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TREATY 9 ORAL PROMISES

Summary:

When Treaty 9 was first explained and presented for signature to First Nations in 1905 and 1906, the Treaty commissioners made numerous oral promises and assurances to the First Nations representatives to secure their agreement to the Treaty. These oral promises were contemporaneously recorded in the reports, diaries and other writings of these same government representatives. The Treaty 9 commissioners repeatedly promised the First Nations representatives that after signing the Treaty, they could continue to hunt and fish anywhere they pleased, that their traditional means of livelihood would continue after the Treaty as before, and that this livelihood would not be interfered with in any way.

In Canadian law, oral promises made at the time of Treaty signing are legally binding on the government. In most court cases that have dealt with oral Treaty promises, the promises made by the government representatives were of a much more qualified or limited nature. The oral promises made by the Treaty 9 commissioners, however, were expansive and made in very strong and unqualified terms. These specific oral promises have not yet been considered by the courts, but under current law and precedent they are legally binding.

Given the strength of the Treaty 9 oral promises, and the considerable amount of supporting documentary evidence, these promises are likely to dramatically expand the legally recognized scope and strength of First Nations' hunting and harvesting rights under the Treaty compared to what has been recognized in the past. These promises are likely to have very major effects on how development decisions will be made in this region in the years to come, if these legal promises are respected.

PART I: Oral Treaty Promises are Legally Binding as Terms of the Treaty

The Supreme Court of Canada recognizes that oral promises made by government representatives at the time a Treaty was made are legally binding, even where these promises are not recorded in the signed Treaty document. The Supreme Court has ruled that such promises form part of the Treaty itself. In situations where an agreement was concluded orally, and later reduced to writing, the Court has ruled that the Treaty consists of the oral agreement reached with the First Nations; the written document is evidence of this agreement, but is often an incomplete record of the full Treaty. Other documents, such as reports or meeting minutes, may provide additional evidence to shed light on the actual agreement. Additionally, the Supreme Court has stated that it would be "unconscionable" for the government to be allowed to ignore oral promises made by its representatives where the First Nations representatives had relied on these promises when they chose to sign the Treaty.

Oral promises are a part of the Treaty

In the case of *R. v. Marshall*, the Supreme Court of Canada acquitted Donald Marshal, Jr. of various fishing-related offences on the basis of a 1760 Treaty between Mi'kmaq communities and the British.[1] The acquittal was based on a Treaty right arising from the "oral terms" of the Treaty, which were "reflected in documents made by the British at the time of the negotiations but recorded incompletely in the … written treaty."[2]

The Court, in *Marshall*, ruled that the trial judge had made an error of law when he concluded "that the treaty obligations are all found within the four corners of the [written 1760 Treaty]."[3] The Court stated that this "narrow view of what constituted 'the treaty'", was inconsistent with a "proper recognition of the difficulties of proof confronted by aboriginal people."[4] The Court noted that such a narrow view was particularly inadequate where "the British-drafted treaty document does not accord with the British-drafted minutes of the negotiating sessions and more favourable terms are evident from the other documents and evidence."[5]

In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, the Supreme Court affirmed that oral promises can give rise to Treaty rights, and that a failure of the government to uphold such a promise could form the basis of a lawsuit for Treaty infringement.[6]

In the recent case of *Ermineskin Indian Band and Nation v. Canada*, the Supreme Court applied the principle that oral representations made by government agents during Treaty negotiations constitute "oral terms" of the Treaty, and are legally binding on the Crown.[7] The Court identified an oral representation by Alexander Morris, the then Lieutenant-Governor of Manitoba and the North-West Territories, and applied the principles of Treaty interpretation to conclude that the representation amounted to a Crown guarantee that proceeds from the sale of reserve land would be securely preserved for the Band and would increase in value.

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[1] [1999] 3 S.C.R. 456 ["*Marshall #1*"].
[2] *R. v. Marshall*, [1999] 3 S.C.R. 533 at para. 4 ["*Marshall #2*"].
[3] *Marshall #1* at para. 19.
[4] *Ibid.* at para. 20.
[5] *Ibid.*
[6] [2005] 3 S.C.R. 388 at para. 48 ("If the time comes that in the case of a particular Treaty 8 First Nation 'no meaningful right to hunt' remains of *its* traditional territories, the significance of the oral promise that 'the same means of earning a livelihood would continue after the treaty as existed before it' would clearly be called into question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response.")
[7] [2009] 1 S.C.R. 222 at paras. 53-56 [*Ermineskin*].

Treaties are sometimes oral agreements reduced to writing

In several cases, the Supreme Court has emphasized the predominately oral nature of many Treaty agreements, and indicated that the written Treaty documents often provide an incomplete record of the original oral agreements. In *R. v. Badger*, the Court stated that the Treaties, "as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement."[8] Similarly, in the context of the Douglas Treaties in British Columbia, the Supreme Court commented in *R. v. Morris* that where a Treaty is agreed to orally and later put into writing, the "oral promises made when the treaty was agreed to are as much a part of the treaty as the written words."[9] The Court affirmed this principle in *R. v. Marshall*, and cited the analysis of Treaty No. 20 (the Rice Lake Purchase) in *R. v. Taylor and Williams* for an example of another Treaty "only partly reduced to writing."[10]

Unlike Treaty 8 and the Douglas Treaties which are addressed in these two cases, Treaty 9 was not "reduced to writing" after the fact. A written form of the proposed Treaty was prepared in advance, its language negotiated between the Province of Ontario and the Dominion government, and physically presented to the First Nation members without opportunity for amendments. Thus, strictly speaking, the "reduced to writing" line of cases would not be directly applicable to Treaty 9. However, the reasoning behind this line of cases can and should be extended to address a situation where the facts show that the Treaty was conducted orally – where it is clear that the First Nations signatories accepted the Treaty *as spoken*, rather than as it was written.[11]

Where the actual Treaty agreement is reached on an oral basis – that is, where the First Nations signatories do not read English and no full translation is provided to them – it should make little difference whether the Treaty document is "reduced to writing" *after* the fact, or is prepared in advance and presented, without translation, for signature. In the latter situation, the Treaty agreement is not embodied in the written document itself, but rather in the oral explanation of the document and any other oral representation made by the Treaty commissioners at the time the Treaty document was signed, when it is the oral agreement that has been accepted and agreed to by First Nations representatives.

