

Marginalized by Sui Generis? Duress, Undue Influence and Crown-Aboriginal Treaties

M I C H A E L C O Y L E *

“To speak of law as too blunt an instrument to resolve the complex and competing interests implicated in the protection of Aboriginal lands and resources ignores the fact that the law is already there – establishing baselines, defining rights, forming and maintaining a range of interests at stake, and actively constituting the relative power of the parties. Instead of whether the law should intervene, this narrative asks on whose behalf should the law intervene.”¹

I. THE ARGUMENT

Twenty five years after the entrenchment of Aboriginal treaty rights in the Canadian Constitution, and more than 240 years since the Royal Proclamation of 1763 declared that treaty-making would be the legal framework for the future settlement of immigrants to North America, large areas of the law in relation to First Nation treaties remain undeveloped. In Canada, the first two centuries of judicial treatment of Aboriginal treaties saw treaty promises, as enforceable legal rights, virtually ignored by the courts.² Since the constitutional entrenchment of treaty rights in 1982, the Supreme Court of Canada has sought to define a path that recognizes the uniqueness of the context of treaty-making and the *sui generis* nature of treaty promises. While this approach has the merit of acknowledging

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¹ P. Macklem, “What’s Law Got To Do With It? The Protection of Aboriginal Title in Canada” (1997) 35 *Osgoode Hall L.J.* 125 at 136.

² Not atypical was the conclusion of Patterson, Acting Co. Ct. J. in *R. v. Syliboy*, [1929] 1 D.L.R. 307 (N.S. Co. Ct.) at 313 that “where a statute and treaty conflict a British Court must follow the statute”. In *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1103 [*Sparrow*] Dickson C. J. reviewed the courts’ treatment of aboriginal rights prior to 1982 and concluded: “there can be no doubt that over the years the rights of the Indians were often honoured in the breach”.

that it would be inappropriate to import, *holus-bolus*, principles of law developed in other contexts, it creates a problem. Outside of the areas of treaty law focused on by the Supreme Court of Canada (primarily questions of treaty interpretation and the resolution of conflicts between treaty terms and the general laws of the land) the parties have little guidance as to how the courts might address their treaty disputes.

Consider two historical fact situations. First, in England a pawn broker refuses to return a customer's goods unless the customer pays an exorbitant and illegal surcharge. The customer desperately wants his property and submits to the pawnbroker's demands.³ Let us term this Situation A. Second, in Situation B, a government official suggests to Anishinabek leaders at Manitoulin Island that unless they surrender one and a half million acres of their ancestral lands, he will be unable to prevent settlers from illegally encroaching on their lands.⁴ The Anishinabek reluctantly submit, exchanging their land for a vague assurance of future consideration. Both Situation A and Situation B occurred in a common law jurisdiction. For Situation A, which occurred in the eighteenth century, the customer's lawyers would have known, at the time, the legal framework under which their client's rights would be adjudged. Further, although the law has evolved since then, any first year law student today could advise the plaintiff as to the legal rules relevant to his grievance. For Situation B, however, the applicable law in the first half of nineteenth century was utterly unclear – and it remains so today.

This article explores why Canadian law has developed principles for resolving the claim in Situation A, yet provides no corresponding framework for the resolution of Situation B. Both situations appear to raise the same questions about the necessary elements for the formation of binding agreements. What are the theoretical and practical implications of this apparent double standard? Does the nature of treaties render inappropriate any reference to common law concepts in developing a basis for understanding questions of consent in treaty formation? If not, might certain principles fundamental to the common law governing agreements provide that departure point? How might the courts move from such a presumptive reference point to arrive at principles fully suited to the special context of Aboriginal treaties? This article proposes to offer insight into each of these questions through a consideration of the doctrines of duress and undue influence.

³ *Astley v. Reynolds* (1731), 93 E.R. 939 (K.B.). The property in question consisted of household utensils, pawned for £20.

⁴ This situation actually occurred in 1836, as discussed below under "B: The Crown-Saugeen Treaty of 1836." For a more detailed discussion of the events leading up to the 1836 agreement, see *infra* note 18.

These questions are important because, although the Supreme Court has recently insisted on the obligation of the Crown to act “with honour” in the treaty-making process,⁵ to date, the court has said comparatively little about the principles by which the Crown’s conduct in treaty formation should be assessed. As it is now clear that a fiduciary duty does not arise in all interactions between the Crown and Aboriginal groups,⁶ the relatively vague expression “honour of the Crown” must bear the weight of addressing the control of exploitative tactics in treaty formation. In relation to disputes about the interpretation of treaties, the courts have paid considerable attention to the implications of the Crown’s duty to act honourably and to avoid “the appearance of sharp dealing.”⁷ However, the meaning of the “honour of the Crown” in relation to the treaty-making process has received little direct judicial attention. It is clear that the legal obligations of the Crown to act honourably and avoid “the appearance of sharp dealing” apply both to current treaty negotiations and to the formation of historical treaties.⁸ There is a need, therefore, for the courts to give content to those legal obligations as they apply to treaty formation.

As we shall see, the common law has long concerned itself with questions of voluntariness and fairness in the formation of agreements. The common law

⁵ See *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at para. 19, McLachlin C.J., for the Court [*Haida*]: “The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of “sharp dealing.”” In *Haida*, the main preoccupation of the court was not with treaties, but the scope of the Crown’s obligation to consult with Aboriginal groups about decisions that might affect as yet unproved Aboriginal rights. See also *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 at para. 28.

⁶ See *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245 at para. 81 [*Wewaykum*].

⁷ See e.g., *R. v. Marshall*, [1999] 3 S.C.R. 456 paras. 49-52 [*Marshall*], where the majority relied on this concept to support its conclusion that a Crown-Mi’kmaq treaty from 1760 should be read as subject to an implied term that the Mi’kmaq had the right to engage in hunting, fishing and gathering to obtain a moderate livelihood. See also *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360 at 367 (C.A.), MacKinnon A.C.J.: “[i]n approaching the terms of a treaty... the honour of the Crown is always involved and no appearance of “sharp dealing” should be sanctioned.” Justice MacKinnon’s admonition has been repeated frequently by the Supreme Court of Canada; see, e.g., *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 41 [*Badger*] and *Haida*, *supra* note 5.

⁸ On the application of the Crown’s obligation to act honourably to modern treaty negotiations, see *Haida*, *supra* note 5. On the application of the obligation to the formation of historical treaties, see *Mitchell v. Canada (Min. of Natl. Revenue)*, [2001] 1 S.C.R. 911 at para. 9, where McLachlin C.J. for the majority stated that “The part of North America we now call Canada was first settled by the French and the British who, from the first days of exploration, claimed sovereignty over the land on behalf of their nations... [T]he Crown asserted that sovereignty over the land, and ownership of its underlying title, vested in the Crown...With this assertion arose an obligation to treat Aboriginal peoples fairly and honourably, and to protect them from exploitation...” [*Mitchell*]. Compare *Haida* at para. 17.

doctrine of duress and the equitable concept of undue influence arose from the courts' insistence that binding agreements can flow only from the free choices of individuals. Even during the nineteenth century, when the common law courts took a more formalistic approach to the formation and interpretation of contracts,⁹ they insisted that contracts had to reflect the autonomous choices of the parties. The nuanced rules developed by the courts to ensure that agreements are not procured by misrepresentation, threats or improper pressure, all reflect this concern. The question, for the purposes of this analysis, is whether the product of centuries of common law jurisprudence on these issues offers a useful departure point for analyzing the relevance of coercion and exploitative behaviour in the formation of Aboriginal treaties.

The Supreme Court of Canada has made it clear, that treaties are created and enforced in accordance with *sui generis* principles, not the laws of contract or international law.¹⁰ The Court is surely correct in recognizing the unique nature of Aboriginal-Crown treaties. On the one hand, the relationships between the parties, which span more than 250 years of treaty-making, cannot readily be subjected to the requirements of international law, developed, as it was, by European nation-states to serve their own interests.¹¹ On the other hand, as solemn compacts entered to reconcile each party's rights in the context of European arrival and establishment on Aboriginal territories, all treaties are more than contracts, in that they implicitly recognize the autonomy of the Aboriginal party and its right to enter into independent relations with the Crown. At a more basic level, it may be argued that it would be inappropriate to assume that

⁹ See P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, 1979) at 352-353.

¹⁰ On the *sui generis* nature of treaties, see *R. v. White and Bob* (1965), 50 D.L.R. (2d) 613 at 617-618 (B.C.C.A.); *aff'd* [1965] S.C.R. vi, 52 D.L.R. (2d) 481 [*White* cited to 50 D.L.R. (2d)]; *R. v. Simon*, [1985] 2 S.C.R. 387 at para. 33, Dickson C.J. [*Simon*]; *Badger*, *supra* note 7 at para. 78. For a discussion of the importance of taking into account the perspectives, worldviews and legal orders of both parties to historical treaties, see J.Y. Henderson, "Interpreting *Sui Generis* Treaties" (1996) 36 *Alberta L. Rev.* 46.

¹¹ For an interesting analysis of the inconsistencies of international law in its historic treatment of relations between European states and indigenous peoples, see A. Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law" (1999) 40 *Harv. Int. L.J.* 1. Strict application of the formalities of international treaty-making would mean that, in general, Crown-Aboriginal treaty promises would not be enforceable *per se* in Canada, as almost none received legislative ratification. It is noteworthy that the validity of an international treaty depends on the adequacy of each party's consent to be bound: see, e.g., A. Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2000) at 75-99, 255-7. However, the application of this international law principle to historic treaties would raise questions of inter-temporality (i.e. determining the applicable international rules at the time that a particular treaty was concluded). See Aust at 195.

principles from one group's domestic law should govern the treaty relationship between the parties.¹²

Any proposal to use common law¹³ principles as a reference point on the question of treaty consent must address these legitimate practical and theoretical concerns. It is worthwhile at this stage, however, to make the following brief observations.

First, although treaties are not contracts, the courts have found that a number of contract principles offer assistance in developing appropriate *sui generis* rules of treaty interpretation. Treaties are *sui generis* instruments, but that should not make them exempt from fundamental concerns of fairness and voluntariness manifested elsewhere in the law.¹⁴

Second, on the appropriateness of relying upon Canadian law to govern the treaty relationship, to date Canadian courts have refused to question either the sovereignty of the Crown over Aboriginal peoples, or their own right to adjudicate treaty disputes and set out the law applicable to those treaties.¹⁵ This conclusion has not been the subject of any substantial judicial explication and it remains the subject of controversy in academic and Aboriginal circles alike.¹⁶ Nevertheless, if Canadian courts continue to apply Canadian law to compacts between Aboriginal

¹² Consider on this point the argument of G. Christie that an approach to treaty interpretation premised on Crown sovereignty over the Aboriginal signatory is questionable from a historical perspective and damaging in its implications for the scope of the rights recognized in the treaties. See G. Christie, "Justifying Principles of Treaty Interpretation" (2000) 26 Queen's L.J. 143. On the appropriateness of referring to an "inter-societal rule of law" in disputes between Aboriginal peoples and the Crown, see M.D. Walters, "The Morality of Aboriginal Law" (2006) 31(2) Queen's L.J. 470 and J. Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples" (1996) 33 Osgoode Hall L.J. 623.

