January 31, 2022

**Re: Submission to EMRIP study on Treaties, agreements and other constructive arrangements, between indigenous peoples and States, including peace accords and reconciliation initiatives, and their constitutional recognition**

1. **Background on the Treaty Relations Commission of Manitoba**

The Treaty Relations Commission of Manitoba (TRCM) is a neutral body, created through a partnership between the Assembly of Manitoba Chiefs (AMC) and Canada with a mandate to strengthen, rebuild and enhance the Treaty relationship and mutual respect between First Nations and Manitobans as envisaged by the Treaty Parties.[[1]](#endnote-1) The TRCM is led by the Treaty Commissioner, currently Loretta Ross from Hollow Water First Nation in Manitoba, Canada. The TRCM also has a Council of Elders, with representatives from each of the Treaties and linguistic groups within Manitoba. The Council of Elders are a key component of our work. They provide input, support and guidance to the research initiatives, as well as advise on curriculum development and leadership forums, and contribute to public education events.

The TRCM undertakes three main activities: (1) enhancing and maintaining positive intergovernmental relations and cooperation, (2) conducting independent research that advances discussion on Treaty related issues, and (3) facilitating public understanding of the importance and role of Treaty making in building a stronger and healthier nation.

Key successes of the TRCM include the development and implementation of kindergarten through grade 12 Treaty education teacher resources and a full Treaty Education Kit to complement and enhance Manitoba curricula outcomes for all students across the province. The learning outcome of this education strategy is that all Manitoba students should be expected to demonstrate knowledge of key topics, concepts and understandings of the Treaties and Treaty relationship by the end of grade 12. Since 2010, teacher resources have been developed, piloted and implemented into provincial and First Nations local controlled schools and privately funded schools. We also have a robust Speakers Bureau that provides various presentations on Treaties and the Treaty relationship, including the written and oral interpretations of the Treaty relationship, as well as sharing expertise on Treaties including the topics of education, law, health and Elder’s expertise on the Treaty relationship. Presentations are provided to both public sector and private sector organizations.

One of the highlights of our research efforts is a four volume Treaty Elders teachings series. This series is the result of meetings with 61 of the 64 Manitoba First Nations and fourteen focus groups, seven community forums and sixty follow-up Elder interviews that included 228 Elders from the seven Treaty areas and five Manitoba linguistic groups including the Dakota Nation. This series covers who we are as Treaty people, our relations with the land, our relations with the newcomers, and the idea that we are all Treaty people. In 2022, the TRCM will publish *Miinigoowisiwin: Our Spiritual and Natural Teachings.* Authored by Dr. Elder Harry Bone and former Treaty Commissioner Elder Dennis White Bird, *Miinigoowisiwin* provides foundational Anishinaabe teachings that are at the heart of the Treaties. The teachings in this publication focus on Anishinaabe sources and help us understand the wisdom and values of Anishinaabe people.

The TRCM, AMC and the Government of Canada are guided by the following principles, many of which are reflected in article 37 of the UN *Declaration on the Rights of Indigenous Peoples*:

* Treaties are a fundamental part of the relationships between First Nations Treaty signatories and the Crown;
* The involvement of First Nation Elders is a fundamental part of maintaining the honour of the Crown in its relations with First Nations;
* Recognition that the Treaty relationship is dynamic and will evolve over time;
* The Treaty Relations Commission of Manitoba shall be based on mutual respect, operating at arm’s length from the Parties as a neutral body;
* Respect for Treaty and inherent Aboriginal rights is an important part of maintaining the honour of the Crown in its relations with First Nations; and
* Recognition that in order to advance the Treaty relationship it will be necessary for the Parties to share information and fully participate in the process.

1. **Brief Background on the Numbered Treaties 1-11**

The TRCM focuses its work on the historic “Numbered Treaties” that exist within Manitoba. There are eleven numbered Treaties, which were “made during a 50-year period from Treaty No. 1 in 1871 to Treaty No. 11 in 1921. The territory covers all of the provinces of Manitoba, Saskatchewan, Alberta, and parts of Ontario, British Columbia and Northwest Territories.”[[2]](#endnote-2) These Treaties were made between the Crown and various First Nations.