This analysis is consistent with the fundamental principle of Treaty interpretation that the terms of a Treaty "must be interpreted in the sense that they would naturally have been

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[8] [1996] 1 S.C.R. 771 at para. 52.
[9] [2006] 2 S.C.R. 915 at para. 24.
[10] *Marshall #1* at para 10, *R. v. Taylor and Williams*, [1981] 3 C.N.L.R. 114 (Ont. C.A.) (leave to appeal dismissed, [1981] 2 S.C.R. xi).
[11] See e.g., Diary of Daniel MacMartin, August 3rd, 1905, Fort Albany ("Mr. Goodwin – said that they were very glad to accept the terms *as stated*"); Diary of Daniel MacMartin, August August 9th, 1905, Moose Factory ("Fred Monk replied … that they concurred in *all that had been said*"); Diary of Daniel MacMartin, August 21st, 1905, New Post ("Angus Weenusk, replied that they accepted the terms *as stated*").

understood by the Indians at the time of the signing."[12] Where the written Treaty is presented in English without a full translation, the Treaty terms could only have been understood to the extent and in the manner that they were orally explained to the First Nations signatories. In *R. v. Sundown*, the Court observed the fact that "in many if not most" Treaty negotiations, the First Nations members could not read or write English and would have "relied completely on the oral promises made by Canadian negotiators."[13] Where the evidence shows that the First Nations members indeed "relied completely on the oral promises made by Canadian negotiators," the actual "Treaty" agreed to consists of these oral promises. The written version of the Treaty is evidence of this oral agreement, but – as with an agreement reduced to writing – it may often be an incomplete record of the real Treaty agreement.

According to this analysis, if there is a direct conflict between the written (but unexplained) terms and the oral terms which formed the basis of the Treaty agreement, the oral terms should be the primary consideration, as they most accurately represent the common intention of the parties. For example, in the Treaty 9 context, when one is confronted by a term in the written Treaty – here, the "taking-up clause" – that would appear never to have been explained to the First Nations signatories and which significantly conflicts with the oral promises that were made by the Treaty commissioners, that written term cannot be given any legal effect which would conflict with the oral terms of the Treaty. This is consistent with the Supreme Court's statement in *Mikisew Cree* that the interpretation of a similar "taking-up clause" in Treaty 8 is limited by the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it." [14] If the government were to attempt to take up land to such an extent or in such a manner that this oral promise was called into question, the Court commented that an action for Treaty infringement would be an appropriate First Nations' response.[15] Similarly, the legal effect of the taking-up clause in Treaty 9 is limited by the oral promises made by the Treaty commissioners, and relied upon and agreed to by the First Nations in 1905 and 1906.

It is unconscionable for the government to ignore oral terms

The Supreme Court has repeatedly stated that where the oral and written versions of a Treaty agreement diverge, it would be "unconscionable" for the Crown to ignore the "oral terms" of a Treaty agreement, and rely on the written document.[16]

This line of legal authority begins with *Guerin v. The Queen*, which was not strictly a Treaty case, but which dealt with a surrender of reserve land under the *Indian Act*.[17] In *Guerin*, while government representatives had made oral representations which induced

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[12] *R. v. Badger*, supra at 52.
[13] [1999] 1 S.C.R. 393 at para. 24.
[14] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), supra*, at para. 48.
[15] *Ibid.*
[16] *Ermineskin* at para. 54, *Marshall #1* at para. 12, *Guerin v. The Queen* [1984] 2 S.C.R. 335 at 388-389.
[17] *Guerin, Ibid.*

the Band to surrender its land, these "oral terms" were not recorded in the surrender document. The Court ruled that the Crown "was not empowered by the surrender document to ignore the oral terms" which the Band had relied on in agreeing to the surrender.[18] The Court drew an analogy to the legal doctrine of equitable estoppel, stating that the Crown "cannot promise the Band that it will obtain a lease of the latter's land on certain stated terms, thereby inducing the Band to alter its legal position by surrendering the land, and then simply ignore that promise to the Bands detriment."[19]

In *R. v. Marshall*, the Supreme Court cited this analysis from *Guerin*, and applied it to conclude that Treaty negotiations could give rise to legally binding "oral terms."[20] The Court in *Marshall* also highlights the principle that oral promises made by Crown representatives may be legally binding on the Crown, even where the Crown has not officially authorized or approved such promises:

> The Guerin case is a strong authority in this respect because the surrender there could only be accepted by the Governor in Council, who was not made aware of any oral terms. The surrender could not have been accepted by the departmental officials who were present when the Musqueam made known their conditions. Nevertheless, the Governor in Council was held bound by the oral terms which "the Band understood would be embodied in the lease."[21]

