



**“Strengthening Partnership between States and
indigenous peoples: treaties, agreements and other
constructive arrangements”**

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Background Paper

Terence Sakohianisaks Douglas
**Indigenous Peoples Development Nexus &
Iskatewizaagegan #39 Independent First Nation**

*The views expressed in this paper do not necessarily reflect those of the
OHCHR.*

A. Introduction

The purpose of this submission is to provide information relating to issues of concern for the OHCHR's consideration in relation to strengthening partnerships between Indigenous Peoples and Canada within the context of the treaties. Specifically, this submission provides information relating to issues of concern as experienced by the Iskatewizaagegan #39 Independent First Nation (the Nation) in relation to its continued attempts to hold Canada, and the provinces of Ontario and Manitoba, accountable to the promises made by the British Crown with their ancestors as contained in both the written version and oral promises of Treaty #3.

B. Background

The Nation as Indigenous Peoples

The Nation is one of approximately 630 First Nations within Canada, most of which have outstanding grievances with Canada concerning traditional lands and territories. In the Nation's instance, it has a number of outstanding claims directly relating to Treaty #3 that was signed between our Nation's ancestors and the British Crown, of which Canada is the successor state.

The Nation's traditional territory, and the location of its main community, is located in what is now known as the provinces of Ontario and Manitoba, in the centre of the state of Canada. The lakes, and the water networks dependent on such lakes, directly feed the city of Winnipeg, Manitoba with its clean drinking water, a city with a population of approximately 685,000 people. In addition, the lands and waters of our traditional territory are exploited by private third parties for various economic activities that provide great economic benefit to these third parties. None of these activities, including the taking our water, provide the Nation with any benefit whatsoever, but in fact ~~legislation developed~~ legislation developed further restricts the Nation ~~from~~ benefiting from our lands and waters.

As a First Nation within Canadian jurisprudence, and an autonomous community of the larger Anishinaabe Nation, the Nation identifies and is recognized as an "Indigenous Peoples" as understood in Special Rapporteur Alfonso-Martinez's Final Report (E/CN.4/Sub.2/1999.20). As an Indigenous Peoples, the Nation asserts that there is also recognition of its right of self-determination under Article 3 of the *Declaration of the Rights of Indigenous Peoples*. In addition, the Nation is a "Peoples" as set out in the United Nations *International Covenant on Civil and Political Rights* (the ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (the ICESCR). Canada agreed to be bound by these two covenants when it signed and ratified their acceptance.

C. The Nation's Experience Concerning Canada's Failure of the Effective Recognition of Treaty #3

Actual Nature of Treaties within Canada

As a starting point, the Nation observes that Canada has not made any substantive attempts to implement the recommendations of the Final Report, nor to implement in any meaningful manner the principles articulated within the *Declaration*. Due to Canada's failure at implementation, the Nation asserts that Canada in effect has failed

to effectively recognize the actual nature of the treaties made by the British Crown and the Indigenous Peoples within Canada. The Nation contends that its ancestors entered into treaty with the British Crown as sovereign nations, as understood within the “Law of Nation” paradigm, not as lesser international actors.

The Nation asserts that it is, and always has been, a “nation” and a “peoples” as contemplated by international law. Given the developing recognition of the legal status of Indigenous Peoples and the corresponding rights, particularly as expressed within the *Declaration*, Canada’s position that treaties are not “treaties” as understood within international law can no longer maintain its vitality.

Although Canadian jurisprudence does state that Indigenous Peoples had the capacity to enter into treaties with the British Crown, the jurisprudence also holds that such treaties were not international treaties nor were they merely contractual agreements but something *sui generis* in-between. Accordingly, when at times Canada acts honourable towards Indigenous Peoples in relation to treaty reconciliation, the treaties are viewed within this limited understanding. The Nation asserts that given the development and ongoing understanding and articulation of Indigenous Peoples’ rights within international jurisprudence, such a position as held by Canada can no longer be reasonably maintained.

The Nation asserts that the treaties, including Treaty #3, are international treaties between Indigenous Peoples and the British Crown, of which Canada is the successor state. The Nation inherently exists as an Indigenous Peoples and does not require the concurrence of Canada, which has a vested interest in denying such existence, to validate and legitimize such an existence.

The Nation asserts that the verbal promises made during the negotiations and their ancestor’s subsequent understanding of the completed treaty was that it was not a “cede and surrender” agreement, but a “peace and friendship” treaty that provided, in part, a manner in which European settlers could travel through the Nation’s traditional territory.

