

# Treaties and the Law

## We Are All Treaty People

The land that is now known as Canada was already occupied when Europeans came to live here. As a peaceful, negotiated and mutually agreed upon way of resolving the situation, both First Nations and the British, then later, Canadian governments chose to enter into Treaties. Treaties are solemn agreements that are sacred, made between sovereign nations.

Although the law recognizes that Treaty rights are enforceable rights, implementing the Treaties has been a difficult and complex task. To help better understand the importance of Treaties, this issue of *The PLEA* examines Treaties and their relationship with Canadian law.



# What are Treaties?

A Treaty is a negotiated agreement between two or more nations. Nations all over the world have a long history of using treaties, often for land disputes or settlements and sometimes to end or avoid wars. For example, in 1763 the Kings of Britain, France, and Spain entered into the *Treaty of Paris* to end the Seven Years' War over land in North America.

This led to the **Royal Proclamation**, a document that sets out guidelines for European settlement of Indigenous territories in what is now North America. The Royal Proclamation was issued by King George III in 1763 to officially claim British territory in North America after Britain won the Seven Years' War.

As Europeans explored and settled what is now known as the Americas, Treaties were used to promote and make peace, and secure military alliances with the First Nations. However, this was not the first time that the First Nations of what is now Canada entered into Treaties. Long before, the First Nations entered into Treaties with each other. One of the earliest recordings of such Treaties is the Great Law of Peace of the People of Longhouse. Negotiated before 1450, it created a code of law and a form of government.

Another Treaty that is told through oral history is the Story of the Iron Nations Treaty Alliance as told, verbatim, by Danny Musqua in 2010:

"I heard this story long time ago from Elder Solomon Mosquito, I also heard of this from my Mosom Lawrence Tompson, when I was young. About 100 years prior to the first newcomers to this land, the Assiniboine, the Cree and the Saulteaux made a treaty and alliance. This treaty and alliance purpose was to maintain peace and good order among the nations. The treaty and alliance also provided agreement to share the hunting territory, share the resources such as trapping, hunting, fishing, etc. It also agreed that there would be free trade among the people. The territory of the treaty alliance encompassed the 'Red Rock Country' (Montana) to the Northern Tree Line."

Although Canada is party to many treaties, the Treaties made between First Nations and the representatives of the head-of-state of first Britain and later Canada (often referred to as the Crown) are unique and have a distinct place in Canadian law.







## Treaties: In the Beginning

There are a number of different Treaties with First Nations that cover most of the territory of Canada. The Treaty-making process in what is now Canada began in the 1600s and continues even today. Each Treaty is unique in terms of the people who entered into the Treaty and the location, as well as what was agreed to by the Treaty.

The rights created by these Treaties are part of the law in Canada. The Crown, having made solemn, sacred promises and having received benefits under the Treaties, is obliged to uphold its honour by fulfilling the promises made to the First Nations. The lasting and binding nature of these Treaty promises was reinforced when these rights were made part of the highest law of the Canadian Constitution. Section 35 of the *Constitution Act* recognizes and affirms Aboriginal rights:

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

The Treaties are promises, and the importance of keeping promises is “deeply ingrained in all of us, and indeed is common to all cultures and legal systems.”<sup>1</sup> The fact that Treaties were entered into represents “a profound commitment by both parties to the idea of peaceful relations between people.”<sup>2</sup> Canada would not be the Canada we know today if the First Nations and those representing the British and later Canadian governments had not been committed to the Treaties as a peaceful means of deciding how they were going to live together.

