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4

Shading a Promise: Interpreting the Livelihood Rights Clauses in Nineteenth-Century Canadian Treaties with First Nations

Arthur J. Ray

Introduction

The Robinson Treaties of 1850 and Treaties 3 to 9 contain variously worded clauses that promised First Nations that they would be able to continue to earn their livelihoods from the lands they surrendered, in the manners related to development. Subsequently, these clauses have been the subject of ongoing treaty rights litigation. I will highlight the recurrent issues that I have had to address as an expert witness over the past thirty years in cases concerning the Robinson Treaties and Treaties 3, 6, 8, and 9. Some of these cases proceeded through trial and appeal all the way to the Supreme Court; others never made it to court. Collectively, the cases raise two major questions which I will consider in this document: What did First Nations and government treaty negotiators intend these clauses to accomplish? Have government actions and litigation shaded the promises made long ago?

Issues Arising from my Experience as an Expert Witness

My involvement in Aboriginal and treaty rights litigation began in 1985 with the Treaty 8 hunting rights case *Regina v. Horseman* (1990).¹ It involved the Cree hunter, Mr. Bert Horseman, who had killed a grizzly bear in self-defence, but subsequently sold the skin in violation of the *Alberta Wildlife Act* (R.S.A. 1980), which protected this endangered species. Mr. Horseman's lawyer, Ken Starozyck, phoned me in 1984 and explained that the case concerned interpretations of the clause in Treaty 8 that guaranteed the First Nations who signed it that they and their ancestors

shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as hereintofore described, subject to such regulations as may from time to time be made by the government of the country, acting under the authority of Her Majesty, and saving and accepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.²

Mr. Starozyck pointed out to me that the clause raised a question about historical context: What were the usual vocations of the Cree in northern Alberta when they signed the treaty in 1899 and 1900? In particular, did their “usual vocations” include harvesting for commercial purposes? If the answer was yes, did this activity include trading grizzly bear skins? Mr. Starozyck requested that I write a report and give oral evidence that addressed these questions and that would provide the court with the broader historical context it needed to interpret the treaty properly. He thought that would require me to include a broad discussion of the western Canadian fur trade during the nineteenth century. After expressing some surprise that there was any question about whether Cree who were involved in the fur trade of northern Alberta had fished, hunted, and trapped for commercial purposes in 1899, I agreed to provide the evidence that Mr. Starozyck requested. Data obtained from Hudson’s Bay Company (HBC) archives made it abundantly clear that the Treaty 8 area had been one of the company’s most important fur-trading districts in the 1890s. I emphasized in my testimony that the commercial and subsistence activities of Aboriginal people were inextricably interconnected.³ Furthermore, I presented data from the HBC accounts showing that grizzly bear pelts had been traded at Fort Vermilion in the 1890s. This post was the one closest to where Mr. Horseman had shot the bear. Alberta Provincial Court Justice Wong accepted the evidence and ruled that Treaty 8 did promise commercial rights given the usual practices of the Cree in 1899. Accordingly, she dismissed the charges against Mr. Horseman.

The Alberta government appealed the decision to the Court of Queen’s Bench, and rather than challenge the judge’s findings, the Crown contended that the Alberta Natural Resources Transfer Agreement (NRTA), as confirmed by the *Constitution Act (1930)*, had the effect of limiting Treaty 8 livelihood rights to subsistence harvesting. Shifting the focus on appeal to the intention and effect of the NRTA raised historical questions that had not been addressed in evidence presented at trial. So, at the Court of Queen’s Bench, in support of the province’s position, Justice J. Stratton conjured up legislative intent from the text of the NRTA and turned to a dictionary for a narrow definition of the word “subsistence.” Mr. Horseman then appealed to the Supreme Court of Canada, where, acting in a manner similar to Justice Stratton, a majority of the justices also concluded that the drafters of the NRTA intended to limit treaty livelihood rights to subsistence harvesting.

