

We are Treaty Peoples: The common understanding of Treaty 6 and contemporary Treaty in
British Columbia

by

Kelsey Radcliffe Wrightson
B.A. University of Victoria, 2007

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

Masters of Arts

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Supervisory Committee

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Abstract

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Indigenous and settler relations have been negotiated, and continue to be negotiated in various forms across Canada. This thesis begins from the continued assertions of treaty Elders that the historic Treaty relationships are valid in the form that they were mutually agreed upon and accepted at the time of negotiation. From this assertion, this thesis asks how this mutually agreed upon understanding of Treaty can be understood. In particular, the holistic approach to reading historic treaty draws on the oral history and first hand accounts to provide an understanding of the context and content of treaty. The holistic approach is then applied to Treaty 6 in Alberta and Saskatchewan, as well as the contemporary Treaty process in British Columbia. This provides a critical analysis of the continued negotiation of the relationship between Indigenous Peoples and Settlers, both regarding how historic treaties are understood in Canada, and how contemporary treaty relations continue to be negotiated.

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Dedication

For my friends and family who have believed in me, challenged me, supported me and inspired me. Thank you.

Introduction

There is a diverse topography of relationships between Indigenous and settler populations in Canada. Across Canada, Indigenous and settler relations are constantly being renegotiated, both in contemporary understandings of historic treaties and in the continued negotiation of treaties in British Columbia. While in much of Canada, the relationship between Settlers and Indigenous peoples was negotiated through historic treaty agreements ranging from the Peace and Friendship Treaties to the numbered treaties, in most of British Columbia, treaty was not settled. Acknowledging that both historic and contemporary treaties are complex living treaties, this thesis asks how Indigenous and settler relations have been, and continue to be negotiated in Canada? This question rests in the nexus of a complex field of study. There are multiple narratives and perspectives regarding treaty interpretation and the questions that arise regarding treaty negotiation are inherently multidisciplinary with ramifications across multiple fields of study, while simultaneously contesting these disciplinary divisions. This examination also transects historic and contemporary practices of treaty negotiation through a comparative examination and re-imagining of the contemporary treaty practice. As such, this analysis is a practice of negotiation in itself, and the beginning of a conversation that must take place regarding the negotiation of relationships between Indigenous and settler populations.

There are three areas of focus in this thesis. First, this thesis looks at the method of the holistic approach to reading treaty. The second area of focus is on the use of the holistic approach in the interpretation of a specific historic treaty, Treaty 6. Finally this thesis looks to employ the holistic approach in the contemporary context of treaty negotiation in British Columbia. This final section is a doubled focus as it not only employs the holistic approach to understand the contemporary treaty negotiation process, but also compares the common understanding of Treaty 6 and the contemporary treaty process.

Before analysis of Treaty 6 or the contemporary treaty process begins, an examination of the methodology is fundamental to this thesis. The holistic approach to treaty interpretation described in this thesis is the application and extension of the method developed by Michael Asch, which is described and used in his forthcoming book. His method for treaty analysis innovatively combines an applied understanding of the philosophical principles justifying contemporary settler occupation with recent court

decisions in order to provide an innovative method to interpret historic treaties. He begins by stating that arguments denying the recognition of First Nations occupation of land in Canada prior to contact, or the denial of the principle of temporal priority as a justification for contemporary settler occupation in Canada, are simply the means to avoid calling Settlers “thieves.” He continues by stating that, rather than settler theft, the historic treaties “clearly show that from the outset of the colonial period, the policy of representatives... was to gain the consent of Indigenous communities prior to engaging in activities on their lands” (Asch 2010, 3). From the position that the historic treaties were a product of colonial policy recognizing the need to gain the consent of Indigenous peoples, Asch turns to interpretation of treaty based on the “common intention.” The common intention of treaty is how the negotiation parties understood treaty at the time of negotiation. Asch bases his interpretive practices of the common intention of treaty in the judgement of Chief Justice McLaughlin in the *Badger* case. Asch emphasizes that in this reading, the Crown is assumed to be acting in good faith. The Chief Justice also makes clear that the unique cultural and linguistic differences of parties must be considered in interpreting the historic treaties. Further, the common intention of these treaties is based on the mutual consent of treaty parties. In short, Asch follows the method adopted by the Supreme Court in which he seeks to “to reconcile the “common intention” presented by contemporary members of Indigenous communities with information from other sources” (Asch 2010, 9).

The holistic approach to reading Treaty 6, described in this thesis, is an application and extension of Asch’s method. The method of understanding Treaty 6 is a response to two problematic interpretations of the historic treaties. The first problematic approach to treaty interpretation relies solely on the text of treaty as the only legitimate form of treaty. The second interpretation of treaty is a response to the exclusive reading of the treaty text, and asserts the validity of the “spirit and intent” of treaty. In the former approach, the text of treaty is the only valid form of the agreement. This interpretation claims that the treaty relationship is a practice of cede and surrender, or the finite sale of the land by Indigenous peoples in return for a set of exhaustively defined treaty provisions. The reliance on the written document is often attributed to government officials and representatives, but it is more pervasive as a foundation for both policy and public thought. For example, the “medicine chest” clause in Treaty 6, asserts that a medicine chest will be kept in the house

of the Indian Agent to provide care for the First Nations of Treaty 6. This inclusion has become a source of public policy debate regarding access to universal health care, including in the context of the H1N1 flu pandemic (Cuthand 2009).

In part, the prioritization of the written form of treaty reflects the colonial prioritization of written history over oral history. For example, in Tom Flanagan's book First Nations? Second Thoughts the validity of the text of treaty is simply assumed. While there has been inclusion of oral testimony in legal proceedings, "Canadian courts are still sceptical about the evidentiary value of oral history, despite the Supreme Court's stated openness in *Delgamuukw*" (Penikett 2006, 244). Further, while there are many documents and statements arguing for the inclusion of the spirit and intent of treaty, there is a distinct lack of material justifying the interpretation of treaty that relies solely on the text of treaty. The validity of the written text of treaty is assumed and given priority from the outset of treaty policy and practice. This reading is unilateral in that it focuses on a narrow interpretation based in the text of Treaty 6 as a reflection of all Treaty provisions. Further, reliance on the text of treaty also precludes the possibility of contention by claiming the written document as the full and final agreement. As such, the responses to claims that the treaty obligations are not being fulfilled are based on a narrow reading of the explicit text of treaty.

The second problematic interpretation of treaty is a response to this singular reading of the text of treaty. This interpretation of treaty calls for the recognition of the "spirit and intent" as a second, but equally valid form of treaty. The Treaty First Nations and scholars repeatedly take up this stance as a direct refutation of the reliance on the text of treaty.

"The treaty documents are remarkable for they reveal a detailed negotiating process with a clear Indian agenda. They also reveal two distinct sets of negotiations and understandings: while the formal, written treaties outline a broad understanding, they also include some specific rights guaranteed Indians. At the same time, the negotiations reveal a number of verbal promises and understandings that were clearly understood by the Indians to be a part of the broad treaty agreement" (Harrin 1998, 255).

Looking to the "spirit and intent" of treaty has resulted in two mutually exclusive interpretations of Treaty. The first is the text of treaty, which aligns with Government policy and reads the numbered treaties as documents of surrender analogous to land sale. In

contrast, the interpretation of historic treaties based on the “spirit and intent” of treaty claims that First Nations cultural practices limit how historic treaties were understood by the negotiators. For example, interpretations of Treaty 6 that rely on the spirit and intent of the agreement often assert that Treaty 6 was not a document of cessation or sale because Cree negotiators did not culturally understand those concepts (S. Venne, *Understanding Treaty 6: An Indigenous Perspective* 1997). This situates treaty contention in direct relation to cultural practices, relying on particular cultural practices to negate other particular cultural interpretations, and thus, diametrically opposing the parties based on cultural diversity. Additionally, this framing of two divergent versions of treaty also negates the legitimacy of the numbered treaties as negotiated agreements. In this framing, because there was no “meeting of the minds”, there was no Treaty.

It is argued that these two versions of treaty stem either from the inability for settler and Indigenous cultures to come to a shared understanding, or the deceit and dishonesty of settler negotiation parties. In the former, the argument that there was no intercultural understanding at the time of negotiation negates the possibility of a shared understanding of treaty.

“The making of Treaty 6 and the other numbered treaties involved a clash of cultural ideals and understandings between First Nations people and the Canadian government. As a result, there is still debate over the spirit and true meaning of treaties in Canada” (Foundation n.d.).

The second interpretation, which reads the negotiated treaties as fraudulent and dishonest invalidates the common understanding of treaty because of deceitful intentions on the part of the negotiators.

“The illegality of the treaty process still pervades the legal culture of the plains tribes. The sense of dishonesty and betrayal was immediate, brought out in the open in the discussions at treaty, and then repeated over the succeeding months and years as it became increasingly obvious that the crown would not keep its treaty agreements. This was not an option open to the tribes, who approached treaty with pure heart after purification rituals obligating them to speak true words” (Harrin 1998, 272).

Rather than beginning analysis of the historic treaty with an approach that either interprets the text of treaty as the only valid form of the relationship, or negates the

common understanding of treaty by asserting the validity of the spirit and intent of treaty alongside the text of treaty, this analysis is based on a new way of understanding the treaty relationship, which I have termed the holistic approach.

The holistic approach to treaty analysis is based on a dual foundation, continually articulated by Elders in treated areas. This dual foundation is that treaties continue to exist in the form that they were commonly understood. In other words, treaties remain valid documents in the form that they were negotiated and agreed upon by government officials.

For the Elders, what is at issue is not whether or not treaties exist, but whether a mutually acceptable record of them can now be agreed upon and implemented. They remain confident that if the fundamental values identified by them guide any future process and if *tapwewin* (truth) is the basis for arriving at an agreement on a mutually acceptable record of the treaties, the parties, with good faith, ought to be able to succeed in reaching such an agreement (Cardinal 2000, 59).

From this initial stance of the continued validity of the common understanding of Treaty, the holistic approach is based on three principles of analysis. These are: the context of treaty, the principle of equality of standing and the principle of certainty. The context of treaty includes the material that is analyzed as well as four focal areas of content analysis. Initially, the contextual analysis begins with the examination of the oral history of Elders. Rather than assuming the unilateral validity of the text of Treaty, the holistic approach begins with the validity of the oral history. This analysis then looks to first hand accounts of the negotiation process, and finally the text of treaty. The first of the four contextual focus areas looks at *terra plenus*, or the mutual recognition of the prior and continued existence of Indigenous political, economic and social systems. The second focus area looks at the process of coming to a shared understanding. The third contextual focus looks at the authority to enter into treaty with regard to who enters treaty as well as how the parties understood each other through the relationship. The final focus area of the contextual analysis is on the economic context of entrance into treaty.

The second aspect of the holistic approach is the principle of equality of standing. The principle of equality of standing has a long history in western philosophy and practice. However, in the instance of this analysis, the principle of equality of standing reflects the manner in which treaty parties came into the negotiation process and is also a practice of

reading treaty. As a way of understanding how parties came into the negotiation, equality of standing asserts that all treaty parties recognized that cultural differences did not equate to justification for settler occupation or the forced assimilation of Indigenous peoples. In other words, settler and Indigenous peoples were different, but those differences did not invalidate Indigenous life ways and necessitate assimilation into settler society. In the specific context of treaty relations, this is exemplified through other treaties in Canada such as the Two-Row Wampum Treaty, and the use of kinship terminology in negotiation. As an analytical practice equality of standing asserts that the common understanding of treaty does not include dishonest or undeclared intentions of negotiators, but only what was explicitly and commonly understood by all parties. As such, treaty agreements are not defined by settler policies of crass assimilation and colonialism where the Indigenous people are viewed as the weak and ignorant participants that they are sometimes cast. Rather, through the analytic practice of equality of standing, the parties are understood to be active participants with their own perspectives on the negotiated treaty relationship. The treaty relationship was not an imposition of one framework of understanding, nor was it a gross example of cultural misinterpretation and a lack of communication across or between cultures. Through this analytic practice, treaty is understood as the product of an active negotiation between parties, and each was fully capable of understanding and communicating with the other.

The third aspect of the holistic approach is the principle of certainty. The holistic approach to treaty looks at certainty as a goal in both the historic and contemporary treaty negotiation. However, certainty as a goal has been achieved in substantively different ways through very different practices. Thus, the principle of certainty is understood and analyzed as both a goal and a practice of treaty making. Given that certainty is framed as a process and goal in very different ways, the third portion of the holistic approach to treaty interpretation takes a comparative focus by looking at certainty in the historic process in juxtaposition to the framing of certainty as a contemporary practice. The process by which certainty is achieved in both historic and contemporary treaty reflects the substantive nature of the treaty negotiation. In other words, the characterization and achievement of certainty has come to reflect the relationship negotiated between settler and Indigenous treaty parties. As such, this third aspect of the holistic approach enables an understanding of the nature of

the negotiated relationship between parties through the particular instantiation of the principle of certainty.

The second portion of this thesis employs the holistic approach to find the common understanding of Treaty 6 as it was negotiated between the treaty parties. The use of the holistic approach to provide a detailed analysis of the single instantiation of the historic treaties follows Michael Asch's examination of Treaty 4 given his method grounded in the common intention of treaty. His examination of Treaty 4 begins with an analysis of the history of the Treaty 4 agreement, and emphasizes that the Treaty 4 parties recognized the need to enter into a relationship between settler and Indigenous peoples. He finds that entering Treaty was a way in which Indigenous communities could resolve grievances with the Commissioners. In analysis of the content of Treaty 4, Asch begins by looking at the oral history and statements of Elders. He finds that, with regard to the political status of parties prior to entering treaty, First Nations had the inherent authority to negotiate, derived from their prior occupation of the land. In contrast, Crown representatives negotiated Treaty on behalf of the Crown and thus, were authorized to enter into negotiation by virtue of being recognized by the Queen. As such, Treaty 4 was negotiated between Queen and First Nations and was characterized as a nation-to-nation relationship. The political relationship established through Treaty established First Nations as autonomous with the right to govern themselves. Under treaty, parties were obligated to share the land to the depth of a ploughshare, and these activities of sharing the land would not interfere with the ability of Indigenous peoples to continue existing life ways of Indigenous peoples, including hunting and fishing. Further, Indigenous peoples would be provided for in times of famine, and there were provisions for healthcare, and education.

Following with Michael Asch's assertion that "there is good evidence to show that common intention reached in Treaty 4 typifies most, if not all of the territorial treaties" the second section of this thesis employs the holistic approach in an examination of Treaty 6. Treaty 6 was signed in 1876, which was the same year the first Indian Act was passed. From the time of contact in North America, settler policies regarding Indigenous peoples were constantly changing in practice and in the philosophical grounding in which they were based. Prior to this, Indian-Settler relations were legally codified based largely through the Royal Proclamation of 1763. The Royal Proclamation recognized the distinction between

Indian and settler lands, and established treaty as the process by which Settlers could legitimately enter Indian lands. However, after the Indian Act was signed, it was Dominion Government policy that determined the legal and political relations between Indigenous and settler peoples. While after 1876 it was the Indian Act contained the legal and political articulations for relations between Indigenous peoples and the Canadian government, from 1763 to 1921 when the last of the numbered treaties was signed, treaty was recognized in principle and practice as the only way to legitimately enter Indian lands.

To begin the analysis of Treaty 6, it is important refute any assumption that historical treaties are either uniform or homogenous. Not only were the First Nations who signed into the numbered treaties diverse but also, the different First Nations experienced different conditions and frameworks of multiple treaties. Further, multiple adhesions to Treaty 6 separate Treaty signatories by more than fifty years. Given the temporal range of treaty negotiation, there is great variety in both the form and the content of historical treaties, ranging from the Peace and Friendship Treaties, to the more explicitly negotiated numbered Treaties. Despite, or perhaps because there is such variety in these Treaties, there are many things to be learned from the numbered Treaties, both in principle, and the way that they were understood in historical and contemporary practice. The holistic approach to analysis includes principles which characterize multiple treaties, including, kinship terminology, nation-to-nation negotiation, and sharing the land rather than ceding or surrendering, as well as particular principles unique to Treaty 6, such as the medicine chest and particular provisions for different hunting rights and land claims. This enables an analysis that emphasizes the unique aspects of historic treaties generally, and Treaty 6 in particular. By focusing on Treaty 6, the holistic approach provides a deeper understanding of both the general philosophical principles of treaty as a negotiated relationship of sharing, and the particular context of Treaty 6.

The second portion of this thesis, the holistic approach to Treaty 6, is divided into three parts. First is the examination of the context of the treaty negotiation. Second, is analysis of the reasons to enter into treaty, which centres on the holistic approaches contextual focus on economic aspect of treaty negotiation. Finally, the holistic approach to Treaty 6 looks at the explicit content of Treaty 6. This common understanding was negotiated between parties, and is not reflective of either an imposition of cultural values,

or a cross-cultural misunderstanding. The holistic approach to Treaty 6 finds that the common understanding of Treaty was based on a sacred and long-standing relationship of sharing. The economic and cultural preservation and self-determination of the parties was fundamental to the agreement. The holistic approach asserts that there was a common understanding of Treaty 6 at the time of negotiation.

The final portion of this analysis doubles as both the examination of the contemporary treaty process through the holistic approach, and a comparison of the contemporary treaty practice with the common understanding of Treaty 6. In contrast to historic treaties in most of the rest of Canada, treaty has not been settled in most of British Columbia. The newly negotiated treaties in British Columbia are meant to move away from historical wrongs to create a shared future that is beneficial for all treaty parties. The creation of a “new relationship” through contemporary treaty negotiation is meant to address the contemporary social and economic discrepancies experienced by Indigenous peoples as a result of past, and continued wrongs such as detrimental government policies in the form of residential schools, the outlawing of Indigenous languages and practices such as potlatch, and the continued economic marginalization of First Nations individuals and communities. The influence of these detrimental policies have continued to be manifest in a variety of social issues, ranging from a disproportionately high First Nations population in the Criminal Justice system, high levels of suicide and extreme levels of poverty both on and off reserve. This new relationship has been framed as a necessary step in the move to a mutually beneficial shared future, and the means to resolve historic and contemporary issues of subordination and assimilation that has defined the Aboriginal experience in British Columbia.

In part, this new relationship is a response to domestic and international calls for a domestic means of resolving Aboriginal Rights that are largely undefined in the Canadian political and legal system (Penikett 2006, 246). After years of Indian Act policy that was compounded incarnations of paternalistic, assimilationist and colonial philosophy in both goals and policy, in 1970, First Nations were able to bring territorial claims to the Supreme Court. As issues of territorial and cultural rights were increasingly brought into the court systems to be resolved, there was pressure to resolve the disputes politically, without expensive litigation. As such, the modern treaty process is meant to be a political

relationship, based on a government-to-government framework, to resolve contemporary issues of relations between Indigenous and settler populations.

However, this “new relationship” has been met by critique from many angles. I do not debate the analytical merit in critiquing contemporary treaty negotiations. However, critique that relies on a comparative analysis to historic treaties as colonial documents of subordination limits contemporary understandings of the historic treaties. To argue that contemporary treaty negotiation is contiguous with practices and policies of colonial assimilation first assumes that these practices of subordination were the foundation of historical treaty relationship. For example, Penikett argues “the northern treaties of the late 20th century are demonstrably superior to the numbered treaties railroaded through the western tribes in the century before” (Penikett 2006, 245). The holistic approach to the contemporary treaty process compares the historic and contemporary treaty practice and enables new understandings of the contemporary treaty process in light of both the holistic approach as a method of analysis, and as a comparison to Treaty 6. The holistic approach finds that the contemporary treaty process is based on the assumption of settler priority and jurisdiction rather than coming into the treaty process with the intention to negotiate a new relationship based on the recognition of the equal standing of parties, and the prior legitimacy of Indigenous peoples on the land that grounded the common understanding of Treaty 6. As such, rather than negotiating a shared understanding of treaty, starting from the assumption of settler jurisdiction and authority, the contemporary treaty process is an imposition of both the process, and the goals of treaty negotiation. The use of the holistic approach offers new ways of understanding contemporary treaty practice, as well as a means of engaging in contemporary treaty negotiation based on the historic negotiation of treaty.

The three sections of this thesis all reflect on the question of how historic and contemporary relations between Indigenous and settler peoples are understood and practiced in Canada. The holistic method, the analysis of Treaty 6 and the analysis of the contemporary practice of treaty negotiation are spaces of analysis reflecting some initial points upon which begin a greater conversation regarding relationships may take place.

Chapter 1: A Holistic Approach to Reading Treaty

The holistic approach to reading treaty addresses two problematic practices of interpretation commonly employed to understand the historic treaties of Canada. The first of these readings relies solely on the text of treaty as the only legitimate articulation of the negotiated relationship (Flanagan 2000) (R. v Horse 1988). This reading leads to interpretation of treaty as the negotiated subordination of Indigenous peoples. Exclusive reliance on the text of the numbered treaties results in an understanding of treaty as the cession or sale of the land, the extinguishment of Indigenous rights and subordination of Indigenous peoples to the Canadian government. A second reading, in response to the exclusive reading of the text of treaty, has called for the inclusion of the “spirit and intent” of the treaty negotiation in the interpretation of the historic treaties (R. v. Marshall 1999) (Cardinal 2000)(S. Venne, *Understanding Treaty 6: An Indigenous Perspective* 1997). However, the articulation of the spirit and intent of treaty in opposition to the text of treaty results in two, mutually exclusive versions of treaty often linked to the respective cultures of the negotiators. The text of the treaty is associated with the settler culture and written history, while the spirit and intent of treaty is associated with the First Nations parties and oral history. In other words, when conflicts arise, the interpretation that relies solely on the text is often favoured by the settler government parties, while interpretations based on the “spirit and intent” of treaty are favoured by Indigenous communities. The two mutually exclusive interpretations of treaty negate the validity of treaty agreements because there was no shared understanding between parties. Further, these two mutually exclusive versions of treaty position the parties as diametrically opposed and culturally incomprehensible. Thus, both the singular reading of the text of treaty and the divisive reading of the text of treaty and the “spirit and intent” of treaty contradict the contemporary legitimacy of the negotiated historic treaties. This also refutes the calls of Elders for treaty interpretation based on the common understanding of a negotiated treaty relationship.

In contrast to these two interpretive approaches, the holistic approach in this thesis is the application and extension of the method developed by Michael Asch in his unpublished book. Asch’s method of treaty interpretation looks at the “common intention”

of treaty, which is read in multiple sources and utilizes the method of the Supreme Court as articulated in *R v Badger*. As an application and extension of Asch's approach, the holistic approach used in this thesis rests on two initial premises and three principles of analytic orientation. The doubled foundation of treaty is based on the continued legitimacy of the common understanding of treaty. The three analytical orientations are: the contextual analysis, the principle of equality of standing and the principle of certainty. While reliance on the text of treaty or two mutually exclusive versions of treaty negates the continued legitimacy of treaty and the possibility of a shared understanding, the initial premise of the holistic approach is based on a doubled foundation; first that the historic treaties continue to be relevant, and second, that treaty was a mutually understood agreement. The continued presence and relevance of the historic treaties is based on the assertions of treaty Elders.

For the Elders, what is at issue is not whether or not treaties exist, but whether a mutually acceptable record of them can now be agreed upon and implemented. They remain confident that if the fundamental values identified by them guide any future process and if *tapwewin* (truth) is the basis for arriving at an agreement on a mutually acceptable record of the treaties, the parties, with good faith, ought to be able to succeed in reaching such an agreement (Cardinal 2000, 59).

In congruence with the continued legitimacy of the common intention of treaty, the second foundation upon which the holistic approach is premised asserts that treaty agreements were a result of a "meeting of the minds." Thus, the contemporary problem of treaty negotiation is not that there was no shared understanding at the time of the treaty agreement, but that most contemporary interpretive practices result in two mutually exclusive versions of treaty – one of which rests solely on the words in the text and the other of which relies heavily on what is attributed as the spirit and intent of the treaty. This obscures the relationship as it was commonly understood at the time of Treaty.

A real problem exists with respect to the treaties — there is no formal existing agreement between the Crown and the First Nations as to the meaning and content of the treaties. It is a problem that needs to be addressed and resolved, if the spirit and intent of the treaty relationship is to be properly implemented (Cardinal 2000, 48).

The holistic approach responds to this problem because the approach is premised on the common understanding of treaty as it was shared between the treaty parties when it was signed and continues to be the legitimate form of the relationship. Thus, the dual premise of the holistic approach asserts that historic treaties continue to exist in the form that they were commonly understood and mutually agreed upon.

From this foundation of the continued legitimacy of the common understanding of treaty the three principles of analytic orientation that compose the holistic approach ensure that treaty interpretation is neither read as a relationship of subordination, nor generates two mutually exclusive understandings of treaty. The three principles reflect three distinct aspects of study that focus on 1) the importance of context of treaty, 2) the principle of equality of standing and 3) the principle of certainty.

First, the importance of context of treaty requires that treaty interpretation include awareness of the material examined and four focus areas. The doubled foundation of the holistic approach as the continued legitimacy of the common understanding of treaty is also the foundation of the contextual aspect. From this foundation, there are three main sources of material included in analysis: oral history, first hand accounts, and the treaty text. These three sources of material then lead to four focus areas: *terra plenus* or “filled land,” negotiating a shared understanding, authority to enter negotiation, and the economic implications of both the context and content of treaty. The contextual analysis based on the inclusion of multiple sources and multiple focus areas reflects the common understanding of treaty at the time of negotiation. As a practice of analysis, the inclusion of multiple sources and analytical focus areas substantiates the possibility of a common understanding of treaty negotiated between the parties that have been framed as opposed in their interests and ideas in and through other treaty interpretations. Further, the findings of this contextual analysis reflect the common understanding of treaty as it was shared between parties at the time of negotiation.

The second and third aspects of the holistic analysis focus on the respective roles of equality of standing and certainty as principles in treaty process and analysis. Both the principle of equality of standing and the principle of certainty are analytically similar as substantive articulations of the integral relationship between the process of treaty negotiation, and the result or end of the negotiation. While the first aspect of the holistic

approach, context, is based on the explicit material and focus of analysis, the next two aspects of the holistic approach do not rely on explicit material in the same way. Instead, as principles, both equality of standing and certainty are part of the process of treaty, a way of reading and understanding treaty, as well as a goal of treaty. As such, they both act as “themes,” raised in analysis of why treaty was entered and the specific content of both Treaty 6 and the contemporary treaty process.

The principle of equality of standing is both a historical practice and an analytical process. As a historical practice, equality of standing is the principle that encapsulates how treaty parties understood each other as they came into the treaty relationship. In short, according to the principle of equality of standing, the difference between parties was not a justification for blanket assumption of inherent Indigenous inferiority. Thus, while the treaty parties were different, difference did not equate to an assumption of justified settler superiority and subsequent policies of forced assimilation. As a practice of analysis, the principle of equality of standing calls for the preservation of the integrity of treaty negotiators in and through analysis. While negotiation parties may have had ulterior motives in negotiating, it was the explicitly negotiated provisions of the common understanding of treaty that are relevant for treaty interpretation. In contrast to the principle of equality of standing as a historical practice and analytic process, the principle of certainty is a goal of both historic and contemporary treaty. As such, the principle of certainty in the holistic approach to treaty is a focus of analysis, enabling both a comparative understanding of treaty, and analysis that considers the relationship between the goal and the process of treaty making. The relevance of certainty is primarily in the manner in which certainty as a goal is achieved. As such, the third portion of the holistic approach to treaty interpretation, which focuses on the principle of certainty, is primarily a comparative analysis in which the process by which certainty is achieved in both historic and contemporary treaty reflects the substantive nature of the treaty negotiation.

The principles of equality of standing and certainty are part of the dialectical relation between the process of treaty making and the product of that negotiation. The dialectical relationship between the process and outcome of treaty manifests as a historical practice to be understood in situ with historic treaty negotiation, and an analytical practice in the holistic method of treaty examination. As a historical practice of the integrated

relationship between the goal of treaty and the practices of negotiation, the method of coming to the treaty agreement informed the agreement itself. For example, the goal of the agreement as an ongoing relationship of sharing delineated the manner in and through which treaty could be agreed upon. In particular, treaty could not have been arrived at through either imposition or threat to the parties as this imposition or forced entrance would negate the common intention of the relationship. Rather, the common intention of treaty was to come to a shared understanding of how the treaty parties could share and take joint responsibility for the land. This end must inform the manner in which the parties came to the negotiation table and reciprocally, the manner in which the parties came to the negotiation process is reflected in the end of treaty. Thus, the process that defines treaty also dictates the goals and end of treaty.

