Into Relevance: Treaty Words Matter

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Rebuilding Indigenous economies is a long, complex, and arduous set of tasks. It involves the creation of new institutions that can harness Indigenous innovation and creativity and channel Indigenous ideas and values into actions that improve the quality of Indigenous lives, enabling us to participate effectively in the world we find ourselves in. Treaties were one such institution.

Treaty-making and treaties were the institutions that our forefathers used to accomplish these important tasks. Treaties were, from Indigenous perspectives, a way to create on-going relationships of mutual benefit with the newcomers, designed to help Indigenous peoples and newcomers to live well together. Almost from the day that they were signed, treaties were interpreted by Canada through the lens of a land deal to enable the expansion of its territory. Treaties, while important to Canada for its territorial growth, came to be seen as irrelevant and were largely ignored until the 1970s.

The 1996 Final Report of the Royal Commission on Aboriginal Peoples spoke of the promise of treaties: "If what Aboriginal peoples thought they had won had been delivered — a reasonable share of lands and resources for their exclusive use, protection for their traditional economic activities, resource revenues from shared lands, and support for their participation in the new economy being shaped by the settlers — the position of Aboriginal peoples in Canada today would be very different. They would be major landowners. Most Aboriginal nations would likely be economically self-reliant. Some would be prosperous." The Commissioners called for a renewed treaty process that would enable Aboriginal nations to exercise control over their lands, waters, and economic matters.

The Government of Canada acknowledged the existence of treaties and recognized that there were differences in interpretation. In the 1969 Statement of Indian Policy of the Government of Canada (aka the White Paper), the government described these differences as "the anomaly of treaties between groups within society and the government of that society (that) will require that these treaties be reviewed to — how they can be equitably ended."

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The Indian Association of Alberta began the Red Paper, its response to the White Paper, by boldly stating: "To us who are Treaty Indians there is nothing more important than our Treaties, our lands and the well-being of our future generations." On treaties, they elaborated: "The intent and spirit of the treaties must be our guide, not the precise letter of a foreign language. Treaties that run forever must have room for the changes in the conditions of life. The undertaking of the Government to provide teachers was a commitment to provide Indian children the educational opportunity equal to their white neighbours. The machinery and livestock symbolized economic development."

The Chiefs of Manitoba also profoundly disagreed with the stated desire to terminate treaties and said so in Whabung: "It is the position of the Manitoba Indian people that the treaties as negotiated in the context of their time and as they exist today, are in fact, unconscionable agreements. They were negotiated by the Crown, on its part, in the full knowledge of the potential of this country, in the flowery language of its time and in an incomprehensible and foreign tongue that was not understood by our fathers. The terms of the treaties were unconscionable in that they did not ensure fair and equitable treatment to us and must rank in history as one of the outstanding swindles of all time."[1]

Both Indigenous groups, among many others, provided evidence that the treaties had not been implemented fairly and needed to be restructured. Treaties and their proper implementation were the foundation of a just and honourable approach to creating the conditions for success. Since the 1970s, there have been academic and Indigenous oral histories that help us better understand the treaties from Indigenous perspectives and how they might be used as institutions to further Indigenous economic development.

As a result of Indigenous advocacy, the strong Indigenous reaction to the White Paper, and the 1973 *Calder* decision, Canada recognized the importance of the treaties in 1973 with its first policy statement on Indian land claims, known as the "Statement on the Claims of Indian and Inuit People", followed by the 1981 statement titled "In All Fairness". Treaty rights were officially recognized in section 35 of the Constitution Act, 1982. The Comprehensive Land Claims Policy of 1986 set out the process for negotiating new treaties. A half century of jurisprudence has made clear the nature of Aboriginal rights in Canada. In 1989, Canada and the Federation of Saskatchewan Indigenous Nations (now the Federation of Sovereign Indigenous Nations) established the Office of the Treaty Commissioner to foster a strong and effective continuing treaty relationship. Four years later, in 1993, the governments of Canada, British Columbia, and BC First Nations created the British Columbia Treaty Commission to oversee the process of negotiating treaties in that province.

In 2014, Canada established the Aboriginal and Treaty Rights Information System to provide information pertaining to potential or established Aboriginal or treaty rights. Three years later, in 2017, it issued the Cabinet Directive on Modern Treaty Implementation. This directive was accompanied by the Statement of Federal Principles on Modern Treaty Implementation. These directives and statements created a whole-of-government approach to treaties and treaty implementation. A Deputy Minister's Oversight Committee, consisting of representatives from 18 departments, oversees Canada's treaty process.

In 2017, Canada and the Modern Treaty and Self-Governing First Nations held the Canada–Modern Treaty and Self-Governing First Nations Forum, the first in a series of

[1] Whabung refers to the 1971 statement, "Whabung: Our Tomorrows", by the Indian Tribe of Manitoba (now the Assembly of Manitoba Chiefs).

annual meetings to discuss treaty affairs. Crown–Indigenous Relations adjusted its organizational structure in 2015 to create a unit responsible for the implementation of treaties: The Modern Treaty Implementation Office.

Treaties and treaty-making represent, for some, a way to continue the process of confederation and to right past wrongs, and they remain at the heart of an Indigenous political agenda. After a half-century hiatus, lasting from the 1923 Williams Treaties, Canada restarted treaty-making through the modern land claims agreement process. The 1975 James Bay and Northern Quebec Agreement initiated the period of modern treaty-making. The Prairie Treaty Nations Alliances in the 1980s advocated for treaty modernization. The Yukon Land Claims Agreements in 1993 and the Nisga'a Treaty in 1999 are excellent examples of the outcomes of the continuing process.