In the recent case of *R. v. Ermineskin*, the Supreme Court reaffirmed the basic principle that it would be "unconscionable for the Crown to ignore oral terms and rely simply on the written words of a treaty." [22] The Court decided that an oral representation by a Crown representative during Treaty negotiations constituted a "guarantee" that was legally enforceable.[23]

Interpreting Oral Treaty Promises

The "oral terms" of a Treaty are interpreted according to the same principles that apply to the interpretation of terms found in written Treaty documents. The Supreme Court's classic summary of the principles of Treaty interpretation comes from the case of *R. v. Badger*:

> First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. . . . Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions

[18] *Ibid*.
[19] *Ibid.*
[20] *Marshall #1* at para. 12.
[21] *Ibid.*
[22] *Ermineskin*, *supra* at para 54.
[23] *Ibid.*

> which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. . . . Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed.[24]

The Ontario Court of Appeal, in *R. v. Taylor and Williams*, recited these general principles of Treaty interpretation, and applied them to all the Treaty terms in issue – including both its written and oral terms – ruling that "all the principles recited lead to the conclusion that the terms of the treaty, which include the oral terms recorded in the Minutes, preserve the historic right of these Indians to hunt and fish on Crown lands in the lands conveyed …"[25] The Court of Appeal also noted that the documents evidencing the "oral terms" of the Treaty (meeting minutes, in *Taylor and Williams*) should not be formally dissected and "analyzed in minute detail."[26]

Similarly, in *Marshall*, the Supreme Court cited and relied upon the principles in *Badger* and *Taylor and Williams* to determine the scope and content of the oral promise of a "truckhouse" (trading facility) recorded in the minutes of a Treaty negotiation meeting between the British and Mi'kmaq in 1760. The Court stated that the honour of the Crown required that the agreement "be interpreted in a manner which gives meaning and substance to the promises made by the Crown," and concluded that the substance of the Treaty was not the literal promise of a "truckhouse," but a Treaty right to hunt and fish for the purposes of earning a moderate livelihood.[27]

The Supreme Court again applied general principles of Treaty interpretation to the "oral terms" of one of the Douglas Treaties in *R. v. Morris* to rule that the Tsartlip Treaty right to hunt "with the same freedom as when they were the sole occupants of the country," included the right to hunt safely at night with the aid of an illuminating device.[28]

Similarly, in *Ermineskin*, the Court applied these principles to identify and interpret an oral treaty term. The Court relied on the principle that Treaty terms should be interpreted in the sense that they naturally would have been understood by the First Nations members. The Court found that a statement during negotiations by the Lieutenant-Governor with respect to the previous sale of reserve land of other Indians amounted to a legally binding guarantee as to how the proceeds from such a sale would be handled in the future, as the First Nations signatories would have likely understood it as such.[29] While the Court emphasized the need to look for common intention, in

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[24] *Badger*, *supra* at 41 [citations omitted]; also *Sundown*, *supra* at 21.
[25] *Taylor and Williams*, *supra* at 123-124.
[26] *Ibid.* at 124.
[27] *Marshall #1*, *supra* at paras. 52, 56, 61.
[28] *Morris*, *supra* at paras 22-24, 56-61.
[29] *Ermineskin*, *supra* at para. 56.

Ermineskin the First Nations' likely understanding of the statement at the time determined its content.[30]

The Bottom Line: Oral Treaty Promises are Binding as Terms of the Treaty

Oral promises made by government representatives at the time a Treaty is signed are legally binding. Such promises are considered by the courts to be "oral terms" of the Treaty. These "oral terms" may be the source of further Treaty rights and obligations not recorded in the written Treaty document. The "oral terms" may also be used to interpret or give meaning to the written terms of the Treaty. It would be unconscionable for the government to rely on the written terms of the Treaty alone, when the Treaty was made on the basis of the oral promises offered by the government's representatives.

The general rules of Treaty interpretation apply to oral Treaty terms: they should be interpreted as they would have naturally been understood by the Indians; they should not be dissected in minute detail or subjected to modern rules of construction; and ambiguous terms should be resolved in a manner favourable to the Indians. A court will look for the common intention of the parties at the time, and select the interpretation of this common intention that best reconciles the interests of the Indians and the Crown at the time of Treaty signing.

Thus, the oral promises made to the Treaty 9 First Nations by the Treaty commissioners in 1905 and 1906 are legally binding. These promises are the "oral terms" of Treaty 9. They carry the same legal force as the written terms, and are interpreted according to the same principles. The government is not allowed to act on the basis of the written terms alone, such as the "taking-up clause," when to do so would violate the oral promises made to the First Nations. Any violation of these oral terms is an infringement of First Nations' substantive Treaty rights, and must be strictly justified by the government according to the *R. v. Sparrow* test.

PART 2: The Oral Promises that Form Part of Treaty 9

The Nature & Content of the Oral Promises Made at Treaty 9:

The Treaty 9 commissioners repeatedly presented three interrelated oral promises to the First Nations (promises which were not recorded in the written Treaty document) about what would happen (or not happen) if the First Nations signed the Treaty. First, the commissioners promised that there would be no new geographic restrictions on First Nation hunting and fishing rights, and First Nations could continue to hunt and fish

[30] *Ibid.* at 54-56.

wherever they pleased. Second, they promised that there would be continuity in the nature and scope of these rights, that is, that the First Nations could continue to hunt and fish as their forefathers had done. Third, they promised that the First Nations' traditional means of livelihood would not be interfered with in any way. The cumulative effect of these oral promises is to guarantee, in very clear and unqualified terms, that the right of the Treaty 9 First Nations to continue to hunt and pursue their traditional livelihoods would not be altered or diminished in any meaningful way.

