Breathing Life Into the Stone Fort Treaty

by

Aimée Craft
B.A., University of Manitoba, 2001
LL.B., Université d’Ottawa, 2004

A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of

MASTER OF LAWS

in the Faculty of Law

© Aimée Craft, 2011
University of Victoria

All rights reserved. This thesis may not be reproduced in whole or in part, by photocopy or other means, without the permission of the author.
Supervisory Committee

Breathing Life Into the Stone Fort Treaty

by

Aimée Craft
B.A. (L.-Ph.), University of Manitoba, 2001
LL.B, Université d’Ottawa, 2004

Supervisory Committee

Jeremy Webber, Faculty of Law
Supervisor

Michael Asch, Department of Anthropology
Co-supervisor
Abstract

Supervisory Committee

Jeremy Webber, Faculty of Law
Supervisor

Michael Asch, Department of Anthropology
Co-supervisor

This dissertation will demonstrate that, by considering Treaty One (1871) from the perspective of the Anishinabe, especially Anishinabe laws or Anishinabe *inaakonigwein* and normative expectations, one can obtain a better understanding of why there is a discrepancy in interpretations of the treaty.

The research draws on practices of treaty making prior to Treaty One and shows that the parties relied extensively on Anishinabe protocols and procedural laws in the context of the Treaty One negotiations. In addition, kinship relationships, the obligations derived from them, and a sense of the sacred obligations involved in treaty-making, informed the agreement that was made between the parties. In particular, the kinship between a mother and child was invoked by the parties; the Crown negotiators relying on it primarily to secure good terms with the Anishinabe and the Anishinabe advocating for a commitment to ensuring a good life while respecting and preserving their autonomy.

The exploration of the historical records of the negotiations and the oral history surrounding the treaty help draw out the differing and sometimes competing understandings of the treaty, many of which continue to this day, and in particular in relation to the effect of the treaty agreement on legal relationships to land. They help illuminate questions regarding the interpretation of the Treaty, including what would be necessary in order to implement it in accordance with its signatories’ understandings.
Table of Contents

Supervisory Committee .......................................................... ii
Abstract .................................................................................. iii
Table of Contents ..................................................................... iv
List of Figures .......................................................................... vi
Acknowledgments .................................................................... vii
Dedication ................................................................................ viii

Chapter 1: INTRODUCTION ................................................................. 1
  Overview ................................................................................. 1
  Treaty interpretation and implementation .................................. 7

Chapter 2: PRE-TREATY CONTEXT .................................................... 29
  Indigenous treaties ................................................................. 34
  The fur trade treaties ............................................................. 37
  Anishinabe treaties with the Crown ........................................ 45
  Treaty with the Indians of Manitoba ........................................ 52
    The need to secure alliance ................................................... 52
    The Selkirk Treaty ............................................................... 57
    Reigning Uncertainty .......................................................... 59

Conclusion .............................................................................. 62

Chapter 3: ANISHINABE INAAKONIGEWIN (LAW) AND TREATY ONE ...... 65
  Understanding and defining - what is law? ............................... 65
  Recognition of indigenous legal traditions ............................... 66
  Multiple systems of law ......................................................... 69
  Anishinabe inaakonigewin (law) and Treaty ............................. 71
  Building on solid foundations: relationships and protocols ......... 74
    Relationships between groups - Waiting for the others, Authority to speak .......... 75
    Relationships to other Anishinabe - Removing the dark cloud ......................... 78
    Relationships with guests - Gifting and Feasting .................................. 81
    Relationship with the Creator and Spirit - The Pipe .................................. 84
  Kinship with the Queen .......................................................... 87
    Obligations of love, kindness and understanding .......................... 91
    Equality among the children .................................................. 94

Conclusion .............................................................................. 96

Chapter 4: THE STONE FORT TREATY AND ANISHINABE LAND .......... 99
  Overview ................................................................................. 99
  The negotiations .................................................................... 102
List of Figures

Figure 1 ................................................................................................................................. 49
Acknowledgments

I hope that the wind will catch my *Miigwetch* (thank you) song and carry it to all of those who have lived, breathed, ached and felt the joy of this work. My family, my friends, my relatives - in Victoria, in Manitoba and all over Turtle Island - you have inspired me.

*Miigwetch* to my Mom and Dad. You give so much and ask for so little.

*Miigwetch* to my *mishomis*. You taught me all that I needed to know to be *Anishinabe*, a good person. You showed me that love and kindness really have no limits.

*Miigwetch* to my ancestors. May you know that I carry your thoughts for us in my little heart.

*Miigwetch* Kitchi-Manitou.
Dedication

For all of those that have gone on, those that are here today and in particular, to those who are yet to come. May you honour the treaty relationship.
Chapter 1 : INTRODUCTION

Only thus can hope be bright that there might come a tomorrow when you, the descendents of the settlers of our lands, can say to the world,

"Look, we came and were welcomed, and then we wrought much despair; but we are also men of honour and integrity and we set to work in cooperation, we listened and we learned, we gave our support, and today we live in harmony with the first peoples of this land who now call us brothers."

We hope that tomorrow will come.  

Dave Courchene Sr., Grand Chief of Manitoba

Overview

Treaties are solemn agreements between people. In order to interpret and implement a treaty, we look to its spirit and intent, and consider what was contemplated by the parties at the time the treaty was negotiated. This thesis is premised on the idea that both parties’ understandings of the treaty need to be taken into account in its interpretation. In seeking out these understandings, we cannot assume that the parties shared their understandings of the treaty or that they came to a “common understanding” of it. Even if a “common understanding” existed, it might have been limited to an agreement to share the land – and it might have been that each party had a different understanding of what sharing the land actually entailed. To understand what was negotiated at the time of treaty, and to construct what it should mean today, requires an independent understanding of each perspective, which includes an understanding of the normative values and laws of the indigenous parties. Today, our interpretations of treaties are needed, so that we can

---

1 Manitoba Indian Brotherhood, Wahbung: Our Tomorrows (Winnipeg: Manitoba Indian Brotherhood, 1971).

2 I use the term “indigenous” openly and broadly to refer to the many indigenous nations of first peoples of Canada. The term “aboriginal” is used in the context of “aboriginal peoples of Canada” as defined in the
continue to breathe life into what are essentially relationship documents, while accepting that past interpretations have resulted in significant disagreement and contestation. In order to interpret and implement treaties as meaningful agreements, different and differing understandings need to be considered and addressed. While the task of implementation may prove challenging, it is a challenge that is firmly rooted in our history, given that many of us have lived in a way that has given meaning to treaties, despite disagreement.

I do not propose in this thesis to resolve the issues relating to the implementation of treaties. Rather, this research will hopefully allow us to consider how we can support a better interpretation of Treaty One by looking to the Anishinabe understanding of the treaty they made with the Crown, rooted as it was in procedural and substantive norms derived from Anishinabe inaakonigewin (law). I want to show how those norms shaped the Anishinabe position in ways that were manifest in the treaty negotiations themselves. Although the treaty parties may have understood that they each had differing perspectives, each was guided by its own understandings, including its own legal tradition and jurisdiction, which informed the negotiation of the treaty.

Treaty One was an agreement between the Crown and the Anishinabe people of southern Manitoba that effectively opened up the west to settlement and expansion. The treaty

---

Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11. At times, I will use the term “Indian” to reflect the use of the term by certain authors or in certain circumstances, especially historical. Other times I will refer in particular to the Anishinabe people or nation, a term which I define at footnote 3 below.

3 The word Anishinabe means “the people” in the Anishinabemowin language. The Anishinabe consist of three nation groups: the Ottawa, Potawatomi and Ojibway (Ojibwa, Ojibwe). The Ojibway are also known as the Chippewa (mostly in the USA) or Saulteaux (a name given to the Ojibway settled near the rapids in Sault Ste. Marie). In Manitoba, the Ojibway generally refer to themselves as either Anishinabe or Ojibway. I will employ the term Anishinabe. See Charles Bishop, The Northern Ojibwa and the Fur Trade: An
was negotiated over nine days in the summer of 1871, at the HBC post of Lower Fort Garry, known to many as the Stone Fort. Since the signing of Treaty One in 1871, the Anishinabe and the Crown have disputed the terms, understandings and obligations that arise out of the treaty. What transpired over the nine days of negotiations is the subject of some controversy. The record is patchy and there were disputes during the early implementation of Treaty One because some of the promises were not included in the treaty text. In addition, disputes over the regulation of and access to natural resources arose almost immediately, and continue to this day. The Anishinabe have disputed that Treaty One is a surrender of their traditional territory, almost since the time pen touched paper. One hundred and forty years later, treaty implementation continues to be the subject of litigation and political tension.

Historical and Ecological Study (Toronto: Holt, Rinehart and Winston Canada, 1974) and Laura Peers, The Ojibwa of Western Canada: 1780 to 1870 (Winnipeg: The University of Manitoba Press, 1994) at xv-xviii.

4 Many Anishinabe still refer to the treaty as the Stone Fort Treaty. For ease of understanding, I will use the term “Treaty One” in this thesis, although some of my citations or references may also reference the Stone Fort Treaty. I note also there is no word in the Anishinabemowin language that I know of that means “treaty”, although some expressions used to refer to treaty have been communicated to me, including Tibamagaywin (an agreement of exchange) Dave Courchene, personal communication (24 October 2011); and Dibamahdiwin – Irene Linklater, “Treaty Reconciliation – Kiway-Dibamahdiwin” (Paper presented at the Canadian Bar Association Aboriginal Law Conference, Winnipeg, 28 April 2011) [unpublished].

5 Some of these “outside promises” were added to the treaty in 1871 (see Chapter 2 of this dissertation).

6 Although I use the term “natural resources” in this dissertation, I must note that, in the Anishinabe world view, and in particular the normative relationship between the Anishinabe and the land, animals, plants, trees, rocks and other “natural resources”, such “resources” are considered to be living beings to whom the Anishinabe are related through systems of kinship.

7 There is debate, in the context of historic treaties generally as to whether the “X” signature marks on the treaty documents were actually made by the indigenous “signatories”. The practice of marking an X on the treaty was a fairly recent practice, and many of the Anishinabe in the east had signed their treaties with totemic marks. Also, many of the same bands that entered into Treaty One had made the Selkirk Treaty some 50 years earlier, employing their totemic marks to indicate their territory and adherence to the treaty. See Alexander Morris, The Treaties of Canada with the Indians of Manitoba and the North-West Territories (1880; reprint, Saskatoon: Fifth House, 1991) at 298. I note also that that the Anishinabe names of all of the Chiefs who are listed in the written version of Treaty One have bird names. It is possible that the Anishinabe treaty negotiators may have been of the bird clan, and that their role in the negotiations related to the bird clan’s responsibilities of leadership and ability to speak on behalf of the group.
According to the written text of Treaty One, the Anishinabe of southern Manitoba agreed to “cede, release, surrender and yield up” land (the geographic boundaries of which are described in the Treaty), in exchange for 160 acres of reserve land per family of five, for farming, an annuity payment of $3 per person, schools and farm tools. The Chiefs bound “[…] themselves and their people strictly to observe this treaty and to maintain perpetual peace between themselves and Her Majesty’s white subjects, and not to interfere with the property or in any way molest the persons of Her Majesty’s white or other subjects.”

One of the witnesses to the Treaty One negotiations, former Toronto Globe reporter Molyneux St. John, wrote to Deputy Superintendent of Indian Affairs William Spragge two years following the negotiations, expressing the imperfect understanding between the Commissioner and the Indians about what had been negotiated into the treaty:

There is no difference of sentiment amongst them [the Indians] on this point however remote from one another, their demands and assertions are alike; in every case the cry has been the same and there is not a shadow of doubt that when they left the Grand Council at the Stone Fort, they were firmly impressed with the idea that the demands which they had made had been with a few exceptions, granted […] When Treaty One was under negotiation the spokesmen of the several Indian Bands enumerated the gifts and benevolence which they required from Her Majesty’s Representative in return for the surrender of the Indian Country. Some of these were accorded; some refused but in the natural desire to conclude the Treaty, His Excellency the Lieutenant Governor and Mr. Commissioner Simpson assumed, as it afterwards proved too hastily that their distinctions and decisions were understood and accepted by the Indians […] So the Treaty was signed, the Commissioner meaning one thing, the Indians meaning the other.10

---

8 This amount was increased to $5 per person per year in 1875.
9 Treaty No. 1, 1871 (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationery, 1957) [Treaty One, 1871].
10 Molyneux St. John to William Spragge, (24 February 1873) Ottawa, Library and Archives Canada (RG10, vol. 3598, file 1447, C10, 104) [emphasis added].
According to oral accounts of the treaty and supported in the written record of the negotiations, the Chiefs, on behalf of their people, entered into an agreement with the Crown in order to ensure *mino-bimaadiziwin* (a good life)\(^\text{11}\) for themselves, their children and the generations to come. They knew that White settlers were coming into the territory and that their use of the land would be impacted by settlement and agriculture.

This thesis will show that the written text of the treaty does not capture the extent of the treaty promises or the relationship that was entered into between the Crown and the Anishinabe. It will also show that Treaty One, considered from the perspective of the Anishinabe, includes Anishinabe laws and normative expectations. In turn, these laws and expectations can, at the very least, provide a better understanding about why there are discrepancies between understandings of the treaty. They may even go as far as to shape a different or competing understanding of what was agreed to at the time of treaty.

While the Crown generally proceeds on the basis that Treaty One was a surrender of land, the record of the negotiations shows that, from the Anishinabe perspective, the substantive agreement was to enter into a relationship of mutual assistance and care, in which land was to be shared with the white settlers.

While the written record of the treaty negotiations, including primarily the Crown negotiator’s speeches and the newspaper accounts, have often been canvassed to reflect the intent and perspective of the Crown in the Treaty One negotiations, few attempts have

---

\(\text{11}\) The Anishinabe are taught to seek out *mino-bimaadiziwin* (a good life). This is a multi-layered teaching that relates the proper ways to conduct oneself as an Anishinabe person. Leanne Simpson explains *mino-bimaadiziwin* as “[...] a way of ensuring human beings live in balance with the natural world, their family, their clan, and their nation and it is carried out through the Seven Grandfather teachings, embedded in the social and political structures of the Nishnaabeg.” See Leanne Simpson, “Looking after Gdoo-naaganinna: Precolonial Nishnaabeg Diplomatic and Treaty Relationships” (2008) 23 Wicazo Sa Rev. 29 at 32 [Simpson, “Looking after Gdoo-naaganinna”].
been made at understanding the Anishinabe perspective of the treaty negotiations, with
the exception of some documented oral history. Considering the written and oral record
from the Anishinabe perspective and, in particular, by considering Anishinabe procedural
and substantive norms, one can draw out the potential differing or competing
understanding of what was agreed to at the time of treaty, based on divergent
perspectives and systems of law. The reliance of the parties on Anishinabe procedural
norms during treaty negotiations allowed for substantive obligations and responsibilities
to inform the Anishinabe understanding of the treaty.

This research explores four distinct concepts that support this interpretation. First, prior
to negotiating Treaty One, Anishinabe practices of treaty making with indigenous
nations, fur traders and the British Crown resulted in each treaty partner adopting, to
some extent, Anishinabe legal principles as foundations of treaty practices and
relationships, setting an important precedent for the recognition of indigenous ways of
making treaty. Second, the particular context of the Treaty One negotiations, including
settler expansion into the west, the sale of land from the Hudson’s Bay Company to
Canada, and the creation of the Province of Manitoba in 1870 placed pressure on both the
Crown and the Anishinabe to enter into treaty. Third, the reliance on and use of
Anishinabe protocols in the negotiations illustrates the use of Anishinabe procedural laws
in the Treaty One negotiations and informs the substantive expectations of the treaty,

---

12 Leanne Simpson calls for this type of work: “Destabilizing and decolonizing the concept of ‘treaty’ then
becomes paramount to appreciate what our ancestors intended to happen when those very first agreements
and relationships were established, and to explore the relevance of Indigenous views of ‘treaty’ and ‘treaty
relationships’ in contemporary times.” Ibid. at 31.

13 See, for example, Doris Pratt, Harry Bone & the Treaty and Dakota Elders of Manitoba, with contributions
by the Assembly of Manitoba Chiefs Council of Elders & Darren H. Courchene, Untuwe Pi Kin He – Who
We Are: Treaty Elders’ Teachings, vol. 1 (Winnipeg: Treaty Relations Commission of Manitoba and
Assembly of Manitoba Chiefs, 2011) [Pratt].
including the sacredness of the treaty. Fourth, while each party negotiated the relationship on the basis of kinship and referred to the Queen as mother, the Anishinabe kinship norms invoked duties of love, care, kindness, equal treatment of all children and the overarching obligation of a mother to ensure a good life for her children. In addition, the Anishinabe understandings of their relationship to Mother Earth informed what could be negotiated in terms of sharing the land.

**Treaty interpretation and implementation**

To date, treaty interpretation has been largely dependent on federal policy and Canadian common law courts. The courts have developed a set of interpretive rules, specific to treaty interpretation, that are largely modelled on statutory canons of construction. Recognizing that “treaties are a solemn exchange of promises made by the Crown and various First Nations,” the Supreme Court of Canada has recognized that “[… ] the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction.” Generally, interpretation is structured around the principle of large, liberal and generous interpretation, with ambiguities being resolved in favour of aboriginal people. Treaties are to be understood as they would have been construed by the aboriginal signatories, and interpreted flexibly, with the use of extrinsic evidence. “If there is evidence by conduct or otherwise as to how the parties understood

---


15 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 at para. 29 [*Mikisew Cree*].
the terms of the treaty, then such understanding and practice is of assistance in giving content to the term or terms."^{16}

The application of treaty interpretation principles by Canadian courts has not resulted in a meaningful or complete understanding of Aboriginal-Crown treaties, nor has it achieved the court’s goal of remedying disadvantage.^{17} In many cases, treaty interpretation has privileged the perspective of the Crown and largely set aside indigenous perspectives. Following the enactment of the Constitution Act, 1982,^{18} a body of literature emerged that is somewhat critical of Canadian constitutional aboriginal law, and sceptical of how constitutional legal protection of treaty and aboriginal rights are to be given “legal” effect.^{19} Sidney Harring finds that the “Indians” had their own reasons and agendas that informed the negotiations, some of which were legal in nature.^{20} There is an expanding view that indigenous legal traditions should be given weight, not only by reason of common law acceptance but proprio vigore.^{21} Some indigenous scholars and

---


^{17} According to Dickson C.J.C. for the court in Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85 at para. 15, “The Nowegijick principles must be understood in the context of this Court’s sensitivity to the historical and continuing status of aboriginal peoples in Canadian society […] It is Canadian society at large which bears the historical burden of the current situation of native peoples and, as a result, the liberal interpretive approach applies to any statute relating to Indians, even if the relationship thereby affected is a private one. Underlying Nowegijick is an appreciation of societal responsibility and a concern with remedying disadvantage, if only in the somewhat marginal context of treaty and statutory interpretation.”

^{18} Constitution Act, 1982, supra note 2.

^{19} See, for example, the work of Michael Asch, Sákéj Henderson, Patrick Macklem, Kent McNeil, Patricia Monture, Brian Slattery, Mark Walters, etc.


practitioners have approached treaty re-interpretation from an indigenous legal perspective.  

Indigenous legal thought has begun to be (and should be) infused into treaty interpretation. Robert Williams Jr., in his work *Linking Arms Together*, refers to treaties as a vision of law and peace within a burgeoning system of intercultural diplomacy.  

Harold Johnson explains in *Two Families* that indigenous people viewed the treaty as an agreement to adopt settlers and to enter into a kinship relationship with them, defined primarily by an obligation to *share* in the bounty of Mother Earth. Johnson also suggests that the sharing relationship, forged between the treaty “families” and the Creator, is a covenant that cannot be breached and cannot be voided, regardless of action or inaction:

> The treaties are forever. We cannot change them because the promises were made, not just between your family and mine, but between your family and mine and the Creator. There were three parties at the treaty. When my family adopted your family, we became relatives, and that cannot be undone. A bond far stronger than any contractual obligation holds us together. Your law of contract and treaty allows for breach and remedy. The Creator’s law does not allow for any breach whatsoever. Failure to comply had consequences, and no matter how severe the

---


24 See also Office of the Treaty Commissioner, *Treaty Implementation: Fulfilling the Covenant* (Saskatoon: Office of the Treaty Commissioner, 2007) at 5 [*Treaty Implementation*]: “The treaties with the Crown are sacred covenants, made among three parties – the First Nations and an undivided Crown, as sovereign nations, and the Creator. In their view, a permanent relationship of mutual respect and sharing was thus established. The unwavering conviction of the Treaty First Nations is that the treaties include not only the written texts recorded by the Crown and the oral agreements made at the time of each treaty, but also their very spirit and intent, and that the treaties govern every aspect of their relationship with the Crown, and, through the Crown, with all non-First Nations peoples. In this view, the treaties are holistic in their relevance to all dealings between the Parties and have political, legal and sacred status. It is through these agreements with the Crown that the First Nations gave their consent to sharing their territories with newcomers from overseas and their descendants, and that a unique and eternal relationship between the First Nations and the Crown was forged.”
failure, the promise never becomes null and void; the consequences just keep getting greater and greater.\(^\text{25}\)

Heidi Kiiwetinepinesiik Stark explains the treaty relationship in terms of respect, responsibility and renewal:

Treaties created relationships among nations. They established relationships of trust. That trust did not end with the completion of a written document; it merely began with it. However, it was the responsibility of all parties involved to maintain the relationships established through treaty making. The sustainability of these agreements was dependent upon each nation adhering to the principles of respect, responsibility and renewal.\(^\text{26}\)

We must remember that treaties are agreements between two parties in which neither party’s perspective should be privileged. Is it fair that one of the parties to the treaty carries the authority of interpretation? As John Borrows states:

\[
\text{[T]here are problems with theories of discovery, occupation, prescription, and conquest when considering the place of Indigenous legal traditions in Canada’s legal hierarchy. Fortunately, there is an alternative. We do not have to abandon law to overcome past injustices [...] we only have to relinquish those interpretations of law that are discriminatory. Working out the fuller implications of treaties between Indigenous peoples and the Crown is a way out of the impasse created by the rejection of other legal theories. Treaties have the potential to build Canada on more solid ground.}\(^\text{27}\)
\]

A better understanding can be achieved not only through the interpretive lenses provided by archives and western readings of those archives, but by considering the Anishinabe perspective on treaty. This perspective, informed by contextual factors, includes a body of substantive and procedural Anishinabe legal principles that helped make the treaty. It is not acceptable to consider the subsequent interpretation and implementation of the


treaty only in terms of Canadian common law. The Anishinabe laws underlying the negotiations and the subsequent formation of the treaty agreement must be recognized and considered in the interpretation and implementation of the treaty. This perspective has, to date, been generally disregarded by the Crown and courts and has remained relatively uncanvassed in academia (with the exception of some anthropological oral historical projects and the work of scholars mentioned above).28

Some may wonder why a perspective rooted in the past is relevant to understanding our treaty obligations today. Countering this, Linda Tuhiwai Smith argues that “reclaiming history is a critical and essential aspect of decolonization.”29 At the same time, Indigenous scholars such as Vine Deloria, Taiake Alfred and others may question the effectiveness or appropriateness of providing what may be perceived as an explanation to the other side, preferring rather to work within our communities to enhance our understandings of ourselves in order to decolonize.30 This thesis is premised on the assumption that, by returning to understandings that may have informed the treaty negotiation, we can serve the dual goal of understanding ourselves better and working towards collectively shedding the baggage of years of conflicting interpretation and implementation. As Jeremy Webber states, the non-indigenous society’s “[... actions

28 Support for this work is found in Arthur Ray, Jim Miller & Frank Tough, Bounty and Benevolence: A History of Saskatchewan Treaties, (Montreal and Kingston: McGill-Queen’s University Press, 2000) at 69 [Ray, Miller & Tough]: “Treaty-making involved an unequal meeting of two property systems. Unfortunately, this aspect of the process has not received much attention, and it is poorly understood, in part because the terms describing ownership, land use, and occupancy are used in an imprecise way in the historical records and scholarly literature. Furthermore, conflicting scholarly theories about the nature of Aboriginal tenure systems add to the confusion.” It is also found in Borrows, ibid. at 20-21.


have impeded indigenous peoples’ ability to develop and express their distinctive understandings, not least by placing their languages and lands under heavy pressure.

There is reason to make space.”

In particular, looking to Anishinabe procedural and substantive norms will help us to better understand the Anishinabe perspective about what was agreed to in the treaty negotiations. It may also help us understand where the parties differ in view, and where there is potential for rapprochement, based on respect for varying understandings. In essence, we need not seek out perfect common understandings, nor displace either side’s perspective; accepting that there are varying and possibly competing interpretations may allow the movement towards potential implementation solutions. Although I will not suggest a process for arriving at these implementation solutions in the context of this thesis, my work is aimed directly at creating a better understanding of the Anishinabe perspective, based in Anishinabe laws and normative expectations, in order to allow the parties to be better informed as they approach ongoing interpretation and implementation.

**Methodology**

Different understandings can result in different consequences and normative behaviour. Proper treaty interpretation requires that the interpreter take into account the different understandings that may be associated with the same event or phenomenon. In order to understand the Anishinabe perspective, I consider the written record of the negotiations in order to glean how the Anishinabe may have understood the substance of their

---

agreement with the Crown. Firstly, I recall the important features of the treaty negotiations as reported and, in particular, the elements of the negotiations relating to lands and the relationship between the Crown and the Anishinabe. Secondly, I relate the negotiations to concepts of Anishinabe inaakonigewin (laws) which explain the unique and distinct perspective that the Anishinabe had in relation to the relationship that was developed in 1871. This is not revisionist history. Rather, it is aimed at understanding the views and contexts that shaped the understandings of a principal party to the agreement.

In order to draw out principles of procedural and substantive law in the context of the treaty, I consider primarily the written record surrounding the treaty negotiations, including the records of the Crown’s negotiating parties and a newspaper account of the negotiations. I also consider other recorded interpretations of the treaty, such as oral history books, videos and audio-recordings. The use of ethnohistorical methods and emic perspectives, applied to normative understandings, helps us to better understand what was happening (or what was understood to have been happening) at the time of the treaty negotiations. In his legal ethno-history methodology, Mark Walters advocates for the consideration of symbols and representations particular to a context. These methods are in keeping with the Anishinabe way. Basil Johnston finds that in the Anishinabe

---

32 Much of this material was gathered in the context of treaty litigation research, internet research, library research, personal interviews, the Provincial Archives of Manitoba and the library collections of the Treaty and Aboriginal Rights Research Centre (T.A.R.R.), the Treaty Relations Commission of Manitoba (T.R.C.M.) and the Manitoba First Nations Education and Resources Centre.

33 See, generally, the work of scholars such as Jennifer S.H. Brown, Laura Peers, Julie Cruikshank and particularly Jennifer S.H. Brown & Elizabeth Vibert, eds., Reading Beyond Words: Contexts for Native History, 2d ed. (Toronto: University of Toronto Press, 2009).

worldview, differences of opinion are explained by saying that “Kitchi-Manitou has
given me a different understanding.”

In considering the Anishinabe understandings of Treaty One and Anishinabe
inaakonigewin (law), the use of language is crucial. One should attempt to understand
the concepts as articulated in their original language and to convey Anishinabe principles
using Anishinabemowin words. In addition, I use the expressions “making” or
“negotiating” treaty rather than “signing” treaty, which more accurately reflects the
solemnity and spirit of the agreement that was negotiated between the Anishinabe and the
Crown.

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

In addition to particular attention to language, I will consider the actions (and inactions)
of the parties at the time of the treaty.

