Cultivating Treaty Relationships:

The Significance of the Cows and Ploughs Clauses for the Numbered Treaties

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Abstract

The modern interpretation and implementation of historic treaty promises is an ongoing opportunity for relationship-building in Canada that includes working to fulfill the spirit and intent of the originating formal agreements between the Crown and First Nations. This thesis analyzes the interpretation and implementation of one such treaty promise on the Canadian prairies – the historic treaty promise to provide agricultural benefits such as livestock, farm equipment and seed to treaty signatories. The promise of agricultural benefits is important because it represents a treaty obligation with broad and far-reaching food system implications that remain substantively misinterpreted and unimplemented in the present day. By looking at the spirit and intent of agricultural benefits as a food system promise through the lens of food law, a strong case can be made for the continued value and significance of agricultural benefits promises to the ongoing treaty relationship.

When the historic treaties were negotiated, agriculture was seen as an opportunity to create mutual gain for both the Crown and First Nations. The agricultural benefits promises were presented as a way to support First Nations in the colonially imposed transition to an agrarian food system and economy. For the Crown, these agricultural benefits promises aided in solidifying treaty negotiations and ensuring adhesion to the treaties. For First Nations, they alleviated concerns about food security, promised an opportunity for a sustainable food system, and held the potential for access to future economic development opportunities. Whereas the mutual advantage of agricultural benefits was made abundantly clear at the time of treaty making, these promises were ineffectively kept and remain unfulfilled in contemporary interpretation and implementation.

In this thesis, I analyze the agricultural benefits promises through the Supreme Court of Canada's principles and framework for historic treaty interpretation. I demonstrate how recent trial and appellate decisions expand the potential for contemporary agricultural benefits claims and negotiations. I also rely on the emergent lens of food law to argue that the treaty promises for agricultural benefits are a gap deserving additional attention and clarity from the judiciary, First Nations and the Canadian Crown. For both First Nations and the Crown it is beneficial to resolve agricultural benefits claims collaboratively, and as soon as practicably possible with a view to building and supporting strong food systems.

In considering the contemporary resolution of agricultural benefits claims, I discuss the importance of providing clarity in resolving agricultural benefits treaty obligations in a constructive way. By engaging with the specific historical context of Treaty 6 and the way agricultural benefits cases have been decided, negotiated and settled, I show the value in the parties coming to meaningful resolutions that support the original treaty promises in the contemporary interpretation and fulfillment of these treaty rights. I illustrate the importance of further engaging with these integral treaty promises to cultivate strong contemporary treaty relationships now and into the future.

This work does not seek to impose or suggest a single solution to complex contemporary food system challenges, and instead argues that the treaty relationship on the prairies demands further support from Canadian law when it comes to building sustainable, resilient, and equitable food systems that are capable of meeting the needs of present and future generations. Bringing together treaty interpretation principles with the core tenets of food law as an emerging legal discipline helps to understand the importance of agricultural benefits to the contemporary treaty relationship.

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Table of Contents

I. TREATY RIGHTS AND THE FOOD SYSTEM

a. The Nexus Between Treaty Rights and the Food System

Food is an essential and interwoven part of the treaty rights paradigm in Canada. From the negotiation of the historic treaties to the more recent jurisprudence of the Supreme Court of Canada, food is a subject matter that runs deeply through the binding agreements between Indigenous peoples and the Canadian Crown. In many instances, historic treaty agreements were intended to recognize and protect Indigenous peoples' right to access food resources and food procurement methods through traditional means such as hunting, fishing, trapping and gathering, as well as through promises in support of the practice of agriculture.[1] Consequently, contemporary treaty rights jurisprudence has attempted to address food resources and food procurement disputes and issues through cases interpreting the scope, extent and parameters for the rights to hunt and fish, the protection of wildlife and ecosystems that support traditional food sources, as well as the implementation of economic development opportunities connected to the food system.[2]

The abundance of intersections between food and treaty rights demonstrate that food issues and the food system are an area worthy of focus. The historic treaties were intended to

[1] For example, the Numbered Treaties entered into between 1871 and 1921 have similar scope and general form (discussed in greater detail throughout this writing). See Canada, "The Numbered Treaties" (March, 2023) available online: < https://www.rcaanc-cirnac.gc.ca/eng/1360948213124/1544620003549>. These treaties contained unique clauses as a result of negotiations between the parties with competing interests, and the subsequent treaty agreements reflect the parties various goals and desires. The Numbered Treaties (either directly or by outside promise) included promises specific to hunting, fishing and trapping rights. In several of the Numbered Treaties, there were promises made to specific tools or implements intended to support food procurement through agricultural means. The historic treaty rights that were negotiated between Indigenous peoples and the Crown often included provisions that protected their ability to access and use natural resources, including food sources such as fish, game, and plants. These treaties signed in the late 1800s and early 1900s included promises to provide Indigenous peoples with access to traditional hunting and fishing grounds, as well as to provide rations of food and other supplies in times of need. They also recognized Indigenous peoples' right to maintain their traditional ways of life and to continue using the land and resources for subsistence and cultural purposes.

[2] For example, see *Lax Kw'alaams Indian Band v Canada (Attorney General),* 2011 SCC 56 where the Supreme Court of Canada determined that ancestral fishing and trading practices were insufficient to establish a right to a modern commercial fishery for the Lax Kw'alaams and other First Nations. The rationale for this decision (in part) was that while Aboriginal rights can evolve in terms of their scope and how they're practiced, a broad commercial fishery right is fundamentally different in quality and quantity from the traditional pre-contact eulachon grease trade. For another example, see *R v Horseman*, [1990] 1 SCR 901, [1990] 4 WWR 97 where the Supreme Court of Canada determined that the sale of a grizzly bear hide was considered an act of commerce that was not protected by treaty. In *Horseman,* the Court articulated how the treaty right was limited to hunt for food, and killing the grizzly in self-defence and selling its hide remain subject to valid government regulation concerning preservation of the grizzly species.

establish a relationship of shared coexistence on the land, and it is evident that food was a critical component of establishing and maintaining this relationship. Despite the criticality of food to the historic treaty relationship, the focal point on food has not carried through to the contemporary treaty relationship. The significance of food to the treaty relationship is downplayed or seen as tertiary to other matters, which this thesis seeks to remedy in part by prioritizing the food system and the prairie treaty relationship with a specific focus on the promises made about agriculture, which is an area in which I am personally and professionally invested.[3] It has been my experience that if you know something about farming, you get asked to explain things like what a combine is or what those round metal houses are when you are driving down the highway (they are grain bins). Despite the fact that agriculture has changed significantly over the past century, there remains a romanticised vision of what agriculture is and what it means to be prairie farmer. Being a settler farmer and lawyer has encouraged me to focus on ways of building treaty relationships in the context of food systems and agriculture. The connection between honouring treaties and agriculture is particularly important in the Saskatchewan context, because of how closely linked agriculture is to Saskatchewan's economy as well as Saskatchewan's evolution and identity as a prairie province.

While food is clearly of importance to the historic treaty rights paradigm, there is limited analysis of the nexus between food issues and historic treaty rights. Food issues are usually characterized narrowly without consideration for the broader food system and are rarely analyzed beyond being a catalyst or by-product of larger aspects such as economic development or disputes about access to natural resources. The result is that the significance of food issues for

[3] I was raised on a multigeneration grain farm twenty kilometers north of Saskatoon, and I was raised with the stories of how my family came to farm in Saskatchewan. Saskatoon is where I currently reside, farm and have completed this research. According to family records, my ancestors were successful Mennonite farmers that were forced out of Ukraine in the late 1800s. They immigrated to Saskatchewan because it reminded them of Ukraine, and they saw Saskatchewan as a place where they would be able to survive and perhaps even thrive as farmers. For most of my life I have lived in Treaty 6 territory, but I did not always understand that I was working, farming and living on lands that have a history beyond that of my family cultivating the soil. What I do know is that the land that is now my family farm was provided to my great uncle Peter J. Driedger in 1902 via a Dominion Lands Agent on behalf of the Canadian Crown. Peter J. Driedger was issued a homestead receipt and subsequently began farming the land. As each generation of my family has prospered, the farm has grown and passed from one generation to the next. There is very little knowledge about who was on this land before it became the Driedger family farm. These lands are now a very special place for me. Beyond a connection to the family farm, I have studied law and work as a lawyer in Treaty 6 territory, with a significant amount of my legal work revolving around agriculture, natural resources, and food systems. I have worked on cases involving everything from faulty tractors, to frozen livestock and even contaminated grain.

treaty rights is often overlooked and underemphasized. Food issues are compartmentalized rather than prioritized and analyzed. This writing seeks to address this deficiency by analyzing a particular set of food relationships within the historic treaty rights milieu and bringing the focal point directly onto food issues and the food system via the promise of agricultural benefits within the numbered treaties.

b. The Food System: A Series of Interconnected Relationships Intended to Achieve Food Security

Food has been an integral part of human existence since time immemorial[4] and has enabled the survival and flourishing of societies and communities throughout history.[5] A considerable part of the human experience revolves around food. We spend significant amounts of time, money and effort acquiring and enjoying food. Food is also a fundamental part of human identity – from the way cuisines and culinary traditions reflect cultural heritage to the social and familial connections that food helps create through social gatherings.

While difficult to neatly encapsulate or define as a particular phenomenon, all of the activities and relationships in relation to food can be described as the "food system", which the Food and Agriculture Organization of the United Nations defines as:

> [a]ll the stages of keeping us fed: growing, harvesting, packing, processing, transforming, marketing, consuming and disposing of food. The most common food system is the agro-industrial food system that is

[4] Given its usage by the Supreme Court of Canada in Indigenous rights decisions in connection to the temporal depth of many Indigenous people's connection with ancestral lands, I use the phrase "time immemorial" as a reference to being beyond memory or record and to show the temporal depth of connection between food and identity. For further discussion on the phrase "time immemorial" within the context of Indigenous rights decisions see Loraine Weir, "Time Immemorial and Indigenous Rights: A Genealogy and Three Case Studies (Calder, Van der Peet, Tsilhqot'in) from British Columbia" (2013) 26 J of Hist Soc 383 at 384.

[5] For example, an archeological discovery of a 14,000-year-old village on Triquet Island northwest of Victoria, British Columbia unearthed fish hooks, spears, and tools to ignite fires. This discovery is supported by the oral history of the Heiltsuk Nation, and researchers from the Hakai Institute and the University of Victoria, along with local First Nations members. See Lacy Cook, "Ancient village discovered in Canada is 10,000 years older than the pyramids" (17 April 2017), online: <https://inhabitat.com/researchers-discover-14000-year-old-canadian-village-one-of-north-americas-oldest/>. In Saskatchewan, 9,000 year old spear points used to hunt bison have been found at Ponteix and Heron Eden. See Henry Epp & Tim Jones, "Prehistory, Southern Saskatchewan", online: <https:// https://teaching.usask.ca/indigenoussk/import/prehistory_southern_saskatchewan.php>.

> global. It is dominated by a few multinational corporations through vertical integration. This is a very complex system with a long supply chain and it has a lot of processed foods.[6]

The Food and Agriculture Organization's definition of a food system is broad and all-encompassing. This definition mirrors the ways that people interact and engage with food as part of their food systems and supports the conceptualization of the food system as an interconnected network of activities, processes, and actors involved in the production, processing, distribution, and consumption of food. The food system encompasses all the steps and components involved in bringing food from the point of production to the point of consumption. These "stages of keeping us fed" extend from the ways that our food is grown to how it is distributed and disposed of, and there are myriad complex relationships between the types of foods we eat and the ways we consume it.

Strong and healthy food systems create the positive outcome of food security (meaning sufficient access to food) for individuals and communities.[7] The stages of keeping humans fed, and the interconnected nature of all the various relationships to and with food have a cause-and-effect relationship, where the overarching goal is to ensure food security. Healthy food systems bring individuals together,[8] sustain communities, and create the potential to build staggering wealth for nations.[9] Conversely, when there is insufficient food or food systems are broken,

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[6] Food and Agriculture Organization of the United Nations, "The Future Food System: The World on One Plate?" (Rome: FAO, 2016) available online: < http://www.fao.org/cfs/home/blog/blog-articles/article/en/c/448182/>.

[7] The Food and Agriculture Organization (FAO) defines food security as "existing when all people, at all times, have physical and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life." See Food and Agriculture Organization of the United Nations, *Rome Declaration on World Food Security and World Food Summit Plan of Action*, World Food Summit, 13-17 November 1996, Rome, Italy, online: < https://www.fao.org/3/al936e/al936e.pdf >.

[8] E. N. Anderson, *Everyone Eats: Understanding Food and Culture,* 2d ed (New York: NYU Press, 2014) at 5-8. For clarification, Anderson argues that humans eat the foods they do based on a biocultural synthesis which includes ecological and economic rationales that are dictated by rules, customs and practices that is constantly evolving based on a multitude of factors.

[9] For example, the agri-food sector (which includes agriculture, fisheries and aquaculture, and food and beverage processing) accounts for 2.9% ($49.4 billion) of Canada's GDP. See Statistics Canada: Table 379-0031 – Gross domestic product (GDP) at basic prices, by North American Industry Classification System (NAICS), monthly (dollars), CANSIM (database); AAFC calculations.

people starve, communities dissolve, and civilizations collapse.[10] Clearly, the food system is an essential part of sustaining human life and this system is inherently vulnerable to change. It is a system that is susceptible to external factors such as environmental and human interference. On the individual level, food security (and the opposing concept of food insecurity) plays an integral role in whether people flourish or fail. On a community level, food systems can be leveraged to create economic prosperity or manipulated as a tool of starvation and oppression. Considering the implications of strengthened or broken food systems, it is unsurprising that ripple effects from food security and insecurity may reverberate far into the future.

In addition to seeing the food system as a complex supply chain, a food system is a way of describing the relationships that connect people with their food, which includes everything that contributes to building the relationship from harvesting, foraging, and growing food to processing, distribution, consumption, and even food waste.[11] A food system also includes land, air, water, soil, as well as plants, animals and fungi that have helped sustain peoples.[12] These various characterizations of the food system demonstrate that there are interconnections and relational aspects within the food system, all of which are vital to creating accessible food sources and procurement methods, and ultimately driving food security. Clearly, the food system is critical for human society, and how the system is organized and managed creates tremendous impacts on the environment, health and various other facets.

An intriguing aspect about the history of the food system is that numerous questions remain unanswered about why the food system looks the way it does, and how it has evolved into present day. Food may be understood as having been a "driving preoccupation of humans

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[10] For example, the Sumerian civilization's downfall (circa 1900 BC) was caused in significant part by rising salt levels in soils, causing their food system to collapse. Another example comes from the Mayan civilization, which was decimated by soil erosion (circa 1000 AD).

[11] Studying food systems provides an opportunity to look at specific areas in the system that cause food insecurity, starvation, poor food system governance, inequitable solutions, the perpetuation of inequality and other food-related injustices. See: Nadia Lambek, "Social Justice and the Food System" in Food Law and Policy in Canada, (Toronto, 2019) at 326. The term "food system" helps to describe the relationship between actors within the food chain. See also Kameshwari Pothukuchi & Jerome L. Kaufman "The Food System: A Stranger to the Planning Field" (2000) 66 J. AM. PLAN. Ass'N 113 at 113 (explaining that the food system includes "production, processing, distribution, consumption, and waste management").

[12] Charles Levkoe & Lana Ray, "The Indigenous Food Circle: Reconciliation and Resurgence Through Food in Northwestern Ontario" (2019) 9:2 J of Ag, FS & CD 101 at 102.

since the dawn of evolution."[13] However, there are a great many unknowns including "when food processing began and when the original hunter-gatherers settled down to develop agriculture - or even the question of which of these occurred first. "[14] These unanswered questions may be caused in part by the passing of thousands of years, and help to illustrate the value in analyzing the interconnected and relational parts of the food system.

The foregoing discussion about the food system outlines the elements that are integral to keeping humans fed, including the stages in procuring and processing food. The various sources of food – from plants to animals, and the ways that humans interact with these food sources show the fundamental value of the food system as a concept for looking at food related issues. The food system is one way of connecting the relationships and components surrounding food and creates an opportunity to analyze food issues in a comprehensive way. Rather than viewing food as a separate or isolated commodity or phenomenon, the food system shows how food is part of a series of relationships or an interconnected system, all of which come together in the interest of establishing food security. Taking a food systems approach to food issues facilitates a more holistic framework that helps to address complex issues and reveals parts of the system that are otherwise hidden.

A foundational element of this thesis is the premise that the food system is an effective framework for analyzing food specific matters. Relying on food systems to comment on food issues is further validated by the fact that strong food systems create robust food security. Throughout this thesis, I pay close attention to ways that the treaty relationship has impacted Indigenous food systems and food security. I also consider the complex relational nature of the food system alongside the treaty relationship and question how treaty promises have affected Indigenous food systems. Substantial value can be gained by using the food system as one of the focal points for interpreting and implementing historic treaties.

c. Indigenous Food Systems and the Impacts of Colonization and Agriculture

[13] Peter Barton Hutt, "Food Law & Policy: An Essay" (2005) 1:1 J of Food L &Policy 1 at 1.

[14] *Ibid*.

Historically, Indigenous peoples on the Canadian prairies had effective food systems established in response to prairie food resources such as the bison and other wildlife.[15] This changed with European colonization, during which pre-colonial Indigenous food systems and food security were devastated by colonial interests.[16] The settlement of the prairies between the 1700s and late 1800s included destruction, control and access to food sources, from using the beaver and bison for their furs to the promises that were made of their replacement with lush fields of protein-rich wheat.[17] As native grasslands were broken up into cropland, the bison ceased to be a sustainable food source. The result for many Indigenous communities on the prairies was that it was longer possible to maintain food security through their traditional hunter-gatherer lifestyle. Ultimately, the consequence of colonization on the prairies was that Indigenous food systems were irreparably damaged and Indigenous peoples needed to search for alternative food security and food system solutions.[18] Faced with the impacts of agriculturalization on the prairies, Indigenous people were forced to look for alternative ways to maintain food security and establish new food systems.

Historians have shown that food (and specifically the practice of agriculture) was used as a Eurocentric tool of control and colonization throughout the nineteenth and twentieth centuries.[19] Food was intentionally used to control and attempt to assimilate Indigenous peoples, and starvation and malnutrition was common in many instances for Indigenous peoples in residential schools and on-reserve.[20] Control of the food system went as far as limiting hunting and fishing activities through government policies which in turn eroded food security for many

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[15] Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy*, (Montreal 1990) at 7. As Carter asserts, pre-colonial Indigenous food systems relied on hunting and gathering as a fundamental part of the food system. As this thesis identifies, agriculture was also a source of food within pre-colonial Indigenous food systems, which was manipulated and used as a tool of colonization. This duality of agriculture being both a beneficial component of pre-colonial Indigenous food systems and part of colonization is what makes agriculture so challenging to engage with.

[16] *Ibid*.

[17] *Ibid*.

[18] *Ibid*.

[19] *Ibid*.

[20] James Daschuk, *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Indigenous Life* (Regina, University of Regina Press: 2019) at 6.

Indigenous communities.[21] Beyond eroding Indigenous food security, the Canadian government and legal system supported and protected food security interests of settlers over those of Indigenous peoples. For example, in the 1800s many Indigenous communities were practicing farming lifestyles under biased and discriminatory peasant farming policies set by the Department of Indian Affairs, which limited Indigenous farms to 40 acres while homesteaders received 160 acres.[22] Indigenous farmers were required to sell their grain to a government agent that dictated sale conditions such as crop prices and when they were permitted to sell their harvest.[23] Food security erosion and prioritization of settler interests is a disappointing historical reality for the treaty relationship.

The way colonial interests leveraged control and access to food is contrary to how agriculture was conceived as an economic development and food procurement opportunity as part of treaty. Agriculture was proposed as an opportunity for future sustenance and economic growth for Indigenous peoples by prairie treaty negotiators. For example, Treaty 6 includes a promise to supply agricultural tools such as ploughs, harrows and scythes, along with seed for the "encouragement of the practice of agriculture among the Indians."[24] The Canadian government gave assurances of assistance in the transition to an agricultural way of life for Indigenous peoples, and despite the fact that promises were made, and agreements signed regarding the transition to an agrarian economy, Indigenous peoples and their food systems were left with much less than they bargained for. These promises were not meaningfully kept.[25]

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[21] *Ibid*.

[22] Sarah Carter, *Lost Harvests, supra* note 15.

[23] *Ibid*.

[24] Canada, Treaty 6 (1876), available online: < https://www.rcaanc-cirnac.gc.ca/eng/1100100028710/1581292569426>.

[25] Contemporary historians such as Sarah Carter, James Daschuk and Sheldon Krasowski have drawn attention to the historical record as it relates to food, agriculture and the treaty negotiation context. Alongside careful research into the impacts of various diseases and epidemics such as smallpox and influenza, these contemporary historians convey how the reality of how food and access to sustenance (whether via hunting, trapping or agriculture) was intentionally used by the Canadian Crown to achieve government objectives throughout this volatile treaty-making period on the Canadian prairies.

By breaking these food system promises, Canada created deep contemporary food system challenges for Indigenous peoples, including social, economic, environmental and human health-related problems. There are disproportionately high rates of food insecurity for Indigenous peoples in Canada.[26] For example, research indicates that as many as 51% of Indigenous children live in poverty, rising to 60% for children on-reserve.[27] Healthy and nutritious foods remain out of reach to many northern remote communities due to cost and access, despite federal subsidy programs and food insecurity rates in the territories are well above the national Canadian average, with rates of 46.8% in Nunavut and 24.1% in the Northwest Territories.[28] This data points to a major breakdown in Canada's food system for Indigenous peoples.

Beyond contemporary food insecurity, the failure to fulfill these treaty food system promises created significant economic disparities and marginalized food systems for First Nations. At present, millions of acres of First Nations reserve land are farmed on the Canadian prairies, but First Nations are not usually farming the land, and Indigenous peoples have not been included at the table when it comes to proportionate economic opportunities flowing from the agriculturalization of the Canadian prairies.[29] A recent report about Indigenous peoples' engagement with the agri-food sector illustrates how structural exclusions from government decision-making around food policy marginalize Indigenous peoples' access to the food

[26] Valerie Tarasuk, *Discussion Paper on Household and Individual Food Insecurity* (Ottawa: Health Canada, 2001), online: <http://www.hc-sc.gc.ca/fn-an/alt_formats/hpfb-dgpsa/pdf/nutrition/food_sec_ entire-sec_aliments_entier-eng.pdf>. See also the Council of Canadian Academies, *Aboriginal Food Security in Northern Canada: An Assessment of the State of Knowledge* (Ottawa: Council of Canadian Academies, 2014), online: <http://www.scienceadvice.ca/uploads/eng/assessments%20and %20publications%20and%20news%20releases/food%20security/foodsecurity_fullreporten.pdf>; Jaime Cidro, Evelyn Peters & Jim Sinclair, "Final Report: Defining Food Security for Urban Aboriginal People" (UAKN Prairie Regional Research Centre, 2014) online: <http://uakn.org/wp-content/uploads/2014/08/ UAKN-PRC-Final-Report_Defining-Food-Security-For-Urban-Aboriginal-People-Cidro-Peters-Sinclair_FINAL_Spring-2014.pdf>.

[27] David MacDonald & Daniel Wilson, "Shameful Neglect Indigenous Child Poverty in Canada. Canadian Centre for Policy Alternatives" (Canadian Centre for Policy Alternatives: Ottawa, 2016) online: < https://www.policyalternatives.ca/publications/reports/shameful-neglect>.

[28] Statistics Canada, "Canadian Community Health Survey" (2014) online: <https://www150.statcan.gc.ca /n1/daily-quotidien/150617/dq150617b-eng.htm>.

[29] Melissa Arcand *et al*, "Sowing a Way Towards Revitalizing Indigenous Agriculture: Creating Meaning From a Forum Discussion in Saskatchewan, Canada" (2020) 5 FACETS 619 at 619.

system.[30] Further, Indigenous people are often omitted from historical and contemporary agricultural narratives, and there is insufficient support for contemporary Indigenous agriculture.[31] These exclusions and omissions contradict one of the main intentions behind the negotiation of the historic numbered treaties, particularly when looking at the context of the negotiation of Treaty 6 in Saskatchewan, where the spirit and intent of the agricultural benefits provisions in the Numbered Treaties was to enable Indigenous participation in the transition to new economic and ecological realities on the prairies.[32]

There have been commissions and tribunals formed, declarations offered, and memorandums signed, however the fulfillment of agricultural benefits treaty promises are yet to be satisfactorily addressed or achieved.[33] As Indigenous-led agricultural projects begin to receive more attention in both the academic and agricultural contexts and continue to evolve, there is an opportunity to engage with the originating agreements and promises about agriculture, and to comment on how those original food system promises should take shape in a contemporary context.[34] The significance of food systems to the prairie treaty relationship must

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[30] Tabitha Robin *et al,* "Indigenous Food Sovereignty in Ontario: A Study of Exclusion at the Ministry of Agriculture, Food & Rural Affairs" (2023) Yellowhead Institute Report 1 at 2.

[31] Arcand, "Revitalizing Indigenous Agriculture" *supra* note 29 at 619. See also David Natcher & T. Allen "Corporate agricultural investment in First Nation reserves in Canada: the case of One Earth Farms" (2017) 10 J of Abo Eco Dev 73. Arcand emphasizes that the primary sources of information that academic resources cite about contemporary Indigenous agriculture are newspaper reports and other grey literature, meaning little by way of legal analysis or scientific studies have been completed related to issues specific to Indigenous agriculture (such as the impact of leasing on the health of Indigenous agricultural lands).

[32] *Ibid*.

[33] For example, the Specific Claims Tribunal, which is part of the *Federal Government's Justice at Last* Policy and is a joint initiative with the Assembly of First Nations aimed at accelerating the resolution of specific claims to provide resolution for First Nations claimants and certainty for government, industry and Canadians. The Specific Claims Tribunal was established pursuant to Bill C-30, the *Specific Claims Tribunal Act (SCTA)*, which was first introduced in the House of Commons on November 27, 2007 and the *SCTA* came into force on October 17, 2008. The Specific Claims Tribunal is discussed in additional detail in Chapter 4. The term "specific claims" generally refers to monetary damage claims made by a First Nation against the Crown regarding the administration of land and other First Nation assets and to the fulfillment of Indian treaties that have not been accepted for negotiation or that have not been resolved through a negotiated settlement within a specified time frame. The Specific Claims Tribunal is comprised of superior court judges with the authority to make binding decisions on the validity of claims and compensation awards, to a prescribed maximum of $150 million per claim. See Chapter 4 for further analysis.

