Treaties and the Law

Information Backgrounder

Office of the Treaty Commissioner

Acknowledgements

This publication was developed by the Office of the Treaty Commissioner (OTC) as part of its mandate to support a better understanding of the historic treaties between First Nations People and the Crown in what is now known as Saskatchewan.

The purpose of this publication is to provide support to Law 30 teachers as they teach about treaties. This publication provides teachers, students and the general public with information about treaties and the law. The content of this publication is intended as general information only and should not form the basis of legal advice of any kind. Individuals seeking specific legal advice should consult a lawyer.

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About this Resource

This Backgrounder is designed to give teachers information that will support their teaching about treaties and the law and their use of the accompanying Teacher Resource Guide. The chapters in this backgrounder correspond to the lessons in the Guide. For some of the activities in the Guide, it may be helpful or necessary to have students become familiar with the corresponding chapter in the Backgrounder. The reading level of the Backgrounder is grade 12.

The accompanying DVD is designed to give students an overview of the topics and concepts covered in the Backgrounder and the Teacher Resource Guide.

Introduction

Aboriginal nations are the original inhabitants of Canada. For thousands of years before people came from Europe or Britain and before anyone thought of this part of the world as Canada, Aboriginal nations occupied this land. From the first contact the Aboriginal nations and those who later came to this land have had to find ways to live together.

There were times when some nations of original inhabitants and the newcomers were at war and there were times when some nations of original inhabitants were considered important allies. Peaceful means of resolving the fundamental conflict created when the newcomers began to live in these already occupied lands have been sought by both the Aboriginal nations and the newcomers. This backgrounder explores one of these important means – the treaties.

The Aboriginal nations living in what is now Canada were not a single group of people. There were many different societies of original inhabitants living in the different areas each with their own customs, political organizations, language and spiritual beliefs. These societies also had trade and economic systems of their own.[1] In many ways the original occupiers of what the Europeans called the "new world" were far more culturally diverse than the Europeans.[2] Despite this variety, the Europeans in many ways saw the Aboriginal nations as one group. For this reason the newcomers created general terms to describe those that were already living in the lands to which they came.

An example of a word created by the newcomers to describe the original inhabitants of many different First Nations is the word *Indian*. One theory is that the term Indian resulted from a case of mistaken identity. The theory is that when Christopher Columbus sailed into the islands around Cuba he called the inhabitants Indians because he mistakenly thought he was just south of China and that these people were from India.

Another theory is that Columbus was so taken by the physical and spiritual beauty of inhabitants he first met that he believed they must have been made in the image of God. The term "du corpus in Deo" means from the body of God. The term Indian then may have come from the word "in Deo".

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[1] *Fact Sheet - Terminology*: Assembly of First Nations.

[2] H. Hertzberg, *The Search For an American Identity: Modern Pan-Indian Movements* (Syracuse: University Press, 1971) at 1.

Indian is sometimes still used today to describe all descendants of the original inhabitants who are not Inuit or Métis. It is however, considered outdated by many people. The Department of Indian and Northern Affairs Canada now uses the term First Nation. The term Indian, however, is still used if it is a direct quote, or a discussion of history or when it is a legally defined term.[3] Similarly the Assembly of First Nations, a political group that represents some of the Aboriginal nations, explains First Nation(s) as a term that started to be used in the 1970's to replace Indian, which some found offensive.[4]

In keeping with these usages the original inhabitants who entered into treaties will be referred to as First Nations in this backgrounder. This is also in keeping with the growing understanding that those who originally lived in what is now Canada lived in organized societies and had their own forms of government. The term Indian will be used when dealing with historical documents, legislation or cases that use that term.

This backgrounder looks at the treaties between the First Nations and the British. The treaties are a key foundation of the relationship between the First Nations and those who came after. Treaties between First Nations and those who came to what is now Canada are a unique type of agreement. What treaties are both in the general sense of the word and in the context of First Nations treaties will be discussed. Why treaties were entered into will

Aboriginal peoples is a more general term that includes all of the original peoples of North America and their descendants. It is used in Canada's Constitution. The Constitution recognizes Aboriginal peoples as including Indians, Métis and Inuit. The term Native has a meaning that is similar to Aboriginal; however it is increasingly seen as outdated.[5]

Inuit are the Aboriginal people of Artic Canada. The word Inuit means "the people" in Inuktitut, the Inuit language. The term "Eskimo" applied to Inuit by European explorers is no longer used in Canada. It comes from the Algonquin term meaning "raw meat eaters" and many people find the term offensive.[6]

The word *Métis* is French for mixed blood. Métis are recognized as one of the three Aboriginal peoples in Canada. Originally the term referred to the children of French fur traders and Cree women in the Prairies and of English and Scottish traders and Dene women in the North. Today the term is used to describe people with mixed First Nations and European ancestry who identify themselves as Métis.[7]

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[3] Communications Branch Indian and Northern Affairs Canada, *Words First* (Ottawa: Indian and Northern Affairs Canada, 2002).

[4] *Fact Sheet - Terminology*: Assembly of First Nations.

[5] Communications Branch Indian and Northern Affairs Canada, *Words First* (Ottawa: Indian and Northern Affairs Canada, 2002).

[6] Ibid.

[7] Ibid.

also be considered from the perspective of the First Nations, the British and the law. With this background the question of what the law says about these treaties will be addressed. Finally the question of what it means to have treaty rights today in Saskatchewan will be discussed.

• 1 •
What are Treaties?

A treaty is a negotiated agreement between two or more nations.[8] Many nations all over the world have a long history of using treaties. Often treaties are used to end land disputes between nations and sometimes to end a war or to avoid having a dispute end in armed conflict. 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 and transfer some of the land from France to Britain.

The First Nations of what is now Canada entered into treaties with each other long before the first Europeans came to trade furs and settle in what is now Canada.[9] One of the earliest recorded treaties is the great Law of Peace of the People of the Longhouse.[10] It was negotiated before 1450. It created a code of law and a form of government.[11] Most treaties between the First Nations were peace treaties to end wars and to establish the land or territory that different nations would share.[12] This treaty-making tradition was a model for relationships between people[13] that would later be used in establishing relationships with the British.

Treaty-making in Europe began during the time of the Roman Empire. Rome used treaties to form alliances for defence and trade. Later treaties became the accepted way of establishing the exclusive right to trade in newly explored areas. When Europe began to explore and settle the Americas, treaties were used to promote and make peace, and secure military alliances.[14]

It is not surprising then that the First Nations and the nations that came to what is now Canada entered into treaties with each other and that Canada continued this tradition with the First Nations after becoming a country. The treaties with First Nations are unique and have a distinct place in Canadian law. These treaties were made between various First Nations groups (called Indians by the Europeans that came to what is now Canada) and the representatives of the head-of-state of first Britain and later Canada (often referred to as the Crown). These treaties are the kind of treaties that are being discussed in this backgrounder.

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[8] Richard Price, *Legacy: Indian Treaty Relationships* (Edmonton: Plains Publishing, 1991) at 4.

[9] Ibid.

[10] Ibid.

[11] Ibid.

[12] Ibid. at 6.

[13] John Borrows, "Towards a New Aboriginal Governance Agenda – TANAGA" (Ottawa: Institute On Governance, 2005) at 3.

[14] *Statement of Treaty Issues: Treaties As A Bridge to The Future* (Saskatoon: Office of the Treaty Commissioner, 1998).

The term the "Crown" originated because Britain, like many other countries, was ruled by a monarch (either a King or a Queen). Today Canada, like Britain, is a parliamentary democracy but representatives of the British monarchy are still part of our system of government. This is why Canada has a Governor General and why the provinces have Lieutenant Governors. The Governor General and the Lieutenant Governors represent the Queen in Canada and perform some, mainly ceremonial, roles in Canada's governments.

When the treaties with First Nations are considered, courts and others will commonly refer to the obligations of the "Crown" or benefits given to the "Crown". This does not mean that dealing with the treaties is solely the responsibility of the Queen or her representatives in Canada, although some First Nations see the British Crown as playing a role in treaties today.[15] The Crown is not just the Queen. The Crown represents Canadian people and their governments and the rights and obligations of Canadian people as a whole.[16]

There are a number of different treaties with First Nations that cover much of the territory of Canada. The treaty-making process in what is now Canada began in the 1600's 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.

Starting in the mid-1600's treaties of "peace and alliance" were negotiated in the Maritimes. These treaties helped to establish British control over the export of raw resources in the face of competition from other European powers. From 1780-1850 treaties were entered into in what was then Upper Canada. These treaties dealt with small tracts of land needed by the settlers for farming. When the Hudson Bay Company expanded its operations to the west coast in 1850, treaties were used to accommodate the limited settlement the company needed for their operations. From 1871-1921 treaties were entered into on the prairies to allow settlers to come and farm the land and to prevent these lands from possibly being absorbed into the United States.[17]

Despite this variety, there are certain characteristics of treaties with First Nations. The Supreme Court of Canada has held that a treaty with a First Nation "…is a solemn agreement between the Crown and the Indians…the nature of which is sacred."[18] The Supreme Court has also said that treaties with the First Nations are unique agreements that are *sui generis*.[19] This means that treaties with First Nations are in their own class.

A treaty can be described as an agreement that reflects a common understanding.[20] However, in the case of the treaties with the First Nations, differences in language, culture

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[15] *Report of the Royal Commission on Aboriginal People*, vol. 2 (Ottawa: Indian and Northern Affairs Canada, 1996).
[16] Ibid.
[17] Robert Alan Reiter, *The law of Canadian Indian Treaties* (Edmonton: Juris Analytica Pub., 1995).
[18] *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1063.
[19] *R. v. Simon*, [1985] 2 S.C.R. 387.
[20] Robert Alan Reiter, *The law of Canadian Indian Treaties* (Edmonton: Juris Analytica Pub., 1995).

and history may have resulted in a lack of a common understanding about certain matters. There was however a common understanding that the purpose of the treaties was to allow the parties to live together in peace and share the land and its resources. [21]

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.[22] By entering into treaties with the First Nations the Crown recognized their nationhood. The British policy towards the First Nations was based on the assumption that First Nations had the "political, territorial and economic characteristics of nationhood."[23]

Both the First Nation and the Crown must have gained something by making the treaty. The Crown, and through the Crown, all Canadians have treaty rights just as the First Nations have treaty rights. Although treaty rights are often assumed to be the rights of the First Nations and treaty people are often assumed to be only members of the First Nations, in fact Canadians as a whole have treaty rights and are treaty people.

Both must have intended to be bound by the agreement. As well a treaty creates rights which are passed on over time.[24] Treaties were meant to be enduring.[25] This means that a treaty does not end when those who made the treaty are no longer alive but rather that it continues to give rights and create obligations for future generations.

A treaty is also made with a "certain measure of solemnity".[26] The Crown used a written document under seal. By the traditions of the Crown this gave the treaties the force of law. The First Nations used their own solemn practices to "seal" the agreements. These included the pipestem, wampum, tobacco and oratory. For the First Nations of the plains the sacred pipe sealed the agreements.[27]

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[21] *Report of the Royal Commission on Aboriginal People*, vol. 2 (Ottawa: Indian and Northern Affairs Canada, 1996).
[22] Robert Alan Reiter, *The law of Canadian Indian Treaties* (Edmonton: Juris Analytica Pub., 1995).
[23] *Report of the Royal Commission on Aboriginal People*, vol. 2 (Ottawa: Indian and Northern Affairs Canada, 1996).
[24] Robert Alan Reiter, *The law of Canadian Indian Treaties* (Edmonton: Juris Analytica Pub., 1995) at 1-4.
[25] *Report of the Royal Commission on Aboriginal People*, vol. 2 (Ottawa: Indian and Northern Affairs Canada, 1996).
[26] *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1044.
[27] *Report of the Royal Commission on Aboriginal People*, vol. 2 (Ottawa: Indian and Northern Affairs Canada, 1996).

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Why were Treaties Made?

Treaties are by their nature voluntary, negotiated agreements. To understand why First Nations and the British, then later Canadian, governments entered into treaties, it is necessary to consider the reasons why each party entered into this process and what each may have hoped to get out of it. The British and later Canadian governments did not only have practical and policy reasons for entering into treaties with First Nations. They also had to consider their own laws that recognized both the rights of the First Nations and the treaties as a legitimate way of dealing with those rights.

First Nations Perspective

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 British Crown and later the Canadian Government. [28]

The treaties represented many different things to the First Nations including a way to share the land, have peace, continue with their way of life and assure the future of their children by learning how to survive in the white man's world. 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.[29]

One way to understand the First Nations perspective on treaties is through the views of an Elder of a First Nation community. Elder is the title given to a respected individual in a First Nation community. An Elder is a keeper of the community's traditions and worldview.

One First Nation Elder commenting on negotiations with his First Nation said "what I do understand is that we were to share the land with other people who were white people. That was the purpose of the treaty, I think, since there were going to be more white people, to share the land with them."[30] Sharing the land, rather than giving up their rights

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[28] Ibid.

[29] *Statement of Treaty Issues: Treaties As A Bridge to The Future* (Saskatoon: Office of the Treaty Commissioner, 1998).

