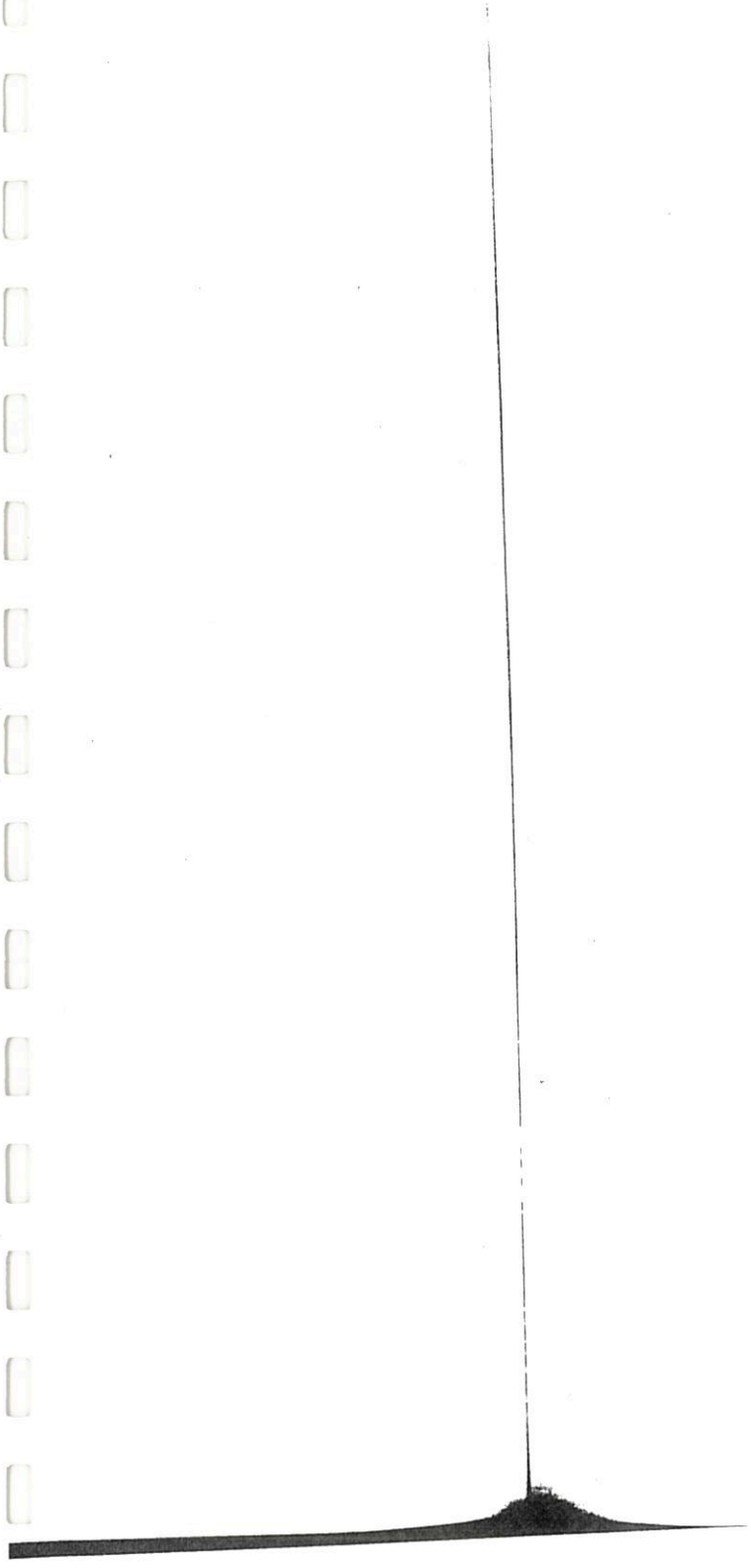
THE LAW OF TREATIES BETWEEN THE CROWN AND ABORIGINAL PEOPLES

J. Timothy S. McCabe



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It appears, however, that in some circumstances the existence of a treaty, and treaty rights pursuant to it, may be inferred even in the absence of the written document. In *R. v. Côté*, the Quebec Court of Appeal (Baudouin J.A.) proceeded on the basis that a treaty entered into by the British and the Algonquins at Swegatchy (Ogdensburg, New York) and Caughnawaga in 1760 had been lost but was sufficiently verified by material contained in the journals of the Crown's officer, Sir William Johnson, and the evidence of an historian at trial.[193]

F. SPECIFICITY AND COMMUNALITY

Because a treaty is a mutual agreement between parties, treaty rights are specific to the particular Indian party who entered into the treaty.[194] And they frequently pertain to activities on and in respect of particular lands. That is, they protect the Indian party's relationship to its traditional territory and the continuity of its ability to act therein. The point is exemplified in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*. Though that case concerned Treaty no. 8 of 1899 in particular, the principle is clearly of wide application.