[34] See a Statistics Canada report released in 2019 from Canada's federal Census of Agriculture, which provides some information about Indigenous farmer numbers: Nicolas Gauthier & Julia White "Aboriginal Peoples and Agriculture in 2016: A Portrait" (2019) online: <www150.statcan.gc.ca/n1/pub/96-325-x/2019001/article/00001-eng.htm>.

be made apparent and it is imperative to build mutually beneficial relationships and work toward the creation of just and sustainable food systems.

d. A Food System and Agricultural Benefits Claim Example: Stoney Knoll Indian Reserve No. 107

The Young Chipeewayan's experience acutely portrays the impact of broken treaty promises for agricultural benefits:

On August 23, 1876, Chief Chipeewayan and his headmen signed Treaty 6 at Fort Carlton, Saskatchewan on behalf of the Chipeewayan Band.[35] At the time Treaty 6 was signed, the Chipeewayan Band was made up of eighty-four people in nineteen families.[36] The terms of the treaty were abundantly clear: as treaty signatories[37], these nineteen families were to receive land and assistance in the transition to an agricultural economy.[38] This promise was understood as a means for the Chipeewayans to transition toward an agrarian economy when there were few other options for sustenance which would be accomplished through the conveyance of agricultural implements such as livestock, seeds for planting, as well as education and support in learning how to farm the land. Shortly after the ink on the treaty paper had dried, the Chipeewayan reserve was surveyed and called Stoney Knoll Indian Reserve No. 107 (Stoney Knoll).[39]

Despite the allocation of land and promises of agricultural support made in Treaty 6, the Chipeewayan Band could not sustain themselves on the lands at Stoney Knoll. The decades of

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[35] Canada, Indian Claims Commission, *The Young Chipeewayan Inquiry into the Claim Regarding Stoney Knoll Indian Reserve No. 107 (1994)* in Indian Claims Commission Proceedings (1995) 3 ICCP Reports at 183. The Chipeewayan headmen that signed Treaty 6 were Naa-poo-chee-chees, Wah-wis, Kah-pah-pah-mah-chatik-way, and Kee-yeu-ah-tiah-pim-what.

[36] *Ibid* at 184.

[37] I am using the term "treaty signatory" here to refer to the individuals who signed the agreement on behalf of treaty rights-bearing communities and as such had the authority to enter into the agreements on behalf of their communities. I will continue to refer to signatories as individuals that had the authority to enter agreements on behalf of their communities, however, the notion of a signatory is also often referred to in regard to particular First Nations or even states capable of entering into agreements.

[38] ICC, *Young Chipeewayan Inquiry supra* note 35 at 184.

[39] *Ibid.* The reserve land was surveyed in 1879 by George Simpson, who was a Dominion Land Surveyor.

the 1870s, 1880s and 1890s were fraught with difficulty for many on the prairies, with the threat of starvation looming. The Chipeewayan community did not receive the promised agricultural support and were forced to leave the Stoney Knoll lands. As a result, the Chipeewayan lands were taken back by the Canadian Crown in 1897 and conveyed to settlers in the ensuing years.[40]

When the Chipeewayans left the Stoney Knoll area, Mennonite and Lutheran settlers came to live and farm within the territory that had been previously allocated as Reserve 107. The Canadian government encouraged this transition, as it was an opportunity to achieve settlement objectives on the Canadian prairies. For the most part, these settlers were successful at cultivating and growing food on the Stoney Knoll lands, however none of the Chipeewayans shared in this success. To this day, the land in the Stoney Knoll area is some of the best arable farmland in Treaty 6 territory.[41]

The years turned into decades, and descendants of the Chipeewayan Nation eventually sought redress through the Canadian legal system. They submitted a claim to the Indian Claims Commission for the breach of Treaty 6 promise of land and agricultural support. Following a hearing, the Indian Claims Commission determined that "[a]s a result of disease, climatic hardship, and the rapid disappearance of the buffalo, the membership of the [Chipeewayan] Band diminished owing to death and to the migration of individuals and families to larger, established Bands elsewhere in Saskatchewan."[42] The Commission found that the Chipeewayan community shrank and individuals moved away from the Stoney Knoll area, predominately because of "the rapidly diminishing resource base, food resources."[43] Based on this diaspora from Stoney Knoll, the Commission concluded that the Chipeewayan Band "had ceased to exist in fact, and had also ceased to have any legal existence under the *Indian Act*."[44] The Indian Claims Commission determined that the Young Chipeewayans were not eligible to submit a specific claim and were

[40] *Ibid* at 185.

[41] Brad Leitch, *Reserve 107: Reconciliation on the Prairies*, (2016: Blue Sky Media) available online: <https://www.reserve107thefilm.com/>.

[42] ICC, *Young Chipeewayan Inquiry supra* note 35 at 185.

[43] *Ibid* at 200.

[44] *Ibid* at 201.

no longer entitled to the land or agricultural benefits that were promised to them in accordance with Treaty 6.[45] According to the Commission's decision, the Young Chipeewayan people were not able to claim the land initially allocated to them by the Canadian Crown, despite the admission by the Canadian Crown that the land comprising Stoney Knoll had been unlawfully seized by the Canadian Government.[46] The result of the Commission's ruling was that the Canadian legal system upheld the decision not to confer lands or agricultural benefits to the Chipeewayan descendants that had originally been promised in Treaty 6.

In its evaluation of the Young Chipeewayan's claim, the Commission failed to acknowledge the primordial importance of sustenance, food security and agriculture to the treaty relationship. The way the claims process unfolded with a determination that the Young Chipeewayans were not entitled to the land at Stoney Knoll, or even compensation through the claims process, shows the lack of understanding about the importance of the transition to an agricultural economy. The Commission's determinations were founded on logic that did not grasp the impact of the Young Chipeewayan's not receiving the type of agricultural assistance that was promised.

The Stoney Knoll narrative exemplifies the cascading effect resulting from original treaty terms not being met. The experience of the Young Chipeewayans highlights one of the main reasons Treaty 6 was negotiated and signed, which was to sustain their community during an era where the bison was becoming extinct and food was scarce. With sustenance being a focal point, the promise of assistance in the transition to an agricultural economy was nothing less than essential. When these agricultural rights were not meaningfully provided and the Chipewaayans left Stoney Knoll, the flawed nature of the historic treaty framework becomes readily apparent. The Stoney Knoll example shows how the failure in providing agricultural benefits provisions of the Treaty resulted in the Chipeewayans losing their land, and also lost everything that they should have received from the treaty agreement in the first place. The Stoney Knoll story reveals the centrality of these original agricultural promises to the treaty relationship. The Chipeewayan narrative illuminates the centrality of the agricultural promises to the treaty context and also

[45] *Ibid at* 205.

[46] *Ibid.*

shows how concepts specific to food security and a food system lens have been underemphasized in judicial determinations, which has had myriad effects and impacts.

e. Food Law: A Holistic and Interdisciplinary Lens to Analyze Food Systems

Food is an indicator of larger societal issues and has been the subject of substantial commentary and analysis. In 1826, French lawyer and politician Anthelme Brillat-Savarin wrote "tell me what you eat …[and] I will tell you what you are."[47] As a self-proclaimed gourmand with a flair for the dramatic, Brillat-Savarin's musings about food are obviously exaggerated, but the sentiment put into plain language, suggesting "we are what we eat" is an accurate portrayal of the importance of food for humanity. Brillat-Savarin's main contention was that food is an essential ingredient of human identity, and the food we eat, and the ways in which we access food, are central and defining components of human identity.

Brillat-Savarin's claims of food illuminating human identity is echoed through various academic disciplines keen on looking at the food system from various vantage points. These include food philosophy and food ethics.[48] While food is not often the focal point for legal analysis, food law is the emerging discipline seeking to change this.[49] Legal issues that affect the food system are analyzed through the lens of food law, which has emerged as an area of interest in several different jurisdictions, including the United Kingdom, Australia and Canada.[50] Each jurisdiction has different areas of interest, and these can span a wide spectrum of issues from food safety and regulatory issues to the drafting of national food policies and meeting epidemiological health objectives. Brillat-Savarin's assertion about food being linked to identity

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[47] Anthelme Brillat-Savarin, *Physiologie du Gout, ou Meditations de Gastronomie Transcendante* (1826). The original French phrase is: "Dis-moi ce que tu manges, je te dirai ce que tu es."

[48] See Andrea Borghini & Nicola Piras, "The Philosophy of Food. Recipes Between Arts and Algorithms" (2020) 13:38 Humana Mente. Over the past few decades an increasing number of philosophers have been intrigued by the wealth of intellectually challenging and socially engaging issues raised by food.

[49] There is a swath of literature specifically about the philosophy and ethics of food and why food matters to humanity, spanning issues related to the way humanity thinks about food and the impact of what we eat has upon humans as individuals but also the impact upon society and the environment. For additional reading on the philosophy of food, see David Kaplan, *The Philosophy of Food* (Berkeley: University of California Press, 2012). See also: Peter Singer, *The Ethics of What We Eat: Why Our Food Choices Matter* (New York: Rodale Books, 2007) and Michael Pollan, *The Omnivore's Dilemma: A Natural History of Four Meals* (2007).

[50] Heather McLeod-Kilmurray *et at*., *Food Law and Policy in Canada* (Toronto: 2019).

is a strong justification for why it is important to look at the laws and policies regulating and governing food systems. These areas of "food law" reveal a substantial amount about societal identity and how a government approaches larger food system issues as well. This is because food law enables an interconnected perspective about the food system, where the system is seen as greater than the sum of its parts. As a lens to discuss food issues, food law supports analysis of whether food systems are just and sustainable and identifying where there are clear gaps in law and policy necessitating remedy.

As outlined in this chapter, food systems are a relational way of describing the many stages involved in keeping us fed. Food law therefore provides a lens to grapple with the specific legal problems affecting the food system. A narrow definition articulates that food law is:

> [t]he complete set of local, state, and federal laws and regulations that implement food policies. Food Law & Policy… is the study of the basis and impact of those laws and regulations that govern the food and beverages we grow, raise, produce, transport, buy, sell, distribute, share, cook, eat, and drink.[51]

Food law is not just the statutes and common law about food, however. Further to this definition, food law creates space to focus on the relationship between laws and policies "that structure the food system and their intended and unintended consequences on health, the environment, the economy, and many other areas."[52] In accordance with this characterization, food law is intended to look at the "how" and "why" for the laws and policies that affect the food system and is a way to create intersectionality for the causes and effects upon the food system to become relevant.

In the United States, food law has emerged as a holistic and interdisciplinary way of working with food related legal issues comprehensively. This was not always the case, as the laws about food were historically taught at law schools as the black letter law about food and agriculture. It was principally about the regulation of various food products according to jurisdiction and legislation. Food law was an exercise in statutory interpretation and the way that food was regulated. Alongside the black letter study of food, agriculture law emerged at the

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[51] Baylen J Linnekin & Emily M Broad Leib, "Food Law & Policy: The Fertile Field's Origins and First Decade" (2014) 2014:3 Wis L Rev 557 at 584.

[52] *Ibid* at 585.

beginning of the 20th century. Agriculture law was specifically focused on issues related to farming such as farm credit and farm estate planning and other aspects of the law that are particular to those growing "food and fiber", or more specifically as "is the study of the law's effects upon the ability of the agricultural sector of the economy to produce and market food and fiber."[53]

The origins and early construction of American food law suggest that food law fills an important gap, because while both agriculture law and statutory interpretation and the regulatory framework about food "are enduring, distinct, and important silos of American legal education, neither one alone nor the two in tandem adequately covers many of the legal issues that currently impact our food system."[54] Food law emerged because of unmet aspects that neither agriculture law nor statutory interpretation were able to contemplate, including issues specific to sustainability and localization.[55] Therefore, food law offers a way of grappling with legal issues connected to food systems. Rather than limiting engagement with food issues to specific statutory interpretation or to the regulation of agriculture, food law allows for critical engagement with food issues in a holistic and comprehensive fashion.[56] Whereas important legal issues may have slipped through the cracks between the interpretation of a specific piece of food safety legislation and the narrow operation of law applied to farming, food law casts a wide enough net to grapple with the issues between and beyond these fields. In addition, food law infuses a significant policy focus that is not common in other legal discourse. Food law is often multidisciplinary and interdisciplinary as it adapts to work on issues arising in the food system.[57]

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[53] Neil D. Hamilton, "The Study of Agricultural Law in the United States: Education, Organization, and Practice" (1990) 43 ARK L REV 503 at 503. It is important to note that lawyers have been practising law in the context of agricultural issues for a very long time, but it was only during the twentieth century that it was specifically identified as "agriculture law".

[54] Linnekin & Leib, "Food Law Origins" *supra* note 51 at 559.

[55] *Ibid* at 560.

[56] The research conducted by Linnekin and Leib shows that food law and policy has seen increasing interest and attention. The creation of various academic programs seeking to study legal issues related to food beyond statutory interpretation or agricultural production issues shows that food law exposes unmet needs related to holistic legal issues specific to food.

[57] Linnekin & Leib, "Food Law Origins" *supra* note 51 at 586.

This necessitates various professionals with experience in a vast array of areas, and it also means that research can cover issues that may arise throughout the food system.[58]

In the United States, food law has had a lengthy head start relative to food law in Canada and therefore informs a significant portion of the food law discussion happening in Canada.[59] Looking to the American legal landscape helps to establish first principles about food law as a legitimate legal discipline and illuminates the growth and expansion that is anticipated to occur for Canadian food law in the years to come. Canadian food law scholars and practitioners have the opportunity of learning from the work that has occurred in the American context. In contemplating the American food law milieu, it becomes readily apparent that food law and policy deserves close and concerted attention.

In comparison to the United States, Canadian food law is a much newer field of study. An annual food law and policy conference has occurred for several years, a textbook has been released, there are various student societies working at legitimizing food law as a Canadian discipline, and scholarly writing is continuing to come out with a focus on food law.[60] One of

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[58] Linnekin and Leib suggest that food law and policy coalesced into a field based on the important work that various policy makers, scholars and even pop icons achieved (which includes the writing that journalists and authors such as Eric Schlosser and Micheal Pollan contributed in the early 2000s). See for example, Eric Schlosser, *Fast Food Nation: The Dark Side Of The All-American Meal* (New York: Harper Collins, 2001); See Also Jonathan Safran Foer, *Eating Animals* (New York: Little Brown & Company, 2009); Marion Nestle, *Food Politics: How The Food Industry Influences Nutrition And Health* (2002).

[59] In a follow up article in 2017, Linnekin and Leib emphasize how food law's growth has legitimized its place in academia. See Emily M Broad Leib & Baylen J Linnekin, "Food Law & Policy: An Essential Part of Today's Legal Academy" (2017) 13:2 J Food L & Policy 228 at 229. In this research Linnekin and Leib looked at how food law has expanded in the United States beyond just teaching, and also includes the work of publishing scholarly works, leading clinical programs, establishing research centers, working with national committees, organizing conferences and publishing casebooks. They discovered that the emergence of food law and policy in the mid-2000s continued with exponential growth into 2014 through the development of 10 distinct areas demonstrative of the field's growth and maturity. They found that there has been a significant increase in the amount of published scholarly work specific to food law. Linnekin and Leib track the emergence of both FDA law and agriculture law in the United States through the twentieth century, and what becomes evident is that for more than a century there has been a focus in the United States on how the law is applied to issues related to food and the way that it is grown. Various American law schools have developed programs specific to agriculture law and it is evident based on this expansion of food related legal programs that food law is an effective and meaningful way of grappling with food system issues. They emphasize that there are an increased number of courses, clinical programs and student organizations engaged in food law, and that food law is growing by nearly all metrics that they measured.

[60] For example, see: Canadian Association of Food Law and Policy website, online: <http://foodlaw.ca/>. Recent developments in the Canadian food law landscape, such as the advancement of a Canadian Food Policy and new legislative and policy changes further support the proposition that food law is gaining increased traction as a

the areas of utmost importance to Canadian food law is the creation and maintenance of just and sustainable food systems, and indeed this is one of the great challenges and opportunities of the twenty-first century. Further, there is strong government support at present for food-related issues as there has been a surge in excitement and understanding about the value of food systems and how food systems can contribute to addressing broader systemic challenges.[61]

What this means within the Canadian context is that there is an opportunity to further carve out food law as an emergent legal discipline and bring a holistic and interdisciplinary focus to crucial food related legal issues that have not yet been adequately addressed by more narrow legal frameworks. In relation to historic treaty promises and the agricultural benefits flowing from these promises, food law can help to expose the interconnected nature of the food system to the original treaty intent and help to challenge the way these original promises are understood or construed according to a food system lens. The agricultural benefits provisions in the historic treaties are an unmet component of the food system that neither the current judicial approach to treaties nor the Canadian government's current approach to Indigenous food systems adequately addresses. The interdisciplinary nature of food law is particularly valuable in relation to historic treaty rights because it creates different characterizations of treaty rights than the judiciary may have delineated when considering the rights more narrowly.

Indeed, one of the crucial areas that food law in Canada must engage with is the historic treaty promises to agricultural benefits. The intended and unintended consequences from these original promises not having been kept are closely linked. The Chipeewayan narrative helps to show the centrality of agricultural promises to the prairie treaty context, and as made evident by the Indian Claims Commission's decision, food security and the importance of sustenance have been underemphasized in decision makers' determinations about the treaty relationship, which has had myriad negative effects and impacts for treaty signatories. For the Chipeewayan community, food insecurity during the early treaty years had a cascading and cumulative effect,

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discipline. See also: Canada, Canada's National Food Policy, 2019: available online: <https://agriculture.canada.ca/sites/default/files/legacy/pack/pdf/fpc_20190614-en.pdf>.

[61] The vast breadth of topics and dynamic nature of food law makes it difficult to neatly encapsulate food law's merit or benefit, however, utilizing a legal framework that is flexible enough to comment on the complexity of the food system is an excellent opportunity, and there is increasing momentum for the analysis of legal issues and Canada's food system.

wherein the outcome was loss of a treaty land base (and even any contemporary compensation for the breach of the treaty promise) pursuant to the treaty.

As a lens to look at the treaty right to agricultural benefits, food law helps to identify how significant the failure to fulfill the agricultural promises ultimately was for Indigenous stakeholders when their pre-colonial food system was no longer viable due to prairie settlement. The food law paradigm helps to articulate the significance of the agricultural benefits to the colonization of the prairies and shows the interconnected nature of the unfulfilled original agricultural benefits promises and impacts on the contemporary food system. This chapter articulates how Indigenous communities had established food systems that were affected by colonialism, which prompted negotiations and inclusion of the cows and ploughs provisions in specific treaties such as Treaty 6. Food law illustrates the obvious gap that these unfulfilled treaty promises created. Evidently, food law is an important lens to rely on for this writing, which other ways of analyzing the historic treaty rights to agricultural benefits may not consider. Food law is still an emerging legal discipline, and the intent is for this thesis to be a contribution to further bolster food law and encourage analysis of food issues that will further assist in creating just and sustainable food systems.

f. Thesis Chapter Outline

This thesis argues that the agricultural benefits promises were at the heart of why the prairie treaties were signed. I argue that the centrality of agricultural benefits makes it important for First Nations and the Crown to find resolutions to contemporary agricultural benefits claims and fulfill these original treaty promises. The creation of the historic numbered treaties and their contemporary interpretation and implementation is an opportunity to strengthen First Nation and Crown relationships for a shared future, but this needs to include making good on the root purpose and intentions of the agreements that were originally negotiated.[62] In this thesis I argue that the contemporary interpretation and resolution of agricultural benefits claims on a collaborative and expedient basis is mutually beneficial for both First Nations and the Crown. I

[62] See Arcand *et al*., *supra* note 29 for further discussion on Indigenous contemporary agriculture. Despite their exclusion from agricultural narratives, Indigenous peoples continue to be connected to agriculture through both historical agreements and contemporarily through Indigenous-led farming and agricultural leasing of First Nations reserve lands to non-Indigenous farmers.

argue that the original intent of the agricultural benefits clauses was to provide food security and support a food system for Indigenous peoples based on new ecological and economic realities on the prairies. These original treaty promises should be fulfilled with a view to building mutually beneficial relationships and working toward the creation of just and sustainable food systems.

This chapter has set the stage for why food and agriculture matter to the treaty relationship. It has highlighted that food is important at an individual as well as at a community level, which is made even more apparent when looking at the historical record of the settlement of the Canadian prairies and current food system challenges that Indigenous peoples are disproportionately facing. The focal point for this chapter has been to articulate the reasons why food and agriculture need to be central to discussing the treaty relationship on the prairies. This chapter has also discussed food security and sustenance as concepts related to the food system and shown how studying food systems through food law is a useful lens to analyze the treaty relationship when considering the centrality of the agricultural benefits provisions in the historic treaties.

In Chapter Two, I argue that the contemporary treaty rights paradigm can be impactful for agricultural benefits claims.[63] I unpack the way the Supreme Court of Canada has articulated the interpretation of historic treaty rights and show how recent trial and appellate cases have furthered the gradual evolution of treaty interpretation principles. This chapter shows that it is increasingly likely that First Nations will be successful in agricultural benefits claims founded on the prairie treaties.[64]

Chapter Three focuses closely on Treaty 6 in Saskatchewan. I show what transpired with the historical conveyance of agricultural benefits. I address how agricultural benefits were

[63] There is some difficulty in finding the appropriate language to discuss the fulfillment of Indigenous rights. Part of the challenge is based on negative connotations arising from early Indigenous rights discourse, but this is also based on the type of intention particular words convey. For the sake of this research, I am using words like "fulfill", "legitimize", "respect" and "honour" in an attempt to emphasize that Indigenous rights discourse requires careful language that does not assume one type of characterization.

[64] See Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan - Our Dream Is That Our Peoples Will One Day Be Clearly Recognized as Nations*, (University of Calgary Press: 2000). *Treaty Elders* was an early work that aimed to provide the historical context needed to intelligently and respectfully forge new relations between First Nations people and non-Indigenous peoples. The authors emphasize that the point was to learn from the past and work toward a future built on cooperation and respect.

negotiated and agreed to by Indigenous leaders and the Canadian Crown representatives in Treaty 6, and how the destruction of traditional Indigenous food systems such as the buffalo pressured First Nations to negotiate Treaty 6. This analysis of Treaty 6 shows that rather than the agricultural benefits provisions in Treaty 6 being narrow and limited in their conferral of farming provisions and implements, the historical record demonstrates that these provisions were intended to convey meaningful economic development and food systems rights.

Chapter Four addresses the dispute resolution context for historic treaty rights claims to agricultural assistance. I will present various examples where decision makers are applying treaty interpretation principles and demonstrate how these rights are being interpreted in a contemporary context. This chapter ultimately shows how the current framework for navigating these treaty rights claims is deficient, but also opens opportunities for mutual benefit between First Nations and the Crown. Chapter Five looks at contemporary scholarship about historic treaty interpretation and argues that the judiciary is beginning to take incremental steps toward implementing a more accurate and effective position that addresses the academic commentary.

Finally, in the concluding chapter, I bring together food law, treaty interpretation and the specific context of Treaty 6. I will show that there is potential for agricultural benefits to be mutually beneficially resolved for First Nations and the Canadian Crown, and that the agricultural benefits context is on the cusp of being opened up by the judiciary. This is only possible if the treaty right to agricultural benefits moves away from static contemporary compensatory mechanisms. I argue that the agricultural benefits promises should be implemented according to the importance they represented at the time of treaty signing and in line with seeing treaties as relational or covenantal instruments. In this concluding chapter, I show how in reframing the treaty more must be done to support Indigenous food systems and food rights and how there is an opportunity to continue working toward strong treaty relationships by acknowledging the colonial impacts that agriculture has had upon Indigenous peoples. I will demonstrate that a more robust, comprehensive and careful engagement with the historic treaty agreements regarding agriculture is essential, and I provide suggestions for how to make this happen.

II. TREATIES

a. Legislation: The *Indian Act*

> "We need to get to a place where Indigenous peoples in Canada are in control of their own destinies and making their own decisions about their futures ... This framework [for the recognition and implementation of Indigenous rights] gives us the opportunity to … ensure the rigorous, full, and meaningful implementation of treaties and other agreements[.]"[65]

Finding the tools to rebuild Indigenous communities, nations and governments is not a new Canadian government objective.[66] These tools have taken many different shapes depending on the government in power and the intended government objectives, however, a dubious history of policy failures and poorly thought-out initiatives inundate the relationship landscape. One of the most glaring failures was the attempted dismantling of the *Indian Act*[67] in 1969, where Prime Minister Pierre Trudeau and Minister of Indian Affairs Jean Chretien revealed a proposal calling for the end of the special legal relationship between Indigenous peoples and the Canadian Crown.[68] Trudeau and Chretien's proposal (called the White Paper) was intended to achieve equality among Canadians by removing "Indian" as a distinct legal status, and where Indigenous peoples were to be recognized as Canadians with equal rights commensurate to all other Canadian citizens. The White Paper was forcefully contested, labelled as assimilationist in

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[65] Canada, House of Commons Debates, 42nd Parl, 1st Sess, No264 (14Feb2018) at 1550. Shortly after Prime Minister Justin Trudeau made this comment, he announced the launch of a new policy initiative, the creation of a Recognition and Implementation of Rights Framework, which was intended to enshrine the recognition of Indigenous rights in federal legislation and to fulfill the promise of section 35 of the *Constitution Act, 1982*. However, it was later declared that Framework would not be tabled in the House of Commons prior to the 2019 federal election. There was backlash from many Indigenous spokespersons indicating that they were tired of Indigenous rights being "put into cages" or not being "emancipatory" or where recognition is applied to ideas while maintaining denial. For more on the response to the Rights Recognition Framework, see Jorge Barrera, "Wilson-Raybould battled Bennett, other ministers over Indigenous rights framework" CBC (22 February 2019), online: <https://www.cbc.ca/news/indigenous/rayboulddwernick-framework-1.5029144>.