¹³ Unless the context indicates otherwise, the use of the term "common law" in this paper is intended here to include the principles of equity as well as the common law.

¹⁴ Brian Donovan makes a somewhat similar argument in the context of Aboriginal property rights, arguing that the courts have used the *sui generis* categorization in that area to develop novel legal principles "without authority or reason" to the detriment of Aboriginal peoples: see B. Donovan, "The Evolution and Present Status of Common Law Aboriginal Title in Canada: The Law's Crooked Path and the Hollow Promise of Delgamuukw" (2001) 35 U.B.C. L.R. 43.

¹⁵ According to the court in *Sparrow*, *supra* note 2 at 1103, "...there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown."; see also *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 paras. 146-149, Lamer C.J. [*Delgamuukw*].

¹⁶ See J. Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: U of T Press, 2002) at 122-137; G. Christie, *supra* note 11 at 154-155; K. McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, 2001) at 82-101; Walters, *supra* note 12 at 494-516; and J.Y. Henderson, *Aboriginal Tenure in the Constitution of Canada* (Toronto: Thomson Canada Limited, 2000) at 428-443.

peoples and the Crown, one might argue that they should apply Canadian law in a manner that treats Aboriginal parties to an agreement *no less favourably* than the common law treats non-Aboriginal parties to an ordinary contract.

This article is divided into several parts. First, in order to provide a vantage point from which to consider the nature and potential significance of the current *lacunae* in treaty law, it will describe the circumstances leading to an agreement reached in 1836 between the Lieutenant-Governor of Upper Canada and the Saugeen Anishinabek. Second, the article will review the doctrines of duress and undue influence and consider how those principles might shed light on the question of consent in relation to Aboriginal treaties. In other words, if the common law's concerns about coercion and fairness were relevant to the formation of Aboriginal treaties, what might be the result? Third, it will examine whether the theoretical foundations of these common law principles are compatible with the *sui generis* nature of treaties. Finally, it will briefly identify certain issues that would need to be addressed if the principles of undue influence and duress were adopted as a reference point in analyzing sufficiency of consent within the *sui generis* body of treaty law.

II. THE CROWN-SAUGEEN TREATY OF 1836

In August 1836, Sir Francis Bond Head, Lieutenant-Governor of Upper Canada, traveled to Manitoulin Island where some 1500 Anishinabek people had assembled for the annual distribution of presents from the Crown. Bond Head had been appointed to the position earlier in the year and wished to gather information requested by his superior, Lord Glenelg, on the living conditions of Aboriginal people in the province.¹⁷ Instead, on a single day during his visit, in the course of a Grand Council, Bond Head succeeded in obtaining documents purporting to transfer the entire Manitoulin Island chain to the Crown for the benefit "of all Indians whom [the Crown] shall allow to reside on them", as well as the transfer of 1.6 million acres of the territory of the Saugeen Anishinabek, south of Owen Sound.¹⁸ No monetary compensation was offered¹⁹ to the Saugeen

¹⁷ Lord Glenelg was the Colonial Secretary at the time. Bond Head wrote several letters to Glenelg about the reasons for and the results of his meeting with the Anishinabek on Manitoulin Island. The letters can be found in F.B. Head, *Communications and Despatches: Relating to Recent Negotiations with the Indians* (Toronto: Printed by order of the House of Assembly, 1837) [*Despatches*]. Bond Head argued that Indians were a doomed race, subject to corruption by encounters with settlers, and thus best served by plans to remove them from the path of settlement.

¹⁸ For a general description of the circumstances surrounding the treaty, see: R. Surtees, *Treaty Research Report: Manitoulin Island Treaties* (Canada: Treaties and Historical Research Centre, Indian and Northern Affairs, 1986) [*Treaty Report*]; D.B. Smith, *Sacred Feathers* (Toronto: University of Toronto Press, 1987) at 163-164; O.P. Dickason, *Canada's First Nations* (Toronto:

Anishinabek for what Bond Head described as “the vast and fertile territory”²⁰ now freed for European settlement. Instead, in exchange for leaving their houses and farms and hunting grounds, Bond Head committed the Crown to build houses for those who moved, to offer proper assistance to enable the Anishinabek to become “civilized”, and to protect forever the remaining lands of the Saugeen Anishinabek from the encroachment of settlers.²¹

Eleven days later, Bond Head wrote with pride of the coup he felt he had achieved. “[T]here can be no doubt”, he wrote, “that the acquisition of their vast and fertile territory will be hailed with joy by the whole Province.”²² For Bond Head, the opening up of the Saugeen lands for non-Aboriginal settlement seems to have been of great political importance.²³ Although the security of Aboriginal peoples in the occupation of their lands had been guaranteed by the British in clear terms since the Royal Proclamation in 1763²⁴ and the Treaty of Niagara in 1764,²⁵ illegal settler encroachment on Anishinabek lands was an urgent concern

Oxford University Press, 1997) at 211-212; The Aboriginal Committee, of The Meeting for Sufferings, *Facts Relative to the Canadian Indians* (London: Harvey and Darton, 1839) at 19 [*Canadian Indians*]; and Canada Legislative Assembly, *Report on the Affairs of the Indians in Canada*, Section II, App EEE [*Bagot Commission*].

¹⁹ R. Surtees, *Indian Land Surrenders in Ontario 1763-1867* (Ottawa: Indian and Northern Affairs Canada, 1983) at 91 [*Surrenders*]. Eleven years later, an annuity in the principal amount of £1250 was established by the Crown to be “shared in” by the Saugeen Anishinabek. It appears that the annuity was created as a result of Anishinabek protests about the 1836 surrender and the presence of settlers fishing in waters that were to be protected for the Anishinabek: see *Bagot Commission*, *ibid*; S.P. Jarvis to Lieutenant Governor Arthur (14 May 1838), Ottawa, National Archives of Canada (RG 10, vol. 75, reel C-11026 at 68449-451); and S.P. Jarvis to R.A. Tucker (26 March 1840), Ottawa, National Archives of Canada (RG 10, vol. 75 at 68446-448).

²⁰ Bond Head to Lord Glenelg (20 August 1936) in *Despatches*, *supra* note 17 at 2.

²¹ The promises are contained in the language of the treaty memorandum. See Treaty 45 ½ (9 August 1836), Ottawa, National Archives of Canada (RG 10, vol. 62, reel C-11021 at 61639-640); and Canada, *Indian Treaties and Surrenders*, vol. 1 (Ottawa: Queen’s Printer, 1891) reprinted (Toronto: Coles Publishing Co., 1971) at 113.

²² Bond Head to Lord Glenelg (20 August 1936), *Despatches*, *supra* note 17 at 2.

²³ *Ibid*. See Treaty Report, *supra* note 18 at 9.

²⁴ *Royal Proclamation*, 1763, R.S.C. 1985, App. II, No.1. [*Royal Proclamation*] states, “And whereas it is just and reasonable... that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them... .We do hereby strictly forbid...all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained.”

²⁵ At a large council with Aboriginal leaders convened at Niagara in July, 1764, Sir William Johnson reaffirmed the Crown’s promises to protect Aboriginal lands in accordance with the Royal Proclamation. For a discussion of the Crown’s undertakings there, see *Chippewas of Samia*

in Upper Canada.²⁶ For Bond Head, the treaty with the Saugeen Anishinabek meant that the Crown could placate Euro-Canadian settlers, while furthering an initiative of his own to persuade the Aboriginal peoples living in the south of the province to remove themselves to the isolation of Manitoulin Island.²⁷

There was a darker side to this agreement, however. Witnesses related that the Saugeen treaty was procured only after Bond Head repeatedly warned the gathered Anishinabek, including the Saugeen chiefs, of the threat of settler encroachment on their land.²⁸ A Methodist missionary present at the treaty gathering reported that Bond Head had advised that “he could not protect [the Saugeen Anishinabek] in the possession of their land; that the white man *would* settle on it; and if they did not give it up they would *lose* it.”²⁹ Indeed, Bond Head’s own memorandum, drafted to encapsulate the treaties reached that day, indicates that he advised the Anishinabek that “new arrangements” were now necessary to protect the Anishinabek from “the encroachments of the whites.”³⁰ Ultimately, it appears that the Anishinabek leaders may have acquiesced to the loss of their land only because they felt they had no alternative:

Band v. Canada (Attorney-General), [2000] 51 O.R. (3d) 641 paras. 54-56 (C.A.) [*Sarnia*] and J. Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government” in M. Asch, ed., *Aboriginal and Treaty Rights in Canada* (Vancouver: UBC Press, 1997) at 155-172.

²⁶ In 1844, the *Bagot Commission*, *supra* note 18 at Section 3, App. (S.) recommended that measures be taken to protect Aboriginal lands from trespass and theft. In 1850 the Legislative Assembly of the Province of Canada enacted legislation to prevent settler encroachment on Indian lands: *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*, S. Prov. C. 1850, c. 74. For a discussion of the challenge of protecting First Nation lands in the 19th century and the various statutes enacted in response, see R.G. Moore, *The Historical Development of the Indian Act*, 2d ed. by J. Leslie & R. Maguire (Ottawa: Department of Indian Affairs and Northern Development, 1978).

²⁷ Bond Head to Lord Glenelg (20 August 1936) in *Despatches*, *supra* note 17. Bond Head wrote, “it was evident to me that we should reap a very great benefit if we could persuade these Indians, who were now impeding the progress of civilization in U. Canada to resort to a place possessing the double advantage of being admirably adapted to *them* (in as much as it affords fishing, hunting, bird-shooting and fruit) and yet in no way adapted to the white population.”

²⁸ *Surrenders*, *supra* note 19 at 90.

²⁹ James Evans, St. Clair, 24 March 1838, CG, II April 1838, as cited in D.B. Smith, *Sacred Feathers*, *supra* note 18 at 163.

