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Treaty Canoe

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International Law's Objects

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For Iris and Angelika—a picture book. JH
For Katie. DJ

Treaty Canoe

Ruth Buchanan and Jeffery G Hewitt

Introduction

'Treaty Canoe' is an admittedly complex object to select for the present collection.¹ As an artwork which is an assembly of made and found objects as well as a performance (in its making), its meaning is both layered and evolving. And yet, its evocation of both the promise and peril of international law in colonial North America is unmistakable. In 'Treaty Canoe', 'document, object, and location cohere to scrutinize the logics of colonialism, sovereignty and the question of responsibility that inheres in both'.² As a collection of objects both art and law, tool and text, past and present, 'Treaty Canoe' offers both an important recognition of the violence and erasure at the foundation of the colonial project in Canada as well as an invitation to participate in a de-colonial 'rewriting' of these histories.

At Osgoode, 'Treaty Canoe' was set on saw-horses in the glass walled front lobby of the library, where those who entered and exited the library or passed through the central atrium of the law school could encounter the installation. Its presence in the law building was impossible to miss; it commanded attention from passersby and generated comment and discussion among law students, faculty, staff, and visitors. The juxtaposition of the various elements of the installation, the combination of

¹ I would like to thank artist Alex McKay for 'Treaty Canoe' and for his generous installation of it at the Osgoode Hall Law Library in January and February 2016, Kristina Mansveld for able research assistance and those students and colleagues who participated in our discussion of the installation on 8 February 2016. Finally, thanks to Jeffery Hewitt for introducing me to Treaty Canoe, agreeing to write about it with me, and for his insights and collegiality on the collaborative voyage that ensued (Ruth Buchanan); Serendipity feels like an old-fashioned idea in our modern, busy times but it still exists. I am grateful to Ruth Buchanan for drawing law, arts, and culture into the law school in a way that makes room for people like me. Indeed, her generosity led us to this collaboration, which also called upon artist, Alex McKay to install Treaty Canoe at Osgoode (no small feat). The staff of the Osgoode Hall Law Library readily agreed to host Treaty Canoe, which generated interest by its presence and in turn drew many attendees to a discussion on the installation where I learned much more from the participants than I could give. That all of these elements transpired so seamlessly reminds me of what it means to be a benefactor of serendipity (Jeffery Hewitt).

² David Stirrup, 'Bridging the Third Bank: Indigeneity and Installation Art at the Canada-US Border' in Gillian Roberts (ed), *Parallel Encounters: Culture at the Canada-U.S. Border* (Wilfred Laurier UP 2013) 164.



Fig 36.1 'Treaty Canoe' was installed by the artist, Alex McKay, in February 2016 in the library entrance of Osgoode Hall Law School, Toronto, Ontario, Canada. It is a performance/sculpture/installation. Behind the canoe hangs a purple and white flag, mounted to the ceiling representative of the two-row wampum belt. Perched in between the flag and canoe is a birch bark megaphone with script 'Treaty of Niagara 1764' written on it in red paint

Source: photo courtesy of Alex McKay.

familiarity and strangeness that they evoked, invited closer inspection, reflection, and dialogue.

The central object in the installation resembles a birch-bark canoe, but instead of bark, the 'skin' of the canoe is constructed out of a paper-maché of handwritten texts including that of the Royal Proclamation (1763) and a variety of contemporaneous treaties. The texts were transcribed by many hands from machine printed text onto hand-made linen paper using dip-pen and ink by volunteer scribes, most of whom had never before read a treaty. The scribe's choice of text, according to artist Alex McKay, invariably related to the territory on which they were born or in which they now resided. The work of close reading and transcription provided the volunteers with an embodied experience of knowledge and responsibility relating to the traditional inhabitants of the territories they currently occupy, one that they took up (according to the artist) 'reluctantly' and 'poignantly'.³

In our reading, 'Treaty Canoe' offers a call to rethink conventional monist understandings of law in relation to the state, sovereignty, and the occupation of territory; offering to international law the challenge of legal pluralism. It

³ Artist Statement by Alex McKay, February 2016 <<http://www.osgoode.yorku.ca/news/27002-2/>> accessed Winter, 2016.

highlights the limitation of recognizing treaties inked on paper while failing to accept wampum, in the same manner, as a record of agreements reached between sovereigns.⁴ Like the articles of a treaty, each bead of the wampum belt contains meaning and instruction.⁵ Like written treaties, interpreting wampum belts requires considerable skill and training. The juxtaposition of written text with the representation of the two row wampum in the flag is an acknowledgement of the plural legal orders that continue to co-exist, however unequally, in the territory that is now Canada.