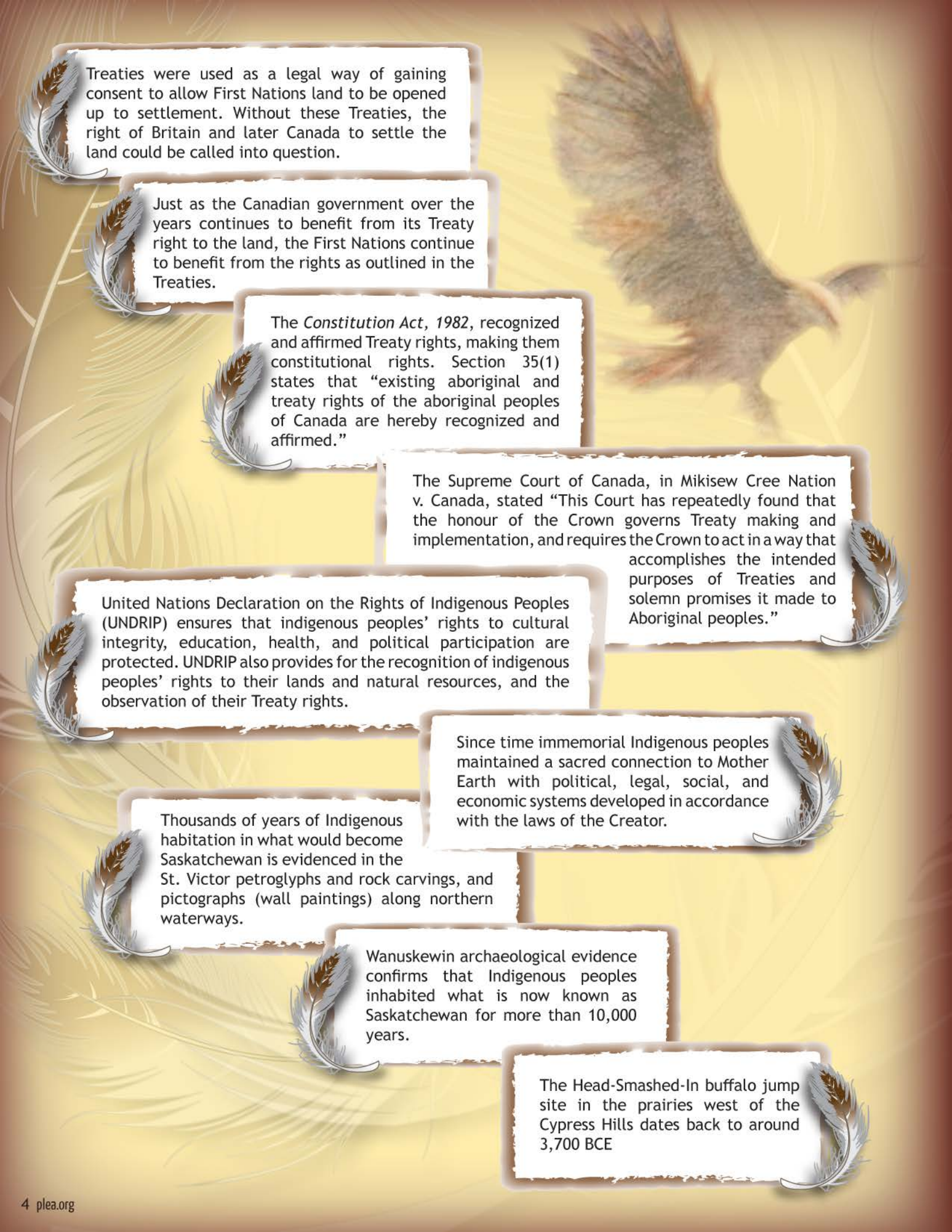
While Treaties are sometimes seen as “ancient, obsolete relics of marginal historical interest,”<sup>3</sup> during negotiations for Treaty 6 the Crown’s chief negotiator stated that the Treaty promises were “not for today but for tomorrow, not only for you but for your children born and unborn, and the promises we make will be carried out as long as the sun shines and the waters flow.”<sup>4</sup>

<sup>1,2</sup> Report of the Royal Commission on Aboriginal People, vol. 2 (Ottawa: Indian and Northern Affairs Canada, 1996)

<sup>3</sup> Warren J. Sheffer. “R. V. Marshall: Aboriginal Treaty Rights and Wrongs” (March, 2000). 10 W.R.L.S.I. 77. Quoting from speech of Phil Fontaine when he was National Chief of the Assembly of First Nations.

<sup>4</sup> Sheila Carr-Stewart, “A Treaty Right to Education” (2001) 26:3 Canadian Journal of Education.





Treaties were used as a legal way of gaining consent to allow First Nations land to be opened up to settlement. Without these Treaties, the right of Britain and later Canada to settle the land could be called into question.

Just as the Canadian government over the years continues to benefit from its Treaty right to the land, the First Nations continue to benefit from the rights as outlined in the Treaties.

The *Constitution Act, 1982*, recognized and affirmed Treaty rights, making them constitutional rights. Section 35(1) states that “existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

The Supreme Court of Canada, in *Mikisew Cree Nation v. Canada*, stated “This Court has repeatedly found that the honour of the Crown governs Treaty making and implementation, and requires the Crown to act in a way that accomplishes the intended purposes of Treaties and solemn promises it made to Aboriginal peoples.”

