

ARTICLE 8

THE SHIP IS NOT THE ONLY VESSEL ON THE RIVER: REVISITING FIRST NATIONS' MOBILITY RIGHTS UNDER ARTICLE III OF THE 1794 JAY TREATY

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ABSTRACT

In 1794, the *Treaty of Amity, Commerce and Navigation* (“*Jay Treaty*”) was concluded between the United States of America and the British Crown. This treaty came on the heels of the British-American imposition of an international border, dividing the Haudenosaunee Confederacy in half without their consent. But while the *Jay Treaty* bears the signatures of only the two above-mentioned settler governments, they were not the only parties to the agreement. Article III provides that “Indians on both sides of the boundary line” are “free to pass and repass” the border. In this paper, I argue that courts have been wrong to reject that this provision gives rise to the Crown’s treaty promise to uphold the mobility rights of the Mohawk and Huron claimants who raised them. I argue that the provision must be considered in light of the Crown’s pre-existing commitment to the Silver Covenant Chain treaty alliance, premised on an entirely different conception of treaty. I canvass two legal developments which suggest that the Crown’s obligations to the Silver Covenant Chain would need to be central to any future *Jay Treaty* First Nations’ mobility rights claims, and would support a finding in favour of such rights.

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INTRODUCTION

“The roots of life of the Haudenosaunee are in Haudenosaunee lands and hands, entwined with the symbolic great white pine, the Tree of Peace. The organic nexus of the confederacy is a network of the White Roots of Peace moving out from this tree. Even through turbulent and often disheartening centuries of colonial intrusion, the roots grow in the rich, dark earth. Below the topsoil, they quietly transgress all artificial boundaries of nation-state and surveyed property lines; they have no fidelity to land titles.”

– Vera B. Palmer¹

Imagine that you had been happily living in your neighborhood for as long as you could remember. You had carefully selected the place you were going to live based on proximity to your work, the grocery store, and a good school for your children. Suddenly, a new group of residents decides to form a neighborhood committee. This committee takes it upon itself to make decisions for the wellbeing of the community, and one day, they decide to draw a border through the neighborhood. This border runs right through your front yard,

1 “The Devil in the Details: Controverting an American Indian Conversion Narrative” in A. Simpson and A. Smith, eds., *Theorizing Native Studies* (Durham: Duke University Press, 2014) 266 at 292.

and stands between your home and the places you need to go on a daily basis: your work, your children's school, and your family members' homes. The neighborhood association never consulted you before making these decisions. Suddenly you have an armed guard looking through your grocery bags on your way home from work. You are now regularly late to pick up your children from school because you are routinely stuck in a line-up of cars at the border checkpoint. You know these guards have been given broad discretion to detain you "for the preservation of public safety," so you keep your frustrations to yourself. Along with the physical imposition of the border, you must also now contend with two sets of laws. The laws where you live are now different from the laws where you work. There are also two sets of currencies. The value of the currency on the side of the border where you work has plummeted, and suddenly you are taking a hefty pay cut. You have public health insurance, but only on the side of the border where you are a resident, so your weekdays are spent working in a jurisdiction where, should anything happen to you, you would have to pay out of pocket. The border now costs you time and money, weighs on your mental health, and impacts you in so many ways that you can scarcely untangle them all. The border is everywhere; seen and unseen.

In 1783, when an international border was drawn through the Haudenosaunee Confederacy to delineate the United States from what would later be called Canada, it is said the British Crown promised their Haudenosaunee allies that the line would be drawn "ten feet above their heads."² This border was drawn in the context of the Crown's commitment to the Haudenosaunee people and a number of other First Nations in the Great Lakes region through the Silver Covenant Chain treaty relationship. At the core of the Silver Covenant Chain treaty was the agreement by all parties to uphold the principles of sovereign non-interference—a principle that this border would violate. To this end, Article III of the 1794 *Treaty of Amity, Commerce, and Navigation* ("*Jay Treaty*") affirmed a promise to uphold the right of "Indians on either side of [the] boundary line to pass and repass freely and undisturbed". The substance of Article III was accompanied by the Crown's assurances that the border was merely an internal agreement between the European settler governments, and would not apply to the Nations who had been living there for centuries prior to European arrival.

While First Nations' mobility rights have been implemented to a limited extent in the United States, pursuant to the *Jay Treaty*, Canada continues to deny it is bound to uphold any iteration of Article III.³ Thus far, Canadian courts have supported this position. This denial has had particularly negative implications for the Mohawk people of Akwesasne, who have contended with the international border running through their territory for the past 200 years. In Akwesasne, the border divides families; compels members to carry Canadian or American identity documents; and has resulted in frequent harassment of community members by border guards, including vehicle confiscation and detention in immigration holding facilities.⁴ The border also means residents have been forced to contend with two federal, two provincial and two county jurisdictions, two currencies, and two settler-state imposed bodies of tribal governance: the Mohawk Tribe on the American

2 Carrie E Garrow. "The freedom to pass and repass: can the UN declaration on the Rights of Indigenous Peoples keep the US-Canadian border ten feet above our heads?" in Elvira Pulitano, ed, *Indigenous Rights in the Age of the UN Declaration*, (Cambridge: Cambridge University Press, 2012) 172 at 172.

3 For examples of First Nations mobility rights implemented in the U.S. pursuant to the *Jay Treaty*, see Greg Boos et al, "Canadian Indians, Inuit, and Métis: An Exploration of the Unparalleled Rights Enjoyed by American Indians Born in Canada to Freely Access the United States" (2014) 4:1 Seattle J Envtl L 343 at page 347.

4 Garrow, supra note 2 at 172-73; Dave Dean, "The Canadian Border Service Agency Held a Paraplegic Woman Hostage" (7 March 2014), Vice Media (news), online: https://www.vice.com/en_ca/article/3b4738/the-canadian-border-held-a-paraplegic-woman-hostage, archived at <<https://perma.cc/6BH6-7J4T>>.

side and the Mohawk Council of Akwesasne on the Canadian side. The Mohawk people of Akwesasne have raised the *Jay Treaty* several times in the courts as evidence that they never consented to the border. The last word in that regard is that the *Jay Treaty* cannot be construed as a treaty within the meaning of section 35(1) of the *Constitution Act, 1982* because no First Nations party was a signatory.

In this paper, I argue that judicial findings on *Jay Treaty* First Nations mobility rights claims have fallen short of articulating the essence of the Crown's promise. I argue that examining the contents of Article III through the lens of the Crown's responsibilities to the Silver Covenant Chain would allow a court to properly construe the contents of the provision, and to find for a section 35(1) Aboriginal treaty rights claim brought by a party to that alliance. Such a finding would involve making space in Canadian constitutional law for the coexistence of Haudenosaunee and Canadian conceptions of treaty-making and treaty relationships.

Part I of this paper provides an overview of the theoretical and historical context. In this part, I canvass the history around the Silver Covenant Chain and *Jay Treaty* negotiations, starting from the origins of the Haudenosaunee Confederacy around the 15th Century. I focus on the central role the alliance between the British Crown and the Haudenosaunee Confederacy played in forming the Silver Covenant Chain, and in the British Crown's tabling of "Indian" mobility interests in the *Jay Treaty* negotiations. In part II, I canvass how the courts have treated the *Jay Treaty* mobility rights assertions brought by Mohawk and Huron claimants. Finally, in part III, I talk about two relevant developments in the state of the law.

The first of these two developments is the conclusion of the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP"),⁵ to which Canada has given an unqualified endorsement. In addition to affirming Indigenous self-determination, UNDRIP articulates a responsibility of settler-colonial states to honour treaties and other agreements made with Indigenous peoples. The second development is in the realm of section 35(1) treaty interpretation. In 1999, two years after the last treatment of a First Nations' mobility claim under *Jay Treaty*, *R v Marshall* held that Aboriginal treaty rights interpretation must involve consideration of the historical, cultural, and normative context within which the agreement arose. These developments together suggest that if a section 35(1) *Jay Treaty* mobility rights claim were brought today, the Silver Covenant Chain and corresponding treaty framework would have to be invited into the fold as a central part the substance of Article III of the *Jay Treaty*.