The court’s theory was that this curtailment was the quid pro quo for allowing First Nations to pursue their harvesting rights throughout Alberta, rather than only in their respective treaty regions (Treaties 7 and 8). As Frank Tough’s post-*Horseman* research on the NRTA has shown conclusively, this textual rather than contextual interpretive approach to the transfer agreements⁴ led the appeal courts to invent a history and draw conclusions from it that are wrong. Tough noted that the courts erred in two respects. First, their textual analyses of Paragraph 12 of the NRTA failed to take into consideration the fact that this section of the act

mentioned “trapping” as one of the livelihood rights. Tough notes that the close association of trapping with the commercial fur trade should have raised alarm bells for the justices who argued that this section of the NRTA was meant to bar commercial activities. Second, he points out that because none of the justices had researched the drafting of the NRTA, which began in 1926, they were not aware that the reference to trapping was added late in the drafting process in response to interventions by the HBC, which had a vested interest in Aboriginal peoples continuing their involvement in commercial harvesting.⁵

Soon after the Supreme Court of Canada’s *Horseman* ruling in 1990, I became involved in a number of Treaty 9 (also known as the James Bay Treaty) rights cases in Ontario, where the NRTA did not apply. The first of these was *Regina v. Spade, Regina v. Wassaykessic*, which took place in a small provincial courtroom in Thunder Bay, Ontario, in the autumn of 1992.⁶ The defendants, Ivan Spade and Isaiah Wassaykessic, were from the Mishkeegogamang (New Osaburg) First Nation. Mr. Spade had been charged with unlawfully selling migratory birds contrary to Section 5 of the *Migratory Birds Convention Act*⁷ and Mr. Wassaykessic with unlawfully selling sturgeon contrary to the *Ontario Game and Fish Act* (R.S.O. 1990, Chapter G.1).⁸ The defendants’ lawyer, Mary Bird, wanted me to educate the court about the commercial hunting and fishing activities that the First Nations of the southern portions of the Treaty 9 region (south of the Albany River) had been engaged in as participants in the fur trade prior to 1905.

Having been called in at the last moment when a previously contracted expert withdrew, I did not have time to prepare a brief for the court. So, I presented what was essentially one of the routine fur trade lectures that I gave every year in my Native History course concerning the importance of “country provisions” (food and commodities other than furs that were supplied by Aboriginal people) to the operations of the HBC. These provisions included an array of fresh and preserved foodstuffs. The trial judge was very receptive to my “lecture,” thanking me afterward. He was a self-confessed “fur trade buff,” who indicated that he had just read author and journalist Peter C. Newman’s account of the thousands of geese that the Swampy Cree killed every year for the HBC’s posts on James Bay during the eighteenth century.⁹ Not surprisingly, in the end the judge affirmed that commercial harvesting was a usual vocation of Treaty 9 First Nations long before 1905.¹⁰

Immediately after Spade and Wassaykessic, I became involved in another Treaty 9 fishing rights case. It arose in the autumn of 1992, when the Ontario Crown laid a charge against Mr. Eli Moonias. At the time, the defendant was the chief of the Marten Falls First Nation.¹¹ He also operated a fishing company. The Crown charged Chief Moonias with exceeding the quota of his commercial licence to fish for sturgeon on the Albany River. Chief Moonias wanted to confront this charge for two reasons: he believed that his treaty rights exempted him from having a quota imposed and, alternatively, he considered the quota to be arbitrary because the Crown had not provided any biological data about the size

or health of the Albany River sturgeon population. In other words, the Crown had not proven the need for the conservation measure it had imposed.

