

Treaties of Peace and Friendship

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What Are Treaties?

- Solemn agreements between two parties, typically Nations or governments, meant to govern the relationship between them.
- Contemporary examples are international treaties to which Canada is a signatory; treaties that address issues such as trade, taxation, extradition and military alliances such as NATO, the North Atlantic Treaty Organization.

Pre-European Arrival

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 - Established and Recognized Territories
 - Established Nations Carrying On Military Alliances and Trading Relationships

European Arrival

- Quest for Natural Resources
- Terra Nullius and Doctrine of Discovery
 - In the early sixteenth century, the influence of the church on the affairs of Europe was still significant.
 - Papal Bulls issued by the Vatican in the fifteenth century gave Christian explorers the right to claim lands they "discovered" and to claim to those lands for Christian Monarchs.
 - Land that was not inhabited by Christians could be "discovered", and thereafter, claimed on behalf of the respective monarchies.
 - The Papal Bulls also decreed that "pagan" inhabitants could be spared if they converted. Otherwise, they could be enslaved or killed.

Colonization Period

- Competition for Resources and Territory
- Colonial Wars
 - Need for Indigenous Military Alliances
- Fur Trade
 - Need for Trading Partners
- Commencement of Treaty Relationships with Indigenous and European Nations
 - An early example is the Two Row Wampum between Mohawks and Dutch settlers

Mi'kmaq and Wolastoqiyik Treaties

- Initially allied with the French.
- After the defeat of the French in British North America, the British sought peaceful relations.
- Series of Pre-Confederation Treaties from 1725 to 1779.
- Peace and Friendship Treaties to ensure either alliance or neutrality.
- Provisions to ensure “Hunting and Fishing as Usual”, including provisions for trade.

Royal Proclamation of 1763

- "And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds. ..."

Royal Proclamation of 1763 (cont'd)

- Designed to ensure orderly westward settlement.
- Relations with Indians to be managed through the central colonial government and later, the federal government and Indian lands now may only be surrendered or sold to them.
- Established treaty process that led to Pre-Confederation Treaties such as Robinson-Huron, Williams and Douglas Treaties as well as the Numbered Treaties.

Treaty of Niagara

- Royal Proclamation was considered ratified as a Treaty by Indigenous Nations at a large gathering of Nations at Niagara, Upper Canada in 1764.
- Records indicate representation from Nations as far east as “the Micmac of Nova Scotia.”
- Ratification of the Royal Proclamation often referred to as the Treaty of Niagara.

Expanding European Settlement

- As early as the mid-eighteenth century, unauthorized encroachments and disregard for Indigenous territorial boundaries by European settlers already occurring.
- Influx of United Empire Loyalists after American Revolution.

Declining Significance of Indigenous Alliances

- Decline of the Fur Trade
 - Increasing economic activity by settlers such as farming and resource extraction meant Indigenous people seeking recognition of their rights and title were now seen as hindrances to development.
- Declining Populations
 - Disease
 - Alcohol
- Diminished Role as Military Allies after the War of 1812.
 - Relations with Indigenous nations, which had always been regarded as primarily diplomatic and handled by military colonial officials, had been transferred to civil authorities by 1830.

Nineteenth Century Policy

- Indigenous Nations becoming increasingly dispossessed and increasingly impoverished.
- As noted in the RCAP report of 1996, focus turned to “...the process of dismantling Aboriginal nations and integrating their populations into the burgeoning settler society around them.”
- Theories of racial and cultural superiority were taking root and forming the basis of Indian policy.
- Churches were enlisted to assist the federal government in achieving their goals.

Confederation

- British North America Act (now known as Constitution Act, 1867)
 - Section 91 sets out federal powers, while section 92 sets out provincial powers.
 - S. 91.24 – “Indians, and Lands Reserved for Indians” falls within federal jurisdiction.
- Allowed for the first *Indian Act* in 1871.

Indian Act

- Forbade First Nations from forming political organizations.
- Prohibited anyone, First Nation or non-First Nation, from soliciting funds for First Nation legal claims without special license from the Superintendent General. (this 1927 amendment granted the government control over the ability of First Nations to pursue land claims).