³⁰ Treaty 45 (9 August 1836), Ottawa, National Archives of Canada (RG 10, vol. 62, Reel C-11021 at 61642); and Canada, *Indian Treaties and Surrenders*, vol. 1 (Ottawa: Queen’s Printer, 1891) reprinted (Toronto: Coles Publishing Co., 1971) at 112-113.

"they were ruined, but it was no use to say any thing more, as their Great Father was determined to have their land, - that they were poor and weak and must submit, and that if they did not let him have it his own way, they would lose it altogether."³¹

Following the treaty, there were protests from Chiefs and missionaries who had witnessed the proceedings. Both groups focused on the pressure allegedly placed on the Saugeen Anishinabek by Bond Head, while the missionaries also noted the apparent imbalance in the value of what was promised by each side.³² As for Bond Head's focus on the "necessity" to protect the Anishinabek from settler encroachment and his promise to provide such protection on their remaining lands (by the Royal Proclamation of 1763 and the Treaty of Niagara in 1764), the Crown had already undertaken to protect the Anishinabek lands from settler encroachments.³³ At any rate, eighteen years after the treaty, the Crown (citing the continuing threat from settlers) induced the Anishinabek to surrender nine-tenths of the territory that remained to them on the Bruce Peninsula.³⁴

Even from this brief review of the historical record, it is clear that if the Crown-Saugeen agreement of 1836 had been a transaction governed by the common law, it would have raised a number of obvious questions. Among the most salient: what are the legal consequences of the fact that the primary consideration offered by the Crown in return for transfer of a vast tract of land appears to have been nothing more than a repetition of a pre-existing Crown undertaking?³⁵ While the courts do not ordinarily scrutinize the sufficiency of consideration in an arms-length transaction, equity will take notice of substantial

³¹ O.P. Dickason, *supra* note 18 at 212; for a similar description of the dialogue between Bond Head and the Anishinabek leading up to the treaty, see *Canadian Indians*, *supra* note 18 at 19.

³² See B. Slight, *Indian Researches or, Facts Concerning the North American Indians* (Montreal: J.E.L. Miller, 1844) c. 4, for an account of the protest by Chief Wawanosh. The record of a similar protest made on 13 September 1836 by Metigwob, one of the Saugeen Chiefs, can be found in Six Nations/New Credit Dept. of Indian Affairs Agency Files, Filed as No. 123-1836. For accounts of protests by missionaries present at the council, see *Sacred Feathers*, *supra* note 18, at 163-64 and *Canadian Indians*, *ibid.* at 15-20.

³³ *Royal Proclamation*, *supra* note 24. At the time, the protocol established by the *Royal Proclamation* had the force of law in the Province: see *Sarnia*, *supra* note 25 paras. 19-20.

³⁴ *Surrenders*, *supra* note 19 at 101-105.

³⁵ That is, the offer to protect Aboriginal traditional lands from encroachment seems simply to confirm the assurances contained in the *Royal Proclamation*, *supra* note 24, and the Crown's undertakings at the Treaty of Niagara, *supra* note 25. For a contracts lawyer, this conclusion would raise the question of whether the Crown offered any new, enforceable consideration to the Anishinabek: see *Bridge v. Cage* (1791), 79 E.R. 89 (C.P.). On the rationale for the contract rule about pre-existing duty, J.D. McCamus has written: "The concern underlying the pre-existing duty rule is that the person subject to the duty may be tempted to exploit another party's urgent need to have the pre-existing duty performed by exacting an additional fee or other unfair advantage from that party." See J.D. McCamus, *The Law of Contracts* (Toronto: Irwin Law Inc., 2005) at 239. [McCamus on Contracts].

unfairness in an arrangement reached between parties of unequal bargaining power.³⁶ A lawyer trained in the common law would investigate whether the consent of the Anishinabek had been secured by illegitimate threats from the Crown, amounting to duress. A lawyer seeking to impugn the agreement might also focus on the nature of the relationship between the Crown and the Anishinabek, questioning whether the agreement had been secured through undue influence or breach of fiduciary duty. The present article will examine only duress and undue influence, two foundational frameworks through which the common law examines the sufficiency of consent.

III. DURESS AND THE QUESTION OF CONSENT IN THE FORMATION OF AGREEMENTS

From the moment the common law recognized the ability of individuals to order their own affairs and property privately, it had to contend with the issue of whether such arrangements were entered into freely. The common law doctrine of duress and its equitable counterpart, undue influence, reflect different aspects of this preoccupation. Traditionally, duress focused on threats to person or property, examining whether such illegitimate pressure played an improper role in securing a party's agreement. Undue influence, on the other hand, developed as a tool for the courts to address the securing of agreements by more subtle, but, in the view of the courts, no less objectionable exercises of pressure. Both are rooted in considerations of procedural fairness (i.e. whether one should be able to benefit from a transaction secured by improper means), yet both also reflect the influences of a concern for substantive fairness of outcome.

The modern law of duress provides that a transaction procured by a "coercion of the will" may be avoided at the instance of the party so coerced.³⁷ While the courts have frequently used language suggesting that duress requires a level of pressure tantamount to the destruction of voluntariness,³⁸ *dicta* suggesting that duress requires an "overborne will" can be misleading.³⁹ A finding of duress

³⁶ These, of course, are the elements of the modern test for unconscionability. For an early example of the application of this doctrine, see *Morgan v. Palmer* (1824), 107 E.R. 554 at 556 (K.B.), Abbot C.J. [*Morgan*].

³⁷ See *Pao On v. Lau Yiu*, [1980] 1 A.C. 614 at 635, Lord Scarman (P.C.) [*Pao On*], cited with approval in *Gordon v. Roebuck* (1992), 64 D.L.R. (4th) 568 at para. 3 (Ont. C.A.) [*Gordon*]; and *Universe Tankships Inc. of Monrovia v. International Transport Workers Federation and Others*, [1983] 1 A.C. 366 (H.L.) at 383, Lord Diplock, at 400, Lord Scarman [*Universe Tankships*].

³⁸ See, e.g., *Knutson v. Bourkes Syndicate*, [1941] S.C.R. 419 at 425; and *The Siboen and the Sibotre*, [1976] 1 Lloyd's Rep. 293 at 335 (Q.B.).

³⁹ R. Bigwood, "Coercion in Contract: The Theoretical Constructs of Duress" (1996) 46 *University of Toronto L.J.* 201 at 207 [Bigwood, "Coercion"].

does not actually require forensic evidence demonstrating that one party was rendered psychologically incapable of exercising free will at the time of the transaction. Lord Scarman, who made the phrase “coercion of the will” central to his definition of duress in the Privy Council judgment in *Pao On*, later clarified what it signifies:

Compulsion is variously described in the authorities as coercion or the vitiation of consent. The classic case of duress is, however, not the lack of will to submit but the victim’s intentional submission arising from the realization that there is no other practical choice open to him.⁴⁰

Accordingly, when examining whether a party’s will has been coerced, the law of duress focuses on the conditions of choice available to the party at the time of the agreement. The courts will intervene where they conclude that one party’s perspective as to its available choices was limited improperly by the application of pressure from the other side. Such pressure may include threats of physical violence⁴¹ or improper demands that jeopardize the plaintiff’s property or economic well-being.⁴² In either case, the jurisprudence suggests that what is required for duress is 1) the making of an illegitimate demand that 2) leaves the other party with no *reasonable alternative* other than to manifest consent to the transaction.⁴³

Both elements of the test must be satisfied for a finding of duress. First, for a court to set aside a transaction it is not enough for the complainant to plead that he had no practical alternatives; those alternatives must have been limited by means that can reasonably be considered improper. Constraints are, after all, a fact of life; the law will not hold one party responsible merely because she has entered into an arrangement with another who finds himself compelled to select

⁴⁰ *Universe Tankships*, *supra* note 37 at 400.

⁴¹ *Barton v. Armstrong*, [1976] 1 A.C. 104 at 106 (P.C.) [*Barton*].

⁴² *Universe Tankships*, *supra* note 37; *Gordon*, *supra* note 37. See generally G.H.L. Fridman, *The Law of Contract in Canada* (Toronto: Thomson Canada Ltd., 2006) at 306-314 [Fridman]; and J. Swan, *Canadian Contract Law* (Canada: LexisNexis Canada Inc., 2006) at 76-81 [Swan].

⁴³ See *Universe Tankships*, *supra* note 37 at 384, Lord Diplock, and at 400 where Lord Scarman states that “the authorities... reveal two elements in the wrong of duress: (1) pressure amounting to compulsion of the will of the victim; and (2) the illegitimacy of the pressure exerted.” This test was cited with approval by the Privy Council in “*R*” v. *Her Majesty’s Attorney General for England and Wales (New Zealand)*, [2003] U.K.P.C. 22 para. 15 [“*R*” v. *New Zealand*], Lord Hoffman for the majority. See also *Barton*, *supra* note 41 at 121, Lord Wilberforce and Lord Simon, in dissent; and *Gordon*, *supra* note 37 at para. 3.

from a range of unpalatable alternatives. In the words of Lord Wilberforce in *Barton v Armstrong*⁴⁴:

[I]n life, including a life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can say that the actor had no choice but to act. Absence of choice in this sense does not negate consent in law: for this the pressure must be one of a kind which the law does not regard as legitimate.

For pressure to be considered illegitimate such that it will support a claim of duress, the pressure need not in itself be unlawful. In its treatment of what amounts to illegitimate pressure, the structure of the law is similar to the criminal law approach to extortion. Criminal blackmail frequently involves a threat by the blackmailer to do something that would otherwise be within the blackmailer's rights.⁴⁵ The essence of the wrong in such cases is that the threat is combined with a demand that cannot be legally justified (for example, to receive money not owed by the victim). Thus, for the purposes of duress, pressure may be considered illegitimate either because the means used to apply pressure are themselves unlawful or because the demand supported by the pressure is unlawful or exploitative.⁴⁶ Finally, it is not necessary that the illegitimate pressure be applied by the other contracting party, so long as that party was aware that the victim was under duress from a third party. Thus, if party A enters a contract with party B, knowing that B was subject at the time to illegitimate pressure from C to enter the contract, the contract may be set aside against A.⁴⁷

The second requisite element for a finding of duress is that the complaining party has been induced to manifest agreement because the illegitimate pressure has caused him or her to have no reasonable alternatives apart from compliance. In this regard, it will be material to inquire about the complainant's alternatives at the time of the transaction, whether the complainant protested, whether the complainant was independently advised of his or her rights, and whether, after entering the agreement, the complainant took steps to avoid it.⁴⁸ Evidence as to the latter three questions, however, will not be determinative; the essential issue is

⁴⁴ *Barton, ibid.* This statement is cited with approval by Lord Hoffman in "*R*" v. *New Zealand, ibid.* and *Permaform Plastics Ltd. v. London & Midland General Insurance Co.* (1996), 110 Man. R. (2d) 260 at para. 98 (C.A.).

