³ *Nittum*, the “first” in *Anishinaabemowin*, was found in the records of European traders on both sides of the U.S./British line around Rainy Lake.³⁴ *Kee-tak-pay-pi-nais*, the “aged hereditary Chief” who signed the *Articles of Treaty* first, is a descendant of *Nittum*, or Premier.³⁵ *Kee-tak-pay-pi-nais* was held in great esteem but may or may not have been “Grand Chief” of the *Anishinaabeg*.

Two other *Ogitchi-Taaug* spoke at length during the negotiations discussed above: *Mawintopinesse* of the Rainy River area and *Powassin* of the Lake of the Woods. These three hereditary chiefs in the treaty discussions were both spiritual and political leaders.³⁶ For example, *Mawintopinesse* may have been given an *Anishinaabemowin* name, which includes a description of *animikii* or the “thunderers,” and when he came to *Animakee Wa Zhing*,³⁷ the sacred place of the thunder birds for the treaty

30. Nute, *supra* note 28 at 9.

31. Brian Walmark, *Alexander Morris and the Saulteaux: The Context and Making of Treaty Three, 1869-73* (M.A. Thesis, Lakehead University, 1994) at 31 [unpublished].

32. Waisberg & Holzkamm, “One Mind”, *supra* note 18.

33. Morris, *supra* note 1 at 13-15. See especially, p. 299 where the “bear” authority is clearly marked on the map next to the words “Premier” or Oukidoat, which may have been a mispronunciation or misspelling of *Ogitchi-Taaug*. The written terms of the treaty are found at 299-302.

34. Ethnohistorians Waisberg and Holzkamm did not agree with the historical accounts, for example, Hickerson, *supra* note 27 at 54. Hickerson states, “In 1804 Premier was not the only *band* leader. There was also the *band* of Picotte.” Hickerson’s account is that Premier is a chief of a small group who frequented Rainy Lake.

35. Waisberg & Holzkamm, *Agency Indian Reserve*, *supra* note 20.

36. The Grand Council Treaty #3, “We have kept our Part of the Treaty.” (The Anishinaabe Understanding of Treaty #3m 3 October 1998) [unpublished]. See also, Michael R. Angel, *Discordant Voices, Conflicting Visions: Ojibwa and European-American Perspectives on the Midewiwin*. (D. Phil. Thesis, University of Manitoba, 1997) at 17:

It is no surprise then most of the Ojibwa political leaders such as Eshkebugechoshe (Flat Mouth), Pizhiki (Great Buffalo), Shingwaukonse (Little Pine) and Powasang (Powassan), were also Mide shamans, since the survival of the community depended upon the ability of these leaders to deal with the environment and socio-political challenges which faced them.

37. Kinew, *supra* note 18 at 104.

talks in 1873, his powers likely grew.³⁸ It is clear to our *Anishinaabeg* Elders that both *Mawintopinesse* and *Powassin* were *Ogitchi-Taaug* and spoke for the Grand Council in 1873.

IV THE DAWSON ROAD

The *Anishinaabeg* knew Simon Dawson because he was instrumental in the Red River Road, otherwise known as the “Dawson Road” development in 1857.³⁹ Competing with U.S. settlements to the south, Canada recognized the need to detour the route to the west from the borderlands area through Minnesota to Fort Garry (present-day Winnipeg).⁴⁰ The planning of this route would bring Simon Dawson, an engineer by trade, through the *Anishinaabeg* territory.⁴¹

The lack of immigrant settlement prior to the treaty and the need to protect the British soil from American trespass made the region of Rainy Lake and Lake of the Woods key to confederation.⁴² The Dawson road, a 300-mile stretch of waterways and roadways, was important for this new region’s development.⁴³ Further, the *Anishinaabeg* were seen as both “pagans and savages” because most missionary efforts were resisted by them in order to protect the strongly held *Midewewin* beliefs of these communities. Our ceremonies took place along the Rainy River and Rainy Lake areas, which are now the “twin-towns” of International Falls, Minnesota, and Fort Frances, Ontario. It is hard to fathom that those municipalities could have developed if the *Midewewin* ceremonies continued

38. His name may mean gathering of the thunderbirds, or simply gathering of birds. We have spirit guides through our connection to the animals, including the sacred Thunderbirds. Names are not given or taken lightly by the *Anishinaabeg*, and therefore, *Mawintopinesse* would have great respect for the thunderers. The thunderers carry messages from *Gitchee-Manidoo*, the Great Spirit, and are very sacred beings. His *Anishinaabemowin* name would carry great power which is evidenced by his place in the Grand Council as principal orator.

39. Canada, “Report on the Line of Route between Lake Superior and the Red River Settlement” by Simon Dawson in *Sessional Papers*, No. 81 (1868) at 27-30 [Dawson, “Report”]. Also see Hind, *supra* note 25.

40. Hind, *ibid*.

41. Dawson, “Report”, *supra* note 39. Simon Dawson would report to the government that he had been engaged in explorations from July 1857 with the Hind expedition: Canada, Legislative Assembly, 2d Sess., 6th Parl., *Journals of the Legislative Assembly of the Province of Canada*, vol. 17 (28 January to 4 May 1859), Appendix.

42. Department of Public Works, *supra* note 24 at 128.

43. *Ibid*. at 133.

unabated after the 1873 treaty. The presence of an uncontrolled *Anishinaabeg* population discouraged European settlement.⁴⁴

V THE “LAND-SHARING” NEGOTIATIONS: 1869-1873

Simon Dawson knew the *Anishinaabeg* reasonably well. He regarded his knowledge of the *Anishinaabeg* of Lake of the Woods and Rainy Lake to be the most extensive of all Europeans and he looked upon the *Anishinaabeg* as keen negotiators.⁴⁵ Blackstone or “*Makuhda-ubsin*” the war Chief of a small band of *Anishinaabeg* along Namakan Lake (present-day Lac La Croix) and Dawson would have an interesting relationship. In 1872, Dawson was forced to respond to allegations made by Blackstone:

“Mr. Dawson says that if we do not take the three dollars per head which he has offered to pay, that our lands will be overrun and ourselves murdered.” Assuming that this reference is being made about the negotiations at Fort Frances, it is not very likely that three Commissioners standing alone among hundreds of armed Indians should threaten to murder them.⁴⁶

Furthermore, Dawson explained in this correspondence that Blackstone was coerced by drink or the bad influence of a “half-breed” woman in Fort William and could not have been the true source of this letter. Four months later, Dawson reported that he had the letter read to Blackstone and the Chief had agreed that the words in the letter were not his. Moreover, Dawson felt that the “fraud” committed against Blackstone should be remedied in a “court of law.” In closing, Dawson requested that Blackstone’s original letter be sent to him in order to prove the matter in court.⁴⁷ The account by Dawson is notably embellished, as T.A. Towers, who had the letter read to Blackstone, reported in the following:

He [Blackstone] came down the other morning and of course came here begging, so I at once seized the opportunity and obtaining an interpreter had the letter carefully explained to him, sentence after sentence In fact he said half the letter he had never spoken. He only wanted them to state that “as the other

44. Rev. Edward F. Wilson, *Missionary Work among the Ojebway Indians*. (New York: E. & J.B. Younge, 1886) at 65: referencing a meeting with “Chief Blackstone” and his warriors. See also, Simon J. Dawson to Minister of Interior (26 August 1873) Library and Archives Canada (RG 10, vol. 1904, file 2235).

45. Simon J. Dawson, “Memorandum in Reference to the Indians on the Red River Route” (2 June 1873), Library and Archives Canada (RG 10, vol. 1904, file 2235). Simon J. Dawson to Minister of the Interior, *ibid.*.

46. Extract of a letter from T.A.P. Towers to S.J. Dawson (5 February 1873), Library and Archives Canada (RG 10, vol. 1872, file 747).

47. *Ibid.*

Chiefs had poor heads, they had made him spokesman and when the Government came to make a treaty they would all come down in a friendly manner and arrange it.”⁴⁸

The embellishments of Indian Agents and Indian Commissioners and lack of inter-societal understanding of the symbolism used by the *Anishinaabeg* in many reports is problematic to my study. It certainly creates issues in litigation when “experts” utilize these reports and create “context” with a thin air of reality.

Through further research, an analysis of the four years of treaty negotiations with the *Anishinaabeg* may reveal that there are pre-1873 treaty obligations. Treaty benefits could include the annuity for the Dawson Road that was paid up to the 1871 treaty negotiations.⁴⁹ Other negotiations include the 1869 demands for rent made by the *Anishinaabeg*,⁵⁰ the 1871 and 1872 treaty negotiations with Simpson and Dawson, and the 1873 negotiations that led to the signing of the *Articles of Treaty*.⁵¹ The first agreement with the *Anishinaabeg* for the Dawson Road was instrumental in laying the groundwork to achieving the 1873 conclusion of the *Articles of Treaty*.⁵²

Presents and money were not the primary consideration, but were important procedural signs of the great solemnity of the occasion, in the presence of the Creator.⁵³ In addition, the *Anishinaabeg* were likely resistant

48. *Ibid.*

49. Wemyss M. Simpson, S.J. Dawson & Robert Pether, Commissioners to the Secretary of State for the Provinces (11 July 1871), *Sessional Papers*, No. 22 (1872), also found at Library and Archives Canada (RG 10, vol. 1868, file 577).

50. “Demands Made by the Indians as Their Terms for Treaty, October 2nd 1873” (Fort Frances, 22 Jan. 1869) LAC (RG 10, vol. 1918, file 2790B).

51. The *Anishinaabeg* hired Joseph and August Nolin to take notes of the treaty agreement. “Nolin on Behalf of the Indians as the Treaty Made at the North West Angle at the Lake of the Woods,” Library and Archives Canada (RG10, vol. 1918, file 2790B) [“Nolin notes”].

