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## Aboriginal-Crown Treaty-Making in Canada: A Many-Splendoured Thing<sup>1</sup>

Jim R. Miller

### Introduction

One of the frustrating things about trying to teach treaty-making as an element of Canadian history is that one's audience, like the country itself, is highly regionalized. On the prairies, students come to the class knowing there are "Numbered Treaties" and resistant to the idea that there are any other treaties, or any other categories of treaties, than those made in their own region. I suspect that students in the Maritimes fixate on eighteenth-century treaties, Quebec students focus on treaties between 1701 and the 1760s, and Ontario students have an unhealthy fascination with treaties of the first half of the nineteenth century. Happiest of all are students in British Columbia, who have been raised to believe that "B.C. doesn't have treaties."

The reality is, of course, that the history of Aboriginal-Crown treaty-making in Canada is far richer and more diversified than the treaty history of any one region. There have been four phases of treaty-making: commercial compacts, peace and friendship treaties, territorial treaties, and modern treaties that are either comprehensive claims settlements or separately negotiated agreements of recent decades. Moreover, there is another vast field of treaties between First Nations of which non-Native students and scholars are almost totally ignorant. And, as I will argue later, there is further complexity in the fact that historical writing about treaties and other matters can vary widely from discipline to discipline. It is worth taking a few minutes to explore the richness of this many-splendoured thing—treaty-making in Canada.

Commercial compacts, which were once thought to be the vanished artifacts of a bygone era when fur was king, have in fact been with us through Canadian history and are found among us still. It is true that commercial agreements of a unique character did spring from economic ties in the fur trade, beginning as early as the 1670s. Both French and English fur traders understood that their small numbers and lack of expertise made them dependent on First Nations to locate, take, process, and bring to market the furs that the newcomers sought. For example, as early as 1680, Hudson's Bay Company (HBC) officials in London issued orders to their representative in Hudson Bay concerning how he was to conduct his dealings with First Nations who controlled the area in which he hoped

to establish a trading post.<sup>2</sup> Thanks to research by Arthur Ray and a few others, we know that the HBC in particular entered into pacts with First Nations in Rupert's Land that made the commerce possible, using Aboriginal protocols that involved, whether the Europeans understood it or not, entering kin relationships with their North American hosts. As a Montreal-based fur trader memorably complained, "There is no end to relationship among the Indians,"<sup>3</sup> because the First Nations had to make strangers kin before they could trade with them with confidence.

Aboriginal protocol and kin-making were features that commercial compacts shared with the second form of treaty-making that emerged simultaneously after contact. In fact, it was only the European partners in these early treaties that thought there were two distinct forms of agreement. First Nations did not distinguish between commercial compacts and treaties of friendship as the Europeans did, because for them both ententes were outgrowths, or aspects, of the kinship relations they entered into with the newcomers. As a Six Nations diplomat put it in 1735, "Trade & Peace we take to be one thing."<sup>4</sup> Whether it was Champlain and the Montagnais chief Anadabijou in northern Quebec in 1603 or the Five Nations and Corlaer, as they called the English governor, at Albany, the foundational protocols they went through created many ties: kin, commercial partners, friends, and, if necessary, allies. Peace and friendship treaty-making entered a new and more formal phase in the eighteenth century when the Great Peace of Montreal of 1701 and the Mi'kmaq treaties of 1726, 1752, and 1760–61 emerged to take centre stage, at least in our historiography. But it is important to recognize that they were all founded on the practice of Aboriginal kin-making protocol, a mechanism for making friends of strangers. One of the striking features of this phase of treaty-making was the way in which some Europeans and Euro-Americans, men like Frontenac and Sir William Johnson, became masters and enthusiastic practitioners of indigenous rituals involving the pipe, speech-making, feasting, and wampum.

