BOOK REVIEW

The Right Relationship: Reimagining the Implementation of the Historical Treaties

John Borrows & Michael Coyle, eds (Toronto: University of Toronto Press, 2017)

*Katherine Starks**

The Right Relationship: Reimagining the Implementation of the Historical Treaties, edited by John Borrows and Michael Coyle, is a timely collection. Published this year amid the "Canada 150" celebrations and their corresponding Indigenous activist and artistic responses,[1] *The Right Relationship* takes the 1764 Treaty of Niagara, rather than Confederation, as its starting point.[2] The 250th anniversary of this treaty between Britain and Indigenous peoples passed in 2014 with significantly less state fanfare, but was one "impetus for this book."[3] Still, *The Right Relationship* shares with Canada 150 a focus on national identity and the origins of Canada. The central concern of this collection is "the right relationship between Canada's Indigenous peoples and the modern nation that is

* B.A. (Saskatchewan), M.A. (Alberta); J.D. candidate, University of Saskatchewan.

1 See e.g. Resistance 150, a project initiated by Isaac Murdoch, Christi Belcourt, Tanya Kappo and Maria Campbell showcasing "Indigenous resistance, resilience, resurgence, rebellion, and restoration", and Unsettling Canada 150, a day of action planned for July 1 alongside promotion of Arthur Manuel & Grand Chief Ronald M Derrickson's book *Unsettling Canada: A National Wake-up Call* (Toronto: Between the Lines, 2015) throughout the month of June. Resistance 150, online: Twitter <twitter.com/resistance150>; Onaman Collective, "#Resistance150", online: <onamancollective.com/resistance150/>; Alicia Elliott, "#Resistance150: Christi Belcourt on Indigenous History, Resilience and Resurgence", *CBC* (22 February 2017), online: <cbc.ca>; "Unsettling 150: A Call to Action" (5 May 2017), *Idle No More* (blog), online: <www.idlenomore.ca/unsettling_150_a_call_to_action>; Unsettling Canada 150, online: <unsettling150.ca>.

2 John Borrows & Michael Coyle, "Introduction" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 3 at 4.

3 Jacinta Ruru, "A Treaty in Another Context: Creating Reimagined Treaty Relationships in Aotearoa New Zealand" in Borrows & Coyle, *ibid* 305 at 305.

Canada," which it frames as a foundational issue for the legitimacy of Canada.[4] The collection considers the Treaty of Niagara and subsequent historical treaties as the founding framework for this relationship, creating a partnership that may yet be reinvigorated as the basis of right relations today.

Borrows and Coyle seek a wide audience for this work, framing its topics as "not just academic concerns"[5] and directing the book to "lawyers, elected officials, public servants, journalists, and indeed all concerned citizens."[6] The degree to which the collection actually speaks to this multifaceted audience varies; Jean Leclair's legal theory contribution, if not totally inaccessible to a lay audience, may be somewhat difficult for a non-specialist to frame in terms of its immediate social relevance. Similarly, Francesca Allodi-Ross's tightly-focused treatment of the uncertainty regarding Aboriginal individuals' assertions of harvesting rights seems directed to practitioners.[7] However, as a whole, the collection is written in clear, accessible prose, and succeeds in contextualizing its concerns in ways that make it a relevant and welcome work for a broad non-specialist audience. Furthermore, in its focus on treaty remedies and implementation, this collection makes an important contribution to the study of Indigenous-settler relations and the fields of Aboriginal and Indigenous law.

The collection is divided into three parts, focusing in turn on history, Indigenous legal orders, and forums for treaty dispute resolution. Part I opens with Borrows's account of a set of constitutional narratives of Canada, from the doctrine of discovery to treaty federalism to recent section 35 jurisprudence that increases provincial power over First Nations.[8] In the second chapter, Coyle identifies significant gaps in Canada's legal approach to historical treaties and develops a legal framework for implementation of these treaties.[9] These two chapters set the stage for the collection as a whole. Coyle centres historical treaties as the basis for an enduring partnership between Indigenous and settler peoples, a key theme animating most of the subsequent essays. Borrows challenges the dominant framework of reconciliation under section 35, arguing that given the power dynamics that marginalize Indigenous peoples in Canada,

4 "Introduction", *supra* note 2 at 3.

5 *Ibid* at 5.

6 *Ibid* at 13.