52. James Y. Henderson, Marjorie L. Benson, & Isobel M. Findlay, *Aboriginal Tenure in the Constitution of Canada*. (Toronto: Thomson Canada, 2000) at 172, Citing at [1] Canada, Department of Public Works, S.J. Dawson’s Report to the Government (Ottawa: Queen’s Printers, 1864), DPW, (RG11, vol. 265), and at [2] Canada, Department of Public Works, S.J. Dawson’s Report to the Government (Ottawa: Queen’s Printers, 1861) (RG11).

Reports to Ottawa suggested that the Ojibwa would oppose any attempt to “[open] a highway without any regard to them, through a territory of which they believe themselves to be the sole lords and masters.”[1] Commissioner S.J. Dawson, who had negotiated with the Ojibwa for the right of way for the Dawson route, warned Ottawa that they were encountering people who “in their actual dealings they are shrewd and sufficiently awake to their own interests.”[2] That the Ojibwa were aware of the negative consequences of foreign settlement was evident.

53. Dawson remarked that the *Anishinaabeg* were “much impressed by ceremony and display” in his recommendations for treaty-making. Dawson, “Memorandum”, *supra* note 45. See generally, Cary Miller, “Gifts as Treaties: The Political Use of Received Gifts in *Anishinaabeg* Communities (1820-1832)” (2002) 26:2 *The American Indian Quarterly* 221.

to making a treaty with the British Crown after witnessing decades of treaty administration in the United States and the British administration of the Robinson treaties from 1850. Therefore, the Crown-side negotiators had to continue to show good faith towards the *Anishinaabeg* in order for them to agree to a treaty.⁵⁴

At the time of treaty-making the area occupied by the *Anishinaabeg* was part of the Northwest Territories.⁵⁵ After the transfer of the Hudson's Bay Company lands in 1870 and Confederation in 1873, the "opening up" of this area held strategic importance.⁵⁶ Arthur Ray gives a standard account of the *Anishinaabeg* negotiations of Treaty Three:

The Ojibwa ... looked for ways to profit from the new business possibilities in their district. They lived near the Dawson Road, which the Canadian government had started to build in 1858. By the early 1870s, as many as sixteen hundred people used the road annually to travel from Lake Superior to the Red River. The Ojibwa wanted to be paid for the right of passage through their territory, they expected compensation for the wood construction along the Dawson Road and to fuel the steamboats, and they claimed that they owned the settlers' houses because the intruders had not paid for the timber they had used to build them. In addition, they wanted to lease access and resource rights, rather than sell their lands to the Crown.⁵⁷

As landlords, the *Anishinaabeg* viewed the treaty as a solemn agreement to share the land which was their mother. It was to be an agreement that was the greatest leap of faith for our people. When the British came to treaty

54. Dawson, *ibid.* A secondary account highlights the strategic imperative of treaty-making with the *Anishinaabeg*:

[T]he treaty process only started after Yellow Quill's Band of Saulteaux turned back settlers who tried to go west of Portage la Prairie, and after other Saulteaux leaders insisted upon enforcement of the Selkirk Treaty or, more often, insisted upon making a new treaty. Also ignored is that fact the Ojibway of the North-west Angle demanded rents, and created fear of violence against prospective settlers who crossed their land or made use of their territory, if Ojibwa rights to their lands were not recognized. This pressure and fear of resulting violence is what motivated the government to begin the treaty-making process.

John L. Tobias, "Canada's Subjugation of the Plains Cree, 1849-1885" in J.R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada*, (Toronto: University of Toronto Press, 1991) at 212-240, cited in: Office of the Treaty Commissioner (Saskatchewan), Report, *Statement of Treaty Issues: Treaties as a Bridge to the Future* (October 1998), online: <http://www.otc.ca/PDFs/OTC_STI.pdf> at 19.

55. David T. McNab, "The Administration of Treaty 3: The Location of Boundaries of Treaty 3 Indian Reserves in Ontario, 1873-1915" in Ian L. Getty & Antoine S. Lussier, eds., *As Long As the Sun Shines and Water Flows* (Vancouver: University of British Columbia Press, 1983) at 146.

56. *Ibid.*

57. Arthur J. Ray, *I Have Lived Here Since the World Began: An Illustrated History of Canada's Native People* (Toronto: Key Porter Books, 1996) at 30.

negotiations in 1869–1873, their negotiators were unresponsive to claims of sovereignty and ownership by the *Anishinaabeg*. This was undoubtedly a good diplomatic strategy as about 500 to 1,500 *Anishinaabeg* resided in the region frequented by Dawson, Pither and military expeditions to the west.⁵⁸ Our leap of faith was that the Queen would ensure that her men would keep their word and her honour.

VI THE TREATY RELATIONSHIP

Because there is more than one source of written account,⁵⁹ my treaty is one of the best examples of treaty negotiations leading to divergent understandings of treaty promises. Among the accounts are the notes of August and Joseph Nolin, literate French half-breeds commissioned by the *Ogitchi-Taaug* to record the treaty terms.⁶⁰ Along with the “Nolin notes” and Simon Dawson’s notes are those included in Morris’ chapter on “The Northwest Angle Treaty” in his later published work on treaty negotiations.⁶¹ All of these reports highlight and augment the official report of Lt. Governor Morris, and all of them differ slightly.⁶² However, it is the oral accounts of the treaty that hold the truest form of what the treaty is for the *Anishinaabeg*. The “Paypom Treaty” or Nolin notes⁶³ have been said to be the closest account of the *Anishinaabeg* perspective of the treaty because the words used could be more easily translated into *Anishinaabemowin*. Furthermore, the terms defined by August and Joseph Nolin most resemble the oral tradition evidence of the treaty.⁶⁴ It is conspicuous that the commissioned notes for the *Anishinaabeg* were written in French and translated by Lt.

58. Waisberg & Holzkamm, *Agency Indian Reserve*, *supra* note 20, citing HBCA B.105/e/6, fol. 2d-3; D.4/109. fol. 10-10d; D.3/2. fol 30d-33c. The numbers swelled during spring fishing gatherings to over a 1,500 *Anishinaabeg*.

59. Because it was “Chief Paypom” who purchased the treaty document from Charles Linde, the notes are known by the *Anishinaabeg* as the “Paypom Treaty.” The notes are found in the Canadian archives, as attached to Lieutenant Governor Morris’ report, “Nolin notes”, *supra* note 51.

60. Jill St. Germaine, *Indian Treaty-Making Policy in the United States and Canada, 1867-1877*. (Toronto: University of Toronto Press, 2001) at 64.

61. Morris, *supra* note 1 at 48.

62. The impact of the other two reports should be noted, as most research about the Treaty relies heavily on all three accounts to generate the final analysis, that the *Articles of Treaty* was incomplete at best. See Daugherty, *supra* note 15.

63. Joseph Nolin’s notes were originally written in French. In *R. v. Morris*, 2006 SCC 39 [R. v. *Morris*], the Lt. Governor requested that these notes be translated into English, and it is unknown where the French version is or if it still exists. See Morris, *supra* note 1 at 48.

64. Kinew, *supra* note 18 at 109-119. See also Mainville, *supra* note 13.

Governor Morris' interpreters immediately following the conclusion of the treaty negotiations and that the original French version no longer exists.⁶⁵

The opening of the treaty discussions was dramatic. It is clear that the 1869 demands being reasserted by the *Anishinaabeg* were beyond his mandate; therefore, Morris appealed to the Chiefs:

This is the best I can do for you. I wish you to understand we do not come here as traders, but as representing the Crown, and to do what we believe is just and right. We have asked in that spirit and I hope you will meet me in that spirit and shake hands with me to-day and make a treaty for ever.⁶⁶

Certainly on the face of it, the *Articles of Treaty* resulted in more expense for the public coffers than other treaties with other Indigenous groups.⁶⁷ However, it is not the items and monetary terms agreed to that allowed the *Ogitchi-Taaug* to "solemnize" the agreement; it was the treaty principles that solidified a relationship that was to last forever. On the third day, Morris, as the representative of the Queen, and the *Ogitchi-Taaug*, representing the *Anishinaabeg*, made a lasting agreement for a shared future. The enumerated items in the *Articles of Treaty* were significant:

The government concluded Treaty Three with the Salteaux only after four unsuccessful attempts had been made [And,] extravagant demands were in fact the provisions for schools, agricultural assistance, and help in making the transition to a new life, which give the treaties the appearance of a forward-looking plan for the economic and social well-being of the Indian people.⁶⁸

In summary, the treaty was successfully developed through an ongoing relationship founded by Dawson and fostered by Morris.⁶⁹ These men recognized the "nation" of the *Anishinaabeg* as well as the customs,

65. There should not be much made of the fact that the French version is not in existence as the English translation by Morris' translators and the "Paypom" document kept by the *Anishinaabeg* are identical. "The Following are the Terms of the Treaty held at Northwest Angle the Third day of October, Eighteen Hundred and Seventy Three" (14 Oct. 1873), Appendix A, Morris/Minister of Interior, Library and Archives Canada (RG10, vol. 1918, file 2790B) ["Short-hand reporter's notes"], See the "Paypom Treaty" found online: Grand Council Treaty #3 website: <http://www.treaty3.ca/pdfs/grandchief/gct3/paypom_treaty.pdf>.

66. Morris, *supra* note 1 at 67.

67. Indian Affairs, "Estimate of money values of demands made by the Indians." Library and Archives Canada (RG10, vol. 1918, file 2790B). Found at the Grand Council Treaty #3's Treaty and Aboriginal Rights Research office.

68. 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*, 3d ed. (Edmonton: University of Alberta Press, 1999) at 6.

69. Walmark, *supra* note 31. Contrast this with the account found at note 89, in which the customs and traditions were centred around *midewewin* religious activity and therefore, the Chiefs were angered at the thought of Christian missionary influence.

traditions and practices integral to sustaining future good relations. The *Anishinaabeg* were indifferent to the pursuit of European practices such as Christianity and the fur trade in early relations.⁷⁰ Through witnessing the treaty relationships of their neighbours and Indigenous allies, the *Anishinaabeg* defined terms and practices with which the Europeans willingly complied.

