

Manitoo Mazina'igan:

An Anishinaabe Legal Analysis of Treaty No. 3

by

Janine R. Seymour, JD

A Thesis submitted to the Faculty of Graduate Studies of

The University of Manitoba

In partial fulfillment of the requirements of the degree of

MASTER OF LAWS

Department of Law

University of Manitoba

Winnipeg, Manitoba

Copyright (c) 2016 by Janine Seymour

ABSTRACT:

Historical Treaties entered into with Indigenous peoples are often a source of conflict. This conflict is connected to treaty implementation, which tends to be at the sole discretion of the domestic jurisdiction. Accordingly, a one-sided interpretation of a two-sided agreement is a problematic approach.

This thesis will explore key concepts of Indigenous law, in relation to the historical Treaties made with the Crown. Particular emphasis will be on the Anishinaabe in Treaty No. 3 in Turtle Island, the State now known as Canada. Indigenous law will be grounded in widely accepted international law principles, which may allow for further insight by the Treaty partners. Through grounding the Indigenous perspective of the true spirit and original intent of the Treaties, explanation can be drawn out and further understanding between the parties will occur. Mutual understanding, along with respect, is part of the foundation to the reconciliation process of the relationship between Indigenous and non-Indigenous peoples.

ACKNOWLEDGEMENTS:

I would like to thank the Administration and Faculty at the University of Manitoba, Faculty of Law for their continued support and assistance in my endeavours. *Miigwetch* to my supervisor Brenda Gunn for all her assistance through this project. *Miigwetch* to my children and family for their love, support, patience and teachings. *Miigwetch* to my many friends whom are my family. *Miigwetch* Creator, *Gitche Manitoo*, for all your gifts, blessings and for everyday (*noongom*). I am humbled and grateful for all of the reminders to live *mino-bimaadiziwin*.

DEDICATION:

This thesis is dedicated to all my Relations.

Chapter I: INTRODUCTION.....	6
i. Treaty Relationships.....	8
Conclusion.....	11
Chapter II: The Root Problem- Treaty Interpretation and Implementation.....	15
a. Application of Canadian Law Interpretative Problems- <i>Keewatin case</i>.....	16
b. Canadian Courts Treaty View.....	20
i. The Legal Profession.....	24
ii. Legislation Restricting Precedent.....	27
Conclusion.....	31
Chapter III: METHODOLOGY.....	34
i. Application of Sources.....	37
ii. Indigenous Research Instruments.....	40
iii. Indigenous Legal Orders.....	43
Conclusion.....	49
Chapter IV: TREATY CREATION.....	51
A.) Authority.....	52
i. The Anishinaabe in Treaty No. 3.....	53
ii. The Grand Council of the Anishinaabe in Treaty No. 3.....	55
iii. Collective Decision-making.....	56
iv. Recognition of Authority.....	58
B.) Written Form.....	59
i. Treaty No. 3 Recorded.....	60
ii. Use of Interpreters.....	61
iii. Paypom Treaty.....	63
C.) Express Consent to be Bound.....	65
i. <i>Opwaagan</i> (The Pipe).....	67
ii. <i>Manidookewinan</i> (Ceremonies).....	69
iii. Offerings.....	71
Conclusion.....	72
Chapter V: SPIRIT AND INTENT – <i>Miinigozii’onan</i>.....	74
A.) <i>Oonjnewin</i>.....	75
i. Treaties cannot be terminated.....	77
B.) <i>Mino-Bimaadiziwin</i>.....	83
i. Perpetual Nature of Treaties.....	85
ii. Crown Must Abide.....	87
iii. Context- ‘Object and Purpose’.....	88
Conclusion.....	91
Chapter VI: CONCLUSION.....	93
i. Treaties Legitimize State Sovereignty.....	96
ii. Bound by the Crown.....	98
iii. Reconciliation.....	100
Bibliography.....	103

Chapter I: INTRODUCTION

The Numbered Treaties are the way Canada legally settled interests with Anishaabeg (Indigenous peoples, the ‘Original Peoples’ of Canada). Post-confederation Numbered Treaties are “11 territorial treaties in Canada, made during a 50 year period from Treaty No. 1 in 1871 to Treaty No. 11 in 1921. The territory covers all of the provinces of Manitoba, Saskatchewan, Alberta, and parts of Ontario, British Columbia and NorthWest Territories”.¹ The focus of this thesis is on *Manitoo Mazina’igan*, Treaty No. 3, which was ratified on October 3, 1873. Treaty No. 3 was made with the Anishinaabe in Treaty No. 3 and covers Northwestern Ontario and parts of Manitoba. The Late Harold Cardinal, distinguished Cree lawyer and academic discussed the necessity of the Treaties from a European viewpoint:

The treaties were the way in which the white people legitimized in the eyes of the world their presence in our country. It was an attempt to settle the terms of occupancy on a just basis, legally and morally to extinguish the legitimate claims of our people to title to the land in our country...[There is no] doubt in the mind of the government ... upon the basis of white recognition of Indian rights that the treaties were negotiated. Otherwise, there could have been nothing to negotiate, no need for treaties.²

This thesis will explain an Anishinaabe legal understanding of Treaty No. 3 to a non-Indigenous legal audience, focusing on an examination of the legal sanction under Anishinaabe law and the application of two fundamental Anishinaabe doctrines. To facilitate an analysis of Anishinaabe law, a respectful environment needs to be created. This environment existed at the time of treaty negotiations, when Euro-Canadians and Indigenous peoples came together with their respective legal systems and mutually

¹ Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014) at 75 [Asch].

² Harold Cardinal, *The Unjust Society: The Tragedy of Canada’s Indians* (Edmonton: M G Hurtig Ltd, 1969) at 29 [Cardinal, “Unjust”].

agreed to define a continuous relationship going forward through the mechanism of the Treaties.

While some narratives exist that Indigenous peoples were forced into the Numbered Treaties, upon closer examination of this Treaty we will see that is not the case for Treaty No. 3. The Crown acknowledged the authority of the Anishinaabe and Grand Council per Anishinaabe laws.³ Prior to the successful treaty negotiations concluded on October 3, 1873, many unsuccessful treaty attempts occurred between the Anishinaabe and the Crown.⁴ Reportedly, the Anishinaabe would not enter into a treaty “unless impossible demands are first complied with”.⁵ From the Crown’s perspective, the Treaty was of great importance to not only calm relations with Anishinaabe peoples but vital for the Crown’s expansion plans into Western Canada (as the entire territory is geographically centrally located).⁶ It was reported that the Anishinaabe did not desire “Canada’s money” and the situation was seen as “dire” for the Crown.⁷ Making a treaty was not imperative to the Anishinaabe in Treaty No. 3, whom held off negotiations for over four years because of disagreement over proposed treaty terms.⁸ Their collective actions to resist treaty making until conditions were acceptable to them, demonstrate that treaty making with Europeans was at the Anishinaabeg discretion. As Anishinaabe Elders prophesied of an upcoming change and a new way of life, the Anishinaabe expected that a new people were coming which would cause great change within our territories and

³ The Honourable Alexander Morris, P.C., *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 Publishers, 1880) at 47 [Morris].

⁴ *Keewatin v Minister of Natural Resources*, 2011 ONSC 4801 at para 282, MA Sanderson J (Ont SCJ) [Keewatin].

⁵ *The Globe* (5 August 1872), cited in *ibid* at para 284.

⁶ Morris, *supra* note 3 at 47.

⁷ *The Manitoban* (27 July 1872), cited in *Keewatin*, *supra* note 4.

⁸ *Ibid* at para 284.

traditional ways of life.⁹ The Anishinaabe expected the arrival of the European settlers and the act of treaty making was the way in which the Anishinaabe could deal with the impending changes on their own laws and terms, as exemplified by refusing to settle in the first four years.¹⁰

i. Treaty Relationships

In addition to Treaties creating partnerships between Indigenous peoples and European settlers, the use of Anishinaabe law created significant relationships. As demonstrated throughout this thesis, relationships are critical to understanding Indigenous or Anishinaabe law. Comprehending Anishinaabe law requires a paradigm shift in thinking, strictly independent and removed from a Western mindset. An example of this shift in thinking is the relationship terms contained within the Treaty agreement. While Eurocentric values focus the words contained in the Treaty, ‘Great White Mother’ and ‘children’ to that of western family values of a parental relationship of reliance; that is not how the Anishinaabe understood them.¹¹ The language ought to be understood in the context of Indigenous familial relationships, in which children are autonomous, responsible to learn and make their own decisions with the freedom to do so

⁹ 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 31 [Cardinal, “Treaty Elders of Saskatchewan”]; Heidi Kiiwetinepinesiiik Stark, “Respect, Responsibility, and Renewal: The Foundations of Anishinaabe Treaty Making with the United States and Canada” (2010) 34:2 *American Indian Culture and Research Journal* [145] at 155 [Stark].

¹⁰ Kathi Kinew, *Manito Gitigaan Governing in the Great Spirit’s Garden: Wild Rice in Treaty #3* (Interdisciplinary Doctorate Thesis, The University of Manitoba, 1995) [unpublished] at 110.

¹¹ Treaty 7 Elders and Tribal Council with Walter Hildebrandt, Dorothy First Rider & Sarah Carter, *The True Spirit and Original Intent of Treaty 7* (Montreal & Kingston: McGill-Queen’s University Press, 1996) at 302 [Hildebrandt, “Treaty 7”]; D’Arcy Linklater, Harry Bone, and the Treaty & Dakota Elders of Manitoba with contributions by the AMC Council of Elders, *Ka’esi Wahkotumahk Aski -Our Relations With The Land: Treaty Elders’ Teachings*, vol 2, (Winnipeg: Treaty Relations Commission of Manitoba, 2014) at 40 [Linklater & Bone] (quoting the late Anishinaabe Elder Mark Thompson).

independently.¹² This traditional child-rearing practice is to ensure that the children are capable of governing themselves but does not alleviate the requisite family support.¹³ Parents still provide assistance to the child(ren) when needed, but have a hands-off approach to interfering with the child's autonomy. Despite the familial language used in Treaty No. 3, the Anishinaabe do not hold the Treaty relationship as that of a dependent nature: "I have a Chief too. I have one who answers me too. His name is Creator. I also have a Queen who answers me. Her name is Earth."¹⁴ It is in this manner that the Anishinaabe view the Treaty relationship as one of a traditional Anishinaabe familial relationship and not dependency, where Anishinaabe retained their autonomy, including legal capacity for treaty negotiations and legal authority to conclude the Treaty.¹⁵

As stated, the Numbered Treaties are of great importance to the current relationship between Indigenous and non-Indigenous peoples in Canada. The role Canadian lawyers and judges play is instrumental to realize the Treaty. Canadian law is critical to many Indigenous peoples in Canada as:

Aboriginal people are looking to the law in Canada not only to protect them, not only to address their grievances, but to establish a legal basis for the co-existence of Aboriginal and Non-Aboriginal people as equals in Canadian society. In every forum available to us, --legal and otherwise-- we are clearly spelling out the terms by which we can take our rightful place in the modern world and by which we can complete the circle of confederation.¹⁶

¹² Jennie Wastesicoot, *Tapwetamowin: Cree Spirituality and Law for Self-Governance* (Interdisciplinary Doctor thesis, University of Manitoba, 2014)[unpublished] at 64-65 [Wastesicoot].

¹³ Hildebrandt, "Treaty 7", *supra* note 11.

¹⁴ Linklater & Bone, *supra* note 11 (quoting the late Anishinaabe Elder Mark Thompson).

¹⁵ The Grand Council Treaty #3, "Pazaga'owin Reclaiming our Wings: Transition to Nationhood" [unpublished] online: <<http://caid.ca/RecWing010308.pdf>> at 9 [The Grand Council Treaty #3, "Pazaga'owin"].

¹⁶ Louis "Smokey" Bruyere, "Unheard Voices in the Law: Aboriginal People and the Law in Canada" (Presentation delivered to The Canadian Association of Law Teachers and The Canadian Law and Society Associations, 8 June 1988) at 27 [unpublished] [Bruyere].

Treaties are to be viewed as defining a fundamental relationship between two peoples.¹⁷ To reconcile both the Canadian and Anishinaabe perspective, this thesis will provide a fuller consideration of Anishinaabe treaty law, which has not been given due attention in Canadian legal landscape.

Many people, including the Canadian government feel that as the Numbered Treaties were created in the past they are somehow non-relevant today.¹⁸ It was not that long ago that they were concluded, considering how young Canada is. The Late Harold Cardinal believes the Treaties are still relevant:

Rather than denigrating our viewpoint as backward and thereby delaying solutions to the many pressing problems faced by Indians, the time has come for the government to recognize that the question of Indian rights must be settled immediately. Only when this is accomplished can the problems of hunger, of joblessness, of lack of education and opportunity be faced. If the government would even indicate a willingness to try to live up to its obligations, many problems would vanish.¹⁹

Moreover, the Treaties continue to be relevant as the Indigenous legal basis on which they were created remains a current continued practice of Indigenous peoples. That is a key and fundamental distinction – the people and their legal tradition are alive and thus Treaties remain relevant. The fact that many Indigenous peoples, particularly the Anishinaabe in Treaty No. 3 who are the focus of this thesis and where I am from still actively use this legal system, means that we cannot disregard Anishinaabe law as archaic. Anishinaabe law is still highly present and very applicable. The Treaties created a new world order, “one where principles of peace and harmony between individuals and

¹⁷ Gordon Christie, “Justifying Principles of Treaty Interpretation” (2000) 26 Queen’s LJ 143 at 157 [Christie].

¹⁸ Cardinal, “Unjust”, *supra* note 2 at 35.

¹⁹ *Ibid.*

people were to prevail”.²⁰ This ‘new world order’ did not come into fruition for Canada’s Indigenous peoples who face alarming high statistical rates (compared against non-Indigenous Canadians) of poverty, lack of education, unemployment, high incarceration rates and high rates of children in foster care.²¹ It has been routinely stated, and indicated by the Late Harold Cardinal, that the social problems that arise in alarming frequency (and are only predicted to be on the rise) could be solved with a full implementation of the actual historic and sacred agreement entered into.²² In this regard, as the Treaties are the way in which Canada was created, Treaties can be the salvation for the Canadian State and all peoples within.

Conclusion

The relationships that were created by the Treaties are key towards reconciling current issues Indigenous peoples have within Canadian society. When treaty implementation has occurred it ignores the Indigenous peoples’ *gikendaasowin* and *nibwaakaawin* (knowledge and wisdom, which provides an understanding) of the Treaty. Treaty interpretation and implementation problems in Canadian law will be considered in Chapter two through discussion of the legal profession and *stare decisis* as applied in a recent Treaty No. 3 Supreme Court decision. The value and purpose of implementing an Indigenous *gikendaasowin* and *nibwaakaawin* of the Treaties, is to offer a step towards the reconciliation of the strained relations amongst Indigenous and non-Indigenous peoples within Canada. The Treaties, which are often seen as a source of conflict, can

²⁰ Cardinal, “Treaty Elders of Saskatchewan”, *supra* note 9 at 70.

²¹ Fact Sheet (June 2011), online: Assembly of First Nations <http://www.afn.ca/uploads/files/factsheets/quality_of_life_final_fe.pdf>.

²² Cardinal, “Unjust”, *supra* note 2 at 35.

offer a chance of hope and opportunity if implemented in the same manner in which it was created: an environment where both distinct autonomous nations created these everlasting arrangements with reciprocal benefits.²³

To understand the Indigenous legal perspective of the Treaty, you must understand the Anishinaabe teachings and the principles of *gikendaasowin* and *nibwaakaawin* (knowledge and wisdom, which provides an understanding). In chapter three, an Indigenous methodology will be used to explain this viewpoint. This thesis will draw on Indigenous academics to draw out an Anishinaabe legal perspective of the Treaty. Although the focus of this thesis is on my Anishinaabe legal perspective, many different Indigenous Nations in Canada share a common understanding of the sacred nature of the Numbered Treaties and similarly hold these legal concepts, which will be drawn upon.

Chapter four will focus on how Treaty No. 3 was created under Anishinaabe law through an examination of parallel treaty formation requirements under international treaty law, specifically the *Vienna Convention of the Law of Treaties*. The *Vienna Convention* is often viewed as ‘the treaty of treaties’ as the highest doctrinal law in this matter. International law is an important connector as Anishinaabe view themselves as independent sovereign nations with the demonstrated capabilities to enter into legally binding treaties with other Nations.²⁴ As treaties are relations between States, and the purpose of the *Vienna Convention* is to regulate treaties between States, I feel this is a useful tool to aid in the articulation of my Anishinaabe legal perspective of Treaty No. 3 to a non-Indigenous legal audience and serves to bridge the gap between Anishinaabe and

²³ Asch, *supra* note 1 at 139.

²⁴ The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 15.

Canadian law.²⁵ I feel that the Supreme Court who categorized the Numbered Treaties as ‘*sui generis*’ (neither created nor terminated according to the rules of international law) further upholds this thesis’ approach.²⁶

After achieving an understanding how the Treaty was sanctioned, we will examine the Anishinaabe legal significance and implications of the ratification of Treaty No. 3. Chapter five will draw out key important legal concepts that strike to the heart of the Treaty - the true spirit and intent. While there are many critical Anishinaabe Treaty laws, entrenched in spirituality, this thesis will restrict examination to two fundamental laws relevant to the interpretation of the Numbered Treaties. The *Vienna Convention* will again offer a grounding of these concepts, through key legal correlations of Anishinaabe law components. Highlighting key aspects of international and Anishinaabe legal principles of treaty interpretation is a starting point for conversations that need to occur domestically. This approach of using another legal model is congruent with Indigenous legal scholars who are utilizing space between the areas of law, providing opportunities for the areas of law to mediate with respect and equality, all while retaining their own integrity.²⁷

Through the approach of this thesis, international, domestic, and Indigenous law will be interwoven. This method is similar to that of a braid, depicted as three strands woven and bound together.²⁸ Its premise is that each strand of the braid symbolizes a separate area of law to which Indigenous law remains independent of British and French

²⁵ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 at Article 2(1) and Article 1, 8 ILM 679.

²⁶ *Simon v The Queen*, [1985] 2 SCR 387 at para 33 [*Simon*].

²⁷ Sakej J. Y. Henderson, “When Learning Draws us in Like Magnets, our Heart and Brain Connect to Animate our Worldviews in Practice” (Saskatoon: University of Saskatchewan, Aboriginal Education Research Centre, May 2009) online: <<http://www.ccl-cca.ca>> at 64.

²⁸ Braid concept articulated by Professor Brenda Gunn during a thesis discussion meeting on December 11, 2014.

law interpretation.²⁹ Through the binding and application process of this braiding, Canadian law will be strengthened by obtaining a greater understanding of Anishinaabe treaty law.

²⁹ James (Sakej) Youngblood Henderson, “Postcolonial Indigenous Legal Consciousness” (2002) 1:1 *Indigenous LJ* 1 at 34 (Henderson, “Postcolonial”).

CHAPTER II - The Root Problem- Treaty Interpretation and Implementation

There is a conflict of laws issue in Canada between Canadian and Indigenous laws and how the legal systems are to work together. By referencing the Court's reliance on analogies to European legal traditions when discussing Indigenous law, Indigenous legal scholar Sakej Henderson reasons that Canada takes the position that British/Canadian common-law prevails.³⁰ Indigenous legal scholar Gordon Christie argues that Crown sovereignty is assumed and paramount, and if there is any recognized sovereignty of Indigenous peoples it is merely subservient.³¹ This thesis will narrow this divide by arguing that Indigenous treaty law has not been extinguished through the imposition of Canadian law. Indigenous legal scholar John Borrows states that this argument is consistent with Canada's constitutional ideals of federalism.³² Indigenous peoples' autonomy continues to exist despite the British political and legal intrusion in the traditional Anishinaabe territory of 'Turtle Island', now known as Canada. Fact of the matter is both Indigenous law and Canadian law are here to stay. Both legal systems were instrumental in the creation of the State now known as Canada and the only question remains as to what relationship they will have.³³

The purpose of this thesis is to encourage treaty interpretation reform within Canadian law towards a full implementation of the Numbered Treaties, which must include compliance with Indigenous laws. It is highly problematic that the adversarial court system interprets and implements the Treaty. Since European contact and the

³⁰ James (Sa'ke'j) Youngblood Henderson, "Constitutional Vision and Judicial Commitment: Aboriginal and Treaty Rights in Canada" (2010) 10:2 AILR 24 at 35 [Henderson, "Constitutional Vision"].

³¹ Christie, *supra* note 17 at 159.

³² John Borrows, *Canada's Indigenous Constitution*, (Toronto: University of Toronto Press, 2010) at 200 [Borrows].

³³ *Ibid* at 261.

transplant of British laws, there has been legal recognition of the unique status of Indigenous peoples. The *Constitution Act, 1982* of Canada enshrines “existing Aboriginal and Treaty Rights”.³⁴ Prior to repatriation of the Constitution, the Royal Proclamation of 1763 was the fundamental legal document recognizing Indigenous peoples’ rights. Given this recognition, the courts are authorized to interpret and apply law when there are disputes arising of Indigenous rights. For Indigenous peoples, it is wrong for Canadian courts to solely apply, interpret, and rely on English law when determining Indigenous peoples rights, and, applying restrictions on those rights.³⁵ This chapter will demonstrate treaty interpretative problems within Canadian law through a case analysis, which highlights concerns with the court’s ability to interpret and apply Anishinaabe treaty law.

a. Application of Canadian Law Interpretative Problems- *Keewatin case*³⁶

There exists a conceptual gap between Indigenous and Canadian legal interpretations with the substance of the Treaty. This could not be more evident than by the most recent Supreme Court of Canada (SCC) decision arising from Treaty No. 3, *Grassy Narrows First Nation v Ontario (Natural Resources), (Keewatin)*.³⁷ In July 2014, the Supreme Court was asked to adjudicate on the right of the Province of Ontario to issue forestry licenses within traditional Treaty No. 3 territory. In *Keewatin*, the critical dispute was the precise interpretation of a Treaty term: the “taking-up” clause. The First Nation put forth the argument that under Anishinaabe law the Treaty was made solely

³⁴ *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act*].

³⁵ Olthuis, Kleer, Townshend LLP, *Aboriginal Law Handbook* 4th ed (Toronto: Carswell, 2012) at 186 [Olthuis, Kleer, Townshend].

³⁶ Janine Seymour, “*Casenote: Grassy Narrows First Nation v Ontario (Natural Resources)*”, Case Comment (May/June 2015) 8(18) *Indigenous Law Bulletin* (this *Keewatin* analysis concept is inspired from a journal article written by me).

