



DISCUSSION PAPER SERIES IN
ABORIGINAL HEALTH:
LEGAL ISSUES

No. 1

Aboriginal Health
A Constitutional Rights Analysis

Yvonne Boyer

June 2003



© National Aboriginal Health Organization

National Aboriginal Health Organization (NAHO)
130 Albert Street
Ottawa, Ontario K1P 5G4
website: <http://www.naho.ca>

Native Law Centre
University of Saskatchewan
101 Diefenbaker Place
Saskatoon, Saskatchewan S7N 5B8
website: <http://www.usask.ca/nativelaw>

The author is a Legal Advisor/Policy Analyst with NAHO. The author is grateful to Judge Mary Ellen Turpel-Lafond of the Saskatchewan Provincial Court for "planting the constitutional seeds" many years ago and to Sákej Youngblood Henderson for his infinite patience and wisdom. Without the sharing of his knowledge, this paper would not be possible. The author would also like to thank Sheila Grantham, Wanda McCaslin, Larry Chartrand, Maura Hanrahan, Valerie Gideon, Susan Haslip and the NAHO communications staff for their helpful suggestions.

This Discussion Paper Series is jointly published by NAHO and the Native Law Centre, University of Saskatchewan. The views expressed in this Discussion Paper Series do not necessarily reflect those of the Native Law Centre.

ISSN 1707-1933

Table of Contents

Executive Summary	5
<hr/>	
Introduction	7
<hr/>	
1 Constitutional Supremacy and Aboriginal Dignity	10
<hr/>	
2 Aboriginal Right to Health	14
2.1 Source	14
2.2 Test for Aboriginal Rights	14
2.3 Importance of Aboriginal Right to Health Care	15
<hr/>	
3 Treaty Right to Health	17
3.1 Treaty Interpretation	17
3.2 Treaty Right to Protection of Aboriginal Health	18
3.3 Treaty Right to Medicines	20
3.4 Interpretation of the Medicine Chest Clause	22
<hr/>	
Conclusion	24
<hr/>	
Notes	26
<hr/>	
Bibliography	32

Executive Summary

The health of Aboriginal people in Canada is in a deplorable state with the overall health status falling well below that of other Canadians. By examining the legal history of health care in Canada, as applied to Aboriginal people, one is able to conclude that Aboriginal rights and treaty rights have been largely ignored by the federal government when implementing health policies.

Since 1982, Aboriginal and treaty rights have been recognized and affirmed as constitutionally protected rights under section 35 of Canada's *Constitution Act, 1982*.¹

Aboriginal rights are based in Indigenous knowledge, heritage, culture, and traditions encompassing all aspects of Aboriginal societies. Sákéj Youngblood Henderson expressed that “[t]he Supreme Court acknowledged that these cultural rights arise within a system of beliefs, social practices and ceremonies of Aboriginal people. They are traced back to their ancestral Indigenous order and their relationship with the ecology.”² Since customs and traditions reflect the distinctive cultures of Aboriginal groups, rights affiliated with these customs and traditions will be unique to those specific groups. Certain practices, such as the practices of healing and medicine, were and are integral to all Aboriginal Peoples as part of collective societies.

In addition to Aboriginal rights, some Aboriginal Peoples possess treaty rights that supplement the right to Aboriginal health and health care. The Supreme Court of Canada has determined that a treaty is an exchange of solemn promises between the Crown and Indian nations whose nature is sacred.³ The basis of treaty rights is the promises made to the Indian nations during negotiations rather than the written text of the treaties. Treaty 6 is the only treaty to have specifically included medical care in the written text of the treaty itself.⁴ The federal government has acknowledged that a similar clause was also promised during treaty negotiations of Treaties 7, 8, 10, and 11.⁵

This paper explores the constitutional status of Aboriginal and treaty rights through a constitutional supremacy analysis because it is the standard from which one must review government power in relation to Aboriginal health. While the Constitution can be amended, neither the federal Parliament nor provincial legislatures can alter the existing provisions of Aboriginal or treaty rights in section 35.⁶ The Supreme Court of Canada has held that governmental powers or regulations must be consistent with Aboriginal and treaty rights to be valid; they cannot conflict with, contradict, or impede these rights. In some cases, the Supreme

Court will allow infringement on these constitutionally protected areas, but such infringements must be strictly justified by high necessity, such as conservation. Compensation must be provided to the holders of the constitutional rights for infringement of these rights. Additionally, federal and provincial governments are required to consult with constitutional rights holders before any infringing action can be justified.

Despite the entrenchment of Aboriginal and treaty rights in Canada's Constitution (through section 35) the federal government has not acknowledged the impact of such entrenchment on Aboriginal and treaty rights to health. This paper demonstrates that there is a treaty right to medical services, a fiduciary duty to provide medicines, a reasonable and legitimate expectation to receive supplemental medicines and health care, and an Aboriginal right to health. This paper is written in an attempt to illustrate that, when properly understood, constitutional rights impose certain positive, social, fiscal and institutional obligations on federal, provincial and territorial governments. These obligations, in turn, permeate legislative and social policy development. In light of the constitutional reform and judicial interpretations surrounding Aboriginal and treaty rights, lawmakers and policy-makers can be compelled to accept the existence and implementation of Aboriginal and treaty rights to health in Canada.

Introduction

The health of Aboriginal Peoples is in crisis. Aboriginal people have an overall health status that falls well below that of other Canadians.⁷ Evidence of this crisis comes in many forms including increasing rates of suicide (particularly amongst Aboriginal youth) diabetes, heart disease, fetal alcohol syndrome, and mental health disorders.⁸ The crisis in Aboriginal health is attributed to a variety of historical sources including Canada's legislation and policies of assimilation, the residential school system and imposed change from indigenous lifestyles to those of Canada's industrialized society.⁹

Dr. Maureen Lux's book, *Medicine That Walks: Disease, Medicine and Canadian Plains Native Peoples: 1880-1940*,¹⁰ documents how federal policy and institutions created the crisis in First Nations health. The failure of Indian health policies has always resided in the false assumptions that First Nations people were biologically predetermined to vanish, were inherently unhealthy and inferior, and that their culture caused them to pursue harmful lifestyles. *Medicine That Walks* and the *Report of the Royal Commission on Aboriginal Peoples*¹¹ document how the policies of the federal government, designed to implement the treaty promises of settlement, diminished the treaty avocation of hunting, fishing, and trapping in the transferred lands and resulted in suffering, starvation, disease, and death. Residential schools had inadequate health facilities and contributed to the spread of the settlers' diseases. Traditional medicine and healing ceremonies were discouraged and prohibited.

To address the crisis facing Aboriginal Peoples, Aboriginal health issues must be addressed from an Aboriginal and treaty rights perspective that affirms a holistic perspective to health. It is argued that Aboriginal Peoples in Canada have constitutionally entrenched rights to health and health care that are not possessed by any other individual or group of Canadians. The entrenchment of Aboriginal and treaty rights in the Constitution means that every Aboriginal man, woman, and child carries a remarkable set of constitutional rights.¹² Constitutional rights authorize the fair distribution of power. They limit federal and provincial authority over health care and research into traditional health practices. While the *Canada Health Act*¹³ is geared to distributing health care to all Canadians equally, Aboriginal Peoples argue that constitutional difference is relevant to the just distribution of health rights and entitlements. Treatment of Aboriginal Peoples as merely "other peoples" ignores their constitutional rights and creates inequality of services for Aboriginal Peoples.

The constitutional protection extended to Aboriginal and treaty rights stems from section 35 of the *Constitution Act, 1982*.¹⁴ Section 35 recognizes and affirms existing Aboriginal and treaty rights, as opposed to delegated or conferred rights, and implies that such rights owe their existence to inherent human rights. Human rights are the rights to which all human beings are justly entitled merely by virtue of their being human. (This approach to rights is known as a natural rights approach.) Consequently, according to the natural rights concept, each Aboriginal person equally possesses certain immutable rights by virtue of his or her Aboriginal rights. The Supreme Court has confirmed that it is the duty of a just government to protect these inherent rights. These inherent rights are not dependent upon Canadian law for their existence. The implications of these constitutional rights to health have not been studied or reconciled by either the federal or provincial governments. As Lamer C.J.C. stated in *Van der Peet*:

... what s.35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights, which fall within the provision, must be defined in light of this purpose ...¹⁵

Aboriginal rights are inherent to all Aboriginal people in Canada and are passed down from generation to generation. They are derived from Aboriginal knowledge, heritage, and law.¹⁶ Aboriginal rights and fundamental freedoms stem directly from recognition of the inherent and inalienable dignity of Aboriginal Peoples. It follows that the practices of traditional healing and herbal medicine for health are ways through which Aboriginal people manifest or express an inherent right.