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) ensures that indigenous peoples’ rights to cultural integrity, education, health, and political participation are protected. UNDRIP also provides for the recognition of indigenous peoples’ rights to their lands and natural resources, and the observation of their Treaty rights.

Since time immemorial Indigenous peoples maintained a sacred connection to Mother Earth with political, legal, social, and economic systems developed in accordance with the laws of the Creator.

Thousands of years of Indigenous habitation in what would become Saskatchewan is evidenced in the St. Victor petroglyphs and rock carvings, and pictographs (wall paintings) along northern waterways.

Wanuskewin archaeological evidence confirms that Indigenous peoples inhabited what is now known as Saskatchewan for more than 10,000 years.

The Head-Smashed-In buffalo jump site in the prairies west of the Cypress Hills dates back to around 3,700 BCE



# *Treaties Over Time*

## **Mid-1600s**

Treaties of “peace and alliance” negotiated in the Maritimes to help establish British control over the export of resources.

## **1780-1850**

Treaties entered into in what was then Upper Canada, dealing with small tracts of land needed for farming.

## **1850**

When the Hudson’s Bay Company expanded operations to the west coast, Treaties accommodated the limited settlement needed for company operations.

## **1871-1921**

Treaties entered into on the prairies allowed settlers to begin farming the land and prevent these lands from being absorbed into the United States.

## *Treaties by the Numbers*

After becoming independent of Britain in 1867, the Canadian government used the already established Treaty-making tradition when negotiating with the First Nations on the prairies. Just as Britain had before Confederation, Canada benefitted from these Treaties in many lasting ways.

### **Treaties 1-7**

Cleared the way for the Canadian Pacific Railway and agricultural settlement in the prairies and northwest Ontario.

### **Treaty 8**

Gave access to the Yukon Territory following the start of the gold rush.

### **Treaty 9**

Followed silver discoveries and expected hydroelectric, pulp, and paper development in Northern Ontario.

### **Treaty 10**

Allowed for expected development in Northern Saskatchewan.

### **Treaty 11**

Entered into after Imperial Oil’s first gusher at Norman Wells.

The value today of the land opened up for settlement via the Treaties in Saskatchewan alone is estimated at \$61 billion.



# What's in a Name?

In many ways, the original peoples of what the Europeans called the “new world” were far more culturally diverse than the Europeans. For example, there were approximately 300 different First Nations languages spoken in what is now known as North America. Despite this diversity, Europeans in many ways saw the Indigenous peoples as one group and for this reason used general terms to describe them.

One word created by the newcomers to describe the original inhabitants of many different First Nations was Indian. One theory is that the term resulted from a case of mistaken identity: When Christopher Columbus arrived at the islands around Cuba he mistakenly thought he was just south of China, and thus the people were from India. The term was then later applied to the surrounding islands and eventually the continent.

The term Indian is sometimes still used today to describe all descendants of the original inhabitants who are not Inuit or Métis. It is, however, considered by many to be outdated and offensive. The Government of Canada now uses the term First Nations, but Indian is still used if it is a direct quote, a discussion of history, or a legally-defined term.



## True or False – Treaty Trivia

### How Much Do You Know?

1. “Aboriginal” is the appropriate term to use when discussing Treaties.
2. All First Nations in the prairies entered into Treaties with the British Crown.
3. The First Nations had their own laws and social order and were sovereign nations when the Treaties were signed.
4. First Nations leaders were formidable negotiators and understood Treaty rights and benefits.
5. Treaties are simple land transactions.
6. Ten Treaties were signed in what is now Saskatchewan.
7. The British and First Nations had similar worldviews regarding land ownership.
8. Language and communication barriers were encountered during the Treaty negotiation process.
9. First Nations women did not participate in Treaty negotiations.
10. The written text of Treaty is all that a person needs to understand Treaties.
11. Flags, Treaty medals and suits were symbols used at the time of Treaty making.
12. Treaties benefit all Canadians.
13. The *Indian Act* of 1876 was not part of the Treaties.
14. Treaties have no relevance today; they are part of the past.
15. All Saskatchewan citizens are Treaty people.

