AGREEING TO SHARE: TREATY 3, HISTORY & THE COURTS

KATE GUNN†

INTRODUCTION

In 2014, the Supreme Court of Canada opened its landmark judgment in *Grassy Narrows* with the statement that, upon entering into Treaty 3 in 1873, the Ojibway "yielded ownership of their territory" to the Government of the Dominion of Canada in exchange for reserve lands, payments, and certain limited rights on nonreserve lands in 1873.[1] The remainder of the decision addresses the question of whether the present-day provincial government is authorized to limit the Treaty 3 harvesting right. There is no mention of the fact that the SCC's opening statement is contrary to the Ojibway understanding that the treaty was an agreement for both parties to share in and benefit from the lands, or that that understanding had been repeatedly and unequivocally confirmed by the trial judge three years earlier in the same case.[2]

Grassy Narrows is emblematic of a pattern that has persisted between Indigenous peoples and the Crown for 140 years. Since the conclusion of Treaty 3, the Ojibway signatories have maintained that they agreed to share their lands and resources with Europeans, not surrender control of those

† Kate Gunn is a lawyer practicing with First People Law in Vancouver, BC. She is currently completing an LLM at the Peter A. Allard School of Law at UBC. Thanks to Dr. Paige Raibmon for supervision and feedback in developing this article, and to the *UBC Law Review*'s editors and anonymous reviewers for their helpful comments on previous drafts.

1 *Grassy Narrows First Nation v Ontario (Minister of Natural Resources)*, 2014 SCC 48 at para 2, [2014] 2 SCR 447 [*Grassy Narrows*].

2 *Keewatin v Ontario (Minister of Natural Resources)*, 2011 ONSC 4801, [2012] 1 CNLR 13 [*Grassy Narrows*, ONSC].

lands to the Crown. By contrast, the Crown has proceeded to use and develop lands in Treaty 3 on the basis that by entering into treaty, the Ojibway relinquished all authority to make decisions about and share in benefits from those lands to the Crown.

This paper explores the extent to which modern Canadian courts support the Crown's unilateral interpretation of the treaty over the objections of the Indigenous treaty partners.[3] Part I sets out the background and context for the negotiation of Treaty 3 and the Ojibway understanding of decision-making authority over treaty lands. Part II describes the development of treaty interpretation principles in Canadian law, including the use of historical evidence in the courtroom. Part III examines the recent application of these principles to the interpretation of Treaty 3. I conclude that while there is strong support in the historical record for the Ojibway understanding of the treaty, the courts' approach to treaty interpretation ultimately upholds the colonial status quo. As a result, there remains a profound disconnect between Indigenous peoples' understanding of the treaty and their ability to obtain meaningful outcomes through the courts.

I. TREATY 3 FROM A HISTORICAL PERSPECTIVE

The Crown's refusal to recognize the Ojibway understanding of Treaty 3 is striking in light of the foundational role played by Treaty 3 and the other numbered treaties in the formation of Canada as a country. The numbered treaties, negotiated between 1871 and 1921, collectively establish the terms by which Indigenous peoples and the Crown agreed that lands and resources in large portions of what is now western Canada would be shared, used and controlled. They remain essential elements of Canada's legal and constitutional structure and to its legitimacy as a nation.[4] The significance

---

[3] For consistency with judicial decisions and historical documents, I use the term "Ojibway" in this paper to refer to the Indigenous signatories of Treaty 3. I note, however, that many Treaty 3 communities today prefer different terms to identify themselves, their members, and their governance structures.

[4] Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Public Works and Government Services Canada, 2015) at 195.

of the treaties today is evidenced by section 35(1) of the *Charter*, which provides constitutional protection to Indigenous peoples' treaty rights.[5] However, the Indigenous parties' position that the treaties were agreements to share and benefit from the lands remains largely unacknowledged by the Crown and by Canadian courts. This section will explore the background and context which resulted in the agreement known as Treaty 3 between the Crown and the Lake of the Woods Ojibway, and the Ojibway perspective on what was agreed to in terms of decision-making authority over treaty lands.

A. Treaty 3 in Context

Today, the Ojibway people of Treaty 3 understand their rights and obligations in relation to land based on an established system of governance which long predates the arrival of Europeans. Prior to the assertion of colonial authority Indigenous peoples throughout North America maintained legal orders which regulated their members' activities and relations, including systems for managing resources and controlling use of and access to lands.[6] For the Ojibway in what is now Treaty 3 territory, this governance structure focused on consensus-based decision-making processes which determined how their lands and resources would be used.[7]

The Ojibway perspective on Treaty 3 also has roots in a long history of treaty making with other Indigenous nations. For centuries prior to colonization, Indigenous peoples throughout what is now Canada engaged in treaty making with neighbouring nations in order to secure

---

5 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

6 George Erasmus & Joe Sanders, "Canadian History: An Aboriginal Perspective" in John Bird, Lorraine Land & Murray Macadam, eds, *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Toronto: Irwin Publishing, 2002) at 3; Peter J Usher, Frank J Tough, & Robert M Galois, "Reclaiming the Land: Aboriginal Title, Treaty Rights and Land Claims in Canada" (1992) 12:2 Applied Geography 109 at 111.

7 See Tim Holzkamm & Leo Waisberg, '*We Have Kept Our Part of the Treaty': The Anishinaabe Understanding of Treaty #3* (Kenora, ON: Grand Council Treaty #3, 2012).

access to essential resources and maintain alliances which were critical for their survival and wellbeing.[8] Like other Indigenous peoples, the Ojibway of the Lake of the Woods who would later negotiate Treaty 3, had already developed understandings with other Indigenous nations that were aimed at establishing and maintaining relationships of reciprocity and respect.[9] These nation-to-nation agreements were not negotiated solely for political expediency.[10] Rather, they were based on the parties' understanding of their distinct obligations to the land and to other forms of life.[11] As George Erasmus and Joe Sanders explain in reference to pre-colonial agreements generally:

> When our people treatied with another nation, each nation's interest, its pride, and its word was at stake. The word of the agreement, the treaty, was given in a very sacred way. And that was not easily broken.[12]

In addition, the Ojibway perspective on Treaty 3 flows from the understandings and agreements between Indigenous peoples and the Crown prior to the negotiation of the numbered treaties. For many historians and legal scholars, the key starting point for this contextual analysis is the British Crown's Royal Proclamation of 1763.[13] The

---

8 Sharon Venne, "Treaty-Making with the Crown" in John Bird, Lorraine Land & Murray Macadam, eds, *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Toronto: Irwin Publishing, 2002) at 44.

9 Robert J Talbot, *Negotiating the Numbered Treaties: An Intellectual and Political Biography of Alexander Morris* (Saskatoon: Purich, 2009) at 58.