Another significant point is that the *Articles of Treaty* were, in fact, drafted in 1872 and were never amended to reflect the shared understanding reached between the *Anishinaabeg* and the Queen's representatives on October 3, 1873.⁷¹ However, the fact that the agreed terms are not reflected in the *Articles of Treaty* does not mean there is no treaty, as there was agreement on key matters related to land use and sovereignty.⁷² What the incomplete *Articles of Treaty* does mean is that more has to be done to discover the treaty as it exists in the oral tradition evidence of our Elders, Grand Council members, and the written historical record.

The next section of this paper is my analysis of the treaty principles developed between the *Anishinaabeg* and the Queen's representatives from 1869 to 1873.⁷³ This analysis is the basis for my view that a treaty renewal table is a treaty right of the *Anishinaabeg* that was not included in the *Articles of Treaty*.⁷⁴ As evidence of this, in the decade following the 1873

70. Wilson, *supra* note 44 at 65, referencing a meeting with "Chief Blackstone" and his warriors. See also, Simon J. Dawson to Minister of Interior, *supra* note 44.

71. Daugherty, *supra* note 15, cites Library and Archives Canada (RG10, vol. 3800, file 48) at 542, S.J. Dawson to Deputy Minister of Indian Affairs Hayter Reed (26 April 1895):

The treaty was practically completed by myself and Mr. Simpson in 1872, and it was the draft we then made that was finally adopted and signed at the North west Angle of the Lake of the Woods in 1873.

This was also cited by Kinew, *supra* note 18 at 111. Kinew writes about the *Articles of Treaty*:

Discussions held up to that point led to an early drafting of the legal jargon of Treaty #3 in Ottawa prior to 1873. According to Commissioner Dawson, it was the 1872 version that was "finally adopted and signed" at Northwest Angle; Morris, "in his haste to conclude an agreement, used as a finalized version the draft treaty which did not reflect the new items of agreement" reached at the Angle.

72. *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1045 [*Sioui*]: "[I]f 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." *Sioui* clarifies that the "intention to create obligations, solemnity and the presence of mutually binding obligations" may result in a treaty.

73. Jean Friesen's work conflicts with my understanding of the treaty. Friesen argues that it was clear that the *Anishinaabeg* gave up their title to their lands for future economic security in "Magnificent Gifts: The Treaties of Canada with the Indians of the Northwest 1869-1876" in Price, *supra* note 68 at 43, cited originally in Walmark, *supra* note 31 at 25.

74. Walmark, *ibid.* at 40: "Finally, Ebenezer McCole, an inspector for the Dominion government, confirmed in his 1880 Annual Report that promises made to the *Saulteaux* had not been included in the final draft of the treaty."

treaty, the Chiefs would use the treaty councils to resolve grievances within the treaty relationship. Indian Commissioners facilitated this by attending large gatherings for annuity payments near our sacred gathering places, including the shores of Rainy Lake where I grew up.⁷⁵ This treaty renewal table is the first step towards creating an effective form of self-government for the *Anishinaabeg*. The substantive and procedural rights within Section 35 of the *Constitution Act, 1982* protect this right.⁷⁶ It is further protected by being incorporated into the sacred bundle given to the *Anishinaabeg* by the Creator. This bundle includes our inherent Aboriginal rights and obligations.

VII NATION-TO-NATION RELATIONSHIP

The underlying goal of the *Anishinaabeg* in securing the treaty was to build a strong alliance with the British.⁷⁷ Also, the *Anishinaabeg* shared their vision of economic partnership during the treaty negotiations.⁷⁸ However, Morris had been divisive in his dealings with the Lac Seul Chief by promising security that he knew the remote communities required more than those on the Dawson Road.

Governor: I have heard and I have learned something. I have learned that you are not all of one mind. I know that your interests are not the same—that some of you live in the north far away from the river; and some live on the river, and that you have got large sums of money for wood that you have cut and sold to the steamboats; but the men in the north have not this advantage. What the Chief has said is reasonable; and should you want goods I mean to ask you what amount you would have in goods, so that you would not have to pay the trader's price for them. I wish you were all of the same mind as the Chief who has just spoken. He wants his children to be taught. He is right. He wants to get cattle to help him to raise grain for his children. It would be a good thing for you all to be of his mind, and then you would not go away without making this treaty with me.⁷⁹

75. See for example, 31 May 1874 correspondence by several Chiefs to Lieutenant Governor Morris, Library and Archives Canada (RG10, vol. 1918, file 2790D).

76. I look forward to the concept of reconciliation enunciated in *Sparrow*, *supra* note 16, and most recently forwarded by *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 [*Haida Nation*] and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 [*Mikisew*].

77. Many Chiefs refer to past grievances throughout the Morris account, *supra* note 1 at 48, 50, 55, 56, 57, 62, and 73-74.

78. *Ibid.* at 63.

79. *Ibid.* at 63-64. Moreover, Daugherty refers to a memo that outlines a meeting with the Lac Seul Chief prior to the late September 1873 treaty discussions. In this memorandum, it is noted by Daugherty that the Chief is willing to “break ranks” and agree to the terms outlined by Morris: Daugherty, *supra* note 15 at 34. See also the newspaper report on Morris’ strategy to treat only with some bands after the second day of treaty discussions: Morris, *supra* note 1 at 65: “The

Throughout the 1869–1873 negotiations, the treaty imperative was that the British were not to treat with individual bands in respect of the protocol of nation-to-nation discussions.⁸⁰ Morris may have been showing his lack of understanding for *Anishinaabeg* customs, language and traditions when he took a hard bargaining position on the first day of the treaty discussions. It is likely a measure of how relationships are viewed in his society. Contrast this with the *Anishinaabeg* worldview where relationships were necessary and dependency did not hold a negative connotation; it was a sign of kinship and strength.

Within our territories, the British were directed to respect the Grand Council and furthermore, the Queen's representatives were told not to deal with individual bands.⁸¹ In addition, various protocols were demanded of the Europeans in order to reassure suspicious warriors and maintain good relations:

The reason why we stop you is because we think you do not tell us why you want to go that way, and what you want to do with those paths. You say that all the white men we have seen belong to one party, and yet they go by three different roads, why is that? Do they want to see the Indian's land? Remember, if the white man comes to the Indian's house, he must walk through the door, and not steal in by the window. That way, the old road, is the door, and by that way you must go You must go by the way the white man has hitherto gone.⁸²

These directives were informed by the alliances the *Anishinaabeg* had made with their neighbours to the north and south. It was indeed important that the Grand Council stay unified as they were in the midst of enemies; conflicts with the Dakota Sioux, and between the British and Americans made alliances both strategic and political necessities. Further, the *Anishinaabeg* were witnessing changes to their lifestyle through alcohol and new

Governor decided that he would make a treaty with those bands that were willing to accept his terms, leaving out the few disaffected ones."

80. Moreover, in a memorandum signed by the Commissioners, Simpson, Dawson and Pither, there is the caution that the large gatherings of Indians and the summer would detour settlement: "it would mefestly be unsafe to place settlers or miners among them without the means of protecting them or enforcing the law" Library and Archives of Canada (RG10, vol. 1868, file 577). However, these large gatherings were the foundation of the *Anishinaabeg*'s national government.
81. Morris, *supra* note 1 at 59-60, regarding meeting individually with Chiefs, not complying with the Grand Council's wishes not to meet with them individually.
82. Hind, *supra* note 25 at 99; "Memorandum in Reference to the Indians on the Line of Route Between Lake Superior and the Red River Settlement" (19 December 1870) Library and Archives Canada (MG11 C.O.42, vol.698) at 99 ["Red River Memorandum"].

diseases.⁸³ It was disease that halted progress in the second round of treaty negotiations in 1872, noted by Indian Commissioner, Simpson.⁸⁴

During the treaty discussions there were important discussions on how the Canadian government or the *Anishinaabeg* government would merge or work together.⁸⁵ For example, *Mawintopinesse* explained his authority regarding the regulation of peace and order within the territory:

I don't like fire water myself and don't want it where I live. Perhaps at times I might take some for medicine but should any-one insist that we should have it I will break the kegs and destroy the houses where it is sold.

It is the wish of all wherever our Reserves be, that peace should reign. Any-one carrying arms, murderers etc, will be put out of the reserves.

The words I have said are the words of the nation and have not been said in secret but openly so that all could hear and I trust that those who are not present will not find fault with what we are about to do to-day. And, I trust, what we are about to do to-day is for the benefit of our nation as well as for our white brothers—that nothing but friendship may reign between the nation and our white brothers.

I have now spoken our principal part. We want to see the promises fulfilled. If they are not, I will hunt up the person neglecting his duty.⁸⁶

All the discussions about how the nations would order themselves together may not be completely found in the written accounts, and oral tradition evidence is therefore crucial. The oral tradition evidence of the treaty councils likely hold the key to how the two societies were working through treaty implementation.

In 1867, the *British North America Act* had created a federal government for the Confederation of Canada. Bruce Ryder reviews the impact of confederation on Aboriginal societies:

In light of this history, Confederation was a legal non-event as far as the constitutional statuses of First Nation people are concerned. They were not consulted or involved in the formulation and adoption of the *Constitution Act, 1867*. Thus, the British principle of parliamentary sovereignty has to be further adapted to the Canadian constitutional context by taking into account not only

83. See generally, Daugherty, *supra* note 15.

84. 1872 Indian Commissioners Report, Library and Archives Canada (RG10, vol. 1868, file 577) at 9.

85. Joseph Nolin, "Notes Taken at Indian Treaty: North West Angle Lake of the Woods, from 30th Sept. 1873 to Close of Treaty," Library and Archives Canada (MG 29 C 67 35). A typed copy of the notes are found at the Grand Council Treaty #3's Treaty and Aboriginal Rights Research offices.