³⁷ *Grassy Narrows First Nation v Ontario (Natural Resources)*, [2014] SCC 48 [*Grassy Narrows*].

with the British Crown, which obliged only the Federal government of Canada and did not bestow the power to the Province to take up land within *Keewatin* territory.³⁸ The Supreme Court strictly considered the division of powers and held that while the federal government has exclusive jurisdiction over Indians and lands reserved for Indians under s. 91(24) of the *Constitution Act, 1867*, the doctrine of interjurisdictional immunity did not preclude provinces from justifiably infringing on treaty rights protected under s. 35(1) of the *Constitution Act, 1982*.³⁹ This approach is inconsistent with the position put forth by the First Nation, which is congruent with the understanding of other Indigenous peoples in Canada, such as the Late Harold Cardinal.⁴⁰ At trial, based on hearing evidence of treaty negotiations from an Anishinaabe perspective, the learned judge found that per Treaty No. 3, the Province of Ontario did not have the authority to take-up tracks of land that would limit Treaty No. 3 harvesting rights, and, in addition, the Province of Ontario did not have the authority under the *Constitution Act, 1867* to justifiably infringe Treaty rights.⁴¹ It was the intention of the treaty partners to require federal approval for lands to be taken-up under the terms of the Treaty. At trial, it was found that the unilateral enactment of subsequent constitutional legislation did not alter Treaty No. 3 terms as understood and agreed by the Anishinaabe.⁴² The disparity between the Supreme Court and lower Court's judgement, or alternatively, Canadian law and Anishinaabe law, is difficult to reconcile. This chapter will explore problems of interpreting and applying Indigenous law by non-Indigenous members of the Bar and judiciary.

³⁸ *Keewatin*, *supra* note 4 at para 282.

³⁹ *Grassy Narrows*, *supra* note 31 at para 53.

⁴⁰ Cardinal, "Unjust", *supra* note 2 at 30.

⁴¹ *Keewatin*, *supra* note 4 at para 1452-1459 and 1564-1567.

⁴² *Ibid* at para 1452-1459.

Treaty interpretation problems were further heightened in *Keewatin* when the Supreme Court emphasized Canadian common-law over Anishinaabe law by relying on an 1888 case from Treaty No. 3: *St. Catherine's Milling*.⁴³ *St. Catherine's* is a Privy Council decision only a few years post-treaty in which the Province of Ontario sued the Federal government over a timber dispute concerning treaty-protected interests of the Anishinaabe. The Privy Council held that the Anishinaabe only had usufructuary rights to the land to be maintained at the pleasure of the Queen.⁴⁴ Treaty No. 3 was determined to be a "transaction between the Indians and the Crown" and "not an agreement between the government of Canada and the Ojibway people."⁴⁵ *St. Catherine's* was strictly a legal dispute between the two levels of government in Canada but clearly had grave consequences to the legal interests of the Anishinaabe within their traditional territories, not only at the time of trial, but 126 years into the future. In *St. Catherine's* the Anishinaabe in Treaty No. 3 were never consulted nor appeared before court to give testimony, the reasons for which will be subsequently expanded in this chapter. The Supreme Court in the 2014 *Keewatin* decision cited *St. Catherine's* as it was the leading case of Indigenous title in Canada until the 1970's.⁴⁶ The reliance on precedent will be explored further as this continues to be a barrier to incorporate an Indigenous perspective on the Treaty because precedent takes precedence over the Indigenous understanding of the Treaty.

⁴³ The Grand Council Treaty #3, "Pazaga'owin", *supra* note 15 at 5 citing the decision of The Privy Court in *St. Catherine's Milling and Lumber Co v The Queen* (1888), 14 App Cas 46 (PC) [*St Catherine's*].

⁴⁴ *Ibid* (*St. Catherine's*).

⁴⁵ *Grassy Narrows*, *supra* note 31 at 33.

⁴⁶ *Calder v British Columbia (AG)* 1973 SCR 313 (for the first time title was acknowledged, which was later expanded in subsequent case law).

In *Keewatin*, the reliance on precedent as a finding of law is a noted concern to be explored later in this chapter, but findings of fact are also of concern. Wab Kinew, a popular Anishinaabe educator, musician and broadcaster from Onigaming First Nation in Treaty No. 3 territory, narrowed the ‘worst part’ of *Keewatin* decision where the Court states “Ontario has exercised the power to take up lands for a period of over 100 years, *without any objection by the Ojibway.*”⁴⁷ Although the Supreme Court declared that this was not determinative in their ruling, this statement signifies how difficult it is to reconcile the Indigenous perspective and non-Indigenous perspectives. This statement is contrary to the findings of the lower court in which it was determined that clear objections by the Ojibway in the disputed territory occurred as soon as development was initiated in the 1920’s-1950’s.⁴⁸ As will be discussed further in this chapter, the Canadian Courts (and the Privy Council) did not hear Indigenous peoples’ positions on this legal dispute as the Anishinaabe were never informed of any court proceeding affecting them. Therefore, no legal objections were on record in Canadian law.⁴⁹ The lower court finding that the Anishinaabe had “made repeated complaints about interference with off-reserve Harvesting Rights” relied on Euro-Canadian historical evidence put forward, including a newspaper protest letter published in 1924 by an Anishinaabe Chief.⁵⁰ The Supreme Court judgment in *Keewatin* exemplifies the Court’s dismissive treatment of Indigenous peoples’ legal understanding of the Treaty and by extension of their history. As seen through *Keewatin*, following the Court’s rules of law and relying on precedent was

⁴⁷ Wab Kinews Twitter status, Online: Twitter <<https://twitter.com/wabkinew/status/487603600193892354>> (Emphasis added) (Wab Kinew’s expression of the worst part of *Keewatin* decision was the Anishinaabe have never objected. This is not the case. Legally we weren’t able to, but, more importantly, we have objected in as many forums available, as our Anishinaabe history has taught us).

⁴⁸ *Keewatin*, *supra* note 4 at para 1139- 1152.

⁴⁹ Kinew, *supra* note 10 at 131.

⁵⁰ *Keewatin*, *supra* note 4 at para 1226 and 1139.

detrimental in this 2014 Supreme Court decision interpreting Treaty No. 3. Canadian law oppresses Indigenous peoples when there is inadequate consideration of the Indigenous legal perspective. It is particularly problematic as historically due consideration was not afforded to Indigenous peoples' perspective and that inaction presently influences current undue consideration.

b. Canadian Courts Treaty View

There are concerns with representation of the Canadian Courts, which are not trained to apply Indigenous law, as well as the over reliance on British law and common law precedent. Based on the treaty interpretation principles articulated by the Court, which are discussed below, there should not be any concerns of treaty interpretation from an Indigenous perspective because many of the principles encourage consideration of the Indigenous perspective. However, the Court does not fully apply these principles. The failure of the Court has contributed to tensions between Canadians and Indigenous peoples. The Canadian Court considers the historic treaties as '*sui generis*', a unique agreement neither created nor terminated by international law.⁵¹ A treaty case, *R v Badger* summarized the following principles when interpreting a Treaty: historic Treaties are agreements that record how the parties reconciled their mutual interests, Treaties must be sensitive to the cultural differences in which they were agreed upon, Treaties must not be interpreted in their strict technical sense but must be interpreted in their everyday sense, Treaties are a combination of the recorded written agreement recorded and unrecorded oral agreement which did not always record full extent of oral agreement, the 'Honour of the Crown' is at stake (highest integrity of the Crown with no appearance of

⁵¹ *Simon, supra* note 26 at para 33.

“sharp dealings” to be sanctioned), Treaties represent an exchange of solemn promises between Crown and Indigenous Nations, and Treaties are a sacred agreement.⁵² These Treaty principles appear to parallel the Indigenous perspective of the Treaties, however, as we have seen in their application in *Keewatin* this is not the case. Indigenous legal scholar Gordon Christie conducted a review of Treaty case law and the results highlight the “misguided approach” to treaty analysis by the Courts, including accompanying bias.⁵³ The common law review led by Christie points to a fundamental bias in favour of the Crown based on a premise that treaty interpretation outcomes are flawed from the outset.⁵⁴ With limited available options under Canadian law, there is more Treaty litigation initiated by Indigenous peoples. Upon increased litigation, the Supreme Court has provided further direction of treaty interpretation principles: Treaties are to be construed in the naturally understood sense of Indigenous peoples;⁵⁵ Treaties require “fair, large and liberal construction in favour of Indigenous nations”;⁵⁶ evidence by conduct or otherwise as to how parties understood treaty terms is of assistance to providing content to the treaty terms;⁵⁷ an adaptation of laws of evidence to include oral evidence;⁵⁸ and it is unconscionable for the Crown to ignore oral terms if concluded verbally and subsequently written by Crown representatives.⁵⁹ However, as previously demonstrated how these principles were applied differently in the trial and Supreme Court in *Keewatin*, with different weight given to Anishinaabe perspective, upon

⁵² *R v Badger*, [1996] 1 SCR 771 at para 41, 52 and 76 [*Badger*].

⁵³ Christie, *supra* note 17 at 158.

⁵⁴ *Ibid* at 159.

⁵⁵ *R v Taylor and Williams*, [1981] 34 OR (2d) 360 at para 236 (*R v Taylor Williams*).

⁵⁶ *Simon*, *supra* note 26 at para 27.

⁵⁷ *R v Taylor Williams*, *supra* note 55.

⁵⁸ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 87 [*Delgamuukw*].

⁵⁹ *R v Marshall*, [1999] 3 SCR 456 at para 78.

application of these treaty principles the division amongst Indigenous and non-Indigenous peoples appears to increase.

A newspaper account in Canada on any given day shows tension between Indigenous peoples and non-Indigenous people. This tension eventually mounted into a national grassroots movement called: 'Idle No More'.⁶⁰ This movement and Indigenous political leaders continue to call for a full and meaningful implementation of the Treaties as a means to address these tensions.⁶¹ Locally, in response to concerns of treaty interpretation, the leadership in Treaty No. 3 continues to take stances contrary to the Canadian government's economic ventures with the infringement of activities on their traditional territories that have damaging environmental impacts.⁶² As a result of this evident treaty interpretation disconnect between Indigenous peoples and the government, often the only available recourse for Indigenous peoples is to seek reprieve to the Canadian judicial system.

Given the lack of agreement between Indigenous peoples and Canada on constitutionally protected treaty rights, treaty interpretation has been largely tasked to the Canadian Courts. The judiciary are thus left with few choices: leave constitutionally treaty rights unprotected, detract and limit them, or fully implement the spirit and intent of the treaties. Facing these options the Courts have had to advance treaty rights by

⁶⁰ Idle No More Manifesto, online: Idle No More <<http://www.idlenomore.ca/manifesto>> (the Idle No More Manifesto describes how Treaty implementation is required to respect and recognize the sovereignty of Indigenous peoples in Canada).

⁶¹ "Sacred Treaties ~ Sacred Trust: Working Together for Treaty Implementation and Advancing our Sovereignty as Nations, a strategy for treaty implementation" (Resolution delivered at the Annual General Assembly, Winnipeg, June 2010), online: Assembly of First Nations <http://www.afn.ca/index.php/en/resolutions> (Assembly of First Nations is a national political body purporting to represent indigenous peoples in Canada).

⁶² Alan S. Hale, "Negotiations between Treaty 3 Grand Council and TransCanada on Energy East come to an angry end", *Kenora Daily Miner and News* (22 January 2015) online: Kenora Daily Miner and News <<http://www.kenoradailyminerandnews.com/2015/01/22/negotiations-between-treaty-3-grand-council-and-transcanada-on-energy-east-come-to-an-angry-end>>.

providing their own interpretation based on the evidenced put forward and following the Court's rules. Indigenous legal scholar Sakej Henderson states that: "without reflection or explanation, Europeans have evaluated their legal system as superior. Eurocentric legal thought supresses and controls all Indigenous forms of law, even those provisions interpreted as 'special' or *sui generis*."⁶³ The Courts have clearly attempted to provided strides in groundbreaking treaty interpretation cases, such as *Badger*, in which the Supreme Court stated that:

Treaties are analogous to contracts, albeit of a very solemn and special, public nature. They create enforceable obligations based on the mutual consent of the parties. *It follows that the scope of treaty rights will be determined by their wording, which must be interpreted in accordance with the principles enunciated by this Court.*⁶⁴

These legal principles were previously articulated and include what appears to be deference to Indigenous peoples through recognition of the existence of cultural differences, treaty interpretation to an 'everyday' sense and recognition that the articles of the Treaty may not be full and complete records.⁶⁵ However, this concluding statement in *Badger* emphasises that despite the apparent progress by the Courts of treaty interpretation, Canadian law continues to be the ultimate decision-maker and is entrusted with the binding application as to *their* understanding of Indigenous law. Interpretation for the Numbered Treaties may not be in accordance with Indigenous law given the lack of interpreters (lawyers and judges) holding an appropriate degree of understanding Indigenous law doctrine. The composition of the legal profession as well as the issue of precedent will now be discussed.

⁶³ Henderson, "Postcolonial", *supra* note 29 at 21.

⁶⁴ *Badger*, *supra* note 52 at para 76 [emphasis added].

⁶⁵ *Ibid.*

i. The Legal Profession

There are concerns with the non-Indigenous composition of the judiciary and members of the Bar. In Canada, lawyers and judges are taught and have degrees in Canadian law, not, Indigenous law. It is troublesome to vest sole responsibility of interpreting treaty rights to the Courts yet have no requirement to learning Indigenous law. Indigenous legal scholar John Borrows explains the problems that may arise: “in practice, there are enormous risks for misunderstanding and misinterpretation when Indigenous laws are judged by those unfamiliar with the cultures from which they arise.”⁶⁶ Indigenous treaty laws should be comprehended by their own understandings.⁶⁷ Knowledge of Indigenous law is not a requirement in the accreditation process to become a lawyer and potentially the future appointment to the bench in Canada. If a lawyer does not have direct experience in practice, then they might never be exposed to Indigenous peoples and laws prior to becoming a judge. Once they become a member of the judiciary however, there are rules provided by the Courts that they must follow, as outlined in cases such as *Badger*.⁶⁸ Legal precedent from the Supreme Court and other decisions do not provide all the necessities to handle the complexities of treaty and aboriginal rights litigation that is routinely brought before the Courts. *Keewatin* is the most recent Supreme Court decision of Treaty rights arising from Treaty No. 3. Through examination of this case, the interpretation problem by non-Indigenous legal professionals was concretely demonstrated. Further, as the Higher Courts opposed the trial judge who had heard the first-hand evidence of Anishinaabe law, and weighed it accordingly, evident disparities were shown. *Keewatin* demonstrates that although case law has established an

⁶⁶ Borrows, *supra* note 32 at 140.

⁶⁷ Henderson, “Constitutional Vision”, *supra* note 30 at 40.

⁶⁸ *Badger*, *supra* note 52.

onerous duty on the Courts to afford equal and balance weight to the Indigenous understanding and consider oral evidence and testimony from Indigenous peoples, application of these principles fall extremely short.⁶⁹ Indigenous legal scholar Sakej Henderson states that in particular, the oral histories of Indigenous peoples should not be “discounted” by judges, simply because they do not conform to their Eurocentric expectations.⁷⁰ The demand of requiring proven, skilled capabilities to interpret Indigenous law is analogous to the stipulation of accreditation to become a Canadian lawyer (as legal training and demonstrated competency is deemed a requisite to be qualified to interpret Canadian law, so too should a separate standard exist, measured against Indigenous requirements for the ability to apply and interpret Indigenous law).

Indigenous legal and international scholar Sharon Venne argues that any treaty analysis requires Indigenous peoples to represent themselves, to indicate their understanding of the treaty from within their cultural and spiritual context.⁷¹ Indigenous legal scholar Sakej Henderson supports this position by stating that only those who have been taught within the system itself, in the language and through lifelong learning can really comprehend the deep structure of Indigenous laws and its operations.⁷² Learning Indigenous law is not easy knowledge to gain as the process is embedded in an active belief and practice of an Indigenous way of life. However, learning Indigenous laws is necessary if the Canadian Courts continue to interpret Indigenous treaty laws.⁷³ The predominately non-Indigenous composition of the judiciary and members of the Bar are

⁶⁹ *Delgamuukw*, *supra* note 58 at para 87.

⁷⁰ Henderson, “Constitutional Vision”, *supra* note 30 at 36.

⁷¹ Sharon Venne, “Understanding Treaty 6: An Indigenous Perspective” in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada* (Vancouver: UBC Press, 2002) 173 at 206 [Venne].

⁷² Henderson, “Constitutional Vision”, *supra* note 30 at 36.

⁷³ Borrows, *supra* note 32 at 385.

at a disadvantage in the ability to apply and interpret Indigenous law related to the Numbered Treaties. Indigenous treaty law is difficult to comprehend by others not of that background, primarily as Indigenous law is not typically ‘learned’ but ‘lived’. This imposes a practical component to learning Indigenous law; a requirement of living these spiritual laws as a way of life. The Anishinaabe Treaty No. 3 Elders describe this active practice requirement of the traditional belief system: “we have [a Constitution]...but we must come to know it, understand it, and live it ourselves. Before the Treaty, we really never had the need to explain our Constitution to anyone other than to ourselves and we did this by living it.”⁷⁴ Knowledge of Indigenous law is different from understanding Indigenous law, as the understanding requires an additional component: it must be integrated and incorporated into one’s way of life.

There are challenges in the understanding of Indigenous law as it is presumably not consistently applied in the daily lives of non-Indigenous peoples. Indigenous law is animate in our language, and as you will see that through this thesis its application must be lived and can be learned to a certain degree. It is my hope that an Anishinaabe explanation of the Treaties provided from myself as an Anishinaabekwe (Anishinaabe woman) and Indigenous legal practitioner; Indigenous legal professionals will help non-Indigenous lawyers begin the process of learning Indigenous treaty law. Indigenous leaders call for all Indigenous peoples to assume the undertaking of ensuring full and accurate treaty interpretation occurs, while non-Indigenous peoples must respect this approach.⁷⁵ Indigenous researcher Margaret Kovach confirms this approach: “as Indigenous researchers, our responsibility is to assist others to know our worldview in a

⁷⁴ The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 16.

⁷⁵ Cardinal, “Unjust”, *supra* note 2 at 92-93.

respectful and responsible fashion.”⁷⁶ This thesis will not only discuss how key Anishinaabe treaty laws are understood by Anishinaabe, but will be articulated in a way that is accessible to reach the Canadian legal audience and help the legal community to grasp an Anishinaabe legal understanding. It is hoped that this method may be a means to ‘spending time with us’, as required and routinely advocated from my Elder advisors through my upbringing.

ii. Legislation Restricting Precedent

In addition to problems with the Canadian demographic of legal professionals, there remains an inherent structural problem in the Court’s ability to accurately interpret and apply Indigenous law. *Stare decisis* is the rule in Canada. Current decisions including *Keewatin*, are based on precedent which may have been made during a time period when access to justice for Indigenous peoples was either illegal or unavailable. This problem was exemplified in *Keewatin* when the Supreme Court cited *St. Catherine’s*.⁷⁷ The fundamental flaws were earlier reviewed including an inaccurate finding of fact to the Anishinaabe not objecting. Part of this 2014 SCC finding stemmed from no Canadian legal objection recorded from the Anishinaabe in Treaty No. 3. The *St. Catherine’s Milling* was a decision from 1888 in which the Anishinaabe were never informed of any court proceeding affecting them.⁷⁸ In 1923, the Anishinaabe obtained services of a local lawyer to obtain information of their own reserves and their financial affairs from Indian

⁷⁶ Margaret Kovach, *Indigenous Methodologies: Characteristics, Conversations, and Contexts* (Toronto: University of Toronto Press, 2009) at 14 [Kovach].

⁷⁷ *Grassy Narrows*, *supra* note 37 at para 40.

⁷⁸ Kinew, *supra* note 10 at 131.

Affairs.⁷⁹ When the Chiefs received no response from the Superintendent of Indian Affairs they wrote to the local newspaper (evidence of objection was relied on in the lower decision of *Keewatin*).⁸⁰ In 1927 there was an amendment to the *Indian Act* that outlawed the raising of funds and undertaking legal activities regarding claims, which remained in effect until the legislative provisions were removed in 1952.⁸¹ In *St. Catherine's* and applied in the recent *Keewatin*, the Anishinaabe were never informed of litigation and were unrepresented. Indigenous legal scholar Sakej Henderson believes that Canadian law was developed by, and for the benefit and protection of Euro-Canadians.⁸² Under *stare decisis*, however, the Courts remain bound to previous decisions and without a mass upheaval of the common-law system, reconciling previous findings of fact or law has yet to occur. Relying on *stare decisis* as a rule of law is detrimental to Indigenous peoples positions. Reliance on previous decisions of the Courts in determining and interpreting the Treaty calls for confidence on decisions, which restricted the ability of Indigenous peoples to access these systems. Alternatively, Indigenous peoples may or may not have had opportunities to provide submissions and have their evidence weighted adequately. Precedent consideration disallows opportunity for growth and development in the law when the Courts are bound to previous decisions that may not have had a full opportunity for the positions of Indigenous peoples and evidence to be initially brought forth before the Courts. This has been detrimental to interpretation of the Numbered Treaties as shown in the 2014 Supreme Court decision. The legislation, which barred access to the justice system for Indigenous peoples in Canada, will now be discussed.

⁷⁹ *Ibid* at 140.

⁸⁰ *Ibid*.

⁸¹ *Ibid*.

⁸² Henderson, "Postcolonial", *supra* note 29 at 12.

The legislation that was initially intended to administer the Treaties, the *Indian Act of 1876*, is evidence of the discord between the origin of Canadian treaty law and the common-law. This legislation was unilaterally imposed on Indigenous peoples within Canada without adequate consultation or consent.⁸³ Indigenous peoples quickly realized that the *Indian Act*, and associated administration, in no way envisioned the spirit of the creation of the Treaties and can be viewed as a breach of the Treaty.⁸⁴ The Late Harold Cardinal summarizes the failings of the *Indian Act* as legislation that was supposed to implement the terms of the treaty, yet was drafted by those solely concerned with colonial laws, thus subjugated colonial rule to the very people it was supposed to protect.⁸⁵ Under the *Indian Act*, traditional ceremonies of Indigenous peoples were outlawed, children were forcibly removed from their parents and home communities (Indian Residential School era, the last school closed in 1996), voting was not permitted and movement was restricted to on-reserve (people were only allowed to leave the reserve with approval from the Indian Agent). Indigenous people were prohibited from retaining lawyers to engage in the fight of the cause of any band and made it illegal to raise money to commence a claim against the Crown.⁸⁶ Restricting the ability to have access to the law is legal oppression by the State of Canada on Indigenous peoples. The *Indian Act* was revised in 1952 to remove most of these provisions, however, the damages still remain. There are remnants of the damages caused by the *Indian Act* within our current legal system, as the Courts rely on precedent made during a time period when it was prohibited under Canadian law for Indians to be heard by the Courts. Using

⁸³ Cardinal, “Unjust”, *supra* note 2 at 101.

⁸⁴ *Ibid.*

⁸⁵ *Ibid* at 44.

