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Hunting Down a Lasting Relationship with Canada—Will UNDRIP Help?

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Abstract

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SARA MAINVILLE*

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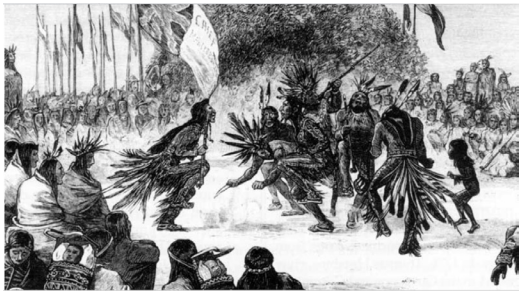

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ANISHINAABE AKI ARE THE lands known to my ancestors and relatives of the Anishinaabe Nation along the boundary waters of Minnesota (Rainy Lake and Lake of the Woods), in territory that would become Canada's northwestern Ontario and south-eastern Manitoba. These lands were harsh even for the Anishinaabe, and the Dawson Route was the first real agreement made between the British and Anishinaabe to create the "white man's road" which also required British travellers to purchase Anishinaabe birch bark canoes and Anishinaabe timber to feed steamboats that travelled along this pre-Confederation passageway.[1] The Dawson expedition started a relationship of mutual benefit and mutual co-existence in the period from 1860 to 1869. This was a decade of relationship-building by people like Simon Dawson, who was an engineer who had several encounters with the Anishinaabe before Treaty 3 was signed by him and two other Treaty Commissioners on 3 October 1873. Their knowledge and understanding of the Anishinaabe were helpful in gaining the trust that the treaty would be forever, a relationship of substance and diplomatic protocol between the British and the Anishinaabe Nation along the boundary waters.

During litigation, courts have little time to hear the long recollections of Anishinaabe storytellers. Other evidence must be brought forward at great expense to bring some sort of understanding of these past treaty relationships. An example of this problem is the decade of relationship skipped over in the following introductory paragraph to Treaty 3 found in the *Grassy Narrows* decision:[2]

1. Sara J Mainville, "Treaty Councils and Mutual Reconciliation Under Section 35" (2007) 6 Indigenous LJ 141 at 151 [Mainville, "Treaty Councils"].
2. *Grassy Narrows First Nations v Ontario (Natural Resources),* 2014 SCC 48 at para 1 [*Grassy Narrows*].

> In the early 1870s, Canada was a young country looking to promote Western expansion and Confederation. Settlers travelled west along an immigrant travel route called the Dawson Route, and British Columbia agreed to join Confederation on the condition that Canada build a transcontinental railway. But the immigrant travel route and the prospective railway to the west ran through traditional Ojibway land in what is now Northwestern Ontario and Eastern Manitoba. Canada was concerned about the security of immigrant travellers and surveyors preparing for the construction of the Canadian Pacific Railway ("CPR"), and feared that it may need to station troops in the area. Securing a safe route through the Ojibway lands was critical for the addition of British Columbia to Confederation and to the development of the West. It was against this historical backdrop that Treaty 3, which is at the heart of this case, was negotiated.

The Court does not mention the help and aid that was being shared between the parties and the relationship being formalized through diplomatic protocols. There is also no mention of the importance of this relationship for peaceful co-existence in the fifty-five thousand square miles that would be described in the Articles of Treaty as Treaty 3 territory.

Whether or not Grassy Narrows First Nation had a treaty right to stop a regional government from clear-cutting their traditional territories was at the root of the litigation between the parties between 2003 to 2014. The plaintiffs had to create a "theory of a case" beyond mere consultation and accommodation that would permanently remedy the situation. The problem of bringing a nation-to-nation treaty into one nation's domestic court system is a larger matter—specifically, what is the proper dispute resolution mechanism in nation-to-nation treaties? The two dialogues seem like counter-narratives, but they were linked in our history of Anishinaabe protocols related to treaty enforcement. To be clear, I am a member of a Treaty 3 community, I have studied the treaty both in law school, through graduate studies, and by having several long conversations with Treaty 3 knowledge holders. I am also a practicing lawyer who works with Treaty 3 clients. From 2008 to 2011, I was an advisor to the Grand Council and the Grand Council Chief, *Ogichidaakwe* Diane M Kelly.[3] I also have some personal recollections of the efforts made by the Grand Council and influential people in the Grand Council from 1997 to 2014 to keep the treaty protocols consistent with past customs.

My understanding of the Grand Council Treaty 3 is informed by the Treaty 3 Elders and some prominent leaders, most from the biizhew or lynx clan (my grandmother's clan). The Grand Council has existed since we found the manomiin

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3. The Government of the Anishinaabe Nation in Treaty #3, "Grand Council Treaty #3", online: *Home* <gct3.ca/>.

(wild rice) at the height of land on a storied journey of the Anishinaabe from east to west on Turtle Island. The Grand Council met during the spring and summer fisheries of Rainy River, Couchiching Falls, now more famous as the border crossing between Fort Frances, Ontario and International Falls, Minnesota. The Grand Council is a meeting of four spiritual institutions (or houses), including the Mitewewin society, and it is both a spiritual and political gathering of the Anishinaabe people of the boundary waters. Ogichidaa, or "boundary warriors" would lead the discussions of the Council, and a Grand Chief has always been present, known in the early contact period with French explorers and fur traders as "Nittum" meaning "first" in Anishinaabemowin (the language of the Anishinaabe) and "La Premier" in the French records.[4] This Grand Council was always present and I have heard about Ogichidaa in my family (Gus Mainville), and of course in more well-known families from the Lake of the Woods area. The first official corporate organization was developed in the 1970s, and the Grand Council Treaty 3 offices were set up in a former residential school in what is now present-day Kenora, Ontario.

It is an interesting position for a person that does not believe that my treaty belongs in a domestic court to be writing an article about the recent litigation history of Treaty 3. My legal and political career has focused on encouraging our treaty partner to see the future wisdom in their representatives advancing nation-to-nation dispute resolution to resolve interpretative differences in implementing Treaty 3. My legal career has focused on the implementation of Treaty 3 and understanding of how treaty councils and Indigenous law can play a central role in nation-to-nation dispute resolution. My belief is that it is in the process of becoming familiar with one another in formal diplomacy, on a nation-to-nation basis, that we will understand the importance of both interdependence and independence between the parties. Treaties, in my view, allow parties to mutually agree to the boundaries of the relationship, and the interdependencies in formal arrangements. The substance of the treaty council will be to properly work through interpretative difficulties and prescribed dispute resolution on this basis. This builds a friendship and common interests of working through disputes and better defining a government-to-government relationship.

Given my knowledge of Treaty 3 claims, I am not surprised that Anishinaabeg have brought their Treaty with the Queen to a domestic Canadian court. Is this a modern form of "hunting" down the Queen? What are the "rules that govern us

4. Leo Waisberg & Tim Holzkamm, "'We Have One Mind and One Mouth. It Is the Decision of All of Us' Traditional Anishinaabe Governance of Treaty #3" (2001) Grand Council Treaty #3 Working Paper at 6.

rightly" in making treaty litigation acceptable to the Anishinaabe Nation of the Boundary Waters, now self-proclaimed as the Anishinaabe Nation of Treaty 3? To answer these questions, I will use my experience and understandings of Grand Council protocols to explain how the original litigation was decided amongst us, such that we were all "of one mind" prior to Statements of Claim being finalized on behalf of the Anishinaabe Nation. I do this in order to explain how a "once in a lifetime" hunting down has been squandered and so that we are more prepared if we need to use the extraordinary remedy of litigation ever again.

The relationship between the parties has been more than adversarial; in fact, it is an abusive and untrusting relationship with the Crown, a relationship in need of an urgent prescription to bring it back to balance. Will the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*)[5] make a difference here? Is there a better way of dispute resolution with legal and procedural remedies against the Crown now that the Federal government has committed to the implementation of the *Declaration*? In particular, Article 37 of *UNDRIP* declares:[6]

> Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive agreements.
>
> Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive agreements.