The cyclical nature of treaty making as a relationship between the goals of treaty and the process of treaty making must be mirrored in the analytical process of understanding treaty. The analytical process cannot be undertaken from a static point, beginning or ending with the finite document as a goal of treaty. In contemporary understandings of the numbered treaties, to read the text of treaty as though it expresses the complete relationship assumes that the end goal of treaty was to be a document of sale or cessation of land. Analysis of Treaty 6 that begins and ends with the text of treaty presumes the context of the relationship to be one of domination, and the outcome to be the ceding and surrendering of the land. This assumption reciprocally delimits how the parties can be understood through the negotiation process and eliminates the possibility of contextual analysis informing the common understanding of treaty. Instead, the holistic approach calls for analysis that takes into consideration the relationship between the goal and the process of treaty analysis. As such, both what is studied and the method of approaching that study are interrelated. To reiterate, the holistic approach reflects the relationship between the goals of treaty and the process of the negotiation in the three key areas of analysis: context, the principle of equality of standing, and the principle of certainty. These three focus areas will be explored in the next section.

Context: What is read to understand treaty?

Responding to the problematic framing of treaty as a relationship of subordination or two mutually exclusive versions of treaty, the holistic approach is premised on the continued legitimacy of the common understanding of treaty. There are three aspects of the holistic approach: context, the principle of equality of standing, and the principle of certainty. The first aspect of the holistic approach is the contextual framework of treaty. This is further divided into the material that is analyzed and the focus of the context analysis. With regard to the material, there are three sources that are mobilized in treaty analysis: oral history, first hand accounts, and the text of treaty. Second the focus of the analysis also provides a contextual understanding of the treaty according to four focal points: *terra plenus*, or “filled land,” negotiating a shared understanding, the authority to enter negotiation, and the economic standing of both the context and content of treaty.

Material Included

There are three main sources for the material used in this contextual analysis: oral history, first hand accounts, and the text of treaty. Analysis of multiple narratives does not reflect divergent understandings of treaty at the time of negotiation. Rather, when analyzed, the multiple narratives reveal the common understanding of treaty as negotiated and agreed upon by the treaty parties. This analysis follows with the assertions of Elders in the Treaty 6 area.

The Elders have taken the position that treaty rights, obligations, duties, and relationships cannot be determined solely by reference to the written articles of treaty. The Elders observed that those written terms do not adequately reflect the spirit and intent of the treaties nor the outcomes of the original treaty negotiations. They further point out that some of the written terms distort or misrepresent the understandings arrived at treaty and that the so-called official documents include written terms that were not discussed with First Nations at the time the treaties were concluded (Cardinal 2000, 50).

In the material aspect of the contextual focus of the holistic approach, the common intention of treaty is read through three main sources: oral history, first hand accounts, and the text of treaty. The holistic approach to treaty analysis begins by looking at the oral history of the Elders of the treaty area. Elders in the Treaty 6 area have shared their

knowledge through multiple interviews, and have come together collectively to create a written record of the oral history of Treaty 6 and 7 in the book Treaty Elders of Saskatchewan. This is an extensive and thoroughly examined documentation of the common understanding of the Treaty 6 relationship. While the book includes many different narratives from many different Elders, these histories all indicate a consistent and shared understanding of Treaty. Additionally, Sharon Venne has written extensively on the perspective of Cree Elders on treaty negotiation (S. Venne, *Understanding Treaty 6: An Indigenous Perspective* 1997)(S. e. Venne 1997). Her research has included cultural contextualization of the Treaty 6 text in relation to Cree belief systems and philosophy. She has also spent time speaking with Elders and documenting oral history at the Onion Lake Meeting in 1998.

Second to the oral history, first hand documentation of the negotiation is used for analysis. In the case of Treaty 6, Commissioner Morris's book The Treaties of Canada with the Indians of Manitoba and the Northwest Territories, provides a first hand account and record of the negotiation process. Morris was a government official who was present at the negotiations of the Treaties numbered 1 through 7. At the time of the Treaty 6 negotiations, Morris was an appointed judge in Manitoba as well as the Lieutenant Governor of the North-West Territories. As the Chief Commissioner in the negotiations of Treaties 3 through 7, Morris collected short hand dictations of the negotiation as well as letters pertaining to the context and practice of the negotiations. These writings are a unique insight into the treaty process from the perspective of the Crown negotiators and Dominion representatives. First published in 1880 as a record of the negotiation process, this writing gives a "living" perspective of government negotiators on both the context and the process of negotiation. Including these multiple perspectives enables a richer analysis of the historical and cultural context and content of Treaties 1 through 7, indicative of a common intention of the historic treaties that cannot be read when analysis is limited to the text of treaty. Both the oral narratives and Morris's first hand accounts of the Treaty context and negotiation contrast with readings of the Treaty 6 text as a finite and complete reflection of treaty. As such, the text of Treaty 6 does not reflect the full and final agreement of Treaty, as it was commonly understood. Instead, the text of treaty is an articulation of a particular

perspective on treaty which was shared with the Crown, but not the common intention of numbered treaties as there were understood and agreed upon by all parties.

Finally, the text of treaty is read but not relied upon as the finite and complete understanding of treaty as this leads to a partial or flawed understanding of the relationship, as it was commonly understood. Rather, the text of treaty exemplifies the manner in which the shared understanding of treaty as articulated in the oral history and first hand accounts was later re-articulated to the Crown. As such, indigenous parties were not party to this version of Treaty in the same way that they fully participated in the negotiated common intention. As Michael Asch explains, it is more reasonable to rely on the common intention of Treaty found in the oral history, as this is the interpretation of treaty that was shared by Aboriginal and Settler negotiators, rather than what was re-articulated after the completion of treaty (Asch, 2010). Legal precedent is moving towards inclusion of oral history and supportive documentation in interpreting the Treaty (*Delgamuukw v. British Columbia* 1997). However, the written form of the Treaty remains the prioritized version in Canadian political and legal practice. In disputes over land, mining and oil development, the written version of the numbered treaties is read as a finite and exclusive document of sale. Rather than beginning and ending my analysis of Treaty 6 with the written text, which was the version of the Treaty that was delivered by the negotiators to the Dominion Government and the Queen, the use of Morris's text and the oral history of the Elders indicates a common intention of treaty that is divergent from the written text.

The use of oral history as the starting point of historical analysis is inspired by Michael Asch's novel approach to interpreting treaty. Beginning with the extensive oral history of treaty, Asch argues that the common intention of Treaty as it was understood by the negotiators differs extensively from the written text of the treaty as it was delivered to the Queen. Concerns that the oral history of treaty is an insufficiently reliable form of reading treaty are allayed with the inclusion of other sources and materials. As Asch says, the Elders express an understanding of treaty relationships that are also read in other sources. "Once the degree of agreement between these sources is understood, the evidence for the reliability of contemporary Indigenous interpretations of the common intention will become transparent" (Asch, 9). Beginning with the oral history of the historic treaties should not be construed as a superficial reconciliation of the oral history of treaty with the

assumed, though diminished, priority of the written text. Nor does an analysis of the oral history reinforce or substantiate divergent and doubled versions of treaty by diametrically opposing the text of treaty with the “spirit and intent” of treaty. Looking at the multiple narratives and sources as a reflection of two different understandings of the treaty agreement negates the possibility and necessity to recover the shared meaning as it was negotiated and commonly understood by all Treaty parties. By arguing that there was no agreed upon common intention, treaty as a legal and political agreement is negated. Instead the holistic approach focuses on reading the oral history together with Morris’s accounts of the negotiation and the text of treaty. This tripartite reading reveals the common understanding of treaty shared by the negotiators.

Four Contextual Focus Areas

Further to the three sources of material read to provide a contextual understanding of the treaty negotiation the holistic approach looks at the common understanding of treaty contextually through four key focus areas: *terra plenus*, or “filled land,” negotiating a shared understanding, authority to enter negotiation, and the economic standing of both the context and content of treaty. These four focus areas are key to the inclusion of context as the first aspect of the holistic approach and not only draw on multiple sources but also clarify the manner in which the conditions of entrance into treaty are important to understanding the shared meaning of treaty and the way in which it has been interpreted. In other words, this reading is necessary for analysis of the common understanding of Treaty 6, inclusive of historical practices and the nuances of the relationship at the time. These four focus areas each reveal the treaty relationship in principle, but also speak to the practice of the common understanding of treaty.

The first contextual focus in the holistic approach is *terra plenus*, or filled land. This aspect contrasts with the assumption of *terra nullius*, which presumes legitimate settler jurisdiction as a result of the land being empty upon settler arrival. *Terra plenus* emphasizes the settler and Indigenous understandings of treaty negotiation in the context of the historically present and continued existence of Indigenous and settler political, economic and social systems. This focus asserts that the common intention of treaty was not a practice of colonial imposition of knowledge systems. The history surrounding treaty negotiation as a practice both Indigenous to First Nations, and part of the new and

constantly evolving relationship between First Nations and Settler populations shows the degree to which treaty was negotiated congruently with Aboriginal understandings of treaty as a practice, process, and relationship. Settler negotiation parties entered into a long-standing and sacred relationship with Indigenous peoples. As such, the common intention of treaty does not reflect the imposition of a foreign knowledge system, but a negotiated and shared understanding between the many parties. Given the recognition of present and lasting Indigenous political, economic and social systems, the context in which treaty was entered was based on the mutual recognition of *terra plenus*, or filled land.

Secondly the contextual analysis is focused on evidence and practice of the shared understanding between treaty parties. All negotiators entered into the process of negotiation with the explicit goal of ensuring that all parties understood the process and outcome of the negotiation. The contestation and debate that took place during the negotiation process exemplify the depth of care taken by each party to understand the content of the agreement and the ramifications of the common intention of treaty. As such, debate during the negotiation process reveals the extent to which parties negotiated to come to a shared and mutually agreed upon common understanding of treaty.

The third focus of the contextual analysis is on the authority to enter into treaty negotiation. Specifically, this includes analysis of who entered the treaty negotiation, and what their authority to enter the negotiation was. The authority to enter into negotiation is derived from the population represented by the treaty parties, as well as how the parties recognized each other. In other words, this focus looks at how parties understood each other in the entrance to treaty and through the process of negotiation. The focus on the authority to enter treaty delimits the manner in which treaty can be understood given how the treaty parties were understood both relationally and individually prior to entering treaty, and through the negotiation process.

Finally, the holistic approach calls for an analytic focus on the economic issues contained within and contingent to historic and contemporary treaty relationship. This focus manifests in the context of the treaty negotiations, the content of the common understanding of the treaty agreement and is also an instantiation or practice of the common understanding of treaty. Thus, the economic context of treaty must be read in multiple ways and directions. A contextual examination of the changing economic systems at the time of

Treaty 6 negotiation, which moved from fur trade and mercantilism to more settled practices of agriculture, situates the economic interests and practices within the Treaty negotiation and relationship. The shifting economic practices are reflected in the concerns of all parties involved in the negotiation and the manner in which economic interests were tied into the text and negotiations of Treaty 6. As such, the economic context, and the economic interests of all the actors are articulated in the content of the treaty. The economic focus of the holistic approach reveals shared interests of treaty parties in the common awareness of the unique economic needs as reflected in the content of the agreement. Finally, the economic focus of the holistic approach looks at the economic aspects of treaty as a practice of the common understanding of the agreement. In particular, the explicit provisions for the continued economic self-sufficiency of Indigenous peoples, either through the maintenance of hunting rights or integration into agricultural practices reveals the continued interest in the ability of Indigenous peoples to exist both culturally and economically. The integrated vision of economic and cultural self-sufficiency reveals the degree to which the treaty parties did not recognize the distinction between economic and cultural practices, and thus, intended to protect both.

Integration of economic and cultural interests as an example and practice of the common intention of the Treaty 6 relationship is especially important in consideration of the Canadian legal distinction between economic and cultural rights and practices. While Canada separates economic and cultural rights,(R. v. Van der Peet 1996) in international law economic rights are integrated with cultural rights (Cutler n.d.). This distinction between economic and cultural rights and practices has become a major point of legal and political contestation in treaty negotiation. Views prioritizing the distinction between economic and cultural rights lead to interpretations of treaty based on “frozen rights”, or impose a particular pre-contact conceptualization of Indigenous practices as “authentic” (R. v. Van der Peet 1996). The historic practices of Treaty 6 did not differentiate cultural practices and rights from economic pursuits. Rather, the ability to pursue economic self-determination and self-sufficiency was connected to the cultural integrity and longevity of First Nations cultures, and protected in the numbered treaties. In contrast, contemporary treaty negotiations segregate cultural rights and economic practices, relegating non-subsistence economic activities to the realm of practices that are not authentic to or

distinctive of Aboriginal peoples. In other words, the cultural practices of First Nations are protected, but the economic means to continue practices of cultural integrity and economic self-sufficiency are deemed outside of the scope of political and legal protection. The division between the two is determined largely in relation to the historical imaginary of “pre-contact” and “post-contact,” where practices that are determined to have resulted from contact with settler populations are deemed external to cultural rights. Looking to the distinction between economic and cultural rights in Treaty 6, and asking if they are recognized by either Indigenous or settler negotiators forces a re-examination of the situation and framework of economic aspects of contemporary treaty negotiation. Not only does this question the contemporary division between economic and cultural practices, which is then imposed upon historical contexts, but it also problematizes the need to distinguish between the cultural and economic pursuits in contemporary treaty practice.

Inclusion of an explicit economic focus also addresses some of the issues that arise from reading the common understanding of treaty without an explicit attention to reparative justice as an integral part of the resolution of contemporary Treaty issues. While addressing issues of reparative justice are beyond the scope of this particular study, this does not negate the need to recognize and understand the social and economic issues in historical analysis and examination of contemporary treaty negotiation practices. The term “bivalent collectivity” has been used to describe groups that are “differentiated as collectivities by virtue of *both* political-economic structure *and* cultural-valuational structure of society” (Fraser 1997, 19). Indigenous peoples, as a “bivalent collectivity,” have been, and continue to be, negatively affected by the economic and social decisions rooted in historic treaty interpretations based solely on the text of treaty. The nature of this discrimination necessitates analysis that addresses the economic implications of treaty agreements rather than purely moral, ethical or legal examinations. Because First Nations have experienced injustices across the intersections of social, economic and legal issues, the holistic approach and explicit inclusion of the economic facets of historic treaty ensures that the many dimensions, and the intersections between these issues, may be addressed.

Summary

In summary, the contextual aspect of the holistic approach responds to the problem of reading treaty as a document of sale and surrender by relying solely on the text of treaty,

or reading treaty as two mutually exclusive versions that negate the agreement. Beginning with the foundation of the continued existence and legitimacy of the common understanding of treaty, the contextual aspect of the holistic approach provides the context for the common understanding of treaty. The holistic approach to context considers both the material used in analysis, and the focus of that analysis. There are three sources of material used in analysis: the oral history, the first hand accounts and the text of treaty. Reading these different narratives does not result in different versions of treaty, where differences between parties could not result in a mutually negotiated common understanding of treaty. Rather, these three sources of material reveal the common understanding of treaty as it was understood by all treaty parties. Further, there are four focus areas in this contextual analysis: *terra plenus*, a shared understanding, the authority to enter and the economic interests. Each of these areas may be uniquely examined in relation to the common understanding of treaty and reveals the shared understanding of the context of treaty as well as the common understanding of treaty content and in the manner in which it was intended to be practiced. The economic focus of the contextual aspect of the holistic approach has important ramifications in contemporary understandings of the binary between cultural and economic rights, and the manner in which both were protected in the common understanding of treaty agreements.

Principle of equality of standing: treaty practice and analytic process

The second aspect of a holistic approach to treaty, the principle of equality of standing, is part of the dialectical framework in which the process of treaty is reflected in and reflective of the product of treaty. In other words, the means define the end of treaty making, while simultaneously how the end of treaty is understood reflects upon the practice of treaty making. As part of this dialectical relationship, the principle of equality of standing resonates in two areas. In short, the principle of equality of standing is an articulation of the foundation of a relationship in which parties are understood to be different, but differences do not equate to either hierarchical classification of the parties, or the imposition of value judgements. In other words, the principle of equality of standing maintains both the difference and integrity of parties prior to, and through the commonly understood treaty relationship. It is important to note that equality of standing as practiced

at the time of Treaty 6 is not analogous with equal legitimacy regarding ownership of land. As recognized in the Royal Proclamation, Settlers could only legitimately enter land through treaty with the Indigenous peoples. As such, Settlers entered into the Treaty 6 relationship by asking what Indigenous people were willing to share, rather than assuming blanket settler jurisdiction, land right and title.

In the holistic approach to understanding treaty, the principle of equality of standing can be understood as a historical practice of the treaty negotiation that defines the end of treaty. Second, the principle of equality of standing is also a practice of reading treaty. As both an articulation of the starting point of the negotiation process of treaty and a way of reading treaty, equality of standing responds to the problem of conflating the common intention of treaty as negotiated between party members, and the practices and policies implemented after the treaty negotiation. The conflation of the common understanding of treaty and the policies that followed is problematic because the Dominion Government policy that followed this signing of treaty is incongruent with the shared understanding of treaty.

Analytically, the second aspect of the holistic approach, or the principle of equality of standing, necessitates the distinction between the common understanding of treaty as it was negotiated and the government policies that followed after signing. I am not proposing a revisionist history where the importance of these assimilationist and destructive policies is either ignored or diminished in favour of a relationship oriented solely towards the future. Dominion and Canadian Government policies of over a century represents no less than an attempted ethnocide in the forced assimilation or extermination of the diverse Indigenous peoples in Canada and this cannot be ignored in any understanding of the contemporary landscape of Indigenous and settler relations. Further, narrow and static interpretations of the historic treaties based solely on the written text continue to negatively impact lives and experiences of people in the treaty territories. However, these historic and contemporary policies result from the interpretations of treaty that followed after the signing of most of the historic treaties, rather than the common understanding of treaty as it was negotiated. For example, while the common intention of Treaty 6 reflected a shared understanding and agreement, there was a disjunction between the common intention of the historic treaties and the manner in which the Dominion Government understood the treaties

and then implemented them in policy. When it came to the ratification and implementation process, the subtlety of the agreements as expressed in the common understanding of the treaty was lost or wilfully ignored in the policy through the prioritization of the written text as the singular form of treaty. The lack of regard for the nuanced and shared negotiation of Treaty 6 pervaded Alexander Mackenzie's government, and continues to be reproduced in policy. In 1887, Minister of the Interior, David Mills, expressed objection to some of the provisions of Treaty 6. He declared the provisions for famine relief "extremely objectionable" as these provisions were too generous and were argued to lead to systemic idleness on the part of the Indians. "The treaty text... did not reflect the subtlety of Morris's understanding, and Mills was not inclined to look beyond the literal document" (St. Germain 2009, 104). This tradition of ignoring the negotiated common intention of treaty was long-standing, and arguably continues today. The lack of regard for the common intention of Treaty 6 "took what Canada did for the Crees out of the context of obligation arising from mutually negotiated and reciprocal treaty obligations and put it firmly within Canadian control, to be exercised at Canadian discretion" (St. Germain 2009, 118). Thus, while there was a common intention to Treaty 6, there was a divergence from this common intention when Treaty was brought to the government. In the holistic approach to the common understanding of Treaty, the government policies following treaty should not be conflated into an interpretation of treaty as it was negotiated and shared by the Treaty parties.

This analytical separation of the policies that followed treaty from the common intention of treaty prefaces the second aspect of the holistic approach, or the principle of equality of standing. The principle of equality of standing is doubled. First, equality of standing can be understood as the initial starting point of the treaty relationship, or the process of negotiation that subsequently defined the common understanding of the treaty agreement. Second, equality of standing is also an analytical approach to understanding treaty. Equality of standing has a long history in both principle and practice. In Western thought, it has come through many forms and incarnations, but is articulated explicitly in the third declaration of Article 1514 of the United Nations in 1970, that states, "inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence" (United Nations 1960). The early decolonization movements

after World War II remained closely linked to colonial ideals and preconceptions of difference, especially regarding evolutionary hierarchies and subalternization of peoples. For example, colonial socio-economic and cultural systems remained in place as hierarchically superior to Indigenous cultural practices, and this was understood to be the continuation of imposed colonial governmentality, or colonial elite systems. In contrast, Declaration 3 of Article 1514 is premised on a practice of equality of standing, positing a sharp counterpoint to the differentiation of groups based on a relational monological scale. Rather than measuring differences between peoples according to the relative civilization or hierarchically advanced culture of the colonizers, Equality of standing asserts that relative difference is irrelevant to the denial of independence of nations. This overtly contradicts arguments asserting that peoples are not evolved or too primitive, and therefore, not ready to fulfil the requirements of political life. Instead, there is no metric or measurement system of social progress or development that can be used to legitimately deny the independence of a people. While not explicitly critiquing colonial practices placing peoples in relative hierarchies based on measures in a diachronic teleology, this principle asserts that there is no time and no excuse for the denial of the full political status of people. Thus, while equality of standing in article 1514 does not unequivocally attack the practice of hierarchical relative measurement, such teleological assertions are irrelevant in the discussion, categorization, or independence movements of people.

Equality of standing as a Process of Treaty

As a process of negotiation, equality of standing was the initial starting point from which the Treaty 6 participants entered treaty. During the process of signing the numbered treaties in Canada there was debate over the manner in which the Indigenous peoples in Canada would be understood in relation to the assumed primacy of Western civilization. In particular, there were questions over whether Indigenous peoples should face forced assimilation, or be left alone. While debate at the time of historic treaty negotiation did influence the paternalistic and assimilationist policies that followed after treaty by reinforcing the relative subordination of Indigenous peoples, this was not reflected in the negotiation process of most of the numbered treaties. Rather, based on the theoretical principle of equality of standing, relative difference of treaty parties was recognized and understood, but this was not the basis upon which denial of legitimacy or jurisdiction of

Indigenous peoples could be claimed. Equality of standing in the practice of treaty negotiation was based on acknowledgement that all parties were different, but both prior to and during the negotiation, all treaty parties had equal standing and legitimacy to enter into the treaty relationship.

Equality of standing as a historic practice is exemplified in and through other forms of treaty negotiated across Canada, and the kinship terms that were used in the description of the treaty relationship. Across Canada, treaties signed starting from the time of contact set a precedent in which the principle of equality of standing was a way of entering into relations, as well as a practice of the treaty relationship. For example, the Two-Row Wampum Treaty was agreed upon by representatives of the Five Nations of the Iroquois and representatives of the Dutch government in 1613. Without conflating the circumstances of the numerous treaties across Canada, the philosophical principles are applicable to understanding the starting point of the Treaty 6. Though there are many interpretations of the visual analogy of the Two-Row Wampum Treaty, one version is that the Wampum belt represented the conditions of the specific relationship that was entered by Iroquois and Dutch representatives through the treaty. As a mnemonic device, the imagery of the wampum belt symbolically references two boats, travelling in the same river, but each steering and dictating their own path. The two blue lines on a background of white reflected a philosophy that called for cooperation while the distinction between the parties remained. In this interpretation, the Two-Row Wampum belt is a visual analogy of the complex treaty relationship in which two parties come together in relation, but remained distinct parties, both maintaining rights of self-governance. The Two-Row Wampum belt made tangible the philosophy that asserted the capacity to relate, interact, and cooperate in a spirit of peace and friendship, without conflation or assimilation of the parties or the subordination of one party to another.

Congruent to the relationship of difference based on equality of standing as represented by the wampum belt, kinship relationships are an important theoretical facet of treaty negotiation, and exemplify how equality of standing was understood as the basis for entrance in historic negotiation, and practiced through the negotiation and agreement. Kinship relations are more than the dictation of marriage relations, but also a way of understanding and practicing economic, social and political systems. Kinship terms were

used to express the political relationship that was entered into through treaty. “Kinship terms were used in treaty making for a variety of purposes. Besides determining many of the minor protocols of the council diplomacy, kinship terms were used to define the expected forms of behaviour among treaty partners” (Williams Jr. 1999, 71). The use of these terms mobilized a network of meaning beyond the singular connotation of blood relations. For example, the term “little brother” mobilizes practices of obligation and care, but not subordination. The complex sets of meanings and relationships inherent in the kinship terms employed during treaty negotiation gave deep meaning and context to the relationship itself and laid out relational obligations of the parties to each other. “It is not difficult to understand why Indians of the encounter era relied on the language of connection used within the tribe as a principal method for negotiating treaties with communities at a distance. From an Indian perspective, this language provided a precise method for fixing understandings of rights and duties in a relationship of connection” (Williams Jr. 1999, 71). Thus, the kinship terms were mobilized as a means for both defining the parties involved, and outlining the terms of the relationship, including the interactions and duties of each party to each other. Given that Morris frequently used the terms “brother to brother” in the negotiation practices of the numbered treaties that he negotiated, these kinship terms exemplify the relationship of treaty foundationally premised on the recognized equality between the participants as another iteration of equality of standing in both theory and practice.

Equality of standing as a Practice of Reading Treaty

The second part of equality of standing as an aspect of the holistic approach looks to equality of standing as a contemporary practice of reading treaty. This is further subdivided into equality of standing a way of reading the relational position of the actors as they entered treaty and a way of interpreting the intentions of the negotiators as they entered into negotiation. With regard to the position of the negotiators, upon entering treaty equality of standing as an analytical practice recognizes difference between negotiation parties, but this does not equate to structural hierarchies or inequality in the Treaty relationship. Rather, treaty is understood to be a negotiated relationship between unique parties and differences between parties do not preclude the possibility of coming into a relationship based on the mutual recognition of both agency and cultural integrity. As such, the form of the

relationship is always already based on the assumption of the equal standing of the other party. Further, the treaty parties cannot be understood relationally as either subordinate or ignorant to the “true” meaning of treaty. Given that the common understanding of treaty was shared between negotiators, the parties were all willing and aware participants in the negotiation.

With regard to the intentions of the treaty parties involved in negotiation, equality of standing is the basis for the assumption of the integrity of parties, which substantiates the common understanding of treaty. In other words, the integrity of the negotiators preserves the relationship as it was commonly understood rather than negating the relationship by including ulterior motives of negotiators which leads to two, mutually exclusive versions of treaty. In the analytical practice of equality of standing, it is important not to claim or represent an omnipresent understanding of the thoughts of negotiators. Settler negotiators are often cast as having ulterior motives, or underhanded goals in the negotiation, which substantiates the division between the text of treaty in contrast to the spirit and intent of treaty and reinforces interpretations of Treaty 6 as two mutually exclusive, but equally valid treaties. The intentions of the individual negotiators cannot be made transparently clear by reading historical text, and it is possible that the negotiators of the historic treaties had motives or intentions in agreeing to treaty that were not made explicit in the process of the negotiations. However, the underlying intentions are not as important in this analysis as the explicit intentions that were shared and commonly understood by the treaty participants. In other words, the underlying intentions of the negotiators do not affect the legitimacy of the shared understanding of the common understanding of treaty as it was agreed upon. Thus, while there may be ulterior motives on the part of the negotiation parties, these are not relevant to the common understanding treaty. Instead, the common understanding of treaty, or the meaning that was explicitly shared between negotiators, is the only legitimate form and interpretation of treaty and cannot be invalidated with the inclusion of unspoken intentions of negotiators.

The principle of equality of standing in the intentions of negotiators manifests in the assumption of the status of negotiators. For example, Michael Asch uses the interpretive method laid out by C.J Lamer in the *R v Badger* final decision as part of his method for understanding the common intention of treaty. The *Badger* method has four key points.

First, a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. Second, the honour of the Crown is always at stake; the Crown must be assumed to intend to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. Third, any ambiguities or doubtful expressions must be resolved in favour of the Indians and any limitations restricting the rights of Indians under treaties must be narrowly construed. Finally, the onus of establishing strict proof of extinguishment of a treaty or Aboriginal right lies upon the Crown (R.v Badger 1996).

In the holistic approach to treaty analysis, the second aspect of the Badger interpretive model has explicit implications for understanding the parties and the intentions of coming to Treaty negotiation on the basis of equality of standing. The assumption that the Crown intended to fulfil its promises is foundational in the holistic approach to Treaty 6 as it preserves the integrity of the common intention of Treaty 6 as a valid document of shared understanding. The honest intentions of the Crown negotiation parties are not only assumed on the basis of these legal principles of interpretation, but also evidenced in the oral history of the Elders in the Treaty 6 area, and supported by the Morris writings. Reciprocally, First Nations participants expressed the sanctity of their entrance to Treaty through the Peace Pipe ceremony, and repeatedly express the continued integrity of the relationship both in the historic context, and lasting to today. By assuming that neither negotiation party had the intention to enter into a deceitful relationship, the integrity of negotiation parties is maintained and the common intention of Treaty 6 as a shared agreement is preserved. Given that all the parties entered Treaty 6 with the intention of preserving the sanctity of the practice and the relationship that fell from it, there is a disjunction between the common intention of Treaty 6 and the manner in which Treaty was later interpreted in policy. However, the policy misinterpretation of the common intention of Treaty 6 does not negate the presence of the common intention of Treaty 6 as a shared understanding. The principles of interpretation laid out in R v Badger reflect the principle of equality of standing in the assumption of the good intentions of each party in the negotiation.