Out of the final paroxysm of the peace and friendship phase, the Seven Years' War, emerged the basis for the third and most enduring of the eras of Crown-Aboriginal treaty-making in Canadian history. Commercial compacts and peace and friendship relationships did not disappear, but beside them, and soon supplanting them, there emerged land-related agreements based on the requirements of the Royal Proclamation of 1763. The Proclamation, which Britain promulgated to tidy up awkward details of the peace that ended the showdown between France and Britain, concluded with half a dozen paragraphs that were intended to reassure France's First Nations allies that Britain meant them no harm. It attempted to do this by declaring out of bounds to settlers all lands west of the Appalachian Mountains and south of Rupert's Land that were not included in existing colonies such as Quebec to be lands "reserved to them ... as their Hunting Grounds." Moreover, the Proclamation said that, should the First Nations who occupied these lands wish to dispose of some of them, they could lawfully do so only to the Crown "at some public Meeting or Assembly of the said Indians to be held

for that Purpose by the Governor.<sup>5</sup> The aim of the “Indian clauses” at the end of the Royal Proclamation was to stop the land frauds that had caused so much strife west of the Thirteen Colonies. Their effect, though, was to lay down a Crown-sanctioned procedure for making Crown-Aboriginal territorial treaties that would provide access for Europeans to First Nations lands. As is also well known now, Sir William Johnson, Indian superintendent in the northern colonies, converted a unilateral imperial document into an Aboriginal-Crown treaty by means of the Treaty of Niagara of 1764.<sup>6</sup>

Though never scrupulously observed by officers of the Crown, the Royal Proclamation initiated a succession of phases of treaty-making that dealt with Indian lands from southern Ontario to the Rocky Mountains and as far north as the southern portions of the Northwest Territories by 1921. The Government of Canada does not recognize an important group of these agreements—the Upper Canadian treaties made between 1784 and the late 1830s—as treaties. The government’s position is that these are not treaties, but indentures or simple contracts. That position can only be sustained if one concentrates solely on the language of the government’s version of the agreements that eventually were published.<sup>7</sup>

If, on the other hand, one looks at the accounts of the Crown’s treaty commissioners of the meetings at which the agreements were fashioned, one finds a much richer and more complicated picture. At least until the Robinson Treaties of 1850, the making of these so-called indentures occurred within a framework of First Nations protocol. So, for example, the opening speech by treaty commissioner James Givins in 1811:

Children—I am happy to see you, and I return thanks to the Great Spirit, that has been pleased to enable us to meet at this place in good health. Children—I am sent by Your Father the Governor to make an agreement with you for the purchase of a small piece of land, the plan of which I now lay before you ... Children—As your women and children must be hungry, I have brought some of Your Great Father’s Bread and milk, and some ammunition for your young men, which I will give you before we hear this.<sup>8</sup>

The speech-making and present-giving continued the use of traditional protocol. By 1850, however, these markers of traditional treaty-making had almost completely disappeared, and in the making of the Manitoulin Island Treaty of 1862 they were nowhere in evidence.

It is striking that First Nations protocols re-emerged into prominence in the 1870s in the making of the southern Numbered Treaties. Largely because First Nations performed the rituals and partly because the Crown’s representatives were accompanied by and dependent upon a number of Hudson’s Bay Company veterans, the smoking of the pipe, kinship rhetoric, feasts, and also equestrian displays surrounded the talks. These phenomena linked the events on the Plains in the 1870s with both the twin treaty phases of the northeast woodlands and the persistent protocol of the Rupert’s Land fur trade. Moreover, in the Numbered Treaties one other element was unusually prominent: both sides made much of involving the deity in the proceedings. First Nations leaders talked of the Great

Spirit and often offered the pipe, while government treaty commissioners, Alexander Morris especially, frequently talked of both the Christian god and the Great Spirit as witness to all they were doing. While Morris understood the importance of the pipe ceremony, it is unlikely that he appreciated that First Nations held that its use converted bilateral negotiations into three-way talks that included the Great Spirit. Equally significant was the fact that the agreements that resulted from such multilateral parleys were covenants, agreements to which the deity was a party. The dissonance between the government's view of the Numbered Treaties that conveyed ownership of land, and First Nations understanding of them as covenants that established a relationship between First Nations and the Crown that was to be renewed regularly and adjusted is striking. That disagreement has been a major cause of the problems that Canada and First Nations have had agreeing upon and properly implementing treaties ever since the late 1870s.

