

TREATIES AND THE LAW



TEACHER RESOURCE GUIDE
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 *Teacher Resource Guide* has five lessons with activities designed to help students understand the role and place of the treaties, between the First Nations of Saskatchewan and the Crown, within the Saskatchewan and Canadian legal framework.

Treaties and the Law: Information Backgrounder can be used with this resource. The chapters in the Backgrounder correspond to the lessons in this resource. For some activities it may be helpful or necessary to have the students become familiar with the corresponding chapter in the Backgrounder. The reading level of the Backgrounder is grade twelve.

The accompanying DVD is designed to give students an overview of the topics and concepts covered in this resource and in the Backgrounder.

The material in this resource can be covered as part of *Unit One: Foundations of the Legal System* of the Law 30 curriculum. The material deals with core specific learning objectives of the Law 30 curriculum including the common law, the rule of law, statute law, the characteristics of treaties and treaties as a source of law in Canada.

The material in this resource can also be covered as part of the Social Sciences curriculum in a number of different grades. The grade eight social sciences curriculum Unit two deals with citizenship. Topic six of Unit two covers the history of Canadian Government. One of the things students learn about when studying this topic is why Aboriginal peoples believe they should have special status in the Constitution. Understanding the history behind treaties, as well as their place in today's society, would be an excellent way to teach students about why Aboriginal people have unique constitutional rights.

Unit four of the grade nine Social Sciences curriculum involves the study of First Nations. Topic six of this unit is treaties and land claims. Native Studies 10 Unit three involves the study of Aboriginal perspectives on governance. This unit includes topics like the treaties and legislation concerning Aboriginal peoples. Unit one of Native Studies 30 is devoted to Aboriginal and treaty rights.

Unit four of Social Studies 30 deals with governance. As part of this unit students learn about the role of a constitution in society as well as some aspects of the Canadian Constitution like the *Canadian Charter of Rights and Freedoms* and the division of powers. This resource deals with the concept of the Constitution as the supreme law of the land, the division of powers as it relates to First Nations and First Nations constitutional rights.





SUMMARY OF LEARNING OUTCOMES

Teaching students about how treaties made with First Nations are part of the law of Canada can be approached in many different ways. Teachers and students have a variety of resources to assist them, including *Treaties and the Law: Information Backgrounder*, the *Teacher Resource Guide* and the DVD.

Whatever approach is selected, the following is a summary of the learning outcomes these materials are designed to achieve.

FIRST NATIONS

- *Distinct First Nations lived here for thousands of years before others came to what is now Canada.* The Aboriginal peoples who lived here were not a single group of people. There were many distinct nations of Aboriginal people each with their own characteristics, including laws by which they governed themselves and their relationships with other Aboriginal peoples.

COMMON LAW

- *In Canada one source of law is the common law which is formed by judges' decisions and continues to grow over time as new legal issues arise.*

COMMON LAW ABORIGINAL RIGHTS

- *Common law recognizes Aboriginal rights based on their prior possession of the land.* This area of the common law developed because people came from Britain and Europe to live in what is now Canada when the First Nations were already living in this land and had been for thousands of years.

FIRST NATIONS CUSTOMARY LAW

- *Common law recognizes and in some ways incorporates the customary laws of First Nations.*

RULE OF LAW

- *The rule of law is a principle of the common law of Canada and it means that laws apply to everyone, including the government.*





WHY TREATIES?

- *Treaties are recognized by Canadian law as a legitimate way of reconciling the interests of First Nations with the interests of those who later came to Canada. Because First Nations had common law Aboriginal rights and because the government is required to respect these rights (rule of law) treaties were needed to deal with First Nations rights before the land was opened up for settlement by newcomers.*

CHARACTERISTICS OF TREATIES

- A treaty is an agreement, voluntarily entered into between two or more nations that creates mutually binding obligations. The written text of the treaties does not reflect all that was agreed to in the treaties.

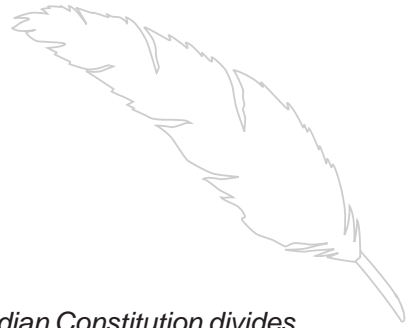
TREATY PROMISES

- *By entering into the treaties both the First Nations and the government agreed to a process of negotiation and consultation as a way of reconciling the interests of the First Nations and those who came later.*
- *The obligations that the First Nations undertook were to share the land and its resources with the newcomers.*
- *The obligations that the government undertook were to assist the First Nations in dealing with the changes brought on by the newcomers settling on their lands and protect their existence as distinct societies. For these reasons promises concerning things like reserve lands, hunting, trapping and fishing, education, annuities and healthcare were made.*
- *All people in Saskatchewan are treaty people because it is the treaties that allowed people initially from Britain and Europe and other places to come and live on the traditional lands of the First Nations in Saskatchewan.*

IMPLEMENTING TREATIES

- *In the years since the treaties were entered into, First Nations have experienced difficulties in having what they understood to have been agreed upon implemented and implementation of the treaty promises is still a complex problem.*
- *After the treaties were entered into and the lands covered by the treaties were being used by the newcomers, Canada did not pass laws to implement the treaties. Instead the government passed laws (including the *Indian Act*) to give effect to the social policy of assimilating First Nations into the culture of the newcomers; the assimilation policy reflected the values of those who had the power in Canadian society at that time.*



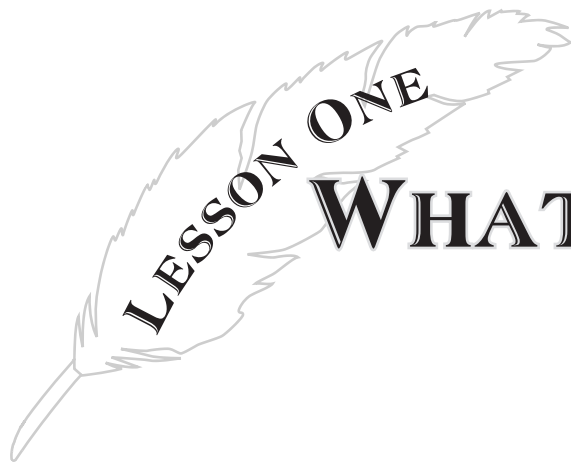


- *Implementing the treaties is also complicated because the Canadian Constitution divides the law-making powers between the provinces and the federal government.* The division of powers in the Canadian Constitution gives the federal government the authority to pass laws concerning treaties and the responsibility to fulfill the treaty promises, while many treaty issues involve things that are provincial responsibilities, like ownership of land and natural resources.

TREATIES TODAY

- *Today the treaties are recognized as solemn, sacred, lasting agreements that create legally enforceable obligations.* As of 1982 treaty rights are protected by the Constitution, which is the supreme law of the land.





WHAT ARE TREATIES?

RATIONALE

This lesson is designed to introduce students to the concept that treaties are part of the law of First Nations and many other nations, including Britain and Canada, developed by those societies as a way for nations to co-exist peacefully. This lesson is also designed to help students understand who the parties to the treaties were and the characteristics of treaties made with the First Nations.

LEARNING OBJECTIVES

Knowledge/Content

- know that law is a social construct of the society in which it is implemented
- know that the Aboriginal peoples of what is now Canada consisted of distinct nations
- know that a treaty is an agreement, voluntarily entered into between two or more sovereign states, that creates mutually binding obligations

Skills

- identify functions of law in society
- identify misconceptions concerning what treaties are and who entered into them

Values

- appreciate the diversity of the Aboriginal peoples in Canada
- appreciate the importance of treaties to First Nations and all Canadians

TEACHER INFORMATION

A treaty is a negotiated agreement between two or more nations. Many nations all over the world have a long history of using treaties. The First Nations of what is now Canada entered into treaties with each other long before the first Europeans came to trade for furs and settle in what is now Canada. The treaties with First Nations are unique and have a distinct place in Canadian law.



ACTIVITY: WHAT'S IN A NAME?

PURPOSE

This activity is designed to help students understand some of the terminology used to describe the peoples who lived in what is now Canada before the Europeans and the British.

TEACHER BACKGROUND

The treaties were made between First Nations and the representatives of the head-of-state of first Britain and later Canada.

The representative of the head-of-state of both Britain and Canada is often referred to as the *Crown*. This term 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.

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. 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.