In addition to Aboriginal rights, some First Nations communities possess treaty rights. Some treaties supplement the right to Aboriginal health care, such as the medicine chest and pestilence clauses of Treaty 6.¹⁷ The Supreme Court of Canada has recognized that Indian treaties constitute a unique type of agreement that attract special principles of interpretation.¹⁸ It has defined a treaty as representing an exchange of solemn promises between two sovereign nations – the Crown and Indian nations – whose nature is sacred.¹⁹ According to the Supreme Court, treaties entrench a legal relationship between the Crown and an Indian nation with the intent to create obligations. These obligations are derived from the intent and context of the treaty negotiations. The controlling premise of treaties is that the parties are only bound by those rules to which they have consented. Treaty obligations and rights result from formal negotiations and explicit consent. Treaties were recorded in the English language, but the

Supreme Court has held that treaty rights arise from promises made to the Indian nations by the sovereign's agent during negotiations. Often these rights were not included in the written treaties.²⁰

Indian nations and tribes that signed the treaties did not relinquish their sovereignty to the British sovereign nor to Canada. Nor did the Indian nations and tribes that signed the treaties relinquish their traditional health regimes to the British sovereign or the Government of Canada. No textual evidence exists of such relinquishment. Evidence does not exist that suggests that the Crown intended to limit Aboriginal rights to health. Moreover, a limitation of Aboriginal rights to health would violate the sovereign's promise of protection.

1 Constitutional Supremacy and Aboriginal Dignity

Since 1982, Aboriginal and treaty rights have been recognized and affirmed by section 35(1) of the *Constitution Act, 1982*:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.²¹

Modern treaty making takes the form of land claims agreements, which section 35(3) of the *Constitution Act, 1982* specifically recognizes as treaty rights.²²

This recognition and affirmation of Aboriginal and treaty rights means that these rights are protected by Canada's Constitution. The Constitution, however, is not the source of Aboriginal and treaty rights. These rights are not delegated by the Imperial Parliament to the Aboriginal Peoples of Canada. Rather, Aboriginal and treaty rights are inherent in the Aboriginal Peoples of Canada by virtue of their being Aboriginal Peoples and the agreements to which they consented.

The recognition and affirmation of the inherent (Aboriginal and treaty) rights of the Aboriginal Peoples of Canada change the structure and scope of legislative power. By entrenching Aboriginal and treaty rights in the Constitution of Canada, these rights are given the highest protection by law in the country:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.²³

As a result, neither the federal Parliament nor the provincial or territorial legislatures can alter the rights of Aboriginal Peoples of Canada.²⁴

Henderson explains the significance of constitutional supremacy by looking at the Constitution from a holistic perspective. That is, he reconciles the original constitutional documents with recent reforms.²⁵ This is vital because in 1982 when section 35 of the *Constitution Act, 1982* recognized and affirmed Aboriginal and treaty rights, constitutional protection and the rule of law were extended to these rights. Since Aboriginal rights are derived from Aboriginal knowledge, heritage, and law, the necessary relationship was then forged between Aboriginal knowledge, heritage, and law (Aboriginal rights) and the old prerogative regime

that created and protected treaty rights with the government of Canada.²⁶ This integrated the powers from the original documents and rule of law into section 35 of the *Constitution Act* thereby infusing the same royal prerogative powers that created the *British North America Act* in 1867.

The Supreme Court of Canada provides an analysis of constitutional principles in its 1998 decision in *Quebec Secession Reference*.²⁷ This analysis acknowledges that, although the text of the Constitution of Canada has a primary place for determining constitutional rules, the text of the Constitution is not exhaustive (that is, not the only source of analysis). Certain unwritten principles generated the internal architecture/framework of the Constitution. These implicit principles operate symbiotically with the text to create a framework for interpreting the Constitution. The Supreme Court stated that this framework “embraces the entire global system of rules and principles which govern the exercise of constitutional authority.”²⁸ The Court stated, “superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading.”²⁹ It asserted that proper constitutional analysis requires a more profound investigation of the underlying principles animating the whole of the Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities. These principles must inform our overall appreciation of the constitutional rights and obligations.³⁰ For Aboriginal Peoples, these unwritten principles protect, affirm and inform the overall appreciation of their inherent rights.

The Supreme Court of Canada has articulated the principle of constitutionalism or constitutional supremacy and how it relates to the rule of law:

... the constitutionalism principle requires that all government action comply with the Constitution. *The rule of law principle requires that all government action must comply with the law, including the Constitution.* This Court has noted on several occasions that with the adoption of the Charter, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc. v. The Queen*, [1985] 1 SCR 441, at p. 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.³¹

The Supreme Court explained that understanding the scope and importance of the principles of the rule of law and constitutionalism makes constitutional rights entrenched beyond the reach of simple majority rule and ordinary legislation. In other words, all governments – federal,

provincial, and territorial – must comply with the Constitution. There are three reasons for this:

1. A constitution provides an added safeguard for fundamental human rights and individual freedoms that might otherwise be susceptible to government interference.
2. A constitution can ensure that vulnerable minority groups are granted the institutions and rights necessary to maintain and promote their identities and can protect minorities against the dominant culture's attempts to assimilate them.
3. A constitution provides for a division of political power that allocates power amongst different levels of government.³²

The existence of a constitution is predicated upon these very important grounds. The underlying purposes for a constitution would be defeated if a democratically-elected government could seize the powers of another government simply by passing laws unilaterally that would grant a government additional political power.

Constitutional supremacy also plays a critical role in supporting Aboriginal and treaty rights because it implies that constitutional provisions creating federal and provincial legislation must consider these rights. Constitutional law professor Patrick Macklem has argued that the constitutional rights of Aboriginal Peoples do more than restrict governmental action. When properly understood, constitutional rights impose certain positive, social, fiscal, and institutional obligations on federal, provincial and territorial governments. These obligations, in turn, permeate legislative and social policy development.³³

The Supreme Court of Canada in *R. v. Sparrow* held that Aboriginal rights are not extinguished by federal law and policy decisions. Rather, only imperial statutes can extinguish those rights.³⁴ Any level of modern governmental regulation must be consistent with Aboriginal and treaty rights to be valid. Since the Supreme Court has stated that any ambiguities in statutes and treaties must be interpreted in favour of Aboriginal Peoples,³⁵ it is difficult to argue that these rights have been extinguished.³⁶ It is unreasonable to assume that Aboriginal people would voluntarily have surrendered the rights that go to the core of their existence.

The entrenchment of Aboriginal and treaty rights in the Constitution of Canada also takes on heightened significance in light of recent decisions of the British Columbia Court of Appeal. In *Taku River Tlingit First Nation v. Ringstad et al.*³⁷ and *Haida Nation v. B.C. and Weyerhaeuser*,³⁸ the Court of Appeal found that the Crown's fiduciary duty (both federal and

provincial) requires meaningful consultation with Aboriginal Peoples. The Court of Appeal noted that in the absence of a proven Aboriginal or treaty right – even where the judiciary has remained silent on an issue – constitutional rights must be respected.³⁹

Judicial rulings contribute to the interpretation of constitutional law. As guardians of the Constitution, judges are responsible for ensuring that exercises of governmental power comply with constitutional rights. The Crown must demonstrate that it meaningfully consulted with the Aboriginal group that alleges interference with asserted rights. While the government of British Columbia has sought leave to appeal both decisions to the Supreme Court of Canada, at the time of writing this paper, these decisions are binding on lower courts in British Columbia and are persuasive on judges across Canada.⁴⁰

2 Aboriginal Right to Health

The Aboriginal right to health is best understood as one of the several groups of constitutional rights protected by sections 35 and 52 of the *Constitution Act, 1982*.