Sylliboy (1929)

- Grand Chief Sylliboy charged with illegal possession of muskrat pelts, contrary to Nova Scotia Lands and Forests Act.
- Defence was that the Treaty of 1752 protected his right to hunt.
- In reaffirming the Doctrine of Discovery, Justice Patterson of the Inverness County Court, who presided over Sylliboy, stated the following with regard to the Mi'kmaw capacity to enter into treaties:

Sylliboy (cont'd)

“‘Treaties are unconstrained Acts of independent powers.’ But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.”

White and Bob(1965)

- Two individuals from the Snuneymuxw First Nation near Nanaimo, BC were charged under BC's Game Act, with illegal possession of six deer carcasses during a closed season, and with hunting without a permit
- Their defense was that they were entitled to hunt for food by virtue of the treaty their community had with the Crown which was one of fourteen treaties known as the Douglas treaties, and by virtue of s. 87 (now s. 88) of the Indian Act
- Acquitted by the BC Court of Appeal and the SCC denied the Crown's leave to appeal.

Importance of White and Bob

- The first case to recognize the validity of the Douglas treaties in Canada.
- It is said that White and Bob foreshadowed the Calder decision in referencing Aboriginal title.
- In addressing the Royal Proclamation of 1763, the Court said that it is declaratory of Aboriginal rights and was not a source of rights and that the Douglas Treaties affirmed rights and were not the source of the rights.

Constitution Act, 1982

- Repatriation of Canada's Constitution.
- Most well-known for the Charter of Rights and Freedoms.
- For Indigenous people, the inclusion of s. 35(1) is most important. It states:

“The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.”
- Gave constitutional protection to Aboriginal and treaty rights.

Simon (1985)

- Simon, a Mi'kmaq from Nova Scotia, was charged with illegal possession of a firearm, contrary to the Section 150(1) of Nova Scotia's Lands and Forest Act.
- Simon argued that he was exercising his treaty right to hunt pursuant to the Treaty of 1752 and that the possession of a firearm was incidental to his right to hunt.
- Simon argued that the treaty right, together with s. 88 of the Indian Act, was complete defense to the charge. SCC agreed and overturned lower court decisions.

Importance of Simon

- For the Mi'kmaq, it was the first modern legal recognition of one of their Peace and Friendship Treaties and vindication for their late Grand Chief, Gabriel Sylliboy.
- The Crown relied on the 1929 Sylliboy decision arguing that the Mi'kmaq did not have the capacity to enter into a treaty. The SCC dismissed this argument.

Importance of Simon (cont'd)

- The Court defined Indigenous treaties as neither treaties in the international law sense, not simply contracts but “Sui Generis”, meaning “of their own kind”.
- Because of a lack of written records by the Mi'kmaq, it was impossible to establish direct lineage with treaty signatories and so the Court determined that being a registered Indian living in the same general area as the treaty signatories was enough for Simon to be a treaty beneficiary.

Importance of Simon (cont'd)

- The Court reaffirmed the principle it set out in a decision known as Nowegejick that, given issues of language, interpretation and the benefit of written history held by the Crown, “...Indian treaties should be given a fair, large and liberal construction in favour of the Indians”.

Importance of Simon (cont'd)

- The Court rejected the Crown's argument that the Treaty was not valid because it did not contemplate the surrender of land.
- The Court determined that a liberal interpretation of treaties meant that it should not restrict the methods of exercising the right to those in use in 1752.
- The Court said that harvesting rights such as hunting, trapping and fishing includes those activities that are incidental to those rights.

Sparrow (1990)

- Sparrow was a member of the Musqueam band of British Columbia.
- He was charged pursuant to the federal Fisheries Act with fishing with a drift net larger than permitted under the Band's food fishing license.
- He asserted in his defense the Aboriginal right to fish and that the net length restriction contained in the Band's licence was invalid in that it was inconsistent with s. 35(1).
- SCC agreed with Sparrow and acquitted him.