86. Nolin, *ibid.*

the existence of a federal division of powers between the provinces and the federal government and of entrenched constitutional rights, but also the existence of unsundered inherent sovereignty of the First Nations.⁸⁷

This unsundered inherent sovereignty may have been reconciled at the historic treaty table between the Queen and the *Anishinaabeg*. However, the pre-existing *Anishinaabeg* society needs to be the renewed focus of treaty research. The “altered” sovereignty of the *Anishinaabeg* that emerged from the treaty at the Northwest angle needs to be comprehended within the context of legal history.

A contextual analysis of the treaty relationship with the *Anishinaabeg* and the underlying goals of the Crown in developing this relationship reveal that the *St. Catherine’s Milling and Lumber* decision breached the fundamental treaty principle between the *Anishinaabeg* and the Crown, the protection of the *Anishinaabeg*’s inherent rights within the territory. Borrows and Rotman note that the Courts “did not consider the existence of [I]ndigenous law in this case, nor did they consider the importance of [A]boriginal perspectives on the treaty.”⁸⁸

The importance of a shared foundation or principles of treaty relationships has been revisited through “treaty renewal” research found only in Saskatchewan. As mentioned in the historical overview, there is no record that British employees informed the *Anishinaabeg* of the asserted British sovereignty over the *Anishinaabeg*’s lands in the 1869, 1871, 1872 or 1873 negotiations. This assertion never became known until the *Anishinaabeg* had become dominated by the *Indian Act* regime within Canada.⁸⁹

Prior to confederation, the U.S. had dealt with their treaty issues under similar colonial-like constructs. Chief Justice Marshall delivered judgment on key cases involving claims to Indian lands by settlers. Justice Marshall’s decisions continue to hold promise for self-government claims. However, the views of the courts of that period were mired in colonial views about our societies:

87. Bruce Ryder, “The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations” (1991) McGill L.J. 308, at 315 [footnotes omitted].

88. John Borrows & Leonard I. Rotman, “The *Sui Generis* Nature of Aboriginal Rights: Does It Make a Difference?” (1997) 36 Alta. L. Rev. 9 at 17.

89. See generally, Mainville, *supra* note 13. This review of various rights, including fishing, agriculture, hunting, mineral rights, forestry and gathering and self-government, the Grand Council highlights that generally, it was not until 1909 that Ontario began asserting a new “political” or moral obligation, resting solely with the federal Crown, as their view of *Anishinaabeg* rights. It is likely that the *Anishinaabeg* would have strongly protested the policy being asserted in the 1873-1890 period.

A people once numerous and powerful and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties, each which carry a solemn guarantee of the residue.⁹⁰

Justice Marshall explained that the residue was an internal right to self-government, as “domestic dependent nations,” a level of internal authority was held by the Indigenous peoples within the new order.⁹¹ The form of self-government for U.S. based tribes was constructed from these judgments and presently allows treaty nations a level of jurisdiction on their lands.⁹²

Justice Marshall accepted this inherent form of self-government. However, there have been few judges in Canada who will allow recognizing and affirming self-government of Aboriginal peoples outside of a statutory or “textual” constitutional basis. For example, in Barry Cottam’s historical study of the *St. Catherine’s Milling and Lumber* dispute, the author attributes the following correspondence to the solicitor for the Crown, David Mills:

The appellant assumes that there is a property in the soil apart from the law. A natural right of real property independent of utility and anterior to legislation. Older and higher than any human code. Where are we to find this law? What is the extent of the estate under this higher & better law under which Indians acquired their title?⁹³

Chief Mawintopinesse could have argued this issue, when he stated the following during the treaty discussions:

We have understood you yesterday that Her Majesty has given you the same power and authority as she has, to act in this business; you said the Queen gave

90. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) at 15 [*Cherokee Nation*].

91. “They may, more correctly, perhaps, be denominated domestic dependent nations.” *Cherokee Nation, ibid.* at 17.

92. As treaty partners in Canadian Confederation, it is understood that the Minnesota tribes’ level of self-government is likely less than what the *Anishinaabeg* claim today. See, as a critique on U.S. Courts future interpretation of Justice Marshall’s decision, Michael C. Blumm, “Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country” (2003-2004) 28 Vt. L. Rev 713 at 775.

93. Barry Cottam, A Historical Background of the St. Catharine’s Milling and Lumber Company Case (M.A. Thesis, University of Western Ontario, 1987) at 110. See also the Supreme Court of Canada judgment in *St. Catherine’s Milling and Lumber v. The Queen* (1887), 13 S.C.R. 577 at 588 [*St. Catherine’s Milling (SCC)*] where the majority found:

It is a rule of the common law that property is the creature of the law and only continues to exist while the law that creates and regulates it subsists. The Indians had no rules or regulations which could be considered laws.

you her goodness, her charitableness in your hands. This is what we think, that the Great Spirit has planted us on this ground where we are, as you were where you came from. We think where we are is our property. I will tell you what he said to us when he planted us here; the rules that we should follow—us Indians—He has given us rules that we should follow to govern us rightly.⁹⁴

However, David Mills had his own understanding of the *Articles of Treaty* as a complete document. As Minister of Interior, David Mills wrote the following extract in response to “Mawandopides” and his complaints:

Many of the Indians complain of the indefinite promises that were made to them by Mr. Simpson; and although these “outside promises” as they have been termed, have since been dealt with, they are not altogether satisfied. All the complaints made will be duly inquired into and if any wrong is known to have been done these chiefs and their bands, it will be rectified.⁹⁵

This understanding of responding to treaty promises through “chiefs and their bands” did not respect the nation-to-nation relationship created in 1869–1873.

VIII LOYALTY AND FIDELITY WITHIN THE RELATIONSHIP

Recently, Justice Binnie of the Supreme Court of Canada has shown an understanding of both treaty principles and legal history that could transform Section 35 of the *Constitution Act, 1982*.⁹⁶ For example, in a case involving *God’s Lake First Nation*⁹⁷ Justice Binnie highlights contextual legal history that assists with the interpretation of the *Indian Act*’s protection of treaty and First Nation relationships:

The history ... has generally been one of dispossession, including dispossession of their pre-European sovereignty, of their traditional lands, and of distinctive elements of their cultures. Of course, arrival of new settlers also brought considerable benefits. The world has changed and with it the culture and expectations of [A]boriginal peoples have changed, as they have for the rest of us. Yet it has been recognized since before the *Royal Proclamation of 1763* ... at some point the process of dispossession has to stop.⁹⁸

94. Morris, *supra* note 1 at 59.

95. David Mills, Minister of Interior, “To the Hon’ble Minister Campbell, Senator” (7 November 1877), Ottawa (RG10, vol. 2028, file 8908).

96. Section 35 is constrained because of s.9 1(24) of the *Constitution Act, 1867* and the *Indian Act* legislation enacted under that authority.

97. *McDiarmid Lumber v. God’s Lake First Nation*, 2006 SCC 58 (December 15, 2006) [*God’s Lake First Nation*].

98. *Ibid.* at para. 106 (Binnie J. for Abella, Fish, Binnie, JJ. in dissent).

In viewing these mutually beneficial arrangements under the light of historical evidence, one gets a truer picture of the importance of gift-giving, annuities and treaty councils.

The *Anishinaabeg* were enjoying economic benefits of pre-treaty relations, especially along the Dawson Road. However, the *Anishinaabeg* treaty relationship that promised economic self-sufficiency was largely aborted after late 19th century jurisprudence proclaimed Ontario and Canada's legal rights to the territory.⁹⁹ The early confederation cases created the licence to breach sacred treaty obligations to the *Anishinaabeg*.

I recognize that when Indian Commissioners met with the *Anishinaabeg*, the importance of gift-giving, ceremony, and supplying suitable European clothing for the *Anishinaabeg* leadership set the foundation for a relationship of mutual respect.¹⁰⁰ An example of how the administration misinterpreted these agreements is found where Secretary of State Joseph Howe reported that presents promised in 1869 should be delivered as an "earnest" illustration of the "friendly disposition" of the government in 1871.¹⁰¹ The 1869 promises were, from the *Anishinaabeg*'s perspective, annuities. Therefore, receiving the first payment in 1871 for something promised in 1869 to be annual was not an auspicious beginning to the relationship.¹⁰²

To help reconcile the failure to meet the promises, Henderson uncovers a framework for implementing the *Anishinaabeg*'s internal sovereignty within Canada's constitutional order.¹⁰³ Henderson characterizes the treaties as "consensual arrangements between nations for the sharing of a territory and creating a new order."¹⁰⁴ I characterize this law as the rules that instruct the people about the right way to live together. Utilizing the work of Henderson, I argue that the "internal" order of self-government might be evidenced by the obligations that the *Anishinaabeg* have given to keep the peace, as well as their fidelity to the British Crown.

When *Mawintopinesse* agreed to the terms, in conclusion he stated, "We have now spoken our principal part. We want to see the promises fulfilled. If

99. See Mainville, *supra* note 13; *St. Catherine's Milling (SCC)*, *supra* note 93; and *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434.

100. Miller, *supra* note 53.

101. Canada, *Report of the Indian Branch of the Department of the Secretary of State for the Provinces* (Ottawa: Parliament of Canada, 1872). J. Howe to Secretary of State for the Provinces (17 April 1871) at 4.

102. This explains the initial day of negotiations in the 1873 Treaty Council by the *Anishinaabeg*. Morris, *supra* note 1 at 44, 47-48

103. James Sákéj Henderson, "Implementing the Treaty Order" in Richard Gosse, James Y. Henderson & Roger Carter, *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing, 1994).