As had been the case in Upper Canada, the longer territorial treaty-making went on in the West and the North, the weaker the attachment of the Crown to traditional understandings of treaty became. By Treaty 9 in northern Ontario in 1905, for example, the only remnant of the old protocol of kin-making that remained was the "feast" that occurred at the end of deliberations. By now this was a pretty poor affair, and treaty commissioners clearly were puzzled by the fact that their First Nations treaty partners took the gatherings quite seriously. By the final territorial treaty, the Williams Treaties of 1923, traditional protocol was nowhere to be seen or heard. Canada would follow that mockery of treaty-making by shutting down treaty negotiations for half a century. It was not until the James Bay Cree and Nisga'a got the state's attention by means of court decisions in 1972 and 1973 that the federal government rediscovered its ability to make treaties with the First Nations whose lands and resources southern entrepreneurs coveted. The *Calder* decision of 1973 led to the creation of a claims process that included a comprehensive claims settlement mechanism by 1974. The interim injunction the James Bay Cree obtained in 1972 resulted from difficult negotiations in the James Bay and Northern Quebec Agreement (JBNQA) of 1975. The JBNQA is generally regarded as the first modern Canadian treaty, and comprehensive claims settlements have the same legal and constitutional status as territorial treaties. These events ushered in the modern treaty-making era.

The fourth era of treaty-making has involved three forms of agreement: comprehensive claims settlements, large treaty agreements such as Nunavut and Nisga'a, and the more localized territorial treaties that are beginning to emerge from the British Columbia Treaty Commission process. It is probably unnecessary to underline the fact that traditional kin-making protocol is either not associated with these agreements, or, if it is, that the government has no understanding of its significance.

Looking back over the last four centuries, then, we can appreciate that Canada has had—and continues to have—and will always have—a lengthy, diverse, and rich treaty-making history. Commercial compacts and peace and friendship

treaties were joined in the latter part of the eighteenth century by territorial treaties that have gone through numerous transformations and are with us still in several forms. Clearly, we have a big job to do to teach our students, policy-makers, and Canadians more generally about the diversity and richness of this legacy, about its contemporary relevance, and about its importance for the future.

If that history is not complex enough, consider another dimension to the diversity that typifies our understanding of Crown-Aboriginal treaty-making. I am, of course, referring to the differing approaches to interpreting the history of treaties that predominate in First Nations and Euro-Canadian communities. The former emphasizes both the oral and documentary record, while the latter tends to take seriously only its own form of history. That issue is sufficiently well known that I need not pursue it here.

There is another difference about understanding treaties that is not as well known, but needs to be understood if we are to begin to make our way towards consensus on the meaning of treaties. I refer to the difference between history and legal history. By “legal history” I do *not* mean what James Clifton scorned as “law office history” described as “the selective use and suppression of historical and anthropological evidence, systematic distortion of facts in support of a preconceived ‘theory of the case,’ the dexterous manipulation of judicial and public sentiments, perfectly astounding hyperbole, and the most outstanding fabrications” that the anthropologist witnessed in land claims litigation.<sup>9</sup> Nor do I mean the legal history that academics in law faculties produce. Scholars such as Sid Harring, Hamar Foster, and Kent McNeil, to mention only a few, do historical analyses that are similar in methodology and historiographical contribution to their colleagues in arts departments.<sup>10</sup> Rather, I refer to the more understandable differences in how historians construct the past, and how lawyers and judges, most especially of the Supreme Court of Canada, fashion an authoritative view of the past through judicial decisions in cases in which history is a major factor. I hasten to add that I mean no disrespect to my legal and judicial brothers and sisters in pointing out this difference of approach.

Law and the judicial system have a more specific and immediate job to do than does history, and they go about it differently. As Mr. Justice Ian Binnie famously said on behalf of the majority in the Supreme Court of Canada’s first *Marshall* decision in 1999, the courts face real problems that are dependent on historical evidence and must reach a decision in the short term:

The courts have attracted a certain amount of criticism from professional historians for what these historians see as an occasional tendency on the part of judges to assemble a “cut and paste” version of history ...

While the tone of some of this criticism strikes the non-professional historian as intemperate, the basic objection, as I understand it, is that the judicial selection of facts and quotations is not always up to the standard demanded of the professional historian, which is said to be more nuanced. Experts, it is argued, are trained to read the various historical records together with the benefit of a protracted study of the period, and an appreciation

of the frailties of the various sources. The law sees a finality of interpretation of historical events where finality, according to the professional historian, is not possible. The reality, of course, is that the courts are handed disputes that require for their resolution the finding of certain historical facts. The litigating parties cannot await the possibility of a stable academic consensus. The judicial process must do the best it can.<sup>11</sup>