Importance of Sparrow

- Court provided an analysis for lower courts to analyze the constitutional question that arose in the case.
- Test included a determination of whether a right exists and if so, can the government justify the infringement.
- In addition to the test it set out, it was the first time the Supreme Court of Canada addressed the meaning of s. 35(1).
- Because it is a constitutional provision, the purpose of s. 35(1) is to limit government power and its adverse impacts on Aboriginal rights.
- However, rights aren't absolute and can be infringed if government can establish justification.

Important Principles from Sparrow

- “Existing Aboriginal rights” means rights that were in existence when Constitution Act, 1982 came into effect. Rights could have been extinguished prior to 1982 where there is a “clear and plain intention to do so” by government.
- S. 35(1) does not revive previously extinguished rights.
- Aboriginal rights are not “frozen in time” meaning the phrase “existing aboriginal rights” must be interpreted flexibly so as to permit their evolution over time, i.e., rights may be exercised in a contemporary manner.

Important Principles from Sparrow

- In addressing interpretation of s. 35(1), the court said that a “generous and liberal” interpretation is required.
- The court cited several earlier decisions and concluded that the following should guide s. 35(1) interpretation: “... the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.”

Re-affirmation of Doctrine of Discovery in Modern Canadian Law

“It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.”

Badger (1996)

- In addition to extending the Sparrow test to treaty cases, it also set out important principles established from previous case law and prescribed their use in addressing Crown-Indigenous treaties.

Principles of Treaty Interpretation (Badger)

1. Treaty represents an exchange of solemn promises between the Crown and various “Indian nations”.
2. Honour of the Crown is always at stake and the Crown must be assumed to intend to fulfil its promises.
 - No appearance of “sharp dealing” will be sanctioned.

Principles of Treaty Interpretation (Badger)

3. Any ambiguities or doubtful expressions must be resolved in favour of the Indians and any limitations restricting the rights of Indians under treaties must be narrowly construed.
4. The onus of establishing strict proof of extinguishment of a treaty or aboriginal right lies upon the Crown.

Treaty Principles and Legislation (Badger)

With respect to application of legislation, the SCC said “...it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing.”

Marshall (1999)

- Marshall was a Mi'kmaq charged with the selling of eels without a licence, fishing without a licence and fishing during the close season with illegal nets, contrary to fisheries regulations set out under the federal Fisheries Act.
- Marshall claimed a treaty right to catch and sell fish under the Treaties of 1760-61 that exempted him from compliance with the regulations.
- SCC agreed with Marshall and acquitted him.

SCC Disposition in Marshall

- The Court concluded that the lower courts failed in the face of ambiguity, to go beyond the text of the treaty to look at historical and cultural context and the understandings of the parties.
- Regarding context, the Court said “Where a treaty was concluded verbally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written terms.”

SCC Disposition in Marshall (cont'd)

- In giving a modern context to the right to trade, the Supreme Court found that there was no right to “an open-ended accumulation of wealth” but rather to a “moderate livelihood”, and could be subject to justifiable regulation.
- The Supreme Court therefore found that the regulations under which Marshall was charged unjustifiably infringed on his treaty rights and were therefore of no force and effect and Marshall was acquitted.

Importance of Marshall

- The first historical treaty right to trade recognized in Canadian law.
- Significant impact on an established Canadian industry, the Atlantic fishery.
- Highlighted the perils for government and business of ignoring Indigenous rights.
- Led to a negotiation process on treaty implementation long sought by the Mi'kmaq.

West Nova Fishermen's Coalition Application re. Marshall

- Two months after Marshall, the Supreme Court addressed an application by the Southwest Nova Fishermen's Coalition for a re-hearing of the appeal in Marshall.
- In rejecting the application, the Supreme Court issued a clarification of Marshall which it was careful to point out, was not a “clarification”
- Referred by some as “Marshall II” and the original decision as “Marshall I”.

Relevance of the WNFC Application Decision

In reiterating Canada's authority to regulate the treaty right in certain circumstances, the SCC said:

“The paramount regulatory objective is conservation and responsibility for it is placed squarely on the minister responsible and not on the aboriginal or non-aboriginal users of the resource. The regulatory authority extends to other compelling and substantial public objectives which may include economic and regional fairness, and recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups.”