---


36 My mother tongue is French, I am fluent in English and have basic Spanish knowledge. I am also a student of the Anishinabewomin language. My understanding is much better than my ability to speak, but I consider it a lifelong project to improve and enhance my knowledge and use of the language and all the insight and perspective that comes with it.


38 Johnson, supra note 25 at 41-42.
The record of Treaty One

Written accounts, beyond the text of Treaty One itself, can be helpful in understanding what was negotiated and promised in 1871. These include a newspaper account of the negotiations, the Commissioner’s speeches and reports, parliamentary records, and correspondence and accounts of meetings between the Anishinabe and the Crown following the negotiations. Nonetheless, there is a gap in the written resources, which are written primarily from a colonialist’s perspective. As Robert Williams Jr. describes in his work Linking Arms Together, there are:

[...] only partial fragments and signs of indigenous North American legal traditions at work in the history of Indian responses to Western colonial domination. Because the conqueror writes history in the colonial situation, the cultural archives maintained by the conquering society frequently neglect to record or adequately document the many different and distinct visions of law that have contributed to the traditions of resistance forged by the colonized peoples.

Although there are no verbatim records of what the parties said at the negotiations, a daily summary of each of the nine days of negotiations was recorded by an anonymous reporter and published by The Manitoban newspaper for four consecutive weeks. The reports extensively detail parts of the negotiations as observed by an anonymous reporter, who also used one of the treaty facilitators, Hon. James McKay as an informant. The
Manitoban account, although somewhat helpful in relaying parts of the Indian Chiefs’ speeches, perspectives and negotiating positions, betrays the reporter’s European/colonial perspective and illustrates the difficulties that arise when using interpreters in bilingual and bi-cultural negotiation. Thus, what has been recorded or “transcribed” in The Manitoban is a biased account of what was said, seen through the lenses of the interpreters and the reporter. Unfortunately, summaries of the Indian Chiefs’ speeches are condensed into nondescript passages or portrayed as insignificant, which leads the reader to question the editorial decisions that were made. For example:

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

As noted by D.J. Hall, The Manitoban, “[...] despite its limitations and obvious bias, provides an adequate notion of the ebb and flow of discussion, the unease of the Indians, and the evolution of their determination to force concessions from the government. Unfortunately the account becomes sketchy near the end [...]”

In addition, the contemporaneous written record of the treaty negotiations includes speeches, official correspondence and reports of the negotiations prepared by Lieutenant-


See, for example, D.J. Hall, “‘A Serene Atmosphere?’ Treaty One Revisited” (1984) 4 Canadian J. of Native Studies 321. Hall lists in appendix all of the speakers, both on the Crown and Anishinabe side of the negotiations as notes to the Appendix.

At points throughout the text I will refer to the Anishinabe treaty negotiators as “Indian”, as they are referred to in the historical record.

The Manitoban, supra note 39 at 37.

Hall, supra note 44 at 6.
Governor Adams Archibald\textsuperscript{48} and Treaty Commissioner Wemyss Simpson\textsuperscript{49}. Commissioner Simpson resigned after the negotiation of Treaties One and Two, and was replaced by Alexander Morris, who negotiated treaties Three, Four, Five and Six. Morris was responsible for the implementation of Treaty One, including the negotiation and inclusion of the “outside promises” into Treaty One in 1875. His report on \textit{The Treaties of Canada with the Indians of Manitoba and the North-West Territories} is helpful in understanding some of the context and parts of the treaty negotiations, including the relationships that were developing in the west.\textsuperscript{50} In reference to Treaty One, Morris relies on Archibald’s dispatches and Simpson’s report of negotiations “[...] embracing as it does a full and graphic narrative of the proceedings which took place at the negotiation of these treaties, and of the difficulties which were encountered by the Commissioner, and the mode in which they were overcome.”\textsuperscript{51} Morris’ book includes important correspondence from before and after the negotiations, as well as accounts of his discussions with Indian Chiefs, which add to the interpretation of the treaty.

Almost immediately after the making of Treaty One, correspondence from Anishinabe leaders highlighted their understanding of the terms of the treaty. Many of the Chiefs

\textsuperscript{48} For a biography of Adams Archibald, see \textit{The Dictionary of Canadian Biography Online}, s.v. “Sir Adams George Archibald”, online: \url{http://www.biographi.ca/index-e.html?PHPSESSID=c254v418atebag743r3cvm61k3}.

\textsuperscript{49} Wemyss Simpson was a cousin of Sir George Simpson, the former Governor of the HBC. He came to the west in his early teens, married a Métis woman and worked for the HBC fort at Sault Ste. Marie for 23 years (including as Chief Factor). It is reported that Simpson witnessed the Robinson-Huron treaty negotiations.

\textsuperscript{50} According to Morris, the goal of his report was to “[...] preserve, as far as practicable, a record of the negotiations on which they were based, and to present to the many in the Dominion and elsewhere, who take a deep interest in these sons of the forest and the plains, a view of their habits of thought and speech, as thereby presented, and to suggest the possibility, nay, the certainty, of a hopeful future for them.” Morris, \textit{supra} note 7 at 11.

\textsuperscript{51} \textit{Ibid.}, at 32.
wrote or met with government officials to express their dissatisfaction with outside attempts to regulate their natural resource use. In addition, outside promises, which had been recorded in a memorandum attached to the Commissioner’s treaty report, were not implemented. Protestations and complaints were made by the Chiefs, including their refusal to take annuity payments or to select reserves. Lieutenant-Governor Morris was forced to re-negotiate the outside promises into the treaty in 1875.

My analysis also relies on the oral histories of Treaty One. Anishinabe understandings are generally not written but rather recorded through oral transmission. Historically, understandings, stories and laws were physically recorded via birch bark scrolls, wampum belts, pictographs and petroforms. Some of these interpretations have been shared with me and others have been recorded. In some cases, this evidence has been transmitted to me personally, and in other cases it has been audio or video recorded and/or published in written form, including a recent volume on treaty perspectives, as told by Manitoba Elders. There are also recorded speeches and submissions made by Anishinabe leaders after the treaty and up until the present day, all of which have articulated that Treaty One was a solemn agreement to share in the land. Elder Elmer Courchene explains that our “[...] ancestors entered into sacred treaties to protect our

52 “The oral version of a treaty, features of which are verified by a variety of extrinsic written records, is crucial in understanding the contemporary meaning of treaty rights.” Ray, Miller & Tough, supra note 28 at 83.

53 Note that exceptions exist and are becoming more common. See, for example, Pratt, supra note 13.


55 Pratt, supra note 13.
land, our languages and our culture. They also agreed to share this land and its resources with all newcomers."

Of course, reliance on any of the versions of the negotiations must take into account the specific challenges of bilingual and bicultural translation. Other limitations include gaps in the record, resulting from the priority and weight placed on particular events or words, and the particular perspective, background and biases of each writer. For example, I have identified a gap in Commissioner Simpson’s report where he refers to “questions and answers” that lasted the better part of a day and which are not detailed in the written record, nor to my knowledge are they specifically referred to in the oral history.

[The n]ext morning the Indians, through one of their spokesmen, declared in presence of the whole body assembled, that from this time they would never raise their voice against the law being enforced. After the order of release, the Chiefs and spokesmen addressed us, questions were asked and answered, and some progress made in the negotiations. Eventually, the meeting adjourned till this morning at ten o’clock.

I will endeavour to use The Manitoban contemporaneous accounts, the written accounts of the negotiations produced by the Treaty Commissioner and Lieutenant-Governor, Morris’ account, and the secondary sources relating to the treaty negotiations (including recorded oral history), to draw out the Anishinabe legal principles that informed the Treaty One negotiation.


57 Morris, supra note 7 at 34.
Anishinabe *Inaakonigewin* (Law)

There is relatively little published material on the Anishinabe perspective of the Treaty One negotiation. More importantly, what has been published does not generally take into account the Anishinabe law that informed the treaty, even if it seeks to illustrate the Anishinabe perspectives on the treaty. My understanding of Anishinabe law (or Anishinabe *inaakonigewin*) is drawn primarily from secondary sources, including written cultural, ethnographic and ethnohistorical evidence. This includes Anishinabe emic scholarship, including Basil Johnston’s collection of writings, and recent scholarly works by Anishinabe scholars such as John Borrows, Darlene Johnston, and Leanne Simpson. 58

I also rely on ethnographic materials from the nineteenth century (from the period just prior to the Treaty One negotiations) produced by Johann Georg Kohl, William Warren and Frances Densmore, and A. Irving Hallowell’s work with the Northern Ojibwe (Anishinabe) in the 1930s. 59 Some references are drawn from the personal account of John Tanner, who lived amongst the Anishinabe in the early nineteenth century. In some cases, I rely on personal understandings that have been communicated to me by Anishinabe Elders. My empirical research took place in the context of a gathering on women’s teachings held at Sagkeeng First Nation in June 2011. I conducted a series of interviews with Anishinabe Elders and knowledge keepers which focused on Anishinabe normative obligations of mothers towards children. The interviews focused on the

---


obligations and responsibilities of the mother as a parent and on how by referring to the Queen as a mother in the treaty negotiations, particular normative behaviour would have been assigned to her, based on Anishinabe norms.

This work is founded on the assumption that Anishinabe inaakonigewin (law) is culturally and collectively influenced. Just as there are many ways of being indigenous, there are many ways of approaching indigenous legal traditions. I agree with John Borrows that: “When working with Indigenous legal traditions one must take care not to oversimplify their character.”  I, My goal is to be respectful and considerate of the diversity of opinions on Anishinabe inaakonigewin (law) and to consider, from my perspective and my teachings, the things that I understand to be law. This being said, I acknowledge that this project cannot achieve a complete understanding of the Anishinabe legal perspective, which would require an extensive oral history project of the treaty and Anishinabe inaakonigewin (law).

I expect that many of the hypotheses I am putting forward would greatly benefit from additional field work with Treaty One First Nations Elders, oral historians, traditional knowledge informants and law keepers on the subjects of the treaty and Anishinabe inaakonigewin (law) itself. Further suggested research which is outside the scope of this thesis includes: a review of the archival records for the period immediately pre- and post-treaty, as well as work within the Anishinabe communities of southern Manitoba to further draw out the oral history accounts of Treaty One.

---

60 Borrows, Indigenous Constitution, supra note 21 at 30.
61 French missionary records that existed in relation to the Anishinabe communities have, to my knowledge, not yet been reviewed in relation to Treaty One.
Outline

In the following chapters, I will argue that the lack of understanding of Anishinabe legal principles relating to land and treaty making has not given effect to the spirit and intent of treaty. One of the keys to unlocking the Anishinabe understanding of Treaty One is to canvass the record of the negotiations for indications of Anishinabe laws and normative expectations that influenced how and under what terms the treaty was made. In the context of Treaty One, the use of Anishinabe procedural laws helped secure the negotiations and open the door to a “gathering of spirit”.  

In addition to procedural norms, substantive Anishinabe legal principles likely formed part of the Anishinabe understanding of Treaty One.

In Chapter 2, I will demonstrate that the Anishinabe were skilled negotiators and treaty makers. In their negotiations, they employed Anishinabe laws and normative principles. Their political, military and trade alliances amongst themselves and with other indigenous nations provided for extensive experience in treaty and alliance building, modelled on indigenous legal traditions. Their extensive history of negotiations and making of “trade treaties” or “commercial compacts” with fur traders established the mutually respectful relationships in which the fur traders moulded themselves to Anishinabe ways and normative expectations. In addition, the Anishinabe had a history

---

64 Miller, supra note 43.
of treaty making with the British Crown; this included the Anishinabe further east and to
the south in the United States, with whom the Anishinabe of the Treaty One area were
linked by kin and clan.

Chapter 3 will canvass concepts of Anishinabe procedural law, as they are illustrated by
the treaty negotiations. I will discuss the significance of certain Anishinabe protocols or
procedural laws and the substantive obligations or understandings that are attached to
each, such as non-interference in each other’s affairs, respect for each other’s territory
and jurisdiction, and commitment to the sacred nature of agreements made in ceremony.
The Anishinabe have expressed that the treaty is a sacred relationship with the Crown
that allowed for a peaceful and mutually beneficial sharing of the land between the
Anishinabe and white settlers. I will address how certain substantive elements of
Anishinabe inaakonigewin (law) formed the understanding of what was being negotiated
at the time of treaty. In particular, I will look at the invocation by both parties of the
mother-child relationship. Both the Crown and the Anishinabe relied heavily on the
concept of the Queen as a mother to the Anishinabe and of her equal treatment of all her
children. While the Commissioner and Lieutenant-Governor used the term as a matter of
form, knowing that the Anishinabe viewed their relationships in terms of kinship, the
Anishinabe invoked the relationship to express its deeper implications and normative
expectations, including long-term and inviolable commitments to preserving the welfare
of their children. Drawing on the relationship of the Anishinabe with their primary
mother figure, Nimaamaa Aki, Mother Earth, the Anishinabe Chiefs and spokesmen
illustrated the special bond and obligations of kindness, caring and unconditional love,
and of the earth’s bounty, which ensured that the mother would care for the Anishinabe’s needs.

In Chapter 4, I will show that, based on the record of the negotiations, a great deal of time and effort was expended in the negotiations on the question of land ownership and the concept of “use of land”. The continued use of the land by the Anishinabe for hunting and other harvesting purposes was not disputed. Confusion arose primarily over the concept of reserves. The record does not mention discussions about concepts such as cession, release or surrender, terms that were later used in the treaty text to effect the purported surrender of land. The evidence shows that up until the last day of the negotiations, the Anishinabe were prepared to walk away from the treaty discussions. While it is unclear what was said, or what promises or assurances were delivered to entice them into signing the treaty on August 3, 1871, the fact remains that the Anishinabe were never recorded to have agreed to a complete surrender of land. The Anishinabe reserved the right to continue to use the land, to manage it and to share it with the White settlers. In relation to reserves, they were to be lands reserved exclusively for the purposes of agriculture, for when the Anishinabe chose to take up farming.

**Conclusion**

The Anishinabe generally think in terms of the impacts of their actions seven generations ahead. The Treaty One relationship began 140 years ago – or seven generations ago. Is this what our ancestors would have envisioned for us? Elder D’Arcy Linklater has stated, “[W]e do not want to be prisoners of the past. We want to sit down with the Queen’s representatives and the government representatives from the three levels to create a
dialogue, to construct a bridge of understanding [...] We are all responsible for our children.\textsuperscript{65}

Understanding the treaty requires depth, consideration and knowledge. To understand the treaty is to know more than the written text. While it is not possible to go back in time to relive the negotiations, there is benefit in understanding how and why the parties negotiated, even if the entire and conclusive substance of that agreement cannot be fully discovered. It may be that there was no “meeting of the minds” or “common intention” at the time of Treaty One, beyond the agreement to share the land in a spirit of peace and coexistence, and that we are now faced with elaborating an appropriate meaning of a treaty that both parties considered they had made.\textsuperscript{66} However, why is it that the current elaboration of that foundational intention rests primarily in the Crown’s understanding of treaty? Why is the Anishinabe oral version of the treaty being systematically discounted in practice by courts and the Crown? Should only one of the systems of law that were relied on for the negotiations of the treaty form the framework of interpretation?\textsuperscript{67} Or should Anishinabe legal principles, both procedural and substantive, inform the interpretation and implementation of treaties today? How can years of uni-directional understanding, based on a written text and privileging the Crown’s view, be reconsidered in order to give voice to the Anishinabe understanding of treaty?

\textsuperscript{65} D. Linklater, supra note 37.

\textsuperscript{66} Sákéj Henderson argues that “[t]he shared meaning of a specific Treaty relation can be found in understanding and interpreting the wording of a Treaty text from each language. Each category in the Treaty text is embedded with competing historical and legal context as well as the shared intent and purposes of the Treaty parties. This makes finding a clear understanding of the Treaty text challenging,” James (Sákéj) Youngblood Henderson, Treaty Rights in the Constitution of Canada (Toronto: Thomson Canada, 2007) at 34 [Henderson, Treaty Rights].

These treaties were the product of negotiation between very different cultures and the language used in them probably does not reflect, and should not be expected to reflect, with total accuracy each party’s understanding of their effect at the time they were entered into. This is why the courts must be especially sensitive to the broader historical context in which such treaties were negotiated. They must be prepared to look at that historical context in order to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time.\(^{68}\)

It is a pressing Canadian concern to attempt to reconcile Crown and Anishinabe understandings in order to give effect to the treaty relationship and the spirit and intent of the treaties. According to the Treaty Commissioner for Saskatchewan, Justice David Arnot, the treaty created an everlasting relationship between nations that could not be altered unilaterally.

The treaties are an integral part of the fabric of our Constitution. They form the bedrock foundation of the relationship between the Treaty First Nations and the Government of Canada. It is from the treaties that all things must flow in the treaty relationship. They represent the common intersection both historically and politically between nations. They created a relationship which is perpetual and unalterable in its foundation principles. The treaties are the basis for a continuous intergovernmental relationship.\(^{69}\)

It is not enough to understand the Crown’s objectives and perspectives leading up to the treaty and the historical record surrounding the treaty, recorded from the Crown’s standpoint. The political, social, economic and geographic contexts suggest that multiple rationales and perspectives were at play in the making of Treaty One. Anishinabe concepts of sharing, kinship and responsibility towards the land are equally important in understanding the approach to the treaty. A balanced and full understanding of the treaty requires an understanding of the Anishinabe relationship to the land and the sacred


\(^{69}\) *Treaty Commissioner*, supra note 24 at vii.
commitment to share; this understanding and this commitment both informed the
substance of the treaty relationship. Although one could take the approach that either
there were no validly negotiated treaties, or that treaties were made by the Crown to be
broken, the Canadian law of treaty interpretation has dismissed these approaches.
Similarly, indigenous laws have forbidden the treaties from being set aside.

Currently, a treaty relations commission has been established by the federal government
and Manitoba First Nations (through the Assembly of Manitoba Chiefs) to work towards
treaty education. A similar body, the Saskatchewan Office of the Treaty Commissioner,
reports that there is “common ground that opens the way for further discussion.”

The first Manitoba Treaty Relations Commissioner Dennis White Bird has explained that
there are two possible understandings of treaty. One can look at the written text or the
legal context, by which the Crown operates, which aims to limit the terms of the treaty.
Alternatively, one can consider First Nations understandings that are based on custom,
transfer of knowledge, oral history handed down, or “in terms of capturing the agreement
itself”. “These are very much living treaties – they live from one generation to the next
[...] capturing the life of the Treaty.”

By understanding both perspectives, a mutually acceptable implementation process can be developed to honour the spirit and intent of
Treaty One. This is a Manitoban project, a community project. As stated by the Premier
of Manitoba, Greg Selinger, in his introduction of the Proclamation of Treaty Day at the
Manitoba Legislative Assembly:

70 Ibid. at 33.
71 Former Manitoba Treaty Relations Commissioner Dennis White Bird, “What is the TRCM?”
72 Ibid. at 71.
While it is easy to think of the treaties as history, we must keep in mind they are as relevant today as the day they were signed. The treaties are not frozen in time, they are living agreements fundamental to the Manitoba we know today. Understanding the treaties is crucial to understanding where we’ve been and where we are going collectively as Manitobans and Canadians. We must also be honest in acknowledging that the Crown’s promises, so central to the treaties, have not yet been fully fulfilled. As a Province we have an important role in the treaty relationship.  

The true spirit and intent of treaties must be canvassed proactively, collectively, with an aim to give effect to the relationships and obligations that were made between the parties at the time of treaty.

---

Chapter 2 : PRE-TREATY CONTEXT

The combined political, geographical and historical context led to particular circumstances that allowed Treaty One to be negotiated. Each party brought specific understandings and normative expectations into the treaty negotiations, and emerged nine days later with an agreement based and perceived in their own ways of understanding. In attempting to understand the treaties, some have hypothesized that the Indians were taken advantage of, that they did not understand the terms of land surrender and sale and that they could not read or comprehend complex legal terminology. Others point to the difficulties encountered with translation, both in the quality and in the conceptual inability to translate certain terms. In *The Birth of Western Canada*, Stanley wrote that “[T]he Natives seldom understood the terms of the contract. The disparity in power and interests between the signatories reduced the treaties to mere grants of such terms as the weaker people might accept without active resistance […]”

More nuanced perspectives on Treaty One have been drawn out in part by scholars such as D.J. Hall, Jean Friesen, Arthur Ray, Jim Miller and Frank Tough. Hall wrote in 1984 that the “[...] treaty-making process of the 1870’s is undergoing reassessment.” He acknowledged that “[m]any researchers [...] have begun to look at the evidence from an Indian perspective; they have contended that the Indians played a much larger role in

---

76 Hall, supra note 44 at 332.
shaping the treaties than had been admitted in the earlier works.”

Hall posed some foundational and important questions in relation to the negotiations and the treaty:

Why did the Indians sign such a limited document after the lengthy struggle to gain more extensive concessions? Were they merely relying on verbal or “outside” promises to be as binding as those written down? Certainly to the Indians, such promises were binding, and that would probably account in part for what happened. But they were not quite so naïve about the ways of the white man as to trust verbal promises entirely. In all likelihood, the Commissioner at the time explained that the provisions included in the treaty were in line with those of previous treaties; or close enough so as not to mark a major departure; after all, he had already slightly exceeded his instructions. Other promises would not be forgotten by the government.

More recently, academics such as Jean Friesen have argued that Indian leaders made the best deals they could in exchange for the surrender of their lands, given the difficult situations they were faced with. Friesen argues that the negotiations were highly informed by the past relationships between the Anishinabe and the HBC, as well as by the Anishinabe need to ensure their future economic security. Friesen concludes that the Anishinabe understood the treaty as a surrender of land, and that by making “the best deal they could”, they protected their control over the natural resources and their way of life.

In her view, there is some truth to the imbalance of power and implicit or explicit threat that the land would be taken anyway, “[b]ut to portray the Indian leaders as weak tools of the treaty commissioners is very misleading.”

To a certain extent, the relationship with the HBC and the adherence to the protocols are responsible for the incomplete understandings that resulted, although I argue that the misunderstandings were also attributable to differing normative values and principles that

77 Ibid. at 322.
78 Ibid. at 328.
79 J. Friesen, “To Make My Living”, supra note 63.
80 J. Friesen, “Magnificent Gifts”, supra note 63 at 43.
informed the views of each party. I share Friesen’s view that security and reciprocity of relationships were the underlying motives that led to the making of the western treaties. I also agree with Friesen’s argument that the Crown negotiators for Treaty One did not understand the significance of the social contract that was being brokered by the Anishinabe. The negotiators viewed the treaties as finalizing, once and for all, the clearing of title while, for the Anishinabe, it was “the beginning of a continuing relation of mutual obligation.” Friesen also argues that we should take into account the political and economic perceptions of the Anishinabe at the time the treaties were made and that new perspectives on treaties should look to the politics and approach of Indians to others (fictive kinship) and the adaptation of fur trade politics (or trade treaties). Bruce White refers to the use of kinship language in the fur trade and how this impacted the words which infused the Treaty One negotiations and solidified the relationship between “The Great Mother”, the Queen, and “her Children”. In particular, Bruce White notes that “[t]he power and extent of these new relationships were based on the degree in which they could be made to resemble the social and economic relations that existed among family members.”

81 Ibid. at 49.
82 Kinship fostered reciprocal obligations and alliances and allowed for exchange. According to Friesen, at the treaty negotiations, “The commissioners are called Brothers who represent the queen, but who are nevertheless in the same position relative to Her Majesty as the Indian ‘children’ […] In the fur-trade alliances the factor had been addressed as father, for he served in one sense as provider and supplier. Similarly, to take the hand of the Great White Mother indicated that one accepted that the Queen would ‘clothe’ the Indians – that is, that protection and material wants were part of what was being offered whether or not it was written in such precise terms. In using such language the treaty commissioners were accepting an implied moral responsibility of greater proportions than they realized.” Ibid. at 47.
83 Ibid. at 48-49.
Ray, Miller and Tough, like Friesen, look at the treaty records to demonstrate how the Indians were concerned with securing their livelihood. “Because they had an economic and social agenda for securing a future livelihood, the details of the terms of the treaties had to be negotiated. Otherwise an agreement would not have been reached.”

Sidney Harring takes a slightly different view, relating his argument to something akin to shared land use, rather than retained rights over resources. Harring equates the surrender clause in the treaty to cessions of some land use rights, but not to a full surrender of land. In *Bounty and Benevolence*, Ray, Miller and Tough conclude that the understanding of Treaty One should be broadened:

“[… ] beyond the narrow legal terminology contained in the official treaty texts. Aboriginal title was not explained, the significance of reserves was blurred by assuring Indians of an ongoing access to lands not taken up, and concerns about land needs and livelihood were placated by invoking the Queen’s good intentions […] the written version of these treaties was not complete.”

The general consensus amongst these scholars in post-colonial legal history is that looking at the written text of a treaty does not do justice to the complexity of the issues and interactions that exist. I agree with those who go on to say that the social and political contexts, including the indigenous forms of normative ordering, must be taken into account.

---

86 Harring, *supra* note 20 at 251
87 Ray, Miller & Tough, *supra* note 28 at 86.
88 See Janna Promislow, “One Chief, Two Chiefs, Red Chiefs, Blue Chiefs: Newcomer Perspectives on Indigenous Leadership in Rupert’s Land and The North-West Territories” in Hamar Foster, Benjamin L. Berger & A.R. Buck, eds., *The Grand Experiment: Law and Legal Culture in British Settler Societies* (Vancouver: UBC Press, 2009) [Promislow, “One Chief”] in which the author moves beyond the treaty record into the relationships that precede and shape the treaty. In particular, Promislow looks to the HBC trading practices and their relationships with the indigenous trading partners (including kinship and
Many factors contributed to the making of the treaty with the First Nations that lived in the area of Treaty One, which is today referred to as southern Manitoba. The collision of the Anishinabe experience with the HBC for over a century and a half, the then recent influx of White settlers, the Red River Resistance, as well as the need to secure a future for children and grandchildren, resulted in particular circumstances that allowed for the making of a treaty of alliance between the Anishinabe and the Queen. In this chapter, I will canvass the contextual factors that informed the negotiation of Treaty One or “set the table” for the agreement between the Crown and the Anishinabe. Although I will canvass only briefly the various factors that induced the Anishinabe to enter into treaty, they remain an important sub-text for understanding the negotiations. First, I will consider the longstanding diplomatic relationships between the Anishinabe and other indigenous groups from surrounding territories to be the pillars of Anishinabe diplomacy and treaty making. Second, I will canvass the impact of generations of interactions with fur traders and the culture of trade treaties, as traders adopted Anishinabe ways in order to conclude economic agreements. Third, I will explore the approach to treaty making between the Anishinabe and the Crown, over the century preceding Treaty One, as an important precedential relationship-building exercise that was conducted in accordance with Anishinabe legal principles.

---
ceremonial elements, similar to Jean Friesen’s work) to illustrate the symbolic acts of recognition that overlapped the fur trade and the treaty negotiations.
Indigenous treaties

Prior to the arrival of Europeans on Turtle Island, the Anishinabe had longstanding diplomatic relationships amongst the different groups (or tribes) within their nation, as well as with other indigenous peoples. These relationships persist to this day and are the foundational indicators of Anishinabe diplomacy and illustrate indigenous principles of normative ordering that were applied to the making of the peace treaties. “These ‘treaty processes’ were grounded in the worldviews, language, knowledge systems, and political cultures of the nations involved, and they were governed by the common Indigenous ethics of justice, peace, respect, reciprocity, and accountability.”

The Council of Three Fires was the historic system of alliance developed amongst the Anishinabe (Ojibway, Odawa and Potawatomi nations), through which governance was conducted via public meetings aimed at union, alliance, treaty making and renewal.