The Crown entered into these Treaties believing that First Nations would agree to surrender their land and maintain peace in exchange for “a small cash annuity, reserves of land, schools, agricultural assistance, and hunting and fishing supplies.”[[3]](#endnote-3) Many Canadian governments (including provincial governments) continue to interpret Treaties based on the written text, which states that the Indigenous peoples “do hereby cede, surrender, and release up to the Government of the Dominion of Canada for Her Majesty the Queen and her successors forever, all their rights, titles and privileges whatsoever, to the lands included in the following limits.”[[4]](#endnote-4)

From the Anishinaabe perspective, under the terms of Treaty 1, they agreed to share the land, and at no point during the negotiations did the parties discuss the concepts of land surrender or sale.[[5]](#endnote-5) Rather, the “assurances of continued land use without interference constitute a recognition of Anishinaabe jurisdiction over and primary right of use of the resources and land.”[[6]](#endnote-6) Speaking to Treaty 5, Nehetho Elder D’Arcy Linklater explains that “They promised to look after us in exchange for the use of our land, sharing our land.”[[7]](#endnote-7) According to Anishinaabe Elder Bone, during Treaty-making, government officials said that the Treaties were on top of what the Anishinaabe already had. Consequently, Anishinaabe did not give up their languages, way of life, and belief systems, and they would continue to live as they had before from the land.[[8]](#endnote-8)

While each Treaty was negotiated separately, Indigenous peoples were aware of the promises made in previous Treaty negotiations. Generally, the promises of previous Treaty negotiations were included in subsequent negotiations leading to many similar provisions across all Treaties 1-11. The written text of Treaties 1-11 are fairly formulaic, most containing similar promises, and did not include the promises made by the Crown during the negotiations. Sharon Venne’s account of the fourteen promises contained within Treaty six exemplifies the promises within Treaties 1-11: health care; education; water; fishing, hunting, and trapping; police; reserves; mountains; birds; social assistance; minerals; Indian Agents; farm instructors; treaty money; and citizenship. The Treaties contained provisions for individual annuities to be paid. The Treaties generally contained formulas for the creation of reserves, generally 160 acres per person, though there are many examples where communities did not receive the lands they were promised. Sharon Venne argues that “at the Treaty signing, the Chiefs understood they could reserve as much land as they wanted.”[[9]](#endnote-9) Many of the promises within the Numbered Treaties 1-11 are included within various provisions of the UN *Declaration on the Rights of Indigenous Peoples*.

1. **Challenges to Implementation**

One of the challenges to full implementation of the Numbered Treaties 1-11 is the ongoing disagreement between the parties on the nature and extent of the promises made in the Treaties. For example, there continues to be a certain degree of disagreement between Treaty parties whether First Nations placed themselves under jurisdiction and authority of the Crown when signing Treaties. The Royal Commission on Aboriginal Peoples (RCAP) points out that “the Crown has traditionally contended that treaty nations, by the act of treaty making, implicitly or explicitly accepted the extinguishment of residual Aboriginal rights and acknowledged the sovereignty and ultimate authority of the Crown, in exchange for the specific rights and benefits recorded in the treaty documents.”[[10]](#endnote-10)

From First Nations’ perspective, these Treaties are “living agreements rather than as mere documents. The agreements created a permanent living relationship beyond the particular promises. This relationship was typically expressed in terms of kinship.”[[11]](#endnote-11) This relationship was sacred and required the parties to continue to meet “to renew the friendship, reconcile misunderstandings and share their wealth.”[[12]](#endnote-12) This means that the Treaties and the promises made are living agreements and the understandings of the promises must continue to evolve with changing circumstances.