⁴⁵ As, for example, the blackmailer who threatens to circulate legally releasable, but compromising, information to the public. On this point, see *Thorne v. Motor Trade Association*, [1937] 1 A.C. 797 at 806 (H.L.).

⁴⁶ "*R*" v. *New Zealand, supra* note 43 at para. 16; McCamus on Contracts, *supra* note 35 at 380.

⁴⁷ See Fridman, *supra* note 42 at 307.

⁴⁸ *Pao On, supra* note 37 at 635, Lord Scarman; *Gordon, supra* note 37 at para. 3; and see *Maskell v. Homer*, [1915] 3 K.B. 106 at 118-121 (C.A.).

whether the complainant had no reasonable and practical alternative to submitting under the pressure.⁴⁹

Of course, it must be shown that it was the *wrongdoer's* behaviour (or perhaps illegitimate inaction⁵⁰) that worsened the complainant's reasonable perception of the alternatives to entering into the contract. In this regard, the complainant is not required to show that the illegitimate pressure was the only factor that led to the agreement; it is sufficient that the pressure was at least "a reason" for the contract.⁵¹

The law's concern with duress extends beyond the confines of contract law. The application of coercive behaviour to obtain an unjust benefit may also give rise to liability in tort and unjust enrichment⁵² or result in criminal liability.⁵³ Where duress is used to impugn the sufficiency of consent to a contract, the usual remedy is that the contract may be avoided at the instance of the innocent party. Because duress renders a contract voidable (rather than void *ab initio*), the intercession of third party rights,⁵⁴ subsequent affirmation of the arrangement by the complainant,⁵⁵ and unreasonable delay by the complainant in enforcing his or

⁴⁹ In *Universe Tankships*, *supra* note 37 at 400, Lord Scarman summarized the law as follows: "[t]he absence of choice can be proved in various ways, e.g. by protest, by the absence of independent advice, or by a declaration of intention to go to law to recover the money paid or the property transferred... But none of these evidential matters goes to the essence of duress." See also *Barton*, *supra* note 41.

⁵⁰ In determining when the threat of inaction might be said to render a demand illegitimate, A. Wertheimer distinguishes the cases of two physicians, each of whom ask their patient for a large amount of money before they will provide medication that will cure the patient. Whether refusing to provide the medication should be considered an illegitimate threat will depend on whether the physician resides in a jurisdiction where she is legally required to provide the medication: A. Wertheimer, *Coercion* (New Jersey: Princeton University Press, 1987) at 207-208. Following Bigwood, "Coercion", *supra* note 39 at 226-231, the writer suggests that A's proposed behaviour (or inaction) *clearly* constitutes illegitimate pressure on B where it would violate a legal duty owed by A to B, and *may* constitute illegitimate pressure where it would violate B's reasonable expectations as to his baseline alternatives.

⁵¹ *Barton*, *supra* note 41 at 119.

⁵² G.H.L. Fridman, *The Law of Torts in Canada*, 3d ed. (Toronto: Thomson Canada Limited, 2002) at 781-789; P.D. Maddaugh & J.D. McCamus, *The Law of Restitution* (Canada: Canada Law Book Inc., 1990) at 532-562 [Restitution].

⁵³ *Criminal Code*, R.S.C. 1985, c. C46, s. 346 (extortion of benefits by "threats, accusations, menaces or violence") and s. 302 (extortion by libel).

⁵⁴ *McCamus on Contracts*, *supra* note 35 at 343.

⁵⁵ *Ibid.* at 342. For an example of a contract procured under duress but held valid due to subsequent affirmation, see *Stott v. Merit Investment Corporation* (1988), 48 D.L.R. (4th) 288 (Ont. C.A.) [*Stott*] and *North Ocean Shipping Co. v. Hyundai Construction Ltd.*, [1979] 3 W.L.R. 419 (Q.B.) [*Hyundai*].

her legal rights⁵⁶ may all lead a court to decline to upset a contract in the interests of justice.⁵⁷ Damages are not ordinarily available to remedy the presence of duress in the formation of contract,⁵⁸ a point to which this article will return when it considers the possible application of duress principles to Aboriginal treaties.

The nature of the elements of duress means that in practice the doctrine has been applied sparingly in the commercial context. One of the most prominent modern examples of a court setting aside a transaction on the basis of duress was the 1983 House of Lords decision in *Universe Tankships*.⁵⁹ In that case, the impugned transaction involved a payment of money by ship owners to a trade union's welfare fund after the ship had been blacklisted and prevented from returning to sea. After making the payment and leaving the port, the owners successfully obtained the return of the payment on the basis that it had been procured by duress.⁶⁰ Other cases have ruled that economic duress may be established where one party illegitimately demands extra payments before completing its obligations under a contract and the other party is left with no reasonable alternative but to make the payment.⁶¹ In *North Ocean Shipping v. Hyundai*,⁶² for example, the conduct of shipbuilders in demanding more money before completing a ship amounted to duress in circumstances where the builders knew that the owners required the timely completion of the ship to satisfy another contract. The builders' conduct was illegitimate because there was no

⁵⁶ McCamus on Contracts, *ibid* at 345.

⁵⁷ Compare the Ontario Court of Appeal's treatment of barriers to relief where equitable or public law remedies are sought in an Aboriginal rights claim: see *Sarnia*, *supra* note 25 paras. 103-138.

⁵⁸ Unless, of course, a claim can be framed in terms of another cause of action such as unjust enrichment, breach of fiduciary duty or tort. Evidence of the courts' willingness to be flexible in awarding compensation may be seen in decisions such as *Dusik v. Newton* (1985), 62 B.C.L.R. 1 (C.A.). For an example of compensation for breach of fiduciary duty in the Aboriginal context, see *Guerin v. Canada*, [1984] 2 S.C.R. 335 [*Guerin*]. For an intimidation claim framed in tort, see *Rookes v. Barnard*, [1964] A.C. 1129 (H.L), in which tort damages were awarded where an illegitimate demand made to a third party by the defendant caused economic losses to the plaintiff.

⁵⁹ *Universe Tankships*, *supra* note 37.

⁶⁰ On the issue of the owners' alternatives, their Lordships found that the consequences of continued blacklisting by the union would have been financially catastrophic. On the nature of the pressure applied by the union in relation to the welfare payment, the majority held that the threat of blacklisting to support this demand was illegitimate, as it was contrary to public policy and fell outside the protective *aegis* of applicable labour legislation. See *Universe Tankships*, *ibid.* at 390-391, Lord Diplock.

⁶¹ *Nfld. & Labrador Drilling Ltd. v. Miller* (1992), 97 Nfld. & P.E.I.R. 140 (Nfld. T.D.); *Stott*, *supra* note 53 (although in *Stott* the complainant's subsequent actions were held to have affirmed the arrangement).

⁶² *Hyundai*, *supra* note 55.

legal ground for their request and, in the words of Professor Fridman, they “were using their knowledge of the economic circumstances of the owners to compel or coerce them into agreeing to something they would otherwise not have assented to in the absence of the threats.”⁶³

The underpinnings of the doctrine of duress focus on the process by which consent has been obtained. The substantive fairness of the ensuing agreement is not directly material to the enquiry into whether the agreement should be upheld. The court’s focus is on the conditions of consent, a concern we might term one of procedural fairness.⁶⁴ This procedural enquiry is conditioned, of course, by the law’s value judgments as to the kinds of pressures that may be used to secure consent. The law does not concern itself with the use of ordinary commercial pressures, such as lawful tactics aimed at limiting the negotiation alternatives available to the other party, or the use of time-limited offers. Such tactics may in fact place pressure on a negotiator to consider an offer on the table, but the law distinguishes the effect of such tactics from the effects of threats or demands that one is not entitled to make in reducing the other party’s scope for independent judgment.⁶⁵

The philosophical concerns that underlie the principles of duress in contract law – procedural fairness and the need to ensure sufficiency of consent before enforcing agreements – seem, *prima facie*, to be concerns that the courts might be expected to bring to bear when they consider the enforcement of treaties between the Crown and First Nations. After all, treaties, by their terms, purport to be based on the free consent of both parties.⁶⁶ This is so whether the parties’ consensus is memorialized by documents signed by both sides (as was the case in the 1836 Crown-Saugen Treaty) or by an exchange of wampum belts (as occurred

⁶³ Fridman, *supra* note 42 at 311. Notwithstanding the finding of duress in *Hyundai*, the owners ultimately failed in their action, as the court held that their subsequent actions had affirmed the agreement after the pressure had disappeared: see *Hyundai*, *ibid.* at 434.

⁶⁴ Bigwood argues that the law of duress is in fact more concerned with questions of unfairness than with questions of freedom or voluntariness. See Bigwood, “Coercion”, *supra* note 39 at 206. For a similar view see A. Wertheimer, *supra* note 50 at 53. P.S. Atiyah states that fairness was the primary basis of the contract principles of duress prior to the 18th century. See P.S. Atiyah, *supra* note 9 at 435.

⁶⁵ The philosopher Robert Nozick has pointed out that one potentially helpful way of identifying illegitimate pressure is to ask whether putatively coercive behaviour should properly be characterized as a *threat* to undermine the alternatives that the other party would otherwise reasonably expect, or an *offer* to ameliorate their baseline alternatives: R. Nozick, “Coercion” in S. Morgenbesser, P. Suppes, & M. White, eds., *Philosophy, Science and Method* (New York: St. Martin’s Press, 1969) 440 at 447 [Nozick, “Coercion”]. For further discussion on this point, see Bigwood, “Coercion”, *ibid.* at 205-213.

⁶⁶ On the importance of consent in Aboriginal treaties, see J.Y. Henderson, *supra* note 10 at 65, and the cases cited in note 68, *infra*.

at the Treaty of Niagara in 1764). Indeed, at least in relation to Aboriginal lands, the relationship between the British Crown and First Nations in Canada was expressly founded from the outset upon the principle of consent.⁶⁷ The Supreme Court of Canada has repeatedly confirmed that the legal significance of treaties arises from the fact that they reflect the consent and the intentions of both parties.⁶⁸ The courts' focus on the need to determine the parties' intent in resolving disputes about the interpretation of treaties would make little sense if the law permitted one party's "intent" in a treaty to be dictated by the other side.⁶⁹

Finally, in relation to procedural fairness, we have taken note that the Crown was legally obliged to act "with honour" and to avoid the appearance of sharp dealing in the formation of treaties.⁷⁰ If the common law requires that a party who has no duty to act honourably must avoid using coercion to obtain an

⁶⁷ This was the assurance of the *Royal Proclamation*, *supra* note 24, which indicated that Aboriginal lands would be acquired by the Crown "if at any Time the Said Indians *should be inclined* to dispose of the said Lands the same shall be Purchased only for Us...at some public Meeting or Assembly of the said Indians, to be held for that purpose..." (emphasis added).