[E]ach band or community has its own chiefs, and manages its own affairs, within the limits of its territory, quite independently of other tribes of the same nation; but in matters which affect the whole nation, a general council is called, composed of all or a majority of the chiefs of the different tribes.

---

89 “Turtle Island” is the term used by the Anishinabe and other indigenous peoples to describe what is geographically known as North America. This terminology relates to creation stories in which the turtle is generally described as having emerged from the great flood to carry on her back a new home for the indigenous peoples.

90 In this context, I refer broadly to the Anishinabe nation (encompassing all of the Anishinabe sub-groups) and use the term “groups” (or “tribes”) to identify the smaller groups or independent collectivities within that broader structure, many of which were identified as decision making authorities in the process of treaty making.


92 Also referred to as the “Ojibway Confederacy” or “Western Lake Confederacy”.

93 Peter Jones, History of the Ojebway Indians with Especial Reference to Their Conversion to Christianity (London: A.W. Bennet, 1861) at 39.
This confederacy maintained alliances and relations with the other nations that shared or bordered their territories, such as the Iroquois (Haudenosaunee) in the east, and the Sioux (Dakota) in the west. The primary aim of those relationships was peace, often associated with the resolution of territorial disputes: they recognized each nation’s independence, nationhood and sovereignty. “Both political entities assumed that they would share the territory, that they would both take care of their shared hunting grounds, and that they would remain separate, sovereign, self-determining, and independent nations.”

The relationships of peace between the Anishinabe and their neighbouring nations to the east and west were essential for their sustenance and survival. Often, war was the catalyst for alliance and treaty. The concept of indigenous political diplomacy existed long before the arrival of Europeans and was widespread among tribes. Peace and friendship was brokered between the Anishinabe and the Haudenosaunee as early as 1701 and regularly reaffirmed. This peace treaty was confirmed with wampum at Lake Superior in 1840.

To formalize agreements, Aboriginal Nations might sometimes enter into treaties with one another. The purpose was to endorse accord that might flow from diplomatic exchanges. Treaties are a form of agreement that can be very productive as a method for securing peace. An important indigenous-to-indigenous treaty occurred between the Haudenosaunee and the Anishinabek in 1701 near Sault Ste. Marie. The agreement was orally transacted and is recorded on a wampum belt (a memory device with shells forming pictures, sewn onto strings of animal hide and bound together). The 1701 belt has an image of a ‘bowl with one spoon.’ It refers to the fact that both Nations would share their hunting grounds in order to obtain food. The single wooden spoon in the bowl meant that

---

95 Williams, supra, note 23 at 33.
96 Ibid. at 36.
no knives or sharp edges would be allowed in the land, for this would lead to bloodshed. This agreement is still remembered by the two nations today.98

Although warfare was a regular occurrence between the Anishinabe of southern Manitoba and the Sioux (Dakota), who occupied the territory immediately west and south of the Anishinabe territory,99 peace was also secured between them through protocols and treaties, including the Peace of Fort Garry.100 These relationships of peace, centred around the use of territory, continued to be brokered even up to the time of Treaty One. At this time, the United States government was trying to force the Sioux to settle on reserves; many resisted and this led to many Sioux fleeing to Canadian territory.

The concept of peaceful relations was linked to a commitment to share lands and resources, which was portrayed through the imagery of the “dish with one spoon”101 or Gdoo-naaganinaa “Our Dish”102:

By conjoining their lands into a common bowl, treaty partners eliminated one of the most frequent causes of conflict and distrust between the tribal peoples of indigenous North America: competition for hunting grounds and resources. But in agreeing to this act of commitment, they did much more: They obligated themselves to act as relatives toward each other in times of crisis or need. Each could be trusted and relied on steadfastly by the other.103

99 Tanner, supra note 59.
100 The Nor’Wester (14 March 1860).
103 Williams, supra, note 23 at 126.
Alliance provided for sharing between nations in times of need and linked one to the other in order to secure mutual obligation and assistance. After centuries of interconnection between indigenous peoples within Turtle Island, it was a natural extension of indigenous diplomatic principles to enter into peace, alliance and sharing relationships with newcomers.

Treaty making fulfilled what tribal Indians regarded as a sacred obligation to extend their relationships of connection to all of the different peoples of the world. A treaty was therefore far more than just a reassuring way of blunting contradictions and conflicts of interests between societies. Indians understood a treaty as another way of reconstituting a society itself on an unstable and conflict-ridden multicultural frontier.

The fur trade treaties

In addition to peace treaties, various indigenous nations from across Canada participated in an extended inter-tribal trading system, rooted in complex systems of tribal diplomacy. These regulated systems of trade between indigenous peoples directly informed the development of a system of trade in furs with the Europeans. Trade relationships were conducted in large part in accordance with indigenous protocols, to which the fur traders became accustomed and which they found to be necessary in solidifying their trade alliances. John Long, in his book *Treaty No. 9*, refers to the use of the protocols used to solidify the trade relationships: in particular, gift giving, feasting and the smoking of the pipe.

Those whom the Europeans considered to be Indigenous leaders were given British flags to fly from their canoes as symbols of their status, and guns were

---

104 Ibid. at 62.
105 Ibid. at 50.
106 Ibid. at 32.
fired at the fort to honour their arrival. Indigenous trading “captains” were presented with suits of clothing, along with gifts of food and alcohol; in return, the HBC factor received a token gift of furs. Only after more smoking and more speeches could the winter’s furs be bartered for the Company’s trade goods. Indigenous healers (described by the British traders as “doctors”) and their wives were presented with western medicines. Lavish gifts were distributed to the trading captains before they departed from the post. The trade and its attendant ceremonies lasted just a few days, and then the Indigenous visitors left for their winter territories.107

The Anishinabe were one of the fur trade’s earliest and most important partners, trading first with the French, and later with the HBC, the North West Company and other independent traders. Although the fur trade began along the shores of Hudson’s Bay, to which many indigenous nations travelled to trade with the company, in later years, the HBC and its competitors began to travel inland and set up fur trade posts along rivers. Anishinabe control over the inland route to the west and their abundant fur resources required the fur traders to develop solid relationships with the Anishinabe, who acted as fur providers, guides and middlemen in the trade with the Cree and Assiniboines further west. In some cases, the alliances ran deep, including connections through marriage between indigenous women and fur traders.108

They entered into treaties with the Indian tribes and nations, and carried on a lucrative and extensive fur trade with the natives. Neither the French government, nor any of its colonists or their trading associations, ever attempted, during an intercourse of over two hundred years, to subvert or modify the laws and usages of the aboriginal tribes, except where they had established colonies and permanent settlements, and, then only by persuasion [...].109


While some argue that the fur trade was characterized as an era of dependency by the indigenous people on the fur traders, those assumptions are being nuanced in the work of Arthur Ray\textsuperscript{110} and in Richard White’s \textit{The Middle Ground},\textsuperscript{111} and explained more fully by scholars such as Jennifer Brown, Laura Peers, Jim Miller, Sylvia Van Kirk, Bruce White, Janna Promislow and others. In \textit{The Middle Ground}, Richard White argues that a unique world, defined by shared meanings and practices developed out of the fur trade in the Great Lakes area.\textsuperscript{112} “In this world the older worlds of the Algonquians and of various Europeans overlapped, and their mixture created new systems of meaning and of exchange.”\textsuperscript{113} White further states that a system of legal interaction, informed by the first two, developed between the Crown and the Anishinabe for the purposes of making treaties of peace and alliance. White argues that “[T]he central and defining aspect of the middle ground was the willingness of those who created it to justify their own actions in terms of what they perceived to be their partner’s cultural premises.”\textsuperscript{114} Janna Promislow argues that this does not mean that they perceived their partners’ cultural premises “completely or correctly.”\textsuperscript{115}


\textsuperscript{111}Richard White, \textit{The Middle Ground: Indians, Empires and Republics in the Great Lakes Region, 1650-1815} (Cambridge: Cambridge University Press, 1991) [R. White, \textit{Middle Ground}].

\textsuperscript{112}Ibid.

\textsuperscript{113}Ibid. at x.

\textsuperscript{114}Ibid. at 52.

Contact between the fur traders came later in the territory of Treaty One than with other Anishinabe further east, with the first fur trading post, Fort Maurepas, being established in the area in 1734. The Anishinabe of south-eastern Manitoba participated actively in inland fur trade expeditions from the mid-eighteenth century up until the decline of the fur trade a century later. Having joined the fur trade in an area of significant competition between traders, both English and French, the Anishinabe of Treaty One likely did not develop “new systems of meaning” to the same extent as Richard White argues was the case for the Great Lakes area between 1650 and 1815, but rather were dealt with more in accordance with Anishinabe requirements and protocols.

When the Royal Charter of 1670\textsuperscript{116} was granted to the Hudson’s Bay Company, ostensibly providing it with exclusive trading rights over the entire Hudson’s Bay drainage basin,\textsuperscript{117} it allowed the HBC to enact laws for “good government of its territory” and to adjudicate company personnel according to laws of England. These laws were applied only to HBC personnel and not to the indigenous population that was within the territory described in the Charter. The scope of the jurisdiction of the HBC and the extent of the application of the HBC Charter in the territory (known as Rupert’s Land and the Northwestern Territories) was a source of continuous uncertainty. For example, it was unclear whether the HBC Charter or the laws of Canada applied in Rupert’s Land and the Northwest Territories after the *Royal Proclamation of 1763*\textsuperscript{118}.


\textsuperscript{117} Note that southern Manitoba and the area of Treaty One is within the Hudson’s Bay drainage basin.

Jurisdiction Act\textsuperscript{119} was passed in 1803 in order to attempt to resolve this issue, although the uncertainty continued.\textsuperscript{120}

Throughout the fur trade era, the relationships between the fur traders and the Anishinabe were in large part based on indigenous legal traditions.\textsuperscript{121} Over the course of two centuries, a culture of trade treaties, based in part on Anishinabe laws, developed into a template for interaction with Europeans.

From the 1500s onward, many European individuals submitted themselves to indigenous legal orders. For example, many traders and explorers adopted indigenous legal traditions and participated in their laws. A perusal of the fur trade literature reveals that commercial transactions were often conducted in accordance with indigenous traditions. The giving of gifts, the extension of credit, and the standards of trade were often based on indigenous legal concepts. Traditionally, Aboriginal peoples in Canada did not transfer goods by conducting their relations with other people in a static way. Relationships were continually renewed and reaffirmed through ceremonial customs. The idea of trade terms being “frozen” through a contract, written on paper, was an alien concept. The traders recognized this fact and conducted their affairs in accordance with indigenous laws. In the more personal sphere, many of the early marriage relationships between indigenous women and European men were formed according to indigenous legal traditions. There were no priests or ministers in the Northwest to officiate at weddings until 1818, and this meant that governing laws were found in the various indigenous nations throughout the land.\textsuperscript{122}

The relationships between fur traders and the Anishinabe being essential to the success of the fur trade, in particular in the period of increased competition prior to the amalgamation of the HBC and the North West Company in 1821, there was a great deal of deference towards the Anishinabe approach to trade. The traders quickly understood that they were dependent on the indigenous peoples for the provision of furs, as well as

\textsuperscript{119} The Canada Jurisdiction Act, 43 Geo. III, c. 138.
\textsuperscript{120} See A.S. Morton, “The Canada Jurisdiction Act (1803) and the North-West” (1938) 2 Transactions of the Royal Society of Canada 121.
\textsuperscript{121} Borrows, Occupations of Land, supra note 98 at 12.
\textsuperscript{122} Ibid. at 11-12.
for their knowledge of the land, and thus accommodated the political and trade norms of the Anishinabe. “Because of the fur trade, the tribes of eastern North America during the Encounter era were often treated in fact, if not wholly regarded in theory, as political, economic, and military equals by their European trading partners.”

Even while engaged in the fur trade, the Anishinabe of Manitoba continued to disperse and hunt in the winter months and then come together again in spring for ceremonies and preparation for the summer harvest. “European traders simply fit into the accustomed annual cycle when they exchanged European goods for furs and food. Trade did not result in Aboriginal dependence on Europeans.”

When the Anishinabe did meet with the fur traders, Anishinabe protocols were followed. “European fur-trading enterprises learned very quickly to accommodate First Nations wishes and practices, including the web of customs that concerned creating and maintaining harmonious relationships.”

Gifts were exchanged, the pipe ceremony was conducted, the parties feasted, and alliances were reaffirmed. According to Promislow, “[T]rading practices had evolved to include pipe smoking, speeches, gifts of tobacco, and feasts for the leaders, who then shared the food with their followers [...] feasts and gifts of food were an important part of cementing the relationship between the local Indians and the HBC, quite apart from questions of subsistence and need.”

---

123 Williams, supra note 23 at 21.


125 Miller, supra note 43 at 12.

126 Promislow, “Merchandise”, supra note 42 at 87.
All of these protocols were conducted in order to “set the table” for the trade discussions. Each of these protocols had a particular significance and was viewed as essential to the conduct of good relationships. For example, gift giving created goodwill between the parties, which would allow the message to flow. “An important message not accompanied by a gift, in the language of Indian diplomacy, was not even worth listening to.”127 Fur traders were incorporated into the system of kinship alliance by adoption or by marriage.128 Their integration into the Anishinabe kinship structure solidified their roles and obligations both at micro (individual and family) and macro (corporate and national) levels. Such kinship alliances helped secure and clarify the obligations between parties.129

J.R. Miller supports Friesen’s view that the HBC trading practices impacted the process and outcome of the numbered treaty negotiations. Miller argues that the trade ceremonies with the HBC aligned with indigenous beliefs and practices, and that the HBC entered into binding treaties with the indigenous people as part of fur trade practice by adhering to indigenous treaty making protocols to establish commercial relationships. The “[…] whole string of events and practices – the fur trade protocol – constituted the commercial compact. In other words, the relationship established in this was the treaty.”130 Like Friesen, Miller goes on to describe how these “commercial compacts” and social and kinship relationships set the stage for the negotiation of the land treaties in Manitoba,

---

127 Williams, supra note 23 at 76.
128 For a discussion of aboriginal women’s role in the fur trade, see Sylvia Van Kirk, supra note 108.
130 Miller, supra note 43 at 21.
Saskatchewan and further west. In *Bounty and Benevolence*, Ray, Miller and Tough also consider the trade relationships and general good will between the Indians and the HBC as significant in informing the protocols and tone of the Treaty One negotiations; they also note that HBC posts were used as the stage for the treaty negotiations. John Long affirms that when Treaty Nine was negotiated in 1905, the traders’ ceremonies that were features of the fur trade “were much diminished but likely not forgotten.”

The culture of trade treaties, founded on Anishinabe legal principles, was important for the subsequent negotiation of the treaties with the Crown. The negotiation of trade treaties created expectations about the development of relationships between parties. Trade treaties confirmed respect and adherence to Anishinabe protocols and Anishinabe inaakonigewin (law) and acknowledged the procedural and substantive content of those laws.

At the height of the fur trade, the Western Anishinaabeg lived within a complex cultural middle ground that was neither entirely indigenous Anishinaabe nor foreign European; it was nevertheless uniquely Anishinaabe.

In Commissioner Robinson’s report of the 1850s Robinson-Huron and Robinson-Superior treaty negotiations, he acknowledges “[…] the valuable assistance afforded me by all the officers of the Honorable the Hudson’s Bay Company resident on the lakes; and the prompt manner in which their Governor, Sir George Simpson, kindly placed their

---

131 See generally Miller, ibid.
132 Ray, Miller and Tough are three prominent researchers and scholarly writers who focus on treaties and western Canadian-aboriginal history. *Bounty and Benevolence* is considered to be one of the key written resources relating to the interpretation of the numbered treaties.
133 Long, supra note 107 at 21.
services at my disposal.‖ Treaty One, negotiated at the Stone Fort (Lower Fort Garry), was built upon existing relationships of trust developed in the context of the fur trade which dated back over two centuries.

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

This practice continued throughout the negotiation of the numbered treaties in western Canada.

**Anishinabe treaties with the Crown**

Treaty relationships between and amongst indigenous people, as well as treaties with fur traders served as important precedents for treaties between the Anishinabe and the Crown. Robert Williams Jr. argues that “Indians tried to create a new type of society with Europeans on the multicultural frontier of colonial North America. Recovering this shared legal world is crucial to the task of reconstructing our shared understandings of the sources and the nature of the rights belonging to Indian peoples […]”

The use of Anishinabe laws, both procedural and substantive, informed the earlier treaties and infused the relationship with the Crown. The treaties with the Crown, negotiated over the course of the century preceding Treaty One, adopted Anishinabe methods of

---

135 Morris, *supra* note 7 at 21.

136 *Ibid.* at 285

concluding treaties and solidified the foundations of the relationship between the
Anishinabe and the Crown.

Other indigenous nations formed treaty relationships with both the French Crown (prior
to capitulation) and the British Crown. The earliest recorded example of treaty making
between indigenous peoples and a European power in Turtle Island is the agreement
between the Haudenosaunee and the Dutch in 1613. The Haudenosaunee Two Row
Wampum Belt (Guswhenta or Kaswehnta) confirmed the relationship between the two
nations and depicts the two separate paths (or rivers) on which each party travels in its
own vessel.

The *Gus-Wen-Tah* is comprised of a bed of white wampum shell beads
symbolizing the sacredness and purity of the treaty agreement between the two
sides. Two parallel rows of purple wampum beads that extend down the length of
the belt represent the separate paths traveled by the two sides on the same river.
Each side travels in its own vessel: the Indians in a birch bark canoe, representing
their laws, customs and ways, and the whites in a ship, representing their laws,
customs, and ways. In presenting the *Gus-Wen-Tah* to solemnize their treaties
with the Western colonial powers, the Iroquois would explain its basic underlying
vision of law and peace between different peoples as follows: We shall each
travel the river together, side by side, but in our own boat. Neither of us will steer
the other’s vessel.138

The alliances between the Haudenosaunee and the Dutch, and later between the
Haudenosaunee and the British (referred to as the Covenant Chain), laid the foundations
that informed all future alliances and relationships between the French Crown and the
indigenous peoples of Canada and later with the British Crown. The Anishinabe had
direct relationships with the British Crown as early as the 1700s. Treaties were
concluded between the Great Lakes Anishinabek and the French, according to

Anishinabe ceremonies, protocols and wampum.\textsuperscript{139} The relationship between the Anishinabe and the Crown further developed after the capitulation of France in North America in 1761. Under the terms of capitulation, indigenous lands were to be protected and the indigenous peoples were not to be punished for assisting the French in the war.\textsuperscript{140} The Anishinabe were clear with the British Crown representative that, although the French had been conquered, the Anishinabe had not.\textsuperscript{141} Williams argues that “[…] there was a time when the West had to listen seriously to these indigenous tribal visions of how different peoples might live together in relationships of trust, solidarity, and respect.”\textsuperscript{142}

In 1763, the British Crown issued a royal proclamation which protected Indian lands from occupation, settlement or sale without their consent.\textsuperscript{143} Under the \textit{Royal Proclamation of 1763}, surrenders and purchases could only be made by the Crown according to a specified process.

The Proclamation uncomfortably straddled the contradictory aspirations of the Crown and First Nations when its wording recognized Aboriginal rights to land by outlining a policy that was designed to extinguish these rights. These rights and their potential removal were affirmed by three principles or procedures: 1) colonial governments were forbidden to survey or grant any unceded lands; 2) colonial governments were forbidden to allow British subjects to settle on Indian lands or to allow private individuals to purchase them; and 3) there was an official system of public purchases developed in order to extinguish Indian title.\textsuperscript{144}

John Borrows argues that First Nations, including many tribes of Anishinabe, were active participants in the formulation and ratification of the \textit{Royal Proclamation}. In 1764, the

\textsuperscript{139} See R. White, \textit{supra} note 111.
\textsuperscript{140} Borrows, “Wampum at Niagara”, \textit{supra} note 22.
\textsuperscript{141} \textit{Ibid.} at 157.
\textsuperscript{142} Williams, \textit{supra} note 23 at 23.
\textsuperscript{143} The “Indian Country” included the Anishinabe territory in what would become the Treaty One area.
\textsuperscript{144} Borrows, “Wampum at Niagara”, \textit{supra} note 22 at 160.
Treaty of Niagara assembled over 2,000 chiefs of 24 nations, from as far away as Hudson’s Bay, for the negotiation of a treaty of alliance and peace.\textsuperscript{145} The \textit{Proclamation} and the Treaty of Niagara set the terms for the relationship between the Crown and indigenous people and set the stage for the negotiations of the future treaties. “The purpose of the Treaty conference was for the chiefs to discuss the principles that would govern their relationship with the British sovereign. The chiefs’ role was jurisdictional; they watched over the territories and settled disputes.”\textsuperscript{146} The Covenant Chain Belt\textsuperscript{147} was presented by the British Crown and a Two Row Wampum Belt was presented by the First Nations. Copies of the \textit{Royal Proclamation} were distributed by the Crown. “This agreement, at the start of the formal relationship between the British and the First Nations of Canada, demonstrates the foundation-building principles of peace, friendship, and respect agreed to between the parties.”\textsuperscript{148}

\textsuperscript{145} Although many Anishinabe chiefs attended at Niagara, it is unclear to me whether the Anishinabe people who later negotiated Treaty One were represented amongst the 2,000 chiefs in attendance. It would be safe to assume that, even if they were not in direct attendance, they would have had knowledge of the meeting and the treaty that was concluded with the Crown.

\textsuperscript{146} Henderson, \textit{Treaty Rights, supra} note 66 at 225.

\textsuperscript{147} I have seen a replica of the Covenant Chain Belt and was fortunate to have heard a part of the oral history of the belt being shared at a community led conference: Inclusion and Representation in Anishinabek Self-Government, Nipissing First Nation, 21-22 January 2011.

\textsuperscript{148} Borrows, “Wampum at Niagara”, \textit{supra} note 22 at 165.
According to Sákéj Henderson, the Niagara treaty was a consensual relationship of peace, protection and respect with each member of the Ojibway Confederacy being treated “[…] as sovereign nations with treaty capacity.” Henderson further states that the Two Row Wampum Belt, which was presented by the Anishinabe to the Crown, expressed sovereignty and non-interference, principles that were foundational to Anishinabe treaty relationships. The 1764 Niagara treaty created the context for future treaty negotiations between the Crown and the Anishinabe. According to John Borrows, “[T]he express terms and promises made in the Proclamation and at Niagara may yet be found to form the underlying terms and conditions which should be implied in all subsequent and future treaties.” The Covenant Chain Belt, the Two Row Wampum Belts and copies of the Royal Proclamation were each invoked in many instances after the 1760s in the context of treaty negotiations, including in 1818 on Lake Huron and at the Manitoulin

---

149 Henderson uses the term “Ojibway Confederacy”. I prefer to speak of the Anishinabe Nation as the collective group of Anishinabe peoples that exist independently but collectively as Anishinabe people. Henderson, Treaty Rights, supra note 66.

150 Ibid. at 226.

151 Ibid. at 227.

152 Borrows, “Wampum at Niagara”, supra note 22 at 169.
Island treaty negotiations in the 1860s. Mark Walters finds that in “[...] subsequent treaty councils, chiefs would hold the same belt in their hands, recite the story of the meeting at Niagara and implore ‘our Great Father’ – the king – to honour the promises then made.”\textsuperscript{153} The Anishinabe recalled what Sir W. Johnson had said at the Niagara treaty:

\begin{quote}
Children, you must all touch this Belt of Peace. I touch it myself, that we may all be brethren united, and hope our friendship will never cease. I will call you my children; we will send warmth (presents) to your country; and your families shall never be in want. Look towards the rising sun. My Nation is as brilliant as it is, and its word cannot be violated [...] If you should ever require my assistance, send this Belt, and my hand will be immediately stretched forth to assist you.\textsuperscript{154}
\end{quote}

This is an example of what Williams refers to as the “[...] distinctive language of multicultural diplomacy that Indians and Europeans used to conduct their treaty relations with each other.”\textsuperscript{155}

In the century following the \textit{Royal Proclamation} and the Treaty of Niagara, many other treaties were negotiated between the Crown and Anishinabe in what is now Ontario. These treaties furthered the relationships that had been forged between the Anishinabe and the Crown. In the treaty purchases of land in southern Ontario, the Anishinabe were continuously reassured that they could continue to use the land as they always had, without modification to the terms of the original treaty. The Robinson-Huron and Robinson-Superior treaties (1850) set aside large reserves and confirmed the right to continue hunting and fishing, although there was discomfort amongst the Anishinabe about the approach to settlement and their subsequent displacement. The Manitoulin Island treaties (1861-62) achieved only a partial “surrender of land”, as some Anishinabe

\begin{footnote}
\textsuperscript{153} Walters, “Your Sovereign and Our Father”, \textit{supra} note 34 at 92.
\textsuperscript{154} Borrows, “Wampum at Niagara”, \textit{supra} note 22 at 166.
\textsuperscript{155} Williams, \textit{supra} note 23 at 11.
\end{footnote}
refused to sign the treaties on the basis that they still had title to their land.\textsuperscript{156} In addition, 1871 marked the last year that treaties were negotiated with Indian tribes in the United States, although the United States government continued to make “agreements” with Indian tribes,\textsuperscript{157} the shift in policy was certainly dramatic and had a ripple effect, which likely was felt across the border. As expansion and settlement was moving westward through Ontario, Manitoba continued to be relatively undeveloped. One notable exception was the Selkirk Settlement, established via a grant by the Hudson’s Bay Company to Lord Selkirk in the early nineteenth century. In order to secure the “quiet possession” of a two-mile reserve on the banks of the Red River, Lord Selkirk negotiated a treaty with the Anishinabe chiefs of the region in 1817, the Selkirk Treaty. The intent of the treaty was later disputed, as the Anishinabe claimed that the land had been leased. The Selkirk Treaty was concluded with many of the same bands\textsuperscript{158} that would later negotiate Treaty One.\textsuperscript{159}

Anishinabe treaty making with the Crown was a well-established practice by 1871, in the Upper Canada treaties, the Robinson-Huron treaties, the Selkirk Treaty and the United States treaties. Each of the treaties between the Anishinabe and the Crown “set the table” for the negotiation of Treaty One. Each of the negotiations built upon the principles established in the \textit{Royal Proclamation} and at the Niagara treaty, and was conducted, at least in part, in accordance with Anishinabe protocols and laws.

\textsuperscript{156} Miller, \textit{supra} note 43 at 121.
\textsuperscript{158} I use the term “band(s)” to refer to the small groups of Anishinabe that generally lived and hunted together and were represented by a common leader in the Treaty One negotiations.
\textsuperscript{159} Miller, \textit{supra} note 43 at 163.
Treaties were clearly not static agreements from an Anishinaabe perspective but were contingent on each nation meeting the obligations they carried. These commitments necessitated a constant renewal of friendship and peace throughout their fulfillment. Anishinaabe nations, when entering into a treaty with the United States and Canada, frequently built upon their previous agreements.\textsuperscript{160}

In particular, the non-interference and mutual assistance that are illustrated by the Covenant Chain Belt and the Two Row Wampum Belts help further illustrate the perspective that the Anishinabe brought to the treaty and the mutual reliance of the treaty parties on the Anishinabe procedural and substantive legal principles that informed Treaty One.

**Treaty with the Indians of Manitoba**

**The need to secure alliance**

The time and place of Treaty One is particularly significant to its negotiation and its terms. It was the first of the numbered treaties of western Canada to be concluded. It was the hinge on which western agricultural expansion, and the national railway, were resting. Various geographic, political, social and economic factors influenced the Anishinabe and the Crown prior to and around the time of the Treaty One negotiations. Miller points to concerns about food security, intertribal wars and a succession of epidemics as important contextual factors leading up to the negotiation of the numbered treaties in the 1870s.\textsuperscript{161} In particular, the end of the fur trade and the transfer of HBC territorial interests to Canada, the Canadian desire to expand westward and settle the

\textsuperscript{160} Stark, supra note 26 at 155.