"Recognition, observance and enforcement" of treaties is the impasse that the Anishinaabe beneficiaries of Treaty 3 find themselves in. There are no domestic forums or mechanisms to establish a mutually agreeable process here. The specific claims and self-government policies of the federal government are so circumscribed by colonial perceptions of certainty, mutuality, and finality that it is not safe or advisable to enter these discussions from a historic reconciliation perspective.[7] Federal governments want to renegotiate terms to create a "modern treaty" that establishes very clear powers and authorities between the parties in a

5. *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/Res/61/295 [*UNDRIP*].
6. *Ibid* at Article 37.
7. Treaty knowledge keepers honour the historic reconciliation achieved in the solemnized treaties, as the Creator and others have sanctioned these agreements in ceremony. The historic reconciliation in Treaty 3 is an understanding of what was agreed to, and that both Anishinaabe Inakonigaawin (an Indigenous legal order) and the British common law rules were applicable in ensuring that each party upheld their commitments and obligations to one another.

way that strips away the Indigenous law, protocols, and ceremonies that are core to what the treaty relationship is.

This article involves my understanding of Treaty 3, a treaty made by my nation, the Anishinaabe Nation of the Boundary Waters, represented by a Grand Council,[8] and the Queen, who represented her Nation. On the last day of treaty negotiations, 3 October 1873, our principal spokesperson, Mawendopenais[9] promised to "hunt" down the Treaty Commissioners personally, as representatives of the Queen in England, if the treaty was breached. This was not an idle threat; Mawendopenais was a formidable man, accustomed to dress in the traditional way of an Ogichidaa, or boundary warrior of our nation. His face was likely painted, and he stood much taller than most men. This Anishinaabe threat made personally against Canada's officials was dealt with quickly and diplomatically. Treaty Commissioner and main spokesperson for the Crown, Lieutenant

8. A Grand Council is an institution of the Anishinaabeg, it is both spiritual and political and it has the ceremonial and spiritual connections to bind the Nation together through protocol, diplomacy and law. There are Midewewin leadership, both women and men, as well as the political leadership and boundary warriors present to discuss matters of importance to the Nation at the Grand Councils, many times in the past Grand Councils convened in both Fall and Spring Assemblies. Grand Councils were ever present in the encounter era with the French and English near Couchiching Falls on the Minnesota/Ontario border near Fort Frances, Ontario. See *e.g.* Waisberg & Holzkamm, *supra* note 4.

9. Mawendopenais, I imagine the sketch at the beginning of this article was done after a reading a reporter's account of the Governor General's visit of Rat Portage (near Kenora, ON) on 18 August 1881 that described the Anishinaabe Ogichidaa. See "The Great Chief of the Ojibways", *The New York Times* 3 September 1881:

> Mawindobenesse, the great chief, is certainly one of the finest-looking Indians I have ever seen, and though he was carefully supported as he walked up from his canoe, it turned out that all this apparent infirmity was merely put on to magnify his greatness in the eyes of the distinguished visitors who eyes he supposed to be upon him, for as soon as the dancing commenced he was one of the first to engage in it, and he was quite as ready to keep it up as were any of his subjects. though he has a grand pair of shoulders, straight and broad, without the smallest inclination to stoop, a full chest, symmetrically tapered toward the waist, and though, in short, Mawindobenesse has a remarkably fine figure, it is his face that makes the strongest impression in one's memory. He has a broad, high forehead that recedes slightly and regularly, almost or quite from the eyebrows. His eyes are decidedly good, though partially thrown back by his prominent brows and cheek bones. His nose has just enough of the eagle's beak about it to escape being Grecian, his mouth has plenty of firmness and unmistakable in expression while his lower jaw would indicate that he had all the physical courage, but none of the brutality, of the successful prize-fighter. He looks like a man of superior courage, intelligence, and character, and in looking at him it would be hard to divest one's self of the idea that he was not devoid of culture.

Governor Alexander Morris made this key commitment, "The Queen's Ear is promised to you."[10]

These forgotten or ignored treaty claims are extraordinary, and the effort to see the light of day in a courtroom is a testament to the resiliency of our First Nation communities. There are so many barriers to litigation, including the impecuniosity of the First Nations and the cost of litigation. It is no wonder that we turn to the *UNDRIP* to afford us other forums for treaty dispute resolution. In fact, I would argue for a specialized court co-developed between the parties, including the important step that any treaty court would be given life by *Miinigoziiwin* (Anishinaabe legal order) and Canada's Constitution.[11] It would be truly an international court of a *sui generis* nature. This would be the better forum, but procedural rules need to be co-developed between the parties in light of the *Declaration* and the commitment to have justice and reciprocity between the treaty partners in Canada.

A second Article in *UNDRIP* that is relevant to my argument is Article 27:

> States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to [I]ndigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples, pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

This institution does not exist in Canada. Canadian courts have become an untrusted and biased forum for section 35 rights-holders, particularly, any inherent or Indigenous legal right holder or authority. The *UNDRIP* does have some promising "reconciliation" ingredients, but only if those ingredients include co-development with Indigenous peoples to create the final recipe and solution.

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10. *Keewatin v Minister of Natural Resources*, 2011 ONSC 4801 at para 367 ["*Keewatin* 2011"]. "The following are the terms of the treaty held at Northwest Angle the third day of October, Eighteen Hundred and Seventy Three", Appendix A in *Report on the Negotiations for Treaty 3 by Lieutenant Governor Alexander Morris*, Ottawa, Library and Archives Canada (RG 10, vol 1918, file 2790B, con C-11110). The shorthand reporter's notes observe: "The Queen's ear would always be open to hear her Indian Subjects."
11. The *Canadian Charter of Rights and Freedoms* is Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 is, while section 35 is located in Part II of *Constitution Act, 1982*. The remedy for the breach of Section 35 may be found in section 52, which reads: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

With this article, I attempted to advance Anishinaabe custom on how to be "of one mind" in using domestic courts to "hunt down" persons and governments responsible for a breach of their sacred treaty obligations, hunting down being the prerogative treaty remedy that the Anishinaabe kept for themselves.[12] I also argue that the common law is so ill-suited for treaty rights recognition, that Crown intervention is procedurally necessary at the very beginning. Canada should prioritize efforts with Indigenous partners to establish a path forward to implement the Truth and Reconciliation Commission's Call to Action 45,[13] that is the ultimate path to fixing treaty relationships. Until then, temporary solutions like the recently announced Litigation Guidelines will be a controversial measure inside of the Department of Justice, which may not receive full implementation because of stronger beliefs in the adversarial system of litigation in Canada. An example very connected to the Treaty 3 litigation discussed in this article is guideline number 15 that states:[14]

> Canada respects the right of Indigenous peoples and nations to define themselves and counsel's pleadings and other submissions must respect the proper rights-bearing collective. Where rights and title have been asserted on behalf of larger Indigenous entities—nations or linguistic groups, for example—and there are no conflicting interests, Canada in the proper case, or where supported by the available evidence, will not object to the entitlement of those groups to bring the litigation. This approach is consistent with principle 1, which affirms the Government of Canada's renewed nation-to-nation approach. In Aboriginal rights and title cases, Canada will not usually plead that smaller Indigenous entities—clans or extended family groups, for example—are the proper holders of Aboriginal rights and title.