⁶⁸ See, for example: *Badger*, *supra* note 7 at para. 76; *R. v. Sioui*, [1990] 1 S.C.R. 1025 [*Sioui*] at para. 43; and *Simon*, *supra* note 11 at para. 24. Some have questioned whether the manifesting of consent by Aboriginal nations under the unequal conditions of the colonial era should ever be treated as an appropriate basis for determining contemporary political or legal rights: see, e.g. D. Ivison, "Consent and the Subject of Rights" (paper presented at the Inaugural Conference of the Consortium on Democratic Constitutionalism, University of Victoria, 1-3 October 2004) [unpublished]. In this paper I accept that the concept of consent is contingent and complex, but I wish to pursue the Supreme Court's premise that consent in treaty-making is a meaningful and legally significant principle.

⁶⁹ In *Badger*, *supra* note 7, Cory J. noted that treaties "create enforceable obligations based on the *mutual consent* of the parties." In the words of Wilson J. in *R. v. Horseman*, [1990] 1 S.C.R. 901 at para. 6, "Indian treaties must be given the effect the signatories obviously intended them to have at the time they were entered into." Compare, however, the conclusion, in *obiter dicta*, of the Ontario Court of Appeal in *Attorney-General of Ontario v. Bear Island Foundation* (1989), 68 O.R. (2d) 394, at para. 55, that a treaty document, as an expression of the sovereign will, might be effective at least in removing Aboriginal rights in an area even against an Aboriginal nation that had not consented to the treaty. The Supreme Court of Canada affirmed the result without commenting on this point, at [1991] 2 S.C.R. 570.

⁷⁰ *Supra* note 5. It is arguable that in treaties involving the transfer of recognized Aboriginal interests in traditional lands, the Crown was also bound by a fiduciary duty to the Aboriginal party. The decisions in *Wewaykum*, *supra* note 6 and *Haida*, *supra* note 5, indicate that the courts will be cautious in imposing a fiduciary duty on the Crown, requiring for this that "the Crown [have] assumed discretionary control over specific Aboriginal interests": *Wewaykum*, *supra* note 6 at para. 79. Whether the duty applies in a treaty negotiation involving Aboriginal title appears to depend, then, on whether the Crown's actions (by imposing its monopoly over the land surrender process, for example) should be interpreted as giving it a measure of discretionary control over an identified Aboriginal interest in particular ancestral lands. Compare the analysis of Dickson J. in *Guerin*, *supra* note 58 at 375-376, 383-387.

agreement, *a fortiori*, one would expect the courts to require as much from a party who is bound by such a duty of honourable dealing.

The main concerns of the law of duress, therefore, appear to find a parallel in the preoccupations expressed by the courts in relation to the formation of First Nation treaties. Nonetheless, as noted, there is little judicial guidance in Canada as to the rules that should apply to assess the sufficiency of consent in treaty-making. It may be postulated that this vacuum in established principles in an area the courts describe as *sui generis*, will redound to the disadvantage of Aboriginal parties in cases where their assent to treaties appears to have been the result of manipulation or illegitimate pressure by the Crown. After all, the treaty terms to which they are alleged to have assented will, in such situations, presumably favour the Crown more than would be expected in a situation where such manipulation or pressure was absent. Uncertainty in the law will handicap the efforts of those who seek to establish that their consent was invalidly obtained.

Before proceeding to an analysis of how the common law framework of duress might be applied to the formation of First Nation treaties, one objection specific to the law of duress needs to be addressed. It might be argued that it would be inappropriate to apply legal doctrines retroactively to a historical situation if the doctrine did not exist at the time of the events in question. The honour of the Crown, it has been said, does not require after-the-fact largesse.⁷¹ On this point, it must be kept in mind that duress was a well-established principle in the common law even before the British acquisition of North America.⁷² Historically, the common law doctrine of duress originated from a concern to protect individuals from exploitation through threats of physical violence.⁷³ However, cases in which the courts have focused on threats to property date back at least to the first half of the eighteenth century. Indeed, the dispute described at the beginning of this article as "Situation A" was adjudicated by the King's Bench in 1731. The case was *Astley v. Reynolds*⁷⁴ and the court found that the defendant pawnbroker's threat to retain the plaintiff's property amounted to unlawful compulsion. From an early date, the courts also recognized that compulsion in

⁷¹ In the context of treaty interpretation, see *Marshall*, *supra* note 7 at para. 14, Binnie J.

⁷² See *Bayly v. Sir Henry Clare* (1609), 2 Br & Gold 275, 123 E.R. 939 (C.B.) (stating that a deed secured by threats to imprison the signatory's wife or son would be invalid); *Kinnersly v. Smart* (1653), Cro. Eliz. 195, 78 E.R. 450 (Q.B.); and *Talleyrand v. Boulanger* (1797), 3 Ves Jun 447, 30 E.R. 1099 (Ch.) (where securities given for debts were held not enforceable because they were procured by imprisoning the plaintiff).

⁷³ McCamus on Contracts, *supra* note 35 at 367; Fridman, *supra* note 42 at 306-307.

⁷⁴ *Supra* note 3. In *Skeate v. Beale* (1841), 113 E.R. 668 (Q.B.) Denman C.J. suggested that findings of duress would be rare in cases of threats to property, as the complainant would normally have sufficient legal remedies to counter such threats at the time they were made.

the form of more general economic pressure could equally impugn the validity of an agreement.⁷⁵ Thus, it is not historically inapt to consider the possible application of the doctrine of duress, and particularly duress against property, in relation to the Crown-Saugen Treaty of 1836.

If this proposition is accepted, it will remain to be determined whether, in disputes relating to the formation of historical treaties, the *modern* elaboration of the principles of duress should form the basis of the courts' analysis. This point might be addressed by relying on the jurisprudential conception that the details of the common law have existed since time immemorial (the elaboration of the law over time by judges amounting to a process of discovering the applicable principles, rather than inventing them).⁷⁶ While there are limits to the usefulness of this "declaratory" conception of jurisprudence in describing the process by which legal principles evolve,⁷⁷ every judicial decision is in a practical sense backward-looking insofar as it defines the parties' legal obligations at the time of their dispute. In fact, in Aboriginal rights cases, the Supreme Court of Canada has frequently applied a modern analysis of the parties' legal relationship to historical transactions. The reference to modern fiduciary principles in cases like *Guerin*⁷⁸ and *Blueberry River*⁷⁹ is one example. The elucidation of modern conceptions of the parol evidence rule and the officious bystander test for implied

⁷⁵ See, e.g., *Valpy v. Manley* (1845), 1 C.B. 594, 135, E.R. 673 (C.P.); *Morgan*, *supra* note 36; *Ailee v. Backhouse* (1838), 3 M. & W. 663, 150 E.R. 1298 (Exch. of Pleas). Historically, as it does today, the doctrine of duress extended beyond the confines of contract law. Thus, in addition to providing a framework for examining the validity of agreements, the doctrine also provided a basis for recovery in tort against the wrongdoer. To support a claim in tort, the action threatened by the defendant must have been unlawful: see *Restitution*, *supra* note 52 at 532.

⁷⁶ A useful modern description of this "declaratory" theory can be found in *Kleinwort Benson Ltd. v. Lincoln C.C.*, [1998] 2 A.C. 349 at 377-379 (H.L.), Lord Goff. For a recent pragmatic discussion of the role of judges in this regard, see B. McLachlin, "Remarks of the Right Honourable Beverley McLachlin, P.C.: Respecting Democratic Roles" (Delivered at the Conference on the Law and Parliament, Ottawa, Ontario, 22 November 2004), online: Supreme Court of Canada <www.scc-csc.gc.ca/aboutcourt/judges/speeches/DemocraticRoles_e.asp> where the Chief Justice stated: "The law does not apply itself, and the answers to constitutional questions are not obvious or pre-ordained. If they were, we would not need judges. It follows that there is no clear demarcation between applying the law, interpreting the law, and making the law."

⁷⁷ For the jurisprudential questions raised by the declaratory theory, see Z. Chafee, Jr., "Do Judges Make or Discover Law?" (1947) 91 *Proceedings of the American Philosophical Society* 405. For a recent judicial discussion of the theory, and its limitations, in the context of declarations of legislative invalidity, see *Canada (Attorney General) v. Hislop*, 2007 SCC 10 paras. 82-95 [*Hislop*]. The decision in *Hislop* affirmed that the courts will not always grant retroactive remedies where legislation is declared constitutionally invalid.

⁷⁸ *Guerin*, *supra* note 58.

⁷⁹ *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344.

terms is another.⁸⁰ Further, a reasonable case can be made that the fundamental principles and underpinnings of the law of duress, as outlined herein, have not changed significantly over the past two centuries.⁸¹ If either argument is accepted, the courts should apply the doctrine to treaty claims in a manner consistent with the modern treatment of non-treaty claims of duress. Accordingly, the argument will proceed on the basis of the current framework of judicial analysis.

Adopting duress' two-pronged approach to the question of consent in Aboriginal treaties would involve asking 1) whether either party placed illegitimate pressure on the other, and 2) whether the effect of such pressure was to leave the complainant with no reasonable alternative but to manifest assent to the arrangement. On the first issue, the court would review evidence about the historical context of the treaty, written records (if any) of the pre-treaty negotiations and any oral evidence passed down within the Aboriginal nation of the events leading up to the treaty.⁸² Here, the court would focus on whether the defendant placed pressure on the complaining party to secure its consent. If so, the court would determine whether such pressure was itself illegal or otherwise illegitimate or was used to support an illegitimate demand. An affirmative finding here would satisfy the first prong of the duress test. Relevant evidence here would include the prevailing laws at the time of the treaty and any evidence that the alleged coercer was not entitled to demand the terms that ultimately formed part of the treaty. In this regard, it is not necessary for the complainant to show that the alleged coercer acted in bad faith, although any such evidence may strengthen the case that the treaty resulted from illegitimate pressure.⁸³

Turning to the second prong of the duress test, the analysis would shift to a determination of whether the alleged coercer's illegitimate behaviour placed the complainant in a position where it had no reasonable alternative but to manifest assent to the treaty. Here, the enquiry would focus on evidence of the complainant's access at the time to legal remedies and other practical means of resisting the pressure to accept the treaty terms. Relevant, but not determinative on this point, would be evidence that the complainant had access to independent legal advice and evidence, if any, that the complainant protested against the treaty

⁸⁰ On this point, see, e.g., *Marshall*, *supra* note 7 at para. 10, Binie J.; *R. v. Horse*, [1988] 1 S.C.R. 187 [*Horse*] at para. 35, Estey J.