I. THE SHIP AND THE CANOE TRAVELLING DOWN THE RIVER TOGETHER: ARTICLE III OF THE JAY TREATY AND THE SILVER COVENANT CHAIN

A. Settler-Colonialism and Human Rights Discourse

This paper is framed both in the context of settler-colonialism and human rights discourse. Settler-colonialism is the structural acknowledgement that those of us who are non-Indigenous living on land that was taken through colonization are the beneficiaries of the dispossession of Indigenous lands. It also acknowledges the complex web of policies by settler-colonial states aimed at the extinguishment and de-legitimization of the pre-existing Indigenous political and legal orders.

5 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp no 53, UN Doc A/RES/61/295 (2007) at Arts 36 and 37.

As a normative frame, settler-colonialism propagates its own internal definition of colonialism as a period far in the Canadian past, whereby the “historical” loss of Indigenous life and land theft by Britain (and later Canada) are understood to be the unfortunate but natural and necessary consequences of establishing the Canadian state. However, as Glen Coulthard argues, while Indigenous pushback against the overtly violent and genocidal nature of Canada’s earlier colonial policies may have forced Canada to shift to a “seemingly more conciliatory set of discourses and institutional practices,” at its core “the relationship between Indigenous peoples and the [Canadian] state has remained *colonial* to its foundation.”⁶

The internal manifestations of colonialism laid out by Coulthard include an effort to have those who undertake to undo colonial harms accept the institutions borne of the settler-state ideology—i.e. in our case, the principles and norms in Canadian law—as the natural (or best) tools with which colonial harms should be undone. It follows that an appeal to the framework of the Canadian Constitution—built upon the liberal notion of supremacy of individual rights, and the vehicle of “human rights” as a means of furthering the interests and freedoms of all persons, especially groups chronically disadvantaged by the status quo—is an appeal to the very power-structure responsible for justifying and perpetrating ongoing colonial harms.

That settler-colonialism is a power structure responsible for both past and *ongoing* colonial harms, is central to the analysis put forward in this paper. This understanding also situates the Canadian political and legal order in relation to the sovereignty of the Haudenosaunee and other First Nations of the Great Lakes region who were party to the Silver Covenant Chain, and gives voice to the power dynamic and normative tension therein.⁷ Understanding the sovereignties of Haudenosaunee and other First Nations who were party to the Silver Covenant Chain as being “nested,”⁸ and in a dissonant relationship with the imposed sovereignty of Canada as a settler-state, helps us better appreciate the tension underlying the Crown’s promises set out in Article III of the *Jay Treaty* with regard to First Nations’ mobility rights.

With that, I provide a caveat to my use of human rights discourse. Human rights discourse is useful to the extent that it enables an articulation of First Nations’ mobility rights through treaty relationships as conceived in Canadian and international human rights law. However, to accept the argument put forward in this paper, that a fundamental shift is needed whereby space is made for other legal paradigms informing Crown-Indigenous treaties, it is important to acknowledge that this language is being used solely because it belongs to the Canadian settler-state legal paradigm and therefore any solutions explored in that space must be framed accordingly. The use of human rights discourse should not be understood as a natural logic or only means of redress for the broken treaty promises discussed in this paper. Finally, a note that my interchangeable use of the terms “First Nations,” “Indian,” “Aboriginal,” and “Indigenous” at different points in this paper are intentional. Each of these terms has a distinct legal definition tied to different times (i.e. Canadian law pre and post 1982), legal spaces (i.e. international and domestic) and peoples (i.e. First Nations being distinct from Inuit and Métis peoples). These distinctions are all settler-imposed, but the scope of this paper is such that they all have a place.

6 Glen Sean Coulthard, *Red Skin White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014) at 6.

7 The tension of multiple existing sovereignties in the context of settler-colonialism has been dubbed “nested sovereignties” by Audra Simpson. *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Durham: Duke University Press, 2014)

8 *Ibid.*

B. The Haudenosaunee Confederacy, the Fur Trade, and the Silver Covenant Chain

Founded between the mid-1400s to late 1500s, the Haudenosaunee Confederacy is an alliance between the Mohawk, Oneida, Cayuga, Onondaga, and Seneca Nations; joined in 1715 by the Tuscarora.⁹ As Chiefs have told and retold over the years, prior to the alliance, the six nations had been engaged in a lengthy war, which had taken its toll on all nations involved. In an effort to put an end to the wars, a man who came to be called the Peacemaker travelled to the nations and convinced them to join together under the *Kaienerekowa* or ‘Great Law of Peace’ and put an end to the wars. To seal the alliance, the five founding nations met at Onondaga Lake and ratified their commitment to the *Kaienerekowa* with the *Aionwàtha* wampum belt.¹⁰ The *Aionwàtha* depicts the Great White Pine at Onondaga, two squares to the east representing the Oneida and Mohawk Nations, and two squares to the west for the Cayuga and Seneca Nations. These depictions reflect the geographical relationship between the respective nations, and the mutual understanding that the Confederacy share one heart as a united people.¹¹

Mohawk legal scholar Joyce Tekahnawiiaks King notes that the *Kaienerekowa* contains four core directives premised on the notion of responsibility: 1) offer thanks; 2) don’t take the first “catch” you encounter; 3) take only what you need; and 4) leave some for future generations.¹² These directives are also reflected in the Thanksgiving Address (*Ohen:ton Karihwaterhkwen*) and Creation Story (*Tsi kiontonhwentsison*); two other central elements of the Haudenosaunee worldview along with the *Kaienerakowa*.¹³ In contrast with the political ideology that informed European settlers, the foundations of the Haudenosaunee Confederacy have never been based on the subjugation of its members under a central ruling authority or the domination of humans over other beings and elements of the natural world.¹⁴ Instead, the notion that human beings have a responsibility to act in a good way toward one another and all beings and elements of the natural world forms the basis of the shared moral, legal, and spiritual commitment of the Haudenosaunee people.¹⁵

When early European settlers arrived on Haudenosaunee territory in the early 1600s, various trading and military relationships arose between them, the Haudenosaunee, and neighboring First Nations in the Great Lakes Region. This early period of contact—dubbed the “Beaver Wars”—was marked by power struggles between European groups and First Nations for control over the fur trade.¹⁶ Haudenosaunee legal principles, such as those discussed above, were put forth as the guiding basis for the relationship with

9 Darren Bonaparte, *Creation & Confederation: The Living History of the Iroquois*, (Akwasasne: Wampum Chronicles, 2006) at 46; Li Xiu Woo, *Canada v the Haudenosaunee (Iroquois) Confederacy at the League of Nations: Two Quests for Independence* (1999) [unpublished, archived at McGill University Faculty of Law Library] at 7.

10 *Ibid* at 123 and 125.

11 *Ibid* at 115.

12 Joyce Tekahnawiiaks King, *The Value of Water and the Meaning of Water Law for the Native Americans Known as the Haudenosaunee*, 16 Cornell J L & Pub Pol’y (2007) 449 at 457.

13 Barbara A Grey (Kanatiyosh), “The Effects of the Fur Trade on Peace: A Haudenosaunee Woman’s Perspective” in Louise Johnston ed, *Aboriginal Peoples and The Fur Trade: Proceedings of the 8th North American Fur Trade Conference, Akwasasne* (Akwasasne Notes Publishing: Akwasasne, 2001) at 73; King, *Ibid* at 453.

