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Dwight Newman

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# Contractual and Covenantal Conceptions of Modern Treaty Interpretation

Dwight Newman<sup>\*</sup>

## I. INTRODUCTION

After a long period of inactivity on treaty negotiations with Canada's Aboriginal communities, the 1975 James Bay and Northern Québec Agreement marked the start of a new phase of treaty negotiation, and the 1998 Nisga'a Agreement launched this new phase's intensification, as the latter was to be followed by numerous others taking on a similar form.<sup>1</sup> Both judicial and constitutional pressure played a significant part in fostering this modern phase of Aboriginal treaty-making. The 1973 *Calder v. British Columbia (Attorney General)* decision<sup>2</sup> of the Supreme Court of Canada announced that the game was up on any future denials of the legal standing of Aboriginal title, the 1982 constitutional amendments established that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed,"<sup>3</sup> and the 1990s case law of the Supreme Court of Canada began simultaneously to give full-fledged legal force to these rights and to urge negotiations

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<sup>\*</sup> Professor of Law, University of Saskatchewan. I thank for their helpful comments on a prior form of this article Ben Berger, Julie Jai, Kent McNeil, Bruce Ryder, Ria Tzimas, Kerry Wilkins and other participants at the session of the Osgoode Constitutional Cases Conference 2011 at which it was presented.

<sup>1</sup> On the history of Canadian Aboriginal treaties, see generally J.R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009) [hereinafter "Miller"]. On the Nisga'a Agreement, see also Tom Molloy, *The World is Our Witness: The Historic Journey of the Nisga'a Into Canada* (Calgary: Fifth House, 2000); Sari M. Graben, "The Nisga'a Final Agreement: Negotiating Federalism" (2007) 6 *Indigenous L.J.* 63.

<sup>2</sup> [1973] S.C.J. No. 56, [1973] S.C.R. 313 (S.C.C.) [hereinafter "*Calder*"].

<sup>3</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 35(1).

of outstanding issues.<sup>4</sup> The latter stance was arguably further supported through the duty to consult doctrine that carries on the aspiration to negotiated reconciliation.<sup>5</sup>

Only in 2010 has the Supreme Court of Canada become directly engaged with the interpretation of these modern Aboriginal treaties. Its engagement comes in a blockbuster pair of cases that divided the Court. These cases were keenly anticipated, with some having written of them previously as an upcoming opportunity for the Court to define the principles of modern treaty interpretation.<sup>6</sup> These two cases were both complex and interlayered with a number of different issues, so it is worth briefly situating the differences in them slightly more broadly.

In *Quebec (Attorney General) v. Moses*,<sup>7</sup> the Court split 5-4 on interpretation of parts of the James Bay and Northern Québec Agreement (“JBNQA”) in the context of a dispute about the application of federal environmental assessment processes after the forms of participative environmental assessment negotiated in the JBNQA. Justice Binnie’s majority judgment concluded that the JBNQA did not oust federal jurisdiction. In dissent, LeBel and Deschamps JJ. held that the specific terms of the JBNQA had deliberately created one assessment process that would embody environmental and participatory aspects, with specific terms of the Agreement then precluding the other level of government from applying additional processes.

In *Beckman v. Little Salmon/Carmacks First Nation*,<sup>8</sup> the Court considered whether an ongoing duty to consult applied to the Crown in the context of arguments that the 1997 Little Salmon/Carmacks First Nation Agreement excluded this requirement. This case featured a pair of judges fracturing off from the rest of the Court with a perspective and language

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<sup>4</sup> See also generally Dwight G. Newman, “Negotiated Rights Enforcement” (2006) 69 Sask. L. Rev. 119 (examining the phenomenon of seeking to have certain rights implemented through negotiation, and resulting implications).

<sup>5</sup> See Dwight Newman, “Institutional Roles and Chief Justice Lamer’s Aboriginal Rights Jurisprudence” (2009) 46 S.C.L.R. (2d) 77. See also *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] S.C.J. No. 43, [2010] 2 S.C.R. 650, at para. 38 (S.C.C.): “As the post-*Haida Nation* case law confirms, consultation is ‘[c]oncerned with an ethic of ongoing relationships’ and seeks to further an ongoing process of reconciliation by articulating a preference for remedies ‘that promote ongoing negotiations’: D.G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (2009), at p. 21.”

<sup>6</sup> See especially Julie Jai, “The Interpretation of Modern Treaties and the Honour of the Crown: Why Modern Treaties Deserve Judicial Deference” (2009) 26 N.J.C.L. 25 [hereinafter “Jai”].

[2010] S.C.J. No. 17, [2010] 1 S.C.R. 557 (S.C.C.) [hereinafter “*Moses*”].