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12. Given the information that the Anishinaabe had about the Robinson Superior treaty and the Minnesota treaties and "slow" or non-implementation of treaty obligations, Mawendopenais, speaking for the people advanced what I term a prerogative power of "hunting down" treaty breakers. As the sovereign power over the given territory at the time of treaty-making it was important for Mawendopenais to explain that there would be personal consequences for breaking Anishinaabe Inakonigaawin, or the creator's rule, whichever was the case. This was not an illegitimate remedy, I would argue, as Ogichidaa are boundary warriors and responsible for keeping the peace.
13. See *e.g.* Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission: Calls to Action* (Truth and Reconciliation Commission of Canada, 2015) at 4. Section IV of Call to Action 45 reads: "Reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements."
14. Canada, Department of Justice, *The Attorney General's Directive on Civil Litigation Involving Indigenous Peoples*, 2018, online: <www.justice.gc.ca/eng/csj-sjc/ijr-dja/dclip-dlcpa/litigation-litiges.html>.

I attempted to explain through example, how treaty litigation has created even deeper relations of animosity with the Crown and may feed violence if the treaty relationship is damaged beyond repair. It is unlikely that the above *Litigation Guidelines* will continue to exist after the next federal election, but they provide a temporary solution and promise of dealing with an issue outlined in the litigation discussed in this article.

So what to do with the breach of a procedural treaty right and the forgetting of this important diplomatic relationship? I realize that to most legal academics and lawyers, who want to advance treaty litigation, my approach seems questionable; why fight for a remedy that is normative when you can get a strong legal ruling through rights recognition in section 35 of *Constitution Act, 1982*?[15]

There are several retellings of Treaty 3, as it is my understanding that the Anishinaabe treaty protocol is to remember treaties through oral understandings of the treaty. It is the role of the "recorder" or, a person having extraordinary memory to officially retell the version of the treaty to the Grand Council. In Canada, there was not a similar oral tradition, and like the Robinson Treaties before it, a "quit claim" deed called "Articles of a Treaty" was drafted to memorialize Treaty 3 prior to 3 October 1873. Both Simon Dawson and Alexander Morris took their own personal notes of their discussions with the Anishinaabe, as may have been European tradition, or their independent responsibility as appointed Treaty Commissioners. Simon Dawson's notes are more culturally acceptable to Anishinaabe readers and historians, likely because of his long experience working with the Anishinaabe of the boundary waters region.[16]

The Grand Council Treaty 3 was revitalized in various periods of treaty relationships with Canada. The Grand Council was ever-present in early European relationships since the seventeenth century. The main spokesperson was called "La Premier" in early fur-trading accounts and also Niitum or "first among equals" as the Grand Chief of the Nation.[17] There is an unpublished account of this early history completed by Treaty and Aboriginal Rights Research (TARR) historians, Leo Waisberg and Tim Holzkamm, called "We Have One Mind and One Mouth. It is the Decision of All of Us" Traditional Anishinaabe Governance of Treaty #3" that shares several of these early contact reports with the Grand Chief and

15. *Constitution Act, 1982*, *supra* note 9, s 35.
16. See *e.g.* Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (Bedfords, Clarke, 1880) at 72 [Morris, *Treaties*] ("The ear of the Queen's Government will always be open to hear the complaints of her Indian people, and she will deal with her servants that do not do their duty in a proper manner.").
17. Waisberg & Holzkamm, *supra* note 4 at 6.

the Grand Council. Also, one of the most important documents created by the Grand Council Treaty 3 is this "We have kept our part of the Treaty document" that can still be viewed online at the Grand Council Treaty 3 website, this is a list of the treaty-based grievances in 1990. This document is an overview of the various land-based treaty grievances of the Grand Council. However, rather than being granted the Queen's ear to listen to these well-documented grievances, the First Nations themselves were told that they would need to remedy their claims through the specific claims policy of Indian Affairs in 1976.

I. REFLECTING ON WHAT MADE TREATY 3 A RECONCILIATION WORTH NATIONAL COMMEMORATION

The shorthand reporter's note is my favourite retelling of the promise of procedural justice for the Anishinaabe. It is more in line with Anishinaabe Inakonigaawin, the "law and order" of my Nation, based on the fact that the Queen must listen to the Anishinaabe in the future—as part of their treaty relationship. It is a promise fashioned to illicit inter-cultural understanding, as the Anishinaabe did not speak English, nor, did they understand the Canadian legal or political order. They were told that, the Queen would listen to you if you had grievances, implying in the British constitutional tradition of the time, that the Queen had certain powers and a special role and that she would *personally* be responsible to fix or remedy the problem.

In the meantime, in the decade after Treaty 3 was made, Mawendopenais was doing his part to enforce the treaty. For example, he was actively advocating against being forced to build a school-house on-reserve prior to receiving a school teacher in his community. He demanded to be shown in Canada's "Articles of a Treaty" where it said that that schoolhouses were a pre-condition to the "education" guarantee in Treaty 3.[18] Other grievances would be heard by Canada's officials (including Alexander Morris and Simon Dawson, who was a Member of Parliament for the District of Algoma) from delegations of Chiefs who went

18. "We Have Kept our Part of the Treaty" *Anishinaabe Understanding of Treaty #3* (Grand Council Treaty #3, October 2011) at 44.

to Winnipeg and Thunder Bay to make good on their promise to enforce the treaty themselves.[19]

In this article, I argue that the right for the Anishinaabe was to take up a process that would effectively "hunt down" or prosecute a treaty breaker. The focus would have been on the men who negotiated the treaty, Alexander Morris, Simon Dawson, and Joseph Provencher. Alexander Morris was subject to various delegations from the Anishinaabe in the period after the treaty was made.[20] However, colonialism would weaken the resolve of the Anishinaabe Nation, as the Grand Council had to meet secretly. There were early twentieth century newspaper accounts of panicked Euro-Canadian neighbours, as the military was ordered in when the Anishinaabe left the reserve for ceremonies.[21] Further, the *Indian Act* was over-policing their original civil society, ceremonies and languages, which could not be practiced after the 1890s. Notably, lawyers could not even work for *Indian Act* bands until after changes to the *Indian Act* in 1951.

II. TREATY COUNCILS AS DISPUTE RESOLUTION

So it is not surprising that Mawendopenais would attend with some pomp and circumstance, to meet the Governor General in Canada in 1881. The Queen's foremost representative stopping to meet with the Anishinaabe, less than eight years after a treaty would be a very special event. There is not much of a record beyond the newspaper account of Mawendopenais, and not any mention of a specific meeting or discussion between the two nations in the fall of that year. What would have happened if there was a true government to government meeting? Would the Governor General have explained the plans to impose *Indian Act* and *Indian Act* governance on the Anishinaabeg who still had hereditary Chiefs and traditional governance? Would they have carefully explained that children would soon be forcibly removed from families to go to Christian schools between 1900 and 1902 in both Fort Frances and Kenora, Ontario? These would all be an impossible discussion in a true treaty relationship. The discussions would be especially difficult with this relatively strong Anishinaabe Nation, who had kept Christian Missionaries away from their communities for a century and jealously

19. I have reviewed Canada's archive materials on treaty grievances for my LLM thesis. See Sara J Mainville, *Manidoo Mazina'igan: An Anishinaabe Perspective of Treaty 3* (LLM Thesis, University of Toronto, 2007) [unpublished] [Mainville, *Manidoo*]. See also Brian Walmark, *Alexander Morris and the Saulteaux: The Context and Making of Treaty Three, 1869–73* (MA Thesis, Lakehead University, 1993) [unpublished] at 31.
20. Mainville, *Manidoo*, *supra* note 19.
21. Mainville, "Treaty Councils," *supra* note 1.

guarded their Midewewin (a centuries old organized, spiritual society). Of course, it is unlikely that these discussions were had. A ceremonial leader like Governor General Sir John Douglas Campbell (who was on an expedition of promoting western farming in Canada),[22] was unlikely to want to alarm Mawendopenais and his men. The usurping power of colonialism is an ongoing narrative that delays and aggravates the treaty relationship. It has no transparency and colonial forces do not seek consent from peoples who they believe are of inferior race or religious customs.