⁸⁶ The Indian Act, Online: Indigenous Foundations Arts UBC <<http://indigenousfoundations.arts.ubc.ca/home/government-policy/the-indian-act.html>>.

legislation, in particular the *Indian Act*, Canadian law has been used as a means of oppression against Indigenous peoples. The *Keewatin* decision is an example of direct legal oppression occurring in the present day.

As the Canadian court classifies the Treaties as *sui generis*, Sakej Henderson argues that this requires a different approach to treaty interpretation, a *sui generis* approach.⁸⁷ Sakej defines *sui generis* as a “distinct knowledge system” separate from Euro-Canadians.⁸⁸ Under Canadian law, this legal classification of the treaties creates a new space, one in which Indigenous peoples and Canadians may come together to and work towards treaty interpretation, which will essentially displace the predominant flawed Canadian common-law.⁸⁹ This *sui generis* approach will allow for respect of each other, respective legal systems, and laws. Sakej argues that the Courts are “uncomfortable and incapable” of articulating *sui generis* interpretations outside of the existing Canadian legal system and knowledges.⁹⁰ However, as one culture cannot be judged by the norms of another, an urgent need is identified and the Canadian Courts must adopt a different approach to treaty interpretation and implementation.⁹¹ In recognition of this new space to be created, a *sui generis* approach that is compatible with the aspirations of Canadian law is what this thesis attempts by explaining Anishinaabe law to a Western legal audience.

⁸⁷ Henderson, “Constitutional Vision”, *supra* note 30 at 25.

⁸⁸ *Ibid* at 31.

⁸⁹ *Ibid* at 26.

⁹⁰ *Ibid* at 31.

⁹¹ *Ibid* at 34.

Conclusion

This thesis will provide an Anishinaabe legal understanding of the spirit and intent of the treaties, which can be of assistance to the Courts with their application of treaty law in Canada. Law is transformative and this thesis argues that Canadian treaty law needs to evolve given the historic, and current, fundamental flaws within the system. The Canadian Courts speak to this application and have held that Indigenous law is not a merely a matter of an Indigenous ‘perspective’; it is law.⁹²

The legal principles announced by the Courts should be viewed as part of the ongoing process of moving towards a more ideal State.⁹³ To achieve this, Indigenous law must be recognized and accepted as law within the Canadian legal landscape. Indigenous legal scholar Borrows argues that: “the denial of Indigenous legal traditions has been a painful and harrowing experience for many Indigenous people.”⁹⁴ As members of society, law is fundamentally important and governs all aspect of daily life. Law is made between nations, governs relationships and imposes conduct of one’s self and role within society. Anishinaabe Elder Smokey Bruyere reiterates the pre-contact existence of Anishinaabe law: “there is no question but that the function of law did and does exist in Aboriginal communities. It has always been puzzling to me why legal theorists aren’t more interested in how Aboriginal societies managed all this without police or a formal system of courts.”⁹⁵ To Indigenous peoples, law is operational everywhere and does not exist simply within the confines of the recognized legal systems in Canada. Grand Council Treaty #3 states that:

⁹² Othuis, Kleer, Townshend, *supra* note 35 at 177.

⁹³ Christie, *supra* note 17 at 213.

⁹⁴ Borrows, *supra* note 32 at 170.

⁹⁵ Bruyere, *supra* note 16 at 6.

We will see the impacts of historical events upon our Nationhood and our government; and that although certain adaptations have been necessary, traditional governance is as dynamic and valid as it always was. We will come to see that our law-making capacity is the only means of reclaiming our inherent jurisdiction. Thus, we will see that our laws are real. And how traditional values, principles and beliefs will come to be an integral part of our laws.⁹⁶

This thesis will provide an explanation of Anishinaabe law making in relation to Anishinaabe treaty law. One way Indigenous peoples exercised law making authority is through treaty making. Prior to treating with Europeans, Indigenous peoples made Treaties with each other, including the Anishinaabe.⁹⁷ Grand Council Treaty #3 states that Treaties were diplomatic relations engaged by the Anishinaabe Nation on Turtle Island: “treaties of peace, friendship, alliance, rights of passage to regulate trade and commerce, and other arrangements were conducted among the peoples as sovereign nations.”⁹⁸ Treaties are an exercise of sovereignty by a ‘free and independent peoples,’ the act of which created a significant relationship with the other party through these times of union, peace and reciprocity.⁹⁹ The Anishinaabe in Treaty No. 3 state that “our Treaty with the Crown was an agreement between sovereign nations. We will come to understand our traditional constitution is a vibrant body of Sacred and Traditional Law that also forms the basis for contemporary laws.”¹⁰⁰ Given this relevancy of Anishinaabe treaty law, the problems identified within the current approach of treaty interpretation taken by Canadian Courts and how vital treaty implementation is for the State of Canada,

⁹⁶ The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15.

⁹⁷ Stark, *supra* note 9 at 148.

⁹⁸ The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 4.

⁹⁹ Dave Courchene Jr., (Presentation delivered at the 40th Anniversary commemorating the Anishinaabe Park Occupation, Kenora, 23 August 2014) [unpublished] Online: <<http://www.cbc.ca/news/canada/thunder-bay/anishinaabe-park-occupation-observed-in-kenora-40-years-later-1.2744139>> (Anishinaabe as “free, sovereign and independent peoples” is a concept that respected Anishinaabe Elder and leader Dave Courchene Jr. speaks of often).

¹⁰⁰ The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 15.

this thesis will focus on an explanation of Anishinaabe treaty law so that it may be better understood by non-Indigenous lawyers, in order to be properly applied by the Canadian Court.¹⁰¹

¹⁰¹ *Ibid* at 9.

Chapter III. METHODOLOGY

In order to provide insight to an Anishinaabe legal perspective of the Treaty, it is only appropriate to utilize Indigenous methodology. It is important to use an appropriate methodology as methodology shapes the analysis by framing the questions to be posed and determines the methods and instruments to be used.¹⁰² Indigenous methodology has been described as: “research by and for indigenous peoples, using techniques and methods drawn from the traditions and knowledges of those peoples.”¹⁰³ Indigenous methodology will be used in this thesis.

While the purpose of this thesis is to make Anishinaabe law accessible to a non-Indigenous legal audience, a grounding of key concepts through the *Vienna Convention of the Law of Treaties* will be used to aid in explanation of an Anishinaabe legal understanding of Treaty No. 3. This is congruent with a *sui generis* approach to redefine the space to interpret the Treaties by including Anishinaabe law. Chapter two reviewed current difficulties in achieving an understanding of Anishinaabe law by non-Indigenous peoples. Practical insight to Anishinaabe law will be provided to a non-Indigenous legal audience from making analogies by using another legal model, international treaty law.

To address the failure of Canadian law to include the Anishinaabe perspective of the Treaty, it is imperative to use Indigenous knowledge to rewrite and rectify “our position in history.”¹⁰⁴ To achieve this goal, Indigenous scholar Stan Wilson lobbies for a release of our dependency on Western research tradition.¹⁰⁵ The benefit that Indigenous

¹⁰² Beth Blue Swadener and Kagendo Mutua, “Decolonizing Performances: Deconstructing the Global Postcolonial” in Norman K. Denzin, Yvonne S. Lincoln & Linda Tuhiwai Smith eds, *Handbook of Critical and Indigenous Methodologies* (Los Angeles: Sage Publications, 2008) 31 at 32.

¹⁰³ *Idid* at Preface x.

¹⁰⁴ Joe L. Kincheloe and Shirley R. Steinberg, “Indigenous Knowledges in Education: Complexities, Dangers, and Profound Benefits” in *ibid*, 135 at 147.

¹⁰⁵ Kovach, *supra* note 76 at 30-31.

knowledge offers to other Nations is the chance to comprehend another view without paternalism and without condescension.¹⁰⁶ This thesis will foster an appreciation of how fundamental the Treaties are in relation to the existence of the sovereignty Canadians enjoy. To reconcile relations between Indigenous and non-Indigenous citizens, appropriate use of Indigenous methodology is critical.

This purpose of Indigenous methodology is essential with this thesis, which advocates for a full implementation of the Numbered Treaties in Canadian law, emphasizing Indigenous laws. Scholars state the goal of using Indigenous methodology is to ‘decolonize’ Indigenous societies and contribute to radical social change.¹⁰⁷ Non-Indigenous interpretive scholars should be part of this change, however, Indigenous peoples must determine its implementation.¹⁰⁸ In order to decolonize Canadian treaty law, we need to use Indigenous law and use Indigenous law as the Indigenous methodology.

As part of methodology, a key element of the research process is the relationship of respect.¹⁰⁹ While Western research centres respect on ethical considerations grounded in administrative policies, Indigenous research refocuses respect as relational, concerned with “doing research in a good way”.¹¹⁰ Doing research *mino*, ‘in a good way’ means that the research must be conducted with the highest regard to obtaining and utilizing the knowledge in a way which follows traditional Indigenous protocols of *manaaji’idiwin*, respect.¹¹¹ There is a greater responsibility in conducting Indigenous research as there are

¹⁰⁶ Marie Battiste, “Research Ethics for Protecting Indigenous Knowledge and Heritage: Institutional and Researcher Responsibilities” in Denzin, Lincoln & Smith, *supra* note 102, 497 at 508.

¹⁰⁷ Swadener and Mutua, *supra* note 102, 255 at 257.

¹⁰⁸ *Ibid* at Preface xi.

¹⁰⁹ Kovach, *supra* note 76 at 35.

¹¹⁰ *Ibid*.

¹¹¹ *Ibid*.

several audiences which must be satisfied: it must be accurate to the general Indigenous community, the method for arriving at findings must be accessible to the non-Indigenous legal community, and the findings as well as means for arriving must resonate with other Indigenous researchers (as they are in the best position to evaluate).¹¹² To fulfil Indigenous research methodology, this thesis not only has to be meaningful and helpful to non-Indigenous peoples, but there is a larger purpose in terms of understanding the bigger picture of who we are as Anishinaabe.¹¹³

An Indigenous research framework honours the traditional value of *manaaji'idiwin*, respect, as well as giving back to the community (in relation to a purpose).¹¹⁴ By using and applying traditional Indigenous knowledge this thesis attempts to rebuild Nations and peoples. Accountability and consequences are high because as an Indigenous researcher “you are answering to all your relations when you were doing research”.¹¹⁵ Research conducted must respect the dissemination of knowledge (ceremony undertakings), honour the knowledge keepers (our Elders and Spirit guides), as well as be answerable to our ancestors and future generations.¹¹⁶ This respect and accountability concept will be greater understood upon application of Sacred laws in chapter five of this thesis.

¹¹² *Ibid* at 134.

¹¹³ The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 12.

¹¹⁴ Kovach, *supra* note 76 at 134 (Kovach devotes chapter 8 in her book to: ‘the Ethics and Reciprocity of Doing Indigenous Research in a Good Way’).

¹¹⁵ *Ibid* at 35.

¹¹⁶ *Ibid* at 36.

i. Application of Sources

As stated, this thesis is limited as it is merely an explanation of my understanding of Anishinaabe law of Treaty No. 3, building off my restricted knowledge of Anishinaabe law. Indigenous legal scholar Harold Johnson states:

I do not speak for all Aboriginal peoples. I do not have that right. I only speak for myself, for my ancestors for seven generations behind me who prepared the way for me, and for my children and grandchildren and great grandchildren who are yet to come, seven generations ahead.¹¹⁷

I am an Anishinaabekwe from Treaty No. 3, born and raised in Wauzhushk Onigum Nation, a Nation located in North-western Ontario. Given my upbringing, supplemented by my education in my life experience and careers throughout the territory, I am versed with traditional knowledge and teachings from Elders but can only speak to that which I know, from the territory I belong. Although I was raised in an environment rich with traditional knowledge, it has only been the past decade of my life where I have been instructed in our ways. These instructions primarily came to me through the gift of becoming a mother to three young Anishinaabe children. Being entrusted to care for children showed me the importance of our ways, which had been severed by Residential Schools and non-practicing in our family during my generation. As the Anishinaabeg are traditionally an oral society and personal interviews could have been one possible method, I did not choose this route. Seeking out traditional knowledge is heavily burdened with responsibilities. Indigenous legal scholar Harold Johnson states that:

The oral historian is bound by the internal consistencies of our language and by the law of consequence. Oral historians know in their deepest core that if they misconstrue, add, or delete, then they, their

¹¹⁷ Harold Johnson, *Two Families: Treaties and Government* (Saskatoon: Purich Publishing, 2007) at 11.

children, and their children after them will suffer the negative consequences of it.¹¹⁸

Given the importance of the accountability with disseminating knowledge, and as I have only received instructions for the past decade of my life, I do not feel confident in my capabilities to share and honour the sacred knowledge bestowed. Additionally, I chose not to conduct oral interviews as I felt an interview format would be an unsuccessful attempt to re-create my received (and continuing) education as many of my teachers have passed on into the spirit world. With the rich documented sources available, I felt that oral interviews were not necessary for the research purposes of this thesis and felt supported through utilizing previous works conducted of other Indigenous researchers. As a result, this thesis' *gikendaasowin* and *nibwaakaawin* (knowledge and wisdom, which provides an understanding) is restricted to speaking to only my limited experience as I will be articulating only what is known to me.

As I chose not to conduct oral interviews in this thesis, it is important that the drawing on primarily works commissioned by Indigenous peoples is congruent with my known Anishinaabe understanding. It is imperative that the selection of written sources supports and does not detract Anishinaabe law. Indigenous legal scholar Sakej Henderson concurs that Indigenous legal traditions are not a singular vision of 'a good mind', but a balanced relationship of many.¹¹⁹ Reliance on previously written sources is an opportunity to strengthen our collective Indigenous conception, and ownership, of our history and laws. Indigenous legal scholar Heidi Stark states although portions of her research on Anishinaabe treaty law focuses on other Indigenous Nations, "findings have broader implications and can inform our understanding of Anishinaabe treaty

¹¹⁸ *Ibid* at 43.

¹¹⁹ Henderson, "Constitutional Vision", *supra* note 30 at 34.

practices”.¹²⁰ There are many commonalities between the various Indigenous Nations’ treaty laws within Canada, just as there are similarly parallels between common-law Countries.¹²¹ Thus, I carefully use written sources of treaty law from other Indigenous Nations when they support my Anishinaabe teachings and understanding. It is important for my research that these sources not only be accurate, but the spiritual foundation observes the traditional Anishinaabe processes and spiritual laws.¹²²

Whenever possible, I relied on sources documenting first-hand the traditional knowledge keepers, usually revered Elders in our society as they are “custodians of Sacred and Traditional Law and...give us the interpretations”.¹²³ Frequently cited sources in this thesis promotes a preference of Elders whose oral research and testamentary collection was conducted in a manner congruent and respectful of Indigenous laws.¹²⁴ This respectful data-collection process included laying down tobacco as a gift offering when sharing knowledge and the presentation of blessed eagle feathers in appreciation to those who shared the knowledge.¹²⁵ It is interesting to note that there are several parallels between this research collection process and the sanction of Treaty No. 3. Anishinaabe Elder Harry Bone, Giizis-Inini, explained the reasons for this commonality: “what we share [the research] is alive – it has an *ojichaagowin* (spirit).”¹²⁶ Anishinaabe animate concepts will be further explained in this thesis. Some concepts that are considered inanimate in the Western world and English language are animate in Anishinaabemowin,

¹²⁰ Stark, *supra* note 9 at 148.

¹²¹ Cardinal, “Treaty Elders of Saskatchewan”, *supra* note 9 at 9 (Cardinal devotes a chapter to the shared foundation of the Numbered Treaties which exists amongst the various Indigenous peoples within Canada. In addition, Treaty No. 7 was made with multiple Indigenous nations and languages yet the common understanding of the treaty and principles remains unvaried from Nation to Nation).

¹²² *Ibid* at 1.

¹²³ The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 15.

¹²⁴ Linklater & Bone, *supra* note 11 at 122-123.

¹²⁵ Wastesicoot, *supra* note 12 at 161; Linklater & Bone, *supra* note 11 at 122-123.

¹²⁶ Linklater & Bone, *supra* note 11 at 124.

such as this research of the Treaty, by the way in which it was collected and shared. This thesis' research method is similar to the creation of the Treaty, as it too is alive and has a spirit. As this thesis is living with a spirit, it was important for me in my research to use these sources 'in a good way', which honoured the traditional protocols in the documenting and collecting of Sacred laws. Throughout this thesis journey, I too was reminded by my Elder spiritual advisors to 'lay out tobacco'; a process to humbly seek guidance and direction as well as offer prayers of gratitude. This process will be concretely applied in chapter four, the creation of Treaty No. 3.

In addition to direct quotes from Elders on the specifics of treaty law, I will also use observations of non-Indigenous written works of Treaty No. 3, specifically Treaty Commissioner Lieutenant-Governor Alexander Morris and newspaper records of the negotiations at the time of treaty making. Generally these sources provide little insight to Indigenous law, however, they do verify historical facts and will be used wherever applicable. As these sources were not written from an Indigenous basis and lacked understanding of an Indigenous viewpoint, less emphasis will be placed on these accounts. The primary sources of this thesis, in order to explain Anishinaabe law, will be Indigenous works conducted in a spiritual way, which includes honouring Indigenous laws and protocols. It is only within this framework that any examination of the Treaty may be undertaken.

ii. Indigenous Research Instruments

After discussing the sources used in this thesis and why they are selected, we will now review the instruments to be used. The instruments for Indigenous methodology

include: prayer, ceremony, pipe, sacred medicines and offerings.¹²⁷ This will be expanded in chapter four, the formation of Treaty No. 3, where these mechanisms will be applied directly. In conducting Indigenous research there are significant differences from Western research, including the instruments utilized. As our instruments can be prayer, pipes, drums, songs, sacred items and medicines, all of these instruments have several protocols they must go through. Indigenous methodologies include ceremonies such as sweats, visions and spirit lodges.¹²⁸ These “ceremonies, protocols, and ways of free people cannot be separated from their underlying values. Rather, they are there to affirm values. This is integral to a holistic epistemology.”¹²⁹ As such, when discussing an Anishinaabe understanding of the conception and ratification of Treaty No. 3, the main focus will be on the protocols and laws observed.¹³⁰

In conducting research of the Treaty it is important to use the traditional language (Anishinaabemowin), as language is the lens in which we view our ways. Grand Council Treaty #3 states that reverting “the knowledge is extremely valuable but in addition [requires] a clear understanding of our concepts and cultural nuances inherent within our own language.”¹³¹ Anishinaabe Elder Harry Bone, *Giizis-Inini* describes his grandmother’s teaching of the importance of Anishinaabemowin: “you have to understand your own language; otherwise you will lose your own way of thinking. We cannot live on translated languages alone. Our history and way of doing things is

¹²⁷ Kovach, *supra* note 76 at 72.

¹²⁸ *Ibid* at 72-73.

¹²⁹ *Ibid* at 73.

¹³⁰ Linklater & Bone, *supra* note 11 at 129 (*inakonigawin* is translated as: laws, protocols).

¹³¹ The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 12.

embedded in Anishinaabemowin.”¹³² Contained in Anishinaabemowin there are great meanings in the language,¹³³ which aids in interpretation:

We need to know who, and what we are, if we are to maintain ourselves as originally intended by the Great Spirit. Our language, *Anishinaabe-mowin*, is our history and it is also the essence of our continuity. Through our language we recall and celebrate the sacred events in our history as they were passed on to us by our ancestors over countless generations. These become traditional teachings that embody our spirituality and define our sacred relationship to the land and all life in creation. To understand our teachings is to understand our culture and who we are as Anishinaabe.¹³⁴

The sacred meanings held in Anishinaabemowin often cannot be translated or the full meaning adequately captured by the English word.¹³⁵ As this thesis is directed for a non-Indigenous legal audience, the bulk of this thesis is in the English language. However, throughout this thesis, I endeavour to use Anishinaabemowin as a means of language capacity building, which supports the aspirations of research towards a greater purpose of strengthening Indigenous communities and peoples.¹³⁶ In addition, when there are words that hold a significant meaning, or, should be used in a way that denotes the high respect it deserves, I will use Anishinaabemowin as a means to better capture that essence. The language, as well as pipes and ceremony, will be the primary instruments in providing an explanation of Anishinaabe law of Treaty No. 3.

¹³² Linklater & Bone, *supra* note 11 at 123.

¹³³ The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 12.

¹³⁴ *Ibid* at 1.

¹³⁵ The Grand Council Treaty #3, “We have kept our Part of the Treaty.” (The Anishinaabe Understanding of Treaty #3, 3 October 1998) [unpublished] at 30 [The Grand Council Treaty #3, “We have Kept”] at 2.

¹³⁶ Christopher Dunbar Jr. Smith, “Critical race theory and indigenous methodologies” in Denzin, Lincoln & Smith, *supra* note 102, 85 at 98.

iii. Indigenous Legal Orders

After reviewing the sources and instruments used in this thesis I will now provide a cursory analysis of Indigenous ways of being, with an emphasis on Indigenous laws as it is inherently different from a traditional Western viewpoint of law. The Treaties were negotiated with different worldviews and as this thesis is using a *sui generis* approach, knowledge of the Anishinaabe worldview is an absolute.¹³⁷ The Indigenous way of learning “is culturally integral to the transmission of knowledge through First Nations oral and spiritual traditions. These requirements need to be carefully integrated in any ongoing treaty process that seeks to derive an Indian understanding of treaty.”¹³⁸ By providing a background structure on Indigenous ways of being as a narrative, it is intended to better assist non-Indigenous peoples in understanding this thesis’ application of Anishinaabe law to the Treaties.

The Indigenous legal system and the function of law are built into the framework of Indigenous society.¹³⁹ Anishinaabe society is organized not only to facilitate but also to preserve Indigenous legal traditions. To achieve this goal “law and culture are inextricably intertwined.”¹⁴⁰ To have a “full conception of what law is and how it works,” an understanding of how Anishinaabe society was organized at the time of treaty making is critical.¹⁴¹

The Late Anishinaabe Elder Tobasonakwut Kinew explained how the Anishinaabe Nation in Treaty No. 3 are simply part of a larger Nation of Indigenous

¹³⁷ Christie, *supra* note 17 at 197.

¹³⁸ Cardinal, “Treaty Elders of Saskatchewan”, *supra* note 9 at 2.

¹³⁹ Bruyere, *supra* note 16 at 5.

¹⁴⁰ Matthew L. M. Fletcher, “A Perfect Copy: Indian Culture and Tribal Law” in Jill Doerfler, Niigaanwewidan James Sinclair & Heidi Kiiwetinepinesiik, eds, *Centering Anishinaabeg Studies* (Michigan: Michigan State University, 2013) 191 at 192.