The Documentary Evidence of Treaty 9 Oral Promises:

Contemporaneous evidence of the oral promises made by the Treaty commissioners is recorded in the following documents:

- "The James Bay Treaty" (Official Report of the Treaty Commissioners, 1905 & 1906)
- Diaries of Duncan Campbell Scott, 1905 & 1906
- Diaries of Samuel Stewart, 1905 & 1906
- Diaries of Daniel MacMartin, 1905
- "The Last of the Indian Treaties" (Article by Duncan Campbell Scott, 1905)
- "Twelve Hundred Miles by Canoe" (Article by Pelham Edgar, 1906-1907)

These documents were written by persons who directly witnessed or participated in the explanation of the Treaty and its terms to the First Nations.

The evidence of the oral promises and oral explanations of the Treaty recorded in these documents is consistent with the understanding of the Treaty that has long been shared by Treaty 9 elders. One advantage of this kind of documentary evidence, from the point of view of First Nations wishing to enforce their rights, is that, unlike oral history testimony from First Nations' elders, Canadian courts are very used to dealing with this kind of evidence. While oral history evidence has been accepted by Canadian courts and there are even statements from the Supreme Court of Canada affirming the general importance of such evidence, in practical terms, it is often difficult for a court to know how best to understand and incorporate such traditional oral evidence in a particular case. Also, because these documents were written by non-Native government officials, a judge would find the documents credible for the simple reason that these officials would have had nothing to gain by fabricating such promises; it is not self-serving. The only reasonable explanation for the fact that these oral promises were recorded in the commissioners' writings was that the promises were actually made to the First Nations.

Direct Quotations of the Treaty 9 Oral Promises:

The following are quotations of the oral promises made to the Treaty 9 First Nations, as recorded in the writings of the government representatives who explained and presented the Treaty. For analytical clarity, these quotations have been organized under three headings corresponding to the three general promises of (1) unrestricted hunting territory, (2) continuity, and (3) non-interference with traditional livelihoods. Quotations that relate to more than one of these general promises have been included under each.

1) No geographic restrictions on hunting:

- "…they were assured that they were not expected to give up their hunting-grounds, that they might hunt and fish *throughout all the country*, just as they had done in the past" (Osnaburgh, 1905, D.C. Scott article)
- "When it was explained to them that they could hunt and fish as of old and *they were not restricted as to territory* … they gladly accepted the situation" (Marten Falls, 1905, D. MacMartin diary)
- "again it was put forcibly before them … that *they could hunt wherever they pleased*, they signified their assent" (Marten Falls, 1905, D. MacMartin diary)
- "they could follow their custom of *hunting where they pleased*" (Moose Factory, 1905, D. MacMartin diary)
- "[the band] had terms of treaty explained to them … that they were … allowed as of yore to hunt and fish *where they pleased*" (New Post, 1905, D. MacMartin diary)

2) Continuity in the nature and scope of hunting rights:

- "…they were assured that they were not expected to give up their hunting-grounds, that they might hunt and fish throughout all the country, *just as they had done in the past*" (Osnaburgh, 1905, D.C. Scott article)
- "On being informed that they could *continue to live as they and their forefathers had done*…" (Osnaburgh, 1905, S. Stewart diary)
- "it was explained to them that *they could hunt and fish as of old*" (Marten Falls, 1905, D. MacMartin diary)
- "the Indians desired full information [as] to the effect the treaty would have on their hunting rights. When assured that *these would not be taken from them*…" (New Post, 1905, S. Stewart diary)
- "they could *follow their custom of hunting* where they pleased" (Moose Factory, 1905, D. MacMartin diary)
- "[the band] had terms of treaty explained to them … that they were … allowed *as of yore* to hunt and fish where they pleased" (New Post, 1905, D. MacMartin diary)
- "Ontario … has conceded the Indians *all the hunting and trading privileges which they have ever possessed*." (1906 signatory First Nations: Abitibi, Matachewan,

Mattagami, Flying Post, New Brunswick House, and Long Lake; Pelham Edgar, Twelve Hundred Miles by Canoe, 1906)

3) No interference with traditional livelihoods:

- "On being informed that their fears in regard to both these matters [being compelled to live on reserve and being deprived of fishing and hunting privileges] were groundless, as their present manner of making their livelihood *would in no way be interfered with…*" (Osnaburgh, 1905, official report)
- "…hunting and fishing, in which occupations *they were not to be interfered with*" (Fort Hope, 1905, official report)

Part 3: The Circumstances Surrounding the Treaty 9 Oral Promises

As the Supreme Court of Canada stated, in *R. v. Sundown*, the interpretation of any Treaty "must take into account the First Nation signatory and the circumstances that surrounded the signing of the treaty."[31] A proper understanding of a Treaty's meaning depends on an understanding of its specific historical context and the circumstances under which the solemn agreement was made.

The evidence of the circumstances surrounding Treaty 9 makes it clear that the commissioners' oral promises were extremely important in achieving First Nations' agreement to the Treaty. Indeed, these promises, which were initially made in response to specific concerns raised by the First Nations, were eventually incorporated into the commissioners standard explanation of the Treaty terms. What is more, the evidence indicates that the written "taking-up" clause, which appears to conflict with many of these oral promises, was not orally presented or explained to the First Nations. Finally, the evidence shows that the First Nations representatives explicitly relied upon and accepted the oral presentation of the Treaty, and not the written document, as the basis of the Treaty agreement.