[30] Patrick Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995) 21 Queen's Law Journal 173. Original quote from R. Daniel, "The Spirit and Terms of Treaty Eight" in R. Price ed., *The Spirit of the Alberta Indian Treaties* (Montreal: Institute for Research on Public Policy, 1980).

to the land, was in keeping with the culture and spiritual beliefs of many First Nations by which land could not be bought or sold since it was not "owned" by the people but was a gift from the Creator or the Great Spirit.[31]

First Nations generally saw treaties as a way of planning for their economic future. Especially during the time when the treaties were entered into on the prairies, the First Nations were faced with famine, disease and hardship as the buffalo they depended on became very scarce. Influenced by these harsh conditions, the First Nations focused on the future and how they could ensure their survival for generations to come.[32]

Many First Nations saw the treaties as a way of being able to continue living as they had for countless generations.[33] For this reason great concern was expressed by the First Nations about the continuation of their traditional means of living (such as hunting and fishing) in nearly all records of treaty negotiations.[34]

Many First Nations also recognized that their world was changing and regarded the treaties as a way of helping their people adjust to these changes.[35] Treaty promises of schools and help with farming were included because "First Nations negotiators wanted training for their people so that they could adapt to the new way of life being brought upon them."[36]

Policy Reasons for Treaties

There were a number of very practical reasons that Britain, and later Canada, chose to negotiate treaties with the First Nations. Early on the British needed military support from the First Nations. Both the British and later Canadian governments were also anxious to ensure that First Nations would continue to be able to be self-sufficient. As more people came from Britain and other places to what is now Canada it also became clear that conflict could result if no agreement was reached about sharing the land. The government was anxious to avoid this conflict and at the same time secure for itself access to the land and resources.

Early on the representatives of the British Crown recognized the need for support from First Nations if they were to be successful in claiming what is now Canada for their own.

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[31] Richard Price, *Legacy: Indian Treaty Relationships* (Edmonton: Plains Publishing, 1991).

[32] Vic Savino & Erica Schumacher, "Whenever the Indians of the Reserve Should Desire It: An Analysis of the First Nation Treaty Right to Education" (1992) 21 Manitoba Law Journal 476. Quoting from analysis of treaty negotiations by Professor Jean Friesen, Grant Me Wherewith to Make My Living (Faculty of Arts, University of Manitoba, 1985) [unpublished] at 68.

[33] Gordon Christie, "Justifying Principles of Treaty Interpretation" (2000) 26 Queen's Law Journal 143 at 32-33.

[34] Ibid. at 33 note 136.

[35] Richard Price, *Legacy: Indian Treaty Relationships* (Edmonton: Plains Publishing, 1991) at 48.

[36] Vic Savino & Erica Schumacher, "Whenever the Indians of the Reserve Should Desire It: An Analysis of the First Nation Treaty Right to Education" (1992) 21 Manitoba Law Journal 476.

The Supreme Court of Canada when considering the 1752 Mi'Kmaq Treaty, noted that the Treaty was entered into after more than a decade of intermittent hostilities between Britain and the Mi'Kmaq, that the British wanted peace and safety for their settlers and that they did not feel completely secure in occupying what is now Nova Scotia.[37]

When considering a treaty with the Huron First Nation made in 1760, the Supreme Court concluded that "...both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations."[38] The court went on to note that Britain did everything it could to keep each Indian nation on their side and to encourage nations that supported their enemy (France) to change sides.[39] When Britain secured a nation's alliance a treaty would be negotiated.[40] The treaties and the relationships created by them stopped wars between the First Nations and the French and the British.[41]

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."[42] 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."[43]

After becoming independent of Britain, the Canadian Government used the already well established treaty-making tradition when negotiating with the First Nations on the prairies.[44] Just as Britain had before confederation, Canada benefited from these treaties in many lasting ways. Treaties 1 to 7 cleared the way for the Canadian Pacific Railway and agricultural settlement in the prairies and northwestern Ontario.[45] Treaty 8, giving access to the Yukon Territory, was entered into after the start of the gold rush.[46] The waterways of the north, the Peace, the Athabasca and the Mackenzie Rivers all afforded passage to the Yukon and once the gold rush began the potential for conflict between First Nations and

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[37] *R. v. Marshall*, [1999] 3 S.C.R. 456 at 480- 481.

[38] *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1052-1053.

[39] Ibid.

[40] Ibid.

[41] *Report of the Royal Commission on Aboriginal People*, vol. 2 (Ottawa: Indian and Northern Affairs Canada, 1996).

[42] *R. v. Marshall*, [1999] 3 S.C.R. 456 at 482.

[43] Ibid. at 482-483.

[44] D. N. Sprague, "Canada's Treaties With Aboriginal Peoples" (1996) 23 Man. L. J. 341 at 4.

[45] Ibid.

[46] Ibid.

those travelling to the Yukon through First Nations territory increased.[47] Treaty 9 followed silver discoveries and expected hydroelectric, pulp and paper development in northern Ontario and Treaty 10 served a similar purpose in northern Saskatchewan.[48] Treaty 11 was entered into after Imperial Oil's first gusher at Norman Wells.[49]

These treaties also continued the policy of trying to ensure that First Nations continued to have the ability to support themselves and share the economic benefits of the land. Protection of the traditional way of living of hunting and fishing, setting aside of land for the exclusive use of the First Nations, supplying First Nations with farming equipment and promising schools are all examples of this.

The treaties were made because First Nations and non-First Nations people were occupying a common territory and could have come into conflict unless some means of reconciling the rights of each were found.[50] While the American government spent around $20 million every year during the 1870's forcing First Nations off of the United States plains through bloody conflicts, Canada spent only slightly more than $730,000 between 1875 and 1905 on costs related to the treaties. There was also considerably less bloodshed in Canada during these years.[51] The treaty rights that the Crown received have had a profound influence on the history of Canada and the Crown and Canadian people continue to exercise their treaty rights today.

Legal Reasons for Treaties

There are laws that apply within a country, called domestic laws, and also laws that concern how countries deal with each other, called international laws. The legal reasons for entering into treaties can be found both in international law and in the laws of Canada itself.

International law

Within Canada there are laws that govern peoples' actions and help resolve disputes. The criminal law makes it illegal to take things that belong to someone else. In civil court a person can sue someone who they feel is responsible for harming them or their property.

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[47] *Inquiry into the Treaty Land Entitlement Claim of the Forst McKay First Nation* (Indian Claims Commission, 1995).

[48] D. N. Sprague, "Canada's Treaties With Aboriginal Peoples" (1996) 23 Man. L. J. 341.

[49] Ibid.

[50] *Report of the Royal Commission on Aboriginal People*, vol. 2 (Ottawa: Indian and Northern Affairs Canada, 1996).

[51] *Canada in the Making* (Ottawa: canadiana.org, 2004); "Aboriginals: Treaties & Relations – 1867-1870: *British North America Act, 1867* and Sale of Selkirk Treaty Lands (1869).

Nations also need a way to deal with other nations. In the same way that two people could disagree about to whom some property belongs, two nations may not agree on what land each one can claim as part of their country. In the same way that someone might think another person has treated them unfairly or harmed them in some way, a nation may disagree with how another nation is treating them.

One nation may enter into a treaty with another nation as a means to resolve a particular situation. International law regulates how treaties can be made and enforced between countries.

The concepts of international law apply when groups deal with each other on a nation-to-nation basis. 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…."[52] Historical research shows that the British regarded the original occupants as nations.[53]

By entering into treaties with First Nations the Crown recognized the nationhood of the original occupants of what is now Canada because a group must have the authority to govern its people and to negotiate with other nations to be able to enter into a treaty.[54] International law and a tradition of using treaties to deal with other nations is one of the reasons the British entered into treaties with the First Nations of what is now Canada.

Law of Canada

the rule of law

There are also legal reasons, found within the laws of Canada, for entering into treaties. A fundamental principle of the Canadian way of life is the *rule of law*. It is based on the belief that it is better to be ruled by laws than to be ruled by leaders who can act any way they like. If a king, queen, or dictator ruled us they would be free to do whatever they wanted. A Queen could decide that everyone had to give her half of their salary. A King could decide people with blue eyes must work for free for anyone with brown eyes. A dictator could imprison or even execute anyone who disagreed with him.

According to the rule of law everyone, including the government, must obey the law. 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.

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[52] *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) and stating that the U.S. court's "essential insight that the claims of the Cherokee must be analyzed in light of their pre-existing occupation and use of the land – their 'undisputed' possession of the soil 'from time immemorial' – is as relevant for the identification of the interests s. 35(1) [recognition and affirmation of existing Aboriginal and Treaty rights] was intended to protect as it was for the adjudication of Worcester's claim."

[53] Gordon Christie, "Justifying Principles of Treaty Interpretation" (2000) 26 Queen's Law Journal 143.

common law

The common law is where the laws concerning the rights of the Aboriginal nations developed. This part of the common law is referred to as the common law of Aboriginal rights. The concept of Aboriginal rights became part of the British common law[56] and part of Canada's common law after Canada became a country.[57] Because the common law recognized the rights of the Aboriginal nations, the 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.

Aboriginal rights law tells us about the relationship between the original inhabitants of Canada and those who later came to Canada from Europe and Britain. Aboriginal rights are a way of reconciling the fact that Aboriginal people were already occupying what is now Canada with the British and later Canadian claim to the same land.[58] The Supreme Court of Canada has said that the "…fundamental objective of the modern law of Aboriginal and Treaty rights is the reconciliation of Aboriginal peoples and non-Aboriginal peoples and their respective claims, interests and ambitions."[59]

In Britain, and then later Canada, something could be the law because the government passed a law or made a royal proclamation or because of the common law.

Legislation is created when the government passes a law. A law is passed when a majority of the elected representatives vote for it. A law must also receive Royal Assent from the Crown's representative (Governor General or Lieutenant Governor).

In Canada we also have *constitutional laws* that even our elected government cannot change. These laws divide the powers of government between the provinces and the federal government and give people certain rights and protections.

A *Royal Proclamation* had the same force as a statute in colonies of Britain that did not have their own government.[55] Even after colonies gain independence, a royal proclamation continues to be the law unless it is repealed.

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 statutes could be passed and are part of British and Canadian law.

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[54] *Report of the Royal Commission on Aboriginal People*, vol. 2 (Ottawa: Indian and Northern Affairs Canada, 1996).
[55] Arthur J. Ray, J. R. Miller & Frank Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal: McGill-Queen's University Press, 2000) at 33.
[56] *R. v. Van der Peet*, [1996] 2 S.C.R. 507.
[57] *Roberts v. Canada*, [1989] 1 S.C.R. 322.
[58] *R. v. Van der Peet*, [1996] 2 S.C.R. 507.
[59] *Mikisew Cree First Nation v. Canada*, 2005 SCC 69.

The Supreme Court of Canada has also said that the reason that Aboriginal rights exist is "…because of one simple fact: when Europeans arrived in North America, Aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures as they had done for centuries."[60] The Supreme Court went on to say that "it is this fact, and this fact above all others, which separates Aboriginal peoples from all other minority groups in Canadian society…" and results in their "special legal…status".[61] Aboriginal rights are justified by "…fairness which suggests that…a prior occupant of land possesses a stronger claim to that land than subsequent arrivals."[62]

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.[63] Aboriginal rights then are not English or Aboriginal but are the result of the meeting of the two very different societies.[64] Aboriginal rights law "…bridges legal cultures and relies on stepping outside our own ways of justice."[65] The common law did not end the legal traditions of the First Nations upon the arrival of the newcomers; the common law presumed that these traditions would survive[66] and recognized them as part of the law of the land.

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 the Aboriginal nations to occupy their traditional lands. This right did not come from any action of the British government; it existed because the Aboriginal nations were already occupying the land when the British came to Canada.[67] 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."[68]

Because the rights of the Aboriginal nations were recognized, treaties were used as a legal way of allowing First Nations lands to be opened up to settlement[69], by gaining the consent of the First Nations. Under the common law it was not possible for individual

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[60] *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

[61] Ibid.

[62] Ibid. Quoting with approval from David Elliott, *Law and Aboriginal Peoples of Canada*, 2nd ed. (North York, Ont.: Captus Press, 1994) at 25.

[63] Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 C.B.R. 196. Local laws would not continue if they were unconscionable or incompatible with the Crown's sovereignty.

[64] *R. v. Van der Peet*, [1996] 2 S.C.R. 507. Quoting with approval from Mark Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on Delgamuukw v. British Columbia" (1992), 17 Queen's L.J. 350 and Brian Slattery, "The Legal Basis of Aboriginal Title", in Frank Cassidy, ed., (Lantzvilee, B.C.: Oolichan Books, 1992).

[65] John Borrows, "Towards a New Aboriginal Governance Agenda – TANAGA" (Ottawa: Institute On Governance, 2005) at 3.

[66] Ibid. at 5.

[67] *Guerin v. Canada*, [1984] 2 S.C.R. 335.

[68] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1103.

[69] *R. v. Sikyea*, [1964] 2 C.C.C. 325, affirmed [1964] S.C.R. 642. Judgment of the Court of Appeal noted that "…the Government of Canada has treated all Indians across Canada…as having an interest in the lands that required a treaty to effect its surrender."

settlers to make legal agreements regarding the use of First Nation lands.[70] 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.[71]

Royal Proclamation of 1763

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.[72]

When the Proclamation was passed it became the law in the British colonies and, since it has never been repealed, it continues to be the law today in Canada.[73] The Supreme Court of Canada in considering Aboriginal rights has taken into account the Royal Proclamation[74] and has also confirmed that it did not *create* Aboriginal rights but recognized the *existence* of common law Aboriginal rights.[75]

The Proclamation was passed at the end of the Seven Years War between the British and the French. During this war the First Nations had allied themselves with the French. The British did not want further hostilities and passed the Proclamation as a way of gaining the trust of the First Nations.[76] Peace with the First Nations was crucial for Britain to be able to continue colonizing what is now Canada.

In the years before the Proclamation there had been clashes because land speculators and settlers were moving onto First Nation lands. The Proclamation was part of the British policy to prevent these kinds of conflicts.[77] The Proclamation forbade British subjects from moving onto or purchasing lands occupied by First Nations. It also stated that if

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[70] Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 C.B.R. 196.

