

The Importance of Oral and Extrinsic Historical Evidence in Understanding Indian Treaties

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The True Spirit and Original Intent of Treaty 7. TREATY 7 ELDERS and TRIBAL COUNCIL with WALTER HILDEBRANDT, SARAH CARTER, and DOROTHY FIRST RIDER. Montreal and Kingston: McGill-Queen's University Press, 1996. 408 p. ISBN 0-7735-1522-4.

Bounty and Benevolence: A History of Saskatchewan Treaties. ARTHUR J. RAY, JIM, MILLER, and FRANK TOUGH. Montreal and Kingston: McGill-Queen's University Press, 2000. 299 p. ISBN 0-7735-2023-6.

Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Junior. WILLIAM C. WICKEN. Toronto: University of Toronto Press, 2002. 301 p. ISBN 0-8020-7665-3.

RÉSUMÉ Au cours des dernières années, les tribunaux ont appris aux Canadiens l'importance des témoignages oraux et d'autres preuves historiques extrinsèques qui précisent le contexte et apportent un éclairage nouveau sur la signification et l'interprétation des traités indiens. L'auteur commente trois livres qui explorent comment ce genre d'information historique aide tant les peuples autochtones que les non-autochtones à mieux comprendre le Traité no 7 en Alberta, de même que l'importance des six traités indiens de Saskatchewan. L'article porte également sur le rôle des historiens dans les salles d'audience ainsi que sur l'utilisation créatrice de la documentation extrinsèque lors du procès de Donald Marshall Jr. devant la Cour suprême du Canada, alors que les juges ont insufflé une nouvelle vie aux Traités de paix et d'amitié des Maritimes. Selon l'auteur, l'utilisation accrue des témoignages oraux et des preuves extrinsèques par les organismes juridictionnels qui doivent réinterpréter les traités se traduira par un fardeau accru pour les archivistes et les historiens. Cet activisme judiciaire a eu et continuera d'avoir un impact significatif sur la vie politique canadienne.

ABSTRACT In recent years, the Courts have instructed Canadians about the importance of oral testimony and other extrinsic historical evidence in providing context and insight into the meaning and interpretation of Indian treaties. The author reviews three books that explore how this genre of historical information assists both Native peoples

and non-Natives in gaining a better understanding of Treaty No. 7 in southern Alberta, as well as the importance of the six numbered Indian treaties in Saskatchewan. This article also examines the courtroom role of historians and the creative use of extrinsic documentation in the Supreme Court of Canada trial of Donald Marshall Jr. in which senior justices breathed new life and substance into the Maritime Peace and Friendship Treaties. The author advises archivists and historians of an increased burden on their activities, as oral testimony and other types of extrinsic evidence will be used increasingly by adjudicative bodies to provide a modern interpretation to provisions of Indian treaties. This judicial activism has had, and will continue to have, a significant impact on the Canadian polity.

These are three important and timely books on a subject – Canadian Indian treaties – which twenty years ago would not have generated much public attention or scholarly interest. Today, Indian treaties and the implementation of their historic provisions are a topic for intense public discussion. What factors have contributed to this increased public awareness? First, Indian treaties are now constitutional documents protected under Section thirty-five of the *Constitution Act, 1982*. Second, recent judicial activism has breathed new life and meaning into ancient treaty promises which, when implemented by government, have had a significant impact on local economies and fostered a sense of unease among natives and non-natives from the Maritimes to British Columbia. Given this situation, there is a need for books that will inform and contribute to the public debate on the role and place of Indian treaties in Canadian society.

Each of these books has a different analytical approach to Indian treaties and related issues. A unifying theme is that a simple reading of the written treaty text will not suffice to gain an understanding of the purpose, historical context, content, and expectations of the negotiating parties. The oral traditions of aboriginal participants and other extrinsic evidence associated with the treaty must be included in the analysis. This approach places a burden on archivists and historians to locate, preserve, and document all contemporary records, written or oral, relating to Indian treaty negotiations.

The authors of *The True Spirit and Original Intent of Treaty 7* have done an admirable job of presenting the oral historiography surrounding the negotiation of Treaty 7 in southern Alberta in 1877. The book represents the “collective memory” of over eighty elders from the Blood, Peigan, Siksika, Stoney, and Tsuu T’ina First Nations who recorded their thoughts and insights on the meaning of Treaty 7 on separate occasions in the 1970s and 1980s. According to the elders, Treaty 7 was a peace treaty, not a land cession treaty, in which Indian signatories agreed to “share” the land and resources with European settlers in exchange for education, annuity payments, reserve lands, and medical assistance. Thus the treaties were a form of social contract.