The oral promises were necessary to secure the First Nations' agreement

The documentary evidence recorded by the Treaty commissioners shows that it was necessary to make these oral promises in order to convince the First Nations representatives to sign the Treaty. The documents show that the First Nations representatives in each of the communities visited by the commissioners were very concerned that signing the Treaty would mean that they might not be allowed to hunt everywhere they had hunted before. To address these concerns, the Treaty

[31] *R. v. Sundown, supra*, at para. 25

commissioners promised the First Nations that their hunting rights would in no way be diminished.

For example, at the first signing of Treaty 9, at Osnaburgh, commissioner Stewart records in his diary that the First Nation representatives asked questions "as to whether their fishing and hunting privileges would be curtailed," and the official report of the Treaty signing records that chief Missabay expressed the fear that they "would be deprived of the fishing and hunting privileges which they now enjoy."[32] In response to these concerns, the commissioners assured them that their fears in regard to these matters "were groundless, as their present manner of making their livelihood would in no way be interfered with," that "they were not expected to give up their hunting grounds, that they might hunt and fish throughout all the country," and that "they could continue to live as they and their forefathers had done."[33] Only after receiving and considering these assurances were the First Nations representatives at Osnaburgh prepared to sign the Treaty.

A similar exchange occurred at New Post. Commissioner Stewart writes:

> As usual, the point on which the Indians desired full information was as to the effect the treaty would have on their hunting and fishing rights. On being assured that these would not be taken from them, they expressed much pleasure and their willingness to sign the treaty, which was accordingly done, and the signatures duly witnessed.[34]

Similarly, commissioner MacMartin records that the New Post representatives were assured that they "were also allowed as of yore to hunt and fish where they pleased," in response to which Angus Weenusk replied that they "accepted the terms as stated."[35]

The oral promises became part of the commissioners' standard presentation of Treaty 9

While initially the commissioners' oral promises came in response to repeated First Nations' questions on this issue, the promise of undiminished hunting rights was eventually incorporated into Duncan Campbell Scott's standard presentation and explanation of the Treaty. [36] The 1905 diary of Daniel MacMartin provides the most detailed record we have of the precise manner in which the terms of Treaty 9 were explained to each of the First Nations.

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[32] James Bay Treaty, 1905 (Osnaburgh); Samuel Stewart, Personal Diary, July 11, 1905 (Osnaburgh)
[33] James Bay Treaty, 1905 (Osnaburgh); Samuel Stewart, Personal Diary, July 11, 1905 (Osnaburgh)
[34] Samuel Stewart, Personal Diary, August 21, 1905 (New Post)
[35] Daniel MacMartin, Personal Diary, August 21, 1905 (New Post)
[36] Commissioner MacMartin's diary entries for both Osnaburgh and Fort Hope indicate that Duncan Campbell Scott provided the oral explanation of the Treaty ("thro' an interpreter"). While the explanations recorded by MacMartin at the other locations are not attributed to any particular commissioner, it is reasonable to infer that Scott was the commissioner generally responsible for explaining the Treaty to the First Nations representatives, particularly given the relatively consistent wording used at each of the Treaty meetings. This would also be consistent with Scott's status as the highest ranking Dominion representative among the three commissioners.

Daniel MacMartin's 1905 diaries show the gradual development of a standard speech that accompanied the presentation of the Treaty to the First Nations' representatives. This presentation is first recorded at Fort Hope and is repeated or paraphrased with minor variations and additional details added at Marten Falls, Fort Albany, Moose Factory, and New Post.[37] The presentation begins with a statement that the King had sent the Commission to enter into Treaty with them and that the King wishes them to be "happy and prosperous". [38] It then describes the eight-dollar "present" and four-dollar annuity;[39] the establishing of a "tract of land" as a reserve for their "sole use and benefit", where "no white man should put his foot" without their permission;[40] the election of chiefs and councillors for three-year terms;[41] the provision of a one-time feast to celebrate the signing of the Treaty;[42] and the provision of a flag to the newly elected chief (to be passed to successive chiefs) as a badge of his authority.[43] Some minor variations included the requirement to be "good Indians" and "obey the laws of the land" (Marten Falls & New Post),[44] and the promise of a school (Moose Factory). [45]

It is significant that the last two Treaty presentations of the commissioners' 1905 journey, at Moose Factory and New Post, include specific assurances that the First Nations could continue to hunt as before "where they pleased," and would not be compelled to live on reserve. The most likely explanation for this is that Duncan Campbell Scott incorporated this assurance into the standard presentation of the Treaty terms because of the difficulty and confusion this very issue had provoked at previous meetings, such as at Osnaburgh and Marten Falls.

First Nations representatives at Marten Falls twice confronted the Treaty commissioners to ask that their "hunting reserve" include both banks of the river for 50 miles. The commissioners denied this request but, in response, assured them that "they could hunt and fish as of old and they were not restricted to territory."[46] Later that same evening, the chief and councillors again raised the issue with the commissioners, and commissioner MacMartin records that "again it was put forcibly before them, that [the reserve] was a home for them that was being provided & not a hunting reserve and that they could hunt *wherever they pleased,*" upon which "they signified their assent."[47]