14 Woo, *supra* note 9 at 50; Grey, *Ibid* at 74.

15 Grey, *supra* note 13 at 74; King, *supra* note 12 at 452.

16 For a more detailed account of the Beaver Wars, see John C Mohawk, “Unambiguous Conquests Haudenosaunee Warfare (1603-1673)” in Louise Johnston, ed, *Aboriginal People and the Fur Trade: Proceedings of the 8th North America Fur Trade Conference, Akwasasne*, (Akwasasne: Akwasasne Notes Publishing, 2001) at 100-101

European settlers when the fur trade alliance was formed between the Confederacy and early settlers. They were expressed first through the Two-Row Wampum (“*Kaswentha*”), and later in the Silver Covenant Chain.¹⁷

The *Kaswentha* is a treaty, which was first presented to the Dutch by the Haudenosaunee in 1613. A wampum belt with two purple rows on a bed of white beads, the *Kaswentha* represents a canoe and a ship travelling down a river side-by-side. The canoe holds the Haudenosaunee peoples, cultures, customs and laws, while the ship houses European settlers and their ways of life. The principles of the *Kaswentha* provide that the vessels travel together in a spirit of friendship and mutual respect. While those in each vessel agree to provide aid to one another to the best of their ability if the need arises, a fundamental basis of the relationship is the agreement not to interfere with one another.¹⁸ In essence, the *Kaswentha* is a solemn agreement between sovereign entities to work together, respect one another’s differences, and most importantly respect the sovereignty of the other.

With regard to Haudenosaunee treaty-making, there are crucial distinctions to be made from “treaty” as put forward in the settler-European frame. Anishinaabe legal scholar Aaron Mills describes the settler-European foundations of treaty as a “treaty as a contract” which limits the agreement to a set of written terms understood to be enforceable between only signing parties.¹⁹ The treaty as contract is drafted out of pre-emptive self-defense to protect one party against another party’s possible future breach.²⁰ According to Mills, a treaty as a contract “doesn’t link us together [...] it’s a chain that binds us apart and anchors us in perpetuity and with certain division.”²¹ By contrast, Penelope Myrtle Kelsey describes Haudenosaunee treaty-making as “agreements that are to be understood and followed in principle, not in the letter.”²² For example, as described in the above paragraph, the *Kaswentha* is not written document. Rather, it sets out guiding principles informing a treaty relationship where parties commit themselves to working together to resolve differences and changing circumstances as they arise. The Haudenosaunee conception, like the Anishinaabe frame distinguished by Mills, is reflective of a “treaty as mutual aid” rather than a contract.²³ It speaks to an understanding of a treaty as a relationship rather than a treaty as the contents of a document.²⁴

The nonhierarchical structure of this type of relationship stood in stark contrast to European imperial efforts to exert power over the peoples and lands they encountered, and over other European powers vying for control of the fur trade. An example of this contrast is that during the fur trade Haudenosaunee and Anishinaabe Nations made flexible arrangements regarding hunting on one another’s territory and formed independent

17 Li Xiu Woo, *supra* note 9 at 51; see also Penelope Myrtle Kelsey, *Reading the Wampum* (Syracuse: Syracuse University Press, 2014) at 3.

18 Kelsey, *ibid* at 2.

19 Aaron Mills (Waabishki Ma’iingan), “What is a Treaty? On Contract and Mutual Aid” in John Borrows and Michael Coyle eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 209 at 213.

20 *Ibid* at 215.

21 *Ibid*.

22 Kelsey, *supra* note 17 at 2.

23 Mills, *supra* note 19 at 215.

24 See Aaron Mills’ discussion of treaty as a relationship as conceived in Anishinaabe Constitutionalism. Though the Silver Covenant Chain has its roots in Haudenosaunee treaty-making (Mark D Walters, “Rights and Remedies within Common Law and Indigenous Legal Traditions: Can the Covenant Chain be Judicially Enforced Today?” in John Borrows and Michael Coyle eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 187 at 190) the principles of the *Kaswentha* also put forward a vision of a treaty as a relationship. To this extent Mills’ discussion provides an excellent context for further reading on how a treaty as a relationship is contrasted with the notion of a treaty as a contract as conceived in Canadian constitutionalism. *Supra* note 19 at 225.

trade relationships despite French and British efforts to draw rigid lines distinguishing the territory from their respective First Nations' allies.²⁵ The European tendency to equate sovereignty with subordination and domination was precisely what gave rise to the need for the principles of the *Kaswentha* to be asserted as a reminder that European sovereignty could not encroach upon that of the Haudenosaunee people.²⁶

When the British defeated the Dutch and established a trading relationship with the Haudenosaunee, the principles of the *Kaswentha* were put forward as the basis of this relationship, too. In 1764, following Britain's defeat by an alliance of First Nations from the Great Lakes region (the "Pontiac Wars"), the Crown convened a peace conference at Niagara. The Pontiac Wars had been sparked by Britain's violation of trading protocols with the Huron, and resulted in them losing some major trading posts.²⁷ Present at the peace conference were representatives from several First Nations from the Great Lakes region including from the Huron, Sault, Anishinaabe and Haudenosaunee member nations.²⁸ At this conference, the Crown committed itself to the principles of the Silver Covenant Chain.²⁹

Drawing on principles of the *Kaswentha*, the Silver Covenant Chain was put forward at the Conference of Niagara as the framework that would guide the relationship between all nations in attendance. It affirmed that the vessels of all nations would travel down the river together in mutual respect for one another's sovereignties. The written and oral accounts of the meeting also affirmed their commitment to meet as needed to "polish the chain;" i.e. renew their bond, re-evaluate the terms of their relationships and, if necessary, modify them.³⁰ Polishing the chain speaks to an understanding of a treaty relationship—like any relationship—as one which is bound to change over time. But while the treaty relationship, as a dynamic force, was subject to change, the nations bound together with the Covenant Chain agreed the core, mutual respect for one another's sovereignties was the purpose of their alliance. Accordingly, a neglect of this core principle, or any effort to transgress it, would risk rusting or even breaking the chain. Thus, the entire relationship depended on the parties upholding the commitment to respect each other's sovereignty and to polish the chain.

Unsurprisingly, the written records of the conference suggest a backhanded British intention to impose their sovereignty over the other nations in attendance.³¹ However, a thorough canvassing of the record reveals that these intentions were not communicated to other parties in attendance, and were out of step with the purpose of the conference.³² The record reveals numerous references to canoes and smoothing the waterways as analogy for establishing good relations.³³ For example, chiefs in attendance noted that the Crown-

25 Jonathan Hart and Joan Holmes, "We Have Never Parted with Such a Power"—Assertions of First Nations Sovereignty and the Right to Trade and Travel in the Seventeenth and Eighteenth-Century Great Lakes Region" in Louise Johnston ed, *Aboriginal Peoples and The Fur Trade: Proceedings of the 8th North American Fur Trade Conference, Akwesasne* (Akwesasne Notes Publishing: Akwesasne, 2001) 48 at 51.

26 Li Xiu Woo, *supra* note 17 at 50.

27 Hart and Holmes, *supra* note 25 at 51.

28 *Ibid* at 56.

29 John Burrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self-Government" in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: U.B.C. Press, 1997) 155 at 161; *Ibid* at 56; Walters, *supra* note 24 at 192.

30 Mark D Walters, "Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History After Marshall" (2001) 24: Dal LJ 75 at 77.

31 *Supra* note 16 at 90

32 *Ibid*.

33 Walters, *supra* note 29 at 197.

representative, Sir William Johnson, stated that he “hoped before he left Niagara to render the Lakes, and waters perfectly smooth.”³⁴ Moreover, Canadian constitutional scholar Mark Walters notes “except for the Hurons of Detroit and the Senecas of Chenussio, no specific terms of peace were signed at Niagara; rather the unwritten Covenant Chain relationship was simply reaffirmed.”³⁵ Over and above the complexity of the written and oral accounts of the conference one thing appears clear: all the parties in attendance—British and First Nations—understood the principles of the Silver Covenant Chain and affirmed a commitment to them as the guiding basis for their relationship.