There is also disagreement on whether Indigenous peoples ceded rights to their lands when signing the Numbered Treaties 1-11. Canadian governments (including provincial governments) continue to take the position that these Treaties are “land surrender agreements in which the Indians gave up their claims to occupancy and use in return for gifts and annual payments.”[[13]](#endnote-13) Indigenous peoples understand these Treaties constituted international Treaties: “pacts of friendship, peace, and mutual support; they did not constitute the abandonment of their rights and interests.”[[14]](#endnote-14)

To understand the promises within the Numbered Treaties 1-11, it is important to understand the pipe ceremonies and the Spirit and Intent of Treaties. Treaties are spiritual covenants beyond the written version. The negotiation and conclusion of these Treaties included smoking a ceremonial pipe: “Smoking the pipe would signify to the Creator the intention of the parties to keep the terms of the agreement in a strong binding manner. The Indigenous peoples wanted this treaty to last as long as the earth would exist; this is the reason they smoked the pipe with the Commissioner.”[[15]](#endnote-15) Anishinaabe Elder Harry Bone explains how the pipe ceremonies are the source of Anishinaabe laws and a recognition of their nationhood.

As Anishinaabe Elder Harry Bone explains “The spirit and intent of our Treaties was universal. We signed Treaties for the same purpose and it is to live forever for who we are, the survival and well being of our people, in whatever way we mean.”[[16]](#endnote-16) Unfortunately, these aspects of the Treaty process are not recorded in the written historic accounts or text of the Treaties. The Royal Commission on Aboriginal Peoples (RCAP) which concluded in 1996 notes that “the original meaning – or as it is often described, the spirit and intent – of treaties has become obscure.”[[17]](#endnote-17) Implementing Treaties in accordance with the Spirit and Intent of Treaties was recognized in the *American Declaration on the Rights of Indigenous Peoples*.[[18]](#endnote-18)

A second challenge is the lack of competent bodies to resolve these disputes on the scope of the Treaties. The most frequently used avenue to resolve disputes is through the Canadian legal system, where far too few judges have any in-depth experience with Indigenous laws, history and working with Elders. It is also unfortunate that an early decision of the Supreme Court of Canada determined that “An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law.”[[19]](#endnote-19)

The Supreme Court of Canada has developed a series of rules of Treaty interpretation.[[20]](#endnote-20) The Supreme Court has clearly stated that “where a treaty was concluded verbally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written terms.”[[21]](#endnote-21) The Court is particularly concerned with balancing Indigenous and Crown perspectives on the terms of the treaties, but the court warns that liberal interpretations and inclusion of Indigenous peoples’ perspectives should not “be confused with a vague sense of after-the-fact largesse.”[[22]](#endnote-22) Unfortunately, these rules do not usually result in interpretations of Treaties that reflect Indigenous peoples’ understanding of the Spirt and Intent of Treaties. Professor Leonard Rotman notes that “in a number of situations courts have explicitly affirmed the use of these [interpretation] principles, yet subsequently abandoned or ignored them altogether in their judgments.”[[23]](#endnote-23)

There are additional challenges to using the Canadian court systems to address Treaty disputes, which include the length of time to resolve a dispute, the adversarial nature of the Court proceedings, the high cost of litigation, and the challenge of bringing Elder expert testimony on the oral history of Treaties.

1. **Engaging the Facilitation Role of Commission in Resolving Disputes**

Treaty commissions such as the TRCM can play a crucial role in resolving disputes given the challenges that exist with turning to the Canadian court systems. As noted above, the TRCM mandate includes facilitation to enhance and maintain positive intergovernmental relations and cooperation between the Government of Canada and Indigenous peoples. Unfortunately, this is the area of the mandate that has yet to be fully operationalized and utilized by the Treaty partners.

