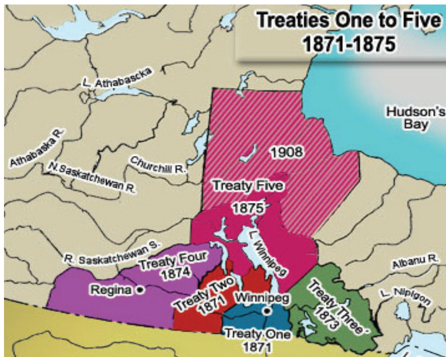
Understanding Canadian Aboriginal Law



What is a Treaty?

The Supreme Court of Canada in the Badger case defines a treaty as *"an exchange of solemn promises…whose nature is sacred".* Treaties are more than just contracts or real estate deals; they are nation-to-nation agreements.

What is a treaty?

Not all treaties are the same. Generally speaking, First Nations agreed by treaties to peace with settler governments and to give up some land rights. In exchange, the British (and later Canadian) governments promised the First Nations that certain social, economic and political rights would be protected and respected.

History of treaties in Canada

Pre-contact: Before the arrival of Europeans, First Nations entered into treaties with each other.

Post-contact: After the arrival of Europeans, a number of "peace and friendship" and some treaties concerning land were signed.

Post- Confederation: About 150 treaties were signed between 1867 and 1923, and many of these treaties affected large areas of land.

Included in this number are "the Numbered Treaties." There were 11 numbered post-Confederation treaties signed between 1870 and 1921, including five in Manitoba.

Modern Treaties: These were signed after the Supreme Court decision in the Calder case (1973). These mostly cover areas of BC and Quebec not previously covered by treaties.

The treaty making process

The terms of each treaty were negotiated by representatives from the British and Canadian governments and the First Nations. For the government, primary goals were to secure allegiance or neutrality and to extinguish Aboriginal title while the First Nations sought to protect their land, political and other rights and livelihood.

The treaty making processes often resulted in unfairness to Aboriginal peoples. There were inequalities in the positions of the Aboriginal leaders and the government negotiators. The written treaties often did not include oral promises made to the First Nations. Finally, many treaties have not been honoured.

What are treaty rights?

Treaty rights stem from the promises that governments made in treaties. These rights can include, among others, hunting and fishing rights, healthcare and education benefits, and reserve lands. Treaty rights are collective or communal rights that can be enjoyed by an individual but belong to the community.

Can treaty rights be taken away?

Section 35 of the Constitution Act, 1982 recognizes and affirms existing treaty rights of the Aboriginal peoples of Canada. Therefore, treaties have constitutional status, which means they are protected as a part of the legal foundation of Canada. The treaty rights cannot be altered unless the government has a compelling and substantial legislative objective. As well, the government is now required to consult with First Nations who are parties to the treaty before making future changes to treaty rights and compensate for losses experienced.

For more Information

Olthius, Kleer, Townshend, Aboriginal Law Handbook: 3rd Edition (2008)

Treaty Relations Commission of Manitoba

http://www.trcm.ca

Contents of all treaties available at Indian and Northern Affairs website

http://www.ainc-inac.gc.ca/al/hts/tgu/index-eng.asp

Grand Council of Treaty 3 website

http://www.gct3.net/

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What is a Land Claim?

What is an Aboriginal land claim?

Aboriginal peoples have a special relationship to land that involves not only their historic occupation of the land, but also Aboriginal spirituality, cultural practices, livelihood and economic self-sufficiency.

Aboriginal title is a legal term that describes the right of groups to exclusively occupy and use the land covered by the title as they wish, as long as the use protects the ability of future generations to enjoy the land. Where treaties have not extinguished Aboriginal title, this right still exists. In areas covered by treaties, Aboriginal title exists on reserve land. Additionally, Aboriginal peoples often retain Aboriginal rights to use Crown land even if it is not subject to Aboriginal title.

Disputes can arise when Aboriginal title is not recognized. For example, First Nations may have lost reserve lands when forced to move or they may never have been given the per person allotments promised by the treaties. These disputes are called land claims. Claims are filed with the federal or provincial governments, resulting in negotiations between the parties. In addition, these disputes may end up in court.

Comprehensive claims

One type of land claim is called a comprehensive claim. These claims involve land in areas where treaties have not been signed. Large areas of land are often involved in these claims. Many comprehensive claims have been made in British Columbia.