¹⁴¹ *Ibid.*

peoples in Turtle Island who were “given a special way of life that is recorded and celebrated in a sacred dance and ceremony”.¹⁴² For the Anishinaabe, order was maintained through the familial structure of the *doodem*, or clan system, which originated as a gift from “incorporeal beings (who) offered to guide the Anishinaabe in the conduct of their affairs”.¹⁴³ Anishinaabe author the Late Basil Johnston defines *doodem* as “that from which I draw my purpose, meaning, and being”.¹⁴⁴ *Doodem* was how Anishinaabe society functioned, roles of governance, defense, education, medicine practice and providers of necessities were discharged by trained members who were born into that clan or *doodem*: “as these animals were endowed with certain traits of characteristics, so did the Anishinaabe endeavour to emulate that character and make it part of themselves. Each animal symbolized an ideal to be sought, attained, and perpetuated.”¹⁴⁵ For example, I am a member of the bear clan (*makwa nindoodem*). I was taught at an early age that this means who all my relations are, both human and animal: all Anishinaabe members of that clan and bears are my direct relatives as we share and hold the spirit of the bear. In Anishinaabe society, bears have strength and traditionally performed justice roles and the peacekeeping functions as protectors and healers within our society. Given my career choices as a lawyer it is seemingly appropriate that I am a member of the bear clan. As part of living as an Anishinaabekwe, I respect my clan - *makwa nindoodem*- and strive to honour this through my actions. To reiterate, the clan system unites every

¹⁴² The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 2.

¹⁴³ *Ibid.*

¹⁴⁴ Basil Johnston, *Ojibwe Heritage* (Toronto: McClelland & Stewart, 1976) at 61 [Johnston].

¹⁴⁵ *Ibid* at 60 and 53.

Anishinaabe in Treaty No. 3 in function, birth, and purpose and ensures that all societal needs are met.¹⁴⁶

Aside from the societal organizational structure, individual Anishinaabe members have spirit names retrieved from those holding those capabilities, such as sacred medicine people. Spirit names are how the spirits know and acknowledge us in the spirit realm and an individual must live their life in a way that honours that spirit.¹⁴⁷ Anishinaabe author the Late Basil Johnston describes the importance of this naming ceremony ritual, *wiindaawasowin*: “with the gift of name...a duty to espouse the ideals embodied in his name was imposed upon the infant, and upon the parents and obligation to guide the child in the pursuit of those ideals.”¹⁴⁸ As names are often descriptive of an action, often relating to natural elements or the spirit world and beings, they tend to not translate adequately into the English language as a literal meaning. The best way I can describe the meaning of my name is: after much turmoil in the atmosphere, with a heavy disruption in the sky, suddenly, there appears a bright, clear, blue, sky. It has been told to me that it is an incredibly beautiful day, one where you feel the presence of spirit and the love of Creator and the land, where you feel happy to be alive. That action, that appearance, that feeling, is my name: *Mizhikan*. As my name is *Mizhikan* and I am a member of the bear clan, I am further instructed how best to proceed in my affairs and by extension, conducting this thesis’ research.

At the centre of the organization structure of Anishinaabe society is the sacred relationship that Indigenous people hold to the land. Anishinaabe believe that *Gitché Manitoo*, Creator placed them here and would provide all that they needed through *Aki*,

¹⁴⁶ *Ibid* at 72.

¹⁴⁷ *Ibid* at 122.

¹⁴⁸ *Ibid*.

our Mother Earth: “the land which produces the food, shelter and all necessities of life, is all-nurturing and provided for us by our Mother. The Creator, or Great Spirit is believed to be our Father.”¹⁴⁹ If you do not take care of the land, it will not take care of you.¹⁵⁰ In being interconnected and ‘part of the land’, if it is destroyed, it becomes useless and you are therefore destroying yourself as it is all connected and required to live in balance.¹⁵¹ Indigenous legal scholar Gordon Christie states that because of this relationship to the land, this does not allow for a release from *Aki*.¹⁵² Indigenous people believe the “land was to be shared by all and from this flowed the fundamental law [to] respect all things and everybody around.”¹⁵³ In application of this concept, Creator provided *Aki* for the equal use and benefit of all spirit beings. Anishinaabe Elder Francis Nepinak, *Giiwedinanang*, states that:

Understanding where we come from is vital to our identity. The Elders are sharing their creation stories with us to assist us in coming to know who we are. These sacred narratives tell us that we are spirit first and human second. Our relationship with the land is spiritual. We are related to everything on the earth. We were the last placed on this earth in the order of creation and we always recognize those that came before us.¹⁵⁴

With the vital benefits Mother provides, there are reciprocal duties.¹⁵⁵ It is the tradition of Indigenous Nations, including the Anishinaabe, to honour the land given by Creator through various offerings including ceremony and dance, which respect the sacredness of Mother Earth. Sacrifices of appreciation are made in return of all that comes from the

¹⁴⁹ Hildebrandt, “Treaty 7”, *supra* note 11 at 88.

¹⁵⁰ Cardinal, “Treaty Elders of Saskatchewan”, *supra* note 9 at 15.

¹⁵¹ Hildebrandt, “Treaty 7”, *supra* note 11 at 12.

¹⁵² Christie, *supra* note 17 at 197-198

¹⁵³ Hildebrandt, “Treaty 7”, *supra* note 11 at 96.

¹⁵⁴ Linklater & Bone, *supra* note 11 at 13.

¹⁵⁵ Aimee Craft, *Anishinaabe Nibi Inaakonigewin Report: Reflecting the Water Laws Research Gathering conducted with Anishinaabe Elders* (Report, created at Roseau River, Manitoba, June 20-23, 2013, revised spring 2014) [unpublished] (the Anishinaabe in relation to *Nibi*, and the power of the Water has particularly emphasized this point, as it is life-giving and life-taking).

land.¹⁵⁶ The practice is to offer sacred medicines such as tobacco, or food offerings, such as wildberries. These offerings also serve as a reminder that the sacredness of the land is to be respected and nothing is to be wasted.¹⁵⁷ The honouring of the land is a reciprocal active practice of our laws, which we will see in the succeeding chapter, had occurred during the conception of Treaty No.3.

As indicated in this structure of Anishinaabe ways of being, the origin of law comes from *Gitche Manitoo*, Creator. Law was gifted to the Anishinaabe from Creator since the beginning of time and this is what is meant by the word ‘inherent’.¹⁵⁸ Anishinaabe history, stories, ways, which include laws, have been recorded in many ways. Laws were written on birch bark scrolls and on the land through various forms, including Petraforms at the gathering site of the Anishinaabe in the Whiteshell region bordering the provinces of Manitoba and Ontario.¹⁵⁹ At some point in all societies, law originated from an oral aspect, which relied on oral transmission. Canadian common law similarly uses oral transmission of law. One comparative example in Canada is the unreported judicial decisions. Chapter four will focus on the means in which Treaty No. 3 was recorded under Anishinaabe law.

As an oral society, the need to share our Anishinaabe knowledge to the next generation is vital: “our knowledge of the land and of the sacredness of certain places hold our truths and remind us of our relationship to the spirit world. We have a sacred responsibility to share this knowledge with future generations.”¹⁶⁰ These sacred stories are analogous to Canadian legal cases and precedent in how they have been perpetually

¹⁵⁶ Hildebrandt, “Treaty 7”, *supra* note 11 at 89.

¹⁵⁷ *Ibid* at 107.

¹⁵⁸ The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 15.

¹⁵⁹ Linklater & Bone, *supra* note 11 at 26.

¹⁶⁰ *Ibid* at 28.

applied. As an oral society, Indigenous peoples have been passing down laws through a traditional teaching process.¹⁶¹ There are several safeguards used to ensure accuracy and consistency of spiritual laws. Accuracy is ensured through the use of aids, such as smudging or *nookwezigen*, through the performance of ceremony and a strictly controlled environment where young people were not allowed to make noise or move around during the transmission process.¹⁶² When an error was found, great care was exercised in correcting each other so all people left with the same story to be retold another time.¹⁶³ Through these processes, the Anishinaabe have ensured that sacred laws have continued to pass from generation to generation. With these systems in place, we can rely on the Indigenous law of Treaty No. 3 as law, which is necessary to understand in order to fully appreciate the Treaty.

As demonstrated, the land is a gift, a responsibility embedded with duties not to be misused nor abused with an inability to be ‘sold’ and ‘owned’.¹⁶⁴ This Indigenous worldview is significantly different from a European worldview. Anishinaabe Elder Smokey Bryuere suggests that Europeans “simply did not have the conceptual tools to recognize holistic functions in a society”.¹⁶⁵ In the holistic Anishinaabe model described above, members of society were encouraged to interact cooperatively through the built-in function of law. Furthermore, Bryuere states that:

The point I am trying to make is that the legal system in Aboriginal communities is completely integrated into the fabric of community. It is not a distinct and separate institution as it is in European society. It is not a literate and formally codified system as it in European

¹⁶¹ The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 2.

¹⁶² Hildebrandt, “Treaty 7”, *supra* note 11 at 4 and 11.

¹⁶³ *Ibid* at 4.

¹⁶⁴ Christie, *supra* note 17 at 197-198

¹⁶⁵ Bryuere, *supra* note 16 at 4.

society...And, from an Aboriginal perspective it is a better system than the one that exists in European society.¹⁶⁶

These two different worldviews have contributed to confusion on the Treaty and the failure of the Canadian Court to properly consider the Anishinaabe perspective on the Treaty. As stated, this thesis will use Indigenous law to understand the significance and provide a complete picture of the Treaty. At its core, Indigenous law is an ecological order that stems from everywhere and is operational everywhere.¹⁶⁷ In understanding law, Indigenous peoples are concerned with both the seen and unseen spiritual levels, as well as the interconnectedness and relatedness of animal and nature.¹⁶⁸ This concept differs from a Eurocentric understanding of ‘natural law’, as it does not contain the same spiritual component and tends to focus solely on human beings. Indigenous peoples understand that these relationships are important as it relates to the balance of all life within society.¹⁶⁹ It is only with this spiritual foundation that we can attempt to understand how the Anishinaabe negotiated the Treaty and how its true meaning, or the spirit and intent, must be interpreted and applied in the present.

Conclusion

Upon reviewing Indigenous legal orders, there maintains a severe disconnect in Canada in spite of the numerous commissions and bodies that have been constructed with

¹⁶⁶ *Ibid* at 6.

¹⁶⁷ Christine Zuni Cruz, “Law of the Land- Recognition and Resurgence in Indigenous Law and Justice Systems” in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oregon: Hart Publishing, 2009) 315 at 318.

¹⁶⁸ *Ibid* at 315.

¹⁶⁹ *Ibid*.

the purpose of educating Indigenous and non-Indigenous peoples.¹⁷⁰ This thesis argues that if Canadian law is going to apply Treaty law, the treaty making process must be understood in the context as the Anishinaabe do. In order to do this, an understanding of Anishinaabe ways is a requisite: “you cannot begin to understand the treaties unless you understand our cultural and spiritual traditions and our Indian laws.”¹⁷¹ When discussing this deeply complex and spiritual understanding with a non-Indigenous audience, the appropriate methods of pipe, ceremony, will be used. *The Vienna Convention* will be utilized to ground Indigenous law through making analogies and help ease concern that Anishinaabe law is too foreign to follow, by demonstrating a *sui generis* approach.

¹⁷⁰ The Royal Commission of Aboriginal Peoples, online: <<http://www.parl.gc.ca/content/lop/researchpublications/prb9924-e.htm>>; Canada’s most thorough study includes 4,000 pages and 440 recommendations;

The Treaty Relations Commission of Manitoba online: <<http://www.trcm.ca>>.

¹⁷¹ Cardinal, “Treaty Elders of Saskatchewan”, *supra* note 9 at 1.

Chapter IV: TREATY CREATION

Treaty performance and interpretation are areas where breakdowns occur between Indigenous peoples and the Crown, leading to litigation of constitutionally protected section 35 aboriginal and treaty rights. Although there are numerous disputed claims over substantial promises, I argue that a critical problem stems from a lack of understanding the Anishinaabe perspective of the treaties by the non-Indigenous beneficiaries. These misunderstandings cause intense litigation because “the Treaty constitutes a political space for the encounter between two expressions of power...Each of the parties use the same principles now as they did at the time when they signed the Treaty to strengthen their political position.”¹⁷² Using previous approaches, without a coming together or cross-cultural understanding perpetuates the current misgivings. As described in the methodology chapter, to gain an understanding of the Anishinaabe perspective one needs to appreciate that the metaphysical is “a very special and complete relationship with Creator, that provides a framework for the political, social, educational and cultural institutions and laws of their people.”¹⁷³ Within this context, this thesis will first describe how the treaty was sanctioned under the traditional spiritual laws and then explain the legal ramifications under Anishinaabe law.

From an Anishinaabe perspective, to ensure that Treaty No. 3 was entered into according to Anishinaabe law, certain requirements needed to be concluded. These necessities include negotiating the Treaty with those who held legitimate authority to do so on behalf of the Nation, the documentation and recording of Treaty No. 3 and

¹⁷² International Work Group for Indigenous Affairs, *Honour Bound: Onion Lake and the Spirit of Treaty Six: The International Validity of Treaties with Indigenous Peoples* (Copenhagen: RotaRota, 1997) at 45 [Onion Lake].

¹⁷³ Hildebrandt, “Treaty 7”, *supra* note 11 at 11.

voluntary consent expressly articulated. This chapter will analyze the authority, written form, and consent of Treaty No. 3 to understand the Treaty formation. The formation of the Treaty under Anishinaabe law will be considered against the *Vienna Convention* as a backdrop to aid in comprehension of sacred and deeply spiritual laws of the Anishinaabe. Analogies between Anishinaabe law and the *Vienna Convention* will be identified to help translate to a non-Indigenous legal audience, demonstrating a *sui generis* approach.

A.) Authority

In determining legalities of a treaty, the first factor to be considered is authority. Article 7 of the *Vienna Convention* enunciates the authority for representing a State under international law: if they produce appropriate full powers, or, by virtue of their functions solely, without having to produce full powers.¹⁷⁴ Heads of State are therefore considered to have full binding authority under the *Vienna Convention's* definition of authority.¹⁷⁵ This sub-section will explain the legal, political and spiritual capacity for Treaty No. 3, which flows from traditional Anishinaabe laws and provides a breakdown of how this was exercised under Anishinaabe law.¹⁷⁶ Indigenous legal and international scholar Sharon Venne argues that an appreciation of the authority of Indigenous peoples to negotiate the Numbered Treaties is “essential” to understanding the Treaty relationship.¹⁷⁷

¹⁷⁴ *Vienna Convention*, *supra* note 25 at Article 7(1)(a) and 7(2)a-c, 8 ILM 679 [*Vienna Convention*] (or if it appears from practices or circumstances to represent the State for such purposes Article 7(1)(b)).

¹⁷⁵ *Ibid* at Article 7(2)a.

¹⁷⁶ Venne, *supra* note 71 at 189.

¹⁷⁷ *Ibid* at 174.

i. The Anishinaabe in Treaty No. 3

To understand how the authority to sanction the Treaty is derived under Anishinaabe law, we must first come to understand how the Anishinaabe understand themselves. Anishinaabe is the name of the original peoples in the territory, known as the Anishinaabe Nation in Treaty No. 3.¹⁷⁸ Anishinaabe is the lowered spirit which means: The Original People¹⁷⁹ and is a concept shared amongst many Original Peoples or First Peoples throughout Turtle Island.¹⁸⁰ According to the Anishinaabe, all Indigenous Nations across Turtle Island are collectively Anishinaabe: “that is why we refer to ourselves locally, as the Anishinaabe Nation in Treaty #3.”¹⁸¹ Anishinaabe is the preferred name as I have been told that there are other incorrect labels unilaterally imposed on us by non-Indigenous peoples, similar to the fallacy of the word ‘Indian’.¹⁸² Creation included the placement of the Anishinaabe on Turtle Island, the States now known as Canada and United States, with a process for temporal law or people made law: “Laws of the Nation can only be made by the Nation which necessarily entails a traditional process.”¹⁸³ The Anishinaabe were placed to live on Turtle Island with the aspiration of living by the laws of *Gitche Manitoo*, Creator.¹⁸⁴

The purpose of the Anishinaabe is to understand the “fullness and completeness of His [Creator’s] blessings”¹⁸⁵ as “it’s the Creator’s gift, the land, and the resources of this land. He gave us those gifts to use, from the universe to our Mother Earth and the

¹⁷⁸ The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 1.

¹⁷⁹ Linklater & Bone, *supra* note 11 at 57 (quoting Anishinaabe Elder Harry Bone, *Giizis-Inini*).

¹⁸⁰ Cardinal, “Treaty Elders of Saskatchewan”, *supra* note 9 at 10.

¹⁸¹ The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 26.

¹⁸² Linklater & Bone, *supra* note 11 at 57 (quoting Anishinaabe Elder Harry Bone, *Giizis-Inini*).

¹⁸³ Cardinal, “Treaty Elders of Saskatchewan”, *supra* note 9 at 3; The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 18.

¹⁸⁴ The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 1.

¹⁸⁵ Cardinal, “Treaty Elders of Saskatchewan”, *supra* note 9 at 3.

water that flows around her.”¹⁸⁶ In exchange for these gifts, there was a reciprocal duty imposed on the Anishinaabe,¹⁸⁷ the responsibility of stewardship:

Creator put us on this earth, to look after wherever it is where we’re living. *Ji-dibendamang*, we say, to look after it, to be caretaker of that land. To communicate with those animals, those plants, those trees, so they can show us their wisdom and knowledge for the medicine of our people, for the health and well-being of our nation, our Anishinaabe people.¹⁸⁸

The values, morals and principles or laws, which regulate the conduct of people in all their relationships is inherently tied to this special bond with Creator.¹⁸⁹ The Anishinaabe believe that “the Creator gave us land, to have to live off, not so we can in turn give it to someone else, and not so someone else can come and take it away from us. Many of us were put here.”¹⁹⁰ The Late Anishinaabe Elder Mark Thompson illustrates the relationship between the fulfillment of being Anishinaabe and the spiritual connection to Creator:

When the Anishinaabe person understands their empowerment how he made his living, he has nothing to fear. He owns this land, he owns his life, and he was put here by the Creator to look after the land that he was placed into. When you understand your empowerment, that way of survival, you invite the spirits in to come and listen, to come and pass on the message, and to come and interpret the meaning.¹⁹¹

Sovereignty, the ability to live freely and govern by their own laws and systems as a people, was given to the Anishinaabe through their divine birthright.¹⁹² The exercise of sovereignty of the Anishinaabe Nation in Treaty No. 3 includes law-making authority:

¹⁸⁶ Linklater & Bone, *supra* note 11 at 13 (quoting Anishinaabe Elder Lawrence Smith).

¹⁸⁷ *Ibid* at 27 and 13 (quoting Anishinaabe Elder Ernest McPherson and quoting Anishinaabe Elder Lawrence Smith).

¹⁸⁸ *Ibid* at 39 and 13 (quoting the late Anishinaabe Elder Mark Thompson and quoting Anishinaabe Elder Lawrence Smith).

¹⁸⁹ Cardinal, “Treaty Elders of Saskatchewan”, *supra* note 9 at 10.

¹⁹⁰ Linklater & Bone, *supra* note 11 at 122 (quoting the late Anishinaabe Elder Mark Thompson).

¹⁹¹ *Ibid* at 13 (quoting the late Anishinaabe Elder Mark Thompson).

¹⁹² The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 16.

“our laws have been in existence for much longer here than foreign laws.”¹⁹³ Governance is a fundamental act of sovereignty, which the Anishinaabe apply through the administration of laws and procedures.¹⁹⁴ Sovereignty has enabled the Anishinaabe to survive as Nations since time immemorial.¹⁹⁵ Based on their sovereignty within the territory that Creator placed them, the Anishinaabe in Treaty No. 3 arguably possess ‘full appropriate powers’ as stipulated under the *Vienna Convention*.¹⁹⁶

ii. The Grand Council of the Anishinaabe in Treaty No. 3

Treaty No. 3 is unique to the Numbered Treaties in Canada as the signatories, the Chiefs, negotiated from their respective roles within their traditional governance structure of the Grand Council.¹⁹⁷ The Grand Council is a compilation of Chiefs and Headmen in the 55,000 square mile radius territory now known as Northwestern Ontario extending into Southeastern Manitoba.¹⁹⁸ The Anishinaabe was organized into the *Midewiwin* (The People of the Heart, the Medicine Lodge, or Grand Medicine Society), which encompassed larger roles of leadership.¹⁹⁹ Chiefs were assigned roles including Chiefs primarily concerned of relations with Europeans, relationships between the Anishinaabe, and the mediation of internal disputes. In discharging these duties, the Chiefs functioned within the traditional political and social structure of the Grand Council.²⁰⁰ Under Anishinaabe law, the Grand Council was the only body designated with full and complete

¹⁹³ *Ibid* at 20.

¹⁹⁴ *Ibid*.

¹⁹⁵ Cardinal, “Treaty Elders of Saskatchewan”, *supra* note 9 at 11.

¹⁹⁶ *Vienna Convention*, *supra* note 25, at Article 7(1)a (or if it appears from practices or circumstances to represent the State for such purposes Article 7(1)(b)).

¹⁹⁷ The Grand Council Treaty #3, “We have Kept”, *supra* note 135 at 51- 52.

¹⁹⁸ Online: Grand Council Treaty #3 <<https://gct3.net>>. Grand Council still exists in its present-day, under the incorporated entity of Grand Council Treaty #3.

¹⁹⁹ The Grand Council Treaty #3, “We have Kept”, *supra* note 135 at 52.

²⁰⁰ *Ibid*.

authority to negotiate and enter into Treaty No. 3. By virtue of their function of the traditional government,²⁰¹ the Chiefs of the Grand Council would be the equivalent of ‘Heads of State’ and as such have full binding authority under the *Vienna Convention*.²⁰²

iii. Collective Decision-making

When the Anishinaabe Chiefs negotiated Treaty No. 3 they bargained collectively, as was the custom practice of the Grand Council.²⁰³ Although Chiefs have community autonomy and free will to bargain individually, they did not do so.²⁰⁴ Under Anishinaabe law, the leadership role is heavily burdened with responsibilities. Leaders are expected to have forgone the option of being egocentric, in return for the honour to look out for the interests of all.²⁰⁵ In consideration of everyone’s interests, it is custom in decision-making to think of the effects and potential impacts seven generations in advance.²⁰⁶ The Anishinaabe make decisions based not on the needs of themselves presently, but with the consideration of all other life including generations unborn.²⁰⁷ This seven generations thinking is because the Anishinaabe believe that the life that they enjoy and appreciate is held ‘in trust’ for “their children and generations yet unborn”.²⁰⁸ It is in this trust-like relationship that their own life is viewed as a duty, with obligation, as the effects of one will impact another. With motivation not self-interest driven, but of potential ramifications on future descendants, this was the position of the Anishinaabe leaders in creating the treaty relationship.

²⁰¹ The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 22.

²⁰² *Vienna Convention*, *supra* note 25 at Article 7(2)a.

²⁰³ Morris, *supra* note 3 at 48-49.

²⁰⁴ Johnston, *supra* note 144 at 72.

