

Document 1: The Office of the Treaty Commissioner: Challenges and Changes in First Nations Law

Speaking Notes of David Arnot

Treaty Commissioner for the Province of Saskatchewan
to

Canadian Bar Association, Saskatchewan Branch
Native Law Section

11 April 1997

A. Introduction

I am especially pleased to introduce the Office of the Treaty Commissioner and its new mandate. As practitioners, you may have a special interest in clarifying the meaning of First Nations treaties, and more broadly, clarifying the significance of section 35(1) of the *Constitution Act*, 1982, where it "recognizes and affirms the existing aboriginal and treaty rights of the Aboriginal peoples of Canada." If successful, the Office of the Treaty Commissioner will play a pivotal role in achieving those clarifications in a way that benefits all peoples who live in Saskatchewan.

What I plan to do is outline the mandate, role, and methods of the new office. As well, I will indicate how the office can make a unique contribution to improving the clarity and respect for Aboriginal and treaty rights in Saskatchewan. To a great extent, I must seek your indulgence to be artfully ambitious: the office is the servant of the parties. *Our principal task is to assist the Federation of Saskatchewan Indian Nations and the federal Crown to reach agreements regarding treaty rights. These are the parties.* We have barely begun our preliminary task of building consensus on specific protocols, priorities, and procedures to be followed in the years ahead. I may be able to hint about what I believe we can or should agree, but the decision is not mine. The decision making rests with the parties.

B. The Renewal of the Office

The Office of the Treaty Commissioner was originally established by an Order-In-Council in June of 1989, in accordance with a Memorandum of

Agreement between the Minister of Indian Affairs and the Federation of Saskatchewan Indian Nations. The Terms of Reference of the original Treaty Commissioner, Clifford Wright, were to facilitate progress on the issues of treaty land entitlement. *This refers to the process which compensates First Nations for a short fall in lands granted under the original formula used to create reserves.* That office was responsible for education, coordinating meetings of the parties and providing them with expert advice. The original office was also mandated to conduct research.

The original office helped the parties develop the formula which, as a part of the 1992 Treaty Land Entitlement Framework Agreement with the federal government, has been the basis for determining restitution to 25 First Nations in Saskatchewan. I understand that roughly half of these First Nations have already received at least some additional lands in reserve status, under individual agreements with the Crown. The appointment of the original Treaty Commissioner expired in March of 1996. The parties seized upon this opportunity to negotiate new Terms of Reference which broaden the range of treaty issues on the table, and expand the responsibilities of the office for an initial term of five years.

Permit me to refer, first to last year's Memorandum of Agreement between the Federal Government of Canada and the Federation of Saskatchewan Indian Nations. I think you will share my conclusion that the parties chose their words very carefully and in a way that gently "pushed the envelope" of past treaty processes.

(1). Guiding Principles

There are four key guiding principles in the agreement. First, of utmost importance, the parties agreed upon several fundamental principles which may be characterized as the conceptual framework for the renewed treaty process. The parties expressly agreed that the canon of interpretation shall be the treaties' "spirit and intent, including oral promises." This means that the discussions will not be strictly bound by the archival texts of treaties, but will instead attempt to recover the historical context and original meaning of these engagements to the peoples concerned.

A second guiding principle may be found in the declaration of the parties that: "The Government of Canada recognizes the inherent right of self-government as an inherent Aboriginal right which may find expression in treaties. The significance of this is profound. While it does not have any immediate legal effect on First Nations authority as governments,¹ it ensures that self-government will be the framework for all of the parties' deliberations. Accordingly, the parties have expressly agreed to discuss "jurisdiction," which they have defined as "law making power." This power which they acknowledge may be found either in the treaties or implied in the

inherent right of self-government.