2.1 Source

The contemporary existence of Aboriginal rights stems from two key understandings. First, prior to contact and at the time of contact, Aboriginal societies were self-sustaining nations with evolved institutions such as law, policing, education, and health. The Supreme Court of Canada has acknowledged that,

... when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.⁴¹

Second, Aboriginal Peoples “have not deferred either our individual or collective right(s) to be sovereign.”⁴² This latter understanding is significant as it illustrates that Aboriginal Peoples have a different understanding of social control from that of non-Aboriginal Canadians who accept that social control is state imposed and, therefore, outside the individual. Implicit in this acceptance is the relinquishment of individual freedoms.⁴³

Aboriginal rights are designed to protect integral aspects of Aboriginal health. Aboriginal rights are based on pre-contact views and practices of Aboriginal knowledge, heritage, law, culture, and traditions of health and healing but also are inherent in the continuity of practices that govern the daily lives of Aboriginal people. (For many Aboriginal communities, for example the *Kanien'kehaka* (Mohawk) community of Kahnawake, these institutions continue to exist in dynamic contemporary forms.)

2.2 Test for Aboriginal Rights

The Supreme Court of Canada in *R. v. Van der Peet* developed a test to identify an existing Aboriginal right within the meaning of section 35 of the *Constitution Act, 1982*.⁴⁴ In order for an activity to be an Aboriginal right, the activity must be:

- an element of a practice, custom, or tradition integral to the distinctive culture of the Aboriginal group asserting that right.⁴⁵ In order for a practice to be integral, it must have

been of “central significance” to the society and must be a “defining characteristic” and “one of the things that made the culture of the society distinctive[.]”⁴⁶

- developed before contact.⁴⁷ Practices that developed “solely as a response to European influences” do not qualify as an Aboriginal right;⁴⁸and
- specific to a definable Aboriginal group and the right in issue must be distinctive in relation to that society.⁴⁹

2.3 Importance of Aboriginal Right to Health Care

Since customs and traditions are reflective of the distinctive cultures of Aboriginal groups, rights affiliated with such customs and traditions will be unique to those specific groups. Certain practices, however, such as healing and medicine, were integral to all Aboriginal Peoples as part of collective societies. Aboriginal Peoples had complex and diverse medical and healing traditions to deal with health problems and the maintenance of good health:

Traditional healing has been defined as ‘practices designed to promote mental, physical and spiritual well-being that are based on beliefs which go back to the time before the spread of western “scientific” biomedicine’. When Aboriginal people in Canada talk about traditional healing, they include a wide range of activities, from physical cures using herbal medicines and other remedies, to the promotion of psychological and spiritual well-being using ceremony, counselling and the accumulated wisdom of the elders.⁵⁰

These traditions not only predated contact, they evolved with the environmental and health changes brought by the Europeans. Aboriginal rights to health arise out of behavioural regularity and practices.

It is critical to recognize the existence of a constitutionally entrenched Aboriginal right to health care for the following reasons:

- Prior to 1982, when the *Constitution Act, 1982* came into force, the federal government’s position concerning the provision of medicine to Indians was that it did so as a matter of policy and not in response to any duty or obligation on the part of government.⁵¹ Research has demonstrated that these policies are, in large part, responsible for the existing health crisis among the Aboriginal Peoples in Canada.⁵²

- In spite of the entrenchment of Aboriginal and treaty rights in Canada's Constitution (through section 35) the federal government has not acknowledged the impact of such entrenchment on Aboriginal and treaty rights to health.
- The fiduciary relationship that characterizes the relationship between Canada and Aboriginal Peoples, including the duty to consult Aboriginal Peoples, could readily be extended to the area of health and health care.
- The existence of a constitutional right to health care could also impact upon how government and third parties conduct research involving Aboriginal Peoples.

In *Sparrow*, the Supreme Court of Canada stated that the interpretation of Aboriginal cultures must be done in a sensitive manner, respecting the way that Aboriginal Peoples view their rights.⁵³ Evidence concerning therapeutic ceremonies and healing practices of Aboriginal Peoples demonstrates that such ceremonies and practices were integral to the existence of Aboriginal society. The integral nature of these ceremonies and practices supports the existence of an Aboriginal right to health. The explorers and traders who witnessed and wrote about these practices acknowledged the importance of the healing practices of Aboriginal people. The testimonies of these explorers and traders support the existence of an Aboriginal right to health. Europeans did not teach Aboriginal people how to heal or practice healing methods. Rather, these methods of healing and practice were already in existence when the Europeans arrived in North America. Many traditional methods, while outlawed by the government, survived oppressive assimilationist laws and policies and remain integral to Aboriginal societies.⁵⁴

The question arises, however, whether the requirement laid out in *Van der Peet* that claims to Aboriginal rights be adjudicated on a specific rather than a general basis is appropriate in relation to Aboriginal Peoples in the context of health and health-related activities. The practice of healing and medicine in accordance with their own customs and traditions, for example, is not unique to a select specific group of Aboriginal Peoples. Rather, it is integral to Aboriginal Peoples in Canada as a collective.⁵⁵ This customary regime established persistent and connected traditions amongst Aboriginal Peoples in Canada. Thus, a general, rather than a specific, type of test articulated by the Supreme Court in *Sparrow* appears more applicable when considering the existence of Aboriginal health and health-related activities.⁵⁶

3 Treaty Right to Health

The Aboriginal nations and tribes that signed the treaties did not relinquish their Aboriginal health regime/system to the British sovereign or to Canada. Rather, they protected these systems. Part of their intent in entering into treaties was to supplement these systems with promises of medical care and medicines that were useful in treating European diseases.

3.1 Treaty Interpretation

The Supreme Court has set out the principles governing how treaty rights are to be interpreted on many occasions. Treaties should be loosely translated and ambiguities or doubtful expressions should be resolved in favour of the Indian signatories.⁵⁷ Treaties made by the British sovereign with the Indian peoples were written in English. The words of the treaty must be understood today as they would have been when the treaties were signed.⁵⁸ A technical or contractual interpretation of treaty wording should be avoided.⁵⁹ The English words contained in the treaties encompass British legal traditions, not Aboriginal legal traditions. The parties' respective historical lineages inform these traditions and are found behind the text, involved in the text and function within the treaty text. The best source of information, from an Aboriginal perspective, is the oral traditions of the Indians who were present at the signing of the treaties or accounts transmitted by Aboriginal law.⁶⁰ In other words, when interpreting the terms of treaties, it is necessary to be sensitive to the unique cultural linguistic differences between the parties⁶¹ and to construe the English words generously. The terms of the treaties, however, cannot be altered by exceeding what is possible on the language or realistic.⁶²

The Supreme Court has repeatedly said that courts should show flexibility when determining the constitutional nature of a document recording a transaction with Indians.⁶³ Any ambiguities about the language in a treaty or the negotiations must be resolved in favour of the Indian signatories.⁶⁴ Further, any treaty limitations that restrict the rights of Indian signatories must be narrowly interpreted.⁶⁵ Where a treaty was concluded orally and then later drafted by the Crown's agents afterwards, it is unconscionable for the Crown to ignore the oral terms agreed to by the parties.⁶⁶ Where this does occur, a court is to supply any deficiencies in the written document.⁶⁷

The analysis of Aboriginal law and traditions aids the courts in their interpretation of the underlying constitutional principles. These principles are the fundamental assumptions upon

which the treaty texts are based, “they inform and sustain the promises of the treaties.”⁶⁸ Henderson, for example, states:

The purpose of the treaties was to secure a positive future for their children [the children of the signatories] and future generations. The treaty negotiators and the beneficiaries at the time of the treaty understood an enriched livelihood as a sufficient, sustainable, supplemental livelihood. The three purposes for entering into treaties or ‘covenant’ with the British sovereign w[ere] to ensure that future generations (1) would continue to govern themselves and their territories according to Aboriginal teachings and law; (2) would make a living (*pimachihowin*), providing for both spiritual and material needs ... [and] (3) would live harmoniously (*witaskewin*) and respectfully with treaty settlers.⁶⁹

When faced with various interpretations of the treaties, the Supreme Court of Canada has directed judges to do the following:

- choose the mutual intent that best reconciles the shared interests of the treaty parties;⁷⁰
- be sensitive to the unique cultural intents and differences between the parties;⁷¹
- interpret the treaties in a way that:
 - does not bring dishonour to the Crown,⁷²
 - assumes the integrity of the Crown and its desire to fulfill its promises,⁷³ and
 - does not validate any hidden intent of the Crown to be deceitful, commit fraud or to use sharp practices;⁷⁴
- recognize that treaty rights are not frozen in time⁷⁵ and must be interpreted in meaningful present-day language that is sensitive to the evolution of change in normal practice that recognizes “continuing obligations”;⁷⁶ and
- use a ‘reasonable person’ standard to determine incidental treaty rights⁷⁷ and a ‘ubiquitous officious bystander’ perspective to understand the intent and context of the treaties.⁷⁸

3.2 Treaty Right to Protection of Aboriginal Health

The treaty negotiations contain multiple references to the protection of, and non-interference with, traditional ways of life. These references arguably encompass and apply to Aboriginal health. From 1837 to 1901, for example, under the Victorian treaties, the Great Mother

(understood to refer to the Queen of England) was obliged to “create an enriched way of life for treaty beneficiaries and their ancestors.”⁷⁹

In 1871, Treaty Commissioner Archibald opened the negotiation of the treaties stating that the Great Mother wished the Indian people to be “happy and content and live in comfort... to make them safer from famine and distress ... to live and prosper.”⁸⁰ In doing so, the Treaty Commissioner established a standard. The Great Mother “has no idea of compelling you to do so,” but left the lifestyle decision to their own choice and free will.⁸¹

Archibald reaffirmed his earlier statements in the context of Treaty 4, the Qu’Appelle Treaty:

The Queen cares for you and for your children, and she cares for the children that are yet to be born ... The Queen has to think of what will come long after to-day. Therefore, the promises we have to make to you are not for to-day only but for to-morrow, not only for you but for your children born and unborn, and the promises we make will be carried out as long as the sun shines above and water flows in the ocean.⁸²

In 1876, the Treaty Commissioner for Treaty 6 “fully explained” to the Cree that they (the treaty makers) “would not interfere with their present mode of living”⁸³ and that what was being offered by the Treaty Commissioner “does not take away your living, you will have it then as you have now, and what I offer you is put on top of it.”⁸⁴ Furthermore, “we have not come here to take away anything that belongs to you.”⁸⁵

Treaty 6 contained a clause pertaining to pestilence or famine:

That in the event hereafter of the Indians comprised within this treaty being overtaken by any pestilence, or by a general famine, the Queen, on being satisfied and certified thereof by her Indian Agent or Agents, will grant to the Indians assistance of such a character and to such extent as her Chief Superintendent of Indian Affairs shall deem necessary and sufficient to relieve the Indians from the calamity that shall have befallen them.⁸⁶

When Treaty Commissioner Morris negotiated Treaty 6, he noted in the official texts that,

[t]he Indians were apprehensive about their future ... Small-pox had destroyed them by hundreds a few years before, and they dreaded pestilence and famine.⁸⁷

The Treaty Commissioner for Treaty 7 told the Blackfoot that the purpose of the treaty was so that the Great Mother “would hold them in the palm of her hand, protect them, and

look after them just like a child, as long as the sun, rivers and mountains last ... [The Queen] will take the best care of you. Whatever you ask for will be given to you.”⁸⁸

The Treaty 8 Indian Elders stressed the importance of maintaining their way of life and livelihood during the negotiations.⁸⁹ The treaty commissioners made it clear to the Aboriginal people that the intent of the treaties was not to interfere with their traditional way of life.⁹⁰ It is therefore clear from these accounts that when the above-noted treaties were signed, Indians were promised that their traditional way of life would not be interfered with and that they would receive benevolence from the Great Mother. This was the spirit and intent of those signing the treaty.

3.3 Treaty Right to Medicines

Treaty 6 contained two clauses that are of importance when discussing a treaty right to health. In addition to the pestilence clause discussed above, Treaty 6 is the only treaty to have specifically included medical care in the written text of the treaty itself. Treaty 6 contained the following clause concerning the provision of a medicine chest:

That a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians at the direction of such agent.⁹¹

The Indians articulated to Morris that they required “provisions for the poor, unfortunate, blind and the lame,” “the exclusion of fire water in the whole Saskatchewan [district], and a free supply of medicines.”⁹² The report filed by Morris is silent concerning a response to the request for medicine.⁹³ However, the records of Dr. A.G. Jackes, acting as the Secretary of the Treaty Commission, recorded the Indians’ request that medicine be provided free of charge. Dr. Jackes also recorded the response from Treaty Commissioner Morris: “[a] medicine chest will be kept at the house of each Indian agent, in case of sickness amongst you.”⁹⁴

While there is no written reference made to health matters outside of Treaty 6, the federal government has acknowledged, “similar verbal undertakings were made by treaty commissioners when negotiating treaties 7, 8, 10, and 11.”⁹⁵ There is evidence that ill health, disease, and the suffering brought to the Indians by the European settlers played a critical role in the decision to enter into treaties.⁹⁶

Although inadequate to control the widespread of disease, medical doctors often accompanied treaty parties after the signing of treaties, dispensing medicine and providing

medical care.⁹⁷ This demonstration of medical care was important to the Aboriginal Peoples since their knowledge system is built on actions rather than words. The treaty commissioners indicated to the Indians that medicine and the provision of medical services would be available at subsequent treaty annuity ceremonies. Physicians attended these ceremonies, examined and treated patients at no cost.

Historian Rene Fumoleau writes that during the Treaty 8 negotiations, the treaty commissioners did promise medicines and medical care. According to Fumoleau, the treaty commissioners “promised that supplies of medicine would be put in charge of persons selected by the governments at different points and would be distributed free to those Indians who might require them.”⁹⁸ Fumoleau also references a 1919 report by Assistant Deputy and Secretary of Indian Affairs, D. McLean, in which Indians were “assured that the government would always be ready to avail itself of any opportunity of affording medical service.”⁹⁹ This continuity of service establishes a link between the provision of medical services and the treaty, thereby supporting a treaty right to medical services, a fiduciary duty to provide medicines, a reasonable and legitimate expectation to receive supplemental medicines¹⁰⁰ and health care, as well as affirming a right to Aboriginal health.

The expectation of medicines and health care was part of the intent of the Indian treaty parties. In 1887, Thomas White, Superintendent of Indian Affairs, described repeated applications for such protection made by the Indians inhabiting the regions north of the boundary of Treaty 6. White linked diseases with famine:

... quite recently the Hudson's Bay company has renewed its solicitations in the same behalf, alleging that serious sickness is now prevalent among the Indians of the Peace River District and there is apprehension of there being an insufficiency of food during the winter ... The diseases they are stated to be suffering from are measles and the croup.¹⁰¹

According to White's report, the Hudson's Bay company took the position that “the expense of providing and caring for the sick and destitute Indians should devolve on the government as their natural protectors.”¹⁰² Fumoleau cites an 1887 *Calgary Tribune* article, “Starving Indians”, where it was suggested that the destitute Indians needed a treaty in order to alleviate suffering.¹⁰³

Treaty 11 documents a similar story to what occurred surrounding the signing of Treaty 6. In the case of Treaty 11, the Dene Indians were suffering from starvation combined with tuberculosis, dysentery, whooping cough, measles, and Spanish influenza. The intent of the Dene in making Treaty 11 was to alleviate their suffering.¹⁰⁴

3.4 Interpretation of the Medicine Chest Clause

Judicial interpretation of the medicine chest clause is dated. The leading decision interpreting the meaning of the medicine chest clause is that of the Exchequer Court (now the Federal Court of Canada) in *Dreaver*.¹⁰⁵ Dreaver was a Chief of the Mistawasis Band in Saskatchewan who had been present at the signing of Treaty 6. He launched a lawsuit against the federal government to recover money he had spent on medical supplies between 1919 and 1935. Dreaver argued that all medicines were guaranteed free to Indians under the medicine chest clause in Treaty 6. He further supplied evidence that medicines had been provided free of charge from the time of the Treaty in 1876 to 1919. Mr. Justice Angers held that the medicine chest clause means that all medicines, drugs, or medical supplies are to be supplied free of charge to treaty Indians.¹⁰⁶ The Supreme Court of Canada has never had occasion to consider the interpretation of the medicine chest clause.