7 Jean Leclair, "Nanabush, Lon Fuller, and Historical Treaties: The Potentialities and Limits of Adjudication" in Borrows & Coyle *supra* note 2 at 325; Francesca Allodi-Ross, "Who Calls the Shots? Balancing Individual and Collective Interests in the Assertion of Aboriginal and Treaty Harvesting Rights" in Borrows & Coyle, *supra* note 2, 149.

8 John Borrows, "Canada's Colonial Constitution" in Borrows & Coyle, *ibid* at 17.

9 Michael Coyle, "As Long as the Sun Shines: Recognizing That Treaties Were Intended to Last" in Borrows & Coyle, *supra* note 2 at 39.

reconciliation will typically force First Nations to align their interests with broader provincial interests, in essence "requir[ing] that Indigenous peoples reconcile themselves to colonialism."[10] Rather than embracing reconciliation, he recognizes the complexity of Indigenous-settler relations in Canadian political and judicial contexts over time and accordingly calls for a realistic outlook that seeks the best possible outcomes for Indigenous communities. As I discuss below, this skepticism of reconciliation is taken up in different ways by other contributors. As a whole, the collection is cognizant of both current Canadian jurisprudential and political realities. It is, at times, deeply critical of these realities and calls for reform or even radical change.

The remaining essays in Part I take up some specific issues in treaty implementation, with a focus on the role of history. Kent McNeil pointedly critiques one Crown expert witness to discuss broader issues of the development of the common law and the use of historical evidence.[11] Julie Jai traces the shifting levels of bargaining power held by First Nations treaty negotiators from Niagara to today, ultimately arguing that principles and mechanisms in modern treaties should be brought to bear on historical treaties.[12] Allodi-Ross highlights the tension between the collective nature of Aboriginal rights and the position of individuals who seek to assert an Aboriginal right as a defence; she calls on courts to bring clarity to this area of the law by balancing individual and collective interests.[13] Finally, Sari Graben and Matthew Mehaffey present a case study of funding negotiations under a modern treaty, arguing that courts must enforce modern treaties as constitutional documents limiting governmental power to prevent a return to the *Indian Act* model of external control over First Nations communities.[14]

Part II turns to Indigenous legal orders, beginning with Mark D. Walters's account of the Covenant Chain treaty, a relationship between the Crown and Indigenous peoples affirmed by the Treaty of Niagara. Arguing from first principles drawn from Anishinaabe origin stories, he outlines a legal framework for understanding this treaty as establishing a relationship in which right and

10 *Supra* note 8 at 33.

11 Kent McNeil, "Indigenous Rights Litigation, Legal History, and the Role of Experts" in Borrows & Coyle, *supra* note 2 at 70.

12 Julie Jai, "Bargains Made in Bad Times: How Principles from Modern Treaties Can Reinvigorate Historic Treaties" in Borrows & Coyle, *ibid* at 105.

13 *Supra* note 7.

14 Sari Graben & Matthew Mehaffey, "Negotiating Self-Government Over & Over & Over Again: Interpreting Contemporary Treaties" in Borrows & Coyle, *supra* note 2 at 164.

remedy are intertwined.[15] Aaron Mills/Waabishki Ma'iingan presents a scathing critique of social contract theory and an account of Anishinaabe constitutionalism based on the Anishinaabe teaching that all life is a unique and interrelated part of creation.[16] Heidi Kiiwetinepinesiik Stark focuses on the earliest treaties known to Anishinaabe law, which govern the relationship between Anishinaabe people, the Earth, and the Creator, and considers the implications of these sacred agreements today.[17] Sarah Morales adopts an intercultural approach in a case study of negotiations between the Hul'qumi'num Treaty Group and the Crown.[18] She analyzes the concept of good faith under Canadian, international, and Hul'qumi'num law, observing shared values among these approaches and arguing that Hul'qumi'num dispute resolution processes could help meet the needs of the parties in modern treaty negotiation.