\textsuperscript{161} Miller, supra note 43 at 150.
whole of Canada, as well as the creation of the Province of Manitoba, all had an impact on how Treaty One was negotiated.\textsuperscript{162} In eastern Canada, the indigenous population was outnumbered by Europeans, but such was not the case in Manitoba.

In the western interior [...] from the early 1600s to 1870, the Aboriginal people of prairie Canada lived within a society defined by traditional Aboriginal laws, while Europeans in the region increasingly demanded a justice system for themselves akin to those in Britain and Europe.\textsuperscript{163}

In Assiniboia,\textsuperscript{164} the Quarterly General Court was established in 1835, and in 1864 it was determined that British law would be applied to the settlers in both criminal and civil cases. Enforcement was constantly a challenge. In his report to the Aboriginal Justice Inquiry of Manitoba, historian Gerry Friesen argued that because of the interaction of the Métis\textsuperscript{165} with the white settlers in the mid-nineteenth century “[...] a distinctively Manitoban mix of European and Aboriginal legal cultures was evolving in Red River.” It is unclear what, if any, jurisdiction was claimed or exercised with regard to the Anishinabe.

The geographic distance from Canada, the proximity to the United States, the important waterways linking the Red River area to the United States (via the Red River) and Canada to the west (via the Winnipeg River, known as the “Highway to the West”), as well as the abundant forest and agricultural potential of the prairies, made this area highly

\textsuperscript{162} The area of Treaty One is roughly the equivalent of the Province of Manitoba and the adjoining timber grounds.

\textsuperscript{163} G. Friesen, “Justice Systems”, supra note 124 at 53.

\textsuperscript{164} Assiniboia overlapped significantly with what became the Province of Manitoba in 1870 and the Treaty One territory in 1871.

\textsuperscript{165} In this case, I am referring to the Red River Métis. For a discussion of the Métis, see Jennifer Brown, “Métis” in The Canadian Encyclopedia, online: <http://www.thecanadianencyclopedia.com/index.cfm?Params=A1ARTA0005259&PgNm=TCE>.
desirable to Canada, while being just far enough out of the reach of Canada’s control. In addition, the issue of Indian title had to be settled in order to allow for the distribution of 1.4 million acres of lands to the Métis, in accordance with Manitoba’s Constitution.\textsuperscript{166} As stated by Marcel Mauss, indigenous people, faced with European or White settlers “[...] may move away or in case of mistrust or defiance they may resort to arms; or else they can come to terms.” In this case, the Anishinabe and the Crown attempted to come to terms.

By viewing the period as the beginning of efforts of competitive, intersecting, and roughly equal cultural groups to build a workable social order, we see the response of Indians to the European invaders on their lands as part of a much more complex setting. As opposed to simply being barriers to European expansion, Indians assume essential roles as potential allies and facilitators, acting for their own reasons in concert with European colonial powers. As opposed to history simply passing them by in their “savage” social state, Indians are found coping and responding to Europeans with sophistication, resourcefulness, and long-term vision on the complex cultural landscape of the Encounter era frontier.\textsuperscript{167}

With the decline of the fur trade and later the transfer of Rupert’s Land and the Northwest Territories to Canada, jurisdictional questions were perpetuated. Canada, newly formed in 1867, was in its infancy as a nation at the time the Treaty One negotiations were undertaken. The Canadian government had assumed jurisdiction over “Indians and Lands Reserved for Indians” under section 91(24) of the Constitution Act, 1867.

Rupert’s Land and the Northwest Territory (formerly referred to as “Indian Country”) was transferred to Canada by the British Crown (which had acquired it from the HBC), on the condition that Canada protect First Nations and reserved Indian lands. Canada proposed to annex Rupert’s Land and the Northwest Territories as new territories of

\textsuperscript{166} The Manitoba Act, 1870, 33 Victoria, c. 3, s. 31-32.

\textsuperscript{167} Williams, supra note 23 at 23.
Canada. As Canada prepared to assume control over these new western territories, their surveying efforts were met by opposition from the Métis of Red River, who would not let Governor William McDougall enter the territory. Historian W.L. Morton qualifies the Red River situation of 1869-70 as a resistance rather than a rebellion, because of the power vacuum that existed in the Red River at the time.\(^\text{168}\)

The first Riel Resistance began in 1869 with an ill-advised attempt by the government of Canada to open for Canadian and European immigration parts of the prairies it had purchased from the Hudson’s Bay Company. The government had not consulted those who already lived in the area, most of whom were First Nations and Métis people, but sent surveyors to the Red River to prepare for a new system of land distribution, even before the transfer to Canada was complete. Métis people, who felt their land holdings threatened, ordered the surveyors to cease their activities and organized a common response with other residents to the incursions of the government of Canada. The newly formed provisional government, headed by Louis Riel, Jr., dispatched a delegation of Red River representatives to Ottawa to negotiate the terms of the area’s entry into Canada […] In the meantime, a party of Canadian officials, including the new governor-designate, was intercepted by an armed Métis force and ordered to stay out of the territory […]\(^\text{169}\)

According to Gerald Friesen, “[…]without the presence of troops in Red River, HBC law depended on the consent of Rupert’s Land Residents.”\(^\text{170}\)

The Métis formed a provisional government and negotiated Manitoba’s terms of entry into Canadian confederation. It was agreed that the Red River area was to enter into confederation as a partner province, known as Manitoba. Louis Riel called the agreement a “treaty” between “nations”. The \textit{Manitoba Act}\(^\text{171}\) came into force on May 12, 1870 and provided that 1.4 million acres of land would be set aside for the use of the children of


\(^{169}\) See Canada, Royal Commission on Aboriginal Peoples, \textit{Perspectives and Realities} (Ottawa: Supply and Services, 1996), c. 5 at 2.1.

\(^{170}\) G. Friesen, “Justice Systems”, \textit{supra} note 124 at 58.

\(^{171}\) \textit{The Manitoba Act, 1870}, \textit{supra} note 166.
Métis heads of families. No negotiations or discussions took place with the Anishinabe in the context of Manitoba’s entry into confederation.

As settlement increased, the issue of indigenous title to the land had to be resolved, as required by the *Royal Proclamation*. In addition, the Anishinabe Chiefs requested of the Lieutenant-Governor that treaty be negotiated, and that matters of interest to them be resolved,\(^{172}\) as more and more settlers were entering their territory and using their resources. The Anishinabe recognized that the Lieutenant-Governor had authority over the settler population.

Ojibwa chiefs demanded treaties before they would allow the British sovereign to enter or use their lands and resources. Ojibwa governments were not prepared to give up their lands, on which they depended for their livelihood, without a formal relationship that would protect and respect their jurisdiction, lands and resources.\(^{173}\)

Following the Métis uprising in Manitoba in 1869-70, in which the citizens of Red River protested the purchase of Rupert’s Land and the transfer to Canada, it was clear that the indigenous populations in western Canada were a strong force that the Government of Canada had great difficulty controlling from afar. There was significant Indian unrest following the end of the HBC rule, the Red River uprising and the influx of White settlers.

The predecessors of Canada – the Company of Adventurers of England trading into Hudson’s Bay, popularly known as the Hudson’s Bay Company – had for long years, been eminently successful in securing the good-will of the Indians – but on their sway, coming to an end, the Indian mind was disturbed. The events, that transpired in the Red River region, in the years 1869-1870, during the period

\(^{172}\) The articles of Treaty One provide that the parties would be called to “deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and to the said Indians of the other.” (Treaty One, 1871, in Morris, *supra* note 7 at 313).

when a provisional government was attempted to be established, had perplexed the Indians. They moreover, had witnessed a sudden irruption into the country of whites from without.\textsuperscript{174}

The Anishinabe were well aware of changing circumstances and the need to negotiate a peaceful agreement in relation to the land. Despite past treaties,\textsuperscript{175} the Anishinabe land tenure, in what had, in 1870, become the Province of Manitoba, was not as secure as the Indians would have liked.\textsuperscript{176} The Indians “[…] were full of uneasiness, owing to the influx of population, denied the validity of the Selkirk Treaty, and had in some instances obstructed settlers and surveyors.”\textsuperscript{177}

**The Selkirk Treaty**

Half a century earlier, many of the same bands had participated in the negotiation of the Selkirk Treaty. The Selkirk Treaty had been made to settle disputes between the incoming settlers and the Anishinabe and Cree over use of land for settlement and agriculture. Lord Selkirk noted “[…] their resentment against my settlers for having taken possession of their lands without their consent or any purchase from them.”\textsuperscript{178} Selkirk then brokered an agreement that allowed for the use of two-mile tracts on each side of the

\textsuperscript{174} Morris, *supra* note 7 at 9.

\textsuperscript{175} See, for example, the Selkirk Treaty, negotiated in 1817, which allowed for white settlement of the lots along the Red River, in exchange for an annual rent of 100 pounds of tobacco to each nation. After Lord Selkirk’s death, the treaty was not renewed and payments ceased, the land having been sold back to the HBC by Selkirk’s successors in 1836.

\textsuperscript{176} Chief Peguis also noted that, in 1859, fellow Chiefs Makasis, Ke-kisimakirs and Wa-waskasis all sent letters to the Aborigines Protection Society in London and to Mr. Isbister about the land question in the west. A full account of this was published in *The Nor’Wester* on June 1, 1861.

\textsuperscript{177} Morris, *supra* note 7 at 25-26.

\textsuperscript{178} Lord Selkirk to Commissioner S.B. Coltman (17 July 1817), Fort Douglas, Selkirk Papers (C.4.v.II 3809)
Red and Assiniboine Rivers. He reasoned that the purchase of land for significant goods could potentially bring into question the validity of a sale; he therefore chose to negotiate for the exclusive use of land, not in terms of a sale or surrender, but rather of a “gift”.

If a large quantity of goods were offered for the purchase it might be said that the temptation of immediate advantage had induced them to sacrifice their permanent interests. I would therefore propose to them merely a small annual present in the nature of a quit rent or acknowledgement of their right: - and having specified what I intend to give in this way I would leave it to themselves to specify the boundaries of the lands which they agree to give up on that consideration and to appropriate to me for the exclusive use of the settlers. ¹⁷⁹

Later, Chief Peguis affirmed that their land had never been sold to Selkirk or to the HBC.

We never sold our land to the said Company, nor to the Earl of Selkirk; and yet the said Company mark out and sell our lands without our permission. Is this right? I and my people do not take their property from them, without giving them great value for it, as furs and other things [...] I got nothing for my land [...] I speak loud: listen! ¹⁸⁰

This treaty experience was influential in the Anishinabe understanding of agreements with settlers for use of land. In particular, the concept of an annual rent in exchange for the use of land and the idea that jurisdiction over land would be retained by the Anishinabe were concepts that likely carried over into or informed the Anishinabe negotiations at Treaty One.

¹⁷⁹ Ibid.
¹⁸⁰ The Nor’Wester (14 February 1869) - an extract from an address from Chief Peguis to the Great House Across the Water.
Reigning Uncertainty

During the winter prior to the Treaty One negotiations, Chief Moosoos of High Bluff wrote to the Lieutenant-Governor, complaining that settlers had been cutting wood in his territory. He included with his letter a written warning and posted notices on the land forbidding the settlers from cutting wood.

Whereas the Indians’ title to all lands west of the fifty mile boundary line at High Bluff had not been extinguished and whereas these lands are being taken up and the wood thereon cut off by parties who have no right or title thereto, I hereby warn all such parties that they are fringing [sic] on lands that as yet virtually belong to the Indians.\(^\text{181}\)

In 1868, the Portage band had warded off settlers who were taking timber from their lands. The Hon. James McKay\(^\text{182}\) was sent to negotiate a three-year agreement with Chief Yellow Quill (the Rat Creek Treaty), in anticipation of a full treaty.\(^\text{183}\) Indians further west restricted all access to their territories: "[T]he natives around Riding Mountain (the finest region in the country) have distinctly forbidden anyone to approach their territory until the treaty has been consummated."\(^\text{184}\) Those in the immediate area of settlement, such as Chief Peguis and his son Henry Prince, published an “Indian Manifesto” in *The Nor’Wester* newspaper to the effect that anyone who cultivated Indian land would have to make annual payment as acknowledgement of the Indians’ title to the land.

\(^\text{181}\) Chief Moosoos to A. Archibald (17 December 1870), Winnipeg, Public Archives of Manitoba (Archibald Papers MG 12, A1).

\(^\text{182}\) McKay was influential in securing Treaty One and many of the later treaties. “James McKay, a member, at that time, of the Executive council of Manitoba, and himself a half-breed intimately acquainted with the Indian tribes, and possessed of much influence over them.” Cited to Morris, *supra* note 7 at 25 [emphasis added].

\(^\text{183}\) Alexander Morris to the Minister of the Interior (18 August 1875), Ottawa, Library and Archives Canada (RG 10, vol. 3624, file 5217-1, C10, 109).

\(^\text{184}\) *The Manitoban*, *supra* note 39 at 4.
The settlers were uneasy about the uncertainty that reigned in the absence of a treaty with the Crown. The hope was that a treaty would be concluded speedily. On behalf of the residents of Red River, Louis Riel’s list of grievances to Canada had included a demand for Indian treaties.

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

Given the political instability of 1869-70 and Canada’s obvious inability to control the Red River Colony, Rupert’s Land and Northwest Territory, or its population, the new nation was vulnerable in its quest for western expansion and required the “peace and goodwill” of the Anishinabe. The Treaty Commission was given instructions to communicate with Indian bands for the purposes of securing friendly relations for travel and settlement, including the system employed by the HBC in dealing with them previously.

---

185 The Manitoban, supra note 39 at 2-3.
186 Morris, supra note 7 at 37.
187 The Manitoban, supra note 39 at 1.
188 Canada, “Instructions from Canada to the Treaty Commission” in Sessional Papers, No. 20 (1870)

1. You will, with as little delay as possible, open communication with the Indian Bands occupying the country lying between Lake Superior and the Province of Manitoba, with a view to the establishment of such friendly relations as may make the route from Thunder Bay to Fort Garry secure at all seasons of the year, and facilitate the settlement of such portion of the country as it may be practicable to improve.
Upon his appointment and arrival in western Canada, Adams Archibald, the Lieutenant-Governor of Manitoba and the Northwest Territories, met with the Anishinabe in the fall of 1870. Archibald reported that “[...] the Indians were anxiously awaiting my arrival, and were much excited on the subject of their lands being occupied without attention being first given to their claims for compensation.”

Archibald promised to make a treaty with them the following year and sent them home with ammunition “to enable [them]to gain a livelihood during the winter by hunting.” In 1871, Wemyss Simpson was appointed as Indian Commissioner by the Privy Council of Canada because of “[...] the necessity of arranging with the bands of Indians inhabiting the tract of country between Thunder Bay and the Stone Fort, for the cession, subject to certain reserves such as they should select, of the lands occupied by them.”

As he explained to the Indians gathered at the Stone Fort:

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

2. You will also turn your attention promptly to the condition of the country outside the Province of Manitoba, on the North and West; and while assuring the Indians of your desire to establish friendly relations with them, you will ascertain and report to His Excellency the course you may think most advisable to pursue, whether by treaty or otherwise, for the removal of any obstructions that may be presented to the flow of population into the fertile lands that lie between Manitoba and the Rocky Mountains.

3. You will also make a full report upon the state of the Indian Tribes now in the Territories; their numbers, wants and claims, the system heretofore pursued by the Hudson’s Bay Company in dealing with them, accompanied by any suggestions you may desire to offer with.

189 Morris, supra note 7 at 37.

190 *Ibid.* at 27.


192 *The Manitoban, supra* note 39 at 12.
Despite his assurances that he had “been present at a great many Indian treaties in Canada”, Simpson had been unsuccessful at securing the treaty with the Anishinabe at North-West Angle in July of 1871.\(^{193}\) Under pressure to conclude a treaty during the summer of 1871, Simpson continued on to Manitoba, where he met with the Lieutenant-Governor of Manitoba, Adams Archibald, and other officials, including James McKay. Collectively, they agreed to treat with the Indians for lands beyond the boundaries of the Province “as were required for immediate entry and use.”\(^{194}\) Simpson issued proclamations to meet on July 25 at Lower Fort Garry and August 17 at Manitoba Post. The Commissioner knew that these treaties would set the stage for the future treaties that would open up western Canada to settlement, and to the national railway.

I look upon the proceedings, we are now initiating, as important in their bearing upon our relations to the Indians of the whole continent. In fact, the terms we now agree upon will probably shape the arrangements we shall have to make with all the Indians between the Red River and the Rocky Mountains. It will therefore be well to neglect nothing that is within our power to enable us to start fairly with the negotiations.\(^{195}\)

Knowing that political relations with the Indians were of great significance to Canada, the Commissioner undertook the “[…] work, of obtaining their good will, by entering into treaties of alliance with them.”\(^{196}\)

**Conclusion**

Prior to Treaty One, there was an established history of inter-nation\(^{197}\) and trade law that existed, distinct from European or Canadian laws. Williams and Richard White argue

\(^{193}\) Treaty Three was later made with these same bands by Commissioner Morris in 1873.  
\(^{194}\) Morris, *supra* note 7 at 26.  
\(^{195}\) *Ibid.* at 32.  
\(^{196}\) *Ibid.* at preface [emphasis added].
that this resulted in a newly developed system of law, founded on indigenous legal principles.

The Encounter era treaty tradition recalls the long-neglected fact in [...] history that there was a time in our national experience when Indians tried to create a new type of society with Europeans on the multicultural frontier of colonial North America. Recovering this shared legal world is crucial to the task of reconstructing our shared understandings of the sources and the nature of the rights belonging to Indian peoples [...]198

According to Henderson, there were existing indigenous orders, into which the immigrants attempted to fit themselves, which “[...] generated a common jurisdictional and institutional framework of legal pluralism.”199 Others view indigenous normative principles not simply as contributing factors to the legal relationships but as being the pillars of those relationships. Regardless of which view one takes, the fact is that indigenous normative values were taken into account in treaty making long before the negotiation of Treaty One. The application of these principles extended to relationships between indigenous nations, to relationships with fur trade partners and to treaties with other nations, including Britain, France – and later – Canada.

Given this political and geographic context, questions arise as to the application of British colonial law by the Hudson’s Bay Company from 1670 to 1870, Canadian law after 1870, and Manitoban provincial law as of 1870. Gerald Friesen argues that when Manitoba became a province in 1870, there was a new, jointly developed legal order in place.200 It is unclear what system of state law would apply in the territory of Treaty One at the time

197 I use the term “inter-nation” rather than “international” to avoid the connotations associated with international law.
198 Williams, supra note 23 at 9.
199 Henderson, Treaty Rights, supra note 66 at 479.
of the negotiations in 1871, given the recent shift in “ownership” of the territory from a company to the Canadian state and the creation of the province, all in the months preceding the treaty negotiation. Furthermore, the Treaty One lands extended beyond the 1870 Manitoba border into the adjacent timber lands.

There are questions as to whether there was any de facto jurisdiction of the Anishinabe of the area prior to Treaty One. Long argues that when “Rupert’s Land, the HBC territory, was acquired by the three-year-old Dominion of Canada in 1870, the Indigenous inhabitants likely understood this transfer to mean (if they were aware of it at all) that Canada would somehow continue the long-established fur trade protocols governing immigrants’ interactions with the First Nations.” 201 The issues of consent to use land, as required by the Royal Proclamation, had not yet been resolved and there was no effective imposition of law or jointly developed law prior to the making of the treaty in 1871. Consequently, and in the absence of an imposed or jointly developed system of law, the Anishinabe relied on inaakonigewin (law) to inform their understanding in the negotiation of Treaty One.

201 Long, supra note 107 at 22.
Chapter 3: ANISHINABE INAAKONIGEWIN (LAW) AND TREATY ONE

Understanding and defining - what is law?

What is meant by the term “law”? “Where do we stop speaking of law and find ourselves simply describing social life?”

Gordon Woodman suggests that, “The conclusion must be that law covers a continuum which runs from the clearest form of state law through to the vaguest forms of informal social control.” Jeremy Webber rejects a distinction between customs and “laws” (as conceived by positivists) and cites Lon Fuller’s view that all law is customary (including statutes) and “[...] owes its force to the fact that it has found direct expression in the conduct of men toward one another.” For the purposes of this work, I will not focus on sharp distinctions between formal and informal systems of law, but will consider all forms of normative ordering.

Fuller finds that law is “[...] grounded in particular practices, emerged from those practices, and serve[s] to facilitate human interaction within them [...] To understand law is to understand norms’ relationship to the web of human interaction in a given society.” The individual, outside of the social and collective, is incapable of creating law: it is necessarily interactive and culturally rooted. Legal pluralists such as Clifford Geertz and Webber explicitly consider the cultural underpinnings of law. Webber

---

convincingly argues that law is culturally shaped and suggests that the language used to conceptualize and analyze the normative content is itself infused with normative content:

[T]he very language that participants use to conceptualize and analyze – the very concepts they employ to conceive of normative challenges – have particular normative dispositions inscribed into them. These dispositions shape participants’ deliberations and, alongside participants’ reflections on the stock of common experience, account for the salience of potential solutions.206

Webber’s reflection is particularly important in the context of indigenous legal systems, given that context and normativity are infused into the language we use to understand law.207 In addition, because of the prevailing notion that indigenous laws are contained in language, language itself (including translations) impacts on understandings and legal commitments. Cultural, social and linguistic perspectives are critical to the analysis of the Treaty One negotiations. They help illustrate the application of different legal systems, the overlap between them and the potential variations in terms of the legal significance of some of the elements of the treaty negotiations.

**Recognition of indigenous legal traditions**

Indigenous legal systems are profoundly complex and consist of multiple sources. As convincingly argued by Fuller and Webber, law goes beyond state enacted ordinances, but this is not always easy to recognize. Therefore, it is worth exploring the complexity of sources of and approaches to indigenous legal traditions. According to John Borrows, law consists of “[…] formal and informal elements. It pivots around deeply complex explicit and implicit ideas and practices related to respect, order and authority. Laws

---

206 Ibid. at 605.
207 Ibid.
arise whenever inter-personal interactions create expectations and obligations about proper conduct."\textsuperscript{208} Borrows lists the following sources of indigenous law: sacred, natural, deliberative, positivistic and customary.

But how should indigenous legal traditions interact, if at all, with other legal traditions within Canada? Although indigenous legal traditions have been recognized by the Supreme Court of Canada, challenges arise as to how to value, understand and respect indigenous laws and whether this recognition should take place within the Canadian legal system. In Borrows’ view, Canada has three legal traditions: common law, civil law and indigenous law, although he acknowledges that this is not a universally held view:

There is a debate about what constitutes ‘law’ and whether Indigenous peoples in Canada practiced law prior to European arrival. Some contemporary commentators have said that Indigenous peoples in North America were pre-legal. Those who take this view believe that societies only possess laws if they are declared by some recognized power that is capable of enforcing such a proclamation. They may argue that Indigenous tradition is only customary, and therefore not clothed with legality.\textsuperscript{209}

Borrows argues that indigenous legal systems pre-date British or Canadian law and continue to co-exist with (or exist alongside) Canadian law.\textsuperscript{210} “Put simply, Canada’s Aboriginal peoples were here when Europeans came, and were never conquered.” \textsuperscript{211} Brian Slattery,\textsuperscript{212} Sákéj Henderson\textsuperscript{213} and Borrows argue that, “[W]hen treaties are made they can be seen as creating an inter-societal framework in which first laws intermingle

\textsuperscript{208} John Borrows, \textit{Canada’s Indigenous Constitution} (Toronto: University of Toronto Press, 2010) at 7 [Borrows, \textit{Indigenous Constitution}].

\textsuperscript{209} \textit{Ibid.} at 12.

\textsuperscript{210} See Borrows generally and, particularly, Borrows, \textit{ibid.} at 16.


with Imperial laws to foster peace and order across communities.”

Within the academic study of law, there is a project, championed by John Borrows, Jeremy Webber, Val Napoleon and others, which seeks to recognize and promote indigenous legal traditions. My project differs from modern understandings and applications of indigenous laws and considerations about their place within the Canadian constitutional framework. I place importance on understanding the articulation of an indigenous legal tradition, as it existed at the time of the Treaty One negotiations, when two parallel and autonomous systems of law coexisted within one geographical space at one particular time. I will focus less on the inter-societal framework that may have been achieved through the treaties, but rather on the independent understandings and foundations of the treaties, so that we may better understand the expectations that flowed from the treaties. Although I accept that, to some extent, indigenous and non-indigenous societies engaged at some point in a “[...] modus vivendi that became the foundation of a normative community that crossed the cultural divide”, I argue that this engagement was, at best, in its infancy at the time Treaty One was negotiated and that the systems of

---


215 See, for example, Val Napoleon & Hadley Friedland, “An Inside Job: Developing Scholarship from an Internal Perspective of Indigenous Legal Traditions” (Paper provided to Thinking About and Practising with Indigenous Legal Traditions: An Exploratory Workshop, Fort St. John, BC, 30 September - 2 October 2011) [unpublished].

216 Roughly the area of the Province of Manitoba (as it was in 1871, the “postage stamp province”) plus the timber lands to the north and east.


218 For a discussion on intersocietal normativity in the context of the fur trade, see Janna Promislow, “Merchandise”, supra note 115.

219 Webber, “Relations of Force”, supra note 217 at 626
normative understanding of the Anishinabe remained independent of those of the settlers and Crown.

Multiple systems of law
Prior to the negotiation of Treaty One, Anishinabe inaakonigewin (law) existed alongside and, in some cases, in complex systems of interaction with other legal traditions. As illustrated in Chapter One, the Anishinabe fostered long-standing legal relationships with other indigenous nations in relation to lands and treaty making. In addition, during the seventeenth and eighteenth centuries, the relationship between the Anishinabe of Treaty One and the fur traders was characterized primarily by the adoption of Anishinabe inaakonigewin (law) into the “commercial compacts” that were concluded between the trading parties. Outside of the context of trade interactions, non-indigenous laws applied to white traders, while Anishinabe inaakonigewin (law) continued to apply to the Anishinabe. “The Aboriginal peoples’ and the colonist’s own normative orders did not disappear in this new community. They retained their specificity [...]”.

To understand how Treaty One may have been informed by the Anishinabe legal perspective, one must begin with the premises that multiple legal traditions can exist in one geographic space at one particular time, and that, while at some level they interact, they exist independently of one another. In this case, by considering the non-hierarchical

220 Particularly the Hudson’s Bay Company but to some extent the North West Company as well.
222 Webber, “Relations of Force”, supra note 217 at 657.
co-existence of two distinct and autonomous legal systems (Anishinabe and western),\textsuperscript{223} in what is now Manitoba, at the time of making Treaty One, we can better understand the importance of examining the treaty from the perspectives of both legal cultures.\textsuperscript{224}

Webber explains:

Any attempt to truly describe the law of a particular context […] should not state the law as though it were singular. Instead, it should aim to capture a legal culture, portraying the range of contending arguments; the normative resources on which those arguments can build; the relationship between those arguments on the one hand, and practices, interests, patterns of historical experience and individuals’ identifications on the other; the extant mechanisms for resolving social disagreement; and, from an assessment of all of these factors, the relative chances of success of various normative assertions.\textsuperscript{225}

Put simply, Anishinabe inaakonigewin (law) co-existed with other systems of law at the time of Treaty One negotiations and therefore should be considered in order to better understand and interpret the treaty.