C. Polishing the Chain: The British Crown’s Promise to “Indians” in Article III of the 1794 *Jay Treaty*

And so this normative tension continued between the ongoing British imperialist efforts to carry out the settler-colonial agenda of land acquisition and de-legitimization of Indigenous governance, and the Crown’s responsibilities to the Silver Covenant Chain. When Britain and the newly independent United States agreed to divide land between them in the 1783 *Treaty of Paris*, they did so without any input or consultation with the nations to whom they were responsible in this treaty relationship.³⁶ Angered by bilateral decisions such as the British concessions of forts that had become Haudenosaunee strongholds of military and trade, and the drawing of a border through their territory without their consent, the Haudenosaunee threatened military action against the British.³⁷ Fearing another war, the British returned to the negotiation table to lobby Haudenosaunee interests with a new proposal: an “Indian buffer state” between the two borders where neither European party would interfere, and British retention of two of the forts.³⁸

The 1794 *Treaty of Amity, Commerce and Navigation* (“*Jay Treaty*”) was concluded between the United States and Britain to address outstanding disagreements following the war. Dubbed the *Jay Treaty* after the chief American negotiator John Jay, in part, its purpose was also to preserve Britain’s trade and military alliance with the Haudenosaunee. Though Britain’s “Indian buffer state” proposal was ultimately unsuccessful, their efforts did culminate in a guarantee under Article III that the border would not apply to “Indians.”³⁹ The article reads:

It is agreed that it shall at all times be free to [...] the Indians dwelling on either side of said boundary line, freely to pass and re-pass by land or inland navigation, into the respective territories and countries of the two parties on the continent of America [...] and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other [...]

[...] No duty of entry shall ever be levied by either party on peltries brought by land, or inland navigation into the said territories respectively, nor shall

34 *Ibid* at 198.

35 *Ibid*.

36 Alan Taylor, “The Divided Ground: Upper Canada, New York, and the Iroquois Six Nations, 1783-1815” (2002) 22: 1 *J Early Republic* 55 at 64.

37 Britain’s recent defeat in the Pontiac Wars demonstrated that the threat of military action was real, and if followed through with would have had dire consequences for British trade. See Hart and Holmes, *supra* note 25 at 51; see also Robert W Venerables, “The Jay Treaty and the Haudenosaunee Traders: An Affirmation of Historical Precedents” in Louise Johnston ed, *Aboriginal Peoples and The Fur Trade: Proceedings of the 8th North American Fur Trade Conference, Akwesasne* (Akwesasne Notes Publishing: Akwesasne, 2001) at 32.

38 Denise Evans, “Superimposed Nations: The Jay Treaty and Aboriginal Rights” (1995) *Dal J Leg Stud* 216 at 220.

39 Timothy D Willig, *Restoring the Chain of Friendship: British Policy and the Indians of the Great Lakes, 1783-1815*. (London: University of Nebraska Press, 2008) at 12.

the Indians passing or re-passing with their own proper goods and effects of whatever nature, pay for the same any import or duty whatever. But goods in bales, or other large packages unusual among the Indians shall not be considered as goods belonging bona fide to Indians.⁴⁰

It should be noted that Article III of the *Jay Treaty* also affirmed mobility rights of British subjects and citizens of the United States. However, these guarantees of free passage are distinguishable from those accorded to First Nations for at least two reasons: Firstly, and most importantly, Britain's commitments to the Silver Covenant Chain precluded them from asserting their sovereignty over the members of that treaty relationship by limiting their mobility with a border. The promise of non-application of the border under Article III of the *Jay Treaty* was a necessary "polishing of the chain" on their part to maintain their obligations to that treaty relationship. Secondly, as discussed below, subsequent treaties between Britain and the United States affirmed First Nations' mobility rights apart from those of the "citizens and subjects" of the United States and Britain, respectively. When the War of 1812 broke the tenuous peace, the contents of the *Jay Treaty* were suspended, including all the mobility rights guaranteed under Article III.⁴¹ But the 1814 *Treaty of Ghent* reinstated and reaffirmed these guarantees exclusively for "Tribes and [First] Nations" after the hostilities had ended. Article IX assured that:

The United States engage[s] ... to restore to such Tribes or Nations respectively all the possessions, rights, and privileges which they may have enjoyed or been entitled to in one thousand eight hundred and eleven ... [H]is Britannic Majesty engaged on his part ... to restore to such Tribes or Nations respectively all the possessions, rights, and privileges which they may have enjoyed or been entitled to in one thousand eight hundred and eleven.⁴²

The right of "Indians" to move freely across the border, as expressed in Article III of the *Jay Treaty*, was captured—and therefore restored—by this provision.⁴³ Delegates of the Crown also made representations to this effect during conferences with First Nations around the time that these agreements were concluded. These representations formed the context surrounding the words in both the *Jay Treaty* and the *Treaty of Ghent*. In this regard, documentation shows assurances from the Crown delegates that the words of these treaties would be honoured by the Crown, and were intended to be permanent.⁴⁴

This historical background establishes that both the *Jay Treaty* and the *Treaty of Ghent*—though formal agreements between Britain and the United States—occurred within the context of Britain's Silver Covenant Chain treaty responsibilities to the nations with whom they were bound. As the agreed-upon framework for British and First Nations sovereignties to co-exist, the Silver Covenant Chain established a basis for a treaty relationship premised on the principles of renewal, reciprocity, and the promise to respect one another's sovereignties.

40 *Treaty of Amity, Commerce, and Navigation (Jay Treaty)*, United States and Britain, 19 November 1794, 8 Stat 116 130 at 130.

41 Evans, *supra* note 38 at 221.

42 *Treaty of Peace and Amity between His Britannic Majesty and the United States of America (Treaty of Ghent)*, United States and Britain, 24 December 1814, 8 Stat 218 at 22–23.

43 *Ibid.*

44 Evans notes that Article XXVIII of the *Jay Treaty* states that "the first ten articles of the treaty shall be permanent [Evans, *supra* note 38 at 219]; see also record of Lord Dorchester speech to a council of chiefs in 1791" "But brothers, this line, which the King marked out between him and the States even supposing the Treaty had taken effect, could never have prejudiced your rights" in *Mitchell v Minister of National Revenue*, [1997] FCJ No 882, 1997 CarswellNat 3604 at para 190.

But in keeping with the settler-colonial agenda that travelled in an uncomfortable dissonance alongside the Crown's commitments to the Silver Covenant Chain, as soon as the alliance was no longer convenient or strategically necessary, the Crown went back on their promises—including those guaranteed under Article III of the *Jay Treaty*. From the time since First Nations' mobility rights were affirmed as pre-existing rights, member nations of the Haudenosaunee Confederacy have remembered these words, and asserted them as evidence that they never consented to the border. The compounding consequences of the border on the lives of the Mohawk people of Akwesasne has made the need for Canada's implementation of *Jay Treaty* First Nations' mobility rights especially crucial—and where the Crown refused to honor their promises, they have turned to the courts.

II. OBSCURING THE CANOE FROM VIEW: JUDICIAL TREATMENT OF *JAY TREATY* FIRST NATIONS' MOBILITY RIGHTS

The following decisions illustrate Canadian courts' treatment of claims made pursuant to Article III of the *Jay Treaty*. Thus far, such claims have culminated in a resounding judicial rejection of the notion that the *Jay Treaty* confers any iteration of First Nations' mobility rights.

