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"Get the province of Alberta in line": Treaty Promises, Provincial Power, and the Role of Indigenous Nations in Discussions on Alberta Secession

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Matter Commented On: Alberta Separatism

With the Liberals forming a minority government in last month's election, and a small but vocal contingent of Albertans seemingly enamoured with President Trump's suggestion that Canada become a state, the possible secession of Alberta is in the news cycle again. In 2019, the possibility of western separation made headlines as Jack Mintz and others made the case for the benefits to Alberta (see here). Premier Danielle Smith has given oxygen to the renewed debate by introducing legislation that would lower the threshold for initiating provincial referenda. While she has denied supporting separation, her moves, including her participation at a pro-separation rally held at the Alberta legislature on May 3 and her statement that she will put the issue to a referendum if it gathers enough support, have energized the movement. This has drawn responses from Indigenous Nations across the province. Recently proposed amendments which would add a non-derogation clause purporting to protect treaty rights (discussed by Nigel Bankes in a forthcoming post) has done little to reduce opposition.

This post outlines the legal arguments that Indigenous leaders have advanced and why those arguments are significant. David Wright and I commented on this issue in 2019 and Nigel Bankes' recent post considers further legalities: I won't go over the same arguments here. Instead, I will supplement those pieces by considering the direct responses of Indigenous leaders and highlighting important legal elements of their arguments.

On April 29, the Treaty 8 First Nations of Alberta issued a statement on the result of the federal election. While not addressing the issue of separatism directly, Treaty 8 leaders emphasized that the "era of making decisions for us and without us must end. We will not stand by while governments attempt to erode or rewrite the promises made to our people" (see Treaty 8 First Nations of Alberta, News Release, 29 April 2025 here) They noted that Treaty 8 was not a surrender of land or rights, but a promise to share and coexist, and that the promise "remains unfulfilled." Further, they called on the federal government to honour the "true spirit and intent" of the treaty, adding that reconciliation is not optional, it is a "constitutional, legal and human imperative" (see April 29 press release, above).

On April 30, 2025, the Sturgeon Lake Cree Nation and the Mikisew Cree First Nation issued a letter to Premier Smith directly addressing separatism (the subject line was "Cease & Desist - Separatist Threats" see letter here). The nations noted that "Alberta is on Treaty lands" and stated that it "has no authority to supersede or interfere with our Treaties, even indirectly by passing the buck to a 'citizen' referendum" (Letter to Premier Smith, 30 April 2025). The same day, they

published a letter to Prime Minister Mark Carney, enclosing the letter to Smith stating that "We are not prepared to accept any further Treaty breaches and violations" and that "We respectfully ask that you get the province of Alberta in line." (Letter to Prime Minister Carney, 30 April 2025).

On May 2, the Treaty 7 First Nations Chiefs' Association, representing the Tsuu'tina, Bearspaw, Chiniki, and Goodstoney Nations, added their voices. They reminded Albertans that "large swaths of this province are governed by the sacred Treaties between First Nations and the Imperial Crown," and that under these Treaties, "vast areas of Alberta are held in trust by the Crown for the benefit of the Treaty First Nations, not as property of the provincial government" (see Treaty 7 First Nations Chiefs' Association, Joint Media Statement, 2 May 2025). The statement concludes: "First Nations will not separate. Any efforts to separate will be met with our full opposition" (Treaty 7 First Nations Chiefs' Association, Joint Media Statement, 2 May 2025).

That same day, the Piikani Nation issued its own statement. Referring to Premier Smith's referendum legislation and the mobilization of separatist organizing, Chief Troy Knowlton wrote: "Alberta lacks the authority to interfere with or negate those Treaties. Proceeding down a path towards separation cannot be undertaken without the consent of Alberta's First Nations." The letter ends by saying: "We are here, we will aggressively protect our historic Treaty rights and our inherent rights, and we will require that the Crown's obligations to First Nations be honoured and fulfilled" (Piikani Nation, Statement on Potential for Alberta Separation, 2 May 2025).

On May 6, Chief Ivan Sawan of Loon River First Nation published an open letter to Premier Smith reinforcing the legal position taken by other Treaty Nations. Chief Sawan wrote: "The idea that Alberta could unilaterally leave Canada is not only unconstitutional—it is a direct violation of the Treaties that predate the province itself." He emphasized that Treaties 6, 7, and 8 "are living, nation-to-nation agreements" and that Alberta, created in 1905, is "a latecomer to this relationship and holds no rightful authority to disregard it." Referencing the *Secession Reference* (*Reference re Secession of Quebec,* 1998 CanLII 793 (SCC)), Chief Sawan acknowledged that even a referendum triggers only a duty to negotiate, and that "those negotiations must include First Nations." His letter is unequivocal: "Loon River First Nation will never support Alberta's separation." Further, "Our treaties bind us to Canada, not Alberta. We will not stand by while our lands and rights are treated as political leverage. We are not guests- we are the original Nations." (Loon River First Nation, Open Letter, 6 May 2025)

These are not symbolic or rhetorical statements. They are constitutional arguments. And they are strong ones that deserve our attention.