> The arguments of the federal and Alberta Crowns simply ignore the significance and practicalities of a First Nation's traditional territory. Alberta's 23 square kilometre argument flies in the face of the injurious affection of surrounding lands

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Horseman, [1990] 1 S.C.R. 901. Where this occurs, the aboriginal rights crystallized in the treaty become treaty rights and their scope must be delineated by the terms of the agreement.

See Chapter 6, Section A.

193 *R. v. Côté*, [1993] J.Q. no 846, 107 D.L.R. (4th) 28, at 47-54 (Que. C.A.) (*per* Baudouin J.A.). The documentary evidence for the treaty consisted of a record of a meeting in 1769 at Caughnawaga at which the chiefs addressed Johnson as follows:

> By this String of Wampum we beg to remind you of what you Transacted with the Dep. of y. Seven confederate Nations of Canada i August 1760, near Swegatchy, when in behalf of the Great King of England, and the Concurrance of the Commander in chief of his Troops then on the Spot, you entered into preliminary Engagement with [depu] tized by s. 7 Nations, that provided [ ] on the English Armys descending the [River] & during the final Conquest of Canada you would secure to us the quiet & peaceable Possession of the Lands we lived upon, and let us enjoy the free Exercise of the Religion we were instructed in: which Engagements we then firmly & mutually agreed upon, and after the final Conquest of this Country they were confirmed and ratified by you in behalf of the Great King of England our Father, as a general Congress of all the Ind. Nations in Canada, held by you at Caghnawagey, all which is still fresh in our Memories, & we on our Side have strictly & inviolably adhered to.

On the basis of that, the Court of Appeal held that the Algonquins have a treaty right to fish for food in their traditional territories. See Chapter 1, Section C, Subsection ii, and this Chapter, Section D, and Chapter 7, Section D. On appeal, the Supreme Court of Canada (*per* Lamer C.J.), "without deciding the existence of such a treaty right", assumed its existence but found that on the facts of the case there was no infringement of it: [1996] S.C.J. No. 93, [1996] 3 S.C.R. 139, at para. 88 (S.C.C.) (*per* Lamer C.J.).

194 *R. v. Sundown*, [1999] S.C.J. No. 13, [1999] 1 S.C.R. 393, at para. 25 (S.C.C.). As the Court pointed out, relying on *R. v. Van der Peet*, [1996] S.C.J. No. 77, [1996] 2 S.C.R. 507, at para. 69 (S.C.C.) (*per* Lamer C.J.), and *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075, at 1111 (S.C.C.), this specificity is true of aboriginal rights as well, though for different reasons.

as found by the trial judge. More significantly for aboriginal people, as for non-aboriginal people, location is important. Twenty-three square kilometres alone is serious if it includes the claimants' hunting ground or trapline. While the Mikisew may have rights under Treaty 8 to hunt, fish and trap throughout the Treaty 8 area, it makes no sense from a practical point of view to tell the Mikisew hunters and trappers that, while their own hunting territory and traplines would now be compromised, they are entitled to invade the traditional territories of other First Nations distant from their home turf (a suggestion that would have been all the more impractical in 1899). ... *Badger* recorded that a large element of the Treaty 8 negotiations were the assurances of *continuity* in traditional patterns of economic activity. Continuity respects traditional patterns of activity and occupation. The Crown promised that the Indians' rights to hunt, fish and trap would continue "after the treaty as existed before it". This promise is not honoured by dispatching the Mikisew to territories far from their traditional hunting grounds and traplines. [italics in original]

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The "meaningful right to hunt [*pace* Rothstein J.A. in the Federal Court of Appeal, [2004] 3 F.C.R. 436, at para. 18] is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today.[195]

