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TREATIES IN HISTORY AND LAW

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Treaties between the Crown and Indigenous peoples are, according to Canadian jurisprudence, historical phenomena. To identify particular treaty rights, the jurisprudence requires us to look for a historical moment of common intention.¹ The primary constitutional significance of the treaty also emanates from this moment. The legal problem is diagnosed as one of empirics; the solution is thus found through historical inquiry. Historians, on the other hand, have taken issue with how courts have interpreted and relied on history in treaty cases.² According to historians, treaty histories are diverse, encompassing both strong and weak relationships, and a spectrum of bargaining positions on the part of both Indigenous and Crown parties. Moreover, historians' interpretations of treaties often illuminate only incomplete, tenuous, and questionable moments of agreement. With the legal emphasis on common intention and the historical emphasis on context and the rarity or fleeting nature of common intention, the two fields of knowledge and the national narrative they each produce are out of sync.

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¹ *R v Sioui*, [1990] 1 SCR 1025, 70 DLR (4th) 427 [*Sioui* cited to SCR]; *R v Marshall*, [1999] 3 SCR 456, 177 DLR (4th) 513 [*Marshall* cited to SCR]; *R v Morris*, 2006 SCC 59, [2006] 2 SCR 915 [*Morris*].

² Arthur J Ray, *Telling It to the Judge: Taking Native History to Court* (Montreal & Kingston: McGill-Queen's University Press, 2011) [Ray, *Telling It*]; JR (Jim) Miller, "History, the Courts and Treaty Policy: Lessons from *Marshall* and Nisga'a" in Jerry P White, Paul Maxim & Dan Beavon, eds, *Aboriginal Policy Research: Setting the Agenda for Change* (Ottawa: Thompson Educational, 2004) 29 [JR Miller, "Lessons"]; William C Wicken, *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Junior* (Toronto: University of Toronto Press, 2002) [Wicken, *Mi'kmaq Treaties*].

Alongside the legal and historical accounts of treaties, numerous Indigenous groups, scholars, and public commissions identify treaties as critical to reconciliation, including establishing post-imperial or post-colonial foundations for the Canadian state.³ In their treatments, the negotiated and consensual aspects of historical and modern treaties and related treaty processes are the cornerstone in efforts towards Indigenous self-determination and reconciliation between the Crown and Indigenous peoples. Those who have signalled the promise of treaties variously describe them as processes of dialogue and recognition, and as a mechanism through which the ideal of a society founded upon consensual relations can be approximated. Whether formulated through the filters of Western political philosophy and history, or through Indigenous intellectual and political traditions, advocates conceive treaties as a dynamic, ongoing relationship anchored by shared commitment to that relationship and the attendant mutual recognition and respect. From

³ See e.g. Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001); James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, UK: Cambridge University Press, 1995) [Tully, *Strange Multiplicity*]; John Borrows, "Ground-Rules: Indigenous Treaties in Canada and New Zealand" (2006) 22:2 NZUL Rev 188 [Borrows, "Ground-Rules"]; James [sákéj] Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 Sask L Rev 241 [Henderson, "Treaty Federalism"]; *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Minister of Supply and Services, 1996) [RCAP, vol 1]; *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Minister of Supply and Services, 1996) [RCAP, vol 2]; Treaty 7 Elders and Tribal Council with Walter Hildebrandt, Sarah Carter & Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal & Kingston: McGill-Queen's University Press, 1996) [Treaty 7 Elders]; Office of the Treaty Commissioner of Saskatchewan, *Statement of Treaty Issues: Treaties as a Bridge to the Future* (Saskatoon: Office of the Treaty Commissioner, 1998), online: <<http://www.otc.ca/publications/7>>; *Report of the Ipperwash Inquiry*, vol 4 (Toronto: Government of Ontario, 2007) (Commissioner: Hon Sidney B Linden), online: <<http://www.attorneygeneral.jus.gov.on.ca>>; Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: Native Law Centre at the University of Saskatchewan, 2012).

these perspectives, treaties present both legal and political problems that demand solutions that take the past, present, and future into account.

What bearing should history have on the determination of the legal significance of treaties? What contributions do history and law make towards a politics of treaties capable of achieving their promise? Is it, and why is it, a problem to have different narratives of treaties emerging from law and history? Law, history, and political theory all contribute to the national narrative of Canada. Within each of these disciplines “official history” favouring colonial powers has been challenged by greater inclusivity of Indigenous and other perspectives, resulting in small shifts that broaden and change that narrative. But these changes are uneven and incomplete, and Indigenous perspectives and traditions (which may not manifest the same disciplinary divides) may remain poorly incorporated. This is particularly true in law, which has a privileged place in this interdisciplinary dialogue. Law calls on history to inform treaty rights decisions and often sets the course for further historical study on Indigenous–Crown relations. Law then sets the course for treaty negotiations, setting the parameters of treaty politics even as judges urge the parties to find negotiated solutions. With the coercive force of the state behind it and the role of courts as public authorities, the narrative that emanates from courts has a controlling impact on the public history of treaties. When law, history, and political theory collide through the law, the legitimacy and character of the national narrative is at stake.

This paper explores the conceptualizations of treaties in history and law, assessing these conceptualizations against the promise of treaties as well as their influence on each other. I will argue that the promise of treaties is better served by greater coherence in the conception of treaties between the different fields, and in particular, a conception that takes its lead from accounts of treaties as defining and constitutive of dynamic relationships. By canvassing treaty histories and survey-style discussions of historical treaties, I will first demonstrate that treaties remain categorized on colonial terms. I will argue for a reorganization of this schema in favour of one that situates and explains particular treaties in relation to evolving relationships rather than evolving colonial interests. Second, I will review legal accounts of treaties and treaty rights to illustrate doctrinal expectations of a one-dimensional empirical history, and argue for

re-situating history within legal analysis towards a more explicitly normative treaty rights jurisprudence. This legal argument is not new, although it is drawn from a more explicitly interdisciplinary approach and will offer some variation on the prescription with more attention to remedial avenues.⁴ Although the argument is not new, there are new or renewed impetuses for this discussion: consultation and negotiation processes in Aboriginal and Canadian public law proliferate;⁵ the death knell sounds frequently for treaty processes that are taking far too long;⁶ and, implementation problems continue even where modern treaties have been concluded.⁷ These ongoing and new developments give rise to a need for a conceptual map capable of showing the linkages between them and suggesting the path forward.

To arrive at these arguments and outline the connections between the promise of treaties and the understanding of treaties in both history and law, this paper will need to wade through several methodological debates

⁴ For related arguments regarding the need to reconsider how history shapes Aboriginal and treaty rights, see Brian Slattery, “The Generative Structure of Aboriginal Rights” (2007) 38 Sup Ct L Rev 595 [Slattery, “Generative Structure”]; Mark D Walters, “Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History after *Marshall*” (2001) 24 Dal LJ 75 [Walters, “Covenant Chain”]; John Borrows, “(Ab)Originalism and Canada’s Constitution” (2012) 258 Sup Ct L Rev (2d) 351 [Borrows, “(Ab)Originalism”].

⁵ Dwight Newman has suggested that the development of the duty to consult may ultimately impede the development of Aboriginal rights doctrines, which define the scope of any duty to consult. See Dwight G Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich, 2009) at 26–27.

⁶ See e.g. Justine Hunter, “Treaty commissioner suggests shutdown”, *The Globe and Mail* (13 Oct 2011), S1; James M Lornie, *Report on Acceleration of BC Common Table Treaty Negotiations*, submitted to the Minister of Aboriginal Affairs and Northern Development (2011) [unpublished], online: First Nations Summit <<http://www.fns.bc.ca>> [Lornie Report]. It remains to be seen whether the recent declaration of Aboriginal title in *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44, 459 NR 287 [*Tsilhqot’in*] will provide the catalyst required to revive the treaty process in British Columbia.

⁷ See e.g. *Inuit of Nunavut v Canada (Attorney General)*, 2012 NUCJ 11, [2012] 3 CNLR 210, rev’d 2014 NUCA 2, 2014 CarswellNun 14 (WL Can) [*Nunavut*].

that have dogged Aboriginal rights jurisprudence. Treaty rights (and Aboriginal rights more generally) have posed a particular challenge to what constitutes a productive relationship between law and history. Particularly animated in debates surrounding Aboriginal title, legal scholars from New Zealand and Australia especially have contested the historical justiciability of Aboriginal title, claiming that a properly historicist legal history of the doctrine renders legal arguments about the continuity of Aboriginal title in the common law tradition suspect.⁸ Other scholars, particularly from Canada, have viewed the continuity of Aboriginal title as a matter of both legal history and legal argument, situating the historical account of Aboriginal title within legal discourse and noting that the interpretive parameters of law, as well as disputes about the character of law, are part of the account of its history.⁹ Their respective insistences on the controlling significance of historical versus legal accounts assume different relationships between law and history, and, presumably, different underlying views of what serves the ends of justice or reconciliation (or simply, legal arguments) in the present.

These debates transfer into interdisciplinary conversations, where the potential for clashes between historical and legal methodologies manifest in historians' discomfort with the interpretive selectivity and finality required of history in Aboriginal rights cases and the judicial treatment of the nature of historical knowledge more generally.¹⁰ Further

⁸ See e.g. PG McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford: Oxford University Press, 2004) [McHugh, *Aboriginal Societies*] (the common law doctrine of Aboriginal title did not emerge as law until the 1970s); Mark Hickford, "'Vague Native Rights to Land': British Imperial Policy on Native Title and Custom in New Zealand, 1837–53" (2010) 38:2 *Journal of Imperial and Commonwealth History* 175.

⁹ See e.g. Mark D Walters, "Histories of Colonialism, Legality, and Aboriginality" (2007) 57:4 *UTLJ* 819 [Walters, "Histories of Colonialism"]. Other scholars who have emphasized the legal and historical continuity of Aboriginal rights in their work include Kent McNeil, Brian Slattery, and John Borrows.

¹⁰ See citations in *supra* note 2; Alex Reilly & Ann Genovese, "Claiming the Past: Historical Understanding in Australian Native Title Jurisprudence" (2004) 3 *Indigenous LJ* 19; Joel R Fortune, "Construing *Delgamuukw*: Legal Arguments,

methodological challenges are introduced by Indigenous conceptions and methodologies of law and history, which the disciplines of law and history have both struggled to recognize and accommodate.¹¹ And finally, the disciplinary perspective of political philosophy changes the shape of the debate about the relationship between law and history to focus on the normative weight of history, and historical injustice in particular, in the formulation of present-day legal or constitutional rights, and in democratic politics more generally.¹² Moving between all of these methodologies and disciplinary concerns requires attention to their similarities and contributions to the formation of national narratives.

Grappling with these various disciplines, methodological intersections, and related strands of critique is a vital step in arriving at a more coherent account of treaties. This paper will attempt to move through them one by one, starting on this path by exploring the promise of treaties as drawn from a variety of scholarly accounts of the constitutional significance of treaties. Next, the discussion will turn to history, both to provide some

Historical Argumentation, and the Philosophy of History” (1993) 51:1 UT Fac L Rev 80.

¹¹ See e.g. John Borrows, “Listening for a Change: The Courts and Oral Tradition” (2001) 39:1 Osgoode Hall LJ 1; Val Napoleon, “*Delgamuukw*: A Legal Straightjacket for Oral Histories?” (2005) 20:2 CJLS 123 [Napoleon, “Straightjacket”]; Bruce Granville Miller, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts* (Vancouver: UBC Press, 2011) [B Miller]; Dipesh Chakrabarty, “Reconciliation and Its Historiography: Some Preliminary Thoughts” (2001) 7:1 Cultural Studies Review 6 [Chakrabarty, “Reconciliation and Its Historiography”]; Miranda Johnson, “Honest Acts and Dangerous Supplements: Indigenous Oral History and Historical Practice in Settler Societies” (2005) 8:3 Postcolonial Studies 261.

¹² See e.g. Jeremy Waldron, “The Half-Life of Treaties: Waitangi, *Rebus Sic Stantibus*” (2006) 11:2 Otago L Rev 161, and regarding Aboriginal rights more generally, Jeremy Waldron, “Indigeneity? First Peoples and Last Occupancy” (2003) 1 New Zealand Journal of Public and International Law 55; Dwight G Newman, “Prior Occupation and Schismatic Principles: Toward a Normative Theorization of Aboriginal Title” (2007) 44:4 Alta L Rev 779; Duncan Ivison, *Postcolonial Liberalism* (Cambridge, UK: Cambridge University Press, 2002); Tully, *Strange Multiplicity*, *supra* note 3; Will Kymlicka & Bashir Bashir, eds, *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008); James Tully, *Public Philosophy in a New Key* (Cambridge, UK: Cambridge University Press, 2008) vol 1.

descriptive anchors for the Canadian experience of treaty making as well as to consider the narrative impressions left by treaty histories, with particular emphasis on what I refer to as “survey accounts” that attempt to organize the diversity of treaty histories. The final section of the paper will turn to the legal account of treaties, considering the doctrinal history as well as the interpretive principles that guide the determination of treaty rights. These discussions will close with reflections on judicial approaches to treaties that can better support a coherent national narrative and thus also better support the promise of treaties beyond the courts.

I. THE PROMISE OF TREATIES: TREATIES AS CONSTITUTIONAL NARRATIVE

Legal and political theorists, both Indigenous and non-Indigenous, have looked to a long history of treaty making in North America to provide alternative constitutional narratives—a mix of legal, moral, and historical storytelling (and argument) aimed at articulating the foundations of a post-imperial constitutional order. In their discussions, the constitutional character of treaties has several overlapping dimensions. First, treaties represent a constitutional event, providing a “credible alternative to the doctrine of discovery as a source of legitimacy for European assertions of sovereignty in North America.”¹³ Second, treaties create a framework for working together within or between political communities, giving rise to descriptions of treaties as relationships and processes. And third, through these frameworks, treaties generate intersocietal (and constitutional) norms and meanings that also guide the conduct of the relationship. In this section I canvass these three constitutional dimensions of the promise of treaties to set the stage for the later discussions of treaties in history and law.

A. TREATIES AS CONSTITUTIONAL EVENT

Courts have generally avoided a definitive account of the constitutional event marked by treaties, in part because courts have taken a broad

¹³ Macklem, *supra* note 3 at 156.

approach to what counts as a treaty and the circumstances and nature of each treaty vary according to time and place. More significantly, the courts have carved out *sui generis* space for Crown–Indigenous treaties.¹⁴ This *sui generis* status distinguishes Crown–Indigenous treaties from their international law counterparts, thereby avoiding the need to inquire into the sovereign status of the parties required to form treaties under contemporary international law—a status that historically may have been as or more elusive for the Crown than for Indigenous parties.¹⁵ Our current law, however, has 19th-century starting points in which courts characterized treaties as confirming if not accomplishing the subjection of Indigenous peoples to the Crown, and as a distribution of power and protection from the Crown to Indigenous peoples. This juridical history will receive more attention in the third section of this paper. At this point in the discussion, however, it is important to raise the doctrinal treatment to contextualize the accounts that will be reviewed below, which react to the unsatisfactory account of the acquisition and nature of Crown sovereignty in Imperial and Canadian constitutional law.

Alternative accounts of the constitutional events marked by treaties place greater significance on the role of treaties in the acquisition of Crown sovereignty and the formation of the Canadian state. Treaty federalism, advanced by James [Sákéj] Youngblood Henderson and Keira Ladner, is a prominent narrative that emphasizes treaties as the most

¹⁴ *R v Simon*, [1985] 2 SCR 387, 24 DLR (4th) 390 [*Simon* cited to SCR] (“an Indian treaty . . . is an agreement *sui generis* which is neither created nor terminated according to the rules of international law” at 404).

¹⁵ In *Sioui*, *supra* note 1, the treaty in issue predated the Royal Proclamation of 1763 and was primarily concerned with peace and alliance between the Huron and the British. The Court commented that “[a]t the time with which we are concerned [Crown] relations with Indian tribes fell somewhere between the kind of relations conducted between sovereign states and the relations that such states had with their own citizens” (*ibid* at 1038). The *sui generis* approach permitted the Court to avoid difficult issues regarding the status of the Crown’s sovereignty at the time (not yet established, as the Attorney General for Quebec pointed out). It should also be noted that these concerns arise from the present construction of state sovereignty in international law and that the law of nations in the mid-18th century might have evaluated the capacity of Indigenous nations differently.

significant feature of a constitutional theory that is grounded in North American experience.¹⁶ Henderson first presented his treaty federalist argument in 1994 when he argued treaties are the source of the Crown's powers within treaty lands, creating a treaty order in which the treaties are on par with the *Constitution Act, 1867* that divided jurisdiction amongst provincial and federal legislatures.¹⁷ More recently, he has reasserted his arguments, grounding the pre-treaty environment in Indigenous legal regimes by reviewing treaties within Indigenous nations or confederacies.¹⁸ He supports the judicial direction towards finding "shared meaning" in interpreting treaty rights and argues for institutional reform and a negotiated implementation of the treaty order. In his view, the potential of

¹⁶ Henderson, "Treaty Federalism", *supra* note 3; Kiera L Ladner, "Treaty Federalism: An Indigenous Vision of Canadian Federalisms" in François Rocher & Miriam Smith, eds, *New Trends in Canadian Federalism*, 2d ed (Peterborough, Ont: Broadview Press, 2003) 167. Jean Leclair has pointed out weaknesses in the treaty federalism narrative, and in particular that it fails to bring non-treaty Indigenous people (i.e., Métis people and non-status and urban Aboriginal people) into the revamped federation for which it advocates. See Jean Leclair, "Federal Constitutionalism and Aboriginal Difference" (2006) 31:2 *Queen's LJ* 521. His view is in part premised on what I would argue is an overly narrow understanding of treaties. Some of his concerns may be addressed by the broad view of treaties discussed in this paper. Other concerns raised by Leclair relate to how indigeneity has been constructed by law and policy, resulting in different and uneven access to constitutional protections among Indigenous peoples. These topics are beyond the scope of this paper. See generally John Borrows, "Physical Philosophy: Mobility and the Future of Indigenous Rights" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart, 2009) 403; Val Napoleon, "Aboriginal Discourse: Gender, Identity, and Community" in Richardson, Imai & McNeil, *ibid*, 223; Sébastien Grammond, *Identity Captured by Law: Membership in Canada's Indigenous Peoples and Linguistic Minorities* (Montreal & Kingston: McGill-Queen's University Press, 2009).

¹⁷ Henderson, "Treaty Federalism", *supra* note 3, referring to *Constitution Act, 1867* (UK), 30 & 31 *Vict*, c 3, reprinted in RSC 1985, App II, No 5 [*Constitution Act, 1867*].

¹⁸ James (Sa'ke') Youngblood Henderson, *Treaty Rights in the Constitution of Canada* (Toronto: Thomson Carswell, 2007) [Henderson, *Treaty Rights*].

treaties to support a post-colonial constitutional order depends “upon a reliance on consensual values and dialogical processes.”¹⁹

Other legal scholars share the essential argument that legitimate foundations for the Canadian state can only be grounded on the consent and participation of Indigenous nations obtained through treaties, a view that recognizes the pre-existing sovereignty of Indigenous nations and the continuation of some degree of sovereignty post-treaty.²⁰ As will be reviewed in the second section of this paper, treaty histories encompass a wide variety of experiences and agreements, including occasions that suggest fraud and abuses on the part of the Crown and disagreement regarding the meaning and significance of particular treaties. The variety of historical experience suggests that treaty federalist and treaties-as-consent narratives may potentially be destabilized by historical accounts that contradict such narratives. Should potentially ahistorical accounts be relied on as cornerstones of Canadian sovereignty? In relation to Henderson’s narrative, Mark Walters has commented that his “legal arguments would collapse without the historical foundations” on which his narrative is built.²¹ Walters resolves the concern for the potential lack of historicism in Henderson’s account by pointing out that lawyers and historians belong to different interpretive communities, and that lawyers such as Henderson treat law in history as a normative concept rather than an empirical one. As such, Henderson’s argument regarding the legal and constitution effect of treaties is judged from “an amalgam of historic commitments interpreted today with a view to the coherence . . . of the

¹⁹ *Ibid* at 1005.

²⁰ See e.g. Borrows, “Ground-Rules” *supra* note 3; Macklem, *supra* note 3; Kent McNeil, “Negotiated Sovereignty: Indian Treaties and the Acquisition of American and Canadian Territorial Rights in the Pacific Northwest” in Alexandra Harmon, ed, *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest* (Seattle: University of Washington Press, 2008) [Harmon, *Power of Promises*] 35; Gordon Christie, “Justifying Principles of Treaty Interpretation” (2000) 26:1 *Queen’s LJ* 143.

²¹ Walters, “Covenant Chain”, *supra* note 4 at 93.

present legal order.”²² Thus, the demand for the past to be brought into line with a standard of consent exists in the present.

The problems and consequences of potential disjunctures between the specificity and past-ness of a historian’s account on the one hand and the presentist generality of the accounts by legal scholars on the other will be further discussed in the later sections of this paper. For now, the focus is on political theory, which offers other ways to consider the relationship between law and history around the issue of consent. First, the normative weight of consent in accounts of treaties as a constitutional event leads to a requirement that weak or incomplete treaties and fraudulent acts in this history be addressed through reconsideration and renegotiation in the present. James Tully, for example, suggests:

Just because a particular practice of consent, such as a treaty with a non-European authority, is surrounded by force and fraud, it does not follow that the practice of treaty making loses its authority. As with any kind of contract, what follows is that the honour and duty of the Crown require that the specific violation of the treaty caused by the force or fraud must be remedied in some manner. . . . If anything, the very fact that one can distinguish between a consensual treaty and force and fraud strengthens, rather than weakens, the practice of treaty making.²³

In these comments, Tully shifts the idea of consent from a moment in time to something that emerges over time. He differentiates between points of agreement and commitment to the forums through which those points of agreement are worked out. This shift suggests that consent itself may be more of a process than an event. It also anticipates the second constitutional dimension of treaties to which we now turn our attention.

²² *Ibid* at 94.

²³ James Tully, “Consent, Hegemony, and Dissent in Treaty Negotiations” in Jeremy Webber & Colin M Macleod, eds, *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) 233 at 238 [Tully, “Consent”].

B. TREATIES AS FRAMEWORK/RELATIONSHIP/PROCESS

The appeal of treaties has attracted the attention of numerous constitutional theorists in recent years. James Tully is prominent amongst these theorists. For him, the historic treaty-making patterns and policies of colonial North America, which he terms “treaty constitutionalism”, provide an exemplar of three conventions he contends are required to support a post-imperial constitutionalism: mutual recognition, continuity, and consent.²⁴ In such accounts, the *process* of treaties is as or more important than treaties as historical, constitutional events. What “actually happened” in 1760, 1854, or 1899 matters less than that treaties were made on those dates because treaties convey mutual recognition between the parties and consent to deal with each other. As Patrick Macklem explains, treaties are

instruments of mutual recognition. . . . The treaty process is a means by which competing claims of authority and right can be reconciled with each other by each party agreeing to recognize a measure of the authority with the other. . . . As an instrument of mutual recognition, a treaty is an ongoing process, structured but not determined by the text of the original agreement, by which parties commit to resolving disputes that might arise in the future through a process of dialogue and mutual respect.²⁵

Treaties are thus not simply or primarily historical markers of significant moments in the formation of the Canadian state, but also a lasting commitment to a mechanism for renewing and maintaining a just Crown–Aboriginal relationship. This conception of treaties in turn leads to critiques of the emphasis on achieving certainty and finality in modern treaty processes. Instead, scholars have argued that renewed relationships and ongoing processes of negotiation should be the aim of contemporary treaty processes.²⁶

²⁴ Tully, *Strange Multiplicity*, *supra* note 3 at 116–17 ff.

²⁵ Macklem, *supra* note 3 at 155. See also Henderson, *Treaty Rights*, *supra* note 18.

²⁶ See e.g. Mark L Stevenson, “Visions of Certainty: Challenging Assumptions” in *Speaking Truth to Power: A Treaty Forum* (Ottawa: Law Commission of Canada, 2001) 113; Andrew Woolford, *Between Justice and Certainty: Treaty Making in*

These accounts draw on and are paralleled by diverse accounts of Indigenous conceptions of treaties and the manner by which they structure and guide relationships. Two-Row Wampum (*Gus-Wen-Tab*) is well-known for its elegant expression of the Haudenosaunee conception of the treaty relationship between their confederacy and European newcomers. The two parallel strips of purple shell beads on this wampum belt are explained as representing continued autonomy while the white rows represent peace, friendship, and respect, suggesting that autonomy of both Indigenous and settler political communities is supported by their interdependence and mutual support.²⁷ The covenant chain is another well-known Haudenosaunee legal concept that was widely used in relations between the British and First Nations in the Great Lakes region. The links of the chain describe “notional links of kinship, an extrapolation of the clan unit that was the basic building block of local, national and confederal aboriginal political organizations.”²⁸ The chain was not self-maintaining, but rather required frequent attention through councils and diplomatic practices to keep it “bright.”²⁹ Both Two-Row Wampum and the covenant chain convey a feature of Indigenous conceptions of treaty that has been broadly noted: treaties are best understood as “vital, living instruments.”³⁰ Constitutional theorists have borrowed heavily from this characterization of treaty as relationship to arrive at their accounts of treaties as a dynamic, ongoing constitutional process.