A third essential principle is the commitment of the parties to a "forward looking relationship." I understand this phrase to mean that the goal is not merely to redress past injustices. Our task is more than to pay old debts, and declare that the books are balanced. In keeping with the views of the Royal Commission on Aboriginal Peoples, which recognized treaties as "living relationships," the objective here in Saskatchewan will be to breathe new life into the treaties. It is to make them useful blueprints for fruitful future cooperation and co-existence between First Nations and their neighbours.²

A fourth and final basic principle is embodied in the Memorandum of Agreement which redefines the Office of the Treaty Commissioner. The parties acknowledge that achieving full respect for Aboriginal and treaty rights is a condition for maintaining the "honour of the Crown." I would characterize this as the over-arching standard of responsibility for the office of the Treaty Commissioner and for my work as Treaty Commissioner. "The honour of the Crown" must be restored in every aspect of First Nations' relationships with Canada and Saskatchewan. I will return to this theme later.

(2) Substantive Scope of the Work

With respect to the scope of discussions, the parties have agreed to seek "a common understanding" of the treaties which are applicable to Saskatchewan. The parties tactfully describe the exercise in terms of "exploring" existing differences in their views of the "content and meaning" of their treaty commitments. The parties also agree that their discussions will be both political and technical. I take this to mean that they will address policy, as well as practical measures.

The parties have identified seven priority areas for discussion: child welfare, education, shelter, health, justice, treaty annuities, and harvesting rights. I must comment that I am personally heartened by the parties choice of these initial priorities because they have clearly focused their work on healthy children and human development. This is a practical platform for achieving results that will not only liberate the full potential of First Nations, but also benefit everyone in this province.

These substantive issues were already the subject of a joint work plan adopted by the parties in June of 1996. This agreement launched "exploratory discussions" of the administrative requirements of treaty implementation in Saskatchewan – a kind of "scoping" exercise which could focus the future deliberations. The exploratory process is limited to an exchange of views about understandings of the meaning and content of the treaties, what the parties wish to achieve through further discussions, appropriate procedures for discussion and agreement, and the fiscal implications for solutions.

Although the parties have identified a range of topics for their initial discussions, they must still agree on the order in which these issues will be addressed, sequentially or in parallel tracks. The discussions must also include time-frames and specific goals. I should also emphasize that the mandate for this process is open-ended. Additional substantive topics may be added at any stage.

(3) The Role of the Office

With respect to the role of the Office of the Treaty Commissioner, the parties agree that it should function as an "independent body to coordinate and facilitate the bilateral process" between the federal Crown and the Federation of Saskatchewan Indian Nations. The three key terms in this mandate are: "independent, coordinate and facilitate." I take this to mean, above all, that I must listen carefully to the parties and serve the process. This is to say the "honour of the Crown" is paramount in my own job. I must scrupulously defend the complete independence of the office from political, partisan or interest-group pressures of any kind.

My task is to "assist the parties" in their efforts at clarifying and implementing the treaties through coordinating and facilitating the parties' work. The tools, which have been placed at my disposal by the parties' Memorandum of Agreement and Order-In-Council, are limited to:

- facilitating meetings between the parties;
- facilitating meetings involving other affected groups;
- mediation, if requested by the parties;
- background research;
- public information to create a positive climate for resolution;
- monitoring progress in reaching agreements; and
- monitoring the implementation of such agreements as may be made by the parties, including the existing Saskatchewan Treaty Land Entitlement Agreement.

The parties have retained authority to assign additional tasks or functions to the office from time to time. This will be based in part on a comprehensive evaluation of the work of the office after three years.

Significantly, the parties themselves have described this process as an "intergovernmental mechanism" which will constitute the "primary mechanism" for achieving a common understanding of the requirements of existing treaties. The model to which we are committed is diplomatic. It is grounded in precedents from federal-provincial diplomacy as well as international diplomacy. This implies, among other things, that we respect the perfect equality of the parties whenever they are sitting at this table. The parties are entitled to equal dignity and respect, just as they must accept

equal responsibility for achieving solutions. I will not only expect each of the parties to act honourably, in good faith, but to be practical, flexible and willing to bear a fair share of the work of building a productive future relationship.