The Nation’s Experience

The Nation further asserts that, based on its experience in dealing with Canada through “negotiations” and other similar meetings regarding disputes traceable back to the promises contained in Treaty #3, Canada’s failure to effectively recognize the actual nature of Treaty #3 has created a “colonial paradigm” within Canada’s state machinery, its people and its representatives that is contrary to:

- the spirit and intent of Treaty #3, and the historical realities surrounding the need to negotiate such a treaty;
- Canada’s obligations under international law; and
- The developing and ongoing understanding and articulation of Indigenous Peoples rights within international jurisprudence.

Canada’s failure has thereby resulted, and will continue to result, in the continued diminishment of the Nation’s human rights and thereby their existence as an Indigenous Peoples.

Canada's current "colonial paradigm" is a self-justifying process that is also contrary to the understanding that the Nation has in relation to the negotiation and signing of Treaty #3. The Nation, along with other Indigenous Peoples that entered into treaty, was treating with "Her Majesty the Queen". Within the British common-law at the time, it was a function of the Royal Prerogative to recognize foreign nations and to enter into treaties with such nations.

If the Nation's ancestors that entered into treaty with "Her Majesty the Queen" were not a sovereign nation, as Canada assumes, then why did the Canadian state not enter into an agreement with the Nation? The Nation asserts that at the time of the signing of Treaty #3, the Nation's traditional territory was not a part of Canada, accordingly Canada itself could not enter into treaty with the Nation as such ability was outside of its authority as articulated in the *British North America Act 1867* (the BNA) that gave birth to the modern state of Canada.

According to section 91(24) of the BNA, the federal government had at the time of Treaty #3 legislative authority for "Indians and lands reserved for Indians". There is no provision in the BNA that provide the federal government with the authority to enter into agreements with other states. Accordingly, if the Nation and other Indigenous Peoples were not sovereign states but something less such as "Indians", then the federal government would have had the authority to enter into *sui generis* agreement with them under authority of section 91(24); Canada did not enter into such agreements.

The Nation entered into Treaty #3 with "Her Majesty the Queen", which the Nation asserts was due to the Nation being recognized as a sovereign nation. As a result, the British Crown exercised its Royal Prerogative to enter into treaty with the Nation, and the Nation further asserts that by entering into the treaty the British Crown recognized the Nation as a sovereign nation. Accordingly, once the British Crown entered into treaty with the Nation, then international jurisprudence rightly should expect the British Crown, and now Canada as successor state, to be bound by its verbal and written terms, including recognition of the actual nature of the treaty as an international instrument.

However, within Canada's "colonial paradigm" the Indigenous Peoples are not recognized as sovereign nations. Canada's adherence to such a "colonial paradigm" has allowed a system of jurisprudence, which at its core holds the false belief of Canada's paramountcy over the Indigenous Peoples and such belief is contrary to the spirit and intent of the Treaty #3, Canada's obligations under the ICCPR and the ICESCR, the principles contained within the *Declaration*, and international jurisprudence.

Below in point form are some of the Nation's experiences in dealing with Canada, and the provinces of Ontario and Manitoba, within the "colonial paradigm" that denies the actual nature of Treaty #3:

- Within Canada's *Specific Claims Process*, Canada has demonstrated that it is only willing to "negotiate" certain aspects of the claims put forth by the Nation, which diminishes the claim as a whole. For example, with the Nation's "Garden Island" claim the Nation had original claimed 32 islands

that it had traditionally used to cultivate various crops for sustenance, trade, medicinal and cultural purposes. However, Canada was only willing to “negotiate” for seven (7) of the islands. The basis of the Nation’s claim was that the oral promises and written version of Treaty #3 stated that the islands being cultivated at the time of the signing of Treaty #3 were to be set aside and protected as “reserve lands”.¹ While Canada accepted that it failed to set aside such islands as required under Treaty #3, it was only willing to negotiate for the seven (7) islands. The Nation was required to enter into these “negotiations” upon this basis, as Canada would not otherwise “negotiate” with the Nation. Further, originally Canada had required that the Nation release any claim it had to the other 25 islands if a settlement was reached regarding the seven (7) islands;

- Ontario, through a partnership with Canada, is attempting to expand a two-lane highway into a divided four-lane highway; this highway runs straight through the Nation’s traditional territory. Despite the fact that such an expansion would greatly and negatively affect the Nation’s inherent rights as Indigenous Peoples, and the rights recognized under Canadian law as “Aboriginal” and “Treaty” rights, Ontario completely failed to consult with the Nation, or have its consultants and experts prepare any data on how the Nation’s rights will be affected by the expanded highway. The highway was scheduled to begin construction in the spring of 2010, but due to the Nation’s steadfast insistence that Ontario and Canada have failed to meet their legal obligations to the Nation, the project has been delayed;