Summary

The second aspect of the holistic approach to understanding treaty responds to the problem of conflating the common understanding of treaty with the policies that followed the negotiation. Prefaced with the analytical distinction between the common understanding

of treaty and the policies that followed after the signing, the principle of equality of standing has relevance as both a practice of the relationship, and an analytical process. As a practice of the relationship, equality of standing is embedded in the cyclical relation between the process of the negotiation, and the end of the negotiation. In other words, because treaty was entered based on a relationship of equality of standing, the common understanding of treaty reflects this initial stance and the practice of equality of standing throughout the negotiation. Equality of standing as a process of treaty first assumes the equal standing of parties as they entered into treaty. As such, each party was aware and able to come to an equally negotiated common understanding. Equality of standing was practiced throughout the treaty negotiation, as exemplified by other treaties agreed to across Canada, as well as the kinship terminology used in the treaty negotiation process. Given that equality of standing was practiced in and through the negotiation process of the historic treaty, there is a need to integrate equality of standing into the analytic process of reading treaty. Thus, second to understanding equality of standing as a practice of treaty, equality of standing is also a contemporary analytical process. This is further subdivided into the way that actors entered into negotiation, and how the intentions of actors are read. Equality of standing as a way of understanding how the actors entered into treaty analytically establishes that neither actor was passive in the negotiation process, but all treaty participants had vested interest in coming to the shared understanding of treaty. Further, the unwritten intentions of the treaty parties are not relevant to the common understanding of treaty. Thus, because all parties entered as equals, the unnegotiated or ulterior assumptions and motives cannot be given priority in contemporary interpretations and are irrelevant to the common understanding of treaty. Given this, equality of standing is also an analytical practice that has relevance with regard to understanding the integrity of the participants. Following with the method of reading treaty articulated in *R. v Badger*, the integrity of all treaty participants is assumed, and thus, the only legitimate form of treaty is the common understanding as it was explicitly negotiated.

The Principle of Certainty as a goal of treaty making

The final aspect of the holistic reading of Treaty is the principle of certainty as a goal of treaty negotiation, which then defines the process through which negotiation takes

place. Like the principle of equality of standing, the principle of certainty is divided into two areas of focus. First, is the manner in which certainty is an integral part of the process of treaty, and second, the manner in which certainty is a goal of treaty making. In the analysis of historic and contemporary treaty, certainty is a reoccurring structural concept framing the process of treaty and final treaty agreements. This aspect of the holistic analysis again exemplifies the process of treaty in direct relation to the goal of treaty and, reciprocally, the manner in which the goals of treaty define the process. Structurally and analytically an assumption of the end of treaty informs and delimits the contents and reciprocally, the context and content of the negotiation process frames the end or the product of the negotiation.

Congruent with the dialogical relation between the practice of treaty making and the product of treaty, certainty is a process of treaty making, and a goal to be achieved through treaty agreements. However, it must be made clear that the principle of certainty is not in and of itself being contested. Certainty is a principle present in both historic and contemporary treaty negotiation. While certainty is a primarily contemporary term and practice, reflective of the modern treaty framework, that is not to say that a form of certainty was not practiced in the context of Treaty 6. Further, certainty was and remains a goal that is desired by Aboriginal and Settler negotiation parties, both in the contemporary Treaty process and through the conclusion of the historic treaties. J. Edward Chamberlin writes about the practice of treaty as an evocative practice, which was both a new space, and a space of compromise for Aboriginal and non-Aboriginal parties. “That’s what the treaties were about. Making sure the centre held. Keeping the world on its bearings by maintaining an understanding of the difference between Aboriginal and non-Aboriginal traditions, and a corresponding acceptance of the untranslatable as well as the translatable.” (Chamberlin 1997, 32) What grounded this was the certainty founded upon “keeping your word.” Thus, while historic treaty negotiation did not contain the same desire for certainty as a process of exhaustive definition or a goal, certainty was achieved through the sanctity of the treaty negotiation, symbolized by the use of the Peace Pipe, and by the provision that the treaty was to last as long as the sun was to shine. This is a different practice of certainty, as it is the ongoing relationship that is certain, not the explicit provisions within treaty. However, what must be examined with regard to the principle of certainty is the manner in

and through which the particular vision of certainty has come to delimit the process of negotiation, and the result or goal of that negotiation.

Certainty has come to be a point of contention and analytical debate in the contemporary treaty negotiation process, especially regarding the concept of certainty as a practice, the meaning of the term, and the purpose of its use. In the contemporary context of treaty, certainty tends to be attractive to those representing the Canadian governments interests, while advocates of Aboriginal interests tend to view certainty as an undesirable outcome of the treaty process. As such, the debate over certainty has become emblematic of the conflict within the contemporary treaty negotiation process. As articulated by government parties and in the BC Treaty Commissions literature, in the contemporary treaty negotiation certainty as a goal is achieved through the final and explicit definition of the treaty provisions. Working towards certainty necessitates clarity of the relationship between First Nations and settler communities jurisdictionally and in Rights discourse. It is argued that this form of certainty is necessary in order to build future economic prospects and ensure that business interests are addressed in the negotiation process. Certainty is advocated as the framework in which a “better” future for all Canadians is posited on addressing the nature of the historical relationship in British Columbia without significantly disrupting the status quo of the present. In other words, certainty is oriented to future goals that are congruent and do not disturb present practices. As a concept, certainty both reflects and creates a particular structural relation through treaty that is aligned with the needs of the proponents. In other words, certainty reflects both the preconditions of the framework in which contemporary treaty negotiation is entered, and consequently, creates or structures a particular treaty relationship based on these predefined limits.

As a process, the contemporary practice of certainty is the exhaustive definition of the treaty rights. There was a shift in the use of certainty as a practice after the recommendations of RCAP. Prior to 1991, certainty was achieved by exchanging implicit Section 35 rights, for explicit Treaty rights. This practice was deemed unsuitable to Indigenous participants and so certainty was shifted to the practice of exhaustive definition rather than extinguishment. However, there remains debate as to the extent to which exhaustive definition is functionally different from achieving certainty through extinguishment.

This debate is emblematic of one of the fundamental problems taking place in contemporary treaty negotiation, namely, that the contemporary treaty process is biased to the non-Aboriginal government participants and the interests of the normative majority as opposed to being responsive to the needs of Aboriginal participants. This recalls the earlier structural condition, equality of standing, which characterized the entrance to the Treaty 6 relationship. In a treaty relationship based on the initial recognition of equality of standing as the basis for parties entering into treaty, the procedural damage caused by prioritization of certainty as an example of the continued precedence of settler models of justice would be disallowed. Instead, a framework of relations premised on the initial assumption of cultural equality between the participants would reframe the structural requirements of treaty. In the contemporary treaty process the prioritization of certainty as understood by settler negotiation parties exemplifies the normalization of the particular needs of one group into the assumed universalized needs of all. In other words, the particular concepts of settler legal and social practices are assumed to be universal and thus, imposed as a structural limit to the treaty negotiation. This has implications both in the assumption of certainty as a universal concept and requirement, as well as other aspects of the contemporary treaty negotiation model where assumed structural limits define the nature of the relationship that may take place through treaty.

Andrew Woolford enters the debate on contemporary treaty negotiation with an analysis of the concepts of “Justice” and “Certainty” in relation to the BC Treaty process. Throughout the book Between Justice and Certainty, Woolford works through a series of illustrative binaries. He employs these binaries as a means to demonstrate and understand the complex relations taking place in the process and substance of the contemporary treaty negotiations. In his work, he looks at the manner in which the terms and conditions of both “Justice” and “Certainty” have come to have meaning, and be practiced in the contemporary Treaty negotiation. Woolford argues that the modern-day Treaty process in British Columbia is guided by the goals of moral reckoning or material redistribution in the face of historical injustices. In these negotiations, the twin goals of justice and certainty frame the negotiations in a particular way. He argues that these terms are not ahistorical or unbiased, but rather, carry complex sets of contextual meaning. As such, they reflect and structure the contemporary treaty relationship in a way that reinforces or normalizes the

practices of the majority while continuing to condone violence against the First Nations participants.

Acknowledging the tension between past and future, between the Aboriginal and non-Aboriginal perspectives on contemporary treaty negotiation, Woolford attempts to find the middle ground opened through an understanding and negotiation of the binaries. In his approach, he is looking for the space between justice and certainty, asking if it is possible to have treaty based on a certain future that still addresses the moral responsibilities called for as a result of past relations. Looking for the middle ground in relation to justice, Woolford argues that the procedural model of the BC Treaty process does not have clear substantive guidelines, and thus, prioritizes the political and economic interests of non-Aboriginal Government actors rather than acknowledging the need for a reparative past. As such, the orientation of the treaty relationship is based on the prioritization of the future without need to address the historical conditions of inequality and continues to reflect the needs and structure of non-Aboriginal negotiators. He argues that First Nations communities have been denied on two fronts, both the universal form of justice, and the particular.

In this debate over the schematic and normative power of non-Aboriginal Government representatives, certainty is questioned as a space and practice of “symbolic violence” where the “other” is persuaded to embrace the interests of the dominant groups through particular parameters that have been constructed to demarcate rational action, ways to think, and ways to discuss within a certain context and understanding. In other words, the limits and the framework of the treaty negotiation dictate the form and the product of the relationship that takes place. He claims that the rigid notion of certainty limits the possibilities for justice outside of the rubric designed and controlled by the state. The requirements of the present, as defined by those who hold various forms of socioeconomic power, determine the form of treaty negotiation. As such, the limits of the treaty framework, product and relationship, are predefined by conditions which Aboriginal peoples have no stake in. As such, the ends of treaty are defined by the manner in which it comes to be created.

One example of the limits defined by the power holders is the practice of institutionalization, which is congruent with certainty. Institutionalization is the practice that makes the relationship of treaty both tangible and legal by bringing it into an

institutional context and articulation. Through this practice, treaty as a relationship is placed into bureaucratic and governable institutions, with a legislative code of practice. This is significant because it makes the relationship tangible, in that it is something that can be seen, read and practiced. But in making it tangible in the way that it has, treaty is practiced in particular ways, contingent upon the formation of the institution. In other words, it becomes reflective of the institutions in which it is practiced, the Indian and Northern Affairs Department in particular. As such, certainty has not only become an emblematic point of contestation in the divergent perspective on contemporary treaty negotiation, but has also come to be the means in and through which the negotiation process is structured. Determined by those who hold various forms of socioeconomic power, participants do not enter as equals because the limits of treaty are already set, and treaty as a practice reflects the needs and priorities of these non-Aboriginal power holders. Rather than a relationship that is created as a reflection of the initial premise of equality of standing nuanced with the legal and political necessity to enter into treaty in order to gain legitimate access to land, the contemporary treaty relationship based on the settler notion of the goal of certainty has come to be prioritized as a particular set of principles and practices that predefine the ends of the negotiation.

Summary

The third analytical aspect of treaty, the principle of certainty, responds to the problem posed when coming to understand the purpose of treaty making. In a foil to equality of standing, which is the initiate point from which the process of treaty negotiation begins, certainty is a goal that reciprocally defines the process of negotiation. While certainty as a principle was practiced in historic treaty, the contention over the contemporary use of certainty as both goal and process is based upon the manner in and through which certainty has come to be reflective of the needs of one party over another. In other words, certainty as defined by the settler parties has become the universalized goal that causes procedural damage in the process of negotiation. While certainty is both a process and a goal of treaty making, the association of certainty with settler definitions and practices has come to structure and orient treaty to settler interests while negating the priorities of Indigenous peoples. In other words, the status quo is maintained through the

preservation of certainty as a goal, and negotiations do not create a new relationship outside of this predetermined end.

Conclusion

This holistic approach to reading treaty addresses two problems that are currently present in contemporary treaty negotiation. First, it addresses the issue of reading the treaty text exclusively, resulting in an understanding of treaty as a document of cede and surrender and the subordination of Indigenous peoples to the Crown. The holistic approach also responds reading the text of treaty in direct contradiction of the “spirit and intent” of treaty resulting in two mutually exclusive versions of treaty. Instead, the holistic approach begins from the doubled foundation that is continually asserted by treaty elders. Namely, treaties continue to be present and have legitimacy in the form that they were commonly understood. In other words, the common understanding of treaty continues to hold legitimacy.

From this initial premise, the holistic approach is divided into three distinct aspects: the context, the principle of equality of standing, and the principle of certainty. The first aspect of the holistic approach is the context, which is further divided into two categories. First, is the material analyzed, namely the oral history, the first hand accounts and the finally the text of treaty. The use of multiple narratives does not result in divergent forms of the treaty understanding, but reinforces the common understanding of treaty as it was shared between treaty parties. Second, the contextual aspect of the holistic approach has four focus areas: *terra plenus*, shared meaning, authority to enter and the economic aspects. These four focus areas of contextual analysis not only provide a contextual basis for analysis of the common understanding of treaty, but also exemplify the practices and content of treaty as it was commonly understood.

While the contextual aspect of the holistic approach to treaty provides substantive material and focus for analysis, the next two aspects are not as explicitly focused on material and example. Both the principle of equality of standing and the principle of certainty are instantiations of the dialogical relationship between the process of treaty, and the end of the negotiation. The principle of equality of standing is further divided into two categories of analysis. First, equality of standing is understood in the historical context of treaty negotiation as the initial relationship between parties from which a treaty relationship

was then negotiated. This is articulated in other treaties across Canada, as well as through the use of kinship terminology. However, equality of standing is also a practice of treaty analysis. As a practice of analysis, equality of standing presumes that parties were active participants in the negotiation process, and as such, came to a shared understanding. Given this, the implicit or “dark dealings” of treaty parties that were not explicitly shared and understood as part of the negotiation are not relevant to the common understanding of treaty. Equality of standing provides the basis for analyzing treaty that preserves the integrity of both parties. Again, this negates any implicit intentions of treaty negotiators in favour of the explicitly agreed upon common intention of treaty.

The third aspect of the holistic approach is the principle of certainty. In contrast to equality of standing, certainty is a goal of treaty negotiation that informs and structures the process of the negotiation. While certainty as a process and goal is not being negated as a principle in both historic and contemporary treaty relations, the manner in which contemporary practices of certainty are defined and linked to the process of negotiation has become problematic. The prioritization of certainty in a form that is defined by the settler power holders has come to delimit treaty negotiation in accordance to the needs of settler parties. In other words, it has universalized the particular needs of settler parties and the universal goal of treaty negotiation.

Combined with the initial premise of the lasting legitimacy of the common understanding of treaty, these three aspects of the holistic approach look to a new understanding of the treaty process and negotiation that considers multiple narratives and aspects of treaty. At heart, this approach asserts that there was a common understanding of treaty. Thus, the holistic approach to reading Treaty 6 leads to an understanding of Treaty 6 that preserves the integrity of all parties, and reads the treaty relationship as a single shared agreement, fully negotiated, and mutually understood.

Chapter 2: Treaty 6

The holistic approach to reading Treaty 6 begins from the dual foundation that Treaty 6 has continued legitimacy in the form that Treaty parties mutually understood it at the time of negotiation. As such, this approach responds to contemporary contestations of Treaty 6 that are based on the doubled problem of treaty interpretation as either a document of subordination and sale, or two mutually exclusive versions of the treaty. This analysis is tripartite. In the first section, the context of treaty will be examined, with particular reference to *terra plenus*, coming to a shared understanding, and the authority to enter into treaty. The second section will look at the reasons why negotiation of treaty took place. This section is based on the holistic approaches' explicit inclusion of economic interests in contextual analysis, and includes analysis on the principle of equality of standing in historic context and analytic practice. The final focus of the holistic approach to Treaty 6 will look at the content of Treaty 6, with explicit reference to the sacred relationship negotiated, the longevity of that relationship, and the concept of sharing understood in treaty, as opposed to "cede and surrender." The principle of certainty as articulated in the historical content is explicitly examined and exemplified throughout this section. Additionally, the principle of equality of standing is examined in the content section of Treaty 6 analysis, based on how a relationship of sharing was agreed upon by all parties.

The area of Treaty Six extends across the central portions of present day Alberta and Saskatchewan. The Indian inhabitants of this area are mainly Cree with some Assiniboine, Saulteaux and Chipewyan peoples. When the Treaty was signed in 1876, there were no provinces, however, in current geographical terms, Treaty 6 extends from Alberta through Saskatchewan and into Manitoba. It comprises more than 260,000 square miles, and the Federal Government recognizes fifty-two First Nations communities in the area. Treaty 6 was negotiated and signed in two main locations. There were two signings at Fort Carleton on August 23rd and August 28th, and then a third signing at Fort Pitt on September 9th. At the negotiations in Fort Carleton, more than two thousand men, women and children gathered to take part in the process, representing just a fraction of the population of the prairies. The first signing of Treaty 6 took place in 1876, however, bands continued to sign into the Treaty all the way to 1956 and 1958 with the signing of the Cochin band.

The negotiations that took place as part of Treaty 6 were congruent with a longstanding tradition of settler and Indigenous relations negotiated through treaty. Between 1871 and 1875, the first five of the numbered Treaties were signed. These Treaties were also negotiated under Commissioner Morris, who was the chief negotiator for Treaties 3 through 7. Though predated by the Robinson Treaties and the Peace and Friendship Treaties with the MicMaq, the numbered Treaties were unique in that they contained more explicit provisions and articulated a relationship based on explicit sharing of land and resources. This is in contrast to the relationship of co-existence articulated in and through peace and friendship treaties.

In the Treaty 6 area across Northern Alberta and Saskatchewan, a range of contemporary debates over recognition of Indigenous rights, the forced placement of Indigenous peoples onto reserve, policing practices, health care and subsurface mining rights are related to interpretations of Treaty 6 as documents of surrender. The courts have been largely silent regarding treaty interpretation. However, issues such as water rights, and mining practices remain related to treaty interpretations (Statt 2003)(Chopra 2007). The policy interpretation of Treaty 6 relies solely upon the text of treaty as a legally binding document. This interpretation of treaty reads the relationship in a light favourable to the power holder, namely settler society and the provincial and federal governments. Relying solely on the text, Treaty 6 is read as a document subordinating Indigenous rights beneath Crown assertions of sovereignty while exterminating Indigenous land claims. These text based interpretations rely heavily on the term “to cede and surrender” as the most important treaty provision. Contemporary contestation of reliance on the text of treaty seeks to include the “spirit and intent” of Treaty 6. This response to a singular reading of the text of treaty often relies on conjectures of dark dealings and purposefully misleading negotiations to negate the validity of the text of Treaty 6 as a document of sale. However, the argument that there were two distinct versions of Treaty 6 as understood by two distinct parties negates the possibility of a mutually understood relationship between treaty parties that is coherent with the original intent of the negotiators. This assertion of two mutually exclusive versions of treaty counters the continued assertions of the continuing existence and legitimacy of Treaty 6 by Elders.

While I will not disagree about the variety of perspectives that came to the Treaty negotiation table, the holistic approach to understanding treaty argues against the assumption that multiple perspectives rendered the historical treaty incomprehensible or incompatible to particular cultural understandings. In other words, Treaty 6 was not an irresolvable or a misinterpreted product of cross-cultural incomprehensibility. Instead, not only was Treaty 6 the product of a conversation between treaty parties, but the Treaty was a practice of complex cultural negotiation in which the perspectives of all parties were mutually understood.

As such, the holistic approach to Treaty 6 begins from the premise that there was an agreement reached between parties in the form of the common understanding of Treaty 6. This understanding of Treaty 6 follows with the three aspects of the holistic approach, the context, the principle of equality of standing, and the principle of certainty. While the context of treaty is explicitly analyzed through the holistic approach, the principle of equality of standing and the principle of certainty are both more obliquely read by looking at the reasons to enter into treaty, and the content of the common understanding of treaty.

Congruent with the “context” aspect of the holistic approach, there are three sources of material employed in interpretation of Treaty 6. Beginning the holistic approach to Treaty 6 with the oral history of Treaty 6 reveals a different conceptualization of a relationship than articulated in the text of Treaty 6. Sharon Venne, a Cree academic, has conducted extensive research, recording and analyzing the oral history of the Treaty 6 area. Much of her research is further supported by the oral history recorded in the book Treaty Elders of Saskatchewan. This book is a detailed and thoughtful work articulating the oral history, and clarifying the common intentions of Treaty 6. Treaty 6 as articulated by Elders is further reinforced by the work of Commissionaire Morris. Commissionaire Morris wrote extensively about the Treaties that he was involved with settling. His book The Treaties of Canada with the Indians of the North-West Territories included letters that were written prior to the negotiations, which give further context of the treaty negotiations from the perspective of Crown representatives as they entered Treaty. Further, he extensively documented the actual process of Treaty making with the Indigenous peoples. This included an account of the ceremonial practices, as well as the various demands that were entertained by the negotiators and the shorthand dictation of the proceedings. Ensuring that

the material read as part of the interpretation process of Treaty includes the multiple perspectives and is not reliant on the static text of Treaty reveals the complexity of coming to a holistic understanding of Treaty 6.

When undertaking this analysis of multiple perspectives, I am not attempting to homogenize the narratives that have come to give meaning to Treaty. Instead, by reading context into the practices and positions of Treaty, I am looking at Treaty 6 as a product reflecting the historical conditions and relations in which it was created. Treaty 6 is a document of negotiated understanding between the parties and must be understood as such. Despite the debate over contemporary Treaty 6 interpretations, these conflicts are a reflection of a complicated history, where different positions have interpreted Treaty 6 according to the prioritization of particular philosophies and understandings. These contemporary interpretations of Treaty are often loaded and partisan, and reliant both on divergent philosophies and different histories. However, given that Treaty 6 was a negotiation of different philosophies I endeavour to find a reading of Treaty 6 that reflects the shared understanding at the time.

This holistic interpretation results in a more nuanced understanding of Treaty 6 in which Treaty is a living document of shared understanding. Analysis of the context, the reasons for treaty negotiation, and the content of treaty, through the holistic approach, enables new readings of the Treaty based on the common intention as it was mutually understood and agreed upon in 1876.

Context of Treaty 6

“Terra plenus:” negotiated sharing

Interpretation of the treaty documents that rely on the settler interpretation of treaty, or the text of treaty only, also rely on the prior assumption of the superiority of settler social, economic and political systems. In contrast to the concept of *terra nullius* or empty land, which is part of the justification for settler occupation and assumption of jurisdiction, *terra plenus* asserts that Settlers entered into “filled lands.” As such, the context of Treaty 6 according to the holistic approach reflects the mutual recognition of the existence of Indigenous political, economic and social institutions, and subsequently, the negotiation of a new relation that takes place given this context.

Despite some characterizations of pre-contact North America as a vast empty land where interactions between autonomous and isolated groups was based in outright war and conflict, this is not an accurate understanding of either pre-contact North America, or the years leading up to Treaty 6 (Flanagan 2000) (*Delgamuukw v. British Columbia* 1997) (Borrows, *Sovereignty's Alchemy* 1999). The assumption that treaty took place in political and social vacuum, where the European system of governance and legal authority took automatic precedence over an undeveloped Indigenous legal and social system encourages and substantiates racist and ethnocentric understandings of the historical context of Treaty, and influences contemporary practices of making and interpreting Treaty. Basing interpretation of Treaty 6 on the premise that Indians were primitive savages without any form of social organization reinforces the justifications for past and present occupation of land and practices that continue the subordination of Indigenous people both in Canada and globally. These assumptions of inherent primitivism are summarily false. “Far from being the romantic and wild raiders of the plains, the Cree and other natives of the plains were engaged in a series of well-structured, inter-tribal relationships which were designed to ensure their security, to assist them in meeting the challenge of plains existence and to facilitate the acquisition of the good things of the world” (Milloy 1988, xiv). The holistic approach to Treaty 6 recognizes that all parties understood the prior existence of settler and Indigenous political, economic and social systems.

The Government and First Nations representatives did not enter Treaty talks in a context that was completely devoid of political and legal practices. Rather, both Settlers and Indigenous peoples entered into a rich political and international system of relations that was recognized by all parties. As such, the Treaty relationship was not entered through the imposition of a settler political relationship upon the cultural blank slate of primitive Indigenous peoples. Rather, “the early treaty process was but a part of the larger set of intersocietal encounters, some friendly, others hostile, through which Aboriginal and non-Aboriginal participants generated norms of conduct and recognition that structured their ongoing relationship” (Macklem 2001, 137). Treaty was a well-known concept across pre-contact North America. Prior to European contact, the Treaty 6 peoples had long used treaty as a way of practicing their existing relationships, and building new relationships

with peoples both within and outside of the Treaty 6 territory. Entrance into the lands of other nations was long attained through Treaty.

The tradition of Treaty making with European newcomers also has a long history in Canada. At the time of the numbered Treaties, there was a long history of Treaty making between Indigenous and settler populations, beginning before the Royal Proclamation of 1763. Thus, treaty practices undertaken in Canada, known as the historic Treaties between 1763 and 1923, reflected the complicated and deeply rooted relational system already practiced between First Nations, and between Aboriginal and Settler. According to Fournier, written in an 1874 report regarding the land act, “there is not a shadow of doubt, that from the earliest times, England has always felt it imperative to meet the Indians in council” (Berger 1991, 144). Aboriginal peoples have not forgotten the implications of the long history of treaty in Canada for both understanding the historic Treaties and the ramifications for contemporary practice. As Les Healy stated in his RCAP testimonial:

The concept of treaty, *inaitisinni*, is not new to the Blood Tribe. *Inaistisinni* is an ancient principle of law invoked many times by the Bloods to settle conflict, make peace, establish alliances or trade relations with other nations such as the Crow, the Gros Ventre, the Sioux, and, more recently, the Americans in 1855 and the British in 1877. *Inaistisinni* is a key aspect of immemorial law, which served to forge relationships with other nations. *Inaistisinni* is a sacred covenant, a solemn agreement, that is truly the highest form of agreement, binding for the lifetime of the parties. So solemn is a treaty that it centres around one of our most sacred ceremonies and symbols, the Pipe.

Despite the already well-established political and legal structures Indigenous to the Treaty 6 area, after first contact with settler cultures, the time leading up to the first signing of Treaty 6 in 1876 was characterized by changes in the political, social and economic climate of the area. The Cree first made contact with Settlers in the 1640s and within 30 years most First Nations in the Treaty 6 area were in contact with traders and fur trappers, or were participating in the fur trade actively themselves. During the 1700s the plains economy shifted greatly with the increased availability of the gun and the horse. The fur trade built up along long-standing and deep connections between different Indigenous nations while also forging new familial ties and opening the space for cultural and linguistic exchange

and understanding. By 1772, Cree were making buffalo pounds on the plains to draw buffalo into large corrals to be slaughtered for sale and trade. This extensive meat-trading network took advantage of the new trade networks with settler populations as well as working along the Indigenous trading networks, such as the Cree with the Mandan-Hidatsa (Milloy 1988, op. cit.:47).

In and through these new economic practices and interactions, settler negotiation parties were forced to confront stereotypes of Indigenous peoples as “savage” and “barbarian” with the reality of the highly organized groups and political organizations that they found. Reciprocally, Indigenous people also addressed their legal norms and practices in the face of an increasingly changing dynamic world and interactions with newcomers. Robert A Williams uses the term “jurisgenesis,” as explained by Robert Cover in his article “Nomos and Narrative” to explain this dynamic era of interaction. Cover explains “jurisgenesis” as a time of interaction and reciprocal sharing of meaning. “Jurisgenesis” results in the negotiation of new legal and normative practices. The settler and Indigenous parties were coming together to define a *nomos*, or the normative world that they would share. “This world was held together by the jurisgenerative force of the common interpretative commitments to a law created and shared by the different peoples of Encounter era North America” (Williams Jr. 1999, 28). Following in the long tradition of cooperation and economic interaction, Treaty reflected the needs of both parties to understand and negotiate with the other. Thus, neither party entered into the negotiation with the presumption of *terra nullius* or empty land. The land, and the peoples who occupied the land, were recognized as having long standing political and economic systems, and longstanding relationships with each other. Thus, the context of the negotiation took place in *terra plenus* or filled lands and the treaty relationship was based first on the negotiation of pre-existing political, economic and social systems in reconciliation with the continued and new interactions between Indigenous and settler peoples. All parties recognized this as they entered into negotiation and resulted in the “jurisgenerative” negotiation of a new relationship.