By reworking treaty texts into the body of the canoe, the artist challenges our tendency to over-value the written text as the source of law's authority.⁶ The hybridized object 'canoe-text' reminds us of the material role of Indigenous Peoples and their technologies in the settlement of this territory, and of the necessary alliances that were struck between the British Crown and the Indigenous communities at that time, and have since been forgotten. In this way, 'Treaty Canoe' calls for a reconsideration of relations between the Canadian state and the Indigenous communities that have resided in this place since long before Confederation.

In the context of this edited collection, in which a diverse array of objects are variously encountered as singular, fungible, or purely symbolic, it is important to note that the starting point for our discussion of 'Treaty Canoe' is a specific material object in a particular location—a piece whose presence, or 'aura', evokes a diverse array of affective and embodied responses.⁷ We recognize also that 'Treaty Canoe', to create its effects, imports and combines elements of the iconic (the canoe), the symbolic (the treaties), and the performative (its making/its installation) not unlike the way in which law constitutes and consolidates its authority. In this way, 'Treaty Canoe' calls to mind for us, the 'theatrical and emblematic dimensions of legality,' and functions explicitly to 'place the text of law in the critical context of its performance'.⁸

⁴ That treaty councils between European powers and Indigenous nations 'bestowed on each other the condition of sovereign entities in accordance with the non-Indigenous international law of the times' is acknowledged in numerous recent accounts. Final Report of Mr Miguel Alfonso Martinez, Special Rapporteur, 'Study on Treaties, Agreements and other Constructive Arrangements Between States and Indigenous Populations' (July 1997), reported to UN Working Group on Indigenous Peoples, 1997 para 186; cited in Jessie Hohmann, 'The Treaty 8 Typewriter: Tracing the Roles of Material Things in Imagining, Realising and Resisting Colonial Worlds' (2017) 5(3) *London Review of International Law* 371, 385.

⁵ Brian Charles, of Georgina Island First Nation, in his presentation at Osgoode Hall Law School, 27 January 2016. For more, see also Kathryn V Muller, 'The Two "Mystery" Belts of Grand River: a Biography of the Two Row Wampum and the Friendship Belt', (2007) 31(1) *The American Indian Quarterly* 29.

⁶ Jessie Hohmann notes, as one example, the 'lack of knowledge and uncertainty' that surrounded the negotiation and implementation of Treaty 8. Hohmann (n 4) 385.

⁷ On the notion of 'aura' as emanating from the uniqueness of a work of art, see Walter Benjamin, 'The Work of Art in the Age of Mechanical Reproduction' in Walter Benjamin, *Illuminations: Essays and Reflections* (Hannah Arendt ed, Harry Zohn trans, Schocken 1968) 217, 222–3.

⁸ Peter Goodrich, 'Screening Law' (2009) 21(1) *Law and Literature* 1, 3.

Encountering The Canoe

Understanding that 'Treaty Canoe' speaks powerfully but differently to Indigenous and non-Indigenous people in Canada, the concepts of 'dialogue' and 'reconciliation' have necessarily framed the way in which the two of us, as legal scholars and paddlers, a white woman and a Cree man, have sought to draw meaning from this object. The Osgoode installation of Treaty Canoe also coincided with discussions within Canadian law schools over the calls to action made in the Final Report of the Truth and Reconciliation Commission of Canada, which marked an important intersection in the shared history and ongoing relations with Indigenous Peoples.⁹

Canoes were once vessels of trade, war, peace, exploration, and settlement. The use of canoes by Indigenous Peoples in Canada has been referenced as far back as 1534 by Jacques Cartier¹⁰—though in use for countless generations before Cartier's first sighting. For many, the canoe has become the iconic Canadian object, both friendly and familiar, collected and celebrated in a national canoe museum,¹¹ suturing together images of past and future prime ministers, paddles in hand,¹² with personal recollections of time spent in the Canadian wilderness. There is no lack of writing in Canada that celebrates the Canoe as a national icon or even, according to some others, a 'sacred text':

The canoe unites Canadians from coast to coast and girds us with the strength of a common heritage... The canoe grounds us through direct and accessible experience in our home landscape. The Canoe is Canada.¹³

This canoe, we think, both invokes and contests that account. The erasures that are effected by the assertion of the phrases 'common heritage' and 'home landscape' are made visible, even as they do not fully occlude for us the affective resonance of

⁹ Truth and Reconciliation Commission, *The Final Report of the Truth and Reconciliation Commission of Canada* (McGill-Queen's UP 2015). For a discussion of the application of the Truth and Reconciliation Commission Calls to Action 28 and 50 to law schools in Canada, see Jeffery Hewitt 'Decolonizing and Indigenizing: Some Considerations for Law Schools' (2016) 33 Windsor Yearbook of Access to Justice 65.