British Columbia (Vancouver: UBC Press, 2005) [Woolford, *Treaty Making in BC*]; Ravi de Costa, “History, Democracy, and Treaty Negotiations in British Columbia” in Harmon, *Power of Promises*, *supra* note 20, 297.

²⁷ See e.g. John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 149–50; Walters, “Covenant Chain”, *supra* note 4 at 82.

²⁸ *Ibid* at 81 [citation omitted].

²⁹ *Ibid* at 82–83.

³⁰ RCAP, vol 1, *supra* note 3 at 37. See also Robert A Williams Jr, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600–1800* (New York: Oxford University Press, 1997) [Williams, *Linking Arms*].

A further aspect of Indigenous conceptions of treaty that is relevant to understanding their constitutional dimensions is the frequent emphasis on the sacred character of treaties. Ceremonies and protocols, such as pipe ceremonies, that accompanied the negotiation of treaties expressed the sacredness of the negotiations and their outcome.³¹ Sacredness also signifies the permanence of the peace and friendship established through the agreement.³² The Supreme Court has adopted this language, frequently stating that treaties are sacred agreements, made up of solemn promises. In the jurisprudential context, the Supreme Court uses this language to assert both the legally binding nature of these agreements as well as their permanence.³³ Permanence is a necessary part of the characterization of treaties as constitutional, since constitutions, by their very nature, are built to last.³⁴ But which aspects of a treaty are permanent, and thus, constitutional? How do we identify and work with the evolutionary aspects of treaties while respecting their permanence?

³¹ See e.g. Treaty 7 Elders, *supra* note 3 at 7; Williams, *Linking Arms*, *supra* note 30 at 40–61.

³² See e.g. Treaty 7 Elders, *supra* note 3 at 7 (peace alliances were “binding for all time”).

³³ See e.g. *Sioui*, *supra* note 1 at 1063 [citations omitted]:

It would be contrary to the general principles of law for an agreement concluded between the English and the French to extinguish a treaty concluded between the English and the Hurons. It must be remembered that a treaty is a solemn agreement between the Crown and the Indians, an agreement the nature of which is sacred. The very definition of a treaty thus makes it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned.

³⁴ The sacredness of treaties also connects treaties to religion, made more apparent through ceremonies that accompany treaty making. Such ceremonies (e.g., pipe ceremonies) often involve connecting the actions of the leaders to spiritual realms, situating them in creation and recalling the sources or nature of their authority. While beyond the scope of this paper, it is also helpful to recall the deep religious roots of European political authority in Europe as well as in America. Regarding the latter, see e.g. Brian Slattery, “Paper Empires: The Legal Dimensions of French and English Ventures in North America” in John McLaren, AR Buck & Nancy E Wright, eds, *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) 50. Thus, by recalling the sources of political authority, the sacredness of treaties presents another dimension of constitutionality.

Litigants asserting particular treaty rights locate this permanence in specific terms and rights (both before and after section 35 of the *Constitution Act, 1982*³⁵). The jurisprudence follows their lead. However, the conception of treaties articulated by Indigenous voices does not require that permanence attach to particular terms. Instead, permanence attaches to the living relationship that is the central defining feature of the treaty.³⁶ Particular terms operationalize that relationship, and as “solemn promises”, cannot be put aside lightly or without the consent of the Indigenous parties. But any working relationship requires adjustment over time, and thus a conception of treaty as relationship requires, as a corollary, some flexibility in its terms.

The variety of terms available to describe treaties in Indigenous languages reinforces this claim. Indigenous languages specifically appear to distinguish between types of agreements on the basis of whether the agreements were fixed or open for additions and evolutions. As historian John Long explains, “Oral agreements were not fixed or final; they were revisited when circumstances warranted. Hunting territories, for example, had sometimes to be adjusted. When a man died, others might not want to hunt on his land, for ‘the animals leave the territory in search of him.’”³⁷ Similarly, the Treaty 7 Elders state that alliances for the purposes of trade did not carry with them the same binding and immutable character of peace alliances,³⁸ and the Royal Commission on Aboriginal Peoples reported that “in the Ojibwa language . . . there is a difference between *Chi-debakk-(in)-Nee-Gay-Win*, an open agreement with matters to be added to it, and *Bug-in-Ee-Gay*, which relates to ‘letting it go’.” The Lake Huron Treaty of 1850, according to the oral tradition of the Ojibwa, was

³⁵ Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].

³⁶ For a related discussion of Indigenous constitutional practices, see Borrows, “(Ab)Originalism”, *supra* note 4.

³⁷ John S Long, *Treaty No 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905* (Montreal & Kingston: McGill-Queen’s University Press, 2010) at 346, citing Brian Craik & Byers Casgrain, “Making a Living in the Bush: Land Tenure at Waskaganish” (1986) 28:1-2 *Anthropologica* 175.

³⁸ Treaty 7 Elders, *supra* note 3 at 7.

to be ‘added to’.”³⁹ Conceptions and language that portray an evolving relationship also illustrate this specificity and sophistication. The covenant chain set in motion a framework through which differences were attended to and further negotiations were fostered, and thus reaffirmed the peace and alliance it expressed.⁴⁰ Similarly, James Henderson reports that the Treaty of Niagara was conceptualized by the Ojibwa “as a helping agreement (*wechizinchikewina*) or creation of a helping system (*apichchikan*).”⁴¹ These accounts of treaties suggest a fine balance between maintaining the fundamental shape of a relationship defined through a treaty and allowing that relationship to grow, shift, and adjust to changing conditions over time. It is a process that has been likened by some legal scholars to the “living tree” metaphor that has, since the 1930s, described constitutional interpretation in Canada.⁴²

The tensions inherent in maintaining stability and preserving the consensual foundations, while allowing growth and change within a relationship are further elaborated by accounts of how consent grounds the legitimacy of democratic political communities. Political theorist Duncan Ivison explains that because individuals are embedded in relationships and interdependencies to which they either did not or could not have consented, we should not look for “evidence of primal or continuing consent” but rather “evidence of *contestability*—for the capacity of people to effectively contest those norms or actions acting on them and to alter or shape their course in different ways.”⁴³ Thus, the nature of those relationships and interdependencies becomes the focus, and consent itself becomes a process rather than an event.

³⁹ RCAP, vol 1, *supra* note 3 at 121.

⁴⁰ Walters, “Covenant Chain”, *supra* note 4 at 82–85.

⁴¹ Henderson, *Treaty Rights*, *supra* note 18 at 228.

⁴² See Borrows, “Ground-Rules,” *supra* note 3; Walters, “Covenant Chain”, *supra* note 4 at 94.

⁴³ Duncan Ivison, “Consent or Contestation” in Webber & Macleod, *supra* note 23, 188 at 193–94 [emphasis in original].

Moving such approaches into the realm of treaties, many constraints on the possibility of a “true” moment of consent are evident. With respect to historical treaty negotiations, many observers have noted that First Nations may not have had much choice about whether to take a treaty or not⁴⁴ and contemporary negotiations and implementation processes continue to be constrained by numerous markers of power imbalance between First Nations and the Crown.⁴⁵ Tully identifies these present-day conditions as the “problem of hegemony”, whereby treaty negotiations are circumscribed by legal, political, and economic institutions that have been imposed on Indigenous peoples and by discursive traditions defined by Western theories that justified colonial authority and continue to underpin global political and economic regimes.⁴⁶ Under these conditions, treaty negotiations do not take place on a level playing field and there is little room to dispute the boundaries of the negotiations. Nevertheless, Tully contends that parties should not reject negotiations: “The aim of entering into negotiations is precisely to change unequal circumstances. . . . To reject negotiations because of the unequal initial conditions is to be taken in by the false normative ideal of negotiation among free and equal partners that serves to obscure the real world of negotiations among differentially free and unequal partners.”⁴⁷ Parties must therefore challenge the agenda and boundary conditions of negotiations and reject the notion that the field of negotiations is fixed by

⁴⁴ See e.g. René Fumoleau, *As Long as this Land Shall Last: A History of Treaty 8 and Treaty 11 (1870–1939)* (Calgary: University of Calgary Press, 2004); Long, *supra* note 37; Michael Coyle, “Marginalized by Sui Generis? Duress, Undue Influence and Crown–Aboriginal Treaties” (2008) 32 *Man LJ* 34.

⁴⁵ See e.g. Murray Browne, “The Promise of Delgamuukw and the Reality of Treaty Negotiations in British Columbia” in Maria Morellato, ed, *Aboriginal Law since Delgamuukw* (Aurora, Ont: Cartwright Group, 2009) 465; Woolford, *Treaty Making in BC*, *supra* note 26; Gabrielle A Slowey, “Unfinished Business: Self-Government and the James Bay Northern Quebec Agreement Thirty Years Later” in Yale D Belanger, ed, *Aboriginal Self-Government in Canada: Current Trends and Issues*, 3d ed (Saskatoon: Purich, 2008) 206; Lornie Report, *supra* note 6.

⁴⁶ Tully, “Consent”, *supra* note 23 at 240–41.

⁴⁷ *Ibid* at 247.

the boundaries of official treaty processes. Tully includes actors within governmental and judicial institutions, negotiations in other contexts, and Indigenous and non-Indigenous peoples contesting those institutions through a variety of actions in national and international arenas as all contributing to the discursive field of treaty negotiations. From these premises, Tully arrives at a picture of treaty processes that encompass “a much broader *field* of consent and dissent, and a much broader range of *practices* of consent and dissent” that unpredictably shape “ongoing and open-ended relationships among unequal partners that are continually modified by their practices of consent and dissent, agreement and disagreement, and negotiation and renegotiation.”⁴⁸

Tully’s approach emphasizes treaty processes as political processes. As constitutional rather than ordinary political processes, the politics of treaties constitute political communities: Indigenous, non-Indigenous, and the presumably federated communities formed through their interactions. Tully points out that non-hegemonic treaty processes demand that not only the process, but also the boundaries and shape of the communities constituted and reconstituted through these processes must be contestable. Further, the centrality of contestability in treaty processes suggests that the interests and values of treaty parties may not become merged or reconciled.

Most fundamentally, a non-hegemonic view of treaty processes should allow for the contestation of sovereignty—how it was acquired, and its present form and legitimacy. Referring to the difference between politics and “the political” in the political theories of Hannah Arendt and Chantal Mouffe, Andrew Schaap explains, “the concept of the political refers to a certain potentiality within politics according to which commonality emerges out of difference. In other words, the political refers to a dynamic inherent within political action by which a ‘we’ . . . comes to be articulated.”⁴⁹ This is a useful distinction to bring to treaties, and particularly with Schaap’s emphasis on agonism and concerns to not

⁴⁸ *Ibid* at 249 [emphasis in original].

⁴⁹ Andrew Schaap, “Agonism in Divided Societies” (2006) 32:2 *Philosophy & Social Criticism* 255 at 271.

presume reciprocity in dialogues within divided societies (such as a dialogue involving historically aggrieved and persistently unequal treaty partners) and to maintain the dynamic of contestation.⁵⁰ A non-hegemonic approach to treaties will thus recognize treaty processes as politics and the hoped-for transformation upon a treaty settlement as an expression of the political. The latter aspiration is for a utopian ideal that may not manifest even while parties' participation in treaty processes suggests that at least some notion of the political "we" has already emerged.⁵¹ The risk of not giving such a wide berth for difference within and around treaty negotiations is the potential of hegemonic forces to push the emergence of a more complete and settled "political moment" even further away.

Political theorists thus urge us to understand the constitutional moment of treaties to be an ongoing one, to conceive of treaty processes broadly, and to accept that as much dissent as consent might be present within a given treaty. These political accounts stand in contrast to juridical narratives that tend to emphasize finality, the accomplishment of discrete treaties, and a jurisprudence focused on treaty rights defined by discrete moments of "common intention". We will return to these contrasts in Sections II and III of the paper, but we first turn to the generative aspect of treaties, a third constitutional dimension of treaties that builds on the analysis of treaty processes and relationships.

⁵⁰ For the adaptation of agonism to address democratic politics in pluralist societies, see Monique Deveaux, "Agonism and Pluralism" (1999) 25:4 *Philosophy & Social Criticism* 1.

⁵¹ According to Schaap, the idea of "the political" represented here is more Arendt than Mouffe. Mouffe's view of the political embeds dynamics of ongoing disagreement (perhaps the treaty moment that is), while theorists have interpreted Arendt's view of the political as expressing a more of utopian, aspirational, or transformative "we" (capturing perhaps the hopes and expectations embedded in treaty processes and why such processes are so often perceived as a disappointment). See Andrew Schaap, "Political Theory and the Agony of Politics" (2007) 5:1 *Political Studies Review* 56.

C. TREATIES AS GENERATIVE

Drawing on Robert Cover's "*Nomos* and Narrative",⁵² Robert Williams Jr describes the multi-nation and multicultural world of colonization as "held together by the jurisgenerative force of the common interpretive commitments to a law created and shared by the different peoples of Encounter era North America."⁵³ Within this world, treaties and Indigenous diplomatic traditions were important forces regulating and producing an emerging shared normative context.⁵⁴ Similarly Brian Slattery and Jeremy Webber have situated treaties as part of a larger set of intersocietal processes.⁵⁵ Brian Slattery describes Canadian constitutional foundations as "organic", suggesting North American as well as British origins for our constitutional traditions. Those North American origins include a body of "intersocietal law" arising from "interaction between Aboriginal nations and British and French officials in eastern North America during the seventeenth and eighteenth centuries."⁵⁶ To this body of law, Slattery adds the philosophical foundations of the natural law tradition, through which principles of justice become intertwined with the intersocietal custom to inform the present day content of Aboriginal rights. For Webber, Aboriginal rights

are the result of the interaction between Aboriginal and non-Aboriginal peoples, and the process of reflection on that experience They constitute a set of norms that are fundamentally intercommunal, created

⁵² Robert M Cover, "Foreward: *Nomos* and Narrative" (1983) 97:1 Harv L Rev 4.

⁵³ Williams, *Linking Arms*, *supra* note 30 at 28.

⁵⁴ See e.g. Walters, "Covenant Chain", *supra* note 4 at 88–89.

⁵⁵ Brian Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1996) 34:1 Osgoode Hall LJ 101[Slattery, "Organic"]; Jeremy Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples" (1995) 33:4 Osgoode Hall LJ 623 [Webber, "Relations"].

⁵⁶ Slattery, "Organic", *supra* note 55 at 109.

not by the dictation of one society, but by the interaction of various societies through time.⁵⁷

In contrast to Slattery, however, Webber sees this process as one of practical reason, emergent from processes of interaction and reflection on that interaction, without resort to overarching principles of justice.

Many accounts of Aboriginal rights identify the sources of Aboriginal and treaty rights as distinct, juxtaposing the consensual basis of treaty rights with the customary basis of Aboriginal rights.⁵⁸ Slattery's and Webber's accounts, however, suggest a close relationship between the two types of rights. Aboriginal rights emerge from a larger field of intersocietal normativity, a field grounded in both negotiated (treaty-based) as well as customary norms.⁵⁹ The inclusion of a broader field of norm generation in accounting for the constitutional significance of treaties parallels Tully's description of the broader fields of treaty discourse in contemporary contexts. It also anticipates the discussion of treaties in history, below, in which I argue that Canadian treaty making has generally been iterative in nature, building upon experience, reflection, and previous rounds of negotiated relationships and accommodations. Generative accounts thus

⁵⁷ Webber, "Relations", *supra* note 55 at 638.

⁵⁸ See e.g. Patrick J Monahan, *Constitutional Law*, 3d ed (Toronto: Irwin Law, 2006) at 447–48:

Aboriginal rights and the Treaty rights of Aboriginal peoples differ in both origins and structure. Whereas Aboriginal rights flow from the historic use and occupation of land by Aboriginal peoples, Treaty rights are those contained in official agreements between the Crown and Aboriginal peoples. Treaties thus create enforceable obligations based on the mutual consent of the parties.

Leonard Rotman's critique of the transfer of the *Sparrow* justification test from Aboriginal rights to treaty rights is similarly premised on treaty rights as negotiated in origin. See Leonard I Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the *Sparrow* Justificatory Test" (1997) 36:1 *Alta L Rev* 149.

⁵⁹ Webber does not address the relationship between treaty and other Aboriginal rights explicitly. However, his account of intercommunal normativity considers early land purchase agreements and other instances of explicit negotiation, which indicates fluidity between negotiated and customary norms. See Webber, "Relations", *supra* note 55. A similar calibre of negotiations will be discussed later in this paper as examples of early treaties.

situate treaties in broader processes of norm formation between societies. As such, these narratives place less significance on moments of consent as founding a post-colonial constitutional order, emphasizing instead the formation of a constitutional order that draws on both Indigenous and European contributions and traditions.

All of the different accounts of the constitutional dimensions of treaties addressed above draw on historical experience to suggest the path forward. In these accounts, treaties are both constitutional politics and constitutional law, and they provide a narrative frame in which to understand Crown–Aboriginal relations, Aboriginal rights, and the potential for post-colonial constitutional foundations. As narrative frames, however, they do not directly address the proper balance between fidelity to historical commitments and evolution through present-day treaty processes required to support dynamic treaty relationships and processes of consent and dissent. Moreover, against these ideals, locking in particular treaty rights via constitutional protection—the one constitutional aspect of treaties presently recognized at law⁶⁰—may seem at odds with the aspirations of most of these constitutional narratives. We will return to consider the jurisprudential prescriptions that emerge from these narratives in the third part of this paper. But first, we turn to consider treaties in history to ground the historical experience that has informed these constitutional narratives and to understand the narratives that are produced by the discipline of history itself.

II. TREATIES IN HISTORY

At this point in the discussion it will be helpful to ground the theoretical accounts of treaties with a “descriptive” account of treaties in history. However, as will be rapidly apparent from this overview, treaty histories are not simply descriptive. History is an interpretive discipline encompassing a range of methodologies. Thus, what constitutes a “treaty” in history, and, more contentiously, the nature of relations expressed by a

⁶⁰ Subsection 35(1) of the *Constitution Act, 1982*, *supra* note 35, recognizes and affirms “existing aboriginal and treaty rights of the aboriginal peoples of Canada”.

treaty and the materials relevant to understanding such things, are matters of interpretation.

It is also not easy to discuss Canadian treaty histories in a generalized manner given the chronological and geographic scope of such an endeavour. Jim Miller remarks that “[w]hile there are several studies that look at specific treaties, . . . there is none that surveys the entire field.”⁶¹ Nevertheless, the need for benchmarks for understanding treaties—particularly in law—has led to valiant attempts to summarize treaty making into eras and/or types. These efforts include Miller’s recent contribution aiming to remedy the void he identified. In light of the aims of this paper, it is the shape of the narrative that flows from generalized accounts that is of most interest in this discussion. The story of treaties at a general level forms a baseline from which treaty interpretation proceeds and the conceptual unity against which particular treaty rights are interpreted. This section therefore proceeds by addressing dominant historiographical themes and then reviewing survey approaches that attempt to provide a bird’s-eye view of Canada’s treaty-making experience. I will then move on to critique these accounts, drawing on the constitutional narratives of treaties in the previous section to argue that Canada’s treaty-making history is better expressed by the concept of “treaty processes” rather than “treaties”.

A. THEMES

Treaty making has arguably been central to Indigenous–Crown relations in North America from first contact and continuing on today. It is one of the most persistent features of both colonial and Canadian state relations with Indigenous peoples. Beyond that, summary statements about treaty histories should be made cautiously. There was, after all, no uniform experience of colonization in the geographical expanse that became Canada. As Sarah Carter describes, these former British colonies and possessions were characterized by a

⁶¹ JR Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009) at xi [JR Miller, *Compact*].

diversity of Aboriginal people, their varied environments and resources, and . . . unique patterns of contact with newcomers [which] meant that there was no single or monolithic pattern of encounter with settlers. Aboriginal land for agriculture was desired by settlers in many localities, but not in others where Aboriginal labour was necessary to extract resources, and where the land did not invite intensive settlement, as in the massive territories of the fur trade well into the twentieth century. . . . Nor did the Imperial government pursue a consistent, uniform policy toward the colonies of British North America; rather, there was an ad hoc set of responses to local conditions, which were in part the result of initiatives, politics, and diplomacy of Aboriginal nations seeking to direct the structure of their relationship with the British.⁶²

In light of such regional, cultural, and chronological variations in colonial experience, any attempt to briefly describe or summarize treaty histories will come up short. Nevertheless, amongst related and neighbouring peoples, regions, and eras, and even across different ones, there are remarkable similarities of experience to be found.

In sharp contrast to the “corrective” narratives canvassed in Part I, which emphasize the generative and transformative potential of treaties, accounts of treaties in history have been a significant component of the larger narrative of Indigenous victimhood at the hands of British colonizers. Early accounts assumed that First Nations were powerless and their circumstances tragic,⁶³ accounts that accepted and perpetuated the persistent colonial myths of “the passive, unsophisticated Indian who easily submits to superior European technologies” and “the perceived right and legal authority” of the colonial powers to acquire the subject

⁶² Sarah Carter, “Aboriginal People of Canada and the British Empire” in Phillip Buckner, ed, *Canada and the British Empire* (Oxford: Oxford University Press, 2008) 200 at 200 [Carter, “Aboriginal People”].

⁶³ See e.g. Fumoleau, *supra* note 44; George FG Stanley, “The Indian Background of Canadian History” (1952) 31:1 Report of the Annual Meeting of the Canadian Historical Association 14. For brief discussions of this type of historiography, see Jean Friesen, “Magnificent Gifts: The Treaties of Canada with the Indians of the Northwest 1869–76” (1986) 1 Transactions of the Royal Society of Canada (5th) 41; Long, *supra* note 37.

territories.⁶⁴ Since the 1980s, treaty histories have attempted to move past these colonial tropes by emphasizing both Indigenous and colonial perspectives in treaty negotiations in full historical and cultural context,⁶⁵ paralleling developments in the historiography of Indigenous–settler relations more generally.⁶⁶ Histories that take this approach pay greater attention to the parties’ individual and collective knowledge and strategic calculations in historical context, allowing regional and chronological variations in the power balance to come to the fore. They attempt to avoid what Alexandra Harmon calls the “outcome-oriented perspective on power relations” from eclipsing a more subtle and grounded view of treaties in history.⁶⁷

Even with greater attention to context and participant agency, colonial interests such as the acquisition of land continue to be central to how the

⁶⁴ Paul W DePasquale, “Refractions of the Colonial Past in the Present” in Paul W DePasquale, ed, *Natives & Settlers, Now & Then: Historical Issues and Current Perspectives on Treaties and Land Claims in Canada* (Edmonton: University of Alberta Press, Canadian Review of Comparative Literature/Revue Canadienne de Littérature Comparée, 2007) [DePasquale, *Natives & Settlers*] xv at xxiii–xxiv.

⁶⁵ See e.g. Friesen, *supra* note 63; Robert J Talbot, *Negotiating the Numbered Treaties: An Intellectual and Political Biography of Alexander Morris* (Saskatoon: Purich, 2009); Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal & Kingston: McGill-Queen’s University Press, 1990) at 54–57.

⁶⁶ See e.g. Daniel K Richter, “Whose Indian History?” (1993) 50:2 *William and Mary Quarterly* (3d) 379; James Axtell, *Natives and Newcomers: The Cultural Origins of North America* (New York: Oxford University Press, 2001); James H Merrell, *Into the American Woods: Negotiators on the Pennsylvania Frontier* (New York: WW Norton & Co, 1999); Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650–1815* (Cambridge, UK: Cambridge University Press, 1991) [R White, *Middle Ground*]; Germaine Warkentin & Carolyn Podruchny, eds, *Decentering the Renaissance: Canada and Europe in Multidisciplinary Perspective, 1500–1700* (Toronto: University of Toronto Press, 2001); John Sutton Lutz, *Makúk: A New History of Aboriginal–White Relations* (Vancouver: UBC Press, 2008).

⁶⁷ Alexandra Harmon, “Introduction: Pacific Northwest Indian Treaties in National and International Historical Perspective” in Harmon, *Power of Promises, supra* note 20, 3 at 17.

meaning and significance of treaties are often conveyed.⁶⁸ Such interpretations bring attention to the naked power of the British colonizers and the injustices of this past, emphasizing the unconscionable power relations that accompanied many treaty negotiations and the breaking of treaty commitments, or ineffective enforcement of treaty rights that often followed immediately after treaties were made. There is no doubt that such interpretations remain viable historical interpretations, notwithstanding historiographic trends that emphasize Indigenous contributions to treaties.