²⁰⁵ *Ibid* at 63.

²⁰⁶ The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 2.

²⁰⁷ *Ibid*.

²⁰⁸ *Ibid*.

The structure of the Anishinaabe Nation in Treaty No. 3 is consensus based. The trust in the legitimate political structure of the Grand Council was so strong that individual Chiefs who were not present for treaty negotiations sent word that they “will accept the terms made at this treaty and ratify it with any one commissioner who will go there to meet them”.²⁰⁹ The fact that individual leaders unable to attend sent messengers that they would ratify whatever was agreed upon evidences the trust in the system. With consent given to the Grand Council from the Chiefs in attendance and those not present, the Grand Council had the authority to bind all through the negotiation of Treaty No. 3.

Although the Grand Council possesses the legal authority to bind, they did so only with the consent of the Anishinaabe and sanction of the spirit guides. Throughout treaty negotiations, the Anishinaabe Nation in Treaty No. 3, collectively as a people, retained the authority to bind the people to the Treaty. Per traditional laws, this authority was designated to the political structure of the Grand Council to administer. Upon conclusion of the Treaty, Anishinaabe Chief *Mawedopenais* proclaimed:

The words I have said are the words of the nation and have not been said in secret but openly so all could hear and I trust that those who are not present will not find fault with what we are about to do today. And, I trust, what we are about to do today is for the benefit of our nation as well as for our white brothers – that nothing but friendship will reign between the nation and our white brothers. And now I take off my glove to give you my hand and sign the Treaty.²¹⁰

Although this powerful closing statement displays many characteristics of Anishinaabe treaty legalities (which will be explored in the subsequent chapter), this emphasizes the importance of the Treaty being negotiated amongst all of the Anishinaabe openly and freely as required to fulfil the Anishinaabe collective decision-making laws. Indigenous

²⁰⁹ Morris, *supra* note 3 at 54.

²¹⁰ The Grand Council Treaty #3. “The Creator Placed us Here: Timeline of significant events of the Anishinaabeg of Treaty #3.” (October 3 2013) [unpublished] at 6.

legal and international scholar Sharon Venne states that the political structure of Indigenous peoples is “best described as a democracy, in the full sense of the word”.²¹¹ International law requires that prior to the ability to exercise “full powers”, specific instructions must be obtained.²¹² As demonstrated in this legal analysis of authority under Anishinaabe law, including the orders to ratify the Treaty from Chiefs not in attendance, the Grand Council through open negotiations with all Anishinaabe ensured instructions to enter into the Treaty were received, which is compliant with Anishinaabe law and international law.

iv. Recognition of Authority

By entering into the Treaty, the Crown recognized the authority of the Anishinaabe and Grand Council and indicated this at the time of treaty-making by Lieutenant-Governor Morris’ statement: “I wish to treat with you as a Nation and not as separate bands.”²¹³ In addition, the Grand Council wanted to negotiate with only the Crown and insisted on dealing with a Crown representative solely.²¹⁴ It was acknowledged that not only did the Anishinaabe through this formal organized entity have authority to bind Anishinaabe people to Treaty No. 3, but they insisted on the Crown’s representatives holding proper authority as well. The legitimacy of this authority through the Anishinaabe and political structure of the Grand Council is congruent with the stipulations under international law. By comparing the requirements under

²¹¹ Venne, *supra* note 71 at 179.

²¹² Anthony Aust, *Modern Treaty Law and Practice*, 2d ed (New York: Cambridge University Press, 2007) at 75 [Aust].

²¹³ The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 4.

²¹⁴ Robert J Talbot, *Negotiating the Numbered Treaties: An intellectual & Political Biography of Alexander Morris* (Saskatoon: Purich Publishing, 2009) at 70 [Talbot].

Anishinaabe law to the *Vienna Convention*, it is evidenced that the Grand Council had authority to enter in negotiations and bind all Anishinaabe in Treaty No. 3.

B.) Written Form

After demonstrating that Grand Council had authority under Anishinaabe law, which is a similar requirement to that of the *Vienna Convention*, the next consideration is format of the Treaty itself. Article 2 of the *Vienna Convention* sets out the definition of the treaty agreement: a treaty is an international agreement concluded by States in written form and governed by international law.²¹⁵ According to international law expert Anthony Aust, most legal questions that arise from this definition are centered on whether or not a particular instrument or transaction falls within this meaning.²¹⁶ In this thesis, this analysis will focus on the prescribed recorded format of Treaty No. 3 under Anishinaabe law, comparable to the *Vienna Convention* written requirement. At the outset of this thesis, it was explained that Anishinaabe people are an oral society and had mainly unwritten forms of communication. Oral agreements can be considered valid treaties under customary international law.²¹⁷ Furthermore, it has been suggested that a successful international legal argument may be made that a written form exists, as soon as the oral agreement is recorded with consent of the parties.²¹⁸ Aust explains that the international law of treaties is “extremely flexible” and can accommodate departures from normal practice, with good reason, provided that one knows exactly what they are

²¹⁵ *Vienna Convention*, *supra* note 25 at Article 2(1)(a) [emphasis added].

²¹⁶ Aust, *supra* note 212 at 16.

²¹⁷ Oliver Corten & Pierre Klein, *The Vienna Convention on the Law of Treaties: A Commentary*, Volume I (New York: Oxford University Press, 2011) [Corten & Klein, “Volume I”] at 39.

²¹⁸ *Ibid.*

doing, including any legal implications.²¹⁹ Indigenous legal and international scholar Sharon Venne asserts that the written text of the Treaty expresses only the Canadian view of the treaty relationship.²²⁰ Thus, this thesis will demonstrate how the Anishinaabe recorded the Treaty under Anishinaabe laws to achieve a fuller understanding of the overall treaty relationship. This sub-section will explain how Treaty No. 3 was recorded with strict methods of retaining and passing of laws critical within Anishinaabe society and the making of the Treaty.

i. Treaty No. 3 Recorded

To the Anishinaabe, Treaty No. 3 is not exclusively conceptualized as a written document; rather the entire negotiation process comprises the treaty agreement.²²¹ Chief *Mawedopenais* is recorded to have told the Commissioners that he was to ‘hold fast all the promises made’, meaning commit them to memory.²²² At the time of treaty making, a Treaty No. 3 Chief had requested a written copy of Treaty No. 3, so that it would not be ‘rubbed off’.²²³ Obtaining a written copy of the Treaty was not for the purposes of the Anishinaabe to remember what was agreed to, as they have recollected the Treaty and recorded it as in their custom, but for the purposes of ensuring their non-Indigenous treaty counterparts abide by it.²²⁴ The Anishinaabe were an oral society and their ability to recall what was said is remarkable. A Treaty No. 3 Anishinaabe Chief was recorded to have said: “you must remember that our hearts and our brains are like paper; we never

²¹⁹ Aust, *supra* note 212 at 16.

²²⁰ Venne, *supra* note 71 at 174.

²²¹ Stark, *supra* note 9 at 148.

²²² The Grand Council Treaty #3, “We have Kept”, *supra* note 135 at 29.

²²³ Morris, *supra* note 3 at 72.

²²⁴ Stark, *supra* note 9 at 151.

forget.”²²⁵ Indigenous legal scholar Heidi Stark describes Commissioner S.J. Dawson advising the negotiators to use caution when using their words as a Fort Frances Anishinaabe leader repeated everything verbatim he had said at a meeting two years prior.²²⁶ As Indigenous societies functioned with the ability to recount as an oral civilization since time immemorial, highly developed protocols and procedures existed in capturing and recording the language. As discussed in the methodology chapter, these protocols are all administered with great care and caution. To the Anishinaabe, the entire proceedings leading to the development and implementation form part of the Treaty.²²⁷ As stated at the outset of this thesis, when the Canadian Courts initiate their legal analysis with an over-emphasis on the written treaty text, it not only poses a grave danger to the Anishinaabe who have a lack of written recording, but we will see is also seemingly inconsistent with international law provisions.²²⁸

ii. Use of Interpreters

Although there exists a lack of formal written recording under Anishinaabe law, the Anishinaabe have had their oral recollection of the Treaty agreement substantiated by supporting evidence. Use of outside parties during the making of the Treaty is instrumental in obtaining evidence to support the Anishinaabe understanding. At the time of treaty making an Anishinaabe Chief requested a translator be provided.²²⁹ There was an obvious language (and cultural) barrier between the Crown and the Anishinaabe. An Anishinaabe Chief specifically requested a translator with an Anishinaabe understanding:

²²⁵ *Ibid* at 149.

²²⁶ *Ibid*.

²²⁷ *Ibid*.

²²⁸ Cardinal, “Unjust”, *supra* note 2 at 32.

²²⁹ Morris, *supra* note 3 at 71.

“it is a white man who does not understand our language that is taking it down. I would like a man that understands our language *and our ways*.”²³⁰ Metis interpreters were provided to both the satisfaction of the Anishinaabe and Crown.²³¹ These interpreters held noteworthy roles, which will be discussed below. One Metis interpreter was an assistant to Commissioner Dawson in previous treaty negotiation meetings, Nicolas Chatelaine, to whom I am a descendent of.²³² The demand of interpreters identifies not only the language barrier, but more significantly isolates the proposition of this thesis: an absolute requirement of an Anishinaabe understanding by non-Indigenous peoples who wish to assess the Treaty.

There are many integral meanings within a singular word in Anishinaabemowin. To obtain an understanding of our language, there is danger that meanings can be ‘lost in translation’ or not fully comprehended and inadvertently incorrectly applied. In addition, Anishinaabe language is verb-centred, while the English language is noun-centred.²³³ This discord would make the literal translation greatly difficult.²³⁴ In present-day, the Anishinaabe state that the entire text of Treaty No. 3 cannot be literally translated into Anishinaabemowin.²³⁵ Given the inability to translate Treaty words, greater weight needs

²³⁰ Morris, *supra* note 3 at 71 [Emphasis added].

²³¹ *Ibid.*

²³² Wayne Daughtery, “Treaty Research Report: Treaty Three” (Ottawa: Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986) at 4 [Daughtery] (Nicholas Chatelaine is my ancestor through my father Rocky Seymour, my grandfather Patrick Seymour, my great-grandfather Louie Seymour and my great-great grandmother Elise (nee Elizabeth Chatelaine), who was the daughter of Metis interpreter Nicholas Chatelaine. Nicholas was an interpreter not only during preceding negotiations in 1870, and at the time of making of Treaty No. 3 in 1873, but also assisted later on with the adhesion of Treaty No. 3, the half-breed adhesion. Witness signature confirming him at Grand Council Treaty #3 online:

<<https://gct3.net/grand-chiefs-office/gct3-info-and-history/government-of-canada-document/>>).

²³³ Hildebrandt, “Treaty 7”, *supra* note 11 at 200.

²³⁴ *Ibid* at 202-203 (provides list of Eurocentric and indigenous view of treaty terms).

²³⁵ The Grand Council Treaty #3, “We have Kept”, *supra* note 135 at 2.

to be afforded to understanding the Anishinaabe treaty perspective to gain a more accurate and complete picture of the Treaty.²³⁶

iii. Paypom Treaty

There remains an additional form of written recording of Treaty No. 3, the Paypom Treaty, which remains as the closest form of documentation that reflects the Anishinaabe perspective and could be said to satisfy the written treaty requirement under Article 2(1) (a) of the *Vienna Convention*. The Paypom Treaty refers to a set of notes for one of the Chiefs present at the treaty negotiations in 1873, Chief Powassin, taken by a knowledgeable Metis interpreter present during internal deliberations at the time of Treaty No. 3 negotiations.²³⁷ The notes are highly sacred to the Anishinaabe and are a written record of the negotiations, which did *not* form part of the final written treaty text provided by the British Crown.²³⁸ Researchers suggest that the final printed version of Treaty No. 3 was written in 1872, one year prior to the 1873 negotiations.²³⁹ This would provide explanation for the discrepancies of the Paypom Treaty (negotiations in 1873) and the articles of Treaty No. 3 potentially drafted in 1872. Treaty #3 Anishinaabe legal academic Sara Mainville states that the oral account of the treaty holds to the truest form in the Paypom Treaty, and, the words could be more easily translated into

²³⁶ The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 30.

²³⁷ Online: Grand Council Treaty #3 <https://gct3.net/wp-content/uploads/2008/01/paypom_treaty.pdf> [Paypom Treaty].

²³⁸ Online: Grand Council Treaty #3 <<https://gct3.net/grand-chiefs-office/gct3-info-and-history/paypom-treaty/>> [Emphasis added]; Daughtery, *supra* note 231 at 45.

²³⁹ Daughtery, *supra* note 232 at 47.

Anishinaabemowin.²⁴⁰ The verification of the written Paypom Treaty strengthens the validity of the oral Treaty records of the Anishinaabe.

The way in which the Paypom Treaty was preserved speaks to the meticulous record keeping of the Anishinaabe. The Anishinaabe received the handwritten notes through a local photographer who notarized that he obtained them in 1906 from Chief Powasson.²⁴¹ The one who received them, Elder Allan Paypom, was the carrier and had them in his possession since received in 1908.²⁴² Presently, his daughter Verna Paypom is the carrier of the Paypom Treaty, now an Elder herself and residing in a retirement home in the city of Kenora.²⁴³ Carrier responsibilities include the holding and passing of the stories and knowledge entrusted from her late father.²⁴⁴ To the Anishinaabe these notes are sacred and held in high regard, which is why they are referred to as the ‘Paypom Treaty’ or *manidoo mazina’igan* in Anishinaabemowin.²⁴⁵

The Paypom Treaty recorded issues of discussion that were of grave concern to the Anishinaabe. The protection and continuation of harvesting *manoomin* or wild rice to which is a sacred medicine, as well as the importance of including half-breeds into the Treaty.²⁴⁶ The Crown recognized a treaty discrepancy regarding mineral rights as an error

²⁴⁰Sara J Mainville, “Treaty Councils and Mutual Reconciliation Under Section 35” (2007) 6:1 Indigenous LJ 141 at 153 (Mainville).

²⁴¹ Paypom Treaty, *supra* note 237.

²⁴² Kinew, *supra* note 10 at 107; (This was told to me during my previous employment at Grand Council Treaty #3 when we were celebrating the 135th Anniversary of the signing of Treaty No. 3. I was organizing the event, per the instructions of the *Ogichidaakwe* (Grand Chief)).

²⁴³ *Ibid* at 298 (Elder Allan Paypom died in 1985); (I was responsible for ensuring Elder Verna Paypom, the Paypom Treaty holder was honoured and in attendance. I had to drive to Verna’s home at the Elder’s complex in Washagamis Bay, to ensure her attendance for this event. A few years later I asked about her and her health and was informed that she is now a resident in a Kenora retirement home). (Kinew)

²⁴⁴ *Ibid* (told to me during the above course of employment and performance of duties).

²⁴⁵ *Ibid* at 107.

²⁴⁶ The Grand Council Treaty #3, “We have Kept”, *supra* note 135 at 36; Morris, *supra* note 3 at 50 (the discussion of the half-breed provision of a choice of status or script. Commissioner Morris later canvassed the latter issue and Treaty No. 3 was amended to include the half-breeds living in the Rainy River area; known as the Treaty No. 3 Halfbreed Adhesion).

of omission in 1899 by the Federal government and 1902 by the Provincial government.²⁴⁷ This was subsequently codified in reciprocal federal-provincial legislation in 1924 whereby Treaty No. 3 retained 100% of proceeds of mineral development, as opposed to other Ontario First Nations retaining 50%.²⁴⁸ This governmental correction regarding mineral rights post-Treaty is an indication that Treaty No. 3 as published by Canada is not a complete record. Treaty #3 Anishinaabe legal academic Sara Mainville states that this incomplete record does not affect the validity of the Treaty, but rather enforces an onus of discovery and cohesion of the application of Anishinaabe oral records to the incomplete articles of the Treaty.²⁴⁹ As these written notes co-exist with the oral records of the Anishinaabe, the Paypom Treaty strengthens and adds validity to the Anishinaabe testimony of Treaty No. 3 and by extension to the oral record keeping of Indigenous societies. I contend that through the Paypom Treaty and recorded oral history, the Anishinaabe in Treaty No. 3 maintain a formalized treaty record congruent with the requirements under international law. Now that a fuller understanding of the Treaty negotiations and recording is achieved, the legal processes of the Anishinaabe to conclude the Treaty will be explored.

C.) Express Consent to be Bound

As a treaty is a mutually binding agreement freely entered into between Nations, consent is critical.²⁵⁰ Article 11 of the *Vienna Convention* requires express consent of the

²⁴⁷ The Grand Council Treaty #3, “We have Kept”, *supra* note 135 at 36.

²⁴⁸ *Ibid* (Grand Council Treaty #3 states that: “In 1983 Ontario officials again questioned on-reserve mineral ownership and refused to agree minerals were treaty rights until clarified and corrected to 100% by the Courts in 1991”).

²⁴⁹ Mainville, *supra* note 240 at 155.

²⁵⁰ J R Miller, “Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada” (Toronto: University of Toronto Press, Scholarly Publishing Division, 2009) at 3.

parties to be bound by a treaty. The means of expressing consent can include, signature, exchange of instruments constituting a treaty, accession, ratification and acceptance, or, by any other means as agreed.²⁵¹ The purpose of Article 11 is to allow for States to express consent other than the means identified in the *Vienna Convention* and not be at odds with international practice.²⁵² Given that consent may be expressed by any other agreed means, international law expert Anthony Aust identifies this latter clause of Article 11 as a good example of the “inherent flexibility” on the law of treaties.²⁵³ Article 11 includes traditional means of expressing consent and allows for the freedom of choice, leaving room for the progressive development of law.²⁵⁴ It is argued that an oral commitment to a treaty is theoretically possible under international law; however, formal procedures would have to be followed up.²⁵⁵ Under Anishinaabe law, there are similarly enumerated different types of acts expressing consent to be bound by the Treaty. These expressed protocols of consent include, the pipe, ceremony and offerings. Although the means of expressing consent are different than international law, there is a commonality in that both legal systems required consent to be given. In fact, both processes were used, through the written signed text in accordance to British and international law, and by complying with Anishinaabe law as well.

International law requires two inquiries into the freedom of choice as means to express consent to be bound: the possible extent of this choice and the means by which it is determined.²⁵⁶ Both of these inquiries will be undertaken within the domain of

²⁵¹ *Vienna Convention*, *supra* note 25 at Article 12, 13, 15, 14(1), 14(2) and 11.

²⁵² Corten & Klein, “Volume I”, *supra* note 217 at 190.

²⁵³ Aust, *supra* note 212 at 113.

²⁵⁴ Corten & Klein, “Volume I”, *supra* note 217 at 192 and 191.

²⁵⁵ *Ibid* at 197.

²⁵⁶ *Ibid* at 190 and 193.

Anishinaabe law. Treaty No. 3 negotiations were held in deeply spiritual places, the Shaking Tent or *Chiskan*, to receive direction and advice from the Spirits. Smudging or *nookwezigen*, is the burning and lighting of medicines in a purification process, which occurred during treaty negotiation process. There was a smoking of *asemaa* or tobacco, a sacred medicine in the sacred pipe. Songs, drumming and ceremonial rituals also took place. Finally, the transmission of offerings and gifts transpired. All of these were necessary to sanction what was agreed to as Treaty No. 3 according to Anishinaabe law. These processes for expressing consent under Anishinaabe law will be further explored in this sub-section.

i. *Opwaagan* (The Pipe)

In this review of Anishinaabe law, the first means of expressing consent that will be analyzed is the pipe. Anishinaabe author the Late Basil Johnston shares the story of the origin of the teaching of the pipe: a gift bestowed on the Anishinaabe, an emblem of peace and goodwill, used as a crucial method in which to create peace and bind relations.²⁵⁷ The physical formation of the pipes themselves derive from a sacred source, a gift, often coming through a vision or dream that provides instructions and offers spiritual guidance and support for a specific purpose.²⁵⁸ Because of this sacred source, pipes cannot simply be substituted or replaced. In caring for sacred pipes, there are responsibilities imposed on the pipe carrier and every spring the pipe is “renewed and regenerated”.²⁵⁹ The Anishinaabe achieve this through the performance of ceremony, which include prayers chanted to “re-dedicate and re-sanctify” the pipe to the mood and

²⁵⁷ Johnston, *supra* note 144 at 19.

²⁵⁸ Hildebrandt, “Treaty 7”, *supra* note 11 at 88-89.

²⁵⁹ *Ibid* at 96; Johnston, *supra* note 144 at 140.

spirit of peace.²⁶⁰ The pipe is handled with great care and passed through generations. Its survivorship is not credited to Western history practices of museums, but that of customary maintenance practices of the Anishinaabe. The sacred pipes that were used at the time of treaty making are still in existence today and they are brought out during times when direction is needed or when there are important matters to be discussed.²⁶¹ Along with the sacred pipe, stories were also passed to the pipe carrier responsible for the keeping and passing of that knowledge. This maintenance has continued to be the practice of the Anishinaabe, despite the intrusion and legal interference of Canada, notably through the prohibitions in the *Indian Act*. Not only have the traditional practices of the pipe been strictly observed in how the Anishinaabe concluded the treaty, but has been preserved and continued practice to this day.²⁶²

The pipe was an integral part of the treaty negotiations: “the pipe is holy and it’s a way of life for Indian people.... The treaty was made with a pipe and that is sacred, that is never to be broken...never to be put away.”²⁶³ Indigenous people in the presence of the pipe are reminded that they must “tell the truth like the straightness of the pipe”.²⁶⁴ The smoking of the pipe is similar to non-Indigenous peoples of swearing on the Holy Bible.²⁶⁵ For the Anishinaabe, the potential consequences of acting in dishonesty are great, as all could be affected: “if a person lied in the presence of the pipe, he or she would suffer in the future.”²⁶⁶ As the worldview of the Anishinaabe heeds seven generations in advance, that is a substantial threat not to be taken lightly.

²⁶⁰ Johnston, *supra* note 144 at 140.

²⁶¹ Kinew, *supra* note 10 at 116.

²⁶² Johnston, *supra* note 144 at 136.

²⁶³ Cardinal, “Treaty Elders of Saskatchewan”, *supra* note 9 at 28.

²⁶⁴ Hildebrandt, “Treaty 7”, *supra* note 11 at 84.

²⁶⁵ *Ibid* at 68.

²⁶⁶ *Ibid* at 84.