¹⁰ Alan Gordon, *The Hero and the Historians: Historiography and the Uses of Jacques Cartier* (UBC Press 2010) 25.

¹¹ On the relationship between museums and constitutions, and the nation building exercise more generally, see Stacy Douglas, *Curating Community: Museums, Constitutionalism, and the Taming of the Political* (U Michigan Press, 2017).

¹² Former Canadian Prime Minister Pierre Elliott Trudeau was the author of a well-known essay on the virtues of canoeing and was often photographed in a canoe, paddle in hand. See Pierre Elliott Trudeau, 'Exhaustion and Fulfilment: The Ascetic in a Canoe' *Che-mun* (2000) <<http://www.canoe.ca/che-mun/102trudeau.html>> accessed 14 February 2017. The current Canadian Prime Minister has also been photographed in a canoe, both with his famous father (now deceased) and more recently. See Bob Hepburn, 'How the Iconic Canoe has Shaped Canada' *Toronto Star Online* (5 September 2015) <<https://www.thestar.com/opinion/commentary/2015/09/05/how-the-iconic-canoe-has-shaped-canada-hepburn.html>> accessed 14 February 2017. See also Roy MacGregor, *Canoe Country: The Making of Canada* (Random House 2015), described in the review cited herein as a book that 'celebrates our love affair with the tippy craft that helps define our nation'.

¹³ From James Raffan, *Bark, Skin and Cedar*, as quoted in Erickson, *Canoe Nation: Nature, Race and the Making of a Canadian Icon* (UBC Press 2013) 1.

the canoe's elegant shape as a carrier of both memory and desire. The revelatory work performed by 'Treaty Canoe' is both evident on the scripted parchment in which it is encased, and embedded within the process of its making, in which the volunteers (many of whom had never before read a treaty) undertook not only to transcribe the text of The Royal Proclamation and other treaties relating to lands onto which they or their ancestors have settled, but also to sign those contracts 'in the stead of their original faithful negotiators'.¹⁴ The act of inking text and signatures to paper evokes law's claims to authority, solemnity, and permanence. And yet, we might also wonder whether the aura of these texts emanates from the same imagined 'common heritage'¹⁵ as the image of the canoe as a 'Canadian icon'?

Reading Law's Many Forms: Treaty as Text/Wampum

Beside the canoe, at about the same height, the artist placed a megaphone made of curled birch bark with the words 'Treaty of Niagara, 1764' written on its side in red paint. For Indigenous leaders present at the historic Niagara gathering, the Treaty of Niagara solemnized the relationship with the British Crown, which had also been set out in the *Royal Proclamation of 1763*.¹⁶ On that occasion, a two-row wampum belt—Kahswenhta¹⁷—was presented by the Crown to the more than two thousand gathered Indigenous leaders.¹⁸ The Osgoode installation of Treaty Canoe included a flag reproduction of the Kahswenhta, suspended behind and above both the canoe and megaphone, along with a Hudson's Bay blanket laid out beneath

¹⁴ McKay (n 3). ¹⁵ Erickson (n 13).

¹⁶ For more on the Treaty of Niagara, see John Borrows, 'Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-government,' in Michael Asch (ed), *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (UBC Press 1997) 155–72.

¹⁷ The Kahswenhta (Mohawk)—also 'Guswenhta' (Cayuga), often referred to in English as the Two-Row wampum belt—is a treaty, originally between the Haudenosaunee and the Dutch, which was ratified between the two nations in the seventeenth century. It has come to signify the relationship between Indigenous Peoples in Canada and the settlers. The wampum repeats three rows of beads—white, purple, white, purple, white. One of the two purple beaded rows represent the Haudenosaunee people, culture, and laws within a canoe. The other purple row the Dutch boat with its people, culture, and laws. The two rows of purple beads run in parallel to demonstrate that the Haudenosaunee and the settlers shall live side by side without interfering with the others' cultures and laws. The three white beads separating the purple rows in the middle signify the terms by which the two groups will live in parallel—through peace, friendship, and respect. It is considered to be the oldest treaty ratified by the Haudenosaunee and the Dutch settlers. For more on the two-row wampum belt, see Richard Hill, *Oral Memory of the Haudenosaunee: Views of the Two Row Wampum* (American Indian Program at Cornell 1990). The artist, Alex McKay states, '[a]lso in the installation [is] a Two Row flag, referencing the Two Row Treaty, depicting two canoes traveling down the same river, each steering its own course...' <<http://treatycanoe.ca/>> accessed Winter 2016.