Just as the representative of the government is often referred to as the Crown, the Aboriginal peoples living in North America, that the Crown entered into agreements with, are often called *First Nations*. The Aboriginal peoples 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, languages and spiritual beliefs. These societies also had trade and economic systems of their own.

In many ways the original occupiers of what the Europeans called the “new world” were far more culturally diverse than the Europeans. Despite this diversity, the Europeans in many ways saw the Aboriginal peoples as one group. For this reason the newcomers created general terms to describe those that were already living in the lands they came to.

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.





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. 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. However, the term Indian is still used in some situations, for example if it is a direct quote, or a discussion of history or when it is a legally defined term.

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.

Inuit are the Aboriginal people of Arctic 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.

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.

PROCEDURE

1. Distribute the *Handout: Who's Who* to the students.
2. Have the students either complete the match as a pre-test prior to doing research on the terminology or as an assessment of the application of data gathered through their research into terminology.
3. Share information in the answer key with the students.

RESOURCES

www.afn.ca – has a *Fact Sheet* on terminology used to describe the original inhabitants of North America

www.ainc-inac.gc.ca – has a Terminology Guide called *Words First*, found in the Publications & Research section of the website

www.metisnation.ca – has a definition of Métis

www.cbc.ca/news/background/aboriginals/ - see the FAQ section and the section on National Organizations





WHO'S WHO

Match the descriptions to the appropriate words.

Native

includes all of the original peoples of North America and their descendants and is used in Canada's Constitution.

Aboriginal peoples

is the term that started to be used in 1970's to describe the original inhabitants and their descendants who were not Métis or Inuit.

First Nations

Indian

is a term created by those who came to what is now Canada to describe all the peoples they found living here, now considered outdated by many people.

Inuit

Métis

was used by the Europeans to describe the original inhabitants of the Arctic and is no longer used because it comes from the Algonquin term meaning "raw meat eaters" and many people find the term offensive.

Eskimo

refers to the original peoples of the Arctic and means "the people" in Inuktitut.

has a similar meaning as Aboriginal but is increasingly seen as outdated.

is French for mixed blood and today is used to describe people with mixed First Nations and European ancestry who identify themselves as belonging to this group.

Source: Words First published by the Communications Branch of Indian and Northern Affairs Canada in 2002, available online at www.ainc-inac.gc.ca.



LESSON ONE WHAT ARE TREATIES?



WHO'S WHO

Match the descriptions to the appropriate words.

Native	_____	_____	includes all of the original peoples of North America and their descendants and is used in Canada's Constitution.
Aboriginal peoples	_____	_____	is the term that started to be used in 1970's to describe the original inhabitants and their descendants who were not Métis or Inuit.
First Nations	_____	_____	is a term created by those who came to what is now Canada to describe all the peoples they found living here, now considered outdated by many people.
Indian	_____	_____	was used by the Europeans to describe the original inhabitants of the Arctic and is no longer used because it comes from the Algonquin term meaning "raw meat eaters" and many people find the term offensive.
Inuit	_____	_____	refers to the original peoples of the Arctic and means "the people" in Inuktitut.
Métis	_____	_____	has a similar meaning as Aboriginal but is increasingly seen as outdated.
Eskimo	_____	_____	is French for mixed blood and today is used to describe people with mixed First Nations and European ancestry who identify themselves as belonging to this group.

Source: Words First published by the Communications Branch of Indian and Northern Affairs Canada in 2002, available online at www.ainc-inac.gc.ca.



ACTIVITY: MYTHS AND MISCONCEPTIONS

PURPOSE

This activity is designed to help students use knowledge about the characteristics of treaties to assess the validity of some commonly held beliefs about treaties.

TEACHER BACKGROUND

Treaties with the First Nations are unique agreements that are *sui generis* (soo-ee-jen-e-ris). This means that treaties with First Nations are in their own class. Every treaty with a First Nation is unique but there are characteristics that the Supreme Court of Canada has identified as common to all treaties with the First Nations.

A treaty with a First Nation is a solemn and sacred agreement. For this reason treaties were made with a “certain measure of solemnity.” 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.

A treaty reflects a common understanding. Although differences in language, culture and history may have resulted in a lack of a common understanding about certain matters there was 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.

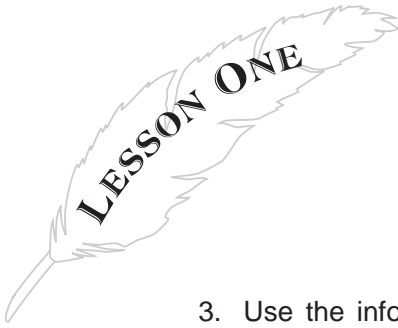
A treaty creates rights and obligations for both parties. Both the First Nation and the Crown gained something by making the treaty and both undertook certain obligations. The Crown, and through the Crown all Canadians, has treaty rights just as the First Nations have treaty rights. Although treaty rights 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 many Canadians as a whole have treaty rights and are treaty people.

A treaty creates rights which are passed on over time. Treaties were meant to be enduring. 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.

PROCEDURE

1. Distribute the *Handout: Myth or Reality?* to the students.
2. Engage the students in a discussion about their thoughts on the statements in the handout.





3. Use the information in the teacher background and the points below to guide student discussion to an understanding of the characteristics of treaties with First Nations.
 - Explore the differences between a purchase of land between two private individuals and the treaties. Have the students consider the solemn practices used by both parties and the use of the word “treaty” to describe the agreement.
 - Have the students think about the benefits that both parties received.
 - Discuss the enduring aspect of treaties and how that relates to the relevance of treaties today.





MYTH OR REALITY?

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





WHY WERE TREATIES MADE?

RATIONALE

This lesson is designed to help students understand the practical as well as the legal reasons for entering into treaties. It is also designed to show students how the law evolved to deal with a new circumstance (people coming to a land where First Nations were already living) and the advantages of having laws to resolve competing claims peacefully.

LEARNING OBJECTIVES

Knowledge/Content

- know that the Canadian legal system has evolved over time and has been influenced by several traditions
- know that sources of law include *The Constitution*, *The Charter of Rights and Freedoms*, treaties, statutes and common law
- know that a culture responds to change in the natural or social environment by creating new cultural adaptations - as circumstances and surroundings evolve, the need for change in our institutions is reflected
- know that common law is formed by court decisions that become judicial precedent - common law continues to grow over time as new legal issues arise, and as the courts define new interpretations
- know that among the main principles of early common law - that continues to exist in the legal system today - is that of the rule of law, a tenant that laws apply to everyone, and each person is protected by the law
- know that in Canada, as well as in other democratic nations of the world, neither individual nor institution is above the law, and that all are legitimately governed by the rule of law
- know that worldview is influenced by an individual's beliefs

Skills

- investigate the reasons both parties had for entering into treaties

Values

- appreciate the benefits of living by the rule of law
- appreciate the importance of treaties to First Nations and Canadians



- respect the value of customary law and common law as sources of law in Canadian society
- appreciate the historical development of our legal system in Canada, and the benefits to Canadian society

ACTIVITY: WHERE DO LAWS COME FROM?

PURPOSE

This activity is designed to introduce students to various sources of laws in Canada.

PROCEDURE

1. Distribute the *Handout: Where do laws come from?* to the class.
2. Use the true/false quiz to check students' understanding of the information (the quiz can also be used as a pre-test). Teachers can also have the students complete the quiz in small groups.

RESOURCES

Why Laws??– The *PLEA* Newsletter - available electronically at www.plea.org or by contacting plea@plea.org





WHERE DO LAWS COME FROM?

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, however, everyone - including the government - must obey the law.

There are a number of different ways that something can become law. In Britain, and then later Canada, something could be the law because the government passed a law. When Canada was a colony of Britain something could also become law through a Royal Proclamation. Today we also have constitutional laws that are the supreme law of the land. Finally in both Britain and Canada something can be law because it is part of what is called the common law.

Legislation is created when the government passes a law. A law is passed when the majority of the elected representatives vote for it. Under our system of government a law must also receive *Royal Assent* from the monarch's representative in Canada (the Governor General for federal laws and the Lieutenant Governor for provincial laws). Laws passed by a government are also called statutes.

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

In Canada we also have *constitutional laws* that even our elected government cannot change. To make changes the federal government and seven provinces, that have at least 50% of the population, must agree. Constitutional laws divide the powers of government between the provinces and the federal government and give people certain rights and protections. The part of the Constitution that gives people certain rights and protections is called the *Canadian Charter of Rights and Freedoms*. The government must respect the Charter rights of people when taking action or passing legislation.