10 James Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 Sask L Rev 241 at 295.

11 *Ibid.*

12 Erasmus & Sanders, *supra* note 6 at 4.

13 George R, Proclamation, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App II, No 1 ["Proclamation"]. See e.g. 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* (Vancouver: UBC Press, 1997) 155; Kenneth Narvey, "The Royal Proclamation of 7 October 1763, The Common Law, and Native Rights to Land Within the Territory Granted to the Hudson's Bay Company" (1974) 38:1 Sask L Rev 123.

Proclamation set out the British Crown's policy in relation to Indigenous lands, including the Crown's obligation to negotiate treaties with Indigenous peoples prior to acquiring the right to access their territories.[14] As a result, it bound the Crown and its agents to follow certain rules, including the requirement to negotiate agreements with Indigenous peoples before asserting colonial authority over lands and resources.[15] According to Sharon Venne, the Proclamation "enshrined the protection of Indigenous lands by the British Crown, and a process of seeking Indigenous consent to European settlement through treaty-making" and confirmed that "Indigenous nations had an inalienable right to their lands."[16] This recognition set the stage for the Crown's approach to treaty-making with Indigenous peoples, which persisted throughout the negotiation of the numbered treaties.[17]

On a less optimistic note, the Proclamation also foreshadowed the Crown's tendency in subsequent treaty negotiations to claim to be simultaneously protecting and extinguishing the rights of Indigenous peoples. The Proclamation is premised on the Crown's recognition of Indigenous peoples as distinct, politically organized societies with whom treaties were to be negotiated prior to settlement.[18] At the same time, however, the Crown inserted language in the Proclamation that was contrary to Indigenous peoples' understandings of their relationship to the Crown and to their lands.[19] As John Borrows argues, the Proclamation "uncomfortably straddled the contradictory aspirations of the Crown and

---

14 Proclamation, *supra* note 13; Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 173 at 186.

15 *Ibid* at 187–88.

16 *Ibid* at 185.

17 James R Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009) at 290.

18 Venne, *supra* note 8 at 185.

19 See Borrows, *supra* note 13 at 160.

First Nations when its wording recognized Aboriginal rights to land by outlining a policy that was designed to extinguish these rights."[20]

The Proclamation was initially a unilateral declaration which reflected only the perspective and obligations of the Crown and its agents. This changed in 1764 after a conference attended by Crown representatives and over 24 Indigenous nations, which resulted in an agreement known as the Treaty of Niagara.[21] The treaty included certain aspects of the Proclamation, including the Crown's guarantee that Indigenous peoples were entitled to use and possess lands not ceded by treaty, but at the same time rejected the assertion of colonial authority over Indigenous territories.[22] These terms were recorded through a Covenant Chain and wampum belts which reflected the Indigenous participants' understanding of the agreement.[23] Unlike the Proclamation, the Treaty of Niagara demonstrated "the foundation-building principles of peace, friendship, and respect agreed to between the parties."[24]

The Ojibway thus approached the eventual negotiation of Treaty 3 in the context of a longstanding tradition of treaty making and with a robust governance system which included distinct processes for determining how lands and resources would be shared. They also negotiated Treaty 3 against the backdrop of the Royal Proclamation, which served to both recognize and undermine Indigenous peoples' rights to land relative to the Crown, and the Treaty of Niagara, which reflected the Indigenous parties' understanding that they would remain self-determining, independent nations in their dealings with the Crown. These factors contributed to the Ojibway understanding that Treaty 3 was intended as an agreement for the parties to mutually share and use the treaty lands, not a surrender of jurisdictional authority to the Crown.

---

20 *Ibid.*

21 Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, University of Saskatchewan, 2012) at 12.

22 *Ibid* at 13.

23 *Ibid* at 12–13.

24 Borrows, *supra* note 13 at 165.

B. The Treaty Agreement

The treaty parties' priorities at the time of the treaty negotiations also provide critical insight into why the Ojibway maintain that they did not surrender control of their lands upon entering into Treaty 3. At the time negotiations commenced, the Ojibway economy was based around trapping and fishing, and although these pursuits had declined somewhat since the 1870s, the Ojibway were not subject to the drastic loss of livelihood as had happened to Indigenous peoples further west with the extermination of the buffalo. [25] Further, because of the limited agricultural capacity of their lands, the Ojibway were not overly concerned with the possibility of a significant influx of European settlers in their territory.[26] As such, they were prepared to negotiate with the Crown to obtain economic benefits and security but had no urgent need to enter into an agreement on less than satisfactory terms.[27]

The Ojibway were also aware both of their own property rights and of the wealth of resources within their territory. As Chief Mawedopenais of Manitou Rapids, one of the speakers for the Ojibway, told the British during negotiations:

> The sound of the rustling gold is under my feet where I stand; we have a rich country . . . where we stand upon is the Indians' property, and belongs to them . . . The whiteman has robbed us of our riches, and we don't wish to give them up again without getting something in their place.[28]

The Ojibway thus recognized that they were in a strong position to negotiate an agreement which would ensure their economic well-being without unduly limiting their way of life. As a result, when negotiations commenced in 1873 after several failed previous attempts to arrive at an agreement, the Ojibway representatives raised numerous concerns regarding how they would maintain jurisdictional authority over land and resources.[29]

---

25 Talbot, *supra* note 9 at 70.

26 *Ibid.*

27 *Ibid.*

28 Usher, Tough & Galois, *supra* note 6 at 117.

29 Holzkamm & Waisberg, *supra* note 7 at 49.

As negotiations proceeded, the Ojibway representatives maintained their position that they would not give up rights to the land or submit to Crown legislative authority.[30]

By contrast, concluding a treaty with the Ojibway was becoming a matter of increasing urgency for the Crown in the 1870s. At the time of negotiations, the Crown was particularly concerned about maintaining a positive relationship with the Ojibway because it had committed to construct a transcontinental railroad that would run through what would become Treaty 3 to British Columbia.[31] In addition, there was growing pressure by 1870 for Crown agents to ensure the safe passage of soldiers through the area in response to the Red River Resistance.[32] Crown commissioners were eager to reach an agreement with the Ojibway that would allow settlers and troops to safely move west through Treaty 3 territory.

Ultimately, after over three years of protracted negotiations, representatives for the Crown and the Ojibway concluded the agreement now known as Treaty 3. According to the English version of the treaty published by Canada, the Ojibway surrendered "all their rights, titles and privileges"[33] to approximately 55,000 square miles of land in northwestern Ontario and southeastern Manitoba. The document goes on to provide that while the Ojibway would have the right to continue to hunt and fish in the surrendered territory, those rights were subject to regulations made by Canada and to the Crown's right to take up tracts of lands for "settlement, mining, lumbering or other purposes."[34] Although signed by both parties, the English version of the treaty contains legal language prepared by the

---

30 Brittany Luby, "The Department is Going Back on These Promises: An Examination of Anishinaabe and Crown Understandings of Treaty Three" (2010) 30:2 Can J Native Studies at 206.