¹⁸ 'Dating back one thousand years, wampum beads and other material components (eg bark fibers, sinew, hemp fibers, string—or other weaving materials) have been used by Woodlands Indians for ceremony and as records of important civil affairs (eg alliances, treaties, marriage proposals, ceremonies, wars, etc.) by stringing the wampum beads together on individual strands or weaving them into belts. Thus wampum serves as a sign technology that has been used to record hundreds of years of alliances within tribes, between tribes and between the tribal governments and colonial government.' Angela Haas, 'Wampum as Hypertext' (2007) 19(4) *Studies in American Indian Literatures* 77, 78.

them.¹⁹ The canoe's installation above a Hudson's Bay blanket unmistakably recalls its use as a vessel of trade, exploration, and war, and the histories of disease and dispossession of Indigenous communities that accompanied those uses. For us, this contrast is key to the power of the installation as a provocation to thought in relation to Canada's national reconciliation project. It speaks to the making of the nation-state in Canada and the simultaneous attempts at unmaking Indigenous nations of this territory that was the violent underbelly of that nation-building exercise. It invites us to reflect on the means by which Canada has come to assert sovereign authority over this territory and to reconsider what we think we know about the place of Indigenous legal orders in relation to that exercise of authority. It does this by reminding us of a pivotal moment in our collective history when the British colonial authority engaged in negotiations with first nations on a different basis, as distinct communities with their own legal orders, jurisdictions, and practices of authorization.

Legal historians such as Lauren Benton and Lisa Ford²⁰ speak of this period of British colonial rule (in North America and Australia) as exemplified by an 'uneasy legal pluralism'; that is, authority was not exercised by the imperial authorities consistently or evenly over territorially bounded spaces. According to Lauren Benton: 'Empires did not cover space evenly but composed a fabric that was full of holes, stitched together out of pieces, a tangle of strings.'²¹ And Shiri Pasternak observes, further, that:

These 'imperfect geographies' were a fundamental aspect of imperialism; full (or perfected) territorial control has never been realized as a straight chronological progress towards absolute sovereignty, as many claim. Rather, new kinds of differentiated legal zones have emerged where Indigenous territorial jurisdiction forms lumps that betray patterns of partial and uneven state sovereignty.²²

As noted above, one of the ways in which Indigenous territorial jurisdiction in this region was asserted and negotiated was through the wampum belt. We have learned from Indigenous historians, such as Brian Charles,²³ and Indigenous legal

¹⁹ Treaty Canoe was originally created in 1999. It has been installed and displayed in numerous sites. Our acquaintance with it began during its residency at the First Nation main government building of the Chippewas of Rama First Nation in Ontario, where one of us worked. As a result of our engagement with the project 'International Law's Objects', we facilitated, with the support of the Dean, the installation of Treaty Canoe at Osgoode Hall Law School in February 2016. Our observation that Treaty Canoe at Rama differed in significant respects from its Osgoode installation called our attention to the way in which the material constraints and/or opportunities in a given site interacted with artist and object in re-constituting the piece itself, as we will detail further below.

²⁰ Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia 1788–1836* (Harvard UP 2010).

²¹ Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires 1400–1900* (CUP 2010) 2. This quote is particularly resonant for us as it contrasts sharply even as it evokes for us the image of the orderly strings of wampum being intentionally knotted and bound. See later in the chapter.

²² Shiri Pasternak, 'Jurisdiction and Settler Colonialism: Where Do Laws Meet?' (2014) *Canadian Journal of Law and Society* 145.

²³ Charles (n 5).

scholars, such as John Borrows²⁴ that in this region from pre-contact to around 1812, agreements among Indigenous communities and between those communities and the Crown were marked by the exchange of wampum. The belts—comprised of beads made from small purple and white shells strung on hide and varied in overall size—served as a form of international law and were read by the belts' carriers. Many wampum belts were gifted to and by the Crown to communities to acknowledge the settlement of a conflict or to confirm agreements of peace and friendship.

Unsettling International Law's Fictive Foundations

To assert that 'Treaty Canoe' can be read as an object of international law is to note not only that the treaties that are inscribed upon it are themselves international legal artefacts, but also to note the ways in which the installation as a whole functions to unsettle the usual way of talking about international law that takes the nation-state as its foundation or point of reference. We are here referring to a canonical 'Westphalian' account of international law, which brings to mind the European origins of a certain model of the nation-state as an entity that exercises legal authority over a certain territory. As 'arbitrary and clichéd'²⁵ as this reference might be, the Treaties of Westphalia (1648) remain the conventional reference point for the inauguration of modern international law and for the modern state form.²⁶ While the consolidation of a universalized conception of statehood in which 'territory, people and government coincide ... to produce international law's map of the world as a jigsaw puzzle of solid color pieces fitting neatly together'²⁷ would not come about until the mid twentieth century, Westphalia marks an (admittedly ambiguous) period in which the centrality of a certain language of law to the ways in which European states governed their relations with each other emerges—the language of 'sovereignty'. Approaching 'Westphalia' as a 'mythic' rather than a 'properly historiographic' origin of contemporary international law might help us to understand its cultural and geographic specificity: that is, how the story of international law unfolds as a 'monistic history, an extraversion of a self-contained Europe'.²⁸ Fitzpatrick's citation to Latour's mellifluous account of this history is particularly resonant here; it is described as a "fine laminary flow," a "beautiful order," drawn out of and away from what is a "turbulent flow of whirlpools and rapids". This exercise of inverting the narrative of international law may be instructive in both offering new perspectives on Westphalian-based assumptions and in