[71] Gordon Christie, "Justifying Principles of Treaty Interpretation" (2000) 26 Queen's Law Journal 143. Christie argues that that the treaties "…must be seen as fundamental constitutional documents, making possible the very nation state of Canada. Quite simply, without these agreements there could be no lawful authority by which Canada could be established on Aboriginal lands."

[72] *Guerin v. Canada*, [1984] 2 S.C.R. 335.

[73] Arthur J. Ray, J. R. Miller & Frank Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal: McGill-Queen's University Press, 2000) at 35.

[74] *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313.

[75] *Guerin v. Canada*, [1984] 2 S.C.R. 335.

[76] John Borrows, "Towards a New Aboriginal Governance Agenda – TANAGA" (Ottawa: Institute On Governance, 2005) at 3.

[77] Arthur J. Ray, J. R. Miller & Frank Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal: McGill-Queen's University Press, 2000) at 32-33. D. N. Sprague, "Canada's Treaties With Aboriginal Peoples" (1996) 23 Man. L. J. 341.

"Indians should be inclined to dispose" of their lands they could only be purchased by the Crown.[78] 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 British Crown reinforced this requirement in 1870 when they transferred ownership of what was then called Rupert's Land to the new Dominion of Canada. In the order making this transfer, Britain required that when these lands were transferred, the Canadian Government would consider and settle claims of Indian tribes for compensation for lands settled "in conformity with the equitable principles" that the British Crown applied in dealing with the First Nations.[79]

Later Canadian legislation dealing with Crown land and opening areas up for settlement also required that "Indian title" be dealt with before the land could be settled.[80] The Canadian Government disallowed one province's legislation dealing with Crown land because it did not require "Indian" title to be dealt with before the land was settled. The Canadian Government stated that "there is not a shadow of doubt, that from earliest times, England has always felt it imperative to meet the Indians in council, and to obtain surrenders…required for purposes of settlement."[81]

The common law, the Royal Proclamation of 1763 and legislation have all recognized the rights of the Aboriginal nations. They also recognize that only the government can deal with these rights and that the treaties are a legitimate way of dealing with these rights.

The legal reasons for entering into treaties are as true for Canada as they were for Britain when Britain ruled what is now Canada. The *British North America Act* made Canada independent of British rule in 1867. This Act, which is now part of our Constitution, gave the federal government exclusive powers over "Indians and lands reserved for the Indians". The *British North America Act* recognized that the new Dominion of Canada had existing obligations to First Nations and that the process of dealing with the First Nations was ongoing.

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[78] *Aboriginal Peoples and the Law: Indian, Métis, and Inuit Rights in Canada*, ed. by Bradford Morse (Ottawa: Carleton University Press, 1985) at 52-54.

[79] Schedule A in Order in Council of Great Britain (23 June 1870).

[80] See the *Dominion Act*, S.C. 1872, c.23, s.42; *An Act to Amend and Continue the Act 32 and 33 Victoria, Chapter 3; and to Establish and Provide for the Government of the Province of Manitoba*, S.C. 1870,c.3; *Dominion Lands Act*, S.C. 1879, c.31.

[81] Department of Justice, Canada, "Report of the Honourable Minister of Justice" (19 January 1875) (The Hon. T. Fournier, Minister of Justice) published in W.E. Hodgins, ed., *Dominion and Provincial Legislation, 1867-1895* (Ottawa: Government Printing Bureau, 1869) at 1026.

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Treaty Rights and the Law of Canada

Treaty rights are part of the law of Canada. The treaties created enforceable obligations. 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 the treaty promises was reinforced when these rights were made part of the Constitution of Canada. The Constitution is the highest law of the land.

solemn and lasting promise

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."[82] The fact that treaties were entered into represents "…a profound commitment by both parties to the idea of peaceful relations between people."[83] Canada would not be the Canada we know today if both the First Nations and those representing the British and later Canadian governments had not been committed to the treaties as peaceful means of deciding how they were going to live together". [84]

Treaties are sometimes seen as "…ancient, obsolete relics of marginal historical interest."[85] However, during negotiations for Treaty 6 the Crown's chief negotiator stated that the treaty promises were "…not for to-day but for to-morrow, 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 above and the water flows in the ocean."[86]

Treaties are not just a part of our history - they are part of the fabric of Canadian society today. The Supreme Court of Canada has never questioned the ability of Aboriginal people who were not alive when the treaties were signed to rely on rights given in the treaties.[87] Just as the Canadian government over the years continues to rely on its treaty right to the land, the treaties continue to give rights to First Nations.

It is clear from the treaties themselves that both parties intended to make a lasting agreement enforceable for generations to come. The numbered treaties that cover Saskatchewan refer to the First Nations giving land rights to the "Government of the Dominion of Canada, for Her Majesty the Queen, and successors forever" and provides,

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[82] *Report of the Royal Commission on Aboriginal People*, vol. 2 (Ottawa: Indian and Northern Affairs Canada, 1996).

[83] Ibid.

[84] Ibid.

[85] 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.

[86] Sheila Carr-Stewart, "A Treaty Right to Education" (2001) 26:3 Canadian Journal of Education.

[87] *R. v. Simon*, [1985] 2 S.C.R. 387. The court considered what connection to the original signatories is required.

for things such as payments to be made to the First Nations "next year and annually afterwards for ever", hunting ammunition to be provided "yearly and every year" and implements to cultivate the land for "Indians who are now cultivating the soil, or who shall hereafter commence to cultivate the land."[88]

mutually beneficial and binding agreements

Treaties, being negotiated agreements, gave benefits to both parties. For the First Nations the treaties "provided a basis for asserting their rights in the wake of European intrusions on their lands and interference with their ways of life".[89] Britain and later Canada received considerable "economic, military and political benefits."[90] The Crown received benefits on behalf of those who settled in Canada and their descendants. In this sense Canadians are treaty people and continue to benefit from the rights negotiated on their behalf by the Crown.

Treaties, as well as giving benefits to both sides, created mutually binding obligations.[91] The First Nations living on the prairies were fulfilling their obligations, undertaken when they signed the numbered treaties, when they allowed settlement of the prairies to take place peacefully.

Just as Canada gained certain rights under the treaties with First Nations, Canada also has certain obligations to the First Nations that entered into treaties. The Supreme Court of Canada, when considering a First Nation treaty entered into in 1752, stated "the Treaty was an exchange of solemn promises between the Micmacs and the King's representative entered into to achieve and guarantee peace…it is an enforceable obligation between the Indians and the white man…."[92]

faith and honour

As early as 1895 the Supreme Court of Canada described the fulfillment of treaty promises as a matter involving the "faith and honour of the Crown."[93] One hundred years later the Supreme Court still stressed that "the honour of the Crown is always at stake in its dealing with Indian people" and that "it is always assumed that the Crown intends to fulfill its promises."[94]

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[88] *Consolidated Native Law Statutes, Regulations and Treaties*, ed. by Jack Woodward (Toronto: Thomson Canada Limited, 2005).

[89] Leonard I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights and the Sparrow Justificatory Test" (1997) 36 Alta. L. Rev. 149.

[90] Ibid.

[91] Patrick Monahan, *Constitutional Law*, 2nd ed. (Toronto: Irwin Law Inc., 2002).

[92] *R. v. Simon*, [1985] 2 S.C.R. 387 at 411. This was a departure from early cases where treaty promises were considered unenforceable. See Gordon Christie, "Justifying Principles of Treaty Interpretation" (2000) 26 Queen's Law Journal 143.

[93] *R. v. Marshall*, [1999] 3 S.C.R. 456 at 497 referring to *Province of Ontario v. Dominion of Canada and Province of Quebec*; *In re Indian Claims* (1895), 25 S.C.R. 434 at 511-12.

[94] *R. v. Badger*, [1996] 1 S.C.R. 771.

Courts often state that the Crown has *fiduciary* responsibilities or obligations towards the First Nations. Fiduciary is a legal word used to describe a situation where one person has a duty to act for the benefit of another.[98] The Crown has a duty to protect Aboriginal people in the enjoyment of their Aboriginal rights.[99] This duty exists because of the nature of Aboriginal rights and the historic powers and responsibility assumed by the Crown in relation to First Nations.[100]

A fiduciary relationship does not assume that one party is not equal to the other party. It exists between First Nations and the Crown because the Crown promised to protect the interests of First Nations[101] and the First Nations relied on this promise in, among other things, allowing peaceful settlement of what is now Canada. This same promise, that the Crown would protect the rights of First Nations, formed the basis of the treaty relationship. This is why treaty rights, although they are different than Aboriginal rights because they are created by agreement, also give rise to a fiduciary relationship.[102] This means that the Crown has a duty to fulfill treaty obligations.[103]

However, over the years it was decided, in some cases by the Supreme Court of Canada, that the federal government itself could override treaty rights by passing legislation that had a clear and plain intention to take away from a treaty or Aboriginal right.[95] In one case, the Supreme Court had to decide whether a law passed by the Parliament of Canada could take away treaty hunting rights. The court found that "it is…clear that the rights given to the Indians by their treaties as they apply to migratory birds have been taken away by this Act…."[96] Although the court allowed the legislation to take away a treaty right, the court commented that this action was a "breach of faith on the part of the Government."[97]

constitutional protection

The *Constitution Act, 1982* made treaty rights constitutional rights. Section 35(1) of this Act states that the "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." The Supreme Court has noted that the inclusion of Aboriginal and treaty rights in the Constitution "…represents the culmination of a long and difficult struggle in both the political forum and

[95] Patrick Monahan, *Constitutional Law*, 2nd ed. (Toronto: Irwin Law Inc., 2002).
[96] *R. v. Sikyea*, [1964] S.C.R. 642.
[97] Ibid.
[98] *Black's Law Dictionary*, 7th ed., ed. by Bryan A. Garner (St. Paul, Minn.: West Group, 1999).
[99] Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 C.B.R. 727 at 753;*R. v. Sparrow*, [1990] 1 S.C.R. 1075.
[100] *R. v. Sparrow*, [1990] 1 S.C.R. 1075.
[101] Peter W. & Schulze Hutchins, David, "When Do Fiduciary Obligations To Aboriginal People Arise" (1995) 59 Sask. L. Rev. 97.
[102] *R. v. Badger*, [1996] 1 S.C.R. 771.
[103] *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570.

the courts…."[104] The Court also said that the constitutional recognition of Aboriginal and treaty rights "…is a solemn commitment that must be given meaningful content" that holds the "...Crown to a substantive promise."[105]

The Constitution did not create treaty rights; it "recognized and affirmed" that these rights exist in Canadian law. The Supreme Court has said that the purpose of this section of the Constitution is to recognize and respect the fact that First Nations lived in what is now Canada before the Europeans came and to reconcile this fact with the fact that these same lands were claimed for first the British and later the Canadian Crown. As well the government has the responsibility to protect the rights of First Nations.[106]

This means that treaty rights are now protected from legislation by either the provinces or the federal government.[107] The Constitution protects "existing" treaty rights. A treaty right is "existing" if it has not been extinguished. A right can be existing even if it could not be exercised because of regulations.[108]

a balancing act

The Constitution does not prevent any law from taking away from an existing treaty right in any way. The Supreme Court has developed a way of deciding what legislation can be allowed to affect treaty rights by balancing the interests of those with treaty rights with the interests of governments to protect the interests of the community as a whole.[109]

The government must "justify" any legislation that conflicts with a protected Aboriginal or treaty right.[110] Although the test for when legislation can take away from Aboriginal people's constitutionally protected rights was developed in a case that dealt with Aboriginal rights[111] not treaty rights, the test has also been applied to cases where legislation affected treaty rights.[112]

The first step in finding out if a law is justified is to ask if it was passed for a "compelling and substantial objective". This means that the law must be trying to reconcile the fact that Canada was already occupied by Aboriginal people with the fact that people from other countries also ultimately claimed Canada for their own. Examples of purposes that

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[104] *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

[105] Ibid.

[106] Jack Woodward, *Native Law* (Calgary: Carswell Legal Publications, 1989).

[107] Patrick Monahan, *Constitutional Law*, 2nd ed. (Toronto: Irwin Law Inc., 2002).

[108] Jack Woodward, *Native Law* (Calgary: Carswell Legal Publications, 1989).

[109] Patrick Monahan, *Constitutional Law*, 2nd ed. (Toronto: Irwin Law Inc., 2002).

[110] *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

[111] Ibid.

[112] *R. v. Badger*, [1996] 1 S.C.R. 771 ; *R. v. Marshall*, [1999] 3 S.C.R. 456. Some academics argue that allowing "justified" legislation to override treaty rights does not take into account the difference between Aboriginal and treaty rights. They argue that because treaty rights are negotiated agreements under which the Crown has benefited it is wrong to allow the Crown to unilaterally take away benefits given to First Nations. See Leonard I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights and the Sparrow Justificatory Test" (1997) 36 Alta. L. Rev. 149.

would meet this test include conservation, economic and regional fairness or the fact that non-Aboriginal people have for many years made their living from using the resource in question (such as fisheries).[113]

The second step in determining if a law is justified takes into account the special relationship that exists between the Crown and Aboriginal people. Because the honour of the Crown is at stake and because it must always be assumed that the Crown intends to fulfill its treaty promises[114] priority must be given Aboriginal claims[115] under a treaty. When allocating a resource the government must respect that Aboriginal rights have priority over other uses of a resource.[116]

In addition to showing that the priority of treaty rights has been respected, the government must also show that to accomplish their goals they have infringed the treaty right as little as possible. However, this does mean that the legislation will not be allowed simply because there may have been another way of achieving the goals of the legislation that would have affected treaty rights less. The Supreme Court has held that achieving the goal of the legislation must be done in a way that can be "reasonably" considered to have as little impact as possible on the rights of Aboriginal people under the Constitution.[117]

In determining if legislation that conflicts with Aboriginal or treaty rights under the Constitution is justified, the courts will also consider whether compensation has been paid and if so the amount of the compensation. The amount required will depend on the right in question, how it was affected and the degree to which the Aboriginal interests were accommodated.[118]

The Supreme Court of Canada has held that there must be consultation with a First Nation before any action is taken that interferes with their existing treaty rights. The Supreme Court stated that this duty to consult flows from the honour of the Crown and the constitutional protection of existing treaty rights. Whether consultation has taken place and what accommodations have been made will be considered when determining if legislation that conflicts with treaty rights is justified,[119] but the duty to consult is not limited to cases where a treaty right has been infringed by legislation.