104. *Ibid.* at 52.

they are not I will hunt up the person neglecting his duty.”¹⁰⁵ Some of their spiritual leaders were known throughout the region, and some *Ogitchi-Taaug* were past warriors who fought fierce battles along the western frontier with the mighty Dakota. *Mawintopinesse*’s authority was unquestioned amongst the nation.¹⁰⁶ He was also well respected by Indian Commissioners in the treaty councils. These great warriors and spiritual leaders promised to be loyal and faithful to the Queen as long as the treaty lasted, which was meant to be for ever.

IX RESOURCE SHARING AND DEVELOPMENT

Because Canada has dominated the *Anishinaabeg* and Ontario reaped unjust enrichment from that domination,¹⁰⁷ the treaty relationship is in great need of equitable renewal prior to any act of reconciliation under Section 35 of the *Constitution Act, 1982*.¹⁰⁸ When I discuss equitable renewal, I am informed by the historical research I conducted during the many weeks I spent sifting through various memoranda and reports of government agents, many of which were found in the Grand Council Treaty #3’s archives. A relevant example is the “Memo to the Deputy Minister” dated September 17, 1929 regarding Treaty Three hunting and fishing rights.¹⁰⁹ In this memorandum, the “Indian Timber Lands” supervisor discusses the ramifications of Ontario law on the *Anishinaabeg* of Treaty Three:

I have seen many Indians practically starving on the shore, whilst they watched whitemen fishing commercially in the bays, adjacent to their reserves, the Indians themselves being refused fishing licenses by Ontario, although quite willing to pay the license fee and purchase their nets and equipment.¹¹⁰

The author of this memorandum, H.J. Bury conveys that the *Anishinaabeg* were likely experiencing “the worst conditions of living that they have ever experienced. Prevented from hunting for food, restricted from commercial fishing.”¹¹¹ Further, the need for equitable renewal is evidenced in present-day reserves and their economic difficulties, including the fact that equitable

105. Nolin, *supra* note 85.

106. Mainville, *supra* note 13.

107. See for example, the case of *Keewatin*, *supra* note 6.

108. *Guerin v. Canada*, [1984] 2 S.C.R. 335 and *Secretary of State for Foreign and Commonwealth Affairs*, *supra* note 4.

109. H.J. Bury, “Memorandum to the Deputy Minister, Department of Indian Affairs, Treaty rights and Treaty 3” (17 September 1829), Library and Archives Canada (RG10, vol. 1912, file 2563-2).

110. *Ibid.*

111. *Ibid.*

sharing of the resources within Northwestern Ontario has not been undertaken by either federal or provincial governments. Yet, the memorandum ends with a hope for the future

that their grievances will be remedied, so far as it is humanly possible to do so, then they will turn to the future with renewed hope and a conviction that treaties are inviolable documents, not susceptible to alteration or abrogation by parties who were not contributory signatories.¹¹²

Bury refers to Ontario as the party abrogating the treaty. The early confederation cases¹¹³ set the stage for Ontario's regulatory activity which arguably breached fundamental *Anishinaabeg* treaty rights. At the treaty table, the *Ogitchi-Taaug* asserted exclusive control over the lands along Lake of the Woods and Rainy Lake areas.¹¹⁴ In contrast, Morris attempted to explain that the "Great Spirit" has made the lands and waters equally for all. The *Ogitchi-Taaug* responded that the *Anishinaabeg* owned the lands and this assertion was not directly responded to by either Morris or the Indian Commissioners.¹¹⁵

Lieutenant Governor Morris, the lead negotiator in the treaty council, tried to share a colonial understanding in his statement that the trees and the water were as much the new Canadians' property as the *Anishinaabeg*'s. The *Anishinaabeg* Chief asserted in response that the land is the Creator's forever; however, if it is a competition between Canadian and *Anishinaabeg* peoples, the *Anishinaabeg* use of the trees and water should prevail.¹¹⁶ The lack of response from the Queen's representatives and the question of whether there can be a meeting of the minds at the end of the day regarding the continuing force of certain inherent *Anishinaabeg* rights both need to be reconciled in an honourable way, attuned to the treaty principles underlying

112. *Ibid.*

113. It is difficult to read the language in Chancellor Boyd's decision, *St. Catherine's Milling and Lumber* (1885), 10 O.R. 196 at 227-229 where the Court mischaracterizes the *Anishinaabeg* as "usually degraded Indian type," but through treaty are "regarded no longer in their wild or primitive state," yet the people are uncivilized, existing in an "erratic tribal condition."

114. Explained later in this section; these assertions are first found in the accounts found in Hind, *supra* note 25 at 99; "Red River Memorandum", *supra* note 82.

115. Morris, *supra* note 1 at 57. See also, S.J. Dawson to Hon. H.L. Langevin, Minister of Public Works (18 July 1872) in Canada, *Sessional Papers*, No. 6 (1873), Appendix No. 19.

They live chiefly by fishing or the chase, and their general affairs are regulated by a primitive sort of government of their own. They claim not only territorial but sovereign rights, and this led to questions somewhat embarrassing, but so far, always amicably arranged—at least, for the time being.

116. Morris, *ibid.* at 57, 59.

the *Anishinaabeg* treaty with the Queen and the treaty interpretation principles found in *Sioui*¹¹⁷ and *Simon*.¹¹⁸

The question of whether the Province of Ontario is a treaty party because of the nature of the treaty obligations and the evolving constitutional order is contentious to treaty peoples. Recently courts have analyzed the word “treaty,” in the context of the Crown and treaty peoples,¹¹⁹ and have found that this word embraced all:

[E]ngagements made by persons in authority as may be brought within the term “the word of the white man” the sanctity of which was, at the time of the British exploration and settlement, the most important means of obtaining the good-will and co-operation of the [N]ative tribes and ensuring that the colonists would be protected from death and destruction. On such assurances the Indians relied.¹²⁰

In *Keewatin v. Ontario*,¹²¹ the trappers’ council, a group of *Anishinaabeg* from Grassy Narrows is asserting a division of powers argument, ostensibly to keep Ontario outside of the treaty relationship. In that case, a Court may find that there is a treaty relationship between the Crown in Right of Ontario and the *Anishinaabeg*. It may be the only equitable solution to remedy those accounts that can be found in the *Anishinaabeg*’s petitions to the government. These petitions highlight the infringements of sacred treaty obligations in the early 20th century:

We don’t want to be stopped and Game Inspectors cutting our lines and taking our nets it is in our Treaty Papers and you are not right to take our privileges away We have allowed you to build Dams and Power Works unmolested We may not kill moose without some one interfering and being stopped. We want to know why Are we to be treated as white men? Are your words or the word of the Great White Queen, our Mother, to be as smoke? We trust you still remember the Queen Man’s word is his bond?¹²²

117. *Sioui*, *supra* note 72 at 1035, 1061-1063. See also *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360 (Ont. C.A.) at 367 [*Taylor and Williams*].

118. *Simon v. The Queen*, [1985] 2 S.C.R. 387 at 401, 406 [*Simon*]. See also *Calder v. British Columbia (Attorney-General)*, [1973] S.C.R. 313, 24 at 404 [“] and *Sparrow*, *supra* note 16 at 1107.

119. This phrase is borrowed from Professor Darlene Johnston of the University of Toronto. “Aboriginal peoples” has become such a generic term that it does not correctly capture the differences in the distinct peoples that have Treaty rights under section 35 of the *Constitution Act, 1982*.

120. *Gitanyow First Nation v. Canada*, [1999] B.C.J. No. 659 (B.C. S.C.) at para. 17 (Q.L).

121. *Keewatin*, *supra* note 6.

122. Indian and Northern Affairs Canada, “Delegations and Deputations: Fort Frances Agency.” Central Registry Files, File 485/3-7, vol. 1. Originally cited in Leo G. Waisberg, Joan A. Lovisek, & Tim E. Holzkamm, “Ojibwa Reservations as ‘An Incubus upon the Territory’: The Indian Removal Policy of Ontario 1874-1982” in Pentland, *supra* note 23 at 347.

Within these historical documents is a testament of the *Anishinaabeg* reliance on the honour of the Crown through a century of treaty experience. The relationship was respected by the *Anishinaabeg* throughout and the role and responsibility of the Crown was never forgotten to this day. As part of the new treaty order, the *Anishinaabeg* would expect a treaty council to deal with new issues as they come into being.¹²³

In 1875, the Indian Commissioners were having difficulty explaining the deficiencies in the implementation of the treaty.¹²⁴ The creation of the reserves had not been as promised; only a portion of the land promised had been surveyed,¹²⁵ largely on account of the Ontario–Canada boundary dispute which would not be settled until the *Ontario Boundary Act, 1889* and the *Ontario Boundaries Extension Act, 1912*.¹²⁶ In the aftermath of the Ontario–Canada settlement of the reserves, the *Anishinaabeg* were routinely placed along rocks and bogs, out of range of planned areas for resource development and immigrant settlements.¹²⁷

Before the beginning of reserve selection, the Chiefs petitioned the government to allow them to select their reserves first, and then “the whiteman can go about and search for minerals there.”¹²⁸ It was fundamental for the *Anishinaabeg* to select the land they would keep, as they had agreed to the important terms regarding lands and minerals within the treaty negotiations.¹²⁹

123. Memorandum (to be used or not as Hon. Mr. Morris thinks fit) (1 November 1875), Library and Archives Canada (RG10, vol. 1918, file 2790D).

124. S.J. Dawson to the Minister of Interior (29 January 1875), Library and Archives Canada (RG10, vol. 1918, file 2790D); J. Provencher to Minister of the Interior (3 July 1875), Library and Archives Canada (RG10, vol. 1918, file 2790D); Lt. Gov. Alexander Morris to the Minister of Interior (4 July 1875), Library and Archives Canada (RG10, vol. 1918, file 2790C); Confidential Memo to Minister of Interior (1 November 1875), Library and Archives Canada (RG10, vol. 1918, file 2790C); Morris, *supra* note 1 at 69. The adhesion was not finalized with an Order-in-Council, see Daugherty, *supra* note 15, specifically at n. 69 in “Administration of Treaty 3.”