<sup>8</sup> [2010] S.C.J. No. 53, [2010] 3 S.C.R. 103 (S.C.C.) [hereinafter “*Little Salmon*”].

rarely seen in recent Aboriginal rights cases, but, as I will discuss, continuous with the *Moses* decision itself. Justice Binnie wrote for seven judges in holding that the duty to consult is a constitutional requirement that cannot be contracted away but that the terms of the Agreement shaped the implications of the duty to consult on the particular facts, such that it had been met with even limited steps. In her concurring judgment, Deschamps J. held that the Agreement in question had in fact addressed and defined consultation requirements and would prevail over the duty to consult existing outside the treaty. How, one might ask, did the judges fracture so significantly in these two cases? Much came down to nuances of interpretation of the modern treaties.

Although a number of different matters were at stake, the development to note in these two cases on the issue at hand is the adoption of a different attitude to and philosophy of Aboriginal treaty interpretation in the context of modern Aboriginal treaties. This attitude stems from a different form of and background to these treaties, and, in Part II, I will argue that although the judges split over some matters in these cases, there is actually a remarkable degree of agreement amongst the different judges on the different principles applicable to modern treaty interpretation. I will suggest that the judges on both sides of the splits affirm a strong adherence to the text of modern treaties, albeit with the shared aim of interpreting them to achieve certain purposes. The judges actually adopt the implicit analogy with contractual interpretation. In Part III, I will seek to show in more general terms how interpretation can take on a more contractual conception or what I will call a more “covenantal” conception of the nature of treaties.<sup>9</sup> In Part IV, I will raise concerns that the dominant thrust of these recent cases toward the contractual approach may well carry other very significant consequences that may yet enter into Aboriginal law in unanticipated ways. In Part V, however, I will introduce a counterpoint to the triumph of contractual interpretation, arguing that some fragments of the reasoning in these cases leave alive the possibility of more covenantal readings of even the modern treaties, with the jurisprudence to this point thus continuing to straddle different possibilities and to leave open different futures that will continue to be defined by the courts, by the parties, and by Canadians more generally.

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<sup>9</sup> As I will discuss below, the term is one designed to embrace sacred dimensions of treaty-making. To be clear, there is no connection intended to the contract-related concept of a “restrictive covenant”.

## II. PRINCIPLES OF MODERN TREATY INTERPRETATION

The key doctrinal point to note is that the Court defines in the recent cases a clear set of lines between historical treaty interpretation and modern treaty interpretation. This is apparent right from the outset in *Moses*, with Binnie J. specifically distinguishing the task at hand from that in past case law on the interpretation of historical treaties, and several features of his five-judge majority judgment in *Moses* notably set the tone for the other judgments. Distinguishing the context in *Moses*, involving an interpretation of a provision of the JBNQA, from the Court's 1996 decision in *R. v. Badger*,<sup>10</sup> Binnie J. writes that:

[a]t issue in that case was an 1899 treaty. The contract analogy is even more apt in relation to a modern comprehensive treaty whose terms (unlike in 1899) are not constituted by an exchange of verbal promises reduced to writing in a language many of the Aboriginal signatories did not understand ... The text of modern comprehensive treaties is meticulously negotiated by well-resourced parties.<sup>11</sup>

One key result of this distinction is a strong adherence to the text of the modern treaty, with Binnie J. going on to emphasize “[t]he importance and complexity of the actual text” as a distinguishing factor in the context of the modern treaties and thus something to be prioritized in interpretation.<sup>12</sup>

Several features of Binnie J.'s emphasis on the actual text mark differences from the Court's approach to interpretation in past cases in the context of historical treaties. First, the emphasis now is on the text rather than on any external promises that may have been given orally. Past case law on historical treaties has responded to a different context in which “[t]he treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement,”<sup>13</sup> with the result that the words of the treaty were less significant and accompanying oral promises could be very significant in interpretation of the treaty.<sup>14</sup> Second, the emphasis is on a reading

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<sup>10</sup> [1996] S.C.J. No. 39, [1996] 1 S.C.R. 771 (S.C.C.) [hereinafter “*Badger*”].

<sup>11</sup> *Moses*, *supra*, note 7, at para. 7.

<sup>12</sup> *Id.*

<sup>13</sup> *Badger*, *supra*, note 10, at para. 52.

<sup>14</sup> *Id.*, at paras. 55-58. See also *R. v. Marshall*, [1999] S.C.J. No. 55, [1999] 3 S.C.R. 456, at para. 12 (S.C.C.) [hereinafter “*Marshall No. 1*”]; *Ermineskin Indian Band and Nation v. Canada*, [2009] S.C.J. No. 9, [2009] 1 S.C.R. 222, at para. 56 (S.C.C.).

of the treaty provisions' natural legal effect rather than on particular techniques of construction in favour of the Aboriginal treaty-making partner as had been present in the past jurisprudence on historical treaties. Past interpretation of historical treaties was premised, at least in theory, on the famous *Nowegijick* principle that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians."<sup>15</sup> This principle was reaffirmed in *Badger*, where Cory J. wrote that "any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed."<sup>16</sup> Third — and on a matter to which I will return in Part III — Binnie J.'s language now adheres to analogies to contract interpretation, which Binnie J. specifically accepts and calls "even more apt" than in historical contexts.<sup>17</sup> This adoption of contractual language contrasts with Binnie J.'s prior shrinking from such language in *Marshall (No. 1)*, where he wrote of a treaty provision that "[t]his was not a commercial contract"<sup>18</sup> and adopted interpretive techniques as far removed from the contractual as possible.