The converse is true as well. The Supreme Court (*per curiam*) has established that treaty rights to harvest natural resources are exercisable in the traditional territory of an aboriginal party to the treaty.[196] The Courts of Appeal of New Brunswick (Robertson J.A.) and Nova Scotia (Cromwell J.A.) have held that treaty rights under the several "separate but similar" treaties in the maritime provinces[197] to harvest and trade natural resources pertain only to the traditional territory of the aboriginal people whose member purports to exercise the rights, not to the territory of another people who entered into a treaty.[198] And there is authority in relation to the numbered treaties[199] that only Indian parties to the

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[195] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at paras. 44-48 (S.C.C.), citing *R. v. Badger*, [1996] S.C.J. No. 39, [1996] 1 S.C.R. 771 (S.C.C.).

[196] *R. v. Marshall (Marshall No. 2)*, [1999] S.C.J. No. 66, [1999] 3 S.C.R. 533, at para. 17 (S.C.C.):

> In the event of another prosecution under the regulations, the Crown will (as it did in this case) have the onus of establishing the factual elements of the offence. The onus will then switch to the accused to demonstrate that he or she is a member of an aboriginal community in Canada with which one of the local treaties described in the September 17, 1999 majority judgment was made, and was engaged in the exercise of the community's collective right to hunt or fish in that community's traditional hunting and fishing grounds.

[197] See Chapter 1, Section C, Subsection i.

[198] *R. v. Sockabasin*, [2003] N.B.J. No. 338, 261 N.B.R. (2d) 177, at paras. 14-16 (N.B.C.A.) (*per* Robertson J.A.); *R. v. Marshall*, [2003] N.S.J. No. 361, 218 N.S.R. (2d) 78, at paras. 25, 27-29 (N.S.C.A.) (*per* Cromwell J.A.), rev'd on other grounds *R. v. Marshall; R. v. Bernard (Marshall No. 3)*, [2005] S.C.J. No. 44, [2005] 2 S.C.R. 220 (S.C.C.).

[199] See Chapter 1, Section C, Subsection iv.

treaty and their members have rights under a particular treaty, and other Indians have no such rights in the territory covered by the treaty.[200]

This view may, however, be in tension in some circumstances with that expressed in *R. v. Shipman*. There, the Ontario Court of Appeal (LaForme J.A.) endorsed the proposition that a First Nation may grant permission to Indian persons with no rights under the First Nation's treaty, residing 900 kilometres distant, to "shelter" under the treaty rights in order to hunt pursuant to them, provided that there is evidence that at the date of the treaty the First Nation had a custom of "sharing the treaty resource with others seeking food and who were passing through the territory".[201]

The Federal Court of Appeal (Strayer J.A.) affirmed that the promise in Treaty no. 11 of 1899 to provide "assistance" to "any Indians ... desirous of following agricultural pursuits" does not extend to a member of an Indian party to the treaty establishing a farm in another part of Canada.

> [T]he usual basis upon which a treaty such as Treaty 11 would be negotiated with a given group of Indians or tribes in respect of a particular area would be their attachment to that area through traditional use since time immemorial. Once the treaty is signed, its interpretation cannot be divorced from that origin.[202]

The same conclusion was reached earlier by the Trial Division (Tremblay-Lamer J.) with respect to the provision of the treaty that "His Majesty agrees to pay the salaries of teachers to instruct the children in such a manner as His Majesty's government may deem advisable."[203]

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[200] *R. v. Lefthand*, [2007] A.J. No. 681, [2007] 10 W.W.R. 1, at para. 62 (Alta. C.A.) (*per* Slatter J.A.); *R. v. Martin*, [2008] A.J. No. 136, 90 Alta. L.R. (4th) 305, at paras. 22, 30-37 (Alta. Q.B.). See Chapter 8, Section D, Subsection iii; Chapter 9, Section C, Subsection ii.

[201] *R. v. Shipman*, [2007] O.J. No. 1716, 85 O.R. (3d) 585, at paras. 2-3, 6, 13, 26, 37, 41-42 (Ont. C.A.). See Chapter 6, Sections C and F.