31 Talbot, *supra* note 9 at 69.

32 *Ibid.*

33 *Treaty 3 between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods with Adhesions, 3 October 1873*, online: <www.aadnc-aandc.gc.ca/eng/1100100028667/1100100028669>.

34 *Ibid.*

Crown for which there is no direct translation in the language of the Ojibway signatories.[35]

Despite the Supreme Court's blanket statement in Grassy Narrows that the Ojibway surrendered control of their territory on entering treaty, it is questionable whether the version of the treaty published by Canada supports this position. In particular, the document contains no reference to a purchase price or other consideration agreed upon by the parties for the transfer of ownership of the lands.[36] This has led some scholars to argue that the English words of the document demonstrate not a surrender of jurisdictional authority but rather a "transfer of Aboriginal tenure to the protection of the Crown consistent with the idea of shared territorial jurisdiction."[37] Under this interpretation of the English version of the treaty, the agreement resulted in overlapping areas of Crown-Indigenous jurisdiction which left the Ojibway signatories' decision-making authority intact.[38]

Unsurprisingly, the Ojibway written and oral records of the treaty negotiations reflect a story that is very different from the English version published by Canada. The Lake of the Woods Chiefs hired Joseph Nolin, a Red River Metis, to record the negotiations on their behalf in 1873.[39] Nolin's records, which became known as the *Paypom Treaty*, differ in significant ways from Canada's version of the treaty agreement.[40] For example, the *Paypom Treaty* provides that the Ojibway "will be free as by the past for their hunting and rice harvest."[41] Unlike the version published by Canada, this provision is not subject to the Crown's right to make regulations or take up lands for settlement and other purposes. In addition, the *Paypom Treaty* provides that the Ojibway would have the benefit of

---

35 Holzkamm & Waisberg, *supra* note 7 at 40–41.

36 Luby, *supra* note 30 at 206.

37 Henderson, *supra* note 10 at 262.

38 *Ibid* at 268.

39 Luby, *supra* note 30 at 205.

40 Holzkamm & Waisberg, *supra* note 7 at 31.

41 *Ibid* at 51.

mineral resources found on their reserves, whereas Canada's document makes no such promise.[42] Critically, the *Paypom Treaty* makes no reference to Ojibway surrender of ownership and control of their lands to the Crown.

Ojibway oral recollections of the negotiations passed down through generations from the original signatories to Treaty 3 confirm, consistent with the terms in the *Paypom Treaty*, that the Chiefs and Elders did not agree to surrender control of their lands to the Crown. [43] Instead, they agreed to share their lands and resources with incoming settlers in exchange for rights, guarantees, monetary payments and other terms intended to assist with economic development.[44]

Oral recollections also confirm that the Ojibway entered into treaty on the basis that they would maintain their traditional governance structures.[45] This understanding has been affirmed by the Royal Commission on Aboriginal Peoples, which concluded in relation to the historical treaties generally that:

> First Nations were assured orally that their way of life would not change unless they wished it to. They understood that their governing structures and authorities would continue undisturbed by the treaty relationship. They also assumed, and were assured, that the Crown would respect and honour the treaty agreements in perpetuity and that they would not suffer—but only benefit—from making treaties with the Crown.[46]

As outlined above, the Ojibway position that Treaty 3 was an agreement between the parties to share lands and resources is strongly supported by historical and contextual evidence. [47] However, this did not prevent the

---

42 *Treaty Held at North West Angle*, 3 October 1873, online: <www.gct3.ca/wp-content/uploads/2016/02/paypom_treaty.pdf> [*Paypom Treaty*].

43 Holzkamm & Waisberg, *supra* note 7 at 50.

44 *Ibid* at 39.

45 Holzkamm & Waisberg, *supra* note 7 at 75.

46 Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol 1 (Ottawa: Minister of Supply and Services Canada, 1996) at 161 [RCAP].

47 Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014) at 109–10.

Crown from implementing the treaty on its own terms, as demonstrated shortly after the conclusion of negotiations when it enacted federal policies which encroached on Ojibway control of their territory.[48] These policies and the subsequent assumption of legislative control over Treaty 3 lands in the following decades suggests that the Crown broke the treaty as it was understood by the Ojibway parties in order to facilitate its own goals of opening Treaty 3 territory for its own settlement and resource development.[49]

II. TREATY INTERPRETATION AND THE COURTS

The Crown policies implemented post-treaty were a precursor to what would become a longstanding pattern of unilateral actions in relation to Treaty 3 and other numbered treaties. In the decades immediately following the treaty, the Crown's position that it was entitled to control and develop treaty lands was reinforced directly by the courts. Later, the courts' approach to treaty interpretation would become more nuanced, but still often functioned to foreclose recognition of the Indigenous perspective on the treaties. This section examines how principles for treaty interpretation, including the use of historical evidence, evolved to set the stage for the Supreme Court's interpretation of Treaty 3 in 2014 in *Grassy Narrows* by perpetuating the disconnect between Indigenous understandings of the treaty and the position advanced by the Crown.

A. Early Decisions

In the decades following Treaty 3, colonial courts confirmed the Crown's view of the treaties without the input or presence of the Indigenous parties. Perhaps the example with most far-reaching consequences for subsequent judicial treatment of Treaty 3 was in *St Catherine's Milling*, in which the Judicial Committee of the Privy Council held that the Province of Ontario

---

[48] Luby, *supra* note 30 at 204.

[49] *Ibid* at 208.

was entitled to control lands and resources in Treaty 3 territory.[50] The decision turned, in part, on how the court interpreted the Ojibway interest in the territories prior to treaty.[51] The Privy Council concluded, absent any involvement on the part of the Ojibway treaty parties, that Ojibway rights to land had been transferred to the federal government at the time of the treaty. The Privy Council went on to hold that the Ojibway held only "a personal and usufructuary right" to the land which was "dependent upon the goodwill of the sovereign"[52] and which amounted to a "burden" on underlying Crown title.[53]

The impacts of *St Catherine's Milling* were significant. The Privy Council's conclusion placed severe limits on the Ojibway right to use and control lands relative to the Crown, and carried with it the implication that the Crown could extinguish any of those rights that remained at will.[54] As a result, the decision effectively stripped the Ojibway of decision-making authority in respect of their territory and resources less than 20 years after the conclusion of the treaty.[55]

The Crown's approach to treaty implementation—endorsed by the court in *St Catherine's Milling*—was aided by an amendment to the *Indian Act* in 1927 which prohibited raising money to pursue litigation related to Indigenous lands without the permission of the Department of Indian Affairs.[56] As the Royal Commission noted:

> [T]he Crown did not involve First Nations in decisions about how proceeds from their [treaty] lands would be used. The eclipse of treaties and the absenting of Indian people from decision making was pervasive,

---

50 *St Catherine's Milling and Lumber Co v The Queen*, [1888] UKPC 70, 14 AC 46 [*St Catherine's Milling*].