Shared Understanding

Given that treaty was entered in the context of *terra plenus*, and had to include a “jurisgenerative” process in the negotiated creation of a new relationship between Settler

and Indigenous peoples through Treaty, the negotiation parties that came to the table each approached the practice of Treaty from their own perspective. However, in the case of Treaty 6 this did not mean that the negotiations were incomprehensible or premised on deceptive practices. In contrast, coming to a shared understanding of treaty was an explicit goal of treaty making. The process of coming to that shared meaning is exemplified through the contestation and negotiation of meaning that took place. The debate over meaning and the reluctance of some Chiefs to sign onto treaty represents the degree to which all parties were intensely aware of the process of negotiating the shared meaning of the common understanding of treaty.

According to Commissionaire Morris's writings, Mr. McKay, a translator who worked for the Treaty Commission, spoke to the Indian party with the intention of asserting the need for clarity and transparency in the negotiation. He states that there was no intention for deception in the negotiation but asserted the need for each party to understand the perspective of the other.

“Before we rise from here it must be understood, and it must be in writing, all that you are promised by the Governor and Commissioners, and I hope you will not leave until you have thoroughly understood the meaning of every word that comes from us. We have not come here to deceive you, we have not come here to rob you, we have not come here to take away anything that belongs to you, and we are not here to make peace as we would to hostile Indians, because you are the children of the Great Queen as we are, and there has never been anything but peace between us. What you have not understood clearly we will do our utmost to make perfectly plain to you" (Morris 1880, 1971, 131).

Given the complex economic, political and social relations that defined the interactions between Indigenous people and settler populations, to think that the practice of Treaty was either one-sided, or an imposition of one party upon another is analytically flawed. Further, arguing that Treaty misunderstandings are based solely on cultural miscommunication resulting from entirely incompatible settler and Indigenous perspectives does not take into account the long history of interaction and cooperation between Indigenous and settler populations. Instead, interpretation of the Treaties must take into consideration that this was a novel time for all participants, and thus, Treaty was a negotiated understanding of the relationship fully agreed upon by all parties. Attempting to read Treaty solely through

either Indigenous or European philosophy cannot reflect fully upon the relationship, or provide an understanding of Treaty 6 as an ongoing function and practice of those relations. Nor do these divisive readings acknowledge the unique situation in which these Treaty agreements were settled, namely, that it was a new relationship being formed through Treaty, and that this relationship was based on both parties coming to a shared understanding of the needs of each other, not deception or the prioritization of one party over another.

This lack of deception and the importance of the shared understanding are evidenced in the shared symbolic systems used in the Treaty 6 negotiation process. “At the treaty negotiations, Crown representatives used symbolism in a calculated manner making sure that it was clearly, plainly visible to the Indian nations... The Elders as well use these symbols to augment their understanding of the treaty relationship and to teach about the character and nature of that relationship” (Cardinal 2000, 55). Sharing of a symbolic system was not an act of displacement or subordination of one system to another. Rather, it reveals the attempts on both sides of the negotiation to clarify the meaning of the relationship to all parties. This use of these symbolic systems did not displace other knowledge systems, but rather, revealed the commitment of both parties to building and protecting the common intention of the Treaty relationship. As such, Treaty 6 should not be read as an example of wilfully misleading the Indigenous peoples on the part of the Crown negotiator, or an example of irreconcilable cultural differences.

However, coming to a shared understanding is not to say that there was no disagreement between the treaty parties during the negotiation process over the Treaty content and implementation. These contestations can be read as a reflection of the seriousness in which parties undertook the negotiation and the shared responsibility of negotiating a meaning comprehensible to both parties, rather than imposing or assuming the precedence of one meaning. Big Bear, one of the Cree leaders, was critical of the Treaty 6 negotiation process both during the negotiation and following the signing. Though he was present at the negotiations in 1876, he, as a representative of his people, did not adhere to Treaty 6 until well into the 1880s. Regarding the entrance into Treaty, Big Bear wanted to ensure that the relationship was based on transparency, rather than bribery, and each party

was recognized as equals to one another. According to Morris's writings on the negotiation process:

"I found the Big Bear, a Sauteaux, trying to take the lead in their council. He formerly lived at Jack Fish Lake, and for years has been regarded as a troublesome fellow. In his speech he said: "We want none of the Queen's presents; when we set a fox-trap we scatter pieces of meat all round, but when the fox gets into the trap we knock him on the head; we want no bait, let your Chiefs come like men and talk to us." These Sauteaux are the mischief-makers through all this western country, and some of them are shrewd men" (Morris 1880, 1971, 105).

Big Bear's concern about acts of bribery reveal a nuanced and forward thinking understanding of the potential motives of both parties for entering into Treaty. He expressed concern over the manner in which Treaty was framed to Indigenous peoples that would mislead them into unforeseen constraints such as restricting the freedom of Indigenous peoples. By addressing the settler negotiation party with the request to come as "Chiefs" Big Bear was requesting a relationship of equality and transparency between the partners. Using this term of address not only symbolically exemplifies the relationship as it was understood by Indigenous negotiators, but also reveals the seriousness of the Treaty given the authority reciprocally recognized by of all parties to negotiate.

While Treaty 6 was an example of a negotiation to come to a shared understanding, there were some issues that remained questionable as a result of mistranslation between the Aboriginal and the Crown negotiators. In one of the more famous stories coming from the Treaty 6 talks, and an example of the problems of cultural translation, Big Bear also expressed concern that he would be "hung" as a result of signing the Treaty. Morris interpreted this as a fear of being punished, or literally being hung by the Crown.

"The Bear said, "Stop, my friends. I never saw the Governor before; when I heard he was to come, I said I will request him to save me from what I most dread hanging; it was not given to us to have the rope about our necks." I replied, that God had given it to us to punish murder by death, and explained the protection the police force afforded the Indians. Big Bear still demanded that there should be no hanging, and I informed him that his request would not be granted. He then wished that the buffalo might be protected, and asked why the other Chiefs did not speak (Morris 1880, 1971, 119).

While this was taken to be the literal act of hanging when translated to Commissioner Morris, it has also been argued that Big Bear was using these terms as an analogy to the noose around a horse's neck (S. Venne, *Understanding Treaty 6: An Indigenous Perspective* 1997). The analogy to horse training symbolically reveals Big Bear's concern over the degree to which Treaty 6 would restrict the freedoms enjoyed by Indigenous peoples rather the terms in which corporeal punishment could be carried out. Big Bear was attempting to symbolically represent his concerns in a manner that would be understood to both parties. Read in congruence with the analytical process of equality of standing, this debate reveals the degree to which Aboriginal negotiators were not naïve in their entrance to Treaty negotiations, and Treaty 6 cannot be read as such. Rather, Big Bear exemplifies a nuanced understanding and concern regarding the limits of the Treaty implementation. Explicitly, he was concerned over the degree to which Treaty would come to be a relationship of subordination and domination. To address these concerns, provisions which were to restrict the Crown government from coming onto reserve lands and maintenance of traditional ways of life were meant to prevent the exploitation of Indigenous peoples and lands.

The explicit prioritization of coming to a shared understanding of the treaty negotiation by both McKay and Morris reveal the manner in which coming to a shared understanding was an explicit goal of the treaty negotiation. Read in congruence with the analytical practice of equality of standing, the debates that arose during the negotiation process reveal the degree to which all parties understood that this was to be a shared understanding. Contestation and debate during negotiation does not indicate the cultural incomprehensibility between negotiators, but instead, reflects a deep engagement with the process of coming to a shared understanding of treaty.

Authority to Enter

The third focus of the contextual analysis in the holistic approach calls for an understanding of who the treaty parties were, and how they understood each other relationally. In particular, there is a focus on the authority to enter into the treaty negotiation. This authority to enter into the negotiations works in two ways. It is the authority to enter granted by those who are being represented, but also the manner in which the authority was recognized in relation to other parties. The focus on the authority to enter

into treaty is an instantiation of the principle of equality of standing as it was practiced at the time of Treaty 6 negotiation. The inclusion of understanding the authority to enter into Treaty into the holistic approach, not only gives context to who was conducting the negotiations, but also reveals the limits of the understanding and implementation of Treaty. In other words, the actors who entered into Treaty defined the manner in which Treaty can be understood and practiced, specifically with regard to the “sale” of the land.

Representing the Crown, the key negotiator was Commissionaire Morris, who had experience negotiating Treaties 1 through 5 already. At the time of Treaty 6, he was the Lieutenant Governor of the Northwest Territories, and in his negotiating capacity was considered a representative of the British Crown. As such, he had a dual role, alternating between the authorized representative of the Queen and British Crown interests, and representative of the Dominion Government of Canada. This is a complex positioning in which the Morris’s power as a representative of the Government of the Dominion of Canada was derived directly from the Queen. Thus, though the Government of the Dominion of Canada was party to the negotiation of Treaty 6, the authority to negotiate remained vested with the Queen. This has been a structural constraint on both the historical situation of Treaty 6, and the contemporary interpretation of the Treaty practices in Alberta. Historically, despite the dual position that Morris had as representative of Queen and Dominion Government, the structural constraint resulting from the power to negotiate residing with the Crown reinforced Morris’s articulation of the relationship between First Nations and the Dominion of Canada as being that of equals. The Dominion Government derived its powers from the British Crown, and the Crown recognized the First Nations as sovereign negotiation parties. As such, First Nations were not understood to be subordinate beneath Crown or Dominion negotiation parties.

The Aboriginal negotiators viewed themselves and were recognized as autonomous negotiators in entering the Treaty relationship. This exemplifies the practice of the principle of equality of standing as the initial point from which the relationship of treaty was negotiated. The practice of equality of standing in relation to the authority to enter into treaty is exemplified in the kinship terminology and practices that Elders use to describe the relationship. “The First Nations concept of family is seen as the organizing conceptual framework through which the relationships created by treaty are to be understood”

(Cardinal 2000, 18). This kinship terminology of “brothers” relates First Nations as equals to Dominion representatives while the phrase “children of the Queen” evokes a relationship of care. In invoking kinship terminology in his address of the negotiation parties, Morris was careful to articulate a relationship that would make the Dominion Government of Canada equal to the First Nations. In his dictation of the Treaty 6 negotiation, Morris began the negotiation with an important introduction.

“My Indian bothers, Indians of the plains, I have shaken hands with a few of you, I shake hands with all of you in my heart. God has given us a good day, I trust his eye is upon us, and that what we do will be for the benefit of his children. What I say, and what you say, and what we do, is done openly before the whole people. You are, like me and my friends who are with me, children of the Queen. We are of the same blood, the same God made us and the same Queen rules over us” (Morris 1880, 1971, 124).

In addressing the First Nations participants as “brothers,” Morris reinforced the understanding of the relationship as one between autonomous equals. Though it can be argued that saying that the Indians were “children of the Queen” is a linguistic phrase representing the subordination of the Indigenous peoples, it was not subordination to the Dominion government. Indeed, in this phrasing, Morris maintains the equality between the negotiators. According to Cree beliefs the Creator instilled the authority to negotiate in the Indigenous nations. The Queen did not give this authority to negotiate to First Nations, but merely recognized it. While acknowledging that Morris’s power to negotiate came from the Queen, the First Nations were recognized, and recognized themselves, as autonomous negotiators because of both the unique relationship to the Creator, and through the kinship terminology employed. As autonomous negotiation parties recognized by the Crown representatives and contingently by the Dominion government, the First Nations were recognized as having the inherent right to negotiate their own Treaties as sovereign and independent nations. The position of Aboriginal negotiators as independent parties to Treaty exemplifies the foundations of a nation-to-nation relationship between the First Nations negotiators, and the Crown representative.

The treaties, through the spiritual ceremonies conducted during the negotiations, expanded the First Nations sovereign circle, bringing in and embracing the British Crown within their sovereign circle. The treaties, in this view, were arrangements between nations

intended to recognize, respect, and acknowledge in perpetuity the sovereign character of each of the treaty parties, within the context of rights conferred by the Creator to the Indian nations (Cardinal 2000, 41).

Given the nation-to-nation relationship, Treaty 6 was not based on practices of relational subordination, but equality. As such, both historical and contemporary readings of Treaty 6 as either a treaty of subordination to the Canadian government, or the relinquishment of First Nations jurisdiction to the Canadian government, are flawed. If Treaty 6 cannot be interpreted as a relationship of subordination understood by either the Aboriginal or Crown negotiators, then a new there must be a new understanding of the common intention of the Treaty 6 relationship.

While the Crown representatives and First Nations authority were relationally and qualitatively equal given this nation-to-nation framework, there is a further complexity of the negotiation authority and constraints on the negotiation outcomes that is original to the First Nations cultures at the Treaty 6 table. The power to enter into a decision or treaty did not rest solely with the Chief of a group. Instead, there was a form of consensus or approval that had to be reached with all the members. Big Bear expressed this need to have solidarity amongst those he represented in his refusal to sign onto Treaty in the first set of negotiations. According to Morris's writings, Big Bear said "I am not an undutiful child, I do not throw back your hand, but as my people are not here I do not sign" (Morris 1880, 1971, 120). Given this, Aboriginal authority to negotiate was understood to derive directly from the people and the First Nations relationship to the land, not as a result of a relationship to the Queen. As such, the Queen merely recognized Indigenous authority to negotiate, and through the treaty agreement Aboriginal people maintained their prior authority to enter negotiation without tying this authority to Crown recognition.

Contextually, the authority to enter into Treaty negotiations deeply influenced the outcome of Treaty, and the way that the common intention of Treaty 6 can be understood. Within the negotiation framework, the relationship between parties was primarily characterized as one between siblings, recalling the principle of equality of standing. Crown negotiators were understood to be representative of the Queen and thus, deriving authority to negotiate from the Crown or the Dominion Government. In contrast, Indigenous

negotiators were mutually recognized as independent parties, and their power negotiation was not tied to Crown acknowledgement.

Summary of Context

In summary, the contextual aspect of reading the holistic approach to treaty follows three focus areas. First is *terra plenus* where each party is understood to have recognized the prior existence of Indigenous political, economic and social systems. As such, the relationship of treaty was not a blanket imposition of settler interests onto the “blank slate” of Indigenous peoples. Rather, there was a negotiation that took place in order to come to a shared understanding of a new relationship. A singular reading of the text of treaty does not represent the multiple perspectives that ultimately negotiated a shared understanding of treaty. The second focus area is the shared understanding. Not only was coming to a shared understanding of treaty an explicit goal of the negotiation, but it was also a process through which the negotiation took place. Debate during the negotiation process does not represent the divergent and incomprehensible positions of the negotiators. Instead, the debates during the negotiation reveal the degree to which coming to a shared understanding was a serious process undertaken by all participants. The final focus of the holistic approach is on the authority to enter, derived both from whom the parties represented, and also, how the parties were understood relationally. The authority to enter not only limits the understanding of treaty, eliminating the possibility of reading treaty as a document of cede and surrender, but is also an instantiation of the principle of equality of standing as it was practiced in the entrance to treaty.

Why Negotiate The Treaties

The second area of this holistic approach to reading treaty looks at the reasons why Treaty 6 was negotiated. While this section includes the political interest in negotiation, it also speaks directly to the economic interests in negotiation. As such, this section of analysis of Treaty 6 draws on the holistic approach’s explicit contextual focus on economic aspects of treaty. However, before the explicit interests of parties in entering into Treaty negotiation is explored, there must be an understanding of the principles of equality of standing and certainty in relation to the reasons for treaty negotiation.

With regard to the principle of equality of standing, this principle is important as both an historical practice, and a process of analysis. As a historical practice, equality of standing is articulated as one of the political reasons for coming into treaty negotiation in that both parties recognized the need to enter into treaty as a result of the mutual recognition of Indigenous jurisdiction. Additionally, equality of standing is the principle upon which both political and economic motives are based. The principle of equality of standing is a means for understanding the differences between parties without placing these differences into a monological scale of reference. In other words, the differences Indigenous peoples and Settlers are recognized, but no party is determined superior or inferior based on the assumed norm of settler jurisdiction. With regard to the motives for entering into treaty negotiation, this indicates that entrance into treaty was based on the need to engage in a relationship between parties, rather than the imposition of the needs and values of one party over another. Analytically, the principle of equality of standing provides and reinforces a reading of the intentions of treaty parties based on the explicit needs of the parties rather than dark dealing or deceitful acts. Equality of standing as an analytical practice negates the assumption that Indigenous parties were somehow blind or ignorant of the full ramifications of the negotiation. Instead, as an analytical practice, equality of standing asserts that the parties were aware of the motives of each other in coming into negotiation. While there may be underlying assimilative intentions on the part of settler policy makers, the relationship as it was negotiated is distinct from these assimilative and destructive intentions of policy that followed from the signing.

The principle of certainty is not only a substantive motive to enter into treaty in and of itself, but also the underlying principle for many other motives for entering into treaty. Both parties recognized the need to come into negotiation for a variety of political and economic reasons, but at the basis of these motives was the recognized need for a stable and ongoing relationship. Neither party wanted conflict in the area, and a certain relationship ensured this. However, in the holistic approach to understanding Treaty 6, the principle of certainty is a negotiated practice. In other words, certainty as a goal was not predefined, but agreed to and achieved through the negotiation. Thus the principle of certainty is a grounding principle woven through many of the motives for entering into treaty.

Understanding the motives for entering into Treaty gives insight into the varying perspectives of Indigenous peoples regarding their needs at the time. It also reflects on the original intent of the Treaty, where the parties were in agreement and in contestation. Analysis of the reasons for negotiation of treaty begins with the premise that all Treaty parties were interested in the conclusion of Treaties and the Taylor Report on Treaty 6, written in 1985, argues that the Treaties were negotiated and concluded faster than the government desired in response to growing Indian pressures (Taylor, Treaty Research Report Treaty Six (1876) 1985, 2). Both the Aboriginal and Crown negotiators had prior precedent for entering into Treaty within their own systems of relations. Additionally to the precedents set for Treaty negotiation, the Taylor Report cites four main reasons for entrance into the Treaty, while a letter written on April 13th 1871 by W.J Christie wrote to discuss four key concerns that representatives of the Plains Cree had raised.

Broadly speaking, these issues can be divided between political and economic interests. Some of the motives for entrance were on the part of Indigenous negotiators, and others were motives for the crown, but many of the issues were shared between participants. The political motives for entrance of each party can be combined into the categories of: prior precedent for Treaty relations, jurisdictional clarification of land ownership, and clarification of the relationship between Indigenous and settler populations to prevent conflict. Economically, the primary concern was the protection of tradition Indigenous life ways given the shifts in Indigenous traditions and Crown negotiators were also interested in the preservation of settler economies and the growth westward. The economic interests of negotiating treaty explicitly reference the degree to which all negotiators understood that economic and cultural interests were entwined. All parties recognized that in protecting the economic practices of Indigenous peoples, in particular, the ability to continue hunting and fishing while also learning agricultural practices, the distinct cultures of Indigenous peoples would also be protected.

Political Reasons

From the Crown's position, there was already precedent for entering into Treaty relations with Indigenous peoples of the prairies as Treaties numbered 1 through 5 had already been signed. However, prior to this, the Royal Proclamation laid out a legal precedent for entering into Treaty as a way of attaining agreement between Indigenous and

Settler populations. The Royal Proclamation was never binding on Indigenous peoples, but instead, dealt with the rules, the framework, and the structure in which relations would take place between the Crown and the Indigenous peoples from the perspective of the Crown. “It was the codification of the norms of customary international law for entering into treaties. International law required that a sovereign enter into formal agreements with another people’s sovereign prior to entering lands occupied by those peoples”(S. Venne, *Understanding Treaty 6: An Indigenous Perspective* 1997, 185). The Royal Proclamation of 1763 had nearly one third of the text devoted to British-Indigenous relations and set the precedent for Indigenous and settler relations based on Treaty. The Proclamation enshrined the protection of Indigenous lands, clearly stating that Aboriginal people had inalienable right to the land. As such, the Proclamation laid out both the necessity for entering into relations given the blanket right of Aboriginal peoples to the land, and that Treaty was the acceptable mode of by which Settler peoples could enter land.

“And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them. or any of them, as their Hunting Grounds”— (The Royal Proclamation 1763 1996).

While the underlying sovereignty of the Crown is assumed, entrance into Indian Territory is only allowable when a relationship is first entered with the Indigenous peoples. This relationship was deemed legitimate both in how it was conducted, and whom it was conducted with. In other words, the legitimacy of the relationship was based in the negotiation of a shared treaty as a relationship between the Indigenous peoples and the Crown negotiators as opposed to Settlers or private citizens.

We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement: but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians... (The Royal Proclamation 1763 1996).

Since the Royal Proclamation, the tradition of Treaty making had been used to establish relations, so as westward settlement continued the conduct of treaty negotiation was a natural extension of this practice. Though the Crown did not see Indian title as the equivalent of ownership, there remained a need to clarify whatever claim the Indigenous peoples had to the land as established through the Royal Proclamation. The government was using Treaty as the means to solidify the Crown's claim to title by legislating the relinquishment of Aboriginal title.

For the Indigenous negotiators, there was a precedent for entering into Treaties with other First Nations in the area as a means of historically gaining access to each other's land and to form binding contracts regarding the sharing of these lands and resources. "Such arrangements were familiar to them and traditionally had been regulated through First Nations law, generally without any conflict. For example, the family and clan trapping, hunting, and fishing territories in the north and existed for generations" (Harrin 1998, 251). Further, The Treaty 6 nations recognized Treaty as a practice that had been pursued between other Nations and Settlers, most recently in the numbered Treaties 1 to 5. Treaty was also a document that recognized the prior Indigenous jurisdiction, and clarified land-sharing agreements between the parties in the area.

While treaty was the form through which both Aboriginal and Crown negotiators clarified relations, Treaty 6 was meant to address specific needs of both parties. In part, the need to enter into Treaty was a result of confusion over the jurisdiction. Indigenous peoples recognized their own claim to the land. "Prior to entering into treaty, the Chiefs requested that the Crown and its Settlers not enter their territory without concluding an agreement. It was the Indigenous peoples who had the jurisdiction in this area and told the Crown that their jurisdiction must be respected" (S. Venne, *Understanding Treaty 6: An Indigenous Perspective* 1997, 185). However, early in 1876, the Aboriginal people had heard that the Hudson's Bay Company had sold lands to the British Crown. The First Nations never acknowledged that the HBC had any jurisdiction over them, nor did they acknowledge that the HBC had the ownership of the land. As such, they could not have the ability to sell it to the Crown. Given that First Nations did not accept HBC claims to ownership, Indigenous jurisdiction was maintained despite the sale of the land. The agreement between the HBC and the Crown was an invalid way of gaining access to Indigenous lands both in the

Indigenous and settler legal systems. Because of the lack of treaty in the Treaty 6 area, there was a recognized need to enter Treaty on behalf of both participants to both recognize prior Indigenous ownership, and clarify the starting point of what was to be new relationship between settler and Indigenous peoples.

From the government's perspective, there was also a need to legitimate and define the jurisdiction over land in order to both define the settler relations to Indigenous peoples and establish legal jurisdiction. "European powers initially saw fit to enter into treaties with Aboriginal people in part to legitimate their claims of territorial sovereignty" (Macklem 2001, 152). This expression of legitimacy also translated into a congruent exertion of legitimate power in the area. Mr W.J. Christie expressed concern over the lack of jurisdictionally clarified control in the area. Referencing laws that were meant to protect the lives of Indigenous peoples, including restriction on the use of strychnine and prohibition of spirituous liquors, he said "that without any power to enforce these laws, it is almost useless to publish them here" (Morris 1880, 1971, 102). Without jurisdictional clarity, there would be no control.

Another motive for entering into Treaty 6 was the increasing pressure of Settlers moving westward. The entrance of new Settlers into traditional territory necessitated the clarification the relationship between Settlers and First Nations, and provisions and protection for both Settler and Indigenous populations. The First Nations were well aware of the threat posed both the increase of Settlers in the region. The Assiniboine Chief was quoted by Morris as saying "My heart as full of gratitude, foolish men have told us that the Great chief would send his young men to our country until they outnumbered us, and that then he would laugh at us" (Morris 1880, 1971, 104) . Aboriginal peoples were not unaware of the encroachment on their territory, and they demonstrated clear jurisdiction over the land in their interactions with the first newcomers. In a letter written by Morris in the time leading up to the negotiation of Treaty 6, he told a story of a land speculator who ran directly into First Nations claiming a right to their territory.

"A few weeks since, a land speculator wished to take a claim at the crossing on Battle River and asked the consent of the Indians, one of my Saulteaux friends sprang to his feet, and pointing to the east, said: "Do you see that great white man (the Government) coming?" "No," said the speculator. "I do," said the Indian, "and I hear the

tramp of the multitude behind him, and when he comes you can drop in behind him and take up all the land claims you want; but until then I caution you to put up no stakes in our country” (Morris 1880, 1971, 105).

Although the settler Indigenous relationship was not characterized by the widespread conflict of the American “Indian Wars,” the need to establish a peaceful relationship through Treaty was intended to prevent these conflicts. The conflict in the United States created a fear that similar conflicts would emerge in Canada, and would not only endanger the settler population, but also prevent the steady development and settlement westward. The Red River Rebellion and the Cypress Hills Massacre was not deeply troubling to the Canadian government as a harbinger of race wars such as the Indian Wars in the United States. However, it was troubling in its impact on national sovereignty and as a potential disruption to Western settlement (St. Germain 2009, 179). Given that other Treaties had already been settled, and noting that there had been a rapid increase in population from miners and other Settlers, Mr. W.K. Christie, officer in charge of the Saskatchewan District, wrote to the government in early 1876 recommending that a Treaty with the Indians of that country be made as it is essential to peace, if not the actual retention of the country (Morris 1880, 1971, 101). In his letter to the Government, W.H Christie wrote that he was “earnestly soliciting, on behalf of the Company’s servants, and Settlers in this district, that protection be afforded to life and property here as soon as possible, and that Commissioners be sent to speak with the Indians on behalf of the Canadian Government”(Morris 1880, 1971, 102).

Conflict was also a concern for Indigenous peoples in the area who were aware of increasing encroachment of settler populations and influenced with rumours of conflict in the Red River area. In his writing, Morris stated that he was aware of the rumours that were circulating amongst the First Nations, and the fear of conflict between settler and Indigenous peoples. Morris assuaged these fears by assuring the First Nations that the troops were for the protection of everyone. “I was aware that they had heard many exaggerated stories about the troops in Red River, I took the opportunity of telling them why troops had been sent, and if Her Majesty sent troops to the Saskatchewan, it was as much for the protection of the red as the white man, and that they would be for the maintenance of law and order” (Morris 1880, 1971, 101). Prior to Treaty, there was no

force of law to protect the Settlers, so provisions had to be made to both provide for the Indians in times of starvation, and protect the Settlers from pillaging. Treaty 6 was the means established to protect all the parties and secure a peaceful relationship. For the part of the First Nations participants, Treaty rested upon their agreement to maintain these peaceful relations with the new Settlers and Dominion Government. Thus, Treaty rested on the First Nations participants continuing to refrain from action in the maintenance of law and order.

Pre-contact, Treaty was used between Indigenous groups to establish a relationship that would allow groups to enter and hunt in allies' lands. The Treaty 6 relationship was meant to clarify the same for the new Settlers, ensuring that all parties were protected and that all involved recognized the unique circumstances of the relationship. This indicates that all the parties involved in the area recognized the value of Treaty to ensure that a peaceful relationship could be pursued. Treaty was a tool to protect both parties by establishing the limits and the terms of the interaction.

Economic Interests

There were also important economic aspects with regard to signing into Treaty. While some aspects of this can be seen explicitly, there are aspects that are only revealed when looking obliquely at some of the practices contingent to the signing of Treaty. First, it's important to understand that Indigenous culture at the time of Treaty 6 did not have the same divide between cultural and economic practices that has been imposed upon them in the contemporary legal interpretations of rights (R. v. Van der Peet 1996) (Borrows, *Frozen Rights in Canada: Constitutional Interpretation and the Trickster* 1997). In other words, economic practices were inherently intertwined with the cultural practices of the time, and thus, both needed to be continued in order for Indigenous peoples to survive in the manner negotiated in the common understanding of Treaty. While the Dominion government was interested in preventing conflict like the Indian Wars in the United States, there was also widespread recognition that the settler encroachment was changing the lives of Indigenous peoples. Though there is some debate as to whether the Indigenous people were actually starving, there was a noticeable decline in the buffalo and thus, a threat to the traditional livelihood of Indigenous peoples who relied on the hunt for their supply of meat and trade goods.

Treaty 6 came at a time that was in deep flux, where “social and ecological changes on the frontier that would permanently alter their economies and social orders” (Harrin 1998, 257). Prior to 1876 the primary interaction between settler and Indigenous populations was in the context of the mercantile system along trade routes. These interactions were largely mediated through highly mobilized traders who moved goods east and west. In reflection of the lack of wild beaver and the decline of buffalo population, these trading relationships were changing and the trade routes were being stressed by the lack of resources. With the increase in settler populations, rather than trade routes, the domestic economy was increasingly sedentary and there were more stable populations that supported increasing agriculture and settled economic systems.