Let's start, though, with the most uncertain issue. Several of the letters argue that the treaties did not surrender land, that they were instead agreements to share the land. This is not a new argument: it has been advanced by Indigenous peoples in treaty areas for decades and is grounded in oral histories of the treaties. In many cases, existing historical records show no evidence that cession of land was discussed at treaty negotiations. This is significant, as courts have held that oral agreements ought to be given priority over written treaty texts where the two differ (*R v Marshall*, [1999] 3 SCR 456, 1999 CanLII 665 (SCC). Canadian courts, however, have not seriously entertained the argument that numbered treaties do not cede title to treaty lands. It is widely held – again, as a matter of *Canadian* law – that the numbered treaties ceded Indigenous rights to land

and that the Crown has the authority to "take up" lands for a variety of purposes in treaty areas (*Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (CanLII). Note, I am not advancing an *historical* argument here or suggesting that the Indigenous perspectives on the treaties are incorrect – I am simply laying out the current position of Canadian courts.

That said, even if we accept that the numbered treaties cede land, that does not fully undermine the idea that the treaties are about sharing land. Even if Indigenous treaty partners ceded their title to lands, they retain important, legally enforceable, interests over those lands. They have continued rights to hunt, fish, and trap throughout their traditional territories, for example, as well as the right to continue to exercise a way of life associated with those activities (see e.g. *Yahey v British Columbia*, 2021 BCSC 1287 (CanLII)). Where governments have failed to take steps to protect the exercise of these rights and to uphold treaty promises, courts have deemed treaties to have been infringed and provided legal remedies (*R v Marshall*; *R v Sundown*, 1999 CanLII 673 (SCC); *Ontario (Attorney General) v Restoule*, 2024 SCC 27 (CanLII)). In short, treaty rights place limits on governments' discretionary authority, even over ceded lands, as Indigenous signatories retain legal interests that must be respected. Thus, the idea that treaties constitute a promise to share and coexist should not be entirely discounted, even if one accepts the view that they ceded title to land.

The remaining statements from Indigenous leaders are clearly correct from a legal standpoint and provide important context for Canadian constitutional law. Treaty 8 leaders argued, for example, that treaty implementation and reconciliation are not optional, but are a "constitutional, legal and human imperative" (Treaty 8 News Release). Indeed, Canada's Supreme Court has repeatedly held that Crown-Indigenous treaties are "binding legal instruments that must be upheld." (*Shot Both Sides v. Canada*, 2024 SCC 12 (CanLII), at para 51) The legal enforceability of treaties flows from the treaties themselves, as solemn agreements between Indigenous nations and the Crown: "Treaties are analogous to contracts, albeit of a very solemn and special, public nature. They create enforceable obligations based on the mutual consent of the parties." (*R. v. Badger*, 1996 CanLII 236 (SCC), at para 76) They also, since 1982, have constitutional protection which "prevents them from abrogation by federal, provincial, or territorial law." (*Shot Both Sides,* at para 53)

Living up to treaty promises is thus a "constitution and legal" imperative in the sense that governments have legal and constitutional obligations to uphold treaty rights and diligently implement treaty promises. Reconciliation is a similar imperative: "Treaties have long been an important means of reconciling the interests of Aboriginal and non-Aboriginal peoples in Canada. Reconciliation is aimed at building a "mutually respectful long-term relationship"" (*Restoule,* at para 68 citing *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, at para 10). This reconciliation is "the grand purpose of s. 35" (*Little Salmon*, at para 10).

Other statements deserve attention. In the letters cited above, leaders argued, for example, that Alberta "has no authority to supersede or interfere with our Treaties, even indirectly by passing the buck to a 'citizen' referendum" and that as "a latecomer to [the treaty] relationship and holds no rightful authority to disregard it." This is accurate. While treaty rights may be infringed, subject to a judicially supervised justification test, by either federal or provincial governments (*Grassy Narrows First Nation v. Ontario (Natural Resources),* 2014 SCC 48 (CanLII)), no government has had the authority to unilaterally extinguish treaty rights after s.35 came into force on April 17,

1982. There is no mechanism that permits provinces to disregard or abridge treaties, nor to compel First Nations to renegotiate them (a notion I return to below).