Chief Moonias made his claim in the immediate aftermath of the landmark *R. v. Sparrow* Aboriginal (1990) fishing rights case from British Columbia. In the latter case, Mr. Ronald Sparrow of the Musqueam First Nation of British Columbia had been charged with fishing for salmon with a drift net that was longer than the band's Indian food fishing licence permitted.¹² The federal fisheries department had issued the licence with net size restrictions for conservation purposes. Sparrow's defence was that the regulation infringed on his Aboriginal rights according to Section 35 (1) of the *Constitution Act (1982)*. In response to Mr. Sparrow's appeal, the Supreme Court ruled that legislation can curtail Aboriginal rights if there is a valid objective and the restriction is consistent with the special trust relationship created by history, treaties, and legislation, and the responsibility of the government vis-à-vis Aboriginal peoples. The court concluded in *Sparrow* that conservation objectives do warrant placing restrictions on Aboriginal rights provided that any infringement is limited to what is required to accomplish the desired conservation results.¹³

With this ruling in mind, Chief Moonias's lawyer, Mr. Francis Thatcher, asked me to prepare a brief on behalf of his client, which focused on the Aboriginal peoples' consumption and exchange of fish and wildlife in northern Ontario before the negotiation of Treaty 9 in 1905.¹⁴ He was particularly interested in obtaining archival data about the size and nature of Native fisheries—especially the sturgeon fishery of the Albany River. He anticipated that the HBC records would show that commercial fishing had been a common activity of people from Marten Falls First Nation and their neighbours. Mr. Thatcher also hoped that archival data might provide some idea of what the long-term sustainability of an Albany River sturgeon fishery might be.

I hired a team of research assistants to help me, and we examined all of the records in the HBC archives pertaining to the company's posts in the Treaty 9 region, which approximates the territory of the former southern department of the HBC. We began with the earliest accounts from Fort Albany dating back to the early eighteenth century. The data we collected made it clear that Native fisheries became increasingly important to fur-trading operations as fur and game animal populations declined because of overhunting and trapping. Aboriginal people participated in local commercial fisheries in various ways. They supplied fish as an article of commerce, they fished seasonally on contract, and some of them fished as salaried seasonal or regular company employees. The relative importance of these various kinds of arrangements to the overall fish procurement of the company varied considerably from post to post in the late nineteenth century.

Of particular relevance to Chief Moonias's defence, the documentary records indicated that in the late nineteenth century the Marten Falls Post relied heavily on whitefish taken by seine fisheries¹⁵ operated mostly by Aboriginal men who were retained on contract.¹⁶ The post managers often referred to them in general

terms as “our fishers” or “the fishermen.” The fishers named most often from 1869 to 1899 included Old Betsy (and her daughter), Lame Man (and his sister), Old Sturgeon, Moss Sturgeon, Sandy Sturgeon, Osshkapay (and his brother), and Patrick and Jack Wich ee capay (and his sister).¹⁷ The post supplied these and other Native contract fishers with salt, kegs, nets, and sometimes canoes and tents. Fishers on contract usually received small advances and were paid for their catches once they delivered them to the post. Sometimes the post manager hired Aboriginal people to pack the fish in kegs for the fishers and haul them to the post.¹⁸ Of the various seasonal fisheries, the autumn whitefish fishery was the most crucial one for Marten Falls, as it was for most posts in the region.

Whereas most of the fish that native fishers caught on contract were salted, those brought in by natives for trade mostly had been “hung” (dried and/or lightly smoked), although some was fresh. Whitefish and suckers dominated the trade judging from the journals, but sturgeon was also important.¹⁹ One of Chief Moonias’s ancestors was mentioned in this trade. The Marten Falls journals show that some of the Aboriginal men and women who fished on contract also sold fish in the off-season. As noted, women also took part in the trade. The records from other Hudson’s Bay Company posts on the Albany River are much less extensive than those for Marten Falls, but suggest similar patterns nonetheless. Collectively, the data from the HBC post records highlighted the importance of fishing for commercial purposes throughout the Albany River drainage basin.