The increase of Settlers to the area in combination with the massive decrease of buffalo and the practice hunting of buffalo as part of trading networks rather than subsistence economic practices, was altering Indigenous life on the plains. These changes were not unknown or unobserved for the negotiators. Both the settler and the Indigenous parties recognized that the situation was economically tenuous for the continued self-sufficiency of all parties. For Indigenous people, the inability to continue to provide a living from the fur trade and continue to hunt buffalo was a pressing reality. For the settler negotiators, the westward spread of Settlers and telegraph and railway lines were of pressing interest. All the parties realized the economic stakes that were at play in the negotiation.

For both parties, these economic concerns were also tied directly to cultural practices, and the ability to continue, or pursue, a particular way of life. Thus, in negotiation, the Chiefs were making requests that would ensure the continued existence and traditional rights of their peoples. Holding back reserve lands meant ensuring the ability to continue hunting and trapping and maintaining traditional cultural practices. However, requests such as care in times of famine, and the requests for being taught agricultural practices exemplify a desire for the balance between living a traditional life, and participating in the actively changing economy of the area. For Indigenous negotiators, the ability to continue to be economically self-sufficient was indistinct from the continued cultural presence of their peoples.

However, the settler policy regarding the changing plains economy had a different orientation. Treaty was necessary to build the settler economic systems westward. For example, Chief Poundmaker was blocking access to Cree lands and restricting the stringing of telegraph lands across the territory. Without a settlement of Treaty, plans for a trans-Canada railroad, and settlement of the area would be stalled (Harrin 1998). However, these interests did not preclude the possibility of economic cooperation or the maintenance of Aboriginal ways of life that were protected as part of the Treaty 6 negotiation. It is at this nexus between common intention of Treaty 6, as articulated through oral history and the Morris accounts, and the subsequent policy practices after Treaty 6 was signed that confusion over settler interpretation of the Treaty becomes important. If a reading of Treaty 6 is conflated with the policies that fell from the Dominion Government in the time following the signing, instead of protecting the traditional practices of the Indigenous people in the Treaty 6 area, the economic policy subversively expressed through Treaty can be read as an economic extension of the philosophies expressed in the Indian Act of 1876. According to Harrin, “The end of the plains economy supported by the buffalo commons fit two dominion objectives: farmers could not occupy plains ranged by buffalo, and Indians could not carry out their nomadic hunting activities on a plains devoid of game” (Harrin 1998, 259). Thus, according to Harrin, the economic interests of Treaty were based in a legalized paternalistic relationship between Settlers and Indigenous peoples and the goal was the eventual assimilation of Indigenous peoples into the new settler economy. Amendments to Indian Policy after 1876 deeply affected the interpretation of Treaty 6 by the Settler government. However, imposing Settler economic systems upon Indigenous peoples was never part of the original understanding of Treaty provisions. In fact, it was expressly invalidated by the protection to Indigenous ways of life and Morris’s promises that “nothing would change” as a result of Treaty. “The Government will not interfere with the Indian's daily life, they will not bind him.” (Morris 1880, 1971, 146) Take the example of the buffalo, and the lack of protection of the buffalo that was integral for the maintenance of Indigenous ways of life. According to Harrin, the absence of buffalo from Treaty 6 was a reflection of Crown intention to force assimilation of Indigenous peoples.

“Unsettling within this whole context is the possibility that the dominion government deliberately failed to take action because it

understood the destruction of the buffalo would force the Indians onto reserves... As in so many critical matters in Indian policy, there is no direct evidence that the dominion government intended to wait idle while the buffalo were exterminated. Yet there can be no doubt that Canadian authorities were aware of the American policy of extermination of the buffalo” (Harrin 1998, 261).

While this may be a valid interpretation of the Dominion government policy, this policy should not be conflated with the conditions of the negotiators at the time of Treaty 6. The provision to protect buffalo represents an important legal and political intersection. While some tribes specifically requested that laws protecting the buffalo be included in Treaty 6, others felt that the inclusion of buffalo in treaty was giving the Crown legal control over something that was not part of their jurisdiction. Asking for government control over the buffalo would be crossing the line into the traditional hunting and fishing rights that were protected by Treaty, but not resulting from Treaty. In other words, it was giving the Dominion jurisdictional precedence over an area that was reserved for Indian control.

The Dominion government did not have the same overt policy as the American regarding the practiced extermination of the buffalo. However, after the signing of treaty Dominion policy reflected an orientation to the assimilation of the Indigenous population into the settler culture by forcing them into certain economic practices. Around the time of the Northwest Rebellion, “the Indian Department had determined that its Indian policy was too expensive and only created Indian dependency, and so it decided to cut rations to starvation levels to force Indians to work as small farmers” (Harrin 1998, 243-244). This economic warfare caused a serious increase in Indian-Settler violence across the prairies and acted as a watershed moment in the Northwest Rebellion of 1880. These shifts in Indian policy served to further destroy Indian way of life. Encouraging cultural assimilation through economic practices through the extinction of the buffalo and the encouragement of farming shifted when the “the complete destruction of tribal economies created a permanent famine, requiring permanent ‘assistance in the time of famine” (Harrin 1998, 252). To further alienate and destroy all economic resilience in the communities, in 1881 the Indian Act was amended to make the purchase of agricultural produce from Indians without a permit an offense. In 1941 the Indian Act was amended again to make it an offence to purchase furs and wild animals from Indians without a permit, again restricting the ability of Indian hunter and trappers to compete or cooperate with non-Indians.

However, these policies must not be conflated to the agreement of Treaty 6 as it was commonly understood. At the time of signing Treaty 6 in 1876, there was explicit recognition of the need to protect Indigenous ways of life that tied economic interests and self-sufficiency with the cultural of Indigenous peoples. Morris, in his own transcripts of the negotiation, repeatedly stressed that Indigenous ways of life, including practices of hunting and fishing, were not to change as a result of signing Treaty. Crown interests in securing jurisdiction over the lands in order to ensure the protection of economic pursuits such as farming and rail lines were not hidden in the Treaty 6 negotiation process. This interest in protecting Settlers and Settler economy, read in congruence with the practices of shared schooling and provisions for farming implements at the request of First Nations, does not reflect these subversive tactics of forced assimilation later attributed to Indian Policy. Instead, this understanding of sharing the land reflected the degree to which all parties agreed upon the connection between the ability of Indigenous peoples to be economically self-sufficient, and to be culturally self-sufficient. In other words, the continued economic resilience was an integral part of the cultural practices, and was protected through treaty. As such, the common understanding of Treaty 6 was a complicated negotiation of what it meant for both parties to share the land, while ensuring that Aboriginal ways of life, including hunting and fishing rights, would be protected. This tied together economic self-sufficiency with the continued cultural practices of Indigenous peoples.

Summary

The second aspect of the holistic approach to reading treaty looks at the reasons to enter into treaty as a means to understand both the process of negotiation, and the goals of treaty. This aspect of Treaty 6 analysis speaks directly to the economic focus of the holistic approach, especially the manner in which economic practices were tied to the cultural practices of Indigenous peoples. This section is based on the initial premise that both parties had reason to enter into treaty negotiation. These reasons can be divided into political and economic reasons. Politically, there was prior precedent for treaty, the need for jurisdictional clarification of land ownership, and clarification of the relationship between Indigenous and settler populations to prevent conflict. Economically, the primary concern was the protection of Indigenous lifestyle given shifts in the economic conditions on the

prairies. The manner in which this interest was represented in the common understanding of treaty as well as the treaty negotiation reveals the degree to which all parties understood the connection between economic self-sufficiency, and cultural practices and independence. In other words, all parties were interested in the ability to continue living independently both through the continuation of traditional life ways such as hunting and fishing, and through new relationships of sharing the land including agriculture. Both the political and economic reasons for entering into treaty reflect the principles of equality of standing and certainty. Equality of standing is both a historic practice, and an analytic process to understand why parties were motivated to come to a negotiated understanding of the treaty agreement. Certainty was a goal of the treaty negotiation process. This goal was not specified or dictated by one party to another, but negotiated throughout the process of treaty making. As such, certainty was not a finite end moment, but embedding in the relationship of treaty itself.

The Content of Treaty 6

The previous two sections of the holistic analysis of Treaty 6 have provided an understanding of the context of entering into treaty. The final section of analysis looks explicitly at the content of treaty given these prior areas of analysis. Again, this section begins from the initial premise that Treaty 6 is a presently valid document as it was commonly understood. Thus, the content of Treaty 6 reflects this common understanding. This section of treaty analysis speaks to the dialogical relation between the goals of treaty, and the manner in which the common understanding of treaty is arrived at as reflected by the principles of equality of standing and certainty. Given that the entrance of Treaty 6 was premised on the founding principle of coming to a shared understanding of the relationship between Indigenous and settler populations and that there was no intention on the part of either party to wilfully mislead the other, exploration of this content will be based on the premise that treaty was a shared agreement between parties. This section emphasizes equality of standing as a way to understand how the parties came into the negotiation of a relationship of sharing. Certainty is emphasized as a goal of the treaty negotiation that was negotiated, and agreed upon by the treaty parties. There are three focus areas to this analysis: Sacred Relationship, Longevity, and Ceded and Surrender vs. Sharing. The first

two speak directly to the principle of certainty as it was articulated historically, and the last looks at the common understanding of the relationship.

Sacred Relationship

To begin an understanding of the content of Treaty, it is important to understand the nature of the relationship mutually agreed to as part of Treaty 6, especially with regard to the mutually understood form of certainty of the relationship. Treaty 6 was a sacred relationship. The sacred nature of this relationship did not begin with the Peace Pipe ceremony, but with the very decision to enter into Treaty as a relationship with Settler peoples. For Aboriginal peoples, Treaty was a sacred part of life, given by the Father as a way of entering into relationship with others. As such, choosing to enter into Treaty was a sacred act on the part of the Aboriginal peoples. “The first principle affirmed by the treaties was the joint acknowledgement by the treaty-makers of the supremacy of the Creator and their joint fidelity to that divine sovereignty. This was in part the meaning of the ceremonies conducted by the First Nations during the treaty ceremonies where they used the pipe and the sweetgrass” (Cardinal 2000, 31). However, the sacredness of the Treaty was also clearly articulated by Morris who participated in the Peace Pipe ceremony affirming the sacredness of Treaty 6, and also regularly referenced “God” as a party to the negotiation. By evoking the term God in his address to the Aboriginal parties, Morris showed that he also recognized the sanctity of the relationship. Thus, all participants shared the understanding of the importance of Treaty as a sacred relationship. As a sacred relationship, the common understanding of Treaty 6 exemplifies a negotiated understanding of certainty. This certainty was not imposed as an end goal of the treaty, but characterized the actual relationship of treaty as the substantive basis for the shared understanding.

Longevity

Given that Treaty was understood to be a binding compact by both parties, the longevity of the Treaty was never in question for the Elders. “Of the many things the government representations promised, he raised his hand in the name of God. The white man would in turn care for the Indians, the children of God. ‘As long as his spirit, the sun, and the river, as long as these two things are moving, that is how long the promises are good for,’ said the government official. Those were their terms of the Queen” (McLeod

1999). The length of time that the Treaty was meant to last has also come under scrutiny and debate as an issue regarding the content of Treaty. The written text of Treaty states that the lands will be ceded and surrendered “forever,” which has been interpreted as the full and final relinquishment of any Indigenous claim to the land. In the oral history of Treaty 6 length of the Treaty is often quoted as lasting “as long as the sun shines, the grass grows, and the rivers flow.” This version is mirrored in Morris’s own writings. According to Sharon Venne, in the Cree legal system, this is not an accurate phrasing in two ways and there is another interpretation of the length of time the Treaty was to last. In her understanding, the Elders did not want to connect Treaty to grass growing because the medicines for the people came from the land, and the Elder’s did not want to give their medicines to non-Indigenous peoples. Second, rivers could change direction or dry up. Instead, Venne argues that it should read that “the Treaty will last as long as the sun shines and the waters flow.” The waters in this context are to be understood as the waters that flow from a woman, meaning that the Treaty was to last as long as Aboriginal women give birth to Aboriginal men. Elder Jim Myo builds on this interpretation by connecting the sacred act of treaty to the ability to continue practices Indian lifeways. “When that is gone, that is a sign that our treaties are gone because our treaties are part of our cultural and spiritual traditions and our Indian laws” (Cardinal 2000, 37). According to Elder Peter O’Chiese, there would be no inclusion in Treaty of items that would threaten the ability to create and perform the Ceremonies of the Peace Pipe. Both the provisions regarding the grass and the rivers, and the exclusion of items connected to the Peace Pipe, maintain the cultural integrity of First Nations participants in the Treaty agreement. Thus, the ability to continue with the culturally congruent care of First Peoples, and continuing to produce new generations is a fundamental aspect of Treaty content.

This does not suggest that Indigenous people did not want longevity in the Treaty contract. Indeed, the rituals that began the Treaty negotiation, and the Elder’s stories at Onion Lake in 1997 indicate Indigenous peoples both desired and expected that Treaty 6 would continue for a very long time. In contemporary discourse, Elders continually assert the validity of the Treaty, as it was a binding agreement between the Crown, themselves, and Mother earth. However Venne’s description of the length of time Treaty was meant to last indicates the terms of the Treaty inherently protected First Nations continued existence

and connections to the land. In other words, it is a more nuanced perspective that continues to protect the cultural and social independence of Indigenous peoples as part of the Treaty terms. Thus, the principle of certainty was woven into the longevity of the relationship. Not only was the length of time the treaty was meant to last tied to understandings of the earth, and the sacred nature of treaty, but certainty was also tied into the protection of Indigenous and settler peoples as distinct parties to treaty.

Cede and Surrender vs. Sharing

The final aspect of analysis of the content of Treaty 6 relies heavily on the two principles of equality of standing and certainty in order to understand the nature of the relationship. The use of the terms “ceding” and “surrendering” as a concept and practice contained in Treaty text is one of the most important and controversial aspects of the Treaty 6 content in historical context, contemporary interpretation, and legal implications.

According to the written version of Treaty 6:

“The Plain and Wood Cree Tribes of Indians, and all other the Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her majesty the Queen and Her successors forever, all their rights, titles and privileges, whatsoever, to the lands included within the following limits” (Treaty 6, paragraph 8).

The presence of these terms in the written text of Treaty 6 has been interpreted as meaning the full and final relinquishment of rights and jurisdiction to the Crown and the government of Canada. However, contemporary debate over the presence and the use of the terms “cede and surrender” does not reflect the nature of the agreement at the time of adhesion in 1876. This section of analysis first negates the reading of Treaty 6 as a document of sale. Second, this reading asserts that the common understanding of Treaty 6 was a relationship of sharing. According to Elder Jimmy Myo, the common intention regarding the use of the land as a relationship of sharing.

“We got no business to give it up, we got no business to sell that land. We got no business to lease that land. We got no business to make any kind of deal on that land, but when the White man came to make a deal with us, the old people knew that we could try to treat them like our own relatives, so that they could use that land at the certain amount of... like Gordon [Oakes] said, the depth of the

plough. That was the only part that they let them use. Other than that, below the depth of a plough was supposed to be negotiated after like he said, but it never was; they never did negotiate that right up to date they haven't done anything. That's why we hear our Elders keep on saying we didn't let the White man take more than this much. That's about six inches, the depth of a plough. We did not give up the land, we did not sell the land. Those are the things that was told to us, by the Elders never to say: we sold, we lease, we give up, anything like that” (Cardinal 2000, 63).

While Elder Myo articulates an understanding of the relationship as one of sharing (which will be explored further), it has been argued that the use of these terms is a result of cross-cultural miscommunication (Taylor, *Two Views on the Meaning of the Treaties Six and Seven* 1999) (St. Germain 2009). The root of this cross-cultural misunderstanding is based in the assertion that the practice or concept of selling the land was unknown to Indigenous cultural experiences at that time of Treaty. However, to attribute contestation over the use of these terms to a matter of cross-cultural miscommunication is not only untrue, but it would also nullify the treaty as a shared agreement between parties. Arguing that there was no Indigenous understanding of the terms ‘cede and surrender’ denies the complexity of Treaty 6 as mutually understood.

This section first looks at the reasons why Treaty 6 cannot be interpreted as a document of sale. This is based on Indigenous peoples full comprehension of what it meant to sell the land, the lack of explicit reference to sale and surrender in the treaty talks, and the lack of reference to sale of land as practiced by the Aboriginal negotiators. Second, this section looks at why the common understanding of Treaty 6 was a relationship of sharing. This section is based on the holistic approach’s focus on the principle of equality of standing as an historic practice. In short, as a historic practice, equality of standing asserts that both parties recognized each other in entrance to the treaty negotiation. Only from this initial space of equality of standing could a relationship of sharing based on a more complex entanglement of parties be founded.

Cede and Surrender

The first reason why Treaty 6 cannot be interpreted as a document of cede and surrender is because Indigenous peoples recognized the concept of sale, but did not recognize it as part of the Treaty 6 provisions. In other words, there was no settler

conspiracy to deceive or trick Indigenous peoples into agreeing to a practice of land surrender that they did understand. Indigenous peoples were not unfamiliar with the Western conception of land sale. The Cree were concerned about the HBC selling the land prior to Treaty 6 negotiations even being entered. Part of the intention behind entering Treaty was to clarify the jurisdiction over the land. Thus, there was an understanding shared between Indigenous negotiation parties of what it meant to lose possessory and jurisdictional rights to the land. After hearing that the HBC had sold land to the Crown in 1870, First Nations expressed concern over this sale. Chief Sweet Grass approached negotiators as early as 1870, saying “I shake hands with you, and bid you welcome. We heard our lands were sold and we did not like it; we don’t want to sell out lands; it is our property, and no one has a right to sell them”(Morris 1880, 1971, 102). Chief Sweet Grass’s statement indicates that there were understandings of what it meant to sell the land conceptually and that the parties involved did not want to sell the land. Thus, dispute over the provision to “cede and surrender”, or the sale of the land cannot be relegated to cross-cultural misunderstandings.

Secondly, the Morris transcripts of the Treaty 6 negotiation talks and contingent documents conspicuously do not mention “surrender” of the land, nor was the concept explained or mentioned in letters by MacKay, Commissioner Morris or the transcripts of negotiations. The Elders, who say that the concept of surrender or selling the land was never explained reiterate the lack of examination or use of the terms in negotiation. Elders say that in the negotiations, *atawagiwa*, the Cree word for ‘sale’ was never used. Rather, it was repeatedly stated by Morris that the Crown did not come to take anything from the Indigenous people, or change their way of life.

“We have not come here to deceive you, we have not come here to rob you, we have not come here to take away anything that belongs to you, and we are not here to make peace as we would to hostile Indians, because you are the children of the Great Queen as we are”
(Morris 1880, 1971, 131).

As such, sale was never part of the conditions of Treaty. Instead, the opposite, or the continuation of Indigenous lifeways, was constantly reinforced.

Not only was there no explanation of the practice of selling and explicit reference to terms “cede and surrender” as contained in the written record of the Treaty negotiation,

Cree conceptualizations of land ownership only allows cession to take place under certain circumstances. These circumstances and practices of Cree land sale were not present in the negotiation or agreement to Treaty 6. According to Sharon Venne, in Cree culture land cannot be sold for exclusive use because it is Mother Earth and cannot be separated from the people who live on the land. To sell the land would be to sell something that was integral to the Cree nation. You cannot separate the land from the people. Further, the legal and political role of women constrains understandings of Treaty with regard to the “sale” of the land. Prioritization of the written form of Treaty 6, and taking the terms “cede and surrender” to mean the transfer of the jurisdictional and possessory rights to the Crown is effectively critiqued when read cogently with the role of women in Cree legal and political life. Women were conspicuously absent at the Treaty negotiation talks on all sides of the negotiation process. In a Eurocentric interpretation, this might be attributed to the role of women in Cree society as being lesser to that of men, or that women lacked the authority to enter into relationships with other parties because they held the same inferior status as non-Aboriginal women at the time. However, Sharon Venne argues that the unique position of women in Aboriginal society, and the conspicuous lack of women at the Treaty talks, indicates how Aboriginal peoples understood Treaty 6. According to Venne, “when Elders speak about the role of women at the treaty, they talk about the spiritual connection of the women to the land and to treaty-making”(S. Venne, *Understanding Treaty 6: An Indigenous Perspective* 1997, 189). The Creator gave women the ability to create life, and as such, women are linked to Mother Earth, and thus, central to land practices. Because of this unique ability to create, men are the helpers of women who sit beside the Creator in recognition of this unique power. According to these legal practices, when women remained absent from political discussions, Indigenous possessory and jurisdictional authority over land was not in question. In other words, the absence of women meant that relinquishing authority over the land was never part of the Treaty 6 negotiation.

As such, the importance of the role of women in the Treaty 6 negotiation talks has ramifications in the contestation of the “sale” of the land, or the terms “cede and surrender” in the written form of Treaty 6. The implications of the use of the terms “cede and surrender” has meant the loss of jurisdictional and possessory authority for the First Nations party to Treaty 6. However, the role of women in Cree life and the lack of

Aboriginal women in the treaty negotiation process, establishes limits in the interpretation of Treaty as a document of sale or transference of authority. Many arguments against the prioritization of the written version and the “cede and surrender” clause ignore the role of women in Cree life. If the absence of women at the negotiation tables and the importance of women as holders of land claims are acknowledged, the terms of Treaty 6 are necessarily limited.

Thus, given that the Indigenous parties fully understood the concept of land sale, but that the sale, or the terms cede and surrender, were not present in the negotiation, Treaty 6 as it was commonly understood cannot be understood as a finite transfer of the land. Further, Indigenous practices and conditions for the sale of land were not present in the negotiations or agreements of Treaty 6. These three aspects, read in congruence with the assumption of the principle of equality of standing as an analytical practice negating deceitful intentions on behalf of either of the parties, assert that Treaty 6 was not a practice of selling the land.

Sharing

“A thoroughgoing parallelism—tow-row wampum solution—is also unworkable. It would lack staying power as its sensitivity to Aboriginal difference is not matched by an equal concern for the cohesion of the Canadian community”(Cairns 2000, 155).

Rather than a document of sale, Treaty 6 was commonly understood to be a relationship of sharing. The written text of Treaty 6, and the contemporary interpretation of Treaty 6 that emphasizes the clause to “cede and surrender,” articulates an understanding of Treaty 6 as the outright transferral of jurisdictional authority from the Indigenous peoples to the Crown. However, “according to the Elders at the Onion Lake meeting, the leaders in 1876 agreed to set aside the areas outside their reserves for white people to share as they needed for agricultural use” (S. e. Venne 1997, 37). In other words, the land relationship was based on a practice of sharing common lands outside of reserves, not surrendering as was contained in the written form of the Treaty. Thus, instead of the sale of the land, the treaty relationship was based on a complex relationship of sharing in which the cultural practices of each party would be preserved, they would each be able to live off the land and continue to practice their lifeways, but they would also share the resources. According to Elder Jacob Bill, “It was the will of the Creator that the White man would come here to live

with us, among us, to share our lives together with him, and also both of us collectively to benefit from the bounty of Mother Earth for all time to come” (Cardinal 2000, 7).

This relationship of sharing is articulated in three different areas. According to Elders, the Indigenous relationship to the land was tripartite: spiritual, physical and economic and the relationship of sharing with the settler population reflected these three areas as well. With regard to the spiritual aspect, sharing did not mean the conflation of lifeways. Rather, each group would be able to maintain their own distinct practices and relations. According to Elders, the relationship to the land was a spiritual connection and the ability to maintain this spiritual connection was a fundamental aspect to the Treaty 6 agreement. According to Elder Jimmy Myo, “We hear from old people how powerful our spiritual life is, and that's what is going to help us We have to pray like an Indian, believe in our way of life.... When that is gone, that is a sign that our treaties are gone because our treaties are part of our cultural and spiritual traditions and our Indian laws” (Cardinal 2000, 37). In other words, the treaty agreement rests on the ability of Indigenous peoples to continue to practice their spiritual connection to the land. However, this was not an assimilative need on behalf of the Indigenous peoples. The ability of Settler populations to also continue their own practices was also protected. As such, the spiritual connection to the land, in whatever form or practice it consisted of, was shared, but maintained the difference of treaty parties.

Physically, the provisions regarding reserve land were a complicated negotiation of how sharing of physical space would occur. In order to ensure this balance between maintaining Indigenous traditional ways of life while participating in new relationships with the increasing settler populations, Treaty 6 stipulated that some lands would be shared, but other tracts of land were to be set aside and reserved for Indigenous people to live without interruption or intrusion from Settler communities. According to Elder Lazerus Roan, the only land that was included in the treaty talks was the arable land. Indigenous peoples requested reserve lands as a means of protecting their land and culture, and the choice of these land tracts was theirs. This is reinforced in Morris’s dictation of the negotiation where Morris stated, "you can have no difficulty in choosing your reserves; be sure to take a good place so that there will be no need to change; you would not be held to

your choice until it was surveyed”(Morris 1880, 1971, 133). Additionally, Indigenous peoples were able to set aside as much land as they wished for reserve lands.

Reinforcing the spiritual aspect of the relationship to land with the physical aspect, this reserve land was meant to enable Indigenous peoples to maintain their traditional practices while allowing for an increase of Settlers and agricultural development in the area. According to Peter Erasmus, Poundmaker expressed concern over the reserve process. He is quoted as saying, “This is our land! It isn’t a piece of pemmican to be cut off and given in little pieces back to us. It is ours and we will take what we want” (Erasmus 1976, 244). Given these reservations, Morris stated that he addressed his speech according to the fears Indians had expressed, in particular, the belief that First Nations would be forced to live only on the reserves, give up their traditional hunting practices, and be conscripted in war. Morris expressly and repeatedly explained that he, and the Crown government, did not want to interfere with the present way of living, but instead, assist First Nations to begin farming and participate in the burgeoning settler economic systems in the prairies (Morris 1880, 1971, 111).

The economic aspect of the tripartite relationship to the land is closely entwined with the spiritual and physical aspects. From the Indigenous perspective, the physical occupation of reserves was meant to be the means to sustain Indigenous peoples both economically and culturally. “The proposed reserves, guaranteeing some lands exclusively to them, not only offered the prospects of a new economic future in agriculture, but also addressed the unease they had known in the face of unauthorized Canadian expansion into the Northwest” (St. Germain 2009, 107). Through the relationship of sharing commonly agreed upon through treaty negotiation, each party was to be able to benefit from the land in their own ways.

The Elders believed that each of the parties to the treaties wanted to provide the basis upon which their respective peoples would be afforded the opportunity to benefit and grow from the wealth that would be created by their treaty relationship and their agreement to share the land (Cardinal 2000, 62).

There was no explicit intention on behalf of the Crown negotiators to force Indigenous peoples to participate in Settler economies. However, Morris was not unaware of the importance of the decrease of buffalo in the area. He, like the Chiefs, expressed concern

over the ability of the land to continue to provide the resources necessary to maintain Indigenous populations, especially with the decline of the buffalo. Morris “impressed strongly on them the necessity of changing their present mode of life, and commencing to make homes and gardens for themselves, so as to be prepared for the diminution of the buffalo and other large animals, which was going on so rapidly” (Morris 1880, 1971, 111). However, unlike the United States, this expressed concern was not aligned with the destruction of the buffalo as a matter of government policy. Rather, in congruence with Morris’s assertion to not provide continued or day-to-day support to the Indigenous peoples, the self-sufficiency of the First Nations was prioritized in the Treaty 6 negotiation. As such, the agreement over the relationship to the land explicitly included provisions for the spiritual and economic protection of all treaty parties.

The settler representatives did not dictate the mode of this self-sufficiency. Provision of farming implements and hunting tools was not imposed upon the Indigenous groups, but requested by them, indicating that there was always the intention to grow economically together, and interact, but maintain the distinction between the groups. This provision reflects a special understanding of the economic context of Treaty relations.

“The Indigenous peoples wanted to learn agriculture, and the Crown promised to appoint a farm instructor. In order to allow Indigenous people to become self-sufficient in agriculture, the Crown also promised to supply equipment on a yearly basis. Indigenous peoples became so successful at farming that the government of Canada, pressured by non-Indigenous farmers, restricted the sale of Indigenous produce” (S. Venne, *Understanding Treaty 6: An Indigenous Perspective* 1997, 201).