### The courts must rule.

Leaving aside the question of whether academic history ever produces stable consensuses, Justice Binnie had a point. Confronted by a real problem of interpretation and faced with competing reports from historians, courts must come up with a plausible resolution of the history on which the issues at trial turn. The contending lawyers naturally address their presentations to that necessity, and craft briefs intended to lead the court to conclude what is in their client's interest. But necessity brings problems. As a group of Australian scholars has observed, for most judges "the past consists of a single continuous narrative, and the question is whether enough elements in the narrative have been revealed for the rest to be filled in. This approach ignores the complex relationship between the past and the present."<sup>12</sup>

Moreover, judges and lawyers do not always recognize that their training inclines them to a particular approach that can be limiting when it comes time to sift conflicting interpretations. To put the point simply, legal training shapes litigators and judges who are focused on the written word, in contrast to historians' training, which brings them to believe that the written word without its context is literally meaningless. Please note: I am not referring to the distinction between written and oral evidence, but between text and context. To put the point even more simplistically, it is sometimes said that law is about text, and history is about context. In complex Aboriginal law cases, the limitation imposed by legal orientation to the written word can have severe consequences.

A few examples of what is meant are in order. Note, for instance, that Justice Binnie used the report of the Crown's historical expert to uphold the contention of the First Nation party in the case. Another example would be the ruling by Mr. Justice Emmett Hall in *Calder* in 1973 that held, among many other things, that the Royal Proclamation applied to British Columbia.<sup>13</sup> Now, the language of the Royal Proclamation of 1763 is not crystal clear on the point, but it seems to say, to a historian at least, that Rupert's Land, the Hudson's Bay Company territory, was excluded. To assume the British government meant anything else would be peculiar, given the existence of the 1670 Hudson's Bay Company charter that purported to give title to Rupert's Land to the commercial company. In any event, it is unlikely the Proclamation's framers could have intended it to apply to British Columbia because British explorers would not reach its shores for another fifteen years. Not even the eighteenth-century British claimed they could acquire territory by possession retroactively.

It is also instructive to consider how the Supreme Court of Canada has evolved in its treatment of historical evidence. Judges consider the expert opinions of

historians and other scholars as “extrinsic evidence.” In other words, the past as explained by historians is “not inherent, intrinsic, or essential” to the issue at hand.<sup>14</sup> As late as its 1988 decision in *R. v. Horse*, the Supreme Court of Canada declared that it had

some reservations about the use of this material as an aid to interpreting the terms of Treaty No. 6. In my view the terms are not ambiguous. The normal rule with respect to interpretation of contractual documents is that extrinsic evidence is not to be used in the absence of ambiguity; nor can it be invoked where the result would be to alter the terms of a document by adding to or subtracting from the written agreement ... Extrinsic evidence is generally inadmissible when it would, if accepted, have the effect of adding to, varying or contradicting the terms of a judicial record, a transaction required by law to be in writing, or a document constituting a valid and effective contract or other transaction.<sup>15</sup>

The Supreme Court moved towards considering historical evidence only very slowly. Even before the decision in *Horse* that contemplated considering extrinsic evidence only where the law was ambiguous, it had prepared the ground for greater receptiveness to historical evidence. In a 1983 decision the Court had declared that the words of the treaty must be given the sense that they would naturally have held for the parties at the time.<sup>16</sup> That, obviously, put into the Court how the historical actors who made the treaties would have viewed them given the context in which they acted.

Rather more helpful for indigenous litigants, two years later the Supreme Court added important rules of treaty interpretation in *R. v. Simon*.<sup>17</sup> In ruling on a case concerning the Mi’kmaq Treaty of Halifax (1752), the Court said, “The principles of international treaty law relating to treaty termination were not determinative because an Indian treaty is unique and *sui generis*.” Besides holding that Aboriginal treaties were unique and could not be judged by rules developed in another area of law, in *Simon* the Court also adopted an American rule: “treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians ... In *Jones v. Meehan*, 175 U.S. 1 (1899), it was held that Indian treaties ‘must ... be construed, not according to the technical meaning of [their] words ... but in the sense in which they would naturally be understood by the Indians.’”<sup>18</sup>

In *Horseman*, a treaty case with which the Supreme Court had to wrestle in 1990, it added new interpretive principles.

