University of Victoria law professor John Borrows was at the Faculty of Law on February 24th to deliver the 2003 Public Lecture on Law and Diversity – "Why Are We Here?: The Metaphysics of Indian Treaties". Borrows, who received the National Aboriginal Achievement Award in Ottawa on March 28th, is Canada's leading aboriginal scholar and teacher, and a well known activist on behalf of native people.

The lecture will be about the integral nature of treaties in our political landscape. Many agreements between Indigenous peoples and the Crown underlie Canada's political order. Treaties allowed for the peaceful settlement of large portions of the country, while at the same time promising certainty for Indigenous' possession of lands and pursuits of livelihood. These promises are relevant in the contemporary context since they are rights that are recognized and affirmed within our Constitutional structure.

Prof. Borrows is Anishinabe and a member of the Chippewa of the Nawash First Nation. He was appointed professor at the University of Victoria Faculty of Law in 2001, and is Chair of Aboriginal Justice and Governance. He has taught at the University of Toronto; was director of the First Nations law program at the University of British Columbia; director of the intensive program in lands, resources and First Nations governments at Osgoode Hall Law School; and visiting professor and executive director of the Indian legal program at Arizona State University.

> …a long time ago they put a human being in this world. …the Creator, he ask the animals, he ask them to come in the circle and he ask there's going to be a two-legged people coming in this earth and there's something special I've got for those people, but where can I put it? Then the grizzly bear spoke, "I will take it to the mountains and I will hide it over there." "No, they're going to find it and they're going to misuse it." Then the big fish, *kinosew*, he said, "I will take it and I will hide it at the bottom of the ocean." Then again the Creator said, "They're going to find it and they're going to misuse it." Then the buffalo spoke, he said, "I will take it to the berries and I will hide it over there." "No, the people they're going to find it over there and they're going to misuse it." Then the eagle said, "I will take it to the moon, they can't go there." "No, they're going to go there and they're going to misuse it." "The little mole came out from under the ground, he said, "Creator, let me hide it, let me hide it some place." Then these big animals were saying "shush". You know, sometimes we don't listen to our people when they want to spoke and maybe they got the answer. And the Creator telled the big animals, he said, "Let's listen to him." So they listened to him, "Why don't you hide it here for those people? When they found it they won't misuse it."
> **You know, when we found that love there, and justice, and also how to work together, also how to relate to each other as a brother and sister, I think that's the way the Elders, when they sign that treaty, that's the way they would look at it.**

Much of the world is in commotion as people try to solve problems of cultural, social, linguistic, political and religious difference. Many attempts lead to failure because of the absence of well-established common frameworks to guide their discussions and the resolution of their disputes. Many nations do not have protocols, conventions, history or traditions of cooperation and communication in dealings among diverse populations. As a result, States struggle to create better regimes without the advantage of shared ideological roots of intercultural understanding and association. While some jurisdictions can start *tabula rasa* and revolutionize how individuals and groups will relate to one another in society,[1] most simply do not have wide enough support from across the political spectrum to undertake such radical change. Thus, they are left with the arduous project of reforming their systems without ideologies or institutions that have a shared resonance for members of disparate groups. People in most parts of Canada are fortunate to have historic agreements that provide mutually recognized conventions for the resolution of disputes across cultures. As noted earlier, there is no need to invent new policy to solve challenges relating to matters of Indigenous peoples and justice. The parties share a common starting point in their historical relationship. In the words of Roland Duquette: "We need to discuss the blessings we received at the time of treaty and work on them positively and with good feeling, with good faith and discussion, that kindness we talked about, that's what we need to revive, that is the law that I'm talking about. The law of treaty."[2]

Treaties are an integral part of our world's political landscape. They embody some of our highest aspirations for peace, friendship and respect. Through time they have

[1] *Truth vs. Justice,* (New Haven: Yale University Press, 1998).
[2] Roland Duquette, Symposium at 109.

recognized and/or created relationships to prevent conflict and promote order. The ancient and modern history of Europe demonstrates that treaties have been used to allow nations to sort out their differences, and build common understandings. The past dealings of Indigenous peoples also reveal that they have a history of treaty making to acknowledge and guide their relationships with all parts of the world.[3] In fact, treaties are a common form of human interaction across time and space. Many of the great conflicts of the last century were resolved through a process of treaty making.[4] Many of our most pressing contemporary disputes are also mediated through multi-lateral agreements that bind parties to act with the interests of others in mind. Treaties are relevant in many political contexts because their nature and scope can be designed to meet the specific needs of parties who want to secure a more harmonious future.