125. Daugherty, *ibid*.

126. The 1889 *Act* was agreed to after the decision of *St. Catherine’s Milling*, *supra* note 6 was handed down by the Privy Council.

127. Daugherty, *supra* note 15, citing at n. 37: Minutes of Meeting taken by D.C. Scott (10 December 1913), Library and Archives Canada (RG10, vol. 2314, file 62) at 509, part 1; and McNab, *supra* note 55 at 151.

128. Petition to His Excellency the Lieut. Governor Morris, North West Angle (31 May 1874) signed [illegible: Katakapanis...]. “The Indians who were parties to the last treaty wish to have an understanding about the land reserves that being the most important part of the treaty.” Library and Archives Canada (RG10, vol. 1918, file 2790D).

129. Morris, *supra* note 1 at 69. Morris did not respond to the assertion that the Chief had set out his own reserve where the Hudson’s Bay Company had staked, only stating that he would make “enquiries” and that he was writing down the Chief’s words. However, it was important to the Chiefs that the promises in 1869-1872 were that the Chief’s land would be dealt with as the Queen needed the land, on an individual basis. See, Canada, *Report of the Indian Branch of the*

As per the treaty agreement, the *Anishinaabeg* asserted claims within the treaty relationship to both the “riches” at their feet¹³⁰ and the lands they wished to continue to exclusively occupy. However, the Province of Ontario and Canada had not taken these claims under consideration as they were internally disputing their own ownership of the same resources in the early confederation cases from 1880–1905. The importance of mineral development was evident in Blackstone’s complaint against Dawson in 1872.¹³¹ Both societies envisioned the promise of mineral wealth as the economic engine to make the treaty relationship worthwhile. However, Canadian and provincial self-interest would continue to hamper good relations within the treaty to the detriment of the people now illegitimately and illegally confined to reserve-based economies. Given the breach of the resource sharing principle, it is important to renew and protect the treaty under the present constitutional order in respect of the evolving “Crown” and the activities under Ontario’s regulatory regime¹³² that affect the *Anishinaabeg*.

X PEACE AND GOOD ORDER WITHIN THE TERRITORY

The Chiefs, especially “troublesome” men like Chief Blackstone, were required to be recognized leaders of their communities for Indian Commissioners to treat with them.¹³³ Likewise, the *Anishinaabeg* would audit the authority of the Queen’s representatives by such things as the number of people in their party, the grandeur of the gifts and their actions.¹³⁴

Department of the Secretary of State for the Provinces (Ottawa: Parliament of Canada, 1872)
Adams G. Archibald to Joseph Howe (19 July 1871) at 11:

Besides all this, we had led the Indians to believe that they would be treated within their different localities just as the land were required, and it is exceedingly desirable (with these people) to keep a promise even in matters where a deviation would imply breach of faith.

130. Morris, *ibid.* at 62:

Chief: “My terms I am going to lay down before you, the decision of our Chiefs; ever since we came to a decision you push it back. The sound of the rustling of the gold is under my feet where I stand; we have a rich country; it is the Great Spirit who gave us this; where we stand upon is the Indians’ property, and belongs to them. If you grant us our requests you will not go back without making the treaty.”

131. “Extract of a letter from T.A.P. Towers, *supra* note 46.

132. See for example, the most recent case of the Supreme Court of Canada, *R. v. Morris*, *supra* note 63, and specifically, the dissent of Fish J. and McLachlin C.J. The dissenters’ “pith and substance” analysis creates additional constitutional space for provincial regulation of treaty rights.

133. See generally, Morris, *supra* note 1 at 64 where Dawson questions Blackstone’s authority. His authority seems to be quite high; see note 89 above.

134. Simon J. Dawson to Minister of Interior, *supra* note 44.

Therefore, when Wemyss Simpson suggested that a military force accompany Morris, it was not simply self-protection, but also an understanding of the essence of *Anishinaabeg* respectful relations that necessitated such an expense.¹³⁵ The military expedition was justified by the Canadian government as an important form of showing the respect accorded to the Chiefs of the Rainy Lake and Lake of the Woods areas.¹³⁶ It was clear in the Indian Commissioners' accounts before treaty, that the promise of settlement would be hampered by the Rainy Lake gatherings of the *Anishinaabeg*.

Indeed the promise of peaceful relations was a primary reason for treaty-making. In 1872, Morris addressed the "Indians" at Fort Garry and introduced Wemyss Simpson as the Indian Commissioner to deal with the treaty arrangements. In this address he made several important promises:

First, Your Great Mother, the Queen wishes to do justice to all her children alike. She will deal fairly with those of you of the setting sun, just as she would with those of the rising sun. She wishes order and peace to reign through all her country, and while her arm is strong to punish the wicked man, her hand is also open to reward the good man every where in her Dominions.

Your Great Mother wishes the good of all races under her sway. She wishes her red children to be happy and contented. She wishes them to live in comfort. She would like them to adopt the habits of the whites, to till land and raise food, and store it up against a time of want. She thinks this would be the best thing for her red children to do, that it would make them safer from famine and distress, and make their homes more comfortable.

But the Queen, though she may think it good for you to adopt civilized habits, has no idea of compelling you to do so. This she leaves to your choice, and you need not live like the white man unless you can be persuaded to do so with your own free will. Many of you, however, are already doing this.

Your Great Mother, therefore, will lay aside for you "lots" of land to be used by you and your children forever. She will not allow the white man to intrude upon these lots. She will make rules to keep them for you, so that, as long as the sun shines, there shall be no Indian who has a place that he can call his home, where he can go and pitch his camp, or if he chooses, build his house and till his land.¹³⁷

135. *1872 Indian Commissioner's Report*, Library and Archives Canada (RG10, vol. 1868, file 577); and "To Minister of Militia and Defence from Minister of Interior" (9 August 1873), Library and Archives Canada (RG10, vol. 1904, file 2235).

136. *Ibid.*

137. "Memorandum of an Address to the Indians by the Lieut. Governor of Manitoba," 5th Sess., 1st Parl., in Canada, *Session Papers of the Dominion of Canada*, vol. 7 (1872) at 16-17.

These treaty principles were important to the *Anishinaabeg* and can be found within Morris' account in the Northwest angle treaty negotiations of 1873.

Powassin and Minnesota tribal leader Flatmouth attempted to assert their rights in disputes along the Lake of the Woods, as described in media reports in the public archives.¹³⁸ The local superintendent of Indian Agencies investigated a disturbance “caused” by the two Chiefs involving a local fishing vessel. The regulation “outside” of the treaty relationship was disturbing treaty rights on both sides of the U.S.-Canada border.

It is reported that the Indians have been threatening for some time past to put a stop to the fishing themselves if the government could not do it. They have been warned against doing any such overt act and been advised to lay their complaints before the government.¹³⁹

The intersocietal law of treaty-making was being overlooked by the Canadian government and therefore, the *Anishinaabeg* Confederacy was asserting rights to protect their coveted territory on both sides of the Ontario-Minnesota border. This was an important act of symbolic defiance, as non-treaty actors were upsetting important water and land harvesting rights. The *Anishinaabeg* did so because these resources were the essence of their way of life, according to their inherent laws, *Inaadiziwin* and *Miinigoziwin*. Balance and harmony with the natural world was being disrespected. Reconciliation of the breaches of the *Anishinaabeg*'s peace with our Creator will require a form of habitat protection agreement between Ontario, Canada and the *Anishinaabeg*.¹⁴⁰ This habitat protection agreement will meet the promise of resource sharing found in *Manidoo Mazina'igan*.

XI NON-DISCRIMINATORY APPLICATION OF CANADIAN LAW

Treaty peoples were apprehensive about constitutional renewal as it may affect the gains being made in Courts before 1982.¹⁴¹ Their views of their treaties were brought to the Courts of England in the case of *The Queen v.*

138. Two media reports are photocopied at Library and Archives Canada, Indian Affairs (RG10, vol. 3800, file 48) at 542: “Indignant Indians being refused gratuitous ... take it” Rat Portage, August 13 (unknown year). “South of the Line: Reeds Fishery Establishment on American Soil—They were instructed to leave as they were infringing on Indian Reserves – Canadian Indians not interested.” New York—August 14 (unknown year).

139. *Ibid.*

140. It was my original hope that this could be litigated in the “Grassy Narrows” litigation, see *Keewatin*, *supra* note 6.

141. *Calder*, *supra* note 118; *Taylor and Williams*, *supra* note 117; *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 (B.C. C.A.), at para. 649 (aff'd [1965] S.C.R. vi).

The Secretary of State for Foreign and Commonwealth Affairs,¹⁴² by the Indian Association of Alberta, Union of New Brunswick Indians, and the Union of Nova Scotian Indians. The English Court of Appeal found that the Crown of England was no longer obligated to the treaty peoples in Canada. The obligations now rested with the Crown in Right of Canada.¹⁴³

Lord Denning stated that “customs” of Indian tribes are treated as law by them, and that “[t]hese rights belong to members of the community, and take priority over the ownership of the soil.”¹⁴⁴ Furthermore, Lord Denning wrote:

As matter of public policy, it was of the first importance to pay great respect to their laws and customs and never to interfere with them except when necessary in the interests of peace and good order. It was the responsibility of the Crown of England—and those representing the Crown—to see that the rights of the [I]ndigenous people were secured to them, and that they were not imposed upon by the selfish or the thoughtless or the ruthless.