The Supreme Court found that Treaty 8 by its terms allowed land to be "taken up for settlement". For this reason the court concluded that the government's actions in using land for a road did not need to be "justified", using the guidelines outlined by the courts

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[113] Patrick Monahan, *Constitutional Law*, 2nd ed. (Toronto: Irwin Law Inc., 2002).

[114] *R. v. Badger*, [1996] 1 S.C.R. 771.

[115] Patrick Monahan, *Constitutional Law*, 2nd ed. (Toronto: Irwin Law Inc., 2002).

[116] Ibid.

[117] Jack Woodward, *Native Law* (Calgary: Carswell Legal Publications, 1989).

[118] Ibid.

[119] Ibid.

in previous cases. Although the Court did not find that a treaty right was infringed by taking up land for development of a road, the Court found that the treaty itself imposed obligations concerning how the treaty would be implemented. The Court found that implementation of the treaty required a process for taking up lands and that the process required consultation.

The kind of consultation process required will depend on the situation. One consideration is whether the treaty promise is clear and specific. In cases where the treaty itself imposes specific obligations the Court suggested that the Crown and the First Nations should simply “get on with performance”. The Court also stated that how serious the impact of the action is will influence the degree of consultation required. The Court found that the treaty itself created a framework to manage continuing changes to land use that anticipated reconciliation of conflicting claims of First Nations and non-First Nations. [120]

The treaties then are recognized by Canadian law as lasting agreements enforceable for generations. Both the Crown and the First Nations have obligations and rights under the treaties. The courts have recognized that the government can override treaty rights with legislation. However, since treaty rights are now recognized in the Constitution this kind of legislation must be justified. The courts have also recognized that the treaties themselves require consultation with First Nations when treaty rights are being dealt with, even if the treaty rights are not being taken away from.

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[120] *Mikisew Cree First Nation v. Canada*, 2005 SCC 69.

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Government Actions

The First Nations fulfilled their promises to the Crown when they allowed peaceful settlement of this land. Today many Canadians benefit from this treaty promise. On the other hand, in the time since the numbered treaties were made, First Nations have experienced difficulties in having what they understood to have been agreed upon implemented. These difficulties arose for a number of reasons and implementation of the treaty promises made by the Crown to the First Nations is still a complex problem.[121]

Some of these difficulties can be traced to the fact that the Government of Canada did not pass any laws specifically to give effect to the treaty promises.[122] As a result, treaty rights often come to the courts because of a prosecution in which the treaty right is raised as a defence. Even when a treaty right is recognized as providing a defence to a charge, there is no positive way to assert this right, other than as a defence to a criminal charge.[123]

As well, throughout the first half of the 20th century the government actively tried to replace First Nations' way of life and traditions with western ways.[124] Even after these policies were abandoned, issues such as how to interpret the treaty promises and how to fulfill those promises continued to make implementing the treaties a difficult and complex matter.

Government actions such as the *Indian Act* and an amendment to the Constitution which gave the Prairie Provinces control over their own natural resources have undermined the treaty promises, while the division of law-making powers and responsibilities between the provinces and the federal government has complicated giving effect to those promises.

Indian Act

While treaties were still being entered into with First Nations, the Government of Canada passed legislation called the *Indian Act*. This law was not designed to implement the treaty promises. On the contrary, its purpose was at odds with what was promised by the treaties. This is still true of the *Indian Act* today.

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[121] *Statement of Treaty Issues: Treaties As A Bridge to The Future* (Saskatoon: Office of the Treaty Commissioner, 1998) at 27.

[122] Ibid. at 28 referring to the Royal Commission on Aboriginal Peoples.

[123] *Report of the Royal Commission on Aboriginal People*, vol. 2 (Ottawa: Indian and Northern Affairs Canada, 1996).

[124] *Statement of Treaty Issues: Treaties As A Bridge to The Future* (Saskatoon: Office of the Treaty Commissioner, 1998).

Reserve Lands

Throughout Canada in the nineteenth century, lands were set apart for the benefit of the First Nations who had traditionally owned and occupied the land. These lands are called reserves.[126] Promises were made in many of the treaties, by the government, to set aside land as reserves.

Some of the very early legislation concerning First Nations dealt with reserves. These laws, like those that have followed, did not create these rights. This is an example of one of the ways that the *Indian Act*, and legislation that led up to the *Indian Act*, used treaty concepts. However, at the same time these concepts were dealt with in ways that were contrary to the spirit and intent of the treaties.

Legislation was passed in 1850 that dealt with the lands of First Nations. It became an offence for individuals to deal with First Nations for their lands and trespass on these lands was forbidden. First Nation lands were exempted from being taxed and could not be taken in payment for debts. The government also for the first time became involved in *who* was entitled to reside on those lands. For this reason the law had a section that defined "Indian".[127]

To understand the role of the *Indian Act* it is necessary to understand the meaning and effect of *policy* and of *legislation* or *laws*. Laws are passed by the elected members of the government and can be changed (amended) or repealed by the elected members of government. If a law is repealed it is no longer a law. While a law is in force everyone, including the government itself, must obey the law.

Laws are passed for many reasons. Generally governments will pass laws to give effect to a government *policy*. Policies are the general principles that a government uses when managing the affairs of a country.[125] For example, if a government had a policy of treating men and women equally, the government might pass a law requiring that both sexes be paid similarly for doing similar work. Sometimes governments will adopt a certain policy but not pass any laws to give effect to that policy. Policies that have not been made into laws can be changed at anytime without passing any new legislation.

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[125] *Black's Law Dictionary*, 7th ed., ed. by Bryan A. Garner (St. Paul, Minn.: West Group, 1999).

[126] Richard H. Bartlett, *The Indian Act of Canada* (Saskatoon: University of Saskatchewan Native Law Centre, 1988) at 24.

[127] *Report of the Royal Commission on Aboriginal People*, vol. 1 (Ottawa: Indian and Northern Affairs Canada, 1996).

The first *Indian Act* was passed in 1876. This Act, like the current *Indian Act*, made no significant mention of the treaties. Like laws that came before and after, it continued some measures that dealt with First Nation lands. These measures included allowing only "Indians" to live on reserves. Strict penalties were imposed for trespassers on reserves.[128] Other measures included exemptions from federal or provincial taxation on property on a reserve and not allowing property on a reserve or reserve land to be seized for debt.[129] Conditions for surrendering reserve land were also included.[130]

The *Indian Act* created a system for dealing with all lands set aside for First Nations, because of treaty obligations or for other reasons. The Act did not distinguish between lands set aside under a treaty and those set aside for other reasons. The Act applied the name *reserve* to all land set apart for the use and benefit of a First Nation (called a band in the Act).

The Act gave control over First Nation lands and resources to the government and its officials and continued the policy of the government deciding who was a member of a First Nation and therefore allowed to live on a reserve by defining "Indian". Over the years, government officials were given the power to lease reserve lands, allow non-Indians to reside on reserve lands, and give members of a First Nation the right to a particular piece of reserve land. Reserve lands could be expropriated without consent and even moved. Today the *Indian Act* still gives much control over reserve lands to the government.[131] The *Indian Act* also prohibits private individuals from purchasing lands from First Nations and requires consent of the First Nations to the surrender of reserve land.[132]

Assimilation

The British and later Canadian governments recognized the unique position of First Nations and entered into treaties with First Nations to establish a way of peacefully living together. However, even before the last treaty was signed the government actively pursued a policy, through the *Indian Act* and the legislation that led up to the *Indian Act*, to end the special relationship between First Nations and the government and to end any distinctions between First Nations and others living in Canada.

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[128] *The Historical Development of the Indian Act*, 2nd ed., ed. by John Leslie & Ron Maguire (Ottawa: Department of Indian and Northern Affairs Canada, 1979) at 63.

[129] *Report of the Royal Commission on Aboriginal People*, vol. 1 (Ottawa: Indian and Northern Affairs Canada, 1996).

[130] *The Historical Development of the Indian Act*, 2nd ed., ed. by John Leslie & Ron Maguire (Ottawa: Department of Indian and Northern Affairs Canada, 1979) at 64.

[131] *Report of the Royal Commission on Aboriginal People*, vol. 1 (Ottawa: Indian and Northern Affairs Canada, 1996).

[132] Ibid.

This policy is often called the assimilation policy. Assimilate means to absorb people into a larger group, especially by causing a minority culture to acquire the characteristics of the majority culture.[133] Recognizing treaty rights and giving effect to those rights is clearly not compatible with this kind of policy.

In 1830 the British government department in charge of what was called "Indian Affairs" changed from being a branch of the military to being a branch of the public service. Prior to that time the relationship between First Nations and government revolved around the role of the First Nations as military allies. By 1876 the policy of the now Canadian Government to "civilize the Indians" by having them adopt European culture was clear.[134]

This policy continued in many forms over the years. The language referring to aiding "…the red man in lifting himself out of his condition…" was no longer used but as late as 1969 the government maintained an explicit policy of assimilation and ending any unique rights for First Nations.[135] The *Indian Act* provisions dealing with enfranchisement, replacing traditional government and the exercise of traditional culture and treaty rights are all examples of this policy.

Even after the assimilation policy was rejected by the government, the legacy of years of legislation and policy designed to erase the unique culture and rights of First Nations continues.

Enfranchisement

Enfranchisement is the clearest expression of the assimilation policy. The word "enfranchise" means to give the rights of citizenship, especially the right to vote.[136] However, in the case of First Nations it means to give up any rights as a member of a First Nation. This would include treaty rights to such things as reserve land and annuities. Enfranchisement has always been a central theme of government policy, although it has not been used recently.[137]

One of the first expressions of this policy was the *Gradual Civilization Act* passed in 1857. This legislation was designed to remove all legal distinctions between Indians and non-Indians. This was to be achieved through enfranchisement.

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[133] *The Canadian Oxford Dictionary*, ed. by Katherine Barber (Don Mills: Oxford University Press Canada, 1998).

[134] Richard H. Bartlett, *The Indian Act of Canada* (Saskatoon: University of Saskatchewan Native Law Centre, 1988).

[135] Ibid.

[136] *The Canadian Oxford Dictionary*, ed. by Katherine Barber (Don Mills: Oxford University Press Canada, 1998).

This was seen as a privilege and the government offered benefits to those who chose to do this. These benefits included being allotted 50 acres of reserve land.[138] Allotting land to individuals would take away from lands reserved under the treaties.

Under the *Gradual Civilization Act* all enfranchisement was voluntary. Later legislation would be passed that made enfranchisement involuntary in some circumstances. First Nations protested against the later legislation and only one member of a First Nation was enfranchised under it.[139]

The first *Indian Act* passed in 1876 automatically enfranchised any Indian who earned a university degree or became a doctor, lawyer or clergyman. This section was removed four years later.[140]

The first *Indian Act* also provided that individual "Indians" could choose enfranchisement. A government official had to give approval and then the individual would, after a period of time, receive both his share of reserve land and his share of the funds of the First Nation. The consent of the First Nation was required initially but an amendment in 1884 gave a government official the discretion to approve enfranchisement.[141]

Compulsory enfranchisement was reintroduced in 1920. An order could be made to enfranchise any Indian over 21 on the recommendation of a board appointed for this purpose. This section was removed two years later. It was then reintroduced in a slightly changed form in 1933 and remained in effect until 1951.[142]

From 1951 until 1985, a woman who married a person who was not an "Indian" as defined by the Act was automatically enfranchised. Before these changes the number of people enfranchised had been relatively low. This change led to a large increase in the number of people who were enfranchised.

Although changes were made in 1985 to end this practice and reinstate women who had been enfranchised, involuntary enfranchisement stemming from this section still exists today. This is because the children of women who regained status by the 1985 changes are in a different category in the *Indian Act* than those who were not reinstated by the 1985 changes. If these children marry a person who is not a status Indian their children will not have status. [143]

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[137] Richard H. Bartlett, *The Indian Act of Canada* (Saskatoon: University of Saskatchewan Native Law Centre, 1988).

[138] *The Historical Development of the Indian Act*, 2nd ed., ed. by John Leslie & Ron Maguire (Ottawa: Department of Indian and Northern Affairs Canada, 1979) at 28-29.

[139] *Report of the Royal Commission on Aboriginal People*, vol. 1 (Ottawa: Indian and Northern Affairs Canada, 1996).

[140] Ibid.

[141] *The Historical Development of the Indian Act*, 2nd ed., ed. by John Leslie & Ron Maguire (Ottawa: Department of Indian and Northern Affairs Canada, 1979) at 69 & 83.

[142] *Report of the Royal Commission on Aboriginal People*, vol. 1 (Ottawa: Indian and Northern Affairs Canada, 1996).

[143] Ibid.

Like other assimilation policies, the effects of enfranchisement are still felt today. Enfranchisement permanently reduced the size of First Nation reserves in many cases, since a portion of the reserve would sometimes be given to the enfranchised person. It also excluded certain members and their descendants from being legally recognized as "Indians".

