



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

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NGO Submission to the Seminar on “Strengthening partnership between indigenous peoples and States: Treaties, agreements and constructive arrangements”

Indigenous Bar Association in Canada

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



I. Introduction

The Indigenous Bar Association thanks the Office of the High Commissioner for Human Rights for the opportunity to present a written submission for the seminar on “Strengthening partnership between indigenous peoples and States: Treaties, agreements and constructive arrangements.”

The Indigenous Bar Association in Canada (IBA) is a non-profit professional organization for Indigenous (Indian, Inuit and Métis persons) trained, in training and employed in the legal field. The membership of the IBA is comprised of lawyers (practicing and non-practicing), judges, law professors, legal consultants and law students.

The IBA plays an active role in promoting the development of Indigenous law and supporting Indigenous legal practitioners. The objectives of the IBA include:

- To recognize and respect the spiritual basis of our Indigenous laws, customs and traditions;
- To promote the advancement of legal and social justice for Indigenous peoples in Canada;
- To promote the reform of policies and laws affecting Indigenous peoples in Canada;
- To foster public awareness within the legal community, the Indigenous community and the general public in respect of legal and social issues of concern to Indigenous peoples in Canada;
- In pursuance of the foregoing objects, to provide a forum and network amongst Indigenous lawyers: to provide for their continuing education in respect of developments in Indigenous law; to exchange information and experiences with respect to the application of Indigenous law; and to discuss Indigenous legal issues.¹

Given our mandate, this paper will focus on the way in which the Canadian legal system has failed to properly recognize the international character of the Treaties signed between Indigenous peoples and the colonial governments and has ignored the foundational place of Treaties in Canada. This paper will begin by presenting a brief historical overview of the treaty-making history in Canada. The following section briefly sets out some of the current (and enduring) issues regarding Treaty implementation in Canada. Finally, the paper concludes by presenting

¹ Indigenous Bar Association in Canada, mandate: <http://indigenousbar.ca/home/objectives.html>.

some recommendations on implementing Treaties in Canada, which we hope will resonate with Indigenous peoples in other regions.

II. History of Treaties in Canada

Indigenous peoples in Canada have a rich history of entering into Treaties with other Indigenous nations, as well as colonial governments: “[First] Nations made treaties with other nations for purposes of trade, peace, neutrality, alliance, the use of territories and resources, and protection.”² The experiences of treaty-making between Indigenous peoples and colonial governments vary greatly coast to coast to coast. This section will provide a very brief historical overview of the treaty-making history in Canada in order to contextualize the concerns and issues raised in the following section.

Treaties between Indigenous peoples in North America and European colonial powers date back to the 1600s,³ most notably with the Treaty of Albany in 1664.⁴ In the 1760s, the British Crown entered into Peace and Friendship Treaties with the Mi’kmaq, Maliseet and Passamaquody Nations.⁵ Indigenous laws and protocols were followed during these early negotiations,⁶ thus entrenching the Treaties in both Indigenous legal traditions as well as international treaty law.

The 1763 Royal Proclamation codified Britain’s legal obligations for its relations with Indigenous peoples in North America and set the stage for the next phase of Treaty negotiations. During the mid-late 19th century and into the early twentieth century many Treaties were entered into between the British Crown and various First Nations, including those referred to as “the Numbered Treaties.” Again, Indigenous laws and protocols were followed. While the written Treaty does not represent the complete agreement, it is important to note that Britain referred to the agreements as “Treaties” in the written text presented to First Nations for their signature. “Treaty” is a term of art used in international law to reference binding bilateral agreements.

During the period of approximately 1920-1970, there were no major Treaties signed between Britain/Canada and Indigenous peoples. The modern era of treaty-making did not begin until after the Supreme Court of Canada released its decision in *Calder*⁷ in 1973. While the modern era of treaty-making has led to the conclusion of several Treaties, the various processes are not without serious defects. These will be discussed more in the following section.