²⁴ John Borrows, 'Wampum at Niagara: The Royal Proclamation, Canadian legal history, and self-government' (1997) *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* 155.

²⁵ Gerry Simpson, 'International Law in Diplomatic History' in James Crawford and Martti Koskeniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 30–1.

²⁶ *ibid.* See also Peter Fitzpatrick, 'Westphalia and the Poetics of International Law' (2014) 2(1) *London Review of International Law* 155.

²⁷ Karen Knop, 'Statehood: Territory, People, Government' in James Crawford and Martti Koskeniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 95.

²⁸ Peter Fitzpatrick, 'Ultimate Plurality: International Law and the Possibility of Resistance' (2016) 1(1) *Inter Gentes* 5.

considering Treaty Canoe's challenge to the form of law—that is, treaty as written text versus treaty as wampum.

Moreover, as Peter Fitzpatrick cogently explains, the fictive nature of international law's history contains a contradiction. The sovereign state comes to encompass an authority that is imagined as both 'illimitably imperial' and 'territorially delimited':

The outcome can be encapsulated in a continuity with the mediaeval, in the mediaeval conception of empire or Empire, a conception that invested the sovereign with imperial authority. With modernity, that authority is absorbed into a heightened territoriality which ... typifies the state, this being a 'territorial order' which 'became representative of a new order in international law'.²⁹

While we have described it as 'myth', the consequences of this way of thinking for indigenous communities have been devastatingly real. In short, this revisionist account of international law's origins has crowded out other possible ways of conceiving of the 'laws of encounter' between nations, including, importantly, those developed and implemented by the Indigenous communities of what is now known as North America. Sundhya Pahuja has made this point quite succinctly, drawing attention to the projections necessary to sustain the canonical approach:

In order to interpret a global projection as 'universal' (or its everywhere as a 'fact') one must accept the projection as authoritative. The factish quality of the universality of the nation state is therefore settled only from within a particular juridical frame. This is as an elision by which international lawyers look at the map and think they see the world.³⁰

'Treaty Canoe' not only contests the origin story of law in Canada, it questions international law's origins as excluding Indigenous legal orders. It challenges us to acknowledge that the waters within which international law has sailed are not fed by a single stream but are rather enriched by multiple sources, including Indigenous ones. It is a petition in favour of legal pluralism.

Navigating Contested Histories

The specificity of the many treaties in what is now known as Canada that are inscribed upon the surface of 'Treaty Canoe'³¹ might also serve as a reminder of the

²⁹ *ibid.*

³⁰ Pahuja goes on to observe that 'between roughly 1500 and 1800, against the background of an emerging law governing relationships between European states, the laws—or more properly, the jurisdictions—governing encounters between Europeans and non-Europeans were quite varied'. Sundhya Pahuja, 'Laws of encounter: a jurisdictional account of international law' (2013) 1(1) *London Review of International Law* 63, 74–5.

³¹ That the treaties of Treaty Canoe encompass a wide variety of written agreements between the Crown and the Indigenous residents concerning substantial areas of land in Canada, serves as a further demonstration of the widespread displacement of Indigenous laws in favour of the Crown. When asked 'which treaties in particular', McKay responded 'all of them', that is to say, the performance of the making of Treaty Canoe might include any or all of the historic treaties—it is intended to evoke all of them, and to provoke all of us who are settlers to consider our own treaty relations. Personal Communication with the authors.

particularities of the practices and belief systems brought to this part of the world by the British, for whom taking possession of land, by means of labour, exchange, and treaty, was the main objective.³² It should also be noted that one of these texts, perhaps the most significant, was not a treaty—but rather a proclamation issued unilaterally by the British Crown. The Royal Proclamation, 1763, articulated the parameters of the relationship between the British Crown and Indigenous Nations in the region from the Crown's perspective; notably, it recognized Indigenous nations and Indigenous ownership over the territory:

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.³³

Simultaneously, the *Proclamation* declares Crown dominion as a means of making way for Crown administration and advancing several decades of investing in the building of a successful economy, surveying lands and forming alliances (much of which was carried out by canoe).³⁴ The *Proclamation* has become a key part of the Canadian legal archive, in the sense that it is frequently referenced in legal history, constitutional law scholarship, and in judicial reasoning.³⁵ In those references, it stands for a certain conception of a reciprocal relationship between Canada and the Indigenous Peoples who resided in this region prior to the region's incorporation into the state of Canada. With the recognition of Indigenous ownership of land—such as the 'Hunting Grounds', which comprised most of what is now western Canada—the *Proclamation* was the genesis of the Crown's engagement with Indigenous Peoples in a treaty-making process for the 'Interests and Security' of the colonies.³⁶

The Royal Proclamation, which figures prominently on Treaty Canoe, is a text that also evokes the difficult histories of promises made and promises broken. It challenges the viewer to either continue denying the words and meaning of the text

³² Patricia Seed, *American Pentimento: The Invention of Indians and the Pursuit of Riches* (U Minnesota Press 2001).

³³ Royal Proclamation No 1, 7 October 1763 is derived from Clarence S Brigham (ed), *British Royal Proclamations Relating to America, Volume 12, Transactions and Collections of the American Antiquarian Society* (American Antiquarian Society 1911) 212.

³⁴ See, for example, Ann M Carlosand and Frank D Lewis, 'Indians, the Beaver, and the Bay: The Economics of Depletion in the Lands of the Hudson's Bay Company, 1700–1763' (1993) 53(3) *The Journal of Economic History* 465.

³⁵ So, for example, in the landmark ruling of the Supreme Court of Canada, *Delgamuukw v British Columbia* [1997] 3 SCR 1010, SCJ No 108, the court identifies the 'source' of aboriginal title to land in its 'recognition by the Royal Proclamation, 1763, and the relationship between the common law which recognizes occupation as proof of possession and systems of Aboriginal law pre-existing assertion of British sovereignty', para 114. For a critical assessment, see John Borrows, 'Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*' (1999) 37 *Osgoode Hall Law Journal* 537.

³⁶ It is striking how quickly and systematically the treaty-making process as set out in the Royal Proclamation, 1763 was commenced by the Crown. For example, by 1791 the Crown had negotiated treaties with a number of Indigenous Nations around the Great Lakes leading to the formation of Upper Canada by 1791 (the precursor to what is now the Province of Ontario).

or to engage in a dialogue, which has not always been as easily navigated as a canoe over a stream. For instance, once—and possibly for some still—it was thought that:

While it is true we must credit the redskin with the invention of the thin-skinned craft of America's inland lakes and streams ... The white man, with inherent ingenuity, has devoted time, thought and much money to the work of evolving a substitute for the bark covering, one that would possess its meritorious features, and also add those lacking in the original.³⁷

This racist view of Indigenous Peoples and their invention is an echo of the Crown's approach to the treaties themselves.³⁸ During treaty negotiations in what is now known as Saskatchewan, for example, the treaty commissioner proclaimed 'the Queen wishes her red children to learn the cunning of the white man'.³⁹

The 'cunning of the white man' with respect to Indigenous/Crown relations became more evident after the Royal Proclamation of 1763. Though having succeeded in a war with the French and subsequently entering into a treaty with that imperial nation for colonial authority over what is now Canada, the English Crown had not conquered Indigenous Peoples.⁴⁰ It was through the Proclamation that the British Crown sought to secure military and peace alliances with the Indigenous peoples here and promised the recognition of Indigenous Peoples' sovereignty and lands. As we have already noted, the Proclamation was solemnized with Indigenous leaders in 1764 with a wampum belt at Niagara.⁴¹ Indigenous understanding of wampum diplomacy, such as with the Kahswentha, was well established.⁴² In engaging in wampum diplomacy in 1764 the Crown assumed extraordinary responsibilities in relation to Indigenous Peoples and proclaimed respect for their lands. It ought to have taken up that responsibility in an ongoing manner properly reflective of a nation-to-nation relationship firmly grounded in both Indigenous and English legal orders, but as we know, this is not what ensued. Rather, the treaties went unfulfilled and policies were enacted instead which were intended to ensure the subordination of Indigenous Peoples. This perversion of thought by which promises of recognition are transformed into policies of 'cultural genocide'⁴³ is one illustration of 'the cunning of the white man'.

³⁷ S Sangster, 'The History of the Canoe' (1914) 15(12) *Rod and Gun* 1247–1252 as quoted in Erickson (n 13).

³⁸ As James Tully has noted, in a chapter that originated as a paper prepared for the Royal Commission on Aboriginal Peoples, 'Treaty relations were surrounded by a sea of strategic relations of pressure, force and fraud, and the treaty system itself was constantly abused'. James Tully, *Public Philosophy in a New Key*, vol 1 'Democracy and Civic Freedom' (CUP 2008) 226.