The authors make it clear that different world views, conflicting agendas, and linguistic differences affected each party’s subsequent interpretation of

treaty events. By examining the oral tradition and winter counts¹ of Treaty 7 First Nations, new light will be shed on the relationship between aboriginal negotiators and Canadian officials which, in turn, will contribute to a new discourse on the meaning of the treaty relationship.

The book is wonderfully illustrated with charcoal sketches and photographs, including short biographies of the major native leaders, missionaries, and government officials. To balance and enhance the elders' oral testimonies, the authors summarize the written accounts of the Treaty 7 negotiations recorded by Indian Commissioner Alexander Morris, Lieutenant Governor David Laird, missionaries Constantine Scollard and John McDougall, as well as by North West Mounted Police officers. The last three chapters analyse what contemporary scholars have had to say about Treaty 7 and about the other numbered Indian treaties.

Unfortunately *The True Spirit and Original Intent of Treaty 7* has some limitations. The first distressing note is found in the title, which suggests that some final historical truth has been arrived at concerning Treaty 7. This type of assertion makes any historian nervous. The second is more serious since it concerns methodology and, to a lesser degree, terminology.

According to the authors, the interviews with the Treaty 7 elders took place on two different occasions. The first round occurred in the 1970s as part of the Alberta Treaties and Aboriginal Rights Research Centre's research programme. Included were elders who had first-hand knowledge of the Treaty 7 negotiations. The second round of interviews took place in the 1980s when most of the elders present for the treaty negotiations had passed away. In both instances, however, we are not told the wording of the questions which were posed to the elders, and under what recording conditions the testimony was taken. Lack of such methodological information leaves the outsider wondering about the content of the answers. Did the interviewer's questions in any way predetermine the elders' answers?

In reference to terminology, the authors do not distinguish between "oral history" and "oral tradition." This sounds like quibbling, but it is an important distinction for the historian who must weigh the evidence. In short, oral histories are recollections of individuals who were eyewitnesses to or had personal experience with events occurring within their lifetime. The first set of interviews in the 1970s included elders who were actually present at the treaty negotiations. As oral history, their testimony would have more intrinsic value than the testimony from the second group who did not possess first-hand knowledge of events. Thus the second group, which presented narratives transmitted by word of mouth over at least a generation, represented the "oral tradition" of Treaty 7.

1 "Winter counts" are a pictorial form of oral history used to record significant events in Plains Indian history. People would look at drawings made of historical events that occurred throughout the year, such as births, deaths, wars, smallpox etc., and recall the events orally.

The issue of oral history versus oral tradition may not be important depending on the context in which the historical information is used. For example, if the accounts are used for educational purposes by First Nations, there are no major implications. However, if the oral documentation is presented to the courts as evidence, then one can expect that it will be questioned and rigorously evaluated against other evidentiary materials including written texts. For those interested in reading further on these issues, I would suggest they consult *Oral Narratives and Aboriginal Pasts: An Interdisciplinary Review of the Literature on Oral Traditions and Oral Histories* by Dr. Alexander von Gernet (Research and Analysis Directorate, Indian and Northern Affairs Canada, 1996). A companion piece, entitled *Handbook for Creating a Record of Aboriginal Oral Histories and Traditions*, provides a guide on how to undertake the gathering of oral testimony.

Bounty and Benevolence: A History of Saskatchewan Treaties is the work of three well-known Canadian academics. The book was sponsored by the Office of the Treaty Commissioner of Saskatchewan as a vehicle for public education. Unlike *The True Spirit and Original Intent of Treaty 7*, the authors of *Bounty and Benevolence* rely on the written record, often the government account of treaty negotiations, supplemented with contemporary speeches by the First Nation negotiators such as Piapot, Mistawasis, and Ahtakakup, just to mention a few.

Saskatchewan is covered by the numbered Indian treaties: 4 (1874), 5 (1875), 6 (1876), 8 (1899), and 10 (1906). Each treaty has its own origin and history but all were based on earlier precedents: the 1850 Robinson Treaties and Treaties 1, 2, and 3. There are several major themes. Native negotiators viewed the treaty negotiations in light of their experience in negotiating yearly trading arrangements with agents of the Hudson's Bay Company. Prescient and shrewd native leaders effectively substituted the benefits accruing to them from their dealings with the Company (which transferred its territory to Canada in 1870) for the "bounty and benevolence" of the Crown. In effect, as the buffalo disappeared, natives negotiated the basic requirements for a new way of life that would be compatible with settlement and agricultural development on the Prairies. Like the negotiators of Treaty 7, the Saskatchewan chiefs viewed the treaties, not as land cession documents, but as transactions that would result in the sharing of natural resources and provide a framework for shaping future relations with the newcomers.