[66] In this thesis, the terminology "Indigenous" peoples as opposed to "Aboriginal" or "Indian" peoples will be relied on to the greatest extent possible. "Aboriginal" or "Indian" was the historical verbiage the Crown relied on, and has been used in court decisions and statute up until recent years. The judicial and government vernacular has now shifted to "Indigenous", but is still a part of an ongoing discussion around the use of appropriate language and terminology. It is for this reason that I will still refer upon occasion to "Aboriginal rights" as limited to its application in Section 35 of the *Constitution Act, 1982* or the *Indian Act* given usage of the term by the Canadian judiciary and government.

[67] *Indian Act*, RSC 1985, c I-5, LRC 1985, ch I-5.

[68] Naithan Lagace & James Sinclair Niigaanwewidam, "The White Paper, 1969", *The Canadian Encyclopedia:* Historica Canada (11 September, 2015) online: <https://www.thecanadianencyclopedia.c a/en/article/the-white-paper-1969>.

content, and sparked a surge in Indigenous political organization in Canada.[69] In response to this proposal, Indigenous lawyer and rights advocate Harold Cardinal stated that "[i]n spite of all government attempts to convince Indians to accept the White Paper, their efforts will fail, because Indians understand that the path outlined by the Department of Indian Affairs… leads directly to cultural genocide. We will not walk this path."[70]

On its face, the elimination of the *Indian Act* may have seemed like an egalitarian policy approach intended to remove discriminatory legislation, establish equality, and empower Indigenous economic development. Notwithstanding this possible altruistic motive, removal of the *Indian Act* was seen by many stakeholders as an attempt to reduce Indigenous cultural identity and as a failure to address the impact and consequences of Canada's colonial history. Starting fresh without consideration for what had led to the current relationship between Canada and Indigenous peoples was not an option. The response and backlash to the White Paper (as Harold Cardinal so eloquently articulated above), made it clear that ending or reducing the special relationship was not the right path forward.

Fifty years on, the Canadian government and judiciary is still struggling to define and maintain the special legal relationship between Indigenous peoples and the Canadian Crown. What is clear, however, is rather than dismantling existing legislation or skirting around the impacts of colonial history, relationship building must involve the original historic promises such as the agreements that were originally made between Indigenous peoples and Canada.[71] This chapter considers the importance of treaties for relationship building and looks at how the historic treaties are interpreted today. This chapter begins by discussing Aboriginal rights generally and then focuses on the interpretation of historic treaty rights. I argue that the historic treaties are beginning to be interpreted more relationally by the judiciary, and that historic treaty interpretation principles are evolving to create new opportunities for treaty clauses such as the agricultural benefits provisions.

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[69] See Sarah Nickel, "Reconsidering 1969: The White Paper and the Making of the Modern Indigenous Rights Movement" (2019) 100 The Cad Hist Rev 223.

[70] Harold Cardinal, *The Unjust Society* (Douglas & McIntyre, 1999) at p 12.

[71] The focal point of this writing is treaties and the areas covered by these agreements, however, there are areas in Canada where no agreements were put in place.

b. Aboriginal Rights

While the focal point for this research is the set of specific rights coming from agreements between the Crown and Indigenous peoples (treaty rights), it is important to identify that Aboriginal rights and title rights are also established as part of the Indigenous rights framework. Aboriginal rights are rights to an activity carried out by Indigenous peoples reflecting a modern version of a historical practice, custom or tradition carried on by their ancestors prior to contact.[72] Title rights are a type of right that provides a legal basis to occupy and posses lands, and provides a right to exclusive use and occupation.[73]

All rights of First Nations, Metis and Inuit peoples in Canada are based upon a central element – that Indigenous peoples held original occupation and possession of the land that is now called Canada.[74] It is undisputed that for thousands of years, Indigenous peoples inhabited the territory, with their own unique cultures, identities, traditions, languages, and institutions. Contemporary Indigenous rights are intended to revitalize opportunities for independence through self-determination of governance, land, resources and culture because Indigenous peoples held this original ownership. According to Canadian courts, Indigenous peoples are entitled to these rights due to their unique status and original occupancy of Canada, specifically because they were here as societies prior to Canada's existence. There are immense challenges in giving these rights a suitable contemporary structure, framework and vision due to competing

[72] *R v Van der Peet*, [1996] 2 SCR 507, [1996] SCJ No 77. As established in *R v Van der Peet,* Aboriginal rights are distinctive and hold significance for the culture of the specific community. The rights need to be integral and not just incidental. The judiciary has emphasized that a crucial part of defining the right is determining the proper scope of the right, which requires viewing the right in the context of the specific historical facts relating to the exercise of the right. In looking at the scope, the judiciary relies on enumerated factors to consider whether a practice, custom or tradition is integral to a distinctive culture, including central significance, continuity prior to contact, specificity, independent significance, and other factors . See also *R v NTC Smokehouse Ltd*., [1996] 2 SCR 672, [1996] SCJ No 78; *R v Gladstone*, [1996] 2 SCR 723, [1996] SCJ No 79; *Mitchell v MNR*, [2001] 1 SCR 911, [2001] SCJ No 33.

[73] *Guerin v Canada*, [1984] 2 SCR 335, [1984] SCJ No 45; *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, [1997] SCJ No 108.

[74] William Henderson & Catherine Bell, "Rights of Indigenous Peoples in Canada", *The Canadian Encyclopedia*. Historica Canada (7 February, 2006) online: <https://www.thecanadianencyclopedia.ca /en/article/aboriginal-rights>. See also: Jessica Stuart, "Aboriginal Rights & Treaty Research in Canada" (2017) 42:3 Can L Libr Rev 13.

interests, and it has most frequently fallen to the Canadian judiciary to characterize the scope and content of these rights when they come into conflict with other parties.[75]

c. Treaties

Treaties provide a framework for cooperation and sharing the land that Indigenous peoples traditionally occupied. They are formal agreements between the Canadian government, Indigenous groups, and sometimes provinces and territories that establish ongoing rights and responsibilities for all parties involved. These agreements outline ongoing treaty rights and advantages for each group, with Aboriginal rights (also known as Indigenous rights) and treaty rights recognized and upheld under Section 35 of the *Constitution Act, 1982*.[76] The Office of the Treaty Commissioner describes how treaties "form the bedrock foundation of the relationship between the Treaty First Nations and the Government of Canada. It is from the treaties that all things must flow in the treaty relationship."[77] Treaties are the instrument that created the relationship "which is perpetual and unalterable in its foundation principles. The treaties are the basis for a continuous intergovernmental relationship."[78]

Understanding historic treaties is crucial to any discussion about Indigenous rights on the Canadian prairies. The historic treaties are those that were entered into by the Crown before the era of modern treaties in the 1970s. Beginning in 1701 in the British colonies of North America

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[75] Brian Slattery, "A Taxonomy of Aboriginal Rights" in Hamar Foster, Heather Raven, and Jeremy Webber, eds. *Let Right Be Done: Aboriginal title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) at 111-128. When it comes to different types of Aboriginal rights, they are divided into generic rights (rights that are held by rights-bearing communities in Canada, including rights to subsistence resources and activities or the right of cultural integrity) and specific rights (those rights held by specific Indigenous groups, including those rights recognized by a treaty, or defined by a court decision). While generic rights are an essential component of Aboriginal rights more broadly, for the purpose of this writing the focus is on specific treaty rights for particular Indigenous rights-bearing communities.

[76] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. In 1982, a critical milestone was realized for Aboriginal rights law when Section 35(I) of the Constitution Act 1982 was proclaimed. Section 35 states "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada is hereby recognized and affirmed." This provision strengthened protection of treaty rights, and has been interpreted as constitutionalizing treaty rights, requiring equal consideration of Indigenous and non-Indigenous perspectives, with the purpose being "directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown." See *R v Van der Peet supra* note 72 at paras 31, 49, 50, 23.

[77] Office of the Treaty Commissioner, Treaty Implementation: Fulfilling the Covenant (Saskatoon: Office of the Treaty Commissioner, 2007) at vii.

[78] *Ibid*.

(which would later become parts of Canada), the British Crown entered into treaties with Indigenous groups to support peaceful economic and military relations.[79] Over the course of the next two hundred years, the Crown signed treaties that characterized the corresponding rights of Indigenous peoples and European newcomers to use the North American lands that were traditionally occupied by Indigenous peoples. The historic treaties signed subsequent to 1763 gave large tracts of land, occupied by First Nations, to the Crown, while also transferring their Aboriginal title to the Crown in exchange for reserve lands and other benefits.

The treaty-making process was formally established by the *Royal Proclamation of 1763*.[80] In total, the Canadian Government recognizes 70 historic treaties in Canada signed between 1701 and 1923. These treaties include the Treaties of Peace and Neutrality (1701-1760), the Peace and Friendship Treaties (1725-1779), the Upper Canada Land Surrenders and the Williams Treaties (1764-1862/1923), the Robinson Treaties and Douglas Treaties (1850-1854), and the Numbered Treaties (1871-1921).[81] These treaties form the basis of the relationships between the Crown and 364 First Nations, representing over 600,000 First Nations people in Canada.[82] These treaties were designed to establish a new legal and normative order between Indigenous peoples, the Canadian Crown and settlers, and the very fact that those party to the treaties understood that they were joining together in relationship as a way to bridge the gap between separate and distinct legal orders highlights the value and importance of treaty making during the creation of Canada.

Treaties and treaty rights vary significantly depending on the context and circumstances in which they were negotiated.[83] While the historic treaties were intended to endure indefinitely, the written texts of the treaties in Canada were drafted in narrow and precise written terms. The recorded terms of the historic treaties describes the benefits to be provided by the Crown in specific language tied to the context and circumstances prevailing at the time of the treaty, but

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[79] Canada, "Numbered Treaties" *supra* note 1.

[80] *Royal Proclamation, 1763*, RSC, 1985, App II, No 1.

[81] Daschuk, *Clearing the Plains supra* note 20 at 34.

[82] Canada, "Numbered Treaties" *supra* note 1.

[83] For a discussion on treaty term variance, see *R v Sundown*, [1999] 1 SCR 393 at para 25, [1999] 2 CNLR 289.

include no provision for resolving disputes about the implementation of the treaty and do not identify any process for renegotiating the treaty terms to address future changes in circumstances. In *R v Sioui*, the Supreme Court stated that treaties are a mechanism of accountability for the promises made by the Crown to Indigenous peoples, including concessions made by Indigenous peoples, with considerable variance in their terms. [84] In the historic treaties that were signed prior to 1975, reserve lands, money to be paid to the First Nation annually (annuities), hunting and fishing rights, educational support on reserves, and other specific benefits were agreed to.[85]

d. Toward the Current Approach to Treaty Interpretation

The historic treaties have not always been viewed as the building blocks of Canada's creation by Canada or even Canadian courts. During the twentieth century, many non-Indigenous Canadians and Canadian courts regarded the historic treaties "as little more than a cultural footnote in the nation's development."[86] It is only in the past forty-five years that this perspective has begun to shift and treaties have started to be seen as the crucial formal agreements they were intended to be. In addition to the legislated recognition in Section 35, decisions such as *Simon v The Queen* in 1985 saw the Supreme Court of Canada begin to accentuate how treaties between the Crown and First Nations are unique *sui generis* legal arrangements to be governed by specific legal principles requiring a fair, large and liberal construction.[87] In *Simon* (which is a decision about Mi'kmaq hunting rights pursuant to the Treaty of 1752 in Nova Scotia), the Supreme Court of Canada determined the parties intended to

[84] *R v Sioui*, [1990] 1 SCR 1025 at 1035-45, [1990] 3 CNLR 127.

[85] At present, there is significant ongoing treaty rights litigation involving annuities in the Robinson Treaties. This litigation will have an important bearing on how agricultural benefits claims may be negotiated as opposed to litigated. See *Restoule v Canada (Attorney General),* 2021 ONCA 779 with application for leave to the SCC granted and scheduled for appeal hearing in November, 2023, as further discussed further below.

[86] Michael Coyle & John Borrows, "Introduction" in Coyle *et al, The Right Relationship: Reimagining the Implementation of Historical Treaties*, (University of Toronto Press, 2017) at 4.

[87] *Simon v The Queen*, [1985] 2 SCR 387 at para 27, [1986] 1 CNLR. The issue at hand related to whether the Appellant was permitted to hunt pursuant to the Treaty of 1752 and section 88 of the *Indian Act*, and the Court found that the Appellant's right to hunt was not absolute, but in order to be effective had to include reasonably incidental activities, such as travelling with the necessary equipment to the hunting grounds and possessing a hunting rifle and ammunition in a safe manner.

enter into the agreement to create mutually binding obligations, and as such the agreement was enforceable.[88] The Court also emphasized that these historic treaties continue to be in force and effect, and that nothing had been demonstrated to indicate the hunting rights that were protected by the treaty had been extinguished.[89] *Simon* is important because it is one of the early Supreme Court of Canada decisions acknowledging both the significance of treaties and the unique legal status that treaties have in Canada.

Generally speaking, perspectives about how historic treaties should be interpreted result in strong differences of opinion for Indigenous peoples, Canada, and even the courts.[90] These differing perspectives are usually about what the treaties stand for, which can lead to disagreements over the meaning and scope of the treaty rights that were intended. Canadian courts and government actors have historically viewed treaties according to what the treaty document explicitly states and construed the treaty as narrowly as possible, whereas many Indigenous peoples view treaties more holistically and relationally.[91]

Lack of clarity has also been problematic as the historic treaties were signed in a language and cultural context that was different from today, which can make it difficult to interpret their meaning and intent. Limited documentation of treaty negotiation also contributes to interpretive challenges, which causes problems in determining the original intent of the parties and understanding the full scope of treaty rights and obligations. Resistance to change also creates interpretive friction, as there can be pushback from government and other stakeholders to changing the treaty interpretation framework and recognizing the full scope of Indigenous rights and interests, which can make it difficult to achieve meaningful progress in treaty negotiations. These challenges have contributed to ongoing disputes over the interpretation and

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[88] *Ibid* at paras 24 – 31.

[89] *Ibid*. The Court adopted the comment of Norris JA in *R v White and Bob* (1964), 50 DLR (2d) 613 (BCCA) (affirmed in the Supreme Court (1965), 52 DLR (2d) 481) indicating that a treaty is a unique agreement which is neither created nor terminated according to the rules of international law. The *Simon* decision was an early Aboriginal rights decision that affirmed the parties' intent to enter into treaty which created mutually binding obligations. The Court found that the Treaty of 1752 constituted a positive source of protection against infringement of hunting rights, and continued to be in force and effect.

[90] Thomas Isaac & Kristyn Annis, *Treaty Rights in the Historic Treaties of Canada*, (Saskatoon: Native Law Centre, 2010) at 3.

[91] *Ibid*.

implementation of historic treaties in Canada, and they highlight the need for continued effort to address these issues and ensure that the treaties are addressed in a way that is respectful of Indigenous peoples' rights and interests.

Instead of providing clarity to treaty signatories, the case law guiding treaty interpretation has created confusion for signatories to the historic treaties. Confusion exists for both treaty claimants as well as the Crown, and while historians and legal scholars have attempted to provide assistance in pushing the treaty interpretation paradigm forward, the types of deficiencies highlighted by the academy are often not addressed by the courts. In turn, uncertainty is created about potential implications of treaty interpretation decisions or even what the right forum for settling treaty disputes should be.

The reality is that treaty interpretation usually falters in the lower courts because it is a subjective process based on how the provincial, territorial and federal judiciary choose to apply the Supreme Court of Canada's established treaty interpretation principles to the facts on a case-by-case basis. While applying the law to the facts of each specific factual scenario may seem like the usual way trial jurisprudence comes into existence, when the Supreme Court of Canada's treaty interpretation principles say one thing and are interpreted to mean another, it makes for a decidedly frustrating and uncertain process. On the one hand, the judiciary's approach indicates there may be concern about the cascading effects of holistic and generous treaty interpretation on Canada's economic and political system, while on the other hand also remaining acutely aware that the historic treaties now require a far more intentional and generous interpretation.

It is also evident that treaty interpretation principles and the approach to treaty interpretation are being incrementally expanded with certain decisions, and there is a window of opportunity to establish more clarity for the treaty interpretation process overall. The Supreme Court of Canada's approach in *Marshall*, along with new lower court caselaw such as the *Restoule* and *Yahey* decisions that apply *Marshall*, are beginning to gain traction in a meaningful way, and incremental progress continues to demonstrate that the treaty relationship will play a substantial role in Canada's future.

e. *R v Marshall*

R v Marshall (*Marshall No 1*) remains the Supreme Court of Canada's leading decision about historic treaty interpretation, where the Court recognized the hunting and fishing rights promised in the Peace and Friendship Treaties.[92] It continues to be relied on in guiding judicial decisions about treaty interpretation, as evidenced by the judiciary's continued citation of the decision.[93] In *Marshall No 1*, the Supreme Court of Canada overturned the trial and Nova Scotia Court of Appeal decisions and determined Donald Marshall Jr. had a treaty right to a moderate livelihood.[94] Marshall, a Mi'kmaq man from Membertou, Nova Scotia was charged and convicted under federal fishing regulations for fishing and selling eels without a licence during closed season. Marshall argued that as a member of the Mi'kmaq Nation, he had a constitutionally protected right to catch and sell fish under the 1760 Peace and Friendship Treaty.

The written text of the treaty was not clear in providing a right to catch and sell fish, but it did contain a clause where the Mi'kmaq were not to traffic, barter or exchange any commodities in any manner with persons other than government personnel of truck houses (another term for trading posts).[95] In order to reach a decision, the Court needed to grapple with the issue of whether a positive right to catch and sell fish could be implied based on the existence of the truck house clause in the treaty.[96] Justice Binnie, writing for the Court, ultimately determined that the treaty did include an implied right to catch and sell fish, to the extent that the fishing was sufficient to sustain a moderate livelihood.[97] Further, the Court found that this right

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[92] *R v Marshall*, [1999] 3 SCR 456, [1999] 3 RCS 456 [*Marshall No 1*].

[93] See for example: *Wesley v Alberta*, [2022] AJ No 1313 at paras 46 to 48 where the Court quotes Justice McLlachlin (as she then was) in her dissenting reasons summarizing treaty interpretation principles. The Court also emphasizes reliance on oral treaty terms as well as the written terms. See also *R v Green*, 2022 SKCA 92 at para 53 where the court states the correct approach to Natural Resource Transfer Agreements is through their own unique, contextual and linguistic lens, but "generous rules of interpretation should not be confused with a vague sense of after-the-fact largesse," quoting *Marshall No.1* at para 14.

[94] *Marshall No 1 supra* note 92 at para 7. See *R v Marshall*, [1996] NSJ No 246 for trial decision, and *R v Marshall*, 146 DLR (4th) 257, [1997] 3 CNLR 209 for Nova Scotia Court of Appeal decision.

[95] *Ibid* at para 5.

[96] *Ibid* at para 7.

[97] *Ibid* at paras 7, 59.

did not disappear just because the mechanism of trade (the truck house) was no longer in existence.[98] This resulted in the finding that Marshall, who was doing small scale commercial activities to sustain himself and his family, was acting in accordance with the treaty right.[99] Marshall was therefore acquitted.

In coming to this decision, Justice Binnie emphasized the importance of looking at the historical and cultural context within which the treaty was negotiated, even if the "treaty document…purports to contain all of the terms[.]"[100] This would include looking at the oral terms that the First Nation signatories comprehended to be part of the treaty, as well the conduct between the parties showing how they understood the treaty terms, negotiations, and the rationale for the treaty relationship (taking into account the political and economic context the treaty objectives were reconciled).[101]

With the above principles in mind, the Court reviewed the historical record and concluded that the underlying intent of the treaty was reconciliation and mutual advantage, as the British knew protecting Mi'kmaq self-sufficiency would help achieve the colonial goals of peace and settlement.[102] More directly, the truck house clause included in the treaty (which gave the Mi'kmaq the right to bring products of their hunting, fishing and gathering to a location for trade) was intended to facilitate these goals because it gave Indigenous signatories a mechanism for trading for "necessaries" exclusively with the government.[103] Justice Binnie also emphasizes that this restriction to government trade was intended to benefit the Mi'kmaq from being taken advantage of by the "pernicious practices' of unscrupulous traders."[104]

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[98] *Ibid* at para 54.

[99] *Ibid* at para 8.

[100] *Ibid* at para 11.

[101] *Ibid* at para 41.

[102] *Ibid* at para 3.

[103] *Ibid* at para 30.

[104] *Ibid* at para 32.

Justice Binnie also clarified how the truck house clause would not have achieved its intended result of ensuring peace and settlement unless the right to trade was one of continuing access for the Mi'kmaq, and held that the honour of the Crown means the law should allow for nothing less. This was an implied term of the treaty which was required in order to understand the treaty negotiations. In addition, Binnie J determined the historical right to obtain "necessaries" through access to fish and wildlife is equivalent to a contemporary right to "produce a moderate livelihood for individual Mik'maq families at present-day standards."[105] According to the Court, this equates to less than a commercial right to hunt and fish for economic gain, however, is more than a right to sustenance, and should include basics such as food, clothing, housing and some amenities.[106]

Justice Binnie's characterization of the treaty right to a moderate livelihood may be perceived as a beneficial outcome for Marshall, but *Marshall No 1* also includes an excellent characterization of treaty interpretation principles in Justice McLachlin's (as she then was) dissenting judgment. McLachlin J provided a summary of treaty interpretation principles arising from previous Supreme Court of Canada judgments. In place of referring to each of these decisions independently, these treaty interpretation principles were as follows:

> 1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation[.][107]
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> 2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories[.][108]
>
> 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[.][109]
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> 4. In searching for the common intention of the parties, the integrity and honour of the Crown is

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[105] *Ibid* at para 35.

[106] *Ibid* at para 59, citing *R v Gladstone, [1996] 2 SCR 723, 137 DLR (4th) 648.*

[107] *Ibid* at para 78, citing *R v Sundown*, [1999] 1 SCR 393, at para 24, [1999] 2 CNLR 289; *R v Badger*, [1996] 1 SCR 771 at para 78, [1996] SCJ No 39; *R v Sioui*, *supra* note 84 at p 1043; and *Simon supra* note 87 at p 404.

[108] *Ibid* at para 78, with Justice McLachlin citing *Simon supra* note 87 at p 402, *Sioui supra* note 84 at p 1035; and *Badger, Ibid* at para 52.

[109] *Ibid* at para 78, with Justice McLachlin citing *Sioui supra* note 84 at pp 1068-69.

presumed[.][110]

5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties[.][111]

6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time [.][112]

7. A technical or contractual interpretation of treaty wording should be avoided[.][113]

8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic[.][114]

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[.][115]

Looking at the way courts today are continuing to apply *Marshall No 1*, it is evident that these principles cut to the core of what treaty interpretation has come to mean to the judiciary across Canada.[116] With the exception of treaty principle 8 above (which states that treaty terms cannot be altered beyond what is possible or realistic), the treaty interpretation principles articulate the intention to approach treaty terms with a careful and beneficial stance toward Indigenous signatories. The above language used by the courts lends itself toward treaty interpretation grounded in equitable compromise, with the benefit of the doubt being given to the

[110] *Ibid* at para 78, with Justice McLachlin citing *Badger supra* note 107 at para 41.

[111] *Ibid* at para 78, with Justice McLachlin citing *Badger supra* note 107 at paras 52-54; and *R v Horseman, supra* note 2.

[112] *Ibid* at para 78, with Justice McLachlin citing *Badger supra* note 107 at para 53; and *R v Nowegijick*, [1983] 1 SCR 29 at p 36, [1983] SCJ No 5.

[113] *Ibid* at para 78, with Justice McLachlin citing *Badger supra* note 107 and *Horseman supra* note 2.

[114] *Ibid* at para 78, with Justice McLachlin citing *Badger supra* note 107 at para 76; *Sioui supra* note 84 at p 1069; and *Horseman supra* note 2 at p 908.

[115] *Ibid* at para 78, with Justice McLachlin citing *Sundown supra* note 107 at para 32; *Simon supra* note 87 at p 402.

[116] *R v Marshall*, [1999] 3 SCR 533, 179 DLR (4th) [*Marshall No 2*]. See para 44 where the Supreme Court leveraged a subsequent application to further clarify *Marshall No 1 supra* note 90 with regard to regulatory function. A unanimous Court articulated the breadth of federal authority for managing and regulating the fisheries, emphasizing that *Marshall No 1* was tested through a criminal proceeding, whereas there are likely regulatory instances (such as a closed season) which might be a justifiable regulatory device if the Crown can establish a valid legislative objective of pressing and substantial public purpose (such as conservation).

Indigenous signatories, but not going so far as to exceed the bounds of what was originally agreed to.

When the *Marshall* decisions came out, there was concern about what these decisions and these principles would mean for the Canadian prairies.[117] Catherine Bell and Karin Buss indicate that prairie media initially voiced concerns because the *Marshall* decisions "represented a growing and disturbing trend of judicial activism[.]"[118] Bell and Buss argue that this prairie perception was in fact incorrect, as *Marshall* only provided some substantive meaning to old laws of treaty interpretation that had been given lip service or ignored.[119] Rather, they suggest that *Marshall* "is part of a slow and incremental attempt by members of the Canadian judiciary to give some meaningful substance to old rules of liberal treaty interpretation."[120] Gordon Christie, writing shortly after *R v Marshall* was released by the Supreme Court of Canada (more than twenty years ago), suggested that the modern approach to treaty interpretation which claims to emphasize a liberal and generous approach still leaves a lot to be desired.[121] Christie's main claim was that while the *Marshall* principles espoused in modern treaty decisions create the perception of significant evolution of principles, they are in fact creating the same types of outcomes as case law fifty years earlier.[122]

While the commentary provided by Bell and Buss, as well as Christie exposes the limitations inherent in the *Marshall No 1* treaty interpretation principles, the *Marshall* decisions are important because the Supreme Court of Canada found implied treaty rights arising from the original objectives of the historic treaty relationship, which in this case translated from a right to trade for economic self-sufficiency into a "broad and contemporary right to access fish and to

[117] Catherine Bell & Karin Buss, "The Promise of Marshall on the Prairies: A Framework for Analyzing Unfulfilled Treaty Promises" (2000) 63:2 Sask L Rev 667 at 671.

[118] *Ibid* at 671.

[119] *Ibid* at 672.

[120] *Ibid* at 672.

[121] Gordon Christie, "Justifying Principles of Treaty Interpretation" (2000) 26:1 Queen's LJ 143 at 145.