Common laws are laws that are not created by governments. They are not written in a statute 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.





TRUE/FALSE QUIZ

- _____ 1. Royal Proclamations stopped being the law in Canada once Canada became independent of Britain.
- _____ 2. Legislation is created by the decisions of judges.
- _____ 3. The Constitution divides law-making powers between the federal and provincial governments.
- _____ 4. The common law is law made by governments.
- _____ 5. The rule of law is a principle based on the belief that it is better to be ruled by laws than by leaders who can do whatever they like.
- _____ 6. The federal government can pass a law to change the Constitution.
- _____ 7. The government is required to respect the Charter rights of individuals when they are taking action or passing laws.
- _____ 8. In British colonies a Royal Proclamation had the same force as a law passed by the government.
- _____ 9. The government passes laws that apply to all citizens but not to the government itself.
- _____ 10. Common law dates back to a time in Britain when the Parliament did not have the power to pass laws.





TRUE/FALSE QUIZ

- False 1. Royal Proclamations stopped being the law in Canada once Canada became independent of Britain. **(Although Royal Proclamations were only made before Canada became a country they continue to be the law unless they are repealed.)**
- False 2. Legislation is created by the decisions of judges. **(Legislation is created when a government passes a law.)**
- True 3. The Constitution divides law-making powers between the federal and provincial governments.
- False 4. The common law is law made by governments. **(Common law comes from decisions made by judges.)**
- True 5. The rule of law is a principle based on the belief that it is better to be ruled by laws than by leaders who can do whatever they like.
- False 6. The federal government can pass a law to change the Constitution. **(The Constitution can only be changed with the agreement of the federal government and seven provinces. The seven provinces that agree must also have at least 50% of the population of Canada.)**
- True 7. The government is required to respect the Charter rights of individuals when they are taking action or passing laws.
- True 8. In British colonies a Royal Proclamation had the same force as a law passed by the government.
- False 9. The government passes laws that apply to all citizens but not to the government itself. **(The government must obey the law just like everyone else.)**
- True 10. Common law dates back to a time in Britain when the Parliament did not have the power to pass laws.



ACTIVITY: WHEN TWO SOCIETIES MEET

PURPOSE

This activity is designed to help students understand that the treaties were a way of reconciling the fact that First Nations were living in what is now Canada when the British came to this land.

TEACHER BACKGROUND

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.

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.

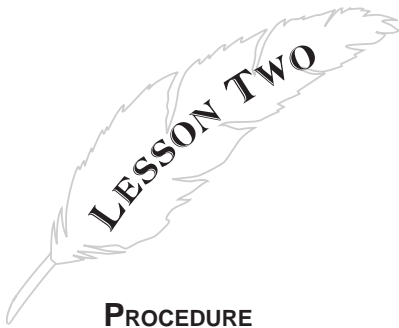
The treaties represented many different things to the First Nations including a way to share the land, have peace, continue with their way of life and assure the future of their children by learning how to survive in the white man’s world. While First Nations agreed to respect the laws of the Crown, in return they expected to still be able to govern their own people according to their own laws.

Sharing the land, rather than giving up their rights to the land, was in keeping with the cultural 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.

The representatives of the British Crown recognized the need for support from First Nations if they were to be successful in the struggle with other European nations over what is now Canada. The treaties and the relationships created by them stopped wars between the First Nations and the French and the British. 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.

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. 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. 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.





PROCEDURE

1. Divide the class into several groups.
2. Within each group have several students represent a First Nation living in North America before other nations had come to North America and several students represent the government of a country (Britain or France) that wants to settle in the area.
3. Have the groups representing the First Nations and the groups representing Britain or France attempt to negotiate an agreement.
4. After giving the groups some time to negotiate have each group record the reasons that they would have wanted to come to some kind of agreement.
5. Have a spokesperson from each group report the reasons they had for coming to an agreement.
6. Have a class discussion about the reasons both parties would have had. Have the students consider the options to a negotiated agreement and how not coming to an agreement could affect both parties. Guide the discussion to consider these alternatives to a negotiated agreement and the consequences for both parties...
 - war and the loss of lives
 - coming to the area without the co-operation of the original inhabitants and possibly not being able to survive in a new environment without that co-operation
 - another European power negotiating an agreement and therefore having the advantage in claiming the area
 - not having an agreement with the newcomers concerning how changes to traditional lifestyles caused by the increase in the population would be handled

ACTIVITY: CHANGING CIRCUMSTANCES/CHANGING LAWS

PURPOSE

This activity is designed to help students see how the law of Britain and then Canada developed in response to people coming to lands that were already occupied by First Nations and how this development in turn led to treaties between the First Nations and the Crown.

TEACHER BACKGROUND

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



the British needed to deal with those rights before they could lawfully settle on First Nation lands. The common law recognized treaties as a legitimate way of dealing with First Nation 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. Aboriginal rights are a way of reconciling the fact that First Nations were already occupying what is now Canada with the British and later Canadian claim to the same land. 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."

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." 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". Aboriginal rights are justified by "...fairness which suggests that...a prior occupant of land possesses a stronger claim to that land than subsequent arrivals."

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. Aboriginal rights then are not English or Aboriginal but are the result of the meeting of the two very different societies. Aboriginal rights law "...bridges legal cultures and relies on stepping outside our own ways of justice." 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 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 First Nations to occupy their traditional lands. This right did not come from any action of the British government; it existed because the First Nations were already occupying the land when the British came to Canada. The Supreme Court of Canada has observed that the "...British policy towards the native population was based on respect for their right to occupy their traditional lands."

Because the rights of the First Nations were recognized, treaties were used as a legal way of allowing First Nations lands to be opened up to settlement, by gaining the consent of the First Nations. Under the common law it was not possible for individuals to make legal agreements regarding the use of First Nation lands. It was up to government to deal with the First Nations before settling land they occupied. The treaties can be viewed as part of the foundation of our legal system. Without these treaties the right of Britain and later Canada to live in the land could be called into question.

A graphic of a feather with the words "LESSON TWO" written along its length.

LESSON TWO

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.

PROCEDURE

1. Distribute the *Handout: Calder Case* and have the students complete the *Questions for Thought*, either individually or in groups.
2. Discuss the *Calder* case with the students. Guide the discussion to include...
 - the facts that were considered relevant in determining that the Nishga had common law Aboriginal rights to their traditional land (occupation since time immemorial, not having surrendered those rights by treaty, not having been conquered)
 - the fact that common law Aboriginal rights exist whether they have been recognized by legislation, proclamations or treaties
 - an understanding that a major legal reason why treaties were entered into between the Crown and First Nations is that the common law recognized these as a legitimate way of dealing with the rights of First Nations
3. As an optional follow-up activity students could find out where the Nishga’s claim stands today (see www.ainc-inac.gc.ca/pr/agr/nfa_e.txt for annual report reviewing the first year of implementation of the Nishga Treaty – May 11, 2000 – March 31, 2001).





CALDER CASE

Calder v. British Columbia (Attorney-General) [1973] S.C.R. 313 (Supreme Court of Canada)

FACTS

The Nishga First Nation brought an action before the courts asking the Court to recognize their Aboriginal title to their traditional lands in British Columbia and asking the courts to find that their title had never been extinguished. After the British Columbia Court of Appeal denied their action they appealed to the Supreme Court of Canada.

It was agreed by both parties that present day members of the Nishga First Nation were the descendants of the First Nations people who had inhabited the area since time immemorial and that their ancestors had obtained a living since time immemorial from the lands and waters in the territory in question.

It was also agreed that no part of the territory had been surrendered to the Crown and that no part had been purchased from the Nishga First Nation by the Crown or by any person acting on behalf of the Crown, at a public meeting or assembly or otherwise, or by any person whomsoever.

JUDGMENT

The appeal was denied and the Nishga's application to have the court recognize their Aboriginal title to their traditional lands was denied. Seven Justices heard the case. Three of the Justices found that any title the Nishga First Nation may have had was extinguished when the lands were opened up for settlement by legislation. Three of the Justices found that the Nishga First Nation had common law Aboriginal rights to their traditional lands and that these rights had not been extinguished. One Justice denied the Nishga's claim on a procedural point.

Despite this outcome, the *Calder* case is seen as a groundbreaking case in which the Supreme Court found that Aboriginal peoples have rights to their traditional lands based on the common law and the fact that they lived in these lands long before the Europeans came to Canada. The Supreme Court in this case is also seen as concluding that Aboriginal rights to their traditional land exist under the common law and that government action, such as legislation, is not required to give effect to those rights.