The decentring directions from Indigenous-settler studies suggest that treaty histories should not fall into an “either/or” dichotomy; treaties were neither entirely reflective of Indigenous traditions, power, and interests nor of colonial ones. These directions leave some treaty historians grappling with how to reconcile Indigenous influence and perspectives with colonial ones in their interpretations of treaty meanings. Indeed, some historians do not interpret the historical treaties as having produced shared meanings, or common or middle grounds.⁶⁹ John Long, for example, opens his detailed consideration of Treaty 9⁷⁰ with an either/or proposition:

⁶⁸ See e.g. John C Weaver, *The Great Land Rush and the Making of the Modern World, 1650–1900* (Montreal & Kingston: McGill-Queen’s University Press, 2003) at 133–77; Dorothy V Jones, *License for Empire: Colonialism by Treaty in Early America* (Chicago: University of Chicago Press, 1982); Patricia Seed, “Three Treaty Nations Compared: Economic and Political Consequences for Indigenous People in Canada, the United States, and New Zealand” in DePasquale, *Natives & Settlers*, *supra* note 64, 17.

⁶⁹ See e.g. Sidney L Haring, “‘There Seemed to Be No Recognized Law’: Canadian Law and the Prairie First Nations” in Louis A Knafla & Jonathan Swainger, eds, *Laws and Societies in the Canadian Prairie West, 1670–1940* (Vancouver: UBC Press, 2005) 92; Carter, “Aboriginal People”, *supra* note 62 at 215 (regarding the numbered treaties in particular).

⁷⁰ For the text of the treaty, see *James Bay Treaty—Treaty No 9 (Made in 1905 and 1906) and Adhesions Made in 1929 and 1930*, online: <<http://www.aandc.gc.ca/eng/1100100028863/1100100028864>> [Treaty 9].

Was it a trick or a treaty? Was treaty-signing in far northern Ontario simply a ruse, whereby the Indigenous signatories were fooled into signing a complex legal document that took away their rights? Or do their signatures signify their agreement to more general promises that constitute an oral agreement, misunderstood by most Canadians?⁷¹

His book-length exploration of these issues shows a treaty history that encompasses abuses by the colonial powers as well as contributions by the Indigenous parties attempting to shape the process and substantive commitments undertaken. He ends with reflections on concerns and unresolved issues in the present and calls for modern revision of Treaty 9, an end point that recalls the presentist orientation of the constitutional narratives and their insistence that the meaning and significance of historic treaties are still being worked out today.⁷² This potential for seemingly opposing interpretive lenses to co-exist is a caution to bring forward into the review of survey treatments of historical treaties below.

B. TAXONOMIES AND CHRONOLOGIES

Historians have not generally been interested in surveying the breadth of treaty-making experience in Canada. Historiographical trends towards deeply contextual studies of Indigenous–settler relations do not make this type of project more likely. Instead, it is lawyers whose discipline demands summary descriptions of Canada’s treaty-making traditions. Such

⁷¹ Long, *supra* note 37 at 3.

⁷² The adhesion of McLeod Lake Indian Band to Treaty 8, signed in 2000, also illustrates that historic treaties can be a matter of active present expansion and/or negotiation. See *McLeod Lake Indian Band Treaty No. 8 Adhesion and Settlement Agreement*, McLeod Lake Indian Band, Canada and British Columbia, 27 March 2000, online: McLeod Lake Indian Band <<http://www.mlib.ca/treaty-8>>. For the text of the historic treaty, see *Treaty No 8 Made June 21, 1899*, online: <<http://www.aadnc-aandc.gc.ca/eng/1100100028813/1100100028853>> [Treaty 8]. See also Robert Irwin, “Treaty 8: An Anomaly Revisited” (2000) 127 *BC Studies* 83 (Irwin notes that the agreement was reached in 1999). The adhesion settled the Band’s land claims, and now the Band is pursuing self-government through the BC treaty process. See BC Treaty Commission—MacLeod Lake Indian Band, online: <<http://www.bctreaty.net>>.

overviews help contextualize a given treaty against a general understanding of treaties and suggest how one treaty history might relate to others. They also provide the backdrop for discussions of colonial policy development and Aboriginal rights. Generalized overviews about the nature of historic treaties thus provide a basic narrative against which Aboriginal rights are understood in law if not history. As a result, historical overviews of treaties should be approached critically, with awareness that their significance may echo well beyond debates of a historiographical nature.

Canadian history is reported to encompass more than 500 historic treaties.⁷³ A common method for summarizing this history divides treaty making into pre- and post-1850, which sets the Robinson Treaties on the northern shores of Lake Superior and Lake Huron as the dividing marker.⁷⁴ Alternatively, the treaty timeline is divided by confederation, with the post-confederation era coinciding with the negotiation of the numbered treaties in what had been the North-Western Territory.⁷⁵

⁷³ See Donald Purich, *Our Land: Native Rights in Canada* (Toronto: James Lorimer & Co, 1986) at 96. This number is specific to what Purich calls “land deals” struck since the 1700s. He also notes that “[o]ver half a dozen treaties of peace and friendship were signed before 1763 between the British and the Indians” (*ibid*). Even with this large number, Robert J Surtees notes that, prior to the modern treaty-making era, “[o]nly about one-half the lands of Canada have been the object of a formal cession agreement, or treaty, between the Indians and federal government”: Robert J Surtees, “Canadian Indian Treaties” in Wilcomb E Washburn, ed, *Handbook of North American Indians: History of Indian-White Relations*, vol 4 (Washington, DC: Smithsonian Institution, 1978) 202 at 202.

⁷⁴ See DN Sprague, “Canada’s Treaties with Aboriginal Peoples” (1995) 23 Man LJ 341.

⁷⁵ See e.g. Henderson, “Treaty Federalism”, *supra* note 3 at 248, who divides treaty models into Georgian and Victorian, perhaps as a way to emphasize the relationship between Monarch and First Nation, but notes the Victorian model as post-confederation rather than post-1850. See also Hamar Foster, “Canada: ‘Indian Administration’ from the Royal Proclamation of 1763 to Constitutionally Entrenched Aboriginal Rights” in Paul Havemann, ed, *Indigenous Peoples’ Rights in Australia, Canada, & New Zealand* (Oxford: Oxford University Press, 1999) 351 [Foster, “Indian Administration”]; Patrick Macklem & Carol Rogerson et al, eds, *Canadian Constitutional Law*, 4th ed (Toronto: Emond Montgomery, 2010) at 613. The latter

Confederation as a divider emphasizes a change in colonial authority from colonial governments to the new Dominion government. By contrast, 1850 more clearly marks the beginning of a new phase of treaty making in which treaties covered larger territories. The earlier date also signifies the completion of a shift in the subject matter of treaties from alliance to land that began with the Royal Proclamation of 1763.⁷⁶ Alliances, generally known as “peace and friendship treaties”, established or reaffirmed peace through establishing mutual military support or neutrality. Such agreements often included or set the stage for trading commitments with Indigenous peoples, which were an important element of maintaining peaceful relations in at least the 18th century.⁷⁷ They also often encompassed terms of goodwill, protection, and continued access to the resources required to maintain Indigenous livelihoods, as exemplified in the 1752 and 1760–61 treaties with the Mi’kmaq,⁷⁸ at issue in the *R v Simon*⁷⁹ and *R v Marshall*⁸⁰ decisions respectively.

two divide treaties into three eras: pre-confederation, post-confederation, and modern.

⁷⁶ George R, Proclamation, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App II, No 1 [Royal Proclamation]. For examples of treatments in which 1850 plays a prominent role, see Peter W Hogg, *Constitutional Law of Canada*, 2012 student ed (Toronto: Carswell, 2012) at 28–34; Sprague, *supra* note 74; Mark D Walters, “Promise and Paradox: The Emergence of Indigenous Rights in Canada” in Richardson, Imai & McNeil, *supra* note 16, 21 at 34–35; Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Sydney: Federation Press, 2008) at 48–51.

⁷⁷ Jones, *supra* note 68 at 97.

⁷⁸ For the text of these treaties, see *1752 Peace and Friendship Treaty Between His Majesty the King and the Jean Baptiste Cope*, 22 Nov 1752, online: <<http://www.aadnc-aandc.gc.ca/eng/1100100029040/1100100029041>>; *1760–61 Peace and Friendship Treaties Between His Majesty the King and the LaHave Tribe of Indians*, online <<http://www.aadnc-aandc.gc.ca/eng/1100100029046/1100100029047>> [1760–61 Treaties].

⁷⁹ *Supra* note 14.

⁸⁰ *Supra* note 1.

The characterization of these agreements as peace and friendship treaties does not recognize that, in spite of an absence of land cession terms, the agreements addressed land and territory as matters of jurisdiction. Such agreements may have specified colonial boundaries or they may have addressed the establishment of new settlements; the British treaty with the Mi'kmaq in 1726 is an example. It included clause III: "That the Indians shall not molest any of His Majesty's Subjects or their Dependants in their Settlements already made or Lawfully to be made."⁸¹ William Wicken reads this clause against the post-1713 Treaty of Utrecht context in which this treaty was negotiated, suggesting that the British did not have exclusive jurisdiction over Mi'kma'ki where lands were occupied by both Mi'kmaq and Acadians and that Mi'kmaq would have expected the lawful processes required by the treaty to have included their consent to new uses of their lands.⁸² In Wicken's interpretation, "the intent of the treaty was to create norms of behaviour that would enable co-existence between the British and the Mi'kmaq in Nova Scotia."⁸³ As we will return to below, this interpretation of a so-called peace and friendship treaty has strong parallels to Indigenous interpretations of the later numbered treaties.

In survey treatments, the post-1850 and post-confederation period is typified by treaties that dealt with large expanses of territory and many Indian nations or tribes. The written terms address land surrenders, annual presents or annuities, commitments to set aside reserves, and continued Indigenous access to Crown lands for harvesting activities until taken up for settlement. They are thus presumed to be different in scope and nature than the 18th-century peace and friendship agreements. The numbered treaties have also been further divided by some historians into the first seven "settlement treaties" (1871–77) and the later three "northern resource development" treaties (1899–1921), drawing

⁸¹ Cited in Wicken, *Mi'kmaq Treaties*, *supra* note 2 at 118.

⁸² *Ibid* at 118–30.

⁸³ *Ibid* at 127.

attention to the different impetus for colonial action in these two time periods.⁸⁴

Between these two main types of treaties, some surveys attend to the Royal Proclamation of 1763 and treaties in Upper Canada in the late 18th and early 19th centuries.⁸⁵ Following the formalization of British treaty-making policy in the Royal Proclamation, scholars note a transitional era in which a critical shift occurs after the war of 1812 when the British need for military support from Indigenous allies waned and settler pressures for land increased.⁸⁶ Prior to 1812, the move from the peace and friendship format towards the geographically limited land cession agreements of the second period was already in progress.⁸⁷ Further changes were introduced in the later era, replacing one-time payments with annual annuities—which Miller has noted was introduced to reduce the financial burden of treaty making on the colonial treasury—and connecting treaty making to the creation of reserves.⁸⁸ Regardless of changing colonial interests, treaties continued to encompass terms

⁸⁴ See Long, *supra* note 37 at 32, citing James Morrison, *The Treaty-Making Process and the Participation of the Ontario Government in the Signing of Treaty No. 9* (1978) [unpublished] at 8. See also JR Miller, *Compact*, *supra* note 61.

⁸⁵ See e.g. JR Miller, *Compact*, *ibid*; Foster, “Indian Administration”, *supra* note 75.

⁸⁶ JR Miller, *Compact*, *supra* note 61 at 66–122; Foster, “Indian Administration”, *supra* note 75 at 359.

⁸⁷ JR Miller, *Compact*, *supra* note 61. See also Long, *supra* note 37 at 24–26.

⁸⁸ Miller notes that First Nations began demanding reserves as they grew more skeptical of the Crown’s promises in light of increasing settler pressures and lax enforcement of earlier agreements. See JR Miller, *Compact*, *supra* note 61 at 103. Commitments to set aside reserves first appear in the text of a treaty in the 1850 Robinson Treaties, but earlier treaties also created reserves as part of cession negotiations: e.g., the reservation of Manitoulin Island in the 1836 Treaty negotiated by Sir Francis Bond Head (*ibid* at 106–09) and Treaty 29 between the Crown and the Chippewas in 1829, as discussed in *Chippewas of Sarnia Band v Canada (Attorney General)* (2000), 51 OR (3d) 641 at paras 66–79, 195 DLR (4th) 135 (CA) [*Chippewas of Sarnia*]. The Haldimand Tract of 1784, purchased from the Mississauga of the Credit and granted to the Six Nations for their loyalty to the British, is also cited as an early reserve. See RCAP, vol 1, *supra* note 3, ch 6.

reflecting Indigenous concerns to retain access to wildlife and fish harvesting areas and waterways. Similarly, the 14 Douglas Treaties on Vancouver Island from the 1850s⁸⁹ reflected many of the elements of the contemporaneous Robinson Treaties in Ontario but retained some of the character of the earlier Upper Canada surrenders in that these agreements were limited in geographic scope and involved one-time payments.⁹⁰

Miller's recent book-length historical survey of Canadian treaty making is much more detailed than many of the "snapshot" surveys noted above, but it is both the level of detail and his approach that provide a different sense of this history. Importantly, although many scholars note the evolving nature of Canadian treaty history, Miller's categorizations are less neat as he traces the chronological development of treaty making with colonial interests that moved from east to west. This approach allows for more overlap between types and eras of treaty making, allowing a sense of the continuity and change that has characterized this enduring practice. His survey is also more inclusive, incorporating what he terms fur trade "commercial compacts" as part of the early period of treaty history. He notes that Indigenous nations would not trade without the establishment of peaceful relations, and thus these "commercial agreements" overlap in both chronology and character with the peace and friendship agreements

⁸⁹ Hamar Foster and Alan Grove argue that there may be a 15th Douglas Treaty made in 1862 between the Cowichan and Governor Douglas. Their archival research shows that Governor Douglas made treaty-like commitments and promises to deliver the necessary presents and compensation to the Cowichan to facilitate settlement on Cowichan lands by non-Aboriginal people. Governor Douglas's promises and commitments were not fulfilled. See Hamar Foster & Alan Grove, "'Trespassers on the Soil': United States v. Tom and A New Perspective on the Short History of Treaty Making in Nineteenth-Century British Columbia" (2003) Summer:138-9 BC Studies 51.

⁹⁰ Miller discusses these BC treaties as distinct from other Canadian traditions, noting that Douglas was provided with sample agreements from the New Zealand Company's dealings with the Maori rather than any samples from Upper Canada. See JR Miller, *Compact, supra* note 61 at 147. Although the BC experience is undoubtedly distinct, experience in other parts of the British Empire informed activities in the east as well. Canada's treaty-making traditions need to be understood as developing out of or alongside American, French, and other precedents.

of the 18th century. Such agreements have generally been left out of legal surveys of treaty history, perhaps because the Crown was not the treaty-making entity. While the Hudson's Bay Company's Charter purportedly granted the Company territorial and governance authority in Rupert's Land, including sufficient authority to make treaties on behalf of the Crown,⁹¹ not all trading companies had such treaty-making powers. Indeed, Miller's account distinguishes between agreements made by the North West Company and the Hudson's Bay Company on this very point, excluding the former from at least "official" treaty history.⁹² Relying on the legal authority of the Hudson's Bay Company to bring fur trade agreements into treaty history, however, is not the only or strongest basis for their inclusion. The argument for inclusion of the fur trade era in treaty history does not depend on the perfect legal authority of either the European and Indigenous treaty-makers in the fur trade era, nor does it require such treaties to be individually justiciable. Instead (or in addition), fur trade treaties are significant as part of an iterative process of treaties that made subsequent treaties possible.

⁹¹ The legality of the Company's Charter was always contentious, but never finally tested in a court of law. See generally Kent McNeil, "Sovereignty and the Aboriginal Nations of Rupert's Land" (1999) 37 *Manitoba History* 2; Hamar Foster, "Forgotten Arguments: Aboriginal Title and Sovereignty in *Canada Jurisdiction Act Cases*" (1992) 21:3 *Man LJ* 343; Hamar Foster, "Long-Distance Justice: The Criminal Jurisdiction of Canadian Courts West of the Canadas, 1763–1859" (1990) 34:1 *Am J Legal Hist* 1; Kenneth M Narvey, "The Royal Proclamation of 7 October 1763: The Common Law, and Native Rights to Land within the Territory Granted to the Hudson's Bay Company" (1974) 38:1 *Sask L Rev* 123; Geoffrey S Lester, *The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument* (DJur Thesis, York University, 1981) [unpublished] at 1309–73; Howard Robert Baker II, *Law Transplanted, Justice Invented: Sources of Law for the Hudson's Bay Company in Rupert's Land, 1670–1870* (MA Thesis, University of Manitoba, 1996) [unpublished] ch 2; Edward Cavanagh, "A Company with Sovereignty and Subjects of its Own? The Case of the Hudson's Bay Company, 1670–1763" (2011) 26:1 *CJLS* 25.

⁹² He notes that even the North West Company made a "formal" treaty at Thunder Bay when it meant to purchase land, but excludes this agreement from being "strictly speaking, a treaty" because the North West Company did not represent the Crown: JR Miller, *Compact, supra* note 61 at 87.

Including fur trade era treaties brings geographies frequently left out of treaty surveys—such as northern Quebec⁹³ and British Columbia—into the picture before the modern era. New France and the early colony of Quebec are also often left out of surveys of the country's treaty-making traditions. French diplomatic relations with Indigenous peoples are, however, well-represented in the literature on Indigenous-settler relations.⁹⁴ Sébastien Grammond explains the differences of Quebec's treaty history as stemming from two points of legal history: first, the assumption that the Indian provisions of the Royal Proclamation did not apply to the colony of Quebec; and second, the lack of a requirement to seek Indigenous consent to land cessions within French colonial law or policy.⁹⁵ But these differences simply mean that treaties in Quebec were

⁹³ Maps of Canada's historic treaties routinely leave the province of Quebec blank. See e.g. the Department of Aboriginal and Northern Affairs, which lists 18th-century peace and friendship treaties from the Maritimes in its resources on historical treaties, but no such treaties from Quebec. See Aboriginal Affairs and Northern Development Canada—Treaty Research Reports, online: <<http://www.ainc-inac.gc.ca/al/hts/tgu/index-eng.asp>>, even though a list of resources about treaties in what became Quebec are provided elsewhere. See Aboriginal Affairs and Northern Development Canada—Bibliographies by Region—Quebec, online: <<http://www.ainc-inac.gc.ca/al/hts/res/rbi/qbc-eng.asp>>.

⁹⁴ See e.g. R White, *Middle Ground*, *supra* note 66; Gilles Havard, *The Great Peace of Montreal of 1701: French–Native Diplomacy in the Seventeenth Century*, translated by Phyllis Aronoff & Howard Scott (Montreal & Kingston: McGill-Queen's University Press, 2001); Gilles Havard, *Empire et métissages: Indiens et Français dans le Pays d'en Haut, 1660–1715* (Sillery, Que, Paris; Septentrion, Presses de l'Université Paris-Sorbonne, 2003).

⁹⁵ Sébastien Grammond, *Les traités entre l'État canadien et les peuples autochtones* (Cowansville, Que: Yvon Blais, 1995) ch 1. But see Narvey, *supra* note 91, who argues that ungranted, unceded lands within existing colonies and territories, such as Quebec, were subject to a similar reservation in favour of the Indians in spite of their geographic exception from the Indian provisions. For discussion of treaties and arrangements continuing Indigenous hunting rights, in accordance with the policy of the Royal Proclamation, see Michel Morin, *L'Usurpation de la souveraineté autochtone: Le cas des peuples de la Nouvelle-France et des colonies anglaises de l'Amérique du Nord* (Quebec: Boréal, 1997) at 248–58.

not land cession agreements, not that there were no treaties of note.⁹⁶ Indeed, important treaty rights cases have arisen from the geography of present-day Quebec.⁹⁷ Similarly, British Columbian territory beyond Vancouver Island (Douglas Treaties) and the northeast corner (Treaty 8) can be connected to the larger treaty-making tradition through the significant history of fur trade relations there before settlers arrived.⁹⁸ Acknowledging this aspect of BC history refocuses attention away from the colonial policy-makers that set British Columbia's Indian policy on a different trajectory from the rest of the western Canada to an older tradition of diplomacy and negotiated trading relationships.

Miller's inclusion of the fur trade era builds on the remarks of numerous historians who argue that relations between Indigenous and European fur traders in the 100–200 years preceding treaties set the stage for at least the numbered treaty negotiations. Sidney Haring, for example, has related the fur trade era to First Nations understanding of treaties as sharing agreements, noting that

[t]here are substantial oral histories of Native understanding of these treaties. Most of them can be corroborated by the logic of the time. It must be clear, for example, that, having shared the Prairies with Euro-Canadian fur traders for two hundred years, Native people must have seen the treaties as recognizing that pre-existing relationship.⁹⁹

⁹⁶ Whether Indigenous groups might be able to establish title to their lands within historic New France remains uncertain. See *ibid* at 259.

⁹⁷ See *Sioui*, *supra* note 1. The treaty in issue was made by General James Murray with the Huron of Lorette in 1760. For discussion of the treaty, see JR Miller, *Compact*, *supra* note 61 at 74–75; *R v Côté*, [1996] 3 SCR 139, 38 DLR (4th) 385 [*Côté* cited to SCR]. The treaty right claim was based on a 1760 treaty at Swegatchy and Caughnawaga between the Algonquins and the British. The Supreme Court assumed but declined to make a determination regarding whether this treaty gave rise to a treaty right. See *Côté*, *ibid* at para 88.

⁹⁸ See Duane Thomson & Marianne Ignace, “‘They Made Themselves Our Guests’: Power Relationships in the Interior Plateau Region of the Cordillera in the Fur Trade Era” (2005) 146 BC Studies 3.

⁹⁹ Haring, *supra* note 69 at 102.

Arthur Ray, Jim Miller, and Frank Tough add precision to this argument, suggesting that pre-treaty fur trade practices provide an essential baseline against which to understand the numbered treaties.¹⁰⁰ As Arthur Ray explains:

The fur-trading institutions and practices that cemented this relationship, particularly the gift-giving and negotiating traditions, and the treaties that Canada had already negotiated to the east in the area of present-day Ontario . . . , served as models for treaty negotiations in the 1870s[.] As a result, the treaties included provisions that had been central features of the classic, pre-1870s fur trade.¹⁰¹

In addition to the gift-giving and negotiating traditions noted by Ray, the central features of the trading regimes emphasized by these authors as connecting to the later treaties include the rights to access lands and resources that Indigenous peoples granted their European and Canadian trading partners,¹⁰² the practices of recognizing trading chiefs with gifts of clothing and pipe ceremonies,¹⁰³ and the practices around sharing

¹⁰⁰ Arthur J Ray, Jim Miller & Frank J Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal & Kingston: McGill-Queen's University Press, 2000) at 3.

¹⁰¹ Ray, *Telling It*, *supra* note 2 at 69 [citations omitted]. Ray (*ibid* at 87) notes that Teitelbaum J did not address this argument in his dismissal of the land sharing arguments put forward by the Samson Indian Band and Nation in *Victor Buffalo v Canada*, 2005 FC 1622, [2006] 1 CNLR 100 [*Victor Buffalo*], *aff'd Ermineskin Indian Band and Nation v Canada*, 2006 FCA 415, [2007] 3 FCR 245, *aff'd* 2009 SCC 9, [2009] 1 SCR 222 (on appeal, the case was joined with a related action brought by the Ermineskin Indian Band and Nation and focused on claims that the federal Crown had breached its obligations in managing funds earned from oil and gas royalties).

¹⁰² Ray, Miller & Tough, *supra* note 100 at 3–20. See also Long, *supra* note 37, ch 1; Thomson & Ignace, *supra* note 98; Janna Promislow, “It Would Only be Just”: A Study of Territoriality and Trading Posts along the Mackenzie River, 1800–27” in Lisa Ford & Tim Rowse, eds, *Between Indigenous and Settler Governance* (Abingdon, UK: Routledge, 2013) 35 [Promislow, “It Would Only be Just”].