A. *Francis v the Queen*

Francis v the Queen, arose when Louis Francis, a member of the Mowhawk First Nation of Akwesasne, claimed that Article III of the *Jay Treaty*, and Article IX of the *Treaty of Ghent* exempted him from paying duty on a washing machine and refrigerator he brought across the border.⁴⁵ In the 1956 Supreme Court of Canada (“SCC”) decision, Justice Rand confirmed the lower court's determination that the *Jay Treaty* was of no force or effect in Canada on the grounds that it had never been implemented into domestic legislation.⁴⁶ Further, as a peace treaty, the agreement had been abrogated by the War of 1812.⁴⁷ Justice Rand rejected the claimant's argument that the *Treaty of Ghent* proved that even if the *Jay Treaty* had been abrogated, the content of Article III survived to the extent that it protected First Nations' rights to free passage. Justice Rand cited the American decision *U.S. v Garrow*, which held that “under the Treaty of Ghent the contracting parties merely ‘engaged’ themselves to restore by legislation the ‘possessions, rights, and privileges’ that the Indians enjoyed in 1811, but that no such enactment had been passed.”⁴⁸ In his concurring decision, Justice Kellock added that the term “treaty” in Section 87 of the *Indian Act*—which provided that treaties could exempt status Indians from provincial laws—“did not extend to an international treaty such as the *Jay Treaty*, but only to treaties with Indians.” Further, he held that the *Indian Act* “constitut[ed] a code governing the rights and privileges of Indians”, and that any exemption from law had to be provided for in the *Act*.⁴⁹

B. *R v Vincent*

R v Vincent was decided on the heels of Canada's constitutional pronouncement that “existing Aboriginal and treaty rights are hereby recognized and affirmed” under section 35(1) of the *Constitution Act, 1982*. The case arose when a member of the Lorette Huron band was charged under the *Customs Act* for smuggling tobacco into Canada. Vincent submitted that the 1794 *Jay Treaty* and the 1814 *Treaty of Ghent* confirmed her Aboriginal treaty rights under section 35(1) to be exempt from duty under the *Customs Act*. As such,

45 *Francis v the Queen*, [1956] SCR 618, 3 DLR (2nd) 641 [*Francis*] at 620.

46 *Ibid* at 627.

47 *Ibid* at 621.

48 *Ibid* at 628.

49 *Ibid* at 631.

the court was tasked with deciding whether section 35(1) changed anything regarding the enforceability of the *Jay Treaty* by First Nations since *Francis*.⁵⁰

At trial, the judge interpreted the text to conclude that the drafters never intended to include commercial rights in the “right to pass and re-pass” under Article III. Specifically, he focused on the passage that provided:

[...] No duty of entry shall ever be levied by either party on peltries brought by land, or inland navigation into the said territories respectively, nor shall the Indians passing or re-passing with their own proper goods and effects of whatever nature, pay for the same any import or duty whatever. But goods in bales, or other large packages unusual among the Indians shall not be considered as goods belonging bona fide to Indians.⁵¹

Curiously, the trial judge did not comment on the excerpt of Article III that explicitly provided for “the Indians dwelling on either side of said Boundary Line to [...] carry on trade and commerce with each other,” which would suggest that commercial rights were indeed intended to be included.⁵² Notwithstanding what could be seen as a selective reading of the provision, he did find the *Jay Treaty* was protected under section 35(1), on the basis that a generous interpretation would be required to “grant Aboriginal [peoples] the full benefit of their rights” under the provision. He came to this conclusion after citing a number of well-respected Constitutional scholars, the majority of whom confirmed a liberal reading of section 35(1) could support a broader interpretation of treaties from that given in *Francis*.⁵³

At the Ontario Court of Appeal, however, Justice Lacourcière reversed this finding on the basis that the authors cited by the trial judge “left some doubt on the question.”⁵⁴ He held that the framers of section 35(1) must have had in mind the definition of “Indian treaty” consistent with the available case law on treaties made directly with Aboriginal parties, otherwise they “could have chosen another expression to indicate an intention to include international treaties.”⁵⁵ Further, he cited the *R v Sioui* decision, which had considered a treaty rights claim under section 35(1). On the basis that *Sioui* had described a treaty as “a solemn agreement between the Crown and the Indians” his ultimate conclusion was that a treaty under section 35(1) referred to a treaty as it was defined in *Francis*.⁵⁶ As leave for appeal to the SCC was denied, Justice Lacourcière had the last word in *Vincent*.

C. *Mitchell v Canada (Minister of Natural Resources)*

Mitchell v Canada (Minister of Natural Resources) followed closely on the heels of *Vincent*. Also a charge under the *Customs Act*, the case arose when the then-Grand Chief of the Mohawk Council of Akwesasne was served with a fine for undeclared motor oil he had brought across the border and sold in the community. He contested the fine on the grounds that, as a Mohawk, the Aboriginal right to trade under section 35(1) protected him. He claimed that the Crown had a fiduciary duty to honor the promises they made in Article III of the 1794 *Jay Treaty* and reaffirmed in Article IX of the 1814 *Treaty of Ghent*. The Aboriginal right claim succeeded at both the Federal Court and the Federal Court of

50 *R c Vincent*, [1993] 12 OR (3rd) 427, [1993] OJ No 4561 at para 22.

51 *Jay Treaty*, *supra* note 40.

52 *R c Vincent*, *supra* note 50.

53 *Ibid* at para 26.

54 *Ibid* at para 27.

55 *Ibid* at paras 27-28.

56 *Ibid* at 30.

Appeal before the SCC overturned the lower courts' determinations.⁵⁷ By contrast, the treaty claim, which bore many similarities to that put forward in *Vincent*, was rejected at trial. The trial judge Justice McKeown adopted the interpretation of the *Jay Treaty* from *Vincent*. Namely, that Article III “did not apply to goods in the commercial sense [...] only for personal use.”⁵⁸ Going on to assess whether the *Jay Treaty* and surrounding treaty councils gave rise to an Aboriginal treaty right under section 35(1), he again applied the holding in *Vincent* that neither are treaties within section 35(1), because only treaties made between the Crown and “the Indians” are protected under the provision.⁵⁹

The plaintiff acknowledged that no First Nations were signatories to either of these treaties, but argued that Article III was intended to be permanent with regard to the Haudenosaunee and other First Nations, and this was confirmed in the *Treaty of Ghent*.⁶⁰ In support of his position, the claimant produced extensive evidence on treaty conferences held between the British and several First Nations around the Great Lakes (including Haudenosaunee delegates) where British officials confirmed that the two treaties were intended to be part of the Covenant Chain treaty relationship between the Crown and Haudenosaunee.⁶¹

For example, Mitchell presented evidence of an address by Lord Dorchester in 1791 during *Jay Treaty* negotiations to the “Chiefs and Warriors, Deputed by the Confederated Indian Nations of the Ottawa, Chippeways, Potawatamies, Hurons, Shawanese, Delawares, Turturs, and the Six Nations [Haudenosaunee].” In his address, Lord Dorchester referred to those in attendance as “Brothers” and stated that “the Kings rights with respect to your territory were against the Nations of Europe; these he resigned to the States. But the King never had any rights against you but to such parts of the Country as had been fairly ceded by yourselves [...]”⁶² Lord Dorchester’s choice of language suggested that he viewed Haudenosaunee Nations as equals.

In light of both the text of the *Jay Treaty* and the other treaties raised in the claim, Mitchell contended that the British Crown’s relationship with Six Nations at the time the treaties were concluded was one between two sovereign nations. As such, Article III gave rise to the *Vienna Convention* law of treaties principle *stipulation pour autrui*, whereby third party rights are so deeply implicated in a treaty that—to the extent that their interests are concerned—the treaty cannot be altered without that party’s consent.⁶³

The judge rejected this argument, accepting the Minister’s proposition that in the treaty conferences following the conclusion of the *Treaty of Ghent*, the British officials must have addressed the members of those First Nations whose territories had fallen to the south of the newly-drawn border, assuring them that the King had not forgotten them.⁶⁴ This was because, according to the Minister, the Crown could not have been promising that the border would not apply to the attending Nations, as they could not possibly have thought they had any jurisdiction over land to the south of the border.⁶⁵ Justice McKeown rejected the *pour autrui* argument and referenced *Vincent* to conclude that the principle applies only to other states, to exclusion of First Nations and other individuals or groups.⁶⁶ Referencing

57 *Mitchell v Canada (Minister of National Revenue)*, (2001) SCC 33, [2001] 1 SCR 911 at paras 2 and 6.

