LITIGATING TREATIES OR LITIGATING TREATY RELATIONSHIPS?

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Without a guardian of the pledged word, only force counts.
   --Alain Supiot, Homo Juridicus: On the Anthropological function of the Law

The Relationship

The question posed by my title deserves a thoughtful answer. As Justice Binnie wrote in Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388 [Mikisew] concerning the proper implementation of Treaty No. 8:

In summary, the 1899 negotiations were the first step in a long journey that is unlikely to end anytime soon. (Mikisew, para. 56)

In Mikisew, Justice Binnie speaks of the treaty in the context of “managing change”. The case itself hinges upon the strength of Mikisew procedural rights (para. 57) and whether the ongoing process of “taking up” lands has been exercised in a manner compatible with the honour of the Crown.

Of course, in the earlier jurisprudence (for example, R. v. Horse, [1988] 1 S.C.R. 187 [Horse]) priority, if not exclusive attention, is given to the written instrument. From there the Courts moved on to the readiness to compare the written instrument with the known terms of any oral promises or negotiations (R. v. Taylor and William, [1981] 3 C.N.L.R. 114 [Taylor and William]) (Dr. von Gernet, a frequent expert for the Crown, would say that the only way any weight can be given to oral terms or oral promises would be if they were confirmed or validated by the written terms). Fortunately, the Courts have moved on and we now live in a juridical world that accepts the predominance of the oral terms given, for these were all that the First Nations parties to treaties had access to. This, of course, involves a challenge for the litigator in identifying, validating and conveying oral terms. And this in turn raises the as yet unresolved (but improving) standing of Elders’ evidence before the Courts and the
weight of their testimony as against that of “expert witnesses”! Or perhaps Elders are themselves expert witnesses... This is being discussed within the Federal Court.¹

Treaty “Hierarchy”

Another general observation I have with respect to putting treaties and treaty relationships before the Courts relates to the artificial and (I am becoming increasingly convinced) mischievous ranking of treaties under the headings: pre-Confederation, historic post-Confederation, modern or comprehensive.

The early wisdom had pre-Confederation treaties at the bottom of the barrel, post-Confederation historic treaties definitely submerged and only modern or comprehensive treaties bobbing on the surface. But if we consider that the most important aspect of this interaction between the State and First Nations is, in fact, the relationship understood and agreed upon by the parties, looked at from this angle, there is a very good case to be made that the pre-Confederation treaties such as those involved in the R. v. Marshall, [1999] 3 S.C.R. 456 [Marshall No. 1] and R. v. Marshall, [1999] 3 S.C.R. 533 [Marshall No. 2], in Simon v. The Queen, [1985] 2 S.C.R. 387 [Simon] and in R. v. Sioui, [1990] 1 S.C.R. 1025 [Sioui] provide a much more fulsome picture of the relationship being established or confirmed than do the post-Confederation historic treaties or indeed the modern comprehensive treaties. The impression left by the pre-Confederation treaties is one of a dynamic relationship of equals. The post-Confederation historic treaties, certainly in their written form, convey termination of any healthy relationship and the denial of First Nations culture. The litigator is faced with a battle of credibility between First Nation oral traditions and the apparently clear language of the treaties (Mixed Messages, Double Standards, Eurocentrism and High Hurdles: Evidentiary Challenges in Aboriginal Litigation [High Hurdles]²). As for the modern comprehensive treaties, their main problem is that they are incomprehensible in that they attempt to set out exhaustive perimeters for the relationship (Quebec

¹ There is some evidence that Elders are reluctant to put themselves through the adversarial process. Federal Court Liaison Committee, Statement of Elders from Turtle Lodge Meeting, October, 2009.

² Peter W. Hutchins with the assistance of Tanya Whiteside, a paper presented to the Continuing Legal Education Society of British Columbia Conference, October 2004.
(Attorney General) v. Moses, 2010 S.C.R. 27 [Moses], Little Salmon/Carmacks First Nation v. Yukon (Minister of Energy, Mines and Resources), 2008 YKCA 13 [Little Salmon]). The Aboriginal Perspective is drained off by the “entire agreement” clauses (Little Salmon/Carmacks and Moses: Original Intent Approach, the Progressive Approach, “Cooperative Federalism” and Treaty Federalism – Name your Poison [Name your Poison]).