Replacing Traditional Government

Although enfranchisement was the most direct expression of the assimilation policy, there were other ways of achieving the same result. The government tried to achieve the same end by attempting to replace First Nations traditional forms of government with ones that reflected a non-First Nations way of life. Before the first *Indian Act* was passed, and partly in response to the fact that First Nations had generally rejected voluntary enfranchisement, the government passed legislation to impose non-traditional ways of government on First Nations.[144]

The *Gradual Enfranchisement Act* gave a government official the power to force First Nations to have elections and also gave the government official the power to remove an elected chief.[145] The elected government had very limited powers and no way of enforcing their authority. Elections were held on individual reserves. The First Nations people living on a particular reserve were called "bands" in the legislation. This was not only an alien way of governing, it also did not recognize any broader alliances that went beyond individual reserves.[146]

Bands are defined by the *Indian Act* as a "body of Indians" for which the government has set aside lands or money. The *Indian Act* also allows a band to be created by the government for the purposes of the *Indian Act*. Although band is sometimes understood to mean the same thing as First Nation the two concepts are quite distinct. A band is created by legislation and may or may not represent a group that is also a First Nation. This could happen because the First Nation may not all reside on the same reserve. As well the *Indian Act* for many years determined who was a member of a band so there may be people who are part of the First Nation who are not included and people who are not part of the First Nation who are included.

Even while legislation was being passed to impose a non-traditional form of government on First Nations, the government continued to negotiate with the traditional governments of First Nations for treaty purposes.[147]

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[144] Ibid.

[145] Richard H. Bartlett, *The Indian Act of Canada* (Saskatoon: University of Saskatchewan Native Law Centre, 1988) at 17.

[146] *Report of the Royal Commission on Aboriginal People*, vol. 1 (Ottawa: Indian and Northern Affairs Canada, 1996).

[147] Richard H. Bartlett, *The Indian Act of Canada* (Saskatoon: University of Saskatchewan Native Law Centre, 1988) at 19.

When the first *Indian Act* was passed in 1876 the elected band council system was continued. The elected band council system did not apply to First Nations living in western parts of Canada. The official reason was that these groups were not "advanced" enough to govern themselves this way. However, these First Nations were still in the process of signing treaties and it may have also been thought to be safer not to impose these kinds of measures on First Nations that still had military strength.[148]

A few years later the imposition of elected band councils was taken a step further by providing that if an elected system was imposed, traditional leaders could no longer exercise any power. As was the case with enfranchisement, only a few First Nations voluntarily adopted the elected band council system at the time. These provisions remained part of the *Indian Act* until 1951. [149]

Band councils are still limited today by requirements that the government confirm by-laws in some cases and the power of the government to disallow by-laws in other cases. As well, any band by-law that covers the same area that a government regulation covers is of no effect.[150] The authority to govern through the *Indian Act* is based on government "giving" these powers to entities called "bands" that were created by legislation, not on the recognition of any right of First Nations to govern themselves.

Restrictions on Traditional Culture

The *Indian Act* in its earlier forms worked towards the assimilation of the First Nations in many ways. These included erasing any legal distinctions between First Nations and others through enfranchisement and replacing traditional government with band councils with limited powers that came from the Act itself. Another way that the *Indian Act* promoted assimilation was by banning some traditional First Nations cultural practices.

In 1884 amendments to the *Indian Act* forbade the potlatch and the Tamanawas dance. The potlatch is a complex ceremony of the west coast First Nations. It involves giving away possessions, feasting and dancing. The potlatch is used to mark important events and for other social and political purposes. The Tamanawas dance ceremony involves supernatural forces and initiation rituals.[151]

Later amendments in the late 1800's and the early 1900's banned traditional dances and customs, the wearing of traditional clothing and participating in fairs and stampedes. Although these prohibitions were removed many years ago their legacy continues today. They resulted in a decline in the use of traditions and interrupted the passing down of these traditions through the generations.[152]

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[148] *Report of the Royal Commission on Aboriginal People*, vol. 1 (Ottawa: Indian and Northern Affairs Canada, 1996).
[149] Ibid.
[150] Ibid.
[151] Ibid.
[152] Ibid.

Exercise of Treaty Rights

The assimilation policy in all its many forms was contrary to the basis for the treaties. The treaties are based, among other things, on the unique legal rights of the First Nations of what is now Canada. In contrast, assimilation is based on erasing any legal or other distinctions between the First Nations and those who came after. Assimilation, however, was not the only way that the *Indian Act* has affected treaty rights over the years since it was first passed.

From 1927 to 1951 a licence had to be obtained from a government official before any funds could be solicited to support a legal claim by a First Nation. This made it hard for First Nations to acquire legal assistance.[153] Not having legal help made it difficult for a First Nation to pursue a court case to enforce a treaty right.

Another example concerns the sale of agricultural products. Although the treaties promised equipment and supplies for agricultural use, the *Indian Act* contained provisions that made it difficult in practice for First Nations to sustain themselves through agriculture. In 1881 a change was made to the *Indian Act* requiring any Indian to have a permit to be able to sell any agricultural produce. This section was expanded over the years and in 1941 it was extended to all Indians in Canada and to the sale of furs and wild animals. The present version of the *Indian Act* still contains the prohibition on sale of agricultural produce although it is not enforced. For a number of years there was also a policy that required Indians to have a "pass" to leave a reserve.[154]

Natural Resources Transfer Agreements

In 1930 a constitutional amendment dealing with natural resources also undermined an important treaty promise and did this in a way that was contrary to the spirit, intent and purpose of the treaties.

When Saskatchewan became a province in 1905, Crown lands remained under federal control and treaty rights to hunt were unaffected.[155] Manitoba and Alberta were in the same position. *Natural Resources Transfer Agreements* (NRTA) were later made between each of these provinces and the federal government to put these provinces "…on an equal footing with other Canadian provinces by giving them jurisdiction and ownership of their natural resources."[156]

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[153] Ibid.

[154] Ibid.

[155] *R. v. Frank*, [1978] 1 S.C.R. 95.

[156] *R. v. Blais*, [2003] 2 S.C.R. 236.

These agreements were made part of the Canadian Constitution by the *British North America Act*, *1930*.[157] This means that the terms of these agreements are the law of Canada and cannot be changed by either the provinces or the federal government.[158]

The NRTA recognized that this transfer could affect the treaty right to hunt. The NRTA provided that provincial laws respecting game in force in the province would apply to Indians. The NRTA also provided that Indians would have the right "of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

The Supreme Court, when considering the effect of the NRTA on a treaty right, emphasized that "…it must be remembered that a treaty is an exchange of solemn promises….whose nature is sacred." The Supreme Court also noted that honour of the Crown "…is always at stake in its dealing with Indian people" and that "it is always assumed that the Crown intends to fulfill its promises."[159]

The Supreme Court has held that the NRTA both limited and expanded the treaty right to hunt. The right to hunt was limited to hunting for food and the area in which hunting was allowed was expanded to a whole province.[160] Under the treaty the right to hunt was not limited to hunting for food and the area in which hunting could take place was limited to the land covered by the treaty.

The NRTA can been seen as a recognition of treaty hunting, fishing and trapping rights and as giving these rights constitutional protection. However, because the hunting right is limited to food it could also be seen as taking away from these treaty rights.

The NRTA allows for the exercise of treaty hunting, fishing and trapping rights throughout the province "on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access." The Supreme Court has said that this means hunting cannot take place when the land is put to a visible use that is incompatible with hunting.[161]

The Supreme Court has also considered the part of the NRTA that applies provincial laws respecting game to the treaty rights of hunting, fishing and trapping. The Court has stated that the NRTA authorized the provinces to make laws for conservation.[162] The Supreme Court has found that when a province uses its authority under the NRTA to regulate the exercise of a treaty right the law must be "justified".

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[157] *R. v. Frank*, [1978] 1 S.C.R. 95.

[158] Ibid.

[159] Ibid.

[160] Ibid.; *R. v. Horseman*, [1990] 1 S.C.R. 901.

[161] *R. v. Badger*, [1996] 1 S.C.R. 771.

[162] Ibid.

Another treaty right that was dealt with in the NRTA was the right to have lands set aside for reserves. Although treaties were made between the Crown and First Nations, the First Nations people live in the provinces of Canada. For this reason it was necessary for the provinces and the federal government to co-operate in fulfilling treaty promises, especially promises regarding setting aside lands for reserves.

After encountering some difficulties in agreeing on what lands in Ontario would be set aside for reserves, the federal government included provisions in the *Natural Resources Transfer Agreements* with the Prairie Provinces to deal with land needed to fulfill treaty promises of reserves.

The agreements did not transfer to the provinces any land selected and surveyed for reserves. The agreements also required the provinces to transfer back to the federal government, free of charge, lands that were needed to fulfill Canada's obligations under the treaties. The provinces were given the right to agree with the selection of land for a reserve before it would be transferred to the federal government.[163]

The governments that negotiated these agreements did not consult with the First Nations. Given what the Supreme Court has said about the need for consultation, a constitutional amendment like this could likely not be made today without the participation of First Nations.

First Nations Treaty Rights and the Federal System

Another factor that complicates implementing the treaties is that although the Government of Canada has the authority to pass laws concerning treaties and the responsibility to fulfill the treaties, many treaty issues involve things that are provincial responsibilities, like ownership of land and natural resources. It can, however, be argued that the provinces share the responsibility of the Crown to uphold the treaty promises. One of the reasons for this is that they too have benefited from the treaties. [164]

The first treaties were entered into by representatives of the British Crown. Later it was representatives of the federal government. While the federal government may have promised to set aside lands for First Nations, provinces have control over the land within their boundaries. While the federal government may have promised the right to hunt and fish, provinces have the authority to pass laws about hunting licences, open season and "bag" limits.

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[163] D. N. Sprague, "Canada's Treaties With Aboriginal Peoples" (1996) 23 Man. L. J. 341.

[164] *Report of the Royal Commission on Aboriginal People*, vol. 2 (Ottawa: Indian and Northern Affairs Canada, 1996).

Who can pass laws that affect First Nations and who is responsible for dealing with First Nation issues is a complex question. It is determined by which level of government is given the law-making power under the Constitution, by the *Indian Act* and in part by which level of government has taken responsibility for dealing with that aspect of the lives of First Nation people.

Law-making Powers

Among other things, the constitution of a country sets out the powers of different levels and branches of the government.[165] By its Constitution, Canada is a federal state. This means that the power to make laws is distributed between the central government (Parliament of Canada) and the regional governments (provinces and territories).[166] In a federal state the powers that are given to the central and regional governments cannot be changed by these governments.[167] In Canada the courts have the authority to decide if a certain level of government has the power to pass a law, in the event of a disagreement.

Parliament can make laws for all Canada about matters assigned to it by the Constitution.[168] Provinces can make laws for their province or territory about matters assigned to them by the Constitution.[169]

The federal Parliament has the power to make laws about issues that concern Canada as a whole such as trade between provinces, national defence and criminal law. The provinces have the authority to make laws for their provinces concerning things like education, property, civil rights, and the administration of justice.[170]

To understand how powers are divided between the two levels of government in Canada it is necessary to understand how the list of powers given to the provinces relates to the list of powers given to the federal government. Because some of the powers given to the provinces are very general, any federal power that would also cover the same type of laws is subtracted from the provinces' powers.[171]

For example, if the provinces were given authority to make laws about cattle and the federal government was given the power to make laws about calves, the provinces' authority would actually be over all cattle except calves. Of course the Constitution does not actually give law-making powers over any kinds of animals in particular, but the same rules apply. It is, however, a little harder to decide who has what powers, since the powers given in the Constitution cover topics that are not nearly so concrete.

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[165] *Canada's System of Justice* by Department of Justice Canada (Ottawa: Department of Justice Canada 2005).

[166] Patrick Monahan, *Constitutional Law*, 2nd ed. (Toronto: Irwin Law Inc., 2002).

[167] Ibid.

[168] *Canada's System of Justice* by Department of Justice Canada (Ottawa: Department of Justice Canada 2005).

[169] Ibid.

[170] Ibid.

[171] Kerry Wilkens, "Of Provinces and Section 35 Rights" (1999) 22 Dalhousie L.J. 185.

The federal Parliament has the power to pass laws regarding "Indians and lands reserved for the Indians". Almost everything that comes within the heading "Indians and lands reserved for the Indians" could also come within a provincial head of power like "property and civil rights".[172]

The Government of Canada, then, has the exclusive powers to make laws about certain things that would otherwise be within the powers of the provinces. This means that the provinces cannot make any laws about those things, even if the federal government does not choose to exercise its powers. What kinds of laws the federal government has the sole ability to pass because of its power over "Indians and lands reserved for the Indians" is not easy to pinpoint.

It is however clear that the federal government's exclusive power to make laws concerning "lands reserved for the Indians" includes many if not all powers to make laws about that land. This means that only the federal government can pass laws concerning who can have an interest in reserve lands, how reserve land can be used, and how interests in reserve land can change hands.[174]

On the other hand, the federal government's exclusive power to make laws concerning "Indians" has been interpreted to mean that only the federal government can pass laws related to what the courts have called "Indianness". The courts have not fully defined what type of law will be considered to affect "Indianness". Generally any law that concerns a treaty right is a law that deals with "Indianness" and is not within the constitutional powers of a province.[175] The provinces also cannot pass laws that take away from the rights Aboriginal people have as Aboriginal people.[176]

Under the Constitution "lands reserved for the Indians" are any lands set aside for "Indians". This includes lands that have been set aside because of treaty promises and lands that "Indians" have a right to by common law, because they occupied the land when settlers came to this country.

The Constitution uses the word "Indian" to describe the original inhabitants of Canada and their descendants. This was in keeping with the terminology used at the time. In the Constitution the word "Indian" has a broader meaning than it has in general use or other laws. In general use it often means original inhabitants who are not Inuit or Métis or it can be used to refer to those who are "Indian" under the federal *Indian Act*. In the Constitution it includes Inuit and also includes people who could not meet the definition of Indian in the *Indian Act* but who are descendants of the original inhabitants.[173]

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[172] Ibid.

