



Law and Treaties

According to the rule of law government must uphold and enforce the law and everyone, including the government, must obey the law. There are legal reasons, found within the laws of Canada, for entering into Treaties. For this reason the government is obligated by the laws of Britain and later Canada to deal with the interests of the First Nations in certain ways. One of these ways is by Treaty.

The common law is where the laws concerning the rights of the First Nations developed. This part of the common law is referred to as the common law of Aboriginal rights. Common laws are laws that are not created by governments. They are not written in a law passed by the government. Common law dates back to a time in Britain before there was a parliament with the power to pass legislation. Judges then applied a common standard of rules to all cases heard in the country. These rules originated from local customs. Common law rules continued to be laws even after laws could be passed by governments and continue to be part of British and Canadian law today.

The concept of Aboriginal rights became part of the British

common law and then part of Canada's common law after Canada became a country. Because the common law recognized the rights of the First Nations, the

Because the common law recognized the rights of the First Nations, the British needed to deal with those rights before they could lawfully settle on First Nation lands

British needed to deal with those rights before they could lawfully settle on First Nation lands. The common law recognized Treaties as a legitimate way of dealing with First Nations' interests in their lands.

Because of common law Aboriginal rights, the local customary laws of the people who had historically occupied the land continued to apply even after Britain began to rule Canada. One of the local customary rights that continued to exist even after the British began to rule what is now Canada was the right of First Nations to occupy their traditional lands. This right did not come from any action of the British government; it existed because the First Nations were already occupying the land when the British came to Canada. The Supreme Court of Canada has observed that the "...British policy towards the native population was based on respect for their right to occupy their traditional lands."

Because the rights of First Nations were recognized, Treaties were the legal means of gaining the consent of First Nations to open up land for settlement and in return First Nations were promised certain things, such as land for their exclusive use. Under the common law it was not possible for individual settlers to make legal agreements regarding the use of First Nation lands. It was up to government to deal with the First Nations before settling land they occupied. The Treaties can be viewed as part of the foundation of our legal system. Without these Treaties the right of Britain and later Canada to settle the land could be called into question.

Under the common law it was not possible for individual settlers to make legal agreements regarding the use of First Nation lands

The common law was not the only law which recognized the rights of the original occupants. 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 it did recognize that these rights existed.

When the Proclamation was passed it became the law in the British colonies and, since it

Law and Treaties

...continued

has never been repealed, it continues to be the law today in Canada. 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. The Proclamation not only recognized the rights of First Nations to their land, it recognized the need for Treaties between the Crown and First Nations concerning the use of First Nation lands.

The Proclamation forbade British subjects from moving onto or purchasing lands occupied by First Nations

Questions for Consideration

1. a) What is the rule of law?
b) Why do you think this concept is key for law-abiding, democratic societies?
2. a) What does the common law say about First Nations’ rights to the land they have always lived on?
b) What agreements did the Crown and the First Nations enter into in order to allow First Nations’ land to be opened up for settlement?
3. What important right was recognized by the *Royal Proclamation of 1763*?
4. This reading notes that “Without these Treaties the right of Britain and later Canada to settle the land could be called into question.” What do you think is the significance of this statement?