Finally, and most importantly, Lord Denning understood the solemnity and importance of the historic treaty rights:

They will be able to say that their rights and freedoms have been guaranteed to them by the Crown—originally by the Crown in respect of the United Kingdom—now by the Crown in respect of Canada—but, in any case, by the Crown. No Parliament should do anything to lessen the worth of these guarantees. They should be honoured by the Crown in respect of Canada “so long as the sun rises and the river flows.” *That promise must never be broken.*¹⁴⁵

There are several “outside” promises that did not get incorporated into the *Articles of Treaty* that were important to the *Anishinaabeg* agreeing to the treaty. Fundamental to the *Anishinaabeg* was that the livelihood that they were enjoying because of Canadian developments in their territory would continue; this included cutting wood for steamships,¹⁴⁶ selling wild rice¹⁴⁷ and fish¹⁴⁸ to various companies, and promised mineral wealth.¹⁴⁹ However, these rights were largely ignored in the Ontario regulatory regime.¹⁵⁰

142. *Supra* note 4.

143. *Ibid.*

144. *Ibid.* at section 2: “Aboriginal rights and freedoms.”

145. *Ibid.* at “Conclusion” [emphasis added].

146. Morris, *supra* note 1 at 57.

147. *Ibid.* at 320-325 (Articles of Treaty) and compare with “Nolin notes”, *supra* note 51: “Mr. Dawson said he would act as by the past about the Indians passage on his road. The Indians will be free as by the past for their hunting and rice harvest.”

148. Morris, *ibid.* at 74.

The most difficult breach occurred when the reserve surveys were completed despite complaints by the *Anishinaabeg* Chiefs.¹⁵¹ At Lake of the Woods, the Chief of Whitefish Bay told the Indian Commissioners that it “agitated his heart” that his community was forced to live on rock.¹⁵² This can be contrasted with Morris’ statement:

I ask you once more to think what you are doing, and of those you have left at home, and also of those that may be born yet, and I ask you not to turn your backs on what is offered to you, and you ought to see by what the Queen is offering you that she loves her red subjects as much as her white.¹⁵³

It was clear to the *Anishinaabeg* Chiefs that their territory was mineral-rich and could sustain both societies. However, through the administration of the *Articles of Treaty* by Canada, the promises for equity within the treaty relationship was never truly met.

XII *MIINIGOZIWIN* AND SECTION 35 OF THE *CONSTITUTION ACT, 1982*

Presently, Section 35 jurisprudence is an ill-suited tool for transforming the *Anishinaabeg* bands into governments that hold *Miinigoziwin* authority. The object of Section 35 is the reconciliation of inherent Aboriginal and treaty rights.¹⁵⁴ What cannot be forgotten is that during treaty-making these inherent rights had been reconciled or given protection in an altered form under the new treaty order. This was recognized by McLachlin J. (as she then was):

Only by fully recognizing the [A]boriginal legal entitlement can the [A]boriginal legal perspective be satisfied The process must go on to consider the non-[A]boriginal perspective—how the [A]boriginal right can be legally accommodated within the framework of non-[A]boriginal law.

149. *Ibid.* at 70; see also Canada, Journals of the House of Commons, vol. 14 (12 February – 7 May 1880) at 432; Rhonda Mae Telford, “*The Sound of the Rustling of the Gold is Under My Feet Where I Stand—We have a Rich Country*”: A History of Aboriginal Mineral Resources in Ontario (D. Phil Dissertation, University of Toronto, 1996) at 103 [unpublished].

150. Mainville, *supra* note 13.

151. See for example, “Correspondence to S. Dennis. Esq. Surveyor General from Fort Frances” (2 August 1875) (RG10, vol. 1968, file 5192).

152. Lt. Gov. Alexander Morris to the Minister of Interior (4 July 1875), Library and Archives Canada (RG10, vol. 1918, file 2790C). See Daugherty, *supra* note 15, specifically at n. 19 in “Administration of Treaty 3.”

It is clear from Dawson’s statement that free passage along the Dawson route, combined road and water system, was granted to the Indians as a favour. It was not intended as a binding treaty commitment.

153. Morris, *supra* note 1 at 60-61.

154. *Van der Peet*, *supra* note 11 at paras. 31 and 42.

Traditionally, this has been done through the treaty process, based on the concept of the [A]boriginal people and the Crown negotiating and concluding a just solution to their divergent interests, given the historical fact that they are irretrievably compelled to live together.¹⁵⁵

This excerpt is from one of two dissents in *Van der Peet*. This understanding imparts a better foundation for the *Anishinaabeg* treaty order. In our historical context, the treaty right to self-government must be examined in light of over 133 years of oppression by the Canadian constitutional order.¹⁵⁶ This is important, as members of the judiciary are now better equipped to deal with the legal history of Aboriginal and treaty rights.¹⁵⁷

The Supreme Court of Canada recognized some authority in the pre-existing title¹⁵⁸ held by the *Anishinaabeg*, and absent extinguishment¹⁵⁹ an altered form of that authority continues to exist within the territory of the *Anishinaabeg* of Rainy Lake and Lake of the Woods. My understanding is that the pre-existing sovereignty was altered to ensure that the inherent rights including the way of life and sacred relationship with the land would be protected within the treaty order, now firmly entrenched in the *Constitution Act, 1982*.

A *sui generis* right to self-government takes shape from an understanding that “collective and physical survival” was the predominant goal of *Anishinaabeg* treaty-making. Borrows and Rotman advance this argument:

155. McLachlin, J. [as she then was] in *Van der Peet*, *ibid.* at para. 313.

156. J.R. Miller, “The Historical Context of the Drive for Self-Government” in Gosse, Henderson & Carter, *supra* note 103 at 42.

157. I think this may be because of scholarly work, in particular some key articles referenced by the Supreme Court of Canada: see note 10, above. However, not all judgments benefit from the scholarly work that has used the corrective lens in an approach to treaty rights protection. The most recent example can be found in *R. v. Morris*, *supra* note 63 at paras. 53-55, where Deschamps and Abella JJ. (Binnie and Charron JJ. concurring) recognize that only an “insignificant” interference with a treaty right could be justified by provincial regulations.

158. *Delgamuukw*, *supra* note 17 at para. 115.

A further dimension of [A]boriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual [A]boriginal persons; it is a collective right to land held by all members of an [A]boriginal nation. Decisions with respect to that land are also made by that community. This is another feature of [A]boriginal title which is *sui generis* and distinguishes it from normal property interests.

159. Waisberg, Lovisek & Holzkamm, *supra* note 122 at 345.

As one condition for confirmation of Treaty 3 reserves, the province demanded in 1913 that Canada secure surrenders of all Rainy River reserves except one. By threats of removal without payment, Ojibwa were forced to abandon their villages and relocate to Manitou Rapids. Over 43,000 acres of reserve lands, the most arable in the region, were taken.

Therefore, in making *sui generis* determination of Aboriginal rights, courts must look to notions of collective physical and cultural survival, as well as specific Aboriginal laws, customs and practices. Reading both of these elements into the jurisprudence would serve as a more appropriate interpretative prism through which the courts may find resolutions to Aboriginal rights disputes.¹⁶⁰

This will help Canadians understand why their institutions are largely rejected by the *Anishinaabeg*.¹⁶¹ Our way of life is protected only by our institutions.

Recently, the Supreme Court was required to review the meaning of “distinctive culture” in the case of *Sappier and Gray*,¹⁶² two wood harvesting cases in the Maritimes that originally involved both a treaty and an Aboriginal rights dimension. The treaty rights argument was abandoned by one of the accused, and the Court decided not to determine the treaty rights argument because of the fact that the Aboriginal right to harvest wood had resolved the dispute. The Supreme Court revisited the dissents in *Van der Peet* and explained the underlying need for pre-contact evidence. This case attempts to explain the importance of those ancient activities to proving that a right is integral to the Aboriginal society:

What is meant by “culture” is really an inquiry into the pre-contact way of life of a particular community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits. The use of the word “distinctive” as a qualifier is meant to incorporate an element of [A]boriginal specificity. [T]he Court must first inquire into the way of life ... pre-contact ... [and] seek to understand how the particular pre-contact practice relied upon relates to that way of life.¹⁶³

This case may lead to more rights protections for the Aboriginal communities, but the root of the problem continues to exist for self-

160. Borrows & Rotman, *supra* note 88 at 43.

161. Recently I visited Victoria, B.C. and attended a CBA B.C. event where I talked about my LL.M. thesis and historic treaty-making. Key to my presentation was the idea of inter-societal laws created in treaties. This brought about a discussion on modern treaty-making and the reconciliation policy of the Province of British Columbia. It is important to understand the importance of our Aboriginal institutions, our law-making powers and inherent rights when defining relationships with us. The promise of s. 35 for Aboriginal peoples is the protections of our societies, not transforming our societies into special rights-bearing Canadian communities.

162. *Sappier and Gray*, *supra* note 11.

163. *Ibid.* at paras. 45-46.

government claimants.¹⁶⁴ The acceptance of the *British North America Act* and colonial-era judicial interpretation used to advance further infringement of *Anishinaabeg* self-government must be revisited legally. Section 91(24) and the *Indian Act*¹⁶⁵ are both illegitimate legal orders to the *Anishinaabeg*. In his most recent works, John Borrows discusses the issue of “interpretative competence” to deal with *sui generis Anishinaabeg* institutions and law-making.¹⁶⁶ It is a crucial area of development for both judiciary and Canadian negotiators to understand how to foster the promise of treaty-making and reconciliation.

XIII INAADIZIWIN AND THE HONOUR OF THE CROWN

The *Anishinaabeg* continued to respect the treaty relationship in their petitions to Indian Affairs. The administration of the treaty was rife with difficulties, as Ottawa was attempting to cut back expenses since 1873,¹⁶⁷ while Indian Commissioners were on the ground trying to explain the discrepancies to the intimidating *Anishinaabeg* Chiefs.¹⁶⁸ Until 1890, it was clear that the Indian Commissioners were anxious to meet any demands or petitions of the *Anishinaabeg*. Furthermore, the *Anishinaabeg* were continuing to live as they had before, utilizing their institutions through seasonal gatherings.