Justice for treaty rights holders was the remedial promise of section 35 of the *Constitution Act, 1982*, a reconciliatory process to further insure peaceful relations between the parties despite a long history of animosity as opposed to friendship. This "remedy" was also promised in the specific claims process to treaty rights holders, post *Calder v Attorney-General of British Columbia* [23] after the federal government formally established a native claims policy in 1974. The Grand Council Treaty 3 is proud to be of the opinion that they established the first "Treaty and Aboriginal Rights Research" office in the country.[24] However, there is a history of Treaty 3 claims being stopped and restarted because of the lack of resources and capacity of communities to carry these expensive and complicated processes forward.

There is important history of treaty-making involving who negotiated the treaty on behalf of the Anishinaabe, the Ogichidaa spokespeople including Powassin and Mawendopenais were tested warriors and were high ranking Mitewewin (medicine society) members. The word "obstinate" was used by Justice Sanderson in her lengthy review of the making of treaty 3, and the Chiefs

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22. The Canadian West, "Governor General's Party Crossing Lake of the Woods 1881, by Sydney Prior Hall" (31 August 2001), online: <www.collectionscanada.gc.ca/canadian-west/052920/05292014_e.html>.
23. See *Calder v Attorney-General of British Columbia*, [1973] SCR 313 at 328 [*Calder*]. *Calder* established claims for Aboriginal title and rights within the Supreme Court of Canada's recognition that:

    > the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right". What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was "dependent on the goodwill of the Sovereign."

24. My friend and former co-worker, Andy Sky says that the TARR unit was established well before 1976.

lack of true desire to make a Treaty with Canada in the *Keewatin v Ontario*.[25] In fact, Elder Allan White[26] had told me on more than one occasion, that the Anishinaabe Nation had sent scouts to Montreal to see if we, the Anishinaabeg, could win a war with the British. Unfortunately (or fortunately), the report back was that the best course for us was to make a treaty with the British based on what was viewed in Montreal as the British military power. I can only imagine the Grand Council meeting where this report back was made and the careful strategy that was created to broker a treaty with the Queen.

Another important development was that the Anishinaabe had hired literate French–Anishinaabemowin interpreters, who wrote down the terms agreed to, in a French document. These terms, also known as the Nolin Notes, expand on the other written records, as does Simon Dawson's notes, a "short-hand reporter's" notes made during the discussions, and a newspaper account of the treaty council of 1873, found in "The Manitoban" newspaper.[27] These many varied contemporaneously created records of what was agreed to in the four-day Treaty Council, should illustrate how easily the problem of hearing simultaneous interpretations and translations could vary the meaning of what was said, what was asked and offered, and what was *mutually* agreed to. This problem deepens when you understand the vast inter-cultural differences that existed between the British and the Anishinaabeg in 1873.

The Anishinaabe near Rainy Lake and Lake of the Woods had established an agreement, that would likely be considered a treaty, for the so-called Dawson route, the canoe and road route completed in 1870 for military and other British expeditions to cross our territory, before 1860, and that treaty was breached early on. The three-dollar annuity agreed to with Simon Dawson, along with various identified breaches, such as the taking of timber for steam-boats, were grievances discussed at length at the beginning of the 1873 treaty council.[28] This former

25. *Keewatin* 2011, *supra* note 10 at para 51.
26. Elder Allan White is a citizen of Naotkamegwanning First Nation otherwise known as Whitefish Bay. He grew up with oral tradition of our people surrounding him, his father was the last Anishinaabe judge that he could remember. The practices of Anishinaabe judges is another tradition in our Nation that I am discovering and learning about. See *e.g.* Aimée Craft, "Anishinaabe Nibi Inaakonigewin Report: Reflecting the Water Laws Research Gathering conducted with Anishinaabe Elders" (2014) at 4, 15, online: <create-h2o.ca/pages/annual_conference/presentations/2014/ANI_Gathering_Report_-_June24.pdf>.
27. For an extensive review of "the documents" of Treaty 3 see, *Keewatin,* 2011, *supra* note 10 at para 308-88.
28. See Morris, *Treaties*, *supra* note 16 at 55. Morris writes: "Promises had many times been made to them, and, said the speaker, unless they were now fulfilled they would not consider the broader question of the treaty."

breach of terms would have informed the Anishinaabe Chiefs, through very contemporary experience, that an effective *procedural* remedy would be required for any new treaty with the Queen and her men.

Clearly, it had been a long time since the "Queen's government ear" was available to the Anishinaabe. My record is that sometime between the trial and the final appeal in *St Catherine's Milling and Lumber*, which ended in 1888,[29] the treaty councils had stopped. The final ruling resulted in an aggressive provincial hand in changing treaty arrangements, including the extinguishment of reserves along the fertile Rainy River watershed and the Quetico Provincial Park.[30] At the same time, the building of navigational and hydro dams led to Winnipeg-basin flooding all along the Lake of the Woods, English River, and Rainy Lake watersheds. By this time, the Crown was aware that the relationship with the Anishinaabe was breached, almost beyond repair. The dust had not settled on all of the unilateral changes made between Ontario and Canada (in various boundary disputes and litigation) until the final negotiations achieved provincial approval of the Treaty 3 reserves in 1915. But, by that time, the Spanish flu and poverty had decimated the population of the boundary waters Anishinaabe, not to mention the destruction and havoc that Indian Residential Schools were to cause upon our communities into the next century.

III. INTERNAL RULES ESTABLISHED BY THE GRAND COUNCIL TO PROTECT THE TREATY

From the 1980s to the 1990s, the Treaty and Aboriginal Rights Research (TARR) unit worked with two Canadian lawyers who have stayed connected to the Grand Council through their work into the new millennium to forward various claims related to flooding throughout the territory. These lawyers have held long-term relationships with the First Nations and understanding of the original claim coordinating role of the Grand Council. There was a formal protocol developed during the TARR unit's initial research years, and that was agreed to through the

29. *St Catherine's Milling and Lumber v The Queen* (1888), LR 14 AC 46 (PC).
30. Rainy River First Nations' land claim was settled in 2003 related to the loss of reserve lands along the Rainy River and the Sturgeon Lake Band claim (Quetico Park lands) is still underway after years of negotiations. For an account of the Ontario/Canada negotiations to finalize Treaty 3 reserves and extinguish the Sturgeon Lake reserve, see Wayne E Daugherty, "Treaty Research Report – Treaty Three [1873]: Treaties and Historical Research Centre, Self-Government", (Indian and Northern Affairs Canada, Ottawa 1986), online: <www.rcaanc-cirnac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAM-TAG/STAGING/texte-text/tre3_1100100028672_eng.pdf>.

Grand Council Treaty 3. The centralized TARR unit and the two historians, Leo Waisberg and Tim Holzkamm had established the claim documents as advised by the various community-hired lawyers. Because of these central research efforts, it was acknowledged that the team knew who had the strongest claims for purposes of litigation.

If a community was forced to bring the treaty to court, the protocol held that the plaintiff, or defendant (if it was a treaty right defence), would need to be sanctioned by the Grand Council Treaty 3, through the "Chiefs in Assembly." Moreover, other communities would consider supporting the claim through small monetary contributions if they could afford to help with the fundraising effort. This was before 1990. At this time, there were filed claims around the subject matter of the "headlands guarantee," wild rice, fisheries, timber claims, and most First Nations had advanced their reserve claims for treaty land entitlement and flooding damages.[31]

IV. THE TREATY 3 LITIGATION WAR CHEST

In addition to litigation, First Nations and the Grand Council asserted demands for consultation and resource revenue-sharing in Treaty 3 territory to protect their inherent authority, and their vision of the treaty relationship once Section 35 of the *Constitution Act, 1982* was in place. In 1994, an agreement was reached with Bell Canada that allowed their secondary fibre-optic corridor through the southern portion of the territory including six First Nation reserves. During that process, Bell Canada also funded the Grand Council in their efforts to create a written law called Manito Aki Inakonigaawin, the Great Earth Law. This law was written down because it applied to industry and "authorized" development was now a requirement under Treaty 3. Of course, writing down the law was not creating the law, it was a law that had existed in Anishinaabemowin for a very

31. David T McNab, "The Administration of Treaty #3: The Location of the Boundaries of Treaty #3 Indian Reserves in Ontario", in Ian Getty & Antoine Lussier, eds, *As Long As The Sun Shines and Water Flows* (UBC Press, 1983) 148 at 148: "By extending the existing shoreline boundaries to a line, drawn from headland to headland, the Indian reserves would be greatly increased in size and the Indian bands would have exclusive control of the fishery and wild rice in that [bay] area." The 1894 agreement and it's headlands guarantee disappeared in future implementation of the treaty discussions between Ontario, Canada, and the Anishinaabe in the twentieth century. "Headlands" claims have been established by Treaty 3 communities and brought before the Province of Ontario in the Grand Council Treaty #3's political "table" discussions with the Ministry of Indigenous Relationships and Reconciliation that I was aware of when I was Chief of Couchiching First Nation in 2014.

long time. It was the "process" that was written down to give some certainty to industry that there was a clear path to receive an authorization from the Anishinaabe Nation in Treaty 3.