For its part, Canadian government negotiators used a variety of negotiating strategies and ploys to encourage Indian compliance. For example, the treaties were characterized as "gifts" from a grateful Queen in which Indians would give up nothing by signing. In some instances Treaty Commissioner Alexander Morris went beyond his mandate and offered "signing bonuses" such as a medicine chest in Treaty 6 and a guarantee of food in case of pestilence and famine. Other federal negotiators granted additional hunting supplies for the

northern treaties. In the later, more northerly Saskatchewan treaties, the sensitive issue of reserve location was separated from the treaty negotiations to reduce possible Indian resistance.

As well, a number of outside promises were made in the treaties, which were then not included in the actual text. The Indian negotiators remembered these promises and forced their later inclusion. An example of this is in Treaty 8: The Treaty commissioners, in their report on negotiations promised that Indian people would be exempt from military service and taxation; however, the pledge was not included in the actual provisions of the treaty. In 2002, the Federal Court of Canada ruled in the case *Benoit v. Canada* that Indians in northern Saskatchewan, northeastern British Columbia, and the Northwest Territories were exempt from all forms of taxation because of the promise made by the commissioners in 1899. During the trial, the oral testimony of elders was admitted as evidence, and this information provided vital context to the Indian understanding of the promise of tax exemption. In reacting to the decision, the Canadian Taxpayers Federation and many media commentators wrongly viewed the decision as one based on race, not on an historic treaty obligation.

There were other problems. Since numbered Treaties 4, 5, and 6 predated the first consolidated *Indian Act* of 1876, many contemporary Indian leaders traced their relationship with the Crown and new colonists to the treaties, not to the *Indian Act*. The treaties were forward looking documents designed as a framework for future relations. The *Indian Act*, on the other hand, emphasized control of natives and the elimination of native lifestyles, languages, customs, and culture. This outcome was not part of the original spirit and intent of the treaties.

Bounty and Benevolence is part of the unfolding scholarship of reinterpreting the genesis, content, and impact of the Western numbered treaties on First Nations. First Nation leaders exerted a powerful influence on treaty-making, an influence that the older historiography failed to acknowledge. Indeed, the text of the numbered treaties should be considered incomplete and inaccurate without the aboriginal perspective. In many instances, these misunderstandings and omissions have led to the filing of specific land and treaty claims. In other instances, government's failure to implement treaty provisions regarding reserve land allocations has resulted in expensive Treaty Land Entitlement claims in Saskatchewan and Manitoba.

Bounty and Benevolence is an informative book. A companion piece on oral history, entitled *My Dream*, is being prepared by Harold Cardinal and Walter Hildebrandt. Unfortunately, the bibliography for *Bounty and Benevolence* is disappointing. James Morrison's comprehensive study of the Robinson Treaties is not cited and there is additional confusion with the authors of other texts; for example, Dr. Robert J. Surtees is not the author of *Research*

Reports on Treaties Four and Six, nor author of the article cited in *The Spirit of the Alberta Indian Treaties*, edited by Richard Price in 1979.

The most intriguing book of the three is Dr. William Wicken's *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Junior*. In this book, where history meets the law, the author raises questions regarding the relationship of text (the written document) and context (oral tradition and other "extrinsic" evidence). The main section of the book deals with Dr. Wicken's historical research on the Peace and Friendship Treaty of 1726, and its subsequent renewals in 1749, 1752, and 1760/1761. At strategic points, Dr. Wicken interjects vignettes from the courtroom and provides insightful commentary concerning his public role as an expert witness in Donald Marshall Jr.'s trial. He illustrates how historians and trial lawyers make different use of historical documents and events, and how judges can creatively interpret the historical evidence presented to them.

Dr. Wicken's personal journey started in the summer of 1993 when Donald Marshall Jr. of the Membertou Reserve was caught illegally selling eels. At trial, the chain of renewed Peace and Friendship Treaties stretching from 1726 to 1779 was examined historically, in particular the 1760–61 version, to determine whether they provided the Mi'kmaq with a right to trade fish to the British, and to what degree, if any, this treaty right was restricted. If Marshall was found not guilty, then the Mi'kmaq would possess a treaty-based right to modern commercial fishing.

Dr. Wicken's historical research is exhaustive and his argument persuasive. Space permits only a summary of the main points. Wicken's thesis is similar to that found in *Bounty and Benevolence*. The Mi'kmaq were skilled negotiators who saw treaty-making as a way to establish a working relationship with the British colonizers (after "Acadie" was acquired from the French in 1713). The 1726 treaty promised the signatories – Mi'kmaq, Maliseet, Penobscot, and Passamaquoddy – would not be "... Molested in their Persons, Hunting Fishing and Shooting & planting on their Grounds...."