And so in litigating treaties and treaty relationships, at least on the First Nations side, any attempt by the Crown to rank treaties by assuming a 300 year process of perfecting these instruments should be resisted.

Questions for the Litigator

There are some fundamental inquiries necessary when undertaking litigation concerning treaties and treaty relationships. Let me list a few that we can then examine and discuss.


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3 Peter W. Hutchins, a paper prepared for a conference hosted by the Canadian Institute, Aboriginal Law, Consultation & Accommodation, Toronto, February 2011.

4. What is the nature and extent of the instrument? (*Sioui, R. v. White and Bob*, 50 D.L.R. (2d) 613 [*White and Bob*])


6. What were the unwritten provisions of the treaty? (*Sioui, Mikisew, Taylor and William*)

7. What was the historical or contemporary context in which the treaty was negotiated and concluded? (*White and Bob, Sioui, Marshall, Little Salmon, Eastmain Indian Band v. Robinson*, [1992] 3 F.C. 800 [*Eastmain*])

9. What might have been the cultural or linguistic barriers to full (or any) mutual understanding? \textit{(Taylor and William, Buffalo v. Canada, 2002 FCT 889 [Buffalo], High Hurdles)}

10. What individuals were involved in the treaty process? \textit{(Syliboy, case referred to by Chief Justice Dickson in Simon, Taylor and Williams, Sioui)}

11. What was the state of the law at the time of the conclusion of the treaty? Does the Intertemporal Rule apply? \textit{(The Island of Palmas Case, Permanent Court of Arbitration (1928) No. XIX; 2 R.I.A.A 829, Alderville Indian Band et al. v. Her Majesty the Queen, Federal Court No. T-195-92 [Alderville], Sioui, Simon, White and Bob)}


13. What events may have taken place that could have altered the original terms of the treaty? \textit{(R. v. Sparrow, [1990] 1 S.C.R. 1075 [Sparrow] (reference to treaties), Sioui, Badger)}
14. What system of law or systems of laws should govern the interpretation and implementation of the treaty? Law of the Constitution, common law, civil law, Imperial law, Law of Nations, international law or Indigenous law?


16. What might have been the effectiveness of various provisions of the treaty such as any “cede, release and surrender” provisions? (Peter W. Hutchins, “Cede, Release and Surrender”: Treaty-making, the Aboriginal Perspective and the Great Juridical Oxymoron or Let’s Face It – It didn’t Happen Here, Chapter 17 in “Aboriginal Law Since Delgamuukw”, Canada Law Book, 2009)

17. Do treaties provide procedural rights as well as substantive rights? (Mikisew, para. 57)


20. Can treaty rights really be unilaterally extinguished? *(Sioui, Badger)*

21. What is the effect, if any, of the passage of time or changing norms and standards? *(Simon, Sioui)*

22. Do Justices Corry *(Badger, para. 41)* and McLachlin (as she was then) *(Marshall No. 1, para. 78)* have the last word on treaty interpretation? And do they provide a coherent framework?

It might be useful to compare their respective understandings side by side.

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<th>Justice Corry – Badger, para. 41</th>
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<td>At the outset, it may be helpful to once again set out some of the applicable principles of interpretation. First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. See <em>R. v. Sioui</em>, [1990] 1 S.C.R. 1025, at p. 1063; <em>Simon v. The Queen</em>, [1985] 2 S.C.R. 387, at p. 401. Second, the honour of the</td>
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<th>Justice McLachlin – Marshall No. 1, para. 78</th>
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| This Court has set out the principles governing treaty interpretation on many occasions. They include the following.  
Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of “sharp dealing” will be sanctioned. See Sparrow, supra, at pp. 1107-8 and 1114; R. v. Taylor (1981), 34 O.R. (2d) 360 (Ont. C.A.), at p. 367. Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed. See Nowegijick v. The Queen, [1983] 1 S.C.R. 29, at p. 36; Simon, supra, at p. 402; Sioui, supra, at p. 1035; and Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85, at pp. 142-43.