¹⁰³ Ray, Miller & Tough, *supra* note 100 at 3–20. See also Long, *supra* note 37; Janna Promislow, “One Chief, Two Chiefs, Red Chiefs, Blue Chiefs: Newcomer Perspectives on Indigenous Leadership in Rupert's Land and the North-West

medicines and assisting each other in dealing with illness, which have a particular correspondence with the written medicine chest provision of Treaty 6.¹⁰⁴

In a slightly different take on how the fur trade relates to treaties, John Foster suggested that the relationship constituted a “compact” between the traders.¹⁰⁵ Similarly, Jean Friesen described the relationship formed through trade, which she identifies as a political and diplomatic act, as a form of alliance, as “*treaty trade*, an institution of Indian origin [that] served both trader and Indian.”¹⁰⁶ This argument emphasizes the negotiated form of the relationship that supported the trade as a form of treaty itself.¹⁰⁷ It also might be taken to reflect the “contracts” and “leagues of friendship and peaceable cohabitation” that the Hudson’s Bay Company instructed its earliest traders to make with the natives of the lands in which they wanted to settle a trade and, if possible, purchase the

Territories” in Hamar Foster, Benjamin L Berger & AR Buck, eds, *The Grand Experiment: Law and Legal Culture in British Settler Societies* (Vancouver: UBC Press for the Osgoode Society for Canadian Legal History, 2008) 55.

¹⁰⁴ Ray, Miller & Tough, *supra* note 100 at 8; for the text of the treaty, see *Copy of Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions*, 1876, online: <<http://www.aadnc-aandc.gc.ca/eng/1100100028710/1100100028783>> [Treaty 6]. There are other specific terms in the treaties that might be connected, in a similar manner, to fur trade practices. For example, Indigenous traders were “outfitted” annually with the equipment for their fall and winter hunting and trapping needs and Treaties 4 through 11 included written terms securing gifts of ammunition and/or twine to support their hunting, fishing, and trapping activities. Educational promises and provisions regarding famine relief might also be explored. Regarding the latter, see *ibid* at 138–39.

¹⁰⁵ John E Foster, “Indian-White Relations in the Prairie West during the Fur Trade Period—A Compact?” in Richard T Price, ed, *The Spirit of the Alberta Indian Treaties*, 3d ed (Edmonton: University of Alberta Press, 1999) 181.

¹⁰⁶ Friesen, *supra* note 63 at 44 [emphasis in original].

¹⁰⁷ See Janna Promislow, “‘Thou Wilt Not Die of Hunger . . . for I Bring Thee Merchandise’: Consent, Intersocietal Normativity, and the Exchange of Food at York Factory, 1682–1763” in Webber & Macleod, *supra* note 23, 77 [Promislow, “I Bring Thee Merchandise”].

lands.¹⁰⁸ The significance of these early treaty–trade relationships in Rupert’s Land was not simply the establishment of good relations with trading partners; the English traders also needed their alliances with local peoples for colonial/military purposes (as in Mi’kma’ki/Acadia), to gain a foothold in the vast territories in which French traders were also present. Indeed, the Hudson’s Bay Company relied on its “leagues of friendship” in legal disputes with the French over Rupert’s Land leading up to the Treaty of Utrecht of 1713.¹⁰⁹ In the end result, both of these arguments—fur trade as essential context and source of insights into a set of relations that would have influenced at least First Nations’ expectations of treaty, and fur trade relationships as involving and embodying (peace and friendship) treaties themselves—bring the fur trade into treaty history. And regardless of which argument prevails, both importantly suggest that treaty making is an iterative process, in which earlier relationships shape what is possible and desirable when the time comes to reformulate and rearticulate the terms of relationship.

Less novel than including fur trade compacts, but equally significant in treaty-making histories, is Miller’s inclusion of the post-1975 comprehensive claims process in his account.¹¹⁰ Linking historical traditions to contemporary developments is important for understanding the context for contemporary negotiations processes and for legal argument, as courts begin to grapple with the interpretive frame to bring to so-called modern treaties.¹¹¹ However, there is room to consider what

¹⁰⁸ Discussed in Ray, Miller & Tough, *supra* note 100 at 4; JR Miller, *Compact*, *supra* note 61 at 12–14; Promislow, “I Bring Thee Merchandise”, *supra* note 107 at 86–87.

¹⁰⁹ Promislow, “I Bring Thee Merchandise”, *supra* note 107 at 87, n 44.

¹¹⁰ JR Miller, *Compact*, *supra* note 61. See also Foster, “Indian Administration”, *supra* note 75; Macklem, Rogerson & Bakan et al, *supra* note 75.

¹¹¹ See *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103 [*Little Salmon/Carmacks*]; *Quebec (Attorney General) v Moses*, 2010 SCC 17, [2010] 1 SCR 557 [*Moses*]; *Eastmain Band v Robinson* (1992), [1993] 1 FC 501, 99 DLR (4th) 16 (CA), leave to appeal to SCC refused, [1993] 3 SCR vi, 104 DLR (4th) vii. In Special Rapporteur Miguel Alfonso Martinez’s report for the UN, he avoids the term “treaties” in naming what are commonly identified in Canada as modern treaties, preferring instead to call them “constructive arrangements”. This language choice

connects the eras beyond the fact of new treaties being negotiated and signed. For example, the delineation of modern versus historic, is consistently demarcated by Miller and others by a 50-year gap between the Williams Treaties of 1923 and the James Bay and Northern Quebec Agreement of 1975, which overlooks adhesions that took place during these 50 years: Saulteux, Cree, and Chippewa (Ojibway) bands signed adhesions to Treaty 6 between 1944 and 1956; Treaty 9 was significantly expanded by an adhesion in 1930, after the boundaries of Ontario were extended in 1912.¹¹² These adhesions extended existing agreements to new nations and, occasionally, new territories. Overlooking them as part of treaty history also overlooks the motivations and perspectives of the new treaty peoples in favour of colonial attitudes during this period, which assumed Indian polities were a fading artifact of the past and that treaties, once signed, required little further attention.¹¹³

signals the Rapporteur's view of these agreements as wholly domestic in nature and limited in terms of the reach of the negotiations (capable of establishing only delegated governmental powers), in contradistinction to the constitutional nature and international status of historic treaties that, in his assessment, were recognized under the Law of Nations. See Miguel Alfonso Martinez, *Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations*, UNCHR Sub-Commission on Prevention of Discrimination and Protection of Minorities, 51st Sess, UN Doc E/CN.4/Sub.2/1999/20 at para 145. While I am sympathetic to the Rapporteur's concerns about the hegemonic frame within which so-called modern treaties are negotiated, my approach in this paper is to take an expansive view of treaties, bringing a variety of forms of negotiation under the umbrella of treaties rather than being concerned to identify a particular form or scope of agreement that may be called a treaty. As a result, my reference to "so-called" is intended to signal concerns regarding the categorization of "modern" rather than "treaty".

¹¹² See James Morrison, *Treaty Research Report—Treaty No. 9 (1905–1906)* (1986), online: <<http://www.aadnc-aandc.gc.ca/eng/1100100028859>>.

¹¹³ Morrison, *ibid.*, notes that the Treaty 9 adhesions were motivated in part by the need for bands to split into smaller units than the treaty bands created in 1905, to suit the government's reserve policy and to reflect the traditional hunting band's hunting groups. For some discussion regarding Treaty 9 adhesions, see Long, *supra* note 3737 at 84–91. The adhesion of the McLeod Lake Indian Band to Treaty 8 in 2000 is also a challenging case to fit into the standard understanding of the split between modern and historic. See Irwin, *supra* note 72.

Modern treaties are not simply distinguished from historic treaties by chronology; they are also differentiated by their scope and conditions of negotiation, or so it is generally presumed. As Binnie J recently emphasized in *Little Salmon/Carmacks First Nation*:

Unlike their historical counterparts, the modern comprehensive treaty is the product of lengthy negotiations between well-resourced and sophisticated parties. . . . The increased detail and sophistication of modern treaties represents a quantum leap beyond the pre-Confederation historical treaties . . . and post-Confederation treaties The historical treaties were typically expressed in lofty terms of high generality and were often ambiguous. . . . Modern comprehensive land claim agreements, on the other hand, starting perhaps with the *James Bay and Northern Québec Agreement* (1975) . . . were . . . intended to create some precision around property and governance rights and obligations.¹¹⁴

Justice Deschamps provided a different view in her concurring reasons, rejecting the date of signature of a treaty or categorization of treaty type as determining the interpretive approach that should be taken, noting that section 35 does not differentiate between treaties in this manner, and “that it would be wrong to think that the negotiating power of Aboriginal peoples is directly related to the time period in which the treaty was concluded”.¹¹⁵ On closer examination, and with respect for Binnie J’s clear desire to launch a new, and better, era of Aboriginal–Crown relations, Deschamps J’s view of the evolution of treaty making has greater correspondence with the historical record.

As noted above, some interpretations of 18th-century treaties, such as Wicken’s interpretation of the 1726 Mi’kmaq–British treaty, demonstrate intentions to create norms of co-existence around “property and governance rights and obligations”, even if such norms were not defined

¹¹⁴ *Little Salmon/Carmacks*, *supra* note 111 at paras 9, 12.

¹¹⁵ *Ibid* at para 116. UN Special Rapporteur Miguel Alfonso Martinez noted numerous conditions around the negotiation of the James Bay and Northern Quebec Agreement that give rise to concerns about the consensual nature of that agreement. See Martinez, *supra* note 111 at paras 137–38.

precisely in text.¹¹⁶ The difficulty of reaching such interpretations of the treaty through the historical record, rather than from the written terms of the treaty, does not erase this historical content. Consider also self-government. The federal government's now dated 1995 policy on self-government considers such negotiations to be an "add-on" to historic treaties, stating specifically that historic treaties will not be reopened.¹¹⁷ Indigenous scholars, on the other hand, have argued that treaties were agreements between sovereign political communities, a fact that implies recognition of First Nations self-government and supports section 35 treaty self-government rights.¹¹⁸ Modern treaties, by contrast, make self-governance rights explicit in their written terms, institutionalizing and protecting various forms or pieces of Indigenous governance or joint Indigenous-public government decision making. The difference may again be primarily between written (modern) versus unwritten (historic) terms, with lingering disputes about the scope of the historic treaties. Moreover, the detailing of self-government jurisdictions and institutions in the modern agreements coincides with the growing complexity of the modern administrative state. Is the detailed nature of the self-government provisions a reflection more of the changing nature of treaties or of the changing nature of government?¹¹⁹ If we also take into account the significant federal policy changes around the parameters of self-government negotiations in the modern era,¹²⁰ we might see that at

¹¹⁶ See Promislow, "It Would Only be Just", *supra* note 102.

¹¹⁷ Aboriginal Affairs and Northern Development Canada—Land Claims—The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government, online: <<http://www.aadnc-aandc.gc.ca/eng/1100100031843>>.

¹¹⁸ See e.g. Henderson, "Treaty Federalism", *supra* note 3; Ladner, *supra* note 16.

¹¹⁹ One might compare the shift to the *Constitution Act, 1867*, *supra* note 17, and note how little was specified in the text about how the provincial and federal governments might work together, amongst other things. Does this absence mean the *Constitution Act, 1867* is unsophisticated?

¹²⁰ From limited co-management arrangements (James Bay and Northern Quebec, 1975; Gwich'in and Sahtu, 1993 and 1994 respectively) to independent legislative bodies (Nisga'a, 1998; Tli'Cho, 2005). For an overview of the comprehensive land claims

least the early 20th-century northern resource development treaties (Treaties 8–11) had more in common with the treaties of the 1970s through the early 1990s than the typical division between modern and historic treaties suggests.

One final concern about how the modern treaty era has been presented in treaty surveys to date is the adherence to official federal treaty policies and processes in how treaties are characterized.¹²¹ Many historians recognize treaty-making experience as inclusive of “informal” treaty processes, exemplified by the authors noted above connecting fur trade practices to treaty histories.¹²² Many constitutional theorists recognize a broad idea of “treaty processes”, as discussed in the first section of this paper. Even the Supreme Court has recognized the connections, when in *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*¹²³ Binnie J commented that the duty to consult applies to the implementation of the Crown’s rights to take up land for settlement and other purposes under Treaty 8.¹²⁴ Thus processes beyond the treaties, such as consultation, are required to make the treaty work. Meanwhile, a plethora of quasi-treaty agreements and processes have cropped up,

process, see Christopher Alcantara, “To Treaty or Not to Treaty? Aboriginal Peoples and Comprehensive Land Claims Negotiations in Canada” (2008) 38:2 *Publius* 343.

¹²¹ See e.g. JR Miller, *Compact*, *supra* note 61; Foster, “Indian Administration”, *supra* note 75. Many of the developments discussed in this paragraph are very recent, following after *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*]. It may be some time before they become absorbed into survey examinations of modern treaty making.

¹²² For a related exploration in relation to New Zealand, see RP Boast, “Recognising Multi-Textualism: Rethinking New Zealand’s Legal History” (2006) 37 *VUWLR* 547. Although Boast’s exploration focuses on written agreements, his analysis points out how exclusive attention to the Treaty of Waitangi misses other important agreements, particularly from Maori perspectives, that also serve as “foundation[s] of relationships with the New Zealand State that endure to this day and a benchmark by which the Crown’s behaviour can be evaluated” (*ibid* at 572).

¹²³ 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew Cree*].

¹²⁴ *Ibid* at para 33.

particularly at the provincial level.¹²⁵ British Columbia's policies embrace "incremental treaty agreements",¹²⁶ which focus on sharing economic benefits with First Nations and building trust before final agreements are reached. These policies also embrace "reconciliation protocols and agreements",¹²⁷ some of which notably establish shared decision making around lands and resources. Neither the BC treaty process nor these developments can be understood in isolation; they exist only in relation to each other and the ongoing rejection or complaints about the BC treaty process by many First Nations and other commentators.¹²⁸ Provincial leadership in this area is itself worth noting, and marks perhaps the greatest departure of the modern from the historic eras (although, at the same time, continuing the tradition of federal-provincial policy

¹²⁵ See e.g. relationship and revenue sharing agreements such as Quebec's Paix des Braves, online: Grand Council of the Crees—Critical Issues <<http://www.gcc.ca/issues/paixdesbraves.php>>. Regarding enforceability issues, and in the context of agreements with Métis, see Jean Teillet, "A Tale of Two Agreements: Implementing Section 52(1) Remedies for the Violation of Métis Harvesting Rights" in Maria Morellato, *supra* note 45, 333.

¹²⁶ See British Columbia—Incremental Treaty Agreements, online: <<http://www2.gov.bc.ca/gov/topic.page?id=21099B139A554865A42119D551BF046B>>. The federal government has recently announced it will also pursue policy changes to support the negotiation of incremental treaties, as well as other "non-treaty" agreements. See Aboriginal Affairs and Northern Development Canada, News Release, "Minister Valcourt Announces Measures to Advance Treaty Negotiations and Reconciliation" (28 July 2014), online: <<http://news.gc.ca/web/article-en.do?nid=871349>>.

¹²⁷ See British Columbia—Reconciliation & Other Agreements, online: <<http://www2.gov.bc.ca/gov/topic.page?id=496EFA5F6C14CB6B9186F4C9A959A50>>.

¹²⁸ See Brown, *supra* note 45; Lornie Report, *supra* note 6. See also *Hul'qumi'num Treaty Group v Canada*, Inter-Am Comm HR, No 105/09; *Annual Report of the Inter-American Commission on Human Rights: 2009*, OEA/Ser.L/V/II/Doc.51 corr.1; Andrew Woolford, "Transition and Transposition: Genocide, Land and the British Columbia Treaty Process" (2011) 4:2 *New Proposals: Journal of Marxism and Interdisciplinary Inquiry* 67 [Woolford, "Transition and Transposition"]. It remains to be seen whether *Tsilhqot'in*, *supra* note 6, in which the Supreme Court declared Aboriginal title to the area claimed by the Xeni Gwet'in First Nation on behalf of the Tsilhqot'in Nation, will be a sufficient catalyst to reinvigorate British Columbia's treaty process.

differences around treaty making).¹²⁹ These developments suggest that consultation and various other forms of agreements need to be considered alongside negotiations under federal comprehensive and specific claims policies in order to paint a full picture of the broad fields of consent and dissent that characterize the modern era of treaty making in Canada.

Thus, even under Miller's expanded approach, the surveys that give a basic shape to Canada's treaty-making history carry forward the historiographical habits of previous generations. Most critically, the distinctions between eras and types of treaties in the surveys correspond to the colonial administration's interests in making a treaty in a particular time and place (peace and alliance or articulations of land ownership and governance powers) and inadequately represent Indigenous perspectives. Of course, if the aim of the survey is to present a snapshot of colonial policy over time, this emphasis is appropriate.¹³⁰ However, if the aim of the survey is to provide a bird's-eye view of Canada's treaty-making traditions, then such approaches are inadequate for presenting a history comprised of both Indigenous and Crown experience. The over-representation of colonial interests is particularly strong in the continued separation of land from peace and friendship treaties and/or fur trade agreements.¹³¹ Many Indigenous groups claim that, in spite of the surrender clauses in the text in the land cession treaties, they never "sold" their land. This claim is anchored in Indigenous beliefs and economic systems, in which land is not a commodity that can be sold. Instead, they claim that they agreed to share their territories and resources with the newcomers.¹³² And while these claims are advanced in the present day, there are at least some

¹²⁹ For a summary, see Sprague, *supra* note 74.

¹³⁰ See e.g. Foster, "Indian Administration", *supra* note 75.

¹³¹ See Martinez, *supra* note 111 at para 122.

¹³² See e.g. RCAP, vol 2, *supra* note 3 at 45; Treaty 7 Elders, *supra* note 3; RJ Surtees, *Indian Land Surrenders in Ontario 1763–1867* (Ottawa: Indian and Northern Affairs Canada, 1984) at 10; Sharon H Venne, "Treaties Made in Good Faith" in DePasquale, *Natives & Settlers*, *supra* note 64, 1. For discussion of these claims in the treaty jurisprudence, see *infra* note 139 and accompanying text.

examples of contestation around ownership of land in the historical record as well.¹³³

The interpretive divide between sharing and cession has been taken up by several historians, particularly those concerned with bringing Indigenous perspectives and contributions to treaty making to the fore. They question the historical grounding of such claims. Jean Friesen, for example, states that even in light of the unbalanced conditions in which the 1871–77 treaties were negotiated, or perhaps because of them,

[t]here is no doubt in my mind that at least some Indian leaders at the treaties were well aware that this was a land sale on an enormous scale. . . . Most writers have assumed either that Indians could not conceive of the sale of “Mother earth” or that they only applied the concept of land *use* rather than ownership and sale. While this may be true for some Indians in some parts of the west, it seems more likely that, like the Iroquois in the eighteenth century, they may have been developing a variety of conceptual approaches to land and resources, depending upon whether they were dealing within the tribe, with other Indians, or with Europeans.¹³⁴

Sidney Haring also considered the Prairie treaties and wrote that, in general,

[t]he concept of the sale of land and its permanent alienation cannot have been known to Indians who never held private property. . . . The First Nations understood the treaties as peace and friendship agreements, with specific cessions on some land use rights in return for payments in cash and goods from the Crown.¹³⁵

¹³³ For example, the treaty records from Treaty 1 and 3 include requests for compensation for lands and resources and Treaty 4 includes discussion of grievances with the Hudson’s Bay Company, including the Company’s sale of the territory to the Dominion. See Friesen, *supra* note 63. For the Treaty 4 record, see Hon Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (Toronto: Belfords, Clarke & Co, 1880) at 99–107.

¹³⁴ Friesen, *supra* note 63 at 43, 49 [emphasis in original, citation omitted].

¹³⁵ Haring, *supra* note 69 at 102.

Nevertheless, in discussing problems of translation, and the difficulties this creates for historical interpretation, Haring further stated that

[i]t is impossible to fully articulate the Indian understanding of these treaties. Part of the evidence is contradictory. For example, the Indians at Fort Carlton, according to official documents, discussed leasing their lands to the whites for four years rather than selling the land. This discussion itself would indicate that the tribes understood that they were selling the land. But that assumes Indians knew what a lease was. Other Indians counseled against selling the land, again indicating that the tribes knew they were discussing a land sale. The final language [of the surrender clauses] seems unambiguous. But it is boilerplate language, inserted in all the treaties, and it is not clear how it was translated.¹³⁶

Inevitably, the historian's conclusion is that the historical "truth" of the competing claims depends on the context—the particular knowledge and experience of the peoples involved, their languages, legal cultures, and knowledge of those of their negotiating partners, and the larger social, political, and economic context in which the treaty was negotiated. Moreover, as Haring suggests, the nature of the historical record rarely permits conclusive interpretations of the sort demanded by law on matters of dispute. As noted earlier, a historian's interpretation may simply be that the meaning of a given treaty was *not shared* between the parties—a perfectly valid conclusion by historical standards.

Looking for points of mutual agreement as represented by treaty terms and texts is an inquiry (im)posed by law, in which the historical inquiry serves or follows from the legal one. Although the historiography of treaties now reflects mixed legal and historical orientations, historians have traditionally been more concerned with portraying the overall context and character of a particular treaty or regional set of treaty negotiations, or with the development and practice of colonial policy around treaties. They have formulated their questions against intellectual developments such as attending to the agency of Indigenous peoples in colonial contexts and theoretical debates about the nature of objectivity and positive historical facts. Legal questions, by contrast, stem from an

¹³⁶ *Ibid* at 104–05 [citation omitted].

abstracted and normative concept of treaties and treaty rights. A historical interpretation of a lack of shared meaning in relation to a given treaty raises legal issues, but not necessarily historical ones. And the legal issues raised are potentially fundamental: if the parties never reached an agreement on important terms, is it appropriate to speak of a treaty having been reached?¹³⁷

To date, the interpretive gulf between sharing and cession has not led parties to litigate claims that no treaty was formed, perhaps in part because such arguments would do little to advance First Nations interests.¹³⁸ Instead, the Samson Indian Band and Nation, for example, disputed the scope and meaning of only the land cession clause in the *Victor Buffalo* case, arguing that Treaty 6 was a treaty of alliance rather than land cession.¹³⁹ Justice Teitelbaum rejected their argument. Without addressing whether the Samson Indian Band and Nation's characterization of the treaty was (historically) correct, we can notice that succeeding in their claim required more than proving their specific case. Succeeding required that Teitelbaum J accept a more fundamental reconfiguration of the basic layout of treaty history in Canada that instructs that, by its nature, Treaty 6 was a land cession treaty. While these labels hold no legal significance (as noted by Deschamps J in *Little Salmon/Carmacks*), and

¹³⁷ See Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2001) 33:2 Ottawa L Rev 301 at 306.

¹³⁸ But note that Saskatchewan Elders have expressed the view that substantial agreement was reached at treaty negotiations and so, according to Harold Cardinal and Walter Hildebrandt, "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": Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is that Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000) at 59. Donald Purich notes that there has been one challenge to the formation of a treaty that failed at the appeal level but does not identify the case. See Purich, *supra* note 73 at 110.

¹³⁹ *Victor Buffalo*, *supra* note 101. Justice Teitelbaum rejected their contention based on the evidence he heard and his strong preference for the experts that relied on the written record (*ibid* at paras 20, 451–532). For discussion, see Ray, *Telling It*, *supra* note 2 at 85–87.

strong facts should overcome prejudicial academic descriptions, a narrative of treaties that does not summarily preclude the Samson Indian Band's argument would help lower the bar they have to meet. Moreover, a survey of treaty making in Canada should be capable of accommodating the interpretive dispute that the Samson Indian Band and Nation put before the Federal Court and claimed by many other First Nations. This dispute characterizes the history of Canadian treaty making as much as the treaties themselves.

The need to reshape treaty surveys to encompass both agreements and persistent disagreements, draws attention to the strong connections between law and history in this area. Consider John Borrows's argument that the Royal Proclamation is best understood as part of the Treaty of Niagara of 1764. As such, that the text of the Proclamation should be read in concert with First Nations understandings of the Proclamation upon which the Treaty of Niagara is premised and as memorialized by the wampum belts presented by the Crown to the nations gathered at Niagara.¹⁴⁰ This argument received a measure of recognition in the *Chippewas of Sarnia* case at the trial level,¹⁴¹ but, in general, the Royal Proclamation continues to be interpreted as a stand-alone and unilateral

¹⁴⁰ John Borrows, "Wampum at Niagara: the Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 155. See also JR Miller, "Compact, Contract, Covenant: The Evolution of Indian Treaty-Making" in Ted Binnema & Susan Neylan, eds, *New Histories for Old: Changing Perspectives on Canada's Native Pasts* (Vancouver: UBC Press, 2007) 66 at 78–79 (regarding documentary evidence that may support Borrows's historical claim).