One might initially be inclined to read *Moses* as dividing the judges based on whether they would look to considerations apart from the text itself, with Binnie J.'s majority judgment then almost seeming like a majority in favour of simple textual construction and the dissent of LeBel and Deschamps JJ. then being a strong note in favour of ongoing purposive interpretation of treaties. However, to perceive matters in this way would be a mistake in several ways. First, LeBel and Deschamps JJ. are fully in accord with Binnie J.'s emphasis on the text of modern treaties. They agree with distinguishing modern treaties from historical treaties, stating that "[t]he Agreement is far more comprehensive in scope than either the treaties of peace and friendship or the numbered treaties considered by this Court in a number of cases in which the analytical framework for interpreting the historical treaties between

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<sup>15</sup> *R. v. Nowegijick*, [1983] S.C.J. No. 5, [1983] 1 S.C.R. 29, at 36 (S.C.C.) [hereinafter "*Nowegijick*"].

<sup>16</sup> *Badger*, *supra*, note 10, at para. 41. Consider also the acceptance of the principle that treaties would not freeze rights, even if they constrained them to those constituting logical evolutions of treaty rights: *R. v. Marshall*; *R. v. Bernard*, [2005] S.C.J. No. 44, [2005] 2 S.C.R. 220 (S.C.C.).

<sup>17</sup> *Moses*, *supra*, note 7, at para. 7.

<sup>18</sup> *Marshall No. 1*, *supra*, note 14, at para. 52.

certain First Nations, Canada and Great Britain was developed.”<sup>19</sup> It is not insignificant to their approach that “all parties to the Agreement were represented by counsel, and the result of the negotiations was set out in detail in a 450-page legal document.”<sup>20</sup> Indeed, they are even in accord with the contract analogies, stating that “[t]he Agreement settles the parties’ mutual rights and obligations, and is clearly binding on the parties in the same way as any ordinary private law contract would be.”<sup>21</sup>

There is, to be sure, a slightly broader contextual tone to the dissenting judgment. Justices LeBel and Deschamps even quote at some length past statements on treaty interpretation from the historical context.<sup>22</sup> They affirm a past statement by McLachlin J. (as she then was) oriented against simple categories of treaties, accepting that it would be best to avoid any practice of “slotting treaties into different interpretive categories.”<sup>23</sup> However, they nonetheless see modern treaties as having been developed in carefully developed forms and, for instance, specifically reject the *Nowegijick* principle in the modern treaty context.<sup>24</sup>

Justices LeBel and Deschamps thus arrive at a principle of modern treaty interpretation phrased this way:

When interpreting a modern treaty, a court should strive for an interpretation that is reasonable, yet consistent with the parties’ intentions and the overall context, including the legal context, of the negotiations. Any interpretation should presume good faith on the part of all parties and be consistent with the honour of the Crown. Any ambiguity that arises should be resolved with these factors in mind.<sup>25</sup>

Although their interpretive approach refers explicitly to intention and reasonable interpretation, thus freeing the way for them to examine some of the practicalities of the issue at play, this element is not actually absent from Binnie J.’s approach. Justice Binnie tests his textual reading against broader consequences in the very same paragraph where he refers to the

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<sup>19</sup> *Moses*, *supra*, note 7, at para. 98.

<sup>20</sup> *Id.*, at para. 118. *Cf. Little Salmon*, *supra*, note 8, at para. 54 (Binnie J. stating that “[t]oday’s modern treaty will become tomorrow’s historic treaty. The distinction lies in the relative precision and sophistication of the modern document.”).

<sup>21</sup> *Moses*, *supra*, note 7, at para. 92.

<sup>22</sup> *Id.*, at para. 107, quoting nine principles from *Marshall No. 1*, *supra*, note 14, at para. 78 (dissenting judgment of McLachlin J., as she then was).

<sup>23</sup> *Moses*, *supra*, note 7, at para. 114, quoting from *Marshall No. 1*, *supra*, note 14, at para. 80.