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[37] This standard presentation is also recorded by Duncan Campbell Scott in his article "The Last of the Indian Treaties", where it appears in Scott's record of the first Treaty meeting at Osnaburgh. Duncan Campbell Scott, "Last of the Indian Treaties" Scribners, p. 578
[38] Daniel MacMartin, Personal Diary, 1905 (Fort Hope, Marten Falls, Fort Albany, Moose Factory)
[39] *Ibid*. (Fort Hope, Marten Falls, Fort Albany, Moose Factory, New Post)
[40] *Ibid*. (Fort Hope, Marten Falls, Fort Albany, Moose Factory, New Post)
[41] *Ibid*. (Marten Falls, Fort Albany, Moose Factory, New Post)
[42] *Ibid*. (Fort Albany, Moose Factory, New Post)
[43] *Ibid*. (Fort Albany, Moose Factory, New Post)
[44] *Ibid*. (Marten Falls, New Post)
[45] *Ibid*. (Fort Albany)
[46] Daniel MacMartin, Personal Diary, July 25, 1905 (Marten Falls)
[47] *Ibid.*

As observed in commissioner Stewart's diary, the impact that the Treaty would have on hunting rights was the "usual" concern raised by the First Nations. It can be inferred from this that the commissioners realized that First Nations' concerns over the potential loss of their hunting grounds and the confusion surrounding the status of reserve land were the primary hurdles to be overcome in securing agreement to the Treaty. By the time of the presentation to the Moose Factory representatives, the commissioners had begun to address these concerns at the outset by including the oral promises in the standard presentation of the Treaty terms.

The "taking up clause" was not presented or explained to First Nations

Notably absent from MacMartin's diary records of these presentations is any discussion whatsoever of the "taking up clause," or even of the surrender of land. It would appear that only the more benevolent terms of the Treaty were included in these oral presentations.[48] Indeed, the Treaty terms were presented as so singularly favourable to the First Nations that the representatives in several communities questioned what, if anything, the Dominion government was gaining from the agreement. To put it another way, they asked: what's the catch?

For example, at Marten Falls, commissioner Stewart observes that some of the First Nations representatives "seemed to think that there was something behind the offer of the Gov't of which they were not aware. It seemed to them that an offer was being made to give them something for which they were not expected to make return."[49] Given the presentation of the Treaty terms as recorded by commissioner MacMartin, such a misapprehension is easily understandable.

Commissioner Stewart describes a similar situation at Fort Hope:

> Very full explanations were asked by the Indians present, they being very much concerned as to what they were expected to give up for the benefits they were to receive. It required some time to convince them that there was not something behind the terms of the agreement set forth in the treaty, for as Moonais, one of the principal men of the band stated, they were not giving up very much for what they were to receive, and it had never been his experience to receive something for nothing.[50]

Commissioner MacMartin records the same exchange:

> Monias – said. I should like to consult with my aunts and cousins. If I buy as small an article as a needle I have to pay for same, you come here offering money

[48] The only exceptions to this are the statements in Marten Falls and New Post that the Indians would be required to be obedient to the laws of the land, and, arguably, the mandatory introduction of an electoral process to select community leaders.
[49] Samuel Stewart, Personal Diary, July 25, 1905 (Marten Falls)
[50] Samuel Stewart, Personal Diary, July 19, 1905 (Fort Hope)

> we have not asked for. I do not understand, and should like to have it explained[.] [A]fter an explanation, he along with the others signified his assent and the Treaty was signed.[51]

This "explanation" was provided by the local priest, Father Fafard, who "fully explained to the Inds. the nature of the treaty, and the reasons for asking them to surrender their title to their *unused* lands."[52] In so far as the terms relating to the surrender and possible taking up of land were explained here, the First Nations representatives were told that the only land effected by the Treaty would be land that was "unused" by them. They would reasonably have understood this to exclude any land that they used for hunting, fishing or other livelihood-related purposes.

This explanation of the Treaty differs enormously from the written version of the Treaty, whereby the First Nations purportedly surrendered title to *all* their lands (except the reserves) and acknowledged that their hunting rights over any non-reserve land were subject to the "taking up clause." Thus, even when the First Nations representatives pointedly asked to be told what exactly they would give up by signing the Treaty, no accurate description of the written Treaty's terms was provided to them.[53]

One explanation for the commissioners' failure to accurately explain the terms of the written version of the Treaty appears in Duncan Campbell Scott's article, "The Last of the Indian Treaties," published between the commissioners' 1905 and 1906 voyages. According to Scott, there was no sense in attempting to fully explain the written terms, as there was no way the Indians could be expected to understand them:

> They were to make certain promises and we were to make certain promises, but our purpose and our reasons were alike unknowable. What could they grasp of the pronouncement on the Indian tenure which had been delivered by the law lords of the Crown, what of the elaborate negotiations between a dominion and a province which had made the treaty possible, what of the sense of traditional policy which brooded over the whole? Nothing. So there was no basis for argument. The simpler facts had to be stated, and the parental idea developed that the King is the great father of the Indians, watchful over their interests, and ever compassionate.[54]

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[51] Daniel MacMartin, Personal Diary, July 19, 1905 (Fort Hope)

[52] Samuel Stewart, Personal Diary, July 19, 1905 (Fort Hope) (emphasis added) (Father Fafard also informed them that "by signing the treaty they would be acknowledging themselves to be subjects of his Majesty the King, and their willingness to observe the laws made by him.")

[53] In this context, it is perhaps not surprising that the Fort Albany representatives expressed "the satisfaction they experienced on receiving such generous treatment from the Crown," (Stewart diary) or that the initially sceptical Chief Missabay of Osnaburgh stated that he "believed that nothing but good was intended" (official report).

[54] Duncan Campbell Scott, "Last of the Indian Treaties" Scribners, p. 578

The taking up clause apparently did not qualify as one of these "simpler facts" that, according to Scott, had to be stated to the First Nations. Presumably, all they needed to understand, according to Scott, was that the Crown would take good care of them, generously providing them money, schools, and a flag. The minute details, such as the government's power to take up land under the written Treaty so that the First Nations could no longer hunt on it, were not merely glossed over; rather, solemn assurances of undiminished hunting rights were made that contradicted and undermined the very existence of this government power.