After my research team completed their work, I summarized the results in a 271-page report that I submitted to Mr. Thatcher in June 1993.²⁰ I never had the opportunity of presenting it in court, however. This was because provincial Crown attorneys withdrew the charges against Chief Moonias ten days before the trial was scheduled to begin. The justification for doing so was that the lawyers had concluded that there was insufficient scientific evidence to prove or to justify the element of conservation beyond a reasonable doubt.²¹

Treaty Intentions

These experiences, and my subsequent involvement in *Regina v. Powley* (2003), concerning Métis hunting rights in Ontario in the vicinity of Sault Ste. Marie, led me to the conclusion that too much attention has been focused on commercial versus subsistence harvesting. Likewise, litigation, especially in criminal cases arising from violations of federal and provincial conservation legislation, is too species-specific. These types of cases, as those I have been involved with illustrate, usually require that First Nations (and Métis) defendants prove that their ancestors harvested a particular species of game, fur-bearers, waterfowl, or fish. This brings us to two basic contextual questions. In the nineteenth century, was it the practice of First Nations or government treaty negotiators to frame their discussions in such specific terms? This raises a related and more basic question: What were the purposes of the livelihood rights clauses?

***The Historical Context for the Original Livelihood Rights Clauses:
The Robinson Treaties, 1850***

When reflecting on treaty-making in western Canada to 1880, Alexander Morris, who had been involved in the process as lieutenant-governor of Manitoba (1872–77) and of the Northwest Territories (1872–76), observed that the Numbered Treaties

are all based upon the models of that made at the Stone Fort in 1871 and the one made in 1873 at the northwest angle of Lake of the Woods with the Chippewa tribes, and these again are based, in many material features, on those made by the Hon. W. B. Robinson with the Chippewas dwelling on the shores of Lakes Huron and Superior in 1850.²²

The Robinson Treaties were the first to include the livelihood rights clauses. Specifically, these treaties stated:

The said William Benjamin Robinson of the first part, on behalf of Her Majesty and the Government of this Province, hereby promises and agrees . . . to allow the said Chiefs and their Tribes the full and free privilege to hunt over the Territory now ceded by them, and to fish in the waters thereof, as they have heretofore been in the habit of doing; saving and excepting such portions of the said Territory as may from time to time be sold or leased to individuals or companies of individuals, and occupied by them with the consent of the Provincial Government.²³

This clause, the essence of which is repeated in later treaties with variable wording, has two important aspects. The first addresses the First Nations goal of protecting their right to continue traditional livelihood pursuits, which they could not do if they were restricted to reserves. The second deals with Canada’s primary concern of opening the territory for colonial development. In the case of the Robinson Treaties, the primary objective was to facilitate mining. The clause accommodated the concerns of both parties, giving the Aboriginal people free access to all areas not physically altered by colonial development projects. Very importantly, the clause put no restrictions on hunting or fishing by Aboriginal people. Rather it gave them “full and free privilege” to do so. To understand why the Robinson Treaties granted such liberal livelihood rights, it is important to consider how the local economic situation affected Robinson’s negotiating position. These local circumstances predisposed him to make certain kinds of accommodations to convince the Aboriginal people that it was in their interest to reach an agreement with him.

I began research into the early nineteenth century Native economies of the Robinson Treaties area in the late 1990s when Jean Teillet, who was legal council for Métis hunters Steve and Rodney Powley of Sault Ste. Marie, Ontario, asked me to prepare a report for her clients. They had been charged with hunting moose without first obtaining a provincial hunting tag in violation of the *Ontario Game and Fish Act*. They claimed they had an Aboriginal right to do so because it was the usual custom of their ancestors to hunt before the Crown asserted effective control over the Upper Great Lakes area. In my preparation for the case, I focused on the nature of the Aboriginal economies (First Nations and Métis) in the Great

Lakes area during the first half of the nineteenth century.²⁴ This research revealed that the Aboriginal people of Lake Huron and Lake Superior had very different sets of economic priorities that they brought to the bargaining table. The southern groups had more diversified economies and wanted to hold out for much higher compensation than Robinson offered for relinquishing lands and the rights to grant mining leases. The northern groups, in contrast, were much more dependent on the fur trade. The problem for them was that the 1840s was a time when they were suffering economic hardships because of fur and game depletion and low fur prices. These northern groups believed that they could address their pressing needs through a treaty by securing annuity incomes that would supplement what they earned from traditional harvesting activities. Of particular importance, this new source of income would enable them to buy the equipment and supplies that were essential for fishing, hunting, and trapping without having to go heavily into debt to fur traders. In other words, annuities could help them live off the land and subsidize their participation in the fur trade.