[122] *Ibid* at 146.

trade for a moderate livelihood."[123] *Marshall* therefore stands for the notion that terms can be read into a treaty to advance the overall treaty objectives of the parties and to allow for meaningful exercise of treaty rights in a contemporary context to maintain the honour and integrity of the Crown.[124]

f. *R v Restoule*: A Treaty Annuity Decision

Recent decisions are signaling a shift for how historic treaty rights are being interpreted. Courts are starting to conclude that the Crown has neglected its historic treaty promises and are taking a proactive stance in their interpretation. These decisions illustrate an evolution of the judiciary's interpretive approach to historic treaty rights, while still remaining grounded in the Supreme Court of Canada's clearly delineated treaty interpretation principles. They indicate a gradual shift from limiting or qualifying historic treaty promises and suggest that the judiciary is beginning to interpret these rights more robustly and expansively.

In *Restoule,* the Ontario Court of Appeal analyzed treaty annuities the Crown agreed to pay the Anishinaabe inhabiting the northern shores of Lake Huron and Lake Superior.[125] In the litigation, Treaty beneficiaries claimed breaches of the Treaties' annuity obligations pursuant to the augmentation clauses contained in the treaties. A central issue on appeal was the interpretation of the terms providing for increases to the annuities due to an augmentation clause in the Treaties.

In 1850 the Anishinaabe signed the Robinson-Huron and Robinson-Superior Treaties with the Crown. These treaties included the surrender of a large portion of northern Ontario in exchange for hunting and fishing rights, as well as an annual payment (known as an annuity) to the Anishinaabe as the Treaty beneficiaries.[126] The Crown promised an increase to the annuity from time to time, provided resource development was profitable and there were sufficient revenues from the Treaty territories to enable the Crown to increase the annuity without

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[123] Bell & Buss, "Promise of Marshall" *supra* note 117 at 674.

[124] *Ibid*.

[125] *Restoule supra* note 85.

[126] *Ibid* at paras 1 – 9.

incurring a loss.[127] Upon signing the Treaties in 1850, the Robinson-Huron Treaty beneficiaries received an annuity of approximately $1.70 per person, and the Robinson-Superior Treaty beneficiaries received an annuity of $1.60 per person. In 1875, the annuities under each Treaty were increased to $4, however, this was the only increase and the annuity amount has been frozen for nearly 150 years.[128]

Fast forward to the Ontario Superior Court trial decision, where Justice Patricia Hennessy relied on numerous forms of extrinsic evidence in her interpretation of the augmentation clause. On the evidence, Justice Hennessy determined the Crown has a mandatory and reviewable obligation to increase the Treaties' annuities when the economic circumstances warrant.[129] In order to carry out that obligation, it was determined that the Crown must engage in a consultative process and pay an increased annuity amount, if there are sufficient Crown resource-based revenues from the territories to allow payment without incurring loss. [130]

The Ontario Court of Appeal mostly focused on treaty interpretation, and while the appellate court reined in the interpretation of Justice Hennessy to some extent, the majority held that she did not err in interpreting the Treaties and made no errors in considering the evidence that would justify the Court of Appeal interfering with her interpretation. The majority adopted the same treaty interpretation reasoning outlined in *Marshall No 1*:

> Principles related to common intention, text, context and purpose inform the interpretation of historical treaties. These principles are well settled, although the facts of any particular case will make some more salient than others. The principles work to instantiate the constitutional principle of the honour of the Crown in the service of the reconciliation of Aboriginal and non-Aboriginal Canadians. [131]

In the above paragraph, the Court summarizes the established principles coming from *Marshall No 1* specific to treaty interpretation. The Court also clarifies the current judicial approach from more recent treaty interpretation decisions.

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[127] *Ibid* at paras 61 – 63.

[128] *Ibid* at para 67.

[129] *Restoule v Canada (Attorney General),* 2018 ONSC 7701.

[130] *Restoule v Canada (Attorney General)*, 2020 ONSC 3932.

[131] *Restoule supra* note 85 at para 106, affirming *Marshall No 1 supra* note 92 at paras. 9-14, per Binnie J., and as summarized at paras. 78-83, per McLachlin J.

First, common intention (of both treaty signatories) means when interpreting a treaty the court needs to "choose from among the various possible interpretations of the common intention [at the time the treaty was made] the one that best reconciles" the interests of the First Nations and the Crown.[132] Second, a court needs to analyze the written text as well as the evidence about the context within which the treaty was negotiated, which must include extrinsic evidence where it is available. This exercise is important because the written record is only one recording of what was established between the parties, whereas using context and implied terms to honourably interpret the treaty adds further clarity for what was agreed to.[133] In addition, a court needs to take a purposive approach, informed by the honour of the Crown and by recognizing that treaty promises are solemn and treaties are sacred.[134]

Finally, reconciliation between Aboriginal and non-Aboriginal Canadians is the grand purpose of s. 35 of the *Constitution Act, 1982*[135] and the honour of the Crown underlies the importance of addressing the conflict between the Crown's assertion of sovereignty and pre-existing Indigenous claims to rights, title and sovereignty.[136] It is this reconciliatory obligation between claims and various interests where the Crown's obligations to act honourably.

The Court's decision was unanimous in dismissing Ontario's claim that the Crown possesses unrestricted authority to determine whether or not to raise the Treaty's annuity payments, which have remained fixed at $4 since 1875. The Court also unanimously concluded that the honour of the Crown is applicable in this decision, as a vital component of Aboriginal law requiring the Crown to act honourably in its dealings with Indigenous peoples.[137] According to the ruling, the Crown must, in fact, enhance the annuities in a benevolent manner that aligns

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[132] *Marshall No 1*, *supra* note 92 at para. 14, per Binnie J. (emphasis in the original), citing *R v Sioui supra* note 84 at p. 1069, per Lamer J., and see, in *Marshall No 1* McLachlin J.'s restatement, at paras. 78(3)- (4), 83.

[133] *Ibid*, at para. 78(5), per McLachlin J.

[134] *Restoule supra* note 85 at para 111, per Lauwers J and Pardu J, citing *Mikisew Cree First Nation v Canada (Governor General in Council),* 2018 SCC 40, at para 28, per Karakatsanis J.

[135] *Ibid* at para 112, per Lauwers J and Pardu J, citing *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, at para 9, per Binnie J.

[136] *Ibid* at para 112, per Lauwers J and Pardu J, citing *Mikisew Cree supra note* 134 at para 21.

[137] *Ibid* at para 87.

with the Crown's dignity and is responsive to the Anishinaabe communities' needs. The verdict affirms the significance of Anishinaabe values such as respect, accountability, mutual benefit, and rejuvenation in comprehending the Treaty. Furthermore, it acknowledges that the Covenant Chain Alliance between the Anishinaabe and the Crown was established on the basis of Anishinaabe and British diplomatic customs and legal systems.

This decision is important for a number of reasons. First, it is an example of an appellate court judgement upholding an expansive interpretive view of a treaty clause. The core of the trial judge's ruling remains intact, stating that Canada and Ontario were legally obligated to consult with First Nations regarding the augmentation of annuities following 1875. In a narrow sense, the *Restoule* decision will likely not have significant impacts beyond the specific dispute at hand because no other Canadian treaty has an augmentation clause. The Supreme Court of Canada has granted leave to appeal the decision for Ontario, which may impact the expansive treaty interpretation ruling of the Ontario Court of Appeal, and at minimum delays conclusion of the litigation.[138] Nevertheless, the case may serve as a precedent for future legal proceedings because it demonstrates how Canadian courts are taking an increasingly proactive role in interpreting treaties. This decision indicates that the judiciary is expanding treaty interpretation beyond the treaty's precise wording and addressing the historical context in ways not previously contemplated.

For the Numbered Treaties, *Restoule* represents an opportunity for further expansion. While the Robinson-Huron Treaty annuity provisions include a specific augmentation clause requiring an increase to the annuity from time to time, there is a similar opportunity with specific regard to the right to agricultural benefits. As in *Restoule* where the Court required the enhancement of the annuity in a way that responds to the First Nation communities' needs, there is a direct line of reasoning where agricultural benefits might similarly be enhanced. Returning to the original intent of the treaty promise of encouragement of agriculture and the development of an agricultural economy for First Nations, despite the fact that the benefit was intended to be given "once and for all", these benefits rarely effectively translated to encouraging agriculture or improving Indigenous agricultural economy. Unless the Crown continues to only see this

[138] See Supreme Court of Canada News Release (June 23, 2022) available online: < https://decisions.scc-csc.ca/scc-csc/news/en/item/7463/index.do>.

provision as lip service, there is a strong argument to be made for contemporary enhancement of agricultural benefits despite there not being a specific augmentation clause.

g. Johnston v The Queen: The Medicine Chest

Courts have started to apply the *Marshall* principles in a way that creates tangible benefits and opportunities for First Nations. There remains, however, instances of cases claiming to apply broad treaty interpretation principles, but the factual findings do not result in an expansion of treaty rights. A relevant example of the judiciary applying broad principles of treaty interpretation, but then making an unfavourable finding of fact for a First Nation comes from the medicine chest litigation in *Johnston v The Queen* (1966), where the Saskatchewan Court of Appeal determined that the medicine chest clause in Treaty 6 did not give rise to a general right to contemporary healthcare, instead determining the treaty implied no more than a literal obligation for the Crown to give an actual chest of medicine on reserve.[139]

The judgement of the Saskatchewan Court of Appeal arose because Johnston failed to pay a hospitalization tax pursuant to the *Saskatchewan Hospitalization Act*[140] as he had been residing off reserve for more than 12 months.[141] At trial, Johnston's lawyer relied upon the text of Treaty 6, with particular reference to the medicine chest clause (which states that a medicine chest shall be kept for the use and benefits of the Indians), as well as the famine clause (which states that in the event of pestilence or general famine, the Crown will provide assistance deemed necessary to relieve the calamity).

At trial, the judge took a surprisingly broad perspective and determined the overarching concern for Indigenous treaty signatories was community well-being and ensuring their people were adequately cared for.[142] This, according to the trial judge, meant these clauses should be interpreted to provide comprehensive contemporary care for those to whom the *Indian Act* applies. With the trial judge's logic in hand, the Court of Appeal took a very different and

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[139] *Johnston v The Queen,* [1996] 56 DLR (2nd) 749, 49 CR 203 (SKCA).

[140] *Saskatchewan Hospitalization Act,* RSS 1953, c 232.

[141] *Johnston supra* note 139 at para 4.

[142] *Ibid* at para 6.

considerably narrower approach to treaty interpretation. The Court framed its decision around the ordinary meaning of the treaty at the time it was signed, and it relied entirely on Alexander Morris' account of treaty negotiations. In considering the plain reading of the treaty text, the Court decided the medicine chest clause was intended to only be for a supply of medicine, and never to include a guaranteed provision of all medical services that would extend to hospital care.[143]

Perhaps on the positive side, a more recent decision of the Federal Court commented on the *Johnston* decision, stating that the Supreme Court of Canada's decision in *The Queen v Sparrow*[144] that concluded "aboriginal rights ought to be interpreted in a flexible manner in order to permit their evolution rather than leaving such rights frozen at a past time,…[means] Johnston is now in all probability wrong."[145]

h. Yahey v British Columbia: Cumulative Impacts

Yahey is another recent decision that is making an impact on the treaty interpretation paradigm, as it raises the question about what was intended when a treaty was signed at the turn of the twentieth century, the potential changes that were anticipated by the signatories, and how these promises that were made over one hundred years ago should be upheld and honoured today.[146]

In *Yahey*, Blueberry River First Nations brought a claim against the Province of British Columbia, alleging that industrial development authorized by the Province has significantly harmed their treaty rights under Treaty No. 8, which their ancestors adhered to in 1900.[147] Blueberry claimed that the cumulative impacts of such development violated their treaty rights.[148] The British Columbia Supreme Court ruled in favor of Blueberry, agreeing that the

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[143] *Ibid* at para 14.

[144] *R v Sparrow*, [1990] 1 SCR 1075, [1990] 1 RCS 1075.

[145] *Wuskwi Sipihk Cree Nation v Canada (Minister of National Health and Welfare*), [1999] ACF no 82. at para 12, [1999] 4 CNLR 293.

[146] *Yahey v British Columbia*, 2021 BCSC 1287 at para 3.

[147] *Ibid* at paras 1-2.

[148] *Ibid* at para 2.

cumulative impacts have infringed their treaty rights. In making this determination, the Court emphasized a number of findings.

First, the Court clarified that Treaty No. 8 guarantees Blueberry's right to maintain their way of life without interference and to hunt, trap, and fish in their territory. This includes a promise that the Crown will not significantly harm or destroy the essential aspects necessary for Blueberry's way of life to persist. The Court also found that British Columbia breached Treaty No. 8 by permitting large-scale industrial development in Blueberry's territory without adequately assessing the cumulative effects and ensuring that Blueberry would still be able to exercise their treaty rights meaningfully in their territory. The cumulative impacts of the industrial development authorized by British Columbia reduced the ability of Blueberry members to exercise their treaty rights to hunt, fish, and trap in their territory, which is an essential part of their way of life. Thus, this constituted an infringement of their Treaty rights.

The Court found that the Province failed to uphold the honour of the Crown and fulfill its obligations under Treaty 8 by allowing industrial development in Blueberry's territory without assessing the cumulative impacts and protecting Blueberry's treaty rights. The Province also breached its fiduciary duty to Blueberry by causing and permitting the cumulative impacts without protecting their Treaty rights, despite having notice of their concerns for almost twenty years. In addition, the Province failed to demonstrate that it had effective measures in place to consider and protect Blueberry's Treaty rights, or to assess the cumulative impacts of development on those rights. Furthermore, the Province did not show that it had developed measures to ensure that Blueberry could exercise its rights in a way that is consistent with its way of life.

The Court interpreted Treaty No. 8 as giving the Province a limited power to take up lands under the Treaty. The Province could not take up so much land that it would prevent Blueberry from meaningfully exercising their rights to hunt, trap, and fish. This interpretation of the Treaty renews the Treaty relationship as having an ongoing basis, beyond the initial signing in 1899, emphasizing the importance of the ongoing relationship between Indigenous parties and the Crown.

The *Yahey* case highlights the issue of cumulative effects and how they impact treaty rights. The Court ruled that the Province's decision-making processes did not adequately

consider cumulative effects and their impact on treaty rights. The Court emphasized the importance of considering the totality of impacts over time on Indigenous rights, rather than addressing potential impacts on a project-by-project basis. This case opens the law to a more Indigenous-focused perspective on how those impacts are experienced. *Yahey* opens up substantial opportunities for the right to agricultural benefits to be further expanded. This decision explains how British Columbia infringed upon Blueberry River's Treaty 8 rights due to the cumulative impacts of decades of industrial development. The Court ultimately prohibited British Columbia from authorizing further activities, which unjustifiably infringed Blueberry River's rights and directed the parties to negotiate a collaborative approach to land management and natural resource development that protects Blueberry First Nation's treaty rights.

i. *Yahey:* Blueberry First Nation and British Columbia's Approach to a Mutually Beneficial Resolution

Shortly after release of the Court's decision, British Columbia issued a statement indicating the Province would not appeal the British Columbia Supreme Court's decision.[149] Instead, British Columbia confirmed their intent to implement the Court's decision and improve the approach to assessment and management of cumulative impacts of industrial development on treaty rights. British Columbia's decision not to appeal the *Yahey* ruling sent a strong message about ending an adversarial process and cooperating with Blueberry First Nation (as directed by the Court). In this initial statement British Columbia showed a willingness to work collaboratively on economic development, resource management and accountable stewardship in partnership with the First Nation instead of proceeding with litigation.

Subsequent to this announcement, British Columbia and Blueberry River First Nation negotiated an initial agreement, which was jointly announced on October 7, 2021 with a view to beginning "to support healing the land, and [providing]…stability and certainty for forestry and oil and gas permit holders in BRFN's traditional territory in the immediate term."[150] As outlined

[149] British Columbia Attorney General, "Attorney general's statement on Yahey v. British Columbia", (28 July 2021), *BC Gov News* (website), online: <https://news.gov.bc.ca/releases/2021AG0117-001488>.

[150] British Columbia Ministry of Indigenous Relations and Reconciliation and Blueberry River First Nations, "B.C., Blueberry River First Nations reach agreement on existing permits, restoration funding", (7 October 2021), *BC Gov News* (website), online: <https://news.gov.bc.ca/releases/2021IRR0063-001940>.

in the joint statement provided by the parties, the initial agreement allocated $65 million in funding for activities to heal the land, creating jobs and business for service providers in region. The initial agreement was clear that Blueberry would decide the restoration priorities and how to manage the funds, and British Columbia would assist in a non-decision-making role to coordinate restoration activities. The agreement also included $30 million in funding for activities to support Blueberry River First Nation in protecting their Indigenous way of life, including items such as work on cultural areas, trap lines, cabins and trails; educational activities and materials, including teaching traditional skills and language; expanding Blueberry River resources and capacity for land management; and restoring the health of wildlife through wildlife management, habitat enhancement including prescribed burning and research. The interim agreement demonstrated an intention between the parties to work together and ensure that resource development that was occurring in Blueberry's territory would also result in benefits for the First Nation.

The interim agreement has now been replaced by a final agreement, which was announced in January 2023. British Columbia and Blueberry River First Nation announced reaching a final agreement intended to guide the partnership approach "to land, water and resource stewardship that ensures Blueberry River members can meaningfully exercise their Treaty 8 rights, and provide stability and predictability for industry in the region."[151] In the announcement, Blueberry River First Nation's Chief articulated how the agreement is focused on healing the land through joint cooperation and cooperation to protect ecosystems, wildlife habitat and old forests. The agreement makes it clear that negotiation (as opposed to litigation) is how British Columbia is attempting to achieve reconciliation and foster stronger government-to-government relationships. It also attempts to transform how the parties "steward land, water and resources together, and address cumulative effects in Blueberry River's Claim Area through restoration to heal the land, new areas protected from industrial development, and constraint on

[151] British Columbia Ministry of Water, Land and Resource Stewardship and Blueberry River First Nations, "Province, Blueberry River First Nations reach agreement", (18 January 2023) *BC Gov News* (website), online: <https://news.gov.bc.ca/releases/2023WLRS0004-000043>.

development activities while a long-term cumulative effects management regime is implemented."[152] This agreement is an effort at mutually beneficial resource development in a way that recognises treaty rights and honours the original obligations.

The approach taken by and between the parties is important because it illustrates an attempt to collaboratively resolve a claim through partnership within the treaty relationship instead of going through the judicial process. While execution of the agreement is only the first step to honouring treaty obligations related to managing adverse cumulative effects of industrial development on treaty rights, it is encouraging to see the parties taking this proactive and cooperative approach. If there are opportunities to accomplish mutually beneficial outcomes through negotiation, it makes sense that the parties should work together to establish a collaborative approach to the interpretation of the treaty relationship while also supporting environmental sustainability, stable economic activity and employment. These negotiations and the final agreement are breaking new ground and will affect how industrial and resource projects are approved throughout Treaty 8 territory.

While the *Yahey* decision is not binding on other provinces and is likely of limited jurisprudential impact, time will tell whether the *Yahey* decision and British Columbia and Blueberry River First Nation's negotiated agreement will have an impact on other provincial and territorial strategies when it comes to government approach and treatment of treaty rights beyond this specific treaty infringement instance. It is undoubtedly a landmark decision that created an opportunity for collaboration following a judicial determination and is encouraging when it comes to the negotiation process and finding mutual benefit. There are a number of factors that create shared value propositions between the parties that are unique to the British Columbian context, including resource development in the forestry, oil and gas areas that have the potential to generate significant revenues which is beneficial for British Columbia as well as the First Nation. The value of regulatory certainty for attracting sustainable resource development is beneficial for all parties, but this same type of value proposition may not translate to other jurisdictions.

[152] *Ibid.*

If the *Yahey* approach indicates a potential shift in government stance on negotiating historic treaty rights, this has significant potential for First Nations in Saskatchewan interested in asserting their historic treaty rights to agricultural benefits. First, it is not difficult to see the Saskatchewan judiciary potentially taking a similar approach to litigation involving economic development claims to agricultural benefits. A similar argument made by a First Nation about the cumulative effects of Canada's failure to provide agricultural benefits may ultimately be successful. If a judicial determination enabled Saskatchewan and a First Nation to negotiate a similar type of sustainable resource development agreement for agricultural benefits, it could create economic opportunities for First Nations that own agricultural lands and have an interest in agricultural economic development. Similar regulatory controls could be established wherein First Nations could permit and restrict agricultural practices in accordance with land stewardship practices deemed appropriate by the First Nation. There could also be value-added agricultural opportunities created. This is not to say that the negotiated agreement between British Columbia and Blueberry translates perfectly to the agricultural benefits context, however, it does make a case for how agricultural benefits litigation could transition into shared value propositions of mutual benefit in Saskatchewan.

There has been a notable shift in treatment of Indigenous rights claims in recent years, with increasing focus put on negotiation. This holds true with a shift from litigation to negotiation when it comes to the *Yahey* decision. It is likely we are going to see a similar shift when it comes to treaty interpretation of the agricultural benefits provisions, and it would be beneficial to take a proactive approach to this with First Nations. These original promises, when analyzed through the Supreme Court of Canada's treaty interpretation framework, clearly expose a gap necessitating further engagement. In the next chapter, I will look at original agricultural benefits promises through a treaty interpretation framework.

III. TREATY 6 and the AGRICULTURAL BENEFITS CLAUSE

[Treaties were a way for the Canadian Crown] to facilitate regional economic and political development. To Canada, they were a legal imperative, an obstacle to be overcome before settlement could proceed in earnest. From the perspective of the plains communities, the bison economy, which had sustained them for so long, was on the wane, and the arrival of large numbers of agrarian settlers was inevitable. To First Nations, the treaties were a means to secure their well-being in the face of an unsure future.[153]

The purpose of this chapter is to analyze the agricultural benefits clause in Treaty 6. This analysis will rely directly on the written text of Treaty 6, as well as the historical information recorded about the negotiation and execution of the treaty. This analysis will engage with relevant sources and draw on the principles of treaty interpretation discussed in Chapter 2. In alignment with Daschuk's quote above, this chapter argues that the agricultural benefits provisions specifically described in Treaty 6 are the focal point for why Treaty 6 was successfully negotiated, and were characterized as being mutual beneficial for Canada and First Nations.

a. The Written Text of Treaty 6

A close reading of the text assists in pointing to the intention of the parties entering into the agreement and captures one perspective about what was agreed to. The written text of Treaty 6 includes many references to sustenance and agriculture, and it reads as an agreement formalizing the intentions of the parties. The preamble to Treaty 6 states the following:

> ARTICLES OF A TREATY made and concluded near Carlton on the 23rd day of August and on the 28th day of said month, respectively, and near Fort Pitt on the 9th day of September, in the year of Our Lord one thousand eight hundred and seventy-six, between Her Most Gracious Majesty the Queen of Great Britain and Ireland, by Her Commissioners, the Honourable Alexander Morris, Lieutenant-Governor of the Province of Manitoba and the North-west Territories, and the Honourable James McKay, and the Honourable William Joseph Christie, of the one part, and the Plain and Wood Cree and the other Tribes of Indians, inhabitants of the country within the limits hereinafter defined and described by their Chiefs, chosen and named as hereinafter mentioned, of the other part.
>
> Whereas the Indians inhabiting the said country have, pursuant to an appointment made by the said Commissioners, been convened at meetings at Fort Carlton, Fort Pitt and Battle River, to deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and the said Indians of the other.[154]

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[153] Daschuk, *Clearing the Plains supra* note 20 at 79.

[154] John Taylor, *Treaty Research Report – Treaty Six (1876)* (Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1985) at 5, online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/al/hts/tgu/pubs/T6/tre6-eng.pdf>. For the purposes of this analysis, I am choosing to rely on the narrative account of treaty making provided by Taylor. This is only one understanding of Treaty 6. For another valuable

These preliminary clauses define the general parameters of the treaty agreement by laying out the location, date and parties to the treaty, along with a high level explanation that the parties convened to discuss mutually beneficial interests. Treaty 6 goes on to state:

> And whereas the said Indians have been notified and informed by Her Majesty's said Commissioners that it is the desire of Her Majesty to open up for settlement, immigration and such other purposes as to Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty and arrange with them, so that there may be peace and good will between them and Her Majesty, and that they may know and be assured of what allowance they are to count upon and receive from Her Majesty's bounty and benevolence.[155]

The objective of the Canadian Crown for Treaty 6, explicitly expressed in the clause above was to "open up" the lands for settlement and development, and to use the treaty instrument to make peace between the parties by clarifying the scope of the agreement. Phrases such as "obtain the consent" and "know and be assured" point to the importance that was placed on the treaty clarifying what the intent of the agreement was. Furthermore, the treaty gave assurances of what the Indigenous signatories could "count on" and "receive" in the form of a promise coming from "Her Majesty's bounty and benevolence", which is indicative of the Crown's intent to be bound to specific obligations in order to achieve their objective of claiming the lands for settlement and development. The language throughout this section reads as an agreement of mutually beneficial terms between two parties, where the Crown agrees to precisely describe the consideration being provided in the treaty itself.

The treaty goes on to explain that the parties in attendance at the treaty negotiations were authorized to conduct the negotiations, execute the treaty, and assume the obligations for its implementation (emphasis underlined):

> And whereas the Indians of the said tract, duly convened in council, as aforesaid, and being requested by Her Majesty's said Commissioners to name certain Chiefs and Headmen, who should be authorized on their

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perspective on Treaty 6, see: Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective" in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* by Michael Asch (Vancouver: UBC Press, 1997) at p. 173. Venne asserts that understanding the relationship between treaty signatories requires looking beyond the written text of the treaty. Venne claims the written text might reflect Canada's perspective of the treaty, but this is not an accurate representation of the actual negotiated agreement, which is open to various interpretations. Venne emphasizes that the oral histories of Treaty Nations provides insight into the treaty and the treaty relationship, and interpreting treaties through oral history and understanding Indigenous negotiators' authority adds contextual accuracy about the actual negotiated agreement. Venne specifically examines Cree society and Treaty 6 from 1876, focusing on the authority structures of Indigenous peoples.