A careful analysis of the documentary evidence of the Treaty 9 commissioners reveals that, not only were oral promises made to the First Nations that are inconsistent with the written Treaty, but the less favourable terms of the written Treaty appear – quite intentionally – not to have been explained to the First Nations at all. Thus, one might reasonably observe that there are two distinct versions of Treaty 9, each with dramatically different terms: a written version, embodied in the printed Treaty document; and an oral version, depicted in the contemporaneous writings of the government representatives who presented and explained the Treaty. Given the significant differences between the terms of these two versions of Treaty 9, it is important to consider which of these two versions factually formed the basis of the Treaty agreement (to put it another way, the "common intention") between the Crown and the First Nations.

Treaty 9 was agreed to by the First Nations as it was "spoken" to them

The evidence shows that the First Nations would have understood the oral promises made by the Treaty commissioners as a part of the Treaty itself. The Treaty they accepted was the Treaty that was spoken to them by the commissioners.

The Supreme Court of Canada has recognized that First Nations representatives often relied entirely on the oral promises made by Treaty negotiators when signing Treaties, due to the simple fact that they could not read English. In *R. v. Sundown*, the Court said:

> In many if not most treaty negotiations, members of the First Nations could not read or write English and relied completely on the oral promises made by the Canadian negotiators. There is a sound historical basis for interpreting treaties in the manner summarized in *Badger*. Anything else would amount to be a denial of fair dealing and justice between the parties.[55]

Also, as discussed above, Duncan Campbell Scott explicitly acknowledged that the First Nations did not understand the written Treaty document, or the significance of its terms. From Scott's perspective, the government's purposes in bringing the Treaty were simply "unknowable" to the First Nations, as they could not be expected to understand the latest judicial decisions on "Indian tenure", the constitutional division of powers, or the various policy objectives that informed the Treaty. Scott also indicates that, because of this, no

[55] R. v. Sundown, supra, at para. 24

attempt was made to convey the more subtle aspects of Treaty 9 or its written terms, but that the oral presentation of the Treaty was limited to the "simpler facts".

There is also considerable evidence that the Treaty 9 First Nations' representatives explicitly stated that they were agreeing to Treaty as it was spoken to them, rather than to the written document itself. At the conclusion of the presentation of the Treaty at Fort Albany, MacMartin records that the First Nation representatives indicated they were "were very glad to accept the terms *as stated.*"[56] At Moose Factory, the First Nation's agreement to sign the Treaty was acknowledged by Fred Monk who "replied … that they concurred in *all that had been said.*" [57] Similarly, at New Post, MacMartin records that "Angus Weenusk, replied that they accepted the terms *as stated.*"[58] In each of these cases, the First Nations representatives made it clear that the Treaty they were entering into with the Crown was based on the commissioners' *oral* presentation and explanation of the Treaty terms.

Thus, the solemn exchange of promises that is Treaty 9 is best understood as an oral agreement between the First Nations and the Crown, of which the written Treaty document is an incomplete and somewhat inaccurate record. That said, a written copy of the Treaty document was left with each of the First Nations communities where it was signed, and this written Treaty has remained an important symbol and document for the Crown and First Nations alike. However, wherever the written version of the Treaty would appear to conflict with the oral promises that were made by the Treaty commissioners and relied upon by the First Nations representatives, the honour of the Crown demands that the oral terms of the Treaty must be understood to govern.

Part 4: The Legal Significance of the Treaty 9 Oral Promises

1) No geographic restrictions on hunting

In accordance with this oral promise, the government is not permitted to unilaterally take up land under Treaty 9 that is used by First Nation members or that is considered by the First Nation to be suitable for hunting or fishing.

The commissioners repeatedly promised the First Nations representatives that the Treaty would allow them to continue to hunt and fish anywhere in their traditional territories, without restriction. This solemn promise was accepted by the First Nations and understood by them to be a term of the Treaty itself. At the same time, this promise directly contradicts the plain meaning of the "taking up clause" in the written version of the Treaty. Under the "taking up clause," as it appears in the written version of the

[56] Diary of Daniel MacMartin, August 3rd, 1905, Fort Albany
[57] Diary of Daniel MacMartin, August 9th, 1905, Moose Factory
[58] Diary of Daniel MacMartin, August 21st, 1905, New Post

Treaty, the government could limit the First Nations' right to hunt over any given tract of land by "taking up" that land and putting it to some use that is not compatible with hunting. As discussed above, the evidence indicates that the taking up clause was not explained to the First Nations, while the promise of unrestricted traditional hunting territory was emphasized by the commissioners quite "forcibly".[59]

Given the general principles of Treaty interpretation, specifically the solemn and sacred nature of Treaty promises, the assumption that the Crown always intends to fulfill its promises, and the principle that no appearance of "sharp dealing" will be sanctioned, it is clear that to the extent the taking up clause conflicts with this solemn oral promise, the oral promise should predominate, as it more accurately reflects the actual agreement reached between the parties. This is also consistent with the Treaty interpretation principle that "any limitations which restrict the rights of Indians under treaties must be narrowly construed."[60] There is simply no way for the Crown to avoid the appearance of "sharp dealing" when seeking to rely on a written term that was not explained to the First Nations, and was in fact directly contradicted by the solemn oral assurances given by government representatives to secure their agreement to the Treaty.