Smoking of the sacred pipe meant that everything that was said would form part of the treaty as well as ensured that negotiations would be conducted in a good faith and solemn manner.²⁶⁷ Treaty No. 3 proceedings were opened with smoking of the pipe, which presented Lieutenant Governor Morris with “the peace of pipe”.²⁶⁸ To the Anishinaabe, the pipe of peace smoking ceremony was the most essential for the occurrence of consensual negotiations.²⁶⁹ By smoking the pipe, both parties agreed to be bound by the Treaty.

ii. Manidookewinan (Ceremonies)

Through ceremonial rituals, consent is also expressed amongst Indigenous peoples, including the Anishinaabe. Ceremonies are a coming together of “sweetgrass, fire, the pipe, and tobacco served as the primary connection between the First Nations and their Creator and his Creation.”²⁷⁰ Ceremonies were a gift to the Anishinaabe to maintain a continuing relationship with Creation, which required maintaining a connectedness to Mother Earth and her life-sustaining forces.²⁷¹ Prayers were and continue to be, acknowledgement of gratitude and not to be disconnected from performance of daily life and living.²⁷² To the Anishinaabe, songs are one form of ceremony and traditional prayers: “the songs are very, very important because they are part of the Treaties. There are some songs that we use to bring out the spirit and the intent of what the ancient ones, the holy ones, have spoken about.”²⁷³ The Late Anishinaabe

²⁶⁷ *Ibid* at 305 and 272.

²⁶⁸ Morris, *supra* note 3.

²⁶⁹ Johnston, *supra* note 144 at 134.

²⁷⁰ Cardinal, “Treaty Elders of Saskatchewan”, *supra* note 9 at 12.

²⁷¹ Johnston, *supra* note 144 at 19.

²⁷² *Ibid* at 23.

²⁷³ Linklater & Bone, *supra* note 11 at 68.

Elder Tobasonakwut Kinew stated that these ceremonial songs are important to the Anishinaabe understanding of Treaty No. 3.²⁷⁴

The Anishinaabe negotiated Treaty No. 3 with the Commissioners only after having council amongst themselves.²⁷⁵ Council amongst themselves included not only discussion of the matter at hand and internal deliberations but the requisite ceremonial protocols and rituals, an honouring through “prayer, chant, dance and ceremony.”²⁷⁶ Treaty No. 3 “required the most extensive consultations” amongst the Anishinaabe and “the most rigorous of traditional procedures. Oral history recalls that some twenty-eight sweat lodges, shaking tents and all the ceremonies of the Nation were brought into use during negotiations and before the Treaty was signed.”²⁷⁷ These comprehensive ceremonies ensured that unanimous consent was derived from the Anishinaabe and Spirits prior to the undertaking of treaty negotiations occurring with the Europeans. Negotiations required *nookwezigen*, a smudging to occur, which enabled the Anishinaabe to approach things in a clean way: “in our ways, cleanliness of the mind and body could be achieved only by the selection of a clean place away from human habitation where sweat lodges, ceremonies, fasts, and quiet mediation could be carried out.”²⁷⁸ Ceremony created the environment for Treaty No. 3 negotiations, a vital process for securing consent to the Treaty, as compliant under Anishinaabe law.

²⁷⁴ *Ibid.*

²⁷⁵ Morris, *supra* note 3 at 53-54.

²⁷⁶ *Ibid* at 54; Johnston, *supra* note 144 at 24.

²⁷⁷ The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 18.

²⁷⁸ Cardinal, “Treaty Elders of Saskatchewan”, *supra* note 9 at 2.

iii. Offerings

The final means in which consent was obtained under Anishinaabe law was through the makings of offerings. Offerings form part of discharging ceremonial duties, such as treaty making. Offerings are made by the Anishinaabe to honour Creator and all blessings he provides.²⁷⁹ The sacred medicine *asemaa* or tobacco, as well as an offering of food to the Spirits in a ‘spirit dish’ continue to be active practices amongst the Anishinaabe.²⁸⁰ Anishinaabe Elder Harry Bone, *Giizis-Inini* explains the gift of tobacco, how the lit *asemaa* smoke in the pipe goes directly to Creator and the spirit medicines that go with it: “sage, cedar, sweet grass are healing and supporting ones but the tobacco is *zhemaag* (immediate). It's a blessing that you ask right away.”²⁸¹ Offerings occur as needed, but are generally performed at the outset of the proceedings as well as upon conclusion of business.

Gift giving is a traditional offering protocol that sanctions an agreement.²⁸² Treaty #3 Anishinaabe legal academic Sara Mainville states that: “presents and money were not the primary consideration, but were important procedural signs of the great solemnity of the occasion, in the presence of the Creator.”²⁸³ Gift giving can be viewed as a traditional protocol expressing reciprocity. My Elder advisors have consistently said that we as Anishinaabe do not take without giving: when you ask for something of a spiritual nature, you must show your appreciation by offering your gift of thanks. Gift giving occurred for Treaty No. 3 and the Commissioners recorded distributions.²⁸⁴ As is the custom of the

²⁷⁹ Linklater & Bone, *supra* note 11 at 54 (explained by Anishinaabe Elder Kim Scott).

²⁸⁰ Johnston, *supra* note 144 at 42-43; Linklater & Bone, *supra* note 11 at 25.

²⁸¹ Linklater & Bone, *supra* note 11 at 48 (quoting Anishinaabe Elder Harry Bone, *Giizis-Inini*).

²⁸² Hildebrandt, “Treaty 7”, *supra* note 11 at 300.

²⁸³ Mainville, *supra* note 240 at 151.

²⁸⁴ Morris, *supra* note 3 at 65.

Anishinaabe, gifts were to be distributed amongst all. After a ceremony occurred, a large Ox was brought for all to enjoy the meal, as a form of wealth redistribution.²⁸⁵ When Treaty No. 3 was finally concluded it was late in the day and the Anishinaabe declined in accepting the gifts until the next day.²⁸⁶ This action demonstrates how the Anishinaabe believed that consent was obtained through the proper channels of the pipe, ceremony and offerings, and the Treaty was already bound.²⁸⁷

Conclusion

The use of Anishinaabe laws regarding authority, recording, and consent to be bound, illustrate the Anishinaabe perspective of the Treaty, explaining how Treaty No. 3 was concluded according to Anishinaabe law. This thesis proposes that because the Treaty was concluded under Anishinaabe law, Anishinaabe law must be used to understand Treaty No. 3 today. Following Anishinaabe law through the conception, negotiation and sanction Treaty No. 3 is legally binding treaty, similar with stipulations of authority, form, and express consent required under the *Vienna Convention*. International legal doctrine was used in the ways in which it aligns with Anishinaabe law, to support the *sui generis* approach used in this thesis and ease Canada into the idea of following Anishinaabe law to engage a transsystemic approach.

The Anishinaabe understanding of the Treaties is based on a spiritual foundation that underlays the treaty-making process. As discussed, there is a deep sacred regard for the Treaty given the significance of the traditional Anishinaabe legal protocols of the pipe, prayer, offerings and ceremony. This ceremonial way of life is comparable to the

²⁸⁵ *Ibid* at 58.

²⁸⁶ *Ibid* at 46.

²⁸⁷ *Ibid*.

Western formal education system of “formal and long-established ways, procedures, and processes”.²⁸⁸ It is because of this requirement that we must approach sacred treaty undertakings with continued high regard to traditional ceremonial procedures under Anishinaabe law. Anishinaabe people are required to follow these requisites when seeking sacred knowledge rooted in spiritual laws, such as the work of this thesis.²⁸⁹ Now that a fuller grasp of the legal sanction process of Treaty No. 3 under Anishinaabe law is obtained, the next chapter will apply core treaty concepts to further draw out *miinigozii’onan* or the spirit and intent of Treaty No 3. Two fundamental Anishinaabe legal doctrines will be used, *oonjnewin* and *mino-bimaadiziwin*, to discuss the treaty relationship that was formed, which will demonstrate the enduring and perpetual nature of the Treaties under Anishinaabe law.

²⁸⁸ Cardinal, “Treaty Elders of Saskatchewan”, *supra* note 9 at 2.

²⁸⁹ *Ibid.*

Chapter V: SPIRIT AND INTENT – *Miinigozii'onan*

As canvassed in Chapter 3, through the use of prayer, pipe, ceremony, and offerings in the creation of Treaty No. 3, there is a direct connection to Creator. As a result of this deep spiritual connection, the Anishinaabe are bound in an unbreakable, tripartite, covenant of Treaty No. 3.²⁹⁰ Grand Council Treaty #3 states, “the Laws of the Anishinaabe Nation derive from this supreme source. Revealed in sacred ceremony, these laws have been observed and honoured throughout the ages and have become part of our life as Traditional Law.”²⁹¹ The Anishinaabe explained this legal concept of governance to the Crown at the time of treaty making by Chief *Mawendopiness*: “He [the Great Spirit] has given us rules that we should follow to govern us rightly.”²⁹² Because of this source, the direct connection to Creator, the Treaty is powerfully binding on both the Anishinaabe and the Crown.

Given that Treaty No. 3 was formed as prescribed under Anishinaabe law, we are all bound to fulfill the spirit and intent in accordance with Anishinaabe law. At the time of treaty making, this was agreed to by the Crown through Commissioner Morris: “I accept your hand, and with it the lands, and will keep all my promises, in the firm belief that the treaty now to be signed will bind the red man and white man together as friends forever.”²⁹³ As a treaty was made under spiritual Anishinaabe law, legal duties from the Treaty arise under Anishinaabe law. This will be further explored and applied in this chapter on core treaty principles: the spirit and intent of the Treaty or *miinigozii'onan*.²⁹⁴

²⁹⁰ The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 15.

²⁹¹ *Ibid.*

²⁹² *Ibid* at 4.

²⁹³ Morris, *supra* note 3 at 51.

²⁹⁴ The Grand Council Treaty #3, “We have Kept”, *supra* note 135 at 3.

As the Treaty was sanctioned through Anishinaabe law, there are irrevocable principles affirmed by both treaty partners. This includes, a commitment to maintain peaceful relations, a mutual sharing arrangement which would guarantee survival of Indigenous peoples and livelihood, the supremacy of the Creator and the creation of a perpetual familial relationship based on Anishinaabe principles of good relationships to be regulated under Anishinaabe laws.²⁹⁵ While specific treaty terms are beyond the scope of this thesis, it will focus on the latter concept: the treaty relationships created and how they are governed under Anishinaabe law. This chapter discusses irrevocable treaty principles sanctioned under Anishinaabe law that binds both the Crown and Anishinaabe. International treaty law will again be used to base the explanation and application of two deeply spiritual Anishinaabe laws: *oonjnewin* and *mino-bimaadiziwin*.

A.) Oonjnewin

Oonjnewin is a fundamental law and core concept of the Anishinaabeg. Indigenous peoples have the knowledge that there are “consequences for inappropriate behaviours” which was “an important part of the people’s worldview, and directly influenced the choices they made in their daily lives”.²⁹⁶ In order to live a good life there must be an opposite for everything.²⁹⁷ If there is good, there must be bad. Where there is darkness, there must be light. The duality to Indigenous traditions is key to explain how Creation remains perfectly in balance.²⁹⁸ In this thesis, this duality approach will be

²⁹⁵ Cardinal, “Treaty Elders of Saskatchewan”, *supra* note 9 at 31-38.

²⁹⁶ Wastesicoot, *supra* note 12 at 156; Kulchyski, Peter. “OOCHINEHWIN: assessing the keeyask project through the lens of aboriginal rights and community member concerns” (Report for the Manitoba Clean Environment Commission on behalf of the Concerned Fox Lake Grassroots Citizens, November 2013) [unpublished] at 1.

²⁹⁷ Linklater & Bone, *supra* note 11 at 9.

²⁹⁸ Johnston, *supra* note 144 at 58.

paralleled, as the first part of this chapter will focus on *oonjnewin* while the second part will focus on *mino-bimaadiziwin*. This thesis' approach of using these two differing concepts as complementary is performance of Anishinaabe law.

In its daily living application, *oonjnewin* is similar to the concept known as 'karma' or the philosophy of 'what goes around comes around'.²⁹⁹ To the Anishinaabe, if you do not live as intended with *mino-bimaadiziwin* (living the good life in balance with all), and do the opposite in operation, then you face these consequences. *Oonjnewin* means that it will come back to you or your descendants.³⁰⁰ Similarly, the Cree share this concept as well:

the Elders remind us of "*Ojina*" if we do not respect life; and these are choices that we have to make as we move forward. We must always be thinking about the future of the children because they will live with the decisions we make today.³⁰¹

Practically, *oonjnewin* functions as the law of correction. *Oonjnewin* is the belief and driving force governing the conduct and actions of the Anishinaabe:

We have laws as Indian people and those laws are not man-made, they were given to us by God...But in my law, if you do such a thing [breach a sacred undertaking], even if no other human being is aware of it, you will always carry that for the rest of your life. Some part of it here on earth, you will pay for it, something might happen, you might lose something that is more important than what you stole...If you lie, it is the same thing...you will carry that. It will always be with you. And when you die, that is when you really pay for it. That is what the law says; our law says that the amount we do not pay here on earth, when we die will pay for it.³⁰²

To the Anishinaabe, at its core, *oonjnewin* is a fundamental law and why we remain bound to the treaty. If the Treaty is broken, then it violates this natural principle of

²⁹⁹ Wastesicoot, *supra* note 12 at 31-33.

³⁰⁰ *Ibid* at 37.

³⁰¹ *Ibid* at 38.

³⁰² Cardinal, "Treaty Elders of Saskatchewan", *supra* note 9 at 8.

oonjnewin. Given the importance of *oonjnewin* in its daily living application, and how repercussions are passed to future descendants, a treaty cannot be breached by the Anishinaabe as *oonjnewin* would engage. *Oonjnewin* is a precautionary warning of how best to proceed with interpretation and application of Treaty No. 3. It is taught at an early age that through *oonjnewin*, what you do will come to someone you love, it will come back to you or your grandchildren.³⁰³ When commonly spoken during the daily life by the Anishinaabe, *oonjnewinitisow* means they did it to themselves, *oonjnewinitisow* means they did it to someone else, their families and communities.³⁰⁴ It is understood that *oonjnewin* is the way in which repercussions originate back to those who commit a violation. *Oonjnewin* is a core law, a heeding to be cautious. This philosophy will be the backdrop of moving forward with this stage of analysis of how Treaty No. 3 remains bound under Anishinaabe law.

i. Treaties cannot be terminated

For the Anishinaabe in Treaty No. 3, no party can terminate the treaty under any circumstances.³⁰⁵ The Elders state that the Treaties are ‘not for the red man or white man to break’ and Treaties “cannot be broken by the two-legged”.³⁰⁶ As the Treaties were made with Creator following Anishinaabe protocols under Anishinaabe law, it is beyond the capabilities of Man to contravene.³⁰⁷ Throughout the various stages of treaty making, there are numerous provisions under international law, which uphold this binding Anishinaabe legal principle.

³⁰³ Wastesicoot, *supra* note 12 at 65.

³⁰⁴ *Ibid.*

³⁰⁵ Cardinal, “Treaty Elders of Saskatchewan”, *supra* note 9 at 42.

³⁰⁶ Onion Lake, *supra* note 172 at 100; Cardinal, “Treaty Elders of Saskatchewan”, *supra* note 9 at 42.

³⁰⁷ Cardinal, “Treaty Elders of Saskatchewan”, *supra* note 9 at 25.

Under the *Vienna Convention*, a treaty may be invalid if it was made under, error, fraud, or corruption.³⁰⁸ Under international law, these grounds are admissible for treaty invalidity if they were used to induce consent.³⁰⁹ The Anishinaabe have not put forth invalidity claims of this nature (moreover, as reviewed in the previous chapter, the Treaty was created in strict accordance to Anishinaabe law). These treaty invalidation provisions under the *Vienna Convention* are in accordance with the understanding of the irrevocable binding under Anishinaabe law.

Under the *Vienna Convention*, treaties may also be terminated post-formation if there was coercion by a representative or State, a fundamental change in circumstances or an impossibility of performance.³¹⁰ The Anishinaabe have not asserted coercion, which is contradictory to the view put forth in this thesis. The evidence of the refusal to settle the Treaty for over four years supports this claim. However, aside from coercion, the final two provisions deserve more consideration. These two post-formation treaty termination provisions will now be reviewed as the latter clauses are of particular interest given the face value potential applicability.

At the outset of this thesis, non-performance claims of the Crown's fulfillment to the Historic Numbered Treaties were outlined by grievances of the Anishinaabe in Treaty No. 3, including the *Keewatin* decision. The fundamental change doctrine in Article 62(1) of *Vienna Convention* states that there must be a radical transformation which goes direct to the aim and purposes of the Treaty, yet be so fundamental a character that further implementation of the Treaty would have a completely different effect than what was

³⁰⁸ *Vienna Convention*, *supra* note 25, at Article 48(1)&(2), Article 49. 67 and Article 50; Enzo Cannizzaro, ed, *The Law of Treaties Beyond the Vienna Convention*, (New York: Oxford University Press, 2011) [Cannizzaro] at 301.

³⁰⁹ *Ibid* at 302.

³¹⁰ *Vienna Convention*, *supra* note 25 at Article 51, Article 52, Article 62 and Article 61.

originally contemplated.³¹¹ The fundamental change of circumstances doctrine appears to apply.³¹² As earlier canvassed, Anishinaabe people have routinely claimed that Treaty No. 3 has not been fulfilled as per the Anishinaabe understanding. Application of Article 62(1) relies on a subjective view: determination of circumstances at the time of treaty conclusion, whether or not the change is ‘fundamental’, if the parties foreseen the change, if the circumstances were an essential basis for achieving consent, and ascertain if the effect of the ‘fundamental’ change would radically transform the extent of the obligations still to be performed under the treaty.³¹³

Domestically, the applicability of this international legal doctrine has been considered by the Canadian Courts in relation to Treaties with Indigenous peoples. In *Simon*, a treaty rights hunting case involving the pre-confederation treaties, the Supreme Court analyzed the fundamental change doctrine in obiter. Although the evidentiary burden was not met and it was unnecessary to decide in the case at bar, upon the Court’s evidential review the Court could not, “with any certainty”, determine what exactly occurred at the time of treaty making 233 years ago.³¹⁴ As the Court could not, with precision, confirm the original treaty making intent, they could not determine whether the effect would be different then originally contemplated. With this domestic jurisprudence reviewing whether or not there was a radical transformation of a Treaty with Indigenous peoples in Canada, it would appear that the fundamental change doctrine could not apply to the non-performance claims of the Anishinaabe understanding of Treaty No. 3. Furthermore, it is important to note that this doctrine only provides for a right to ‘call for

³¹¹ *Ibid* at Article 62.

³¹² *Ibid*.

³¹³ Aust, *supra* note 212 at 298.

³¹⁴ *Simon*, *supra* note 26 at 34.

termination' not necessarily granted.³¹⁵ In addition, Article 62(2)(a) of the *Vienna Convention* expressly states that termination cannot be invoked on boundary treaties or treaties involving land and adjustments of territory such as the Numbered Treaties.³¹⁶ This is due to the simple fact that you cannot terminate and return parties to their original positions pre-treaty. Thus, in Treaty No. 3 and other boundary treaties, except in the “highly unlikely” event that the treaty terms allows for it, there is no available remedy under this legal doctrine of rendering peoples back to their lands.³¹⁷

The impossibility of performance is the other post-treaty formation legal principle potentially relevant to the Numbered Treaties. If successfully proving that the circumstances truly make it impossible to fulfill, the impossibility of performance doctrine could render termination of the treaty, however, it has only been rarely applied.³¹⁸ If the impossibility is temporary, then it may be invoked for only a suspension of a treaty.³¹⁹ The reason for a treaty suspension is symmetrical to adherence in the interests of *pacta sunt servanda*, a fundamental international law concept that will be explained and applied in the next section of ‘keeping the treaties in good faith’.³²⁰ Impossibility of performance is restricted to only the physical impossibility of performance, not in cases of hardship or expense.³²¹ To terminate Treaty No. 3, it would have to be proved that the Crown could not physically fulfill the Treaty not that they merely choose not to. It is contrary to international treaty law to rely on the impossibility of performance if one of the parties is responsible for the inability of performance. Thus,

³¹⁵ *Vienna Convention*, *supra* note 25 at Article 65.

³¹⁶ *Ibid* at Article 62(2)(a).

³¹⁷ Aust, *supra* note 212 at 290.

³¹⁸ Oliver Corten & Pierre Klein, *The Vienna Convention on the Law of Treaties: A Commentary*, Volume II (New York: Oxford University Press, 2011) [Corten & Klein, “Volume II”] at 1408.

³¹⁹ *Ibid* at 1382.

³²⁰ *Ibid* at 1403.

³²¹ *Vienna Convention*, *supra* note 25 at Article 61.

this would not apply for Canada's lack of fulfillment with implementation of Numbered Treaties as claims have been of an under-performance or non-performance of the Crown, not of an inability or impossibility to fulfill.³²² Under doctrinal international law, a party cannot benefit from its own violations to avoid its obligations; the Crown cannot rely on their own inactions bringing about release from its treaty obligations.³²³

Both doctrines, the impossibility of performance and fundamental change of circumstances, are based on the same idea: "a substantial change in the conditions constituting the basis for the conventional obligation".³²⁴ A situation rendering performance impossible leads to a fundamental change of circumstances.³²⁵ As reviewed, both of these international legal doctrines are subjective and there are application problems identified in the fundamental change of circumstances, as well as a barrier to application of the impossibility of performance.³²⁶ Under these two international legal post-treaty formation termination doctrines, fundamental change of circumstances and impossibility of performance, Treaty No. 3 cannot be terminated. Under Indigenous law, as indicated in this thesis, "the Elders have been unequivocal in their statement that the treaties cannot be changed or altered."³²⁷ The *Vienna Convention* is consistent with the equally strict Anishinaabe legalities that the treaties may not be abrogated. However, there is a perception by mainstream Canadians that the Crown should 'just get rid of the treaties'. As analyzed, Anishinaabe law does not support this position, as termination would violate Indigenous law, which is inconceivable due to *oonjnewin*, nor does

³²² *Ibid*; Aust, *supra* note 212 at 297.

³²³ Corten & Klein, "Volume II", *supra* note 318 at 1387.

³²⁴ *Ibid* at 1385.

³²⁵ *Ibid*.

³²⁶ *Ibid* at 1426.

³²⁷ Cardinal, "Treaty Elders of Saskatchewan", *supra* note 9 at 25.

international law allow for this possibility.

Pursuant to international law, when there are grounds for a treaty to be invalidated or terminated, there is “a sort of *sui generis* automaticity” in that they are subjected to judgment of domestic courts, which may determine that a treaty may not be applied even in the absence of a formal recognized act of denunciation.³²⁸ Upon review of decisions, international legal scholars conclude that on the grounds of a fundamental change in circumstances of a party’s material breach, there are no domestic courts that support the view of an autonomous power to terminate the operation of a treaty.³²⁹ With a few exceptions, there exists only a ‘right to claim’ the invalidity or termination of a treaty.³³⁰ Only after the faultless party pleads the invalidity or termination grounds (if so entitled), the operation of a treaty is dependent on the exercise of power, in which “the state is the exclusive holder”.³³¹ Furthermore, international law expert Anthony Aust states that the fundamental change of circumstance has been invoked “many times”, but has not been applied by an international tribunal.³³² Based upon how international law provisions of treaty validity and treaty termination have been applied, Treaty No. 3 has not and could not be terminated. Therefore, there is a need for a *sui generis* approach to treaty interpretation, where space for Anishinaabe law exists without the present inherent biases as currently subjected to by domestic rule in the present regime.