Section III considers alternative forums for treaty dispute resolution. Jacinta Ruru discusses the Waitangi Tribunal, a permanent forum for treaty dispute resolution in Aotearoa New Zealand that has yielded some promising results for Maori communities, including a recent settlement that changed a national park into a legal personality under Maori management.[19] Jean Leclair explores the possibilities of adjudication through foundational questions regarding the purpose and morality of law and the courts.[20] Looking beyond domestic judicial enforcement, the collection concludes with two essays on international law. Sara L. Seck highlights international law's capacity to advance Indigenous rights through resistance movements and through Indigenous peoples strengthening their international legal personalities by taking on responsibilities as non-state actors.[21] Shin Imai discusses the international legal standard of "free, prior and informed consent" (FPIC) for development on Indigenous land, arguing that Canada should follow the lead of industry actors who have already embraced this standard.[22] Imai notes uncertainty as to whether the Liberal government elected in 2015 will accept FPIC; recent remarks of Indigenous Affairs Minister

15 Mark D Walters, "Rights and Remedies within Common Law and Indigenous Legal Traditions: Can the Covenant Chain Be Judicially Enforced Today?" in Borrows & Coyle, *ibid* at 187.

16 Aaron Mills/Waabishki Ma'iingan, "What is a Treaty? On Contract and Mutual Aid" in Borrows & Coyle, *ibid* at 208.

17 Heidi Kiiwetinepinesiik Stark, "Changing the Treaty Question: Remedying the Right(s) Relationship" in Borrows & Coyle, *ibid* at 248.

18 Sarah Morales, "(Re)Defining 'Good Faith' through *Snuw'uyulh*" in Borrows & Coyle, *ibid* at 277.

19 *Supra* note 3.

20 *Supra* note 7.

21 Sara L Seck, "Treaties and the Emancipatory Potential of International Law" in Borrows & Coyle, *supra* note 2 at 344.

22 Shin Imai, "Consult, Consent, and Veto: International Norms and Canadian Treaties" in Borrows & Coyle, *ibid* at 370.

Carolyn Bennett make clear that it has, at least nominally.[23] While FPIC in Canada is an emerging policy area that requires further scholarly attention, Imai's essay provides useful context for these ongoing developments.

A distinct strength of this collection is its treatment of Indigenous legal orders. It presents a fine example of rigorous and specific engagement with Indigenous law, rather than a vague or perfunctory reference to "the Aboriginal perspective." This engagement occurs throughout the collection, as an Indigenous perspective on the historical treaties as a framework for relationship is a premise of the work as a whole. It also occurs in different ways at the level of individual essays, such as in the comparative polyjural approach of Morales's contribution. However, the key contribution of this collection in terms of Indigenous legal orders is its treatment of Anishinaabe law. Three essays on Anishinaabe law account for more than a fifth of the text of the collection, addressing constitutionalism, remedies, and treaty law. Though clearly based in shared principles, these essays offer diversity and debate rather than homogeneity. To cite just one example, Walters and Mills present divergent treatments of treaty remedies in Anishinaabe law. Walters, while complicating the separation of "right" and "remedy" and emphasizing treaty as a structure for relationship, nonetheless seriously engages with possible remedies in the Canadian courts, such as declaratory relief and the extension of cooperative federalism.[24] Mills argues that under Anishinaabe constitutionalism, "treaty isn't even the sort of thing capable of giving rise to a legal remedy"; as a comprehensive framework for relationship among different communities, treaties demand structural political change in which they are recognized as the basis of citizenship.[25] For her part, Stark argues that treaty remedies can only be approached through the wider issue of treaty interpretation; this reframing becomes the basis of her contribution on Anishinaabe sacred law and its implications for modern relationships between Indigenous and settler peoples and the Earth.[26] Thus, within their nationally specific frame, the contributions of Walters, Mills, and Stark offer a window into Anishinaabe law as a rigorous, contested, living legal tradition.

23 *Ibid* at 377, n 22; The Honourable Carolyn Bennett, Address (United Nations Permanent Forum on Indigenous Issues 16th Session delivered at the United Nations Headquarters, General Assembly Hall, 24 April 2017), online: Indigenous and Northern Affairs Canada News Releases <https://www.canada.ca/en/indigenous-northern-affairs/news/2017/04/united_nations_permanentforumonindigenousissues16thsessionopenin.html?=undefined&wbdisable=true>; Gloria Galloway, "Ottawa Drops Objections to UN Resolution on Indigenous Consent", *The Globe and Mail* (24 April 2017), online: <theglobeandmail.com>.

24 *Supra* note 15 at 202-05.

25 *Supra* note 16 at 225.

26 *Supra* note 17.