With the entrenchment of Treaty rights in s. 35(1) of the *Constitution Act, 1982*, Treaties are now explicitly recognized within the constitutional fabric of Canada. This entrenchment is an acknowledgement of the foundational nature of Treaties in Canada and should have afforded

² Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back, (Ottawa: Ministry of Supply and Services, 1996) vol 1, ch 3. [RCAP Report]

³ Bradford Morse, “Indigenous-Settler Treaty Making in Canada” in *Honour Among Nations?: Treaty and Agreements with Indigenous Peoples*, Marcia Langton ed, (University of Melbourne Press, Melbourne:) at p.50

⁴ Articles Between Col. Cartwright and the New York Indians, 24 September 1664.

⁵ These treaties have been considered by the Canadian courts in *Simon v. The Queen*, [1985] 2 S.C.R. 387; *R. v. Marshall*, [1999] 3 SCR 456; and *R. v. Marshall*; *R. v. Bernard*, 2005 SCC 43, [2005] 2 SCR 220.

⁶ For example, the Two-Row Wampum was presented as part of the Treaty of Albany negotiations.

⁷ *Calder et al v Attorney-General of British Columbia*, [1973] SCR 313.

even greater protection to these instruments. Unfortunately, Canadian courts have subsequently given a very impoverished interpretation to Treaties, which will be elaborated upon in the section below.

III. Current Issues of Treaty Implementation in Canada

While there is a rich history of diplomatic relations and Treaty negotiations between Indigenous peoples and colonial Governments, Canada has not fulfilled their obligations under these Treaties. This section will highlight a few ongoing Treaty issues in Canada before the final section presents recommendations for future Treaty negotiation and implementation processes.

In Canada, there is disagreement between the Crown and Indigenous peoples on the nature and scope of Treaties. In 1996, the Royal Commission on Aboriginal Peoples recommended a common starting point for interpreting and implementing historic Treaties:

- Treaty nations did not intend to consent to the blanket extinguishment of their Aboriginal rights and title by entering into the treaty relationship;
- Treaty nations intended to share the territory and jurisdiction and management over it, as opposed to ceding the territory, even where the text of an historical treaty makes reference to a blanket extinguishment of land rights; and
- Treaty nations did not intend to give up their inherent right of governance by entering into a treaty relationship, and the act of treaty making is regarded as an affirmation rather than a denial of that right.⁸

Canada has refused to accept such a premise for the interpretation of historic Treaties. Thus, there is still much dispute over what outstanding obligations remain to be implemented. Canada has always taken a reductionist approach to interpreting their Treaty obligations, but an expansionist approach to interpreting the privileges they gained under these Treaties.

The lack of an impartial arbitrator to resolve these disputes amplifies the negative effects this divergence in understanding has on Indigenous peoples. In Canada, judges are trained in the Canadian legal system (common and civil law) and do not have expertise in the Indigenous legal traditions upon which Treaties are embedded. Few judges, if any, have any expertise in international Treaty law. Furthermore, there are no Indigenous judges on the Supreme Court of Canada and a very limited number on appellate courts. Without this training and knowledge, Canadian courts are limited in their ability to produce fair and impartial decisions.

The limitation of Canadian courts is demonstrated by the domestic Treaty jurisprudence. Unfortunately, Canadian jurisprudence has held that “an Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law.”⁹ This statement by the Supreme Court of Canada is contrary to the findings of the Special Rapporteur and as well as the UN *Declaration on the Rights of Indigenous Peoples*; both of which recognize the international character of Treaties.

⁸ RCAP Report, volume 2, chapter 2.

⁹ *Simon v the Queen*, (1985) 2 SCR 387 at para 404.

While the Supreme Court of Canada has recognized that the terms of the historic Treaties go beyond the written record and have articulated some flexible approaches to interpreting Treaties,¹⁰ Canadian courts have also recognized that the government can unilaterally modify the terms or rights contained within Treaties.¹¹ Further, the Courts have acknowledged that Canada can justifiably infringe Treaties¹² and thus limit Treaty rights.

In its documentation presented at the previous UN Treaty Seminar, Canada claims Treaty negotiation and implementation are political issues.¹³ This statement seems to ignore the legal (and constitutional) nature of its obligations to implement Treaties. Further, it highlights one of the main obstacles in Canada; Treaty implementation is left to the whim of government.