[155] *Ibid.*

> behalf to conduct such negotiations and sign any treaty to be founded thereon, and to become responsible to Her Majesty for their faithful performance by their respective Bands of such obligations as shall be assumed by them, the said Indians have thereupon named for that purpose, that is to say, representing the Indians who make the treaty at Carlton, the several Chiefs and Councillors who have subscribed hereto, and representing the Indians who make the treaty at Fort Pitt, the several Chiefs and Councillors who have subscribed hereto.[156]

After outlining the treaty framework and formalizing the parties' abilities to negotiate and enter into the treaty, the treaty goes into specific terms of what the Crown will provide, which includes explicit reference to the provision of agricultural benefits:

> And whereas, the said Commissioners have proceeded to negotiate a treaty with the said Indians, and the same has been finally agreed upon and concluded, as follows, that is to say:
>
> …
>
> It is further agreed between Her Majesty and the said Indians, that the following articles shall be supplied to any Band of the said Indians who are now cultivating the soil, or who shall hereafter commence to cultivate the land, that is to say: Four hoes for every family actually cultivating; also, two spades per family as aforesaid: one plough for every three families, as aforesaid; one harrow for every three families, as aforesaid; two scythes and one whetstone, and two hay forks and two reaping hooks, for every family as aforesaid, and also two axes; and also one cross-cut saw, one hand-saw, one pit-saw, the necessary files, one grindstone and one auger for each Band; and also for each Chief for the use of his Band, one chest of ordinary carpenter's tools; also, for each Band, enough of wheat, barley, potatoes and oats to plant the land actually broken up for cultivation by such Band; also for each Band four oxen, one bull and six cows; also, one boar and two sows, and one hand-mill when any Band shall raise sufficient grain therefor. All the aforesaid articles to be given once and for all for the encouragement of the practice of agriculture among the Indians.[157]

The above segment of the treaty speaks directly to the items to be provided by the Crown to any Band currently farming, or any Band that decides to commence farming. The list of items is precise, in that it identifies particular farming tools to be given "once and for all", with the intention of encouraging agriculture.[158] This is an intriguing portion of the treaty that demands further discussion. On the one hand the treaty is incredibly specific about the types and quantities of tools, seed and livestock to be provided. On the other hand, the treaty states that these supplies are to be provided with the purpose of "the encouragement of the practice of agriculture"[159].

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[156] *Ibid*.

[157] *Ibid*.

[158] This language gives rise to a question about what type of compensation would be made available for any Band that did not receive agricultural benefits, but now wishes to take up modern forms of agriculture.

[159] *Treaty 6, supra* note 154.

This detailed specificity about the types of agricultural tools to be given, coupled with a vague and general objective not easily achieved is contradictory and difficult to reconcile. Farming is not the type of endeavor that can be encouraged through the one-time conveyance of limited tools and supplies and be expected to be the means to a successful livelihood. This was particularly true in the 1870s. It would have taken years of collaboration, support, and trial and error to effectively encourage agriculture as a means of reliable sustenance.[160] If taking a narrow view about the conferral of agricultural implements and what was intended by the Crown, it could perhaps be read as an empty promise intended to limit the breadth of the Crown's obligation to providing specific implements. However, if the treaty interpretation principles of the Supreme Court of Canada in *Marshall* discussed above are to be relied upon, and treaties are seen as a mechanism of accountability to be liberally construed in accordance with a broad and generous interpretation, including resolving uncertainties in the favour of First Nations, the conferral of agricultural implements should stand for substantially more than the limited giving of specific farming tools.[161]

The mutual understanding of these assurances about the provision of agricultural implements may not have been aligned between the parties, but *Marshall* emphasizes the importance of looking to the common intention of the parties, including the consideration of why the Crown made the commitment and the situation prevailing at the time the document was signed. The intent of the parties becomes increasingly important in the next paragraphs of the treaty:

> …
>
> That in the event hereafter of the Indians comprised within this treaty being overtaken by any pestilence, or by a general famine, the Queen, on being satisfied and certified thereof by Her Indian Agent or Agents, will grant to the Indians assistance of such character and to such extent as Her Chief Superintendent of Indian Affairs shall deem necessary and sufficient to relieve the Indians from the calamity that shall have befallen them.
>
> That during the next three years, after two or more of the reserves hereby agreed to be set apart to the Indians shall have been agreed upon and surveyed, there shall be granted to the Indians included under the Chiefs adhering to the treaty at Carlton, each spring, the sum of one thousand dollars, to be expended for

[160] Carter, *Lost Harvests, supra* note 15.

[161] As discussed in Chapter 2, *supra*. See *Marshall No 1 supra* note 92.

> them by Her Majesty's Indian Agents, in the purchase of provisions for the use of such of the Band as are actually settled on the reserves and are engaged in cultivating the soil, to assist them in such cultivation.[162]

This portion of the treaty speaks to the possibility of help in the event of a famine or pestilence (the famine clause), and is important because it shows that Indigenous negotiators were aware of the possibility that agriculture (among other economic and traditional means of survival) might not always provide sufficient sustenance. The famine clause wording is unclear as to when a pestilence, general famine or calamity would warrant assistance, and was left in the hands of the Crown to determine when it would be applied, however, connecting the more general obligation outlined above about encouraging the practice of agriculture with the famine clause could be seen as the Crown agreeing to support Indigenous signatories in having a consistent and reliable food system, even when agriculture might fail to provide sufficient food security. By realizing the interplay between the agricultural benefits clause and the famine clause, it starts to look like the agreement was in fact for the Crown supporting the establishment of a reliable food system as opposed to simply the provision of a few tools. This is further bolstered by the fact that the Crown agreed to provide financial compensation to signatories (albeit via Crown agents) for additional purchase of agricultural provisions that were actively engaged in agriculture, which indicates the Crown was aware of the need to provide financial support for a prolonged period rather than simply providing agricultural equipment on a one time basis.

Treaty 6 includes abundant details about the form of agricultural assistance the Crown was willing to provide. The treaty also has a baseline requirement for when Crown assistance would be necessary in the case of famine or pestilence, but it is not clear how these provisions work together to encourage agriculture beyond access to various necessary tools or to stave off starvation. As discussed above, a narrow and literal reading of this document might suggest that the Crown was willing to provide certain farming implements which concluded fulfillment of their obligations unless there was a Canada-wide famine. This has been the predominant approach until the present, however, a more holistic reading that aligns with the treaty interpretation principles outlined by the Supreme Court suggests that agricultural benefits were negotiated by First Nations to give them a means to sustain themselves in the transition away from the buffalo economy, and to avoid starvation. An even broader interpretation would be that

[162] *Treaty 6 supra* note 154 at 5.

the provision was intended to confer economic opportunities for the future, and the Canadian Crown was eager to support this transition by including language about encouraging agriculture.

b. The Historical Record of Treaty 6 Negotiations

Beyond the treaty text discussed above, it is helpful to look at the historical record of treaty negotiations for Treaty 6 as a way of understanding the intent of the parties entering into the agreement. In a comprehensive research report on Treaty 6, John Taylor provides details and insight that further assists in understanding the importance of the agricultural benefits and famine provisions to the treaty.[163] Taylor explains that during the late 1800s, the Indigenous peoples living in Treaty 6 territory were mainly Cree, Assiniboine, Saulteaux and Chippewan, and the treaty territory encompassed approximately 120,000 square miles.[164] Taylor explains how Treaty 6 touches Treaty 10 to the north and Treaties 4 and 7 to the south, and that the Indigenous peoples occupying Treaty 6 territory were dependent upon buffalo as a food source.[165]

In his report, Taylor notes that the first seven numbered treaties were concluded more quickly than the government had intended due to pressure from First Nations.[166] Taylor suggests that a central reason for this pressure to negotiate the treaties was that Indigenous peoples had heard their country had been sold to Canada by the Hudson's Bay Company.[167] The treaties were seen by the Crown as instruments to solidify a relationship and ensure peace in times of tremendous turbulence. This pressure was increased even further while the Canadian government was negotiating Treaties Four and Five, as the Plains Cree and Saulteaux sought to negotiate a treaty.[168] An order-in-council from July 25, 1876 authorized Lieutenant-Governor Alexander Morris, along with David Laird, James McKay, and William Christie, to negotiate

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[163] Taylor's report is helpful because it includes additional useful detail for how the treaty may have been negotiated, and also into some of the underlying Canadian government policies that likely shaped the creation of Treaty 6. Taylor's research canvases some of the underlying rationale for why the treaties may have been negotiated in the way that they were, and looks at some of the underlying pressures that contributed to the resulting treaty agreement.

[164] Taylor, *Treaty 6 supra* note 154 at 5.

[165] *Ibid* at 3.

[166] *Ibid*.

[167] *Ibid* at 2.

[168] *Ibid*.

Treaty 6. Prior to negotiations, Morris directed Reverend George McDougall to visit the Cree, deliver presents, and declare that a treaty would be negotiated the following year. Morris, Christie and McKay spent nearly two and a half months travelling and negotiating with the Plains Cree near Fort Carlton, the Willow Cree near Duck Lake, and the Plains and Woods Cree led by Chief Sweetgrass near Fort Pitt.

c. Treaty 6 Negotiations

Taylor writes that the Canadian Government used treaties:

> Because they feared the possibility of Indian wars and the adverse effect such a threat would present to the settlement and development of the North-West. Treaties seemed a natural expedient since they had become a major component of the traditional Indian policy stemming from the Royal Proclamation of 1763. This policy had served the Government well in the older parts of Canada where the Indian wars, so familiar in the United States, had been avoided.[169]

The use of treaties provided an opportunity to avoid the chaos that so often comes with conflict, which was important to the Canadian government. Taylor articulates that the numbered treaties were modeled after the Robinson Treaties of 1850.[170] The Robinson Treaties extinguished Indigenous title and provided various benefits, including an initial cash gratuity, a cash annuity, and hunting and fishing rights.[171] In contrast, the numbered treaties conferred similar benefits to Indigenous peoples, but they also included some important increases in the scope and provision of education, medical and agricultural assistance in various treaties.[172] These changes to the treaty happened in the course of negotiations.[173]

The evidence of the negotiations shows that treaty amendments occurred because of demands that were made by Indigenous negotiators, which arose because of anxiety about lands and livelihood, and concern about losing territory to settlers.[174] Of crucial concern for Indigenous negotiators was the diminishing game supply and their ability to earn a living while

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[169] Taylor, *Treaty 6 supra* note 154 at 3.

[170] *Ibid* at 3.

[171] *Ibid*.

[172] *Ibid.*

[173] *Ibid.*

[174] *Ibid.*

also retaining some control over territories and receiving guarantees of help if settlement and development ended up destroying their traditional way of life.[175] With the rapid extirpation of the buffalo, Indigenous peoples in Treaty 6 territory knew they needed to protect their interests and survival. Food and sustenance were at the forefront of the minds of everyone involved in treaty negotiations.

Indigenous treaty negotiators were clearly aware of what was occurring and understood the way treaty negotiations were heading. In 1876, the Crown was mostly concerned with making a treaty with the Cree, who were the majority of the Indigenous population.[176] There was pressure coming from government officials and Indigenous people to negotiate a treaty quickly, and Lieutenant-Governor Morris urged the making of a treaty as soon as he took office in 1872, however, the Canadian Government moved much slower than that.[177]

Taylor states that:

> The Government had …decided in the summer of 1873 to make treaties only as the territory was required for settlement or other purposes. It was prepared to do no more that summer than to give general assurances to the Saskatchewan Indians that their rights would be respected.[178]

It is evident that the relationship between Canada and Indigenous peoples was reaching a boiling point, and that at the center of Indigenous concerns was starvation and a diminishing supply of food, but the Canadian government was reluctant to negotiate any agreement.[179]

Treaty 6 is unique because treaty negotiations were different than negotiations for the other numbered treaties. A significant concern for the Plains Cree and Saulteaux was negotiating an agreement that ensured survival for their people, and the best viable opportunity for survival

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[175] *Ibid.*

[176] *Ibid*. Taylor writes that Cree people were concerned with the intentions of the Canadian Government, with a particular concern about smallpox and the likelihood of starvation "because of the visible diminuation of the buffalo, their sole support." As a result, W. J. Christie, as the officer designated to the Saskatchewan District for the Hudson's Bay Company determined that a treaty should be negotiated as quickly as possible, and Christie recommended sending troops to maintain order while negotiating the treaties.

[177] *Ibid* at 5.

[178] *Ibid* at 6.

[179] *Ibid*.

at that time was to transition to an agricultural economy.[180] Sheldon Krasowski argues that looking at the historical record of negotiations for Treaty 6, there would not have been any agreement between the parties if provisions ensuring agricultural support were not negotiated.[181] Daschuk also comments on the negotiation of Treaty 6 as being about avoiding starvation for Indigenous negotiators, emphasizing that "[t]o the bulk of the Cree leadership, the successful negotiation of a treaty represented their best hope for survival in the new economic order on the plains. Hunger contributed to the urgency of the treaty. Chief Sweet Grass's priority was to protect his people from starvation."[182] On the other hand, for Morris as the representative of the Crown, "a guarantee of food aid during the transitional period was too extravagant and would result in idleness among the adherents to the treaty."[183]

On July 27, 1876, Morris, accompanied by W.J. Christie and James McKay (as Indian commissioners) and two interpreters left Fort Garry to negotiate a treaty in Saskatchewan. Indigenous negotiators also brought an interpreter, and Dr. Jackes, M.D. acted as secretary and documented the proceedings.[184] The main treaty negotiations occurred at Fort Carlton on Friday, August 18, 1876 and there were approximately two thousand people present.[185] Prior to negotiations, a pipe ceremony was performed. Taylor states that this ceremony was important because:

> The Indians laid the work they were about to undertake at the feet of the Great Spirit who was both in the world and above all mankind. The commissioners participated in this action by receiving the pipe with them.[186]

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[180] Sheldon Krasowski, *No Surrender: The Land Remains Indigenous*, (University of Regina Press: 2019) at 176.

[181] *Ibid* at 176.

[182] *Ibid* at 98.

[183] *Ibid* at 98.

[184] Taylor, *Treaty 6 supra* note 154 at 9. Taylor also states that this was the first time in treaty-making where the North-West Mounted Police provided security for the treaty commissioners.

[185] *Ibid* at 10.

[186] *Ibid* at 11. Taylor does question how much of the ceremony's significance was understood by the treaty commissioners, and that Morris simply stated that the Indigenous peoples present were satisfied that the Crown had accepted the friendship of the Cree Nation.

Taylor emphasizes that "[t]he Queen's Councillors saw that the Indians' means of living were passing away from them and therefore sent men to speak to them and to tell them that their children must be educated and taught to raise food from the soil."[187] Morris went on to say that the Crown did not wish to interfere with their present way of living but would assist them in commencing to farm.

It is obvious that access to food and a shifting way of life was at the forefront of treaty discussions. The decline of the buffalo was one of the key reasons why treaty negotiations occurred how and why they did, and what came out of this was the Canadian government agreeing to specific agricultural benefits provisions. These promises about farming gave Indigenous leaders and their communities hope for avoiding starvation. This did not equate to a fair bargain, as Indigenous peoples had little else to negotiate towards, but the agricultural benefits provisions were fundamental and unequivocally important to the conclusion of treaty negotiations, and a significant amount of trust and hope was put in the opportunity of farming in Treaty 6 territory.

It is clear that discussions between the parties only involved the Queen's care for her Indigenous subjects, and how she would help them.[188] The written record does not indicate that land cession was mentioned by Alexander Morris, perhaps because he thought it was obvious that the treaty would extinguish any Indigenous title claims to the land in question.[189] Another possibility is that Morris thought the concept of land cession would not be understood conceptually, and knew that Indigenous peoples associated treaty with the use of land which would have been sufficient for his purposes.[190] Taylor suggests that Morris may have been strategic in his characterizations, as if he spent too much time explaining land cession he may have failed to conclude the treaty.[191]

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[187] *Ibid* at 13.

[188] *Ibid*.

[189] *Ibid*.

[190] *Ibid.*

[191] *Ibid*.

The historical record illustrates that Indigenous negotiators of Treaty 6 were put into a difficult position because of the limited access to information that they had. There are records that have passed down the treaty process through oral history (for example, Harold Johnson's perspective on the terms of Treaty 6), but Taylor asserts that the only source of information for the Indigenous negotiators present for Treaty 6 negotiations was Peter Erasmus.[192] Erasmus initially started out in the treaty negotiation process as an interpreter for the Indigenous negotiators, but after the negotiations began Erasmus was "taken into the pay of the treaty commission."[193] According to the historical record, Erasmus became convinced in the course of negotiations and meeting that the treaty terms the way that they were proposed were in the Indigenous peoples' best interests, stating that his sympathies transferred to the Governor's side, and that Chief Mistawasis and Ahtukukoop were convinced that the terms were fair and just.[194] In contrast, opposition to the treaty that was led by Poundmaker was seen as less influential, and it was the views of Mistawasis and Ahtukukoop that were more influential during negotiations. Taylor explains that the main argument put forward by Mistawasis that Indigenous peoples:

> were beginning to experience hardship from the diminution of the buffalo and that this situation was likely to worsen rather than improve. He saw a new way of life offered to them in the treaty and asked those who opposed signing the treaty, "Have you anything better to offer our people?" He did not acknowledge directly the point made by Poundmaker that the proposed terms were inadequate to provide a new way of life and that they should insist on better terms. He offered a counter argument, however, in saying that even if all the tribes were to act together, their numbers were too small to make their demands heard.[195]

This is a crucial aspect of the treaty negotiations because it shows how Indigenous negotiators were put into a position where they had little opportunity to do anything but accept the offer as it was provided, and in an era of rapid settler expansion and development, were put under tremendous pressure to accept the treaty terms.

Negotiations of the treaty continued, and according to Peter Erasmus, a list of suggested changes were put forward, which included a request for an ox and cow for each family, as well as an increase in the provision of agricultural implements, along with:

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[192] *Ibid*.

[193] *Ibid.*

[194] *Ibid*.

[195] *Ibid*.

> provisions for the poor, unfortunate, blind and lame; to be provided with missionaries and school teachers; the exclusion of fire water in the whole Saskatchewan; a further increase in agricultural implements as the band advanced in civilization; freedom to cut timber on Crown lands; liberty to change the site of the reserves before the survey; free passages over Government bridges or scows; other animals, a horse, harness and waggon, and cooking stove for each chief; a free supply of medicines; a hand mill to each band; and lastly, that in case of war they should not be liable to serve.[196]

These demands were received by Morris, who then discussed these provisions with the other two commissioners and explained that he would not bargain over the terms of the treaty as for a horse.[197] He considered the requests, and would make a final determination. Morris indicated that only in a national famine would the Crown intervene, but he did subsequently add the famine and pestilence clause into the treaty.[198] Taylor goes on to explain that Treaty 6 had novel terms unique to Treaty 6: namely that they were to receive provisions to aid while cultivating the soil to a maximum of one thousand dollars per year, but only for a maximum of three years.[199] Morris also agreed to increase the number of cattle and agricultural implements further to what had been granted in earlier treaties because it was desirable to encourage settlement.[200]

Looking to how the treaty was drafted also provides helpful supplemental detail to the way that the treaty was completed. Taylor explains that prior to the negotiation of Treaty 6 the document had:

> been written in a fine hand on seven separate sheets of parchment. Now that revisions had been made, there were additions to be made to this text. Erasmus noted that "these special provisions were added into the draft of the treaty before the signing began." The descriptions of the extra farming supplies agreed upon were written between the lines in a different hand. The places in the text where they were inserted were marked by arrows. New sheets were drawn up containing the three additional terms. These were placed before the signature page on which the last few lines of the treaty's concluding paragraph remained in the original penmanship.[201]

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[196] *Ibid* at 18-19.

[197] *Ibid* at 18.

[198] *Ibid*.

[199] *Ibid*.

[200] *Ibid*.

[201] *Ibid* at 19.

The fact that the Indian Commissioners came to negotiate with documents that had already been drafted indicates that the Canadian Crown had a preconceived notion of what the terms of the treaty should look like. This may have been due to the successful negotiation of earlier treaties, but it also indicates that there was a significant amount of rigidity, and the amendments to Treaty 6 were likely crucial to the successful completion of treaty negotiations.

d. Indigenous Agriculture After the Treaty

Following the signing of Treaty 6, there were many instances where Indigenous farmers had success in agriculture during the 19th century.[202] Understanding of the land and the collective use of resources provided an opportunity for Indigenous farmers to succeed where many settlers struggled.[203] Indeed, Indigenous people adapted to western agriculture quickly and historical records indicate that Indigenous farmers often obtained higher crop yields than settlers. This caused settler farmers concern that they were being outcompeted in the market.[204] In response to these early Indigenous agriculture successes, the Crown ultimately ended up implementing restrictive policies that were specifically focused at Indigenous farmers, (as articulated in Chapter One), these policies included limiting Indigenous farms to 40 acres while homesteaders received 160 acres, as well as obligations for Indigenous farmers to sell grain to a government agent that dictated sale conditions such as crop prices and when they were permitted to sell their harvest.[205] In conjunction with the *Indian Act* and the residential school system:

> Indigenous self-determination in agricultural activities eroded. Instead of bolstering the initially successful trajectory that many Indigenous farmers were on, government initiatives that promoted agriculture were paternalistic instruments of assimilation and colonization—for example, the Peasant Farming Policy, Industrial Schools, Home Farms, and Farm Colonies—that ultimately undermined Indigenous farmers.[206]

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[202] Carter, *Lost Harvests supra* note 15.

[203] Candace Savage, *Prairie: A Natural History* (Greystone Books: 2011).

[204] Krasowski, *No Surrender supra* note 180.

[205] Carter, *Lost Harvests supra* note 15.

[206] Arcand, "Revitalizing" *supra* note 29 at 621.

Arcand *et al* explains that after Indigenous farmers were unable to continue to farm their land based on restrictive policies the Crown took measures to dispossess First Nations of their reserve land when it was deemed to be inactive agricultural land:

> first through amendments to the Indian Act that allowed for uncultivated lands to be leased to non-Indigenous farmers, then through surrenders by sale. Over 100 surrenders, amounting to more than 20% of First Nations reserve land occurred in the Prairie region between 1896 and 1911. This increased as land surrenders continued after 1911 through the Soldier Settlement Act of 1917.[207]

A common misconception is that agriculture in western Canada was a failure for Indigenous peoples in the late 1800s because Indigenous peoples were uninterested in learning how to farm. Sadly, a negative portrayal has been conveyed largely due to misinformation and stereotypical perspectives about why Indigenous agriculture was not as successful as hoped. Carter explains how "the standard explanation for the failure of agriculture on western Canadian reserves is that the Indians could not be convinced of the value or necessity of the enterprise."[208] Carter shows that there is far more nuance behind this misguided façade. It is true that Indigenous peoples and communities struggled to be successful at Eurocentric agriculture, but this lack of success was not because Indigenous people were culturally unfamiliar with sustained labour, and neither was it because of a typical transformation from hunter to farmer that should take place over hundreds of years. What the historical record in fact shows is that Indigenous peoples had an interest in establishing agriculture on reserves, however, the less than optimal transition to farming for Indigenous peoples was caused in part due to the way the Canadian government treated Indigenous communities. Carter shows how the laws and government policies:

> acted to retard agriculture on the reserves. The Indians had to persuade government officials of the necessity and importance of agriculture. In treaty negotiations and later assemblies, they sought assurance that a living by agriculture would be provided to them, and they used every means at their disposal to persuade a reluctant government that they be allowed the means to farm.[209]

Indigenous agriculture is an important and often mischaracterized part of Canada's history. When published in 1990, *Lost Harvests* was one of the first books to look at how

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[207] *Ibid*.

[208] Carter, *Lost Harvests supra* note 15 at preface.

[209] *Ibid*.

agriculture impacted and affected Indigenous peoples in western Canada during the late 1800s.[210] Government-Indigenous relations in western Canada were driven by agricultural promises and policies with shifting and ulterior objectives.[211] For example, during the time frame when Europeans were colonizing North America there was a predominant belief amongst European society that agriculture was a way to assimilate Indigenous peoples to a European settler way of life.[212] Carter traces Indian Affairs[213] agriculture policies from their creation in Britain and Ottawa to how these policies were applied in practice. Carter focuses on the geographic areas of Treaty 4 and Treaty 6 and demonstrates that Indigenous peoples actively sought agricultural opportunities and successes that the Canadian government encouraged. Unfortunately, Indigenous farmers were constantly undermined and frustrated in their negotiations with the Canadian government and government agents.

According to Carter, prior to European contact "agricultural products accounted for about 75 per cent of food consumed by North American Indians."[214] This contradicts the dominant perspective that agriculture only started when Europeans showed Indigenous people how to grow food on the land. Further to this point, there was an underlying assumption that Indigenous peoples were primitive based on their dependency on buffalo and other food sources. It was thought that Indigenous peoples lived a lethargic and listless life because they had no need to accumulate and stockpile surplus supplies. These beliefs were espoused by a European Victorian mentality asserting agriculture was the "solution" that would uplift Indigenous peoples from their nomadic traits and show them the value of private property and was one of the essential steps toward civilization. These Eurocentric beliefs were evidently prejudicial and assimilative.

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[210] *Lost Harvests* was recently revised into a second edition following its original release in 1990. One of the strongest components of Carter's writing is that she digs into the historic sources and questions the context and evidence beyond what was written by the non-Indigenous Canadian government officials during the 1860s and 1870s.

[211] These policies may have been touted as being designed to help Indigenous communities grow food and become self-sufficient, but there were frequently other objectives in play.

[212] One aspect of this Eurocentric perspective was that Indigenous peoples were nomadic hunter gatherers that had no understanding of agriculture.

[213] Indian Affairs operating as a branch of the Canadian federal government.

[214] Carter, *supra* note 15 at 37. Further to this point, Carter clarifies how Indigenous peoples were actively involved in gardening and growing crops.

Furthermore, there was an inherent assumption that Indigenous ways of life were inferior to a European way of life.

There was a growing rift between what treaties conferred according to the government's understanding and what Indigenous peoples anticipated would be provided.[215] Indigenous peoples found that the agricultural implements promised through the treaties arrived late or in very poor condition by the time they were received (if at all), which in turn created a cycle of negative feedback between Plains bands and Ottawa officials. The Home Farm Experiment was a Canadian government strategy involving instruction in farming for Indigenous peoples, where agricultural instructors were sent to reserve communities to attempt to teach Indigenous peoples how to farm.[216] For the most part, the Home Farm Experiment was an abject failure, as the instructors were usually sent from Ontario with little understanding of agriculture or what the prairie landscape was like. Ingrained in government policy was also the mandate to produce as much grain as possible, to the detriment of the educational experience. Combined with severe weather and the imposition of Ontario agriculture technology and methods, the result was that agriculture for Indigenous communities mostly failed.[217] This was not the case for many non-Indigenous settler farmers, who experienced success with technology including a steel-bladed John Deere plough. In addition, conflict with the Metis in 1885 resulted in further strong-armed policies, including the pass system, which was designed to limit movement of Indigenous peoples.