When Robinson faced stiff bargaining from the southern groups, he decided to take advantage of the fact that the northern and interior First Nations and Métis had a different set of economic priorities. Therefore, he headed north to Lake Superior where he was in a stronger negotiating position. Here the fur trade-dependent groups quickly agreed to a treaty. This left their southern relatives with little choice but to follow suit. They signed the Robinson Huron Treaty a month later.²⁵

Although Robinson did not keep a detailed record of his negotiations during the summer of 1850, on September 24, 1850, he wrote a lengthy covering letter (essentially a report) when transmitting copies of the treaties to the superintendent general of Indian affairs, Colonel Bruce. In this letter, Robinson makes it clear how he addressed the various economic concerns of the Aboriginal people. Regarding the issue of valuing the land north of Lakes Huron and Superior relative to that in the rest of Canada West, he wrote:

I explained to the chiefs in council the difference between the lands ceded heretofore in this Province, and those then under consideration, they [the former] were of good quality and sold readily at prices which enabled the government to be more liberal, they were also occupied by the whites in such a manner as to preclude the possibility of the Indian hunting over or having access to them.

Regarding the subject of hunting, he continued:

Whereas the lands now ceded are notoriously barren and sterile, and will in all probability never be settled except in a few localities by *mining companies, whose establishments among the Indians, instead of being prejudicial, would prove of great benefit as they would afford a market for any things they may have to sell*, and bring provisions and stores of all kinds among them at reasonable prices²⁶ (emphasis added).

In other words, Robinson's own words indicated that he had pitched the treaties with promises that the development would enhance rather than restrict Aboriginal commercial hunting and fishing prospects by opening up additional local markets.

It would also break the retailing monopoly of the HBC. Robinson advised Bruce that guaranteeing Aboriginal people their traditional livelihoods would save the government from the risk of having them make future claims on the treasury:

In allowing the Indians to retain reservations of land for their own use I was governed by the fact that they in most cases asked for such tracts as they had theretofore been in the habit of using for purposes of residence and cultivation, and *by securing these to them and the right of hunting and fishing over the ceded territory, they cannot say that the government takes from their usual means of subsistence and therefore have no claims for support*, which they no doubt would have preferred, had this not been done.²⁷ (emphasis added)

Although Morris stated in 1880 that the Robinson Treaties, Treaties 1 and 2 of 1871,²⁸ and Treaty 3 of 1873 served as models for those that followed (Treaties 4, 5, 6, and 7), curiously the texts of the 1871 agreements fail to include the livelihood rights clauses of the earlier Robinson and later treaties. The omission is even more puzzling considering that it was one of the “outside promises” that were made verbally by government negotiators.²⁹ According to written accounts of the treaty talks, for example, in his opening address to the assembled chiefs, lieutenant-governor of Manitoba and the Northwest Territories, Adams Archibald (1870–72), promised:

When you have made your treaty you will still be free to hunt over much of the land included in the treaty. Much of it is rocky and unfit for cultivation, much of it that is wooded is beyond places where the white man will require to go ... for some time to come.

He continued:

Till these lands are needed for use you will be free to hunt over them, and make all the use of them which you have made in the past. But when the lands are needed to be tilled or occupied, you must not go on them any more.³⁰

Considering the time, Wemyss Simpson would have understood that making “all the use” of the land would have involved commercial harvesting of fish and wildlife. For instance, in a letter he wrote to the secretary of state for the provinces in November 1871, Simpson commented on the treaties he had just concluded. His reflections indicate awareness that the treaty would subsidize the First Nations’ long-standing participation in the fur trade, which probably helped make it appealing to them. For example, regarding the annuity provision of \$3 per person, Simpson said:

The sum of three dollars does not appear to be large enough to enable an Indian to provide himself with many of his winter necessities, but as he receives the same amount for his wife, or wives, and for each of his children, then the aggregate sum is usually sufficient to procure many comforts for his family which he would otherwise be compelled to deny himself.³¹