In other words, contained within Treaty 6 were the provisions necessary for Indigenous peoples to come into an economic relationship with settler populations while maintaining their own cultural practices. Morris himself recognizes the willingness of First Nations to participate in agriculture as a means of continuing their independence as a sign of their good intentions. He said that the Indians “did not wish to be fed every day, but to be helped when they commenced to settle, because of their ignorance how to commence, and also in case of general famine” (Morris 1880, 1971, 112). This willingness to take an active role in their own economic interests and livelihood encouraged Morris to include provisions in Treaty 6 based on the protection from famine and the provision of tools, which had not been

included in the previous six numbered treaties. Thus, both Morris and the Aboriginal negotiators exemplified the good intentions regarding intended economic and cultural self-sufficiency of Indigenous peoples. It has been argued that the provision of farming implements and the move to agricultural practices was a subversive assimilative attempt on behalf of settler representatives. From the perspective of the Dominion Government,

“the settlement of the Plains Cree would open the door to the colonization of the Prairie West. Reserves were also the critical framework for the delivery of other promised treaty services, including agricultural assistance and schools, and were envisaged by the Canadian policymakers as the crucible in which the transformation of the Crees from hunters to agriculturalists was expected to take place” (St. Germain 2009, 107).

However, this policy of transformation was not explicit in the Treaty 6 negotiation. Only in the subsequent political and policy interpretations of Treaty 6 based only on the text of Treaty were undercurrents of economic policy as assimilation by other means apparent.

One of the most important sites that exemplifying the practice of the sharing relationship is the nature of the gift or exchange relationship that took place both within Treaty and prior to the signing of Treaty 6. When examining the interpretation of the terms ‘cede and surrender’ in the debate over whether the land was sold to the representatives of the Crown through Treaty, there is a great deal of focus on the provisions within Treaty 6 that are interpreted as part of an exchange, subsequently indicating sale. The argument remains that the provisions contained within Treaty 6 that pertain to providing Indigenous peoples with supplies, financial aid, and education, represent the finite sale of the land to settler representatives (Flanagan 2000, 144). However, this reading of Treaty as a document of sale of land to the Crown is contradicted with Morris’s characterization of the exchange that took place. Morris explains, “what was offered was a gift as they still had their old mode of living” (Morris 1880, 1971, 114). To be a sale would mean that the Indigenous people were to give up or relinquish some of their land and their practices. Both Morris’s writings and the Elders oral history attest that during the negotiation there was an emphasis on what would be given by the Crown with much less discussion on what would be given in exchange by the Aboriginal communities. As such, the common intention of Treaty 6 does not contain the explicit provisions for a quantifiable sale of the land.

In framing the exchange relationship in Treaty 6 as a practice of gift giving, Commissioner Morris invoked a long-standing practice in Indigenous culture and Indigenous settler relationship. The principle of the exchange of gifts follows with early interactions with the HBC, where the exchange of gifts was used to validate and solidify political alliances. In Treaty 6, the provisions stating that the Chief and the Headsman would receive annual payments from the government signified the sharing of lands and solidified the constant renewal of the relationship between Crown and First Nations. Morris framed the exchange relationship in such a way that Indigenous people would be “retaining their old mode of tradition with the Queens gift in addition” (Morris 1880, 1971, 141). Both parties agreed to this framework because Indigenous ways of life were not to change, but the relationship with the settler communities would be a positive addition to First Nations ways of life. This is congruent with the shared understanding at the time of Treaty 6 regarding the reliance of First Nations upon the Crown Government. The inclusion in Treaty of these provisions which were to protect the Indigenous ways of life and practices also meant a regulation of the practices and forms of support that would be received by the government, and the particular circumstances in which this support would be deemed necessary.

“The Government will not interfere with the Indian's daily life, they will not bind him. They will only help him to make a living on the reserves, by giving him the means of growing from the soil, his food. The only occasion when help would be given, would be if Providence should send a great famine or pestilence upon the whole Indian people included in the treaty. We only looked at something unforeseen and not at hard winters or the hardships of single bands, and this, both you and I, fully understood (Morris 1880, 1971, 146).

In the negotiation process, there were no requests for the continued support or the reliance of Aboriginal people on the state. Indigenous peoples did not want to rely on the Canadian government for their daily life, but only in times of famine. While the buffalo herds were diminishing during the time, Elder John B. Tootosis reminded people to never believe that they were starving at the time of Treaty, and thus, reliance on the government was not only unwanted but unforeseeable at the time (S. Venne, *Understanding Treaty 6: An Indigenous Perspective* 1997). This is reinforced by the by John Buffalo, who said that though some people were surviving by eating horsemeat, this did not pressure the First Nations into

signing treaty (Buffalo 1975). However, provisions in Treaty 6 were meant to preserve the ability of Indigenous peoples to maintain their self-sufficiency. This was reflected in Morris's understandings of Treaty.

"I cannot promise however, that the Government will feed and support all the Indians; you are many, and if we were to try to do it, it would take a great deal of money, and some of you would never do anything for yourselves. What I have offered does not take away your living, you will have it then as you have now, and what I offer now is put on top of it. This I can tell you, the Queen's Government will always take a deep interest in your living" (Morris 1880, 1971, 130).

Given that the First Nations ways of life were not to change and there was no continued reliance on the government, Treaty 6 could not have been understood as the transference of the blanket ownership of land to the Settlers in exchange for selected Aboriginal reserves. Rather, the money, provisions and education was considered a gift to ensure the peaceful relations between Indigenous and Settlers and to ensure the longevity of a good relationship between the Aboriginal people and the Settlers based on sharing the land, not ownership of the land.

The provisions for education of First peoples also exemplify this unique relationship of sharing as it was understood and written into Treaty. While education regarding the economic practices of settler economies, including agriculture, was part of the negotiation, the Chiefs also negotiated universal access to education for all, regardless of age or sex. "The Chiefs and Elders wanted their young people to be able to cope with the newcomers, and believed the most successful way would be for the children to understand their ways"(S. Venne, *Understanding Treaty 6: An Indigenous Perspective* 1997, 194). This was intended to be entirely voluntary for the communities, not the forced programs of re-education, or moving children off the reserve to be re-educated and assimilated into settler practices. The goal behind these provisions was that First Nations youth would learn English and Settler ways, and in exchange, Settler youth would also learn the ways of the First Nations. Because this was voluntary, the Treaty protected the Indigenous practices of education while ensuring that there was a relationship between Treaty parties.

It was soon after Treaty 6 was signed that the Dominion Government policy regarding Indian education shifted. Morris agreed to the provision of schools at the request

of the Aboriginal negotiators, however, the role of education shifted along with the Dominion policies. Prior to the signing of the First Indian Act, Indian policy was largely based on the need for peaceful co-existence. However “around 1876, government officials singled out education as “the primary vehicle in civilization and advancement of the Indian Race”. Catholic schools were already present in many regions of the province, and their number and enrolment increased in the 1880s when the Department of Indian Affairs assumed part of their operating cost” (Woolford, *Between Justice and Certainty* 2005, 57). This shift changed the dynamic of the relationship between Settler and Indigenous peoples, but this shift was external to the signing of Treaty 6. Thus, provisions for education, as read within the context of Treaty 6, were to maintain the good and open relations between First Nations and Settler peoples.

Thus, the final aspect of the holistic approach to reading the context of treaty articulated an understanding of the relationship based on the principle of equality of standing as the initial point from which a relationship of sharing could be negotiated. From this, both parties recognized the obligation to the other through the relationship. In other words, from the initial point of equality, the parties entered into a relationship where each was obligated to care for the other. This is articulated in the specific provisions of the treaty for famine relief, medicine chest, and education. However, this obligation was not explicitly tied to practices of forced assimilation. Rather, as negotiated in and through the treaty, Indigenous peoples and their lifeways, including economic self-sufficiency, were explicitly protected in Treaty 6.

Summary

This reading of the content of Treaty 6 given the initial premise of a common understanding substantiated through both the context and the reasons to enter treaty is completely divergent from a reading of treaty based on the written text. As explained by looking at the explicit content of treaty, certainty as a principle was articulated in the longevity and sacred nature of the treaty. Because this long lasting relationship was also sacred it had an inherent stability. All parties recognized the sacredness of the relationship of treaty both upon entrance, and through the negotiation process. Included in the length and the sacredness of treaty were provisions protecting the integrity of Treaty parties. This was a negotiated form of certainty in that the it was not explicit provisions within the treaty

that were certain, but rather the relationship, and the parties in that relationship, were certain. This important difference enables negotiable flexibility for future treaty generations, while continuing to recognize the stability of the relationship. Both the longevity and the sacredness of the relationship is an articulation of the principle of certainty as it was negotiated in the treaty. Finally, one of the most contentious aspects of the historic treaties is the term “cede and surrender.” The prioritization of the text of treaty interprets the historic treaties as documents of finite sale. However, content analysis through the holistic approach not only negates this interpretation, but also articulates the common understanding based on a negotiated relationship of sharing. Thus, the common intention of Treaty 6 was negotiated to protect a peaceful and long-lasting relationship between Settlers and Indigenous people, while preserving the ability of all parties to remain self-sufficient.

Conclusion

This holistic approach to understanding Treaty 6 begins with the premise that the common understanding of Treaty 6 continues to be relevant and holds legitimacy today. Elders living in the Treaty 6 jurisdiction continually rearticulate this strong stance for interpreting treaty at it was commonly understood between parties at the time of negotiation. While contemporary conflict in the Treaty 6 area reveals the divergent interpretations of Treaty 6, these interpretations remain based on problematic assumptions that either assume the precedence of the written version of Treaty 6 as the “real” or “true” version, or, alternatively assert that there are two, completely divergent understandings of Treaty 6 based on mutually exclusive understandings of Treaty agreement can never be reconciled. Both these positions result in an understanding of Treaty 6 that is not congruent with the common understanding of Treaty 6. While important to understanding the history of the relationship, the policies that followed from Treaty 6 were antithetical to this understanding of Treaty 6. As such, despite a long and painful history of the relationship between parties in the Treaty 6 area, the common intention of Treaty 6 as a binding and shared agreement between Settler and Indigenous peoples cannot be forgotten.

The holistic approach to Treaty 6 seeks to analyze this common understanding of Treaty 6. The holistic approach is comprised of three key elements. First, is the contextual

analysis, including the material read and a four focus areas. Second, is the principle of equality of standing, and finally is the principle of certainty. These three elements of the holistic approach are woven in and through the analysis of Treaty 6. This analysis of Treaty 6 is broken down into three areas; the context, the reasons to enter treaty and finally the content of treaty.

First, the context in which Treaty was entered characterized the relationship that took place. This analysis of the context of Treaty 6 follows with the holistic approach to reading Treaty and includes the areas of: *terra plenus*, shared understanding and authority to enter. *Terra plenus* is based on the fact that all parties recognized the existence of Indigenous political, economic and social systems at the time of treaty negotiation. As such, treaty was not the blanket imposition of settler institutional and legal structures upon the empty cultural and physical space of the prairies. Instead, Settlers recognized the long-standing precedent of Treaty making, both within settler history, and Indigenous to the First Nations of the area. As such, Treaty was not foreign to either party, and Settlers entered into a well-established system of relationship. Second, the shared understanding of treaty was both an explicit goal of treaty as stated by McKay and Morris. Contestation during the negotiation process is not indicative of cultural incomprehensibility, but reflects the process of negotiating this shared understanding. As such, there were no attempts at purposefully misleading the parties, and the Treaty was signed based on the common understanding of Treaty agreed to by all parties. Finally, both parties recognized the reciprocal authority of the other to sign Treaty. Reinforced by the kinship language used by the negotiators and Morris, each recognized the other as equal members of the relationship. Recognized by both Indigenous and settler parties, the First Nations did not derive authority to enter into relations from the Crown. Thus, the relationship was between parties who were relationally equal in a nation-to-nation form.

The second section of the analysis looks at the reasons for entrance into Treaty 6. This section draws on the holistic approaches explicit interest in the economic aspects of Treaty. Further, it brings in the principle of equality of Standing and Certainty in historic context and analytic practice. While the negotiators all had their own reasons for entering Treaty negotiation talks, many of the issues supporting a Treaty relationship were of concern to both parties. The reasons to enter into treaty can be divided into political and

economic reasons. There are four political motivations, including: prior precedent, the need for jurisdictional clarification, clarification of the relationship, and to prevent conflict. The economic reasons to enter treaty included the protection of Indigenous life ways through continued self-sufficiency, and the preservation and growth of settler economy. In a time where the composition and structure of the Canadian political, economic and social landscape was in flux, clarifying the relationship and the protection of Indigenous ways of life was important to all those involved in the Treaty negotiation. Taken together, not only did Treaty 6 set up the limits of the relationship between First Nations and Settlers by establishing voluntary reserves, but it also ensured that both the First Nations and the new Settler populations were protected in and through the relationship.

Finally, the content of the common understanding of Treaty 6 is based on three important provisions. Reflecting a negotiated form of the principle of certainty, the common understanding of Treaty 6 was a long lasting and sacred relationship. Both these provisions called for the continued protection of parties as a concrete part of the relationship. Further, the term “cede and surrender” is not an accurate representation of Treaty 6 as it was commonly understood. Indigenous peoples fully understood the meaning of these terms and the concept of sale. Therefore inclusion in the text of Treaty 6 cannot be based on ignorance of the Indigenous parties. Further, the terms “cede and surrender” or sale were not included or explained as part of the negotiation. Finally, the circumstances for the sale of land were not present at the time of negotiation. In particular, women were not present at the negotiations. Instead of this interpretation of treaty as a document of sale and surrender, the holistic approach interprets the common understanding of Treaty 6 as a relationship of sharing. This relationship of sharing is based on the spiritual, physical and economic aspects of the relationship to the land. Given the initial relational stance of equality of standing, parties entered into negotiation recognizing the mutual obligation that one party had to the other. In combination with provisions for sharing the land that enabled the continued protection of Indigenous peoples, this relationship of sharing recognized the connection between economic self-sufficiency and cultural resilience. Always contained in the common understanding of Treaty 6 was the continued self-sufficiency of Indigenous peoples. In summation, the common understanding of Treaty 6 is a relationship of peace

based in sharing of land and resources and the continued independence and economic and cultural self-sufficiency of all treaty parties.

Chapter 3: Current Treaty Process and the Tsawwassen Final Agreement

The third chapter of this thesis brings the holistic approach to treaty into the contemporary context by re-engaging with contemporary framings of Indigenous settler relations in untreated lands in British Columbia. Unlike most of the rest of Canada, treaties were not settled in most of British Columbia. Instead, settler jurisdiction and government authority was assumed and the British Columbian government refused to recognize the continued existence of Aboriginal Title. Starting with the Calder decision in 1973, there was a move in the Canadian court system to recognize Aboriginal Title as a burden on Crown claims to exclusive sovereignty. Despite this shift towards legal recognition, at the time of the Nisga'a treaty in the late 90s, the Provincial Governments longstanding refusal to recognized Aboriginal title inspired an interest based school of thought that asserted there was no reason to accept the validity of Aboriginal title, and thus, no reason to engage in a modern treaty process. Former provincial attorney general Mel Smith and radio host Rafe Mair were strong anti-treaty spokespeople, and many economic interest groups concerned backed this opinion that the recognition of Aboriginal title would disrupt economic development in British Columbia. In response to the denial of treaty as a necessary means of clarifying the relationship between settler and Indigenous peoples, the holistic approach to the contemporary treaty process asserts the necessity to enter into treaty in British Columbia while also critically examining the form of this treaty engagement and agreements.

The contemporary treaty process is incredibly complicated, and the process is different for every nation who enters into treaty. Thus, a detailed analysis of each agreement is beyond the scope of this thesis. However, the holistic approach to treaty analysis offers two initial insights into the contemporary treaty process. First, it asks how the holistic approach can be employed as a method for understanding the contemporary treaty process. Second, the use of the holistic approach in understanding contemporary treaty negotiations enables an understanding of the contemporary treaty process in comparison to the common understanding of Treaty 6. While the holistic approach to the

historic treaties focuses on the common understanding of Treaty 6 as it was negotiated, the process of contemporary treaty practice is ongoing. Thus, the holistic approach to the contemporary treaty practice looks at the ongoing process of contemporary treaty settlement. While there are many complex and intersecting factors that can be analyzed when looking at the contemporary treaty process, I am employing the same analytic framework as used in the holistic approach to understanding Treaty 6. First is the examination of the context in which treaty was entered. Second is an examination of the reasons for treaty negotiation. Finally is the examination of the content of treaty. For this content-based examination, I will be using the Tsawwassen Treaty as an instantiation of the contemporary treaty process.

Context

The first aspect of the holistic approach to contemporary Treaty is the context of the analysis. In the holistic analysis of Treaty 6, this was divided into three areas: *terra plenus*, the shared understanding, and authority to enter into treaty. The holistic approach to reading the context of the contemporary treaty process is divided into three analogous sections. The first section is *terra nullius*, which contrasts with the context of Treaty 6 characterized as *terra plenus*. The second section will focus on an exploration of a shared understanding as both a goal and a practice of contemporary treaty negotiation. The final section examines what it means to have the authority to enter into treaty negotiation. This section looks at who enters into the treaty negotiation, and the manner in which their authority to enter into negotiation is understood relationally.

Terra Nullius

The first aspect of the contextual analysis of the contemporary treaty negotiation process is *terra nullius*, which contrasts with the historic context characterized as *terra plenus*. *Terra nullius* is literally translated to mean empty land. This term has a long legal and colonial history globally, but is primarily considered to be the assumption of legitimate settler jurisdiction and occupation based on the reciprocal lack of presence of Indigenous peoples. In other words, according to the doctrine of *terra nullius*, at the time of contact, the territory of Canada was considered to be empty. While used extensively in Australian justifications of land occupation up until the 1992 *Mabo* case, *terra nullius* has been an

underlying assumption in Canadian juridical decisions as well, especially in British Columbia when Aboriginal Title was unrecognized. Michael Asch explains that in the untreated territory of British Columbia, “Indigenous sovereignty is understood to have been extinguished by the mere assertion of sovereignty by the Crown” (Asch, *From Terra Nullius to Affirmation: Reconciling Aboriginal Rights with the Canadian Constitution* 2002, 23).

According to English law, as summarized by Asch, there are four means by which a state can justify occupation of new territory. The first is conquest or military defeat. Second is cession, for example through treaty, where territory is transferred from one political unit to another. Third is annexation or assertion of sovereignty without military action. Fourth is the acquisition of territory that was previously unoccupied or was not recognized as belonging to another territory. In British Columbia, the fourth assertion provides foundation for Canadian claims to contemporary occupation. However, the blanket claim to legitimate occupation on the basis of *terra nullius* is challenged by the continued assertions, both social and legal, of Aboriginal title. The territory now defined as Canada was certainly not “empty” or unoccupied at the time of contact. As such, the doctrine of *terra nullius* has required a “certain elasticity of logic” as Asch describes, to provide the basis for claims of Canadian sovereignty.

The logic behind the doctrine of *terra nullius* as a legal justification of Canadian sovereignty is doubled. First, *terra nullius* asserts that though Indigenous peoples were physically present at the time of settler contact, they were not in the advanced state of civilization necessary to claim sovereignty as recognized by Western law. Indigenous cultural practices did not include concepts of ownership and possession of the land, and Indigenous peoples did not exercise jurisdiction over the land in any way that would be recognized in Western legal code. Secondly, following in Locke’s thesis regarding investment of labour into the land, Indigenous peoples did not invest labour into the improvement of the land, and thus, did not own it. Locke’s thesis reflects the differentiation between agriculturalists and non-agriculturalists as a common marker of civilization in much of the pre-1920s Anthropological theory (Asch and Bell, *Challenging Assumptions: The Impact of Precedent in Aboriginal rights Litigation* 1997, 38).

The doctrine of *terra nullius* has been rejected by the high court in Australia, (*Mabo v Queensland* 1992) by the world community, (United Nations 1960) and by the International Court of Justice (International Courts of Justice 1975) (Asch, *From Terra Nullius to Affirmation: Reconciling Aboriginal Rights with the Canadian Constitution* 2002, 31). Despite this rejection of the explicit employment of *terra nullius* as the logic justifying contemporary settler occupation, *terra nullius* remains a substantive foundation in the justification of contemporary settler occupation of British Columbia, and defines the legal and social topography of contemporary relationship between Indigenous and settler peoples in Canada. For example, the Supreme Courts summary of CJ McEachern's BC Supreme Court's decision in *Delgamuukw* reveals *terra nullius* as the underlying assumption for CJ McEachern's dismissal. CJ McEachern found that Indigenous peoples did not own land in any manner that would be recognized by law, did not control the land through use as subsistence practices represented a "survival instinct" rather than ownership practice, and that Aboriginal peoples could not claim sovereignty over the land through governance as their customs were highly flexible (*Delgamuukw v. British Columbia* 1997).

With regard to the context of the contemporary treaty process, the assumption of *terra nullius* treaty has two implications; first, regarding the necessity to enter into treaty, and second, regarding the form that treaty negotiation will take given this initial assumption of *terra nullius*. In contrast to *terra plenus*, the context of *terra nullius* assumes the priority of settler jurisdiction and presence. The context of *terra plenus* meant that Treaty 6 was negotiated because of the recognized need to enter into negotiation with Indigenous peoples prior to Settlers entering into Indigenous lands. In contrast, the context of *terra nullius* eliminates the necessity to enter into treaty as a reflection of prior Indigenous occupation because legitimate settler occupation is assumed from the outset. In the context of the Treaty 6 negotiation, parties entered recognizing that prior existence of Indigenous political, economic and social systems. Further, there was the explicit recognition of the necessity to enter into negotiation with the Indigenous peoples codified in the Royal Proclamation. In the historic practice of Treaty 6, parties entering into the treaty relationship based on the principle of equality of standing recognized the necessity to negotiate between parties. However, this is not equivalent to an assertion that each party had equal right to the ownership or jurisdiction on the land. Despite the underlying

assumption of settler sovereignty and jurisdiction as articulated in the Royal Proclamation, the right of the Indigenous peoples to live on the land was given precedent over underlying claims to settler sovereignty. Indeed, in the historic negotiation, neither party claimed nor explained that Settlers had either priority, or even equal right to occupation of the land. In the historical negotiation there was recognition of the priority of Indigenous occupation and jurisdiction. As such, the legitimacy of Canadian jurisdiction lies in attaining the consent of Indigenous peoples to enter land.

In contrast, in the context of *terra nullius* the assumption of “empty land” does not problematize the assumption of settler jurisdiction derivative simply from the contemporary occupation of land. In other words, Settlers are assumed to have legitimate jurisdiction simply because of contemporary occupation. In the settlement of British Columbia, Aboriginal title was essentially denied, and with it, the necessity to enter into treaty as a matter of legal and political necessity was also ignored. As such, in British Columbia, the lack of recognized Aboriginal title, and the contingent assumption of Crown jurisdiction and possessory rights became the justification of unquestioned settler occupation. Given this foundation of contemporary negotiation, rather than entering treaty recognizing the necessity of a treaty agreement to claim legitimate settler occupation, the assumed priority settler occupation and congruent jurisdiction shifts the relational dynamics in the contemporary treaty negotiation process so that the power of negotiation and jurisdiction remains firmly entrenched in settler governmental practices. In his address of the third BCTC sponsored conference entitled “Speaking Truth to Power” Jim Abram asks for a reframing of the treaty process which undermines the blanket assumption of legitimate settler occupation.

“The treaty process should not be about what the federal or provincial governments are willing to grant First Nations through negotiation, but treaties should be a negotiation of what First Nations are willing to share with the rest of us” (Abram 2002, 33).

However, without disrupting the assumption of *terra nullius* at the foundation of contemporary treaty negotiation, the contemporary treaty process remains posited upon the assumption of settler jurisdiction based on the lack of legitimacy of Indigenous occupation. Rather than entering into negotiation as a way to gain access to the land, the contemporary

treaty process is framed as a way to resolve the problem of Aboriginal Title given the assumed priority of settler occupation of the land.

In congruence, the assumption of *terra nullius* inherently prioritizes the settler mode or system of governance on the assumed “blank slate” of First Peoples. *Terra nullius* posits Aboriginal peoples as a space of social, economic and political lack having not reached a sufficient civilization level to be recognized by Western institutions. While this reflects a colonial imposition of the hierarchical knowledge practices, it also assumes that Indigenous peoples exist in a space of lack or want. This violence is doubled in that the assumption of lack is then filled with the imposition of a particular settler system of governance. This assumption of the legitimacy of settler practices within the negotiation process will be explored more fully in the following analysis.

Shared Understanding

The second aspect of the holistic approach to understanding the context of the contemporary treaty process looks at the practice of coming to a shared understanding. Following from the foundation of the context of *terra nullius*, in the contemporary context of treaty negotiation, the shared understanding is not a goal or a process of negotiation, but instead, assumed from the outset in the prioritization of settler governance forms and practices. This assumed shared understanding contrasts with the negotiated shared understanding which characterized the common understanding of Treaty 6. In the holistic approach to Treaty 6, negotiating a shared understanding of treaty was an explicit goal of the negotiation process. This was articulated by Morris as a Crown representative, as well as by Indigenous negotiators. Further, the process of Treaty 6 negotiation also exemplifies the negotiation of the shared understanding. Morris’s descriptions of contestation during the negotiation and the Elder’s history of contestation and coming to an agreement are two examples of how the common understanding and shared meaning was negotiated by all parties.

In contrast, in the contemporary context of treaty negotiation, coming to a shared understanding is not an explicit goal of the Treaty process. “There is no common understanding of the parameters and fundamental goals of treaty negotiation and this is causing mounting frustration on all sides of the treaty table” (BC Treaty Commission 2007, 17). However, the solution to this lack of shared understanding has not been the

negotiation of a common understanding, but the assumption of government needs dictating the framework of negotiation. This is exemplified most explicitly in the prioritization of economic interests of the government, such as budget and investment, in the negotiation process. While there is some negotiation regarding the exhaustive definitions and terminology, the shared understanding is assumed as a result of the exhaustive definition. As such, the shared understanding is based on the imposition of the settler interests as universal, rather than a negotiation of meaning.

In the historic negotiation, contestation over treaty provisions resulted in continued negotiation. In contrast, contestation during the contemporary treaty process is not met with the same stance of negotiation. One example of the imposition of a framework of “shared understanding” is the form that the treaty negotiation takes. During the negotiation process there has been debate regarding the speed of treaty resolution. Many Aboriginal negotiators advocate for the incremental approach to treaty resolution, which moves gradually into a relationship, ensuring that both parties understand the impacts of Treaty and that each party can build a relationship. This incremental approach also includes aspects of treaty negotiation, such as reparative justice, that take more than compensation or explicit definition to fulfil. In contrast, the “big bang” approach is advocated as a rapid approach to treaty resolution, which removes “messy” and “complicated” issues such as reparative justice from the framework of treaty negotiation (Woolford, *Negotiating Affirmative Repair: Symbolic Violence in the BC Treaty Process* 2004, 124). In the 2009 study published by PriceWaterhouseCoopers, rapid resolution is found to cost less and bring the most financial benefits. As such, this approach reflects the business and economic needs, rather than other issues brought to the table by Aboriginal negotiators. Despite calls by negotiators for an incremental approach to treaty resolution, the aim of negotiation continues to be rapid resolution, thus preserving the needs of the government negotiators rather than those of the Indigenous peoples. First Nations who do not adhere to this approach, take too long in the process of negotiation or stall during the negotiation, face various forms of economic penalties from the Federal Government. As such, government parties and business interests dictate the form of treaty, regardless of contestation by First Nations participants. This has resulted in a form of “symbolic violence” in which the limits of the treaty negotiation are pre-conceptualized before treaty is entered. As such, there is no

negotiation in the treaty framework, but the imposition of a “shared understanding” through the assumption of settler structures and terms of negotiation. Thus, treaty negotiation is not a negotiation of shared meaning. Instead, treaty negotiation has become a practice where the status quo defined by government parties remains unquestioned and Indigenous peoples are negotiating to fit within these prior structures.

Authority to Enter

The third aspect of the contextual understanding of the contemporary treaty practice looks at the authority to enter into treaty as a reflection of how treaty parties are understood prior to, and through contemporary negotiation practices. Like the holistic approach to understanding the context of Treaty 6, there are two aspects of the authority to enter into treaty. First is the question of who entered into the Treaty negotiation, and second, is the manner in which this authority to enter into treaty is understood as a relationship between parties.

Unlike historic negotiations that took place between the First Nations, and the Crown representatives, there are three parties present at the contemporary treaty negotiation table. These parties are the First Nations, the Provincial government, and the Federal government. Further, there are additional “stakeholder” parties who do not have the authority to explicitly participate in treaty, but have interest in the negotiations. These stakeholder parties have been variably able to influence the treaty negotiations, however, the interests of business and economic parties are a priority of negotiation. In the BCTC explanation of the negotiation process, the three official parties are characterized as a form of government. “In entering negotiations, the parties recognize one another as legitimate governments representing the interests of their constituents” (BC Treaty Commission 2007, 8). The symbolic violence and the limits of this characterization will be explored explicitly in the section content portion of the holistic approach to contemporary Treaty. However, what is important for the contextual analysis is that the treaty parties are discursively characterized as qualitatively similar.