Bell Canada wanted access to the six independent reserves in order to support its fibre-optic network, but it agreed to a revenue sharing agreement that was formulated based on the Treaty 3 territory as a whole. Approximately 150,000 dollars was received every year into the "Bell FOTS3 fund" by Grand Council Treaty 3. There was a misunderstanding about who was the "beneficiary" of the fund created by the Bell Canada payments over those twenty years from 1994 to 2014. The six First Nations clarified at the very end of the agreement, during renewal talks, that Bell Canada made the payments in order to have access to their six reserves only. Eventually, those First Nations accessed the funds in the Grand Council Treaty 3 bank account and depleted it between 2015 and 2016. Prior to this, it was considered the Anishinaabe Nation in Treaty 3's litigation war chest. As a result, the Grand Council had withdrawn significant monies for litigation from the war chest between 2012 and 2015.

The Great Earth Law did not fuel a large war chest for treaty litigation beyond the Bell Canada funding. Given the uncertainties around process and spending the monies, the fund was invested well and grew from 1994 to 2008. When I worked for the Grand Chief, we often fielded discussions about access to the monies for a variety of reasons of significant importance to the communities. As lawyers, the Grand Chief and I often discussed legal strategy around the Grand Council meetings, and there was an expectation that some type of litigation would come before the Grand Council.

Earlier in 2000, the people at the Grand Council Treaty 3 signed the Millennium Declaration to ensure that their Assemblies would be more transparent, especially for important decisions of the Nation. This Declaration required that during the spring and fall assemblies, the Nation would convene as a National Assembly for the first two days of the Assembly, and the final third day would be for the Chiefs in Assembly to make decisions to implement the Nation's will. This was an attempt to decolonize the Grand Council Treaty 3 which was criticized for being too connected to the *Indian Act* authority of the Chief and Councils. The Assemblies have been operating in this way ever since.

The Millennium Declaration has been the goal that I hold most Grand Council Treaty 3 decisions against, that we try to make decisions as a Nation in Assembly. Unfortunately, it is more often than not that we fail to meet this standard in our most important deliberations. Decisions at the National Assembly were thought to be more inclusive of the Nation and involved better decision-making. We tried

to revitalize the famous Mawendopenais closing speech (for Treaty 3, 3 October 1873) of doing our business "openly and in the light of day" so that our decisions would be inclusive and final, as Mawendopenais had explained, there should be "no grumbling" by the Anishinaabe after the treaty was made. However, the "no grumbling" only works if the participants feel strong enough and empowered enough to voice their important concerns and objections. The concerns about the litigation strategy were voiced by the First Nations' legal counsel at meetings of legal counsel and it became clear that we were not truly "all of one mind" about the litigation agenda that we approved.

V. STOPPING CLEARCUTTING IN THE KEEWATIN LANDS

All of these developments to "open the war chest" would have been greatly disappointing to the community of Grassy Narrows First Nation, as they were independently litigating a treaty-based judicial review up to 2005, when the Ontario Superior Court decided that the litigation must take form of a more expensive action and trial. This was much more expensive for the community who was wrestling with a number of issues, including mercury poisoning within its community after decades of negligence by the provincial Ministry of the Environment. Grassy Narrow's Trapping Council had asked to bring the treaty to court and they had also asked to access the war chest for its litigation. While Grassy Narrows were granted approval and support for the judicial review, no financial support was forthcoming. The war chest was still inaccessible at this time. Grassy Narrows was forced to bring an advanced cost motion into the litigation now that it was a full trial, which arguably limited their ability to fully litigate the substantive issues in the best way possible.[32] The Grassy Narrows "impecuniosity" was relied on for the advanced costs motion, but also made it challenging to coordinate legal strategy with friendly parties.

32. See *Keewatin v Ontario (Minister Of Natural Resources)* (2006), 32 CPC (6th) 258 (ONSC) at paras 7-8 [*Keewatin*, 2006].

The cost and coordination of a large treaty claim is probably best illustrated in the Grassy Narrows litigation.[33] Once the trial of this matter began, there were procedural motions before it, which seems to always be the case in section 35 disputes with the Crown. One motion was about "who" were the proper representatives of the Grassy Narrows claim. This claim was first established by the Grassy Narrows Trapper's Council, namely Willie and Andrew Keewatin and Joseph William Fobister. It was these members who brought the litigation to the Grand Council for their approval, to bring the treaty to court. Chief Simon Fobister was also a supporter of this litigation and he attended court with the plaintiffs. Chief Fobister was the Deputy Grand Chief of Grand Council Treaty 3 and he was very aware of Grand Council Treaty 3 protocol and what was happening on their agenda.

The Crown argued that it would be necessary to name Grassy Narrows First Nation formally as part of the representative action "jointly and severally liable" for any costs award if the potential of costs awards for court procedure was granted against the plaintiffs. Obviously, this had a chilling effect of anyone joining this trial prematurely. The Ontario Ministry of Natural Resources (MNR) argued that the plaintiffs, if not the band council, could be less disciplined because the *Indian Act* protected their personal assets from seizure. The Band Council would not be as immune from such actions. The court decided that it was premature to name Grassy Narrows as a plaintiff, or to make the band jointly and severally liable.[34]

The court in that decision also laid out in some detail the cost added to the plaintiff, now that the court procedure was a more expensive trial/action, rather than the planned judicial review, at the Superior Court of Ontario:[35]

> The costs of litigating this case for the plaintiffs are estimated at just over $2.8 million. This figure is based on a detailed budget for an estimated 12-week trial on all issues and it provides for use of experts (scientific, historical, archival, and anthropological).

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33. See *Keewatin v Ontario (Ministry of Natural Resources)* (2003), 66 OR (3d) 370 (Ont Div Ct). This case started as a judicial review, but Abitibi-Consolidated and Ontario won a motion to quash the judicial review, forcing the plaintiffs to spend the next two to three years organizing the case as a more expensive action in Court with a fuller hearing and evidentiary record. I was an articling student in 2005 at Sierra Legal Defence Fund ("SLDF", which is now Ecojustice) where one of my first duties was to send many of the judicial review files to the BC law firm that would now fully represent Grassy Narrows in the new trial. SLDF was supporting the judicial review of Grassy Narrows. Grassy Narrows quickly looked to the law of advanced costs to advocate for cost-sharing between the parties.
34. See *Keewatin*, 2006, *supra* note 32 at para 6.
35. *Ibid* at paras 71-73.

> Most of the work by counsel for Grassy Narrows has gone unpaid, and most of what has been collected has been paid not by Grassy Narrows, but Sierra Legal Defence Fund.
>
> Grassy Narrows paid Cook Roberts LLP a bill of $18,391.54 in December 2005. Grassy Narrows obtained this money by making a special request to INAC for the Band's Ottawa trust fund monies.