His mention of “winter necessities” no doubt was a reference to “winter outfits.” The latter was the term fur traders commonly used when referring to the credit they gave to their native clients in the autumn in the form of equipment that was

needed for hunting, trapping, and fishing (ammunition, nets and/or net lines, twine, traps, hatchets, knives, etc.) and a few so-called “luxury items” (mostly tea and tobacco). By 1870, Aboriginal people of the central and the western interior areas of Canada had been accustomed to receiving outfits for a period from a century and a half to nearly two centuries. As I have noted elsewhere, in the 1870s \$16 or more per family would have paid for a significant portion of the goods that constituted a typical winter outfit, albeit the First Nations of Treaties 1 and 2 subsequently thought it was not adequate.³²

The livelihood rights clause that was omitted from the text of Treaties 1 and 2 reappears in Treaty 3, but a significant qualification was added. It stated that First Nations harvesting pursuits would be “subject to such regulations as may from time to time be made by the government.”³³ The documentary record of the negotiations provides no insight about why the rights clause had been reintroduced with this stipulation. On the contrary, the written records of the treaty talks suggest that livelihood rights received little, if any, attention. The parties appear to have been preoccupied with other issues. The most important of these were the demands by the First Nations living in the southern portions of the future Treaty 3 area that they be paid more for their lands than the government was prepared to offer. These First Nations understood that their lands were located in a zone where the government wanted to build railway and telegraph lines, develop timber resources, and anticipated that mining developments would take place there. Already steamboats plied the boundary waters (Rainy River—Lake of the Woods), a wagon road (the Dawson Road) had been constructed leading from the Rainy River northwest to Red River, and towns were developing. This led the First Nations living in the vicinity of the Canada-United States border also to demand compensation for the wood already used for these developments and for use of the waterways. Because they already were benefiting from the opportunities this new economic growth brought, these First Nations could afford to hold out for better terms than Canada initially offered.

Morris, who had replaced Archibald as lieutenant-governor of Manitoba and the Northwest Territories, said of these hard bargainers: “The Rainy River Indians were careless about the treaty, because they could get plenty of money for cutting wood for the boats.”³⁴ The result was that Morris and his fellow commissioners spent most of their time trying to come to terms with these southern First Nations. In the end, Morris had to raise annuity payments to five dollars as one way of gaining an agreement from them.

The other strategy involved adopted the kind of “divide and conquer” strategy that Robinson used in 1850. This involved appealing to groups who lived in areas remote from the Rainy River-Lake of the Woods corridor. They had a different economic agenda, which predisposed them to making a treaty. Morris said of them: “The northern and eastern bands were anxious for one.”³⁵ This was because these First Nations’ greater dependency on the fur trade put them in a weak bargaining position. By the early 1870s, the world was heading into a major economic

downturn and fur prices had started to decline, which would continue until 1885.³⁶ The difficulty the northern and eastern First Nations faced was exacerbated by increasingly frequent failures of the hunts. A treaty offered them the prospect of addressing these urgent economic problems. A Lac Seul chief representing about four hundred individuals made this clear to Morris. He said that his followers wanted a treaty that would provide them with support for their traditional livelihood pursuits in the form of allowances of ammunition and twine as well as help in developing agriculture. The chief noted that some of his people already planted small plots of corn and potatoes to guard against the increasingly frequent food shortages that resulted from poor hunts.³⁷ Seeing an opportunity to break the ranks of the assembled chiefs, Morris and his fellow treaty commissioners responded to the overture of the Lac Seul chief by adding to the treaty package a \$1,500 per annum allowance for ammunition, fishnet twine, seeds, and implements for those who were doing some farming. So, once again, provisions in the treaty were aimed at sustaining traditional livelihood practices, which included involvement in all commercial aspects of the fur trade.