In contrast to the adversarial nature of the Canadian court systems, facilitation by the TRCM can provide a space to bring the parties together to work toward resolving the dispute through identifying joint solutions. Canadian court systems do not possess the proper expertise and understanding of the Treaties. The TRCM however brings the level of expertise and depth of experience and knowledge to the table when working toward solutions. The TRCM offers the resolution of disputes in a non-adversarial and non-confrontational method, therefore including the approach of the First Nation people. This approach of resolving Treaty disputes through resolution mechanisms that align with Indigenous peoples’ own approaches to dispute resolution is supported by the UN *Declaration* articles 5 and 40 and article XXIV(2) of the *American Declaration on the Rights of Indigenous Peoples* that disputes be submitted to competent bodies.

In order for the TRCM and other Treaty commissions to be fully engaged in facilitating resolutions to disputes, all parties must accept the legitimacy of these commissions to resolve and support the resolution of disputes. The proper resourcing and recognition of the Treaty Commissions is a vital part of moving forward in a way that recognizes the rights of Indigenous peoples and strengthens the partnership between Indigenous peoples and States.

1. **Recommendations**

In achieving the ends of the UN *Declaration*, especially article 37, we make the following recommendations:

* **Article 37 should be interpreted in line with regional developments such as the *American Declaration on the Rights of Indigenous Peoples*, including the recognition, observance, and enforcement of Treaties “in accordance with their true spirit and intent in good faith and to have States honor and respect same. States shall give due consideration to the understanding of the indigenous peoples as regards to treaties, agreements and other constructive arrangements” in article XXIV.**
* **States should ensure that domestic laws, including jurisprudence on Treaties is consistent with the UN *Declaration*.**
* **States should work with Indigenous peoples to co-create mechanisms such as Treaty commissions that particularly include robust facilitation roles to assist in implementation of the full Spirit and Intent of Treaties, with Commissioners who are jointly appointed.**
* **All parties should fully engage non adversarial mechanisms such as Treaty commissions to resolve conflicts and promote the implementation of Treaties in accordance with the Spirit and Intent.**
* **The UN Expert Mechanism should support the implementation of the Spirit and Intent of Treaties, including resolving conflicts, by facilitating dialogue between the Parties.**
* **Conflict resolution mechanisms should engage Indigenous ways of conflict resolution and Indigenous laws.**
* **States and international bodies should support and work with Indigenous peoples to undertake broad public education on the Spirit and Intent of Treaties, including that Treaties are the basis for strengthened partnership between Indigenous peoples and States.**
* **Where treaties exist between Indigenous peoples and States, the interpretation and implementation of the UN *Declaration* should promote the Spirit and Intent of Treaties.**
* **The Expert Mechanism on the Rights of Indigenous Peoples should encourage all parties to interpret Treaties in light of contemporary contexts, including the rights within the UN *Declaration*.**