³⁹ 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* (CUP 2014) 94.

⁴⁰ John Borrows (n 16) 155.

⁴¹ *ibid.*

⁴² Leanne Simpson, 'Looking after Gdoo-naaganinaa: Precolonial Nishnaabeg Diplomatic and Treaty Relationships' (2008) 23(2) *Wicazo Sa Review* 29.

⁴³ Final Report of the Truth and Reconciliation Commission of Canada (n 9).

'Treaty Canoe' mounts a direct challenge to this legal mythology, which continues to inform the relationship between Indigenous Peoples and the Crown. Through the juxtaposition of the visual elements of blanket, canoe-treaties, silent megaphone, and flag-wampum, international law's jurisdiction is both acknowledged and challenged. As the blanket of Western law cascades under the canoe, it calls to mind rapids upon which a canoe was built to nimbly travel. Yet, in the Osgoode installation the canoe is set in dry-dock on two saw horses, themselves resting stoically on the blanket, suggestive of the manner by which voyageurs would portage the Canadian landscape with fur laden canoes overhead. Meanwhile, hovering quietly in the background, are the flag-wampum and the megaphone as a doubled reminder of the ongoing presence and subordination of Indigenous legal orders.

The tensions among the individual elements of the Treaty Canoe provoke reflection on the tensions in the ongoing relations between Indigenous nations and the Canadian state. The artist's statement notes that the megaphone is mute, in recognition perhaps, that over the intervening centuries, the voices of Indigenous Peoples have been oppressed and silenced. And that treaty making through wampum, which the Crown once acknowledged and proclaimed, is now marginalized. Might the megaphone also reflect or invite a resurgence of these Indigenous voices and a revitalization of Indigenous legal orders? Perhaps. The megaphone serves as a pivot point between the vertical lines of the Kahswentha and the horizontal lines of the blanket, which stand in stark contrast, and visually conflict. Consider that wampum belts are traditionally read from top to bottom while Western law is read from left to right. Might the disconnect between the lines of the Kahswentha and blanket be seen to echo the ongoing conflict between Indigenous and Western legal orders; between the resistance of Indigenous Peoples to colonization and the Westphalian state model? Like Niagara itself in 1764, the megaphone is the gathering place at which these two legal orders meet. In our view, its invocation of that defining historical moment following which Indigenous Peoples were effectively silenced by a nation-state supports this reading.

Engaging With Treaty Canoe: The Osgoode Dialogue

Might the megaphone, then, be calling to the canoe? The text-skin of the canoe recalls treaties that were entered into at a time when the Crown engaged in nation-to-nation dialogue with Indigenous Peoples. Treaties belong to all who live on and continue to derive benefit from treaty lands, not only Indigenous Peoples. We might see 'Treaty Canoe' beckoning Indigenous and non-Indigenous people to talk once again; to acknowledge that the relationship between Indigenous Peoples and Canada must be founded on mutual friendship, peace, and respect. Canada's recently elected government has stated that the country will restore the nation-to-nation relationship with Indigenous Peoples.⁴⁴ We are compelled to wonder how

⁴⁴ See, for example, the Opening Statement made on behalf of the Government of Canada in presenting its 6th Report to the UN Committee on the International Covenant on Economic, Social

that might transpire with the ravages of colonization still ongoing, just as immobile on its sawhorses, 'Treaty Canoe' appears unable to respond to the megaphone's call. An urgent question raised by this piece, which invokes the international and colonial origins already discussed but extends the inquiry well beyond the conventional boundaries of international law, concerns how we might engage in a conversation about our shared histories as treaty peoples across epistemic divides, in a way that acknowledges deep plurality while allowing for the possibility of mutual learning?⁴⁵

The challenge of intercultural dialogue is not a novel one, neither is it one that is amenable to a settled resolution: rather, our responses must continually be made and re-made in the many ongoing contexts and relations in which it presents itself.⁴⁶ As we undertook our own dialogue in the context of this project, insights emerged from within our process itself, which is ongoing. During the installation of 'Treaty Canoe', we convened a dialogue with members of the Osgoode community in the library. The opportunity for Indigenous and non-Indigenous participants to gather, in front of the installation, allowed us all to engage with the difficult subjects of our contested colonial histories of dispossession and erasure with a spirit of common purpose. Talking about the piece in its presence allowed for observations and insights to emerge and be shared in parallel—facilitating a deep engagement without direct conflict. The immediate presence of the object, its intriguing combination of familiarity and strangeness, disarmed the audience of so-called legal experts, allowing us to engage in a dialogue in the spirit of curiosity and multiple perspectives. Many of the insights expressed at this event informed our thinking about 'Treaty Canoe', and the views we have expressed in this chapter. In these ways, we are hopeful that Treaty Canoe can offer both guidance and inspiration for the difficult conversations yet to come.⁴⁷

and Cultural Rights, on 24 February 2016 where it is stated that 'Canada is committed to a renewed nation-to-nation relationship with Indigenous Peoples, built on a foundation of recognition, rights, respect, cooperation, and partnership based on the spirit of reconciliation.' <<http://canada.pch.gc.ca/eng/1457110453479>> accessed 22 August 2018.