\textsuperscript{223} I use the term “western state law” as a general term to define systems outside of indigenous legal systems. Note that this “western law” might be variously British, Canadian, or Manitoban. This nuance is important because the Treaty One territory covers roughly the Province of Manitoba (created in 1870) and the timber areas outside of the province (and within Rupert’s Land). In 1670, Rupert’s Land was granted to the Hudson’s Bay Company by the British Crown. It was then sold to Canada in 1870. Following an uprising in Manitoba (1869) protesting the annexation of the Red River area (later Manitoba) to Canada as a “territory”, the Province of Manitoba was created (1870). The rest of Rupert’s Land was transferred to Canada and remained territories (until some of the areas joined in confederation as provinces).


Anishinabe *inaakonigewin* (law) and Treaty

Borrows relates that “Anishinabek law was all about relationships.” It is not codified, but is taught. Anishinabe *inaakonigewin* (law) and teachings are also learned directly from the Earth and other beings, “[…] from the plants, insects, birds, animals, the daily changes in the weather, the motion of the wind and the waters, and the complexion of the stars, the moon and the sun. They didn’t write these down but kept them in their hearts.” Laws are also infused and contained in the *Anishinabemowin* language and passed down through the teachings related to *mino-bimaadiziwin* (leading a good life).

[T]he Ojibway worldview is expressed through their language and through the Law of the Orders, which instructs people about the right way to live. The standards of conduct which arise from the Law of the Orders are not codified, but are understood and passed on from generation to generation. Correct conduct is concerned with “appropriate behaviour, what is forbidden, and the responsibility ensuing from each.” The laws include relationships among human beings as well as the correct relationship with other orders: plants, animals and the physical world. The laws are taught through “legends” and other oral traditions.

Much of Anishinabe *inaakonigewin* is related to kinship and land. Legal relationships exist between various animate beings. These relationships exist between humans, animals, plants, rocks and *adisookan* (spirits), amongst and between themselves individually and collectively. Treaties were made between the Anishinabe and the

---


228 Gerald Friesen, with A.C. Hamilton & C.M. Sinclair, *supra* note 124 at 45.

229 See also D. Johnston, *supra* note 58.

230 In Anishinabe cosmology, animate beings include things that are not recognized as animate in western science, such as rocks, trees, clouds, etc. See discussion in Jennifer S.H. Brown & Susan Elaine Grey, eds., *A. Irving Hallowell — Contributions to Ojibwe Studies: Essays, 1934-1972* (Lincoln: University of Nebraska Press, 2010) at 273 [Hallowell, *Essays*] at 45 and 539 and in Berrens, William, as told to A. Irving Hallowell, edited with Introductions by Jennifer S.H. Brown & Susan Elaine Gray, *Memories Myths and Dreams of an Ojibwe Leader* (Montreal & Kingston: McGill-Queen’s University Press 2009) at 90 and 125.
Animal Nations. These relationships are described in terms of kinship, the trees and rocks being our brothers, “meaning those who knew more and were stronger.” The sun and moon are our grandfather and grandmother, the earth our mother. Each depends on the other, the Anishinabe being most dependent of all on their relations.

Our ancestors saw a kinship between plants, insects, birds, animals, fish and human beings, a kinship of dependence; humans depending on animals and birds and insects; animals depending on insects and plants; insects depending on plants; plants depending only on the earth, sun, and rain. Creation was conducted in a certain order: plants, insects, birds, animals and human beings. In the order of necessity, humans were the last and the least; they would not last long without the other forms of beings.

The Anishinabe define their obligations and responsibilities in terms of their relationships. According to Anishinabe Elder Harry Bone, the first of these relationships is between the Anishinabe and the Creator. The second is between the Anishinabe and Nimaaamaa Aki (Mother Earth). Borrows finds that as Anishinabe we “[...] can’t properly exercise our agency or make the best choices without remembering the land.” These are followed by relationships between the air, wind, fire, animals, plants, birds and fish. These relationships exist between all things at all times.

While some anthropologists and social scientists have used the term “fictive kinship” to describe relationships that are created between individuals who are not biologically related, this does not begin to capture kinship relationships as defined in Anishinabe

---

231 See, for example, the story in John Borrows, Recovering Canada, supra note 21 at 16-20.
232 B. Johnston, Honouring Earth Mother, supra note 35 at 112.
233 Ibid. at vii.
234 Pratt, supra note 13 at 113.
235 Borrows, Drawing Out Law, supra note 226 at 72.
inaakonigewin (law). There is no fiction in Anishinabe kinship. The Anishinabe are kin to the rocks, the trees, the animals, the birds, the fish, to each other and to “the other”.

“The Saulteaux kinship system is centripal in tendency in the sense that everyone with whom one comes in social contact not only falls within the category of a relative, but a blood relative, through the extension in usage of a few primary terms.”

Each relationship carries with it responsibilities and obligations. These are generally mutual obligations, although less importance is placed on equal and immediate return within a relationship. While Jean Friesen, and others, consider “balanced reciprocity” (an equal and specified return) to be the guiding principle of relationships, in Anishinabe inaakonigewin (law), reciprocity is more of a general nature, with the possibility of return at a future or unknown date and of an undetermined value. Hallowell argues that for the Northern Ojibway, “[i]t is within this web of social relations that the individual strives for pimadiziwin”, a good life.

When we consider the terms of Anishinabe inaakonigewin in this way, the relationships and the obligations that accompany them become the defining feature of the relationship, rather than the emphasis being placed on the source of the relationship. Relationships thus define the roles of each living thing in this creation. In turn, the obligations and responsibilities come from our role in creation. “To our ancestors it was self evident that

---

236 Hallowell, Essays, supra note 230 at 273.
238 Hallowell, Essays, supra note 230 at 561.
239 Hallowell uses pimadiziwin in the same way that I use mino-bimaadiziwin.
all creatures were born equal and free to come and go and fulfill their purposes as intended by Kitchi-Manitou.”

Building on solid foundations: relationships and protocols

Since creation, Anishinabe inaakonigewin (law) had applied to the Anishinabe. As discussed in Chapter 2, Anishinabe inaakonigewin was also applied jointly with other indigenous legal traditions in order to secure peace, alliance and trade between indigenous nations. Also, in the early years of contact between the Europeans and the Anishinabe prior to Treaty One, Anishinabe inaakonigewin applied in some interactions with Europeans: for example, in fur trade relations. Relationships that developed between the Anishinabe and the French and British Crowns were heavily informed by Anishinabe practices and protocols.

The mutual reliance of the treaty parties on Anishinabe protocols, or procedural law, invoked substantive normative expectations on the part of the Anishinabe, which informed the development of the Treaty One relationship. Although the use of procedural law may not have been completely understood by the treaty negotiators, they adopted the protocols for the purposes of securing the treaty. Janna Promislow argues that similarly, in the context of the fur trade, the “[...] protocol acquired a normative

---

240 B. Johnston, Honouring Earth Mother, supra note 35 at 147

241 The Anishinabe refer to creation as the moment when time began. For a richer understanding of Anishinabe creation stories, see Basil Johnston, Ojibway Heritage, supra note 54 and Benton-Banai, The Mishomis Book, supra note 54.
dimension for HBC traders because it was how things were done, not because it was understood or respected.\textsuperscript{242}

In the discussion that follows, I will outline some clear examples of the protocols or procedural norms employed in the Treaty One negotiations, which I will argue logically invoke elements of substantive Anishinabe laws, including expectations involving the normative obligations associated with particular relationships. The procedural norms that are detailed below include: waiting for all to be present before beginning the proceedings; speaking only when authorized by the people to do so; removing obstructions to good communication and negotiation; gifting and feasting the treaty partners; and adhering to ceremonial protocol. Importantly, the focus of this discussion is not on whether the application or extent of those laws was known or understood by the Crown representatives. Rather, the point is that the Crown’s invocation and adherence to those protocols almost certainly informed the Anishinabe understanding of the normative obligations resulting from the product of these negotiations, given their normative and historical significance within the Anishinabe legal culture of the time.

\textbf{Relationships between groups - Waiting for the others, Authority to speak}

Although the Treaty One negotiations were set to begin on July 25, 1871, they were delayed for two days, due to the late arrival of some of the bands. While some preliminary discussions took place, those Anishinabe who were present would not agree to start the negotiations without the other bands. “On the part of the Indians, it was stated

\textsuperscript{242} Promislow, “One Chief”, supra note 88 at 100.
that they were not ready to open a Treaty, as a large number of the tribes – those from the upper country – were not present.”\textsuperscript{243} At the outset of the negotiations, the Chiefs were selected to speak on behalf of their bands. One band or Chief could not speak for another band without their express permission. For example, “Henry Prince said that he could not then enter upon any negotiations, as he was not empowered to speak or act for those bands of Indians not then present.”\textsuperscript{244} These protocols were recognized and accepted by the Commissioners as necessary to the negotiation process, as they agreed to wait two days for the others to arrive, all the while feeding those who had assembled. Once all of the bands were represented, the negotiations began.\textsuperscript{245}

Commissioner Simpson equated the delay in negotiations with what he perceived as jealousy between the bands in relation to their communication with the Crown.

\begin{quote}
Amongst them, as amongst other Indians with whom I have come in contact, there exists great jealousy of one another, in all matters relating to their communications with the officials of Her Majesty and in order to facilitate the object in view, it was most desirable that suspicion and jealousy of all kinds should be allayed.\textsuperscript{246}
\end{quote}

Although jealousy may have existed amongst the bands, a more robust understanding of this protocol suggests that the Anishinabe who first arrived at the Stone Fort respected the autonomy of each band and adhered to principles of non-interference in each other’s affairs. Henry Prince explained that when he did things, he did them for the benefit of all Indians, although he acknowledged the limits of his jurisdiction by explaining that his

\begin{footnotes}
\item[243] The Manitoban, supra note 39 at 5.
\item[244] The Manitoban, supra note 39 at 35
\item[245] Morris, The Treaties of Canada, supra note 7 at 27.
\item[246] Ibid. at 38.
\end{footnotes}
authority extended only “as far as Fort Garry”, the geographical boundary of his band’s territory.

Whatever I do, I do it for all the Indians. I have done it always for all the Indians ever since my father spoke for them (at Lord Selkirk’s treaty). When I want to speak about my father I speak loud, and am always glad to speak about him, but whenever I get to say anything, my voice only goes as far as Fort Garry.²⁴⁷

When one of the Chiefs at the negotiations stated that he would enter into the treaty if the annuity were increased, he was immediately corrected by the other Chiefs, as he had not consulted with them and could not speak on their behalf. He then clarified that “he only spoke for his own camp fire”.²⁴⁸ This non-interference is illustrative of a respect for the internal jurisdiction of each band over its affairs.

There was also a degree of individual autonomy and agency in collective decision making. Decisions were made by consulting with individuals. For example, reserves were selected collectively: “[…] the Indians themselves are always consulted as to where they will want it – whether all in one place, or in several.”²⁴⁹ There was a profound sense of equality between all members of a band: “[T]he Anishinaubaek came and went as they pleased, without having to ask permission of the chief or some master. Men and women stood, sat, talked, walked, and worked with chiefs and leaders. They were equal.”²⁵⁰ Where there was disagreement with the general direction of a band, people were free to remove themselves from the collective. When decisions had to be made which would have an impact beyond the band, the Chiefs of the various bands met in council.

²⁴⁷ The Manitoban, supra note 39 at 23.
²⁴⁸ Ibid. at 33.
²⁴⁹ Ibid. at 21.
²⁵⁰ B. Johnston, Honouring Earth Mother, supra note 35 at 147.
[T]hey are shrewd and sufficiently awake to their own interests, and, if the matter should be one of importance, affecting the general interests of the tribe, they neither reply to a proposition, nor make one themselves, until it is fully discussed and deliberated upon in Council by all the Chiefs [...]251

During the negotiations, when asked whether they wanted reserves in one place or several, Chief Kasias responded that the “[...] chiefs must consult with each other and would reply next morning.”252

Thus, the Treaty One negotiations were founded on protocols of waiting for others and not speaking for others without proper authority. These protocols illustrate the reliance on substantive principles of non-interference and respect for autonomous jurisdiction of smaller collectives, and individuals.

Relationships to other Anishinabe - Removing the dark cloud

Once the commissioners had made their opening remarks, the second day of negotiations commenced with an expression of discontentment which shadowed the negotiations. The Anishinabe expressed that “[T]here was a cloud before them which made things dark, and they did not wish to commence the proceedings till the cloud was dispersed.”253 They explained that four Anishinabe men had been imprisoned, for allegedly failing to have fulfilled their terms of employment with the HBC. They were imprisoned at the fort. The Chiefs asked that the prisoners be released prior to the negotiations. The Lieutenant-Governor, pushing back against this strong assertion, released the prisoners “as a matter

251 Parliament, Sessional Papers, No. 81 (1867-68).
252 The Manitoban, supra note 39 at 21.
253 Morris, supra note 7 at 30.
of favour, not as a matter of right”, but not without first confirming that the Anishinabe did not disregard “White” law. The Lieutenant-Governor asked the Indians if they “were under the impression that they were liable to the law” and stated that all men, whether White or Indian would be punished in the same way for breaches of the law (presumably British law as applied in Manitoba).

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

Chief Ayee-ta-pe-pe-tung explained that although he did not wish to disregard the law that had provided for the imprisonment of the men, the obstacle that their imprisonment had created had to be cleared away in order for the parties to work towards a treaty.

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

[…] We are going to make a treaty with the Queen, and want to clean everything away from the ground that it may be clean. We are going to work and will work better if every obstacle is cleared away. I am not defying the law, but would wish to have the Saulteaux at present in jail, liberated.

---

254 The Manitoban, supra note 39 at 20.
255 Ibid. at 19.
256 Ibid. at 19-20.
257 Ibid. at 19.
Finally, the prisoners were released. This allowed the negotiations to proceed. When the prisoners were ordered released, “the sky became clear.”\(^{258}\) Although Archibald stated that he was releasing the four men as a favour, on behalf of the Queen,\(^ {259}\) the result was that there was an adherence to the Anishinabe protocol of starting things “in a good way”, with no ill feeling towards the others and with respect towards the others’ responsibilities and jurisdiction over their own people.

It is worth noting that the discussion in relation to the application of British law to the Indians may not have been similarly understood by each of the parties. While *The Manitoban* report indicates that Ayee-ta-pe-pe-tung “[...] made a predatory flourish about Indian lands, and then came to the point [...]”, it is uncertain as to what can be taken from the Chief’s words. An important part of the context in which this can be understood is it involved a breach of contractual obligations between the HBC and its employees, who happened to be Indians. Although the Lieutenant-Governor was seeking confirmation that the Indians had due regard for Crown law (presumably British law, as it was being applied in Manitoba), it could be inferred that the affirmation by Chief Ayee-ta-pe-pe-tung was limited to situations in which Indians agreed to enter into a relationship where they would subject themselves to British law (i.e. upon entering into contractual relationships with the HBC). Again, there is room for nuance in this discussion. Long argues that Anishinabe concepts of law differed from Euro-Canadian concepts, although these distinctions may not have been fully understood at the time of treaty.

It is highly unlikely that the Ojibwe and Cree understood the Euro-Canadian concept of ‘law’. The closest Ojibwe word, *onaakonigewin*, referred to a plan or

\( ^{258}\) Morris, *supra* note 7 at 31 [emphasis added].

\( ^{259}\) Lieutenant-Governor Archibald to Secretary of State, cited in Morris, *ibid.* at 34.
decision [...] Most of their own laws were values about sharing, cooperation, and other culturally proper behaviours so essential to their survival and well-being – literally, the laws of the land[...] These decisions, or laws, were necessary for maintaining bimaadiziwin [...]260

Relationships with guests - Gifting and Feasting

It is customary for the Anishinabe to give gifts to secure relationships or when asking something of another. Bruce White notes that gifts “[...] aided in establishing and affirming more elaborate relationships. Depending on the situations in which they were given and on the words and ceremonies that accompanied them, gifts communicated something.”261 The political and spiritual worlds of the Anishinabe were connected to one another and were rooted in relations of kinship in which reciprocal obligations of care were continuously reaffirmed through gift-giving.

Political order was intimately connected to spiritual order, and both were oriented toward relations of kinship. Kinship transcended temporal and physical boundaries: trees, water and animals were infused with spiritual life – with manitous – and survival necessitated spiritual balance with them through constant gift-giving. Peaceful relations with the surrounding elements of the natural world and peoples within that world meant establishing and maintaining relationships of spiritual-kinship by creating reciprocal obligations of care. To give or receive presents was to renounce the status of alien and to become kin.262

As had been the practice of the HBC over the years, and of the Crown in past treaty negotiations with the Anishinabe, gifts were presented at the Treaty One negotiations. Chief Ayee-ta-pe-pe-tung explained that when “[...] the President of the United States authorizes a man to come and treat with Indians, he brings with him heaps of goods to

260 Long, Treaty No. 9, supra note 107 at 340.
261 B. White, “‘Give Us a Little Milk’”, supra note 84 at 61.
262 Walters, “‘Your Sovereign and Our Father’”, supra note 34 at 94.
give over to them as a present.” The Anishinabe demanded the same of the commissioner who had invited them to the treaty negotiations:

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

The Commissioner took the hint, and promised to slay some oxen. A “sly old brave” told a story of proper hosting, which was a clear indication about how the Anishinabe expected to be treated in the negotiations – as they had been in the past – with provisions made for them for the duration of the negotiations.

The Crown representatives fed those assembled, recognizing that if they did not feed them, they would likely leave to hunt and gather. Simpson was prepared to incur significant expense in order to secure the treaty: “I fear we shall have to incur a considerable expenditure for presents of food, etc., during the negotiations; but any cost for that purpose I shall deem a matter of minor consequence.” The adherence to the protocol of feasting one’s guests has a deep normative resonance with the Anishinabe. It entailed a respect for the Anishinabe who had been invited to the negotiations, and confirmed the obligations that the Crown had in hosting the negotiations. It confirmed that there was a relationship with the Crown and that the negotiations were being taken seriously. As in past treaty relationships, including at the Selkirk Treaty, the Chiefs

---

263 *The Manitoban, supra* note 39 at 30 [emphasis added].
265 *The Manitoban, supra* note 39 at 8.
266 Morris, *supra* note 7 at 32.
267 Carter, Sarah. “‘Your Great Mother across the Salt Sea’: Prairie First Nations, the British Monarchy and the Vice Regal Connection to 1900” (2004-2005) 48 Manitoba History 34.
were presented with medals at the Treaty One negotiations. Medals were distributed by the British, French, Spanish, and the United States as signs of “friendship, allegiance and loyalty” and to secure military, trade or other treaty alliance. Renewal of obligations and relationships is significant to the Anishinabe and past treaties had generally been founded on those principles. At Treaty One, the Crown proposed payment in the form of annuities (unlike the lump sum payments in the U.S.). While the annual payments were not necessarily intended by the Anishinabe as an opportunity to renew the terms of the relationship, their intentions were possibly misapprehended. The Selkirk Treaty, which had been negotiated with the Anishinabe of the area 50 years earlier, had been negotiated on the basis of an annual payment of tobacco and was understood by the Anishinabe as a renewable lease of land. While the Anishinabe may have expected a confirmation of the relationship and annual discussions about the ongoing terms of the agreement, the Crown approached the treaty as a one-time negotiation. “All the collateral expenses, therefore, of this year, including dresses, medals, presents to the Indians, etc., etc., will not appear in the expenses attending during future payments.” The Anishinabe might have expected that the feasting and gifting would be repeated annually, as was the case with the annual renewal of relationships between indigenous nations, with the fur traders and with the gifts that *Nimaamaa Aki* (Mother Earth) provided annually from her bounty.

268 Note that the medals that were originally presented to the Treaty One and Treaty Two Chiefs did not depict the “handshake” that is figured prominently in the later numbered treaty medals (including the Treaty One and Two replacement medals). The Treaty One and Treaty Two medals issued in 1871 depicted four allegories representing timbering, mining, fishing and agriculture. See online: Collections Canada <http://www.collectionscanada.gc.ca/05/0529/052920/05292002_e.html>.

269 Carter, supra note 267 at 2.


271 Morris, supra note 7 at 42.
Relationship with the Creator and Spirit - *The Pipe*

While waiting for the other bands to arrive on the first and second day of the treaty negotiations, an opening ceremony was conducted with dancing and drumming, to call on the spirit to guide the proceedings and to establish the parameters of the negotiations.

The performances, between ribbons, feathers, paint and clothing, exhibited all the colors of the rainbow. There were two orchestras, half women and half men, one set playing for one style of dancing, and the other for another and very different one. The Band and performers were all seated on the grass, and the Commissioner, Lieut.-Governor and party, and a great crowd formed the spectators. Some of the chiefs and braves were in the most fashionable of dress – that is, dressed as little as possible; having merely breechclouts on; others had buffalo horns, etc., on their heads, while bears’ claws, and similar remembrances [sic] were plentifully scattered through the group.272

The dance was also meant as an introduction to the parties, explaining the role and reputation of the “chiefs and braves”, in accordance with Anishinabe custom and protocol.

Elders have related that the Treaty One negotiations were conducted in ceremony and that spirit was called upon to assist the Anishinabe in the negotiations and in their decision making about their future and that of their grandchildren. Although the contemporaneous written record does not contain an explicit reference to a pipe ceremony, Simpson acknowledged the importance of the pipe and tobacco to the Anishinabe, particularly in relation to decision making. When the Simpson asked the Anishinabe to select their spokesmen or “representatives of the tribe”, he “[…] promised to send some tobacco to the camp, so that they might smoke over this matter and arrive at

---

272 *The Manitoban, supra* note 39 at 8.
a decision that evening.”\textsuperscript{273} The pipe and the pipe ceremony are very sacred to the Anishinabe. The pipe ceremony is conducted to ensure peaceful dealings and to secure friendship between people or between the Anishinabe and Creator.\textsuperscript{274} In the pipe ceremony, the first whiff of smoke is offered in thanksgiving to the Creator.\textsuperscript{275} The second is offered to Nimaamaa Aki. “The offerings of smoke were expressions of honour, respect, love, gratitude.”\textsuperscript{276} The pipe ceremony acknowledges the teachings and laws of the Anishinabe. The pipe brings unity into the gathering.

The knowledge shared by the Elders tell us about the Creator’s laws and sacred teachings. In the seven principles, the first belief is that there is only one Creator; the second belief is that we have a sacred special relationship with the land; the third belief is that we are all human people; the fourth belief is that we have a language; the fifth belief is that we have our culture and traditions through ceremonies; the sixth belief is that we have a history; and the seventh belief is that we are able to look after ourselves through our own forms of government. What this means is that the pipe is pointed in the seven directions during ceremony – to the Creator, to the land, to the people, and the four directions as represented by our languages, cultures, history and government. Each of these directions also have a specific teaching.\textsuperscript{277}

The pipe was used to call upon the Creator to act as a third party to the negotiations and the agreement. The Anishinabe would not have entered into such important negotiations without relying on the pipe to provide guidance and connection to spirit. The spirit being called upon by the pipe would be present throughout the negotiations and therefore the negotiations themselves would be considered to be a ceremony. Charlie Nelson, a Treaty One Elder, referred to Treaty One as “a gathering of spirit”. By invoking spirit, a solemn

\begin{footnotes}
\item[273] The Manitoban, supra note 39 at 15.
\item[274] B. Johnston, Honouring Earth Mother, supra note 35 at 51.
\item[275] Ibid. at 13-14.
\item[276] Ibid. at 149.
\item[277] Pratt, supra note 13 at 111-112.
\end{footnotes}
pledge to uphold any of the commitments made would have been confirmed. Many Elders have told me that the treaty was “signed with the pipe”. What I understand this to mean is that the treaty was confirmed by agreeing with the Creator to enter into a relationship with the Queen for shared use of the land.

The treaty agreement and promises were made with the Creator as a third party and therefore cannot be breached. As with many indigenous peoples, the Anishinabe view the treaty relationship as sacred.278

A treaty sanctified by the smoking of the pipe of peace became, in essence, a sacred text, a narrative that committed two different peoples to live according to a shared legal tradition – an American Indian vision of law and peace.279

Ken Courchene, another Treaty One Elder, speaks of the importance of Gi-giigidowin, keeping a promise, and the sacredness of promises. In Courchene’s view, the treaty is a sacred promise that was made with the Creator and cannot be taken back.

*Owe niwin*, the fourth one. *Gi-giigidowin* [your word, promise or vow]. *Giishin gegoo ashodaman* [If you make a promise] your word becomes sacred. *Gishtwaa.* It means sacred. Your word is sacred. And a promise is a promise. You can’t take it back. And a Treaty is that. That’s a promise that they made not only to themselves but also to the Creator. That we would keep this as long as the sun shines, the earth is green and the waters flow. *Gi-gii-ganawendaamin* [We kept it – we keep it]. *Gaawiin gi-gi-biigwananziimin* [We did not break it]. We keep it. We didn’t break that. Those words are sacred. It was a promise that we, owe *gi-gii-izhi-ganawaabamaanaaning gi-gii-zhi-misidotamaamin* [that we looked at them that way, that way I understood it] [...] I want to believe that we were fair and honourable when our people sat before the Creator on mother earth and the people across from them would be as fair as they were. And those side deals and side promises, they took them to heart because they believed in them. So, it’s very very important.280

280 Pratt, *supra* note 13 at 29.
In order to ensure the proper adherence to the sacred promises, individuals were charged with the responsibility to remember every detail of what was agreed to. Prior to the treaty negotiations, Simon Dawson had advised Ottawa about the Anishinabe and their ability to recall details of agreements and their determinedness to observe their commitments.

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

For my own part, I would have the fullest reliance as to these Indians observing a treaty and adhering most strictly to all its provisions, if, in the first place it were concluded after full discussion and after all its provisions were thoroughly understood by the Indians, and if, in the next, it were never infringed upon by the whites, who are generally the first to break through Indian treaties.\(^{281}\)

Although the opening ceremony, the pipe, the Creator and the involvement of spirit are not easily explained without reference to sacred *inaakonigewin*, adherence to these protocols helps to understand the approach that the Anishinabe take to the sacredness of treaty. This is the foundation for the Anishinabe assertion that the treaty cannot be “thrown out” or reneged on.

**Kinship with the Queen**

Treaty One was the first treaty between the Crown and an indigenous group in what is now Canada, on behalf of a queen. Since first contact, previous treaties had been negotiated on behalf of kings. According to the oral history of the treaty and the text

itself, the treaty was negotiated on behalf of Queen Victoria, directly, and not in the name of the Crown or her representatives. Although Queen Victoria was already a monarch at the time the Robinson Superior Treaty (1850), the Robinson Huron Treaty (1850) and the Manitoulin Island Treaty (1862) were negotiated, these treaties were concluded by the treaty commissioners on behalf of the Crown, possibly because of the Queen’s young age.\textsuperscript{282} In contrast, Treaty One was made “[…] between Her Most Gracious Majesty the Queen of Great Britain and Ireland […] and the Chippewa and Swampy Cree Tribes of Indians […] inhabitants of the country within the limits hereinafter defined and described.”\textsuperscript{283} Although in 1871, at the time of the treaty negotiations, Canada would have been the instructing authority with regard to treaties in western Canada, the written record of the negotiations, including the speeches by Lieutenant-Governor Archibald and Treaty Commissioner Simpson, refer only to the Queen and never to Canada. Henderson argues that a special relationship was formed between the Queen and the Anishinabe in the western treaties or “Victorian treaties”. “These treaties unified the Ojibwa Confederacy into an imperial relationship with the British Sovereign, distinct from either the United Kingdom or federal Parliamentary control.”\textsuperscript{284}

At the Treaty One negotiations, both the Commissioners and the Anishinabe referred extensively to the Queen as “mother” to the Anishinabe. Much reference was made to

\textsuperscript{282} The Robinson Superior and Robinson Huron treaties were made between the Honourable William Benjamin Robinson on behalf of the Queen and the Ojibway. The Manitoulin Island Treaty was made between the Ottawa and Chippewa Chiefs and the Honourable William McDougall, Superintendent General of Indian Affairs, and William Spragge, Deputy Superintendent General of Indian Affairs “on the part of the Crown”. Reference is made to “the Crown” throughout the document, rather than to the Queen.