Canada's attitude towards treaty-making has changed. In the 2018 Provisional Annual Report on the Implementation of Modern Treaties and Self-Government Agreements, Crown–Indigenous Relations and Northern Affairs characterized treaties as "a key component of Canadian nation-building." Modern treaties, the report goes on to state, "promote strong and sustainable Indigenous communities while advancing national socio-economic objectives that benefit all Canadians." This is an incredible change from the attitudes expressed in the 1969 White Paper.

The half century since Whabung demonstrates that treaties remain relevant to both Canada and Indigenous peoples. While new treaties are being negotiated, historic treaties are being scrutinized. Indigenous leaders and their political/legal advisors have developed an adeptness at reading and interpreting the treaties, winning the argument that there is more to treaties than the words written on paper.

Indigenous leaders began to pay attention to the interpretation of treaties and the treaty provisions. One of the most challenging cases involves the Robinson treaties of 1850: Robinson-Huron and Robinson-Superior.

The Robinson treaties were negotiated to secure mining rights to lands occupied by the Anishinaabe between Lake Superior and the Huron watershed. The Robinson-Huron and Robinson-Superior treaties were agreements with several Anishinaabe nations to cede large tracts of land to the Crown. In return, the Anishinaabe were to receive reserve lands and rights to hunt and fish on the lands if they were not "taken up" for resource development and settlement. An important and critical feature of the treaties was the form of payment: a one-time cash payment and yearly payments to individual treaty beneficiaries.

The 1850 Robinson-Huron treaty states:

1. "the sum of two thousand pounds of good and lawful money of Upper Canada, to them in hand paid, and for the further perpetual annuity of six hundred pounds of like money, the same to be paid and delivered to the said Chiefs and their Tribes at a convenient season of each year."
2. "to allow the said Chiefs and their Tribes the full and free privilege to hunt over the Territory now ceded by them, and to fish in the waters thereof, as they have heretofore been in the habit of doing; saving and excepting such portions of the said Territory as may from time to time be sold or leased to individuals or companies of individuals, and occupied by them with the consent of the Provincial Government."

And

3. "The said William Benjamin Robinson, on behalf of Her Majesty, who desires to deal liberally with all her subjects, further promises and agrees, that should the Territory hereby ceded by the parties of the second part at any future period *produce such an amount as will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound Provincial Currency in any year, or such further sum as Her Majesty may be graciously pleased to order.*"

In legal terms, this is known as an escalator clause. The annuity payable to the Anishinaabe beneficiaries would increase according to the value of the harvest from the land. The annuity was raised once in 1874, 25 years after signing, to $4 per person and has not changed since then.

In 2012, the contemporary beneficiaries of the treaty filed a claim in the Ontario Superior Court of Justice, asking the Crown to fulfill the promise to increase the annuity as the value of production from the land had increased over the last 137 years. Six years later, in 2018, the court found that "the Crown has a mandatory and reviewable obligation to increase the Treaties' annuities when the economic circumstances warrant." The court ruled that "the economic circumstances will trigger an increase to the annuities if the net Crown resource-based revenues permit the Crown to increase the annuities without incurring a loss." Ontario tried to claim Crown immunity from claims of breaches of fiduciary duty but was rejected by both the trial and appeal courts of the province. Ontario has appealed the Ontario Court of Appeal decision to the Supreme Court of Canada while the third phase of the Superior Court trial continues.

The third phase of the trial now focuses on the annuity and its potential increase. The outcome hinges on interpretation of the escalator clause: has the wealth produced from the territory exceeded its costs? This is the job of economists and accountants. The Government of Ontario argues that the cost of harvesting the natural resource wealth of the area exceeded its revenues by between $7 billion and $12 billion. As a result, no increase in annuity has been possible. As one Crown lawyer said, "Mining research, re-forestation, insect control, forest fire management, surveys, land agents, as well as expenses in connection with colonization roads and railways without which harvested resources could not be moved to market" are so huge that net revenues "have been negative since about 1960".

Joseph Stiglitz, a Nobel Prize-winning economist and former head of the World Bank, testified that Ontario resource developments have generated about $126 billion after costs and that at least 84% of this, or $105.8 billion, should go to Indigenous communities. Ontario reports that treaty communities have received only about $300 million.

The words of the historical treaties matter. The words we are using in the modern treaty process matter. Treaties, both historic and modern, have moved from irrelevance to relevance in the space of two generations of Indigenous leaders. The Robinson treaties court case demonstrates the power of words across the centuries. Indigenous leaders, educated in the law and Indigenous oral traditions, work with Elders and university academics to use these words to create new relationships and to hold Canada accountable for the Crown's words. Treaties, both historic and modern, are becoming the living documents envisioned by Indigenous leaders of the late 19th and early 20th centuries. Treaties, interpreted from Indigenous perspectives, can become the basis for the continual renewal of the relationship

between Canada and Indigenous peoples and for finding creative and novel ways of sharing the wealth of this country. Treaties, interpreted from the perspective of the 2023 repudiation of the Doctrine of Discovery, can become the institutions for building a new relationship with the newcomers. Based on the principle of mutual benefit by sharing the land and its wealth, they can become effective institutions of economic development. The lesson of the Robinson treaties court case is that words matter.

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