51 Hoehn, *supra* note 21 at 20.

52 *St Catherine's Milling*, *supra* note 50.

53 Miller, *supra* note 17 at 37.

54 *Ibid.*

55 Luby, *supra* note 30 at 207.

56 Douglas C Harris, "A Court Between: Aboriginal and Treaty Rights in the British Columbia Court of Appeal" (2009) 162:1 BC Studies 137 at 137.

> reinforced by *Indian Act* provisions that restricted Indian people to reserves and forbade them to pursue legitimate complaints about the non-fulfillment of treaties.[57]

Between 1927 and 1951, when the amendment was eventually repealed, virtually no claims arising from the numbered treaties were heard by Canadian courts.[58]

The treaty litigation landscape remained largely unchanged until the mid-1960s, when the BC Court of Appeal in *White and Bob* affirmed that the Douglas Treaties on Vancouver Island constituted valid agreements between the Indigenous and Crown signatories.[59] Justice Norris, writing for the majority, rejected the application of strict contractual rules in treaty interpretation, and held instead that the court was to have in mind "the common understanding of the parties to the document at the time it was executed."[60] The decision, which was affirmed in a brief oral judgment by the SCC, established the basic approach to treaty interpretation that is still used by the SCC.

The decision also paved the way for subsequent decisions in which the court defined its objectives and principles for addressing disputes between Indigenous peoples and the Crown, most notably with the landmark *Calder* decision in 1973 in which the Court acknowledged for the first time the pre-existence of Aboriginal title prior to European colonization.[61] The *Calder* decision, while not dealing with treaty rights, in turn heralded a shift towards cases in which the court grappled with questions of how to interpret and implement the historical treaties in a way that took into account the understandings of the Indigenous parties as well as the Crown. These included the SCC's 1996 decision in *Badger,* which addressed the issue of whether the descendants of the Indigenous signatories to Treaty 8

---

57 RCAP, *supra* note 46 at 163.

58 Harris, *supra* note 56 at 137.

59 Leonard Rotman, "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence" (1997) 46:1 UNBLJ 11 at 19.

60 *R v White and Bob*, [1964] 50 DLR (2d) 613 at 648–49, 52 WWR 193 (BCCA).

61 *Calder v British Columbia (AG)*, [1973] SCR 313, 4 WWR 1 [*Calder*].

have the right to hunt for food on privately-held land within Treaty 8 territory,[62] and the two 1999 *Marshall* decisions regarding the treaty right to catch and sell eels pursuant to the 1760 and 1761 treaties between the Mi'kmaq and the British Crown.[63]

This renewed focus on the meaning behind the historical treaties was necessitated in part by the constitutional entrenchment of treaty rights in section 35(1) of the *Constitution Act, 1982*.[64] The express inclusion of protections for treaty rights in Canada's constitution confirmed the status of the treaties under Canadian law, and in so doing called on courts to take seriously the rights advanced by Indigenous peoples based on those treaties. As the trial judge in *Grassy Narrows* stated in respect of Treaty 3:

> Since 1982, the Supreme Court of Canada has made it clearer and clearer that, in the process of reconciliation, Canadian governments must respect treaty rights, interpret ancient treaties liberally and in context, having regard to the manner in which they would have been understood by the Indians. Words imposing limitations on treaty rights should be narrowly construed. Governments must uphold the highest standards in treaty implementation, an important element of the "rededication" of the commitment to Canada's Aboriginal people.[65]

The growing role for the courts in interpreting Crown-Indigenous treaties can also be attributed to the fact that section 35(1) purports to recognize and affirm the "existing" treaty rights of Indigenous peoples without defining what those rights entail.[66] The Crown has used the absence of a clear definition of treaty rights in section 35(1) to take the position that the scope and substance of treaty rights should be determined

---

62 *R v Badger*, [1996] 1 SCR 771, 2 CNLR 77 [*Badger*].

63 *R v Marshall (No 1)*, [1999] 3 SCR 456, 4 CNLR 161 [*Marshall*]; *R v Marshall (No 2)*, [1999] 3 SCR 533, 4 CNLR 301.

64 Harris, *supra* note 56 at 145.

65 *Grassy Narrows*, ONSC, *supra* note 2 at para 1591.

66 Rotman, *supra* note 59 at 19.

by the courts, not through negotiations between the treaty parties.[67] The introduction of constitutional protections for treaty rights therefore both elevated the importance of those rights and increasingly called on Canadian courts to determine the modern-day meaning of the historical treaties.[68]

B. Treaty Interpretation Principles

In recent decades, principles for treaty interpretation between Indigenous peoples and the Crown have become firmly entrenched in the Canadian legal landscape. Underlying these principles is the SCC's recognition that the historical treaties constitute a unique type of agreement between Indigenous peoples and the Crown.[69] The Court has expressly recognized that the treaties represent a "solemn exchange of promises" between the parties which, in many parts of Canada, "formed the basis for peace and the expansion of European settlement."[70] As such, distinct rules are applied in order to give effect to the meaning of the treaties in the present-day.

In interpreting the historical treaties, the SCC's overarching objective is to identify a common intention which reconciles the interests of both parties.[71] In order to achieve this end, treaties are to be given "large, liberal and generous interpretations",[72] and any ambiguities in the wording of a treaty should be interpreted in favour of the Indigenous signatories.[73] As a corollary, the SCC recognizes that treaties are not limited to their written terms and that when interpreting an agreement between Indigenous

---

[67] James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights* (Saskatchewan: Native Law Centre University of Saskatchewan, 2006) at 45.

[68] Harris, *supra* note 56 at 138.

[69] *Marshall*, *supra* note 63 at para 78; *R v Sundown*, [1999] 1 SCR 393 at para 24, 170 DLR (4th) 385 [*Sundown*]; *Badger*, *supra* note 62 at para 78; *R v Sioui*, [1990] 1 SCR 1025 at 1043, 70 DLR (4th) 427 [*Sioui*]; *Simon v The Queen*, [1985] 2 SCR 387 at 404, 24 DLR (4th) 390 .