With the creation of multiple provincial jurisdictions responsible for medical care, Aboriginal Peoples resisted paying health care taxes. In 1965, an off-reserve Treaty 6 Indian was charged with failing to pay tax under the *Saskatchewan Hospitalization Act*.¹⁰⁷ The defendant, Mr. Johnston, argued that the provisions of Treaty 6 gave him tax-exempt status. The trial judge followed the *Dreaver* decision and found that the medicine chest clause “should be interpreted to mean that Indians are entitled to receive all medical services, including medicines, drugs, medical supplies and hospital care free of charge.”¹⁰⁸

The Crown appealed the lower court’s decision and, in March 1966, the Saskatchewan Court of Appeal overturned the decision in *Johnston*.¹⁰⁹ The Court of Appeal held that only a ‘first aid kit’ was required to be provided by the Crown.¹¹⁰ It also stated that the provincial government did not have to provide comprehensive and free medical services to Indians¹¹¹ and that the provision of medicine was at the discretion of the Indian agent on the reserve.¹¹² The Appellate Court used a similar literal interpretation in the 1970 *Swimmer* decision.¹¹³

It is unlikely that the appellate court decisions in *Swimmer* and *Johnston* would be upheld today. Both appellate court decisions predate the constitutional entrenchment of existing Aboriginal and treaty rights. Both decisions were also decided prior to Supreme Court decisions setting out the principles of treaty interpretation. Both decisions also predate the coming into force of the *Canadian Charter of Rights and Freedoms*.¹¹⁴ The courts would more likely be persuaded by the recent decision of the Federal Court of Canada in *Wuskwi Sipihk Cree Nation v. Canada (Minister of National Health and Welfare)*.¹¹⁵

... Mr. Justice Angers took a proper approach in his 1935 decision in *Dreaver* ... , reading the Treaty No. 6 medicine chest clause in a contemporary manner to mean a supply of all medicines, drugs and medical supplies. Certainly, it is clear that the Saskatchewan Court of Appeal took what is now a wrong approach in its literal and restrictive reading of the medicine chest clause in the 1966 decision in *Johnston* ... In a current context[,] the clause may well require a full range of contemporary medical services.¹¹⁶

As recently as March 2001, a judge in Saskatchewan referred to the medicine chest clause and observed that appellate courts in Saskatchewan had been critical of lower courts that gave a broad interpretation to the medicine chest clause.¹¹⁷ Mr. Justice Kyle in the *Duke* case observed that following the introduction of the *Canadian Charter of Rights and Freedoms* in 1982, government policy had favoured the “the generous provision of ... medicines, drugs and medical supplies free of charge”.¹¹⁸ The judge’s comments, however, are *obiter* and therefore without binding authority as the interpretation of the medicine chest clause was not a matter directly before the court. These comments, however, would appear to reflect the contemporary philosophy informing the interpretation of the medicine chest clause and the observations in the *Wuskwi Cree Nation* case.¹¹⁹ As a result, the decision of Justice Angers in *Dreaver* appears to be the controlling precedent on the federal obligation to provide treaty Indians with medicines.

In constitutional law, it is widely understood that treaty promises, obligations and rights of the Aboriginal Peoples of Canada remain unfulfilled. The 1996 *Report of the Royal Commission on Aboriginal Peoples* concluded that, because of the false promises made by the colonialists, “[i]t is indisputable ... that existing treaties have been honoured by governments more in the breach than in the observance.”¹²⁰ The report concluded the treaty relationship between the Treaty nations and Canadian government and Canadian peoples are “mired in ignorance, mistrust and prejudice. Indeed, this has been the case for generations.”¹²¹ The dishonoured treaties are part of the negative ghosts of Canadian history.¹²²

Conclusion

The entrenchment of Aboriginal and treaty rights in the Constitution of Canada means that Aboriginal and treaty rights are afforded the highest protection by law in the country. Canada's Constitution cannot be unilaterally amended by the federal government or by provincial or territorial governments. Any ambiguities in constitutional rights and statutory rights must be interpreted in favour of Aboriginal Peoples.

This analysis illustrates that all Aboriginal Peoples have an inherent right to health by virtue of being born Aboriginal in Canada. Further, a treaty right to health is provided for in the written text of Treaty 6 and accrues to those Aboriginal Peoples who were signatories, or are descendants of those who were signatories, to Treaty 6. A similar right accrues to Aboriginal Peoples who were signatories, or are descendants of those who were signatories, to Treaties 7, 8, 10, and 11. Treaty provisions promised that signatories to those treaties and their descendants would receive benevolence from the Great Mother. This was the spirit and intent of the treating parties.

The federal government has not fulfilled its obligations in relation to Aboriginal rights to health or treaty promises relating to health. The piecemeal approach evidenced by *ad hoc* federal law and policy decisions has not extinguished Aboriginal rights. The federal government's failure to review health policy in light of constitutional reform violates the principle of constitutional supremacy.

Although democratic government is generally considerate of those constitutional rights, the Supreme Court of Canada has noted that there have been occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively. In treaty implementation prior to 1982, the courts and governments ignored the Aboriginal and treaty rights protecting and enhancing health care delivery. Ignoring these fundamental rights has created the legacy of shame and contributed, in large part, to the health crisis faced by the Aboriginal Peoples in Canada. Constitutional entrenchment of Aboriginal and treaty rights has ensured that those rights are to be given due regard and protection.

Neither popular sovereign nor governments can override Aboriginal or treaty rights under a constitutional supremacy model.¹²³ The constitutional rules and rights can be amended – but only through a process of constitutional negotiation that ensures there is an opportunity to respect and reconcile the constitutionally-defined rights. Through this process of negotiation,

the principle of democracy may be harmonized with constitutional supremacy.¹²⁴ The Supreme Court explained the proper relationship of constitutional supremacy and the rule of law to political and regulatory decisions:

Constitutionalism facilitates – indeed, makes possible – a democratic political system by creating an orderly framework within which people may make political decisions. Viewed correctly, constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it. Without that relationship, the political will upon which democratic decisions are taken would itself be undermined.¹²⁵

The Supreme Court of Canada also emphasized that another integral principle that protects Aboriginal and treaty rights from ordinary politics is the principle of the protection of minorities:

Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the *Constitution Act, 1982* included in s.35 explicit protection for existing aboriginal and treaty rights, and in s.25, a non-derogation clause in favour of the rights of aboriginal peoples. The ‘promise’ of s.35, as it was termed in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1083, recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.¹²⁶

Notably, the Supreme Court stressed that both the nation-to-nation relationship in section 35 “on its own right” or “as part of the larger concern with minorities” protects Aboriginal and treaty rights. Under the theories of constitutional supremacy, convergence and interpretation, Canada’s highest court has held that no constitutional principle or text can be defined in isolation from the other constitutional principles or text, nor can any one principle or text trump or exclude the operation of any other.¹²⁷

In light of the constitutional reform and judicial interpretations surrounding Aboriginal and treaty rights, lawmakers and policy-makers can be compelled to accept the existence and implementation of Aboriginal and treaty rights to health in Canada.

Notes

Law reporters, law reviews and courts cited in the notes have been identified by the following abbreviations:

Alta. C.A.	Alberta Court of Appeal
Alta. L. Rev.	Alberta Law Review
B.C.C.A.	British Columbia Court of Appeal
B.C.L.R.	British Columbia Law Reports
B.C.S.C.	British Columbia Supreme Court
C.A.	Court of Appeal
C.C.C.	Canadian Criminal Cases
C.N.L.C.	Canadian Native Law Cases
C.N.L.R.	Canadian Native Law Reporter
D.L.R.	Dominion Law Reports
Exch.	Exchequer Court
F.T.R.	Federal Trial Reports
Man. Q.B.	Manitoba Court of Queen's Bench
Murdoch Univ. L. Rev.	Murdoch University Law Review
O.R.	Ontario Reports
Sask. C.A.	Saskatchewan Court of Appeal
Sask. R.	Saskatchewan Reports
S.C.C.	Supreme Court of Canada
S.C.R.	Supreme Court Reports
T.D.	Trial Division
W.W.R.	Western Weekly Reports