The intergovernmental nature of this process also has implications for the role of the Treaty Commissioner. The office can only act, officially, at the parties' request. The office creates space to talk but it does not try to lead the discussions. It services the efforts of the parties by supplying them with useful information and creative ideas about processes and outcomes, but the parties remain the masters of their own fate. One kind of nudging is expressly contemplated in the parties' Memorandum of Agreement. The office is free to conduct studies and prepare recommendations on anything which might help the parties resolve their differences. This will be an important part of my job: anticipating where we may break bottlenecks by placing sound policy research before the parties.

It is also clear that the Treaty Commissioner has a role to play with respect to "good offices." Privately and informally, I will be in continual contact with the key decision makers in Ottawa, Regina and Saskatoon. The possibility of unnecessary contention and miscommunication can be detected and prevented, before parties take formal public positions from which they may be reluctant to withdraw. Private hesitation on the part of key actors can – and I believe should – be addressed privately, if possible. All parties need to be encouraged, gently but firmly, to maintain their commitments to achieving useful results.

In an extreme situation, the Treaty Commissioner is the conscience of the entire process. If our work stalls, I must evaluate the situation carefully. If it is clearly justified and absolutely necessary, I must cry "foul" in a loud and public voice. This is obviously a weapon of last resort exercised only when informal means of returning the parties to the table fail. I will not hesitate to use it if appropriate. The Treaty Commissioner is, after all, the only voice given to the "honour of the Crown."

(4) Standing to Participate

I have been referring to "the parties," meaning the Government of Canada and the Federation of Saskatchewan Indian Nations, but there is more to the process. The parties clearly recognized the fact that any agreement they might reach could have important political and economic implications for the Province of Saskatchewan and for everyone living and working in this province. There has accordingly been established a so-called "Common Table," which is designed to secure the participation of the Province of Saskatchewan in agreements which may affect provincial jurisdiction. The province has observer status in the parties' exploratory

talks (at the "Treaty Table"). Finally, the Office of the Treaty Commissioner is expressly authorized to help coordinate and facilitate meetings involving non-governmental groups, representing the full spectrum of Aboriginal and non-Aboriginal people here in Saskatchewan.

When fully realized, then the office will be helping coordinate three distinct conversations:

- The main substantive discussions between representatives of the federal government and First Nations *which occur at the "Treaty Table" and where* the province enjoys an observer status.
- The "Common Table," at which the province joins in the discussions as a third party because provincial cooperation on jurisdictional issues is necessary to achieve practical results.
- Meetings to which non-governmental interests are invited, where the aim is to ensure a broad contribution to, and ownership of, a new treaty partnership in Saskatchewan.

C. The Philosophy of the Office

It would be fair to say that the motivation behind the re-design and renewal of the office was the failure of previous governments, and of the courts, to make treaties work in a contemporary context. I am not referring solely to the frustrations experienced by First Nations, who feel that they have spent the past century struggling to reap the benefits they already had secured for themselves by treaty. I am also thinking of everyone else in Saskatchewan, burdened by uncertainty and fearing the worst either from the settlement of treaty entitlements or from failure to achieve a lasting settlement. Everyone stands to gain from a process that is faster, fairer, more comprehensive in its scope and more participatory. It is a process that looks ahead to the future well being of the parties *instead of looking* to the past.

There is a common thread in the submissions of treaty nations to the Royal Commission on Aboriginal Peoples. It is equally demonstrated in the exhaustive research that formed the basis for the Royal Commission's findings on the subject of treaties. This common thread is the Aboriginal view of treaties as social relationships, perpetually evolving and continually in need of renewal and recommitment. For the original peoples of this continent, from Newfoundland to the Pacific, nations formed alliances, promoted peace and fostered trade by extending their family ties. The parties met to celebrate their kinship not to sign a piece of paper. Diplomatic conferences concluded with a wedding or adoption. These ceremonies were both real and figurative: individuals often married or adopted each other as a part of the ceremonial cementing of the new social bonds between families and nations.