This discursive characterization of the qualitatively similar “government” parties is problematized when the authority to enter into treaty is examined relationally between parties. In this examination of the relational authority of parties to enter into treaty negotiation, it is important to understand where the authority to enter into treaty negotiation

is derived from, both in terms of who does the “authorizing” and how the authority to enter into negotiation is understood relationally between parties. In Treaty 6 negotiations, both the Crown and First Nations negotiators recognized that Indigenous peoples did not derive the ability to enter into a treaty negotiation from the Crown. First Nations were independent nations, entering into a nation-to-nation, or international, agreement. In contrast, the authority to enter into contemporary treaty relations is not assumed to be present prior to the negotiation.

While the Provincial Government and the Federal Government have assumed authority to enter into treaty, First Nations only have authority to enter into negotiation through the actual process of Treaty. The Provincial Government derives authority to enter into Treaty from “interests” in the negotiation, and the federal system of allocating jurisdiction. The Federal Government represents an inherent authority to enter into Treaty by virtue of their assumed jurisdiction and sovereignty. In contrast, the authority of Indigenous parties is only present, and certain, as a result of the relationship with the Crown. In other words, Aboriginal authority to enter into Treaty is derivative of the fact that the Provincial and Federal governments recognize them as legal participants. As such, only in entrance into treaty are parties recognized as legitimate representatives and the authority to enter into Treaty is only recognized and granted when contingent in the relationship to the Crown. For example, the Kwayhquitlum First Nation is being denied entrance into the BC Treaty process because they are not recognized by the other parties. Though the Kwayhquitlum meet the criteria laid down by all three parties laid out in the agreed upon BCTC framework, Canadian and British Columbia governments refuse to negotiate treaty. This reveals the degree to which the authority to enter contemporary treaty is directly contingent upon Crown practices rather than the recognition of the inherent, and equal authority, of each party. As such, for First Nations, the authority to enter into treaty is derived only from the relationship with the Crown, and thus, is relationally subordinate.

Summary

The holistic approach to the context of the contemporary treaty negotiation process reveals a stark contrast to the common understanding of Treaty 6. Like the holistic approach to Treaty 6, this analysis looks at three key areas: *terra nullius*, a shared understanding and the authority to enter treaty. In *terra nullius* the assumption that

Indigenous peoples represent a space of lack is the foundation for settler entrance into treaty negotiation. As a result of the assumption of the context of *terra nullius* legitimate settler jurisdiction is assumed because Indigenous peoples did not exemplify legal or usury occupation of the land. In the contextual analysis of a shared understanding, not only is shared understanding not a goal of contemporary treaty negotiation, but it is also not a practice through the negotiation. Rather, in congruence with the assumption of Indigenous peoples representing a space of lack in the foundation of *terra nullius*, a “shared understanding” is imposed. Through exhaustive definition and the imposition of settler frameworks and priorities, a shared understanding is assumed. However, as exemplified by the prioritization of the “big bang” method to treaty resolution, this shared understanding is imposed rather than negotiated. Finally, the contextual analysis looks to the authority to enter into treaty negotiation with regard to who enters into treaty and how these parties are understood relationally. In the contemporary treaty negotiation framework, three parties enter into negotiation. However, there are also additional stakeholders, including the business community, that continue to express interest in negotiation. Unlike the historic treaty where the authority to enter into negotiation was inherent in the Indigenous parties as a nation-to-nation or international agreement, contemporary authority to enter into negotiation rests in the government recognizing that nation as a treaty party. As such, the authority to enter into treaty is contingent upon recognition by the Crown.

Why Negotiate Treaty

The second area of analysis in the holistic approach to understanding the contemporary treaty process looks at the reasons for entering into contemporary treaty negotiation. Like the holistic approach to reading Treaty 6, there are political and economic motivations to entering into treaty; some interests are common amongst parties, where other reasons express the unique interests of one party. Also, like the holistic approach to Treaty 6, the contemporary understanding and practice of the principles of equality of standing and certainty are integrated into both political and economic reasons for entering into treaty. Structurally similar to the Treaty 6 analysis of the reasons to negotiate Treaty, the reasons to enter treaty reflect the cyclical relation between the process of treaty negotiation, and the end product or the goals of treaty. The goal of treaty negotiation

defines the process of negotiation and reciprocally, the process of negotiation delimits the end or the product of the treaty relationship. However, all the reasons for parties to enter into treaty negotiation are not made transparently clear in the contemporary context, nor is an exploration of the complexities of the reasons to enter treaty within the scope of this analysis. As such, I will narrow my examination of the reasons to enter into treaty to six reasons to enter into treaty, based around the principle of certainty. The six reasons to enter contemporary treaty negotiation are: historic precedent, lack of treaty in British Columbia, to address historic and contemporary marginalization, clarification of governance structures, achievement of certainty, and finally integration into modern economy. However, before these six reasons to enter into treaty are explored, the principles of equality of standing and certainty will be examined in relation to the reasons to enter into the contemporary treaty process.

In the historic practice of Treaty 6, parties entered into the treaty relationship based on the principle of equality of standing. In other words, the parties recognized each other as different, but these differences did not equate to the denial of Indigenous jurisdiction by Settlers authority. Nor did these differences equate to the negation of the need to enter treaty. The assertion of equality of standing was not an assertion that each party had equal right to the ownership or jurisdiction on the land. In the historical negotiation there was recognition of the priority of Indigenous occupation and jurisdiction. Thus, in Treaty 6, government representatives were entering into the Treaty negotiation with no explicit claim to ownership or jurisdiction over the land, but asking what Indigenous peoples were willing to share with the increasing settler population.

In contrast, contemporary treaty negotiation in British Columbia is based on the assumption of Crown sovereignty without the necessity to enter treaty as a way of gaining access to lands. In the settlement of British Columbia, Aboriginal title was essentially denied, and with it, the necessity to enter into treaty as a matter of legal and political necessity was also ignored. As such, in British Columbia, the lack of defined Aboriginal title, and the contingent assumption of Crown jurisdiction and possessory rights became the justification of unquestioned settler occupation. The assumed priority settler occupation and congruent jurisdiction shifts the relational dynamics in the contemporary treaty negotiation process. Rather than entering into negotiation as a way to gain access to the land through a

negotiated relationship, contemporary treaty process is a way to resolve the problem of Aboriginal presence and court recognized but unclarified Aboriginal title, given the priority of settler occupation. Thus, unlike the historical context of treaty negotiation, the contemporary treaty negotiation process has been variably framed as the solution to the problem of Indigenous peoples in settler lands. This positions the power for defining the reasons to enter into treaty in the hands of settler negotiators, who establish the goals, and the limits of treaty negotiation.

Certainty

The dynamics of this relational shift of power into the hands of the government negotiation parties is instantiated in the prioritization of certainty as a process and goal of the contemporary treaty negotiation. Before engaging with the manifestations and practices of certainty as a reason to enter treaty or goal of the contemporary negotiation process, it is important to first understand difference between the historic practices of certainty, and the contemporary practices of certainty. In the holistic analysis of Treaty 6, the principle of certainty was a process as well as a goal. However, as both a guiding principle and a goal of negotiation, neither party defined certainty as containing explicit values or provisions. As a principle, certainty was practiced through the negotiation of a sacred and long standing relationship. Thus, certainty was embedded within the practice relationship itself, and was negotiated throughout the process of treaty, not predetermined from the outset.

In contrast, in the contemporary practice of treaty negotiation, the principle of certainty is both a process and goal is dictated by government interests in negotiation. Before 1991, this certainty was achieved through the extinguishment of all Aboriginal rights and title in exchange for finite compensation. It was argued that only the final settlement would create a feasible economic environment for growth with the stable base necessary for investment. In 1991 the BCTC recommended that this practice of attaining certainty be shifted to “reasonable certainty” where Aboriginal rights were clearly demarcated and defined. The BCTC argues that the treaty process should not end with “absolute” or “final” certainty but rather a “reasonable” certainty, with provisions for amendment and revision (Commission, A Review of the BC Treaty Process 2001, 24). However, this “reasonable” certainty still dictates all forms of amendment and revision, and thus, while there is the possibility for treaty amendment, the procedure for amendment is

already negotiated. Again, this reflects a form of final certainty in which all the terms of negotiation are embedded within the framework of the finalized treaty itself, eliminating the possibility for changes outside of this certain agreement.

In the common intention of Treaty 6, certainty as a process was achieved through the mutual recognition of the sanctity of the relationship. Indigenous peoples entered treaty negotiation with the peace pipe ceremony, recognizing the Creator as party to Treaty 6, and the resulting relationship was understood to be sacred and unbreakable. By addressing God in opening the Treaty relationship, and by participating in the Peace Pipe ceremony, Commissioner Morris affirmed the common intention of the sacred relationship. As a sacred relationship, the Treaty agreement was also certain. However, certainty achieved through the treaty process did not result in the static formulation of rules that is advocated in the contemporary Treaty process. Rather, certainty was achieved by emphasizing the strength and longevity of the relationship between settler and Indigenous populations, and there remained flexibility in the relationship. Thus, the certainty practiced in Treaty 6 is founded and situated in and through the relationship, rather than an explicit goal of treaty. In other words, certainty was based in the practice of Treaty 6 as an ongoing relationship rather than defining the Treaty as a static and finite document.

In contrast, the contemporary process of certainty is based on the exhaustive definition of the Treaty relationship. As a “legal technique” or process certainty is meant to specify all the rights and obligations within the Treaty so there are no undefined rights outside of treaty. Certainty is practiced through exhaustive definition of the rights and terms of Treaty. This causes concern for some treaty parties as the exhaustive definition does not provide the flexibility necessary to adapt to possible changes in natural and social worlds. While Non-Aboriginal Government officials argue that Treaty conversation should focus on the future, this form of certainty as a process is antithetical to these “future” orientations. The exhaustive definition of rights forces future generations to take on understandings, clauses, treaty rights and practices of renegotiation and amendment that have been untried. This form of certainty does not take into account the possibility of changing social, political, or environmental issues. First Nations communities do not want to be excluded from accessing future developments or responding to factors that are currently unforeseeable. The exhaustive definition of rights and practices within treaty

saddles future generations with agreements in which they have no say. Thus, this form of certainty causes greater uncertainty for future generations as treaty parties are being asked to gamble the rights of future generations on untested treaties that restrict the possibility of flexibility in future relations.

As a goal, certainty in contemporary terms has come to convey a particular approach to the future that remains congruent with the status quo. In other words, it has meant the maintenance of contemporary institutions and lack of disruption of contemporary practices is framed as leading to a better-shared future (Woolford, *Between Justice and Certainty* 2005). Certainty has also been universalized as the “good for all.” In advocacy for certainty as a goal, the ultimate aim is to create a solid and defined relationship for economic, political and social prosperity. The intertwined relationship between the goal and the process of negotiation means that the goals of negotiation define the process of negotiation, and reciprocally, the process of negotiation defines the goal. The prioritization of certainty as a goal of contemporary treaty making is one instantiation that has come to define many of the contemporary treaty conflicts.

In reflection of the principles of equality of standing and certainty as articulated in the contemporary treaty process, the holistic approach to understanding the reasons to enter into contemporary treaty negotiation reflects upon the processes of negotiation. Given the importance of goal definition for understanding the process of treaty, I have divided analysis of the reasons to enter into contemporary treaty into six areas. Each of these areas reflects the holistic approach to understanding the contemporary treaty process, as well as the manner in which this goal also influences the process of treaty. The first reason to enter treaty is the historical precedent of treaty making, second is legal motivations, third is redress of historical and continued marginalization, fourth is governance clarification, fifth is the protection and growth of contemporary economic systems, and finally is the inclusion of Indigenous peoples in the contemporary economic practices of BC.

Six reasons to negotiate Treaty

The first reason to enter into treaty is based on the historic precedent of treaty making across Canada. Unlike the rest of Canada, where treaty codified the relationship between settler jurisdiction and Indigenous peoples, in British Columbia settler jurisdiction and land claims have been implicitly and explicitly asserted through possession and

occupation, but not negotiated through Treaty. British Columbia is not covered by recognized “historic” Treaty negotiation with the exception of Treaty 8 that comprises areas of Northern British Columbia, Northern Alberta, and a portion of the southern Northwest Territories. The Royal Proclamation of 1763 has been interpreted as a blanket assumption of underlying Crown claim to sovereignty with no recognition of the temporal priority of the Indigenous peoples who were living on the land. Crown sovereignty was assumed. Despite this, the Royal Proclamation asserted that land could not be settled or surveyed, or assumed to be under the control of the colonial government, without first entering into a treaty relationship with the Indigenous peoples. Given the blanket assertion of the Royal Proclamation recognizing that Treaty was the only legitimate way to gain entrance into Indigenous peoples lands, there remains a contemporary necessity rooted in this long history to settle the entrance and continued presence of Settlers living in British Columbia.

However, because there was no treaty settled in British Columbia there is a second political reason to enter into treaty. The lack of treaty in British Columbia resulted in a disjunction between the political assumption of Crown sovereignty and Court recognition of Aboriginal Right and Title as a burden upon Crown sovereignty. Thus, the impetus to enter into contemporary treaty negotiation has stemmed, in part, from shifts in legal decisions that have established precedence for Aboriginal rights and land claims in British Columbia.

As courts progressively moved towards the denial of Canadian Government claims to land by virtue of possession, (*Calder v. British Columbia (Attorney General)* 1973) (*Delgamuukw v. British Columbia* 1997) there has been an increasing call to politically and legally resolve these claims outside of the expensive court system. As such, the BC Treaty negotiation process was undertaken in response to the need to clarify contemporary relations between Indigenous and settler populations in the area. This legal and political policy began to shift in 1973 with the *Calder* case. In this case, the Nisga’a of Northwestern British Columbia argued for recognition of Nisga’a title to occupy and manage lands. In the decision, six of the seven judges confirmed that Aboriginal title was a legal right that existed regardless of it being recognized by the government. However, there remained the question as to whether or not Aboriginal title had been extinguished before Confederation. The *Delgamuukw* cases answered this in part. In the first trial, the Provincial

government held the position that Aboriginal Title had been extinguished before Confederation in 1871. However, this argument changed when taken to the Court of Appeal. There it was argued that Aboriginal Title was a collection of traditional practices, but not jurisdictional priority over the land. The Chief Justices found that Aboriginal title was a unique right to the land itself, not just the practices, such as hunting and fishing, which takes place on the land. However, the Courts did not go so far as to articulate or legislate the particular case of the Gitksan and Wet'suwet'en. In other words, Aboriginal title does exist, but the unique title claims of each Nation had not been settled through court clarification.

Given the legal recognition of Aboriginal title, but the lack of resolution regarding the nature of title beyond the burden on Crown title, there were calls for a process that would politically and legally resolve these issues outside of the expensive judicial system. In Justice Beverly McLachlin's opinion "reconciliation could best be achieved through the time honoured process of treaty-making" (Penikett 2006, 95). Thus, treaty negotiation is understood to be the practice in and through which the court recognized Aboriginal title and other claims were to be explicitly clarified. As such, the goal of contemporary treaty negotiation is not based on the 1763 Proclamation, where treaty is necessary to claim legitimate settler entrance and settlement into Indigenous territory. This historical framing inherently and explicitly recognized Indigenous claims to the land. In contrast, despite the recognition of Aboriginal title and the need to enter into relation with the Indigenous peoples, contemporary treaty negotiation is based on the clarification of the nature of Aboriginal title. Thus, settler occupation of the land is assumed to be justified based on the presence settler populations and infrastructure. Treaty is simply the means to clarify Aboriginal title given the priority of settler jurisdiction.

The third political motivation for entrance into treaty is to address historic and contemporary marginalization by Indigenous peoples.

"First Nation's representatives often suggest that they require public recognition of their suffering as a means to re-claim and re-valorise a despised and maligned public identity, allowing them to re-establish their cultures not only through the funds provided by treaty settlements, but also through the acknowledgement that the past hardships were the result of external imposition, and not due to

the failings of First Nations cultures” (Woolford, *Between Justice and Certainty* 2005, 124).

Andrew Woolford and Nancy Fraser both contend that the contemporary treaty process has the potential to address some historic wrongs and contemporary issues of inequality. Nancy Fraser has explored numerous orientations of justice in the contemporary treaty process, while explaining the problems of each (Fraser 1997). If the goal of the contemporary Treaty process is *redistribution* to uproot unequal economic systems, and put aside cultural differences in order to “level the playing field,” then this does not take into account the cultural specificity and particularity of Indigenous nations. However, claims falling within the scope of *recognition* make concrete or reify previously ignored identities to establish cultural specificity. Thus, reifying differences as fundamental and perhaps irreconcilable. Further, Fraser notes a dichotomy between *affirmative practices*, and *transformative practices*, where affirmative practices are oriented to the future, without changing or modifying the structure or framework of relations. This is in contrast with transformative understandings of treaty negotiation, which look to the deep-rooted issues and attempt to transform injustices on a fundamental or institutional and societal scale.

Affirmative practices of redistribution do not trouble the deep-rooted structures of inequality, working only on the surface reallocations of economic opportunities. Further, affirmative strategies of recognition recognize the wronged party and potentially reify these differences. In contrast, transformative remedies which address the socio-economic and cultural symbolic injustices are less problematic for Aboriginal participants. In all cases, the manner in which Treaty is framed must walk a fine line between the reification of difference that would instil an authoritarian understanding of authenticity, and the move towards equalizing homogeneity that would ultimately perpetuate assimilationist policies of the government. According to Fraser, the key to this is recognizing a “dynamic but persistent” entity that is an important counterweight to the Western culture. Despite the problems of using treaty as a means to resolve long-standing and deep-seated issues of inequality, the potential remains for the contemporary treaty process to enable transformative relations. Thus, one political goal of entering into the treaty process is the recognition and remedy of contemporary issues of injustice on the basis of a newly negotiated relationship.

The fourth reason to enter into treaty negotiation is to clarify and institute governance structures based on the contemporary practice of certainty. Establishing a certainty of governance structures is advocated as the means through which First Nations self-governance practices will be achieved. For example, “a treaty will bring certainty with respect to Tsawwassen First Nation’s right to use, own and manages lands and resources throughout its claimed traditional territory.” Thus, certainty is argued to enable the nations to have a stable governmental form in which to enter into political relations with other governments, as well as govern their own territory. This clarification of jurisdiction and governance structures is argued to enable all First Nations to more effectively represent their communities and engage with other levels of governments and interest groups on the basis of these predefined limits. Thus, despite the rhetorical prioritization of the self-governance of Aboriginal communities through the clarification of the political relationship resulting in jurisdictional certainty, the form of these governance relations remain aligned with the assumption of the jurisdictional priority of Canadian Governments. This contrasts with the political certainty in the common understanding of Treaty 6. In the negotiation of Treaty 6, the First Nations were assumed to have self-governance and the practices of self-governance were not within the scope of the negotiation. Treaty merely clarified the relationship between Settlers and First Nations, rather than dictating the forms of self-governance. In the contemporary treaty process, the goal of jurisdictional certainty is to clarify and define the nature of First Nations governance practices in and of themselves.

The fifth goal of entering into the treaty process is to achieve certainty as the means to ensure economic investment in a way that remains congruent with the economic practices already in place. The economic motives for entering into treaty negotiation are centred around the concept and practice of economic certainty, which is linked to economic and business investment. According to the BCTC, treaties in BC are literally “unfinished business.” The 2009 PriceWaterhouseCoopers report attributes the lack of Treaty in British Columbia to the loss of millions of dollars in missed investment and development opportunities. This has been tied explicitly with the lack of “certainty” that results from the lack of treaty.

“Treaties are unfinished business here in British Columbia. This unfinished business is costing the provincial economy a lot of

money because of continuing uncertainty over ownership of millions of acres of land. Its also standing in the way of Aboriginal communities regaining the self-sufficiency they once had” (Commission, *Why Treaties?* 2008, 1).

Certainty has come to the forefront of contemporary Treaty negotiation as a result of recent legal and economic developments in British Columbia. Since about 1973 the Provincial and Federal courts have made decisions that are favourable to the continued existence of Aboriginal Title (*Calder v. British Columbia (Attorney General)* 1973) (*Delgamuukw v. British Columbia* 1997). Despite these legal decisions, protest activities, especially during the 80s and 90s, have resulted in a climate of “uncertainty” over whether the Crown has unencumbered claim to BC Lands, and consequently, the right to sell, lease, or develop these lands. The creation of a climate of economic certainty is one of the main motivations for the government to come to the Treaty tables in 1991.

According to the publication by the BC Treaty Commission entitled “Certainty,” “a fundamental goal of a treaty is to achieve certainty. This means that the ownership and use of lands and resources will be clear and will result in predictability for continued development and growth in the province.” Uncertainty is claimed to be the cause of delayed or disrupted economic activities, and the loss of billions of dollars. A report commissioned by the BC Treaty Commission and conducted by PriceWaterhouseCoopers in 2009 found that the main concerns were regarding BC investment, including: unsettled nature of rights to land and resources, risk of interruption of product or shipment, redistribution of land without providing satisfactory financial compensation (Commission, *Financial and Economic Impacts of the Treaty Settlement in BC* 2009). It is argued that from a business perspective, increasing globalization leads to an increase in competition. Ensuring that the BC marketplace addresses the needs of potential investors by creating an environment of certainty answers the demands of the economic elite while also creating an environment that has job security for the people worried about employment and local investments. Further, certainty is meant solve the problem of political, economic and social, discrepancies between the parties by addressing the issues of both sides without disrupting the integrity of contemporary institutions and political organizations. In other words, certainty is a method that has been employed to complete Treaty in a particular form, as dictated by the power holders. This has major implications on both how Treaty is

negotiated as well as the business and economic opportunities that follow, which emphasize settler economies in congruence with finality and certainty based on the explicit and static definition of provisions. Focusing on the future, certainty is the means of moving away from the “uncertain” past to focus on future decisions and future communities that are congruent with maintaining the political and economic status quo.

The sixth reason to enter into treaty is the economic improvement of Indigenous peoples lives through integration into the modern economy emphasizing private property and wage-based labour, which follows from the achievement of certainty as a goal of treaty. While all treaty parties have advocated addressing the continued economic marginalization of Indigenous peoples through treaty, the way this goal is framed and practiced through the negotiation necessitates further exploration. While the complexity and ramifications of Indigenous participation in the modern wage based economy cannot be fully explored in the space of this thesis, I would like to emphasize two ramifications of this goal in relation to the practice of Treaty 6. Relating economic success to the incorporation of Indigenous peoples into the modern economy places economic success in direct correlation to the achievement of certainty as dictated by government parties. This maintains the economic status quo while deepening the constructed binary between Indigenous economic and cultural success, leading to the diminution of Indigenous cultural self-determination beneath the economic interests emphasized by the government negotiation parties.

Andrew Woolford and Alan Cairns articulate two critical points for understanding the ramifications of this goal in relation to the contemporary treaty process in British Columbia. Andrew Woolford is critical of the use of the goal of certainty achieved through the explicit definition of economic provisions as dictated by government parties. He critiques economic practices based on certainty as holding the potential for “assimilation by other means,” especially in the emphasis on economic certainty without critical exploration of the degree to which the economic practices are already reflecting particular government needs.

“The logic of certainty, in the absence of a developed discourse of justice, brings forward the prospect of assimilation by other means for First Nation communities. Detached from considerations of historical right, ethical obligations and cultural recognition, settlements threaten to constrain First Nations through the

rationality of neo-liberal capitalism, rather than permitting a return to self-determination” (Woolford, *Between Justice and Certainty* 2005, 237)

In contrast, Alan Cairns seeks to diminish this potential by looking to measure two different forms of success, dividing cultural success from economic success. Cairns distinguishes between land-based cultural success and urban-based economic success as it is commonly understood in contemporary legal and political discourse of the Royal Commission on Aboriginal Peoples.

“The Commission could have argued that for the future there are two versions of success stories—on land-based, culture-sustaining, self-governing communities, and the other, more individualistic success stories in urban settings where success is measured in terms of lifestyles and incomes closer to the urban norm. The Commission could have given its support to a different balance between economic and cultural goals in urban settings and in the land-based self-governing nation communities—with a different, but equally legitimate mix of goals applicable to the difference contexts. This would have legitimated and dignified the experience of the successful urban Aboriginal person, even if the cost was a weakening of Aboriginal identity and some cultural erosion. To the Commission, however, the city was not seen positively as a site of economic and other opportunities, but negatively as a vehicle for a “constant barrage of non-Aboriginal values and experiences” (Cairns 2000, 130).

Cairns exemplifies a critical articulation of the binary between economic and cultural practices. In this statement, he critiques those who see urban economic spaces as threats to the cultural practices. However, he maintains the binary between cultural success and economic success in direct relation to proximity and influence of modern economic practices. This division between the urban economic and the land-based cultural success reinforce geographic and temporal divisions between urban and rural that are congruent conceptualizations of Indigenous culture as static, inflexible and encapsulated. In this framing the possibilities of Indigenous cultural success are relegated to a traditionalism that is kept distinct from economic success that is implicitly understood to be part of modern civilized economies.

While Woolford is critical of the potential for economic integration to create a situation of “assimilation by other means,” Cairns distinguishes between the potential for

economic and cultural success. Not only does Cairns' framing emphasize the binary between cultural and economic practices, but it also relegates culture to something that may or may be supported, given the need to first integrate into the economic practices. Combined, Woolford and Cairns provide two critical points in the analysis of this goal. Woolford is critical of the potential for the imposition of certain forms of economic success to diminish or threaten cultural self-determination. In contrast, Cairns is critical of the assumption that cultural success and economic success are mutually exclusive by emphasizing the division between the two. In other words, he emphasizes the potential for urban economic success by distinguishing it from rural cultural success. While Woolford is critical of the extent to which government dictated economic incorporation results in a process of cultural assimilation, Cairns is critical of the assumption that economic success and cultural success are part of an either/or binary. Read together, these two positions seem to posit this goal of the contemporary treaty negotiation as detrimental to First Nations lifeways, either through assimilation, or through the continued division of economic and cultural self-determination. These two critical points place the fulfilment of the goal of economic success of Treaty parties through integration in a dangerous position. Economic success either runs the risk of the potential for the loss of cultural self-determination, or cultural and economic successes are mutually exclusive.

In response to these two critical points, the reinvigoration of the common intention of Treaty 6 in comparison to the contemporary treaty process holds the potential for reimagining the possibilities of contemporary treaty relations. In the common intention of Treaty 6, the relationship between Indigenous and settler populations was not understood as either assimilationist or isolationist. Rather, there was a mutually understood negotiated form of sharing in which the economic and cultural interests of all parties were understood to be inherently linked. Thus, the success of all parties enabled the continued negotiated success between all treaty parties.

The integration of Indigenous peoples into the contemporary economy in British Columbia to resolve issues of economic disparity contrasts with the economic reasons to enter into the Treaty 6 negotiation. As explained in the holistic approach to Treaty 6, the common intention of Treaty 6 did not differentiate between the cultural and economic protection of Indigenous peoples. Not only was economic self-sufficiency linked with the

ability to continue cultural practices but the economic provisions in the common intention of Treaty 6 enacted the relationship itself. Specifically, there were provisions for agricultural tools and training while providing for the lands and resources to continue other ways of living off the land. Thus, there was a negotiated relationship of sharing in which Indigenous peoples could benefit from the settler economic practices, while maintaining their traditional life ways. Thus, the ability to enter into new settler economies in combination with the explicit and repeated assertions of the protection of Indigenous practices, asserted that this was to be a relationship of mutual self-sufficiency and not reliance.

Summary

In conclusion, the holistic approach to understanding the reasons for entrance into the contemporary treaty process is divided into six reasons. However, before these six reasons were explained, there was an exploration of the principles of equality of standing and certainty as articulated through the goals of treaty. Unlike the historic treaty negotiation process, entrance into the contemporary treaty process is not based on the principle of equality of standing in that it is not based on settler recognition of the need to enter into relationships with Indigenous peoples. In the historic context of Treaty 6, settler negotiation parties recognized that Indigenous peoples had the legitimacy to live on the land. Treaty was necessary in order to negotiate the shared jurisdiction. In contrast, the contemporary treaty process in British Columbia is based on the assumed priority of settler jurisdiction. As such, the reasons to enter into negotiation, and the subsequent process of treaty negotiation, remain reflective of the assumption of settler control and priority. The treaty negotiation process preserves the legitimacy of the occupation of settler peoples.

The prioritization of certainty as both a process and a goal in contemporary treaty making also reflects the prior assumption of the legitimacy of settler jurisdiction, and the continued unequal distribution of power and resources in favour of settler governments. The certainty present in the historic practice of Treaty 6 was a negotiated form of certainty, not dictated in process or goal by either party. Further, certainty was based on the sacred nature of the relationship and the longevity of that relationship, not explicit and exhaustive definition particular goals or clauses. As such, historic form of certainty was based on the

relationship being certain, rather than the stasis and stability of clauses within the treaty agreement.