These treaties were the product of negotiation between very different cultures and the language used in them probably does not reflect, and should not be expected to reflect, with total accuracy each party’s understanding of their effect at the time they were entered into. This is why the courts must be especially sensitive to the broader historical context in which such treaties were negotiated. They must be prepared to look at that historical context in order to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time ... Indian treaties must be given the effect the signatories obviously intended them to have at the time they were entered into even if they do not comply with to-day’s formal requirements. Nor should they be undermined by the application of the interpretive rules we apply today to contracts entered into by parties of equal bargaining power.<sup>19</sup>

At the same time, “we should give it [the treaty] an interpretation, if this is possible on the language, which will implement and be fully consistent with that commitment.”<sup>20</sup>

In the same year, the Supreme Court’s decision in the *Sioui* case established beyond doubt that the highest court was prepared to consider historical evidence. The case turned on the answer to the question, was the document that the appellants relied upon, the Murray Treaty of 1760, a treaty within the meaning of section 35 of the constitution or not? Among the contemporary official sources that were vital to answering that question were the Acts of Capitulation of Quebec and Montreal of 1759 and 1760, the Royal Proclamation of 1763, and the Treaty of Paris (1763) by which France ceded Quebec to Great Britain. Also considered were portions of the *Jesuit Relations*, *The Papers of Sir William Johnson*, E. B. O’Callaghan’s *Documents relative to the Colonial History of New York*, the published journals of military officers, and Emmerich de Vattel’s *The Law of Nations or Principles of the Law of Nature* (1760). To answer the question about the Murray Treaty, the Court probed the documents to determine if Great Britain, General Murray, and the Huron who entered into it “had capacity to sign;” “whether the parties actually did enter into a treaty;” and what the nature of the rights guaranteed in the document and what their “territorial application” was. In commencing their analysis, the justices reiterated their endorsement in the 1985 *R. v. Simon* of something the court had said earlier in *R. v. White and Bob*, which also dealt with the question of whether a document was a treaty. The 1964 decision of the British Columbia Court of Appeal had affirmed “that the courts should show flexibility in determining the legal nature of a document recording a transaction with the Indians. In particular, they must take into account the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration.” In short, context mattered, and had to be considered.<sup>21</sup>

A final example of the different ways in which the courts and historians operate might be found in the Supreme Court of Canada’s maxim “the honour of the Crown.” If Aboriginal-Crown treaty-making in Canada is a many-splendoured thing, then “the honour of the Crown” is an entity that has undergone a Shakespearean “sea-change into something rich and strange.”<sup>22</sup> The notion entered Canadian jurisprudence in the 1990 Supreme Court decision in *Sparrow*. In defining the grounds on which an Aboriginal right—and soon, by extension, a treaty right—might lawfully be extinguished, the Court said, “The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada’s Aboriginal peoples.”<sup>23</sup> Fair enough: the Court was laying down a standard that legislatures would be expected to meet or else see their legislation struck down by the courts.

And then the metamorphosis began. In the Supreme Court’s *R. v. Badger* decision in 1996, the bench broadened the application:

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 *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1053; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 401. Second, the honour of the Crown is always at stake in its dealing with Indian peoples. *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 fulfill its promises.* No appearance of “sharp dealing” will be sanctioned. See *Sparrow*, *supra*, at pp. 1107–8 and 114; *R. v. Taylor* (1981), 34 O.R. (2d) 360 (Ont. C.A.), at p. 367.<sup>24</sup> (emphasis added)

And then in the first *Marshall* decision Justice Binnie wrote:

This appeal should be allowed because nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi’kmaq people to secure their peace and friendship, as best the content of those treaty promises can now be ascertained ... An interpretation of events that turns a positive Mi’kmaq trade demand into a negative Mi’kmaq covenant is not consistent with the honour and integrity of the Crown ... *The trade arrangement must be interpreted in a manner which gives meaning and substance to the oral promises made by the Crown during the treaty negotiations.*<sup>25</sup> (emphasis added)

Scattered through the majority judgment were similar declarations: “the concept of a disappearing treaty right does justice neither to the honour of the Crown nor to the reasonable expectations of the Mi’kmaq people;” and “Here, if the ubiquitous officious bystander had said, ‘This talk about truckhouses is all very well but if the Mi’kmaq are to make these promises, will they have the right to hunt and fish to catch something to trade at the truckhouses?’, the answer would have to be, having regard to the honour of the Crown, ‘of course;’” and “I do not think an interpretation of events that turns a positive Mi’kmaq trade demand into a negative Mi’kmaq covenant is consistent with the honour and integrity of the Crown,”<sup>26</sup> and, finally:

While I do not believe that in ordinary commercial situations a right to trade implies any right of access to things to trade, I think the honour of the Crown requires nothing less in attempting to make sense of the result of these 1760 negotiations.<sup>27</sup>

The “honour of the Crown” had entered jurisprudence in 1990 as a standard for judging the constitutionality of legislation, and by 1999 it was remade into a canon of historical interpretation. What began in 1990 as a sensible requirement for judging legislatures’ actions by the standard of “the honour of the Crown” was transmuted by 1996 and 1999 into an interpretive principle that seemed to mean that historical events were to be interpreted as though the Crown *had acted* honourably. The difference in the Supreme Court positions in 1990 and 1999 is a measure of the distinction between “legal history” and “history.” In cases such as these it is hard to disagree with the judge of the Australian Federal Court who wrote, “Judges do not engage in historiography. They resolve present day disputes and in so doing they adhere to reasonably well understood conventions. Unless you understand this you misunderstand how they use history. For the most part, they are simply history’s bower-birds, somewhat idiosyncratically collecting odds and ends for some present legal history.”<sup>28</sup>

Aboriginal-Crown treaty-making in Canada has evolved through a number of phases and given rise to a multitude of interpretations. The diversity and complexity of the treaty-making tradition give it its historical depth and richness, while complicating the deliberations of lawyers and judges who have to apply this history to specific legal issues. It is, truly, a many-splendoured thing. No doubt it will continue to be for a long time to come. The complexity of the Canadian treaty-making tradition is one more difficult lesson we have to teach our students, policy-makers, and the public.

## Endnotes

- 1 I would like to thank the Social Sciences and Humanities Research Council of Canada, whose Standard Research Grant funded the research for this paper; and to apologize to Alan C. Cairns for “borrowing” the subtitle of his chapter on the Final Report of the Royal Commission on Aboriginal Peoples in *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: University of British Columbia Press, 2000) for my subtitle. The first section of this chapter is mainly a summary of my *Compact, Contract, Covenant: Aboriginal-Crown Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009).
- 2 E. E. Rich. *Copy-Book of Letters Outward &c: Begins 29<sup>th</sup> May 1680 Ends 5<sup>th</sup> July 1687*. (London: Hudson’s Bay Record Society, 1948), 9–13.
- 3 Toronto Reference Library, Baldwin Room, S13 George Nelson Journals, “6 July–22 Aug. 1822,” entry of July 10, 1822.
- 4 A Six Nations spokesman to governor of New York, September 20, 1735, in Peter Wraxall’s *An Abridgment of the Indian Affairs contained in four folio volumes, transacted in the colony of New York, from the year 1678 to the year 1751*, reprint, Charles Howard McIlwain, ed. (New York: Benjamin Blom, 1968), 195.
- 5 Royal Proclamation of 1763, in *British Royal Proclamations Relating to America, 1603–1783*, Clarence S. Brigham, ed., vol. 12 of *Transactions and Collections of the American Antiquarian Society*. (Worcester, MA: American Antiquarian Society, 1911), 215–18.
- 6 John Borrows. “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government,” in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference*. Michael Asch, ed. (Vancouver: University of British Columbia Press, 1997), 155–72, 256–67.
- 7 Canada. *Indian Treaties and Surrenders*, 3 vols. (Ottawa: Queen’s Printer, 1891).
- 8 Library and Archives Canada. CO 42, 351, Colonial Office Correspondence, Upper Canada, 1811 Dispatches, reel B295, 138–9, Minutes of a Meeting with the Mississauga Indians of the River Moira, Smith’s Creek, July 24, 1811. In nineteenth-century councils between First Nations and Crown representatives, “milk” was usually a euphemism for alcohol.
- 9 James A. Clifton, “Introduction: Memoir, Exegesis,” in *The Invented Indian: Cultural Fictions and Government Policies*. (New Brunswick, NJ: Transaction Publishers, 1990), 7.
- 10 For example, Sidney Harring, *White Man’s Law: Native People in Nineteenth-Century Canadian Jurisprudence*, (Toronto: University of Toronto Press, 1998); Hamar Foster, “We Are Not O’Meara’s Children: Law, Lawyers, and the First Campaign for Aboriginal Title in British Columbia, 1908–28,” in Foster et al, *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*, (Vancouver: University of British Columbia Press, 2007); and Kent McNeil, *Common Law Aboriginal Title*, (New York: Oxford University Press).
- 11 *R. v. Marshall*, (1999) 3 S.C.R. 456 at paragraph 37. <<http://sc.lexum.umontreal.ca/en/1999/1999rcs3-446.html>> Accessed January 25, 2008.
- 12 Ann Curthoys, Ann Genovese, and Alexander Reilly. *Rights and Redemption: History, Law and Indigenous People*. (Sydney: University of New South Wales Press, 2008), 82.
- 13 *Calder et al. v. Attorney-General of British Columbia*, (1973) S.C.R. 313. Hall’s ruling on behalf of Spence and Laskin is found at 396–400. Justice Judson, writing for Martland and Ritchie, took the opposite view of the Proclamation’s applicability, but did not go into as much detailed argumentation as Hall. <<http://sc.lexum.umontreal.ca/en/1973rcs0-313/1973rcs0-313.html>> Accessed March 1, 2009.
- 14 *Oxford Canadian Dictionary*, 2<sup>nd</sup> ed. (Don Mills, ON: Oxford University Press, 2006), 332. The *Oxford Canadian Dictionary* defines “intrinsic” as “inherent, essential; belonging naturally.”
- 15 *R. v. Horse*, (1988) 1 S.C.R. 187 at 35. <<http://sc.lexum.umontreal.ca/en/vn/1998/volume1.html>> Accessed February 12, 2008.