[173] Ibid.

[174] Ibid.

[175] Patrick Monahan, *Constitutional Law*, 2nd ed. (Toronto: Irwin Law Inc., 2002); Kerry Wilkens, "Of Provinces and Section 35 Rights" (1999) 22 Dalhousie L.J. 185.

[176] Patrick Monahan, *Constitutional Law*, 2nd ed. (Toronto: Irwin Law Inc., 2002); Kerry Wilkens, "Of Provinces and Section 35 Rights" (1999) 22 Dalhousie L.J. 185.

There are however some situations in which a province can pass laws concerning matters that would normally be considered within the federal government's exclusive area. A treaty may be interpreted as having given the province some rights to pass laws that affect treaty rights. The Supreme Court of Canada has said that Treaty 8, by its wording, gives the provinces the authority to pass laws regulating hunting and fishing by First Nations under the treaty. As well provinces are parties to some modern treaties and for that reason would need the authority to pass laws to implement the promises.[177]

The federal government's law-making power concerning "Indians and land reserved for the Indians" is not limited to those matters over which the government has exclusive authority to make laws. Some laws that relate to "Indians" or their lands can be passed by the provinces and by the federal government. For example, both the federal government and the provincial government have the authority to pass laws to regulate traffic on a reserve.[178]

Federal law-making powers over "Indians and lands reserved for the Indians" then includes both the exclusive power to pass laws about certain core matters and the power to pass laws about certain matters over which provinces may also have law-making powers. Federal jurisdiction over "Indians" allows the federal government to pass laws concerning First Nations taxation, education and Wills.[179] However, if the federal government has not passed laws concerning these areas provincial laws will apply.[180]

Provincial laws that affect First Nations, their lands or their rights are generally authorized by the Constitution if the main purpose of the law is to deal with something under provincial jurisdiction. [181] A valid provincial law may have a significant impact on First Nation rights as long as the purpose of the law is not regulating or dealing with those rights.[182]

Sometimes this is determined by seeing if the law applies to everyone in the province. However, this does not mean that the provinces cannot pass laws that refer to Aboriginal people or even laws that apply specifically to Aboriginal people. A province could pass a law that took into account the special needs and circumstances of Aboriginal people when developing a provincial program.[183]

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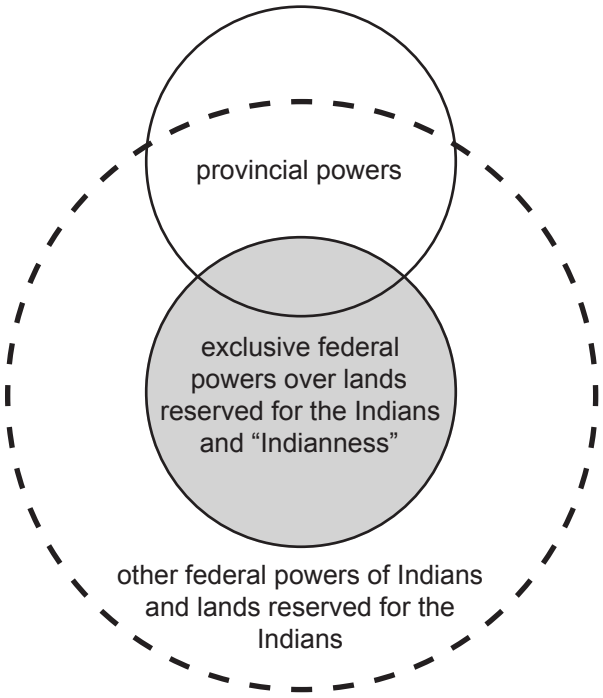
[177] Kerry Wilkens, "Of Provinces and Section 35 Rights" (1999) 22 Dalhousie L.J. 185.
[178] Ibid.; Patrick Monahan, *Constitutional Law*, 2nd ed. (Toronto: Irwin Law Inc., 2002).
[179] Jack Woodward, *Native Law* (Calgary: Carswell Legal Publications, 1989).
[180] Ibid.
[181] Patrick Monahan, *Constitutional Law*, 2nd ed. (Toronto: Irwin Law Inc., 2002).
[182] Kerry Wilkens, "Of Provinces and Section 35 Rights" (1999) 22 Dalhousie L.J. 185.
[183] Patrick Monahan, *Constitutional Law*, 2nd ed. (Toronto: Irwin Law Inc., 2002).



Provincial Laws and the Indian Act

Although the federal government could pass laws to deal with many aspects of the lives of First Nations, the federal government has chosen to adopt provincial laws in many situations. The federal government cannot actually change the Constitution to give the provinces more powers but the federal government can treat provincial laws as if they were federal government laws.

Since 1951 the federal Parliament has chosen, through the *Indian Act*, to apply some provincial laws to Indians. The Supreme Court has explained this section as giving effect to some provincial laws that are within the powers of the provinces but that would not otherwise apply to "Indians or lands reserved for the Indians" because of the division of powers.[184]

However, when the federal government decided to expand the application of provincial laws to First Nations, the government made sure that provincial laws would not affect

[184] Kerry Wilkens, ""Still Crazy After All These Years": Section 88 of the Indian Act at Fifty" (2000) 38 Alta L. Rev. 458.

treaty rights. Ordinarily provinces have no power to pass laws that affect treaty rights and no additional authority is given to these kinds of laws by this section of the *Indian Act*.[185]

While this section of the Act is in place, provincial laws that are not intended to single out Aboriginal people will apply even if the law affects the rights of Aboriginal people.[186] A provincial law will only be given force by this section if it is a "law of general application". This means the law must apply in the same way throughout the province.[187] It also means that it must not be in relation to one class of citizens.[188] This section also likely does not give effect to provincial legislation concerning First Nations lands, although the Supreme Court has not ruled conclusively on this point.[189]

Responsibilities of Federal and Provincial Governments

The division of powers alone does not determine which level of government has responsibility, since in many cases both levels could pass laws covering an aspect of First Nations lives.

The federal government has passed legislation to deal with housing, health care and education for First Nations. In some cases, such as education, federal services in these areas are limited to people living on reserves.[190]

Provincial minimum wage laws, provincial legislation and regulations concerning child welfare and family maintenance are examples of provincial laws that apply to First Nations. On the other hand, provincial laws concerning dividing spouses' property, when they separate, do not allow courts to make an order that would affect who has the right to possess First Nation lands.[191]

In some situations whether provincial law will apply depends on whether there is federal legislation, such as the *Indian Act*, that covers the situation. For example provincial traffic laws apply on First Nation lands if they do not conflict with federal law.[192]

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[185] Ibid.

[186] Patrick Monahan, *Constitutional Law*, 2nd ed. (Toronto: Irwin Law Inc., 2002).

[187] Kerry Wilkens, ""Still Crazy After All These Years": Section 88 of the Indian Act at Fifty" (2000) 38 Alta L. Rev. 458.

[188] Ibid.

[189] Ibid.

[190] Jack Woodward, *Native Law* (Calgary: Carswell Legal Publications, 1989).

[191] Robert Alan Reiter, *The law of Canadian Indian Treaties* (Edmonton: Juris Analytica Pub., 1995) at 49-65.

[192] Ibid. at 61.

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Treaty Promises

Treaties create lasting rights that are enforceable by Canadian law. Government policies and legislation as well as the division of powers have complicated implementing the treaty promises. Another question that complicates giving effect to the treaty promises is deciding 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 obligations.[193]

Interpreting the Treaties

guiding principles

Under Canadian law, the Supreme Court has developed some principles to be considered when deciding what rights are included in a treaty. First, it must be remembered that a treaty is an agreement whose nature "is sacred". Second, the fact that the honour of the Crown is at stake and that "it is always assumed that the Crown intends to fulfill its promises" must be considered. Finally, any part of a treaty that is not clear must be read in favour of the First Nation.[194] This means that a treaty will be found to give a right, even if the wording could be interpreted in a way that would not give a right. It also means that a limit will not be placed on a treaty right unless the treaty clearly intended for such a limit.

The Supreme Court of Canada has also ruled that oral promises and the historical circumstances surrounding the signing of a treaty can be considered when deciding on the terms of a treaty. The Court noted that the treaties recorded agreements that had been made orally, and that the written agreements did not always contain the whole oral agreement. The Court also considered that the treaties were written in English only and that First Nations had a history of communicating only orally. The Court found that the words of a treaty must be interpreted "…in the sense that they would naturally have been understood by the Indians at the time of the signing" and that "…verbal promises made on behalf of the federal government at the times the treaties were concluded are of great significance in their interpretation."[195]

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[193] Office of the Saskatchewan Treaty Commissioner, *Statement of the Treaty Issues: Treaties as a Bridge to the Future* (Saskatoon, 1998) at 40.

[194] *R. v. Badger*, [1996] 1 S.C.R. 771.

[195] Ibid.

changing needs

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.

For example, 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 weapons used when the treaty was signed could be used. The Court noted the principle that treaties should be liberally construed and found that limiting it to weapons used in the 1700's 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."[196]

In another case 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' 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."[197]

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 1700's.[198] Because the treaties were above all a means of establishing an enduring peaceful relationship between the parties, they must be flexible enough to deal with new matters.[199]

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

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

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

[199] *Report of the Royal Commission on Aboriginal People*, vol. 2 (Ottawa: Indian and Northern Affairs Canada, 1996).

The principles of treaty interpretation developed by the Supreme Court show what must be considered when deciding what was promised by a treaty. What rights are given by a particular treaty then must be considered in light of the fact that treaties are sacred agreements involving the honour of the Crown. Any part of the treaty that is unclear must be interpreted in favour of the First Nation. Oral promises, the historical circumstances surrounding the signing of the treaty and how the First Nation would have understood the treaties at the time must also be considered. Treaty promises must also be interpreted in a way that allows them to evolve over time to meet changing circumstances.

Saskatchewan Treaties

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. These treaties are among the numbered treaties (1-11) entered into between 1871 and 1923.[200] The government's objective in entering into these treaties was to allow settlement of the west.[201] The circumstances surrounding the signing of the treaties, the negotiations that took place and promises that were made are unique to each treaty.[202] There are however some similarities between the written text of the treaties.

Overview

Alexander Morris, a government official who negotiated a number of the treaties, described all the treaties with the First Nations as having common features. From his perspective, the treaties involved the First Nations giving land rights to the government over the areas covered by treaties, except for those areas set aside as reserves. The reserves were created by giving a certain amount of land for each member of the First Nation. This land could not be sold without the consent of the First Nation and if it was sold it had to be for the benefit of the First Nation. The First Nations were given hunting and fishing rights in lands not taken up for settlements, in the area covered by the treaties. The First Nations were also promised payments every year for every member, an annual salary for the Chief and councillors, as well as suits of official clothing, agricultural implements and schools.[203]

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

[201] *R. v. Badger*, [1996] 1 S.C.R. 771.

[202] Arthur J. Ray, J. R. Miller &Frank Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal: McGill-Queen's University Press, 2000).

[203] Ibid. at 105.

The following section will look at some of the promises, what the parties understood they agreed to, and the impact those promises have on the lives of First Nations and non-First Nations people in Saskatchewan.

Governance

The fact that treaties were even made is evidence that First Nations governed themselves and were entitled to continue to govern themselves. The treaty-making process also confirms that this is how the Crown saw the First Nations.[204] There is other evidence that the First Nations were seen by the Crown as having the authority to govern themselves. Symbols of government, like medals and uniforms, were given to many First Nations under the treaties.[205] The First Nations also agreed to maintain peaceful relations with settlers. For this they would need the power to govern.[206] The idea of giving up the right to rule themselves would have been an "alien notion" to the First Nations who entered into the treaties.[207] Today First Nations regard themselves as self-governing.

Decisions by the courts that acknowledged the federal government's ability to change or even take away treaty rights (before the rights were protected in the Constitution) could indicate that the courts saw the treaties as a means of establishing the right of the Government of Canada to rule the First Nations.[208]

Although the courts have not directly decided how the treaties relate to governance, the federal government has accepted the concept that all Aboriginal peoples have the right to self-government.[209] Federal government policy recognizes self-government as an inherent right of Aboriginal peoples protected by the Constitution. The government does not however view this right as coming directly from the treaties. The government recognizes the right of First Nations to govern themselves in matters that are "...integral to their unique cultures, identities, traditions, languages and institutions; internal to their communities; or as they relate to their lands and their resources."[210]

Lands and Resources

From the federal government's point of view, one of the reasons the numbered treaties were made was to deal with First Nation rights to the land they occupied so the lands could be settled as part of Canada. The written text of all the treaties that cover Saskatchewan

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[204] Patrick Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995) 21 Queen's Law Journal 173.

[205] *Report of the Royal Commission on Aboriginal People*, vol. 2 (Ottawa: Indian and Northern Affairs Canada, 1996).

[206] Ibid.

[207] Gordon Christie, "Justifying Principles of Treaty Interpretation" (2000) 26 Queen's Law Journal 143.

[208] Ibid.

[209] Patrick Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995) 21; Ibid. at 173.

[210] *Statement of Treaty Issues: Treaties As A Bridge to The Future* (Saskatoon: Office of the Treaty Commissioner, 1998).

state that the First Nations "…do hereby cede, release, surrender and yield up…the lands included within the following limits…." The treaties then go on to describe the traditional lands of First Nations entering into the treaty in question.[211] The Supreme Court has said that the traditional lands of the First Nations were "exchanged" for the other promises in the treaties.[212]

On the other hand, the First Nations view was that they intended to share the land with newcomers, not surrender or give up their rights.[213] When considering a treaty a court must consider "…the context in which the treaties were negotiated, concluded and committed to writing."[214] 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. It could be said that the First Nations would not have understood that they were giving the land to the Crown because by their traditions no one could "own" the land or give it away in the sense that the Europeans understood ownership.