In the Canadian context, treaties are a vital part of its political and legal geology. One strata of the country's treaty making policy is found in those agreements made between Indigenous peoples and the Crown. Many of these agreements underlie Canada's political order because they allowed for the peaceful settlement and development of large portions of the country, while at the same time promising certainty for Indigenous' possession of lands and pursuits of livelihood. They are also crucial because they implement Indigenous law in the Canadian context by grounding Indigenous peoples deepest obligations to the Creator and others in a framework of reciprocity and mutual exchange.[5] These principles and promises are relevant in the contemporary context. They received protection through section 35(1) of the *Constitution Act, 1982* as rights that are

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[3] Robert Williams Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace* (New York: Routledge Press, 1996).
[4] F.S. Marston, *The Peace Conference of 1919* (Oxford: Oxford University Press, 1944); [add cites].
[5] Harold Cardinal and Walter Hilderbrandt, *Treaty Elders of Saskatchewan: Or Dream is that Our Peoples Will One Day Clearly Be Recognized as a Nation* (Calgary: University of Calgary Press, 2000) at 6-7.

recognized and affirmed within our Constitutional structure.[6] The identification of treaties as occupying a prominent place Canada's legal hierarchy is of further significant because treaties can constrain government action that does not have a valid objective or sustain the honour of the Crown.[7] The high placement of treaties in Canada's legal regime, however, is also important because it illustrates that treaties can operate as more than just constraints on political actors. With their secure legal status, though subject to justifiable infringement, treaties can actually facilitate government activities, and provide a solid base upon which harmonious relations can be built.[8] A view of treaties as both limiting and authorizing activity is an important perspective to remember when considering their implications for contemporary justice issues.

Treaty Elders, the Courts, the Royal Commission, Commissions of Inquiry, academic scholarship and others have reminded us that in order to discern particular treaty perspectives there must be attentiveness to the totality of the treaty negotiation process. The written words of a treaty document alone cannot be relied upon to provide the whole picture of the promises exchanged in these gatherings. These written sources are often biased, being written in English, not the Aboriginal language of the negotiation. Furthermore, they utilize technical legal words and their transcription was usually in the hands of non-Indigenous parties. The written version of events cannot be taken at face value. This partiality means that the oral traditions and perspectives of Elders must be taken into account to determine the treaties' meanings.

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[6] *Constitution Act, 1982*, R.S.C. 1985, *Canada Act, 1982*, (UK) c. 11.
[7] *R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Marshall II*, [1999] 4 C.N.L.R. 301.
[8] Judge David Arnot, "Treaties as a Bridge to the Future" [2001] U.N.B.L.J. 58 at 59.

Oral traditions are often accompanied by menomic devices and reinforced by ceremony through the pipe, medicine bundles, fire, pictures, songs, stories and other traditional methodologies. While these sources are sometimes backed up by minutes from non-Indigenous observers gathered at the treaty meetings: missionaries, traders, speculators, journalists, or other government officials, they should never be thought to reflect the totality of the Agreement. The triangulation of written and oral accounts of the treaty provides a clearer picture as to what was agreed to during the negotiations. The "large, liberal and generous interpretation" of the accounts, "resolving ambiguities in the favour of the Indians" creates an important check against the biases embedded in the written accounts of the treaties.[9] These principles for treaty interpretation can also be important as a counter-weight to inequalities of bargaining power that were present when some of the treaties were negotiated. When considering issues of justice and treaties, it is relevant to remember issues when considering the implication of these agreements for present conduct.