Leaders also noted that "vast areas of Alberta are held in trust by the Crown for the benefit of the Treaty First Nations, not as property of the provincial government." As David Wright and I covered here, this is true: Indian reserve lands (140 reserves, and approximately 812,771 hectares of reserve land: see "First Nations in Alberta", *Indigenous and Northern Affairs Canada*) are held in trust for First Nations. These lands could not be transferred to a prospective independent Alberta without Indigenous consent, which is required even to make a surrender of reserve lands.

Finally, I want to consider one of the more striking lines from the letters, this one addressed to Canada's new Prime Minister: "We respectfully ask that you get the province of Alberta in line." This may read on first glance as a bit of political rhetoric, but it underscores an important constitutional reality: by virtue of section 91(24) of the *Constitution Act, 1867*, the federal government has exclusive jurisdiction in relation to Indigenous peoples and constitutional obligations to protect their interests, including as against provincial governments. Indeed, the rationale for including Indigenous peoples and their lands under a head of federal authority in 1867 was that the federal Crown was seen as the best inheritor of the imperial responsibility to protect Indigenous peoples from local governments.

While both federal and provincial governments have an obligation to respect and diligently implement treaty promises, the positions of the federal and provincial Crowns are not identical. The federal government's jurisdiction in relation to "Indians, and Lands reserved for the Indians" under s.91(24) places it in a fundamentally different position. It is the federal government that is "vested with primary constitutional responsibility for securing the welfare of Canada's aboriginal peoples" (*Delgamuukw v British Columbia*, 1997 CanLII 302 (SCC)), at para 176. The context of this remark is important. It was made during the Court's explanation of why only the federal government could have extinguished aboriginal title prior to 1982 (after which no government could). The Court held that if extinguishing rights was not the exclusive purview of the federal government, "the government vested with primary constitutional responsibility for securing the welfare of Canada's aboriginal peoples would find itself unable to safeguard one of the most central of native interests — their interest in their lands." (emphasis added) (*Delgamuukw,* at para 176)

Thus, the Supreme Court has recently referred to "Parliament's protective legislative authority involving Indigenous peoples" (*Reference re Impact Assessment Act*, 2023 SCC 23, at para 347, dissenting on a different point). And, the Court has upheld federal authority to incorporate Indigenous laws as federal law, making them paramount over inconsistent provincial law, in reliance on the reconciliatory function of s.91(24) and the Crown's duty to protect matters which are "absolutely indispensable and essential to [Indigenous peoples'] cultural survival" (*Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5, at para 135).

This has a historical basis, which is reflected in "the Crown's promise in the *Royal Proclamation, 1763* that it would protect the Aboriginal peoples inhabiting the British territories of North America from exploitation by non-Aboriginal peoples (*Restoule,* at para 72). This promise was

passed to the federal Crown in s.91(24), with the purpose "to honour the obligations to Natives that the Dominion inherited from Britain" (*Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 (CanLII), at para 5 citing *Daniels v. Canada (Indian Affairs and Northern Development)*, 2013 FC 6 (CanLII), at para 353.) There were, of course, more colonial aims as well, but even those support the idea that s.91(24) offers a strong counterbalance to provincial authority. As the Court noted in *Daniels,* "the purpose of s. 91(24) was closely related to the expansionist goals of Confederation. The historical and legislative evidence shows that expanding the country across the West was one of the primary goals of Confederation" (*Daniels,* at para 4).

Thus, the federal Crown has constitutional obligations, flowing from s.91(24), to protect Indigenous interests. If provinces do not uphold treaty rights, the federal Crown has an obligation to take steps to ensure those rights are protected. This is sometimes expressed in terms of the fiduciary duty: "The Crown's fiduciary duty (along with its duties arising from the honour of the Crown) should guide its actions when seeking to take up lands under a treaty" (*Yahey,* paras 92-93). It is also expressed as an obligation to diligently implement treaty promises in a manner consistent with the honour of the Crown: "the honour of the Crown is a guiding constitutional principle that informs the interpretation of Aboriginal treaties. It also plays a crucial role in the implementation of treaties to ensure that no dishonour is brought to the government and, through this, to the Crown" (*Restoule,* at para 219). This includes a "duty of diligent, purposive fulfillment" of constitutional obligations (*Restoule,* at para 221 citing *Manitoba Métis,* at para 94).

This duty is not only backwards looking: "[i]n all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question" (emphasis in original) (*Quebec (Attorney General) v Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39 (CanLII), at para 236 citing *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, at para 24). The duties that flow from the honour of the Crown "depend 'heavily' on the context in which that honour is engaged" (*Restoule,* at para 220). While it has never been invoked in the context of the proposed provincial secession, the honour of the Crown would certainly give rise to substantive federal obligations to protect treaty rights.