EXCERPTS FROM THE JUDGMENT OF JUSTICE HALL (ON BEHALF OF HIMSELF AND JUSTICES SPENCE AND LASKIN)

This appeal raises issues of vital importance to the Indians of northern British Columbia and, in particular, to those of the Nishga tribe. The Nishga tribe has persevered for almost a century in asserting an interest in the lands which their ancestors occupied since time immemorial. The Nishgas were never conquered nor did they at any time enter into a treaty or deed of surrender as many other Indian tribes did throughout Canada and in southern British Columbia.



LESSON TWO WHY WERE TREATIES MADE?



CALDER CASE ...CONTINUED

never surrendered

From time immemorial the Nass River Nishga Indians possessed, occupied and used the Nass Valley, Observatory Inlet, and Portland Inlet and Canal, and within this territory the Nishgas hunted in its woods, fished in its waters, streams and rivers. Roamed, hunted and pitched their tents in the valleys, shores and hillsides. Buried their dead in their homeland territory. Exercised all the privileges of free men in the tribal territory. The Nishgas have never ceded or extinguished their aboriginal title within this territory.

common law Aboriginal rights

While the Nishga claim has not heretofore been litigated, there is a wealth of jurisprudence affirming common law recognition of aboriginal rights to possession and enjoyment of lands of aborigines precisely analogous to the Nishga situation here.

Hall, J. went on to look at a number of cases including the American case *Johnson v. McIntosh*, decided in 1823.

*The dominant and recurring proposition stated by Chief Justice Marshall in *Johnson v. McIntosh* is that on discovery or on conquest the aborigines of newly-found lands were conceded to be the rightful occupants of the soil with a legal as well as a just claim to retain possession of it and to use it according to their own discretion....*

Hall, J. went on to consider other authorities including a 1946 case decided by the Supreme Court of the United States. Hall, J. quotes this passage from the case...

purpose of the treaties

In 1896 this Court noted that "nearly every tribe and band of Indians within the territorial limits of the United States was under some treaty relations with the government." Something more than sovereign grace prompted the obvious regard given to original Indian title.

Hall, J. commented on this case saying...

The same considerations applied in Canada. Treaties were made with the Indians of the Canadian West covering enormous tracts of land. These treaties were a recognition of Indian title.

Surely the Canadian treaties, made with much solemnity on behalf of the Crown, were intended to extinguish the Indian title. What other purpose did they serve? If they were not intended to extinguish the Indian right, they were a gross fraud and that is not to be assumed.

Hall, J., after reviewing the support for common law Aboriginal rights, went on to consider the role of the Royal Proclamation, 1763.





CALDER CASE ...CONTINUED

Royal Proclamation

Paralleling and supporting the claim of the Nishgas that they have a certain right or title to the lands in question is the guarantee of Indian rights contained in the Proclamation of 1763.

In respect of this Proclamation, it can be said that when other exploring nations were showing a ruthless disregard of native rights England adopted a remarkably enlightened attitude towards the Indians of North America. The Proclamation must be regarded as a fundamental document upon which any just determination of original rights rests.

Finally Hall, J. considered

...the proposition that after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer.

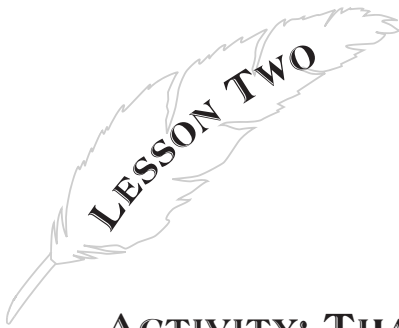
Hall, J. then concluded...

That proposition is wholly wrong as the mass of authorities previously cited...establishes.

QUESTIONS FOR THOUGHT

1. What facts does the Supreme Court consider when determining the common law Aboriginal rights of the Nishga First Nation?
2. Some of the other Justices found that the *Royal Proclamation, 1763* did not apply to British Columbia. If Hall, J. had agreed that the Proclamation did not apply would his decision have been any different? If so, in what way?
3. How does the tradition of entering into treaties with First Nations support the existence of common law Aboriginal rights?





ACTIVITY: THAT WAS THEN - THIS IS NOW

PURPOSE

This activity is designed to help students understand some of the consequences for everyone involved when the commitment to peaceful resolution of the competing claims of First Nations and others in Canada breaks down. This will help students appreciate the value of the treaties as a peaceful means of resolving these conflicts.

This activity looks at a particular dispute but the same procedure could be used to look at other disputes involving First Nations claims including more recent situations like the one in Caledonia, Ontario in April, 2006.

PROCEDURE

1. Have the students research the protests at Ipperwash to answer the following questions...
 - What was the dispute about?
 - What Aboriginal rights were being claimed?
 - How long had the dispute been going on before the protest began?
 - What other means, if any, had been used by the parties to resolve the dispute before the protests began?
 - At what point did the protest and/or response to the protest become violent?
 - What were the consequences and costs of the violence? (consider loss of life, injury to people, property damage, use of police and court resources, criminal charges, costs and other consequences of people being in jail, negative perceptions of police, government and First Nations and how that could affect their future, civil law suits, costs of inquiry to find out what happened, etc.)

Encourage students to research information produced by the government and by the media as well as information that tells the story from the perspective of the First Nation.

2. In 1995 First Nations leader Ovide Mercredi had just attended the funeral of Anthony Dudley George, a member of the First Nation protesting at Ipperwash who was shot and killed by police during the protest. Mercredi said that the events at Ipperwash and Gustafsen Lake made him realize Aboriginal people have to resolve land claims differently. He explained that "We don't want to walk anymore of those distances up the hills to bury our dead." Share these statements with the students and have a class discussion guiding the discussion to include these points...



- How has the law concerning Aboriginal rights evolved to deal with competing claims peacefully?
- How successful has it been?
- Think about other situations where the law is designed to resolve disputes without violence (i.e. “might makes right” vs. fairness in law).
- What are some of the reasons that Aboriginal rights law has not always been successful in resolving issues in a way that works for First Nations and the governments and people of Canada? Consider...
 - ▷ that Aboriginal rights law in Canada, although it is in part derived from the laws of the First Nations, is the law of those who came to this land, not those who lived here originally
 - ▷ whether the rights given by Canadian law to Aboriginal peoples have been fully realized by Aboriginal peoples and why or why not that may have been the case

RESOURCES

www.cbc.ca/news/background/ipperwash/
www.ipperwashinquiry.ca/
www.histori.ca/peace/page.do?pageID=344
www.ainc-inac.gc.ca/pr/info/cin_e.html
www.ryerson.ca/news/2006/20060131b.html
www.ammsa.com/windspeaker/topnews-Sep-2003.html#anchor12364472





TREATY RIGHTS AND THE LAW OF CANADA

RATIONALE

This lesson is designed to help students understand that the treaties created legally enforceable obligations that involve the faith and honour of the government. It is also designed to help students understand the protection that treaty rights have in the Constitution.

LEARNING OBJECTIVES

Knowledge/Content

- know that sources of law include *The Constitution*, *The Charter of Rights and Freedoms* and the treaties as well as statutes and common law
- know that a constitution is a fundamental guide for the daily operation of an organization
- know that in Canada, *The Constitution Act (1982)* serves as the fundamental guide for institutions, including the legislative branch, executive branch and judicial branch of government
- know that, when an item is entrenched in the Constitution, it is a fundamental belief of a society and is designed to be not easily or whimsically changed

Skills

- practice making decisions by analyzing data and applying criteria

Values

- appreciate that treaties serve as a source of law in Canada
- appreciate that the treaties created lasting enforceable obligations that are now recognized by the Constitution

TEACHER INFORMATION

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.



The Royal Commission on Aboriginal People considered the treaties and noted that treaties are promises and that the importance of keeping promises is “deeply ingrained in all of us, and indeed is common to all cultures and legal systems.” The Royal Commission went on to say that the fact that treaties were entered into represents “...a profound commitment by both parties to the idea of peaceful relations between people.” They concluded that 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 a peaceful means of deciding how they were going to live together.

As Phil Fontaine (National Chief of the Assembly of First Nations) stated, treaties are sometimes seen as “...ancient, obsolete relics of marginal historical interest.” 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.”

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.” Britain and later Canada received considerable “economic, military and political benefits.” The Crown received benefits on behalf of all those who settled in Canada and their descendants. In this sense all Canadians are treaty people and continue to benefit from the rights negotiated on their behalf by the Crown.

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.” 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.”