\textsuperscript{283} Treaty No. 1, 1871, \textit{supra} note 9.

\textsuperscript{284} Henderson, \textit{supra} note 66 at 237.
the Queen in kinship terms, as a relative, the “Great Mother”, by both the Crown representatives and the Anishinabe.

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

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

When you hear his voice you are listening to your Great Mother the Queen, whom God bless and preserve long to reign over us.²⁸⁵

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

[…] with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians [...] makes them a present of three dollars for each Indian man, woman and child belonging to the bands here represented.²⁸⁶

Archibald then introduced Simpson as the “chief” who would act on behalf of the Queen. Archibald stated that when Commissioner Simpson was speaking, the Anishinabe would be listening to the Queen: “When you hear his voice, you are listening to your Great Mother the Queen.”²⁸⁷ And the Chiefs agreed: “[I]n hearing the Commissioner this evening, I feel that we have heard the Queen’s voice.”²⁸⁸ This relationship of kinship with the Queen is what secured the attendance and participation in the negotiations.

Chief Sheeship was thankful to hear a message from his mother and indicated that he would beg her to grant him what he required to make his living.

²⁸⁵ The Manitoban, supra note 39 at 30.
²⁸⁶ Treaty One, 1871, supra note 9.
²⁸⁷ The Manitoban, supra note 39 at 12.
²⁸⁸ Ibid. at 14-15.
I am thankful today that I have heard a message from our Great Mother, the Queen. The reason I got up from my seat was to come here and hear her voice. I am glad I have heard good tidings from my mother; and if I live till tomorrow, I will send a requisition to her, begging her to grant me wherewith to make my living.\(^{289}\)

Given the significance of kinship relationships amongst the Anishinabe, and given the extensive reliance by both parties on the mother/child relationship in the negotiations, we must inquire into the expectations implied by that relationship. What were the responsibilities of the mother towards her children and what were the parameters of that relationship? What were the normative expectations of the Anishinabe in relation to the Queen?\(^{290}\) Having relied on the establishment of this relationship, the Anishinabe normative obligations of love, kindness and caring would have been invoked. These obligations entail duties to treat children equally, to listen to their needs and wants, and to provide for them in a loving and kind way. Given that the Anishinabe viewed their relationship with the Queen as one of kinship, they may have expected that the Queen would ensure equality between her “children” (the Anishinabe and the settlers). They may have also expected that their needs, if expressed to the Queen, would be met and that she would endeavour to create a good life for her children, while respecting their autonomy.

\(^{289}\) Chief Sheeship (Fort Alexander) quoted in *The Manitoban*, supra note 39 at 16.

\(^{290}\) A further area for research includes inquiry into how the kinship relationship with the “mother” may have differed from those between the Anishinabe and their “fathers” such as the kings\(^{290}\) and fur traders who had forged earlier kinship relationships with the Anishinabe. It is interesting to note that, after the treaty was made and reserves were being selected, Lieutenant-Governor Morris had some difficulties with the Portage band, who found that they could not rely on their “mother’s” promises and threatened to go to the “Grandfather” with their complaints, referring to the U.S. president.
Obligations of love, kindness and understanding

The outline for a mother’s normative obligations is found for example in the relationship between Nimaamaa Aki (Mother Earth) and the Anishinabe: to love and care for her children, to ensure that each of them are cared for. 291

What it takes is the time and effort of any human being to be able to sit down on Mother Earth and learn to read the laws that we are to abide by if we are to have a happy life. All the laws of Mother Earth are based on respect, love, kindness and sharing. They are all positive – they teach us that we are all connected. 292

The role of the mother, in accordance with Anishinabe laws, is to love her child unconditionally and to be kind and understanding. 293 The Anishinabe inaakonigewin (law) of kindness is explained in the following way by Elder Ken Courchene:

[…] ji-minode’ed Anishinaabe [the people should have good hearts]. Truly your heart, your kindness. And he talked about that. The work that he does, not so much for himself but he wants to do his very best to ensure that there is a future for his child and grandchild. And he has that in his heart. And that’s the third law, that kindness. 294

Kindness is equated with care for others, in particular children and grandchildren. It is something that is carried in a person’s heart. Chief Ayee-ta-pe-tung explained, “I hold my own very sacred, and therefore, could not work while my child is sitting in the dark.” 295 The mother is responsible for her child’s immediate well being but is also responsible to ensure that her children are able to lead a good life into adulthood. The role of the mother is to nurture her child only to the extent that she will not impede on her

291 B. Johnston, Honouring Earth Mother, supra note 35 at vi-vii.
293 Research interviews with Mary Lorraine Mandamin (Sagkeeng First Nation, Manitoba, 12 June 2011), Josie Kipling (Sagkeeng First Nation, Manitoba, 12 June 2011), Mary Maytwayashing (Sagkeeng First Nation, Manitoba, 14 June 2011), Darlene Starr Courchene (Sagkeeng First Nation, Manitoba, 14 June 2011), Dave Courchene (Sagkeeng First Nation, 10 July 2011).
294 Pratt, supra note 13 at 28-29.
295 The Manitoban, supra note 39 at 19.
child’s ability to be autonomous. The level of autonomy is measured by the level of
ability of the child in each particular circumstance. It is reasonable to infer that the
Anishinabe would have understood this in the context of the treaty as a requirement for
the Queen to provide for the Anishinabe and to assist them while respecting their
autonomy. In return, the child must listen to, care for and respect her mother.

Food was for everyone, humans, birds, animals, insects and fish, for this
generation, the next and all those that followed. Mother Earth gave and gave. No
matter how much she gave, Mother Earth’s breadbasket never gave out.\(^\text{296}\)
The sacred teaching of Abenonji Kakikwe Win (which is roughly translated “the
teachings that are given to a child, that will last forever and that can only be given by a
woman”) prescribes that the teachings that a mother gives to her child enable the child to
lead \textit{mino-bimaadiziwin}. These teachings recognize the values of autonomy\(^\text{297}\) and the
child’s individual quest for his or her vision, independently from the collective or the
family unit – while always considering those collectivities in the exercise of autonomy
and agency.

To reproduce the qualities prized in a traditional leader—respect, honesty, truth,
wisdom, bravery, love, and humility—our ancestors practiced relationships with
children that embodied kindness, gentleness, patience, and love. Children were
respected as people, they were encouraged to follow their visions and to realize
their full potential while living up to the responsibilities of their families,
communities, and nations. This was the key to creating leaders with integrity,
creating good governance, and teaching future leaders how to interact in a
respectful manner with other human and nonhuman nations.\(^\text{298}\)

Miller argues that the child’s autonomy was not understood by the Crown
representatives. In particular, the “[...] language of family relations, including childhood,

\(^{296}\) B. Johnston, \textit{Honouring Earth Mother}, supra note 35 at 47.

\(^{297}\) Leanne Simpson, \textit{Dancing on Our Turtle’s Back: Stories of Nishnaabeg Re-Creation, Resurgence and a
New Emergence} (Winnipeg: Arbeiter Ring, 2011) at 132-134.

\(^{298}\) Simpson “Looking after Gdoo-naaganinaa”, \textit{supra} note 11.
stemmed from a society in which youth was a time of autonomy during which children could count on protection and assistance from adult family members. It was not, as it was in Euro-Canadian society, a time of dependence and submission, a time to be ‘seen but not heard’.”

During the negotiations, Wa-sus-koo-koon reminded the negotiators of the benevolence and good wishes of their “Great Mother”, which would require that they be fed well during the negotiations and beyond. The duty of care to children was not limited to the next generation, nor to the following generation, but rather to the descendants to come, for an extended period of time, often referred to by the Anishinabe conceptually as thinking ahead seven generations into the future. It also allowed for autonomy of the Anishinabe, as was reflected in other procedural norms relied on in the Treaty One negotiations and mentioned above.

The relationship between mother and child may help to uncover some of the normative assumptions that were at play during the Treaty One negotiations. Although we cannot conclusively say that the Queen was regarded by the Anishinabe as a mother in more than metaphorical terms, the extensive reliance on the kinship terms by both parties likely had an impact on the understandings that were derived from the negotiations.

299 Miller, supra note 43 at 184.
300 The Manitoban, supra note 39 at 26.
Equality among the children

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

The old settlers and the settlers coming in, must be dealt with on the principles of fairness and justice as well as yourselves. Your Great Mother knows no difference between any of her people.301

Your Great Mother wishes the good of all races under her sway. She wishes her Red Children, as well as her White people, to be happy and contented. She wishes them to live in comfort.302

This equal treatment of children was not limited to concepts of equality between the Queen’s Red and White children, but extended also to equality in treatment of all her indigenous “children”.

The relationship was described as being founded on “that kindness of heart which distinguished her dealings with her red children […]”303 The purpose of the meeting at the Stone Fort was explained as a discussion relating to matters of interest to both parties. They were “[...] to deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and to the said Indians of the other [...]”304 The Lieutenant-Governor and the Commissioner assured the Anishinabe that the Queen wished for what was best for them and found that the Anishinabe believed in this sentiment: “Indians in both parts have a firm belief in the honour and integrity of Her Majesty’s representatives,

301 Morris, supra note 7 at 29.
302 The Manitoban, supra note 39 at 10.
303 Morris, supra note 7 at 40.
304 Treaty One, 1871, supra note 9.
and are fully impressed with the idea that the amelioration of their present condition is one of the objects of Her Majesty in making these treaties.”

The principle of equality between all is fundamental to Anishinabe inaakonigewin (law). For the Anishinabe, equality is expressed “through sharing, borrowing, and mutual exchange.”

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

The Queen’s “equal treatment” of her children “from east to west” was considered by the Anishinabe as an expression of the relationship of sustenance and reliance that was developed in their treaty alliance. If the Queen was to be a mother, all of her children would be treated equally – both by her and amongst themselves. Chief Ka-kee-ga-byness illustrated the principles of reciprocity, mutual obligation and equality which applied to their relationship with the Queen as mother and also with regard to her other children.

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

It appears that the concept of equality between all people, as perceived in accordance with Anishinabe normative values, may have been imperfectly understood by the Treaty

305 Morris, supra, note 7 at 42.
307 Pratt, supra note 13 at 30.
308 The Manitoban, supra note 39 at 20.
One negotiators. Although the negotiators had stated that the Queen would treat all of her children equally,\(^{309}\) Archibald wrote to the Secretary of State that annuities paid to the Indians might have to increase in consequence of the “magnificent territory we are appropriating here.”\(^{310}\)

**Conclusion**

As the foundational pillar of Anishinabe *inaakonigewin* (law), relationships are strong indicators of normative expectations and obligations that exist between parties. Anishinabe relationships are based in equality and profound respect for all parts of creation. This chapter has illustrated relationships that existed within the context of the Treaty One negotiations and how the normative understandings of the Anishinabe were reflected in their ways of speaking, acting and interacting among themselves and with the Queen’s representatives. Adherence to Anishinabe protocols in the context of the treaty negotiations can be seen to have invoked substantive expectations and obligations from the Anishinabe perspective. From ceremonial and behavioural protocols, such as waiting for all of the parties to arrive, sitting together in a circle, releasing prisoners, feasting, offering tobacco and smoking the pipe, substantive principles of Anishinabe *inaakonigewin* (law) became part of the treaty negotiations.

While European treaties borrowed the form of business contracts, Aboriginal treaties were modeled on the forms of marriage, adoption and kinship. They were aimed at creating living relationships and, like a marriage, they required periodic celebration, renewal, and reconciliation [...] they were intended to grow and


\(^{310}\) Morris, *supra* note 7 at 32.
flourish as broad, dynamic relationships, changing and growing with the parties in a context of mutual respect and shared responsibility.\footnote{Canada, Royal Commission on Aboriginal Peoples. \textit{Report of the Royal Commission on Aboriginal Peoples.} Volume 1, \textit{Looking Forward Looking Back} (Ottawa: Canada Communication Group, 1996) at 130 [\textit{RCAP}].}

The Anishinabe approached treaty in accordance with their normative obligations of non-interference in each other’s affairs, respect for each other’s territories and jurisdiction, and commitment to the sacred nature of agreements made in ceremony. Generally and for many years, the Anishinabe have expressed that the treaty is a relationship with the Queen that allowed for a peaceful and mutually beneficial sharing of the land between the Anishinabe and White settlers. Anishinabe Elders recount how the Anishinabe pledged to the Creator to share the land with the Queen’s other children, in accordance with principles of kinship, equality and reciprocity.

Based on the kinship obligations that can be seen to exist in the relationship with the Queen as mother, she would be expected to treat the Anishinabe with kindness, listen to their needs and requests and to help them lead \textit{mino-bimadiziwin}. The expectation that she would Chief Shee-ship his request to “grant me wherewith to make my living” and her express wish to have her Red children “happy, contented [... to live in comfort” met the normative expectations of the relationship from an Anishinabe perspective.

The use of kinship words and concepts by both parties was infused with legal meaning and significance. If Anishinabe inaakonigewin is “all about relationships,”\footnote{Borrows, \textit{Drawing Out Law}, \textit{supra} note 226 at 8.} the relationship between a mother and her children is an illustration of the legal principles that governed the negotiation of Treaty One. The mother and child relationship may or
may not have been understood in the same way by each of the parties. Nonetheless, the treaty Commissioners used the kinship language to establish the terms of the treaty, understanding that these relationships would allow them to enter into the treaty with the Anishinabe. Therefore, the Anishinabe kinship laws formed a pillar of the treaty alliance. This relationship to the Queen continues to be invoked post-treaty. It was invoked by Morris in his efforts to implement Treaty One when he became Lieutenant-Governor. Many Elders continue to assert that Treaty One was not made with Canada but directly with the Queen of England.

313 In addition, the role played by women in the treaty negotiations may have some significance, although it is very difficult to assess this retrospectively with the information available on the record. In particular, this citation from The Manitoban report is interesting, although I will not speculate here on its possible implications: “The daughter of a chief, wearing a couple of medals, and in years being decidedly the shady side of fifty, came forward, shook hands with His Excellency and the Commissioner, and retired; but a new idea seized her and she advanced to the front again, and kissed both the great men, amid the hearty laughter and applause of over 1,000 spectators, red and white. The conference then adjourned.” The Manitoban, supra note 39 at 21.
Chapter 4: THE STONE FORT TREATY AND ANISHINABE LAND

Overview

In this chapter, I turn to the heart of the treaty: the treatment of land. The detailed story of the Treaty One negotiations on land issues is complex and, at critical points, obscure. We see in the following account that competing understandings of land and their foundation in the normative conceptions of each party were expressed both explicitly on the record of the negotiations and were implicit throughout the entirety of the negotiations. This chapter therefore takes the form of a narrative, working through the negotiations, using the written record. The telling of this story also provides an overview of the process of treaty-making, in which a number of the themes canvassed in the preceding chapter are evident.

In the summer of 1871, more than 1,000 Indian men, accompanied by women and children, assembled at the Stone Fort to make a treaty. They were joined by their Métis cousins and some of the local settlers, who all wished to know “the policy of the government” in relation to the “quieting of Indian title” in Manitoba and the adjoining timber districts. The geographic heart of the continent was filled with instability and uncertainty due to the influx of settlers, Britain’s sale of the west to Canada, the Métis Resistance of 1869-70, and the creation of the Province of Manitoba just one year earlier.

314 Letter from Lieutenant-Governor Archibald to Secretary of State, cited in Morris, supra note 7 at 33.
315 The Manitoba Act, supra note 166 at section 31.
Based on the uncertainty of title and the often-times tenuous relationships between settlers and Indians in relation to land, the consensus was that issues of land and access to resources needed to be dealt with urgently; thus, negotiations were entered into. These negotiations were largely based on Anishinabe protocols and practices, as had been employed in past treaty and fur trade relationships.

Treaty One was made at Lower Fort Garry, a Hudson’s Bay Company fur trade post, also known as the Stone Fort, between the Anishinabe of southern Manitoba and the Crown. After a long winter of waiting for the negotiations, the terms of the relationship were worked out over nine days, in conditions of both rain and sun. The Anishinabe camp housed over 100 tents, assembled in a semi-circle outside the fort, with the Chiefs’ lodges at the centre and fires for each. There was a relaxed and comfortable atmosphere in the camp as the Anishinabe continued their activities and interactions, including cooking, visiting and gambling.

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

---

316 The Swampy Cree are mentioned as parties to the treaty but they essentially consist of a very small group that were living at the St. Peter’s reserves with the Anishinabe under the leadership of Chief Peguis.

317 The Manitoban, supra note 39 at 6.
The negotiations themselves took place outside the fort, with the Commissioner and Lieutenant-Governor seated under an awning, facing the Chiefs who were seated in chairs. The “[...] Indians moved to meet the Commissioner en masse.”

On the first day of negotiations, Lieutenant-Governor Archibald opened the discussion by recalling his promise made to the Anishinabe the previous fall, to enter into a treaty with the Queen. “I promised that in the spring you would be sent for, and that either I, or some person directly appointed to represent your Great Mother, should be here to meet you, and notice would be given you when to convene at this place to talk over what was right to be done.” Henry Prince, the son of Chief Peguis (who had entered into the Selkirk Treaty on behalf of his band) had been the most insistent to have the treaty made. He and his members, from St. Peter’s Indian Settlement, were the most numerous group present at the negotiations. Prince recalled his loyalty to the Queen and recounted his refusal to participate in the Red River Rebellion the previous year. “[A]ll last winter I worked for the Queen [...] My people had nothing to do with it [the Red River Resistance] and no dark-skinned man had anything whatever to do with it.” Archibald commended the Anishinabe for not participating in the resistance, on behalf of the Queen: “[S]he had been very glad to see that you had acted during the troubles like good and true children of your Great Mother.”

---

318 Ibid. at 8.
319 Morris, supra note 7 at 27.
320 Notes of an interview between the Lieutenant-Governor of Manitoba and Henry Prince, Miskookenew, Chief of the Saulteux and Swampies (13 September 1870), Winnipeg, Public Archives of Manitoba (Archibald Papers, MG 12, A1).
321 Morris, supra note 7 at 27.
The negotiations

Assurances of non-interference

The negotiations began with statements by both the Lieutenant-Governor and the Commissioner assuring the Indians that they could continue to use their traditional territories for hunting, trapping, fishing and other harvesting, as they had done in the past. While the treaty was meant to ensure that the land in question could be used by settlers for agriculture, the amount of land used for this purpose was to be limited. Assurances were made that Indian ways of life would be sustained. Further assurances were made that Indians would not be confined to reserves, but could freely choose to live on them if they wished to farm.

When you have made your treaty you will still be free to hunt over much of the land included in the treaty. Much of it is rocky and unfit for cultivation, much of it that is wooded is beyond the place where the white man will require to go, at all events for some time to come. Till these lands are needed for use you will be free to hunt over them, and make all the use of them which you have made in the past. But when lands are needed to be tilled or occupied, you must not go on them any more. There will still be plenty of land that is neither tilled nor occupied where you can go and roam and hunt as you have always done, and if you wish to farm, you will go to your own reserve where you will find a place ready for you to live on and cultivate.\(^{322}\)

Archibald and Simpson expressed the Queen’s wishes for the happiness of her children. They assured the Anishinabe that the Queen would not force them to adopt white ways nor would she interfere in their existing ways.

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

\(^{322}\) *Ibid.* at 29 [emphasis added].
good for you to adopt civilized habits, has no idea of compelling you to do so. This she leaves to your own choice, and you need not live like the white man unless you can be persuaded to do so with your own free will.\textsuperscript{323}

In the face of assurances that Anishinabe ways of life would continue, and that opportunities to farm would be made available to them, if so desired, the Anishinabe “[…] declared that they would never again raise their voice against the enforcement of the law […]”\textsuperscript{324} Based on the above, one can deduce that the opening of the negotiations was marked by assurances that Indian ways of life would continue but more importantly, that they would not be interfered with by the Queen or her other subjects.

\textbf{“The land cannot speak for itself”}

Although some Anishinabe negotiators, such as Henry Prince, demonstrated knowledge about concepts of sale and acquisition of land, others defined their relationship to the land very differently. Chief Ayee-ta-pe-pe-tung, “[…] a tall old brave, who was naked all but the breech-clout, and had his body smeared with white earth […] spoke well, and in a very talkative and vehement manner, constantly flourishing an eagle’s wing which he holds.”\textsuperscript{325} Chief Ayee-ta-pe-pe-tung spoke to the Queen’s negotiators about his “ownership” and his view that rather than owning it, he was \textit{made of the land}.\textsuperscript{326} Other Chiefs relayed their view that they had a sacred responsibility towards the land and that the future of the land was intimately linked to the future of Anishinabe children. “The land cannot speak for itself. We have to speak for it; and want to know fully how you are

\footnotesize\textsuperscript{323} The Manitoban, supra note 39 at 10.
\footnotesize\textsuperscript{324} Morris, supra note 7 at 31.
\footnotesize\textsuperscript{325} The Manitoban, supra note 39 at 19
\footnotesize\textsuperscript{326} Ibid. at 25.
going to treat our children.” Chief Ayee-ta-pe-pe-tung explained that his land was a gift from creation and that he could not give an answer, as the future of his grandchildren was dark, based on the proposal before him.

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

Lieutenant-Governor Archibald responded that “[t]here is a dark cloud before us too, because we do not know what you want. There is the same dark cloud before you, because you do not know what we want. What we desire is to rend these clouds asunder.”

For the Anishinabe, the relationship to the land, namely the adherence to views of belonging to the land, being made of the land, and being in a relationship with the land are key factors that informed the Anishinabe perspective and understanding of the negotiations.

Reserves

The Commissioners explained that the Queen proposed to set aside, in perpetuity, land for the Indians to cultivate, “should the chase fail”, in the form of reserves. The Queen would ensure that those lands were kept, for use by the Indians and their children forever.

327 Ibid. at 35.
328 The Manitoban, supra note 39 at 15.
329 Ibid. at 15-16.
without intrusion by white settlers. It would be a place to pitch a camp, build a house and engage in agriculture, at the Indians’ pleasure.

Your Great Mother, therefore, will lay aside for you ‘lots’ of land to be used by you and your children forever. She will not allow the white man to intrude upon these lots. She will make rules to keep them for you, so that as long as the sun shall shine, there shall be no Indian who has not 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.  

The Anishinabe were then asked to select the lands which they would want as reserves but “[…] when their answer came it proved to contain demands of such an exorbitant nature, that much time was spent in reducing their terms to a basis upon which an arrangement could be made.” It was apparent that there were incompatible understandings of what would be reserved exclusively for the Indians, “[…] they wishing to have two-thirds of the Province as a reserve.”

The initial reserve selection was rejected by the Commissioner. “If all these lands are to be reserve, I would like to know what you have to sell?” The Honourable Mr. McKay, “[…] by request of His Excellency and the Commissioner, addressed the Indians, showing them that their demands were so preposterous, that, if granted, they would have scarcely anything to cede, and urging them to curtail their demands.” The Lieutenant-Governor also urged the Indians to agree, stating that, if refused, the offer would not present itself again. In his view, this agreement was superior to what had been offered in

---

330 The Manitoban, supra note 39 at 28-29.
331 Ibid. at 39.
332 Morris, supra note 7 at 31.
333 The Manitoban, supra note 39 at 26.
334 Ibid.
the U.S. to the Indians, who received annuities for only 20 years, not in perpetuity, as was
being proposed to the Anishinabe. He explained that 160 acres meant a quarter of a
square mile of land, and then entered into explanations with diagrams. The Lieutenant-
Governor reminded the Indians that “[…] instead of having only the quantity now held by
Christian Indian families (3 chains), they should have three times as much, and more
reserved to them under the treaty.”

Threats
Throughout the negotiations, the Commissioner used the implied threat of the influx of
white settlers to encourage the Anishinabe to agree to the allotment of 160 acres per
family of five.

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

On the third day of negotiations, the Indians were asked if they would accept terms “[…] same as those given Canadian Indians already treated with, [consisting of] a small
annuity to each family, to last as long as the sun shines, as much land as is allowed to
their brethren in Canada, the reserves to be chosen by the Indians themselves. If they
were satisfied with these general terms, the Commission [sic] said he was ready at once

335 Ibid. at 28.
336 Morris, supra note 7 at 34.
to proceed to details.”

There was no mention in the general terms of the surrender of land nor had there been any recorded explanation of what would be given up or surrendered, nor of the concept of surrender itself. The Indians were asked to provide an answer by the Monday (the next day being Sunday at which time negotiations would be postponed). *The Manitoban* reports that the “Commissioner also spoke in further elucidation of the benefits to be conferred on the Indians, by entering into the proposed treaty,” without explaining what other “benefits” were being proposed in addition to what had just been described.

His Excellency also strongly urged on the Indians the advisability of accepting the terms. Their Mother the Queen wished to benefit them – wished to place her red subjects on the same footing as the white, and even went further, in giving to her red subjects what she did not give to the others, an annual bounty to last as long as the sun shone. In the East, the Indians, the Queen’s subjects, were living happy and tranquil, enjoying all the rights and privileges of white men, and having homes of their own. What had made them happy the Queen was willing to give her Indian subjects here, and no more. They might at once and forever dismiss from their heads all nonsense about large reserves; for they could not and would not be granted. The matter must be looked at by them like men of common sense, who see the Queen trying to save a home for them; if they refuse her offer, it will not be made to them again. His Excellency further reminded them that the terms offered them were better than those under which white men came to settle and made themselves comfortable homes. In the United States reserves were sometimes given and sometimes withheld, while the annuities generally terminated after 20 years. The annuities offered the Indians in this negotiation would last as long as the sun shines.339

**Uncertainty**

Chief Ayee-ta-pe-pe-tung wanted to understand with more certainty what was being offered and the limits of the territory about to be treated for. McKay explained that the

---

territory was defined by the limits of the province. The Chief then turned to the Commissioner, requesting that he make his offer before the Chief would make his. “I want, first, to see what you are offering; and then I’ll tell you my offer.” The Indians were hesitant. Lieutenant-Governor Archibald wrote, “A general acquiescence in the views laid down by Mr. Simpson and myself was expressed but it was quite clear, by the proceedings of to-day, that our views were imperfectly apprehended.” Additionally: “A Portage Indian said that what puzzled his band was that they were to be shut up on a small reserve, and only get ten shillings each for the balance. They could not understand it.” Archibald expressed his concern in a letter to the Secretary of State, finding that “[T]he Indians seem to have false ideas of the meaning of a reserve. They had been led to suppose that large tracts of grounds were to be set aside for them as hunting grounds, including timber lands, of which they might sell the wood as if they were proprietors of the soil. I wished to correct this idea at the outset.”

The confusion continued throughout the negotiations. On the third day of the negotiations, Wa-sus-koo-koon (Rat Liver) – representing the Indians between Pembina and Fort Garry – “expressed a desire to know a little more of what the Queen intended for the Indians”. Commissioner explained “[...] Hon. Mr. McKay, at the request of the Governor and the Indians, also entered into very full explanations in Indian.” No detail of what was said is provided in the record.