⁴⁵ We are encouraged here by the writing of many Indigenous and non-Indigenous scholars. One of the non-Indigenous scholars who has been particularly influential on our thinking on this topic is James Tully, who has observed 'when Aboriginal and non-Aboriginal partners meet on the middle ground, they are not trapped in closed and mutually incommensurable world-views. They have been interacting for over three hundred years. Interaction has shaped the cultural identities of both in complex ways and has brought into being a multitude of intercultural ways of discussing and acting together. The treaty system is perhaps the best known of these practices, woven together out of customs from many cultures.' Tully also notes that this 'middle ground' is far from an ideal speech situation. It is shot through with relations of inequality, force and fraud, broken promises, failed accords, degrading stereotypes, misrecognition, paternalism, enmity and distrusts. Notwithstanding, there is also a multiplicity of paths and ways Aboriginal and non-Aboriginal people have walked together over their long history in peace and friendship, with good intentions and mutual respect.' Tully (n 38) at 201–41.

⁴⁶ *ibid.*

⁴⁷ An important aspect of those difficult conversations, as suggested by this piece and by the Truth and Reconciliation Commission in its final report where it acknowledges how ignorant most Canadians are regarding these histories, might emanate from settler Canadians taking responsibility for, by educating themselves about, the relatively little known histories of settlement in Canada. So, in the dialogue that we convened about Treaty Canoe at the law school, Ruth noted that she had been provoked/inspired by the treaties on the canoe to inquire into her own previously unknown history as a settler. This work, relating to the history of settlement in the late nineteenth century near what is now Mundare,

Conclusion: Traversing the Rapids

For many Canadians, as for international lawyers, the treaties of 'Treaty Canoe' are relics of a colonial past that has long since come to an end. Yet, from the Indigenous perspective, the treaties constituted relationships that are ongoing. What is required is a reconciliation between settler Canadians—those who enjoy the benefits of the lands of what is now known as Canada—and Indigenous Peoples—who continue to share the lands and resources of this territory with those who came later. In other words, as the collage of treaties forming the skin of 'Treaty Canoe' reminds us, those treaty obligations are ongoing.

From the performative gestures of its making to its most recent installation at Osgoode Hall Law School, we have maintained that the aim of 'Treaty Canoe' is both to unsettle and provoke, reminding us of the particularities of histories of settlement and displacement, generating story and inviting dialogue. And yet, at the law school, 'Treaty Canoe' sat empty, held in dry-dock, perched on sawhorses, the silent megaphone alongside. We wonder about the vacancy of this canoe, and what it might suggest about the words on the paper with which it is wrapped. Are they as hollow as the canoe itself? The treaties certainly have meaning to Indigenous Peoples and given they are legal instruments by which the Crown claims ownership over vast tracts of land, the value to Canada is priceless. We hope that this emptiness offers room for all of us to find a seat inside, bringing along our various forms of law—penned and beaded alike.

By their nature, canoes are unstable. This instability is at once the canoe's most wary feature and most powerful. It allows the vessel to be nimble. We hope those who are able to come to a conversation on reconciliation with peace, friendship, and mutual respect will be the first in and provide the stability and navigation required for the rest of us to follow. If the canoe is a metaphor for political community and the legal relationship between Indigenous Peoples and Canada we can also understand it as a vessel that is never finished: that is, it can be made and re-made.

By taking on a form that is both modern and ancient, re-inscribing agreements that have not been honoured, and reminding us of the responsiveness that is a necessary part of any ongoing relationship, 'Treaty Canoe' disrupts conventional histories and calls for a new dialogue concerning the place of Indigenous peoples in Canada. It demands our investigation into the writing out of an international law that, while centuries old, has not been forgotten. By referencing both wampum belts and treaty texts, 'Treaty Canoe' contests international law's origin story and questions our assumptions about the textual formalism of law. It invites us to consider the fluidity of relationships that may float along through time while still maintaining a shape that is at once deeply familiar, necessary, and contemporary.

Alberta and the extent to which her ancestors benefitted from the Federal Dominion Lands Act of 1872, which granted 'free' land to homesteaders, displacing the Indigenous inhabitants, is ongoing.