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. 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.”

The ability of the federal government to override treaty rights changed when 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 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 first by the British and later the Canadian Crown. As well the government has the responsibility to protect the rights of First Nations.



A graphic of a feather with the words "LESSON THREE" written along its length.

LESSON THREE

This means that treaty rights are now protected from legislation by either the provinces or the federal government. 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.

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. The government must “justify” any legislation that conflicts with a protected Aboriginal or treaty right.

ACTIVITY: TREATIES AND THE LAW

PURPOSE

This activity is designed to help students understand the relevance of treaties today.

PROCEDURE

1. Use the teacher information to help students understand what the law of Canada says about treaties. Alternatively students could be asked to read *Treaty Rights and the Law of Canada* which is Chapter Three of *Treaties and the Law: Information Backgrounder*. Highlight the following points for the students...
 - treaties are solemn promises that create legally enforceable rights
 - the faith and honour of the Crown is at stake when the Crown deals with these promises
 - treaties create lasting obligations
 - treaties create benefits and obligations for both First Nations and the Crown
 - the Canadian Constitution recognizes and affirms existing treaty rights and requires any law that takes away from these rights to be justified

2. Phil Fontaine (National Chief of the Assembly of First Nations) has stated that:

...many Canadians today have the view that the treaties are ancient, obsolete relics of marginal historical interest....The effect of downgrading the importance of the treaties is to downgrade the importance of the stature of First Peoples as nations and their contribution to Canada. It also downgrades Canada, its integrity and credibility as a democratic country, which has human rights at its constitutional core.

*P. Fontaine, “We need a return to treaties, not a downgrading of them” *The Globe and Mail* (October 13, 1999) A19.



Have the students consider this statement in light of what Canadian law says about treaties. Have the students consider these questions....

- ▷ Does Canadian law place value on the treaties that is in keeping with how First Nations view treaties?
- ▷ In what ways does Canadian law respect the importance of the treaties? (i.e. recognition that treaties create legally enforceable, lasting obligations, the performance of which involves the faith and honour of the Crown and protection of treaty rights in the Constitution)
- ▷ In what ways has Canadian law given less importance to the treaties? (allowing laws to be passed that could take away from treaty rights, only protecting *existing* treaty rights, allowing laws that take away treaty rights to be *justified*)

ACTIVITY: TREATIES AND THE COURTS PAST AND PRESENT

PURPOSE

This activity is designed to help students see the evolution in Canadian courts regarding the enforceability of treaty rights.

PROCEDURE

1. Distribute the *Handout: Canadian Treaty Cases* to the students.
2. Discuss with the students the changing views about treaties. Guide the discussion to help students see the transition through the three following stages...
 - treaties seen as unenforceable personal promises
 - treaties seen as promises that involved the honour of the Crown that could nevertheless be broken
 - treaties seen as promises protected by the Constitution so that any government action that takes away from the promises has to be justified under a test developed by the Supreme Court





HANDOUT

CANADIAN TREATY CASES

Consider the following quotes from Canadian Courts.

In 1897 the Privy Council, then the highest court of appeal in Canada, stated...

Their lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right in their annuities...beyond a promise and agreement, which was nothing more than a personal obligation by its governor.

Attorney-General of Canada: Re Indian Claims, [1897] A.C. 199 at 213 (P.C.)

In 1964 the Northwest Territories Court of Appeal quoted this passage from the 1897 decision of the Privy Council and went on to state...

While this [statement by the Privy Council] refers only to the annuities payable under the treaties, it is difficult to see that the other covenants in the treaties... can stand on any higher footing. It is always to be kept in mind that the Indians surrendered their rights in the territory in exchange for these promises. This "promise and agreement", like any other, can, of course be breached and there is no law of which I am aware that would prevent Parliament by legislation...from doing so.

It is, I think, clear that the rights given to the Indians by their treaties...have been taken awayHow are we to explain this apparent breach of faith on the part of the Government...?

Regina v. Sikyee [1964] 2 C.C.C. 325 – this decision was affirmed by the Supreme Court of Canada in *Regina v. Sikyee* [1964] S.C.R. 642. Hall, J., speaking for the Court stated "I agree with the reasons for judgment and with the conclusions of Johnson J.A. in the Court of Appeal. He has dealt with the important issues fully and correctly in their historical and legal setting, and there is nothing which I can usefully add to what he has written."

In 1984, two years after changes to the Constitution recognized and affirmed treaty rights, the Supreme Court of Canada stated...

The Treaty was an exchange of solemn promises between the Micmacs [the First Nation] and the King's representative entered into to achieve and guarantee peace. It is an enforceable obligation between the Indians and the white man....

R. v. Simon [1985] 2 S.C.R. 387 at 411.





CANADIAN TREATY CASES ...CONTINUED

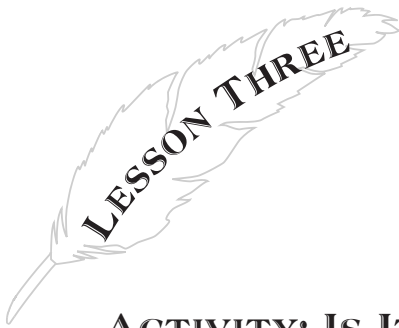
In 1995 the Supreme Court stated...

...it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. ... the honour of the Crown is always at stake in its dealing with Indian people. It is always assumed that the Crown intends to fulfill its promises. No appearance of "sharp dealing" will be sanctioned.

It has been recognized that aboriginal and treaty rights are not absolute. The reasons in Sparrow [another Supreme Court of Canada case] made it clear that aboriginal rights may be overridden if the government is able to justify the infringement.

R v. Badger [1996] 1 S.C.R. 771.





ACTIVITY: IS IT JUSTIFIED?

PURPOSE

This activity is designed to help students think about how the courts give effect to the treaty rights of First Nations.

PROCEDURE

1. Give the students the *Handout: You be the Judge* and have them complete the questions.
2. Share the *Handout: Decisions of the Courts* and have a discussion about how the students' answers were similar to or different from the court decisions. Encourage the students not to think of the court decisions as the *right* answer since convincing arguments can be made for different outcomes.





YOU BE THE JUDGE

THE TEST

The Constitution protects treaty rights. The courts have decided that this means that a law that infringes a treaty right must be *justified* or the law will be found not to apply to the exercise of the treaty right. There are two stages to determining if a law is justified.

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 peoples with the fact that people from other countries also ultimately claimed Canada for their own. Examples of purposes that 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).

The second step takes into account the fact that the honour of the Crown is always at stake in dealing with Aboriginal peoples and the special trust relationship between the government and Aboriginal peoples. In this step a number of matters are considered such as...

- whether there has been as little infringement as possible to achieve the objective
- whether there has been consultation with the First Nation in question
- whether some sort of priority has been given to the exercise of the treaty right over other ways a resource could be used



LESSON THREE

TREATY RIGHTS AND THE LAW OF CANADA



THE CASES

***R. v. LEFTHAND* [2005] A.J. No. 1370**

Ezra Lefthand, a member of the Stoney Nation – Bearspaw Band entitled to fishing rights under Treaty 7, was charged with fishing with earthworms contrary to the Alberta Fishery Regulations. There was evidence that fishing with worms was a traditional method of fishing. The Court found that the prohibition against fishing with bait infringed upon Ezra Lefthand's treaty right to fish. The Court had to consider whether this prohibition was a justified infringement of a treaty right to fish.

The ban against live bait was part of a ban on taking any fish from the lake. Only catch and release fishing was allowed. This was done to maintain fish populations at a level that would ensure the population of fish did not decline. There was evidence that more fish die when caught and released if live bait is used because the fish take the bait deeper into their mouths. It was also noted that there were a number of other locations nearby where fishing with live bait was allowed. There was no consultation with the First Nation regarding the bait ban.

QUESTIONS FOR THOUGHT

1. Was there a “compelling and substantial” objective for the law that prohibited the use of bait? If so, what was it?
2. Was the ban of bait fishing consistent with the honour of the Crown and the special relationship between the Crown and First Nations? What factors suggest that the ban did or did not meet this test? Consider...
 - Was there as little infringement as possible to meet the objective of the legislation?
 - Was there consultation?
 - What sort of priority, if any, was given to the exercise of treaty fishing rights?





THE CASES

***R. v. COUILLONNEUR* [1996] S.J. No. 305**

Pierre Couillonneur, a member of the Canoe Lake First Nation entitled to fishing rights under treaty 10, was charged with fishing with a gill net smaller than allowed under the *Fisheries Act*. The Court found that this was an infringement of Pierre Couillonneur's treaty right to fish. The Court had to go on to consider if this infringement was justified.