³²⁸ Cannizzaro, *supra* note 308 at 362-363.

³²⁹ *Ibid* at 363.

³³⁰ *Ibid* at 365.

³³¹ *Ibid* at 366.

³³² Aust, *supra* note 212 at 298.

B.) Mino-Bimaadiziwin

While the treaties remain in force and effect and cannot be terminated, this thesis will now account for interpretative treaty principles under Anishinaabe law, commencing with *mino-bimaadiziwin* as the fundamental doctrine. *Mino-bimaadiziwin* is the guiding principle for how Anishinaabe are to live is, which means ‘the good life’ or the ‘Sacred Life of the Great Spirit’.³³³ In practice, this means to live your life in a good way in fulfillment of Creator’s purpose.³³⁴ It is a fundamental concept that is widely understood and practiced by the Anishinaabe. *Mino-bimaadiziwin* is “more than mere existence or a chronological progression of age. It is a quest to fulfil our purpose.”³³⁵ *Mino-bimaadiziwin* originates in the laws and relationships that the Anishinaabe have with Creator.³³⁶ *Mino-bimaadiziwin* directs, admonishes and requires the Anishinaabe people (as individuals and as a Nation) to “conduct themselves in a manner such that they create positive or good relations in all relationships, be it individually or collectively with other peoples.”³³⁷ To implement *mino-bimaadiziwin*, the Anishinaabe were gifted with the Seven Grandfather teachings.³³⁸ The Seven Grandfather teachings act as a protocol and guide as to how to live. Honesty, respect, love, wisdom, courage, humility and truth are all aids to the Anishinaabe way of life.³³⁹ In practice of *mino-bimaadiziwin*, Anishinaabe are required to live in balance with all humankind, plant and animal-kind. This extends further than the animate. To the Anishinaabe, the inanimate too can hold a spirit, and is alive, such as the drum or *dewe’igan*, and the pipe, or *odoopwaagan*. This animate

³³³ The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 2.

³³⁴ *Ibid* at 9.

³³⁵ *Ibid* at 2.

³³⁶ Cardinal, “Treaty Elders of Saskatchewan”, *supra* note 9 at 14.

³³⁷ *Ibid*.

³³⁸ Johnston, *supra* note 144 at 27.

³³⁹ The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 2.

classification contained within Anishinaabemowin also denotes a level of respect to the Spirit of the commonly viewed inanimate. *Mino-bimaadiziwin* is a sacramental principle with continued application as the way of life in present day.³⁴⁰ The Treaties were founded upon these doctrines and is a core legal principle of the Anishinaabe. To apply *mino-bimaadiziwin* and the seven Grandfather teachings to the relationships created by the Treaties is to act in fulfillment of Anishinaabe law.

As discussed, holding the treaty relationship to the highest regard is codified under Anishinaabe law through *mino-bimaadiziwin* and upon application of the seven sacred teachings. Under international law, there is a long-standing principle dating back to Roman times and Latin phrase: *pacta sunt servanda*, which means treaty obligations can be relied upon to be fulfilled and must be respected.³⁴¹ This coincides with *mino-bimaadiziwin* under Anishinaabe law. International scholars state that *pacta sunt servanda* is “found in all legal traditions around the world” and has natural law origins as an “ethical rule”.³⁴² Article 26 of the *Vienna Convention* enunciates this principle that every treaty is binding on the parties, and “must be performed by them in good faith”.³⁴³ The theme of ‘keeping the treaties’ is contained throughout the *Vienna Convention*, which emphasises the importance of remaining bound to treaties. The Preamble states that treaties are a “means of developing peaceful co-operation among nations”.³⁴⁴ This is consistent with the Indigenous perspective that treaties were to create peaceful relations amongst one another, as “they desired to live together and...share in the livelihood

³⁴⁰ Mainville, *supra* note 240 at 177.

³⁴¹ Corten & Klein, “Volume I”, *supra* note 217 at 661.

³⁴² *Ibid.*

³⁴³ *Vienna Convention*, *supra* note 25 at Article 26 (*pacta sunt servanda*. Article 1 Observance of treaties: Observance, application and interpretations of treaties).

³⁴⁴ *Ibid* at Preamble.

opportunities arising from the land.”³⁴⁵ *Pacta sunt servanda* extends beyond the restriction to solely international law application and applies to contracts under domestic law.³⁴⁶ Thus, it is directly applicable to Treaty No. 3. *Pacta sunt servanda* is required treaty performance because of “an elementary and universally agreed principle fundamental to all legal systems”, to which the principle of good faith forms an integral part of the rule.³⁴⁷ *Pacta sunt servanda* is restricted in application to only those treaties ‘in force’ and although Article 26 is certainly a fundamental in the law of treaties, scholars maintain that it must be assessed within its context.³⁴⁸ *Pacta sunt servanda* reinforces the Anishinaabe law of *mino-bimaadiziwin* and the Seven Grandfather teachings because there is a duty imposed on both parties to strive towards full treaty implementation. Within the application of Anishinaabe laws of *mino-bimaadiziwin* and the Seven Grandfather teachings, there are sub-rules of treaty implementation. This includes respecting and understanding the perpetual nature of Treaties as the Anishinaabe do and honouring the Treaties to this degree. These concepts will now be explained more fully under Anishinaabe law with the *Vienna Convention* as the backdrop to aid in explanation.

i. Perpetual Nature of Treaties

At the time of treaty conclusion, Treaty No. 3 was bound for ‘as long as the sun shines, rivers flow, and grass grows’; that is to say forever.³⁴⁹ In essence, Treaty No. 3 has no expiry date. Under international law, Article 42 of the *Vienna Convention* states if

³⁴⁵ Cardinal, “Treaty Elders of Saskatchewan”, *supra* note 9 at 59.

³⁴⁶ Corten & Klein, “Volume I”, *supra* note 217 at 665.

³⁴⁷ Aust, *supra* note 212 at 179-180

³⁴⁸ Corten & Klein, “Volume I”, *supra* note 217 at 668 and 685.

³⁴⁹ The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 17.

there is no expiry date, treaties are to remain in force and in effect.³⁵⁰ Where treaties are silent, there is a rebuttable presumption that a treaty cannot be unilaterally denounced unless it is shown that the parties intended to admit the possibility or it is implied into the treaty terms.³⁵¹ These protections under international law are to ensure that no party can unilaterally repudiate a treaty when it is no longer at their advantage.³⁵² As the phrase ‘as long as the sun shines, rivers flow, and grass grows’ is extremely significant to the Anishinaabe, an entire thesis could be conducted around this comprehensive, complex, spiritual meaning. For the purpose of this thesis, a brief analysis into the Anishinaabe understanding of the ‘rivers flow’ treaty expiration provision will be undertaken because it is most significant as demonstrative of the everlasting Treaty principles.

To the Anishinaabe, the phrase ‘as long as the sun shines, rivers flow and grass grows’ runs much deeper than its literal translation.³⁵³ The literal translation provides for the potential termination upon fulfillment of certain requirements. To the Anishinaabe, the phrase ‘rivers flowing’ is symbolic of water, *nibi*, which is very sacred.³⁵⁴ Aside from the physical necessities of *nibi*, she is also integral to spiritual life. To the Anishinaabe, there are spirit waters, one of which is the birthing water.³⁵⁵ To protect the baby, the mother carries the amniotic fluid but when it is released during the birth, the water is a cleansing. The path for the baby is purified and the baby enters the physical world, emerging blessed with this sacred water. The Treaty duration ‘as long as the rivers flow’

³⁵⁰ *Vienna Convention*, *supra* note 25 at Article 42(2).

³⁵¹ *Ibid* at Article 56.

³⁵² Corten & Klein, “Volume II”, *supra* note 318 at 1252.

³⁵³ Morris, *supra* note 3 at 73 & 74-75.

³⁵⁴ Anishinaabe recently gathered at the Turtle Lodge in Sagkeeng, Manitoba, on June 4 & 5th, 2015 in ceremony to make the largest water offering to Lake Winnipeg online: <<https://earthwarriorsrising.wordpress.com/2015/03/23/honoring-water/>>.

³⁵⁵ Sharon Venne, “Treaties Made in Good Faith” in Paul W. DePasquale ed, *Native & Settlers. Now & Then. Historical Issues and Current Perspectives on Treaties and Land Claims in Canada* (Edmonton: The University of Alberta Press, 2007) 1 at 1; Linklater & Bone, *supra* note 11 at 118.

means that as long as we, the Anishinaabe people, continue to exist and be here, the Treaty and all promises remain.³⁵⁶ To be congruent with Anishinaabe law and the *Vienna Convention*, the treaty commitments of Treaty No. 3 must be fully honoured in perpetuity, as the Treaty can never lapse and will continue to remain legally enforceable. In recognition of this forever binding, the Crown continues to pay the original treaty terms of annuity to individual Indigenous people of the Treaty.³⁵⁷ This confirmed acceptance is a covenant not only to be bound, but to Indigenous peoples it is symbolic of the recommitment of the Treaty partners to the Treaty, as discussed in the earlier analysis of the tobacco, pipe, and ceremony.

ii. Crown must abide

As propositioned in this thesis, the Crown must adhere to the full implementation of the Treaty and honouring the Treaty relationship. Within Canadian law, the *Keewatin* decision in particular, there is an imposed duty on the Crown to receive Treaty interpretation and implementation grievances from the Anishinaabe.³⁵⁸ This legal duty stems from October 3, 1873, through the creation of the unique relationship Anishinaabe have with the Crown. The Court has held that that

the [Treaty] Commissioners expressly promised that if the Ojibway had a problem with non-fulfillment or Treaty enforcement, the Ear of the Queen's Government, i.e., the Government at Ottawa, would always be open and that their Treaty partner, Canada, would ensure that the promises made by the Commissioners would be actively enforced.³⁵⁹

³⁵⁶ *Ibid* at 118-119; Venne, *supra* note 71 at 194.

³⁵⁷ For example, as a status Indian registered under *The Indian Act*, within membership of a community from Treaty No. 3, I collect \$5.00 on an annual basis, along with my children who are all full status members.

³⁵⁸ *Keewatin*, *supra* note 4 at para 915.

³⁵⁹ *Ibid*.

The Crown responsibility to fulfill the historic Numbered Treaties in Canada cannot be evaded. Since at least the 1960's, Indigenous activists and lawyers such as the Late Harold Cardinal have used many different avenues including political, academia, and legal mechanisms in pushing for treaty fulfillment. Cardinal is unequivocal that "the treaties must be maintained. The treaties must be reinterpreted in light of needs that exist today."³⁶⁰ Treaty #3 Anishinaabe legal academic Sara Mainville argues that based on the promise made to the Anishinaabe by Lt. Governor Morris, in which "the ear of the Queen's Government will always be open to hear the complaints of her Indian people", there should be an immediate creation of a Treaty Table.³⁶¹ In going forward, the Anishinaabe and the Crown must come together as true and equal treaty partners, towards fulfillment of the Treaty vision, as recently committed by our Canadian government by a renewed Nation-to-Nation relationship.³⁶²

iii. Context- 'object and purpose'

Article 31 of the *Vienna Convention* holds that the treaty must be interpreted in good faith with the ordinary meaning to the treaty terms in their context and in light of its object and purpose.³⁶³ Context includes agreements between the parties at the time of conclusion of the treaty.³⁶⁴ Article 31 is codified as a 'general rule of interpretation', a singular rule with three main elements, all to be considered equally: the text, its context,

³⁶⁰ Cardinal, "Unjust", *supra* note 2 at 166.

³⁶¹ Morris, *supra* note 3 at 72; Mainville, *supra* note 240 at 178.

³⁶² Online: The Liberal Part of Canada <https://www.liberal.ca/realchange/a-new-nation-to-nation-process/>.

³⁶³ *Vienna Convention*, *supra* note 25 at Article 31.

³⁶⁴ Corten & Klein, "Volume I", *supra* note 217 at 808.

and the object and purpose of the treaty.³⁶⁵ International law expert Anthony Aust substantiates this by stating it is “not a hierarchy but rather a logical progression or legal norms”.³⁶⁶ However, as we have seen in application, Anishinaabe context has not been weighted accordingly within Canadian law. There is “no clear schema for orchestrating Article 31” thus, courts have “managed to find an angle allowing it to confirm its solution according to the legal syllogism that it has chosen and that it manipulates to this end”.³⁶⁷ The shortfall of the application of this rule is the dependency on the domestic judge being competent to interpret and utilizing the correct methods for interpretation.³⁶⁸ The reality of these problems were identified and applied at the outset of this thesis in Canadian law. The current interpretations are merely interpretations that “correspond to the aspirations and interests of different societal groups”.³⁶⁹ As such, treaty interpretation frequently reflects the principles of Canadian law, driven by a “temptation by the interpreter to interpret the treaty in line with the rules of interpretation pertaining to his or her own legal system”.³⁷⁰ This thesis proposes that in order to interpret the context of Treaty No. 3, it must use Anishinaabe law and legal principles to determine the true spirit and intent (otherwise known under international law as ‘object and purpose’).

A concept under international law, *Travaux Prepartories* or preparatory works, addresses treaty interpretation problems when it is ambiguous or obscure or leads to a manifestly adsorb or unreasonable result.³⁷¹ When discrepancies occur, this legal doctrine requires that everything leading up to the treaty needs to be taken into account, including,

³⁶⁵ Aust, *supra* note 212 at 234.

³⁶⁶ *Ibid.*

³⁶⁷ Corten & Klein, “Volume I”, *supra* note 217 at 831.

³⁶⁸ *Ibid* at 823.

³⁶⁹ *Ibid* at 837.

³⁷⁰ Cannizzaro, *supra* note 308 at 145.

³⁷¹ *Vienna Convention*, *supra* note 25 at Article 31.

draft treaty texts, statements and exchanges, official records or negotiations.³⁷² As there is not an exhaustive list to define preparatory works, this is indicative of a wide discretion to include all supplementary means.³⁷³ *Travaux Prepartories* is codified under the Article 32 of the *Vienna Convention* as supplementary means of interpretation.³⁷⁴ For Treaty No. 3, preparatory works to support the Anishinaabe understanding include the sacred Paypom Treaty. *Travaux prepartories* is limited to a supplementary means, not primary means for interpreting a treaty.³⁷⁵ Article 32 has two approaches to supplementary means of interpretation: a subjective intent, or ‘real intent’ and an objective intent, or ‘declared intent’.³⁷⁶ Problems with the Canadian courts ascertaining these intents will be described below. For the Anishinaabe in Treaty No. 3, there are already provisions under Anishinaabe law should treaty ambiguity occur, as adaptations to move forward have always been provided for by our ancestors.³⁷⁷ Given that the source of the Treaty is sacred and traditional law, there exist provisions for every contingency, which would require a referral to the Elders for interpretation or clarification.³⁷⁸ This thesis contends that the Treaties must be interpreted in their entire context, specifically incorporating Anishinaabe law.

Generally, applications of Articles 31 and 32 of the Vienna Convention to a treaty are complimentary. If there is no acceptable meaning inferred from Article 31, Article 32, supplementary means of interpretation may be called upon to play a role.³⁷⁹ The difference between Article 31 and Article 32 is that the former is a ‘textual interpretation’

³⁷² Corten & Klein, “Volume I”, *supra* note 217 at 852.

³⁷³ *Ibid* at 863.

³⁷⁴ *Vienna Convention*, *supra* note 25 at Article 32.

³⁷⁵ Aust, *supra* note 212 at 244.

³⁷⁶ Corten & Klein, “Volume I”, *supra* note 217 at 842.

³⁷⁷ The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 18 and 12.

³⁷⁸ *Ibid* at 18.

³⁷⁹ Corten & Klein, “Volume I”, *supra* note 217 at 846.

of a treaty, while the latter is an ‘intentional interpretation’ of a treaty.³⁸⁰ International law expert Anthony Aust states that the drafters of these two Articles rejected the view that when “interpreting a treaty one must give greater weight to one particular factor, such as the text (‘textual’ or ‘literal’ approach), or the supposed intentions of the parties, or the object and purpose of the treaty” because reliance on one, to the detriment of the other, was “contrary to the jurisprudence of the International Court of Justice”.³⁸¹ Whenever treaty interpretation is required, it should be guided by the principles and rules of Article 31 and 32 of the *Vienna Convention*. To the Anishinaabe in Treaty No. 3, the Treaty is living and breathing as having a Spirit. Under Indigenous law, Treaties are evolutionary and not static or frozen in time.³⁸² This is congruent within international law: “the International Court of Justice has expressly endorsed this ‘progressive’ approach, which requires balancing treaties’ historical meaning (intertemporal law) with their contemporary effects.”³⁸³ As Anishinaabe law along with Canadian law, was precisely how Treaty No. 3 was negotiated and agreed to, Anishinaabe law must be properly used to define the continuation of this relationship going forward.

Conclusion

As the Treaties were created and are now governed under Anishinaabe law, the standard of care for the maintenance of the Treaties is high. For Indigenous peoples, they believed that the Commissioners would forever ‘keep us like this feather’.³⁸⁴ A feather, in

³⁸⁰ *Ibid* at 817.

³⁸¹ Aust, *supra* note 212 at 231.

³⁸² Stark, *supra* note 9 at 155.

³⁸³ Russel Lawrence Barsh & James Youngblood Henderson, “International Context of Crown-Aboriginal Treaties in Canada” (Final Report prepared for the Royal Commission on Aboriginal Peoples, 12 May 1995) at 304 [unpublished] (Barsh and Henderson).

³⁸⁴ Hildebrandt, “Treaty 7”, *supra* note 11 at 295.

particular a feather from *migizi* or eagle, is considered sacred as a direct messenger to Creator. To the Anishinaabe, a person presented with an eagle feather is honoured to be gifted with the responsibility to care for the feather and it is a responsibility not to be taken lightly. The treaty understanding of ‘keeping like a feather’ means it is expected to be held to the same standards and to treat with the utmost respect, held in the highest regard.³⁸⁵ It is to these standards which the Anishinaabe hold their treaty partners. The Anishinaabe believe that this mutual obligation to respect the enduring nature of the Treaty was accepted by the Crown, as represented by the solemn handshake for ‘as long as the sun shines, the rivers flow and grass grows’.³⁸⁶ This thesis has proposed that the Anishinaabe legal perspective must be given effect. As directed under the Anishinaabe law of *oonjnewin*, a full and complete application of *mino-bimaadiziwin* and the seven Grandfather teachings are required. It is to these high standards that Treaty No. 3 must be honoured and fulfilled, per the spirit and intent of Anishinaabe law.

³⁸⁵ *Ibid* at 314.

³⁸⁶ The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 17.

Chapter VI: CONCLUSION

At the outset of this thesis, concerns were identified with the Canadian Courts' articulation of treaty principles and treaty interpretation provided from the legislatures. Treaty No. 3 was made with both legal systems (Canadian and Anishinaabe) and should be considered in its entire context. A fundamental principle of Canadian law is that law requires a remedy. In this case, the primary remedy continuously sought by the Anishinaabe is full treaty implementation and interpretation in accordance with Anishinaabe laws.

From the application of Canadian law to the Numbered Treaties come several fundamental flaws. Indigenous legal scholars, such as Gordon Christie, advocate for a critical eye to the hidden assumptions of the Canadian court structure, such as identified in this thesis of the non-Indigenous legal bar composition and precedent concerns.³⁸⁷

Currently, Indigenous peoples have to prove their treaty rights under Canadian law. Treaty rights are determined by either proving in court or the recognition of parliament. To be recognized by the judiciary, there are tests that the courts have developed for Indigenous peoples to prove. With these refined legal tests also come restrictions. Problems occur at this analysis stage as the court is balancing the equality of different laws, created within different legal systems, and, arguably do not give full consideration to Indigenous laws, as evidenced in the *Keewatin* decision. Additional problems with the courts interpretation occur when the government can infringe treaty rights. If this occurs, the courts state that it is a reverse onus and articulate a specific process for the ability to override or infringe. This process of extinguishment is a test in which the government must prove that there was a plain and clear intent to do so. This

³⁸⁷ Christie, *supra* note 17 at 145.

provision for a potential unilateral termination of Indigenous rights negotiated under treaty and protected by the Constitution is incredibly damaging to Indigenous peoples. A one-sided interpretation of a two-sided agreement by the domestic State holding all the resources is contrary to Anishinaabe and international law. This is not what the treaty partners intended.

In determining treaty rights, the consequences of these judicial decisions are massive, impacting the livelihood and traditional means of sustenance, also the political, cultural and spiritual well-being of Canada's Indigenous peoples. This thesis is intended to influence the application of Indigenous law in Canadian law by providing a richer understanding of the Anishinaabe perspective, *debwewin*, through sharing my knowledge. The Treaties are agreements that created relationships and obligations to bind the Crown and Indigenous peoples.³⁸⁸ A Canadian Court cannot begin to ascertain the nature of mutually binding Treaty promises, which constitute the Treaty itself, unless they have an understanding of Indigenous law.³⁸⁹

Treaty interpretation of the historic Numbered Treaties has been left to mostly to domestic law. I have argued that a one-sided interpretation of a two-sided agreement is an inaccurate application of law under which the agreement was formed. It has been suggested by Indigenous academics that within Canadian law, treaty interpretation and implementation could be broadened to incorporate Indigenous laws.³⁹⁰ This has already occurred in Canada, through the early precedent of *Connelly*, which upheld the validity of a binding marriage performed solely under customary Indigenous law, prior to a

³⁸⁸ *Ibid* at 153.

³⁸⁹ *Ibid* at 157.

³⁹⁰ Borrows, *supra* note 20 (Borrows devotes a chapter in his book (chapter seven) to "The Role of Governments and Courts in Entrenching Indigenous Legal Traditions", and provides examples from other jurisdictions to be of assistance to the Courts).

subsequent legal marriage performed under domestic Canadian law.³⁹¹ This example demonstrates how recognizing Indigenous law can and has already been incorporated within Canadian common law. Locally, lower courts are already applying Indigenous law within Treaty No. 3, as evidenced by the trial judge's decision in *Keewatin*. These examples demonstrate that the application of laws in Canada can be broadened to include full application of Indigenous law within the domestic State.