- 1 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. The term 'Aboriginal Peoples of Canada' in the Constitution refers to the "Indian, Inuit and Métis peoples of Canada" at s.35(2) of the *Constitution Act, 1982*.
- 2 M. Battiste & J.Y. Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich, 2000) at 212–213.
- 3 *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 41, [1996] 2 C.N.L.R. 77 [*Badger* cited to S.C.R.]. See also James Sákéj Youngblood Henderson, "Interpreting Sui Generis Treaties" (1997) 36 Alta. L. Rev. (No. 1) 46.
- 4 Treaty No. 6 is entitled, "Between Her Majesty the Queen and the Plains and Wood Cree Indians and other tribes of Indians at Fort Carlton, Fort Pitt and Battle River" (Ottawa: Queen's Printer). The treaties are reproduced in R.A. Reiter, *The Law of Canadian Indian Treaties* (Edmonton: Juris Analytica, 1995) at Part III.
- 5 Canada, Report of an Interdepartmental Working Group to the Committee of Deputy Ministers on Justice and Legal Affairs, *Fiduciary Relationship of the Crown with Aboriginal Peoples: Implementation and Management Issues – A Guide for Managers* (Ottawa: n.p., 1995) at 13.
- 6 P.W. Hogg, *Constitutional Law of Canada*, 4th ed. (Scarborough: Carswell, 2002) at 5–22.
- 7 See, for example, J.A. Smylie, "Guide for Health Professionals Working with Aboriginal Peoples: Health Issues Affecting Aboriginal Peoples" (2000) 23 Journal of the Society of Obstetricians and Gynecologists of Canada 54; First Nations and Inuit Regional Health Survey National Steering Committee, *First Nations and Inuit Regional Health Survey, National Report, 1999* (First Nations, Regional Longitudinal Survey Steering Committee, 1999) and H.L. MacMillan, "Aboriginal Health" (1996) 155 (11) Canadian Medical Association Journal 1569.
- 8 O. Mercredi & M.E. Turpel, *In the Rapids: Navigating the Future of First Nations* (Toronto: Penguin, 1993) at 4.

- 9 *Ibid.*
- 10 M. Lux, *Medicine That Walks: Disease, Medicine, and Canadian Plains Native Peoples: 1880-1940* (Toronto: University of Toronto Press, 2001).
- 11 Canada, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services Canada, 1996).
- 12 *Constitution Act, 1982*, *supra* note 1 at s.35. These Aboriginal and treaty rights are “guaranteed equally to male and female persons” in s.35(4).
- 13 R.S.C. 1985, c.C-6.
- 14 *Supra* note 1.
- 15 *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 31, [1996] 4 C.N.L.R. 146 [*Van der Peet* cited to S.C.R.].
- 16 Battiste & Henderson, *supra* note 2 at 205. See also *Van der Peet*, *supra* note 15; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, [1998] 1 C.N.L.R. 14, reversing in part (1993), 10 D.L.R. (4th) 470, [1993] 5 C.N.L.R. 1 (B.C.C.A.), varying in part [1991] 3 W.W.R. 97, [1991] 5 C.N.L.R. 1 (B.C.S.C.).
- 17 Treaty No. 6, *supra* note 4.
- 18 *R. v. Sundown*, [1999] 1 S.C.R. 393 at 24, [1999] 2 C.N.L.R. 289 [*Sundown* cited to S.C.R.]; *Badger*, *supra* note 3 at 778; *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1043, [1990] 3 C.N.L.R. 127 [*Sioui* cited to S.C.R.] and *Simon v. The Queen*, [1985] 2 S.C.R. 387 at 404, [1986] C.N.L.R. 153 [*Simon* cited to S.C.R.]. See also Henderson, *supra* note 3 and L.I. Rotman, “Defining Parameters: Aboriginal Rights, Treaty Rights, and the Sparrow Justificatory Test” (1997) 36 *Alta. L. Rev.* 149.
- 19 *Badger*, *supra* note 3.
- 20 *Ibid.*
- 21 *Constitution Act, 1982*, *supra* note 1.
- 22 Section 35(3) provides that “[f]or greater certainty, in subsection (1) ‘treaty rights’ includes rights that now exist by way of land claims agreements or may be so acquired.” (*Ibid.*)
- 23 *Constitution Act, 1982*, *supra* note 1, s.52.
- 24 Hogg, *supra* note 6.
- 25 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5. The *British North America Act, 1867* (U.K.), 30 & 31 Vict., c.3 (*B.N.A. Act, 1867*) was the original name of the legislation that provided for the formation of the Dominion known as Canada. The distribution of legislative powers between the federal and provincial governments was set out at ss.91 and 92 of the *B.N.A. Act, 1867*. “Indians, and Lands reserved for the Indians” fell within the legislative authority of the Parliament of Canada pursuant to s.91(24) of the Act. The *Constitution Act, 1982* (enacted as Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11), which came into force on April 17, 1982, amended the name of the *British North America Act, 1867* to the *Constitution Act, 1867*. The Parliament of Canada continues to have legislative authority over “Indians, and Lands reserved for the Indians”.
- 26 Battiste & Henderson, *supra* note 2 at 205.
- 27 *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 32 [*Quebec Secession Reference*].
- 28 *Ibid.*
- 29 *Ibid.*
- 30 *Ibid.*
- 31 *Ibid.* at para. 72 [emphasis added].
- 32 *Ibid.* at para. 74.
- 33 P. Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University Toronto Press, 2001) at Chapters 8 and 9, see esp. 246.
- 34 *R. v. Sparrow*, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160 [*Sparrow* cited to S.C.R.].

35 *Nowegijick v. R.*, [1983] 1 S.C.R. 29 at 36, [1983] 2 C.N.L.R. 89 [*Nowegijick*].
36 Battiste & Henderson, *supra* note 2 at 271.
37 (2002), 98 B.C.L.R. (3d) 16, [2002] 2 C.N.L.R. 312 (C.A.).
38 Original reasons at (2002), 99 B.C.L.R. (3d) 209, [2002] 2 C.N.L.R. 121 (C.A.). Additional
reasons at (2002), 5 B.C.L.R. (4th) 33, [2002] 4 C.N.L.R. 117 (C.A.). Collectively both sets of
reasons form consolidated reasons.
39 For further analysis see M. Louise Mandell, “New Land on Consultation – The Impact of the
British Columbia Court of Appeal – Reconsideration of *Haida and the Taku Rivier Tlingit*
Decisions” (Paper presented to the Canadian Aboriginal Law Conference, Vancouver, Pacific
Business and Law Institute, December 2002).
40 In the *Taku River Tlingit First Nation* case, application for leave to appeal to the Supreme Court
of Canada was granted with costs and application for leave to cross-appeal dismissed (without
reasons) November 14, 2002 (*Supreme Court of Canada Bulletin of Proceedings*, 2002, at 1591.)
In the *Haida Nation* case, application for leave to appeal was granted March 20, 2003 (*Supreme*
Court of Canada Bulletin of Proceedings, 2003, at 442).
41 *Van der Peet*, *supra* note 15 at para. 30.
42 P. Monture-Okanee. “Alternative Dispute Resolution: A Bridge to Aboriginal Experience?” in
C. Morris & A. Pirie, eds., *Qualifications For Dispute Resolution: Perspectives on the Debate* (Victoria,
B.C.: UVic Institute for Dispute Resolution, 1994) 131 at 137–138.
43 *Ibid.*
44 *Van der Peet*, *supra* note 15 at para. 45. Before *Van der Peet* the Supreme Court of Canada did not
define the characteristics of Aboriginal rights. See, for example, *Sparrow*, *supra* note 34.
45 *Van der Peet*, *supra* note 15 at para. 55.
46 *Ibid.*
47 *Ibid.* at paras. 60–62. Two dissenting judges disagreed with this requirement as being arbitrary
and offered less stringent time period tests. This test is not effective for Métis rights. Chief
Justice Lamer acknowledged this difficulty and suggested that a different test would have to be
developed for the Metis peoples. (*Ibid.* at para. 67.)
48 *Ibid.* at para 73. The court in *Sparrow* refused to freeze Aboriginal rights to any particular point
in history but adopted a flexible approach that allows for the exercise of the right in a contemporary
manner whereby any development or variation of these rights does not extinguish them or make
them less effective in Canadian law.
49 In *R. v. Pamajewon*, [1996] 2 S.C.R. 821, [1996] 4 C.N.L.R. 164 it was argued that the Aboriginal
right of self-government was within s.35(1) of the *Constitution Act, 1982*. The argument was
unsuccessful as the Supreme Court of Canada found that the Aboriginal right in issue in that
case concerned a gambling regulation and not self-government.
50 Canada, *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength*, vol. 3, *supra*
note 11 at 348. See also J. Waldrum, D.A. Herring, & T.K. Young, *Aboriginal Health in Canada.*
Historical, Cultural and Epidemiological Perspectives (Toronto: University of Toronto Press, 1995)
at 98–113 for descriptions of healing techniques used pre-contact to deal with health problems.
51 This issue will be explored in this Discussion Paper Series, Paper No. 2: “Fiduciary Obligations
and Aboriginal Health” [forthcoming].
52 Lux, *supra* note 10.
53 *Sparrow*, *supra* note 34 at 1119. The Supreme Court of Canada found that Mr. Sparrow had an
Aboriginal right to fish for food in his traditional territory where Mr. Sparrow’s ancestors had
fished from time immemorial.
54 Waldrum, *supra* note 50.
55 It is acknowledged that reference to the Aboriginal Peoples of Canada may not be the preferred or
even the appropriate terminology for some Aboriginal people living on the border of Canada and the
United States. This issue is important to acknowledge and is outside the scope of this paper.