Evidence showed that although there were no specific concerns about fish population levels in Canoe Lake (where Pierre Couillonneur was fishing) the restriction on gill net size was designed to prevent the capture of smaller fish. Allowing fish to reach a certain size before being caught helps to maintain fish population levels by allowing fish to mature and reproduce. There was evidence that the fish population levels had not always been stable and that at times in the past the population of certain species was very low.

There was also evidence that the restriction had not prevented members of the First Nation from being able to feed themselves, that most complied with the regulation and that conservation was in keeping with the traditional beliefs and philosophies of Aboriginal Peoples. Non-Aboriginal fishing was subject to much more restrictive rules including out-of-season and catch limit rules. There had been no consultation with the First Nation specifically on this regulation.

QUESTIONS FOR THOUGHT

1. Was there a "compelling and substantial" objective for the law that restricted the size of gill nets? If so, what was it?
2. Was the restriction on gill net size consistent with the honour of the Crown and the special relationship between the Crown and First Nations? What factors suggest that it did or did not meet this test? Consider...
 - Was there as little infringement as possible to meet the objective of the legislation?
 - Was there consultation?
 - What sort of priority, if any, was given to the exercise of treaty fishing rights?





DECISIONS OF THE COURTS

R. v. LEFTHAND

The Court found that the bait ban was passed for a “compelling and substantial objective” of conservation of the fish resources. However, the Court found that the bait ban could not be justified under the second step because it was inconsistent with the honour of the Crown for three reasons. First there was no consultation with the First Nation. Second the bait ban did not infringe as little as possible on the treaty right to fish. Third the bait ban did not give the priority to treaty fishing rights that would be consistent with the Crown’s special relationship with First Nations. The regulations allowed catch and release of fish purely for sport even though some fish would die as a result of that activity. The bait ban was not a justified infringement of the treaty right to fish and Ezra Lefthand was acquitted of the charge.

R. v. COUILLONNEUR

The Court found that the law was passed for the valid objective of conservation and was based on sound biological science and good resource management. The Court also decided that the law honoured the special trust relationship between Aboriginal Peoples and the government. The Court noted that although there was no consultation with the First Nation, treaty fishing rights were given priority over other uses and the restriction on gill net length infringed the treaty right as little as possible. All other methods could be lawfully used. Pierre Couillonneur was found guilty of the offence.





NOTES





LESSON FOUR

GOVERNMENT ACTIONS

RATIONALE

This lesson is designed to help students understand how government actions and the division of powers in the Constitution have impacted the exercise of treaty rights by First Nations. These government actions include legislation passed by the government and a 1930 amendment to the Constitution.

LEARNING OBJECTIVES

Knowledge/Content

- know that statute law is formal, written law established by governments
- know that in Canada law-making power is divided by the Constitution between the provinces and the federal government
- know that the Constitution gives the federal government law-making powers regarding “Indians and lands reserved for Indians” but that provincial laws do apply to First Nations in some situations
- know that the *Indian Act* is federal legislation that has been in existence since shortly after Canada became a country and understand some of the impact this legislation had on First Nations, particularly regarding treaty rights
- know that the *Natural Resources Transfer Agreements* resulted in a constitutional amendment in 1930 that impacted treaty hunting and fishing rights in the prairie provinces

Skills

- categorize the various legal jurisdictions of levels of government in Canada
- conduct research to gather specific data
- construct a timeline to organize data

Values

- understand that statutes evolve as the societal standard of norms and mores change
- understand that laws are used as a method of providing legitimacy for a particular approach to social policy of a government
- appreciate that laws reflect the values of those members of society possessing power



ACTIVITY: TIMELINE OF GOVERNMENT ACTIONS

PURPOSE

This activity is designed to introduce students to some of the actions taken by governments over the years relating to First Nations and the treaties and to have them see the evolution of governments' policies over time.

PROCEDURE

1. Distribute the *Handout: When Did it Happen?*
2. Have the students create a timeline by doing research to find the dates for some of the events listed.
3. Go over the timeline with the students and have the students try to identify the different government policies, listed below, that were dominant at different times...
 - nation-to-nation treaty relationship
 - assimilation and unique rights for First Nations as a transition until they became *civilized*
 - First Nations people not having the same rights as other citizens and First Nations people required to give up unique rights to gain rights of citizenship
 - concept of *citizen plus*
 - recognition that First Nations have unique rights in the Constitution
 - recognition of the right of First Nations to self-government

RESOURCES

Treaties and the Law: Information Backgrounder, Chapter 4 *Government Actions*

Report of the Royal Commission on Aboriginal People vol. 2, chapter 9 *The Indian Act* (Ottawa: Indian and Northern Affairs Canada, 1996) available at www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html





WHEN DID IT HAPPEN?

- federal government recognizes the right of First Nations to govern themselves in matters that are integral to their cultures, identities, traditions, languages and institutions, internal to their communities and related to their lands and their resources
- last treaty dealing with land in Saskatchewan signed
- enfranchisement legislation passed for the first time (legislation that allowed First Nations people to give up their rights to things like reserve land and treaty payments in return for having the same rights as other citizens)
- change to the Constitution based on the *Natural Resources Transfer Agreements* limited treaty hunting and fishing rights on the prairies to hunting and fishing for food and also gave this more limited right constitutional protection
- First Nations people given the right to vote in federal elections
- existing Aboriginal and Treaty rights recognized and affirmed in the Constitution
- first *Indian Act* passed
- legislation passed that automatically enfranchised a First Nations person who earned a university degree or became a doctor, lawyer or clergyman
- federal government meets with five Aboriginal groups and signs accords and framework agreements on housing, health, economic opportunities, negotiations and lifelong learning (Kelowna Accord)
- landmark Supreme Court of Canada case recognizing that Aboriginal peoples have rights based on the fact that they were living in Canada in organized societies before people came from Britain or Europe
- enfranchisement provisions were removed from the *Indian Act* (with the exception of the rules regarding women who married someone who was not defined as “Indian” in the *Indian Act*)
- federal government announces \$15 million to improve long-term economic viability of Primrose Lake Saskatchewan Métis communities (traditional Métis lifestyle of hunting and trapping had been disrupted when the government established a weapons range in the area and declared it off-limits for hunting and trapping)
- first legislation passed to prevent non-Aboriginal people from buying reserve lands or trespassing on reserve lands, to exempt First Nation lands from taxation, to prevent them from being taken in payment for debts and to limit who could live on reserve lands
- British government department in charge of *Indian Affairs* in Canada changed from being a branch of the military to being a branch of the public service





WHEN DID IT HAPPEN? ...CONTINUED

- first treaty dealing with land in Saskatchewan signed
- last time that the government explicitly adopted a policy of assimilating First Nations and ending their unique rights – “White Paper”
- legislation passed to impose elected government on First Nations
- federal government passes budget that indicates plans to spend considerably less than agreed to in the Kelowna Accord
- legislation passed forbidding the potlatch and the Tamanawas dance
- legislation passed requiring a licence from a government official before any funds could be solicited to support a legal claim by a First Nation
- Statute of Westminster passed by Britain officially recognizing Canada as an autonomous community with the right to control its own domestic and foreign affairs
- legislation passed that allowed a board to decide if a First Nation person should be enfranchised
- legislation passed requiring First Nations people to have a permit to sell any agricultural produce
- First Nations responded to the White Paper with the Red Paper in which they argued that First Nations people should not have to give up their rights as First Nations people in order to enjoy the same rights as other citizens (citizen-plus)
- restrictions on potlatch and soliciting removed
- Royal Proclamation recognizing the rights of the First Nations to the land they occupied and stating that only the Crown could acquire these rights from First Nations is signed
- Canada is created under the terms of the *British North America Act*
- evidence of Aboriginal civilizations in North America
- federal government announces that it will establish an Office of Native Claims to negotiate claims for land not covered by a treaty and for claims arising from the treaties





ANSWER KEY FOR TIMELINE ACTIVITY

10,000 BC - evidence of Aboriginal civilization in North America [*Treaty Negotiation Process* (Ottawa: Federal Treaty Negotiation Office, Indian and Northern Affairs Canada, November, 1994)]

1763 - The Royal Proclamation [available at www.canadiana.org/citm/themes/constitution/constitution6_e.html#proclamation]

1830 - British government department in charge of Indian Affairs in Canada changed from being a branch of the military to being a branch of the public service

1850 - first legislation passed to prevent non-Aboriginal people from buying reserve lands or trespassing on reserve lands, to limit who could live on reserves, to exempt First Nation lands from taxation and prevent them from being taken in payment for debts [*An Act for the better protection of the Lands and Property of the Indians in Lower Canada*, Statutes of the Province of Canada 1850, chapter 42; *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*, Statutes of the Province of Canada 1850, chapter 74.]