2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories: Simon, supra, at p. 402; Sioui, supra, at p. 1035; and Badger, supra, at para. 52.

3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed; Sioui, supra, at pp. 1068-69.

4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed: Badger, supra, at para. 41.

5. In determining the signatories’ respective understanding and
intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties: *Badger, supra*, at paras. 52-54; *R. v. Horseman*, [1990] 1 S.C.R. 901, at p. 907.

6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time: *Badger, supra*, at paras. 53 et seq.; *Nowegijick v. the Queen*, [1983] 1 S.C.R. 29, at p. 36.

7. A technical or contractual interpretation of treaty wording should be avoided: *Badger, supra*; *Horseman, supra*; *Nowegijick, supra*.

8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what “is possible on the language” or realistic: *Badger, supra*, at para. 76; *Sioui, supra*, at p. 1069; *Horseman, supra*, at p. 908.

9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental
to the core treaty right in its modern context: *Sundown, supra*, at para. 312; *Simon, supra*, at p. 402.


24. Do modern comprehensive treaties comprise an exhaustive “code” for the relationship of parties? (*Moses*)

**Forum Conveniens**

I would suggest that counsel called upon to litigate treaties seriously consider two avenues:

1. Bring proceedings in Federal Court; and
2. If at all possible proceed by way of Application rather than Action.

**Why Federal Court?**

I have long been perplexed by the fact that Canadian jurists, whether on the Bench or at the Bar are in denial over what our Constitution explicitly and implicitly prescribes:

- S. 91(24) of the *Constitution Act, 1867* gives the Parliament of Canada exclusive legislative authority over Indians, and Lands Reserved for the Indians.
- The exclusive role of the federal Crown as treaty maker (Howard) and the constant attempts to sidestep these “inconvenient truths” through devices couched in soothing language such as “harmonization”, “delegation” or “cooperative federalism”. (Moses, Little Salmon)

I suppose that opposing these points draws attention to oneself as being a strict constructionist or an original intent advocate (a current squabble in the U.S. Supreme Court). Let us not forget that the United States severed its public law from Great Britain; whereas Canada (or Westminster for Canada) continued the British constitutional model (Preamble to the Constitution Act, 1867 – “a Constitution similar in principle to that of the United Kingdom”). Under Imperial Policy towards Aboriginal Peoples, from 1760 actually until 1982, the Imperial authorities not the colonial authorities were responsible for “Indian Affairs” (Report of the Select Committee of the House of Commons (U.K.) on the Aborigines (British Settlements), 26th June 1837, contained in Report on the Affairs of the Indians in Canada, Sessional Paper No. 2, vol. 4, Journals of the Legislative Assembly, 1847). The Imperial Crown, and after 1867, the Federal Crown were invested with exclusive, certainly predominant responsibility for Aboriginal peoples. They were the “treaty makers” and the treaty implementers.

The Imperial Crown or sovereign was the authority held out to Aboriginal people through which they agreed to associate with the Crown and participate in the building of Canada (Reference re Secession of Quebec, [1998] 2 S.C.R. 217 [Secession of Quebec], para. 82). All this coupled with section 17(1) of the Federal Courts Act, 2011 suggests that when treaty making authority is in play, the place to be is the Federal Court (Provinces can always attempt to intervene or be hauled in through Third Party Applications).

Why Applications and not Actions?

The current budget allocation for the Federal Justice Department is around $65 million. In the meantime, First Nations are diverting funds from other programs or going hat in hand to the Test Case Funding Program that actually only contemplates cases that have reached the Appeal level after the “scorched earth policy” of the Crown at trial has taken its toll.
The solution is surgical strikes - laying bare Crown intentions and conduct - judicial review, declaratory relief, and administrative law relief.

What tools are needed to best assist the Courts in treaty litigation?


**The Third Way – Court Mediated Solutions and Giving Social Services a Chance**

In a paper I wrote 20 years ago (*Alternative Methods of Dispute Resolution: Practical Analysis – Litigation as a Technique for Dispute Resolution in Aboriginal Law Issues*), I suggested five adjectives to describe why litigation might not be the ideal dispute resolution vehicle. They were: lengthy, expensive, confrontational, arcane and removed. In my opinion these adjectives still describe the current situation.