Despite difficulties, there were success stories amongst Indigenous farmers. European settlers viewed these successes as resulting from unfair assistance provided to Indigenous farmers, and the government then instituted policies that required Indigenous farmers to sell their commodities through an approved permit system.[218] One of the leaders of this system was Hayter Reed, who believed that societies are required to pass through various levels of progress

[215] *Ibid*.

[216] *Ibid*.

[217] *Ibid*.

[218] *Ibid*.

at different stages.[219] Reed emphasized that Indigenous peoples should remain as peasant farmers for a prolonged period despite more advanced technology being available.[220]

The prejudicial nature of early Canadian agriculture policy is clearly identified in Carter's writing, and the impact that agriculture policies had upon Indigenous farmers in western Canada is very evident. If the starting point and the early opportunities with agriculture for both Indigenous peoples and non-Indigenous settlers would have been equal, it is likely that Indigenous agriculture would have been much more successful. It appears as though agriculture policies often shifted focus just as small successes were being made. This exposes a dynamic present in early agriculture policy that indicates the policies were not about encouraging Indigenous peoples to farm, but used as a system of oppression, assimilation and control.

e. A Holistic Interpretation of Treaty 6

Sylvia McAdam and Darcy Lindberg bring important perspectives to the interpretation of Treaty 6. McAdam highlights the importance of resources, environment, and land to Indigenous culture and nationhood and how these principles are crucial in interpreting Treaty 6.[221] She shows how the treaty attached livelihood to agriculture and how the treaty promises to agriculture must be read in a contemporary context.[222] These principles assist her in tackling treaty interpretation principles for Treaty 6:

> For Treaty 6 territory, and similarly for all numbered treaties, two significant things occurred. *Pimacihowin* (livelihood) split two ways: the livelihood that existed prior to treaty making and the livelihood that was created by treaty making. Although agriculture was practiced by Indigenous people before European contact, this specifically speaks to the European method of agriculture.[223]

Using the concept of livelihood, McAdam shows how life before European contact was based on a sustenance and sharing economy that respected the land and prevented and limited activities

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[219] *Ibid.*

[220] *Ibid.*

[221] Sylvia McAdam, *Nationhood Interrupted: Revitalizing Nehiyaw Legal Systems* (Purich Publishing Limited: 2015).

[222] *Ibid* at 64.

[223] *Ibid* at 64-65.

that had the potential to "harm the environment, land, and all of creation[.]"[224] With the creation of the treaty, livelihood then became attached to agriculture.

Historic sources describing treaty negotiations canvas livelihood and the question of "how the generations to come would sustain themselves."[225] There were also discussions around laws needing to be passed in order to protect the buffalo, and there were discussions about agricultural land and agricultural assistance.[226] McAdam addresses the treaty terms about agriculture in particular, questioning how lands were surveyed, and emphasizing that there may have been fraudulent activities on behalf of the Indian Agents and the government.[227] McAdam also helpfully illuminates the way that Morris' report stated:

> We wish to give each band who will accept of it a place where they may live; we wish to give you as much or more land than you will need; we wish to give you as much or more land than you will need; we wish to send a man that surveys the land to mark it off, so you will know it is your own, and no one will interfere with you. What I would propose to do is what we have done in the other places. For every family of five a reserve to themselves of one square mile. Then, as you may not all have made up your minds where you would like to live, I will tell you how that will be arranged: we would do as has been done with the happiest of results at the North-West angle. We would send next year a surveyor to agree with you as to the place you would like.[228]

McAdam emphasizes how "each family of five thereafter would have provided for themselves through agriculture and agricultural assistance as promised under the treaty terms. McAdam explains how agriculture is promised for when Indigenous peoples decide to take up the practice of agriculture, and that "[t]he treaty terms and promises to agriculture must be read in a contemporary context", which means that the agricultural implements must be conveyed in a modern state.[229]

Darcy Lindberg also brings a nuanced perspective to the way that treaties affect Indigenous food rights. Lindberg argues that the treaty-making process between European

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[224] *Ibid* at 65.

[225] *Ibid*.

[226] *Ibid* at 67.

[227] *Ibid*.

[228] *Ibid*.

[229] *Ibid* at 70.

settlers and Indigenous nations in Western Canada had a profound negative effect on Indigenous food sovereignty and security, and that the treaties must be understood not just as legal documents but also in the context of Cree narrative traditions and the relational significance of the entire food system. He explains how Canadian colonialism has resulted in food injustices and that food policies are still influenced by the colonial past. He explains that subsequent to the treaty making process that occurred between European settlers and Indigenous nations in Western Canada, Plains Cree territory "has been subject to constant enclosures and commoditization."[230] Lindberg asserts that besides displacing Plains Cree peoples from their traditional territory, treaty making "radically altered the control…[Plains Cree peoples] have had on their own food security and food sovereignty."[231]

Lindberg explains that Indigenous food insecurity is not an Indigenous issue as much as it is a settler-colonial one given Canada's colonial history and the implementation of agricultural as part of its colonial strategy.[232] This is a valuable characterization of the treaty relationship that emphasizes how important food and sustenance was to the treaties and their negotiation, and therefore remains of the utmost value in understanding contemporary reconciliation. While Canada has a long history of treaties, there are many ways of understanding what is at the heart of the treaty agreement. Lindberg writes that the multitude of treaty stories and ways of interpreting these stories, and the fact that there are specific clauses in the historic treaties to navigate instances of famine and starvation, point to the food crises that caused the treaty negotiations to occur in the first place.[233]

Rather than seeing the treaties as strictly legal documents interpreted in plain language, the value of using alternative ways of knowing such as Cree narrative traditions for teachings on relations between people, animals and the natural world, but also on how to perform law.[234]

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[230] Darcy Lindberg "Transforming Buffalo: Plains Cree Constitutionalism and Food Sovereignty" in *Canadian Food Law and Policy* (2019) at 37.

[231] *Ibid*.

[232] *Ibid* at 42.

[233] *Ibid* at 38.

[234] *Ibid*.

Lindberg explains how various stories provide "touchstones on Plains Cree aspirations towards *miyo piimatisiwin* (or living the good life)."[235] Lindberg is suggesting that it is of utmost importance to see the relational significance of the entire food system, including foodscapes, waterscapes and landscapes. This type of interpretation is in stark contrast to the rigid determinations that are typically made when looking at historic treaties and the rights that they conferred.

Lindberg points to the food injustices that have resulted from Canadian colonialism, including the decimation of Indigenous food sovereignty and security, and explains that food policies are still "haunted by ghosts of Canada's colonial past."[236] He explains how "[l]aws of enclosure (laws that commoditize and marketize lands and waters) work against localized policies aimed at enhancing and protecting food security for Indigenous peoples."[237] By only supporting access to traditional Indigenous food sources, this is a narrow and constrained perspective that fails to address root problems, including how the "historical subjugation of Indigenous nations has deprived Indigenous societies of the sovereignty to apply methods faithful to their epistemologies on food raising and food sourcing."[238] If this is all that is done, it is equivalent to changing the rules of a game without telling everyone involved, and then expecting everyone to immediately catch on to the rules and be as skilled and capable.

The treaty relationship between Indigenous peoples and settlers holds promise for the future, but only when the treaty relationship is understood holistically and all parties understand being complicit in the past. Treaty 6 was negotiated in terms of familial reciprocity and the treaty terms about agriculture remain important to the contemporary relationship. McAdam and Lindberg's perspectives help to inform a way forward for historic treaty interpretation, and their arguments do not take an unreasonable position. Their holistic interpretation aligns with the treaty interpretation principles delineated by the courts, but it also goes further. Instead of being constrained by the specific treaty provisions, or further limited by litigation or monetary

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[235] *Ibid*.

[236] *Ibid.*

[237] *Ibid*.

[238] *Ibid*.

settlements, a holistic interpretation of Treaty 6 (as suggested by McAdam and Lindberg), requires an expansion of the agricultural benefits rights in the contemporary context.

IV. AGRICULTURAL BENEFITS DECISIONS

This chapter is about litigation where First Nations and individual Indigenous claimants have brought claims to decision makers for agricultural assistance. In this chapter I argue that the ways that decision makers are applying the law and treaty interpretation principles, and the subsequent rulings are fundamentally flawed because they fail to consider many of the food system and sustenance criteria comprising the original intent of the treaty relationship. I will first focus on civil litigation examples where claims were brought for agricultural assistance. Second, I discuss the Specific Claims Tribunal process and provide some examples of First Nations making claims. Third, I will address the opportunity for First Nations to settle agricultural benefits claims and outline some of the instances where First Nations have reached a settlement with Canada for agricultural benefits.

a. Civil Litigation of Agricultural Benefits

History holds a unique place in relation to the law because it is both essential and problematic at the same time. It is essential because the historical record is crucial for establishing many of the facts which the law is subsequently applied to. In the same breath, John Borrows asserts that the idea or tool of "history" is often improperly leveraged by the judiciary to serve as the limiting factor for Aboriginal and treaty rights.[239] Borrows argues that this is problematic if history is understood as the constraint on contemporary developments, rather than as the entry point for interpreting the law. Borrows suggests the Supreme Court of Canada has established a narrow way of recognizing Aboriginal and treaty rights in Canada's Constitution by only referring to key moments such as the negotiation of agreements or moment of contact. Summarizing Borrows' central argument, history (and historians' work) is frequently relied upon to capture a narrow understanding of Indigenous rights, rather than being a "grab bag of possibilities for present reasoning[.]"[240] According to Borrows, the consequence of history being

[239] John Borrows, "Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism" (2017) 98:1 Can Hist Rev 114 at 115.

[240] *Ibid* at 125.

used to narrow Indigenous rights is it "reinforces a search for past examples of Aboriginal practices, rather than empowering present-day Indigenous claims[.]"[241]

Borrows's argument is helpful because it shows the deficiencies or limitations for how history is used narrowly to search for "original" understandings in colonial moments.[242] While history is of course very helpful in the search for origin stories, Borrows suggestion that history can be used to limit Aboriginal and treaty rights is also accurate. Borrows contrasts the jurisprudential approach of "originalism" which is a conservative judicial philosophy designed at freezing the past in the past with that of "living tree" constitutional interpretation, which is the dominant strand of constitutional interpretation in Canada requiring judges to know the law's historical context but then to apply the law in view of present-day understandings.[243] Borrows states that "[t]he Supreme Court of Canada applies originalism for Aboriginal peoples and living tree jurisprudence for everyone else."[244] For Borrows, the problem is that history and the law are frequently thought of as two sides of the same coin, whereas they should instead be understood as altogether different pursuits intended to accomplish different outcomes – namely that "[h]istorians must produce work that explains the past, but judges must explicitly make the past speak to the present to guide future decision making."[245]

1. Beattie v Canada

Borrows's contention that the judiciary's application of history has a negative impact for limiting or freezing Indigenous rights in the past holds true when looking at how courts have interpreted the treaty right to agricultural benefits. For example, in *Beattie v Canada*, the Federal Court issued a judgment about agricultural benefits provisions as they relate to Treaty 11.[246] In the *Beattie* case, Joyce Beattie relied upon her grandfather's adhesion to Treaty 11 to claim a

[241] *Ibid* at 116.

[242] *Ibid* at 115.

[243] *Ibid* at 124.

[244] *Ibid* at 126.

[245] *Ibid*" at 125.

[246] *Beattie v Canada*, [2001] FCJ No 62, [2001] ACF no 62.

right to agricultural assistance. Beattie did not reside nor intend to claim agricultural benefits rights in Treaty 11 territory and rather had started a ginseng farm in Merritt, British Columbia and requested agricultural assistance there. In making her claim for agricultural assistance, the provision of Treaty 11 that Beattie relied upon states:

> FURTHER, His Majesty agrees that, in the event of any of the Indians aforesaid being desirous of following agricultural pursuits, such Indians shall receive such assistance as is deemed necessary for that purpose.[247]

Beattie's claim was not accepted by the Minister of Indian Affairs and Northern Development (the Minister) on the basis that agricultural assistance is only available for the area described in Treaty 11, as the wording of Treaty 11 "cannot reasonably be read as applying to the whole of the territory of Canada, as they must if Ms. Beattie's construction of the treaty is correct".[248] Beattie looked to the Federal Court for recognition of her right to agricultural assistance as she disagreed with the geographic restriction imposed by the Minister's interpretation.[249] Her claim was based on the words of the treaty, and she invoked the honour of the Crown, asserting that the most favorable treaty interpretation must prevail and that if Treaty 11 had intended to limit agricultural assistance to Treaty 11 territory, it would have expressly stated so.[250]

Justice Pelletier, writing for the Federal Court, relied on the nine guiding treaty interpretation principles from *R v Marshall*, which *inter alia,* include treaties being special agreements requiring special interpretive principles such as liberal construction, cultural sensitivity, avoiding a technical contractual interpretation, and avoiding interpretive rigidity.[251] Justice Pelletier reviewed the terms of Treaty 11, and asked what the treaty makers "would have

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[247] Kenneth Coates & William Morrison, *Treaty Research Report – Treaty No. 11 (1921)* (Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986) at 26, online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/al/hts/tgu/pubs/T11/tre11-eng.pdf>.

[248] *Beattie supra* note 246 at para 12.

[249] An additional issue that arose in the litigation was the fact that Beattie was unable to afford a lawyer, and as a result commenced an additional action seeking a declaration that she is entitled to a Crown funded lawyer to allow her to pursue her treaty rights. It is of note that Beattie was claiming the right to legal services as a part of the provision of assistance deemed necessary for the purpose of claiming agricultural rights.

[250] *Beattie supra* note 246 at para 9.

[251] *Ibid at* para 18.

had in mind in the early 1920s when they spoke of agricultural assistance?"[252] As identified by Borrows, the Court made a direct connection to the historical record as a way to limit the extent of the right. The Court determined that the intent of treaty signatories was "to preserve their right to continue to use the land as they had."[253] Justice Pelletier's central focus was on how agricultural practices at the time of treaty were to be linked to particular lands. The Court referred to the Treaty Commissioner Report to come to this conclusion, which focused on how Indigenous negotiators were concerned with maintaining their rights to hunt, trap and fish, to which the Treaty Commissioner indicated that the Government expected them to "support themselves in their own way."[254] This was backed by the Crown providing tools and supplies useful for hunting, fishing and trapping.[255]

In the Court's decision, Pelletier J. emphasized that tools for hunting and fishing were to be provided to support a traditional lifestyle, characterizing these tools as "instrumental", meaning they were intended to "provide the means by which those who wished to do so could undertake to support themselves[.]"[256] Justice Pelletier applied the concept of "instrumental support" to agricultural assistance, stating that for those signatories that intended to transition from a "nomadic existence, based on hunting and fishing to a more settled lifestyle which is described as engaging in agricultural pursuits[,]"[257] the undefined agricultural assistance should be instrumental support – or providing the means to support themselves by agriculture. Justice Pelletier goes on to state: "Put another way, considering the type of assistance provided for those engaging in the traditional lifestyle, one would think that the assistance would be of a similar sort, that is, tools, equipment supplies and perhaps seed."[258]

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[252] *Ibid* at para 21.

[253] *Ibid*.

[254] *Ibid*.

[255] *Ibid* at para 23.

[256] *Ibid*.

[257] *Ibid*.

[258] *Ibid*.

Justice Pelletier's rationale was that Indigenous peoples may want to transition from a traditional lifestyle to one grounded in agricultural pursuits and the treaty right was designed to reflect and support this transition. The Court looked to other treaties for interpretive assistance, examining provisions in treaties where agricultural benefits feature more prominently and was a more significant element of the treaty. Justice Pelletier referred to Treaty 8 and 6, emphasizing that providing concrete items necessary to pursue agriculture (such as tools, equipment, livestock and seed) was the key aspect of agricultural assistance, "so as to enable the Indians to begin farming for their living."[259] Pelletier J. was keenly focused on the concept of "instrumentality" or the essential tools of agriculture being the extent of what agricultural benefits were intended in the numbered treaties.

The Federal Court then grappled with the question of where the assistance was to be provided and looked to the intention of the treaty makers. In this regard, Pelletier J. emphasized that the land within Treaty 11 territory is not typically suitable for agriculture, as it is an area "with a short growing season and harsh winters."[260] This did not mean that it was not part of the hopes for the negotiating parties. Justice Pelletier also questions whether the right to agricultural assistance is tied to settling on reserves, and comes to the conclusion that:

> the promise of agricultural assistance was intended to provide a means by which those who wished to change their mode of life could do so and still have a means of subsistence. It was not the intention of the parties to the Treaty that this change in mode of life would occur outside the territory which was the subject of the Treaty.[261]

With the original intent of the parties to the treaty in mind, Justice Pelletier considered a contemporary rendering of these rights to determine whether agricultural assistance might extend beyond Treaty 11 territory based on modern mobility.[262] In applying the *Marshall* principles and "distilling the core of the treaty right to see how it might be developed in a modern context."[263]

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[259] *Ibid*.

[260] *Ibid* at para 29.

[261] *Ibid* at para 33.

[262] *Ibid* at para 34.

[263] *Ibid* .

From this, the Court stated that the core of the treaty right is the development of (emphasis underlined):

> capacity for self-sufficiency based on the use of the land base. This could involve assistance with different modalities of food production or expanding the definition of agriculture to include other renewable resources whose cultivation could be the basis of self-sufficiency. That requires a land base, which was available within the Treaty area. There is no reason to believe that either of the parties to the Treaty would have looked beyond that land base.

The Court determined that agricultural benefits were directly linked to Treaty 11 Territory, and that these rights are therefore dependent upon the actual land base. In summation, Justice Pelletier explained that the core agricultural assistance treaty right "consists of the right to assistance in establishing a sustainable enterprise anchored in the productive capacity of the land."[264] One of the major takeaways from this decision was that agricultural assistance must be linked to the territory upon which the treaty agreement was made. On the facts, Joyce Beattie was not entitled to agricultural benefits and summary judgement was granted.[265]

Returning to Borrows' assertion that history is often leveraged by the judiciary to freeze or limit Indigenous rights, this is found throughout the reasoning of Justice Pelletier in the *Beattie* decision. The Court's reliance on the Treaty Commissioner Report to justify limiting the right to agricultural assistance to a specific land base treats is a prominent example where the original intent is the limiting factor. This is doubly significant because the *Marshall* principles seem to contradict the limitations imposed by the Court.

The *Beattie* decision is a compelling example of an agricultural benefits decision where the Court's logic effectively captures the narrow understanding of the historical record. This clearly operates to the detriment of the Indigenous claimant, because the right was found not to apply beyond the specific Treaty 11 territory where the original agreement was made. In *Beattie,* the Court took the narrowest possible interpretation of the right when considering its linkage to specific lands, specific tools, and the concept of subsistence.

Consider, rather, the outcome of this decision if Justice Pelletier had considered the historical record in accordance with the principles of living tree constitutionalism or as a "grab

[264] *Ibid* at para 33.

[265] *Ibid* at para 36.

bag of possibilities" (as suggested by Borrows). The Court might then have ruled that the Treaty 11 signatories had intended to negotiate agricultural assistance as a means for supporting continuous community sustenance and economic development. With this more open form of interpretation, the historical record might then have expanded the right to agricultural assistance to exist beyond providing capacity for self-sufficiency on the treaty land base or a subsistence lifestyle. It certainly seems as if the intent of the principles outlined in the Supreme Court of Canada's jurisprudence like liberal construction and avoiding contractual rigidity would also lend toward a living tree perspective, but sadly that was not the case and did not inform the Court's decision.

There is a question of whether litigation was the appropriate avenue to pursue in coming to this conclusion, and whether the Court effectively understood the predominant intention of the agricultural assistance provision. The Federal Court does state that the process of negotiation and reconciliation should be at the forefront of claims like this, and Justice Pelletier suggests that litigation may not be the best forum within which to resolve treaty disputes such as this one.[266] It appears that Crown representatives from the outset were unwilling to negotiate with Joyce Beattie about agricultural assistance, and it brings into question how much time and effort was put into determining what the right to agricultural assistance actually means, or why it was litigated in the first place. This decision also raises important questions about how Treaty 6 rights to agricultural benefits claims might be litigated, and whether First Nations might successfully bring claims forward.

2. *R v Frank*

The body of historic treaty case law specific to claims for agricultural rights is limited. In 1999, the Alberta Provincial Court (ABPC) decided a case about the Aboriginal and treaty right to export grains. Harley Frank was charged with failing to produce the necessary export licence for a truckload of feed barley that he transported from his home on the Blood Band Reserve in southern Alberta across the Canada-United States border into Montana, where he then sold the barley for $1,983.80 USD.[267] This right was perceived to conflict with trade and export rules

[266] *Ibid* at para 35.

[267] *Ibid*.

established for industrial agriculture in Canada. The ABPC decision, *R v Frank*[268] is unique because in it a claimant challenged the application of rules related to agriculture and grain export, arguing that his rights pursuant to the *Indian Act* permitted him the right to export grain (as opposed to being required to follow the export rules imposed by the *Customs Act*).[269]

While this decision is more than twenty years old, the judicial approach to agricultural rights remains important. In the decision, the Court determined Frank did not have the right to export barley pursuant to an Aboriginal or treaty right. With regard to the Aboriginal right, the Court applied the factors outlined in *R v Van der Peet* and determined that trade in agricultural products was absent prior to, at time of, and shortly after European contact, and was not integral to the Blood Band community's culture.[270] As for the treaty right (which is more directly relevant to this writing), the Court analyzed the historical interpretation of what was provided by the Crown to Indigenous peoples at time of treaty making, and distinguished between the "encouragement of agriculture" as opposed to creating and sustaining a viable agricultural economy for Indigenous stakeholders.

Mr. Frank asserted that he was acting pursuant to his treaty rights flowing from Treaty No. 7, which the Court proceeded to analyze through the treaty interpretation principles with close attention paid to the plain meaning of the words in the treaty.[271] In his analysis, Stevens-Guille J. reviewed the content of Treaty No. 7, and stated that the historical record of the negotiation and signing of the treaty should be considered in interpreting the treaty, as it provides "evidence of the situation of the Indian people, what they needed as a result of their situation, what they asked for, and what in their understanding, at the time, they were promised by the

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[268] *R v Frank*, 1999 ABPC 81, 74 Alta LR (3d) 157.

[269] *Ibid* at para 1 – 8. On the day that Mr. Frank sold the barley, he stopped at the Canada Customs Port and disclosed his intention to export grain to the United States. He provided a permit from the Blood Band which allowed for discretionary export. The Customs Officer informed Mr. Frank that his export of barley would be in contravention of the Customs Act because he did not have a Canadian Wheat Board (CWB) Export License, and Mr. Frank responded by indicating the he was exporting the barley through provisions of the Indian Act and would continue with the export regardless. He was ultimately charged with exporting barley without obtaining the required CWB licence.

[270] *Ibid* at para 67.

[271] *Ibid* at para 85.

treaty which they agreed to."[272] With this in mind, Stevens-Guille J. described the historical context in the following way (emphasis added):

> [81] The situation of the plains Indians in 1876, in what was to become southern Alberta, was that the land, on which they had lived, and over which they had hunted the buffalo, was being threatened by the arrival, and impending arrival, of non-Indians from the east. The continuing security of land, which had always been their land, and which they needed to carry on with their traditional way of life of hunting, was in jeopardy from the influx of non-Indian people. There was a concern that these people would take buffalo and other game on their hunting lands, or drive them away. They were aware of the treaties which had been made with Indians to the east of them, most recently Treaty No. 6, and the assurances and other benefits received under those treaties. They asked for a treaty for themselves.

Stevens-Guille J. emphasized the concern being whether reliance on the buffalo was sustainable, with the primary alternative being to negotiate a peaceful solution through treaty.[273] From this point, Stevens-Guille J. states that "the resulting terms of the treaty accurately and completely reflect what, on at least the evidence before me including members of the Blood Band, who testified, was asked for and promised[.]"[274] Steven-Guille J. emphasizes how there was no mention of trade in the Treaty because it was not something contemplated at the time of the negotiation of the treaty, nor was it something that occurred with sufficient consistency or regularity to be implicit with in the agreement.[275] From here, the judiciary delves into the question related to agriculture in paras 89 to 92 of the decision (emphasis added):

> [89] As to the issue of agriculture, it was argued that the historical context of the replacement of the buffalo with the promise of agriculture, must be taken to have been a promise to provide for an agricultural economy, including unrestricted marketing of crops, by necessary implication, or as a right reasonably incidental, per *R. v. Sundown, supra*.
>
> [90] In my view this is to focus on the abstract question of whether unrestricted marketing is essential in order for agriculture to be possible, which *R. v. Sundown, supra* rejects in favour of an historical inquiry into whether the activity was so understood in the past, and is understood today as significantly connected to agriculture. While it may be understood today to be significant, it certainly was not understood to be so in 1877, on the historical evidence before me. The Blood Band did not cultivate crops before the Treaty. In my view the historical evidence does not support the proposition that by encouraging agriculture and providing land, implements and seed, it was implicit or necessarily incidental and understood to be so, that the Government was promising the marketing of the crop without regulation.

[272] *Ibid* at para 80.

[273] *Ibid* at para 84.

[274] *Ibid* at para 85.

[275] *Ibid* at para 86.

> [91] I do not read into the fact that hunting was to be regulated, and there was no mention of the regulation of agriculture, as evidence of an intent by the Government, or understanding by the Indian, at treaty time, that there could be no regulation of agriculture, as a treaty right.
>
> [92] In my view the historical inquiry results in the conclusion that agriculture was to be encouraged and what was needed to help it be commenced provided, without more. Any consideration of more than that did not arise in the minds of either party. It was not then, nor is it now, a promise to provide every advantage which might later be claimed.