¹⁴¹ *Chippewas of Sarnia Band v Canada (Attorney General)*, 40 RPR (3d) 49, [1999] OJ no 1406 [cited to RPR]. In his reasons on the summary judgment hearing, Justice Campbell wrote: "The Royal Proclamation was publicly advanced by the Crown to the Indians as the basis of its Indian policy. This declaration of policy, at first unilateral, soon came to be relied upon [by] the Indians and it became a mutually recognized and fundamental element of the treaty relationship" (*ibid* at para 381).

legal instrument.¹⁴² And although the Treaty of Niagara is recognized to be part of treaty history, Borrows's argument demands that Indigenous law and perspectives be taken seriously as part of official history, even if in contradiction to historical evidence regarding the Crown's actions and motivations. Borrows's argument is not that the Crown viewed the Royal Proclamation's legal force as dependent on First Nations' consent at the Treaty of Niagara, but that the Royal Proclamation is not a legitimate source of Crown authority without their agreement. It is an argument that is simultaneously historical and legal: historical in its presentation of First Nations understandings of the Proclamation as embodied in the Treaty of Niagara, and legal in its argument that First Nations understandings, premised on their own legal systems, are significant to the continuing normative import of the Proclamation. The issue of under-inclusion thus shifts: Given the potential disagreements with Borrows's argument about the legal significance of the Treaty of Niagara, how and when should disagreements about the legal significance of that treaty be included within histories of treaties?

This question highlights the difficulty inherent in separating the historical view from the legal view in this arena. The identification of treaties in history begins from a view of what treaties are. That view is likely informed by the historical record itself—what “appears” to be a treaty based on the parties reported actions and words at the time. If historicism is the goal, then historians should rely on the historical understanding of what treaties were, including their legal and political

¹⁴² See e.g. the Court of Appeal's more muted statement in *Chippewas of Sarnia*, *supra* note 88 at para 54:

After setting out its policy in the *Royal Proclamation*, the Crown took extraordinary steps to make the First Nations aware of that policy and to gain their support on the basis that the policy as set down in the *Royal Proclamation* would govern Crown-First Nations relations. In the summer of 1764, at the request of the Crown, more than 2,000 First Nations chiefs representing some twenty-two First Nations, including chiefs from the Chippewa Nation, attended a Grand Council at Niagara. . . . The singular significance of the *Royal Proclamation* to the First Nations can be traced to this extraordinary assembly and the treaty it produced.

See also Justice Linden's approach in the *Report of the Ipperwash Inquiry*, vol 2 (Toronto: Government of Ontario, 2007) at 45–46, online: <<http://www.attorneygeneral.jus.gov.on.ca>>.

significance, at the time the agreement was forged. If the inquiry is sparked by a legal case, then the historical narrative will respond to what present legal standards demand of treaties. In either approach, however, views of what constitutes a treaty and its legal significance are ultimately filtered through or contrasted with ideas of treaty in the present. And in either the historical and present-day legal view of treaties, the question of “whose law?” and “whose history?” must be part of the inquiry, requiring attention to potential differences between what Indigenous and Euro-Canadian traditions identify as treaties as well as their content and import.

Indigenous languages, as reviewed in the previous section, illustrate the legal aspect of the issue, particularly the resources within Indigenous languages (presumably historical as well as contemporary) for describing different forms of agreement and distinguishing between changeable and permanent aspects of treaty relationships.¹⁴³ Less examined is the variation and evolution of the meaning of treaties in English traditions. Patricia Seed notes that “[t]he word ‘treaty’ in English has an historically distinctive meaning compared to other European languages.”¹⁴⁴ Where in other European languages, treaty comes from the word meaning dealing with someone face to face or personally, English was alone in that

treaty also signified *writing*. From the fourteenth century, when the word first appeared in English, until the middle of the seventeenth century, “treaty” primarily meant a form of inscription: a story, narrative, written account, treating a subject in writing. As a result, any *written* agreement between two English subjects could and indeed was called a treaty, not just an agreement between states. Hence, while the earliest written agreements between English colonists and Native Americans were called treaties, at the time this word simply referred to the fact that the agreement (between individuals) was written down. The 1621 pact between Massasoit, leader of the Pokanoket near the Plymouth colony, was labelled a treaty at the time. But that word does not necessarily mean

¹⁴³ See *supra* notes 37 to 42 and accompanying text.

¹⁴⁴ Seed, *supra* note 68 at 20.

an accord between nations or political authorities but only an agreement written on paper.¹⁴⁵

Seed's observation confirms that the nature, or even presence, of politics behind 17th-century agreements cannot be assumed. Further, while the term treaty potentially signified differently in history, it was also not the only word used to describe what treaty surveys generally label as treaties today. As noted earlier, the Hudson's Bay Company instructed its officers to form "compacts" and to purchase their lands and rivers of the Indigenous peoples they encountered in accordance with their traditions. If purchase was not possible, officers were instructed to at least secure a "league of friendship and peaceable cohabitation" and the freedom to trade.¹⁴⁶ Other 17th- and 18th-century sources confirm that, in this era, the emphasis was on the desired relationship or aim—peace, amity, alliance, protection, friendship, trade, subjecthood—rather than on the form of "treaty" used to achieve it.¹⁴⁷ Later in fur trade country, the language of "settling a trade" described the seemingly more limited aims of the European trading companies when they sought out new trading partners and wanted to establish a trading post within their territories.¹⁴⁸

Because the word "treaty" carries status in international and domestic law, both historically and contemporarily, the inclusive approach advocated for in this paper raises concerns about spreading that status thin and miscommunicating the legal significance of an agreement by

¹⁴⁵ *Ibid* at 21 [citations omitted].

¹⁴⁶ See e.g. "Letter to Governor John Nixon" (21 May 1680) in EE Rich, ed, *Copy-book of Letters Outward &c: Begins 29th May, 1680 Ends 5 July, 1687* (Toronto: Champlain Society for the Hudson's Bay Record Society, 1948), 2 at 9; "Letter to Governor John Bridgar" (15 May 1682) in Rich, *ibid*, 34 at 36.

¹⁴⁷ See Mark Walters's discussion of terms used in statutes from colonial America: Mark D Walters, "*Mohegan Indians v Connecticut* (1705–1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America" (1995) 33:4 *Osgoode Hall LJ* 785 at 793–95 [Walters, "*Mohegan*"].

¹⁴⁸ See Promislow, "It Would Only be Just", *supra* note 102 for discussion of the terms of settling a trade under the North West Company, which had no British colonial mandate comparable to the Hudson's Bay Company.

artificially labeling all forms of agreements as treaties.¹⁴⁹ There is merit to considering what moments of agreement deserve the label “treaty” from both historical and contemporary perspectives. The aim of this discussion, however, is to make sure the variations within the different cultural and temporal conceptions of treaties—between fixed and variable agreements or aspects of agreements; between peace, alliance, and subjecthood; between written and oral—are accommodated within surveys of treaty-making experience. Such debates belong within treaty histories, but should not set boundaries around the proper field of inquiry or pre-emptively situate a given agreement within a particular category of treaties.

The second question, “whose history?,” should also give us pause. Up to this point in the paper I have blithely assumed readers would understand my references to “history” to mean “academic history”. Academic history is by no means a narrow field. It has been broadened by new methodologies such as ethnohistory, and the value of historicist expositions of the past have been challenged by intellectual movements, such as post-structuralism, subaltern and post-colonial and settler-colonial studies, as well as the emergence of memory, all of which question the scope for objectivity, attack positivist methodologies, and challenge the dominant linear, pointillist concept of time.¹⁵⁰ Oral histories (not Indigenous oral histories specifically) have played a significant role in

¹⁴⁹ For discussion see Boast, *supra* note 122; Martinez, *supra* note 111.

¹⁵⁰ See discussion in Richard White, “Using the Past: History and Native American Studies” in Russell Thornton, ed, *Studying Native America: Problems and Prospects* (Madison: University of Wisconsin Press, 1998) 217; Gabrielle M Spiegel, “Memory and History: Liturgical Time and Historical Time” (2002) 41:2 *History & Theory* 149; Edward Cavanagh, “History, Time and the Indigenist Critique” (2012) 37/38 *Arena Journal* 16; Bain Attwood, “In the Age of Testimony: The Stolen Generations Narrative, ‘Distance,’ and Public History” (2008) 20:1 *Public Culture* 75 [Attwood, “Stolen Generations”]. It should be noted that within academic history, there is also a strong tradition of acknowledging the non-positivist nature of historical interpretation and the influence or incorporation of the present within historical inquiry even if such approaches do not answer post-structural critiques. See e.g. Lawrence Stone, “History and Post-modernism, III” (1992) 135 *Past & Present* 189; Edward Hallett Carr, *What is History* (New York: Vintage Books, 1961).

these developments in democratizing the field of history, allowing for ground-up perspectives to also be viewed as authoritative. As Dipesh Chakrabarty has explained, the discipline of history is only one way among many of remembering the past.¹⁵¹ Of particular interest for our purposes are the different temporalities contained within different approaches to history. Memory and many forms of oral history emphasize experience and the presence of the past today, while academic or traditional historical scholarship insists on drawing a line, on keeping “the past in the past.”¹⁵² The historicism of academic history demands an exploration of the specificity of the past as a “foreign country”, which boasts the advantage of having “a greater capacity than ‘memory’ to provide other ways of seeing the world.”¹⁵³

Reliance on Indigenous oral histories attracts and exemplifies these debates and concerns. Like memory as a historical discipline, the reliability of Indigenous oral histories, particularly the potential or tendency of oral histories to “telescope” chronologies, has been challenged in both academic and legal forums. But, as many have pointed out, there are many forms of recalling the past caught by the term “oral history”, and they are not all equal in how they remember the past or in their sense of historicism.¹⁵⁴ Nevertheless, Indigenous oral histories often exhibit a different truth claim than those put forward by traditional academic history. In particular, oral traditions are similar to law in that they often involve an element of moral evaluation as part and parcel of the claims of historical truth.¹⁵⁵

¹⁵¹ Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton: Princeton University Press, 2000).

¹⁵² Spiegel, *supra* note 150 at 149.

¹⁵³ Attwood, “Stolen Generations”, *supra* note 150 at 90.

¹⁵⁴ See B Miller, *supra* note 11 at 26; Julie Cruikshank, “Oral Tradition and Oral History: Reviewing Some Issues” (1994) 75:3 *Canadian Historical Review* 403; Napoleon, “Straightjacket”, *supra* note 11.

¹⁵⁵ Napoleon argues that what is in issue in courts’ problematic reception is the presence of two competing legal systems. See *ibid.* In court settings, oral histories are treated as (problematic) forms of history, not law. Bruce Miller draws a different connection

C. BETTER APPROACHES TO TREATY HISTORIES?

Above, I canvassed problems in survey presentations of treaty history in Canada, and argued that treaty histories should be inclusive of more eras and geography as well as different historical methodologies and legal traditions. I have emphasized that in order to move beyond colonial perspectives in treaty histories, typologies and chronologies must not obscure ongoing disputes regarding treaty meanings. By contrast, I have presented disputed meanings as central to Canada's treaty-making experience—a corrective to legally-oriented narratives that emphasize treaties as settled forms of coexistence, the true meanings of which just need to be recovered in the present. I have also argued that fur trade history and the explosion of contemporary quasi-treaties also belong in our overall picture of treaty history, even if not all such agreements merit legal status as treaties on their own. From such starting points, treaties become a matter of incremental agreement, an iterative process of arriving at a working relationship and adjusting to changes of circumstance. Bringing such approaches into surveys of treaty making would better align survey histories with the constitutional narratives described in the first section, and would also provide a more accurate and fulsome picture of the experience of treaty making in Canada over time.

With an account of treaties grounded in an iterative development of relationships and arrangements for coexistence, we can imagine a different organizing principle for attempting to encapsulate our treaty history in short, survey forms. Within a continuum of treaty making, what distinguishes some treaties or agreements from others is the degree of departure from previous relationships and agreements. The question to

between truth in oral history and truth in law. He notes similarities between legal standards of objectivity in fact-finding (particularly the reasonable man) and some forms of oral history in that they both rely on a community standard employed in determining the "truth". See B Miller, *supra* note 11 at 37–38. See also Lori Ann Roness & Kent McNeil, "Legalizing Oral History: Proving Aboriginal Claims in Canadian Courts" (2000) 39:3 *Journal of the West* 66, who discuss the difficulties of introducing oral evidence to support Aboriginal rights claims in court in light of the structural and cultural limitations of court processes that cannot properly accommodate the cosmologies that inform oral histories.

ask in classifying the nature of a treaty is whether it was a turning point or a continuation of the relationship. Dorothy Jones provided this sort of analysis in her assessment of 18th-century American treaties, noting that by midcentury, there were two primary forms of agreement: “belligerency treaties. . . in which the chief purpose was to mark the end of hostilities by exchanging prisoners and so on; and accommodation treaties, in which the terms of coexistence were given formal expression.”¹⁵⁶ In other words, the treaties either changed the nature of the relationship by arriving at terms of peace, or the treaties clarified and supported the peaceful coexistence that was already in place.

Such an approach would not lead to easy categorizations. The historical experts in the *Marshall* litigation, for example, disagreed on exactly this question. Relying more on Mi’kmaq perspectives, William Wicken argued that in the context of the relationship between the Mi’kmaq and the British, the 1760–61 treaty in issue in the case must be interpreted in relation to the terms of an earlier treaty from 1726.¹⁵⁷ His argument was that the 1760–61 agreements were a renewal of the 1726 one. Stephen Patterson argued the opposite. Relying more on documentary evidence, he argued that the 1760–61 treaties renewed Mi’kmaq–British relations; that along with hostilities between 1726 and 1760, the 1760–61 treaties terminated and replaced the earlier agreement.¹⁵⁸ The 1726 treaty was still relevant in his argument, but as a baseline against which change can be evaluated. Such disagreements are productive, suggesting that how to organize and give a bird’s-eye view of treaty histories may be contentious. An approach based on questions of continuity and change highlights that how one defines the relevant context and baseline for a given treaty will impact its interpretation. It also emphasizes that, regardless of whether a given agreement is better

¹⁵⁶ Jones, *supra* note 8 at 93.

¹⁵⁷ Wicken, *Mi’kmaq Treaties*, *supra* note 2 at 191–209.

¹⁵⁸ Stephen E Patterson, “Anatomy of a Treaty: Nova Scotia’s First Native Treaty in Historical Context” (1999) 48 UNBLJ 41 at 62–63. For a discussion of this academic disagreement, see Douglas C Harris, “Historians and Courts: *R. v. Marshall* and *Mi’kmaq Treaties on Trial*” (2003) 18:2 CJLS 123 at 124–25.

characterized as a renewal of terms of coexistence or a new or sharper reorganization of the terms of coexistence, the arrangements that were in place before matter. Under such an approach, surveys may not be able to give very much shape to treaty histories, but they would better convey the complexity and remarkable continuity of treaty making in Canada without the colonial hangover.

III. TREATIES IN LAW

Judicial consideration of treaties can be divided into three areas of concern: the status of treaties as constitutional events; the definition of treaties recognized in law as creating legally enforceable obligations; and the interpretive approach taken to identifying treaty obligations that are, since 1982, protected as constitutionalized treaty rights. This section will discuss each of these dimensions of treaties in law in turn, beginning with the status of treaties as constitutional events, but with some unavoidable overlap between the three issues. The first dimension requires attention to doctrinal legal history, including debates about the enforceability of treaties at law. As Paul McHugh states, the task of the legal historian (with a historicist aim) goes beyond a sketch of what became the dominant doctrinal view:

Rather than having a monolithic and unified presence, law in the past (as law today) had a social and cultural setting that comprised and encompassed “many legalities” that were dynamic sites of iteration and contestation, a collection of possibilities shaped by context, rather than chiselled finality. Legal “truth” existed no more in the past, than it does in our present. The disinterested legal historian’s task, then, is to capture the set of legalities as they occurred in the past, or, in other words, to describe the historical framework of legal argumentation.¹⁵⁹

In keeping with this approach, this history will endeavour to include the positions of First Nations on the legality of treaties that have been

¹⁵⁹ Paul McHugh, “The Politics of Historiography and the Taxonomies of the Colonial Past: Law, History and the Tribes” in Anthony Musson & Chantal Stebbings, eds, *Making Legal History: Approaches and Methodologies* (Cambridge, UK: Cambridge University Press, 2012) 164 at 194–95.

expressed throughout Canadian history even though First Nations had no hand in the key federalism cases that determined the (non-)status of treaties as constitutional events and had poor access to the justice system more generally.

We will then move on to the definition of treaties at law, as set out in more recent cases considering section 88 of the *Indian Act*.¹⁶⁰ Finally, this section of the paper will finish by considering how courts interpret treaty rights. The aim is to bring these discussions together, along with the conclusions of the previous two sections to critique Canadian jurisprudence in light of its coherence with treaty histories and the potential of treaties to ground a post-colonial constitutionalism.

A. TREATIES AND SOVEREIGNTY: TREATIES AS CONSTITUTIONAL EVENT, THE DOCTRINAL HISTORY VERSION

As discussed in the first section, treaties are important to scholars concerned with a more secure and just legal foundation for Canadian sovereignty than colonial doctrines. These scholars illustrate what the law could be, a vision that does not necessarily accord with the current or past state of the law. The jurisprudence, by contrast, has only occasionally hinted that treaties might have a constitutional character that is “integral to the very fabric of Canada.”¹⁶¹

The doctrinal treatment of the status and significance of treaties follows a path that is similar to the legal history of Aboriginal title as well as stages in the development of Imperial common law and international law. In a familiar arc, the dominant view of treaties in British North America moves from some degree of legal enforceability in the pre-modern period, to non-justiciable political acts by the late 19th or early 20th century, and then returns to justiciability in the second half of the 20th century. It is, to be clear, a legal history of Imperial and colonial character. Although legal principles that direct a generous and liberal interpretation of treaties in favour of Indian nations appear to be almost as

¹⁶⁰ RSC 1985, c I-5.

¹⁶¹ Christie, *supra* note 20 at 155.

old as treaty litigation itself,¹⁶² it is only in the post-1982 era that Canadian courts have made Indigenous perspectives—and potentially, Indigenous law—relevant to treaty interpretation and Aboriginal rights more generally. But the (colonial) legal history is far from uniform in its consideration of treaties with Indigenous peoples and the historical path is not as neat as I have just described.

In the 17th and 18th centuries, when the law of nations had not yet settled into its later fixations on the state and territorial sovereignty, Indian nations in North America were generally conceived as having some status and rights amongst nations, albeit not the same status and rights as Christian nations.¹⁶³ Influenced by the developing law of nations, British colonial practice involved treaty making with Indigenous peoples in North America, which, in this period, assumed that Indigenous peoples had the necessary political sovereignty to do so. British assertions of territorial sovereignty (primarily against other European powers) were not assumed to bring Indigenous peoples under British governance, relying instead on treaty making to achieve alliances and set the form of any imperium asserted over Indians in accordance with their consent.¹⁶⁴ Corresponding to the multiple forms of treaties in the 18th century noted in the previous sections, treaties thus defined the degree of jurisdiction or

¹⁶² In the first level arbitration decision on *Ontario v Canada and Quebec (Annuities Case)* (1895), 25 SCR 434, [1895] SCJ no 96 (QL) [*Annuities Case*, SCC cited to SCR], for example, Chancellor Boyd relied on McLean J's concurring reasons in *Worcester v Georgia*, 31 US (6 Pet) 515, 8 L Ed 483 (1832) [*Worcester v Georgia* cited to US], in which McLean J stated that "[t]he language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense" (*ibid* at 582). The courts in the two appeals from the arbitration decision accepted this principle, but not its applicability in the dispute between Ontario and Canada.

¹⁶³ See S James Anaya, *Indigenous Peoples in International Law*, 2d ed (Oxford: Oxford University Press, 2004) at 19, citing Hugo Grotius, *The Law of War and Peace* (1625). For a brief discussion of some of the theorists and scholarship, see Craig Bryan Yirush, "Claiming the New World: Empire, Law, and Indigenous Rights in the Mohegan Case, 1704–1743" (2011) 29:2 LHR 333 at 335–39.

¹⁶⁴ See McHugh, *Aboriginal Societies*, *supra* note 8 at 102–03.

protectorship the British colony acquired over the Indian nation, or determined whether the nation maintained its political independence within or outside of the colony's boundaries.¹⁶⁵ Litigation testing the juridical quality and bindingness of treaties in this period demonstrates a full range of argument about the status of Indian nations, their law, and their lands. As Craig Yirush remarks in relation to his examination of the *Mohegan Indians v Connecticut* (1705–73), the Mohegan's legal fight against their dispossession created a record of a "complex trans-Atlantic debate about Indigenous rights in the eighteenth-century British world [encompassing] . . . concrete disagreements over the ownership of land in America, the binding nature of treaties, and the locus of authority in the empire."¹⁶⁶

Treaties in this early era contributed to the British acquisition of sovereignty by bringing tribes into peaceful relations with colonies, enabling acquisitions and further acquisitions of land, and sometimes bringing the tribes under British imperium. But treaties did not generally confirm or establish British sovereignty in one fell swoop. The famous decision of Chief Justice Marshall in *Worcester v Georgia* is considered to epitomize the pre-modern legal view of the status of Indian nations and nature of treaties:

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. . . . The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We

¹⁶⁵ *Ibid* at 99. McHugh notes that the nature of the relationships found in early American colonies might have more to do with Native forms than English ones.

¹⁶⁶ Yirush, *supra* note 163 at 339. See also Walters, "Mohegan", *supra* note 147.

have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.¹⁶⁷

Thus American Indian tribes were recognized as political communities who relinquished some but not all of their sovereignty through treaties.¹⁶⁸

The Royal Proclamation of 1763 confirmed the existing British policy and practice of treaty making to accomplish surrenders of lands from an Indian band or nation. Treaties also remained instruments through which relationships of alliance were formed or affirmed. But as settler pressures grew in the 19th century, and as the law of nations and British imperialism shifted under the influence of the emerging positivism, so did judicial treatments of treaties. Tribes lost their status on the international stage and were no longer recognized as having the capacity to enter into international treaties.¹⁶⁹ Further, the rights of the European discoverer shifted from achieving only territorial claims against other European powers—claims that had to be completed through war or treaties of cession—to achieving full territorial rights upon which the property rights of prior inhabitants persisted only by the goodwill of the Crown (until protected by legislation). This shift rendered treaties a matter of

¹⁶⁷ *Worcester v Georgia*, *supra* note 162 at 559–60.

¹⁶⁸ This interpretation relies on the discovery doctrine to demonstrate at least a limited recognition of tribal sovereignty within the Imperial law. Such reliance is admitted to be ironic given the larger pernicious effect of the doctrine of discovery. The articulation of the doctrine in the Marshall decisions—particularly the earlier, stronger version of the doctrine in *Johnson v McIntosh*, 21 US (8 Wheat) 543, 5 L Ed 681 (1823)—has been criticized as being without an empirical basis, and as having provided a legal basis for the expropriation of Indian lands and the impetus for further political dispossessions. See Eric Kades, “History and Interpretation of the Great Case of *Johnson v. McIntosh*” (2001) 19:1 LHR 67; Hope M Babcock, “The Stories We Tell, and Have Told, about Tribal Sovereignty: Legal Fictions at Their Most Pernicious” (2010) 55:4 Vill L Rev 803; Lindsay G Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (Oxford: Oxford University Press, 2005); Joseph William Singer, “Sovereignty and Property” (1991) 86:1 Nw UL Rev 1.

¹⁶⁹ See Anaya, *supra* note 163 at 30, citing John Westlake, *Chapters on the Principles of International Law* (1894).

pragmatics and policy rather than law.¹⁷⁰ The judicial reflection of these shifts is illustrated by Prendergast CJ's reasons in New Zealand in *Wi Parata v Bishop of Wellington* in 1877, concerning the legality of the terms of cession of some land by the Maori owners and subsequent Crown land grant.¹⁷¹ Where the Waitangi Treaty had previously been considered foundational to political if not legal relations with Maori, Prendergast CJ referred to the Treaty of Waitangi as a "simple nullity" in regard to construing the treaty as a cession of Maori sovereignty given that "[n]o body politic existed capable of making cession of sovereignty, nor could the thing itself exist."¹⁷²

Similar intellectual and legal shifts made themselves known in Canadian jurisprudence in the late 19th century, at first through the federalism disputes between Ontario and the federal government. Lord Watson's seminal reasons in *St. Catherine's Milling and Lumber Company v The Queen*¹⁷³ equated Treaty 3¹⁷⁴ with a contract that accomplished the surrender of the Ojibway's "personal and usufructory" property rights,¹⁷⁵

¹⁷⁰ See McHugh, *Aboriginal Societies*, *supra* note 8.

¹⁷¹ (1877), 3 NZ Jur (NS) Sc 72 [*Wi Parata*]. *Wi Parata* also denied the existence of any customary Native title. After *Wi Parata*, the Privy Council overturned part of this case to hold that an enforceable Native title claim existed against the Crown under the Native Rights Act in *Nireaha Tamaki v Baker*, [1901] AC 561, (1901) NZPCC 371. For an overview, see John William Tate, "Tamihana Korokai and Native Title: Healing the Imperial Breach" (2005) 13 Waikato L Rev 108.