Let me here refer to my reflections, 20 years after that paper, which are found in the concluding chapter of a book I contributed to titled, *Aboriginal Title and Indigenous Peoples: Canada, Australia and New Zealand*. My title was *Power and Principle: State-Indigenous Relations across Time and Space*. Toward the end of my text or rant I wrote the following, pp. 14-18):

> I return with mixed feelings to the words that I spoke six years ago to open the conference at the University of Calgary. I knew then that there had been defeats in the unequal battles waged in the Canadian courts since *Calder*... I had come to understand as well that any advance in favour of indigenous peoples had been prompted, if not ordered, by court decisions, particularly those of the Supreme Court of Canada. What I had yet to appreciate was the mediating role of the courts, which has the potential to replace final judgments. Brian Ballantyne has the right idea in opening his chapter:

> The debate about Aboriginal title appears to consist of two main themes. The first theme is that various judgments define the scope

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4 Peter Hutchins, a paper presented to the Canadian Bar Association Annual Meeting, Calgary, August 1991.
and tests for Aboriginal title. These judgments are critical because, without them, there would be little legal, political, or cultural (at least by the non-Aboriginal community) acceptance of that title: “You have to get the court to make the order, or it just doesn’t happen.” This theme is widening and deepening.

But I now ask, are there only two possible outcomes: war through litigation or an unequal peace resulting from negotiations in which the settler state makes its paper claims over the lands of indigenous peoples? Peterson contends that “the future requires the development of creative new policies that work toward negotiated rather than litigated solutions.” In my opinion, that depends entirely on what is referred to as “litigated solutions.” The siren call of negotiations, friendly settlements, and their ilk issues from the courts and the state -- from the courts as a naive consummation devoutly to be wished; from the state as a Faustian bargain to entice indigenous peoples away from their “indigenous difference”; and, if I may speak as a member of the world’s second oldest profession, from the law’s protection. The deal with the devil is that one will enter into discussions with the state not on the basis of rights but on the basis of “interests,” not mediated by the courts, but mano-a-mano. I doubt that Rigsby had La damnation de Faust playing in his ears when he wrote the following, but his caution is well worth pondering:

We and our lawyer brethren, I believe, have been too willing to overemphasize the spiritual aspect of Aboriginal traditional ownership of land, to the disregard and perhaps devaluation of its social and material features. I cannot say whether a rights-based approach in our ethnography and Native title research and writing will produce the determinations that our clients desire, but I can say that, without a rights-based approach, we are not even in the game anymore. (emphasis added)

I suggest that, five years on, the path to our own Peace of Westphalia will lie in the supervisory capacity of the courts. This may surprise those who view the courts as often “getting it wrong” or litigation as being one more battle to survive and negotiation the preferred route. Negotiation can be a frustrating, ruinous, and seemingly unending road if the power and discretion of the crown are left unchecked. There will be no progress without the assistance of the courts, assistance that can take many forms -- with due respect to Arthur Ray, Bruce Rigsby, Paul Chartrand, Nicolas

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5 Patrick Macklem, Indigenous Difference and the constitution of Canada (Toronto: University of Toronto Press, 2001.)
Peterson, Jacinta Ruru, and Kenichi Matsui -- indeed to some extent every contributor to this volume.

Other reforms being discussed have been inspired by initiatives by courts in Australia and New Zealand, in particular those that create greater space for Aboriginal peoples’ laws and ways of sharing their knowledge. These initiatives include the recent amendments to Australia’s *Evidence Act 2005* that make it easier for members of an Aboriginal or Torres Strait Islander group to give evidence of their traditional laws and customs. Another amendment makes it possible for a witness to give evidence in narrative form without facing the barrage of questions on cross-examination that many elders and other respected members of Aboriginal communities have found nothing short of harrowing and demeaning. Inspiration also comes from the practice in Australia of judges travelling to the territories at the centre of title claims to hear “on country evidence,” which places the court on the very lands that hold so much meaning to the Aboriginal claimants. This displacement creates space for at least portions of cases to be heard on Aboriginal peoples’ own lands and on their own terms. Canadian courts are following suit. During the trial of the recent and in many ways ground-breaking *Tsilhqot’in* case, the court took the unconventional yet highly respectful step of holding evening sessions in order to hear stories that could only be told by the Tsilhqot’in people after the sun had set. In my own legal practice, I have seen how efforts to hold court in Aboriginal communities have been met with considerable gratitude and resulted in much needed empowerment.