This passage is very important, as it cuts to the very heart of how the judiciary chose to interpret the treaty rights to agriculture. First, there is a question of how far the right to agricultural support should extend, and Stevens-Guille J. sees this promise of agricultural support as being to encourage agriculture rather than to assist in the growth of an agricultural economy. At each point throughout analysis, the Court chooses the most narrow interpretation of the right. The judiciary limits the right to assistance to help commence farming (through provision of tools and seeds). Grain marketing was deemed beyond the scope of what was agreed to.

However, the question then arises: Can the treaty promise be seen as of sufficient value to merit agreement between the parties? If the signatories to the treaty were aware of the importance of negotiating a treaty to support food security with the disappearance of the buffalo (as identified by the Court), then it would make sense that the treaty was negotiated for the very reason to support the commencement of an agricultural economy, and not just for the promise of tools and seeds. It may be unreasonable to interpret the historic treaty right to include contemporary unregulated grain marketing, but the decision only devotes 9 out of 131 paragraphs to the discussion of treaty rights, and the result is a very narrow interpretation of the treaty right.

The historic numbered treaties are an integral part of Canada's identity, but there are different perspectives on what these treaties mean for Canada and its peoples. If the judiciary is going to continue to interpret agricultural benefits rights as they have done in previous cases such as *Beattie* above, this does not provide opportunity to build a strong relationship. However, with contemporary historians exposing the historical record and the centrality of food and sustenance to the treaty relationship, there is sufficient evidence to move the judicial needle. The treaties are the foundation upon which prairie settler and Indigenous relationships were built, and their historic negotiation and modern-day interpretation connect Canada's formation to an

opportunity for strong contemporary relationships.[276] Indeed, the numbered treaties are a crucial component of the ongoing relationship between Indigenous peoples, settlers and the Canadian Crown and are garnering increased scrutiny from historians interested in their construction and how they have been interpreted as legal instruments.[277] It is time for the judiciary to take advantage of the incremental interpretive opportunity provided in the treaty right to agricultural benefits.

b. Specific Claims Tribunal Overview

The Specific Claims Tribunal and its enabling legislation, the *Specific Claims Tribunal Act*[278] provides a framework for First Nations to submit claims for Canada's failure to provide benefits that First Nations were previously entitled to.[279] First Nations are alert to the Crown's failure to fulfill certain obligations, however, receiving recognition or compensation for this failure is a considerable challenge. It is unlikely that the government will issue unilateral admissions regarding treaty breaches without considerable time and pressure, and First Nations have limited forums for seeking equitable relief such as compensation, costs, damages or compensation for fulfillment of treaty promises. Treaty rights litigation is exceedingly expensive, and test cases can stretch on for many years.

The Specific Claims Tribunal (established in 2008 as a joint initiative with the Assembly of First Nations) provides an opportunity for addressing claims in relation to the management of land and other First Nation assets and to the fulfillment of historic treaties. It is intended to accelerate claim resolution and provide certainty for government, industry and all Canadians.[280] The preamble to the *Specific Claims Tribunal Act,* asserts that the resolution of specific claims "will promote reconciliation between First Nations and the Crown and the development and

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[276] I am aware of the difficulty associated with the loaded term "reconciliation", particularly given the difference in understanding what interests are being reconciled, but I am using the term reconciliation to indicate that there has been positive action from involved stakeholders.

[277] *Treaty Elders of Saskatchewan supra* note 64.

[278] *Specific Claims Tribunal Act*, SC 2008, c 22, LC 2008, ch 22.

[279] For a further discussion around the Tribunal, see the Specific Claims website online: <https://www.sct-trp.ca/en>.

[280] Specific Claims Tribunal, "About Tribunal" available online: <https://www.sct-trp.ca/en/tribunal/about-tribunal>.

self-sufficiency of First Nations[.]"[281] The preamble also emphasizes that the adjudication of specific claims in a just and timely manner is a priority, which in turn will create appropriate conditions for resolving claims through negotiations.[282]

The Tribunal's jurisdiction is limited and it operates differently than an appellate court or judicial review. In order for a claim to commence, a First Nation must present a claim to the Minister of Crown-Indigenous Relations for determination of whether the claim will be accepted for negotiation or not.[283] Only if the claim is not accepted for negotiation, or if after three years the claim has not settled with the Crown, is the claim permitted to proceed before the Tribunal. Claims are based on the facts and application of the law, with determinations made as to jurisdiction, validity, evidence and compensation. Section 13 of the *Specific Claims Tribunal Act* states the Tribunal may "take into consideration cultural diversity in developing and applying its rules of practice and procedure".[284] The Tribunal claims this enables "culturally sensitive adjudicative proceedings without compromising the integrity of the process, such as hearings and site visits in claimants' communities."[285]

When it comes to defining what a specific claim is, there are parameters outlining the types of claims that First Nations are permitted to bring to the Tribunal. They include "alleged breaches of the Crown's legal obligations relating to treaties, reserve lands and resources, or First Nations' trust funds."[286] This consists of (but is not limited to) compensable claims for failure to fulfill treaty or other agreement obligations, breaches of legislation, illegal disposition of reserve lands and fraud by Crown employees or agents in connection with the acquisition, leasing or disposition of reserve lands.[287]

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[281] *SCTA*, *supra* note 278 at Preamble.

[282] *Ibid* at Preamble.

[283] Specific Claims Tribunal, "About Tribunal" *supra* note 278.

[284] *SCTA*, *supra* note 276 at s. 13.

[285] Specific Claims Tribunal, "About Tribunal" *supra* note 280.

[286] *Ibid.*

[287] *SCTA, supra* note 278 at s. 14.

Whether the Tribunal accomplishes its mandate and vision of accelerating claim resolution and providing certainty is debatable. The most obvious benefit to First Nations bringing claims is an expedited process that is intended to be more accessible than proceeding with traditional civil litigation. The Tribunal's rules are clearly defined according to its enabling legislation and include clear process guidelines in the Tribunal's Rules of Practice and Procedure.[288] There is also the stated intention for considering cultural diversity in developing and applying rules of procedure, and accepting any evidence the Tribunal sees fit, including oral history.[289] Additionally, claims are not barred for passage of time, as section 19 outlines that the tribunal shall not consider "any rule or doctrine that would have the effect of limiting claims or prescribing rights against the Crown because of the passage of time or delay."[290] For First Nations that can clearly identify whether their claim fits within the Tribunal's parameters, it is a viable option that affords flexibility and opportunity to bring the claim forward.

There are also detriments and limitations to a First Nation filing a claim. First, by its very nature, the required specificity limits the types of claims brought. The legislation lays out clear boundaries for when a First Nation is not permitted to file a claim, such as when there is other legislation or another agreement providing a mechanism for dispute resolution.[291] First Nations also need to meet the requisite criteria for being eligible to file a claim, including being a First Nation pursuant to the meaning of s. 2(a) of the *Specific Claims Tribunal Act,* and as discussed above, must have engaged Crown-Indigenous Affairs in prior negotiation and either not successfully come to a resolution or received consent to the filing of the claim.

A specific claim also only benefits the specific First Nation making the claim and has a lesser impact on establishing precedent. The findings of the Tribunal are evaluated on a factual basis that may not apply for other First Nations. This also means that Indigenous communities

[288] Specific Claims Tribunal Rules of Practice and Procedure, SOR/2011-119.

[289] *SCTA supra* note 278 at s. 13(1)(b) and (c). This includes evidence that would not be accepted as evidence in a court of law (with the exception of privilege.

[290] *Ibid,* at s.19.

[291] *Ibid* at s. 15.

or individuals not part of a First Nation (as defined in the SCTA) are not permitted to submit a claim.

Finally, claims are also only for monetary compensation to a specific First Nation up to $150 million.[292] This amount may seem likely a sufficiently high ceiling, however, when considering the impact of potential claims in a contemporary context, the amount may in certain instances be inadequate. Monetary compensation is not permitted to include punitive or exemplary damages, or any harm or loss not pecuniary in nature (including loss of a spiritual or cultural nature).[293] It is also limited to the market value of the loss, whether for reserve lands taken, damaged, or to acts or omissions caused to the extent the Crown is responsible for the loss.[294]

c. Specific Claims Tribunal Decisions About Agricultural Benefits

While the specific claims process may have significant constraints and be limited in efficacy, there have been numerous claims brought before the Tribunal, including a number involving claims for agricultural benefits. One example that is particularly relevant to this research is Red Pheasant's outstanding agricultural benefits claim. Red Pheasant Cree Nation alleged breach of treaty, fiduciary, trust and honourable obligations through the Crown failing to provide agricultural benefits under Treaty 6, which impeded the transition to an agricultural economy (the Agricultural Benefits Claim or the Claim). Red Pheasant's Claim was originally submitted to Canada via the Minister of Indian Affairs and Northern Development (now the Minister of Crown-Indigenous Relations).[295]

Red Pheasant and Canada agreed in 2017 to negotiate the Agricultural Benefits Claim, which occurred between 2017 and 2019, and included the commissioning of an expert valuation report intended to assist in evaluating the value of negotiated agricultural benefits. Negotiations stalled in 2019, which resulted in Red Pheasant Cree Nation filing a claim with the Specific

[292] *Ibid* at s. 20(1)(a)-(c).

[293] *Ibid* at s. 20 (1)(d).

[294] *Ibid* at s. 20(1)(e)-(i).

[295] Red Pheasant Amended Claim at 3. See SCT File No.: SCT-5010-19. Available online: <https://www.sct-trp.ca/en/claims/list-claims>.

Claims Tribunal in 2020. In their claim, Red Pheasant confirmed that the specific conditions precedent set out in the *Specific Claims Tribunal Act* were met, including previous filing with Canada and consent of Canada to the filing of the Claim with the Tribunal[296], as well as confirmation that Red Pheasant does not seek compensation in excess of $150 million.[297]

Red Pheasant's Claim (now before the Tribunal) is based on the failure to provide agricultural implements, instruction, or provisions, which they stated was a failure on both a failure to fulfil legal obligations under a treaty, as well as breach of fiduciary duty.[298] Red Pheasant cited Treaty 6 promises of laying aside of reserves for farming lands, various agricultural tools, and funds for farming provisions.[299] The claim also outlines how implementation of the benefits fell short. Red Pheasant had 20 acres cropped in 1878, 51 in 1880, and by 1884 had approximately 170 acres, but that:

> the transition to an agricultural economy was frustrated by the Crown's failure to provide the livestock, implements, and instruction required under the terms of Treaty 6. The little that was provided was often of inferior quality and was not provided in a timely manner. A lack of sufficient and consistent farming instruction further hampered the transition to an agricultural economy.[300]

Further, Red Pheasant made requests for more farming implements, and repair assistance, however, funding was reduced and eventually discriminatory policies were introduced to discourage agriculture.[301]

1. *Red Pheasant Cree Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 3

At time of writing, Red Pheasant's 2019 claim is unsettled. The most recent action stemming from Red Pheasant's 2013 claim were reasons provided by the Tribunal to address two applications. The first was an application for bifurcation brought by the Minister of Crown-

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[296] *Ibid* at s. 16(1).

[297] *Ibid* at s. 20(1)(b)).

[298] Red Pheasant Amended Claim *supra* note 295 at 7 – 8.

[299] *Ibid* at 9 – 11.

[300] *Ibid* at 14.

[301] *Ibid* at 15 to 20.

Indigenous Relations to have the Claim heard in two separate stages: validity and compensation. The second application was brought by Red Pheasant Cree Nation to have an expert valuation report included into evidence.

The Tribunal dismissed the application for bifurcation. This decision was made for a number of reasons, including lack of complexity and insufficient evidence demonstrating that bifurcation would increase settlement potential. The Tribunal emphasized the Minister failed to demonstrate, on a balance of probabilities, that bifurcating the Claim sufficiently supports the just, timely and cost-effective resolution of specific claims, which is the Tribunal's main commitment to stakeholders.

With regard to the application to admit the expert valuation report into evidence, the Tribunal determined the report should be allowed as evidence. The Tribunal emphasized that although the report is subject to settlement privilege because it was created to facilitate settlement negotiations, the report is admissible as an exception because "the competing public interest of promoting reconciliation and First Nations' self-sufficiency by the adjudication of specific claims in a just, timely and cost-efficient manner in the present case outweighs the public interest in encouraging settlements."[302] The Tribunal took the position that maintaining settlement privilege over the report would further delay Claim resolution and require Red Pheasant to expend resources to create a duplicate report.

2. *Birch Narrows First Nation and Buffalo River Dene Nation v Her Majesty The Queen in Right of Canada*, 2018 SCTC 8

Another recent claim for agricultural benefits involved Birch Narrows First Nation. Birch Narrows commenced a claim in 2017 (which was amended in 2018 to include Buffalo River Dene Nation) for Canada failing to provide agricultural and economic benefits that the First Nations were entitled to under the terms of Treaty 10.

At the time of writing this thesis, there is a stay of proceedings for this claim, and despite not having a decision regarding validity or compensation at the time of this writing, it is nonetheless useful to analyze the Claimant's arguments for monetary compensation for Canada's failure to fulfill its legal obligations to provide ongoing agricultural and economic assistance

[302] *Ibid* at para 34.

according to the provisions of Treaty 10. They argued that these rights were not provided "once and for all", and there is an objective element in determining when treaty obligations both arise and are fulfilled. This was argued in the context of there having been no assistance provided to the Claimants despite the agricultural potential of the region and documented success of Claimants maintaining their own gardens.

The Tribunal has an opportunity to evolve the agricultural rights benefits in this specific case, however, the challenge is the limited and narrow solutions they are able to provide. While progress is incremental, and the judicial process takes time, the outcome would be limited to the Claimants seeking relief.

The foregoing discussion about the Specific Claims Tribunal is intended to show the uphill battle that individuals and First Nations have for claiming agricultural benefits when it comes to judicial and non-judicial action. Perhaps more optimistically, the federal government has engaged in settling agricultural benefits claims at an increased rate, with many reported settlements having been reached. For example, the Clearwater River Dene Nation received $122.3 million that was distributed to more than 2,600 band members in 2021.[303] Each band member received $44,000, while children had settlement funds placed in trust until they turn 18. The settlement amount was determined based on an approximate amount it would cost to take up farming in the modern context.

Upon review of the settlement records of the Specific Claims Branch of Crown-Indigenous Relations and Northern Affairs Canada, there have been 29 instances since 1973 where First Nations have successfully reached a settlement for agricultural benefits.[304] The majority of settlements have occurred in Alberta and 4 successful claims in Saskatchewan, and they were all pursuant to Treaty 8.

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[303] Bryan Eneas, "Settlement money making positive impact for Clearwater River Dene Nation: Chief" (June, 2021) available online: <https://www.cbc.ca/news/canada/saskatchewan/settlement-money-positive-impact-clearwater-river-dene-nation-1.6055443>. See also: Derek Cornet, "Clearwater River Dene Nation members each receive $44,000 cows and plows payment" (June, 2021) available online: < https://panow.com/2021/06/11/clearwater-river-dene-nation-members-each-receive-44000-cows-and-plows-payment/#:~:text=%E2%80%9CCanada%20and%20the%20Clearwater %20River,the%20promise %20was%20never%20fulfilled>.

[304] Canada, *Reporting Centre on Specific Claims* available online: <https://services.aadnc-aandc.gc.ca/SCBRI_E/Main/ReportingCentre/External/externalreporting.aspx>.

While this data indicates that First Nations pursuant to Treaty 8 have reached mutually beneficial settlement outcomes, it also illustrates how each First Nation is responsible for navigating the claims and settlement process as individual nations. The outcome is incremental justice for those nations that seek it. The fact that there are no agricultural benefits settlements in Treaty 6 Territory is also likely going to change.

d. Black Lake Agricultural Settlement

The Black Lake Denesuline First Nation (BLFN) was involved in recent litigation resulting from a settlement claim brought by BLFN to the Tribunal.[305] The settlement agreement required Canada to pay the BLFN approximately $91 million, and also stipulated various requirements for having the settlement funds administered by the BLFN Agricultural Benefits Trust.[306] In its decision, the Court of Appeal upheld the Chambers judge's finding that it was the Agreement that constituted the Trust and the Trust Board to administer it, rather than it being a federal board with authority derived from a federal order in council.[307]

This decision is important as an example of a First Nation successfully settling an agricultural benefits claim with the Crown, and coming to terms with how the settlement funds should be managed. It outlines a salient example where the BLFN was empowered to reach a settlement with the Crown, and is now navigating the administration of the settlement funds in accordance with the terms of the agreement.

[305] *Treaty #8 Benefits Board of Trustees v Black Lake Denesuline First Nation*, [2022] SJ No 88, 2022 SKCA 29.

[306] *Ibid* at para 7. There was a dispute over the administration of the Trust, and this was an appeal by the Trust Board as to where the Trust Board found its jurisdiction and power.

[307] *Ibid* at paras 26 – 56.

V. ANOTHER WAY FORWARD FOR TREATY INTERPRETATION

The Canadian judiciary and legal academy have wrestled with how the numbered treaties should be interpreted in the present-day, but there have been limited positive outcomes for First Nations and individual claimants. This contrasts with both Indigenous scholars and contemporary historians having shown that the destruction of traditional Indigenous food systems such as the buffalo pressured First Nations into treaty negotiations. To this point, the pressure leading to treaty negotiations and treaty making has not been meaningfully translated into favourable determinations for agricultural benefits claimants. Unless the judiciary begins to acknowledge the treaty relationship in ways seeking to uphold the intention behind the original treaty obligations, it is hard to imagine opportunities for building strong treaty relationships emerging from agricultural benefits litigation.

The text alone of historic treaties fails to reflect the understandings of both treaty parties and what was written down did not adequately capture the actual agreement which had been orally agreed to.[308] If only looking at the written text, the historic treaties are exceedingly bad deals for the Indigenous signatories. It is imperative to look at their spirit and intent from the Indigenous perspective and to strengthen them in a way which fulfils their promise as agreements intended to facilitate mutual respect and coexistence. It is crucial to examine the spirit and intent of the treaties from an Indigenous perspective in order to truly understand their purpose and potential. By doing so, we can work towards fulfilling the promise of these agreements as instruments of mutual respect and coexistence. This involves recognizing the historical context in which the treaties were negotiated and the relationships that they were meant to establish and maintain. This approach will strengthen the treaties, bringing them closer to fulfilling their intended purpose and ensuring that they continue to serve as a foundation for positive and respectful relationships between Indigenous peoples and the government.

Harold Cardinal articulates that Indigenous peoples in Canada see treaties as equivalent to the Magna Carta.[309] For Cardinal, treaties were a way for settlers to legitimize their presence

[308] Coyle & Borrows, *supra* note 86 at 3.

[309] Cardinal, *Unjust Society supra* note 70 at 28.

and an effort to use a legal basis to justify the extinguishment of Indigenous title and ownership to their territory.[310]

Treaty interpretation is a matter of perspective, wherein what was agreed to remains a matter of evaluation of the negotiations that transpired and how the parties came to the bargaining table. For example, Harold Johnson's characterization of the treaty relationship in Treaty 6 is based in terms of sharing, togetherness, equality and cooperation, and it is a relationship of two families sharing the same territory.[311] Johnson explains that:

> Our families came together at treaty. We agreed to share this territory. We agreed that your family would bring technology and share it with us as we agreed to share the earth with you. We did not give you control over the entire territory, nor did we abdicate our responsibility for the earth. Under our law, we did not have the right to pass off our duty to your family, to surrender our choice, our authority.[312]
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> …
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> The treaties are the foundation of your family's occupation of this territory. Without the treaties, your family has no valid justification for its use of the territory. It is only by your treaty right that you have the wealth you enjoy, the standard of living you enjoy.[313]

Perhaps a treaty encompasses more than the words of the official document that was signed at the end of negotiations. As Johnson suggests, a treaty is the culmination of a relationship and discussions not easily reduced to pen on paper. Or, perhaps the numbered treaties should be seen as a way to share resources and cooperate. Chief Sweet Grass had hope that Treaty 6 would unify Indigenous and settler peoples, stating:

> May the white man's blood never be spilt on this earth. I am thankful that the white man and the red man can stand together. When I hold your hand and touch your heart, let us be as one; use your utmost to help me and help my children so that they may prosper.[314]

His central argument is that the treaty making relationship between the Crown and Indigenous peoples was supposed to be one of familial connection, akin to a relationship where family members would help each other in times of need. Johnson's great-grandfather James Ross was present at the signing of the adhesion to Treaty 6, and Johnson explains how he grew up hearing

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[310] *Ibid* at 29.

[311] Harold Johnson, *Two Families: Treaties and Government* (Purich Publishing, 2007) at 20.

[312] *Ibid* at 67.

[313] *Ibid* at 67.

[314] Alexander Morris, *The Treaties of Canada* (Fifth House Books: 1991) at 191.

stories about his great-grandfather, which in turn has shaped his life and understanding of the treaty relationship.[315] He also continues to live on the land that holds these stories.[316]

Johnson explains that his family's oral history tells of a time of plenty and magic.[317] He describes a history of life that was lived according to principles of ecology, in symbiotic relationships with other beings.[318] Johnson expresses how "[t]he treaties that gave your family the right to occupy this territory were also an opportunity for you to learn how to live in this territory."[319] For Johnson, treaties were a chance to build a strong relationship between Indigenous, settler peoples and the Crown, one where a shared experience might provide benefits to both parties. Johnson also emphasizes that when settlers arrived, Indigenous peoples were primarily focused on the maintenance of harmonious relations rather than securing the best possible outcome or result.[320] He sees the treaty making process are seen as an adoption ceremony or the combining of two families.[321] Johnson describes his family's perspective on the treaty negotiation process, explaining how Alexander Morris gave commemorative medals to his family that are deeply symbolic to this day:

> These medals have, on one side, an image of Queen Victoria, and, on the other, the images of a White man and an Indian with their hands clasped. Other symbols include the sun, the grass, a tipi, and a hatchet with the blade buried in the ground. The symbolism is obvious: your family and mine were to be equal. We were to be brothers and sisters for as long as the sun shines and the grass grows. The buried hatchet indicates perpetual peace between us.[322]

Johnson's focus on symbolism indicates a frame of reference where the treaties are agreements that endure forever, and he explains that these agreements are not between "your family and mine, but between your family and mine and the Creator…A bond far stronger than any

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[315] Johnson, *Two Families supra* note 311 at 12.

[316] *Ibid* at 12.

[317] *Ibid* at 17.

[318] *Ibid* at 17 to 18.

[319] *Ibid* at 21.

[320] *Ibid* at 27.

[321] *Ibid* at 28.

[322] *Ibid*.

contractual obligation holds us together."[323] He explains how the agreement was made with the Queen, who sent representatives to ask permission for her children to farm here. Johnson explains that he is not angry about the result from the treaty, just as his ancestors that signed the treaty were not angry.[324] He also clarifies that the treaty negotiations and agreed upon terms were an opportunity to build a strong relationship:

> We expected that you would behave like relatives and help us in hard times, just as we took the responsibility to help you if you needed it. We expected to keep living as a family with a new family in the neighbourhood. We were happy the new family had technology and would share it with us.
>
> We accepted that the buffalo would no longer supply us with food, clothing, shelter, tools, and medicine. We accepted the offer of technology transfer, and it was written into the treaties that we would receive farm equipment and instruction.[325]

Put another way, the treaty can be construed as a relationship between family members, where help is given in times of need. This perspective is crucial to remember when talking about the treaties and the way they were negotiated.

There is also an overarching problem with treaty interpretation because of courts' tendency to approach treaties as contracts, ignoring the crucial relationship-building aspect of treaty-making, and from the ineffectiveness of existing remedies. This is supported by Coyle, who suggests the courts have a "tendency to conceive of and interpret treaties in a manner not dramatically different from contracts negotiated by individuals to set out reciprocal obligations over limited periods of time."[326] While a contractual interpretation of treaties is understandable given the surface similarities for contracts between private parties and treaties, the principles of contract law were not developed to handle long-term agreements, like treaties, and are not equipped to handle the unique disputes that can arise in such relationships.[327] Further to this, as emphasized by Coyle, a contractual interpretation would not be able to account for the "web of relational expectations that infused the treaty-making process or the necessarily unforeseeable

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[323] *Ibid* at 29.

[324] *Ibid*.

[325] *Ibid* at 3.

[326] Coyle & Borrows, *supra* note 86 at 45.

[327] *Ibid* at 47.

and evolving circumstances through which the parties intended to maintain their treaty relationship."[328] Furthermore, a contractual interpretation fails to take into account the fact that treaties are the result of an encounter between two very different legal orders.[329] Despite these differences and the fact that Canadian courts have been reluctant to move beyond interpreting treaties through a contractual lens using:

> contract-like principles in cases involving the interpretation and implementation of treaty promises means that much of the unique content of treaty law remains to be articulated. This has left a significant void in Canadian law, as enunciated so far, for those who would seek to use that law to assist in settling disputes over the substance of the parties' responsibilities today.[330]

The second gap that Coyle discusses is how Canadian legal orders have not taken into account the relational aspect of treaty-making or that "treaties were intended to build specific and reliable forms of relationships as much as they were meant to achieve practical agreements on issues of substance[.]"[331] Coyle emphasizes that the distillation of a set of particular rights for those signatory to the treaty would ignore the core value of ensuring that treaties were the structure of the relationship that was to endure indefinitely and in perpetuity.[332] While the Supreme Court of Canada has outlined the importance of identifying the common intention of the parties in such a way as to take both parties' interests into account, Coyle suggests that the judiciary's evaluation of common intentions are "disproportionately focused on seeking to capture an often-elusive "meeting of the minds" rather than on elaborating legal norms that respond to the relational aspect of treaties."[333]

The third gap Coyle points to is that a set of clear remedial principles to guide the parties in the implementation of the treaties has yet to be effectively put in place, and there is no unique

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[328] *Ibid*.

[329] *Ibid*.

[330] *Ibid.*

[331] *Ibid*. See also J.R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009) at 5 – 8.

[332] *Ibid*.