- 16 *Nowegijick v. The Queen*, (1983) 1 S.C.R. 29, at p. 36; cited in Justice Beverley McLachlin's minority opinion in *R. v. Marshall (Marshall I)*, 3 S.C.R. 456 at 78. <[scc.lexum.umontreal.ca/en/1999/1999rcs3-456.html](http://scc.lexum.umontreal.ca/en/1999/1999rcs3-456.html)> Accessed January 29, 2008.
- 17 *R. v. Simon*, (1985) 124 C.C.C. 100 (N.B.C.A.). <[scc.lexum.umontreal.ca/en/1985/1985rcs2-387/185/rcs2-387.html](http://scc.lexum.umontreal.ca/en/1985/1985rcs2-387/185/rcs2-387.html)> Accessed February, 12, 2008.
- 18 *R. v. Simon*, at 27.
- 19 *Horseman v. The Queen*, (1990) 1 S.C.R. 901, section on "Interpreting Indian Treaties." <<http://scc.lexum.umontreal.ca/en/1990/1990rcs1-901/1990rcs1-901.html>> Accessed March 17, 2009.
- 20 *Ibid.*
- 21 *R. v. Sioui*, section IV analysis, A. Introduction; citing *Simon v. The Queen*, (1985) 2 S.C.R. 187; which cited comment of J. A. Norris in *R. v. White and Bob* (1964) 50 D.L.R. (2d) 613 (B.C.C.A.), affirmed in the Supreme Court (1975) 52 D.L.R. (2d) 481.
- 22 William Shakespeare. *The Tempest*. Act one, scene two.
- 23 *R. v. Sparrow*, (1990) 1 S.C.R. 1075, at 1107-8. <[scc.lexum.umontreal.ca/en/1990/1990rcs1-1075/1990rcs1-1075.html](http://scc.lexum.umontreal.ca/en/1990/1990rcs1-1075/1990rcs1-1075.html)> Accessed February 14, 2008.
- 24 *R. v. Badger*; (1996) 1 S.C.R. 771 at paragraphs 41 and 96, also applied the "Sparrow test" for extinguishment of Aboriginal rights to treaty rights. See Thomas Isaac, *Aboriginal Law: Commentary, Cases and Materials*. 3<sup>rd</sup> ed. (Saskatoon: Purich Publishing, 2004), 82.
- 25 *Marshall*, p. 3 headnote.
- 26 These extracts are from *ibid.*, paragraphs 40, 43, and 52, respectively.
- 27 *Ibid.*, paragraph 44.
- 28 Paul Finn, "Law and History in Four Parts," in *ANZLHE-Journal* 253, 2005. Accessed March 2, 2009. Judge Finn was an academic with an interest and publications in legal history for twenty-one years before his appointment to the bench. He had "never practiced law as such in Australia." *Ibid.*, 239. I am indebted to the University of Saskatchewan Law Library's Greg Wurzer, who accessed this journal for me.