The Canadian courts use Canadian law to articulate Indigenous law. This thesis focused on an Anishinaabe legal perspective explained to people who do not share spiritual practices, beliefs and traditions. Concepts were grounded in international law to draw the analogies between Indigenous legal orders and international law concepts to be accepted by Canadian law. Although international treaty law does not completely relate, nor address all aspects of Anishinaabe law, this thesis demonstrated that there is enough commonality to help bridge Canadian law and Anishinaabe law. The method of using selected Anishinaabe and international law doctrines to draw similarities is a starting point in an attempt to address the current imbalance within Canadian law and initiate dialogue. This thesis used international treaty law as the comparative as there are key concepts founded in international treaty law, which correlates to the Indigenous perspective of the treaty. The use of international law was not meant to undermine Canada's sovereignty, nor be binding on domestic law, but rather was used to simply draw out established concepts. By grounding them in accepted international doctrine, further insight and commonality to the Indigenous perspective may occur. As demonstrated, international law is an important connector between Indigenous and Canadian law. This is a *sui generis* approach to the treaties, as advocated by Canadian

³⁹¹ *Connolly v Woolrich and Johnson et al*, 1867 17 RJRQ 75, 11LCJur 197, Monk J.

courts, using international law as a bridge between Anishinaabe law and the common law.

Supported by Indigenous scholars, this thesis raised questions of the power of Canada to “act unilaterally” to limit the Treaty as the Court has viewed treaty rights subject to Crown authority, held by a subset of the Canadian population.³⁹² New consideration must be given to these sacred and solemn agreements legally entered into between the two nations. Implementation of the Numbered Treaties is determinative of a future pending relationship between the parties, hopefully one towards reconciliation.³⁹³ I attempted to do this by articulating an Anishinaabe legal significance of the Treaty within relevant spheres of international treaty law through the *Vienna Convention*. International treaty law principles and norms were applied to Anishinaabe legal perspectives of the Treaty in order to give new life to this sacred, living and breathing document.

i. Treaties legitimize State Sovereignty

There are several legal and policy reasons to implement the full spirit and intent of the Treaty according to Anishinaabe law, including treaties legitimize Canadian sovereignty, the Crown is bound by the treaties and the treaties provide reconciliation. This thesis demonstrated how important treaties are to Indigenous peoples, but they are also essential to all Canadians. The Dominion of Canada is a sovereign State, yet its existence can only be reconciled with Indigenous peoples as original inhabitants.³⁹⁴ In an advisory opinion, the International Court of Justice found that *terra nullis*, as well as the Doctrines of Discovery and Conquest, were not legitimate doctrines to assert sovereignty

³⁹² Christie, *supra* note 17 at 164 and 184.

³⁹³ The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 16.

³⁹⁴ Hildebrandt, “Treaty 7”, *supra* note 11 at 205.

over a territory.³⁹⁵ Thus, the Crown has a legal obligation to enter into formal agreements with Indigenous peoples.³⁹⁶ Scholars state “we have long accepted that the principle of temporal priority applies when it comes to our settlement on their lands. Treaties offer us a way of seeing the recognition of that principle as the basis for the legitimacy of our settlement here and not in opposition to it.”³⁹⁷ The historic Numbered Treaties are the foundation for the existence of Canada and are thus vital in the continued recognition of the exercise of State sovereignty.

To the Anishinaabe, “the treaties are instruments that expanded the sovereign First Nations circle to accommodate and include the sovereign Crown. These arrangements are, in the view of the Elders, Nation-to-Nation agreements.”³⁹⁸ The Crown’s actions of entering into the Numbered Treaties are seen as an acknowledgement of the sovereignty of Indigenous peoples and recognition of their rights.³⁹⁹ The Numbered Treaties are key not only to the creation, but also the continuance of the Dominion of Canada.

Indigenous legal and international scholar Sharon Venne states that only agreements entered into with Indigenous peoples can give any legitimacy to the use and occupancy of Canadian-claimed lands.⁴⁰⁰ Treaties are the vehicle of State acquisition over traditional territorial lands of Indigenous peoples. In order to legitimize state sovereignty, full and complete understanding of the mutual obligations needs to occur. Indigenous peoples caution against any violation of the grave undertakings of the Treaty:

³⁹⁵ Venne, *supra* note 71 at 186.

³⁹⁶ *Ibid* at 206.

³⁹⁷ Asch, *supra* note 1 at 75.

³⁹⁸ Cardinal, “Treaty Elders of Saskatchewan”, *supra* note 9 at 42.

³⁹⁹ Harold Cardinal, *The Rebirth of Canada’s Indians* (Edmonton: Hurtig Publishers, 1977) at 137 [Cardinal, “Rebirth”].

⁴⁰⁰ Venne, *supra* note 71 at 206.

I wonder if the White man understands that. Me and my friend...were thinking that maybe it is time that [the White man] should know and we should tell him. Maybe that will straighten him, if he understands how dangerous it is to breach sacred understandings.⁴⁰¹

Claims of under performance of these binding agreements need to be taken as serious as the grave breaches as they are.

It is clear that under the Anishinaabe law of *oonjnewin*, Canada cannot legally abrogate the Treaties. Contravening Anishinaabe law has far reaching effects: “to discount the legitimate governments of Indigenous peoples is to discount Canada’s own legitimacy.”⁴⁰² Canada needs to uphold the Treaty to its fullest including the spirit and intent according to Anishinaabe law.

ii. Bound by the Crown

Through concluding the Treaty, there are obligations of Canada to fulfill according to Anishinaabe treaty law. To the Anishinaabe, Treaty No. 3 was a way to act with Creators plan of “securing the guarantee of the Crown to respect the First Nations integrity and relationship with Creator”.⁴⁰³ Per traditional Anishinaabe laws, the Treaty was sanctioned not only by the Anishinaabe, but also by the Crown through their active and willing participation in the observance of Indigenous laws in the treaty-making process.⁴⁰⁴ In the words of the late Lieutenant Governor Morris: “you cannot avoid responsibility for the acts of your predecessor”, thus, Treaty No. 3 binds the Crown.⁴⁰⁵ In an early Privy Council decision, the Court held that Indigenous peoples’ legal systems

⁴⁰¹ Cardinal, “Treaty Elders of Saskatchewan”, *supra* note 9 at 8.

⁴⁰² Venne, *supra* note 71 at 207.

⁴⁰³ Cardinal, “Treaty Elders of Saskatchewan”, *supra* note 9 at 31.

⁴⁰⁴ Hildebrandt, “Treaty 7”, *supra* note 11 at 84.

⁴⁰⁵ Talbot, *supra* note 214 at 176.

existed and “once they have been studied and understood they are no less enforceable than rights arising under English law.”⁴⁰⁶ It is hoped that the legal community may come together and work in a way to rejuvenate these sacred agreements bound in perpetuity as Indigenous and non-Indigenous peoples continue to co-exist in the State now known as Canada.

In order to fulfill the prophesized treaty vision, dedication and commitment is required on behalf of all Canadian citizens as we are all descendants and treaty beneficiaries. An Indigenous Elder states:

Our people have always understood that we must be able to continue to live our lives in accordance with our culture and spirituality. Our elders have taught us that this spirit and intent of our treaty relationship must last as long as the rivers flow and the sun shines. We must wait however long it takes for non-Aboriginal people to understand and respect our way of life. This will be the respect that the treaty relationship between us calls for.⁴⁰⁷

This respectful understanding is the desire from the Anishinaabe in Treaty No. 3 who implore from our treaty partners “I see the time when the true spirit and intent of the Northwest Angle Treaty of October 3rd, 1873 is truly the basis for a peaceful and harmonious relationship between a fully functional Anishinaabe Nation in Treaty #3 and the Crown.”⁴⁰⁸ The actualization of this relationship would achieve a much-needed reconciliation in Canada.

⁴⁰⁶ *Re: Southern Rhodesia*, 1919 PC AC 211, Lord Sumner at para 234.

⁴⁰⁷ Asch, *supra* note 1 at 134.

⁴⁰⁸ The Grand Council Treaty #3, “Pazaga’owin”, *supra* note 15 at 30.

iii. Reconciliation

As indicated by Indigenous peoples, and to an extent the Crown themselves, Treaties are key to reconciliation.⁴⁰⁹ Through this thesis, it was shown how Treaties are considered to contain the highest sources of Anishinaabe legal principles and are representative of a “Magna Carta”.⁴¹⁰ Indigenous legal scholar Sakej Henderson explains this significance in a comparable way to non-Indigenous peoples:

Among Aboriginal people, the spirit of the treaties is equal to the Mosaic Code of the Israelites, equal to St. Paul’s vision of Christianity. The vision of the renewing of Treaties is equal to Mahatma Gandhi’s vision of home rule that stirred a subcontinent, began the long climb of Third World nation to dignity, and the decolonization movement in the U.N. The Treaty vision is similar to Dr. Martin Luther King’s dream of individual equality that stirred the dream of African-American minorities. Yet, in its context and content, the Treaty vision is a distinctive vision. Its binding force must be polished and renewed. It is a relationship, not just an idea.⁴¹¹

The Numbered Treaties are alliances of peace and union. These relations were, and are crucial to survival as peoples. Relationships are fluid and the Treaty is enduring. Treaties are not a means to an end, but rather the start of the relationship. Treaty No. 3 must be viewed in a new light, one where Anishinaabe law prevails, as the beginning of a renewed relationship for Indigenous and non-Indigenous peoples in Canada.

Presently, the Numbered Treaties are a source of conflict in Canada. However, they can be key to facilitate much needed reconciliation. An Indigenous leader was paraphrased stating: “we want to build a house with the White Man. The treaty is our foundation.”⁴¹² There are no quick fixes to the current state of affairs in relationships

⁴⁰⁹ Talbot, *supra* note 214 at 57.

⁴¹⁰ Cardinal, “Unjust”, *supra* note 2 at 28.

⁴¹¹ Barsh and Henderson, *supra* note 383 at 324.

⁴¹² Asch, *supra* note 1 at 132.

between the Crown and Indigenous peoples, but the focus must be on long-term sustainable solutions:

When we talk of aboriginal rights settlements today, the question is not *whether* the white man will share in the wealth and the resources that this land has to offer. In the minds of our elders, that question was settled many centuries ago, at the time at the time of man's creation. The question is *how* we can share those resources so that they will benefit not only the white man of today, but his children and his children's children; so that they will benefit not only the Indian of today but his children and his children's children. If the Creator had meant this country to be Indian country there wouldn't be a white man in it. It is our belief that Indians and white people have to live together in Canada and we must find a way to live together with dignity.⁴¹³

Reconciliation is what Indigenous peoples in Canada have historically sought and have continued to advocate for. To the Anishinaabe in Treaty No. 3, the Treaty is the mechanism to come together with Canada towards implementation of a mutual goal.

Under international law, treaties are designed to achieve a shared purpose. In order to determine the interpretation of a treaty, a judge must respect the will of all parties.⁴¹⁴ Treaties have been a disagreement between two parties as to the scope and context, which is exacerbated by a two-sided agreement supplemented by a one-sided interpretation. These legal agreements were developed and bound by respecting separate legal orders, yet one party is now vested with sole power to interpret and implement. Full understanding of Indigenous laws are required to interpret these sacred agreements.

As evidenced, the Treaty is valid under the spiritual laws of the Anishinaabe, given by *Gitché Manitoo*, Creator. The core problems Anishinaabe people have are not with the Treaty itself, but lack of fulfillment of the Treaty in its legally prescribed form under Anishinaabe law. According to Indigenous peoples, our laws are the original laws

⁴¹³ Cardinal, "Rebirth", *supra* note 399 at 144 [Emphasis in the original].

⁴¹⁴ Cannizzaro, *supra* note 308 at 131.

of the land and must remain as the laws here.⁴¹⁵ Our Anishinaabe elders teach us that the solution for this legal dilemma is to “learn from [one] another.”⁴¹⁶ Our Elder advisors, in their infinite wisdom, truly believe that if non-Indigenous peoples sit down and really spend time with us, then they will learn from us. It is only within this environment that a reconciliation may occur. This is facilitated by explaining Anishinaabe treaty law to non-Indigenous legal professionals through a *sui generis* approach of bridging Anishinaabe law and common law through international law.

⁴¹⁵ Sovereignty Union- First Nations Asserting Sovereignty, Statement, “Aboriginal Law must sit on top of whiteman’s law, because ‘our Law is the Law of this land” (4 December 2013) online: <<http://nationalunitygovernment.org/content/aboriginal-law-must-sit-top-whitemans-law-because-our-law-law-land>>.

⁴¹⁶ Dave Courchene Sr. “A Message of the Grand Chief” in Niigaanwewidam James Sinclair & Warren Cariou, eds, *Manitowapow: Aboriginal Writings From the Land of the Water* (Winnipeg: High Water Press, 2011) 126 at 131.

BIBLIOGRAPHY

LEGISLATION

- Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
- Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

JURISPRUDENCE

- Calder v British Columbia (AG)* 1973 SCR 313.
- Connolly v Woolrich and Johnson et al*, 1867 17 RJRQ 75, 11LCJur 197, Monk J.
- Delgamuukw v British Columbia*, [1997] 3 SCR 1010.
- Grassy Narrows First Nation v Ontario (Natural Resources)*, [2014] SCC 48.
- Keewatin v Minister of Natural Resources*, 2011 ONSC 4801 at para 282, MA Sanderson J (Ont SCJ).
- Re: Southern Rhodesia*, 1919 PC AC 211.
- R v Badger*, [1996] 1 SCR 771.
- R v Marshall*, [1999] 3 SCR 456.
- R v Taylor and Williams*, [1981] 34 OR (2d) 360.
- Simon v The Queen*, [1985] 2 SCR 387.
- St. Catherine's Milling and Lumber Co v The Queen* (1888), 14 App Cas 46 (PC).

SECONDARY MATERIAL: MONGRAPHS

- Aust, Anthony. *Modern Treaty Law and Practice*, 2d ed (New York: Cambridge University Press, 2007).
- Asch, Michael. *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014).
- ed. *Aboriginal and Treaty Rights in Canada* (Vancouver: UBC Press, 2002).
- Borrows, John. *Canada's Indigenous Constitution*, (Toronto: University of Toronto Press, 2010).
- Cannizzaro, Enzo ed. *The Law of Treaties Beyond the Vienna Convention* (New York: Oxford University Press, 2011).
- Cardinal, Harold. *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: M G Hurtig Ltd, 1969).
- . *The Rebirth of Canada's Indians* (Edmonton: Hurtig Publishers, 1977).
- & Hildebrandt, Walter. *Treaty Elders of Saskatchewan: Our Dream is that Our Peoples Will One Day be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000).
- Corten, Oliver & Klein, Pierre. *The Vienna Convention on the Law of Treaties: A Commentary*, Volume I (New York: Oxford University Press, 2011).
- . *The Vienna Convention on the Law of Treaties: A Commentary*, Volume II (New York: Oxford University Press, 2011).
- Denzin, Norman K., Yvonne S. Lincoln & Smith Tuhiwai, Linda eds. *Handbook of Critical and Indigenous Methodologies* (Los Angeles: Sage Publications, 2008).

- DePasquale, Paul W. ed. *Native & Settlers. Now & Then. Historical Issues and Current Perspectives on Treaties and Land Claims in Canada* (Edmonton: The University of Alberta Press, 2007).
- Doerfler, Jill, Sinclair, Niigaanwewidan James & Kiiwetinepinesiik Heidi, eds. *Centering Anishinaabeg Studies* (Michigan: Michigan State University, 2013).
- International Work Group for Indigenous Affairs, *Honour Bound: Onion Lake and the Spirit of Treaty Six: The International Validity of Treaties with Indigenous Peoples* (Copenhagen: RotaRota, 1997).
- Johnson, Harold. *Two Families: Treaties and Government* (Saskatoon: Purich Publishing, 2007).
- Johnston, Basil. *Ojibwe Heritage* (Toronto: McClelland & Stewart, 1976).
- Kovach, Margaret. *Indigenous Methodologies: Characteristics, Conversations, and Contexts* (Toronto: University of Toronto Press, 2009).
- Linklater, D'Arcy & Bone, Harry and the Treaty & Dakota Elders of Manitoba with contributions by the AMC Council of Elders, *Ka'esi Wahkotumahk Aski -Our Relations With The Land: Treaty Elders' Teachings*, vol 2, (Winnipeg: Treaty Relations Commission of Manitoba, 2014).
- Miller, J.R. "Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada" (Toronto: University of Toronto Press, Scholarly Publishing Division, 2009).
- Olthuis, Kloor, Townshend LLP, *Aboriginal Law Handbook* 4th ed (Toronto: Carswell, 2012).
- Richardson, Benjamin J, Imai Shin & McNeil, Kent eds. *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oregon: Hart Publishing, 2009).
- Sinclair, Niigaanwewidam James & Cariou, Warren eds. *Manitowapow: Aboriginal Writings From the Land of the Water* (Winnipeg: High Water Press, 2011).
- Talbot, Robert J. *Negotiating the Numbered Treaties: An intellectual & Political Biography of Alexander Morris* (Saskatoon: Purich Publishing, 2009).
- The Honourable Alexander Morris, P.C. *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 Publishers, 1880).
- Treaty 7 Elders and Tribal Council with Walter Hildebrandt, Dorothy First Rider & Sarah Carter. *The True Spirit and Original Intent of Treaty 7* (Montreal & Kingston: McGill-Queen's University Press, 1996).

SECONDARY MATERIAL: ARTICLES

- Christie, Gordon. "Justifying Principles of Treaty Interpretation" (2000) 26 Queen's LJ 143.
- Henderson Youngblood James (Sa'ke'j). "Constitutional Vision and Judicial Commitment: Aboriginal and Treaty Rights in Canada" (2010) 10:2 AILR 24.
- "Postcolonial Indigenous Legal Consciousness" (2002) 1:1 Indigenous LJ 11.
- Mainville, Sara J. "Treaty Councils and Mutual Reconciliation Under Section 35" (2007) 6:1 Indigenous LJ 141.

- Seymour, Janine. “Casenote: *Grassy Narrows First Nation v Ontario (Natural Resources)*”, Case Comment (May/June 2015) 8(18).
- Stark, Heidi Kiiwetinepinesiik. “Respect, Responsibility, and Renewal: The Foundations of Anishinaabe Treaty Making with the United States and Canada” (2010) 34:2 *American Indian Culture and Research Journal* 145.

SECONDARY MATERIAL: DISSERTATIONS

- Kinew, Kathi. *Manito Gitigaan Governing in the Great Spirit’s Garden: Wild Rice in Treaty #3* (Interdisciplinary Doctorate Thesis, The University of Manitoba, 1995) [unpublished].
- Wastesicoot, Jennie. *Tapwetamowin: Cree Spirituality and Law for Self-Governance* (Interdisciplinary Doctor thesis, University of Manitoba, 2014)[unpublished].

SECONDARY MATERIAL: OTHER

- Bruyere, Louis “Smokey”. “Unheard Voices in the Law: Aboriginal People and the Law in Canada” (Presentation delivered to The Canadian Association of Law Teachers and The Canadian Law and Society Associations, 8 June 1988) [unpublished].
- Barsh, Russel Lawrence & Henderson Youngblood, James. “International Context of Crown-Aboriginal Treaties in Canada” (Final Report prepared for the Royal Commission on Aboriginal Peoples, 12 May 1995) [unpublished].
- Courchene, Dave Jr. (Presentation delivered at the 40th Anniversary commemorating the Anicinabe Park Occupation, Kenora, 23 August 2014) [unpublished] Online: <<http://www.cbc.ca/news/canada/thunder-bay/anicinabe-park-occupation-observed-in-kenora-40-years-later-1.2744139>>.
- Craft, Aimee. *Anishinaabe Nibi Inaakonigewin Report: Reflecting the Water Laws Research Gathering conducted with Anishinaabe Elders* (Report, created at Roseau River, Manitoba, June 20-23, 2013, revised spring 2014) [unpublished].
- Daughtery, Wayne. “Treaty Research Report: Treaty Three” (Ottawa: Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986).
- Earth Warriors Rising, online: <<https://earthwarriorsrising.wordpress.com/2015/03/23/honoring-water/>>.
- Idle No More Manifesto, online: Idle No More <<http://www.idlenomore.ca/manifesto>>
- Fact Sheet (June 2011), online: Assembly of First Nations <http://www.afn.ca/uploads/files/factsheets/quality_of_life_final_fe.pdf>.
- Grand Council Treaty #3 online: <<https://gct3.net/grand-chiefs-office/gct3-info-and-history/government-of-canada-document/>>).
- Online: Grand Council Treaty #3 <https://gct3.net/wp-content/uploads/2008/01/paypom_treaty.pdf>.
- Online: Grand Council Treaty #3 <<https://gct3.net/grand-chiefs-office/gct3-info-and-history/paypom-treaty/>>.
- Online: Grand Council Treaty #3 <<https://gct3.net>>

- Hale, Alan S. "Negotiations between Treaty 3 Grand Council and TransCanada on Energy East come to an angry end", *Kenora Daily Miner and News* (22 January 2015) online: Kenora Daily Miner and News <<http://www.kenoradailyminerandnews.com/2015/01/22/negotiations-between-treaty-3-grand-council-and-transcanada-on-energy-east-come-to-an-angry-end>>.
- Henderson, Sakej J Y. "When Learning Draws us in Like Magnets, our Heart and Brain Connect to Animate our Worldviews in Practice" (Saskatoon: University of Saskatchewan, Aboriginal Education Research Centre, May 2009) online: <<http://www.ccl-cca.ca>>.
- Kulchyski, Peter. "OOCHINEHWIN: assessing the keyask project through the lens of aboriginal rights and community member concerns" (Report for the Manitoba Clean Environment Commission on behalf of the Concerned Fox Lake Grassroots Citizens, November 2013) [unpublished].
- Sacred Treaties ~ Sacred Trust: Working Together for Treaty Implementation and Advancing our Sovereignty as Nations, a strategy for treaty implementation" (Resolution delivered at the Annual General Assembly, Winnipeg, June 2010), online: Assembly of First Nations <<http://www.afn.ca/index.php/en/resolutions>>.
- Sovereignty Union- First Nations Asserting Sovereignty, Statement, "Aboriginal Law must sit on top of whiteman's law, because 'our Law is the Law of this land'" (4 December 2013) online: <<http://nationalunitygovernment.org/content/aboriginal-law-must-sit-top-whitemans-law-because-our-law-law-land>>.
- The Grand Council Treaty #3. "Pazaga'owin Reclaiming our Wings: Transition to Nationhood" [unpublished] online: <<http://caid.ca/RecWing010308.pdf>>.
- "The Creator Placed Us Here: Timeline of significant events of the Anishinaabeg of Treaty #3." (3 October 2013) [unpublished].
- "We have kept our Part of the Treaty." (The Anishinaabe Understanding of Treaty #3, 3 October 1998) [unpublished].
- The Indian Act, Online: Indigenous Foundations Arts UBC <<http://indigenousfoundations.arts.ubc.ca/home/government-policy/the-indian-act.html>>.
- The Liberal Party of Canada Online: <<https://www.liberal.ca/realchange/a-new-nation-to-nation-process/>>.
- The *Royal Commission of Aboriginal Peoples*, online: <<http://www.parl.gc.ca/content/lop/researchpublications/prb9924-e.htm>>.
- The Treaty Relations Commission of Manitoba online: <<http://www.trcm.ca>>.
- Wab Kinew Twitter status, Online: Twitter <<https://twitter.com/wabkinew/status/487603600193892354>>.