As part of this tradition it is important to relate to all parts of their world in peaceful and respectful ways. It is a principle described through the Cree term: *miyo-wicehtowin*. For generations this teaching motivated numerous practices, ceremonies, songs and stories among first people of Canada. *Miyo-wicehtowin* is said to have originated in the laws and relationships that the Cree Nation has with their creator.[10] "It asks, directs, admonishes or requires Cree peoples as individuals and as a nation to conduct themselves in a manner such that they create positive good relations in all

[9] R. v. Nowegijik (1983) S.C.C.
[10] Cardinal and Hildebrandt, supra, at 14.

relationships".[11] Like most human societies that have struggled to live by their highest values, First Nations have not always managed to sustain the harmony they desired. There have been periods of conflict. Nevertheless, *miyo-wicehtowin* is an important principle for our consideration of justice under the treaties because it invites us to consider the goal of maintaining peace between people of different places and perspectives. It expresses a vision of justice that extends beyond the criminal law to all relationships that exist in the country. Similarly, *pastahowin*: "Crossing the line" was another important teaching relating to treaties and justice.[12] Treaties were entered into to establish the bounds of appropriate human behavior so that balance and harmony (*sohohya)* could be maintained. When Indigenous peoples signed treaties and secured promises from the Crown relative to justice, these and similar teachings were present in the hearts and minds of the Chiefs, Headmen and Headwomen who entered into these sacred agreements.

Another critical reminder in relation to justice under the treaties is to remember who the beneficiaries are under such agreements. Most discussions of this issue have focused on Indigenous peoples' rights under the treaties. For example, in those areas of the country where the *Natural Resources Transfer Agreement* is not applicable, the question of which Indigenous group benefits from treaties has been front and centre. For instance, in *R. v. Simon* the question was whether the Mik'maq living in one part of Nova Scotia could claim the benefit of a treaty signed over 200 years ago in another part of the province. Other inquiries outside litigation have also focused on the nature and scope of the benefits Indigenous peoples received in the treaties. For example, there has been

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[11] Ibid.
[12] Roland Duquette, Symposium, at page 64.

some discussion about the meaning of the education or medicine chest provisions in certain treaties.[13] There has also been much focus on Indian rights to fish, hunt, log, mine, and receive assistance through money, goods, or services.

While this is an important inquiry, it misses a fundamental aspect of the treaty relationship. *First Nations peoples are not the only beneficiaries under the treaties. Non-Indigenous peoples also have treaty rights.* Both groups are recipients of the promises made in the negotiation process. The mutuality of Indigenous and non-Indigenous peoples as beneficiaries of the treaties is overlooked because it is most often Indigenous peoples striving to assert their rights. Yet there are a number of potential inheritors of treaty rights beyond Indigenous nations, bands and First Nation individuals. The British and Canadian Crown certainly received many benefits from the treaties. Their citizens were able to peacefully settle and develop the prairies. Non-Indigenous Canadians trace many of their rights to do certain things in this country to the consent that was granted to the Crown by Indigenous peoples in the treaty process.

As the Supreme Court of the United States recognized in the *Winans* case: "treaty rights are a grant of rights *from* the Indians, not *to* the Indians".[14] There are two important implications that flow from this view of treaties. The first is that Indigenous peoples have rights and jurisdiction until those rights are expressly given up in treaty negotiations. This is known as the reserved rights notion of treaty rights. The reserved rights notion of Indigenous rights has also been expressed in Canadian law.[15] The doctrine means that anything not agreed to or expressed in the treaty remains vested in the Indigenous

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[13] Delia Opekokew and Alan Pratt, "The Right to Treaty Education in Saskatchewan" (1992) 12 Windsor Yearbook of Access to Justice 3.
[14] *United States v. Winans*, 198 US 371 (USSC).
[15] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

population, and cannot be claimed by the non-Indigenous population as a general right that flows from the treaty negotiations. The reserved rights doctrine highlights the inherent nature of Aboriginal rights. It builds upon the fact that when the Europeans arrived in North America, the Indians were there first, living in organized societies and occupying their lands as they had done for centuries.[16] The second important implication that flows from a reserved rights view of the treaties is that non-Indigenous peoples received rights in Canada from, among other sources (such as implied rights, Crown sovereignty, positive law, etc), a grant to the Crown by the Indians. This means that in those areas of the country where treaties have been signed, people live there in part because of the permission granted to the Crown by the Indians. Non-Indigenous peoples settled the country because Indigenous peoples granted this right to them through treaties.