<sup>24</sup> *Moses*, *id.*

<sup>25</sup> *Id.*, at para. 118.

skilled drafting of the text and urges respect for the text as agreed.<sup>26</sup> He also considers his reading against broader constitutional considerations, seemingly finding support for his textual approach in its adherence to broader presumptions.<sup>27</sup> His discussion of text is simultaneously about practical implications.<sup>28</sup>

There is every reason to think that both the majority and dissenting opinions in *Moses* adopt an interpretive approach geared to attend particularly to a closely negotiated text and to sensible readings of it that fit with the intentions that can reasonably be ascribed to it. Such an approach to interpretation is of course in keeping with that in other areas of law, with a careful balance of textual identification of subjective purpose and testing against objective purpose,<sup>29</sup> in place of special considerations as had been applied in the historical treaty interpretation context.

Similar principles animate the analysis in the *Beckman v. Little Salmon/Carmacks First Nation* judgments. In this case, Binnie J. writes for seven judges and again emphasizes that “[u]nlike their historical counterparts, the modern comprehensive treaty is the product of lengthy negotiations between well-resourced and sophisticated parties.”<sup>30</sup> The result is that the first resort in determining consultation obligations related to the treaty is the text of the treaty itself:

When a modern treaty has been concluded, the first step is to look at its provisions and try to determine the parties’ respective obligations, and whether there is some form of consultation provided for in the treaty itself. If a process of consultation has been established in the treaty, the scope of the duty to consult will be shaped by its provisions.<sup>31</sup>

Although for the majority the duty to consult can continue to operate as a parameter outside the treaty if there are areas in which the treaty leaves differences of interpretation,<sup>32</sup> the text of a detailed treaty will nonetheless take priority in defining when the duty to consult applies.

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<sup>26</sup> *Id.*, at para. 12.

<sup>27</sup> *Id.*, at para. 13.

<sup>28</sup> See, e.g., *id.*, at para. 51.

<sup>29</sup> For a broad account of interpretation of legal texts in similar terms, see Aharon Barak, *Purposive Interpretation in Law* (Princeton: Princeton University Press, 2005) [hereinafter “Barak”].

<sup>30</sup> *Little Salmon*, *supra*, note 8, at para. 9.

<sup>31</sup> *Id.*, at para. 67.

<sup>32</sup> *Id.*, at paras. 62, 69.



In a separate opinion in the case, Deschamps J. (with the agreement of LeBel J., her duet partner in *Moses*) is even firmer on the relevance of the text, suggesting that the addition of any further obligations apart from those contained in the treaties would be counter to the very purpose of a treaty:

The Crown's exercise of its rights under the treaty is subject to provisions on consultation. To add a further duty to consult to these provisions would be to defeat the very purpose of negotiating a treaty. Such an approach would be a step backward that would undermine both the parties' mutual undertakings and the objective of reconciliation through negotiation. This would jeopardize the negotiation processes currently under way across the country.<sup>33</sup>

Although Deschamps J. considers her reasons for her concurring opinion "very different" from those of Binnie J.,<sup>34</sup> both judgments are again attentive to text as a dominant feature in modern treaty interpretation. That said, there is a very different tone present in the judgment of Deschamps J., as she characterizes the Aboriginal community litigating in the case as "reneg[ing] unilaterally on its constitutional undertaking" in a manner that "could result in a paternalistic legal contempt, compromise the national treaty negotiation process and frustrate the ultimate objective of reconciliation".<sup>35</sup> The language of "reneging" has not typically been used to describe the conduct of Aboriginal treaty partners. In fairness, it should be said that this language is not different than that of LeBel and Deschamps JJ. in *Moses*, where they suggested that the federal government was "unilaterally reneg[ing] on its own solemn promises".<sup>36</sup> Justices LeBel and Deschamps, even more explicitly than Binnie J., see the agreement contained within a treaty as especially important to uphold for broader consequentialist reasons associated with the treaty negotiation and reconciliation process. And the prospect of a party reneging is so disturbing to this process that the word appears repeatedly in Deschamps J.'s discussion in *Little Salmon*, the prospect undermining all possibilities of treaties furthering reconciliation.<sup>37</sup>

The concurring reasons in *Little Salmon* actually go on to discuss the significance of legal certainty for Aboriginal parties and to question

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<sup>33</sup> *Id.*, at para. 91.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*, at para. 107.

<sup>36</sup> *Moses, supra*, note 7, at para. 58.

<sup>37</sup> *Little Salmon, supra*, note 8, at paras. 107, 109, 111, 112.

suggestions that any relational understanding of treaties leads anywhere else.<sup>38</sup> As Deschamps J. goes on to state, “[h]aving laboured so hard, in their common interest, to substitute a well-defined legal system for an uncertain normative system, both the Aboriginal party and the Crown party have an interest in seeing their efforts bear fruit.”<sup>39</sup>

There are, to be sure, genuine differences between Binnie J.’s positions and those of LeBel and Deschamps JJ. in these cases on various matters, including on treaty interpretation. But emphasizing and exaggerating these differences would distract from the dominant commonality whereby all the judges have come to agreement that modern treaties are to be approached in a manner suited to their detailed negotiated text, that approaching them with deep attention to text is the primary means of interpreting them to achieve their purposes, and that failing to approach them in this way undermines processes of reconciliation underway in various ongoing negotiations. Modern treaty interpretation is fundamentally different from the approaches the Court has taken to historical treaty interpretation.

