OVERHEAD Notes

Considering Treaties: Case Studies

The Supreme Court has said that when considering a Treaty a court must consider "...the context in which the Treaties were negotiated, concluded and committed to writing." Courts will also consider oral promises and interpret the words in a Treaty as they would have been understood by the First Nations when the Treaties were signed.

Part of the context of the Treaties is that they were intended by both First Nations and governments to ensure that First Nations would be able to continue to support themselves.

One way to gain peace and support from the First Nations and at the same time ensure that the First Nations could support themselves was to protect their way of life by Treaty. When considering why the 1752 Mi'kmaq Treaty was made the Supreme Court stated that "peace was bound up with the ability of the Mi'kmaq people to sustain themselves economically." The Court went on to say that the "British certainly did not want the Mi'kmaq to become an unnecessary drain on the public purse..." and that "to avoid such a result, it became necessary to protect the traditional Mi'kmaq economy, including hunting, gathering, and fishing."

Another principle of Treaty interpretation is that Treaties are not frozen in the point of time when they were made. Many changes have taken place since the Treaties were signed. The Treaties are the foundation for how the newcomers and the First Nations would live together and as such they have been seen to evolve over time to meet the changing needs of the parties who entered into them.

R. v. *Simon* [1985] 2 S.C.R. 387

The Supreme Court had to consider whether a Treaty promise that "the said Tribe of Indians shall not be hindered from, but have free liberty of Hunting & Fishing as usual…" meant that only implements used when the Treaty was signed could be used. A member of the Treaty First Nation was relying on his Treaty right to hunt as a defence to an illegal hunting charge. He had been hunting with a rifle. The Court noted the principle that Treaties should be liberally construed and found that limiting it to implements used in the 1700s would be an "unnecessary and artificial constraint." The Court found that the words "as usual" required that hunting rights under the Treaty "…be interpreted in a flexible way that is sensitive to the evolution of changes in normal hunting practices."

R. v. *Sundown* [1999] 1 S.C.R. 393

The Supreme Court had to consider whether cutting down trees and building a log cabin in a forest was part of a Treaty right to hunt. The Court stated that "…judges must not adopt a 'frozen-in-time' approach to Aboriginal or Treaty rights." The Court noted that "the phrase 'existing Aboriginal rights' [in Canada's Constitution] must be interpreted flexibly so as to permit their evolution over time" and found that this applies to Treaty rights as well. The Court considered that the Treaty hunters had traditionally built shelters as a base from which to hunt for extended periods. The Court found that originally this would have been a moss-covered lean-to and later a tent. The Court concluded that the shelter "has evolved to the small log cabin, which is an appropriate shelter for expeditionary hunting in today's society."

OVERHEAD Notes ...continued

R. v. *Marshall* [1999] 3 S.C.R. 533

The rights and obligations of both the Crown and the First Nations have evolved over time. The Supreme Court decided that the Crown was not breaching a Treaty that provided for the establishment of "truckhouses" (a type of trading post) simply because the truckhouse system had been ended. The Crown did not have to use this particular method of fulfilling their obligation to allow the Mi'kmaq to continue to trade hunting and fishing products for necessaries, anymore than the Mi'kmaq had to use weapons that existed in the 1700s.