During the last two (2) years, the Nation has attempted to negotiate with Ontario to arrive at a workable and mutually beneficial agreement that respects the Nation’s rights as Indigenous Peoples. However, the provincial representatives at the negotiations would not listen as the Nation insisted their rights as Indigenous Peoples could not be pinpointed to certain areas on a map as discrete, insular activities that could be exercised elsewhere. The provincial representatives approached the negotiations over the Nation’s treaty rights as if such rights were granted by Canada and/or Ontario and that such rights could be unilaterally interfered with if necessary by the province; and

- Since 1919, the City of Winnipeg, located in Manitoba, has been taking water from Shoal Lake, the body of water where the Nation’s main community is located. Such a taking is in direct contravention of the oral promises and written version of Treaty #3, as the taking of the water, and the land from the Nation’s reserves and traditional territory necessary to divert such waters over 150km to the City of Winnipeg, was done without the Nation being

¹ “*And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by said Indians . . .*” in Alexander Morris, “The Treaties of Canada with the Indians of Manitoba and the North-West Territories Including the Negotiations on which they were based”, (Calgary: Fifth House Publishers, 1991) at p. 322.

consulted or providing consent. The written version of Treaty #3 is quite clear where it states:

*“Her Majesty reserves the right to deal with such settlers as She shall deem just so as not to diminish the extent of land allotted to Indians; and provided also that the **aforesaid reserves of lands, or any interest or right therein or appurtenant thereto**, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, **with the consent of the Indians entitled thereto first had and obtained.**”² (Emphasis added)*

The Nation has attempted to resolve these issues directly with the City of Winnipeg, but to no avail as the mayor of the City of Winnipeg has gone on record as stating that it has no obligation to negotiate with the Nation over these matters. The Nation notes the irony that Canada’s Human Rights Museum is being built in the City of Winnipeg, a city that denies the Nation’s human rights as Indigenous Peoples.

Conclusions

The Nation submits that Canada’s failure to effectively recognize the actual nature of Treaty #3 as an agreement signed between two sovereign nations has resulted in Canada, and the provinces and municipal bodies contained therein, acting unilaterally to diminish the oral and written promises of the treaty. Such diminishment violates the Nation’s human rights as Indigenous Peoples, and maintains the “colonial paradigm” that is detrimental and adverse to the Nation’s aspirations to fully exercise its rights Indigenous Peoples as contained in the ICCPR, the ICESCR, and the *Declaration*.

Consequently the Nation submits that in order to achieve an effective recognition of Treaty #3, the following principles, at a minimum, must be included and implemented within the Canadian legal and political systems, and find actual expression in the “negotiations” of issues arising from the treaties:

- Treaties such as Treaty #3 are not *sui generis* or “pseudo-contractual” agreements but international treaties signed between two sovereign nations;
- Treaties must not be interpreted using the Canadian “colonial paradigm” understanding of the treaty as a baseline whereby the Indigenous Peoples understanding of the treaty merely provides a variance to such a baseline. The Indigenous Peoples understanding of the treaty must be given equal weight so as to arrive at a baseline that is respectful of both signatories’ understanding of the treaty and thereby allowing for the reconciliation between the such understandings;
- The treaties, and the verbal promises made during the negotiations of such treaties, should not be construed or understood as “granting” rights, as this is contrary to the inherent rights of Indigenous Peoples. The treaties should be

² *ibid* at p. 323.

regarded as instruments setting out principles how the relationship between the Indigenous Peoples and the settler population was to be structured; and

- The Indigenous Peoples that signed the treaties were sovereign nations as understood within international jurisprudence, and accordingly should rightfully be subject to international jurisprudence, including areas of implementation and arbitration.

D. Participatory and Reconciliation Models for the Implementation of Treaties

“He who has robbed another of his property, will next endeavour to disarm him of his rights to secure that property; for when the robber becomes the legislator he believes himself secure”.³

The Canadian System of Redress

As noted above, it has been the Nation’s experience that Canada operates within a “colonial paradigm”, as expressed through its political and juridical machinery, which functions to deny the actual nature of the treaty, and to thereby lessen the status of the Nation as a sovereign nation. Since this is the starting point between any “negotiations” between Canada and an Indigenous Peoples, it is inherently unfair and biased towards entering into negotiations within the domestic system of Canada.

Furthermore, although the Nation and other Indigenous Peoples have great wealth in the natural resources of their traditional territories, such wealth is not shared with the Indigenous Peoples and most are amongst the poorest groups in Canada. Accordingly, the financial ability of the Indigenous Peoples to seek redress in the Canadian legal system for Canada’s infringement of the oral and written promises of the treaty is almost non-existent. Further, given the “colonial paradigm” inherent in the jurisprudence, there is not much hope that the Nation can realize its inherent rights as Indigenous Peoples through this forum.

In addition, the processes created by the Canadian government to resolve outstanding treaty issues are also fraught with the “colonial paradigm”. The Nation’s experience is that within these processes, Canada controls the “negotiations” through the use of funding. As mentioned, most Indigenous Peoples do not have the financial resources to pursue redress in the Canadian legal system, and that is also true for redress through these other avenues.