### III. DISTINGUISHING CONTRACTUAL AND COVENANTAL CONCEPTIONS OF TREATIES

The distinction between modern and historical treaties might be thought to simply instantiate the broader principle that different types of texts generally or legal texts specifically are subject to different types of interpretation (or at least to different emphases even within shared purposive approaches).<sup>40</sup> However, at the same time, some of the language within the recent judgments draws analogies between modern treaty interpretation and other kinds of interpretation, with the references to contractual interpretation being perhaps the most striking.<sup>41</sup> The idea of referring to contractual interpretation in this context is not unprecedented. To take just one example, the decision on historical treaty interpretation in *Badger* referred briefly to contracts, stating that “[t]reaties are analogous to contracts, albeit of a very solemn and special, public na-

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<sup>38</sup> *Id.*, at paras. 110-111.

<sup>39</sup> *Id.*, at para. 112.

<sup>40</sup> *Cf.*, generally Barak, *supra*, note 29.

<sup>41</sup> To say this much is not, of course, to deny the general analogies between various kinds of interpretation: see, *e.g.*, *id.*

ture.”<sup>42</sup> And, indeed, Julie Jai has explicitly argued for the appropriateness of using contractual interpretation principles in the context of modern treaties, arguing, first, that such principles are appropriate in this context<sup>43</sup> and, second, that it would even be appropriate to adopt specific principles from the contract law context. She writes, “[i]t is possible that other canons of construction from either contract or statutory interpretation such as *contra proferentem* and *espressio [sic] unius* may also be applied in an appropriate case to assist in resolving a treaty interpretation dispute.”<sup>44</sup> However, just what the application of contract-like principles will mean in the modern treaty context is considerably more complex than may first appear and, indeed, may have very significant implications that could be of greater concern than first suspected.

Additional complexity presents itself swiftly. A reference to contractual interpretation will potentially carry different connotations for different judges, notably as between those from common law and civilian backgrounds. Although there may be congruence between elements of the ways in which common law and civil law traditions approach contractual interpretation, there are at the same time key differences in respect of the role in contractual interpretation for something like reasonable expectations.<sup>45</sup> Justice Binnie, as compared to LeBel and Deschamps JJ., might then have conceived of the significance of contractual analogies differently.<sup>46</sup>

At the interstices of legal traditions, treaty interpretation evokes different kinds of possible analogies. The contractual analogy is of course not the sole possible analogy, and perhaps not even the most intuitive analogy. Indeed, although Julie Jai’s recent argument has explicitly called for the use of contractual analogies on modern treaties,<sup>47</sup> Aboriginal law scholars have generally eschewed such an analogy (although their condemnations of it have admittedly typically flowed in the context of

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<sup>42</sup> *Badger*, *supra*, note 10, at para. 76.

<sup>43</sup> Jai, *supra*, note 6, at 56.

<sup>44</sup> *Id.*, at 59.

<sup>45</sup> For an important recent discussion, see Sébastien Grammond, “Reasonable Expectations and the Interpretation of Contracts Across Legal Traditions” (2010) 48 C.B.L.J. 345. For another recent statement on other differences, see also Catherine Valcke, “Contractual Interpretation at Common Law and Civil Law: An Exercise in Comparative Legal Rhetoric”, in Jason W. Neyers, Richard Bronaugh & Stephen G.A. Pitel, eds., *Exploring Contract Law* (Oxford: Hart Publishing, 2009) 77.

<sup>46</sup> And, of course, contractual interpretation might be different yet again within indigenous legal traditions, if all of the communities involved are seen as important!

<sup>47</sup> Jai, *supra*, note 6, at 56.

historical treaties).<sup>48</sup> They have preferred to think of treaties as constitutional accords,<sup>49</sup> agreements embodying the honour of the Crown,<sup>50</sup> agreements sharing jurisdiction in a manner analogous to federalism,<sup>51</sup> or indeed components of the constitution of the modern Canadian state.<sup>52</sup>

An alternative conception of treaties, applicable to modern treaties as much as historic ones, is as what I will call “covenants” establishing or shaping relationships between peoples or communities, or embodying what Jim Miller has recently described as “foundational documents establishing the bases of relations between indigenous and immigrant peoples”.<sup>53</sup> Miller uses the term “covenant” in the title of his book on the history of Aboriginal treaty-making,<sup>54</sup> presumably drawing the term in part from the historical Covenant Chain alliance in Iroquoia<sup>55</sup> but also including it in a list of terms for agreements as a term referencing an agreement with some form of sacred character. My intent in using the term is indeed partly to refer to a sacred or spiritual character that many First Nations consider present in the treaties,<sup>56</sup> with the relationships that treaties embody not being based just on positivist law but also on the requirements of morality as between communities.<sup>57</sup> 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

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<sup>48</sup> See, e.g., Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001), at 140-44.