[333] *Ibid* at 49.

forum for resolving treaty disputes.[334] This is coupled with the fact that treaty principles are typically dealt with according to judicial decisions "issued in response to the prosecution of Indigenous individuals for regulatory offences."[335] Coyle points to the notable challenge for First Nations when a remedy is not available that might take into account the failure to adhere to the spirit of the treaty, or how compensation principles should be used for the calculation of long-term harm to First Nations if the harm was caused by the failure to implement the agreed upon terms of the treaty.[336]

Coyle argues that the important work ahead is to develop a framework for enforcing historic treaty rights that "more fully reflects the shared purposes of the parties when they came together to make the treaty."[337] The three gaps illuminated above by Coyle are helpful in understanding how the judiciary's treaty interpretation principles and approach are deficient, and also point to the task at hand, which is to give valuable contemporary meaning to historic treaty understandings because the historic treaties were negotiated as agreements that would stay in place forever, and the specific written terms therefore necessitate the continued renegotiation and renewal as the treaty relationship evolves. Coyle's identification of these gaps in the judiciary's treaty interpretation principles and approach provides insight into the shortcomings of current practices and highlights the need for change. Thus, the task at hand is to give contemporary significance to historic treaty understandings, ensuring that they are adapted to current circumstances while still respecting the original intent and purpose of the treaties. Failing to do so would result in an incomplete and inaccurate understanding of these agreements, which would have negative impacts on the relationship between Indigenous peoples and the government.

In an article titled "Contractual and Covenantal Conceptions of Modern Treaty Interpretation", Dwight Newman argues that a covenantal approach to treaty interpretation helps

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[334] *Ibid* at 52.

[335] *Ibid*.

[336] *Ibid*.

[337] *Ibid* at 54.

to centralize the foundational relationships between First Nations, settlers and the Crown.[338] Further to this point, Newman suggests that a covenantal approach may even open new opportunities for long term reconciliation.[339] Newman argues that "an alternative conception of treaties, applicable to modern treaties as much as historic ones, is what I will call "covenants" establishing or shaping relationships between peoples or communities."[340] Newman suggests that viewing treaties as covenants is helpful because it refers:

> to a sacred or spiritual character that many First Nations consider present in the treaties, with the relationships that treaties embody not being based just on positivist law but also on the requirements of morality as between communities. To think of treaties as "covenants" is to think of them in a manner building on a series of other scholarly conceptions while also acknowledging the spiritual views of Aboriginal communities as a perspective held by some treaty partners and ultimately thinking of treaties as agreements about foundational relationships between communities that have a fundamentally moral character to them.[341]

When viewing treaties as covenants, there is an opportunity for the continued evolution of the relationships between the communities, as understanding treaties as covenants does not mean ignoring the express terms on a contractual level, but rather helps to show the treaty relationship as:

> a long-term relationship rather than a deal over more specifically defined matters. It has a broad, typically non-commercial orientation rather than a narrow, typically commercial purpose. It recognizes the intrinsic value of the other party rather than having a fundamentally instrumentalist orientation.[342]

Newman's conceptualization of treaties as covenants between peoples or communities offers a helpful analogy when contrasted with viewing treaties in closer alignment with contractual terms, because it helps to shape the way to build a shared relationship moving forward in a way that is intended to continue far into the future. The text alone of historic

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[338] Dwight Newman, "Contractual and Covenantal Conceptions of Modern Treaty Interpretation" (2011) 54:17 The Supreme Court LR [Newman, "Covenantal Conceptions"] at 477. Newman describes the Court's interpretation of *Quebec (Attorney General) v Moses* [2010] SCJ No 17, [2010] 1 SCR 557 and *Beckman v Little Salmon/Carmacks First Nation* [2010] SCJ No 53, [2010] 3 SCR 103 and the embracing of a new attitude to and philosophy of Aboriginal treaty interpretation in the context of modern Aboriginal treaties. While Newman focuses predominantly on modern treaty interpretation he also addresses historic treaty interpretation.

[339] *Ibid* at 488.

[340] *Ibid* at 485.

[341] *Ibid* at 485-486.

[342] *Ibid* at 485.

treaties fails to reflect the understandings of both treaty parties and what was written down did not adequately capture the actual agreement which had been orally agreed to.[343] If only looking at the written text, the historic treaties are exceedingly bad deals for the Indigenous signatories. It is imperative to look at their spirit and intent from the Indigenous perspective and to strengthen them in a way which fulfils their promise as agreements intended to facilitate mutual respect and coexistence. By doing so, we can work towards fulfilling the promise of these agreements as instruments of mutual respect and coexistence. This involves recognizing the historical context in which the treaties were negotiated and the relationships that they were meant to establish and maintain. This approach will strengthen the treaties, bringing them closer to fulfilling their intended purpose and ensuring that they continue to serve as a foundation for positive and respectful relationships between Indigenous peoples and the government.

[343] Coyle & Borrows, *supra* note 86 at 3.

VI. CONCLUSION

> We believe that traditional knowledge, as well as addressing the social determinants of health, should be at the heart of food policies and practices of governments. Indigenous peoples in different areas have sustained themselves on the wildlife and plants that their areas have produced. Various forms of agriculture have been practiced by Indigenous peoples in order to sustain the soil and land. This knowledge has been used by Indigenous peoples and in many cases shared with their non-native brothers and sisters. The uses of plants and animals as medicines and foods were common among Indigenous peoples. This unique knowledge belonging to Indigenous peoples has also assisted the Canadian people to live on the land and to prosper.[344]

For relationships to withstand the test of time, they need to be mutually beneficial, reciprocal, and hopefully contain an understanding of what the future is going to look like between the parties. When considering what a mutually beneficial relationship might look like in the context of contemporary treaty relationships, discussions about food are important. The quote above from Food Secure Canada's *People's Food Policy* asserts that food policies and government practices require acknowledgment of the support and assistance that Indigenous peoples have provided for the Canadian food system. A tangible opportunity for this type of acknowledgment is to refocus on the promise of agricultural benefits in the historic treaties.

Along similar lines, a concept that has received a significant amount of attention in the realm of Canadian Indigenous rights is "reconciliation". It has been a foundational concept intended to move the relationship between Canada, Indigenous and non-Indigenous peoples forward with hope and optimism, but has also been questioned as being less than ideal in many circumstances. The Truth and Reconciliation Commission of Canada's (TRC) 2015 *Final Report* states that it is essential to build a "healthy relationship among people going forward."[345] This relationship building process must occur for Indigenous peoples and non-Indigenous peoples living in Canada alike. From the Canadian Government's perspective, the implementation of reconciliatory processes remains unclear and uncertain, and there remain many questions about how to actively engage in reconciliation moving forward.[346] On the one

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[344] Food Secure Canada, *People's Food Policy* (2011) at 6.

[345] Truth and Reconciliation Commission, *Final Report: Canada's Residential Schools: Reconciliation* vol 6 (Montreal: McGill-Queen's University Press, 2015) at 3.

[346] From the Canadian Government's perspective, the reconciliation framework is built upon the work of the Truth and Reconciliation Commission, as well as by supporting declarations such as the *United Nations Declaration of the Rights of Indigenous Peoples*, and it is through Indigenous and Northern Affairs Canada that this framework is supported. It is also important to note that with the Liberal Government, Justin Trudeau has emphasized working with Indigenous peoples to renew the relationship.

hand, the word 'reconciliation' has become symbolic of government inaction or insensitivity toward Indigenous peoples, and it can be challenging to find ways to embody reconciliation in a positive way. On the other hand, reconciliation represents a renewed attempt at nation-to-nation relationship with Indigenous peoples "based on recognition of rights respect, and cooperation and partnership."[347]

If reconciliation means "establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples [in Canada]"[348] it is crucial to move beyond the destructive legacy of colonialism, but this can not be a passive or one-sided process. Like any relationship, it requires active engagement from all stakeholders, both Indigenous and settler. The responsibility for reconciliation is on the shoulders of all people in Canada and is about honouring ancestors, respecting the land and rebalancing relationships.[349] This is why it remains imperative to open healing pathways built upon the truth and knowledge coming from the Indigenous peoples in Canada.

The TRC's Calls to Action are one way in which the TRC is working toward building strong treaty relationships. In relation to food system rights, the TRC emphasizes the importance in regenerating "cultures, spirituality, laws and ways of life, which are deeply connected to …[Indigenous people's] homelands[.]"[350] There are significant linkages between the mandate of the TRC and food law, including the holistic interpretation of rights, acknowledging the ongoing legacy of dominant systems such as colonialism, and asserting the importance of taking action to decolonize Canada's food system.[351] While food was used as a historical tool of colonization, it has the potential to be a tool for healing and reconciliation. In order for this to occur, treaty

[347] Canada, Indigenous and Northern Affairs Canada, *Reconciliation,* (2017) online: < https://www.aadnc-andc.gc.ca/eng/1 400782178444/1400782270488>.

[348] TRC, *Final Report supra* note 345 at 3.

[349] *Ibid* at 5.

[350] *Ibid* at 72.

[351] *Ibid*.

rights must be respected and a commitment to building nation-to-nation relationships with First Nations, Métis and Inuit peoples must be given.[352]

In a 2017 briefing note, Food Secure Canada (FSC) suggested "Five Big Ideas For A Better Food System", and one of the five ideas was to make food a part of reconciliation. FSC emphasizes that "Canada must acknowledge the history and ongoing legacy of colonialism and prioritize reconciliation and decolonization as key guiding principles of our food system."[353] FSC emphasizes that:

> Food was often used as a tool of oppression and marginalization, including through the use of starvation and malnutrition in residential schools and the assumption, upon the arrival of European settlers, that Canada was largely an empty, uninhabited land ("terra nullius"). For many years, it was the Canadian government's practice to provide only enough food to Indigenous communities on-reserve for basic survival. In addition, policies were implemented with the intention of limiting Indigenous people's ability to engage in hunting and fishing activities, thereby eroding the food sovereignty and food security of many communities.[354]

Taking the above statement at face value, food was used as a mechanism of control by the Canadian Crown, and this history and use of food in this way has largely been ignored. It is imperative to acknowledge this history and work toward strengthening the treaty relationship in accordance with its original intent.

a. Why Connect Food Law and Treaty Rights?

Viewing the historic treaty rights to agricultural benefits through a holistic and interdisciplinary lens such as food law is an opportunity to further delve into how the food system is situated in building strong treaty relationships. The law must assist in moving beyond looking at the symptoms or problems associated with food insecurity and begin looking at the deeper underlying problems and challenges within Canada's food system.

At the forefront of this engagement are the ways that agriculture has operated in a colonial framework. Dominant concepts of law and conventional agriculture originated in and

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[352] Food Secure Canada, "Make Food A Part of Reconciliation: Briefing Note 5 of 5 – 5 Big Ideas for a Better Food System, A Proposal on Food Policy for Canada" (2017) online: <//oemmndcbldboiebfnladdacbdfmadadm/https://foodsecurecanada.org/sites/foodsecurecanada.org/files/briefing_notes_food_for_reconciliation_fsc5bigideas_072017.pdf>.

[353] *Ibid*.

[354] *Ibid.*

continue to perpetuate perspectives of competition, conquering, and control. Indigenous peoples have been removed from lands and displaced from their food systems. Indigenous food systems have also been rejected by settlers and seen as injurious to colonial ideologies relating to progress and development.[355] As discussed above, the past has created uneasy relationships in which Indigenous peoples struggle at a disproportionately high rate for food security within the food system. The Canadian government's imposition of assimilative agriculture laws and policies in the late 1800s affected Indigenous peoples and their rights, and continue to have an impact on Indigenous peoples to this day.[356] Colonial systems have taken resources without respect for the land or the Indigenous people whose territory the land was a part of. Colonial systems have taken from people and taken from the soil without putting anything back. In order to shift these understandings of the law and agriculture, we must work toward a positive future for Canadian food systems.[357]

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[355] Charles Levkoe & Lana Ray, "The Indigenous Food Circle: Reconciliation and resurgence through food in Northwestern Ontario" (2019) 9:2 Journal of Agriculture, Food Systems, and Community Development 101 at 103.

[356] Carter, *Lost Harvests supra* note 15 at 59.

[357] The COVID-19 pandemic has impacted the food system at international and local levels and had considerable effects on food supply chain systems around the world, impacting farm labor, food processing, transportation, logistics, and access to food. Indeed, the pandemic has resulted in increased food system awareness, and it has exposed issues with the way that food is accessed in a globalized world. These effects have resulted in stockpiling, bare grocery store shelves, and demand that has exceeded supply worldwide. COVID-19 has caused the globalized food system to be forced to look to localized solutions, and where there are none, people are forced to do without items they are often accustomed to having. According to Statistics Canada, "[a]lmost one in seven (14.6%) Canadians indicated that they lived in a household where there was food insecurity… [in the course of the pandemic]." See: Statistics Canada, Food insecurity during the COVID-19 pandemic, May 2020, June 24, 2020, online: https://www150.statcan.gc.ca/n1/en/pub/45-28-0001/2020001/article/00039-eng.pdf?st=Q16zJJGf. StatsCan indicates that this was based on a scale of six food experiences, ranging from food not lasting before there was money to buy more, to going hungry because there was not enough money for food. Most Canadians reported only one negative experience, but 2.0% reported the most severe food insecurity, with five or all six experiences reported. Looking beyond the disastrous impact that COVID-19 has had upon global society, it has also prompted consumers to become increasingly aware of the food they are eating and where it comes from. On an international scale, food systems have been disrupted, and as a result consumers are paying more attention to where food comes from. See: Joao Montalvao, Patricia Van De Velde, and World Bank, *COVID-19 and Food Security : Gendered Dimensions*. Policy Notes. 2020. In Canada, there has been a surge in support for local food growers and producers as consumers spend more time with the ingredients that become their food if they are financially capable of doing so. For an article discussing the uptake of local food supply chains, see Annie Albrecht, "Study finds local food systems respond nimbly to COVID-19 supply chain impacts" December, 2020 available online: https://source.colostate.edu/study-finds-local-food-systems-respond-nimbly-to-covid-19-supply-chain-impacts/. In the same way that COVID-19 has resulted in increased attention being placed on food and where it comes from, I argue that similar attention should be paid to the Canadian food system and ways that it can engage with Indigenous rights and reconciliation. The food system is one of the necessary ingredients that we now need to spend more time with as we understand reconciliation and negotiate contemporary Indigenous-settler relationships. Perhaps the

b. Stony Knoll Revisited

Returning to the opening vignette from Chapter 1 regarding the Young Chipeewayan's ICC unsuccessful claim, there is another part to the story. Beyond seeking compensation for unfulfilled treaty promises through the ICC, the Young Chipeewayans reached out to the Mennonite and Lutheran communities to discuss opportunities to enter into a dialogue about the history of Stoney Knoll. Both the Young Chipeewayans and the Mennonite and Lutheran communities were apprehensive and worried about the outcome of discussions as there remained an underlying question about the ownership of the land and how that land came to be acquired by the settler farmers, particularly when the land that was originally allocated to the Chipeewayans did not provide this same bounty to them and they were forced to abandon that land.[358]

There was fear about resolution of land claims and farmers losing land as a result of those claims, but despite misgivings there was a community gathering between the Chipeewayan and Mennonite and Lutheran settlers' descendants.[359] It was an opportunity to meet, share a meal and discuss having a meaningful relationship together in the future. In 2006, they came together and a Memorandum of Understanding between the Young Chipeewayans and the Mennonite and Lutheran settlers came out of the process, stating:

> We the descendants of
>
> The Young Chippewayan First Nation who chose this land as a reservation upon signing Treaty 6 on August 24, 1876
>
> and
>
> The Mennonite and Lutheran settlers who built their communities here following the opening up of this land for settlement in 1897,
>
> Hereby acknowledge the following mutual understanding and desires:
>
> 1. We are deeply grateful for the goodness of the Creator and the blessings which gave us this land and which give and sustain all our lives.

intersectionality of food systems and Indigenous/settler rights can be something we spend more time thinking about and can assist in the process of nurturing healthy relationships between settlers, Indigenous peoples and the Canadian Crown.

[358] Carter, *Lost Harvests supra* note 15 at 59.

[359] Ibid.

2. We respect the sacred nature of covenants, which order our relationships and bring harmony to our communities and actions, including Treaty 6 which was entered into on our behalf, for the purpose of mutual benefit and maintaining our livelihood.

3. We wish for ourselves and for future generations to live in conditions of peace, justice and sufficiency for all our communities. We will work together to help bring about these conditions through a timely and respectful resolution of the issues which history has left to us.[360]

The Memorandum was signed by representatives of the Young Chipeewayan Nation, Mennonites and Lutherans, and was an opportunity to come together and identify commonality in a difficult situation.[361] The Memorandum underlines the importance of the Stoney Knoll land sustaining life, maintaining livelihood, and living in justice and sufficiency for all communities.[362]

Agriculture and sustenance are closely connected to Indigenous and settler relationships in a historical sense, but also remain important to the relationship building process today. There are opportunities to build relationships of trust between Indigenous peoples and settlers. When looking at the contemporary Young Chipeewayan and Mennonite/Lutheran farmer experience, there are significant linkages between food systems, agriculture and Indigenous settler relationships. The Stoney Knoll story encapsulates numerous themes that remain at the centre of treaty rights discourse on the Canadian prairies and is about how forming strong treaty relationships for the future requires refocusing on historic promises about sustenance.

The preceding chapters of this thesis have argued that food and sustenance are integral to building strong prairie treaty relationships. This writing has set out to make it abundantly clear that Canadian settler colonialism has disrupted Indigenous peoples' relationships with land

[360] Leitch, *Reserve 107 supra* note 41.

[361] Mennonite and Lutherans have been grappling with the theological challenges related to food and eating and there is alignment with notions of connecting food to opportunities to build mutually beneficial relationships. For a discussion specific to the Mennonite context as it relates to decolonization see Elaine Enns & Ched Myers, *Healing Haunted Histories: A Settler Discipleship of Decolonization* (Eugene: Wipf and Stock, 2021). For a further discussion on the theology of food and eating see Norman Wirzba, *Food and Faith: A Theology of Eating, 2d ed* (Cambridge: Cambridge University Press, 2018). Wirzba provides a theological account of eating and a framework for the significance and importance of eating, arguing that food is much more than a commodity and is deeply connected to spirituality. For further reading on theology and food production, see Ellen Davis, *Scripture, Culture, and Agriculture: An Agrarian Reading of the Bible* (Cambridge: Cambridge University Press, 2008).

[362] Leitch, *Reserve 107 supra* note 41.

and food and not held true to the original promises or intentions as they were contemplated historically. It requires a push for considerations of how these rights must now be implemented contemporarily.[363]

If food and sustenance is to be a vital ingredient in the continued negotiation of mutually respectful relationships between Indigenous and non-Indigenous peoples in Canada, it is imperative that food rights be interpreted holistically and in a way that holds true to the original intentions of the parties to the treaties. A more robust acknowledgment of food rights must be a part of the contemporary reconciliation vernacular. This holds true for both agricultural benefits rights as well as rights related to hunting, trapping and fishing. When the Treaty 6 assurances of agricultural benefits and support in the transition to an agricultural economy were given in 1876, a promise was made for the opportunity of a shared future and strong relationship. That promise has not been kept. If building strong relationships and a shared future, the agreements about food must be respected and legitimized as opposed to restricted or realized in their most narrow sense.

The themes that have emerged throughout this thesis show that there is an opportunity to learn from the past. Food law notions of viewing food systems holistically will also help realize the opportunity in returning to the focal point of the treaty relationship. Canada's legal system has struggled to open space for food to be a part of building a shared future, but there are opportunities to address this. The agriculture and treaty rights paradigm illuminates how food has a role to play in building a shared future, but it is also evident that this shared future must continue to take shape and be defined. This final chapter contains optimism for the future, and also grapples with questions around how food and the production of food is closely linked to Canada's shared future.

Indigenous agriculture is garnering increased attention and emerging as an area of significance within the Saskatchewan context, as evidenced by academic forums being held that are focused on sharing current knowledge and the contemporary status of Indigenous

[363] Levkoe & Ray, "Indigenous Food Circle" *supra* note 355 at 102.

agriculture.[364] Arcand suggests the heightened attention that is on Indigenous agriculture is due to several factors, including "an increase in agricultural land holdings on reserve and greater autonomy in land management have renewed conversations on how First Nations can realize the full economic benefits and exert greater control over agricultural activities that affect the reserve land base."[365] In a jurisdiction like Saskatchewan where there are significant economic opportunities flowing from agriculture, it makes sense that Indigenous communities would want to participate and benefit from agriculture. This is especially true given the historic treaty context and that the bedrock of the treaty relationship was founded upon a similar promise in the late 1800s.

In a recent Indigenous agriculture forum held at the University of Saskatchewan, the facilitators stated their objective was to "share current knowledge on the contemporary status of Indigenous agriculture and to co-formulate research, capacity building, and policy priorities."[366] In a paper that came out of the forum, Arcand *et al* illuminated five themes which included "centring Indigenous knowledge and traditional relationships to the land, capacity building, building respectful partnerships and relationships, financing farming and equitable economies, and translating research to policy and legislation."[367] The fact that a forum like this is occurring, and that various stakeholders are involved in this research is significant. It is also significant that the work that now needs to happen involves building respectful partnerships and relationships, along with creating viable agricultural economies, and ensuring that research in this area can be meaningfully translated into legislation and policy. These aforementioned themes contain legal elements or components, and it helps to point to the importance of engaging with these issues from a legal standpoint.

Various disciplines in the social sciences and sciences are realizing the importance of engaging with Indigenous agricultural issues, and the Canadian Crown, the legal system and

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[364] For example, the recent Forum on Indigenous Agriculture hosted in Saskatoon, Saskatchewan which involved Indigenous scholars, soil scientists, First Nations land managers and Indigenous agricultural and natural resource organizations. The forum provided foundational data to inform research and capacity building to meet community-defined goals in agriculture on reserve lands and by First Nations people.

[365] Arcand, "Revitalizing Indigenous Agriculture" *supra* note 29 at 619.

[366] *Ibid*.

[367] *Ibid*.

policies (including its courts and legislatures) need to be part of this ongoing work. There are opportunities to engage with First Nations that intend to claim agricultural benefits in a contemporary setting, but this is not the only opportunity to recontextualize the treaty relationship according to these promises specific to food and agriculture. It is not as simple as providing agricultural implements or even funding to First Nations in order to convey the spirit and intent that was originally agreed to according to the agricultural benefits.

It is safe to say that survival was one of the main concerns for the Indigenous treaty negotiators of Treaty 6 in an era where Indigenous food systems were drastically changing. Historical and contemporary sources indicate that agriculture was an opportunity to sustain Indigenous peoples beyond the decline of the buffalo. In fact, it was likely one of the only viable options. The loss of a former way of life forced Indigenous peoples into a negotiation where they had little hope of avoiding starvation unless they grew food the way they were being told to do it. The agricultural benefits provisions of Treaty 6 are the backbone of the treaty document. They represent a promise of encouragement, development and progression for Indigenous peoples when little else was on offer. It is clear that the main point of the prairie treaties was trading goodwill for agricultural sustenance.

In a contemporary setting, the right to agricultural benefits remains important. Through the Supreme Court's treaty interpretation principles, Indigenous groups have an opportunity to revitalize their food systems through agricultural benefits. Treaties are mechanisms of accountability that require broad and generous interpretation, and it is time for the Canadian Crown to make good on the agricultural benefits promises in Treaty 6. This is not to suggest that treaty rights should be conferred exclusively through agricultural economic development, but instead that courts and the Crown should be encouraging a broader and engaged dialogue to ensure that the treaty right to agricultural benefits is understood holistically and meaningfully fulfilled. Interpreting Treaty 6 agricultural benefits holistically may seem like an incremental shift, but it is a way to change treaty rights from being adversarial and litigious to being grounded in mutual respect and cooperation. Agriculture has never been a catchall solution, nor is it necessarily the right approach to food systems, but it is the crux of why Treaty 6 was negotiated in the first place and requires further engagement by the judiciary and the Canadian Crown.

While it is not possible to predict what would have happened if the Canadian government had made best efforts to fulfill the treaty promises to agricultural benefits according to their original spirit and intent when they were originally agreed to, there is an opportunity to retroactively make good on this failed obligation. It is likely that First Nations would have had better opportunities to establish themselves in relation to the agrarian prairie economy if these promises would have been kept, but it is too late for that. With this in mind, the following are a list of recommendations for ways in which the Canadian government can take steps to honour these obligations:

1. The Canadian government must acknowledge the existence of these historic treaty obligations as being integral to the negotiation of the prairie treaties and settlement of the territory;
2. Refocus on these promises in light of their original spirit and intent as a way to sustain Indigenous food systems during colonial transition;
3. Acknowledge that Crown agents who were responsible for fulfilling these treaty promises agreed to provide support that was not meaningfully provided;
4. Issue an apology for failing to honouring the intent behind the agricultural benefits treaty commitment;
5. Engage in meaningful consultation and negotiation regarding how to make good on these promises;
6. Provide support for Indigenous communities that wish to farm their own land.

Beyond the Canadian government providing the foundation for establishing strong treaty relationships, the judiciary has an opportunity to take steps in the right direction. Some of the opportunities include the following:

1. When issuing decisions or judgements that affect Indigenous food system rights, apply principles of treaty interpretation to allow for the realization of these rights;
2. Instead of focusing on the strict and narrow interpretation of the treaty text and whether obligations were met, look at whether the obligations were meaningfully met in light of the spirit and intent and the meeting of the minds between the parties that negotiated the treaty to begin with;

3. View the historic treaties less like contracts and look for ways to interpret and implement the promises according to principles that support today's responsibilities;
4. Consider the relational aspect of the treaties to build reliable forms of continuous relationship;
5. Provide a proper forum for resolving treaty disputes that gives the best opportunity for First Nations or individuals initiating claims to agricultural benefits to prove their claim which might include:
    a. Reducing the time it takes to have agricultural benefits claims evaluated;
    b. Considering various forms of evidence (including oral history);
    c. Taking a holistic view of the impact of these promises not being met.
6. Provide meaningful compensation in ways that acknowledge the impact of these treaty obligations not originally being fulfilled.

It is not only up to the Canadian government and judiciary to support strong contemporary treaty relationships. Both Indigenous and settler stakeholders have an opportunity to take steps forward, which include:

1. Encourage the Canadian government to fulfill agricultural benefits treaty promises;
2. Acknowledge how Indigenous peoples food systems were changed by the agriculturalization of the prairies;
3. Engage in opportunities to strengthen treaty relationships.

The above recommendations are suggestions for ways treaty promises about food and the specific right to agricultural benefits can be honoured and legitimized. These recommendations show that there are numerous incremental steps that can be made by various stakeholders, but only if those involved in the treaty relationship take an active interest and role in moving forward. Cultivating strong treaty relationships requires looking to our shared history, acknowledging areas where obligations have not been met, and looking for ways to improve the relationship into the future.

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