[70] *Sundown*, *supra* note 68 at para 24.

[71] *Sioui*, *supra* note 69 at 1068–69.

[72] Rotman, *supra* note 59 at 11.

[73] *Badger*, *supra* note 62 at para 41.

peoples and the Crown, it is not sufficient to rely on the understandings of only one of the treaty parties.[74] Instead, the SCC will seek to understand the agreement as a whole, including the underlying purpose intended by the parties and the context in which it was negotiated.[75]

Based on the above, it would seem that the SCC is prepared to give full consideration to the understandings advanced by both treaty parties today. However, on closer look the principles and their application raise serious questions about the SCC's commitment to interpreting the historical treaties in a way that accurately reflects both parties' interests and perspectives.

First, the principles themselves are internally inconsistent insofar as they purport to focus on the Indigenous interpretation of the treaty, while in practice, the opposite occurs. For example, although the SCC has held that oral promises made at the time of the agreement form part of the treaty,[76] it still begins its analysis with the written words in the document.[77] As the Court stated in *Badger,* while historical and contextual evidence is an important factor in understanding the treaties, "the scope of treaty rights will be determined by their wording".[78] Thus, even though there is general recognition that in many cases the English version fails to accurately represent the entire agreement, the Court still ultimately privileges the English version of the treaty document. As a result, courts still largely end up interpreting treaties in accordance with the literal words in the treaty document, not the contextual evidence of the negotiations.[79]

In addition, the principles limit the likelihood that courts will actually resolve ambiguities in the written terms of the treaty in favour of the Indigenous signatories. The Chief Justice of Canada's summary of treaty

---

74 Rotman, *supra* note 59 at 36.

75 *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 29, 3 SCR 388 [*Mikisew*]; *Badger*, *supra* note 62 at para 52.

76 *Sundown*, *supra* note 69 at para 24.

77 *Marshall*, *supra* note 63 at para 82; *Badger*, *supra* note 62 at para 76.

78 *Badger*, *supra* note 62 at para 76.

79 Rotman, *supra* note 59 at 31.

interpretation principles in *Marshall* includes the caveat that "courts cannot alter the terms of the treaty by exceeding what 'is possible on the language' or realistic".[80] Similarly, in the same case, Justice Binnie warned that "'[g]enerous' rules of interpretation should not be confused with a vague sense of after-the-fact largesse."[81] More recently, the SCC in *Mikisew* emphasized the importance of ensuring that treaty interpretation reflects the intention of the Crown, not just the Indigenous parties.[82] Lower courts have subsequently relied on these statements as justification to undermine and obscure the Indigenous signatories' understanding of the treaty, contrary to the underlying purpose of the principles of treaty interpretation set out above.[83]

Finally, the SCC's objective of identifying the parties' common intention in an attempt to "reconcile" Crown and Indigenous interests often implicitly favours the position of the Crown. As Leo Rotman argues, "[i]n striving towards these common intentions, it is not sufficient to look only for any overlap between Crown and Aboriginal perspectives",[84] in part because doing so ignores the possibility that one party's interpretation may be closer to the truth than the other. The principles thereby indirectly perpetuate the colonial status quo by failing to take into account the fact that in many cases, the Indigenous perspective on the treaty as an agreement to share lands and resources cannot be fully reconciled with the Crown's position that the treaties constitute a complete surrender of ownership and control of their traditional lands.

---

80 *Marshall*, *supra* note 63 at para 78, citing *R v Horseman*, [1990] 1 SCR 901, 3 CNLR 95 at para 8; *Sioui*, *supra* note 69 at 1069; *Badger*, *supra* note 62 at para 76.

81 *Marshall*, *supra* note 62 at para 14.

82 *Mikisew*, *supra* note 75 at para 28; see also *Sioui*, *supra* note 69 at 1069.

83 See e.g. *Hiawatha First Nation v Ontario (Minister of the Environment)*, [2007] 27 CELR (3d) 197 at paras 56–57, 2 CNLR 186 (ON SCDC).

84 Rotman, *supra* note 59 at 36.

C. Historical Evidence

Historical evidence also plays a critical role in the SCC's current approach to treaty interpretation. This is attributable in part to the courts' growing willingness to consider and take seriously the rights of Indigenous peoples rooted in pre-colonial use and occupation of the land.[85] Like the canon of treaty interpretation principles, the rise in the use of historical evidence goes hand in hand with the increase in treaty-based litigation subsequent to the repatriation of the *Constitution Act, 1982*.[86] In particular, the vagueness of the wording in section 35(1) that necessitates that courts determine what rights attract constitutional protections also requires historical evidence to aid in determining the scope and substance of those rights.[87]

As with the treaty interpretation principles themselves, one might expect that the introduction of historical evidence would increase the likelihood that courts would interpret the treaties in a manner consistent with the Indigenous perspective. As historian and expert witness Stephen Patterson notes, "[c]ourts recognize, as historians do, that the written documentary remains of the past often reflect the views and biases of the powerful, and that the illiterate, or uneducated or less articulate, can have views that perhaps were not preserved in written form."[88] Like historians, courts require context in order to understand how the Indigenous parties to the treaties understood the terms of the agreement.[89] Although the specific approaches may differ, both historians and the courts seek to uncover the truth, and "both understand that the truth goes well beyond the words of a single agreement like a treaty."[90]

---

[85] Arthur Ray, "*Regina v Marshall*: Native History, the Judiciary and the Public" (2000) 29:2 Acadiensis 138.

[86] John Reid et al, "History, Native Issues and the Courts: A Forum" (1998) 28:1 Acadiensis 3 at 18.

[87] *Ibid* at 18–19.

[88] *Ibid* at 21.

[89] *Ibid.*

[90] *Ibid.*

However, as with the application of its treaty interpretation principles, the courts' use of historical evidence often fails to deliver substantive results for Indigenous peoples. For example, the SCC's ruling in *Marshall* cited 12 historical works in its reasons regarding whether treaties between the Mi'kmaq and British in 1760–61 provided a right for the Mi'kmaq to fish sufficient to provide them a moderate livelihood.[91] In the result, the majority and dissenting justices arrived at two separate and competing conclusions about the substance of the treaty based on their own interpretation of the evidence presented at trial.[92] Justice Binnie, for the majority, found that the treaty provided the Mi'kmaq with a right to trade fish for a moderate livelihood. The (now) Chief Justice of Canada, in a dissenting judgment frequently cited for its summary of treaty interpretation principles, found based on the same evidence that there was no such right.[93]

The structure of judicial decision-making in Canada also limits the utility of historical evidence for Indigenous peoples seeking to advance their own view of the treaties. Unlike historians, courts are required to make conclusive findings of fact in relation to the historical treaties.[94] Although these findings are made in the context of a particular case, once they are made they risk being widely applied in other decisions, regardless of how accurately those findings reflect the intentions of the treaty parties. Conversely, the opposite can also happen—critical findings of fact based on historical evidence can be obscured if the decision is subsequently overturned on appeal on other grounds.