⁸¹ One significant change has occurred in the nature of the remedy for duress, however. Until recently, duress made a contract void *ab initio* at common law, not voidable as it does today: see Fridman, *supra* note 42 at 306.

⁸² On the issue of admissible evidence in relation to treaty intent, see *Simon*, *supra* note 10 paras. 41-49; and *Marshall*, *supra* note 7 paras. 9-14.

⁸³ See Swan, *supra* note 42.

arrangement, or actively affirmed the treaty arrangement once the illegitimate pressure was removed.

In a case like Situation B, as described earlier in the paper, the preceding framework of analysis would focus the court's attention on several evidentiary issues. On the question of whether the Crown used illegitimate pressure to induce the Anishinabek to sign the Saugeen agreement, evidence would be needed about the conditions leading up to the treaty, what Bond Head said to the Anishinabek prior to their manifesting their assent, and evidence of any antecedent desire by the Anishinabek to yield up their lands prior to Bond Head's arrival. In reviewing the evidence on the question whether the Anishinabek consent was secured by illegitimate pressure, the court would need to assess whether Bond Head's words should be interpreted as an effort to persuade the Anishinabek that the Crown would not honour their existing legal rights, and whether, at the time of the treaty, the Anishinabek had a reasonable expectation or legal right to expect that the Crown would protect them in the occupation of their traditional lands. Relevant to the second prong of the analysis (whether the Anishinabek had no reasonable alternative to signing the agreement) would be evidence of the severity of settler encroachment in the area of the Saugeen lands in the years leading up to 1836, and evidence as to whether Crown action (or inaction) had contributed to such encroachment. Following the logic of duress principles would mean that all of these questions would form part of the court's assessment of whether the Crown secured the consent of the Anishinabek through extraneous pressure and whether such pressure should be considered illegitimate.

On the second branch of the test for duress, namely whether any such pressure had the effect of eliminating the Anishinabek's reasonable alternatives to signing the treaty, the common law framework would direct the analysis toward an enquiry into whether settler encroachment was a significant risk to the Anishinabek in the enjoyment of their lands, the legal remedies available to an Aboriginal nation in 1836 to prevent or reverse such encroachment, the legal tools available to the Anishinabek to avoid the treaty arrangement, whether the Anishinabek protested against the treaty, and the basis of any such protest. Such facts would inform the court's determination as to whether the Anishinabek entered the treaty under what amounts to legal compulsion. Finally, on the question of whether the Anishinabek are barred from seeking a remedy today, the common law of duress would suggest that the courts consider any evidence that the Anishinabek subsequently freely affirmed the arrangement, and that third parties have subsequently acquired rights to the lands covered by the treaty.⁸⁴

⁸⁴ Strictly speaking, each of these factors would be material to the decision as to the availability of rescission. The availability of compensation would presumably be subject to different considerations, an issue that is discussed later in this paper.

Thus far we have sketched out how the law of duress *might* be applied to an Aboriginal treaty; we have not yet fully explored whether it would be legally appropriate to do so. This is a subject to which we will turn shortly. For the moment, it is sufficient to note that the writer posits only that the common law principles of duress should inform the *sui generis* law in relation to treaty formation. First, however, it is helpful to examine another common law doctrine relating to the sufficiency of consent in the formation of agreements: the equitable concept of undue influence.

IV. UNDUE INFLUENCE AND THE FORMATION OF AGREEMENTS

Like duress, the doctrine of undue influence permits the avoidance of transactions on the basis of insufficient consent.⁸⁵ Unlike duress, which focuses on the presence or absence of threats or other forms of compulsion, undue influence addresses concerns that consent may have been obtained through more subtle, but nevertheless, equally improper methods of influence. In developing the principles of undue influence, the courts of equity were concerned about preventing the exploitation of parties whose vulnerability arose due to an existing relationship with another party who stood to benefit from the transaction. In this way, equity reached beyond the bounds of the law of duress to identify and proscribe other questionable methods of persuasion. Once again, the courts' primary focus is on the process by which the complainant's apparent consent was obtained, rather than on the substantive fairness of the underlying transaction.⁸⁶

All negotiated agreements, of course, are products of mutual influence. Consequently, it has not been easy for the courts to define with precision the types of influence that fall afoul of the law. The courts have not set out a definitive test, although the focus is clearly on whether the assent manifested by the complainant ought to be considered a product of his own free will.⁸⁷ In

⁸⁵ In the words of Lord Hoffman in "*R*" v. *New Zealand*, *supra* note 43 at para. 21, "[l]ike duress at common law, undue influence is based upon the principle that a transaction to which consent has been obtained by unacceptable means should not be allowed to stand."

⁸⁶ The purpose of the doctrine of undue influence is not to "save persons from the consequences of their own folly", but to prevent their being victimized by other people: *Allcard v Skinner* (1887), 36 Ch. D. 145 at 181, [1886-90] All E.R. 90 (C.A.) Lindley L.J. [*Allcard*, cited to Ch. D.], cited with approval in *Geffen v Goodman Estate*, [1991] 2 S.C.R. 353 at 368 [*Geffen*], and in *National Commercial Bank (Jamaica) Ltd. v Hew & Ors (Jamaica)*, [2003] U.K.P.C. 51 at para. 33 (P.C.) [*Hew*]. The substance of the transaction may, however, play an evidentiary role in the determination of whether consent was obtained improperly.

⁸⁷ See *Royal Bank of Scotland plc. v. Etridge (No. 2)*, [2001] 4 All E.R. 449 at para. 7 (H.L.) [*Etridge*], in which Lord Nicholls concluded that in every case of undue influence "the consent... procured ought not fairly to be treated as the expression of a person's free will."

addition to cases where there is evidence of explicit manipulation leading to the complainant's consent, the doctrine has also been applied to transactions where a pre-existing relationship between the parties gives rise by its very nature to a risk that improper influence may have been exercised. Where the parties' relationship was characterized by trust, domination or dependency, the courts have been prepared to draw an inference that undue influence was exercised.⁸⁸

In analyzing the types of relationships that might reasonably be said to raise a risk of undue influence, the courts have identified certain relationships (for example, solicitor-client, doctor-patient, parent-child, trustee-beneficiary) that automatically raise a rebuttable presumption of influence. In other situations, a rebuttable presumption of influence may still arise if it is shown that the parties' *de facto* relationship involved one of them reposing trust in or depending on the other.⁸⁹ Here, the courts will look to whether one party had the ability, because of their relationship, to dominate the will of the other in relation to the kind of transaction in dispute.⁹⁰ In either case, once the necessary relationship is proved, if the nature of the transaction itself raises questions, the courts will require the dominant party to bring evidence that the complainant's consent was free of improper influence.⁹¹

In Canada there has been some debate as to whether, for an agreement to be set aside for undue influence, a complainant must establish that the agreement was to the "manifest disadvantage" of the complainant.⁹² The better view appears to be that while the substance of an agreement may provide evidence that an agreement resulted from overbearing influence, substantive unfairness is not necessary for undue influence to be proved.⁹³ The substance of the transaction

⁸⁸ See *Etridge*, *ibid.* at paras.11-14, Lord Nicholls; and *Geffen*, *supra* note 86 at para. 43, Wilson J. and at para. 80, La Forest J.

⁸⁹ For a discussion of the relationships in which this presumption will automatically arise, and how this presumption is raised outside of these already recognized relationships, see *Barclays Bank v. O'Brien*, [1994] 1 A.C. 180 at 189-190 (H.L.) [*Barclays Bank*]. It should be noted that despite the courts' use of the phrase "evidentiary presumption", the real question in all cases is whether, at the end of the day, the preponderance of evidence indicates that consent was obtained through undue influence: *Barclays Bank* at 219, Lord Scott, cited with approval in *CIBC Mortgage Company v. Rowatt* (2002), 220 D.L.R. (4th) 139 at para. 20, Feldman J.A., for the Court [*Rowatt*].

⁹⁰ *Geffen*, *supra* note 86 at para. 40, Wilson, J., at para. 80, La Forest J.

⁹¹ *Etridge*, *supra* note 87 para. 13-14, Lord Nicholls; "*R*" v. *New Zealand*, *supra* note 43 at para. 22; *Geffen*, *ibid.* paras. 42-48, Wilson J.

⁹² See *Geffen*, *ibid.* at para. 41, Wilson J. and paras. 82-85, La Forest J.

⁹³ This is the current position in the U.K: see *Etridge*, *supra* note 87 at para. 17, Lord Nicholls. It was also the historical approach of the courts in this area: see, e.g., *Allcard*, *supra* note 86 at 171, Cotton L.J. The U.K. position in this regard was adopted by the Ontario Court of Appeal in *CIBC Mortgage Company v. Rowatt*, *supra* note 89 at para. 20, Feldman J.A., for the Court.

itself is directly material only to the extent that it raises evidentiary suspicion that consent was obtained by improper means.⁹⁴

The doctrine of undue influence focuses on vulnerability resulting from certain kinds of relationships⁹⁵ It does not generally concern itself with arms' length negotiations. It does not, for example, intervene to undo the effects of hard bargaining among parties at arms' length, nor does it inquire what methods of persuasion dominated negotiations between such parties. Nor does the doctrine require interference with agreements that result from differentials in bargaining power. To the extent that bargaining power arises from the relative attractiveness of the parties' alternatives away from the bargaining table⁹⁶ or from the relative preferences of each party for what the other might exchange,⁹⁷ equity is generally blind to such concerns. As discussed, where equity, through the doctrine of undue influence, does become concerned is when, *because of an existing relationship of trust or dependence*, one party was able to secure the other's assent through improper manipulation of that relationship. In such circumstances, the assent has been obtained by means that equity will not condone.⁹⁸

For the same reasons as set out in the case of duress, one might expect the principles underlying the law of undue influence to be of interest in relation to Aboriginal treaties. Like the doctrine of duress, the doctrine of undue influence

⁹⁴ In the words of Lord Nicholls in *Etridge*, *supra* note 87 at para. 13: "The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case" (emphasis added).