58 *Mitchell v Canada (Minister of National Revenue)*, [1997] FJC No 882, 1997 CarswellNat 3604 [Mitchell] at para 255.

59 *Ibid* at para 262.

60 *Ibid* at para 265.

61 *Ibid* at para 241.

62 *Ibid* at para 190.

63 *Ibid* at para 265.

64 *Supra* note 58 at para 190.

65 *Ibid* at para 224.

66 *Ibid* at para 269.

addresses by British officials between 1791–1796 where they referred to First Nations as “children” and to the Crown as “the King your Father”, he concluded that First Nations could not possibly have been viewed as sovereign entities by British Crown at the time.⁶⁷

However, these references do not reflect the overall context of the treaty conferences raised at trial in *Mitchell*. In essence, these meetings were diplomatic conferences between sovereign nations, and this is made clear in the title of Lord Dorchester’s above-mentioned address: “Chiefs and Warriors, Deputed by the Confederated Indian Nations of the Ottawa, Chippeways, Potawatamies, Hurons, Shawanese, Delawares, Turturs, and the Six Nations.” The contention that Lord Dorchester could not possibly have meant to convey any promises regarding land south of the newly drawn border because he did not have the authority to do so is undermined by the fact that at the time the Crown was in ongoing negotiations for the *Jay Treaty*. Even if he did not have authority to make unilateral decisions about newly claimed American land, he did—as a Crown representative—have the power to bring these wishes to the negotiating table. In fact, Lord Dorchester’s assurances regarding the non-application of the border to “Indians” were brought to the table and crystallized under Article III of the *Jay Treaty*.

In none of the above decisions did the court’s reasoning give any real weight to the Silver Covenant Chain as the basis for the Crown’s treaty obligations to the Haudenosaunee (or the Huron, as was the case in *Vincent*). Even when explicitly raised at trial in *Mitchell*, the court dismissed the contention that the Crown could have viewed the Haudenosaunee as their sovereign equals, by selectively focusing on language that ostensibly showed the Crown viewed the Haudenosaunee people as their subjects.

III. THE SHIP IS NOT THE ONLY VESSEL ON THE RIVER: IMPLICATIONS OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES AND *R V MARSHALL* ON SECTION 35(1) TREATY CLAIMS

In addition to the above-mentioned critiques, two additional developments suggest that the court’s refusal to find the *Jay Treaty* as giving rise to First Nations’ mobility rights should be revisited. Firstly, the United Nations Declaration on the Rights of Indigenous Peoples” (“UNDRIP”) provides the Indigenous right to self-determination, and the corresponding treaty rights provide an international human rights backbone. Secondly, the *Jay Treaty* has never been properly considered in light of the Crown’s obligations to the Haudenosaunee (or other parties) through the Silver Covenant Chain. The legal landscape with respect to section 35(1) Aboriginal treaty rights after *R v Marshall* now precludes the sort of textual treaty analysis that courts used to dismiss the *Jay Treaty* claims outlined above. I now turn to discuss the first of these developments: what UNDRIP could mean for section 35(1) Aboriginal treaty rights, and correspondingly, how it undercuts the judicial rejections of the *Jay Treaty* as an expression of First Nations’ mobility rights.

A. UNDRIP as a Framework for Legislative Change

UNDRIP was the culmination of decades of negotiations at the United Nations, led by representatives from Indigenous groups around the world. When adopted by the U.N. General Assembly in 2007 to an overwhelming 143 out of 147 states voting in favor, UNDRIP became the first international legal instrument recognizing the distinct rights of Indigenous peoples to self-determination. Canada was a staunch opponent in 2007,

67 *Ibid* at para 268.

and among the only four states to vote against its adoption.⁶⁸ In 2010 however, the Harper administration gave UNDRIP a qualified endorsement as a “non-legally binding document that does not reflect customary international law.”⁶⁹ In May 2016, the then newly-elected Liberal government declared Canada to be a “full supporter, without qualification,” though the official position is still that “a declaration is not legally binding, unlike a treaty or a covenant.”⁷⁰

Over the past year, the trajectory of official support for UNDRIP has been clarified in some respects, in terms of federal plans to operationalize it. In the fall of 2017, the Ministry of Justice released *Principles respecting the Government of Canada's Relationship with Indigenous Peoples*: a “guide for the review of laws and policies [so that the government may] fulfill its commitment to implementing the Declaration.”⁷¹ These principles, which are non-binding, tell us at least two things:

Firstly, they indicate the Liberal government's reluctance to meaningfully implement UNDRIP. By choosing to introduce guidelines as opposed to a bill, which *would* provide a legally binding framework, the principles suggest a commitment that is at best symbolic. At worst, the guidelines might be viewed as yet another iteration of a seemingly conciliatory mask to distract from an ongoing unadulterated settler-colonial agenda. Second, these principles suggest that any domestic application of the declaration would be rooted in section 35 of the *Constitution Act, 1982*. As we have seen in the line of rejections above, section 35(1) has not been a friend to claimants of First Nations' mobility rights.

But where the Liberal majority of the day appears reluctant to give UNDRIP a legal backbone, New Democratic Party Member of Parliament Romeo Saganash has introduced a private members Bill C-262 which—if passed—would provide a binding framework for ensuring Canadian laws are consistent with UNDRIP.⁷² If not, domestic implementation will hinge on the goodwill of the Liberal administration, and in that case, if their actions thus far are any indication, external accountability will almost certainly be needed to bring about substantial change with regard to domestic adherence to UNDRIP. International human rights scholars have argued that UNDRIP has already demonstrated its interpretive value as a source of international customary law. Thus, whether or not Bill C-262 passes, it would be open to the courts to interpret the Constitution and Canadian statutes to ensure their consistency with their commitments to UNDRIP.

B. UNDRIP as a Source of Customary Law

To grasp the potential and limits of UNDRIP as an international human rights instrument in the absence of domestic legislation, it is important to understand that as a declaration, UNDRIP is formally distinct from a treaty.⁷³ This means that firstly, it cannot be ratified, and therefore state commitment alone does not amount to an ostensibly binding body

68 Hugh M Kindred *et al*, *International Law: Chiefly as Interpreted and Applied in Canada*, 8th ed, (Toronto: Emond Montgomery Publications, 2014) at 637.

69 *Ibid.*

70 Canada, Indigenous and Northern Affairs, *International Activities: United Nations Declaration on the Rights of Indigenous Peoples*, online: < <https://www.aadnc-aandc.gc.ca/eng/1309374407406/1309374458958> > (retrieved 29 April 2018) archived at <<https://perma.cc/B74B-5Q9L>>.

71 Canada, Department of Justice, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, (Ottawa: 2018) online: <<http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>> (retrieved 29 April 2018) archived at <<https://perma.cc/4MXS-TJZ2>>.

72 As of January 26, 2019 Bill C-262 passed in the House of Commons and is in its second reading in the Senate: Bill C-262, An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples, 1st Sess, 42nd Parl, 2018.

73 Clive Baldwin and Cynthia Morel, “Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation” in Stephen Allen & Alexandra Xanthaki, eds, *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Portland: Hart Publishing, 2011) 121 at 122.

of norms. This also means that at the U.N. level, there is no treaty body guiding states' implementation, or monitoring their compliance.⁷⁴ In the formal sense, a declaration is non-binding upon states who vote to adopt it, but in practice, this line is less clear.