¹⁷² *Wi Parata*, *supra* note 171 at 78. For discussion, see PG McHugh, "A History of Crown Sovereignty in New Zealand" in Andrew Sharp and Paul McHugh, eds, *Histories, Power and Loss: Uses of the Past—A New Zealand Commentary* (Wellington: Bridget Williams Books, 2001) 189; David V Williams, *A Simple Nullity? The Wi Parata Case in New Zealand Law and History* (Auckland: Auckland University Press, 2011).

¹⁷³ (1888), 14 App Cas 46, 10 CRAC 13 (PC) [*St. Catherine's Milling* cited to App Cas].

¹⁷⁴ Text of the treaty available at: *Treaty 3 between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods with Adhesions*, 3 October 1873, online <<http://www.aadnc-aandc.gc.ca/eng/1100100028675/11001000286679>> [Treaty 3].

¹⁷⁵ *St. Catherine's Milling*, *supra* note 173 at 46.

allowing the Crown's "substantial and paramount estate" to become a *plenum dominium*.¹⁷⁶ Lord Watson then reprised his role of articulating lasting principles of Canadian Aboriginal law in the *Annuities Case*,¹⁷⁷ in which he described the annuities provisions of the Robinson Treaties in issue as not conveying a right, but rather as a mere "promise and agreement, which was nothing more than a personal obligation by its governor, as representing the old province [of Upper Canada], that the latter should pay the annuities as and when they become due".¹⁷⁸ Finally, in the 1929 case of *R v Syliboy*,¹⁷⁹ Patterson J brought Lord Watson's approach together with the removal of Indigenous political personality from international law to dismiss the enforceability of the Mi'kmaq Treaty of 1752. He dismissed the Mi'kmaq's argument that the continuing rights to hunt and fish found in the terms of the 1752 Treaty protected them from provincial regulations based on the Mi'kmaq's lack of capacity to enter into a treaty as a people,¹⁸⁰ adding, for good measure, that the Treaty of 1752 "[was] not a treaty at all . . . it [was] at best a mere agreement made by the Governor and council with a handful of Indians", thus branding treaties as a form of political agreement that was unenforceable at law.¹⁸¹

In all of these cases, and in contrast to the earlier era epitomized by *Worcester v Georgia*, the Crown's full territorial sovereignty, imperium and

¹⁷⁶ *Ibid* at 55.

¹⁷⁷ *Attorney-General for the Dominion of Canada v Attorney-General for Ontario (Annuities Case)*, [1897] AC 199, 11 CRAC 308 (PC) [*Annuities Case*, PC, cited to AC].

¹⁷⁸ *Ibid* at 213.

¹⁷⁹ (1928), [1929] 1 DLR 307, 50 CCC 389 (NS Co Ct) [*Syliboy* cited to DLR]. For discussion, see William C Wicken, *The Colonization of Mi'kmaw Memory and History, 1794–1928: The King v. Gabriel Syliboy* (Toronto: University of Toronto Press, 2012) [Wicken, *Colonization*]; Macklem, *supra* note 3 at 138–39.

¹⁸⁰ Patterson J also found that the Governor lacked capacity to treat on behalf of the Crown as a result of not having the appropriate delegation of powers from Great Britain. See *Syliboy*, *supra* note 179 at 314.

¹⁸¹ *Ibid* at 313.

dominium, was assumed to be complete both in law and in fact.¹⁸² On these assumptions, treaties were not required to secure the Crown's assertions or to bring Indigenous peoples in British North America under the Crown's jurisdiction. Instead, treaties (and land rights) became understood as an expression of goodwill. As executive policy, Indigenous "rights" could be altered when the will of the executive changed (unless secured by legislation).

In spite of these characterizations, it is too much of a leap to suggest that treaties were not justiciable in Canada through the 19th century; that the executive's personal goodwill and subsequent actions could not give rise to legally or equitably enforceable obligations. In some cases, it seems that the courts in Canada assumed that treaties were enforceable as some form of trust. For example, in the *Annuities Case*, the focus was on whether the obligation lay with the federal government, as the Supreme Court majority and Privy Council held, or had passed with the lands in issue to the Province of Ontario under section 109 of the *British North America Act, 1867*, as the dissenters and original arbitrators had found. While the treaty promise was characterized as a "personal obligation" taken on by the governor representing the Province of Canada, the political trusts cases were not relied on and the enforceability of that form of promise by the First Nations was not in issue.¹⁸³ Indeed, if the obligation was one that could be ignored by the governments, there would have been no need to litigate. The assumption that treaty rights were to be respected was also evidenced in the negotiations around the Natural Resource Transfer Agreements of the 1930s, in which the Crown's ownership of lands and resources was transferred from the federal Crown to the western provincial Crowns to align their provincial status with that of the original members of Confederation. Each of those transfers included a provision protecting treaty hunting rights, which

¹⁸² See e.g. *Annuities Case*, SCC, *supra* note 162 at 508–27, Gwynne J, dissenting.

¹⁸³ It is worth noting that all of the judges of the Supreme Court of Canada assumed that the annuities provisions of the Robinson Treaties would be honoured, with principles of equity and trusts figuring prominently in their construction of the nature of the Indian interest stemming from the treaty. See *Annuities Case*, SCC, *supra* note 162.

constitutionalized treaty rights in Canada for the first time,¹⁸⁴ rights that were upheld in regulatory prosecutions soon after.¹⁸⁵ Treaty obligations were also found to be legally enforceable in *Dreaver v The King*,¹⁸⁶ another case from the same era. In this case, the federal Exchequer Court enforced the medicine chest provisions of Treaty 6, holding the federal government liable as trustee for medically-related and other expenses it had charged back to the First Nations' accounts.

Later in the 20th century, the enforceability of treaties became framed as a matter of contract. In the 1979 case, *Pawis v The Queen*,¹⁸⁷ Ojibway fishers charged with violating Ontario fisheries regulations defended themselves (and lost) by claiming the regulations were a breach of treaty obligations under the Robinson–Huron Treaty of 1850. The federal court rejected framing the issue as one of trusts, reading the *Annuities Case* through the line of Imperial “political trust” cases in which the trusts are admitted but unenforceable at law.¹⁸⁸ Thus the *Syliboy* line of reasoning

¹⁸⁴ Albeit a modified form of those rights, since the wording of the NRTAs has been held to have extinguished any commercial hunting rights and expanded the scope of those rights to beyond treaty territories to all unoccupied Crown lands within the province. See *R v Horseman*, [1990] 1 SCR 901 at 933, 108 AR 1. For discussion, see Frank J Tough, “The Forgotten Constitution: The *Natural Resources Transfer Agreements* and Indian Livelihood Rights, ca. 1925–1933” (2004) 41:4 *Alta L Rev* 999; Kerry Wilkins, “Unseating *Horseman*: Commercial Harvesting Rights and the *Natural Resources Transfer Agreements*” (2007) 12:2 *Rev Const Stud* 135.

¹⁸⁵ See *R v Wesley* (1932), 26 *Alta LR* 433, [1932] 4 *DLR* 774 (CA) [cited to *Alta LR*]. McGillivray JA also commented on the enforceability of treaty rights at law (*ibid* at 449–50).

¹⁸⁶ (1935), 5 *CNLC* 92 (Exchequer Ct) [*Dreaver*]. In the later 1966 case of *Johnston v The Queen* (1966), 56 *DLR* (2d) 749, 49 *CR* 203 (Sask CA), the Saskatchewan Court of Appeal did not treat the medicine chest provision generously but nevertheless accepted a contractual model of interpretation that assumed the enforceability of treaty provisions against the Crown.

¹⁸⁷ (1979), [1980] 2 *FC* 18, 102 *DLR* (3d) 602 (TD) [*Pawis*]. See Macklem, *supra* note 3 at 140, regarding *Pawis* as a shift to the contractual view of treaties.

¹⁸⁸ See e.g., *Kinloch v Secretary of State for India in Council* (1882), 7 *App Cas* 619 (HL Eng).

was applied to reinterpret the *Annuities Case*. Nevertheless, the Court was willing to contemplate damages for a breach of contract but ultimately held that such an action was unfounded in the case. Cases like *Dreaver* and *Pawis* illustrate that *Syliboy's* influence as a precedent in the first half of the 20th century was limited and that differences regarding the legal nature of treaty obligations persisted.¹⁸⁹

Throughout this history, First Nations perspectives on their treaty rights and obligations are not well represented in the jurisprudence,¹⁹⁰ but it is certainly clear that they did not view the treaties as purely political and unenforceable at law. When opportunities presented themselves to press their concerns, they took them. For example, First Nations witnesses appeared before a special joint committee of Parliament and a 1946 Royal Commission to complain that their treaty rights and privileges were binding and were not being honoured.¹⁹¹ Contestations also extended to what treaties accomplished. The Six Nations, for example, have steadfastly claimed they are not subjects of the Crown, disputing the Crown's view of the implications of their 17th- and 18th-century treaties. Their objections to the application of the *Indian Act* to their confederacy reached the

¹⁸⁹ Indeed, legal commentary on *Syliboy* from 1929 disagrees with Patterson J's conclusions about the capacity of the parties to enter into the treaty. See NAM Mackenzie, "Indians and Treaties in Law" Case Comment on *Rex v Syliboy*, (1929) 7:8 Can Bar Rev 561. However, Wicken notes that because *Syliboy* was decided just after Parliament restricted the ability of Indians to hire lawyers to pursue land claims, it had more significance. He also notes that at least in Nova Scotia, governments relied on *Syliboy* well into the 1970s. See Wicken, *Colonization*, *supra* note 179 at 7, n 6. In later cases, the decision in *Syliboy* was interpreted more narrowly, as limited to Patterson J's first finding that the treaty was made with a particular band of Mi'kmaq rather than applying to the whole tribe and therefore did not extend to encompass the defendant. See e.g. *R v Wesley* (1975), 9 OR (2d) 524, 78 DLR (3d) 227 (Dist Ct).

¹⁹⁰ See Wicken, *Colonization*, *supra* note 179, for a book-length treatment of the evolution of Mi'kmaq understandings of the 18th-century treaties.

¹⁹¹ See Parliament, "Report of the Commission on Indian Affairs" in *Sessional Papers*, No 68B (1947) at 3–4, as cited by Kerry Wilkins, "'Still Crazy After All These Years': Section 88 of the *Indian Act* at Fifty" (2000) 38:2 Alta L Rev 458 at 462, n 20.

courts in *Logan v Styres*¹⁹² in 1959. They expected the Haldimand Deed of 1784 and the Simcoe Deed of 1793—documents that granted the Six Nations territory in southern Ontario for their loyalty to the British in the American war of independence—to support their claims. Instead, the Ontario High Court found that “by accepting the protection of the Crown” the Six Nations “then owed allegiance to the Crown and thus became subjects of the Crown.”¹⁹³

To sum up the doctrinal view in the early modern period (and later in other parts of the British Empire¹⁹⁴), treaties were related to the process by which sovereignty was acquired. In late 19th-century Canada, however, this connection to sovereignty was severed in what became the dominant line of judicial opinions. Sovereignty was instead viewed as complete without the contributions of Indigenous peoples, and the primary significance of treaties at law was a gesture of political goodwill to ensure a consensual basis for land surrenders, the legal import of which, if any, rested in different types of trust obligations. In this Austinian sense of constitutionalism, the command of the sovereign was law and the acquisition of territory and sovereignty through coercive forces was a fact of political life, beyond the purview of the rule of law.¹⁹⁵ Nevertheless, this line of cases should not eclipse the continuing presence of other

¹⁹² (1959), 20 DLR (2d) 416, 1959 CarswellOnt 228 (WL Can) (HC) [*Logan* cited to DLR]. For discussion, see Darlene M Johnston, “The Quest of the Six Nations Confederacy for Self-Determination” (1986) 44:1 UT Fac L Rev 1 at 20–23.

¹⁹³ *Logan*, *supra* note 192 at 422. Hamar Foster points out that the Court’s move from protectorship to subjecthood was inconsistent with American precedent and international law principles. See Hamar Foster, “Forgotten Arguments: Aboriginal Title and Sovereignty in *Canada Jurisdiction Act* Cases” (1992) 21:3 Man LJ 343 at 345, n 9.

¹⁹⁴ See Kent McNeil, *Common Law Aboriginal Title* (New York: Oxford University Press, 1989) at 110–33 for a discussion of treaties in relation to judicial classifications of whether colonies were conquered, ceded, or settled.

¹⁹⁵ Jeremy Webber, for example, discusses the political philosophy of Hume, who argues that all political authority is historically founded on force. See Jeremy Webber, “The Meanings of Consent” in Webber & Macleod, *supra* note 23, 3 at 3–5 [Webber, “Consent”].

constitutional traditions, represented in the presence of political and legal opinion that the Crown's gestures of "goodwill" were actionable and mandatory as trust or contractual obligations, and the persistence of Indigenous advocacy for the enforcement and implementation of their understanding of the treaties.

By the mid-20th century, the dominant judicial approach to treaties began to shift again. In 1951, the enforceability of treaties was reinforced by section 87 (later 88) of the *Indian Act*, a provision that extended the application of provincial law where, historically, it would otherwise not apply in light of federal jurisdiction over Indians and Indian Lands.¹⁹⁶ Section 88 makes treaties enforceable by also setting out an exception: the extension of provincial laws is subject to the terms of any treaty, thereby making treaties enforceable as against the application of provincial laws. Through the jurisprudence on section 88, a significant shift in the conceptualization of treaties occurred. In *Simon*, the Supreme Court relegated *Syliboy* to an artefact of an earlier and outdated set of colonial attitudes. The Court moved past this precedent by correcting the capacity issues raised by Patterson J and differentiating Crown–Aboriginal treaties from international treaties by identifying them as *sui generis*.¹⁹⁷ The *sui generis* approach recognizes the capacity of Indian nations to have entered treaties as political communities within the state, but it does not resurrect the American line of authorities (i.e., *Worcester v Georgia*) to address how treaties relate to the acquisition of sovereignty. If anything, the *sui generis* status of treaties in Canada muddied the sovereignty waters.¹⁹⁸

¹⁹⁶ See *Constitution Act, 1867*, *supra* note 17, s 91(24) (titled the *British North America Act, 1867* before 1982). See generally Wilkins, *supra* note 191. I suggest this is the "historic" approach because the recent Supreme Court decisions in *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48, 372 DLR (4th) 385 [Keewatin], and *Tsilhqot'in* appear to have significantly limited the application of the doctrine of interjurisdictional immunity to s 91(24). See *Tsilhqot'in*, *supra* note 6 at paras 128–52; *Keewatin*, *ibid* at para 53.

¹⁹⁷ *Simon*, *supra* note 14 at 404.

¹⁹⁸ Some commentators view the *sui generis* status of treaties (and Aboriginal rights more generally) as potentially helpful in understanding treaties as a product of both British

The introduction of section 35 in 1982 gave constitutional force to treaty rights and increased momentum towards settling longstanding grievances around the meaning and implementation of historic treaties. The phrasing of section 35, however, focused legal attention on particular terms and promises in a manner that avoids the more difficult questions around the role of treaties in the formation of the Canadian state. In other words, the constitutionalization of treaty rights has not addressed the constitutional status of treaties themselves. The Supreme Court has only broached this issue in relation to its articulation of a constitutional duty to consult and accommodate Aboriginal peoples. In the seminal 2004 decision, *Haida Nation*, McLachlin CJC commented that

[t]reaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition This promise is realized and sovereignty claims reconciled through the process of honourable negotiation.¹⁹⁹

This comment, coupled with her attention to the difference between de facto and de jure sovereignty (another first in the Supreme Court's jurisprudence), situates treaties as the key process by which Crown sovereignty may finally be part of a rule of law that encompasses both Indigenous and European legal traditions.²⁰⁰ Thus, *Haida Nation* offers a

and Indigenous legal traditions. See e.g. Henderson, *Treaty Rights*, *supra* note 18; John Borrows & Leonard I Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?" (1997) 36:1 *Alta L Rev* 9. For a contrasting view, see Coyle, *supra* note 44.

¹⁹⁹ *Haida Nation*, *supra* note 121 at para 20. In the recent *Tsilhqot'in* decision, the mention of treaties is more circumspect: "Throughout most of Canada, the Crown entered into treaties whereby the indigenous peoples gave up their land in exchange for reservations and other promises": *Tsilhqot'in*, *supra* note 6 at para 4.

²⁰⁰ For commentary on this point see Mark D Walters, "The Morality of Aboriginal Law" (2006) 31:2 *Queen's LJ* 470 at 513-16; Borrows, "Ground-Rules", *supra* note 3; Hoehn, *supra* note 3. For discussion of the difference between de jure and de facto sovereignty more generally, see Kent McNeil, "Factual and Legal Sovereignty in North America: Indigenous Realities and Euro-American Pretensions" in Julie Evans et al,

crack in the door of Canada's constitutional origins that might permit the significance of treaties as "integral to the constitutional fabric of Canada" to finally be addressed as a matter of law and not just theory.

B. DEFINING TREATIES AT LAW (DOMESTIC)

Beyond judicial treatments of the constitutional significance of treaties, the way that Canadian courts have defined treaties is also of interest in our interdisciplinary survey. The section 35 jurisprudence does not define treaties; the question of "what is a treaty" does not occur in a jurisprudence directed at particular promises or treaty terms. Instead, this question comes up in the jurisprudence around section 88 of the *Indian Act*, where direct consideration of what qualifies as a treaty is necessary to determine when the exception to the application of provincial law applies. In this context, the Supreme Court has taken a remarkably broad approach to what may qualify as a treaty in law.

Avoiding any overarching definition of treaties, the Court has explicitly rejected approaches based on subject matter, such as land cessions or peace and friendship. Instead, Lamer J (as he was then) stated in *R v Sioui* that treaties are identified by "the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity."²⁰¹ This broad approach draws directly from *R v*

eds, *Sovereignty: Frontiers of Possibility* (Honolulu: University of Hawai'i Press, 2013) 37.

²⁰¹ *Sioui*, *supra* note 1 at 1044. For an argument that in proper historical context, the agreement in issue in *Sioui* should not have been recognized as a treaty, see Denis Vaugeois, *La Fin des alliances franco-indiennes: Enquête sur un sauf-conduit de 1760 devenu un traité en 1990* (Montreal: Boréal, Septentrion, 1995). For a response and contrary opinion, see Morin, *supra* note 95 at 248. See also *Simon*, *supra* note 14. In *Francis v The Queen*, [1956] SCR 618, 3 DLR (2d) 641, the Court rejected international treaties such as the Jay Treaty from falling within s 88's purview, but this does not limit such treaties from being considered under s 35, see e.g. *Mitchell v MNR*, 2001 SCC 33, [2001] 1 SCR 911.

White and Bob,²⁰² in which Norris JA of the British Columbia Court of Appeal stated:

In [section 87; now section 88] “Treaty” is not a word of art and in my respectful opinion, it embraces all such engagements made by persons in authority as may be brought within the term “the word of the white man” the sanctity of which was, at the time of British exploration and settlement, the most important means of obtaining the goodwill and co-operation of the native tribes and ensuring that the colonists would be protected from death and destruction. On such assurance the Indians relied.²⁰³

Lamer J also adopted five factors extracted from the Ontario Court of Appeal’s decision in *R v Taylor and Williams*²⁰⁴ to guide the analysis of the historical context and the intent to make a treaty: 1) continuous exercise of a right in the past and at present; 2) the reasons why the Crown made a commitment; 3) the situation prevailing at the time the document was signed; 4) evidence of relations of mutual respect and esteem between the negotiators; and 5) the subsequent conduct of the parties.²⁰⁵ These factors incorporate attention to the parties’ relationships and practices both before and after the agreement in issue into the identification of which

²⁰² *R v White and Bob* (1964), 50 DLR (2d) 613, 52 WWR 193 (BCCA), aff’d [1965] SCR vi, 52 DLR (2d) 481 [*White and Bob* cited to DLR].

²⁰³ *Ibid* at 649.

²⁰⁴ (1981), 34 OR (2d) 360, [1981] 3 CNLR 114 (CA) [*Taylor and Williams*], leave to appeal to SCC refused, 40 NR 539, [1981] SCCA no 377 (QL).

²⁰⁵ *Ibid*. Adopted in *Sioui*, *supra* note 1 at 1045. In *Taylor and Williams*, these factors along with the principle of the honour of the Crown were part of the analysis of the binding character and scope of a treaty promise that was recorded in the minutes of the treaty negotiations but not in the terms of the treaty document. In *Simon*, the fifth factor was considered to determine whether the treaty was terminated or limited by subsequent hostilities. The Court held that the treaty was not terminated, finding that the Crown had not met its burden of proof regarding termination of the treaty. See *Simon*, *supra* note 14 at 404.

treaty obligations are relevant at law, reflecting the directions emerging from the historical overview in the previous section.²⁰⁶

This approach to identifying treaties in the jurisprudence around section 88 accords reasonably well with the breadth of treaty experience described in the section on treaties in history. It does not establish any barriers to arguing that a treaty was made regardless of the form and documentation. And it allows for the possibility that treaties evolved through the subsequent conduct of the parties. While the emphasis on the Crown's interests in making treaties in the five factors adopted in *Sioui* may tilt the approach to one side, the emphasis on the reliance of the Aboriginal parties on the promises of the Crown in *R v White and Bob* provides a counterpoint that potentially connects treaties to discussions of constitutional origins. Most importantly for this discussion, it is notable that the notion of a "common intention" between the parties regarding the content of particular treaty provisions—which, as we will see below, dominates the section 35 jurisprudence—is absent. Instead, mutuality is important only in regards to identifying an "intention to create obligations" and the presence of "mutually binding obligations," neither of which demands a finding of shared meaning with respect to the treaty itself or particular treaty promises. As will be discussed below, the focus on "common intention" in section 35 treaty rights interpretation narrows the expansive approach to treaties that emerged from the section 88 cases.

C. DEFINING TREATY RIGHTS

The introduction of section 35 through the *Constitution Act, 1982* "recognized and affirmed" existing treaty rights, shifting the emphasis of

²⁰⁶ The interpretation of the terms of the 1818 treaty in issue in *Taylor and Williams* involved dealing with several fur trade practices and expectations, including the meaning of the word "milk" and the easily misconstrued negotiation tropes of hunger and pity. On the former, see Bruce M White, "'Give Us a Little Milk': The Social and Cultural Meanings of Gift Giving in the Lake Superior Fur Trade" (1982) 48:2 *Minnesota History* 60. On the latter, see Mary Black-Rogers, "Varieties of 'Starving': Semantics and Survival in the Subarctic Fur Trade, 1750–1850" (1986) 33:4 *Ethnohistory* 353; Promislow, "I Bring Thee Merchandise", *supra* note 107.

treaty litigation towards the scope and nature of particular treaty promises (and once rights are established, whether government action infringing those rights can be justified).²⁰⁷ By this time, a principle of a generous and liberal interpretation of the words of statutes relating to Indians was already established, adopted from *Worcester v Georgia* as noted earlier (*Annuities Case*). In *R v Badger*,²⁰⁸ Justice Cory summarized the gist of this longstanding interpretive stance as follows:

Treaties and statutes relating to Indians should be liberally construed and any uncertainties, ambiguities or doubtful expressions should be resolved in favour of the Indians. In addition, when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement. The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing.²⁰⁹

²⁰⁷ The language of “recognized and affirmed” in *Constitution Act, 1982*, *supra* note 35, s 35 protects the treaty and Aboriginal rights that continued to exist in 1982, i.e., rights that were not unilaterally extinguished by the Crown prior to 1982. See *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385; *Côté*, *supra* note 97. In the case of treaty rights, s 35(3) allows that rights arising from land claims agreements—i.e., modern treaties—concluded before or after 1982 would also receive constitutional protection. For discussion, see Brian Slattery, “Making Sense of Aboriginal and Treaty Rights” (2000) 79:2 Can Bar Rev 196 at 205–06.

²⁰⁸ [1996] 1 SCR 771, 133 DLR (4th) 324 [*Badger* cited to SCR].

²⁰⁹ *Ibid* at para 52.

The “generous” posture of these interpretive principles allow for some present-day accounting for the unequal bargaining conditions that characterized the negotiation of many of the historic treaties discussed earlier. However, these principles also implement the doctrinal stance from the 19th-century jurisprudence, discussed above, in which the obligations formed through treaties are a matter of trust and goodwill on the part of the Crown. One additional principle—the honour of the Crown—has also been brought forward from the 19th century and is relied on to slightly different effect from the above set of principles.²¹⁰ Specifically, the honour of the Crown directs courts to avoid interpretations of treaty commitments that would give the appearance of “sharp dealing” on the part of the Crown. An approach that moves past the 19th-century jurisprudence would, minimally, need to move away from text as the starting point for the interpretation of treaty obligations and rights.