These claims arise because Aboriginal title has not been extinguished on these lands. As a result, comprehensive claims are resolved through the negotiation of modern-day treaties. These negotiations are complex, intense and take a long time to complete.

Concluded agreements contain terms involving rights to control and use land and natural resources. The agreements are not without controversy as many interpret them as vehicles to extinguish Aboriginal rights, including title.

Specific claims

The second types of claims that arise in Canada are called specific claims. These claims often result from a failure to fulfill promises made in the historic treaties. For example, First Nations may have lost reserve lands when forced to move or they may never have been given the per person allotments promised by the treaties. Specific claims do not always involve land and can arise, for example, from a failure of government to properly manage Aboriginal funds and assets.

Specific claims are resolved through the negotiations of settlements. The negotiations are arbitrated by the Specific Claims Tribunal. The Tribunal has the power to grant monetary compensation up to $150 million, but cannot order other compensation, such as the return of lands.

Treaty Land Entitlement claims are a form of specific claims that address the failure of the government to provide the reserve lands promised under a treaty. Some of these claims have been settled in Manitoba but most have not.

For more Information

Report of the Royal Commission on Aboriginal Peoples, http://www.ainc-inac.gc.ca/ap/rrc-eng.asp

Specific Claims Tribunal Act, S.C. 2008, c. 22.
Outstanding Business: A Native Claims Policy, 1982, PDF version at http://www.ainc-inac.gc.ca/al/ldc/spc/plc/plc-eng.asp

Olthius, Kleer, Townshend, *Aboriginal Law Handbook: 3rd Edition 2008*

Status Report on Treaty Land Entitlements in Manitoba, http://www.ainc-inac.gc.ca/ai/mr/nr/m-a2007/2-2925-rp-eng.asp

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What are Aboriginal rights?

What are Aboriginal rights?

"Aboriginal rights arise from the fact that Aboriginal people are Aboriginal."

Supreme Court of Canada, R. v. Van Der Peet.

Aboriginal rights were not created by the Canadian Government or the constitution; they exist because of the occupancy and use of the land by Aboriginal people before the arrival of Europeans. An Aboriginal right exists where the customs, practices and traditions were central to Aboriginal communities prior to contact. This means that the same Aboriginal rights are not held by all Aboriningal people across the country, but are distinct and specific to various communities.

Except where extinguished or surrendered, aboriginal customs, practices and traditions continued after European contact and became part of Canadian law as rights.

Where do Aboriginal rights come from?

Aboriginal rights are inherent rights. This means Aboriginal rights are drawn from Aboriginal people's historic presence and use of the land long before Europeans arrived.

These inherent rights are protected by section 25 of the *Charter of Rights and Freedoms* and recognized and affirmed by section 35 of the Constitution Act, 1982.

Where existing Aboriginal rights have not been recognized, these rights can be claimed. It is up to the individual or group claiming the right to prove that the right in question was "integral to the distinctive culture of the Aboriginal party at the time of the first contact with Europeans and the practice still exists (in some form) today." This happens in court, or through negotiation with the federal government.

How are Aboriginal rights held, used and enjoyed?

Aboriginal rights are held communally. This means that while individuals enjoy Aboriginal rights, the rights are shared and belong to the community. Aboriginal rights vary between communities depending on historic use.

Aboriginal rights are not exclusive. For example, if a community has the right to fish, this does not prevent non-Aboriginals from fishing in the same area. Aboriginal peoples will have priority rights to fish for food purposes if the resource needs to be subject to limitations.

What is Aboriginal title?

Aboriginal title is a sub-set of Aboriginal rights. The term "Aboriginal title" is a legal term that recognizes an Aboriginal interest in land due to prior occupation and possession. This is a sui generis, or unique, right to land.

Unlike Aboriginal rights generally, Aboriginal title is the right to occupy and use the land and to exclude others from exercising such rights.

Aboriginal title can only be sold or given up through the government, by a treaty or agreement. Where no treaty or agreement has been reached, Aboriginal title still exists. Aboriginal title claims are therefore most likely to be made where there is no treaty. In the prairies, under the numbered treaties, title claims will be made where promises made under the treaties have not been honoured.

For more Information

B. Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Review, 727

Olthius, Kleer, Townshend, *Aboriginal Law Handbook: 3rd Edition 2008*

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Understanding Canadian Aboriginal Law

What are Métis rights?