The fact that the honour of the Crown is at stake in the treaty relationship means that there is a special relationship between First Nations and the Crown. The Crown has a duty to look out for the interests of the First Nations and cannot take any unfair advantage of the First Nations. For this reason the Crown would have to show that the First Nations consented to giving their lands and that they understood what this meant.[215]

Treaty Land Entitlement

Providing for settlement on the traditional lands of the First Nations was not the only way lands were dealt with by the treaties. One of the agreements made between First Nations and the federal government, when the treaties were entered into in what is now Saskatchewan, was that some land would be set aside for the exclusive use of the First Nations. The land set aside in this way is called a reserve.

The purpose of this land was to allow First Nations to continue to support themselves in the face of diminishing food and fur resources. Agriculture was thought to be the way that First Nations would use this land but having land for their exclusive use was and is important to the First Nations in many other ways as well. The land is a place where First Nations can continue to govern themselves and it is also the source of revenue from agriculture, minerals, timber and other resources.[216]

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[211] *Consolidated Native Law Statutes, Regulations and Treaties*, ed. by Jack Woodward (Toronto: Thomson Canada Limited, 2005).

[212] *R. v. Sundown*, [1999] 1 S.C.R. 393 ; also see *R. v. Badger*, [1996] 1 S.C.R. 771.

[213] *Report of the Royal Commission on Aboriginal People*, vol. 2 (Ottawa: Indian and Northern Affairs Canada, 1996).

[214] *Beattie v. Canada (Minister of Indian Affairs and Northern Development)*, [1998] 2 C.N.L.R. 5.

[215] *Report of the Royal Commission on Aboriginal People*, vol. 2 (Ottawa: Indian and Northern Affairs Canada, 1996).

[216] Office of the Saskatchewan Treaty Commissioner, "Historical Basis for Treaty Land Entitlement", "Treaties Reconcile Two Systems" (Saskatoon, 1991).

To fulfill the promise of setting aside land for the First Nations it was necessary to know how many people belonged to the First Nation in question and calculate how much land should be included by multiplying the number of members by the number of acres each person was to get. Except for Treaties 2 and 5, the treaties covering Saskatchewan 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.

Surveyors did not immediately come to survey for reserves. Many Plains First Nations wanted to continue to hunt for as long as possible and the Northwest Conflict created turmoil. When the surveyors did come they had to find out how many people belonged to the First Nation for which a reserve was being surveyed. In some cases they talked with government representatives called Indian Agents. Present day research suggests that some Agents gave misleading information about population size. Sometimes they added a percentage to allow for growth. Some members of the group would likely have been away as it was common practice to travel to find food, for social interaction or for protection. The result was that some First Nations did not receive all the land they were entitled to by treaty.[217]

Although it was recognized that in order to fulfill treaty promises more land had to be set aside for First Nations, two issues had to be resolved. A way to calculate how much, if any, land was still owing under the treaties had to be developed. As well, how land was going to be found to fulfill these promises had to be determined.

Initially the federal government determined treaty land entitlement by multiplying the population of a First Nation by the number of acres promised in the treaties. As First Nations populations grew there was an interest in establishing a “cut-off” date for determining population numbers. In 1976 First Nations, federal and provincial governments agreed on December 31, 1976 as the cut-off date for determining First Nations population for the purpose of treaty land entitlement.

Even though a way of determining population had been agreed upon there were still problems finding land to fulfill the resulting entitlements. The province was obligated to transfer unoccupied Crown land to the federal government so that treaty promises could be fulfilled. However, there was not enough productive land that was both unoccupied Crown land and close to existing reserves.

Since the intent of the treaties was to allow First Nations to be self-sufficient, transferring unproductive land that was not close to the existing reserve would not have been a good solution. The province was also concerned about receiving compensation for land transferred for treaty entitlement, and third parties who leased or used Crown land were concerned about their rights. As a result, only three outstanding treaty land claims were resolved.

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[217] Ibid.

In 1987 the federal government, along with the provincial government, decided to use the date of the first survey to determine treaty land entitlement. This was a change from the 1976 agreement. First Nations argued that this was contrary to the spirit and the wording of the treaties that assured First Nations that more land would be set aside as their population grew.

In 1989 a Treaty Commissioner was appointed in Saskatchewan. At this time 27 First Nations had outstanding treaty land claims. The Commissioner proposed an equity formula for determining how much land was owed and a way to find land to fulfill the outstanding claims.

The Treaty Commissioner formula is based on first determining what percentage of the First Nations people were not counted when the first survey took place. This percentage is then applied to the current population. If 40% of the First Nation was not included in calculating the size of the original reserve the outstanding land entitlement would be calculated by taking 40% of the current population and multiplying it by the number of acres each member was entitled to by treaty. Both the First Nations and the federal government agreed to use this formula.

Once the number of acres owing was established, First Nations were given a certain amount of money for each acre owed, based on the average price of an acre of land. This money was put in a special trust fund and can only be used to purchase land. This allows First Nations to choose the land they want and to purchase the land from willing sellers for the market price.

This formula has the advantage of considering both the original shortfall and the current population. While it does not provide for additional land allotments for every First Nations person born in the future, it does help to provide a land base for agricultural and economic development. Compensation is provided to rural municipalities and school divisions for the loss of their tax base when a new reserve is created.

First Nations will receive approximately $516 million to buy land to add to their reserves. While this may seem like a lot of money, it must be remembered that it is through the treaties that the people of Saskatchewan have been able to legitimately use and develop all land in Saskatchewan. To put things into perspective, it is estimated that the value of the land opened up for settlement by the treaties exceeds $61 billion.[218]

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[218] The above description of land entitlement and the process for settling treaty land entitlement comes from the following articles produced by the Office of the Treaty Commissioner (Saskatchewan) in 1991 and updated in 1999: “Historical Basis for Treaty Land Entitlement”, “Treaties Reconcile Two Systems”, “Treaty Land Entitlement in Saskatchewan”, “Treaty Shortfall Addressed”, “Treaty Land Entitlement: Where Are We Now?”.

Hunting, Fishing and Trapping Rights

Treaties 4, 5, 6, 8 and 10, which cover most of Saskatchewan, all contain promises to the First Nations that they would be able to continue to pursue their way of life throughout their traditional lands. Treaties 4, 8 and 10 all refer to hunting, fishing and trapping, while treaties 5 and 8 refer to hunting and fishing.

The written text of these treaties all contain similar wording. They promise the Indians the right to pursue their avocations of hunting and fishing (and trapping in the case of treaties 4, 8 and 10) throughout the area dealt with by the treaty. They state that these rights are subject to regulations made by the Government of Canada. They exclude lands taken up for settlement, mining, lumbering or other purposes (Treaty 4 does not refer to lumbering).[219]

Treaty hunting, fishing and trapping rights have been considered by the courts on many occasions. This typically happens when an individual is charged with violating a hunting, fishing or trapping law and argues that the law should not apply because of a treaty right.

When considering Treaty 8 the Supreme Court found that "…for the Indians the guarantee that hunting, fishing and trapping rights would continue was the essential element which led to their signing the treaties."[220] On another occasion the Supreme Court, speaking about Treaty 6, found that "it is clear from the history of negotiations…that the government intended to preserve the traditional Indian way of life….hunting and fishing were of fundamental importance to that way of life."[221]

In regard to Treaty 8, the Supreme Court has noted that "the economy of the Indian population at the time of the Treaty had clearly evolved to such a degree that hunting and fishing for commercial purposes was an integral part of their way of life."[222] The Court, after also noting that allowing First Nations to be self-sufficient was one of the purposes of the Treaty, found that the original treaty right included hunting for commercial purposes.[223] A similar conclusion was reached by the Supreme Court regarding Treaty 6.[224]

From the perspective of the First Nations, the parties to the treaties did not agree to regulations including seasonal restrictions, licensing requirements, and restricted access to unoccupied land.[225] The Supreme Court also appears to view the power to regulate,

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[219] *Consolidated Native Law Statutes, Regulations and Treaties*, ed. by Jack Woodward (Toronto: Thomson Canada Limited, 2005).

[220] *R. v. Badger*, [1996] 1 S.C.R. 771.

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

[222] *R. v. Horseman*, [1990] 1 S.C.R. 901.

[223] Ibid.

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

[225] *Statement of Treaty Issues: Treaties As A Bridge to The Future* (Saskatoon: Office of the Treaty Commissioner, 1998).

given in the numbered treaties, as limited. The Supreme Court upheld a judgment of the Court of Appeal where it was concluded that the only regulations authorized by the treaties are those that "…would assure that a supply of game for their [First Nation] needs would be maintained."[226]

Nevertheless, the courts have found that these rights can be taken away or restricted by legislation. We have already seen that prior to Aboriginal and treaty rights being included in the Constitution federal legislation with a clear and plain intention could take away treaty rights. Since treaty rights were included in the Constitution any legislation that infringes upon these rights must be justified.

The Supreme Court has interpreted the wording of Treaty 8 as giving a right to hunt or fish on any land that is not visibly being used for something that is incompatible with hunting. This finding was based on oral promises made during the treaty negotiations and the oral history of the First Nation. In coming to this conclusion the Court considered evidence concerning other numbered treaties as well.[227] Since the wording of the other numbered treaties covering Saskatchewan is much the same, this interpretation could apply to all treaties in Saskatchewan.

Whether land is being visibly used for an incompatible purpose is decided on the facts of each case. In this case the Court found that land was being visibly used for an incompatible purpose because of a farm house nearby in one situation, and signs, run-down barns and evidence of a crop having been harvested in another situation. In a third situation the court found uncleared muskeg with no fences or signs, although privately owned land, was not being visibly used for an incompatible purpose.[228]

The Supreme Court has also considered the statement in the treaties that limits hunting, fishing and trapping rights to land not "taken up for settlement, mining, lumbering, trading or other purposes." When considering Treaty 8, the Supreme Court concluded that taking up land was allowed by the treaty. The Court found that the right to hunt was expressly limited to lands not taken up and concluded that the "language of the treaty could not be clearer in foreshadowing change."[229]

However the Court also found that the government "…is expected to manage the change honourably." The Court found that the treaty itself established a duty to consult and, if appropriate, accommodate First Nation interests before taking up land. The Court also found that if a time came when so much land was taken up that "no meaningful right to hunt" remained, this might be considered a breach of the treaty. In this case the action would have to be justified, since the Constitution protects treaty rights.[230]

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[226] *R. v. Sikyea*, [1964] S.C.R. 642; *Sikyea v. R.,* (1964), 43 D.L.R. (2d) 150 (N.W.T.C.A.).

[227] *R. v. Badger*, [1996] 1 S.C.R. 771.

[228] Ibid.

[229] *Mikisew Cree First Nation v. Canada*, 2005 SCC 69.

[230] Ibid.

On the prairies the *Natural Resources Transfer Agreements* have been found to modify treaty hunting, fishing and trapping rights. The courts have found that these agreements expanded the area in which these rights could be exercised but limited these rights to hunting, fishing and trapping for food.[231]

In provinces not covered by the *Natural Resources Transfer Agreements*, a treaty right of commercial hunting can exist. In 1999 the Supreme Court considered the "historical and cultural context" of a treaty including oral terms that the First Nation understood to be part of the treaty, how the parties understood the treaties and the reasons for the treaty relationship.[232] Based on this, the Court found that there was a treaty right to catch and sell fish in order to make a moderate livelihood. The Court also recognized that this right could be regulated by legislation, if the regulation was justified.[233]

This case resulted in a "media frenzy" in which the Supreme Court was said, by some, to have recognized a right to "unlimited year-round" fishing by the First Nation. The Court, in a second judgment in the same case, emphasized the federal power to regulate for a "pressing and substantial public purpose" such as conservation. However the Court also emphasized the Crown's obligations towards First Nations which requires negotiation and consultation with the First Nations about acceptable regulations. The Court also rejected the idea that treaty rights should only be recognized if they did not interfere with non-Aboriginal use of a resource.[234]

The purpose of the treaty promise of hunting, fishing and trapping rights was to allow First Nations to be self-sufficient and continue their way of life. This was a very important promise for the First Nations entering into the treaties. Without this it may not have been possible to come to an agreement with the First Nations. This promise is the reason that today members of First Nations have hunting, fishing and trapping rights that are different than those of the rest of the population.

Education

Treaty 4 states that the Crown "agrees to maintain a school in the reserve allotted to each band as they settle on said reserve and are prepared for a teacher." Treaty 5 and Treaty 6 contain the promise to maintain such schools on reserves as "may seem advisable" to the government, whenever the Indians "desire it". Treaty 8 includes a promise to "pay the salaries of such teachers to instruct the children of said Indians" as "may seem

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[231] *R. v. Horseman*, [1990] 1 S.C.R. 901;*R. v. Badger*, [1996] 1 S.C.R. 771.

[232] Catherine Bell & Karin Buss, "The Promise of Marshall on the Prairies: A Framework for Analyzing Unfulfilled Treaty Promises" (2000) 63 Sask. L. Rev. 667.

[233] Ibid.