These well-established principles were last revisited in *Marshall*, a case that arguably refocused treaty interpretation from the “generous and liberal” principles above to reconstructing a historical mutual intention as the aim of treaty rights interpretation.²¹¹ At issue in *Marshall* was the truckhouse clause of a 1760–61 treaty and whether it provided the basis for a contemporary right to catch and sell fish. The text of the clause in issue was spartan, stating only that the Mi’kmaq promised to trade

²¹⁰ See e.g. *White and Bob*, *supra* note 202 at 625–64, Norris JA; *Annuities Case*, SCC, *supra* note 162 at 508–27, Gwynne J, dissenting; *R v George*, [1966] SCR 267 at 207–80, 55 DLR (2d) 386, Cartwright J, dissenting.

²¹¹ The absence of a discussion of these principles is notable in the most recent treaty case decided by the Supreme Court, *Keewatin*, *supra* note 196, in which treaty interpretation was approached as a matter of constitutional law—which allowed for federal government treaty rights to be exercised by the successor Government of Ontario—as well as empirically, as a matter of historical intention (of governments primarily). The reliance on constitutional law to delimit the historical inquiry, however, demonstrates the continuing 19th-century colonial frame of reference for treaties in which treaties fit within an established Crown sovereignty rather than contribute to the formation of that sovereignty.

exclusively at the British truckhouses.²¹² The truckhouse system itself was replaced with a (less expensive) system of licensed traders in 1762. The majority judgment, written by Binnie J, reached beyond the inadequacies of the written agreement. He drew from historical sources surrounding the negotiation of the 1760–61 treaty, such as Mi'kmaq negotiators' plea for the truckhouses to furnish them with their necessaries through trade, to support his conclusion that the negative covenant contained in the treaty (to trade only at British truckhouses) implied a positive Mi'kmaq right to bring their goods to the truckhouse to trade for their necessaries and, consequently, to access the resources that were to be traded (in this case, eels). The treaty was thus found to support a modern right to fish and to sell the products of such traditional activities up to the level of a moderate livelihood.

Binnie J's judgment emphasized the idea of reconstructing the parties' *common intention* from a broad view of the historical context of the treaty. He described the aim of treaty interpretation as follows: "The bottom line is the Court's obligation is to 'choose from among the various possible interpretations of the common intention [at the time the treaty was made] the one which best reconciles' the Mi'kmaq interests and those of the British Crown."²¹³ According to Binnie J, the inequities and differences that imbue this treaty history demand that the Court reach beyond the written treaty to imply terms to make "honourable sense" of the treaty and to interpret terms once they are found to exist. The honour of the Crown was thus critical to how Binnie J arrived at this interpretation. As he stated, "an interpretation of events that turns a positive Mi'kmaq trade demand into a negative Mi'kmaq covenant is [not] consistent with the

²¹² See 1760–61 Treaties, *supra* note 78.

²¹³ *Marshall*, *supra* note 1 at para 14 [emphasis in original], citing Lamer J in *Sioui*, *supra* note 1 at 1069. Interestingly, Lamer J made those comments to introduce a check on the liberal interpretation principles that favour First Nations: "Even a generous interpretation of the document, such as Bisson J.A.'s interpretation, must be realistic and reflect the intention of both parties, not just that of the Hurons. The Court must choose from among the various possible interpretations of the common intention the one which best reconciles the Hurons' interests and those of the conqueror" (*Sioui*, *ibid*).

honour and integrity of the Crown. . . . The trade arrangement must be interpreted in a manner which gives meaning and substance to the promises made by the Crown.”²¹⁴ Thus, whatever the historical intention of the Crown might have been at the time, Binnie J’s reasons show that the honour of the Crown is capable of both limiting the availability of some interpretations as well as implying additional treaty terms, such as access to the resources and harvesting activities necessary to participate in the trade secured by the treaty.

The dissenting opinion, written by McLachlin J (as she was then), accepted the trial judge’s assessment of the evidence that the common intention was only to create a right to trade at truckhouses, not a general right to trade. This conclusion was based primarily on the wording of the treaty. McLachlin J favoured an interpretation that relied on the historical evidence that the truckhouse system fell into disuse soon after the treaty so as to render the treaty right to trade obsolete. She claimed that Binnie J’s approach transformed a “specific right agreed to by both parties into an unintended right of broad and undefined scope.”²¹⁵ In spite of their different interpretations of the facts, however, McLachlin and Binnie JJ purported to apply the same interpretive principles and McLachlin J’s 9-point version of the principles is often cited as authoritative.²¹⁶

While there appears to be a high degree of judicial consensus about the principles of treaty interpretation, the honour of the Crown principle retains an open-ended quality that is not surprising given differences in judicial deployment. In *Badger*, for example, Cory J indicated that the integrity of the Crown requires an assumption “that the Crown intends to fulfil its promises” and that “[n]o appearance of ‘sharp dealing’ will be sanctioned.”²¹⁷ This version of the principle is potentially more limited than Binnie J’s version in *Marshall*, where the honour of the Crown ensures that promises have “meaning and substance”. In Cory J’s version,

²¹⁴ *Marshall*, *supra* note 1 at para 52.

²¹⁵ *Ibid* at para 102.

²¹⁶ *Ibid* at para 78.

²¹⁷ *Badger*, *supra* note 208 at para 41. See also *Haida Nation*, *supra* note 121 at para 20.

the honour of the Crown ensures that promises, presumably identified and defined through the other interpretive principles, are fulfilled. Thus, the honour of the Crown might bar an interpretation of treaty promises as short-term obligations where such promises were delivered with assurances of the treaty's longevity—even if a short-term commitment was all the Crown intended or expected. By contrast, Binnie J's version of the honour of the Crown may inform the content of those promises; as illustrated in *Marshall*, the principle can ground the identification of adjunct rights that were not explicitly promised in the treaty record.²¹⁸ Apart from this difference, however, the treaty interpretation principles are well-established and apparently uncontroversial.

Academic evaluations of *Marshall* were, for the most part, cautiously optimistic: the principles contained the necessary ingredients for recognizing the "spirit and intent" of the treaties beyond the treaty text.²¹⁹ As Mark Walters commented: "*Marshall* is premised upon the idea that treaties with Aboriginal nations are not *documents* or *written instruments* but rather are *relationships*—or, more precisely, they represent a shared understanding of and commitment to a normative framework for cross-cultural relationships."²²⁰ One of the reasons for this cautious optimism was the decision's clarification that extrinsic evidence, such as

²¹⁸ For an argument that Binnie J's application of the honour of the Crown went too far in *Marshall*, see Robert Normey, "Angling for 'Common Intention': Treaty Interpretation in *R. v. Marshall*" (2000) 63:2 Sask L Rev 645. The honour of the Crown also limits government treaty rights under taking-up clauses, as illustrated in *Keewatin*, *supra* note 196 at para 50. However, the reliance on the honour of the Crown in interpreting government treaty rights relates more to establishing the presence of consultation obligations and the justification of infringements of Indigenous treaty rights than it does to the interpretive exercise of defining the scope of those rights. See *Mikisew Cree*, *supra* note 123.

²¹⁹ See e.g. Leonard Rotman, "Marshalling Principles from the *Marshall* Morass" (2000) 23:1 Dal LJ 5; Catherine Bell & Karin Buss, "The Promise of *Marshall* on the Prairies: A Framework for Analyzing Unfulfilled Treaty Promises" (2000) 63:2 Sask L Rev 667. For a contrasting view of *Marshall* as a continuation of a status quo incapable of arriving at the true spirit and intent of the treaties, see Christie, *supra* note 20.

²²⁰ Walters, "Covenant Chain", *supra* note 4 at 78 [emphasis in original].

oral history or other records relating to the context of negotiation, may be used to assist in all cases of treaty interpretation, rather than only where the court found ambiguity in the written treaty. Indeed, the principles are flexible enough to treat the text as more or less central to the interpretation of the treaty, as indicated by the historical circumstances.

Since *Marshall*, the Supreme Court has reiterated these principles and emphasis on determining a historically pinpointed common intention as the baseline for defining treaty rights.²²¹ However, as the gulf between Binnie and McLachlin JJ's interpretations in *Marshall* illustrates, these well-established interpretive principles do not constrain judicial interpretation in application. In *R v Marshall; R v Bernard*,²²² for example, the interpretation of the same truckhouse clause from *Marshall* was again in issue, but this time in relation to logging rather than fishing rights. While the primary significance of this case was the discussion of Aboriginal title, the quick work of the Court in dismissing the treaty claim is of interest for present purposes. The claim was that the truckhouse clause supported trading rights in relation to the products of any Mi'kmaq traditional harvesting activities. The counter-argument was that the clause supported trading rights only in relation to items traded at the time of the treaty. The evidence showed that although the Mi'kmaq used wood, they did not conduct much or any trade in forest products at the time of the treaty (distinguishing the case from *Marshall*). McLachlin CJC's majority reasons refer briefly to the historical context of alliance surrounding the treaty, but strongly rely on the words of the treaty itself in siding with the Crown and rejecting the claim: "This [interpretation] is supported by the wording of the truckhouse clause. It speaks only of trade. . . . Nothing in these words comports a general right to harvest or gather all natural resources then used."²²³ Text, not relationship, defined the scope of the inquiry. Moreover, the text-driven approach ensures that, at

²²¹ See e.g. *Morris*, *supra* note 1 at para 18.

²²² 2005 SCC 43, [2005] 2 SCR 220 [*Marshall; Bernard*].

²²³ *Ibid* at para 20. For a critical discussion of the treaty claim, see John McEvoy, "Marshall and Bernard: Treaty Rights and a Treaty Table" (2006) 55 UNBLJ 105.

their core, treaty rights represent historical moments of common intention as determined by the courts, whether supported by historical opinion or not. The constitutional significance of treaties is thus also conveyed through these artificial moments of consent, a significance that stands in sharp contrast to the process-oriented constitutional narratives that give consent an aspirational quality.

Post-*Marshall* decisions in lower courts also demonstrate a stubbornly text-driven approach to interpretation. In *Canada v Benoit*,²²⁴ *Victor Buffalo*, and *Ermineskin Indian Band and Nation v Canada*,²²⁵ for example, the plaintiffs' claims of treaty rights based on oral promises (as opposed to terms in the treaty text) were rejected. The treatment of oral tradition evidence in these cases is an important aspect of these results. In *Victor Buffalo*, for example, Teitelbaum J preferred the Crown historical expert's approach of using oral history evidence as one of many sources or as a check on text in reconstructing "a real past independent of what people presently believe it to be,"²²⁶ and generally preferred written historical accounts over oral tradition as a matter of assessing the weight to be attributed to the different sources of evidence. As Teitelbaum J noted, such an approach is consistent with direction from the Supreme Court's jurisprudence to give "due weight" to oral evidence.²²⁷ *Morris*, in

²²⁴ 2003 FCA 236, 228 DLR (4th) 1 [*Benoit*]. Note that the recent Federal Court of Appeal ruling in *Tuccaro v Canada*, 2014 FCA 184, 2014 CarswellNat 2746 (WL Can), will allow different evidence to be led in relation to the same treaty right claim (to tax exempt status) that was litigated in *Benoit* since the finding of no treaty right in *Benoit* was only a finding of fact and not law.

²²⁵ 2005 FC 1623, 269 FTR 188 [*Ermineskin*], aff'd *Ermineskin*, 2009 SCC 9, [2009] 1 SCR 222. There was no discussion of oral history evidence at the Supreme Court.

²²⁶ *Victor Buffalo*, *supra* note 101 at para 454, quoting the Crown's historical expert Dr. von Gernet. Dr. von Gernet's approach to working with oral traditions was also accepted by the Federal Court of Appeal in *Benoit*, *supra* note 224.

²²⁷ *Victor Buffalo*, *supra* note 101 at paras 38–44, 451–53. See also *Benoit*, *supra* note 224. The discussion in *Benoit* also dealt with the need for evaluating the nature of the oral tradition witnesses' expertise and differences between Indigenous oral traditions. For discussion, see B Miller, *supra* note 11 at 106–13; Napoleon, "Straightjacket", *supra* note 11.

which the Douglas Treaty hunting right was held to include the Saanich Nation's traditional practice of night hunting, might be held out as a counterpoint illustrating the capacity of the treaty rights jurisprudence to take First Nations perspectives seriously. However, the controversy in *Morris* focused on federalism concerns over provincial jurisdiction to regulate night hunting rather than the scope of treaty hunting right.²²⁸ In any event, the treaty interpretation principles cannot, in the abstract, designate the weight that must be attributed to oral tradition evidence in a given case.

A text-driven approach to treaty interpretation disappoints because of the limited access to Indigenous perspectives available through a text that First Nations did not draft and often could not read. Moreover, as the previous section on treaties in history suggests, not all treaties (or treaty promises) were recorded in documentary form. Without assuming that the treaty claims in *Ermineskin* or *Benoit* had to succeed to be fair, the treatment of the oral tradition evidence in these cases leaves readers (and no doubt First Nations claimants) with the impression that their claims were not fully heard. These problems and the need for courts to work with oral tradition evidence are well understood by scholars and courts, so we must ask: Why is text-driven treaty interpretation still dominant? Why is it so difficult to move beyond this approach?

The continued dominance of text in the face of principles that direct the interpretive efforts away from the text is, in part, an institutional problem. Canadian judges demonstrate the limited nature of their collective imagination in their inability to conceive of treaties beyond their representation in the written text. Documentary forms of historical evidence are similar to the forms of evidence judges are accustomed to in civil litigation. As such, judges often make their own assessments of historical documents, much to the consternation of the expert witness historians who perhaps wish their craft was more like a hard science,

²²⁸ It should be noted that the value of *Morris* as a precedent on the federalism issue was recently questioned in *Tsilhqot'in*, *supra* note 6 at para 150.

attracting fewer hobbyists.²²⁹ However, the issue is not simply that treaties remain a fundamentally written phenomenon to courts, but that judges appear to remain “positivist troglodytes” about history.²³⁰ The epistemological crises faced by the social sciences and academic history in the latter part of the 20th century—crises that take aim at the stability and durability of historical facts and past exclusions of minority and marginalized populations in the writing of history²³¹—have not filtered into the court room. History in Aboriginal rights cases is still of the sort that expects to find, as Crown historian von Gernet put it, “a real past.”²³² Moving past a text-driven approach thus involves an epistemological shift to make space for Indigenous law and oral histories, but also away from written law and the positivist tradition of history.

As the post-*Marshall* treaty jurisprudence demonstrates, legal principles alone cannot shift the narrative and epistemological foundations from which interpretation proceeds. The institutional and epistemological aspects of the problems suggest solutions that lie outside the litigation of particular cases, such as increasing the number of Aboriginal decision makers and the creation of a specialized treaty tribunal. Both recommendations have been made before and there is no

²²⁹ See e.g. JR Miller, “Lessons”, *supra* note 2, where Miller laments the enthusiasm Binnie J shows as an amateur historian in his decision in *Marshall*. For his part, Binnie J displayed significant awareness of the different disciplinary demands of law and history in *Marshall*, *supra* note 1, stating at para 37:

The law sees a finality of interpretation of historical events where finality, according to the professional historian, is not possible. The reality, of course, is that the courts are handed disputes that require for their resolution the finding of certain historical facts. The litigating parties cannot await the possibility of a stable academic consensus. The judicial process must do as best it can.

However, this difference regarding conclusive interpretations is not the key obstacle, as I discuss here.

²³⁰ The phrase is from Lawrence Stone. See Stone, *supra* note 150 at 190.

²³¹ See discussion above, in Section II. See generally Chakrabarty, “Reconciliation and Its Historiography”, *supra* note 11.

²³² *Canada v Benoit*, 2002 FCT 243 at para 282, [2002] 2 CNLR 1 (Evidence, quoting Dr. Alexander von Gernet’s expert report for Alberta titled “Oral Traditions, Treaty 8 and Taxation”).

need to repeat these analyses here.²³³ However, there is still room within the jurisprudence itself to consider what principles and approaches might support treaties as relationship, as constitutional events, and as ongoing constitutional processes. Such a jurisprudence will require a shift in focus away from common intent.

D. DIRECTIONS

The above discussion of the treaty jurisprudence shows that it produces an unhappy marriage of law and history, and a deficient, obscured constitutional narrative. To arrive at possible directions for a shift of emphasis in the treaty rights jurisprudence, the remainder of this section will focus on the issues that emerge from the above analysis and then outline the ramifications and directions for treaty jurisprudence. The aim, as stated above, is for a jurisprudence that coheres with the constitutional promise of treaties, which, incidentally, would also better promote the Court's vision of section 35 rights facilitating reconciliation between the state and Aboriginal peoples.

1. PUBLIC HISTORY AND THE LEGAL FICTION OF COMMON INTENTION

As discussed above, the interpretive principles ask judges and parties to look for a historical common intention, instructing them to choose from amongst the possible interpretations of a treaty the one interpretation that best reconciles the parties' interests at the time of the negotiation. Walters

²³³ See e.g. RCAP's recommendation of a specialized tribunal to deal with specific claims, including jurisdiction over "any issue relating to treaties that is currently justiciable in the courts", the ability to return land as a remedy, and a limited supervisory role over the procedural aspects of comprehensive claims negotiation: RCAP, vol 2, *supra* note 3 at 721. The mandate of the recently operational Specific Claims Tribunal is much narrower than was envisioned by RCAP, offering monetary remedies rather than the return of land, but does include the jurisdiction to adjudicate historic treaty grievances with finality. See Specific Claims Tribunal Canada—History, online: <<http://www.sct-trp.ca>>. See also John Borrows's comments on the need to appoint more Aboriginal members to the judiciary: John Borrows, *Indigenous Legal Traditions in Canada*, (np: Law Commission of Canada, 2006) at 139–93.

observes that this judicial inquiry “purports to be primarily an historic one. . . ; shared treaty-meanings appear to be treated as facts and not laws.”²³⁴ However, as Walters points out, the idea of a common intention is primarily a normative concept, rather than a factual one. The empirical emphasis thus obscures the normative foundations for constitutionally protecting treaty rights. Our first issue is the disjuncture that this empirical presentation introduces between academic history and history in court, presenting concerns related to what antipodean scholars have described as “juridical history”: “a mode of representing the past so as to make it available to legal and quasi-legal judgment in the present.”²³⁵

The disjuncture between juridical and academic history is not necessarily problematic: law and history are different interpretive communities and they do not have to reach shared conclusions about the past.²³⁶ These different fields of knowledge may also serve different ends. Miranda Johnson, for example, has argued that, in deciding matters of Aboriginal rights, institutions such as the Waitangi Tribunal are tasked not only with granting historical justice but with reimagining history to support the re-founding of the nation-state.²³⁷ In this role, historical narratives that construct “a formal [political] equivalence . . . [render] political concepts like biculturalism and partnership thinkable in contemporary New Zealand. But in order for these concepts to be established as re-foundational they must be thickened with an (imagined)

²³⁴ Walters, “Covenant Chain”, *supra* note 4 at 94.

²³⁵ Andrew Sharp, “History and Sovereignty: A Case of Juridical History in New Zealand/Aotearoa” in Michael Peters, ed, *Cultural Politics and the University in Aotearoa/New Zealand* (Palmerston North: Dunmore Press, 1997) 159 at 160–61, 166. See also McHugh, *Aboriginal Societies*, *supra* note 8 at 1–58.

²³⁶ See Walters, “Covenant Chain”, *supra* note 4, for a discussion of law and history as distinctive interpretive communities. He argues that, when it comes to finding shared treaty meanings in the past, law and history appear to be working within the same interpretive dimensions (*ibid* at 94). See also Walters, “Histories of Colonialism”, *supra* note 9; Damen Ward, “A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia” (2003) 1:1 *History Compass* 1 at 15–19.

²³⁷ Miranda Johnson, *Struggling over the Past: Decolonization and the Problem of History in Settler Societies* (PhD Thesis, University of Chicago, 2008) [unpublished].

historical past.”²³⁸ Thus, juridical history may be productive of national or official history in a manner that is distinctive from the contributions of empirically-oriented histories, particularly if we take the authoritative voice of the courts into account.²³⁹ In the case of treaty interpretation, however, the disjuncture between juridical and descriptive academic histories is problematic.

The treatment of historical evidence by courts is one aspect of the disjuncture that has attracted a great deal of commentary. Arthur Ray, for example, has commented that the adversarial process of treaty and Aboriginal rights litigation can polarize and destabilize academic opinion, potentially resulting in the “dredging up [of] outdated theoretical perspectives” or the invention of “new ones on the witness stand,” even while creatively pushing the scholarship on Indigenous history and Indigenous–settler relations in new directions.²⁴⁰ More problematic ramifications of the disjuncture, however, can be felt far beyond academia. The occasionally violent aftermath of the *Marshall* decision between east coast fishers—who perceived the treaty right recognized by the Supreme Court as a threat to their livelihood—and the Mi’kmaq is the most obvious manifestation of this phenomenon.²⁴¹ The argument is not that the disjuncture between judicial and academic history caused the violence.

²³⁸ *Ibid* at 254.

²³⁹ It should be noted that the histories produced by the Waitangi Tribunal are also criticized as being juridical or presentist (bounded by the legislative mandate of the tribunal) and vulnerable to critique as insufficiently objective. See e.g. Giselle Byrnes, *The Waitangi Tribunal and New Zealand History* (Oxford: Oxford University Press, 2004).

²⁴⁰ Arthur J Ray, “Native History on Trial: Confessions of an Expert Witness” (2003) 84:2 *Canadian Historical Review* 253 at 269.

²⁴¹ For a review of the fallout from *Marshall*, see Ken S Coates, *The Marshall Decision and Native Rights* (Montreal & Kingston: McGill-Queen’s University Press, 2000) at 7–20. See also Russel Lawrence Barsh & James [Sa’ke’j] Youngblood Henderson, “*Marshalling* the Rule of Law in Canada: Of Eels and Honour” (1999) 11:1 *Const Forum Const* 1 at 1, 15; Harris, *supra* note 158. For similar concerns in the Australian context, see Bain Attwood, *Telling the Truth about Aboriginal History* (Crows Nest, NSW: Allen & Unwin, 2005).

As Ken Coates convincingly demonstrates, the eruption around *Marshall* was not caused by the Supreme Court's decision, but was, rather, embedded in a much longer history of simmering and unresolved disputes.²⁴² The concern is instead how this disjuncture promotes continued public confusion and discord about why Aboriginal rights are constitutionally protected, potentially undermining the authority of law.²⁴³

In the reaction to *Marshall*, the Court's finding was perceived to be "invented" given the lack of reference to fishing rights in the text of the 1760–61 treaty itself.²⁴⁴ This perception potentially undermines the legitimacy of the Court's Aboriginal rights jurisprudence more broadly and led to accusations of judicial activism that continue a decade later.²⁴⁵ The appeal of a "real history" is not confined to the courtroom. More importantly, the empirical emphasis of the jurisprudence feeds public perceptions that Mi'kmaq treaty rights are centuries-old points of (written) agreements, rather than rights imbued with a concern for justice and reconciliation resulting from disregard for centuries-old commitments that has given rise to multi-layered historical grievances, dysfunctional political relationships, and real and unjust inequalities in the present day. The story that the jurisprudence tells about why we protect treaty rights matters. The accusations of judicial activism are troubling (and wrong-headed, in my view), as is the lack of awareness of history and Mi'kmaq experience that fuelled the aftermath of the

²⁴² Coates, *supra* note 241.

²⁴³ Johnson discusses a different problem, arguing that in creating the narrative of political equivalence, juridical history has distorted the representation of political authority within Maori society. See Johnson, *supra* note 237.

²⁴⁴ This perception was no doubt aided by the comment of the Crown's expert, Stephen Patterson, to the press that the Supreme Court had misconstrued his evidence. See Harris, *supra* note 158 at 130.

²⁴⁵ See Alex M Cameron, *Power without Law: The Supreme Court of Canada, the Marshall Decisions and the Failure of Judicial Activism* (Montreal & Kingston: McGill-Queen's University Press, 2009); Dianne Pothier, Book Review of Cameron, *ibid.*, (2010) 33:1 Dal LJ 189.

Marshall decision. Courts are situated within larger fields of public history. While courts should not pander to popular opinion, their contributions to public history should be explicit enough to educate. An empirically presented idea of the normative concept of historical common intention cannot achieve this end.

Besides education, what is lost through the ahistorical treatment of common intention? According to Bain Attwood, opportunities for reflection and change. Writing about Indigenous history and legal claims in Australia, Attwood argues that presenting the full complexity of history better serves the aims of justice.²⁴⁶ He describes the emergence of the “stolen generations narrative” in Australia, constructed largely through oral history, memory, and applied forms of historical discourse. The narrative portrayed the government policy as genocidal and this narrative was broadly accepted by the Australian public. By contrast, Attwood contends that academic history characterizes the past policy as assimilationist.²⁴⁷ In his view, this disjuncture leaves the genocide narrative vulnerable to attack. The clash of historical methodologies involved in producing these opposing narratives and the continuing (and authoritative) appeal of the sharper historicism of much academic history is capable of undermining the testimony of individuals and work of the stolen generations inquiry more generally. It does not serve the ends of justice to have people’s memories publicly discredited, neither for the individuals involved nor when “sympathetic” public opinion is disrupted by evidence that their sympathies were premised on “lies”. Similarly, the authority that the common law and common law constitutionalism draw

²⁴⁶ See e.g. Attwood, “Stolen Generations,” *supra* note 150; Bain Attwood, “*The Law of the Land* or the Law of the Land? History, Law and Narrative in a Settler Society” (2004) 2 History Compass 1.