Conclusion

The preceding discussion has focused on the livelihood rights clauses of the Robinson Treaties and Treaty 3, which Alexander Morris said served as models for later agreements, and the verbal promises made in Treaties 1 and 2. In the negotiations for all of these treaties, the Aboriginal peoples would have brought perspectives to the treaty table that were based on a tradition of involvement in the fur trade for a century and a half or more. For them, the commercial harvesting of a wide range of fish and wildlife species had long been a usual vocation. As we have seen, Robinson appealed to this fact in 1850 to win over those First Nations in the Great Lakes who remained highly dependent on the fur trade. He did so as a way of outmanoeuvring groups that had economic alternatives that put them in stronger bargaining positions. Twenty-three years later, Morris, who was familiar with Robinson's tactic, faced similar negotiating problems and opportunities in Treaty 3. Although Morris did not say he used the same sales pitch to woo the fur trade-dependent groups, he did amend the treaty package to include provisions that helped subsidize their continued participation in the fur trade.

None of the treaty talks I have discussed here indicate that any of the parties involved thought about livelihood rights in the species-specific or commercial-versus-subsistence terms that have become commonplace in rights litigation. The latter perspective is one that derives from the post-conservation legislation era and legal strategizing. As I have noted, in terms of the realities of Aboriginal economic life and ecological circumstances, it makes no sense to think this way because flexibility was the key to long-term economic survival. Aboriginal people had to adjust their harvesting strategies to accommodate fish and wildlife cycles as well as fluctuating markets.

Although Morris added a qualifier to the livelihood rights clause in Treaty 3, which is replicated in the subsequent Numbered Treaties, I think it is highly unlikely that he thought the phrase would have facilitated the subsequent placement of substantial restrictions of First Nations livelihood rights. Evidence for this is suggested in the concluding chapter of his monograph of 1880 that dealt with treaty administration. Here he summarized the seven main features of the treaties negotiated from 1850 to 1877. Regarding the livelihood rights dimension, Morris said that in return for relinquishing “all the great region from Lake Superior to the foot of the Rocky Mountains” the government granted: “permission to the Indians to hunt over the ceded territory and to fish in the waters thereof, excepting such portions of the territory as pass from the Crown into occupation of individuals or otherwise.”³⁸ Strikingly, Morris did not mention that this right was subject to government regulation. His comment on this dimension of the treaties does highlight the key purpose of the livelihood clauses, however. Aboriginal people were to be guaranteed the right to continue their usual vocations only on lands not taken up by development. That was the key restriction. It was essential for the achievement of the primary intention of the livelihood rights clauses. That was to prevent conflict between settlers and Aboriginal people arising from non-compatible land usage. The clauses were neither intended to curtail commercial harvesting of fish and wildlife resources by First Nations nor to serve as a means by which settlers could appropriate those resources for commercial or recreation purposes.

Nonetheless, subsequent treaty rights litigation and legislation before 1982, when Aboriginal and treaty rights received constitutional protection, has had that effect. This has meant that First Nations have had to wage a costly fight against the narrowing of a broadly framed treaty right on a group-by-group, species-by-species basis. Many are reluctant to sue for commercial harvesting rights in the knowledge that they likely will fail, or at best will be granted only sharply limited commercial rights. In these ways, the primary intent of the original promises has been shaded and diminished.