[234] Ibid.

advisable" to the government. 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 the Indian children."[235]

When the treaties were negotiated both the Crown and the First Nations indicated that the purpose of the promises concerning education were to ensure the future prosperity of First Nations. One of the Crown negotiators believed that education would allow First Nations to "live in comfort…prosper and provide". During the Treaty 6 negotiations a promise was made to the First Nations that their "…children will be taught, and then they will be as well able to take care of themselves as the whites around them." The First Nation understanding of education at the time the treaties were negotiated was that education was a holistic life-long process.[236]

Treaty First Nations wanted to secure a livelihood for themselves and for generations to come. One way was to protect the traditional means of living through hunting, trapping and fishing. However, the First Nations also knew that some people would not be able to or would not want to continue to support themselves through only traditional pursuits. The education promises, along with things like promises of agricultural supplies, were intended to ensure that First Nations would have the means to participate in the new economies.[237]

In the years since these commitments were made there have been disagreements between the government and First Nations concerning what was promised and also concerning how those promises should be fulfilled. This issue was complicated by the fact that governments have recognized that all children in Canada have education rights and the fact the government provided educational service to First Nations as a matter of policy without reference to a treaty-based right to education.

Initially the government left the establishment of schools to various religious organizations.[238] Some First Nations objected to religious schools being established on their reserves because they wanted their children taught about First Nations traditions and beliefs. The government then established residential schools off reserves. In these schools First Nation children were taken away from their families and cultures and many suffered abuse.[239]

By the 1970's the government began to recognize First Nations desire to control education of their people. The government, however, continued to have some control through things like curriculum requirements and other policies. Often these arrangements did not include

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[235] *Consolidated Native Law Statutes, Regulations and Treaties*, ed. by Jack Woodward (Toronto: Thomson Canada Limited, 2005).

[236] Sheila Carr-Stewart, "A Treaty Right to Education" (2001) 26:3 Canadian Journal of Education.

[237] *Statement of Treaty Issues: Treaties As A Bridge to The Future* (Saskatoon: Office of the Treaty Commissioner, 1998) at 40.

[238] Sheila Carr-Stewart, "A Treaty Right to Education" (2001) 26:3 Canadian Journal of Education.

[239] Vic Savino & Erica Schumacher, "Whenever the Indians of the Reserve Should Desire It: An Analysis of the First Nation Treaty Right to Education" (1992) 21 Manitoba Law Journal 476.

any mention of a treaty-based right to education. In many cases these schools were also under-funded.[240]

In 1996 the Royal Commission on Aboriginal Peoples recommended that the Government of Canada recognize and fulfill its treaty obligations by supporting education services, including post-secondary education, for members of treaty nations where promises of education appear in the treaty texts or related documents or oral histories of the parties.[241]

These promises have not been considered by the Supreme Court in the same way that hunting, fishing and trapping promises have been considered. The conclusions the Supreme Court has made about how to interpret promises made in the treaties would however, apply equally to any promise made. Oral promises, the historical circumstances, how the First Nations understood the promises at the time and why the treaty was entered into must be considered. Any part that is unclear must be interpreted in favour of the First Nation. The rights must also be allowed to evolve over time. As well the special relationship between the Crown and the First Nations, which requires the Crown to act honourably and protect the interests of the First Nations, must be considered.

Considering the numbered treaty promises in this light, it could be argued that it was agreed that "…schools would be provided whenever and wherever required to put First Nations children on an even footing with their non-First Nations counterparts." It could also be argued that post-secondary education is part of the treaty promise. In the same way that hunting practices have changed over time, the kind of education people need has also changed over time. Today, a university education is more common and may be considered necessary to achieve the purpose of the treaty promise which was to "enable First Nations to participate fully in the Canadian economy". [242]

The federal government in an agreed statement of facts for a court case in 1978 stated that a scholarship for post-secondary education had been given to assist band members with education in compliance with the obligations of the federal government under Treaty 6.[243] Despite this, court cases have found that the Treaty 6 right to education does not extend to a right to post-secondary education and that the Treaty 11 right to education is only available within the treaty area.[244] If this matter comes before the Supreme Court, however, they could choose to take a different view.

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[240] Ibid.

[241] Sheila Carr-Stewart, "A Treaty Right to Education" (2001) 26:3 Canadian Journal of Education.

[242] Vic Savino & Erica Schumacher, "Whenever the Indians of the Reserve Should Desire It: An Analysis of the First Nation Treaty Right to Education" (1992) 21 Manitoba Law Journal 476.

[243] *Greyeyes v. The Queen*, [1978] 2 F.C. 385.

[244] *Canada (Attorney General) v. Desjarlais*, [2005] 3 C.N.L.R. 42; *Beattie v. Canada (Minister of Indian Affairs and Northern Development)*, [1998] 2 C.N.L.R. 5.

Annuities

The treaties that cover Saskatchewan all contain promises to pay sums of money annually to all members of the First Nations that entered into the treaties. Treaty 4 promised $25 for each Chief, $15 for each headman and $5 for every other man, woman or child annually. Treaties 5, 6, 8 and 10 promised the same amounts. These amounts were to be paid "for ever".[245]

In today's dollar, these amounts may seem trivial. At the times the treaties were entered into the annuities had some real value. The amount set in the Robinson Treaty, for example, represented one-half to one-third of the annual wage of an unskilled worker at that time.

The annuities continue to have symbolic value. The yearly payment can be seen as a chance to renew the treaties and demonstrate the continuing nature of the treaties. In a larger sense, the annuities can be seen as an agreement to share the wealth of the land with the First Nations. From the First Nation perspective the resources transferred in things like social programs represent the Crown fulfilling the treaty promises.[246]

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."[247] The First Nations of Treaty 6 have consistently maintained that a promise of full medical care was made. 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.[248]

The medicine chest promise has been considered by the courts. In 1935 a Court interpreted this clause to mean that all medicines, drugs or medical supplies that might be required by the First Nation were to be supplied free of charge.[249] Thirty years later a Court ruled that the medicine chest clause did not exempt a member of a First Nation, living off a reserve, from paying a hospitalization tax. The Court considered the literal meaning of the word and found that medical services, including hospitalization, were not included.[250] This decision was applied by the same Court when the question of health care premiums was considered in 1971.[251]

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[245] *Consolidated Native Law Statutes, Regulations and Treaties*, ed. by Jack Woodward (Toronto: Thomson Canada Limited, 2005).

[246] *Report of the Royal Commission on Aboriginal People*, vol. 2 (Ottawa: Indian and Northern Affairs Canada, 1996).

[247] *Consolidated Native Law Statutes, Regulations and Treaties*, ed. by Jack Woodward (Toronto: Thomson Canada Limited, 2005).

[248] *Report of the Royal Commission on Aboriginal People*, vol. 2 (Ottawa: Indian and Northern Affairs Canada, 1996).

[249] *Dreaver v. R.* (1935), 5 C.N.L.C. 92 (Exch.).

[250] *R. v. Johnson* (1966), 6 C.N.L.C. 447 (Sask. C.A.).

[251] *R. v. Swimmer* (1971), 17 D.L.R. (3d) 476 (Sask. C.A.).

Because these cases were decided many years ago it could be argued that they did not apply the principles of treaty interpretation that the Supreme Court has now developed. When the Court interpreted the medicine chest clause literally to allow hospitalization taxes or premiums to be applied to treaty people, the Court was not considering that treaty rights can evolve over time and are not "frozen at a past time". It could also be said that the courts were not giving the treaty terms a liberal interpretation and resolving doubtful expressions in favour of the First Nations. For these reasons the medicine chest clause "may well require a full range of contemporary medical services."[252]

Taxation

The *Indian Act*, federal government legislation, exempts First Nations and their members from taxation in some circumstances. This exemption only applies to any interest in reserve lands or surrendered lands and personal property that is on a reserve.[253] This exemption also only applies to those who come within the definition of "Indian" in the *Indian Act*. Because this exemption is limited, virtually all First Nations people in Canada pay some taxes to all levels of government and most cannot take advantage of this exemption. Provinces can tax land and other property that belongs to First Nations people if it is not located on a reserve.

relationship to the treaties

This exemption dates back to at least 1850. The first post-confederation legislation exempting First Nations from taxation was passed in 1876 and it has not changed very much over the years. The Supreme Court has commented on the purpose of the exemption, although they have not examined its purpose in depth.[254]

In one case, one of the Supreme Court judges concluded that the exemption was to protect land and other property obtained by First Nations under the treaties. Another judge, in the same case, disagreed and viewed the exemption as a way to relieve the economic disadvantages of First Nations peoples. Two years later the Supreme Court described the exemption as a way to protect the entitlements of First Nations to reserve lands and to make sure that their property on reserve lands was not taken away from them by taxation.[255]

Many First Nations regard exemption from taxation as a treaty right. When Treaty 8 was negotiated the First Nations were concerned about changes in their way of life that would

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[252] *Wuskwi Sipihk Cree Nation v. Canada (Minister of national Health and Welfare)*, [1999] 4 C.N.L.R. 293 (F.C.T.D.).

[253] *Consolidated Native Law Statutes, Regulations and Treaties*, ed. by Jack Woodward (Toronto: Thomson Canada Limited, 2005).

[254] Jack Woodward, *Native Law* (Calgary: Carswell Legal Publications, 1989).

[255] Ibid.

happen if they had to pay taxes. They were assured that this would not happen but this was not recorded in the written text of the treaty.[256] A lower court has held that Treaty 8 does not contain a promise of exemption from taxation. The Supreme Court of Canada denied an application to appeal this decision.[257]

self-governing communities

In the United States, First Nations were exempt from tax because some laws did not apply to them because of their status as self-governing communities. The Canadian common law concerning Aboriginal rights comes from the same source as the United States. For this reason the first Canadian laws exempting First Nations from taxation may have simply reflected the common law.[258]

on-reserve

A member of a First Nation who comes within the definition of "Indian" in the *Indian Act* is exempt from paying income taxes on income "located" on a reserve. There are many court cases that have addressed when income is located on a reserve. Essentially, the Supreme Court has said that this depends on whether there are certain "connecting" factors such as where the employer lives, the kind of work and how it relates to the reserve, where the employee lives and where the employee is paid.[259]

The exemption also applies to property located on a reserve. By legislation, treaty benefits are considered to be located on reserve, regardless of where they are actually received. First Nations people who are registered under the *Indian Act* do not pay provincial sales tax (PST) or federal sales tax (GST) on items delivered to a reserve and also do not pay PST or GST if they make a purchase from a business located on a reserve. They also do not pay GST on services purchased on a reserve where the benefit will be primarily realized on the reserve.

Reserve land is also exempt from property taxation. In Saskatchewan a reserve that is located within a city pays the city a fee for services that is the same amount that would be paid in property taxes.

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[256] *Report of the Royal Commission on Aboriginal People*, vol. 2 (Ottawa: Indian and Northern Affairs Canada, 1996).
[257] *Benoit v. Canada*, [2003] S.C.C.A. No. 387 dismissing an application to appeal *Benoit v. Canada* (2003), F.C.A. 236.
[258] Jack Woodward, *Native Law* (Calgary: Carswell Legal Publications, 1989).
[259] Ibid.

Summary

Treaties are solemn agreements that are sacred. Treaties were made as a way to deal with the fact that what is now Canada was already occupied when the Europeans came to live here. Both First Nations and the British, then later Canadian, governments chose this peaceful, negotiated and mutually agreed upon way of resolving the situation. British and later Canadian law recognized the interests of First Nations and recognized the treaties as a legitimate way to deal with these interests.

Treaties contain promises that benefit both parties to the treaties. Canadian law recognizes that treaties give both the Crown and the First Nations enforceable rights. At one time the law allowed the government to pass legislation that could take away from First Nations treaty rights. Our Constitution now recognizes and affirms existing treaty rights. This means that any law that takes away from treaty rights must be justified under a test developed by the Supreme Court. Treaties then are part of the law of Canada and the law requires both parties to live up to the promises made.

Although the law recognizes that treaty rights are enforceable rights, implementing the treaties has been a difficult and complex task. One of the difficulties is that the government has never passed legislation designed to give effect to the treaty promises. On the other hand, the government has passed legislation that deals with some matters covered in the treaties. This legislation, however, does not recognize the treaties as the foundation for these rights and in some cases can be seen as going against the promises made.

Similarly, a constitutional amendment dealing with the transfer of natural resources to the Prairie Provinces both protected and expanded the treaty right to hunt, fish and trap and took away from that right. The courts have found that although the geographical area over which there is a treaty right to hunt was expanded, hunting was limited by this agreement to hunting for food and the right to hunt for commercial purposes was extinguished.

Another difficulty with implementing treaty promises is the division of powers between the federal government and the provinces. While the federal government has the responsibility of dealing with “Indians and lands reserved for the Indians” under the Constitution, the provinces have the responsibility for things like health care, education and conservation. In some cases cooperation is required between these levels of government to give effect to treaty promises.

Once it is understood that the treaties create enforceable obligations it is then necessary to look at the treaties themselves and the circumstances that surrounded the treaties to determine what each side promised. The courts have said that oral promises can be considered and that the written words must be considered in light of how they would have been understood by the First Nations at the time. The courts have also said that parts of the treaties that are unclear must be interpreted in the way that is the most beneficial to the First Nations.

The treaties that cover Saskatchewan contain a number of promises by both the Crown and the First Nations who entered into them. The Crown promises included setting aside land for the exclusive use of the First Nations and assuring First Nations of the continued right to hunt, fish and trap. The treaties, also contained promises intended to assist First Nations who did not or could not live any longer live through the traditional means of hunting, fishing and trapping, by promising help with agriculture and promising education. In return the First Nations agreed to the peaceful settlement of Saskatchewan.

As well as making these specific promises the treaties created the foundation for how First Nations and those who came later will live together. By committing to the treaties both parties recognized the need to address the rights of First Nations, as the prior possessors of the land, and the need to do this through a negotiated and mutually beneficial agreement. The Supreme Court has recognized that the treaties require consultation, and in some cases accommodation, with First Nations before more land can be taken up by the Crown. Perhaps the most significant right that comes from the treaties is the right to this kind of relationship with government: a right that recognizes First Nations need and ability to work with the government to continue to resolve issues that arise today, just as both parties worked to resolve these issues when the treaties were first created.