<sup>49</sup> *Id.*, at 151-56.

<sup>50</sup> J. Timothy S. McCabe, *The Honour of the Crown and Its Fiduciary Duties to Aboriginal Peoples* (Markham, ON: LexisNexis Canada, 2008), at 75-84.

<sup>51</sup> James [Sákéj] Youngblood Henderson, “Empowering Treaty Federalism” (1994) 58 Sask. L. Rev. 241.

<sup>52</sup> Gordon Christie, “Justifying Principles of Treaty Interpretation” (2000) 26 Queen’s L.J. 143. See also generally James [Sákéj] Youngblood Henderson, “Interpreting *Sui Generis* Treaties” (1997) 36 Alta. L. Rev. 46.

<sup>53</sup> Miller, *supra*, note 1, at 300.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*, at 49ff.

<sup>56</sup> See, e.g., John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010), at 25.

<sup>57</sup> See, e.g., *id.*, at 24-28. The requirements of morality as between communities are of course complex. I comment on some aspects of them in Dwight Newman, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (Oxford: Hart Publishing, 2011).

relationships between communities that have a fundamentally moral character to them.<sup>58</sup>

A covenantal conceptualization of treaties would essentially see them as agreements between political communities expressing the terms of the ongoing evolution of relationships between those communities. To see them as such does not mean ignoring their express terms. Nonetheless, a covenant, in this sense, differs from a contract in several key ways. It concerns the establishment of the terms of 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. The preferred remedial approaches in the case of faltering by a party will resemble more those of the duty to consult than damages claims after so-called “efficient breaches”.<sup>59</sup> To borrow Robert Cover’s famous term, a covenant offers a “jurisgenesis” of a new normative intersocietal relation.<sup>60</sup> An overly stringent contractual approach, taking it at its harshest possibilities, runs the alternative risk of “juricide” and the presumed contracting away of legal orders.<sup>61</sup>

A covenantal conception of treaties would make room for the argument by the Aboriginal parties in the context of the recent judgments, especially in the context of the *Little Salmon* case, in which their counsel

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<sup>58</sup> The term “covenant” obviously has specific referents within Judeo-Christian traditions that are not those adopted here. Similarly, Sákéj Henderson has used the term as the English-language translation of certain gifts from the Creator to First Nations (James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: University of Saskatchewan Native Law Centre, 2006), at 129-34), which again are not the specific referent here. Although the term has specific referents in particular communities’ contexts, it has also functioned as a broader term to describe foundational political agreements in various contexts. See, e.g., the four-part series of Daniel J. Elazar on the covenant tradition in politics, particularly the fourth volume, *Covenant and Civil Society: The Constitutional Matrix of Modern Democracy* (Piscataway, NJ: Transaction Publishers, 1999). It bears noting that the attempt to describe fundamental constitutional relationships has not infrequently had to draw on metaphors from religious and spiritual traditions, such as in recent talk of “reconciliation” and in conceptions of “subsidiarity”.

<sup>59</sup> There are of course differing views on the doctrine of “efficient breach” in the contract context: for a classic statement more critical of efficient breach, see, e.g., Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge: Harvard University Press, 1981).

<sup>60</sup> Robert M. Cover, “Foreword: *Nomos* and Narrative” (1983) 97 Harv. L. Rev. 4, at 11.

<sup>61</sup> To address a possible counterargument here, the covenantal conception is more attuned to maintaining plural legal systems, whereas the contractual approach will in some instances be attuned specifically to wiping out some legal norms. There is not, as one reviewer put it, “the same amount of law” on both conceptions.

argued that even the modern treaty was designed to foster relationships.<sup>62</sup> The judgment of Deschamps J. in the *Little Salmon* case questions whether the relationship-building understanding of treaties expressed by the Aboriginal parties in the case — one closely fitting with what I have called a covenantal conception — actually reflects a different understanding from that of the government lawyers arrayed against them. She questions the oft-repeated claim that legal certainty is an objective of the Crown only, saying that “[e]xcessive weight should not be given to the arguments of the parties to this case, as their positions have clearly become polarized as a result of the adversarial context of this proceeding.”<sup>63</sup> She also suggests that “[i]t is also wrong, in my opinion, to say that Aboriginal peoples’ relational understanding of the treaty is incompatible with the pursuit of the objective of legal certainty.”<sup>64</sup> This argument is fundamentally oriented toward broader objectives of reconciliation rather than toward the case before the Court. It is an unusual claim to suggest that parties’ own arguments should not be given “excessive weight” in understanding what those parties seek. A judge would not normally accuse specific parties of this sort of false consciousness. However, Deschamps J. is predominantly concerned with the long-term implications of different understandings of treaty negotiation and worries that adversarial proceedings have distracted from this longer-term objective presumably shared by all.