1857 - enfranchisement legislation passed for the first time [*An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*, S.C. 1857, chapter 26]

1867 - Canada is created under the terms of the *British North America Act* [available at www.justice.gc.ca/en/ps/const/loireg/p1t1-1.html]

1869 - legislation passed to impose elected government on First Nations [*An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, S.C. 1869, chapter 6.]

1871 - first treaty dealing with land in Saskatchewan signed [Treaty 2, although it covers land in Saskatchewan no First Nations in Saskatchewan are parties to it so 1874 and Treaty 4 would also be an acceptable answer]

1876 - first *Indian Act* passed [*An Act to amend and consolidate the laws respecting Indians*, S.C. 1876, chapter 18]

1876 - legislation passed that automatically enfranchised a First Nations person who earned a university degree or became a doctor, lawyer or clergyman [*An Act to amend and consolidate the laws respecting Indians*, S.C. 1876, chapter 18]

1881 - legislation passed requiring First Nations people to have a permit to sell any agricultural produce [amendment to 1876 *Indian Act*]





ANSWER KEY FOR TIMELINE ACTIVITY ...CONTINUED

1884 - legislation passed forbidding the potlatch and the Tamanawas dance [S.C. 1884, c.28]

1906 - last treaty dealing with land in Saskatchewan signed [Treaty 10]

1920 - legislation passed that allowed a board to decide if a First Nation person should be enfranchised [An Act to amend the Indian Act, S.C. 1919-1920, chapter 50, section 3]

1927 - legislation passed requiring a licence from a government official before any funds could be solicited to support a legal claim by a First Nation

1930 - change to the Constitution based on the *Natural Resources Transfer Agreements* limited treaty hunting and fishing rights on the prairies to hunting and fishing for food and also gave this more limited right constitutional protection [Constitution Act, 1930 R.S.C. 1985, Appendix II, No.26 section 1]

1931 - Statute of Westminster passed by Britain officially recognizing Canada as an autonomous community with the right to control its own domestic and foreign affairs

1951 - enfranchisement provisions were removed from the *Indian Act* (with the exception of the rules regarding women who married someone who was not defined as “Indian” in the *Indian Act*) [S.C. 1951, c.29]

1951 - restrictions on potlatch and soliciting removed [S.C. 1951, c.29]

1960 - First Nations people given the right to vote in federal elections

1969 - last time that the government explicitly adopted a policy of assimilating First Nations and ending their unique rights – White Paper [*Statement of the Government of Canada on Indian policy - The White Paper - 1969* (Ottawa: Indian Affairs and Northern Development, 1969) available at www.ainc-inac.gc.ca/pr/lib/phi/histlws/cp1969_e.html]

1970 - First Nations responded to the White Paper with the Red Paper in which they argued that First Nations people should not have to give up their rights as First Nations people in order to enjoy the same rights as other citizens (citizen-plus) [Indian Association of Alberta]

1973 - landmark Supreme Court of Canada case recognizing that Aboriginal peoples have rights based on the fact that they were living in Canada in organized societies before people came from Britain or Europe [*Calder v. British Columbia (Attorney General)*] [1973] S.C.R. 313]

1974 - federal government announces that it will establish an Office of Native Claims to negotiate claims for land not covered by a treaty and for claims arising from the treaties





ANSWER KEY FOR TIMELINE ACTIVITY ...CONTINUED

1982 - existing Aboriginal and Treaty rights recognized and affirmed in the Constitution

1995 - federal government recognizes the right of First Nations to govern themselves in matters that are integral to their cultures, identities, traditions, languages and institutions, internal to their communities and related to their lands and their resources [*Federal Policy Guide – Aboriginal Self-Government* (Ottawa: Indian Affairs and Northern Development, 1995) available at www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html]

2005 - federal government meets with five Aboriginal groups and signs accords and framework agreements on housing, health, economic opportunities, negotiations and lifelong learning (Kelowna Accord)

2006 - federal government passes budget that indicates plans to spend considerably less than agreed to in the Kelowna Accord

2007 - federal government announces \$15 million to improve long-term economic viability of Primrose Lake Saskatchewan Métis communities (traditional Métis lifestyle of hunting and trapping had been disrupted since 1953 when the government established a weapons range in the area and declared it off-limits for hunting and trapping)



ACTIVITY: LAW-MAKING POWERS, FIRST NATIONS AND TREATIES

PURPOSE

This activity is designed to help students understand how the division of powers impacts the treaty rights of First Nations.

PROCEDURE

1. Have the students read “First Nations Treaty Rights and the Federal System” in *Treaties and the Law: Information Backgrounder*, Chapter 4 *Government Actions*.
2. Have students use the *Quiz* to test their knowledge. The *Quiz* can also be used as a pre-test.
3. Go over the *Quiz* with the students using the *Teacher’s Answer Key*.





HANDOUT

QUIZ

FIRST NATIONS TREATY RIGHTS AND THE FEDERAL SYSTEM

1. The section of the *Indian Act* that makes more provincial laws apply to First Nations ...
 - a. allows provincial laws to take away from treaty rights
 - b. gives effect to some provincial laws that would otherwise not be valid because they relate to “Indians and lands reserved for Indians”
 - c. allows provinces to make laws intended to apply to the rights Aboriginal people have as Aboriginal people
 - d. all of the above
2. The federal power to make laws relating to “Indians and lands reserved for Indians”...
 - a. gives the federal government exclusive powers to pass laws concerning what the courts have called “Indianness”
 - b. gives the federal government powers to pass laws dealing with things like taxation, education and Wills of First Nations
 - c. does not prevent the provinces from also passing laws that apply to First Nations as long as they do not deal with the rights of Aboriginal peoples as Aboriginal peoples
 - d. all of the above
3. If the federal government had the power to pass laws regarding calves and the provinces had the power to pass laws regarding cattle...
 - a. provinces could pass any law regarding cattle but federal laws concerning calves would have priority
 - b. provinces could pass any law concerning cattle as long as the law only applied within the province
 - c. provinces could pass any law regarding cattle except laws regarding calves
 - d. all of the above





QUIZ ...CONTINUED

4. Under the Constitution “lands reserved for the Indians” includes...
 - a. any lands set aside for “Indians”
 - b. only lands that are reserves under the *Indian Act*
 - c. only lands set aside under the treaties
5. In the Constitution the word “Indian” means...
 - a. the original inhabitants of Canada and their descendants excluding those who are Inuit or Métis
 - b. people who come within the definition of “Indian” in the *Indian Act*
 - c. the original inhabitants of Canada and their descendants
6. The federal government’s exclusive power to pass laws regarding “lands reserved for Indians” gives it the power to pass laws regarding...
 - a. who can have an interest in reserve lands
 - b. how reserve land can be used
 - c. how interests in reserve land can change hands
 - d. all of the above
7. Provincial laws will not apply if they deal with...
 - a. minimum wages for workers on reserves
 - b. which spouse has the right to possess a matrimonial home located on a reserve
 - c. ordering a spouse who is a member of a First Nation to pay spousal support to an ex-spouse who is also a member of a First Nation
8. The federal government’s exclusive power to pass laws regarding “Indians” means that only the federal government can pass laws dealing with...
 - a. education of First Nations peoples
 - b. traffic on reserves
 - c. treaty rights





QUIZ ...CONTINUED

9. The Canadian Constitution...

- a. divides the law-making powers between the federal government and the provinces
- b. gives the federal government the authority to decide what law-making powers to give the provinces
- c. gives federal laws priority if both the provinces and the federal government pass a law concerning the same thing

10. Because First Nations peoples are "Indian" under the Constitution...

- a. provincial laws do not apply to them
- b. provincial laws do not apply to them when they are on reserves
- c. provincial laws cannot take away from their rights as Aboriginal people