WNFC Application

- Decision in WNFC must be read against the Badger Test and the Duty to Consult
- While DFO Retains a limited power to regulate the Treaty Fishery, it's an infringement that needs to be justified.
- Consultation must occur before any regulations or laws that impact rights.

Marshall and Bernard Case (2005)

- The Supreme Court of Canada dealt with two cases with identical facts, identical defenses and very similar lower court rulings.
- Marshall involved 35 Mi'kmaq loggers from Nova Scotia charged with cutting timber on Crown lands without authorization.
- Bernard, a Mi'kmaq from New Brunswick, was also charged with cutting timber on Crown lands without authorization.
- Both Bernard and the 35 loggers claimed Aboriginal title and the right to harvest and sell timber pursuant to the Treaty of 1760-61, as their defence.

SCC Disposition in Marshall and Bernard

- The court issued a very narrow ruling with respect to Aboriginal title, which it seemed to reverse in the Tsihlqot'in decision in 2014 but with respect to the treaty defence, it found that, while the Treaty of 1760-61 did permit harvest and sale of some wood products, it did not confer a treaty right to commercial logging.

Important Principles from Marshall and Bernard

- The Marshall decision of 1999 viewed the “truckhouse” provision of the treaty as a recognition of a right to trade but said “Nothing in the wording of the truckhouse clause comports a general right to harvest or gather all natural resources then used.”
- The court emphasized that the focus is not on what products were used, but on what trading activities were in the contemplation of the parties at the time the treaties were made.

Haida Nation (2004)

- Haida Nation is not a treaty case but the SCC established a Crown duty to consult with Indigenous people where there is potential for adverse impacts on lands or resources subject to an Indigenous claim.
- The duty to consult is grounded in the principle of the honour of the Crown.
- This duty rests with the Crown and not development proponents.

Haida Nation (cont'd)

- The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.

Mikisew Cree Nation(2005)

- SCC extended the duty to consult to treaty rights.
- Even though the Crown has a treaty right to take up land, it still has an obligation to act honourably, which may trigger a duty to consult and in some cases, accommodate, depending on the impact on the treaty rights in question.
- The honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights).

Negotiations

- Treaty negotiation processes in all 3 Maritime provinces.
- In NS, the three parties set a target of six years after the signing of the Framework Agreement in 2007 to negotiate a Memorandum of Understanding (MOU) and then an Accord three years after an approved MOU. These targets have not been met but negotiations continue with smaller agreements achieved in areas such as resource management and lands and protected areas.

Truth and Reconciliation Commission Final Report: Calls to Action

45. We call upon the Government of Canada, on behalf of all Canadians, to jointly develop with Aboriginal peoples a Royal Proclamation of Reconciliation to be issued by the Crown. The proclamation would build on the Royal Proclamation of 1763 and the Treaty of Niagara of 1764, and reaffirm the nation-to-nation relationship between Aboriginal peoples and the Crown. The proclamation would include, but not be limited to, the following commitments:

Truth and Reconciliation Commission Final Report: Calls to Action (cont'd)

- i. Repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and terra nullius.
- ii. Adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples (which calls for “free, prior and informed consent” of Indigenous peoples, over matters that affect them) as the framework for reconciliation.

Truth and Reconciliation Commission

Final Report: Calls to Action (cont'd)

- iii. Renew or establish Treaty relationships based on principles of mutual recognition, mutual respect, and shared responsibility for maintaining those relationships into the future.
- iv. Reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements.

UN Declaration on the Rights of Indigenous Peoples (2007, 2021)

- Free, prior and informed consent required before implementing laws that affect them (Article 19), and for projects affecting their lands or resources (Article 32. 2).
- Right to lands and their resources within their traditional territories, including right to own, use, develop and control those lands and territories (Article 26).
- Right to recognition, observance and enforcement of treaties (Article 37).



Welal'ioq