Consistent with the Aboriginal North American paradigm of treaty

making, relationships required constant attention and frequent renewal as circumstances changed. Like individual marriages, there were often misunderstandings and hurt feelings requiring reconciliation, healing and an adjustment of obligations and expectations. Relationships were mutually beneficial for the parties for only so long as they were kept healthy through periodic review and recommitment. This is to say that the treaties grew, along with the parties. Renewal ceremonies usually were conducted every year or so.

This is plainly what First Nations thought they were agreeing to when they made their treaties with the Crown. They believed that they were adopting the subjects of the Queen as their own kinsfolk and that in turn, the Queen was adopting them as her children. They considered that they had opened their homes (which is to say that this vast territory, called Saskatchewan) to their new British relatives. They expected their relatives to reciprocate by sharing the things they had brought with them from Europe – their technology and their money. Aboriginal nations expected their treaty partners to reciprocate out of kindness and from feelings of respect and not solely because certain specific gifts had been listed in a written contract.

This is where I foresee the distinctive role of this office. What is required is a gradual, facilitated transition from an unhealthy and destructive relationship to one that will enable the parties to shift their energies from managing conflict into building a better home for the next generation of children in Saskatchewan. Litigation cannot be the solution. Courts can declare winners and losers, but they cannot make people friends or repair marriages. Confrontation is also not a solution although I have no illusions about the risk of confrontation if we move too slowly or fail to earn credibility.

In agreeing to renew the mandate of the office, the parties have chosen the course of diplomacy, cooperation and conciliation. But the extent to which the office succeeds as an alternative to litigation or confrontation will depend on a serious investment of faith and effort, not only by the parties themselves, but by all interested person and groups in Saskatchewan to abandon their fears and old habits. Everyone must give this new intergovernmental process a reasonable chance to show that it can work.

D. Protocols and Procedures

How, then, do we foresee the actual process? While I do not wish to preempt or anticipate our discussion with the parties over the coming months, I think it is clear that exchanges of views will need to be arranged at many levels, with varying degrees of formality and publicity. In intergovernmental relations, solutions usually work their way upwards

from technical levels to policy levels. Elected leaders tend to take broad positions, calculated to answer the feelings and concerns of their constituents. Positions once taken are difficult to revise or withdraw without political embarrassment. A process that begins with high-level public positions becomes a "win-lose" proposition.

I would expect to see the Treaty Table evolve into many simultaneous conversations at levels ranging from front-line Aboriginal and non-Aboriginal professionals and community workers to the more formal and public "full dress" councils of Ministers and Chiefs. This would offer a degree of flexibility appropriate to the complexity and the sensitivity of what has been placed on the table. Elected leaders must publicly express their resolve to finding solutions and creating a public climate of positive expectations to maintain momentum.

If the ultimate goal is an intergovernmental partnership that can improve the lives of all people in Saskatchewan, with full respect for First Nations as treaty partners – and I believe this is what we should strive to achieve – then the process itself cannot be confrontational. The pressure on the parties to reach an agreement should come from the firm conviction, on the part of both Aboriginal and non-Aboriginal people of Saskatchewan, that their future depends on equality and cooperation. The future is not built on hard tactics or shrewd bargaining.

We envisage organizing a collateral public process of consultation and information. This process will aim toward building the necessary climate of understanding and positive expectations. It will also mobilize the expertise and institutional resources of all sectors of Saskatchewan Aboriginal and non-Aboriginal society in support of practical results. Over the next few months, the office will be exploring ways of organizing advisory and expert bodies for these purposes.

I wish to stress that the role of the office is to "facilitate" rather than "adjudicate." We will be preoccupied from the start with the process, but will avoid taking any views on substantive matters unless specifically asked by the parties to prepare studies on their policy options. Nonetheless, I interpret "facilitation" as much more than the logistics of meetings and documentation. Six main tasks will be involved in bringing the parties closer to agreement:

1. Building consensus on a clear, concise common goal or vision to serve as our standard of agreement and achievement.
2. Breaking complex substantive issues down into manageable pieces which can be assigned to parallel discussions with targets and timelines for reporting.
3. Assembling background data and strategic analyses in each field of

substantive discussion so that the parties share a reliable database and can avoid unnecessary technical disagreements.