In terms of UNDRIP specifically, the language gives a somewhat mixed indication of its intended power. The resolution whereby it was adopted reads "The General Assembly [...] solemnly proclaims the following United Nations Declaration [...] as a *standard of achievement* to be pursued in a spirit of partnership and mutual respect."⁷⁵ This would indeed suggest UNDRIP to be a guide rather than a legally binding instrument. By contrast, the language of the 46 provisions is much more strongly worded. For example, the Preamble says "States [...] *shall* take appropriate measures, including legislative measures, to achieve the ends of this Declaration."⁷⁶ Given its use of imperative language in the provisions themselves, there is a camp of international legal scholars who argue that a state's endorsement of UNDRIP does in fact give rise to an obligation to comply with UNDRIP's substantive content.⁷⁷

Regardless of whether one agrees with the contention that a state's endorsement of UNDRIP amounts to binding substantive obligations, some scholars suggest it could contribute to the development of international customary law. International customary law is shaped by two elements: an accepted state practice or norm, and states' subjective belief that this practice or norm is law.⁷⁸ The subjective element alone is somewhat slippery as an accountability mechanism for state noncompliance; the subjective belief would likely already be reflected in the law, and failing that, one can hardly bring a claim on the grounds that "you [state] believe this, therefore you should adjust your laws (or actions) accordingly." However, if enough states take a position on how a practice should be reflected in law, that practice can become a form of binding authority as a peremptory norm.⁷⁹ As a peremptory norm, customary international law can exert normative pressure on noncomplying states to bring their laws in line with international legal standards. For example, a peremptory norm could help shape domestic legislation via judicial interpretation of statutes, since judges would be empowered to ensure domestic law is interpreted in accordance with said international standard. While the extent to which UNDRIP will influence customary law (and what exactly this could mean in practice) is unclear at this stage, decisions of domestic courts and international human rights bodies have already demonstrated its potential to have binding legal authority as a statutory interpretation tool.⁸⁰

In the 2007 *Cal v Attorney General of Belize* decision, the Supreme Court of Belize ruled that the state of Belize had an obligation to abide by the provisions in UNDRIP pertaining to Indigenous land rights, by virtue of the state's vote to adopt it at the General Assembly. Chief Justice Abdulai Conteh wrote in his decision:

I [...] venture to think that the defendant would be unwilling, or even loathe to take any action that would detract from the provisions of this Declaration importing as it does, in my view, significant obligations for

74 *Ibid.*

75 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp no 53, UN Doc A/RES/61/295 (2007) [UNDRIP] at Preamble.

76 *Ibid* at Art 38.

77 *Kindred*, *supra* note 68 at 124.

78 *Ibid* at 31.

79 Peremptory norms are defined in the *Vienna Law of Treaties* as a "norm accepted and recognized by the international community [...] as a whole as a norm from which no derogation is permitted" [*Kindred*, *supra* note 68 at 54]. The prohibition against torture is an example of a peremptory norm. *Kindred*, *supra* note 68 at 31, 54 and 625.

80 *Kindred*, *supra* note 68 at 124.

the State of Belize in so far as the indigenous Maya rights to their land and resources are concerned.⁸¹

This ruling came despite the fact that Belize had not adopted UNDRIP domestically.⁸² That same year, the Inter-American Court of Human Rights *Saramaka People v Suriname* decision held that that Suriname's vote for UNDRIP amounted to Suriname's commitment to the duty to consult under Article 32.⁸³ Another example where UNDRIP was interpreted as giving rise to substantive obligations was in *Endorois*, a 2010 African Commission decision, where it supported the Commission's findings that Kenya had violated the land rights of the Endorois people.⁸⁴

i. UNDRIP and Customary Law Principles Interpreted by Canadian Courts

Even prior to Canada's unqualified endorsement of UNDRIP in 2016, courts considered UNDRIP as an interpretive guide for Canada's constitutional obligation not to interfere with Aboriginal and treaty rights under section 35(1) of the *Constitutional Act, 1982*. In the 2001 SCC *Mitchell* decision, former Chief Justice McLachlin characterized the draft declaration in the following way:

There is some international support for special recognition of the plight of indigenous peoples in this respect. The Draft *United Nations declaration on the rights of indigenous peoples* [...] provides in Article 35 that:

Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with other peoples across borders.⁸⁵

Though she appeared open to using the draft as an interpretive guide, Chief Justice McLachlin did go on to say that Canada had already "taken various concrete steps to try to minimize the disruption of Akwesasne created by the international boundary."⁸⁶ She did not elaborate on what these measures were.

In *Elsipogtog v Canada*, the Federal Court considered UNDRIP in connection with a judicial review of the minister's decision to change First Nations social assistance rates and eligibility criteria. The court held that "while UNDRIP does not create substantive rights, the Court nonetheless favours an interpretation that will embody its values."⁸⁷ Ultimately, the minister's decision was set aside.⁸⁸ While the Federal Court of Appeal overturned this decision in 2015, Justice Nadon, the judge at the Federal Court of Appeal, made no mention of UNDRIP in his judgement.⁸⁹ This illustrates a shortcoming of UNDRIP, at least insofar as it remains a non-binding source of international law: judges are free to apply it, or not, as a tool for states' domestic legal obligations toward Indigenous peoples.

81 Julian Berger. "The UN Declaration on the Rights of Indigenous Peoples: From Advocacy to Implementation" in Stephen Allen & Alexandra Xanthaki, eds, *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Portland: Hart Publishing, 2011) 41 at 57.

82 *Ibid.*

83 Baldwin and Morel, *supra* note 73 at 125.

84 *Ibid.*

85 *Mitchell*, *supra* note 57 at para 81.

86 *Ibid* at para 84.

87 *Elsipogtog First Nation v. Canada (Attorney General)*, (2013) FC 1117, [2013] FCJ No 1203.

88 Baldwin and Morel, *supra* note 73.

89 *Canada (Attorney General) v Simon*, 2015 FCA 18 (CanLII).

We now shift away from UNDRIP for a moment to look at how other customary international principles have been employed by Canadian courts generally. There are at least two examples where the SCC used international human rights principles to interpret administrative obligations despite that the principles in question had not been adopted through domestic legislation. In *Baker v Canada*, the court held that immigration officers must consider the best interests of children when making humanitarian and compassionate ground permanent residency decisions, as required by the U.N. Convention on the Rights of the Child. L'Heureux-Dubé held that while the Convention had no direct legal application in Canada by virtue of the fact that no legislation had been introduced, “[n]evertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation [...]”⁹⁰ *Baker* prompted the codification of the “best interests of the child” test in federal immigration legislation, demonstrating that judicial interpretation of a human rights norm can lead to legislative change.⁹¹ In *Suresh v Canada*, the court held that an immigration officer could not deport a person if the deportation were likely to result in that person being tortured, because the prohibition against torture is a binding source of customary law.⁹²

The above examples demonstrate that there is precedent in Canadian law for the application of international customary human rights norms, even in the absence of a firm commitment on the part of Parliament (and provincial legislatures) to legislate themselves into binding obligations. Further, as an international mechanism for the safeguard of the rights of Indigenous Peoples, UNDRIP will continue to be available to courts as an interpretive tool regardless of whether it becomes customary international law.

ii. Implications of UNDRIP for Section 35(1) Aboriginal Treaty Rights

The question remains: as an interpretive tool, would UNDRIP be enough to shift the tide of judicial rejections of the Crown’s duty to honor First Nations’ mobility rights as promised in the *Jay Treaty*? Article 37 of UNDRIP provides:

Indigenous Peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successor and to have States honour and respect such treaties, agreements and other constructive arrangements.

Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.⁹³

Viewed in the spirit of UNDRIP as a whole—as an international affirmation on the right of Indigenous peoples to self-determination—a strong case can be made that Article 37 gives rise to an obligation to redefine what is, and what is not, considered a treaty right under section 35(1).

As evidenced above, the definitions of treaty put forward in *Jay Treaty* claims thus far have fallen short of the UNDRIP standard. With the exception of the Ontario Superior Court *Vincent* decision, all the courts premised their rejections of the *Jay Treaty* on the

90 *Baker v Canada (Minster of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 at para 70.

91 As per subsection 25(1) of the *Immigration and Refugee Protection Act* the Minister is obligated to “take into account the best interests of a child directly affected” when considering an application for permanent residence on humanitarian and compassionate grounds. *Immigration and Refugee Protection Act* SC 2001 c 27.