[202] *Beattie v. Canada (Minister of Indian Affairs and Northern Development)*, [2002] F.C.J. No. 372, [2002] 3 C.N.L.R. 1, at para. 15 (F.C.A.). The conclusion was unaffected by the provision of the treaty that the Indian parties surrendered not only the tract described, almost entirely in the Northwest Territories, but also "all other lands wherever situated ... in any other portion of the Dominion of Canada." The Court (*per* Strayer J.A.) said, at para. 16: "[T]here was no suggestion by the appellant that her Ginseng farm at Merritt, British Columbia, was situated on such land to which she would have some ancestral claim."

[203] *Beattie v. Canada (Minister of Indian Affairs and Northern Development)*, [1998] 1 F.C. 105, at paras. 4, 40-42 (F.C.T.D.):

> [I]t is not conceivable that the Natives, at the time of signing, understood the terms of the education provision as conferring them a universal right to education, that is free schooling outside the defined treaty area or territory.
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> .....
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> [T]he proper interpretation of the education provision is that benefit would be provided only within the boundaries of the defined territory. This does not, in my opinion, render the provision meaningless. I would further add that such an interpretation does confer advantages upon treaty children. In fact, by virtue of s-s. 35(1) of the *Constitution Act, 1982*, they are constitutionally guaranteed to have access to free education. The extent of that constitutional safeguard is, in my opinion, as follows:

Evidence "not *limited* in terms of time or geography" (italics in original) but which instead provides "a broad-ranging global perspective that addresses the impact of colonization and treaty-making in general" is of little or no value in establishing "a proper understanding of the meaning that particular treaties held for the signatories at the time".[204]

Like aboriginal rights, treaty rights are collective rights, belonging to the aboriginal people as a whole, not to individual members,[205] and "are exercised by authority of the local community to which the accused belongs."[206] Treaty rights are not to be interpreted as if they are "common law property rights."[207] And in particular they cannot be alienated or assigned, even to a corporate body controlled by the community that holds the rights.[208]

It does not appear, however, that the commercial nature of treaty rights means that an individual member of the community requires community approval before exercising the right. In *R. v. Bernard*, the New Brunswick Court of Appeal majority (Robertson J.A., Daigle J.A. concurring) held that the communal nature signifies only that treaty rights are not traditional property rights, that no

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1. They are to have access to free education;

2. The free education, however, is confined to the area defined in the treaty;

3. The free education provided in the schools established therein must be akin or equivalent to the education provided to non-Native children in the public school system.

[204] *Sawridge Band v. Canada*, [2005] F.C.J. No. 1860, 275 F.T.R. 93, at paras. 66-72 (F.C.).

[205] *R. v. Sundown*, [1999] S.C.J. No. 13, [1999] 1 S.C.R. 393, at paras. 35-36 (S.C.C.); *R. v. Marshall (Marshall No. 2)*, [1999] S.C.J. No. 55, [1999] 3 S.C.R. 456, at para. 38 (S.C.C.).

[206] *R. v. Marshall (Marshall No. 2)*, [1999] S.C.J. No. 55, [1999] 3 S.C.R. 456, at para. 17 (S.C.C.). The quoted words concern the Nova Scotia treaty of 1760 there in question, but there appears to be no ground for not extending the point to treaties in general. *R. v. Shipman*, [2007] O.J. No. 1716, 85 O.R. (3d) 585 (Ont. C.A.) concerned the ability of the holder of treaty rights to hunt to permit aboriginal persons who do not have the right to nonetheless exercise the right. The Ontario Court of Appeal (*per* LaForme J.A.) held, at paras. 50, 52:

> [T]reaty rights are communal; any consent that may be granted must reflect respect for the community of treaty rights holders, which means that any consent granted to share the harvesting resource must weigh and consider the communal interest. In order to properly do this, the person capable of granting the consent would normally require the request in advance.
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> .....
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> In this case, although consent would have been granted after the fact by the Chief, there was no opportunity for the Chief, on behalf of the community, to consider and respond to historical Aboriginal custom. That is, he was not able to properly consider and weigh the communal rights and protection and conservation of the resource in advance.

See also paras. 43, 51, 53.

[207] *R. v. Sundown*, [1999] S.C.J. No. 13, [1999] 1 S.C.R. 393, at para. 35 (S.C.C.), citing *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075, at 1111-12 (S.C.C.). See above, this Chapter, Section A.