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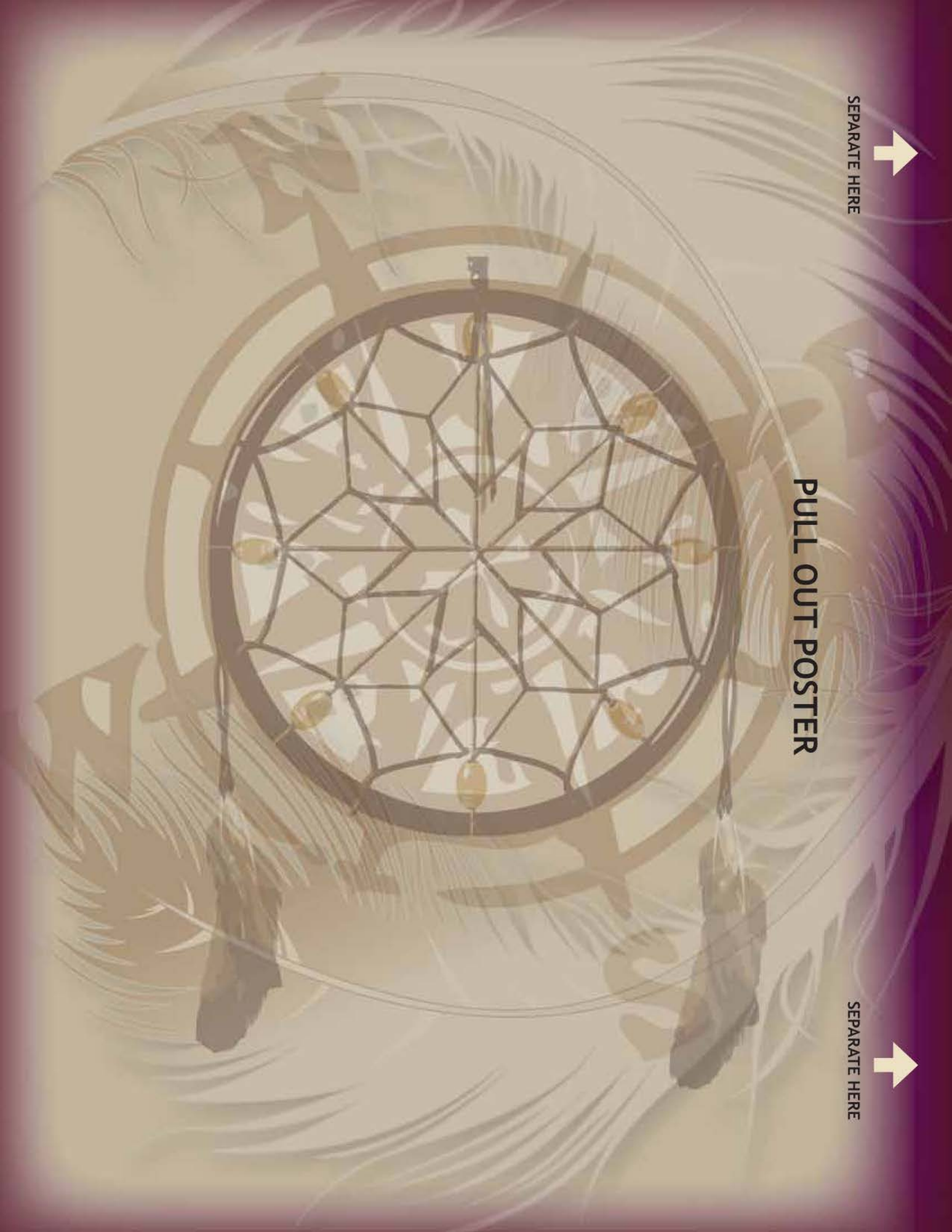


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# Reasons for Treaties

Treaties are by their nature voluntary, negotiated agreements. To understand why First Nations and the British, then later the Government of Canada, entered into Treaties it is necessary to consider the reasons why each party entered into this process and what they hoped to get out of it.

## First Nations Reasons for Treaties

For First Nations the Treaties are sacred and spiritual agreements, representing an alliance with the Crown that cannot be broken. From the First Nation perspective, the Treaties were entered into on a “nation-to-nation” basis to set out the relationship between the First Nations and the Crown.

To First Nations, the Treaties represented many different things, including a way to:

- share the land
- live in peace
- continue with their way of life
- assure the future of their children by learning how to survive in the future

While First Nations agreed to respect the laws of the Crown, in return they expected to still be able to govern their own people according to their own laws.