²⁴⁷ It should be noted that these characterizations of the policy may not be as distinct as Attwood assumes. It is arguable that policies aimed at destroying or eliminating a people through eliminating their culture meet the definition of genocide. See Woolford, “Transition and Transposition,” *supra* note 128, for a discussion of the definition of genocide.

from history is undermined when the “truth” of the courts’ history is shown to be too far from the truth produced in academic contexts.²⁴⁸

Equally importantly for present purposes is Attwood’s further contention that a historicist account of the stolen generations policy would be more unsettling than the genocidal one. Attwood argues that there is greater potential for change in forcing settler Australia to grapple with the continuities in settler policy, in which assumptions that assimilation is for the betterment of Aboriginal peoples are still prevalent:

Grasping this historical continuity and grappling with what amounted to an intimately close relationship with the approach of their allegedly do-gooding forebears or predecessors [who took aboriginal children away from their families to promote assimilation] would have been more unsettling than the sorry people’s distancing of their putatively genocidal ancestors. These settler Australians might have realized that the past was in the present not only in the form of Aboriginal people affected by being separated from their kin but also in the form of a white mentalité we can call assimilationist. Understanding this could have provided a means of working through this past in the present, since it would have pinpointed the very ideas and attitudes that have contributed and continue to contribute to the destruction of Aboriginal communities and the diminution of Aboriginality by the settler society.²⁴⁹

While Attwood’s “might” is an important caveat on predicting the impact of a historicist account of the stolen generations policy, his work makes the point that something is indeed lost by historical accounts that do not attend to the historical complexity of the past. If we cannot see the past clearly, it is harder to move towards a new—hopefully more

²⁴⁸ For discussions of the role and authority of history in the common law, see Gerald J Postema, “On the Moral Presence of Our Past” (1991) 36:4 McGill LJ 1153; Paul McHugh, “Sovereignty This Century—Maori and the Common Law Constitution” (2000) 31:1 VUWLJ 187.

²⁴⁹ Attwood, “Stolen Generations”, *supra* note 150 at 94. For a similar analysis of the importance of seeing the continuity of colonialism through a historicist view of the past in relation to the Waitangi Tribunal, see WH Oliver, “The Future Behind Us: The Waitangi Tribunal’s Retrospective Utopia” in Sharp & McHugh, *supra* note 172, 9.

just—direction. As Postema has argued in relation to the common law’s reliance on precedent more generally, “[i]f members are to take their community’s history as normative for their dealings, that community must *own up* to its past, look back at the roads not taken and the suffering it has caused, and hold itself accountable to them.”²⁵⁰ Thus, the ends of justice may be better served by a treaty jurisprudence that does not “whitewash” the past by retrospectively imposing the honour of the Crown, or other principles aimed at fairness in the present.

2. ADDRESSING THE CONSTITUTIONAL SIGNIFICANCE OF TREATY RIGHTS

The empirical dressing on the normative concept of common intention highlights the need to address the normative foundations for protecting treaty rights. Commentators on treaty interpretation have occasionally gazed wistfully towards contract law, noting the simplicity (and potential transferability) of well-understood normative principles such as undue influence, duress, and unconscionability that are used by the court to interpret the facts of a given contract.²⁵¹ What they notice is the willingness of courts to interpret an agreement between parties with a view to balancing the values behind protecting freedom of contract and the ends of justice in the particular case. As Binnie J remarked in *Marshall*,

The law has long recognized that parties make assumptions when they enter into agreements about certain things that give their arrangements efficacy. . . . If the law is prepared to supply the deficiencies of written contracts prepared by sophisticated parties and their legal advisors in order to produce a sensible result that accords with the intent of both parties, though unexpressed, the law cannot ask less of the honour and dignity of the Crown in its dealings with First Nations.²⁵²

²⁵⁰ Postema, *supra* note 248 at 1180 [emphasis in original].

²⁵¹ See e.g. Coyle, *supra* note 44; Claire E Hunter, “New Justification for an Old Approach: In Defence of Characterizing First Nations Treaties as Contracts” (2004) 62:1 UT Fac L Rev 61.

²⁵² *Marshall*, *supra* note 1 at para 43.

Binnie J's comment suggests that if we apply normative correctives to resurrect the parties' true (and apparently shared) intentions born of a retroactively levelled playing field, treaty rights jurisprudence will have succeeded in accomplishing its task. Serving the ends of justice in the treaty interpretation context, however, is more complex than the interpretation of contracts, due to the historical nature of the agreements and the constitutional character of the moments of agreement—and because the foundational values behind protecting historic treaty rights are arguably less understood and more contentious than the values behind protecting freedom of contract.²⁵³ In contract law, the value of enforcing agreements between parties may be related relatively straightforwardly to liberal values around freedom in economic relations.²⁵⁴ In the context of historic treaties, the law assumes that First Nations' consent matters but does not explain why their consent matters, at what point in time, or in relation to what. In the broad scope of treaties caught by the jurisprudence, consent to land cessions or alliance (as the treaties are characterized by the court) is treated on the same plane. While the value of consent in social contract theory may be well accepted (even if the

²⁵³ Treaty interpretation is presumably less fraught in the present day context, but to date the Supreme Court has exhibited a deep split about how the honour of the Crown applies in the context of modern treaties, the relationship between historic and modern treaties, and the approach that will best promote reconciliation; contrast Binnie J and Dechamps J in *Little Salmon/Carmacks*, *supra* note 111, and *Moses*, *supra* note 111. For commentary, see Julie Jai, "The Interpretation of Modern Treaties and the Honour of the Crown: Why Modern Treaties Deserve Judicial Deference" (2009) 26:1 NJCL 25; E Ria Tzimas, "To What End the Dialogue?" (2011) 54 SCLR (2d) 493; Dwight Newman, "Contractual and Covenantal Conceptions of Modern Treaty Interpretation" (2011) 54 SCLR (2d) 475.

²⁵⁴ No doubt a contracts law scholar could take issue with this assertion. I do not mean to imply that the values behind contract law are fully settled, immune to challenge, or that the values behind enforcing promises could not be justified outside of liberal economics. The comparison is made more for the purposes of showing the relative ease with which one can identify a normative basis for enforcing contracts. For a discussion of various contract theories, see Nathan Oman, "Unity and Pluralism in Contract Law" (2005) 103:6 Mich L Rev 1483.

conceptualization of this consent remains highly contested²⁵⁵), the lingering implications of the 19th-century treaty law suggest that Indigenous peoples were not part of this contract. And as described above, the later section 88 and treaty rights cases avoid any direct engagement with the constitutional significance of treaties.

McLachlin CJC's statement in *Haida Nation* noted earlier—that “[t]reaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s 35 of the *Constitution Act, 1982*”²⁵⁶—continues to disconnect treaty rights from the constitutional significance of treaties more generally. In this separation, treaty rights are the remainder of reconciled sovereignties, representing, perhaps, the terms of that reconciliation. In this schema, treaty rights are born of foundational moments of consent, thus explaining the Court's instinct to rely on history to define their content. But this approach further confounds normative clarity by exacerbating tensions inherent in the values supporting Canada's constitutional order; for example, between liberalism, which is fundamentally skeptical of the justice of past political relations, and common law constitutionalism, which relies on past constitutional arrangements to ground the legitimacy of political authority in the present. Moreover, this approach does not accord with the promise or history of treaty making. In the first section of this paper, I emphasized the relational and evolutionary nature of both treaties and consent. In the second section, I argued that treaty histories were characterized by ongoing disagreements as much as by points of agreement. Bringing these discussions forward highlights to the inadequacy of conceptualizing treaty rights as products of final, complete agreements. This approach simply does not tell a constitutional story upon which more just relations can be built.

Honouring past commitments as a foundation of present day communities and legal rights is a key component of just political

²⁵⁵ Webber, “Consent”, *supra* note 195.

²⁵⁶ *Haida Nation*, *supra* note 121 at para 20.

arrangements in a number of different philosophies and perspectives.²⁵⁷ In the case of treaties, such foundations are constitutional in more than one dimension; treaties embody both a notion of original consent and the continuity of “keeping faith with each other” through keeping treaty relationships alive.²⁵⁸ But even if there is a high degree of acceptance of the value of honouring past commitments, this value does not prescribe how to implement such commitments in the present, particularly when those commitments have suffered long periods of neglect. As Jeremy Waldron has argued, there is no straight line between historic injustice and the rectification of those wrongs in the present.²⁵⁹ Waldron is in part concerned about remedies (e.g., “giving the land back” as a straight line from the wrongful taking of land in the past), and the potential to do further injustice by not taking intervening events and changes into account. While I do not agree with all aspects of his argument, he draws attention to the mediation of the consequences of the past through present-day normative principles. A treaty jurisprudence capable of supporting the promise of treaties must develop transparent and robust normative foundations to adequately address the consequences of the past.

3. REORIENTING TREATY INTERPRETATION

What would a treaty jurisprudence that does not focus on the reconstruction of an imagined common intention look like? Consider, as an example, the different findings of common intention and the resultant treaty rights in *Marshall*. Binnie J found a broad, ongoing right to harvest and trade fish while McLachlin J found a narrower temporary right that disappeared with the truckhouse system. Under Binnie J’s approach, the treaty right re-commits the parties to a treaty relationship and

²⁵⁷ See e.g. Tully, *Strange Multiplicity*, *supra* note 3; James [Sa’ke’] Youngblood Henderson, “Dialogical Governance: A Mechanism of Constitutional Governance” (2009) 72:1 Sask L Rev 29; Martin Krygier, “Law as Tradition” (1986) 5:2 Law & Phil 237; John Ralston Saul, “The Roots of Canadian Law in Canada” (2009) 54:4 McGill LJ 671.

²⁵⁸ See Postema, *supra* note 248 at 1170, 1176, 1178.

²⁵⁹ Jeremy Waldron, “Redressing Historic Injustice” (2002) 52:1 UTLJ 135.

constitutionalizes one particular element of that relationship: a commitment to exclusive trading relations. It relies on the honour of the Crown to bridge the past agreement to the present constitutional right, but does so in a manner that cannot fully explain how this doctrine serves justice in the present because it is applied to reconcile the parties' interests in the past. Moreover, the principles that guide the modernization of the past treaty promise are thinly sketched, focusing on "proportionality" of the modern to the historic to implement the past bargain without inquiring into how parties might have renegotiated their arrangements, or taken account of developments between then and now.²⁶⁰ The jurisprudence thus not only keeps us focused on the past, it also has gaps in the principles that move us from past to present.

Given that McLachlin J did not find an ongoing treaty right, her conclusion did not result in a remedy. But she did not deny the presence of a trade right, just the longevity of it. In her approach, the treaty right was rendered obsolete by the changed trading system. With a different treaty rights doctrine, however, these findings of fact might also support a remedy. As our review of treaty histories suggests, much historic injustice relating to treaties was effected through neglect. These histories suggest that once a treaty right is identified, the proper inquiry is (like the principles from *R v Taylor and Williams*) what happened to the agreement and the particular right: What happened to Mi'kmaq trade and ability to access "necessaries" once the truckhouse system was dismantled? Was the truckhouse system unnecessary because trade was secured through other systems (and so the trade right possibly survived in a modified form)? What happened to British–Mi'kmaq relations more generally? Were trade and other arrangements renegotiated or altered through practices? Was the Crown neglectful of its treaty obligations? Or did the Mi'kmaq agree (under fair conditions) to relinquish their trading and harvesting rights? And if so, for what benefit?

²⁶⁰ Proportionality in "modernizing" rights was discussed in relation to Aboriginal rights in *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56, [2011] 3 SCR 535.

Assuming for present purposes that this story encompassed some elements of Crown neglect, the narrative that emerges suggests that the treaty right remained in its historic form. The dispute is thus shifted from whether the right exists to how the right and treaty relationship were implemented and maintained over time—a diagnosis of the problem that better coheres with constitutional narratives about the significance of treaties and better explains the continuing need for corrective action by the courts. The task for the courts remains reconstructing the historical relationship and its specific terms, but aimed only at defining the historical right as a platform for the parties' negotiations.²⁶¹ Remedial attention is thus also shifted to causing the parties to bring the relationship into good standing, with a guarantee of ongoing historical rights (or perhaps damages for the loss of ability to exercise historical rights) looming as the default “hammer” to ensure negotiations proceed, but without the pretension that such historical rights fully represent the constitutional significance of treaties or fully define the shape of treaty rights in the present. Such remedies are perhaps already available under the honour of the Crown. In *Haida Nation* for example, McLachlin CJC made it clear that the honour of the Crown applies to treaty making, treaty interpretation, and treaty implementation.²⁶²

What is absent from this example is attention to how historic rights would be identified in cases where the written record does not establish the presence of a historic treaty right, such as when treaty rights are

²⁶¹ An approach that is perhaps similar to Vickers J's approach with respect to Aboriginal title in *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700, [2008] 1 CNLR 112. For discussion, see Kent McNeil, “Reconciliation and Third-Party Interests: *Tsilhqot'in Nation v British Columbia*” (2010) 8:1 Indigenous LJ 7.

²⁶² *Haida Nation*, *supra* note 121 at paras 17, 19. See also *Mikisew Cree*, *supra* note 123, regarding the honour of the Crown applying to treaty implementation. See also *Nunavut*, *supra* note 7, in which the Nunavut Court ordered, in a summary judgment, a disgorgement of damages of nearly \$15 million for failures on the part of the federal government in implementing the Nunavut Land Claim Agreement. The remedy was based in part on the finding that the honour of the Crown in this circumstance gave rise to a fiduciary duty in relation to the implementation of the agreement. The remedy and the finding of a fiduciary duty were overturned on appeal.

claimed based on oral promises not reflected in the treaty text. In these cases, the generous interpretive principles still have much to offer, particularly if aimed at shared meaning and intentions on a broader scale. Mark Walters notes that a broader view of common intention, based on customs and practices rather than treaty texts and reports, would allow for a greater possibility of locating shared meanings in the treaties.²⁶³ In this approach, the asserted historic treaty right would be evaluated against a longer historical framework of relations and mutual intention or shared meanings may have more in common with *Sioui* than *Marshall*. Walter's approach is also similar to Brian Slattery's notion of "generic" Aboriginal rights that emerged from intersocietal law and practices, and against which distinctive specific rights evolved through negotiations and other developments.²⁶⁴ And in a similar vein, Shin Imai has proposed a two-stage process to implement "taking up lands" clauses that relies on a more generalized view of treaty rights that better reflects the nature of the bargain struck in historic agreements.²⁶⁵ The first stage would analyze the substance of the treaty right "not as a series of individual rights, but as a guarantee of collective survival".²⁶⁶ The second stage would then focus on the measures necessary to secure the viability and access to the resource that was promised to support collective survival. All of these approaches suggest that the court bypass the identification of mutual intention on narrow, specific rights in favour of greater attention to the intentions around and parameters of the working relationship to define the historic element of a treaty right.

The directions suggested above share much in common with Brian Slattery's theory of the generative structure of Aboriginal rights.²⁶⁷ He defines generative rights as "rights that, although rooted in the past, have

²⁶³ Walters, "Covenant Chain", *supra* note 4 at 89.

²⁶⁴ Slattery, "Generative Structure", *supra* note 4.

²⁶⁵ Shin Imai, "Treaty Lands and Crown Obligations: The 'Tracts Taken Up' Provision" (2001) 27:1 Queen's LJ 1.

²⁶⁶ *Ibid* at 24.

²⁶⁷ Slattery, "Generative Structure", *supra* note 4.

the capacity to renew themselves, as organic entities that grow and change”.²⁶⁸ According to Slattery, Aboriginal rights consist of two elements: core generic rights that are common to all Aboriginal peoples, and specific rights, which develop through treaties and other processes to be distinctive to particular Aboriginal groups. These rights are identified by courts through “principles of recognition”, which take account of historical intersocietal law and the emergence of generic rights to “provide the point of departure for any modern inquiry into the existence of Aboriginal rights and a benchmark for assessing the historical scope of indigenous dispossession and deprivation.”²⁶⁹ The modern and adaptive aspects of the rights are then identified through principles of reconciliation, which guide the transit of the historic rights through changes such as the community’s contemporary needs, changes to implicated lands and resources, and broader societal and third-party interests.²⁷⁰ Slattery’s approach accomplishes several things that have been suggested as desirable directions for the conceptualization and interpretation of treaties and treaty rights. First, by bridging the treaty term with the longer history of Aboriginal rights as products of intersocietal practices and law, he brings the genealogy of the treaty to bear on the interpretation of the treaty itself and the right that is protected under section 35. But in the generative model, history informs but is not determinative. History is not the sole constitutive element of the right and the articulation of rights does not strain history for answers it may not be able to produce. In place of the sole emphasis on history, Slattery’s account introduces greater transparency and specificity around the normative character of Aboriginal and treaty rights through encouraging the development of explicit principles of recognition and reconciliation.²⁷¹ This approach provides a more transparent, and

²⁶⁸ *Ibid* at 595.

²⁶⁹ *Ibid* at 623.

²⁷⁰ *Ibid* at 624.

²⁷¹ Slattery suggests that these principles should be developed within the context of actual cases while identifying several potential features of those principles. See *ibid* at 625–26.

therefore more readily debated, account of why Aboriginal and treaty rights should be protected. Regardless of whether one agrees with these principles, this transparency is critical in shifting treaty rights litigation away from its empirical fixation on the past and exploring the appropriate interpretive principles for serving the ever-debatable ends of justice in the present.²⁷² Finally, Slattery's approach also attends to an aspect of Aboriginal rights jurisprudence that is largely missing in the treaty context, which is the need to support negotiations. He argues that in light of the diverse interests involved in the principles of reconciliation, "certain Aboriginal rights cannot be implemented in their entirety by the courts but require the negotiation of modern treaties,"²⁷³ emphasizing the need to negotiate the resolution of Aboriginal title specifically.

Two differences from Slattery's approach are proposed in the preceding discussion. First, I proposed that the requirement of negotiation to bring the historic right into the modern form applies equally to treaty rights. Taking note of the remarkable uniformity of scholars who envision treaties as living relationships involving ongoing negotiations, negotiated settlements to treaty rights are imperative. Envisioned as part of the definition of the treaty right itself, rather than as a manner by which the Crown might justify an infringement (within its proper jurisdiction), negotiated settlements of historic treaty rights are required to reinvigorate the treaty relationship. Only through the imposition of consultation obligations in relation to "taking up" clauses has the dialogic element of treaty rights and processes been recognized.²⁷⁴ This lack of attention is reminiscent of the colonial hangover that continues to characterize treaty histories, discussed above. In these accounts, treaties are a *fait accompli*; there can be no need to negotiate if

²⁷² Slattery makes a similar point in relation to Aboriginal rights and the *Van der Peet* test. See *ibid* at 610.

²⁷³ *Ibid* at 624.

²⁷⁴ *Mikisew Cree, supra* note 123.

treaty rights have already been negotiated.²⁷⁵ Negotiated approaches to treaty rights—their modern scope, nature, and implementation—are as necessary in treaty contexts as in non-treaty contexts. Second, the discussion above proposed a shift in focus regarding remedies. The remedial focus should not be on the treaty right itself, but on the treaty relationship. As such, and in the absence of other specialized forums designated by Parliament, courts that are asked to resolve treaty rights disputes should supervise the negotiation of the contemporary form and accommodation of the rights they identify and step in to resolve the modern form of these rights only after negotiations fail.²⁷⁶

IV. CONCLUSION

This paper has travelled a long road to consider the conceptualization of treaties in history and then in law, and evaluate them against constitutional narratives that rely on treaties and treaty processes to suggest post-imperial foundations for the modern state of Canada. In spite of several decades of public commissions and scholarship articulating and advocating for understanding treaties as living, evolving relationships, these directions have yet to be adequately incorporated into treaty narratives in history or law. Historical treatments of specific treaties show greater attention to Indigenous agency, but this highly contextual scholarship is not fully reflected in surveys of the vast scope of treaty-making experience in Canada's history. This experience continues to be organized around colonial interests and landmarks. To move beyond such colonial hangovers, I have argued that Indigenous understandings of treaty histories must be incorporated and respected, which will be facilitated by discarding subject matter classifications such as peace and

²⁷⁵ This conceptualization was reflected in *Mikisew Cree*, where the Supreme Court suggested that the Crown would always have notice of the treaty rights contained in a treaty. See *ibid* at para 34.

²⁷⁶ The legal anchors for such judicial supervision requires further elaboration that is beyond the scope of this paper. The honour of the Crown provides potential grounds for arguing for court intervention regarding the implementation of treaties and particularly modern agreements. See the discussion in *supra* note 262.

friendship versus land cession treaties, and chronological lines, such as pre- and post-confederation versus modern treaties. I also argued that, as iterative and cumulative processes, treaty histories must include both fur trade ordering and modern quasi-treaty developments. An inclusive approach has the benefit of incorporating additional geographies and Indigenous forms of treaty relations more centrally in treaty histories. From these arguments, I suggested that treaty-making histories in Canada would be better represented by surveys that attend to the difference between significant moments of transformation versus the reiteration of existing relationships and are thus capable of expressing the evolving nature of treaty relations.

Similarly, legal treatments of treaties have not fully discarded 19th-century characterizations of treaties as a matter of executive goodwill rather than processes and relationships that were and are an essential contribution to the founding of the state. While the duty to consult jurisprudence suggests that treaties involve ongoing processes that support the reconciliation of Indigenous and Crown sovereignties, the treaty rights cases in the post-1982 era do not support a similar vision. By focusing the inquiry on common intention as coalescing around particular treaty terms, lead cases such as *Marshall* and *Marshall; Bernard* since 1982 have disconnected treaty rights from treaty relationships, demonstrating an approach that situates treaty rights as empirically discoverable terms of a fully reconciled relationship. Treaty rights as the factual terms of a largely fictional original consent demands that those historical moments be carried into the constitutional present without attention to problems that stem from implementation, disagreements about the scope of treaty rights and relationships, or the normative basis for honouring those past commitments.

Drawing on similar critiques and prescriptions by other legal scholars, I suggest an approach to the treaty rights jurisprudence that attends to historical interpretation of mutual intentions to enter into and maintain treaty relations but does not rely on common intentions regarding the meaning and scope of the terms of that relationship to define treaty rights. Where Brian Slattery has considered a history of intersocietal law as the historical backdrop informing the development of Aboriginal rights, I have instead encompassed the evolution of intersocietal law in a treaty

framework, emphasizing the negotiated nature of these intersocietal foundations and the iterative processes between negotiated moments as part of treaty processes more generally. This move expands the historical context against which treaty practices might be identified, drawing the historical argument for an inclusive approach to histories into law. It also builds on constitutional narratives of treaty as relationship that promise an alternative to Imperial constitutional foundations. From these positions, I argue that treaty rights must be interpreted with a view to reinvigorating treaty relationships, and that such an approach demands that the parties negotiate the modern parameters of a treaty right under court supervision. Thus, the courts' role in interpreting treaty rights maintains attention to the historical substance of the parameters and terms of treaty relationships but is reoriented to supporting constitutional processes—and improved treaty relationships—in the present.

By tracing these concerns through both law and history, common themes emerge. The challenge presented by the constitutional narratives of treaties is to resist treaties as moments of resolution and embrace treaties as potentially encompassing as much disagreement as agreement. This vision is perhaps more of a challenge to law than history. In the latter, there is no need to finally resolve historical disputes. In law, however, resolving disputes is precisely what courts are called upon to do. Further, the challenge of managing a national narrative that encompasses deep disagreements about the founding of the state and the legitimacy of its current authority should not be understated. The courts, I suggest, have a privileged role in contributing to this narrative. As is common in the field of Aboriginal law, treaty rights disputes call upon the courts to resolve disputes that go to the foundations of the Canadian constitutional order. Such tasks demand that courts muster all of the creativity of the law that is available to them, including fashioning new remedies from time to time. In this paper, I have provided the groundwork to support enlisting the courts' creative energies to interpret treaty rights as a support for ongoing treaty relationships, rather than as representing the terms of a long stale settlement. Through the duty to consult, the Supreme Court has recognized that the ground is always shifting in an agenda of reconciliation. Carrying this recognition into the treaty rights

jurisprudence would go a long way to establishing a treaty jurisprudence capable of supporting the promise of treaties.