4. Clarifying and operationalizing the parties' policy options. In other words, helping the parties think through the implications of alternative solutions. This should include helping to identify collateral resources in the private and non-government sector in order to increase options available to the parties. It may also involve the study of ways of removing perceived obstacles.
5. Proposing and promoting confidence building measures which can gradually build greater trust and a good will among the parties. This might include modest, short-term joint undertakings by the parties in the fields of research, education and administrative cooperate. The measures will have concrete and readily achievable objectives.
6. Maintaining momentum and keeping the parties accountable to the wider public through the mass media, good office and periodic evaluations and public reports.

E. Conditions for Success

I wish to stress that there is little hope for a lasting solution and living partnership unless each of the parties and its constituents fully appreciate the choice they have been given by the establishment of this unique process. If I may be forgiven the use of a cliché, the attitude of the past has been "win-lose" and usually it was the First Nations who lost. The treaty implementation framework we are building now presumes the desirability and feasibility of a "win-win" result. Should we fail and merely add to the frustration and marginalization of Saskatchewan First Nations, I think it is predictable that everyone in Saskatchewan will suffer. *This is obviously* a "lose-lose" outcome. This outcome is a reality that must be understood clearly by key decision makers in Ottawa, Regina and Saskatoon. It must be communicated in fair and plain terms to the public.

This underscores the fundamental need for public involvement and awareness as part of constructing a climate in which positive changes can occur. A high-level political settlement, however technically and legally sophisticated it may be, will fail to achieve a real partnership in the future, or be capable of full implementation in the absence of broad public support. We are therefore talking about launching two parallel work programs: one aimed at creating a space where the basic intergovernmental consensus can be worked out at a technical and policy level; and the other aimed at creating a political environment supportive of the kinds of intergovernmental agreements we would like to see take shape.

I am taking this opportunity to call upon all of you here today – as legal

professionals, and as men and women concerned with Aboriginal peoples' future legal status and rights – to assist me with the design and execution of projects aimed at strengthening public knowledge, not only of treaties, but of the whole past and present conditions of this province so that we have a solid foundation for an informed discourse about our future relationship with First Nations. I believe it behooves you as practitioners in a very honoured profession to respond positively to this challenge.

As part of this climate building work, it is very important that we do not encourage the parties or the public to problematize – that is to focus on cataloguing all our prejudices and injustices. This is not to minimize the evils of the past nor the pain which many people experience today. It is simply that we desperately need to try to get beyond the pain and prejudice. Our challenge is very much like the challenge facing a married couple in counselling. If we get stuck in reliving the past, we will be stuck with the relationship we had in the past. We need to accept the inadequacy of where we are today and concentrate our efforts on understanding what each party has to offer to build a new, more equal and mutually beneficial relationship.

These are my preliminary thoughts about the role of my office and the overall approach we will take to our work. We will re-examine the process and report to the parties and the public annually, with a view to making refinements and learning from our experiences.

We have to face the fact that the substantive issues on the table are enormously complex. Time is of the essence. The unacceptable situation in which we find ourselves today took generations to evolve! Solutions must be created expeditiously. The Office of the Treaty Commissioner will be a positive intergovernmental forum. The challenge is very daunting, but the opportunity is unique. We need to build a new relationship. I believe the opportunity in Saskatchewan is tremendous, perhaps unrivalled anywhere in Canada. I look forward to your creative contributions – and constructive criticism – as we work towards a “win-win” goal.

- 1 The parties agreed that their memorandum, “Renewing the Office of the Treaty Commissioner,” would not itself constitute a “treaty” within the meaning of section 35(1) of the *Constitution Act, 1982*, thus its contents are strictly speaking not binding of the Crown beyond the term of the office.
- 2 It is probably no coincidence that the parties' choice of words echoes the United Nations Commission on Human Rights' Resolution 1899/56, which referred to Aboriginal treaties as a source of “innovative, forward-looking approaches” for the future relationships between Indigenous peoples and the states.