## Policy Reasons for Treaties

There were a number of very practical reasons why Britain, and later Canada, chose to negotiate Treaties with the First Nations. Early on the Crown recognized the need for support from First Nations if they were to be successful in claiming what is now Canada for their own.

To the Crown, the Treaties represented many different things, including a way to:

- help ensure that First Nations would continue to be self-sufficient
- avoid conflict as more people came from Britain and other places
- secure access to land and resources

One way to gain peace and support from First Nations and at the same time ensure that the First Nations could support themselves was to protect their way of life by Treaty.



## Treaty: Myth or Reality

Consider each of the following statements. Explain whether it is a myth or reality.

1. The history of North America began with the arrival of the Europeans.
2. Treaties benefit all Canadians.
3. Treaties are simple land transactions.
4. Treaties are sacred and solemn agreements.
5. Treaties have no relevance today.
6. Treaties only benefit First Nations.

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# Legal Reasons for Treaties

The British and later Canadian governments did not only have practical and policy reasons for entering into Treaties with First Nations, but they also had to consider domestic and international laws that recognized the rights of the First Nations, and recognized the Treaties as a legitimate way of dealing with these rights.

## International Law

For a Treaty to exist, the representatives of the First Nations and of the Crown must have had the authority to make an agreement on behalf of their people. The Supreme Court has recognized that when the British came to North America the First Nations were “considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial . . .”<sup>5</sup> Further, historical research shows that the British regarded the original occupants as nations, understood to be organized societies with their own forms of government. Thus, entering into Treaties with First Nations indicates that the Crown recognized the nationhood of the original occupants of what is now Canada.

## Law of Canada

Canadian common law, the Royal Proclamation of 1763, and other legislation have all recognized the rights of First Nations.

### Common Law

The common law is where the rights of First Nations developed. Common law recognized the existing rights of First Nations, including local customary laws and their right to occupy the land even after Britain began to rule what is Canada. Common law dates back to a time in Britain before there was a parliament to pass legislation. Judges would apply a common standard of rules to all cases heard in the country, with the rules originating from local customs. Common law rules continued to be laws even after statutes could be passed. Because First Nations had historically occupied the land, the local customary laws continued to apply even after Britain began to rule what is now Canada.

### Royal Proclamation of 1763

The right of First Nations to continue to occupy their lands was recognized by the British Crown in the Royal Proclamation of 1763. This Proclamation did not create new rights for First Nations but did recognize the rights of First Nations to their land, and the need for Treaties between the Crown and First Nations concerning the use of First Nation land. The Proclamation forbade British subjects from moving onto or purchasing lands occupied by First Nations. It also stated that if “Indians should be inclined to dispose” of their lands they could only be purchased by the Crown.

### Other Legislation

When the British Crown transferred what was called Rupert’s Land to the new Dominion of Canada in 1870, Britain required the Canadian government to consider and settle claims of Indian tribes for compensation for lands settled. As well, later legislation dealing with Crown land and opening up areas for settlement required that “Indian title” be dealt with before the land could be settled. Further, the *British North America Act* recognized that the Dominion of Canada had existing obligations to First Nations and that the process of dealing with the First Nations was ongoing.

<sup>5</sup> R. v. Van der Peet, [1996] 2 S.C.R. 507. Quoting from the American Supreme Court case *Worcester v. Georgia*, 31 U.S. (6Pet.) 515 (1832).



# Interpreting Treaty Promises

Treaties create lasting rights that are enforceable by Canadian law, but government policies and laws have complicated their implementation. Another question that complicates giving effect to the Treaty promises is defining what was promised in the Treaties.

The parties to the Treaties have different views about the content and the meaning of the Treaties. The Treaty First Nations expect the Treaties to be implemented according to their spirit and intent, including oral promises made when the Treaties were entered into. The Government of Canada, on the other hand, has looked mostly to the written text of the Treaties to determine the Crown's obligation.

## Interpreting the Treaties: Guiding Principles

The Supreme Court has developed some principles to be considered when deciding what rights are included in a Treaty:

- A Treaty is a sacred agreement involving the honour of the Crown.
- It is assumed that promises made by the Crown are intended to be fulfilled.
- Any part of a Treaty that is not clear must be read in favour of the First Nation.
- Oral promises and the historical circumstances surrounding the signing of a Treaty and how the First Nations would have understood it can be considered.
- Treaty promises must be interpreted in a way that allows them to evolve over time to meet changing circumstances.