340 Ibid. at 25.
341 Morris, supra note 7 at 34 [emphasis added].
342 The Manitoban, supra note 12 at 31.
343 Letter from Lieutenant-Governor Archibald to Secretary of State, 29 July 1871, cited in Morris, supra note 1 at 33.
344 The Manitoban, supra note 12 at 20 [emphasis mine].
On the fifth day of proceedings, the Indians were still hesitant. Henry Prince presented a copy of his father Chief Peguis’ will and stated, “[W]e have been already four days in this negotiation, and it seems as though it will not be brought to a decision.” In response, the Commissioner stated that he was “[...] quite ready to finish up matters that day. The delay rested with the Indians altogether.” He explained that the terms proposed were now “[...] better terms than are offered to the Canadian Indians, and to those of the United States, and our Indians will not [...] receive the offer we make them.” He stated that it would be foolish for the Indians not to accept the offer.

Chief Ka-ma-twa-kau-ness-noo was still unsure and “[...] wanted to know how the Indians spoken of were dealt with – wanted to hear the ins and outs of everything.” Chief Ayee-ta-pe-pe-tung explained that the land in question was his property. He could not see benefit for his children and therefore could not enter into treaty if it would not benefit future generations.

God gave me this land you are speaking to me about, and it kept me well to this day. I live at the end of the Settlement, in a clean place (unsettled); and as I travelled through the Settlement, I looked on nothing but my property! I saw pieces of land high up (meaning bridges) and these are my property! When I went into the houses by the wayside, these too I considered my property – (laughter).

When Wa-sus-koo-koon asked what would happen if there were more children, the Lieutenant-Governor assured him that when the reserves became too small, they would be sold and the Indians would acquire land elsewhere.

---

345 Ibid. at 29
346 Ibid.
347 Ibid. at 31 [emphasis added].
348 Ibid. at 21.
349 Ibid. at 30 [emphasis added].
Western views of land

In response, the Lieutenant-Governor espoused the Lockean views of the day and the western view that the natural use to which the land should be put was agriculture. “God, he said, intends this land to raise great crops for all his children, and the time has come when it is to be used for that purpose [...] The time has come when this land must be cultivated. White people will come here and cultivate it under any circumstances. No power on earth can prevent it.” He also explained that, in his view, the Anishinabe did not have a right to this particular land, given that the Cree had inhabited the area first and moved west with the buffalo herds, roughly a century earlier, “[...] and the Chippewa, finding the land unoccupied, came in and stopped here, but they have no rights to the land beyond that.”

Ayee-ta-pe-pe-tung challenged the Commissioner: “You say the white man found this country, and that we were not the first Indians in it. What is the name of the first Indian found along the sea coast?” The Commissioner said he was “[...] afraid some evil bird was whispering in Council. The Commissioner again showed the Indians that they were unwise in not closing with the terms offered.” The Anishinabe were again threatened

---

350 See, for example, James Tully, A Discourse on Property: John Locke and his Adversaries, 2d ed. (Cambridge: Cambridge University Press, 1982) and James Tully, An Approach to Political Philosophy: Locke in Contexts (Cambridge: Cambridge University Press, 1993).

351 The Manitoban supra note 39 at 31.

352 Ibid. at 30-31.

353 Ibid. at 31.

354 Ibid.
with the prospect of having their lands taken from them against their will by the incoming settlers.

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

The atmosphere had become tense and it appeared that the Indians saw no benefit in making the treaty on the terms being offered (annuities and reserves), as this was far less than what they already possessed.

**Breakdown in negotiations**

After a two-hour break in the negotiations, Chief Kasias “[…] came forward with an attendant gaily painted, wearing eagles’ feathers, and something like a blue waterfall on top of his head.”\footnote{Ibid. at 32} In his view, he could not see how he would be enriched by what was being offered by the treaty.

Wa-sus-koo-koon and other chiefs came forward to shake hands and depart:

[… and the invariable ceremony of shaking hands with His Excellency and the Commissioner having been gone through, the brave harangued the crowd, protesting that he could not live on ten shillings if he were to settle down. He also complained of the insufficiency of reserves. Look, he said, at the farmers with all their property; they spent a great deal of money before getting to be as they are. We want the reserve we have asked for and cannot take your terms.”\footnote{Ibid. [emphasis added].}

The Anishinabe treaty was, by all appearances, not going to be concluded.
Ayee-ta-pe-pe-tung said that he “[...] would take a winter to think over the matter before entering into a treaty.” McKay then “made an eloquent speech in Indian explaining matters.” There is no description of what he said, or whether it was ever translated for the Commissioner and Lieutenant-Governor. Whatever was said may have prompted Ayee-ta-pe-pe-tung to revise his position as a consequence, and to request more money, but only on behalf of his band of Indians. The Commissioner again addressed the Indians and threatened to break up negotiations unless they came to a close the following day.

On the last day of negotiations, it was clear that the Indians’ uncertainty with respect to the land question had not been attenuated. Henry Prince spoke of his confusion and the questions that remained. He recalled his father’s dying words, requesting that he retain the land (possibly referring to the lands that were reserved exclusively for the Anishinabe in the Selkirk Treaty – everything outside the two-mile tracts of land along the rivers). “Again, I wish to say that nearly the last words my father said before dying were – There is the line – keep it; and we want to retain it.” In response, the Lieutenant-Governor made a lengthy statement “[...] showing that the Queen was willing to help the Indians in every way [and] would give them a school and a school master for each reserve, and for those who desired to cultivate the soil, ploughs and harrows would be provided on the reserves.”

---

358 Ibid.  
359 Ibid. at 35  
360 Ibid.
And yet, there was still no agreement on the terms of the treaty. Chief Wa-sus-koo-koon “insisted on having the reserve he had specified before.”\textsuperscript{361} Other Chiefs made speeches and “extravagant demands”, which were reported in \textit{The Manitoban} in the following way:

A good deal of parley ensued, in the course of which the Indians made new and extravagant demands, while the Commissioner and His Excellency reasoned with them, and refused to give way any more [...] Another meeting and more speechifying – the Indians continuing their extravagant demands as before.\textsuperscript{362}

The Chiefs had met and agreed in council on their approach to the negotiations (with the exception of the Indians from the Portage, as noted). They resisted the division that was being created amongst them by the Commissioner and the Lieutenant-Governor. Henry Prince, Grand Oreilles, Kasias and Wa-sus-koo-koon came forward and Wa-sus-koo-koon made known the views of the Indians (excluding those of the Portage) and detailed lists of their wants, including fine clothes for the children in the spring and in the fall, furnished houses, ploughs, cattle, farm implements, buggies for the chiefs and supplies for hunting and other supplies as required.

I am going to state the wants of all the Indians – not including those of the Portage. First, in the early part of every spring, we want all the children to be clothed with fine clothes! In the fall of the year they are to be clothed from head to foot with warm clothing! Whenever an Indian wants to settle, a house is to be put up for him fully furnished, and a plough, with all its accompaniments of cattle, etc. complete, is to be given him! We want buggies for the chiefs, councillors and braves, to show their dignity! Each man is to be supplied with whatever he sees for hunting, and all his other requirements, and the women in the same way!! Each Indian settling on the reserve is to be free from taxes! If you grant this request, continued the brave with utmost gravity, I will say you have shown kindness to me and to the Indians.\textsuperscript{363}

\textsuperscript{361} \textit{Ibid.} at 37.
\textsuperscript{362} \textit{Ibid.}
\textsuperscript{363} \textit{Ibid.}
The Commissioner mocked the Chiefs, saying that he would rather be an Indian if those were the terms agreed to.

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

While the record indicates that laughter followed, it does not necessarily indicate that the demands had been refused by the Commissioner.

An unexplained shift
The record of the negotiations at this point becomes very brief. There were other speeches that are not described, either in form or content. Before the end of the second-to-last day’s proceedings, “[... ] the Portage chief and his followers left, formally bidding the Lieut.-Governor and the Commissioner goodbye.” The other bands were also prepared to leave the negotiations, but James McKay asked them to stay on one more night, “[...] promising that in the interval he (McKay) would try and bring the Commissioner and the Indians closer together.” It is unclear what James McKay said or did during the evening, but the Chiefs remained and signed the treaty the following day, the eighth and final day of the treaty negotiations. The following morning, the treaty was signed, with no further terms negotiated, nor any explanation on the record of what

---

236 Ibid. at 37-38.
365 In the Anishinabe culture, humour is often used to diffuse tense situations. It is most probable that the Anishinabe were laughing at the idea of the Commissioner becoming Anishinabe.
366 The Manitoban, supra note 39 at 38.
367 Ibid.
had transpired to change the collective minds of the Chiefs. The Chiefs were “in better humour” and signed the treaty promptly.

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

From Commissioner Simpson’s perspective, after the refusal of the Chiefs’ original reserve selections, the matter of reserves had been clarified. There is no detail on the record as to what was said or done, beyond showing the Indians diagrams of lots that they would acquire, in order to induce the Anishinabe to reduce their original reserve selection from roughly two thirds of the province to a much smaller selection which reflected the formula of 160 acres per family of five. The reserves were to be surveyed and allocated after the treaty and would reflect the land allocation based on the treaty annuity lists that would be developed.

Outside Promises and Post-Treaty Disputes
Almost immediately following the making of the treaty, the Anishinabe complained about the non-implementation of the treaty promises and identified promises that had not been included in the written text of the treaty. “This, naturally, led to misunderstanding with the Indians, and to widespread dissatisfaction among them.” The Indians constantly corresponded and met with the Lieutenant-Governor, and when the Minister of

368 Ibid. at 39.
369 Morris, supra note 7 at 31.
370 Ibid. at 126.
the Interior, David Laird, came to Manitoba, they “pressed their demands on him.”

When Lieutenant-Governor Morris attended the locations of the bands to pay them, in some cases, the money was not accepted. Others prepared to visit Ottawa and some petitioned the Governor General, the Earl of Dufferin. In 1874, the Portage band sent messengers with tobacco twice to Qu’Appelle to tell Indians there not to make a treaty with the Crown.

A list of the “outside promises” had been appended as a memorandum to the treaty but had not made its way into Simpson’s official report of the negotiations. They were therefore never ratified by the Privy Council. In 1873, the government of Canada refused to acknowledge the complaints or to address them substantively “[...] unless it could be shown that this treaty was unjust or unfair, or was obtained by unfair means, it must be maintained.”

Later, in the face of uncertainty about their ability to negotiate further treaties, and at Morris’ insistence, the Privy Council agreed to consider the memorandum as part of the treaty and raised the annuity to $5, in exchange for the abandonment of all claims relating to verbal promises other than those contained in the memorandum. In 1875, Treaty Commissioner Alexander Morris proceeded to re-negotiate the treaty with the bands to include the items listed in the memorandum. These included: dress and buggies for the Chiefs and two of their braves and councillors (except for Chief Yellow Quill), a bull and a boar for each reserve, a cow and a sow for each Chief, and ploughs

371 Ibid. at 129.
372 Ibid. at 40.
373 Ibid. at 128.
374 Memorandum of Things outside of the Treaty Which Were Promised at the Treaty at the Lower Fort, signed the 3rd day of August, A.D. 1871 by Simpson, Archibald, St. John and McKay, reprinted in Morris, supra note 7 at 126-127.
375 Canada, House of Commons Debates (31 March 1873, Sir John A. MacDonald).
and harrows for “each settler cultivating the ground”. In exchange, “[...] any Indian accepting the increased payment, thereby formally abandoned all claims against the Government, in connection with the verbal promises of the Commissioners, other than those recognized by the treaty and the memorandum referred to.” Chief Yellow Quill referred to these negotiations as “the second treaty”.

These outside promises were acknowledged and included in the treaty because they formed part of the official record. They are another written form of treaty. It also appears from the oral history and the written records that additional promises were made, and that much of what was discussed appeared neither in the text of the treaty nor in the memorandum of outside promises: “You will observe in this that there are several matters not spoken of in the Treaty, or mentioned in the outside promises [...]”

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

---

376 Morris, supra note 7 at 127.
377 M. St.John to W. Spragge, supra note 10.
378 Ibid.
Post-treaty assertions made by the Chiefs from various Treaty One bands confirmed the view that natural resources, such as game and fish, had not been given up in the treaty. According to Chief Asham, it was “[...] understood thoroughly and distinctly in regard about game that no Indian was to be prohibited killing or catching for is [sic] own purpose any kind of game all year round.”379 A similar sentiment was echoed by the Chief and Councillors at Fort Alexander:

[T]he Indians under Treaty were permitted to enjoy all privileges of hunting and fishing for their own use and benefit in perpetuity without payment of any licence or fee for game, fish, nets, or hunting implements.380

By Chief Naskepenais:

[W]e have no intention of rebelling against or defying the laws of the land but merely to state that as fishing regulations are against the conditions of “treaty” we cannot accept of them and shall therefore not consider ourselves bound to observe these laws by abstaining from taking fish for their own use.381

And by Chief Naskepenais and his Councillors:

[W]e did not sell our fish, this commodity we reserved for our own exclusive benefit. The fish then being clearly our own we cannot but come to the conclusion that we can sell it to whomsoever we choose without paying license.382

When Chief Yellow Quill was warned in 1885 not to kill deer, he:

[...] neither admitted nor denied the charge but merely laughed and said if he was starving and saw a Deer he would certainly shoot it and that if the Government wanted to prevent them killing Game they must feed them as they had nothing to

379 Chief William Asham to the Superintendent-General of Indian Affairs (8 May 1892), Ottawa, National Archives of Canada (RG 10, vol. 3692, file 14069, C10, 121).
380 William Pennyfather, Joseph Kent, Peter Kent, Joseph Henderson, Robert Henderson, Chief and Councillors Fort Alexander to the Department of Indian Affairs (December 1890), Ottawa, National Archives of Canada (RG 20, vol. 3788, file 43856, C10, 138).
381 Chief Naskepenais to Department of Indian Affairs (17 June 1893), Ottawa, National Archives of Canada (RG 10, vol. 3755, file 30979-4, C10, 133).
382 Chief Naskepenais, Robert Raven, John Raven, Wiassasing and Enecoo to the Department of Indian Affairs (15 January 1889), Ottawa, National Archives of Canada (RG 10, vol. 3788, file 43856, C10, 138).
live on [...] it was the old story with them that when they agreed to let the Government have the land they did not give them the Game and unless they were allowed to kill Game they would starve.\(^{383}\)

The confusion about the concept of reserves continued after the treaty, in particular in relation to reserve selections. In 1876 when Morris, Indian Commissioner Provencher and McKay visited the Portage band and asked them to select reserves, “[...] they did not understand its extent, and claimed nearly half of the Province of Manitoba under it.”\(^{384}\) Yellow Quill said that “[...] he did not understand the extent of the reserve.”\(^{385}\)

Three years after the treaty negotiations, Chief Wa-quse\(^{386}\) wrote to Lieutenant-Governor Morris: “[T]hey don’t follow the agreement at all, it is not for three dollars a head that I would have sold my land. I dindt [sic] sold neither signed the treaty before they had promised me what I asked but now they don’t even give us enough to eat.”\(^{387}\)

Sarah Carter finds that treaties were “[...] confirmed and ratified in the years that followed through audiences and ceremonies held with the Queen’s representatives.”\(^{388}\) Carter argues that the audience and ceremonies were used by the indigenous parties to “restate and recommit the equal parties to the treaties, and to remind their treaty partner of their commitments and obligations”\(^{389}\) and of “grievances to be addressed.”\(^{390}\)

\(^{383}\) Letter from F. Ogletree to E. McColl (28 March 1885), Ottawa, National Archives of Canada (RG 10, vol. 3692, file 14069).

\(^{384}\) Morris, supra note 7 at 129.

\(^{385}\) Ibid. at 139.

\(^{386}\) This is possibly Chief Wa-kooish who was present at the treaty negotiations on behalf of the Anishinabe of Roseau River.

\(^{387}\) Chief Wa-quse to Lieutenant-Governor Morris (30 September 1874), Ottawa, National Archives of Canada (RG 10, vol. 3598, file 1447, C10, 104).

\(^{388}\) Carter, “‘Your Great Mother Across the Salt Sea’”, supra note 267 at 26.

\(^{389}\) Ibid.

\(^{390}\) Ibid. at 6.
Post-treaty complaints by the Treaty One Chiefs can lead to the assumption that, in addition to those items added to the treaty in 1875, there were other “outside promises” that may not have been recorded in Commissioner Simpson’s report, and that the negotiated agreement was far more nuanced than the reported terms of surrender in exchange for annuities and goods.

Anishinabe relationships with land

The Anishinabe dependence on the land and reverence for with Nimaamaa Aki (Mother Earth) impacted how they understood their responsibilities to the land and their ability to enter into negotiations about it with outsiders. The Anishinabe were bound by obligations of care towards the land, thanksgiving to the land for its bounty, and understanding that the Creator had assigned individuals to the land. They were created of the land and belonged to it. There is a direct relationship with Nimaamaa Aki: “[T]he second law is that, the earth itself, mother earth, the grandmother.”  

She is seen as kin to the Anishinabe. The earth is described as a living being, a mother.

They talked to Earth Mother as they would another person, as if the earth could hear and understand and talk back. They told her that she was beautiful, and thanked her for her bounty. Each spring they asked her to be as bounteous as in the past, and beseeched the Thunderbirds to keep Earth Mother fresh and fertile. That every being was indebted to Earth Mother was in their minds.

Although other elements, spirits and animals are referred to in kinship terms, there is only one mother – Nimaamaa Aki. When harvesting from the bounty of the earth, tobacco is

391 Pratt, supra note 13 at 28
392 B. Johnston, Honour Earth Mother, supra note 35 at 149.
offered to *Nimaamaa Aki* in thanksgiving. Seasonal prayers of thanksgiving are directed to *Nimaamaa Aki*, as are daily prayers. The second whiff of smoke and prayer in the pipe ceremony is to honour *Nimaamaa Aki* and to thank her for her bounty.  

When we hunger, Mother Earth nourishes us. Whatever we need is there in abundance, more than enough to fill the wants and needs of every insect, bird, animal, fish, man and woman with fruit, vegetables, seeds and nectars.

When we need to clothe our bodies from the sun, wind, rain, snow and insects, Mother Earth provides the means to cover our bodies. She gives fat and pelt to the deer, beaver, moose, buffalo, rabbit and bear. They, our older brothers and sisters, lend us their coats. To care for ourselves, our families and our communities, Mother Earth yields the means by which we make our weapons, canoes, snowshoes, clothing, utensils, adornments and our homes.

When we need shelter from the winds, snows, storms, rains, cold and heat, there are woods, forests, valleys, mountains, bays, and inlets where insects, birds, animals and humans may find harbour, build their nests and dens, or erect their dwellings and found their villages and towns.

When we are sick and need care to nurse us back to health, Mother Earth’s meadows, forests, and shorelines are lush with berries, plants, roots, seeds and resins that bear the elixir of health and life. Our ancestors called medicine “Mashki-aki”, the strength of the earth for its capacity to infuse the enfeebled sick with energy and vitality.

When our spirits flag and are burdened with cares, worries, losses and sorrows, Mother Earth comforts us. She whispers and chants to the downhearted and dispirited through the tree tops, over the meadows, in cascades and rapids. It is a mother’s soothing voice offering solace to the low in spirit. She whispers, “I love you. I care.”

There was an obligation to share in the bounty of the land with those in need, but there was also a corresponding obligation to acknowledge the primary attachment of those who had been placed on the land. The Anishinabe do not own the land. “We belong to the

---

land.” Others say “we are made of the land.”\textsuperscript{395} Elder Francis Nepinak and Elder Mark Thompson speak about how the Anishinabe are made directly from \textit{Nimaamaa Aki}.

\begin{quote}
\textit{Iwe daabishkoo gichi-gamiin, zaaga’iganii, ziibiwan daabishkoo gimiskwiyaab giwiiyawing bezhigon. Bezhiton nibi eteg omaa akiing, daabishkoo miskwi owe dinong. Dago owe gitigan baabishkoo wiinizisan.}
\end{quote}

The oceans, the lakes, the rivers, it’s similar to a blood vein in your body. It’s like that. It’s like the water on earth is its blood. And the plants like hair. Also, the ground is the same as your flesh.\textsuperscript{396}

\begin{quote}
\textit{Amii aanish imaa gaa-bagidinind Anishinaabe gaa-ozhichigaadeg owe aki [...] gii-ikidowag e-gii-ozhiyaad amii ono Anishinaaben, azhahki egii aabajidood. Amii wenji miskozid awe Anishinaabe gii-ikidowag, wedi miinawaa gii-ozhichigaazo bezhig.}
\end{quote}

This is where the Anishinaabe was placed earth was built/created [sic] [...] The Creator was very mystical. It was said that the Creator made the Anishinaabe. He used the dirt. That is why the Anishinaabe is red, they said.\textsuperscript{397}

Prior to the treaty (and for some time after), the Anishinabe were dispersed over the land and used a seasonal rounds model (or biseasonal movement)\textsuperscript{398} on the land – hunting and trapping in the winter in more remote areas and gathering in the spring and summer for fishing and berry picking, sugaring, etc.\textsuperscript{399} At one time, most Anishinabe learned everything they needed to know from the land.

Through the high places and low, Kitchi-Manitou shows us, speaks to us. Our ancestors watched and listened. The land was their book. The land has given us our understandings, beliefs, perceptions, laws, customs. It has bent and shaped

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{395} \textit{Ibid.} at vii-viii.
\item \textsuperscript{396} Pratt, \textit{supra} note 13 at 18.
\item \textsuperscript{397} \textit{Ibid.} at 21.
\item \textsuperscript{398} Hallowell, \textit{Essays}, supra note 230 at 31
\item \textsuperscript{399} See Bishop, \textit{supra} note 3; Laura Peers, \textit{The Ojibwa of Western Canada}, \textit{supra} note 129; Hallowell \textit{Essays}, \textit{ibid.}
\end{itemize}
\end{footnotesize}
our nations of human nature, conduct and the Great Laws. And our ancestors tried to abide by those laws. The land has given us everything.\footnote{B. Johnston, \textit{Honour Earth Mother}, supra note 35 at xi.}

The areas used by certain groups for particular purposes were recognized and respected by others, often subject to an annual allocation based on resource conditions. People were to take only what they needed.

This earth is bountiful and rich. \textit{Gii-manaajichigewag aaniish} [The people used to be respectful]. The people were respectful. They only took what they needed, everything in moderation. That’s the way the spirits of the people were. So that was important for us to know that.\footnote{Pratt, \textit{supra} note 13 at 29.}

The land was Mother Earth and her resources were her bounty. Where land was not productive for harvesting, it would not be used. Simple ownership without use was meaningless. As Hallowell notes that there is no desire amongst the Anishinabe to own or sell land.

\[T\]here is nothing in Saulteaux culture that motivates the possession of land for land’s sake. Usufruct, rather than the land itself, is an economic value and land is never rented or sold. The use of the land and its products are a source of wealth rather than land ownership itself. There is no prestige whatsoever that accrues to the man who hunts over a large area. Nor is there any direct correlation between the size of the winter hunting group and the area of the hunting ground they occupy.\footnote{Hallowell, \textit{Essays}, \textit{supra} note 230 at 150.}

Basil Johnston explains the attachment to a particular piece of land or territory in terms of a form of tenancy that is assigned by the Creator, rather than ownership or possession of land.\footnote{B. Johnston, \textit{Honour Earth Mother}, \textit{supra} note 35 at 83 and 147.} He also refers to \textit{aeindauyaun} – “a place that belongs to me and where I long

\textit{Gii-manaajichigewag aaniish}: [The people used to be respectful].
to be.”\textsuperscript{404} Treaty Commissioner Morris remarked that the “Indians have a strong attachment to the localities, in which they and their fathers have been accustomed to dwell, and it is desirable to cultivate this home feeling of attachment to the soil.”\textsuperscript{405} The language used by each of the parties in the treaty negotiations can provide some insight into the intentions and understandings of the parties.\textsuperscript{406} The words of the Chiefs at the Treaty One negotiations echoed those of the late Chief Peguis:

\begin{quote}
[T]hese are not my Lands [sic] – they belong to our Great Father for it is he only that give us the means of existence, for what would become of us if he left us to ourselves – we would wither like the Grass in Plains was the Sun to withdraw his animating beams …\textsuperscript{407}
\end{quote}

The relationship to the land cannot be understood in isolation from the Anishinabe practices of treaty making and relationship building. This mutuality of caring and respect for each other’s well being, through the bounty of the land, is reflective of the relationship the Anishinabe have with the land. The land was meant to be shared between living beings.

Dependence upon hunting, trapping and fishing for a living is precarious at best and, even though the individual hunter may exercise his best skills, it is impossible to accumulate food for the inevitable rainy day. As a result, if I have more than I need today, I share it with you because I know that you, in turn, will share what you have with me tomorrow. In Ojibwa society there are no culturally structured incentives that induce individuals to surpass their fellow in the

\begin{footnotes}
\footnotetext[404]{\textit{Ibid.} at 147.}
\footnotetext[405]{Morris, \textit{supra} note 7 at 288.}
\footnotetext[406]{According to Christine Morris (Black), one must relate to “[…] how human beings came to be patterned into a particular tract of land […] This is because a People’s cosmological creation stories and events define principles, ideals, values and philosophies, which in turn inform the legal regime. Furthermore, a cosmology can be likened to a theory. A theory is a story of how things happen: this is not different from the creation story, as it is a particular group’s theory of how things came to be and, more specifically, how to live in a particular place.” Christine Morris (Black), \textit{A Dialogical Encounter with an Indigenous Jurisprudence} (Ph.D. Dissertation, Griffith University, Austl., 2007) at 6 [unpublished].}
\footnotetext[407]{Cited in Carter, \textit{supra} note 267 at 51 in reference to HBC Archives, “Peguis” Search File (B.235/a/3 fos. 28-28d).}
\end{footnotes}
accumulation of material goods. No one is expected to have much more than anyone else, except temporarily.\textsuperscript{408}

For example, if people travel through Anishinabe territory, they are entitled to feed themselves.\textsuperscript{409} This is the way of the Anishinabe. However, the outsider cannot take more than he needs. He must also share his catch with the Anishinabe. As nimishomis (my grandfather) put it, if he took three fish, how would he share them? He would give me two and keep one for himself. “I know that I will catch more fish but I do not know that you will not go hungry.”\textsuperscript{410}

Respect for another’s use of land ensured that everyone would be cared for. “Within the territory set aside for nations, individuals and families occupied land that they regarded as their home ‘ai-indauyaun’, and which their neighbours granted as belonging to them, ‘ae-indauwauwt’.”\textsuperscript{411}

The Indian concept of land ownership is certainly not inconsistent with the idea of sharing with an alien people. Once the Indians recognized them as human beings, they gladly shared with them. They shared with Europeans in the same way they shared with the animals and other people. However, sharing here cannot be interpreted as meaning [that] the Europeans got the same rights as any other native person, because the Europeans were not descendants of the original grantees, or they were not parties to the original social contract. Also, sharing certainly cannot be interpreted as meaning that one is giving up his rights for all eternity.\textsuperscript{412}

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

\textsuperscript{408} Hallowell, Essays, supra note 230 at 451
\textsuperscript{409} Tanner, supra note 59.
\textsuperscript{410} Henry Letander, personal communication, October 2005.
\textsuperscript{411} B. Johnston, Honour Earth Mother, supra note 35 at xv.
Our oral histories do not indicate that we agreed to separate ourselves from our
Mother the Earth, but they are consistent with our understanding of our role as
humans under the laws of the Creator, which mandates that we should be kind and
generous and share the bounty of the earth with each other, with the animal
nations, the plant nations, and with you Kiciwamanwak.\(^{413}\)

**Conclusion**

What was understood by the Anishinabe flowing from these negotiations? Many theories
about the treaty have been espoused by historians, ethnohistorians, lawyers and political
scientists. Early analyses point to deceit and manipulation. Some claim that the
Anishinabe did not understand western concepts of property law, which confused the
concepts of “surrender" and "sharing" of land.