1. **References**

1. www.trcm.ca [↑](#endnote-ref-1)
2. Michael Asch,*On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014) at 75. [↑](#endnote-ref-2)
3. John Leonard Taylor, “Canada’s Northwest Indian Policy in the 1870s: Traditional Premises and Necessary Innovations” in Richard T Price, ed, *The Spirit of the Alberta Indian Treaties* (Edmonton: The University of Alberta Press, 1999) 1 at 3. [↑](#endnote-ref-3)
4. John Leonard Taylor, “Two Views on the Meaning of Treaties Six and Seven” in Richard T Price, ed, *The Spirit of the Alberta Indian Treaties* (Edmonton: The University of Alberta Press, 1999) 9 at 39. [↑](#endnote-ref-4)
5. Aimee Craft, *Breathing Life into the Stone Fort Treaty: An Anishinabe Understanding of Treaty One,* (Saskatoon: Purich Publishing, 2013) at 109. [↑](#endnote-ref-5)
6. Aimee Craft, *Breathing Life into the Stone Fort Treaty: An Anishinabe Understanding of Treaty One,* (Saskatoon: Purich Publishing, 2013) at 109. [↑](#endnote-ref-6)
7. Treaty Relations Commission of Manitoba, *Treaty Elders Teachings*, Nehetho Elder D’arcy Linklater, Volume 3 at 89. [↑](#endnote-ref-7)
8. Interview on radio program, *Let’s Talk Treaty!* Episode 2, “The Spirit and Intent of the Treaties” aired Oct 18, 2017. www.trcm.ca [↑](#endnote-ref-8)
9. Sharon Venne, “Understanding Treaty 6: An Indigenous Perspective” in M. Asch, (ed), *Aboriginal and treaty rights in Canada: essays on law, equity, and respect for difference* (Vancouver: UBC Press, 1997) 173 at 197. [↑](#endnote-ref-9)
10. Royal Commission on Aboriginal Peoples, “Treaties” in *Report of the Royal Commission on* *Aboriginal Peoples*, *Volume 2:* *Restructuring the Relationship* (Ottawa: Canada Communication Group, 1996) 9 at 11 online: <http://data2.archives.ca/e/e448/e011188230-02.pdf>. [↑](#endnote-ref-10)
11. James Youngblood Henderson, “Empowering Treaty Federalism” (1994) 58:2 Saskatchewan Law Review 241 at 248. [↑](#endnote-ref-11)
12. James Youngblood Henderson, “Empowering Treaty Federalism” (1994) 58:2 Saskatchewan Law Review 241 at 248-49. [↑](#endnote-ref-12)
13. JR Miller, *Lethal Legacy: Current Native Controversies in Canada* (Toronto: McClelland & Stewart, 2004) at 164-65. [↑](#endnote-ref-13)
14. JR Miller, *Lethal Legacy: Current Native Controversies in Canada* (Toronto: McClelland & Stewart, 2004) at 165. [↑](#endnote-ref-14)
15. Sharon Venne, “Understanding Treaty 6: An Indigenous Perspective” in M. Asch, (ed), *Aboriginal and treaty rights in Canada: essays on law, equity, and respect for difference* (Vancouver: UBC Press, 1997) 173 at 186. [↑](#endnote-ref-15)
16. Treaty Relations Commission of Manitoba, *Treaty Elders Teachings*, Anishinabe Elder Harry Bone, Volume 3 at 93. [↑](#endnote-ref-16)
17. Royal Commission on Aboriginal Peoples, “Treaties” in *Report of the Royal Commission on* *Aboriginal Peoples*, *Volume 2:* *Restructuring the Relationship* (Ottawa: Canada Communication Group, 1996) 9 at 11 online: <http://data2.archives.ca/e/e448/e011188230-02.pdf>. [↑](#endnote-ref-17)
18. American Declaration on the Rights of Indigenous Peoples article XXIV [↑](#endnote-ref-18)
19. *R v Simon*, [1985] 2 SCR 387 at para 33. In support of this proposition, the Court cited earlier decisions including *Francis v. The Queen*, [1956] SCR 618 where the court was asked to determine whether the *Indian Act* provisions related to treaties extended to the Jay Treaty. [↑](#endnote-ref-19)
20. R v Marshall, [1999] 3 SCR 456 at para 78, citing*R v Sundown*, [1999] 1 S.C.R 393 at paras 24, 32; *R v Badger*, [1996] 1 S.C.R. 771 at paras 41, 52, 53, 76, 78; *R v Sioui*, [1990] 1 S.C.R. 1025 at 1068-69, 1035, 1043; *Simon v. The Queen*, [1985] 2 S.C.R. 387 at 402, 404; *R v Horseman*, [1990] 1 S.C.R. 901 at 907-08; *Nowegijick v The Queen*, [1983] 1 S.C.R. 29 at 36*.* [↑](#endnote-ref-20)
21. *R v Marshall,* [1999] 3 SCR 456 at para 12. [↑](#endnote-ref-21)
22. *R v Marshall,* [1999] 3 SCR 456 at para 14. [↑](#endnote-ref-22)
23. Leonard Rotman, “Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence” (1997) 46 U.N.B.L.J. 11 at 11. [↑](#endnote-ref-23)