- 56 For a discussion on generic Aboriginal rights, see Brian Slattery, “New Developments on the Enforcement of Treaty Rights” (Paper presented to the Canadian Aboriginal Law Conference, Vancouver, Pacific Business and Law Institute, December 2002).
- 57 See *Simon*, *supra* note 18 at 402; *Sioui*, *supra* note 18 at 1035 and *Badger*, *supra* note 3 at para. 52.
- 58 *Badger*, *supra* note 3 at para. 53ff and *Nowegijick*, *supra* note 35.
- 59 *Badger*, *supra* note 3, *R. v. Horseman*, [1990] 1 S.C.R. 901, [1990] 3 C.N.L.R. 95 [*Horseman* cited to S.C.R.] and *Nowegijick*, *supra* note 35.
- 60 Waldrum, Herring & Young, *supra* note 50 at 142.
- 61 *Van der Peet*, *supra* note 15 at paras. 52–54.
- 62 *Badger*, *supra* note 3 at para. 76, *Sioui*, *supra* note 18 at 1069 and *Horseman*, *supra* note 59 at 908.
- 63 *Simon*, *supra* note 18.
- 64 *Simon*, *ibid.* at 402 and *Badger*, *supra* note 3 at para.52.
- 65 *Badger*, *supra* note 3 at para. 52.
- 66 *R. v. Marshall*, [1999] 3 S.C.R. 456 at para. 12, [1999] 4 C.N.L.R. 161 [*Marshall*].
- 67 *Ibid.* at paras. 43–44.
- 68 J.Y. Henderson, “Treaty Rights to Health” (2002) [unpublished, Native Law Centre, University of Saskatchewan] at 15.
- 69 *Ibid.* See also H. Cardinal & W. Hildebrandt, *Treaty Elders of Saskatchewan* (Calgary: University of Calgary Press, 2001) at 31–38.
- 70 *Van der Peet*, *supra* note 15 at para. 45.
- 71 *Ibid.* at paras. 52–54.
- 72 See, for example, *R. v. White* (1965), 52 D.L.R. (2d) 481 (S.C.C.), affirming (1964), 52 W.W.R. 193 (B.C.C.A.), *per* Norris J.A.; *R. v. Taylor* (1981), 34 O.R. (2d) 360, [1981] 3 C.N.L.R. 114 (C.A.); *R. v. George*, [1966] S.C.R. 267 (Cartwright J., dissenting); *R. v. Wesley*, [1932] 4 D.L.R. 774 at 788 (Alta. C.A.) and *R. v. Cooper*, *R. v. George* (1968), 1 D.L.R. (3d) 113 (B.C.S.C.).
- 73 *Van der Peet*, *supra* note 15 at para 42.
- 74 *Sparrow*, *supra* note 34 at 1107–1108.
- 75 *Ibid.* at 1093.
- 76 See discussion of *Sioui* *supra* note 18 and *Sundown*, *supra* note 18 in *Marshall*, *supra* note 66 at para. 53.
- 77 *Sundown*, *supra* note 18 at para. 41.
- 78 Henderson, *supra* note 68.
- 79 *Ibid.*
- 80 Reported by A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North West Territories, Including the Negotiations on Which They Were Based and Other Information Relating Thereto* (Toronto: Belfords Clarke, 1880) at 28ff.
- 81 *Ibid.*
- 82 *Ibid.* at 92–96. To the extent that health and health care would readily fit within an understanding of ‘caring’, reliance on promises that the Great Mother cared for and would provide for Aboriginal peoples ‘for as long as the sun shines and the water flows’ support a right to health and health care.
- 83 *Ibid.* at 184.
- 84 *Ibid.* at 211.
- 85 *Ibid.* at 212.
- 86 *Ibid.* at 354.
- 87 *Ibid.* at 177–178.
- 88 *Ibid.* at 132.

- 89 Henderson, *supra* note 68.
- 90 *Ibid.*
- 91 Morris, *supra* note 80 at 333.
- 92 *Ibid.* at 185.
- 93 *Ibid.* at 186.
- 94 *Ibid.* at 218.
- 95 Canada, Report of an Interdepartmental Working Group to the Committee of Deputy Ministers on Justice and Legal Affairs, *supra* note 5.
- 96 This statement suggests that other legal components should be examined in relation to the validity of the treaty (e.g., undue influence). However, discussion of such elements is beyond the scope of this paper.
- 97 Waldrum, Herring & Young, *supra* note 50 at 145.
- 98 Morris, *supra* note 80 at 145.
- 99 Waldrum, Herring & Young, *supra* note 50 at 133 and 144.
- 100 Henderson, *supra* note 68.
- 101 R. Fumoleau *As Long as the Land Shall Last* (Toronto: McLelland & Stewart, 1973) at 36.
- 102 *Ibid.*
- 103 *Ibid.* at 37.
- 104 Waldrum, Herring & Young, *supra* note 50 at 145.
- 105 *Dreaver v. The King* (1935), 5 C.N.L.C. 92 (Exch.). Available online at <<http://library.usask.ca/native/cnlc/vol05/092.html>>.
- 106 *Ibid.* at 115.
- 107 No information is reported for the decision of the Magistrate's Court in *Johnston* (i.e., date of decision, citation information or name of the judge). This decision would have occurred sometime after the date of the information laid in relation to the charge against Johnston (22 March 1965) and before the date of the appellate court decision in *Johnston* (17 March 1966). The appellate court decision in *Johnston* is reported at *R. v. Johnston* (1966), 56 D.L.R. (2d) 749 (Sask. C.A.) [*Johnston, C.A.*]. See Susan Haslip, "A Treaty Right to Sport?" (June 2001) 8(2) *Murdoch Univ. L. Rev.* at para. 48–57. Available online at <<http://www.murdoch.edu.au/elaw/issues/v8n2/haslip82.html>>.
- 108 Waldrum, Herring & Young, *supra* note 50 at 147.
- 109 See *Johnston, C.A.*, *supra* note 107.
- 110 *Ibid.* at 754.
- 111 *Ibid.*
- 112 *Ibid.*
- 113 The same judges of the Saskatchewan Court of Appeal that heard the appeal in *Johnston, C.A.* also heard the appeal of the decision in *R. v. Swimmer* (1970), 3 C.C.C. (2d) 92 (Sask. C.A.) and arrived at the same decision concerning the medicine chest clause as they had in *Johnston, C.A.* (See Haslip, *supra* note 107.) Since the Saskatchewan Court of Appeal's comments concerning the interpretation of the medicine chest clause in *Johnston, C.A.* were *obiter*, the decision was not binding on other courts in Saskatchewan. However, the Manitoba Queen's Bench treated the *obiter* statement of the Saskatchewan Court of Appeal in *Johnston, C.A.* as binding. (See *Manitoba Hospital Commission v. Klein and Spence* (1969), 67 W.W.R. 440 at 446–447 (Man. Q.B.) citing *Johnston, C.A.*, *supra* note 107.)
- 114 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.
- 115 (1999), 164 F.T.R. 276, [1999] 4 C.N.L.R. 293.
- 116 *Ibid.* at para. 14.