Another major concern regarding Treaty implementation in Canada is the way in which the government and the courts have used the concept of reconciliation. The Canadian court's interpretation of "reconciliation is designed to facilitate the integration of Aboriginal peoples into larger society rather than to protect their collective interests."¹⁴ Thus "reconciliation" is used to diminish Treaties and makes Treaties subject to balancing against the rights of non-Indigenous Canadians.¹⁵

This definition of reconciliation seems to be motivated by a desire for certainty for industry to promote natural resource development. A focus on certainty and finality is contrary to the original spirit and intent of Treaties and the concept of an ongoing relationship. The UN *Declaration on the Rights of Indigenous Peoples* recognizes the role Treaties play in the ongoing

¹⁰ McLachlin J. presents a good summary of the interpretation principles in *Marshall*:

1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation.
2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories.
3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed.
4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed.
5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties.
6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time.
7. A technical or contractual interpretation of treaty wording should be avoided.
8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic.
9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context (para 78).

¹¹ See for example, *R. v. Badger*, [1996] 1 SCR 771 where the court held that the Constitutional transfer of lands from the Federal government to the Provincial governments could place a geographical limit on hunting rights protected in the Numbered Treaties.

¹² *R. v. Sioui*, [1990] 1 SCR 1025.

¹³ Conclusions and recommendations presented by the Government of Canada to the Seminar on treaties, (15-17 December 2003) (E/CN.4/2004/111/Add.1).

¹⁴ D'arcy Vermette, "Dizzying Dialogue: Canadian Courts and the Continuing Justification of the Dispossession of Aboriginal Peoples" (2011) 29 Windsor Yearbook of Access to Justice at 55.

¹⁵ In *R. v. Van der Peet*, [1996] 2 SCR 507, Lamer CJC provided his interpretation of the purpose of including s. 35(1) in the Constitution: "aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown" (at para 31).

relationship: “treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States.”

Over 100 years after Treaties were signed, many First Nations are still waiting to receive the reserve land base promised in historic Treaties. This Treaty Land Entitlement (TLE) process is prolonged and the Government has greatly limited the land eligible to fulfill their outstanding obligations. There are recent examples where Canada has regained possession over Crown land, but Canada has refused to classify the lands as eligible to fulfill TLE.¹⁶

There are many issues that also exist within modern Treaty negotiations, which have been raised by First Nations at previous UN Treaty seminars. Given the vast issues with the Treaty negotiation process under the British Columbia Treaty Process, a recent Senate report notes that “many of the negotiations (or “tables”) have not steadily progressed through the treaty process.”¹⁷ The Senate report highlights problems within the process including:

processes for obtaining or revising specific mandates (or detailed instructions for each treaty) were lengthy, which in turn slowed the pace of negotiations with First Nations; ... overlapping and shared territory issues among First Nations; and a “federal freeze on fish negotiations;” ... federal processes could be streamlined; and the Crown’s positional or “take-it-or-leave-it” approach to negotiations.¹⁸

In fact, Canada’s refusal to consider certain third party lands, including disused railroad lands, for Treaty negotiations has led to a case before the Inter-American Commission on Human Rights (IACHR).¹⁹ In its admissibility report, the IACHR noted that there is no effective remedy for these First Nations to pursue domestically.²⁰

In Canada’s previous submission to the Second Treaty Seminar, Canada claimed that the number of First Nations participating in modern Treaty processes is indicative of the success of the processes.²¹ However despite their huge limitations, First Nations are forced into these processes because no other options exist to resolve outstanding claims. A lack of real alternatives does not substantiate the effectiveness of the process, nor does it satisfy free, prior and informed consent as required in international law.

While some provinces have set up Treaty Commissions, these Commissions do not have the solid statutory mandate they require to support the negotiation and implementation of Treaties. The Commissioners are not mandated to assist the Treaty parties to resolve political and other

¹⁶ For example, see *Canada v Brokenhead First Nation*, 2011 FCA 148.

¹⁷ Report of Standing Senate Committee on Aboriginal Peoples, “A Commitment Worth Preserving: Reviving the British Columbia Treaty Process” June 2012, http://www.fns.bc.ca/pdf/SSCAP_Report_reTreatyNegotiationsinBC_June2012.pdf.