## Questions to Consider

1. The First Nations and the representatives of the Crown understood certain concepts very differently because of very different world views. How would this impact the negotiating of Treaties?
2. It is understood that the Treaties recorded oral agreements; the record was made in a language that was foreign to the First Nations; and the written record did not always include the whole agreement. How does this relate to the Supreme Court's principles in considering what rights are included in a Treaty?



# Treaties of the Prairies

Saskatchewan is covered by Treaties 2, 4, 5, 6, 8, and 10. Although Treaty 2 covers land in Saskatchewan, there are no First Nations in Saskatchewan that are parties to this Treaty.

## *Governance*

Although the courts have not directly decided how the Treaties relate to governance, the federal government has accepted that by virtue of Inherent Rights all Indigenous peoples have the right to self-government.

## *Treaty Land Entitlement*

First Nations and the Crown agreed land would be set aside for the exclusive use of the First Nations, although some First Nations did not receive all the land they were entitled to by Treaty.

- Treaties 4, 6, 8, and 10 provided for one square mile per family of five or 128 acres per person.
- Treaties 2 and 5 provided for 160 acres per family of five in most cases.

## *Health Care*

Treaty 6, unlike the other numbered Treaties, includes the promise that a “medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians, at the direction of such agent.” Other Treaty First Nations regard full medical care as part of the Treaty relationship since it was discussed at the time, although not recorded in the written text.



## *Hunting, Fishing, and Trapping*

Hunting, fishing, and trapping rights are found in Treaty, but exclude lands taken up for settlement, mining, lumbering, or other purposes. These rights are subject to regulations made by the Government of Canada.

- Treaties 4, 5, 6, 8, and 10 promise the First Nations the right to pursue hunting and fishing throughout the Treaty territories.
- Treaties 4, 8, and 10 include rights to trapping throughout the Treaty territories.

## *Education*

Treaty 4 states that the Crown “agrees to maintain a school in the reserve allotted to each band.” Treaty 5 and Treaty 6 contain the promise to maintain schools on reserves as “may seem advisable.”

Treaty 8 includes a promise to “pay the salaries of such teachers to instruct the children of said Indians.”

Treaty 10 simply says that the Crown agrees to “make such provision as may from time to time be deemed advisable for the education of Indian children.”

## *Annuities*

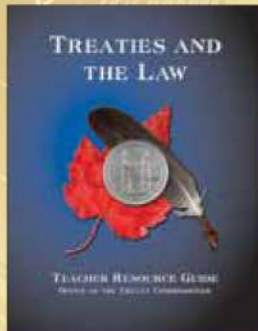
Treaties 4, 5, 6, 8, and 10 promise to annually pay “for ever” \$25 for each Chief, \$15 for each headman, and \$5 for every other man, woman, or child.

## *Taxation*

The *Indian Act* exempts First Nations and their members from taxation on any interest in reserve lands or personal property that is on a reserve.

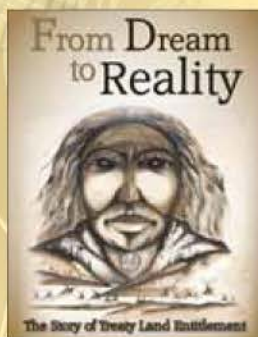


# Also Available



## *Treaties and the Law Full Length Resource*

Developed by PLEA for the Office of the Treaty Commissioner, the full-length *Treaties and the Law* resource includes an Informational Backgrounder for teachers, and a full-length Teacher Resource Guide for senior Social Science classes. Find it at [teachers.plea.org](http://teachers.plea.org).



## *From Dream to Reality: The Story of Treaty Land Entitlement*

Developed by PLEA for the Office of the Treaty Commissioner, *From Dream to Reality: The Story of Treaty Land Entitlement* introduces high school students to concepts surrounding Treaty Land Entitlement. Find it at [teachers.plea.org](http://teachers.plea.org).

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### Answer Key: *Treaty Trivia*

- |          |          |          |           |           |
|----------|----------|----------|-----------|-----------|
| 1. False | 4. True  | 7. False | 10. False | 13. True  |
| 2. False | 5. False | 8. True  | 11. True  | 14. False |
| 3. True  | 6. False | 9. False | 12. True  | 15. True  |

### Answer Key: *Treaty: Myth or Reality*

- |         |            |         |            |         |         |
|---------|------------|---------|------------|---------|---------|
| 1. Myth | 2. Reality | 3. Myth | 4. Reality | 5. Myth | 6. Myth |
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