As described above, significant challenges remain for Indigenous peoples in treaty rights litigation, notwithstanding the court's development of treaty interpretation principles and use of historical evidence. The internal inconsistencies with the treaty interpretation principles (and

---

[91] JR Miller, "History, the Courts and Treaty Policy: Lessons from Marshall and Nisga'a" (Paper 159 delivered at the Aboriginal Policy Research Consortium International at Western University, 2004) [unpublished] at 30.

[92] *Ibid* at 30.

[93] *Marshall*, *supra* note 63, McLachlin J, dissenting.

[94] See *ibid* at para 36.

the courts' reluctance to apply those principles in a way that results in a meaningful outcome for the Indigenous parties) coupled with the inherent challenges of using historical evidence in the courtroom means that courts are more likely to perpetuate rather than right the longstanding imbalance in treaty interpretation which privileges the position of the Crown. The remainder of this paper will consider these challenges in the specific context of the modern implementation of Treaty 3 in accordance with the Ojibway understanding of the treaty agreement.

III. TREATY 3 & THE COURTS TODAY

The agreement negotiated at North West Angle between the Ojibway and the Crown in 1873, still in force today, affects the lives of everyone who makes their home in modern-day northwestern Ontario and eastern Manitoba. For the settler population, the effects of the agreement—being the ability to live on and use lands subject to treaty—are largely invisible. For the Ojibway, the impacts of the Crown's interpretation of the treaty are an everyday reality. The Crown today continues to implement the treaty unilaterally by controlling and developing the resources in Treaty 3. The result is predictable. The Treaty 3 Ojibway are subject to economic and social hardship resulting from the effects of generations of colonization and dispossession, while the Crown, companies and non-Indigenous Canadians benefit from the development of Treaty 3 resources.

At the same time, the descendants of the Ojibway signatories to Treaty 3 continue to assert decision-making authority over their lands and resources based on their own laws and understanding of the treaty agreement. For example, in 2002, members of Grassy Narrows First Nation established a blockade prevent clear-cut logging in their territory.[95] Fifteen years have passed and Grassy Narrows continues to maintain the blockade as a means of protecting the lands which have sustained them for generations. This need for direct action, premised on the underlying fact that without it the

---

[95] See Judy da Silva, "Grassy Narrows Blockade: 2002-2016" *The Media Co-op* (30 May 2016), online: <www.mediacoop.ca>; "Grassy Narrows 12-year Blockade Against Clear Cutting Wins Award" *CBC News* (24 May 2015), online: <www.cbc.ca/news>.

province will continue to authorize logging, highlights the Crown's refusal to acknowledge Grassy Narrows' understanding of the treaty as an agreement which includes a right to decide how lands and resources under Treaty 3 are used. The following section will explore Grassy Narrows' recent efforts to enforce this understanding in Canadian courts.

A. Grassy Narrows

The *Grassy Narrows* case began as an application for judicial review by members of Grassy Narrows in response to the provincial government issuing a licence to a forestry company in 1997 to conduct clear-cut logging in Treaty 3 territory. The judicial review was converted to an action and in 2005, Grassy Narrows commenced an action in the Ontario Superior Court challenging the province's right to "take up" lands for forestry pursuant to the treaty agreement.

Pursuant to a 2006 case management order the action was bifurcated into two separate phases. At the first phase, the trial judge was directed to consider whether Ontario had authority to take up tracts of lands for forestry so as to limit the plaintiffs' Treaty 3 rights; and if not, whether Ontario had authority pursuant to the division of powers under the *Constitution Act, 1867* to justifiably infringe the plaintiffs' treaty rights.[96] The question of whether the plaintiffs' treaty rights had in fact been unjustifiably infringed was left for another day.

The trial on the threshold issues established by the case management judge lasted 70 days and included testimony from a number of expert witnesses regarding the parties' intentions at the time of the treaty. Ultimately, the trial judge found for the Ojibway on both issues and concluded that only Canada, the federal treaty partner, had the right to exercise the taking up clause in Treaty 3 so as to limit the Ojibway harvesting right.

The trial judge's reasons included extensive findings of fact on how the treaty partners understood the terms of Treaty 3, based both on the judge's application of historical evidence and the principles of treaty interpretation

---

[96] See *Grassy Narrows*, ONSC, *supra* note 2 at para 2.

established by the SCC.[97] The trial judge defined her central role as being to "assess all of the evidence, including the historical documentation, to determine the mutual understanding and intent of the Commissioners and the Ojibway in respect of the Treaty Harvesting promise in 1873, and to arrive at the interpretation of common intention that best reconciles the interests of the parties at the time the Treaty was signed."[98] In identifying the common intention of the Ojibway and Canada at the time of treaty, she considered it imperative to consider the overall context of the treaty, including the perspective and understandings of the Indigenous signatories.[99] She noted that Treaty 3 was negotiated by distinct parties in a particular context, and therefore it was necessary "to consider the mindset, interests and unique perspectives of each Treaty partner."[100] Accordingly, she found that the legal obligations that flowed from the treaty would be based on the particular text and circumstances of the document, as well as both of the parties' intentions at the time the treaty was negotiated.[101]

At trial, expert historical, ethno-historical, and anthropological witnesses testified to assist the court in understanding the historical, cultural, and political context that resulted in Treaty 3.[102] The trial judge recognized this evidence as a critical component of understanding the Ojibway intentions at the time of treaty, and noted that "[i]n considering mutual intention in 1873, it would not be acceptable, without more, to uncritically adopt Euro-Canadian interpretations of Ojibway perception contained in the contemporaneous documentation."[103]

However, she also acknowledged the inherent difficulties in interpreting evidence that stretched the boundaries of familiar concepts in Canadian law. For example, the trial judge noted that it was initially difficult to follow

---

97 *Grassy Narrows*, ONSC, *supra* note 2 at paras 1249–1314.

98 *Ibid* at para 53 [emphasis in original].

99 *Ibid* at paras 1288–93.

100 *Ibid* at para 1468.

101 *Ibid*.

102 *Ibid* at para 34.