In addition to the cost of the trial were the costs of the appeal to the Court of Appeal for Ontario and to the Supreme Court of Canada. Costs were awarded on a partial indemnity basis in advance by the courts involved.[36] This would also later include the party of the Wabauskang First Nation, who was added as a party in the Court of Appeal for Ontario and the Supreme Court of Canada. Grassy Narrows, Wabauskang, and Lac Seul were together, one Anishinaabe community around 1873.

The proper rights-holder in the Grassy Narrows decision was worked out by the legal team representing the most interested communities who were neighbouring the claimant. However, my experience as an advisor to the Ogichidaakwe (Grand Chief) in Grand Council Treaty 3 as the trial went on and during the application deadlines on appeal for interventions, was that there were strong concerns about the treaty representation and fairness for the outstanding land claims. At the time, there was a concern about the "reserve creation" issue as it was being discussed in specific claims, flooding negotiations by several teams across the territory on behalf of more than fourteen First Nation communities in Treaty 3. The Treaty 3 issue of when reserves were created, included arguments that reserves were created after survey and counter-arguments that involve the Ontario-Canada negotiations where Ontario held back Ontario's consent to 1915 for the reserves. Ontario's consent would seem to be a requirement in Canadian law after the Weywaykum decision in 2002. This would greatly diminish "damages" for flood claim settlements if the issue was commented on prior to being properly in front of the of a decision-maker.[37] The Grassy Narrows trial was all about the evidence related to the negotiations and settlements around

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36. *Grassy Narrows, supra* note 2 at para 55, *Keewatin v Ontario (Natural Resources)*, 2013 ONCA 158 at para 235.
37. See *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 15. *Wewaykum* stated that:

> Federal-provincial cooperation was required in the reserve-creation process because, while the federal government had jurisdiction over "Indians, and Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*, Crown lands in British Columbia, on which any reserve would have to be established, were retained as provincial property. Any unilateral attempt by the federal government to establish a reserve on the public lands of the province would be invalid…

Ontario boundaries that included the finalization of reserve creation for Treaty 3. Several Treaty 3 communities intervened in the two appeals. This created additional delay and expense for Grassy Narrows, who were being funded on a partial indemnity basis.

Most litigators will explain how complex treaty litigation is generally, and how much more complex Treaty 3 litigation is because of the division of powers and boundaries issues being settled between the Crown governments after Confederation. This complexity is best illustrated by reviewing the Grassy Narrows trial decision that is 1663 paragraphs long.[38] Not included in that legal history is the work that the *Indian Act* administration has done to usurp governing authority from the Grand Council of the Boundary Waters Anishinaabe, including the Anishinaabe law and social structures that bound us together as one Nation.

VI. GRAND COUNCIL AND THE WAR CHEST LITIGATION

In 2011, I was asked by the Grand Chief to coordinate the development of rules to access the Bell Canada Funding (the war chest). The resulting Consolidated Revenue Trust Fund (CRTF) rules were adopted in 2011 by the Grand Council Treaty 3. Again, the only dollars in the CRTF were the Bell Canada dollars and interest earned from investing those dollars, but it was a substantial war chest for litigation. The first litigation matter to access the fund had to be proposed in the National Assembly, be supported, and then voted on with more information, including a litigation budget, at a later Chiefs Assembly so that the amounts accessed would be certain and limited. A process was established and three pieces of litigation quickly went through: (1) The Grand Council Treaty 3 intervention at the Court of Appeal for Ontario for the Grassy Narrows trial decision; (2) The new Treaty Right to Education litigation; and (3) A judicial review of the decision that allowed the sale of dams owned by Abitibi Consolidated to H2O Power, as those dams had illegally flooded Treaty 3 reserves for over a century and was continuing to flood the reserves without any form of easement.[39]

I was in the room for these decisions and there was feeling of history being made for the "treaty right to education" litigation. Unfortunately, the strategy to

38. See *Keewatin* 2011, *supra* note 10.
39. See *Kelly v Canada (AG)*, 2013 ONSC 1220 [*Kelly* 2013], *Ogichidaakwe v Ontario (Energy)*, 2014 ONSC 5492 [*Ogichidaakwe*], *Keewatin v Ontario (Natural Resources)*, 2013 ONCA 158 [*Keewatin* 2013].

hunt down the treaty breakers was not transparent enough for the Nation and some dissent was sown within communities.

The Treaty 3 education litigation was the most divisive. As oral tradition people, the expectation is that all the impacted people would be in the room when a decision is made. With a claim this large, involving everyone as an education beneficiary, many people felt left out of the decision-making process. Also, legal counsel for many First Nations examined the "Statement of Claim" document and had differing opinions on how the case was pleaded. These differences of opinion were so key because unanimity was needed to proceed with this claim in court. As an insider, I was aware that the Statement of Claim was created as a strategy to bring Canada to the negotiation table. We had begun to collect data to show the gap in funding between our schools and mainstream schools, and we had begun a process of defining where we wanted our treaty right to education to take our communities, including culture and language curriculum and other key investments. Not everyone was able to put all of these pieces together and after about six months, there was open dissent about this litigation by some of the Chiefs. This was especially surprising to me, as this education claim was so celebrated when it was first approved.

There was less time spent on the intervention at the Court of Appeal for Ontario by the Grand Council Treaty 3 in the Grassy Narrows case, but it was the most successful of the three matters in litigation funded by the Treaty 3 war chest. I was personally very happy to read parts of the Court of Appeal for Ontario decision about Treaty 3:[40]

> The principle of constitutional evolution has an important bearing upon treaties with First Nations. Treaties are solemn agreements and they are intended to last indefinitely. The rights they guarantee are not frozen in time…Treaties must be capable of adapting to the natural evolution of the Constitution, which evolves as a "living tree" to meet "the changing political and cultural realities of Canadian society."
>
> As the English Court of Appeal explained in *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*, in relation to a challenge to proposals for constitutional change in 1982, if treaties are to be honoured by the Crown "so long as the sun rises and river flows," treaty interpretation has to evolve along with the Constitution…

Unfortunately, the Court of Appeal for Ontario understanding of the treaty as the Articles of a Treaty is underscored by reprinting those Articles at the end of their decision. Despite this, a step forward is made now that the Crown is

40. *Keewatin* 2013, *supra* note 39 at paras 137-38.

understood as both the provincial and federal governments, which is the opposite of what the plaintiff, Grassy Narrows was arguing. The provincial government is a necessary party to Treaty 3 because they hold a lot of the important constitutional authority with regard to treaty relationships. Now, with this significant change in the treaty dynamic, would there be no better reason at that time to have a treaty council? Unfortunately, no. The Grassy Narrows decision of the Court of Appeal for Ontario was appealed to the Supreme Court of Canada and all the intervening parties went forward with their interventions including the Grand Council Treaty 3.[41]

At the same time, a judicial review about the sale of Abitibi-Consolidated's hydroelectric dams to H2O Power Ltd. was also controversial.[42] This judicial review was spurred on by lawyers for several claims related to flooding. That group of lawyers informally created the theory of the case for the judicial review. A law firm was hired that had no relationship with the flood claim lawyers and that may have been detrimental to the success of the judicial review. The fact that the legal team was fairly brand new to the Grand Council Treaty 3 was also an expensive problem. The more interesting story for this article about treaty remedies and rights-claimants is how the judicial review and the trial on the treaty right to education had met a similar end in litigation, on the question of *who* was the proper representative.