Endnotes

- 1 This case went to trial in Edmonton in 1985. I began research for it in 1984.
- 2 <<http://www.ainc-inac.gc.ca/al/hts/tgu/pubs/t8/trty8-eng.asp#chp4>>
- 3 I published substantial portions of this report in A. J. Ray, "Commentary on the Economic History of the Treaty 8 Area," *Native Studies Review* 10 (2), 1996. 169–95.
- 4 There was a separate transfer agreement for each of the prairie provinces.
- 5 Frank Tough. "The Forgotten Constitution: The Natural Resources Transfer Agreements and Indian Livelihood Rights, ca. 1925–1933," *Alberta Law Review* 41 (4), 2004. 1037–38.
- 6 Ontario Court, Provincial Division.
- 7 Parliament first passed this act in 1917. In 1994 and 2008 it was revised and strengthened. See <http://www.cws-scf.ec.gc.ca/legislations/laws1_e.cfm> Accessed February 9, 2009.
- 8 This act was repealed in 1999. See <http://www.e-laws.gov.on.ca/html/repealedstatutes/english/elaws_rep_statutes_90g01_e.htm> Accessed February 9, 2009.
- 9 He had read Peter C. Newman, *Company of Adventurers* (Markham: Viking Press, 1985).
- 10 This treaty was completed in two stages. The 1905 agreement encompassed the lands from the Albany River southward to the Hudson Bay-St. Lawrence drainage divide. Twenty-five years later, the treaty was extended northward to include the rest of northern Ontario.
- 11 This community and the Hudson's Bay Company trading post that was located here are variously spelled in the records as Marten's Falls and Marten Falls.
- 12 The licence stipulated that drift nets were to be limited to twenty-five fathoms in length. Mr Sparrow was caught with a net that was forty-five fathoms in length. Supreme Court of Canada, <<http://Supreme Court of Canada.lexum.umontreal.ca/en/1990/1990rcs1-1075/1990rcs1-1075.html>> Accessed June 13, 2008.
- 13 Ibid.
- 14 See endnote 10.
- 15 Editor's note: A seine is a fishing net that hangs vertically in the water held in place by attaching weights along the bottom .
- 16 Often their wives and children were involved too. It should be noted that the "Sturgeon Clan" was important in the area.
- 17 Marten Falls Journals 1869–99, HBCA B 123/a/85-93.
- 18 For example, the journal entry for October 18, 1872, noted: "Wich ee capay got his pay for his assistance. 6 MB [made beaver] & his plug Tobacco & Falls potatoes each time he came in with the full kegs ... I promised him 1 MB per trip, but was to be 4 kegs each trip" B 123/a/88: 20.
- 19 It should be noted that in the 1890s, the journals make few specific references to the kinds of fish the Aboriginal people bartered. Typically the entries simply say "Indians arrived with some fish," or "a little fish."
- 20 A. J. Ray. "Aboriginal Fishing for Commercial Purposes in Northern Ontario before Treaty 9: A Report for the Marten Falls First Nation." Unpublished, June 1993.
- 21 Facsimile from Francis Thatcher to Arthur J. Ray, June 2, 1994.
- 22 Robinson, 285.
- 23 <<http://www.ainc-inac.gc.ca/al/hts/tgu/pubs/trob/rbt2/rbt2-eng.asp>>
- 24 Arthur J. Ray. "An Economic History of the Robinson Treaties Area before 1860." Unpublished, March 3, 1998. I cited some of this research in Ray, Miller, and Tough, 2000. 35–44.
- 25 Ray, Miller, and Tough, 35–44.
- 26 William B. Robinson to Superintendent General Colonel Bruce, September 24, 1850, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories Including the Negotiations on Which They are Based, and Other Information Relating Thereto*. (Saskatoon: Fifth House, 1991 [1880]), 17–21.
- 27 Ibid., 19.

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- 28 Respectively also known as the Stone Fort Treaty, the Manitoba Post Treaty, and the North-West Angle Treaty.
- 29 These two treaties were amended in 1875 to include the verbal, or “outside,” promises, but the livelihood promise was not added. For a discussion of these amendments see Ray, Miller, and Tough, 81–83.
- 30 Morris, 29.
- 31 Morris, 38, 43. It should also be noted that treaty negotiations were timed so that they did not conflict with hunting, fishing, or trapping activities.
- 32 Ray, 1990, 32. The First Nations of Treaties 1 and 2 became upset two years later when their relatives to the east received annuities of \$5 in Treaty 3. To address their discontent, in 1875 the government raised the annuities to bring them in line with Treaty 3.
- 33 Ibid., 220.
- 34 Morris, 65.
- 35 Ibid., 65.
- 36 Ray, 1990, 38.
- 37 Morris, *op. cit.*
- 38 Ibid., 285–86.