103 *Ibid* at para 215.

the testimony of ethno-historian Dr. Joan Lovisek, who testified for Grassy Narrows, because of the "disconnect between the underlying focus and assumptions of counsel for Ontario and of Lovisek's ... concept of Ojibway understanding of what was happening and what was being promised"[104] at the time of treaty. The trial judge went to note, however, that:

> Once I was able to set aside my own reflexive reactions based on Euro-Canadian concepts of land ownership and to focus instead on Ojibway concepts, her answers were comprehensible and crucial to understanding the transaction from the Ojibway perspective. To them, the Treaty was about continuing their way of life. Their focus was on resources to collectively harvest, not on Euro-Canadian preoccupations.[105]

The trial judge's candid comments here illuminate the challenges faced by the judiciary in interpreting the treaty from a perspective other than one rooted in Canadian law, even with the assistance of expert witnesses.

Ultimately, the trial judge concluded that the Ojibway understood at the time of treaty that they were entering into an agreement in which the use and benefits of the lands would be shared. Summarizing the testimony Dr. Lovisek, the trial judge stated that at the time of the treaty negotiations:

> [The Ojibway] had observed that the settlers were passing through their territory, not staying to settle on it. They perceived that a Euro-Canadian presence would not interfere much overall with their way of life. The Commissioners did not advise and they did not accept that their way of life must change. They perceived there was room to share their resources, without affecting their subsistence harvesting. They did not foresee that sharing would cause resource depletion. At the same time, they believed there could be benefits to be derived from a Euro-Canadian presence.[106]

Based on this evidence, the trial judge concluded that "the Ojibway knew and agreed they were giving up **exclusive** use of their lands and would be sharing the resources on them with the Euro-Canadians after the Treaty was signed" on the expectation that the treaty partners' respective uses of

---

104 *Ibid* at para 631.

105 *Ibid* at para 631.

106 *Ibid* at para 486 [emphasis in original].

the lands would be compatible with each other.[107] At the time of treaty, the Ojibway understood that they were agreeing to allow settlers to use and occupy some of the lands, and that they would share the lands and the benefits of those lands together with their treaty partner.[108]

Importantly, the trial judge affirmed that contrary to the Crown's position, both the Ojibway and the treaty commissioners understood the agreement to be about the sharing of lands and resources. She found that at the time of treaty the commissioners expressly promised that the Ojibway would be entitled to continue to use their territory as they had previously.[109] According to the trial judge, when the treaty was concluded, both parties expected that the Ojibway would continue their traditional harvesting activities and that Euro-Canadians could use and share in the resources without having a significant impact on the Ojibway way of life.[110] This conclusion is a rare example of a court's wholesale rejection of the position relied on by the Crown for a century and a half to justify ignoring the Indigenous understanding of the treaty.

The trial decision in *Grassy Narrows* is striking in its unequivocal affirmation of the Ojibway perspective on Treaty 3. The decision confirms in Canadian law with the support of historical evidence the position that has been advanced by the Ojibway since the conclusion of treaty negotiations. In this respect, it is an important step forward towards an era of decisions in which courts pay careful attention to their own biases in understanding the Indigenous perspectives of the treaty and apply principles of treaty interpretation and historical evidence in a manner that illuminates rather than obscures the intentions of the treaty partners.

Unfortunately, however, the decision is also an outlier in treaty interpretation jurisprudence. The Ojibway parties to Treaty 3 did not have long to enjoy the trial decision and its affirmation of their understanding of the treaty agreement. The Crown appealed the decision, and the Ontario Court of Appeal reversed the trial decision and held that Ontario can

---

107 *Ibid* at para 801 [emphasis in original].

108 *Ibid* at paras 801, 803.

109 *Ibid* at para 913.

110 *Ibid* at paras 917, 1236.

exercise the "taking up" clause so as to limit the Treaty 3 harvesting right.[111] On appeal, the Court relied on its own interpretation of the written text of the treaty document and on what it described as the doctrine of "constitutional evolution" to conclude that Canada, the original treaty partner, no longer has a role or responsibilities to the Ojibway when Ontario takes up lands under Treaty 3.[112]

Although the Court of Appeal overturned the trial judge's decision regarding whether Ontario could exercise the Treaty 3 taking up clause, it did not expressly overturn the finding that at the time of Treaty 3 both parties understood that they would share the use and benefits of the lands. Rather, the Court of Appeal recognized that the decision was based on a thorough review of the evidence, including numerous documents that detailed the 1873 negotiations for Treaty 3.[113] The Court of Appeal otherwise largely ignored the trial judge's conclusions on the treaty parties' intentions. The result was a decision that failed to accord with the Indigenous understanding of which level of government is responsible for fulfilling the Crown's treaty promises, but left the trial judge's findings of fact regarding the treaty partners' understanding about how treaty lands were to be used and shared largely intact.

Grassy Narrows and its neighbour, Wabauskang First Nation, appealed the decision of the Ontario Court of Appeal to the SCC on the basis that their treaty partner, the federal government, remained responsible for fulfilling its promises to the Ojibway pursuant to Treaty 3. On appeal, the narrow issue to be decided by the SCC was whether Ontario needed federal authorization to take up lands under Treaty 3 so as to limit the treaty harvesting right.[114] The SCC upheld the Court of Appeal's decision and rejected the First Nations' position that Canada was obligated to ensure the protection of their treaty rights.[115]

---

[111] *Keewatin v Ontario (Natural Resources)*, 2013 ONCA 158 at paras 140, 150, 174, 114 OR (3d) 401.

[112] *Ibid* at paras 136–41, 153.

[113] *Ibid* at paras 36, 72.

[114] *Grassy Narrows*, *supra* note 1 at para 3.

[115] *Ibid* at para 4.

In the course of its reasons, the Court made a number of comments regarding the scope of the treaty that appear to undermine the trial judge's findings of fact. For example, the Court noted that "[i]n 1873, Canada claimed ownership over all the *Treaty 3* lands" and that the specific area of land at issue in *Grassy Narrows* "was unquestionably under Canada's jurisdiction at that time".[116] In relation to the outcome of the negotiations, the Court held that "[t]he Ojibway ceded the Treaty 3 territory to Canada"[117] and "yielded ownership" of the lands in exchange for various goods, annuities and harvesting rights.[118] These comments are in direct opposition to the trial judge's finding that the parties mutually agreed to share the use and benefits of the treaty lands. However, in contrast to previous treaty interpretation decisions such as Marshall, the SCC in Grassy Narrows cited no historical evidence in support of its comments, nor did it directly address the trial judge's findings of fact on this issue. Like the Court of Appeal, the SCC left the trial judge's conclusion on the parties' mutual intentions in Treaty 3 for another day.

B. LOOKING AHEAD

The SCC's decision in *Grassy Narrows* leaves the present-day Ojibway parties to *Treaty 3* lost in a grey area in Canadian law. The Indigenous perspective on the treaty has been affirmed by the Court based on extensive historical evidence. The trial judge's findings on this issue have never been directly disputed by either of the appellate courts. However, because the trial decision was overturned on the issue of whether Ontario is entitled to take up treaty lands, the remaining findings of fact on the issue of how the lands were to be used and shared are now largely ignored.[119] This of

---

[116] *Ibid* at para 5.