⁹⁵ Compare the views in R. Bigwood, "Undue Influence: 'Impaired Consent' or 'Wicked Exploitation?'" (1996) 16 *Oxford J. Legal Stud.* 503 at 510, who focuses on prevention of exploitation, to P. Birks & C.N. Yin, "On the Nature of Undue Influence" in J. Beatson & D. Friedmann, eds., *Good Faith and Fault in Contract Law* (Oxford: Clarence Press, 1995) at 57, who focus on the validity of consent. This issue is canvassed in *Geffen*, *supra* note 86 paras. 37-39, Wilson J., and paras. 84-85, LaForest J.

⁹⁶ See D.A. Lax & J. K. Sebenius, "The Power of Alternatives or the Limits to Negotiation" (1985) 1(2) *Negotiation Journal*, 163 at 165-166; and R. Fisher & W. Ury, *Getting to Yes*, 2d ed. (New York: Penguin Books, 1991) at 100.

⁹⁷ See R.M. Emerson, "Exchange Theory, Part 11: Exchange Relations, Exchange Networks, and Groups as Exchange Systems" in J. Berger, M. Zelditch Jr., & B. Anderson, eds. *Sociological Theories in Progress*, vol. 2 (Boston: Houghton Mifflin, 1972) at 62-72; and L. Greenhalgh, S.A. Neslin & R.W. Gilkey, "The Effects of Negotiator Preferences, Situational Power, and Negotiator Personality on Outcomes of Business Negotiations" (1985) 28 *Academy of Management Journal* 9 at 29.

⁹⁸ In this sense, as J. Cartwright has noted, the philosophical foundations of undue influence are similar to those of innocent misrepresentation: see J. Cartwright, *Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts* (New York: Oxford University Press, 1991) at 151.

pre-dates the Royal Proclamation.⁹⁹ Like duress, undue influence focuses on unacceptable intrusions into a party's ability to make a free judgment about how to advance its interests based on the alternatives that should legally be open to it. For the student of Aboriginal-Crown relations, however, the doctrine of undue influence, with its focus on preventing exploitation in relations of vulnerability, would seem to present particular potential as an analytical tool. The Crown's monopoly on the right to acquire Aboriginal interests in land, for example, and its jurisdiction over the waves of immigrants who not infrequently were prepared to squat illegally on unceded Aboriginal territories¹⁰⁰ both eventually left Aboriginal nations dependent to a considerable extent on the Crown's willingness to respect Aboriginal interests.

Equally, the Crown's explicit assumption of a protective role in relation to Aboriginal nations (through the Royal Proclamation and its position as expressed through treaty negotiations thereafter) increased Aboriginal vulnerability to sharp dealing by Crown officials. As noted earlier, that vulnerability in historical treaty-making gave rise to an obligation of honourable dealing by the Crown. As with duress, the presence of that duty makes it difficult to argue that the Crown was not obliged to meet the ordinary standards that must be met by parties to a private contract.

Applying the framework of undue influence to the formation of Aboriginal treaties would involve allowing an Aboriginal party to prove that the Crown obtained its consent to a treaty through means that equity would consider improper. The Aboriginal party could satisfy the burden of proof either 1) by showing sufficient evidence of overt acts of improper pressure or coercion by the Crown in the negotiations leading up to the treaty, or 2) by showing that, at the relevant time, its relationship with the Crown was such that it placed trust in the Crown's judgment about how best to manage its affairs¹⁰¹ and that the terms of the treaty call for explanation. In the latter case, the courts would be entitled to draw a rebuttable inference that the Crown exercised undue influence. It is possible that the courts would recognize the historical Aboriginal-Crown relationship as being of a type which invariably supports a presumption of undue influence.¹⁰² It seems more likely, however, given the diversity of relations

⁹⁹ See, e.g., *Clarkson v. Hanway* (1723), 2P. Wms. 203, 24 E.R. 700; *Carpenter v. Heriot* (1759), 1 Eden 338, 28 E.R. 715 (Ch.); and *Wycherley v. Wycherley* (1763), 2 Eden 175, 28 E.R. 864 (Ch.).

¹⁰⁰ See R. G. Moore, *supra* note 26.

¹⁰¹ This is the test set out by Lord Nicholls in *Etridge*, *supra* note 87 at para. 14. In the language of Wilson J. from *Geffen*, *supra* note 86 at para. 40, the question will be whether the Crown had the ability to "dominate the will" of the Anishinabek, "whether through manipulation, coercion or outright but subtle abuse of power."

¹⁰² I.e., like the relationships of solicitor and client, and guardian and ward.

between individual Aboriginal nations and the Crown over the various time periods in which treaties were negotiated, that for the purposes of presumptive undue influence, the courts would require evidence in each case of the nature of the relationship between the parties.

Turning to the Crown-Anishinabek treaty described as Situation B, it is not difficult to envisage how the undue influence framework of analysis could be applied. The onus of proving undue influence would rest with the Anishinabek. The court would apply the presumption of undue influence provided for by the case law if it received sufficient evidence that 1) the Crown-Anishinabek relationship prior to and at the time of the treaty negotiations was one that provided the Crown with an opportunity to dominate the will of the Anishinabek, and that 2) the nature of the treaty itself (in its advancement of both sides' interests) calls into question whether the Anishinabek assent was secured by the Crown through improper means. In reaching its decision, the court would also review any evidence adduced on the question of whether the Crown or its agents overtly manipulated their relationship with the Anishinabek to secure the treaty, either through threats,¹⁰³ or through exploiting an existing relationship of trust to falsely suggest that the treaty terms advanced Anishinabek interests. Also relevant would be evidence of the parties' intentions prior to entering into the treaty, the language used by the parties during the negotiations,¹⁰⁴ any independent advice received by the Anishinabek, and whether the Anishinabek in fact relied on the Crown's agents to advise them how best to advance their interests. The conclusion here, as in all undue influence cases, would depend on a meticulous review of the evidence.

V. BRINGING CONTENT TO *SUI GENERIS* LAW

The aim of this paper is modest: to sketch out the argument that the concerns manifested by the common law of duress and undue influence ought to be taken into account in the *sui generis* body of law that governs Aboriginal treaties. The foundational concept in treaty law is consent. Treaties are enforced against the Crown and Aboriginal nations precisely because they reflect the consent of the Crown and an Aboriginal nation to abide by certain terms.¹⁰⁵ The exercise of

¹⁰³ Here the doctrines of undue influence and economic duress overlap in their application. See the comments of Lord Nicholls in *Etridge*, *supra* note 87 paras. 6-8.

¹⁰⁴ For example, in the treaty signed on the same day with the Manitoulin chiefs (see footnote 30, *supra*), Bond Head refers to the Anishinabek as "My Children": a phrase susceptible to a number of interpretations in the metaphoric relations between the Crown and Aboriginal peoples at the time.

¹⁰⁵ *Badger*, *supra* note 7 at para. 76; *Sioui*, *supra* note 68 at para. 43; *Simon*, *supra* note 10 at para. 24.

seeking common intent in treaty interpretation would be superfluous and misleading if the courts did not concern themselves with the manner in which each party's apparent assent was obtained. We have seen that, precisely because the philosophical concerns of duress and undue influence are to ensure the integrity of consent (where consent is required for a transaction to be binding), they appear, *prima facie*, to be of interest in relation to questions about the formation of treaties between the Crown and Aboriginal peoples.

Surprisingly, in their voluminous jurisprudence on Aboriginal treaties, the appellate courts in Canada have yet to grapple directly with the questions of illegitimate pressure and improper influence in the formation of treaties.¹⁰⁶ The result in this area of treaty law – an area where private law has long concerned itself to police exploitative behaviour – is uncertainty. Although it is logical for Aboriginal treaties to be governed by *sui generis* rules, the courts must develop such rules. Until they do, the law will remain unmoored from any set of rules – domestic, inter-societal or otherwise. To date, treaty law decisions have focused largely on the appropriate methods of interpreting treaty terms, the interaction between treaty rights and laws of general application and, more recently, on the obligation of the Crown to consult Aboriginal peoples when it contemplates actions that may violate treaty rights. Perhaps because most treaty issues have come to the courts as defences in natural resource-based prosecutions by government, areas such as compensation for breach and remedies for improper behaviour inducing consent remain largely unexplored. This lack of judicial guidance across broad areas of treaty law seems inconsistent with the imperatives of the rule of law¹⁰⁷ and makes it particularly difficult to advise Aboriginal signatories of their rights.

¹⁰⁶ There have been express references in lower court decisions to the possibility of applying the doctrine of undue influence and duress to treaties. See, e.g., *Regina v. Batisse* (1978), 19 O.R. (2d) 145 at 150-151 (District Ct.); *Chippewas of Kettle & Stony Point v. Canada (Attorney General)* (1995), 24 O.R. (3d) 654 paras. 197-208 (Gen. Div.); and *Montana Band v. Canada*, [2006] F.C. 261 paras. 549, 576, 586 (F.C.) [Montana]. See also *Re Paulette et al. and Registrar of Titles (No. 2)* (1973), 42 D.L.R. (3d) 8 (N.W.T.S.C.), *aff'd* (1975), 63 D.L.R. (3d) 1 (N. W.T.C.A.), *aff'd* [1977] 2 S.C.R. 628, where Morrow J. found that irregularities in the negotiation of Treaties 8 and 11 raised enough doubt about whether Aboriginal title in the area had been extinguished by those treaties to justify the issuance of a *caveat*.

¹⁰⁷ See *Reference re: Manitoba Language Rights (Man.)*, [1985] 1 S.C.R. 721 paras. 59-60; and *Merkur Island Shipping Corp'n. v. Laughton*, [1983] 2 A.C. 570 at 612 (H.L.) where Lord Diplock stated the following (about the law of industrial relations): "But what the law is... ought to be plain. It should be expressed in terms that can be easily understood by those who have to apply it even at shop floor level. I echo everything that the Master of the Rolls has said in the last three paragraphs of his judgment in this case. Absence of clarity is destructive of the rule of law; it is unfair to those who wish to preserve the rule of law; it encourages those who wish to undermine it."

If the principles underlying duress and undue influence are to be used as analytical tools in relation to treaty formation, they will have to be employed in a manner that respects and recognizes the *sui generis* nature of Aboriginal treaties and the unique contexts in which they were formed. This, in turn, implies that, as juridical concepts, the principles should not be used in a manner that negates the inter-societal nature of treaties. Finally, in the context of the overarching goal of reconciling the parties' historic rights, the courts will need to develop a *sui generis* approach to remedies that reflects the nature of the wrong, and the modern setting in which such remedies would be ordered. Space does not permit a lengthy analysis of these issues in this paper, but it is nevertheless possible to sketch out in a preliminary way how these concerns might be addressed.