Yet, the notion that non-Indigenous peoples might trace certain rights to land to the treaties is, for some, still an emergent concept. Because people have not been exposed to Indigenous understandings of the treaties, or have not had the time to learn about the treaties, they are only now considering them in this light. Professor Noel Lyon, who taught for thirty years at Queen's Law School illustrated this point after listening to First Nations Elders. He said: "Over the last couple of days as I've listened to the Elders, I have begun to understand that what I've learned about Aboriginal peoples and their situation in Canada has largely come from written sources, from books, and there are a lot of things that were embedded in me in my legal education that I haven't overcome. The most important one, I think, is that law school indoctrinated me with the belief that the Crown is all powerful, and I think that's a real problem, because I think legal education, it may not be that bad today, but I think there is a tendency to regard the

[16] *R. v. Van Der Pee*t, [1996] 2 S.C.R. 607.

Crown almost in the way that the First Nations people regard the Creator, as being the source of all things. And from that flows the proposition that the treaties are seen by the non-Aboriginal community as just another body of laws that define the status and rights of Aboriginal peoples, rather than seeing the treaties as a nation-to-nation partnership, intersocietal law. …It had never occurred to me until Elder Crowe said this yesterday or the day before, that the right of the white people to be on this land is founded in the treaty." Professor Lyon's comments are important because they demonstrate that some may still only weakly understand the mutuality upon which the treaty relationship is built. Though courts have recognized the reserved rights nature of treaties, and while Canadian governments are once again regarding treaties as reciprocal agreements, people outside of these circles may not fully appreciate they too are their beneficiaries.

To its credit, the Saskatchewan Office of the Treaty Commission recognized this gap in understanding and highlighted the mutuality of the treaty relationship in its 1998 report in the following terms:

> The people of Saskatchewan can benefit from learning more about the historical events associated with the making of the treaties as they reveal the mutual benefits and responsibilities of the parties. There is ample evidence that many people are misinformed about the history of the Canada-Treaty First Nations relations, and about the consequent experiences of Treaty First Nations communities and individuals. Until recently, the perspective of many Canadians has been to view treaties as remnants of antiquity, with little relevance to the present. Treaties were seen as frozen in time, part of Canada's ancient history. Some no doubt still hold this view of treaties as primarily "real estate transactions" modeled on business contracts and British common law. ***Non-Aboriginal Canadians forgot that they, too, gained rights through treaty – rights to the rich lands and resources from which they have benefited greatly. They also forgot about the partnership formed at the time of treaty-making. The benefits of the treaties were to be mutual, assisting both parties. The wealth generated from these lands and resources has provided little benefit to Treaty First Nations***. [emphasis mine][17]

[17] *Statement of Treaty Issues: Treaties as a Bridge to the Future* (Saskatoon: Office of the Treaty Commissioner, 1998) at 74.

Regarding the treaties as agreements that create mutual obligations that alternately constrain and benefit both parties to the relationship is an important interpretive lens through which to view justice issues. It allows Indigenous and non-Indigenous peoples to equally participate in the process of justice reform with the knowledge that neither should be subordinated or privileged in relation to this issue. As Elder Wapass-Greyeyes reminded us, "The treaties that were written, they're you're treaties too, from whatever direction you're coming from those treaties are to make people get along with one another, to have respect for one another. It's not only an aboriginal problem. When you look it over and over again, you see there's problems all over, in every walk of life."[18]

[18] Elder Gladys Wapass-Greyeyes, Second Symposium at 588.