The sovereignty of the *Anishinaabeg* was premised on the fact that they pre-existed and preserved their authority over the territory purported to be ceded by Treaty Three. The lands were to be shared and in the absence of

164. *Ibid.* See Justice Binnie’s dissenting comments at para. 74, referring to the exclusion of the “external” element of the custom, practice or tradition forming the Aboriginal right. Justice Binnie finds that the external boundaries should be extended to other Aboriginal communities, to allow the claimants to barter and trade their harvested wood, as the more practical limitation of the right.

165. “Indians and Lands reserved for Indians” in the *Constitution Act, 1867* is a responsibility of the federal government in division of powers. In colonial times, this resulted in the first *Indian Act* legislation in Canada.

166. On 24 November 2006 I attended John Borrows’ presentation on a newer document at the University of Toronto. In his paper, “Living Law on a Living Earth: Aboriginal Religion, Law, and the Constitution” (2006) [unpublished], he writes at 26-27:

If one were [to] translate to Anishinabek words into English or French, very many Anishinabek nuances, ideas and understandings would be lost in the process. The same thing happens when one translates Anishinabek law and legal perspectives into the constitution’s common law framework.

167. Daugherty, *supra* note 15 at n. 41 in “Administration of Treaty #3” citing Deputy Minister of the Interior to Indian Commissioner Provencher (18 March 1874) and also Minister of Interior Laird to Lt. Gov. Morris 18 March 1874) Public Archives of Manitoba (MG12, B1).

168. Letter from S.J. Dawson to the Minister of Interior in Ottawa “29 January 1875), Indian Affairs (RG10, vol. 1918, file 2790 D).

honourable dealings in this regard, the *Anishinaabeg* asserted jurisdiction over third parties who were profiting from the breakdown in the treaty relationship.¹⁶⁹

The evidentiary and other legal barriers to Section 35 required that an old doctrine evolve, namely, the honour of the Crown.¹⁷⁰ Chief Justice McLachlin, for the Supreme Court, enunciated the rationale for this doctrine in *Haida Nation*:

To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the “meaningful content” mandated by the “solemn commitment” made by the Crown in recognizing and affirming [A]boriginal rights and title.¹⁷¹

The concept of the honour of the Crown is not new to treaty peoples. Through the treaty principles it was the binding promise that assured them that the relationship would last forever. Newly reformulated under Section 35, “honour” of the Crown now approves the discretionary power of non-treaty parties over legal rights of the *Anishinaabeg*.¹⁷² This cannot be legitimized in *Anishinaabeg* society.

As Mark Walters has correctly advised, the treaties rediscovered in *Marshall* are not just the documents “but rather are relationships ... they represent a shared understanding of and commitment to a normative framework for cross-cultural relationships.”¹⁷³ So how can “honour” be properly entrusted to a non-treaty actor? Legality and legitimacy are at odds.

169. An interesting event is found at Library and Archives Canada (RG10, vol. 3800, file 48) at 542 where Chief Flatmouth and Pow-was-sen are reported on in newspaper accounts involving the Reid Fish Company. The Chiefs had “taken possession” of a fishing vessel that they may have deemed trespassed within *Anishinaabeg* waters of the Northwest angle, or that the fishermen were unlawfully taking an *Anishinaabeg* resource. Similarities may be found in the actions of the 19th century leaders to assert ownership of natural resources with the present-day assertion of *Manito Aki Inakonigaawin*, the Resource Law of the Grand Council Treaty #3. But, my underlying criticism of the Resource Law is that it is outside of the treaty relationship, based on poor interpretation of Canadian common law, and is viewed by many as revenue generation or taxation on Canadian companies. *Anishinaabeg* jurisdiction to tax or license Canadian companies is not within my treaty understanding.

170. This concept existed during the colonial jurisprudence period: see *Mikisew*, *supra* note 76 at para. 51.

171. *Haida Nation*, *supra* note 76 at para. 33:

When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.

172. See *Mikisew*, *supra* note 76 at paras. 31-32.

173. Mark D. Walters, “Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History After Marshall” (2001) 24:2 Dal. L.J. 75 at 79.

Mutual reconciliation¹⁷⁴ was the approach promised since *Simon v. The Queen*.¹⁷⁵ The Court in *Simon* determined that Aboriginal treaties were not “contracts” between Canada and the Indigenous nations, but rather *sui generis* agreements, imparting solemn commitments by the European power to the Indigenous inhabitants.¹⁷⁶ Within the *sui generis* agreement with the *Anishinaabeg*, it was always asserted that the Chiefs never gave up the *Anishinaabeg*’s right to govern themselves and their lands.

As part of the account of these historic rights, it is important to understand the roots of the right in question, and why the inequity exists in the pursuit of self-actualization and democracy for treaty peoples. This may necessitate engaging Ontario and Canada in defining a renewed treaty relationship between the present-day Crown and the *Anishinaabeg*. John Borrows’ work contains an understanding of the treaty peoples’ *sui generis* perspective of reconciliation.

They believe that power was to be shared, and decisions about the treaties’ meanings were to be resolved through further treaty councils. Courts could take guidance from this perspective when faced with disputes over the meaning of treaties and send the parties back to peace and friendship councils to resolve their differences through negotiation and settlement.¹⁷⁷

Important to Canada’s constitutional order is the notion that Section 35 can accommodate the Aboriginal right to self-government and respect the existing legislative ordering.¹⁷⁸ In *Mikisew*, Binnie J. found within Treaty 8 a framework in which to manage “continuing changes in land use already foreseen in 1899 and expected, even now, to continue well into the future.”¹⁷⁹ Furthermore, relying on the honour of the Crown, he found that “consultation is key to achievement of the overall objective of the modern

174. Walters, “Constitutionalism”, supra note 10 at para. 56 (Q.L.).

175. *Simon*, supra note 118.

176. *Ibid.* at para. 49.

In the section “Treaty” is not a word of art and in my respectful opinion, it embraces all such engagements made by persons in authority as may be brought within the term “the word of the white man” the sanctity of which was, at the time of British exploration and settlement, the most important means of obtaining the goodwill and co-operation of the [N]ative tribes and ensuring that the colonists would be protected from death and destruction. On such assurance the Indians relied.

177. John Borrows, “Domesticating Doctrines: Aboriginal Peoples and the Royal Commission on Aboriginal Peoples” (2001) 46 McGill L.J. 615 at 630.

178. *Campbell v. British Columbia (Attorney General)*, [2000] B.C.J. No. 1524 (B.C. S.C.) at para. 81.

179. *Mikisew*, supra note 76 at para. 63.

law of treaty and [A]boriginal rights, namely reconciliation.”¹⁸⁰ However, to meet the treaty promises under the present order will be difficult.

Manidoo-gashkibijigan refers to the sacred bundle. This bundle comprises the rights given to the *Anishinaabeg* by the Creator and is therefore a solemn undertaking that is in need of constant renewal. This renewal is accomplished through ceremony and the giving of gifts. In order to respect this bundle, it is necessary to respect the land and all of creation, to ensure balance and stewardship. The rights within the sacred bundle are focused on *Inaadiziwin*, our way of life respecting and living by the natural laws of the *Anishinaabeg*; the natural laws are gifts from the Creator and are called *Miinigoziwin*. This social order will always be the focus of *Anishinaabeg* renewal. *Miinigoziwin* are distinctively *Anishinaabeg* as they have been carried from generation to generation since time immemorial. It is *Miinigoziwin* that were being respected when Lt. Governor Morris had taken the pipe during the treaty council. While Morris called it a “peace” pipe, the pipe was a means of bringing the message to the Creator, that the solemn arrangement was made in 1873 and the parties requested it to be “blessed” by the Creator’s presence.

As explained to me, in *Anishinaabeg* society it is the sacred bundle that is our Constitution; it is our reason for being where we are and existing together as a people. It is informed by the Creators’ laws, or *Miinigoziwin*. These laws are sacred and we protect them by keeping them in our oral traditions and our understanding of *Biimaadizwin*, the way of living rightly. Therefore, it is our institutions of government that will take us towards this goal of *Bimiiwinitowin Omaa Akiing*, the governance of ourselves and our territory in “the right way.” As long as we are always cognizant of the sacred bundle and those sacred laws, we will honour “all of our relations.” It is from this grounding that we should always consider the treaty relationship.

XIV CONCLUSION

The reconciliation of *Anishinaabeg* sovereignty began when Lt. Governor Morris and the Grand Council met at the Northwest Angle in October, 1873.¹⁸¹

Chief: I now let you know the opinions of us here. We would not wish that anyone should smile at our affairs, as we think our country is a large matter to us. If you grant us what is written on that paper, then we will talk about the

180. *Ibid.*

181. Morris, *supra* note 1 at 60.

reserves; we have decided in council for the benefit of those that will be born hereafter. If you do so the treaty will be finished, I believe.¹⁸²

The mutual reconciliation under Section 35 may be the answer of how the three levels of government are to co-exist in the 55,000 square miles under Treaty Three. It may be supported through a treaty rights analysis that the *Anishinaabeg* have the right to a treaty forum to deal with grievances and renew the treaty obligations.

When Lt. Governor Morris promised, “the Queen’s ear would always be open to hear her Indian subjects,” he was responding to the threat of *Anishinaabeg* retaliation if the treaty was breached.¹⁸³ Through several similar assurances, the *Anishinaabeg* were able to agree to an alliance with the British and sacrifice some of their inherent sovereignty. Would it not be an important component of reconciliation to establish a treaty table to begin discussions around an effective form of self-government for the *Anishinaabeg*?

182. *Ibid.*

183. Contrast the two reports of this treaty promise. In Lieutenant Governor Morris’ account it is the “ear of the Queen’s government” that was promised: see Morris, *supra* note 1 at 72. In the second report, which I find more persuasive, the short-hand reporter, *supra* note 65, wrote that Lieutenant Governor Morris had promised, “The Queen’s ear would always be open to hear her Indian Subjects.”