It may be true that there is less incompatibility than one might presume as between relational understandings of treaties (those seeing them as concerned with establishing the foundational relationships between the parties, or forming the covenant between the parties, in my terminology) and understandings of treaties as oriented to establishing legal certainty. There are certainly dangers of creating false dichotomies as between Aboriginal and Western worldviews. However, it is also a mistake to

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<sup>62</sup> Several portions of the oral argument, accessible on the Supreme Court of Canada website at <<http://www.scc-csc.gc.ca/case-dossier/cms-sgd/webcast-webdiffusion-eng.aspx?cas=32850>> are illuminating on this point. The argument for the respondent from Jean Teillet at 1:57:00 to 2:01:00 of the webcast frames the factual context from a First Nation perspective, reiterated by Arthur Pape throughout his continuation of the argument from 2:15:00 onward. A particularly powerful argument on behalf of the intervener Te’mexw Nations is offered by Robert Janes at 5:24:00 to 5:34:00 of the webcast, with an explicit argument against analogizing treaties to commercial agreements and an argument concerning the effects on First Nation participation in modern treaty negotiations if they are taken that way.

<sup>63</sup> *Little Salmon*, *supra*, note 8, at para. 110.

<sup>64</sup> *Id.*, at para. 111.

override the genuine differences between different conceptualizations of treaties. Where there are ambiguities, contractual interpretation may be ready to fill these ambiguities with what is reasonable in light of the objectives of the parties. The alternative conceptualization of treaties as covenants between peoples or communities may actually open more appropriately the possibility of different interpretations oriented to long-term reconciliation between the parties. This phrasing may sound like a mere nuance and splitting of hairs, especially because an appropriately rich conceptualization of the contractual purposes of the parties could shift toward it, but if there is a difference between contractual texts and constitutional texts, there is equally a difference between analogizing treaties to contracts and analogizing treaties to covenants between communities.

This drawing of distinctions and allegation of potential effects will strike some as pedantic or perhaps even hyperbole-laden. But one of the fundamental principles of interpretation is that the uniqueness of the object to be interpreted is pertinent to the application of interpretive principles. Chief Justice Dickson memorably adopted into Canadian constitutionalism Paul Freund's precept on the need to avoid "read[ing] the provisions of the Constitution like a last will and testament lest it become one".<sup>65</sup> In a recent book on interpretation, Aharon Barak, former Chief Justice of Israel, both recognizes the common principles applicable as between the interpretation of wills, contracts, statutes and constitutions and distinguishes between the areas of their uniqueness, with constitutions notably unique because of the way in which they "guide human behavior over an extended period of time".<sup>66</sup> Modern treaties have guided the relationship between communities thus far over a shorter period of time than historic treaties but are obviously intended to have the same duration. It is, on my argument, important to recognize their uniqueness, distinct from that of a contract. To read them explicitly like contracts will bring some pertinent principles to bear but risks making them into *mere* contracts, thereby taking away from the contribution they can make to long-term relationships and mutually flourishing communities.

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<sup>65</sup> *Hunter v. Southam Inc.*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 155 (S.C.C.).

<sup>66</sup> Barak, *supra*, note 29, at 370.

#### IV. POSSIBLE CONSEQUENCES OF CONTRACTUAL ELEMENTS IN THE RECENT CASES

Those elements of the judgments drawing the contractual analogy in the present cases are neither arbitrary nor malicious. They reflect, first, a genuine attempt to come to grips with the significantly different nature of the modern treaty text. As noted earlier, Binnie J. rightly emphasizes that “[t]he text of modern comprehensive treaties is meticulously negotiated by well-resourced parties.”<sup>67</sup> To fail to respect the text would do harm to the serious efforts underlying it. These elements of the judgments reflect, second, a genuine desire to further processes of collaboration. Even if there is some reason to have concerns about parts of Deschamps J.’s framing of her argument, as outlined above, there is no reason to doubt the sincerity of her concern for the fate of First Nations in the absence of clear treaties, which she outlines as follows:

In fact, according to studies commissioned by the United Nations, (1) lack of precision with respect to their special rights continues to be the most serious problem faced by Aboriginal peoples, and (2) Aboriginal peoples attach capital importance to the conclusion of treaties with the Crown (M. Saint-Hilaire, “La proposition d’entente de principe avec les Innus: vers une nouvelle génération de traités?” (2003), 44 *C. de D.* 395, at pp. 397-98).<sup>68</sup>

Justice Deschamps’ argument is partly consonant with Jai’s argument that interpretation of modern treaties in a manner deferential to the treaties’ texts and thus promoting certainty and finality will nurture a strong, ongoing treaty process, as well as Jai’s further argument that an approach not doing so will discourage further treaty-making.<sup>69</sup>

These allusions to treaty-making incentives are not inherently wrong, for a consideration of some of the underlying dynamics of relationship-building is inherently important.<sup>70</sup> But their instrumentalist orientation must surely be paired with other considerations, or there are arguably significant, farther-reaching implications. For instance, there has begun to emerge a new literature on Aboriginal rights questions that is framed in law-and-economics terms. Queen’s law professor Cherie Metcalf has

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<sup>67</sup> *Moses*, *supra*, note 7, at para. 7.