As this extensive treatment of Anishinaabe law underscores the value of deep engagement with a particular Indigenous legal order, it inevitably begs the question of those Indigenous legal orders the collection does not specifically address. It also creates something of a focus on central Canada in *The Right Relationship*. Such limitations are less a failing of the work than a necessary implication of the breadth of the task the collection sets out for itself. As a point of entry into settler-Indigenous relations in Canada as whole, the historical treaties are at once challengingly broad — evidenced, for instance, in the numerous different Indigenous legal traditions raised by these treaties — and arguably under-inclusive, given the significant tracts of Canada not covered by historical treaties. *The Right Relationship* navigates these challenges admirably, striking a balance of depth and breadth. The focus on a particular Indigenous legal tradition is surely valuable, both for expressing complexity within that tradition, and for offering a corrective to a superficial or pan-Indigenous approach. Anishinaabe law is arguably a fitting area of focus for this collection, given the centrality of the Treaty of Niagara to the work.[27] Furthermore, discussion of modern treaties, in terms of negotiation and implementation of these agreements in Yukon and British Columbia, is threaded throughout the collection, buttressing its relevance to Canada as a whole.

A further strength of this work is the critical dialogue it establishes, not just with the wider scholarship, but also among the contributions to the collection. The editors note that as part of the process of developing this collection, the contributors gathered at two colloquia to discuss its areas of focus.[28] Almost all the authors speak directly to the other contributors and make an effort to position their work within the collection. This collaborative approach has the side effect of highlighting those essays that fail to engage with the themes in which the total work is invested. For instance, McNeil's focus on the Royal Proclamation without mention of the Treaty of Niagara sits somewhat uncomfortably with the rest of the collection; while his attention to current evidentiary issues in Canadian courts is a valuable perspective, his essay misses an opportunity to connect this reality to the question of treaty implementation at the heart of this work. Generally, though, these efforts succeed in creating a cohesive scholarly contribution. Moreover, this conversation is a contribution in itself, as the collection models a productive mode of engagement across different approaches in this crucial and at times contentious field.

27 Of course, many different Indigenous nations, not all Anishinaabe, agreed to the Treaty of Niagara. As Mills notes, the meeting renewed the treaty between the Haudenosaunee and Britain, and extended it to the Western Confederacy, including Anishinaabe and Cree peoples; some other Indigenous nations opted not to attend: *supra* note 16 at 240.

28 *Supra* note 2 at 5.

The cohesive scholarly contribution of this work, along with the diversity of its perspectives, can be usefully traced through the themes of reconciliation and treaty introduced by Borrows and Coyle in their opening chapters. As mentioned above, several contributors share Borrows's skepticism of reconciliation under Section 35 and offer reconsiderations — or indeed entire redefinitions — of reconciliation as it pertains to the topics they take up. In perhaps the most comprehensive rejection of the current reconciliation paradigm, Mills argues that reconciliation ought to require the settler constitutional order to reconcile itself to treaty as the basis of citizenship.[29] Seck gestures toward a similarly transformative agenda, positing that Indigenous peoples could embrace norms of environmental stewardship as an international legal responsibility to work toward the "transformation of [the] destructive narrative of reconciliation and colonialism" identified by Borrows.[30] Others deploy the concept of reconciliation strategically — Jai advocates for reconciliation that recognizes Indigenous sovereignty and emphasizes government-to-government relationships between the Crown and Indigenous peoples,[31] while Walters sees the judiciary's support for reconciliation through political negotiation as an opening for non-traditional treaty remedies.[32] What connects these pieces, and the collection as a whole, is a forward-looking orientation focused on treaty as the framework for settler-Indigenous relations.

The Right Relationship is a wide-ranging collection that explores the roles of history, the courts, Indigenous law, and extrajudicial forums in the implementation of historical treaties. It represents a significant scholarly contribution in these areas, especially in its focus on how disputes might be resolved in the treaty relationship and what remedies may be available for failures to implement treaty promises. This is a boundary-breaking and relationship-building collection, bringing together a diverse set of perspectives on Canadian Aboriginal law and Indigenous legal orders, and speaking to a broad audience of concerned citizens within and beyond the legal profession. At Canada 150, *The Right Relationship* is a crucial reminder of a much longer history, in which treaties — from the treaty between Anishinaabe people and creation reaching back to time immemorial, to the 1763 Treaty of Niagara, to modern treaties — have governed right relations on this land. *The Right Relationship* embraces this history as a means to imagine new ways forward in Indigenous-settler relations in Canada.

29 *Supra* note 16 at 242-43.
30 *Supra* note 21 at 368.
31 *Supra* note 12 at 144.
32 *Supra* note 15 at 202-03.