[117] *Ibid* at para 10.

[118] *Ibid* at para 2.

[119] See e.g. *Wabauskang First Nation v Ontario (Northern Development and Mines)*, 2014 ONSC 7244 [*Wabauskang*]. The case was heard by the Ontario Divisional Court shortly before the release of the SCC's decision in *Grassy Narrows*. In *Wabauskang* the applicants brought an application for judicial review challenging Ontario's approval of an underground gold mine in Treaty 3 territory, in part on the basis that the Crown had

particular concern given the trial judge's express recognition that the Court's findings in the first phase of the litigation would affect the issue to be addressed at the second phase, being the critical question of whether Ontario had in fact breached the treaty.[120]

As *Grassy Narrows* demonstrates, even where there is a favourable finding for the Indigenous parties—which is unlikely, given the challenges described in Part II—there is a risk that those findings will be overturned on appeal, or buried beneath subsequent decisions by appellate courts that are focused on other issues. As such, it seems doubtful that the judicial application of treaty interpretation principles and historical evidence will ultimately result in a meaningful outcome for Indigenous parties. However, as long as the Crown continues to unilaterally implement the treaties at the expense of Indigenous peoples, courts will still be called upon to adjudicate treaty-related disputes. This situation brings to mind the comments of Justice Binnie in *Marshall*—made in that case in relation to issues associated with the interpretation of historical evidence—that notwithstanding those challenges, "[t]he judicial process must do as best it can."[121] The following suggestions are intended to assist Indigenous litigants, lawyers, and courts to do the best they can in a context that is inherently challenging, particularly for the Indigenous treaty partners.

One of the key lessons to be drawn from *Grassy Narrows* is that the historical record affirms the Indigenous parties' assertion that Treaty 3 includes a right to make decisions about and share in the benefits from the land. The trial judge arrived at this conclusion on the basis of extensive historical evidence concerning the parties' intentions and understandings at the time of treaty. It is only when the appellate courts ceased to consider

failed to consult with them about how the decision would affect their right, based on their understanding of the treaty agreement, to share in decisions about and benefits from the mine. The court concluded, notwithstanding the findings of fact in the *Grassy Narrows* trial decision on the intentions of the treaty parties, that there was no right to be consulted about sharing in benefits and decisions about Treaty 3 lands and resources because there is no reference to it in the written English version of the treaty.

[120] *Grassy Narrows*, ONSC, *supra* note 2, at paras 7, 71.

[121] *Marshall*, *supra* note 63 at para 37.

this evidence that the Ojibway perspective was once again ignored in favour of blanket pronouncements that all lands were surrendered at treaty. *Grassy Narrows* is not a case like *Marshall*, where the SCC applied and attempted to grapple with the historical evidence in order to interpret the treaty on its own. In *Grassy Narrows*, there are no competing interpretations of the treaty espoused by different factions of the court, nor is there a dissenting judgment. Rather, there is a single unanimous set of reasons written by the Chief Justice of Canada that make no reference to any historical sources or to the trial judge's findings in respect of the parties' intentions at treaty. As a consequence, there is now a body of historical evidence about the parties' respective understandings at Treaty 3, which could potentially be used by Indigenous litigants wishing to advance their interpretation of the treaty in Canadian courts. This is in itself a significant step forward for the Ojibway treaty parties.

The decision also stands as a reminder for litigants to approach treaty-based cases with caution, even when there is strong historical evidence in support of the Indigenous perspective. Cases based on Indigenous rights and treaty interpretation frequently proceed to the SCC, and as such, groups beyond the specific litigants stand to be impacted by an unfavourable outcome.[122] In the *Grassy Narrows* trial decision, the judge made numerous findings of fact, and since her decision was overturned those findings now risk being ignored by the courts to the detriment of all of the descendants of the Ojibway parties to Treaty 3. To minimize this risk, litigants should be careful to frame cases so as not invite unnecessary findings of fact. Advocates should also push for appellate courts to adopt an enhanced level of deference in relation to findings of fact in treaty rights cases that are litigated at significant expense and risk to the Indigenous parties.[123]

---

[122] Usher, *supra* note 6 at 129.

[123] See e.g. *Ermineskin Indian Band and Nation v Canada*, 2006 FCA 415 at para 38, [2007] 3 FCR 245. In that case the plaintiffs led evidence before the lower court regarding their pre-contact history, territory and practices in support of their position that their Aboriginal title had not been extinguished pursuant to Treaty 6, but on appeal subsequently argued that the evidence was not directly relevant to the issue now before the Court and that the Court should decline to make findings based on that evidence.

Finally, litigants and advocates alike should be cognizant of the fact that courts can and do evolve over time. It was not so long ago that there were no treaty interpretation principles, no constitutional protections for treaty rights, and no Indigenous peoples appearing before the courts to voice their perspectives on what happened when the treaties that underlie Canada's constitutional structure were negotiated. In this respect, courts have evolved significantly since the Privy Council's denial of Indigenous interests in land in *St Catherine's Milling*. To further this trajectory, we must press the courts to call into question their reliance on outdated ideologies and beliefs that perpetuate Canada's colonial history. As Michael Asch argues, in the context of judicial decisions pertaining to Indigenous peoples, reliance on precedent is often "a position of convenience adopted by a court reluctant to embrace meaningful change and diversity in Canadian law."[124] However, in certain circumstances, courts have also shown themselves to be willing to move beyond the blind application of precedent in order to adapt to changing societal values and ideologies.[125] The *Grassy Narrows* trial decision, while still an anomaly, could be one early signal that for Indigenous parties seeking recognition of their understandings of the treaties this shift has finally started.

CONCLUSION

As we pass Canada's 150th anniversary, many aspects of the treaties that underpin Canada's existence as a nation remain ignored. *Grassy Narrows* is just one example of Indigenous peoples' efforts across the country to finally achieve recognition of their understanding of what actually transpired when those treaties were negotiated. Although the Ojibway of Treaty 3 have established a strong basis supported by the historical record and the trial judge's findings of fact in *Grassy Narrows* for the position that Treaty 3 was an agreement to share and benefit from the lands, there remain significant

---

124 Michael Asch & Catherine Bell, "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) at 39.

125 *Ibid* at 41.

roadblocks for Indigenous peoples seeking to exercise jurisdictional authority over their lands. However, the decision also opens the door for courts to look more deeply and honestly at what transpired between the parties to the historical treaties, and how those treaties are to be implemented today.