<sup>68</sup> *Little Salmon*, *supra*, note 8, at para. 111.

<sup>69</sup> Jai, *supra*, note 6, at 59-62.

<sup>70</sup> *Cf.* also generally Shin Imai, “Creating Disincentives to Negotiate: *Mitchell v. M.N.R.*’s Potential Effect on Dispute Resolution” (2003) 22 *Windsor Y.B.* Access Just. 309.



begun an innovative task of economic description of Aboriginal law,<sup>71</sup> McGill political theorist Jacob Levy has used some law-and-economics arguments more prescriptively,<sup>72</sup> and Calgary political scientist Tom Flanagan has developed a widely discussed reform project for Aboriginal property holding that has economic roots.<sup>73</sup> The development of this literature is important and responds to what was previously a serious gap in approaches. The lessons of private law and, indeed, of free markets have much potential in contributing to the fuller flourishing of Aboriginal communities. However, an interpretation of treaties based on overly instrumentalist values would arguably implicitly authorize a completely thorough-going instrumentalism that even this new literature would not claim. A careful balancing of instrumentalist and non-instrumentalist considerations is surely the healthier course.

Approaching even modern treaties as covenants establishing the foundational terms of longer-term relationships does not, to be clear, mean ignoring the text of those treaties. Indeed, there should be ample respect for clear terms over which the parties have negotiated at length and with the aim of finding mutually respectful terms of relationship. However, there is still a different emphasis present in interpreting them covenantally rather than contractually. The spirit in which judges approach ambiguous terms is different when thinking of what will make the treaties the instruments of cooperation between communities than when approaching them with a spirit of rushing to apply technical doctrines like *expressio unius* or *contra proferentem*. To say this much is not to say that the principles these latter doctrines embody are not relevant. But it is to say that it is meaningfully different to start with a mindset related to contracts as opposed to a mindset related to covenants by which communities will live and flourish together.

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<sup>71</sup> See, e.g., Cherie Metcalf, "Compensation as Discipline in the Justified Limitation of Aboriginal Rights: The Case of Forest Exploitation" (2008) 33 Queen's L.J. 385. See also Ian Keay & Cherie Metcalf, "Aboriginal Rights, Customary Law and the Economics of Renewable Resource Exploitation" (2004) 30 Can. Pub. Pol'y 1. Keay and Metcalf have also been working on a paper, potentially the first of several, assessing the economic effects of leading Aboriginal title cases on long-term growth.

<sup>72</sup> See Jacob T. Levy, "Three Perversities of Indian Law" (2008) 12 Texas Rev. L. & Pol. 329.

<sup>73</sup> Tom Flanagan, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal: McGill-Queen's University Press, 2010). See also Thomas Flanagan & Christopher Alcantara, "Individual Property Rights on Canadian Indian Reserves" (2004) 29 Queen's L.J. 489.

These questions of interpretation, I might add, are important precisely because the *Moses* and *Little Salmon* cases will not be the last modern treaty cases. Indeed, they reflect just the beginning of what will no doubt be a series of questions arising as to the meaning of various treaty provisions, whether to be faced by the parties through further negotiation, by counsel to various individuals and communities affected, or by the courts in the context of disputes brought to them.

#### V. THE ONGOING ROOM FOR COVENANTAL INTERPRETATION

Although the recent judgments emphasize the contractual analogy in a number of places, and that analogy perhaps partly defines their emphasis on text, the reasons in the judgments discussed above do not foreclose all possibility of ongoing covenantal interpretations of treaties. Indeed, when confronted with the starker possibilities of contractual interpretation in *Little Salmon*, Binnie J. is ready to back off from commercial readings, and he writes that “as the facts of this case show, the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract. The treaty is as much about building relationships as it is about the settlement of ancient grievances.”<sup>74</sup>

The modern treaty as covenant has a different nature than the historical treaty as covenant, but the modern treaty as covenant also has a different nature than the modern treaty as contract. The ongoing pull between these normative possibilities will affect what kind of reconciliation the Court’s push toward negotiation establishes. The full story of modern treaty interpretation remains only partly written, and future judges will add chapters to those that have been set down in powerful forms in the *Moses* and *Little Salmon* cases. May they write these future chapters with sagacity, humility and respect for all that is at stake.

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<sup>74</sup> *Little Salmon*, *supra*, note 8, at para. 10.