As a result, when an Indigenous Peoples enters into a Canadian government process it requires funding to hire the necessary experts to enable it to make fully informed decisions. Although the Canadian government’s processes, such as the Specific Claims Process and the Specific Claim Tribunal, do provide funding for these purposes, the Canadian government, to the detriment of the Indigenous Peoples, controls such funding.

In the Nation’s experience within the Specific Claims Process, Canada does provide funding for “negotiations” for negotiators, legal counsel and various experts, but such

³ Thomas Paine, “On First Principles of Government (1795)” from **The Thomas Paine Reader**, (Toronto: Penguin Press, 1997) at p. 464.

funding is determined by Canada. The process involves submitting a work plan to Canada for approval, and includes the negotiators, types of studies to be done, and the type of experts to be hired. It has been the Nation's experience that if Canada does not agree with the Nation's determination as to the type of study required or the type of experts to be hired to allow the Nation to make fully informed decisions, then funding is withheld for these purposes. In short, Canada assumes a paternalistic attitude in line with the "colonial paradigm" that determines what is best for Indigenous Peoples, and as a result controls the process for its benefit. With such control, it is not reasonable to believe that such a process is fair and unbiased or that it will achieve "justice at last".

Further, such funding provided by Canada is a loan that is repayable on demand. The Canadian practice is to calculate the amount loaned to an Indigenous Peoples at the end of the negotiations, if successful, and add that amount to financial settlement. If the negotiations are not successful, then the loaned amount remains on the Indigenous Peoples financial books as a debt, which in turn could lead to serious financial hardships, including being forced into "co-management" or "third-party" management by Canada if the Nation's debt to income ratio is too high.

In short, attempting to seek redress within the Canadian system, whether it is through litigation or the Canadian government created and funded Specific Claims Process or Specific Claims Tribunal, is fraught with real dangers. First, the "colonial paradigm" of the Canadian system, both political and legal, is unable to account for the aspirations of the Nation as an Indigenous Peoples and sovereign nation. As a result, the Canadian system can only provide a certain type of redress, and one that falls far below what is required by the Nation as an Indigenous Peoples and what is recognized by the *Declaration* and other international jurisprudence.

Second, even though Canada states that the processes in place to redress issues around the infringement and breaking of treaty promises are fair and provide "justice at last", the implementation of such processes does not meet this promise. Where Canada is allowed to narrow the Nation's claim to smaller, more convenient claims, and to control through funding what negotiators, studies, and experts the Nation believes it requires to make a fully informed decision, there cannot be "justice at last" within the Canadian system.

True Reconciliation Models for the Implementation of Treaties and Arbitration Mechanisms

As noted above, there are no effective mechanisms within Canada to address the multitude of issues surrounding the treaties within Canada. Accordingly, the Nation is looking to the United Nations in the development of an international mechanism that would allow for the just and effective resolution of claims that the Nation and the other Indigenous Peoples have with Canada regarding the implementation of treaties and the arbitration of issues from conflict arising from such treaties.

Any such mechanism must at a minimum include the following principles:

- The treaties are international treaties signed between two sovereign nations, and as such international jurisprudence, including the *Declaration*, should guide the implementation and arbitration of such treaties;
- The treaties must not be interpreted using the state's "colonial paradigm" understanding of the treaty as a baseline whereby the Indigenous Peoples understanding of the treaty merely provides a variance to such a baseline. The Indigenous Peoples understanding of the treaty must be given equal weight so as to arrive at a baseline that is respectful of both signatories' understanding of the treaty and thereby allowing for the reconciliation between the such understandings;
- The creation and implementation of an effective international mechanism must not be controlled by the states that have a vested interest in ensuring their goals and aspirations are met by such a mechanism. Instead, both state representatives and Indigenous Peoples representatives must have an equal voice in the planning, creation, and implementation of the international mechanism to ensure fairness and equality;
- An outside funding source be identified and/or created to enable Indigenous Peoples to finance the required experts to make a fully informed decision regarding the implementation and arbitration of treaty issues. Such a funding source must be free from state interference. In the alternative, the creation of United Nations sanctioned organization that is staffed with various experts required to provide necessary advice to Indigenous People that appear before the international mechanism; and
- An effective enforcement system, as much as possible under the United Nation system, to ensure decisions and recommendations of the international mechanism are followed by both states and Indigenous Peoples alike.

It is clear that with the ongoing evolution and articulation of Indigenous Peoples rights within international jurisprudence, new ways and means will be necessary to give practical application to the principles and values within the *Declaration*. The creation of an international mechanism, based in part on the principles above, to implement and arbitrate on treaties is a logical step along this ongoing evolution.