In *Kelly v Canada (Attorney General)*,[43] the Superior Court of Ontario agreed with Canada that the treaty claim against Canada was improperly pleaded in two ways: the plaintiff was not the twenty-eight bands or a "proper representative" of those twenty-eight bands and the claim itself was non-justiciable, as it was a dispute on education policy of Canada, and the plaintiff's lawyer admitted that it was a strategy to get Canada to the negotiation table. However, upon appeal to the Court of Appeal for Ontario, the claim was found to be justiciable and the Court agreed that the defect about proper representative of the twenty-eight bands could be fixed. The Court decided that "Band Council Resolutions"

41. *Supra* note 2.
42. *Ogichidaakwe*, *supra* note 41.
43. *Kelly* 2013, *supra* note 39 at paras 121, 156.

would establish that the named plaintiffs were the proper representatives of those twenty-eight First Nations for the treaty right to education claim.[44]

In *Ogichidaakwe v Ontario (Energy)*,[45] the Ministry of Energy and the Ontario Power Authority utilized the "Kelly order" to question the proper representative of the judicial review for the Treaty 3 claimants against the decision to allow the sale of the hydro dams. The lawyers for the Grand Council Treaty 3 submitted to Justice Perrell that his original order in the education litigation was offensive as it went against Anishinaabe custom. Justice Perrell shared that he understood the legal argument against the "Kelly order:"[46]

> The Anishinaabe Nation is a community, and it is understandable that the Applicants would be discomfited and resistant to being ordered to sue other members of their community. And it is understandable, therefore, that the Applicants might view a *Kelly v. Canada* Order as offensive to Aboriginal custom. And it would also be understandable that the more cynical and suspicious of the Applicants might harbour the unexpressed sentiment that a *Kelly v. Canada* Order could be used as a divide-and-conquer tactic in civil litigation against Aboriginal peoples.

Notwithstanding the sympathy that the judge had for this argument, he felt that the order was necessary under the circumstances:[47]

> If, however, the Indian Bands do not agree with the Applicants' assertion that they are the rights holder, then they necessarily should be joined as party respondents, precisely because they may be correct in their own assessment that they are rights holders and they should participate in the judicial review proceeding. Here, it bears

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44. See *Kelly v Canada (AG)*, 2014 ONCA 92. The case states:

> This is a fundamentally different challenge from that faced by the appellants before the motion judge. Moreover, as we have said, on this appeal hearing the Crown declined to specifically identify those parts of the appellants' pleading that allegedly run afoul of the requirement of justiciability. While the Crown, of course, is free to reconsider its position on the appellants' proposed action, as currently framed, the altered basis for the Crown's opposition to the appellants' action as now advanced by the Crown results in evident unfairness to the appellants. The appellants are entitled to know the case they have to meet on a pleadings challenge to their action…
>
> Accordingly, the appellants are granted leave to continue this proceeding as a representative action on behalf of themselves and all persons who are beneficiaries of Treaty 3, and Grand Chief Warren White (who, as discussed below, replaces Grand Chief Diane Kelly) is appointed as the representative plaintiff in the action, provided that (1) they are authorized to do so by band council resolutions of all 28 reserve bands, or (2) they join as party defendants those bands that do not authorize the representative action (*ibid* at paras 8, 21).

45. *Ogichidaakwe* 2014, *supra* note 41.
46. *Ibid* at para 9.
47. *Ibid* at para 38.

> repeating that if all the putative Aboriginal rights holders are before the court, it becomes unnecessary to determine which of them is the genuine rights holder. The adamancy of the Applicants' assertion, therefore, undermines the Applicants' assertion that it is beyond doubt that they are the rights holder, which I repeat they may well be, but that judicially remains to be seen.

The end result of the two judicial matters was that the plaintiff/applicants were unable to bring twenty eight Band Council Resolutions to the court to evidence the proper representation in those cases. Additionally, the judicial review went well-beyond the budget received from the Grand Council Treaty 3 for the preliminary matters and motions. Both matters received a finite budget from the CRTF—under $300,000 for the judicial review and just over $1,000,000 for the education litigation. The judicial review procedures had cost over $900,000. It was my initial belief that the over-spending on the part of the judicial review may have been the over-arching concern of the First Nations and may have been why the Band Council Resolutions were not forthcoming. Years later, I now understand that there were several process problems—we did not follow our original rules, so that created some mistrust and misunderstanding of these claims.

The irony of courts establishing other rules, including that the "proper representatives" of collective treaty claims are *Indian Act* bands, is not lost on the people that demanded that they be dealt with as a nation in the Treaty negotiations.[48] It is regrettable that courts were not more receptive to the nature of the claims and who the plaintiffs were and were less concerned about costs orders against these plaintiffs. It was true to the adversarial nature of our treaty partner that they created the divisive "Kelly order" that ostensibly ended the once in a lifetime treaty litigation of the Grand Council Treaty 3.

VII. NOW AFTER THE DUST HAS SETTLED ON OUR TREATY LITIGATION

Fast forward to the 140th anniversary of Treaty 3, 3 October 2013, the Minister of Indian Affairs and other Federal executive representatives including the Governor General of Canada were invited, in advance, to celebrate the anniversary of

48. Simon J Dawson, *Memorandum in Reference to the Indians on the Red River Route* (2 June 1873), Ottawa, Library and Archives Canada (RG 10, vol 1904, file 2235), online: <collectionscanada.gc.ca/pam_archives/index.php?fuseaction=genitem.displayEcopies&lang=eng&rec_nbr=2070938>.

Treaty 3 between the Queen and the Boundary Waters Anishinaabeg.[49] No one representing Canada bothered to attend.[50]

The fact that millions of dollars have been spent on the extraordinary remedy of litigation in such an unsuccessful strategy is lamentable. The Bell Canada dollars from the twenty year agreement are no longer available to fill a war chest to hunt down treaty breakers. It was a once in a lifetime opportunity that may have been squandered by our inability to truly create a nation "of one mind" today. We have a far way to go to decolonize our processes and the road to treaty implementation. The transparency and accountability of the litigation were lost in the way they were managed through the Grand Council Treaty 3. The litigation, by necessity, became directed by Chiefs as they were the named plaintiffs within the claims, and the nature of the litigation and strategy required there to be some confidentiality surrounding these discussions. This hurt the capacity of the nation to truly understand how we were hunting down the treaty breakers. It was a divide and conquer strategy called colonialism.

VIII. CONCLUSION

In my lifetime, I am consistently reminded of the rules that govern us rightly, otherwise known as Miinigoziiwin, that our Creator is given inherent authority. Literally, Miinigoziiwin means, what the Creator has given us. And, Mawendopenais explained a key concept to creating law and binding agreements for our Nation in the final statement after agreeing to Treaty 3:[51]

> I stand before the face of the nation and of the Commissioner. I trust there will be no grumbling. The words I have said are the words of the nation and have not been said in secret but openly so all could hear and I trust that those who are not

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49. The Grand Council Treaty 3 is a revitalized traditional government of the Boundary Waters Anishinaabeg. See for example, the Ogichidag bear clan mark on the Selkirk Treaty of 1817, and the Ogichidaa's mark on an 1825 Treaty of Prairie du Chien that involved the United States of America to set a peace between the "Sioux" and the "Ojibwa" along the Great Lakes to assist the US fur trade. The Selkirk Treaty (18 July 1817), online: <www.gov.mb.ca/chc/archives/hbca/spotlight/selkirk_treaty.html>. Treaty between the United States and the Chippewa, Sauk, Fox, Menominee, Iowa, Sioux, Winnebago and a portion of the Ottawa, Chippewa, and Potawatomi Tribes of Indians living upon the Illinois, signed at Prairie des Chiens in the Territory of Michigan on 19 August 1825, online: <content.wisconsinhistory.org/cdm/ref/collection/tp/id/55638>.
50. Jon Thompson, "First Nations Still Waiting for Federal Treaty Strategy", *The Dryden Observer* (10 October 2013), online: <thedrydenobserver.ca/2013/10/10/first-nations-still-waiting-for-federal-treaty-strategy>.
51. *Keewatin v Ontario*, 2011 ONSC 4801 at para 367.

> present will not find fault with what we are about to do today. And I trust, what we are about to do today is for the benefit of our nation as well as for our white brothers – that nothing but friendship should reign between the nation and our white brothers…. And now before you all, Indians and whites, let it never be said that this has been done in secret. It is done openly and in the light of day.