92 Kindred, *supra* note 68 at 155.

93 UNDRIP, *supra* note 75 at Art 37.

definition of treaty put forward in *Francis*, which in turn relied on the definition in the *Indian Act*. As the statute serving as a legal basis for the dispossession of Indigenous land, and the outlawing of cultural, legal and political structures that had informed Indigenous governing for thousands of years prior to European arrival, the *Indian Act* has been responsible for precisely the sort of colonial harm UNDRIP aims to undo. An unproblematized adoption of the language of the *Indian Act*, including the narrow definition of “treaty”, warrants re-examination in light of Canada’s adoption of UNDRIP.

As far as British-Haudenosaunee relations were concerned around the time the *Jay Treaty* was concluded, we know the principles of the *Kaswentha* and Silver Covenant Chain guided Haudenosaunee-Crown relations then, as they do now. UNDRIP’s emphasis on the right of Indigenous peoples to self-determination suggests that the Crown can no longer ignore the legitimacy of the political paradigms that informed important Haudenosaunee agreements with the British. This emphasis in itself supports the need to revisit the criteria for section 35(1) treaties.

C. The *R v Marshall* Section 35(1) Treaty Interpretation Framework

The state of the law with regard to section 35(1) Aboriginal treaty rights interpretation has also shifted since the *Jay Treaty* was last considered. In 1999, two years after the Federal Court ruled in their *Mitchell* decision that Article III was unenforceable as a Mohawk treaty right, the SCC released their *R v Marshall* decision. This decision provided a framework for the interpretation of historical treaties between the Crown and Aboriginal parties under section 35(1).⁹⁴ At issue in *Marshall* was whether a peace treaty concluded in 1760 between the Mi’kmaq and the Crown conferred a Mi’kmaq treaty right to harvest and trade fish. The majority found that it did, and they based this finding on a reading of the treaty in light of the historical and cultural evidence surrounding the written agreement.

Marshall was significant because it set out a unified standard for the interpretation of Aboriginal treaty rights that precluded consideration of the text of a provision in the absence of the surrounding contextual factors. The court was clear that the historical, cultural, and normative context surrounding a treaty must *always* be considered to determine the shared intention of the parties in that agreement—even where the text appears clear and unambiguous.⁹⁵ Further, where a consideration of these factors leads to various possible interpretations, “courts must rely on the historical context to determine which comes closest to reflecting the parties’ common intention.”⁹⁶ *Marshall* laid to rest the notion that surrounding extrinsic historical and cultural evidence was an optional consideration for section 35(1) treaty claims, or should only be considered in the event the text contained ambiguities.⁹⁷ The clear message was: historical, cultural, and normative factors are always relevant, and when in doubt, should be weighed above the text.

Marshall makes clear that as the guiding basis of the Crown’s relationship with the Haudenosaunee at the time the *Jay Treaty* was concluded, the principles of the Silver Covenant Chain would have to be considered in courts’ treatment of First Nations’ mobility rights if a claim were brought by a member nation today. As a result, a court would be called upon to construe the text of a treaty provision in light of the Crown’s promise to a party who was not formally a signatory—and therefore not an official party according to the Canadian legal frame. Constitutional scholar Mark Walters argues that *Marshall* “is

94 Though the Aboriginal right claim in *Mitchell* went all the way to the Supreme Court of Canada, the *Jay Treaty* claim was not appealed beyond the trial level.

95 *R v Marshall*, [1999] 3 SCR 456, 1999 CanLII 665 (SCC) [*Marshall*] at para 83.

96 *Ibid* at para 83.

97 *Marshall* overturned the Nova Scotia Court of Appeal’s holding (in the same case) that the historical and cultural context of an Aboriginal treaty claim could only be considered where the text under consideration contained some ambiguity. *Ibid* at para 9.

premised upon the idea that treaties with Indigenous nations are not *documents* or *written instruments* but rather *relationships*.” He posits that *Marshall* acknowledges that treaties between the Crown and Indigenous parties “represent a shared understanding of, and commitment to a normative framework for cross-cultural relationships.”⁹⁸ Considering that the principles of the Silver Covenant Chain embody a conception of treaty-making as a relational process, the rigid application of international treaty law cannot capture the essence of Crown-Haudenosaunee agreements concluded in the wake of that alliance. In my view, *Marshall* even suggests that as a central element informing *Jay Treaty* negotiations around Article III, the the Silver Covenant Chain should be considered over and above the international and domestic criteria—such as the *Vienna Convention*—which did not even formally exist at the time it was concluded.

The Haudenosaunee and all member nations of the Silver Covenant Chain relied on the Crown’s promise as expressed in Article III. Conversely, the Crown was also reliant on their own promise because—as mentioned above—the guarantee of non-interference with First Nations’ mobility rights helped them avoid another war. Accordingly, the fact that member nations of the Haudenosaunee Confederacy were not signatories to the *Jay Treaty* (or the *Treaty of Ghent*) cannot be a reason to preclude a finding that these treaties give expression to Mohawk (or Huron in the case of *Vincent*) mobility rights. Viewed in light of the principles of the Silver Covenant Chain, the Crown’s assurance to the Haudenosaunee that the border would only be internally enforceable between Britain and the United States was a fundamental contribution to the renewable and reciprocal basis of their treaty relationship. These assurances were necessary to Britain’s Silver Covenant Chain treaty responsibility to uphold the principle of sovereign non-interference. As such, the substance of Article III was relied upon as an act to “polish the chain.” Without the guaranteed freedom to pass and repass, the Crown would have been in blatant transgression of their responsibilities to that alliance.⁹⁹

The Silver Covenant Chain relationship was directly implicated in the *Jay Treaty* to the extent it guaranteed First Nations’ mobility rights, and through this relationship the Haudenosaunee—and the Silver Covenant Chain as a whole—were party to Article III.

CONCLUSION

I have argued that First Nations’ mobility rights were expressed in Article III of the *Jay Treaty* as an act to fulfill the Crown’s responsibilities to the Silver Covenant Chain alliance. While the courts ultimately rejected all previous *Jay Treaty* claims, in none of those decisions did the judges properly characterize the essence of treaty obligations therein. Absent from the judges’ consideration was the acknowledgement that the legal paradigm they used to justify rejecting the claims was only *one* normative treaty frame informing the agreement. In particular, crucially absent from these decisions was consideration of how the Crown’s responsibilities to the Silver Covenant Chain predate the *Jay Treaty*, and served as the basis for the guarantee under Article III. When the Crown lobbied the United States for First Nations’ mobility rights at the *Jay Treaty* negotiation, it did so knowing that if it transgressed the Covenant Chain principle of sovereign non-interference it would surely face another war. Accordingly, since the legal weight of First Nations’ mobility rights in the *Jay Treaty* is informed by an entirely different conception of treaty—a treaty as a principled and dynamic relationship rather than a treaty as a contract—the fact that the Haudenosaunee were not signatories to the written document is of little significance.

98 Walters, *supra* note 30 at 77.

99 Timothy Willig discusses how, before the guarantee of First Nations free passage was made in Article III, the Haudenosaunee threatened military action against the British. Article III prevented this, and as such the restoration of their relationship depended on it. *Supra* note 39 at 58.

Because of legal developments since the *Jay Treaty* last came under judicial scrutiny, we have seen that the door is far from closed on whether the agreement guarantees First Nations' mobility rights. UNDRIP gives courts the interpretive tools to redefine a treaty in broad enough terms to invite the Silver Covenant Chain into the fold of the Canadian legal paradigm. *Marshall* stipulates that a court must consider section 35(1) Aboriginal treaty claims in light of the historical and cultural context within which the treaty was concluded. Were a court to consider Article III in light of the Silver Covenant Chain, it would see beyond the black letters of the provision, to an image of a canoe and a ship travelling side-by-side down a river. In the decisions to date, the canoe has arguably been obscured from view. Revisiting the *Jay Treaty* in the context of the Silver Covenant Chain would make clear that when it comes to the First Nations' mobility rights expressed in Article III, the ship is not the only vessel on the river.