As the Court has noted, treaties were "founded on the principles of mutual respect, mutual responsibility, reciprocity, and renewal" (*Restoule,* at para 284) and their implementation must be guided by the honour of the Crown (*Restoule,* at para 71). Treaty promises "were intended to be honoured so long as the sun rises and river flows. They are 'vital, living instruments of relationship' and the Crown is assumed to intend to fulfill these integral promises" (*Shot Both Sides*, at para 76). The federal obligation to implement treaty promises therefore must be guided by these principles and the ongoing nature of its obligations.

Further the federal government has a statutory obligation to take all measures necessary to make the laws of Canada consistent with the *United Nations Declaration on the Rights of Indigenous Peoples,* which has a host of relevant provisions, including:

> **Article 3**: Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> **Article 37:** Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

Two final points.

First, the *Secession Reference* has been invoked to suggest that a clear majority vote in a provincial referendum triggers a duty to negotiate the terms of constitutional change. This is correct so far as it goes, but there are some important qualifications. First, it is not clear that the same rationale that supported this conclusion in respect of Quebec would apply equally to another province. Second, the role of Indigenous peoples was not adequately dealt with in the *Secession Reference* and would almost certainly be considered differently today. Third, and perhaps most importantly, even if a referendum on a clear question succeeded, there is no obligation on other constitutional partners to accept given terms of separation. A referendum would not predetermine the outcome – separation – and then leave only the nuances to negotiation. This was suggested by Keith Wilson, for example, who outlined a view of the effects of separation on Treaty rights on X.

Much of Wilson's argument is correct. He argues that, following a referendum in favour of secession, First Nations would have three options: the status quo (by which he means that reserve lands would still be held by the federal Crown and administered by the federal government), request that the government of Alberta assume the role of the federal government in respect of historic treaties (and, one would presume, federal obligations under s.91(24)), or negotiate new agreements with Alberta. And, crucially, Wilson notes that it would be up to Indigenous nations to decide which path was most appropriate to them.

There are a few problems, however, with this argument, two of which I'll consider briefly here. First, the "status quo" option has a major oversight: treaty rights are not confined to reserve lands. To maintain something approximating the "status quo" in a separated Alberta in which only Indian reserve lands remained federal, some coordination would have to occur to ensure that treaty rights could still be exercised over the lands of what would now be a separate sovereign nation. As the federal government has a constitutional obligation to protect treaty rights, it would be responsible for ensuring that Indigenous ways of life associated with the use of resources on treaty lands were protected in perpetuity, unless Indigenous partners agreed to an alternate arrangement. This is not impossible, but it portends an incredibly complex tapestry of legal rights over treaty lands. And that's only considering the treaty rights issue. The prospect of First Nations inhabiting federal islands within a separate country raises significant logistical issues. Where, for example, would they get healthcare and go to school? Would they need to cross an international border each time they wanted to go to the pharmacy or dentist? The risk of First Nations becoming ghettoized seems very real. While "maintaining the status quo" is an easy thing to say, the logistics are daunting and the implications such that it may be far from desirable.

The second issue with Wilson's argument is that it misconstrues the effect of a referendum vote on separation. The result of a positive vote would not be that separation *will* occur, and that all that stands to be negotiated is the details. Rather, the result would be that all parties must negotiated in good faith to modify the terms of their constitutional relationships in a mutually acceptable manner. Other partners to confederation must agree to the terms of secession or else it must occur according to the usual rules of constitutional amendment and a negotiation cannot start with a predetermined outcome (in this case, separation): "The democratic principle identified above would demand that considerable weight be given to a clear expression by the people of Quebec of their will to secede from Canada, even though a referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession" (*Secession Reference,* para 87). Further, "Quebec could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to the other parties: that would not be a negotiation at all … No negotiations could be effective if their ultimate outcome, secession, is cast as an absolute legal entitlement based upon an obligation to give effect to that act of secession in the Constitution. Such a foregone conclusion would actually undermine the obligation to negotiate and render it hollow" (*Secession Reference,* para 91). Alberta does not have the constitutional authority cast secession as a predetermined outcome and require Indigenous nations to negotiate from that starting point.

This leads to the final point. My argument here is not that Alberta cannot separate from Canada or that First Nations are an impediment to such separation (Bruce McIvor has made this same point). The point is that their consent would be required, and, absent that consent, the federal government would have a constitutional obligation to ensure that separation did not occur in violation of treaty promises. The danger in holding a referendum on secession with a promise to abide by the result, as Premier Smith has done, is that it may put the province into a position of having to go back on its word and refuse to honour the results of a referendum or infringing treaty rights.

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