The CRTF decisions were meant to be better decisions about when treaty litigation would be funded by the litigation war chest. In hindsight, there was not a complete understanding about *how* to be more inclusive in the instructions and decision-making *during* the litigation amongst the Treaty 3 communities.

Treaties are about relationships, I argue, they are not meant to create winners and losers. The mutual benefits and the peace that resulted are the attraction to treaty relationships. The fact that Canada is not mired in Indigenous-led violence is a testament to the strength and endurance of our treaty relationships and sacred obligations to those treaty orders that were created. Not that the Anishinaabe of the Boundary Waters were unaccustomed to using warfare to protect their interests. We had constant struggles in our border-relationships caused by earlier settler coercion, namely the American and British fur trade. We fought vigorously to be the "middle-men" in this fur trade and our "Sioux-Ojibway" disputes in Minnesota are central to that state's early violent history of settlement there.[52] There is also a very long-lasting peace that is in the collective memory of Indigenous peoples known as the Great Peace or the Great Law of Peace in and around the Great Lakes prior to any European contact. This peace was unsettled by the European settlement in the eastern shores of the United States moving inland.

Treaties have a more special place in Canadian law than they are presently afforded. There is a misunderstanding in the common law that treaties are between the small *Indian Act* bands that may benefit from them today. The fact is, Treaty 3 was a nation-to-nation treaty that allowed the east-west expansion of Canada into the west, and only the parties themselves should be able to change their own legal position vis-à-vis the treaty relationship, through consent or negotiated agreement.

In *R v Sioui*, the Supreme Court of Canada has determined that treaties cannot be extinguished unilaterally by agreement between colonial powers:[53]

> It would be contrary to the general principles of law for an agreement concluded between the English and the French to extinguish a treaty concluded between the English and the Hurons. It must be remembered that a treaty is a solemn agreement between the Crown and the Indians, an agreement the nature of which is sacred:

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52. Mainville, "Treaty Councils," *supra* note 1.
53. *R v Sioui*, [1990] 1 SCR 1025 at 1063.

> *Simon*, *supra*, at p. 410, and *White and Bob*, *supra*, at p. 649. The very definition of a treaty thus makes it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned. Since the Hurons had the capacity to enter into a treaty with the British, therefore, they must be the only ones who could give the necessary consent to its extinguishment.

The logical conclusion to treaty disputes is that the parties are required to resolve them through mutual agreement. No Canadian court has the powers and authorities to unilaterally change their terms or to do damage to the solemn, honourable reconciliation achieved between the parties over a century ago. What will be an important solution within these disputes is to allow Indigenous law and institutions of Indigenous law to participate in the resolution of these disputes and balancing the relationship with Crown governments.

And, what has happened to the Queen's ear? We know it is literally still available, but is it practically, no longer available to the Anishinaabe Nation? What would be the modern equivalent from Canada's executive government of the government's ear? I have argued this already in a much-earlier article on treaty councils.[54] That was a decade ago, and very little has happened to begin a dialogue on what a treaty council would need to make it an acceptable treaty-based, fact-finding, and dispute resolution mechanism. John Borrows shared this understanding almost twenty years ago, about treaty councils [55]

> They believe that power was to be shared, and decisions about the treaties' meanings were to be resolved through further treaty councils. Courts could take guidance from this perspective when faced with disputes over the meaning of treaties and send the parties back to peace and friendship councils to resolve their differences through negotiation and agreement.

Does this fully explain why the Anishinaabe continue to hold fast to Treaty 3?

Unmistakably, the Anishinaabe Nation drove a hard bargain, it took more than three years and as many attempts to create an agreement known as Treaty 3. Our existing relationship with the British, the Dawson Road annuity, and our relatives having a better treaty in Minnesota than the Lake Superior-based Anishinaabe had in Canada, informed our treaty discussions. An important development that we fashioned was our own version of terms to create an 1869 "list of demands" much like the Queen's representatives pre-fashioned terms in the "Articles of a Treaty" that was drafted in 1871. The Anishinaabe would

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54. Mainville, "Treaty Councils," *supra* note 1.
55. John Borrows, "Domesticating Doctrines: Aboriginal Peoples and the Royal Commission on Aboriginal Peoples" (2001) 46 McGill LJ 615 at 630.

definitely agree that the 1869 demands were not Treaty 3, and that the "Articles of Treaty" were not the treaty either.

How novel would it have been to have demanded not just a parchment copy of the treaty as Chief Powassin and others had done after the treaty was concluded, but also that the treaty be written in their language as a record of the agreement in Anishinaabemowin? The only Anishinaabemowin record was kept by the Anishinaabe "recorder" a person entrusted with the capacity to understand the full oral agreement in Anishinaabemowin, and he was given the responsibility to retell the various terms to the Grand Council into the future. An interesting symbolic act of reconciliation would be for both Nations to *attempt* to work together to establish the official treaty record in both English and Anishinaabemowin, the impossibility of this would almost seem self-evident. If we cannot do this now, and I would argue even now this is an impossibility, why do people suppose or presume that this was achieved in 1873? Is it acceptable that Indigenous law and jurisdiction is also a "living tree" and treaties are rooted in the terms agreed to 1873, but created in symbolic language to ensure that the treaty relationship would last, "as long as the sun shines, the river flow, and the grasses grow, that is to say, forever." The living trees would be fed by the interpretative difficulties, meeting together to come to a mutual understanding for today, then again in future years, and so on.

A *sui generis* dispute resolution court could be the counter-balancing force that the former promise to "hunt down" treaty breakers was in 1873. Articles 27 and 37 of *UNDRIP* are helpful in beginning that important treaty-based discussion on a truly nation-to-nation basis.

Given the practical reality that a true written record of the terms of this treaty does not exist, why is it legally acceptable to bring a treaty such as Treaty 3 to a Canadian court? Courts have been eager to convince themselves of the "principles of interpretation" found in common law,[56] and that a principled approach by common law judges would equalize the interpretative difficulties. The result is winners and losers. The adversarial system, some might even argue, would afford the parties a truly "fair" forum to advocate for various interpretations and findings within the treaty itself. This is all outside of treaty-based dispute resolution to the detriment of the original understandings and the potential

56. *R v Marshall*, [1999] 3 SCR 456 at para 78.

actual agreement (or historic reconciliation) of 1873.[57] To conclude, I want to share that the Anishinaabe refer to treaty between us and the Queen as "Manidoo Mazina'igan" which means the sacred paper. I doubt this is just the Articles of Treaty, given our long legacy of protecting the Paypom Treaty, our knowledge of the Nolin Notes and the "We have Kept our Part of the Treaty" document that lists the many treaty grievances by subject matter. The sacred paper is part of the dispute resolution between us, the ingredients of a mutual understanding over the long history of our treaty relationship. We still strive for peace and understanding and the lasting friendship promised in 1873. That we can share all that is fine and good between us.

57. As a practicing lawyer, I am presently working with both Aboriginal law informed by Anishinaabe Inakonigaawin, and helping my clients assert original inherent jurisdiction as their jurisdiction and staying away from delegations of Canadian legal authority as contingent jurisdiction. My strongest belief about Treaty 3 is that we insisted that our laws, "the rules that govern us rightly," would continue to be co-existing jurisdiction in our territory. To that end, I am greatly interested in how law in Canada is required to be reconciliatory, and how judges can be trained to be better in helping in that purpose. See *e.g.* Mark D Walters, "The Judicial Recognition of Indigenous Legal Traditions: *Connolly v Woolrich* at 150" (2017) 22 Rev Const Stud 374 at 376:

> Indigenous law is acknowledged not because it has been incorporated within another law, or because it has been impliedly (or expressly) accepted or sanctioned by a sovereign king or parliament, but rather because it is one of many bodies of law that can be shown to fit together in a manner that best reflects the equal moral imperative of a normative order.