Subsequent renewals of the 1726 treaty took into account new realities in colonial Nova Scotia such as expanded European settlements. The 1760–61 treaty renewal contained a new clause that promised the establishment of a government "truckhouse" (trading post) for promoting Indian trade. Historical records from the period indicate that the Mi'kmaq visited the trading posts with furs, eels, and fish as barter for British goods.

For the British, the Peace and Friendship treaty texts were used to establish a general legal framework for mediating relations with the Mi'kmaq. As products of an imperial bureaucracy, the treaties were drafted in a manner consistent with colonial policies. Any concerns expressed by Mi'kmaq delegates arising from local issues were not included in the written English text.

Henceforth, the written text became the principal source for understanding

the meaning of the treaties. Any words spoken by Mi'kmaq delegates when the treaties were negotiated became less important in later interpretations. Two social acts – the writing of the treaties and later accounts of the transactions – were embodied in the written culture of the British. This simplified future understandings of the Peace and Friendship treaties by emphasizing the British view while marginalizing Mi'kmaq strategy and understanding.

At the Marshall trial, a central element of the historical evidence presented and of the legal arguments was a discussion of how the series of Peace and Friendship treaties should be read and interpreted *vis-à-vis* a Mi'kmaq right to trade fish with the British. The legal arguments for both the Crown and defense are outlined in Dr. Wicken's account of the two trials: the first in the Nova Scotia Court of Appeal, the second in the Supreme Court of Canada. In brief, Marshall lost his case at the lower court level. The trial judge did agree that the trade clause in 1760–61 treaties gave the Mi'kmaq a right to engage in a commercial fishery, but the right to trade disappeared with the demise of the truckhouses in 1762. The judge adopted a literal interpretation of the trade clause, seeing it as a temporary measure employed by the British to secure Mi'kmaq friendship and neutrality at a time when Great Britain was attempting to establish its suzerainty over the region. Once this was achieved, the British authorities rescinded special trade regulations relating to the Mi'kmaq.

Donald Marshall Jr. appealed the lower court's decision to the Supreme Court of Canada, which overturned the decision in 1999. The question before the Supreme Court was whether the written treaty text incorporated all agreements made between the Mi'kmaq and the British. The Supreme Court decision ruled that the lower court judge had "erred in law" by failing to give adequate weight to the concerns and perspective of the Mi'kmaq people. In interpreting treaty texts the courts were required to assess how both parties understood them.

The Supreme Court judgement noted that there were extant records of discussions which preceded the treaty's signing – extrinsic historical evidence – which informed the written text, and that the honour of the Crown required that the Mi'kmaq and British perspectives be given equal weight. The documents in question were Nova Scotia Council minutes which recorded that Governor Lawrence had asked the Maliseet delegates if they had anything to propose. The Maliseet requested inclusion of a truckhouse " ... for furnishing them with necessaries, in Exchange for their peltry...." This request was integrated into the treaty text. The Supreme Court concluded that the truckhouse system provided an opportunity for the Maliseet and Mi'kmaq to trade furs, fish, and other items for "necessaries."

As Dr. Wicken describes, the term "necessaries" then took on new meaning, for it enabled the justices of the Supreme Court to escape historical and legal tangles and be creative. At stake was the Minister of Fisheries and Oceans' authority to regulate the fishery, a power that had to be upheld while accom-

modating the historical evidence. To the Supreme Court, “necessaries” equated with Marshall’s ability to make a “moderate livelihood.” However, the Minister’s absolute authority to regulate the fishery limited Marshall’s ability to make a moderate living by fishing, and therefore federal fisheries legislation was an unjustified infringement of his historic treaty right. The charges against Donald Marshall Jr. were dismissed.

The violent reaction of non-native fishermen in Atlantic Canada to the Supreme Court’s decision was unprecedented. The media were filled with accounts of armed clashes between opposing parties. Newspaper editorials questioned the validity of centuries old Indian treaties. The Supreme Court took the unheard of step of issuing a clarifying statement that narrowed the scope of the original decision. For its part, the federal government allocated \$500 million to buy out the fishing licences of non-natives and distribute them to aboriginal fishers. As Dr. Wicken wryly noted, the public role and impact of an historical researcher as expert witness had unforeseen consequences for all concerned.

In conclusion, these three books raise a number of concerns and issues for archivists and historians. Indian treaties must be viewed in their historical context: a simple reading of the treaty text will not suffice. Understanding the context of a treaty means examining oral evidence and also searching out other extrinsic historical evidence relating to treaty negotiations and implementation of treaty provisions. As noted, Indian treaties are constitutional instruments and their allied historical documents carry significant interpretive weight. When researching treaty-related issues, archivists and historians should be aware of the significance of their activities and the profound consequences their document discoveries may have on the Canadian polity.