Courts, at least those in Canada, must become considerably more assertive in requiring best efforts to settle matters under court supervision, something almost invariably resisted by the state. What I am proposing, in effect, is that the bench, the bar, and other disciplines swept up in Aboriginal litigation work together to ensure that the judicial process as it applies in state-indigenous litigation becomes less adversarial and more professorial. Perhaps the disputes handed to the judiciary can be resolved, at least in part, through the techniques of mediation, involving a partnership of law, social science, and Aboriginal perspective. One important structural feature of this partnership must be the willingness of the courts to retain jurisdiction to see matters through to the end. I fear,

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6 *Evidence Act of 1995 (as Amended),* (Cth.) (Australia), s. 72.
7 Ibid., s. 29(2).
however, that a significant population of litigation counsel will not only have to be led to this stream but also induced to drink from it.

The trust confided in the courts, whether exercising inherent or statutory jurisdiction, resides in the hope that they will wield power in the vindication of justice and principle -- the principle exposed so skillfully and passionately in the pages of this volume. Just and secure arrangements must reflect a genuine clasping of hands, not a winner and a loser. But that result will not be achieved by leaving power unsupervised to negotiate with principle. The respective perspectives on what is right and lawful may first have to be laid before the courts supported by law -- customary law, common law, indigenous law, the rule of law, constitutionalism, and international law -- for without that “we are not even in the game anymore.” Once this is done, the parties should submit to mediation by the courts, preferably voluntary, if necessary imposed, involving not just counsel but also clients, principals, and the considerable assistance of other relevant disciplines introducing the knowledge and wisdom resulting from social science research. We would no longer be dealing with “might is right” but with informed, directed, and motivated attempts to give expression to our “longing to live in a fair world.” All parties would know that failure in this quest may result in resolution by judicial dictate while at the same time being cognizant of the reality that those judicial pronouncements will, in the future, emanate from a process no longer held hostage to political or financial power. Hopefully, this will be a legacy of the current promising judicial reform and members of the bench and bar who continue to strive for that reform.

Litigating Aboriginal/State conflicts including those arising from treaty relations is no longer a task for one profession, nor is it a single track process unfolding in a Court of law.

Treaty making involves a hybrid of politics and law. Treaty enforcement cannot be left to politics but nor should it be the exclusive province of lawyers and court practice.

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9 Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories Including the Negotiations on which They Were Based and Other Information Relating Thereto* (Toronto: Belfords, Clarke, 1991), 208:

And now, Indians of the plains, I thank you for the open ear you have given me; I hold out my hand to you full of the Queen’s bounty and I hope you will not put it back. We have no object but to discharge our duty to the Queen and towards you. Now that my hand is stretched out to you, it is for you to say whether you will take it and do as I think you ought -- act for the good of your people.
As I conclude in *Power and Principle*, p. 226:

To allow the law to work its magic, the courts need appropriate forums and the wise counsel of visitors from indigenous cultures and those professions that strive to establish connections and comprehension between cultures. The appropriate forums, I am suggesting, must include court-supervised dispute resolution through mediation, facilitation, and persuasion (gentle or not so gentle).

My years of negotiating with the State and litigating against the State have convinced me that neither approach is designed to achieve a just result for Aboriginal peoples. In recent litigation, I have tried hard to combine the two, to strive for a third way.

Courts across the country are offering mediation, but I will suggest that it is the Federal Court that is specifically targeting Aboriginal litigation as being in need of creative remedies.¹⁰ (*Makivik Corporation v. Canada*, [1999] 1 F.C. 38 [*Makivik]*)

¹⁰ Extensive work has been going on in the Federal Court, IBA-CBA Liaison Committee.