Our treaties by the very fact of the Crown’s negotiating and signing them, were
and are recognition of our aboriginal title to this land. Our treaties were and are
unconscionable by virtue of the distortions, inequities, and the inconsistencies
implicit in the negotiations. The demonstrable lack of any intention to implement
the potentially beneficial aspects of the treaties confirms the cynicism and deceit
which attend a one sided treaty making process.\(^{414}\)

Refined analyses raise questions of inept translation of words and concepts which led to
misunderstanding. Historians such as Jean Friesen\(^{415}\) have found that, faced with a
difficult situation, the Anishinabe made the best deal they could and that they surrendered
the land, but retained some jurisdiction over resources. While I agree with Friesen that
the Chiefs were in a sense forced to negotiate, I take a different view about the resulting

---

\(^{413}\) Johnson, *supra* note 25 at 41-42.

\(^{414}\) Indian Tribes of Manitoba, *Wahbung, supra* note 1.

\(^{415}\) Jean Friesen, “Magnificent Gifts”, *supra* note 63 at 141.
agreement. The Anishinabe *inaakonigewin* (law) relating to land and use of land informed the negotiations. Whether they were understood by the Crown is unknown, although there are indications in the record that the Crown negotiators did have an understanding that the Anishinabe were not approaching land issues using an acquisition and possession model. It is my view, based on the evidence marshalled here, that the Anishinabe agreed to share the land with the settlers and to allow them to use the land they desired for agriculture. The Anishinabe also understood that they could continue to use their territory for their traditional activities. Neither party would interfere with the other. On the question of reserves, lands would be kept separate and could be used by the Anishinabe, should they choose to farm. Neither traditional harvesting nor farming were mutually exclusive, the result being that the Anishinabe would continue to use the land of Treaty One, along with the settlers, in a spirit of equality and non-interference. This is what the Elders refer to as a “sharing treaty”.

Friesen aptly points out that natural resources were not mentioned in Treaties One and Two but were mentioned in all other numbered treaties and in the Robinson and Douglas treaties. In her view, the Anishinabe drew a distinction between land and natural resources. She further argues that, once the continuing use of resources was confirmed in the opening speeches (what was to be retained), the discussion moved to what would be given. An alternative perspective to this one, in which land and resources are captured under one concept – *Nimaamaa Aki*, with whom the Anishinabe have a direct relationship – is reflective of the normative principles that were invoked in the treaty negotiations and which reflect ongoing normative values. Based on some Anishinabe understandings of the relationship with the land, the land itself has no value independent of its resources,
which are placed on the land in order to be shared. Use of resources in areas under the jurisdiction (or use) of another group would be requested.

We had a basic understanding and belief that it was to be shared. I remember the many political discussions about that and about rice, wild rice and the harvesting of rice, and how in this area, we liked to believe that this was ours. And some elders from the back said, this is the Creator’s garden. That’s the Creator’s garden. It doesn’t belong to one tribe, it belongs to the ones that believe in the spirit of the gift that we call wild rice.⁴¹⁶

It is possible then to conceive that Treaty One was understood by the Anishinabe not as a surrender of land, but as an agreement to share the land and its resources – *Nimaamaa Aki* – in the following way: plots of agricultural land for the white settlers and continued use of the land for harvesting by the Anishinabe. Elder Victor Courchene explains it in the following way:

The Anishinabe understood that they never gave up everything. They threw an axe in the soil and said “this is how much we will give up” […] The Queen’s representatives asked for only the top six inches of our land so that the white man could farm. They were only given this amount. That is the main thing.⁴¹⁷

Reserves would be set aside for the Indians, if and when they chose agriculture, although it was promised that they would never be compelled to farm. “The different bands will get such quantities of land as will be sufficient for their use in adopting the habits of the white man, should they choose to do so.”⁴¹⁸

---

⁴¹⁶ Pratt, *supra* note 13 at 28.


⁴¹⁸ *The Manitoban, supra* note 39 at 13.
The settlers’ use of land was explained as being generally limited to agriculture, as had been agreed to in the past with Selkirk, and as was explained in the opening statements to the Treaty One negotiations. When asked to clarify the concept of reserves, the Lieutenant-Governor explained, “[R]eserves did not mean hunting grounds, but merely portions of land set aside to form a farm for each family. A large portion of the country would remain as much a hunting ground as ever after the Treaty closed.”

The treaty negotiations were muddled by two land concepts that were being canvassed concurrently: the surrender of land for the entire treaty area and the setting aside of reserves for the Indians, neither of which could be related to Anishinabe concepts of land tenure. The conceptual distinction between the surrender of the entirety of the land (which included the traditional territory of each of the bands present) and the reserves that would be set aside for Indian agriculture is a significant one. Although the concept of reserves of land set aside for the Indians was discussed at length, there is no conclusive indication on the record that the differing views elaborated above were ever really reconciled. It appears from the record and subsequent interactions between the Anishinabe and the Crown that the size of the reserves was likely not commonly agreed upon in the negotiations. As Hallowell notes, the Anishinabe generally measure distance in units of activity. “As for land, what mattered most for the Ojibwe were the distribution and frequency of animal and plant resources on the land (and along the

---

419 The Manitoban, supra note 39 at 21-22.
420 Hallowell, Essays, supra note 230 at 145.
waterways); the measuring of areas in abstract spatial terms was not a useful or relevant
exercise.\(^{421}\)

The concept of what would be retained for exclusive use by the Anishinabe was
improperly understood at the time of treaty, arguably by both parties. Today, the term
“reserve” is translated by the Anishinabe word ishkonigan. This may have been used as
a term to explain the concept of “reserve” at the treaty negotiations. Harry Bone, an
Anishinabe Elder, explains the concept of reserve as land that was set aside for ourselves,
not “leftovers”.

Ishkonigan does not mean ‘leftover’ to us, ishkonigan means gigii-mii-ishkonaamin in other words ‘we left this land aside for ourselves’ not leftover. Leftover is kind of a loose meaning and has a different connotation. For us, the Elders told us that, gigii-mii-ishkonaamin – meaning we left some part of that land for ourselves, that is what it means. Gigii-mii-ishkonaamin – in other words, here is the land, its not left over and that is not what the intent was, set aside, we set aside for ourselves this land.\(^{422}\)

Elder Bone’s comments illustrate the incompatibility between the concepts that were put
forward by the Crown and those relied on by the Anishinabe.

Assurances of continued use were made in relation to the whole of the land, whereas
promises to set aside reserves for agricultural use were made for those who would want
to shift to an agricultural lifestyle (although the Queen promised not to force the Indians
to farm). From the Anishinabe perspective, the land relationship being proposed was one
by which they would continue to use the land for their traditional activities of hunting,
trapping, fishing and harvesting, with shared use by the settlers for agricultural purposes,
and with a promise to have selected lands set aside for their farms, should they choose to

\(^{421}\) Ibid. at 112.

\(^{422}\) Pratt, supra note 13 at 77.
engage in agriculture. This was in keeping with Anishinabe *inaakonigewin* (law) related to land, which allowed for and encouraged shared use of land for sustenance and non-interference with another’s use of land for a specific purpose.

A spirit of mutual helpfulness is manifest in the sharing of economic goods and there is every evidence of cooperation in all sorts of economically productive tasks. No one, in fact, is much better off than his neighbour. Dependence upon hunting, fishing, and trapping for a living is precarious at best and it is impossible to accumulate food for the inevitable rainy day. If I have more than I need I share it with you today because I know that you, in turn, will share your surplus with me tomorrow.\(^{423}\)

From the record of the negotiations, it is clear that the Anishinabe were hesitant throughout the negotiations as to the extent to which the treaty would modify their relationship to the land. They were concerned about the continued use of the land, as well as their relationship with incoming settlers. Concern was expressed for the well-being of the land itself and for future generations.

When they signed the Treaty they didn’t want anything for themselves, it was for the future generations. It was for the children. Seven generations was what they looked at, this is the Anishinabe teaching.\(^{424}\)

It is fundamentally problematic that the concepts of surrender and extinguishment of title were never raised or discussed at the negotiations. Had these concepts been raised and discussed, they likely would have resulted in an immediate breakdown in the negotiations, as the Anishinabe would not have agreed to a surrender of the land. In addition, the use of particular words in both the Anishinabe language and the English


\(^{424}\) V. Courchene, *supra* note 417.
language at the treaty negotiations were infused with particular legal meaning. For example, English vocabulary relating to property was infused with common law content. The Royal Commission on Aboriginal Peoples report confirmed that “[T]erms such as cede, surrender, extinguish, yield and forever give up all rights and titles appear in the written text of the treaties, but discussion of the meaning of these concepts is not found anywhere in the records of treaty negotiations.”425 The Anishinabe perspective on lands and the lawful obligations that they had towards the land and to share with others in the bounty of the land cannot be translated into common law property concepts. Even if the Anishinabe had a vague understanding of British or Canadian concepts of ownership, they likely did not perceive themselves as being bound by them. Similarly, the settlers likely did not view themselves as bound by Anishinabe laws, with the possible exception of some of their earlier trade or political interactions with the Anishinabe, such as those illustrated in previous chapters.

The Anishinabe did not surrender their land in the Treaty One negotiations. It was not in their power to do so, as they did not own the land. In their eyes, they were in a sacred relationship with the land, endorsed by the Creator. In essence, the Crown viewed the treaty as a transfer of land – land that was under the control of the Anishinabe and which was greatly desired by settlers and the Crown. I use the word “control” here as a compromise between the concepts of ownership and jurisdiction from a western perspective and the view of belonging to the land and being allowed to use the land from the Anishinabe perspective. The conceptual differences between these views of land were explained at the treaty negotiations, but it is unclear if either party truly gained an

425 Canada, Royal Commission on Aboriginal Peoples., vol 1, supra note 311.
understanding of the other’s concepts of land and authority over its use. In fact, on the last day of the negotiations, Chief Ayee-ta-pe-pe-tung was prepared to have the land taken from him, rather than enter into a treaty he was not comfortable signing:

I have turned over this matter of a treaty in my mind and cannot see anything in it to benefit my children. This is what frightens me. After I showed you what I meant to keep for a reserve, you continued to make it smaller and smaller. Now, I will go home today, to my own property, without being treated with. You (the Commissioner) can please yourself. I know our Great Mother the Queen is strong, and that we cannot keep back her power more than we can keep back the sun. If therefore the Commissioner wants the land, let him take it [...] Let the Queen’s subjects go on my land if they choose. I give them liberty. Let them rob me. I will go home without treating.\(^{426}\)

\(^{426}\) *The Manitoban, supra* note 39 at 30.
Chapter 5: CONCLUSION

The written text of the treaty, the historical record and the verbal statements made at the treaty negotiations indicate that the Crown wished to settle western Canada with the consent of the indigenous inhabitants. The policy was to make treaties with the indigenous people on behalf of the Queen, and to ensure peace and goodwill between indigenous people and the Crown, in exchange for the Queen’s “bounty and benevolence”\footnote{Treaty No. 1, 1871, supra note 9.}. Each of the parties to the treaty brought into the negotiation circle objectives, viewpoints and systems of law and governance which, in many instances, were vastly different from those of the other party.

I have argued that the true spirit and intent of treaty can be explored and perhaps ultimately resolved by understanding the competition between different systems of law that informed the treaty negotiations. In turn, such understandings can foster better interpretations of the treaty that will allow for more fruitful attempts at treaty implementation. Unfortunately, the more recent practice of privileging western law over Anishinabe inaakonigewin (law) has negatively affected current approaches to treaty interpretation. In particular, Treaty One remains to be fully understood from the Anishinabe perspective.

In trying to understand Treaty One, some questions remain difficult to answer, given the current and historical divergence of the parties’ perspectives:
What was intended to be the effect of Treaty One on the lands? Was it surrender, sale, shared use of land? What was to be retained by the Anishinabe?

How was the concept of reserves explained and understood?

What was the nature of the treaty relationship?

As illustrated in Chapter 2, the Anishinabe had interacted with the fur traders for over a century and a half, in relationships of kinship and trade that were grounded in Anishinabe values and customs. For example, by smoking the pipe together, the parties to a trade treaty made a substantive commitment to speak truthfully and maintain good relations. At the Treaty One negotiations, Commissioner Simpson relied on the existing relationship with the Hudson’s Bay Company and the physical location of the HBC fort to ensure fruitful negotiations. In addition to building on the existing relationships with the HBC, the prior practices of treaty negotiation between the Crown and the Anishinabe informed the making of Treaty One. Each of the treaties between the Anishinabe and the Crown set the table for the negotiations, building upon the principles established in the Royal Proclamation of 1763. For example, the Treaty of Niagara was conducted, at least in part, in accordance with Anishinabe protocols and laws. This continued in later treaty making. In particular, the non-interference and mutual assistance that are illustrated by the Covenant Chain Belt and the Two Row Wampum Belts help to further illustrate the perspective that the Anishinabe brought to their negotiation of Treaty One.

In Chapter 3, I detailed some of the procedural and substantive Anishinabe laws that influenced the Anishinabe view of Treaty One. Although the Crown negotiators may not

---

428 Note that the unsuccessful attempts in July 1871 at negotiating with the Anishinabe at North-west Angle did not take place at an HBC fort.
have understood the full nuances of the norms that were invoked by the Anishinabe in the negotiations, they did rely on them, to a certain extent, to secure the treaty. While the Crown may not have understood the full impacts of the procedural and substantive laws of the Anishinabe, the fact remains that, to some extent, the treaty negotiators either actively relied on or allowed negotiations to be carried out according to those principles, all of which likely informed the Anishinabe understanding of what was being negotiated. As in the context of the fur trade, the treaty relationship may be one of those “ [...] relations in which divergent meanings were, perhaps, a defining characteristic.”

Procedural laws relating to respect for jurisdiction, non-interference, creation of kinship ties, feasting, dancing and ceremony engaged a system of Anishinabe normative values and principles that had substantive resonance in the agreement arrived at in treaty, including: relationship, renewal, responsibility and reciprocity. Although the full extent of these substantive obligations may not have been fully understood by the Crown negotiators, and some of the norms may have been employed exploitatively, it remains the case that, by invoking them, the Anishinabe infused normative obligations into the treaty relationship. For example, the reference to the kinship relationship invoked obligations of love, kindness and caring that rely on foundations of equality and reciprocity. The conclusions that might flow from this better understanding of the Anishinabe normative perspective include expectations that the Anishinabe would share in the Queen’s “bounty and benevolence” equally with the Queen’s White children and that the kinship relationship – and its obligations – would extend to future generations of Anishinabe.

In Chapter 4, I detailed the negotiations of Treaty One to show that, at the outset, assurances were made by the Crown representatives that land and resource use by the Anishinabe would continue and that the use of land for settlers would be limited to agriculture. At no point in the treaty negotiations is it recorded, in any of the documents or in the oral history, that the parties discussed the concepts of land surrender or sale. The assurances of continued land use without interference were a recognition of Anishinabe jurisdiction over and primary right of use of the resources and the land. The terms of the settlers’ agricultural use were guaranteed not to interfere in any fundamental way with the Anishinabe way of life. As stated by Lieutenant-Governor Archibald in his opening remarks, “There will still be plenty of land that is neither tilled nor occupied where you can go and roam and hunt as you have always done.” Elder Victor Courchene explains that the Anishinabe and the settlers would eat on a plate together.

One old man, much older than me, said his grandfather told him about the Treaty and how it was supposed to work. He said it is like a plate and the resources were on that plate. The white man was invited to come and eat from that plate together with the Anishinabe. This is how he understood the Treaty. They never gave up anything.

In many instances, the written record does not detail the discussions or explanations that took place, including the content of the Chiefs’ speeches and the “very full explanations in Indian” by James McKay. It is possible that these “explanations” were not aimed at explaining to the Anishinabe the intentions of the Crown through the lens of western concepts but were for the purpose of explaining the negotiations in terms that would be conceptually understood by the Anishinabe. When the Lieutenant-Governor spoke of

---

430 Morris, supra note 7 at 29 [emphasis added].
431 V. Courchene, supra note 417
432 The Manitoban, supra note 39 at 20.
“God’s will” that the land be cultivated, the translation and understanding of those concepts through the eyes of the Anishinabe would have been very different, given the understandings of their relationship to land and the resources that were placed upon it by the Creator for their use.

While early on in the negotiations the Chiefs claimed two-thirds of the treaty area as reserves, the concept of “reserves” was further explained to them (the content of these explanations is not on the record) and pressure was exercised by the negotiators. The Anishinabe are purported to have agreed to the creation of reserves for their use, although we can conceive from the record that these reserves were understood to be for their use as agricultural lands (if they chose to engage in agriculture), while not limiting their other existing resource use. Part of the divergent understandings about the purpose of reserves may be related to assumptions that the Anishinabe would eventually set aside hunting and trapping in favour of agriculture. While both the Anishinabe and Crown negotiators viewed the treaty as being related to land, the Anishinabe perspective differed and the treaty agreement was approached according to the view that relationship, rather than possession, dictated use of land. The Anishinabe view was rooted in an attachment to the land, based on use assigned by the Creator. There was also an underlying obligation to share in the bounty of the earth with other brothers and sisters, which helps explain the Anishinabe willingness to enter into a sharing treaty, not unlike the shared use of land models they had developed with the fur traders over the previous centuries. The text of the treaty contemplates that the Anishinabe obligation under the treaty would be “[...] to maintain perpetual peace between themselves and Her Majesty’s White subjects, and not to interfere with the property or in any way molest the persons of Her Majesty’s white or
From the Crown’s perspective, although not detailed in the text of the treaty or in the negotiations, a total and complete surrender and acquisition of land was contemplated. In his analysis of Treaty Nine, John Long concludes that “[…] aboriginal title and Indigenous rights were not knowingly ceded, released, surrendered, or yielded up by the Ojibwe and Cree. Indigenous peoples agreed to accept presents that to them signified a renewal of their commitment to the fur trade’s middle ground of compromise and coexistence.” Similarly, Treaty One was not viewed by the Anishinabe as a sale of land, but as an agreement to share in its bounty. At the negotiations, the Anishinabe expressed a clear attachment to the land and responsibility towards the land, as illustrated by the remarks of the Chiefs. These views would have come into direct conflict with concepts of sale and surrender of land. Also, a total surrender of land would have been fundamentally incompatible with continued use of the land for hunting, trapping, fishing, and other types of harvesting, as such activities entail planning and resource management. The written record of the negotiations is consistent with the Anishinabe understanding of their legal relationship to the land. As illustrated in Ayee-ta-pe-petung’s translated speech to the Treaty Commissioners, he was made of the land.

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

---

433 Treaty One, 1871, supra note 9.
434 Long, supra note 107 at 352.
435 The Manitoban, supra note 39 at 26.
Although much pressure and many threats were employed by the Crown in the negotiations, the Chiefs repeatedly expressed hesitation to enter into the treaty relationship, saying that some of the treaty terms were unclear to them. Where demands were made by the Anishinabe, in particular on the last day of the negotiations, there is no explicit reference on the record to those demands having been granted or refused. We cannot know what induced the Anishinabe to change their minds and conclude the treaty after they had announced their departure, other than to speculate that they were reassured by McKay that their position would be protected. We do know that general dissatisfaction with the implementation of the treaty on the part of the Anishinabe began almost immediately after the signing.

It is reasonable to assume that Anishinabe understandings and normativity would have infused the discussions at the negotiations, including the fundamental discussions about land tenure and use. The assurances of non-interference resonated with the Anishinabe normative principles of non-interference and likely engaged expectations about how that non-interference would take shape on the land. Firstly, the Anishinabe expected they would not be limited in their movements or their sustenance activities and, secondly, they understood that they could take up agriculture and settle on lands set aside for them for that purpose, in the form of reserves. Both the Anishinabe understanding of land and resources, and their relationship to Mother Earth and the Creator supported continued Anishinabe jurisdiction over land and natural resources. Neither an owner or seller, the Anishinabe used the land and cared for it. The Anishinabe retained control over the land, subject to sharing it with the white settlers for the limited purpose of sustenance. In return, the mother had obligations of love, kindness and caring towards her children – the
Anishinabe – which entailed listening to their wants and providing for their needs, in order for them to have mino-bimaadiziwin (a good life). The expressions of kinship with the Queen were likely invoked in part to ensure equality between the children (including the settlers), as well as an expectation that their needs, if expressed to the Queen, would be met and that she would endeavour to create a good life for her children. These obligations were to continue into the future and apply to future generations, as was illustrated by many of the Chiefs’ speeches.

In Anishinabe inaakonigewin (law), relationships never end. They are constantly fostered, re-defined, re-examined and re-negotiated. They must be tended, fuelled, nurtured or simmered. They morph and evolve over time. The treaty is a relationship which has no end. As Elder Elmer Courchene describes it, “[T]he fire is lowered, until the next time we meet. We have not finished our work. Our work is never done. Things change, we change. We will discuss this again.”

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

To look at the treaties as one isolated moment in time, independent of the past or the future, is not in keeping with the Anishinabe perspective on treaty. The treaty was a relationship developed on the basis of respect and was intended to last “as long as the

---

436 Elmer Courchene, personal communication, June 12, 2010.

Therefore, the lowering of the fire post-negotiation, and changes in circumstances over the years, should not imply the extinguishment of the treaty, but merely that the relationship needs tending. Treaties are presumed to have been negotiated in good faith. Their provisions were to be implemented faithfully.

How then are the two treaty perspectives to be reconciled? Treaties are agreements between two parties in which neither perspective should be privileged over the other. This thesis has demonstrated that a better understanding of the Anishinabe perspective flows from considering Anishinabe laws, both procedural and substantive, that informed and impacted the treaty negotiations. These understandings may assist the current generation and descendants of the treaty parties in their quest for understanding how the interpretations are divergent and how they may one day be reconciled. There is an Anishinabe prophecy which foretells significant environmental change. Today, Mother Earth is suffering and the sharing of the land has not taken place in accordance with the values that were set out at the treaty negotiations.

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

---

438 Elmer Courchene, “Share the Land”, supra note 56.

439 Pratt, supra note 13 at 45-46.
The prophecy also speaks of hope for a change in the relationship. My hope is that a better understanding of Anishinabe normative values and principles will assist in rebuilding the treaty relationship and honouring its original spirit and intent, emphasizing its core purpose in creating relationship, not simply ceding land -- which was the way that it was understood by the Anishinabe and endorsed by the Creator.
Bibliography

Treaties

Manitoulin Island Treaty, 1862
Robinson Huron Treaty, 1850
Robinson Superior Treaty, 1850
Selkirk Treaty, 1817
Treaty No. 1, 1871 (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationery, 1957).
Treaty No. 2, 1871
Treaty No. 3, 1873

Legislation


The Canada Jurisdiction Act, 43 Geo. III, c. 138.


The Constitution Act, 1867, 30 & 31 Victoria, c. 3.

The Manitoba Act, 1870, 33 Victoria, c. 3.

Case Law


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


Primary Sources: Government Documents

Canada, Royal Commission on Aboriginal Peoples. Perspectives and Realities (Ottawa: Supply and Services, 1996).


Canada, House of Commons Debates (31 March 1873, Sir John A. MacDonald).


Ipperwash Inquiry, Respecting and Protecting the Sacred, by Darlene Johnston (Ontario: Ministry of the Attorney General, 2006).


Primary Sources: Archival Documents

Alexander Morris to the Minister of the Interior (18 August 1875), Ottawa, Library and Archives Canada (RG 10, vol. 3624, file 5217-1, C10, 109).

Chief Moosoos to A. Archibald (17 December 1870), Winnipeg, Public Archives of Manitoba (Archibald Papers, MG 12, A1).

Chief Naskepenais to Department of Indian Affairs (17 June 1893), Ottawa, Library and Archives Canada (RG 10, vol. 3755, file 30979-4, C10, 133).
Chief Naskepenais, Robert Raven, John Raven, Wiassasing, and Enecoo to the Department of Indian Affairs (15 January 1889), Ottawa, Library and Archives Canada (RG 10, vol. 3788, file 43856, C10, 138).

Chief Wa-quse to Lieutenant-Governor Morris (30 September 1874), Ottawa, Library and Archives Canada (RG 10, vol. 3598, file 1447, C10, 104).

Chief William Asham to the Superintendent-General of Indian Affairs (8 May 1892), Ottawa, Library and Archives Canada (RG 10, vol. 3692, file 14069, C10, 121).

F. Ogletree to E. McColl (28 March 1885), Ottawa, Library and Archives Canada (RG 10, vol. 3692, file 14069).


Memorandum of Things outside of the Treaty which Were Promised at the Treaty at the Lower Fort (3 August, 1871) by Simpson, Archibald, St. John and McKay, reprinted in Morris at 126-127.


Notes of an interview between the Lieutenant-Governor of Manitoba and Henry Prince, Miskookenew, Chief of the Saulteux and Swampies (13 September 1870), Winnipeg, Public Archives of Manitoba (Archibald Papers, MG 12, A1).

William Pennyfather, Joseph Kent, Peter Kent, Joseph Henderson, Robert Henderson, Chief and Councillors of Fort Alexander to the Department of Indian Affairs (December 1890), Ottawa, Library and Archives Canada (RG 20, vol. 3788, file 43856, C10, 138).

Secondary Sources: Monographs, Essays in Collections and Articles


______. Recovering Canada: The Resurgence of Indigenous Law (Toronto: University of Toronto Press, 2002).


Carter, Sarah. “‘Your Great Mother across the Salt Sea’: Prairie First Nations, the British Monarchy and the Vice Regal Connection to 1900” (2004-2005) 48 Manitoba History 34


Indian Tribes of Manitoba. Wahbung: Our Tomorrows (Winnipeg: Manitoba Indian Brotherhood, 1971).


______. Ojibway Heritage (Toronto: McClelland & Stewart, 1976).


Morton, A.S. “The Canada Jurisdiction Act (1803) and the North-West” (1938) 2 Transactions of the Royal Society of Canada 121.


_____. “‘Thou Wilt Not Die of Hunger ... For I Bring Thee Merchandise’: Consent, Intersocietal Normativity, and the Exchange of Food at York Factory, 1682-1763” in


**Secondary Sources: Newspapers**

*The Manitoban*, Winnipeg, Provincial Archives of Manitoba, 1871 (as transcribed by the Manitoba Treaty and Aboriginal Rights Research Centre (T.A.R.R.) 1970).
The Nor’Wester (14 March 1860).
The Nor’Wester (1 June 1861).
The Nor’Wester (14 February 1869).

Research Interviews and Personal Communications

Courchene, Darlene Starr (Sagkeeng First Nation, Manitoba, 14 June 2011).
Courchene, Dave (Sagkeeng First Nation, 10 July 2011).
Courchene, Elmer, personal communication (June 12, 2010).
Kipling, Josie (Sagkeeng First Nation, Manitoba, 12 June 2011).
Letander, Henry, personal communication (20 October 2005).
Mandamin, Mary Lorraine (Sagkeeng First Nation, Manitoba, 12 June 2011).
Maytwayashing, Mary (Sagkeeng First Nation, Manitoba, 14 June 2011).
Nelson, Charlie, personal communication (Roseau River Anishinabe First Nation, 21 July 2011).

Electronic Resources

Brown, Jennifer. “Métis” in The Canadian Encyclopedia, online:

Collections Canada. “Treaty Medals”, online:


Dictionary of Canadian Biography Online, s.v. “Sir Adams George Archibald”, online:
<http://www.biographi.ca/index-e.html?PHPSESSID=c254v418atebag743r3cvm61k3>.


The Royal Charter for incorporating the Hudson’s Bay Company, A.D. 1670, online: Solon <http://www.solon.org/Constitutions/Canada/English/PreConfederation/hbc_charter_1670.html>.

**Video Resources**