Because treaties are *sui generis* agreements in their formation, nature and legal status,¹⁰⁸ they cannot be treated as contracts and are not subject to contract law.¹⁰⁹ The distinct legal status of treaties mirrors the distinctiveness of the underlying relationship between Aboriginal peoples and the Crown. The formation, interpretation and enforcement of treaties are governed by special rules, designed to reflect the unique historical context in which treaties were created, and the present constitutional status of treaty rights. Those rules must be sensitive to the fact that the context of treaty creation spans more than two centuries in what is now Canada, encompassing dozens of socio-juridical traditions and multifarious purposes, from alliances, to peace-making, to trade arrangements, to resource and land arrangements. In each of these cases, the process of determining and giving effect to the treaty-makers' intentions requires a nuanced understanding of historical evidence (both written and oral) about the treaty context and the disparate worldviews of the negotiators. Finally, an effective approach to treaty enforcement must be alive to present realities and the question of how historic treaty intentions can best be implemented in a world that has evolved since the parties first negotiated the terms of their co-existence.

For reasons both practical and theoretical, then, the courts have rightly concluded that it would be inappropriate and unhelpful to import the *corpus* of contract law, developed by domestic courts to govern private relationships, into the analysis of the rights created by treaties entered into by the Crown and Aboriginal nations. Treaties that were created on the assurance that they were to last as long "as the sun shines above and the water flows into the ocean"¹¹⁰ cannot

¹⁰⁸ *Supra* note 10.

¹⁰⁹ See *Horseman*, *supra* note 69 at 907; *R. v. Sundown*, [1999] 1 S.C.R. 393 at para. 10; and *Marshall*, *supra* note 7 paras. 10, 43.

¹¹⁰ This was the recorded assurance of the Crown's representative, Alexander Morris (1826-1889), in Treaties 3 and 4. In A. Morris, *The Treaties of Canada with the Indians* (Toronto: Bedfords, Clarke, 1880) rev. ed. (Toronto: Prospero Books, 2000) at 96, the author summarizes what he said in the negotiations leading up to the signing of Treaty 4 at Fort Qu'Appelle: "I know that

be susceptible to the same tools of strict and literal interpretation as an agreement to deliver a specified quantity of widgets next Wednesday. Thus, the courts have properly stated that they will eschew importing technical rules of interpretation from the contemporary world of commercial agreements where to do so would fail to give effect to the parties' intentions or recognize the historic and bi-cultural context in which they were negotiated.¹¹¹ Similarly, the Holmesian notion that a contracting party acts within its rights in willfully breaching its obligations (electing to be liable for damages instead) cannot be reconciled with the nature of the assurances typically made in the context of Aboriginal treaties.¹¹²

Nevertheless, it remains true that in embodying the formal, negotiated consent of the Crown and an Aboriginal nation to abide by *certain* terms in their future relationship, treaties obviously share common fundamental features with contracts and raise many of the same legal issues in relation to their interpretation and enforcement. Because of this, the Canadian courts have recognized that, in certain respects, treaties are analogous to contractual agreements.¹¹³ On this basis, the courts have made cautious use of some of the tools developed by contract law to resolve disputes about the parties' common intent. Those tools include the embracing of oral promises as part of the treaty agreement on the premise that the terms reduced to writing by the Crown did not reflect the entire understanding of the parties.¹¹⁴ They also include the interpretation of ambiguities in the written text in favour of the party who did not draft the document,¹¹⁵ and the implication of unwritten terms where an objective observer would identify them as necessary to give effect to the parties' common intent.¹¹⁶

there are some red men as well as white men who think only of to-day and never think of to-morrow. The Queen has to think of what will come long after today. Therefore, the promises we have to make to you are not for to-day only but for to-morrow, not only for you but for your children born and unborn, and the promises we make will be carried out as long as the sun shines above and the water flows in the ocean."

¹¹¹ See, e.g., *White*, *supra* note 10 at 648-649; *Sioui*, *supra* note 68 paras. 44-45; and *Badger*, *supra* note 7 at para. 78. Compare *Eastmain Band v. Canada (Federal Administrator)*, [1993] 1 F.C. 501 paras. 21, 29 (C.A.).

¹¹² G. Christie, *supra* note 12 at 157. *Quaere* whether this notion (sometimes called the theory of "efficient breach") adequately explains contract law either: S.A. Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at 119-135.

¹¹³ *Badger*, *supra* note 7 at para. 76; *Pawis v. the Queen* (1980), 102 D.L.R. (3d) 602 at 607 (F.C.T.D.); J.Y. Henderson, "Empowering Treaty Federalism" (1994) Sask. L. Rev. 241 at 299.

¹¹⁴ *Horse*, *supra* note 80 at para. 35-37, Estey J.

¹¹⁵ *Ibid.* at 35; *Marshall*, *supra* note 7 at para. 43.

¹¹⁶ See *Marshall*, *ibid.* at para. 44 where Binnie J. suggested that recognizing the implied promise of access to items for trade in that case was necessary to fulfill the honour of the Crown, although Binnie J. stated that he would not have been prepared to infer such a term if the arrangement had been an ordinary commercial agreement.

The importance of consent and intention to the law of Aboriginal treaties suggests that the principles developed by the common law in relation to duress and undue influence might form a minimum reference point in resolving disputes about the sufficiency of consent in Aboriginal treaties. Those principles form a fundamental part of the common law approach to consent. As principles that apply to private agreements in society at large, they would not replace obligations created by a Crown fiduciary duty, or the obligation of the Crown to act honourably and avoid sharp dealing in its relations with Aboriginal peoples. Instead, reference to the common law principles prohibiting illegitimate pressure and improper influence would give some minimal content to the latter concepts, which have remained ill-defined in relation to the Crown's obligations in securing Aboriginal consent to treaties.¹¹⁷ Further, using a jurisprudential baseline that questions the validity of consent coerced by threats or abuse of trust would be unlikely to prove inimical to the inter-societal understandings between the Crown and its Aboriginal treaty partners.

Finally, the issue of remedies would need to be addressed. A multitude of considerations suggest that an award of compensation would frequently be the appropriate remedy for a finding of duress or undue influence in the treaty setting. In most, if not all, treaties involving land rights, the accession of third party interests on treaty lands will mean that avoiding an entire treaty transaction may be barred by equitable, common law and public law principles.¹¹⁸ Equally, the constitutional and symbolic importance to Aboriginal nations of their treaty relationship with the Crown suggests that it would be inappropriate and impractical for the law to insist that the only remedy for duress or undue influence in treaty formation should be the renunciation of the treaties signed by their ancestors. The courts have developed principles to guide the award of compensation where traditional equitable remedies are barred and justice requires that a remedy be awarded.¹¹⁹ Because the law of treaties is *sui generis* and its overarching goal is the just reconciliation of Aboriginal peoples and the Crown, it is well within the purview of the courts to develop a principled approach to the awarding of compensation where duress or undue influence in treaty formation

¹¹⁷ Using these common law principles as a minimum reference point, having analyzed their conceptual relevance to treaty formation, and then taking into account the purpose and context of the treaty in question, is markedly different than characterizing all treaties as contracts or suggesting that contract defences might be imported directly into treaty disputes, as argued in C. Hunter, "New Justification for an Old Approach: In Defence of Characterizing First Nations Treaties as Contracts" (2004) 62 U. of T. Fac. L.R. 61.

¹¹⁸ For a lengthy discussion of how equitable and public law principles may apply to Aboriginal claims in relation to land, see *Samia*, *supra* note 25 paras. 103-138.

¹¹⁹ See *Canson Enterprises Ltd v. Boughton & Co.*, [1991] 3 S.C.R. 534 at para. 83.

have caused harm to the Aboriginal signatory.¹²⁰ Alternatively, it is conceivable that the courts could fashion orders that require the parties, under court supervision, to re-negotiate the treaty terms in a manner that corrects the historic wrong.¹²¹

The question of remedies is an important one. In the end, however, to refuse to grant any remedy and ignore the presence of illegitimate pressure and violations of trust in the formation of treaties would be to treat the integrity of treaty agreements as less important than the integrity of a transaction for the pawning of household utensils.

CONCLUSION

This article has explored the possible relevance of the common law principles of duress and undue influence to the question of consent in historic Crown-Aboriginal treaties. It has suggested that the conceptual underpinnings of those principles render their analytical frameworks worthy of consideration, at least as minimal reference points, in the development of the *sui generis* principles applicable to the formation of treaties. The unique relationship of the Crown and Aboriginal peoples renders the use of such references more, not less, imperative in the treaty context. The precise *sui generis* rules governing the effect of coercion and improper pressure in securing consent to a treaty must develop in a manner that respects the special nature and historical context of each treaty. The absence of any such rules at present is unacceptable and unfair.

The article has also suggested the possible value of further research in a number of related areas. First, although a rigid adherence to the formalistic requirements of contract law would fail to respect the unique setting in which

¹²⁰ See V.J. Vann, "Equitable Compensation for Undue Influence, Unconscionable Conduct and Estoppel?" (Paper presented at University of Queensland, 31 July 2006), [unpublished] at 30: "Even though most cases involving undue influence are resolved by rescission in its most straightforward sense, justice can sometimes only be served by a monetary order. Quantum of equitable compensation in these cases exactly mirrors the pecuniary equivalent of rescission, because the scope of the duty is limited to entry into the transaction." See also *Sarnia*, *supra* note 25 at 288: "Surely, a *sui generis* right should draw freely upon all otherwise relevant principles of our law, whatever their historic origin." For a general introduction to the possible use of compensation as a remedy for violations of Aboriginal rights, see K. Roach, *Constitutional Remedies in Canada*, looseleaf (Aurora: Canada Law Book, 2005) c. 15 at 20-26.

¹²¹ The main challenges here would involve ensuring the practicality of judicial enforcement of such an order, and determining the judicial result if the parties are unable to reach agreement. Arguably, depending on the clarity of the original order, the task of judicial supervision here need not exceed that involved in the modulated consultation requirement set out in *Haida*, *supra*, note 5. For an argument that court-ordered negotiations might be a suitable remedy in certain s. 35 cases, see K. Roach, *ibid* at 2-4, 21-23.

treaties were negotiated, other fundamental principles underlying the common law's treatment of consent and exploitation in relation to agreements also seem to merit analysis in the treaty context. The doctrines of misrepresentation and unconscionability, for example, would be prime candidates for such consideration. Simply put, in situations where the private law in these areas would recognize a remedy, it is reasonable to ask whether there are defensible grounds for excluding a remedy in the treaty context. Finally, if, as this analysis posits, the *sui generis* law governing treaties should offer a remedy where one party's consent was obtained by coercion or improper influence, further work must be done to set out the principles that should guide the awarding of such a remedy.