Given the dual foundation of assumed settler jurisdiction and the prioritization of the dictated rather than negotiated form of certainty, I have divided my analysis into six goals of the contemporary treaty negotiation. First is the historical precedent of treaty making across Canada. Second is legal motivation stemming from shifts in court judgements that recognize the continued existence of Aboriginal Title and Right as a burden on Crown claims to sovereignty. The third reason for entering into treaty is to attempt to remedy or resolve contemporary marginalization of peoples through forms of reparative and transformative treaty justice. The fourth reason is the political certainty that is claimed to enable efficient Aboriginal governance models. The fifth reason is based on the economic aspect of certainty, which is the continued growth and investment in the settler economy. The final reason is the incorporation of Indigenous peoples into the improving economy achieved through certainty.

Content

The final aspect of this analysis of the contemporary Treaty process looks at the specific content that results from the contemporary treaty process. In 1991, a report issued by the British Columbia Claims task force recommended a “New Relationship” as a response to political, social and legal shifts towards recognition of the role of government policies in the social and economic marginalization of Indigenous peoples. Based on principles of mutual trust, respect and understanding, this new variation of settler Indigenous relations led to a reframing of Treaty practice. The 6-stage process is comprised of: Statement of Intent, Readiness, Framework Agreement, Agreement-In-Principle, and Final Agreement. Only in stage 6 is the word Treaty used, the stage where “Treaty is implemented.” The B.C Claims Task Force has brought together representatives from the provincial and federal governments and First Nations to develop a process reflecting the interests of the differing perspectives. This was meant to address critiques of contemporary Treaty practice as a reflection of the hegemony of a monological negotiation body. The BC Treaty Commission is intended to act as the impartial negotiation body ensuring that the issues of impositions of dominant Settler systems are not reproduced in this “New

Relationship.” The new procedure was framed through the BCTC as encouraging non-coercive and equitable communication. Through the new relationship based on equitable reformation of the BC Treaty process in a non-coercive environment, Indigenous peoples are meant to engage with the processes of marginalization as the means to negotiate out of the system that marginalizes. However, this does not indicate a critical engagement with the issues of treaty negotiation. Thus, this analysis of the contemporary treaty content will focus on the central problem of the contemporary treaty process as understood through the holistic approach, namely, the lack of negotiation that results from not entering into treaty from the initial point of equality of standing, and the imposition of a biased and non-negotiated form of certainty. This analysis is divided into four parts. First is the examination of the framing of justice in and through the treaty analysis. Second is the examination of how land claims and jurisdiction are addressed through treaty. Third is an examination of what the implications of exhaustive definition are, and finally is the examination of the relationship as a government-to-government relation.

While the previous two sections have dealt generally with the contemporary treaty process, I will focus this section specifically on the Tsawwassen Treaty. The Tsawwassen Treaty is the first Treaty to be ratified out of the new, post 1991 Treaty process and provides a working example of the manner in which the theoretical space of entrance into Treaty manifests in the practice or the product of Treaty itself. Located south of Vancouver, beside one of the busiest ports in North America, the Tsawwassen First Nation is not geographically isolated from settler development. However, the proximity to development is not reflected in the demographics of the Nation. According to the Tsawwassen Fact book, forty percent of the population was on welfare, unemployment is endemic and only fifty percent of the Tsawwassen residents had graduated from highschool at the time of the Treaty signing.

There are four areas that I focus this content analysis on: Acultural Justice, Land jurisdiction, exhaustive definition, and the government-to-government relation. The first section looks at the manner in which the particular Settlers goals of justice have been universalized. The second focus looks at the practice of defining land jurisdiction and ownership. The third looks at the practice of exhaustive definition of treaty articles, definitions, and practices of contestation. The final section looks at the characterization of a

government-to-government relationship in contrast to a nation-to-nation relationship as part of the content of treaty.

Acultural Justice

Contemporary treaty resolution appeals to an acultural, or universal form of justice as the means of resolving contemporary relations between settler and Indigenous peoples. The relation between justice as a function or result of either process or substantive criteria distances the distinct values of both Aboriginal and non-Aboriginal parties from the resolution by appealing to the possibility of universality in justice. This appeal to universal justice is assumed to lead to the just resolution of treaty for all participants.

“Moral propositions founded on a universalist position contend that justice, whether defined in terms of procedural or substantive criteria, inhabits a space beyond any of the social and cultural cleavages that separate us as human beings. The project of the universalists is to tap into this space in order to arrive at just solutions that meet universal criteria” (Woolford, *Between Justice and Certainty* 2005, 131).

By universalizing the procedure or substantive form of justice, justice as a concept becomes neutral, not culturally specific. As such, application of the blanket form of justice assumes that each party will have their needs met by the proper application of the procedure alone. In other words, in this appeal for the needs of the universal, the position of the majority, or the position of the Settler culture, is reified as the universal.

Appeals to the universal procedural justice in treaty frames difference as a societal problem best addressed through procedural fairness. This emphasizes the possibility of justice as a way of resolving the difference between treaty parties.

“A key axis of debate involves the question of whether repair requires that the maligned group receive opportunities and benefits similar to those available to the dominant group (sameness) or whether the distinctness of the maligned group needs to be recognized by the societal mainstream (difference)” (Woolford, *Between Justice and Certainty* 2005, 130).

For example, the debate over fisheries policy is at the crux of this problematic. It is argued that policies which emphasize special rights for the First Nations groups attempts to solve historical injustice with more wrongs (Milke 2008). In contrast, the argument is also made that these historical injustices must be addressed and that to impose a model that does not

recognize the differences of the rights of Aboriginal peoples is to impose a model of justice that effectively reproduces assimilative practices (Woolford, *Negotiating Affirmative Repair: Symbolic Violence in the BC Treaty Process* 2004). As such, questions of future economic relationships are contingent upon recognizing the historical legacy of denied rights. While differential treatment along race-based definitions may be problematic, unrecognized in the argument for universal fishing rights is that the values of one social group are being superimposed upon another. In other words, by not beginning the treaty relationship in recognition of the equal jurisdictional and possessory rights of Aboriginal peoples, the relationship takes the form of assumed universalization of settler jurisdiction, authority, and in effect, dominance.

In comparison to the negotiated understanding of Treaty 6, this appeal to a universal justice posits cultural differences as opaque or outside of the realm of cross-cultural understanding or negotiation. As such, the only way to solve the problem of cultural difference is through the blanket application of a universalized form of justice. Not only is this universalized form of justice actually the particular Western form of justice that has been universalized, but also this blanket application does not allow space for the negotiation of what form or process justice will take. In other words, appealing to the uncritically defined universal forms of justice negates the necessity and possibility of negotiation between parties.

Cede and Surrender-Land Practices

The second aspect of this content analysis looks at land ownership in the contemporary treaty agreement. The holistic approach to Treaty 6 asserts that the common understanding of the treaty relationship was one in which the land was to be shared. This sharing would preserve the jurisdiction of First Nations parties, and ensure the continued economic and cultural sustainability and self-sufficiency while allowing for settler settlement and use of the land. In comparison, the contemporary treaty negotiation practice prioritizes a framework of land ownership that is based on the assumption of settler priority over land jurisdiction and the surrender of land claims through exhaustive definition.

When entering into contemporary negotiation, the government offers two options for Indigenous populations with regard to the clarification of ownership of land. The first option is the surrender of Aboriginal title in return for defined rights. This assumes that

surrender of title and the exhaustive definition of rights is the only means of achieving a stable relationship between Indigenous and settler parties. Reserve land will be given back to the Aboriginal people as “fee simple,” leaving it open for the sale and use of the land, which is intended to support both integration into settler economies and financial support for First Nations communities. However, the sale and use of this land is in contravention of traditional uses and cultural practices of the original inhabitants and traditional practices. This effectively dissolves the special relationship between Indigenous people and the land, and is counterproductive to Indigenous government based on this connection to the land. The second option allows Aboriginal title to continue to exist in special reserve areas, but this land base must then be used to support and fund the communities, programs and services. This would, in all likelihood, force the Indigenous populations to use land for practices that contravene tradition use and understanding of the territory, for example, mining, logging and other activities. Both options assume the priority of settler jurisdiction in that they demand the cessation of sovereignty in exchange ownership of limited reserve lands.

In the Tsawwassen agreement, the Tsawwassen First Nation will abolish the reserve system, cede parts of its traditional territory and forgo the tax exemptions in place under the Indian act. In exchange, they receive money and government recognition of the portions of land they retain, over which they will have limited self-government. In this form of self-government, the nation will have similar jurisdiction to a municipality. Lands will no longer be held by Indian Affairs, but transferred to Tsawwassen First Nation and available for private ownership and sale. Not only does this frame land ownership within the governance structures of the Canadian government, but it also forces the treaty settlement into the form dictated by the government treaty parties. This restriction of jurisdiction to the reserve lands in a form dictated by the Canadian government parties forces Indigenous peoples to exist within the framework dictated by the government. The forced relinquishment of traditional and practices, including the traditional understandings of land ownership with regard to hunting grounds, is antithetical to the understanding of land ownership as it was commonly understood in the Treaty 6 negotiation. Rather than leaving land practices within the jurisdiction of Indigenous peoples, this places the control of land within the scope of government definition and control.

Exhaustive Definition

The contents of the Tsawwassen Final Agreement are exhaustively defined. Categorically, the Treaty covers the areas of Land, including title and management; Resources, including Forest, Fish, Wildlife, and Migratory Birds; Conservation Areas and practices; Governance and Intergovernmental relations; Fiscal Issues, including Taxation and Capital Transfer; and Dispute Resolution and Amendment. All the aspects of the Treaty are exhaustively defined, including the terminology that is employed. Further, if there is ever contestation over the inclusions in treaty, the process of contestation and amendment is also exhaustively defined in the treaty itself. In this manner, treaty is self-referential, with no external appeal for contestation or even questioning the practice of treaty.

This exhaustive definition of treaty has been articulated as the basis in and through which treaty relations are to become stable. However, this form of certainty is based on the specific protocols of treaty, rather than the relationship itself. As such, the treaty agreements are entirely inflexible, and preserve the conditions of the present rather than enabling a future orientation that allows for flexibility in the relationship.

Government to Government vs. Nation to Nation

The final aspect of the content of the contemporary treaty analysis pertains to how the relationship itself is understood in the context of treaty. In the contemporary treaty negotiation process, a cursory discourse analysis would assume that a relationship between equals is being replicated. “For the first time in Canadian history, a provincial government has joined with Canada to negotiate the resolution of Aboriginal rights and title through government-to-government negotiations”(BC Treaty Commission 2007, 4). The common discourse describing the framework of contemporary treaty and the resulting relationship that falls from treaty is termed as a government-to-government framework. There are benefits to this framing, including the inherent recognition of Indigenous peoples’ capacity to govern and engage with Canadian governance systems. However, this is also a problematic framing as it limits the position of Indigenous peoples in the federal system of governance.

In the Canadian federal system, the framing of a government-to-government relationship does not denote an equal relationship in terms of jurisdictional, institutional, or

governance control. In the framework of treaty, the powers allocated to First Nations are equated to a local or municipal level. Thus, while there is language articulating the recognition of current Aboriginal practices of governance this is not the equivalent of Provincial and Federal Government participants. Instead, at best, Aboriginal interests are likened to a municipal government. First Nations are local to the extent that they are not geographically separate from their territory. However, the term “local” has also lead to limits on jurisdiction and authority that is analogous to the municipal level of government.

Local government, as is often observed, are the creatures of the provincial governments. Local governments exist only insofar as provincial governments pass legislation to create them. The powers local governments possess, however broadly or narrowly defined, are determined by each respective province (Aldridge 2002, 43).

Unlike the common intention of Treaty 6, where the parties were not understood to have derived their power to either negotiate or practice jurisdiction over the land, in this government-to-government relationship negotiated through contemporary treaties, First Nations remain tied, and subordinate, to Canadian governments.

As such, both the ability to govern, and the very presence of First Nations governments are contingent upon decisions of the Canadian government. The Indigenous governance practices are contingently related to the Canadian government, and thus, systemically subordinated beneath the settler institutions and governance structures. Through this, not only are the powers of governance demarcated by the institutional structures that recognize them, but the needs of those parties are also defined externally.

As the Royal Proclamation states, “Her Majesty’s representatives negotiated Treaty on behalf of the Crown carrying the full authority to establish an international Treaty.” As such, the Treaty 6 agreement made between the Indigenous peoples and the British Crown was a nation-to-nation relationship, with two independent nations recognizing one another and coming together in a relationship. The practice of treaty was based on the mutual recognition of each nation and the reciprocal authority of each nation to enter into treaty. In other words, First Nations did not derive authority to enter into Treaty from the Crown, but had the inherent authority to enter into a nation-to-nation relationship stemming from their prior and long standing occupation of the land. As a result of the common intention of Treaty 6 being based on this recognition of the already present political and social integrity

of the participants, there was no subordination of one party to the other. Rather, each party maintained its ability and claim to self-sufficiency and governance.

The contemporary treaty process, with the inclusion of the provincial government, limits the framework and function of treaty governance. The Provincial Government is not able to enter into nation-to-nation agreements. As such, simply by being party to the treaty negotiation, the treaty is limited. While this may seem to be a schematic differentiation, the enforcement of treaty also becomes restricted as a result. Without the full recognition of treaty as a nation-to-nation agreement, First Nations Governments remain legislatively and jurisdictionally beneath the authority of the federal government. When it comes to treaty contestation, this necessarily limits the practices and understandings of the relationship to an understanding dictated by the government parties (Russell 2000, 56).

Summary

The acceptance of this Tsawwassen Treaty was not unanimous, and was opposed by groups both within the nation, and outside the nation. Many other First Nations believed that this Treaty set a dangerous precedent regarding the relinquishment of Aboriginal rights in order to come to a conclusion. Others felt that the territory attributed to Tsawwassen during the Treaty was part of their own traditional lands. Within the nation, of the 180 votes cast regarding the settlement, 50 of those votes were no. The reasons for this have been cited as government distrust, financial impact of loss of tax exemptions, and fear of unequal distribution of development dollars.

The analysis of the content of Treaty has focused on four key areas, each centered on the problem of the lack of negotiation in the contemporary treaty process. Rather than negotiation, the contemporary treaty process is defined by the assumption or imposition of Government needs and priorities. These four focus areas are: 1) the inclusion of justice as a universal goal of treaty through which equality for all marginalized people can be achieved. 2) The land practices, including jurisdiction and ownership. This section looks at the manner in which land practices are dictated by the limits of the treaty relationship as framed by settler governance systems. 3) The process of exhaustive definition with reference to specific provisions within the Tsawwassen Treaty. 4) The nature of the government-to-government relationship.

Conclusion

The holistic approach to understanding the contemporary treaty process in general and the Tsawwassen treaty in particular, follows the same structure of analysis as the holistic approach to understanding Treaty 6. However, rather than coming to an articulation of the common intention of treaty as a mutually negotiated practice of sharing, the holistic approach finds that the contemporary treaty process is an imposition of settler norms and structures which preserve current practices of economic and social marginalization while attempting to resolve these issues.

The analysis of the contemporary treaty process was based on the same three focuses as the holistic approach to Treaty 6. These three areas are the context of Treaty negotiation, the reasons to enter into Treaty, and finally, the content of Treaty. In analysis of the context of Treaty, there were three areas examined. In *terra nullius* it was found that the underlying contextual assumption of negotiation is that of “empty land”. This assumption of Indigenous peoples as lacking social and economic practices recognized in Western legal tradition as ownership of land not only justifies the contemporary settler occupation of the land but also enables the default imposition of settler priorities and frameworks of negotiation. Thus, instead of coming to a “jurisgenerative” relationship based on the recognition of the continued presence and relevance of Indigenous political, economic and social systems, the context of contemporary treaty is based on the assumption of Indigenous peoples as a space of lack, and the subsequent imposition of settler systems and priorities. The second area of contemporary contextual analysis looks at the importance of coming to a shared understanding. In the historical context of Treaty 6 a shared understanding was both a goal of treaty and a process of negotiation. In contrast, the context of coming to a shared understanding in contemporary treaty analysis is based on the assumption of shared meaning given the priority of settler institutions. In other words, rather than negotiating a shared meaning, Indigenous parties are expected to conform to the meaning dictated by settler communities. Third, and finally is the contextual examination of the authority to enter into treaty. In the historical practice of negotiation, there were two main parties at the negotiation, First Nations representatives, and representatives of the Dominion Government who were empowered by the Crown. First Nations parties were understood to have the inherent authority to negotiate, where Dominion representatives

were empowered by the Queen. In contrast, in contemporary treaty negotiation, there are three parties: the Provincial and Federal Governments and the First Nations. First Nations do not have the inherent authority to enter into treaty, but their authority is derived only from the relationship of treaty. In other words, the authority to enter into treaty negotiation is only as a result of the relationship with the Provincial and Federal Government. These three contextual areas of analysis reflect a substantively different context for treaty negotiation.

The second area of contemporary treaty analysis looks at the reasons to enter into treaty. In the holistic analysis of Treaty 6, these reasons were divided into political and economic motives. Some of the reasons were shared, and others were exclusive to either of the parties. Though there may have been underlying or ulterior motives for entering into treaty negotiation, the analytical practice of equality of standing does not view the motives as relevant to the common understanding of treaty. In other words, only the explicitly negotiated aspects of treaty are relevant to interpretation. For the purposes of this analysis, I have divided the motives for entrance into the contemporary treaty process into six different areas. These motives are based on an understanding of the reciprocal relationship between the goals of treaty and the process of treaty, and certainty. Where settler interests in the contemporary treaty process have defined certainty as a goal, this goal reciprocally defines the process of negotiation. Thus, in contemporary negotiation, certainty takes the form dictated by settler parties and is based on the preservation of the status quo and a static grounding of treaty. This contrasts with the form of certainty found in the Treaty 6 relationship that was based on the reciprocal negotiation of certainty and based on the sacred nature and longevity of the relationship. Based on these two foundations, there are six reasons for entrance into Treaty. First, is the precedent set by previous treaty negotiations across Canada. Second is the legal instigation resulting from shifts in court decisions in favour of the recognition of Aboriginal rights and title. Third is the motive of recognition and transforming the continued conditions of marginalization through recognition. Fourth is certainty as political stability, or the exhaustive definition of governance practices from which Aboriginal self-governance is meant to be based. Fifth is the economic practice of certainty in which government defined certainty will increase economic investment in the province. Finally, this increased economic investment is meant

to encourage Indigenous groups to become part of the shared economic system, or the integration of Indigenous parties into the settler economy.

The final aspect of this analysis looks at the content of contemporary treaty, and focuses on the Tsawwassen agreement in particular. This examination looks at four key areas. First is the assumption of the universalized form of justice that assumes particular, settler forms of justice as the universal good. Second are the land ownership practices that equate to the surrender of jurisdiction over hunting grounds in favour of defined *fee simple* ownership in reserve areas. Third is the exhaustive definition of aspects of treaty, which delimits the treaty content and does not allow room for renegotiation or arbitration outside of the agreement. Finally is the characterization of the relationship as a government-to-government relationship as opposed to a nation-to-nation relationship. The holistic approach to the contemporary treaty process finds that rather than a treaty process based on the negotiation between parties the contemporary negotiation process begins from the assumption of settler jurisdiction. Following from this assumption, the negotiation takes the form dictated by settler parties in which First Nations treaty parties are asked to engage with the processes of continued marginalization.

Conclusion:

This conclusion is not the finite ending to this analysis but an invitation to continue to engage in a conversation to which I have only offered a possible start. However, I would like to offer both a summary of this reading, and the potential implications that may be found in pursuit of this analysis further. There are three things that I would like to emphasize in coming to the end of this thesis. First, I would like to comment on the holistic approach as a way of understanding treaty relations. When applied to analysis of the historic treaties, the holistic approach begins from the assertion of Elders that the historic treaties continue to be valid in the form that they were originally understood by the negotiators. From this assertion, the holistic approach is divided into three aspects: the context, the principle of equality of standing and the principle of certainty. In the context aspect of the holistic approach, the initial premise from which analysis is based and the material of analysis reflect the focus on the common understanding of treaty. The holistic approach to treaty examination begins with the Elder's history of the common understanding, and looks to first hand accounts of the negotiation to support the Elder's history. The text of treaty is read as a partial and flawed reflection of the common understanding. The contextual analysis then looks at the foundation of negotiation, characterized as *terra plenus* or "filled land" in the historic negotiations, and *terra nullius* in contemporary negotiation. This contextual analysis also looks at the goal and practice of coming to a shared understanding and the authority to enter treaty. The specific economic context of treaty negotiation is also explicitly examined.

From this grounding of contextual analysis, the next two aspects of the holistic approach to reading treaty are the principle of equality of standing and the principle of certainty. Both these principles are theoretical in concept, but tangibly practiced in the negotiation. Further, both reflect the holistic approach's analysis of the entwined relationship between the goals of treaty, and the process of treaty negotiation. In other words both principles in theory and practice reflect the manner in which the practice of treaty negotiation defines the goal or end of negotiation and also, how the goal reciprocally defines the practice. As such, the particular process of treaty negotiation based upon the principle of equality of standing as both the foundation of treaty and an interpretive stance of contemporary analysis, enables an understanding of treaty that is congruent with the

common understanding shared between treaty negotiators. Reciprocally, the principle of certainty as a goal of both contemporary and historic treaty negotiation defines the process of negotiation. This is especially seen in the contemporary context of treaty negotiation in British Columbia in comparative contrast to Treaty 6. In this comparison, while certainty is reiterated as a goal in both contemporary and historic treaty negotiation, the form through which certainty is achieved is vastly different. As such, the different forms through which certainty is achieved change the way that the treaty relationship itself is negotiated. Taken together in both theoretical framing and practice, these three aspects of the holistic approach enable an understanding of treaty based on the common understanding of treaty negotiated between parties.

The second emphasis of this conclusion is a reiteration of the findings of the holistic approach to Treaty 6. According to the oral history of Treaty Elders in Saskatchewan, “for the Elders, what is at issue is not whether or not treaties exist, but whether a mutually acceptable record of them can now be agreed upon and implemented” (Cardinal 2000, 59). Through the holistic approach, the common understanding of Treaty 6 is characterized as a sacred and long lasting relationship based on the principle of sharing the land. This common understanding of Treaty 6 is reflected both in the oral history of Treaty 6 and in Morris’s transcripts of the negotiation. Provisions in the common understanding of treaty regarding land use, economic systems and education all reflect a relationship in and through which parties would maintain independence and cultural differences while also cooperating in many social and economic spheres. In other words, the ability of Indigenous peoples to continue to live off the land was explicitly protected and was embedded in the framework of Treaty 6 itself. The Treaty 6 provisions ensure the continued self-sufficiency of both treaty parties, practices of cooperation and the maintenance of traditional life ways. Further, contained within Treaty 6 is a complex understanding of the interrelation between cultural and economic practices where cultural and economic self-determination are connected. The common understanding of Treaty 6 reflects a relationship of sharing in which the explicit economic and cultural practices are meant to preserve Indigenous life ways while also maintaining continued economic and cultural self-sufficiency. As such, the protection and continued presence of Indigenous peoples was built into the treaty agreement itself.

Finally, I would like to comment on the connection between the common understanding of Treaty 6 and the contemporary treaty process. The final chapter of this thesis is only the beginning of a larger conversation that must take place regarding the contemporary relationship between Indigenous and settler peoples in British Columbia. However, there are a few substantive points to be reiterated. First, the holistic approach to understanding the contemporary treaty process and the comparison between Treaty 6 and the contemporary treaty, questions the very foundations upon which the modern treaty process is based. In the historic context of treaty negotiation, Settlers could not enter Indigenous peoples lands without first engaging in treaty. The holistic approach to the common understanding of Treaty 6 reveals that treaty was a negotiated relationship of shared understanding that was based on the recognition of the prior and legitimate jurisdiction of Indigenous peoples. The treaty relationship is the only legitimate means for Settlers to enter into Indigenous peoples lands. As such, the historic treaty negotiation was premised on asking what Indigenous peoples would be willing to share with the Settlers given that Settlers are negotiating entrance into territories. A reapplication of this understanding undermines the assumption of settler legitimacy in British Columbia by virtue of contemporary occupation or the assumption of *terra nullius*. The holistic approach brings into question contemporary treaty frameworks in which view negotiations as acts of government benevolence. Rather, the negotiation must ask, what Indigenous peoples are willing to share with Settlers?

Given a foundation based on asking what Indigenous peoples are willing to share with Settlers, the orientation and goals of the contemporary negotiation process would be substantively different. Rather than understanding contemporary treaty as the means to resolve business and economic concerns regarding uncertainty, or resolving Indigenous experiences of inequality through economic integration, a framework based on the historic treaty relationship asks that treaty become a practice based on the mutual obligation of treaty parties to negotiate a shared relationship. In other words, the practice of negotiation, and the responsibilities that come with a shared negotiation inherently affirm the value of Indigenous peoples presence and participation on the land.

This shared relationship is a negotiated relationship, not an imposition of the interest of one party on the other. As such, the reimagining of contemporary treaty

negotiation through this analysis of Treaty 6 articulates a means to negotiate shared interests without implicitly or explicitly prioritizing settler needs in the content and conclusion of treaty. Interests such as business growth do not need to be removed from treaty negotiation in fear that they might be a performance and prioritization of exclusively settler desires. Rather, business and economic interests are negotiated in such a way that the ability to flourish as self-sufficient Indigenous peoples is protected as a substantive part of the treaty agreement. Perhaps this is most aptly articulated in an examination of the negotiated relationship of the ties between economic and cultural practices in Treaty 6 in comparison to the contemporary framing of Indigenous economic and cultural practice. In the common understanding of Treaty 6, economic interests and cultural interests were never wholly distinct. Treaty 6 is a mutually agreed upon relationship in which the correlation of cultural and economic interests is entwined with the self-sufficiency of all treaty parties in and through the perpetuity of the negotiated relationship. Treaty 6 exemplifies the integration of cultural and economic interests without conflation of the parties, or the exclusion of interests. As such, the inclusion of cultural and economic practices of self-sufficiency in combination with the relationship of mutually negotiated shared understanding does not conflate interests or parties, but preserves them through negotiation and agreement. The economic and cultural protection of Indigenous peoples was built into the very structure of the relationship, and throughout the negotiation, the continued self-sufficiency and self reliance of Indigenous peoples was asserted. The implications of this moves far beyond the sharing land and resources in British Columbia to ask how parties understand each other through a continually negotiated relationship.

The 2008 report published by the Fraser Institute claims Indigenous peoples are illiberal and disingenuous in their demands that historic treaties be fulfilled. By citing repeated assertions by Indigenous peoples of not being “Canadian,” yet continuing to demand that the agreements of the historical treaties be met Milke assumes that the only way to be a treaty party is to be subordinate to the Canadian Government. However, the common understanding of Treaty 6 was not assimilation or subordination of Indigenous peoples into Canadian political, social, and economic systems, but the negotiation of a relationship in and through which Indigenous and settler peoples would remain distinct parties. In other words, a treaty maintains the integrity of both parties through the

negotiated relationship, enabling a relationship of simultaneous independence and sharing. As such, the reinvigoration of contemporary treaty practice based on the reciprocal and mutual obligation of parties to understand each other opens the possibility of contemporary treaty relationship as a space of negotiated understanding.

Commissioner Morris ends his book on the historic treaty negotiation by saying,

“Instead of the Indians melting away... we will see our Indian population, loyal subjects of the Crown, happy, prosperous and self-sustaining, and Canada will be enabled to feel, that in a truly patriotic spirit, our country has done its duty by the red men of the North-West, and thereby to herself. So may it be.”

Rather than ignoring the historic treaties, or viewing them as colonial documents of subordination or intercultural understanding, this thesis argues for the fulfilment of the historic treaty obligations as they were mutually understood. Not only does the common understanding of Treaty 6 change the current practices of Indigenous and settler relations in the Treaty 6 territory, but also this reading has wider implications across the historic treaty territories. Further, to reground the contemporary treaty practice in light of this understanding of Treaty 6 disrupts the foundation upon which contemporary treaty negotiation continues to assert the colonial assumption of exclusive settler legitimacy. This calls for a relationship based on the recognition of the prior and continued legitimacy of Indigenous peoples in the occupation and use of land. To begin contemporary negotiation without the assumption of settler legitimacy enables a new conversation to take place in British Columbia, and new imagining of the treaty relations to follow. However, this new imagining is not another iteration of a new “New Relationship.” Rather, this calls for an understanding of treaty that is based on the unique negotiated relationship as the historic foundation upon which contemporary relations may be based.

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