QUIZ

FIRST NATIONS TREATY RIGHTS AND THE FEDERAL SYSTEM

1. The section of the *Indian Act* that makes more provincial laws apply to First Nations ...
 - a. allows provincial laws to take away from treaty rights
 - b. gives effect to some provincial laws that would otherwise not be valid because they relate to “Indians and lands reserved for Indians”**
 - c. allows provinces to make laws intended to apply to the rights Aboriginal people have as Aboriginal people
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 - a. gives the federal government exclusive powers to pass laws concerning what the courts have called “Indianness”
 - b. gives the federal government powers to pass laws dealing with things like taxation, education and Wills of First Nations
 - c. does not prevent the provinces from also passing laws that apply to First Nations as long as they do not deal with the rights of Aboriginal peoples as Aboriginal peoples
 - d. all of the above**
3. If the federal government had the power to pass laws regarding calves and the provinces had the power to pass laws regarding cattle...
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 - b. provinces could pass any law concerning cattle as long as the law only applied within the province
 - c. provinces could pass any law regarding cattle except laws regarding calves**
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QUIZ ...CONTINUED

4. Under the Constitution “lands reserved for the Indians” includes...
 - a. **any lands set aside for “Indians”**
 - b. only lands that are reserves under the *Indian Act*
 - c. only lands set aside under the treaties
5. In the Constitution the word “Indian” means...
 - a. the original inhabitants of Canada and their descendants excluding those who are Inuit or Métis
 - b. people who come within the definition of “Indian” in the *Indian Act*
 - c. **the original inhabitants of Canada and their descendants**
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 - a. who can have an interest in reserve lands
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7. Provincial laws will not apply if they deal with...
 - a. minimum wages for workers on reserves
 - b. **which spouse has the right to possess a matrimonial home located on a reserve**
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8. The federal government’s exclusive power to pass laws regarding “Indians” means that only the federal government can pass laws dealing with...
 - a. education of First Nations peoples
 - b. traffic on reserves
 - c. **treaty rights**





QUIZ ...CONTINUED

9. The Canadian Constitution...
- a. **divides the law-making powers between the federal government and the provinces**
 - b. gives the federal government the authority to decide what law-making powers to give the provinces
 - c. gives federal laws priority if both the provinces and the federal government pass a law concerning the same thing
10. Because First Nations peoples are “Indian” under the Constitution...
- a. provincial laws do not apply to them
 - b. provincial laws do not apply to them when they are on reserves
 - c. **provincial laws cannot take away from their rights as Aboriginal people**





TREATY PROMISES

RATIONALE

This lesson is designed to help students understand the promises made in the numbered treaties that cover Saskatchewan and how treaty and Aboriginal rights are part of life today in Canada.

LEARNING OBJECTIVES

Knowledge/Content

- know that sources of law include the treaties
- know that the written text of the treaties does not reflect all that was agreed to in the treaties
- know the rights and obligations both the Crown and the First Nations undertook when negotiating the numbered treaties
- know some of the ways the existence of the treaty promises has influenced and continues to influence peoples' lives in Saskatchewan

Skills

- investigate the treaty promises contained in the numbered treaties that cover Saskatchewan
- conduct research to gather specific data

Values

- appreciate the benefits both parties received from the numbered treaties that cover Saskatchewan
- appreciate that treaties continue to give benefits and create obligations today just as they have since they were first negotiated

TEACHER INFORMATION

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.



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. 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, and 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. 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.

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. The government’s objective in entering into these treaties was to allow settlement of the west. The circumstances surrounding the signing of the treaties, the negotiations that took place and promises that were made are unique to each treaty. There are however some similarities between the written text of the treaties.

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. 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. The First Nations also agreed to maintain peaceful relations with settlers. For this they would need the power to govern. 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. Today First Nations regard themselves as self-governing.

LANDS AND RESOURCES

From the government’s point of view, one of the reasons the numbered treaties were made was to deal with the First Nation rights to the land they occupied, so that the lands could be settled as part of Canada. The written text of all the treaties that cover Saskatchewan 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. The Supreme Court has said that the traditional lands of the First Nations were “exchanged” for the other promises in the treaties.

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. When considering a treaty a court must consider “...the context in which the treaties were negotiated, concluded and committed to writing.” Courts will also consider oral promises and interpret the words in a treaty as they would have been understood by the First Nations when the treaties were signed. 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.

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 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. 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.

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, calculate how much land should be included by multiplying the number of members by the number of acres each person was to get and then survey the area. 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.

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).



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 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.”

When the treaties were negotiated both the Crown and the First Nations indicated that the purpose of the promises concerning education was 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.” For example, 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 Nations’ understanding of education at the time the treaties were negotiated was that education was a holistic life-long process.

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.

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.”

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.





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.” 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.

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. 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.

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.

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 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. 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.

ACTIVITY: TREATY PROMISES

PURPOSE

This activity is designed to help students learn about the treaty promises that come from the numbered treaties covering Saskatchewan.

PROCEDURE

1. Divide the students into five groups and have each group make a list of the promises in one of the numbered treaties that cover Saskatchewan (Treaties 4, 5, 6, 8 and 10). Encourage the students to consider the explicit promises as well as the promises that would be understood by the very nature of the treaty process; i.e. parties agree to live in peace together, negotiate differences and consult with each other, share the land and resources, allow First Nations to continue to have their unique identity.



2. Use the lists that the students make to develop a comprehensive list of all the promises and record this list on the board.
3. Use the teacher information to start a discussion about what each party might have thought the promises meant. Have the students consider...
 - that the treaties recorded oral agreements, that the record was made in a language that was foreign to the First Nations and that the written record did not always include the whole agreement
 - that First Nations and the representatives of the Crown understood certain concepts very differently because of very different worldviews

RESOURCES

Treaty texts available from Indian and Northern Affairs Canada at www.ainc-inac.gc.ca/pr/trts/hti/site/trindex_e.html.

ACTIVITY: COMPARING TREATIES

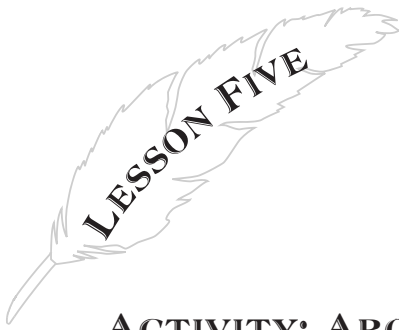
PURPOSE

This activity is designed to help students further understand the treaties with First Nations by comparing them to world treaties negotiated during the same time period.

PROCEDURE

1. Have students look at a treaty such as the Treaty of Paris, the Treaty of Utrecht or the Treaty of Versailles and compare it to one of the numbered treaties. Have the students focus on...
 - Why were the two different treaties negotiated? i.e. to achieve peace/ end a war/ determine how to share the land and resources etc.
 - What kinds of formalities were used for the two different treaties?
 - What promises were made in the two different treaties? i.e. keeping the peace, transfer of lands, religious rights/payments/continued hunting and fishing rights/ education etc.
2. Once the students have looked at both of the treaties have the students consider...
 - To what extent did the two treaties accomplish the goals set out in the treaties?
 - In what ways are the two treaties similar and in what ways are they different?





ACTIVITY: ABORIGINAL AND TREATY ISSUES IN THE NEWS

PURPOSE

This activity is designed to help students understand the legal basis of Aboriginal and treaty issues in the news.

PROCEDURE

1. Have the students look for news items that concern Aboriginal issues. Students could look at current news sources or do research into items that have been in the news in the past.
2. Have the students consider the relationship between the issue in the news and Aboriginal and treaty rights. Ask the students to consider...
 - Were any Aboriginal or treaty rights involved in the issue?
 - If so, what rights were claimed?
 - On what basis were the rights claimed? (Aboriginal rights, based on the common law and prior occupation, or treaty rights based on a negotiated agreement)
 - If the rights are based on common law Aboriginal rights, could a treaty resolve the dispute?
3. Some of the following issues in the news could be used as the starting point for a discussion...
 - First ministers meeting on Aboriginal issues (November 2005)
 - dispute between Grassy Narrows First Nation and Weyerhaeuser and Abitibi-Consolidated over logging on the First Nations' reserve (February 2006)
 - federal government transfer of energy royalties to a trust fund controlled by Alberta's Samson Cree Nation (February 2006)
 - Conservative government's plan to bring in main measures of the controversial *First Nations Governance Act* that was initially proposed by the Liberals but abandoned after widespread protest from Aboriginal organizations (January 2006)
 - Mackenzie Delta energy development and the interests of the Dene Tha (Aboriginal peoples who live in the area) (February 2006)
 - Six Nations' occupation of a development site in Caledonia, Ontario (April 2006)
 - Supreme Court of Canada upholds the right of Mi'kmaq and Maliseet people to take wood from Crown lands for personal use including making furniture, building a home and for firewood (December 2006)





NOTES