This promise puts such a serious limit on the government's written Treaty right to take up land from time to time, that there is little of this right that remains for practical purposes. Conceivably, the government could take up land that would have no impact on the First Nations' right to hunt "where they please" and "without restriction as to territory", by only taking up land that was neither used nor considered suitable for use by the First Nation. Practically, if it intends to take up land in a manner that would reduce the territory in which hunting can take place, the government would require the full consent of the affected First Nations. Otherwise, the taking up of this land would contravene the oral terms of the Treaty, and would thereby be a violation of section 35 of the *Constitution Act, 1982*, subject to justification under the *Sparrow* test.

2) Continuity of livelihood and traditional ways

The legal effect of this promise is to preserve traditional harvesting practices and their modern equivalents. One additional effect would appear to be the protection, as a Treaty right, of First Nations' customary regulatory responsibility for the traditional hunting and harvesting practices of their members.

The commissioners' promises of continuity of harvesting rights took several forms. It was often attached to the promise of no geographical limitations on treaty rights, discussed above. That is, the First Nations Treaty signatories could *continue* to hunt where they pleased, *as they had in the past*.[61] Other times, it appears as a stand-alone

[59] Marten Falls, 1905, D. MacMartin diary
[60] *R. v. Badger*, *supra*, at para. 41
[61] Such joint promises are recorded in: Duncan Campbell Scott, "Last of the Indian Treaties," Scribners (Osnaburgh); Daniel MacMartin, personal diary, August 9, 1905 (Moose Factory); Daniel MacMartin, personal diary, August 21, 1905 (New Post).

promise, such as in Marten Falls, where commissioner MacMartin records that "it was explained to them that they could hunt and fish *as of old*."[62] Similarly, at Osnaburgh, commissioner Stewart writes that the First Nations representatives were "informed that they could continue to live as their forefathers had done."[63]

A similar oral promise of continuity was considered by the Supreme Court of Canada in the case of *R. v. Morris,* dealing with the Douglas Treaty. The relevant oral term of the Douglas Treaty was the promise that the First Nations could fish and hunt on unoccupied Crown lands "with the same freedom as when they were the sole occupants of the country."[64] The Court in *Morris* determined that this promise protected, as a Treaty right, the practice of safely hunting at night with an illuminating device (in the modern context, this included the use of rifles and battery-powered lights). Thus, the promise of continuity may be understood to protect non-dangerous traditional hunting practices (and their modern equivalents) from being prohibited by government regulation.

One likely legal consequence of the promise of continuity is the preservation of First Nations inherent jurisdiction over the hunting ways of its members. The promise that "they could continue to live as their forefathers had done," would reasonably have been understood by the First Nations' representatives as affirming their customary responsibility of governing the proper hunting and conservation practices of their members and in their territories. That is, this Treaty promise may be understood to affirm and preserve as a Treaty right, a continuing (legal) regulatory responsibility of First Nations over hunting and fishing in their traditional territories.

3) No interference with traditional livelihoods

According to this oral promise, the government is not permitted to take up land or regulate traditional harvesting activities under Treaty 9 in a way that would interfere with a First Nation's traditional livelihood.

A similar oral promise was considered by the Supreme Court of Canada in the Treaty 8 case of *Mikisew Cree First Nation v. Canada (Minister of National Heritage).*[65] The Treaty 8 commissioner had promised during negotiations that "the same means of earning a livelihood would continue after the treaty as existed before it."[66] The Court said that this promise would likely be infringed if there came a time when any Treaty 8 First Nation were left with "no meaningful right to hunt" over its own traditional territories. That is, the government could take up Treaty 8 land, but not to such an extent that any particular First Nation was left without a sufficient land base for its members to pursue a traditional hunting livelihood.

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[62] Daniel MacMartin, personal diary, July 25, 1905 (Marten Falls)
[63] Samuel Stewart, personal diary, July 11, 1905 (Osnaburgh)
[64] *R. v. Morris, supra,* at para. 22 (Note that while the Douglas Treaty promise was limited to "unoccupied Crown lands," no such territorial limitation appears in the Treaty 9 oral promises.)
[65] *Supra,* at para. 48
[66] *Ibid.*

While similar, the oral Treaty 9 promise of non-interference is significantly stronger than the Treaty 8 promise. While the Treaty 8 promise guaranteed the "same means of earning a livelihood," it did not guarantee that there would be no qualitative adverse impact on that livelihood due to government interference. In the case of Treaty 9, the official report of the Treaty records the commissioners' promise that the First Nations' traditional livelihoods "would *in no way* be interfered with." The right guaranteed here is much stronger than that recognized in *Mikisew Cree*, and the threshold for a potential Treaty violation – interference *in any way* – is much lower. Certainly any government action or decision that interfered with First Nations traditional livelihoods in a meaningful way would amount to a violation of this oral Treaty term.

Another interesting aspect of this oral promise is that it recognizes traditional Treaty harvesting rights in a general way, not limited to the specific practices of hunting, fishing and trapping rights. The commissioners' promise at Osnaburgh that "*their present manner of making their livelihood* would in no way be interfered with," is not qualified by any words limiting this livelihood to hunting, fishing and trapping. This general "manner of livelihood" right may arguable include the traditional harvesting (and selling or trading) of other non-animal forest products, such as medicines or even timber. Establishing that any particular manner of making a livelihood is protected under this general Treaty right would likely require evidence that the practice is either a traditional practice or the logical evolution or modern equivalent of a traditional practice.[67]

[67] *R. v. Sundown, supra*, at para. 32; *R. v. Marshall, supra,* at para. 78