¹⁸ Senate report, pp. 3-5.

¹⁹ *Hul’qumi’num Treaty Group v. Canada*, Inter-American Commission of Human Rights, Admissibility Report No 105/09, Petition 592-07, October 30, 2009.

²⁰ *Hul’qumi’num Treaty Group* admissibility report at paras. 42-43.

²¹ Conclusions and recommendations presented by the Government of Canada to the Seminar on treaties, (15-17 December 2003) (E/CN.4/2004/111/Add.1).

disputes arising in Treaty processes, nor are they empowered to eliminate substantive and procedural obstacles within Treaty processes.²²

IV. Recommendations

Keewatin v. Minister of Natural Resources is one example where a Canadian court has given effective recognition to a historic Treaty. In this decision, the Court applied a liberal approach to interpreting Treaties, giving full consideration to Indigenous peoples' understanding of the scope of Treaty 3.²³ In a very lengthy decision, the Ontario Superior Court of Justice considered the historical context leading to the signing of the Treaty, including both the British motivations and the Ojibway perspective. The Court held that the Government of Ontario does not have the authority to interfere with harvesting rights of the First Nation signatories included within a historic Treaty.²⁴

Going forward, States need to recognize the fundamental nature of Treaties. In Canada, the full implementation of Treaties must go forward on a basis that recognizes:

- They were made between the Crown and nations of Aboriginal people, nations that continue to exist and are entitled to respect.
- They were entered into at sacred ceremonies and were intended to be enduring.
- They are fundamental components of the constitution of Canada, analogous to the terms of union under which provinces joined Confederation.
- The fulfilment of the spirit and intent of the treaties is a fundamental test of the honour of the Crown and of Canada.
- Their non-fulfilment casts a shadow over Canada's place of respect in the family of nations.²⁵

It is also critical to recognize that Treaties are grounded Indigenous peoples own laws and customs and these laws and customs continue to operate today.

Canadian courts have described the Constitution as a "living tree" that must be able to grow and adapt over time, but whose roots are deeply embedded.²⁶ This living tree analogy can be extended to Treaty-relationships in Canada: "the principles of treaties made between nations must also be interpreted as the relationship evolves. In this light, the treaties must also be

²² For example, the Treaty Relations Commission of Manitoba mandate "requires that we facilitate an open discussion in respect to the Treaty relationship, Treaty rights and the differing views of the Treaties. The TRCM does not advocate for the First Nations or Crown perspective of the Treaties but works to create dialogue and understanding of those perspectives while maintaining principles of honour and respect in our coexistence. Working together to increase the knowledge of the Treaties will lead our future generations in the spirit of fostering understanding of cultural diversity and its importance to our unique society"

http://www.trcm.ca/commissioner_message.php.

²³ *Keewatin v. Minister of Natural Resources*, 2011 ONSC 4801.

²⁴ *Keewatin v. Minister of Natural Resources*, 2011 ONSC 4801.

²⁵ RCAP, volume 2, chapter 2.

²⁶ *Edwards v. Canada (Attorney General)*, [1930] AC 123, 1 DLR 98 (PC).

flexible enough to include new matters that might not have been raised at the time of the original treaty discussion.”²⁷

Moving forward, States should enter into good faith negotiations and discussions with Indigenous peoples to fully implement existing Treaties and to fill any gaps that may exist. The negotiations should proceed with an aim to fulfilling the original spirit and intent of the Treaty.

State parties to Treaties with Indigenous peoples must recognize the international character of Treaties. Thus, the interpretation and implementation of Treaties must be done in accordance with international law on treaties, including the *Vienna Convention on Treaties*. Where States have acted contrary to international law, those actions must be held to be invalid.

Furthermore, given the international character of the Treaties, it is appropriate for the international area to continue to monitor and assist with the full and effective implementation of the Treaties. Where treaties are yet to be finalized, it is also appropriate for the international arena to assist, or provide oversight, over the conclusion of modern treaties and agreements.

²⁷ RCAP, volume 2, chapter 2.