- 117 *Duke v. Puts* (2001), 204 Sask. R. 130 (Q.B.).
- 118 *Ibid.* at para. 2.
- 119 S. Haslip & V. Edwards, “Does a Contemporary Interpretation of the Medicine Chest Clause in Treaty No. 6 Include a Right to Sport?” [unpublished, on file with the author].
- 120 Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2, *supra* note 11 at 3.
- 121 *Ibid.* at 38.
- 122 Canada, Royal Commission on Aboriginal Peoples, *People to People, Nation to Nation, Highlights from the Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services, 1996) at 5.
- 123 *Quebec Secession Reference*, *supra* note 27 at paras. 74–76.
- 124 *Ibid.* at para. 77.
- 125 *Ibid.* at para. 78.
- 126 *Ibid.* at para. 82.
- 127 *Ibid.* at paras. 49–50.

Bibliography

Texts and Articles

- Battiste, M. & Henderson, J.Y. 2000. *Protecting Indigenous Knowledge and Heritage: A Global Challenge*. Saskatoon: Purich.
- Canada. Royal Commission on Aboriginal Peoples. 1996. *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength*, Vol. 3. Ottawa: Supply and Services Canada.
- Cardinal, H. & Hildebrandt, J. 2001. *Treaty Elders of Saskatchewan*. Calgary: University of Calgary Press.
- Fumoleau, R. 1973. *As Long as the Land Shall Last*. Toronto: McLelland & Stewart.
- Haslip, Susan. "A Treaty Right to Sport?" (June 2001) 8(2) Murdoch Univ. L. Rev. <<http://www.murdoch.edu.au/elaw/issues/v8n2/haslip82.html>>.
- Haslip, S. & Edwards, V. 2002. "Does a Contemporary Interpretation of the Medicine Chest Clause in Treaty No. 6 Include a Right to Sport?" [unpublished].
- Henderson, James [Sákéj] Youngblood. 1997. "Interpreting Sui Generis Treaties" 36 Alta. L. Rev. (No. 1) 46.
- Henderson, J.Y. 2002. "Treaty Rights to Health." Native Law Centre, University of Saskatchewan [unpublished].
- Hogg, P.W. 2002. *Constitutional Law of Canada*, 4th ed. Scarborough: Carswell.
- Lux, M. 2001. *Medicine That Walks: Disease, Medicine, and Canadian Plains Native Peoples: 1880-1940*. Toronto, University of Toronto Press.
- Macklem, P. 2001. *Indigenous Difference and the Constitution of Canada*. Toronto: University Toronto Press.
- Mandell, M. Louise. 2002. "New Land on Consultation – The Impact of the British Columbia Court of Appeal – Reconsideration of Haida and the Taku River Tlingit Decisions". Paper presented to the Canadian Aboriginal Law Conference. Vancouver: Pacific Business and Law Institute.
- Mercredi, O. and Turpel, M.E. 1993. *In The Rapids: Navigating the Future of First Nations*. Toronto: Penguin.
- Monture-Okanee, P. 1994. "Alternative Dispute Resolution: A Bridge to Aboriginal Experience?" 131. In C. Morris & A. Pirie, eds. *Qualifications For Dispute Resolution: Perspectives on the Debate*. Victoria, B.C.: U.Vic Institute for Dispute Resolution.
- Morris, A. 1880. *The Treaties of Canada with the Indians of Manitoba and the North West Territories, Including the Negotiations on Which They Were Based and Other Information Relating Thereto*. Toronto: Belfords, Clarke.
- Reiter, R.A. 1995. *The Law of Canadian Indian Treaties*. Edmonton: Juris Analytica.
- Report of an Interdepartmental Working Group to the Committee of Deputy Ministers on Justice and Legal Affairs. 1995. *Fiduciary Relationship of the Crown with Aboriginal Peoples: Implementation and Management Issues – A Guide for Managers*. Ottawa: n.p.
- Slattery, B. 2002. "New Developments of the Enforcement of Treaty Rights". Paper presented to the Canadian Aboriginal Law Conference. Vancouver: Pacific Business and Law Institute.
- Waldrum, J., Herring, D.A. & Young, T.K. 1995. *Aboriginal Health in Canada. Historical, Cultural and Epidemiological Perspectives*. Toronto: University of Toronto Press.
- Woodward, J. 2002. *Native Law*. Toronto: Carswell.
- Young, Loree. 2002. "Accommodation of Interests: A Court-Supervised Consultation Process or a Renewed Treaty Process?" Paper presented to the Canadian Aboriginal Law Conference. Vancouver: Pacific Business and Law Institute.

Treaties

- Treaty No. 6. "Between Her Majesty the Queen and the Plains and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River" (Ottawa: Queen's Printer).
- Treaty No. 7. "Between Her Majesty the Queen and the Blackfeet and other Indian Tribes, at the Blackfoot Crossing of Bow River and Fort MacLeod" (Ottawa: Queen's Printer).
- Treaty No. 8. (Ottawa: Queen's Printer).
- Treaty No. 10. (Ottawa: Queen's Printer).
- Treaty No. 11. (Ottawa: Queen's Printer).

Legislation

- Canada Health Act*, R.S.C. 1985, c.C-6.
- Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.
- Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

Case Law

- Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, [1998] 1 C.N.L.R. 14 (S.C.C.), reversing in part (1993) 10 D.L.R. (4th) 470, [1993] 5 C.N.L.R. 1 (B.C.C.A.), varying in part [1991] 3 W.W.R. 97, [1991] 5 C.N.L.R. 1 (B.C.S.C.).
- Dreaver v. The King* (1935), 5 C.N.L.C. 92 (Exch.). Available online at <<http://library.usask.ca/native/cnlc/vol05/092.html>>.
- Duke v. Puts* (2001), 204 Sask. R. 130 (Sask. Q.B.).
- Haida Nation v. B.C. and Weyerhaeuser* (2002), 99 B.C.L.R. (3d) 209, [2002] 2 C.N.L.R. 121 (C.A.); additional reasons, (2002), 5 B.C.L.R. (4th) 33, [2002] 4 C.N.L.R. 117 (C.A.).
- Manitoba Hospital Commission v. Klein and Spence* (1969), 67 W.W.R. 440 (Man. Q.B.).
- Nowegijick v. R.*, [1983] 1 S.C.R. 29, [1983] 2 C.N.L.R. 89.
- R. v. Badger*, [1996] 1 S.C.R. 771, [1996] 2 C.N.L.R. 77.
- R. v. Cooper*, *R. v. George* (1968), 1 D.L.R. (3d) 113 (B.C.S.C.).
- R. v. George*, [1966] S.C.R. 267.
- R. v. Horseman*, [1990] 1 S.C.R. 901, [1990] 3 C.N.L.R. 95.
- R. v. Johnston* (1966), 56 D.L.R. (2d) 749 (Sask. C.A.).
- R. v. Marshall*, [1999] 3 S.C.R. 456, [1999] 4 C.N.L.R. 161.
- R. v. Pamajewon*, [1996] 2 S.C.R. 821, [1996] 4 C.N.L.R. 164.
- R. v. Sioui*, [1990] 1 S.C.R. 1025, [1990] 3 C.N.L.R. 127.
- R. v. Sparrow*, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160.
- R. v. Sundown*, [1999] 1 S.C.R. 393, [1999] 2 C.N.L.R. 289.
- R. v. Swimmer* (1970), [1971] 1 W.W.R. 756 (Sask. C.A.).
- R. v. Taylor* (1981), 34 O.R. (2d) 360, [1981] 3 C.N.L.R. 114 (C.A.).
- R. v. Van der Peet*, [1996] 2 S.C.R. 507, [1996] 4 C.N.L.R. 146.
- R. v. Wesley*, [1932] 4 D.L.R. 774 (Alta. C.A.).
- R. v. White* (1965), 52 D.L.R. (2d) 481 (S.C.C.), affirming (1964), 52 W.W.R. 193 (B.C.C.A.).
- Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217.
- Simon v. The Queen*, [1985] 2 S.C.R. 387, [1986] 1 C.N.L.R. 153.
- Taku River Tlingit First Nation v. Ringstad et al.* (2002), 98 B.C.L.R. (3d) 16, [2002] 2 C.N.L.R. 312 (C.A.).
- Wuskwi Sipihk Cree Nation v. Canada (Minister of National Health and Welfare)* (1999), 164 F.T.R. 276, [1999] 4 C.N.L.R. 293.