[208] *Anishnaabeg of Kabapikotawangag Resource Council Inc. v. Canada (Attorney General)*, [1998] O.J. No. 2045, [1998] 4 C.N.L.R. 1, at paras. 11-14 (Ont. C.J.), relying on *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010, at paras. 113-15 (*per* Lamer C.J.); *Queackar-Komoyue Nation v. British Columbia*, [2006] B.C.J. No. 2690, [2007] 1 C.N.L.R. 286, at para. 54 (B.C.S.C.). See this Chapter, Section B.

one member of the community has a right to exclude another from exercising the right, and that treaty rights are "not intended to support joint ventures with non-aboriginals". A member of the community can exercise the rights without community approval "unless the native community has validly imposed such a restriction on all members".[209] The Court of Appeal judgment was reversed on appeal, the Supreme Court of Canada (McLachlin C.J.) finding it unnecessary to discuss the issue of community authority.[210]

G. EXPRESS AND IMPLIED TERMS

Where it is established that a transaction constitutes a treaty, its scope is determined by its terms. "While construing the language generously, courts cannot alter the terms of the treaty by exceeding what 'is possible on the language' or realistic".[211]

The Court (Cory J.) has held that, in contradistinction to aboriginal rights,[212] which "flow from the customs and traditions of the native peoples" and "embody the right ... to continue living as their forefathers lived":

> Treaty rights, on the other hand, are those contained in official agreements between the Crown and the native peoples. Treaties are analogous to contracts, albeit of a very solemn and special, public nature. They create enforceable obligations based on the mutual consent of the parties. It follows that the scope of treaty rights will be determined by their wording, which must be interpreted in accordance with the principles enunciated by this Court.[213]

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[209] *R. v. Bernard*, [2003] N.B.J. No. 320, 230 D.L.R. (4th) 57, at paras. 162-69 (*per* Robertson J.A.), 205-06 (*per* Daigle J.A.) (N.B.C.A.).

[210] *R. v. Marshall; R. v. Bernard (Marshall No. 3)*, [2005] S.C.J. No. 44, [2005] 2 S.C.R. 220, at para. 36 (S.C.C.) (*per* McLachlin C.J.).

[211] *R. v. Marshall (Marshall No. 1)*, [1999] S.C.J. No. 55, [1999] 3 S.C.R. 456, at para. 78 (item 8) (S.C.C.) (*per* McLachlin J. dissenting), citing *R. v. Badger*, [1996] S.C.J. No. 39, [1996] 1 S.C.R. 771, at para. 76 (S.C.C.) (*per* Cory J.); *R. v. Sioui*, [1990] S.C.J. No. 48, [1990] 1 S.C.R. 1025, at 1069 (S.C.C.); *R. v. Horseman*, [1990] S.C.J. No. 39, [1990] 1 S.C.R. 901, at 908 (S.C.C.) (*per* Wilson J. dissenting on other grounds). The majority (*per* Binnie J.) in *Marshall No. 1* did not appear to disagree with McLachlin J. on this or any other of the "principles governing treaty interpretation" set out by her. The majority said, at para. 5: "The starting point for the analysis of the alleged treaty right must be an examination of the specific words used in any written memorandum of its terms."

[212] Perhaps the most consequential distinction is that, because of their disparate provenances, treaty rights are normally exercisable "alongside" rights and liberties of the same or a similar kind enjoyed by all persons, and thus guarantee only "equitable access", but aboriginal rights are, by definition, exclusive rights: *R. v. Marshall (Marshall No. 2)*, [1999] S.C.J. No. 66, [1999] 3 S.C.R. 533, at para. 38 (S.C.C.). On the distinction between aboriginal and treaty rights in this regard, see, further, Chapter 3, Section B, Subsection v; this Chapter, Section B, and below, next footnote; Chapter 9, Section B, Subsection iii, Parts c and d.

[213] *R. v. Badger*, [1996] S.C.J. No. 39, [1996] 1 S.C.R. 771, at para. 76 (S.C.C.) (*per* Cory J.). In *R. v. Sundown*, [1999] S.C.J. No. 13, [1999] 1 S.C.R. 393, at para. 35 (S.C.C.) (*per* Cory J.) the Court said, of aboriginal and treaty rights, that: "... they are the right of aboriginal people in common with other aboriginal people to participate in certain practices traditionally engaged in by particular aboriginal nations in particular territories". While this seems an adequate definition