Who is Métis?

Métis peoples are descendants of Europeans settlers and Aboriginal peoples. However, not everyone with this ancestry is considered Métis. The defining feature of the Métis people is the unique culture that developed out of this mixed ancestry.

The report of the Royal Commission on Aboriginal Peoples states that "The Métis developed separate and distinct identities, not reducible to the mere fact of their mixed ancestry: "What distinguishes Métis people from everyone else is that they associate themselves with a culture that is distinctly Métis."

There are a number of distinct Métis communities across Canada, each having developed its own culture over time.

How is Métis identity determined by the courts?

In order for an individual to prove legally that they belong to a Métis community, an individual must self-identify as Métis, have an ancestral connection to an historic Métis community, and be accepted as a member of the community.

A community is identified as Métis if the members share a distinctive collective identity, live in the same geographic area, and share a common way of life.

What rights do Métis people have?

Section 35 of the Constitution Act, 1982 recognizes and affirms existing aboriginal and treaty rights of the Aboriginal Peoples of Canada. This section specifically includes Métis peoples, protecting Métis rights from interference by the government.

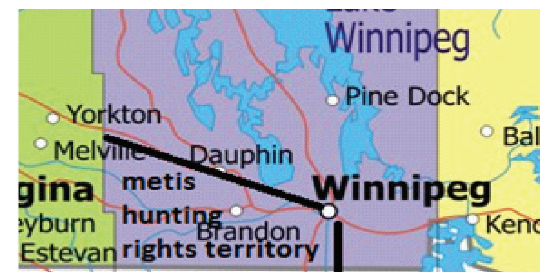
Métis rights protect the historic customs, practices, and ways of survival of the Métis. For example, most Métis communities have hunting and fishing rights. These rights are held communally, not individually.

Who has these rights? Where does the right exist?

The Powley case established that a Métis right exists where the individual claiming the right has an ancestral connection to a Métis community that has been continual and stable at an identifiable site. The practice identified must be important to the community today while also rooted in the time after the Métis community in a given area developed but before Europeans established control over the area.

The geographic area in which a Métis right can be exercised depends upon the traditional patterns and movements of a specific community. For example, in the Goodon case, the Métis community of Southwestern Manitoba was found to have hunting rights in a significantly large territory south and northwest of Winnipeg.

Métis land claims are currently before the courts.



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R. v. Powley 2003 SCC 43, [2003] 2 S.C.R. 207

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http://www.ainc-inac.gc.ca/ai/ofi/mrm/faq/index-eng.asp

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What is the duty to consult?

The Duty to Consult

Canadian courts have recognized that the Crown (Canada) has an obligation to act honourably in its dealings with Aboriginal people. This is because of the historic relationship between Canada and the Aboriginal people.

Legally, the obligation to act honourably results in a duty to consult. If the government wants to develop land on which an Aboriginal group has a credible claim to title or rights, the government must first consult with that Aboriginal group. Until consultation has happened, the land cannot be used.

This duty extends to both federal and provincial levels of government.

What does the duty to consult include?

What the government must do to carry out its duty is different depending on how strong the claim to title or rights is. Therefore, the duty to consult is not the same in all cases, but changes depending on the circumstances.

In all cases, the duty to consult includes a requirement that the government act in good faith in seeking participation and input from Aboriginal groups. In some cases, the scope of the duty may include an obligation to address Aboriginal concerns. In some cases there will be a duty to compensate.

When is there a duty to consult?

There is a duty to consult when the Crown knows of the potential existence of an Aboriginal right or interest, and is thinking of acting in a way that would have a negative impact on that right. This was made clear by the Supreme Court of Canada in the Haida Nation case.

The duty to consult applies in cases where there is either an asserted right, meaning the Aboriginal group has claimed but not proven Aboriginal or treaty rights, as well as when there is proven title.

What do the parties have to achieve in the consultation process?

The Crown should enter into consultation keeping open the possibility of accommodating Aboriginal concerns. However, the duty is to consult. While this may include accommodation, the parties are not required to reach an agreement.

Both parties are required to act in good faith. The Crown must create an opportunity for consultation. At this point, the Aboriginal group is required to participate meaningfully, without frustrating the efforts of the Crown.

In basic terms, the duty to consult requires that both parties "come to the table" to attempt to reach a solution. What happens beyond this is in large part the result of the efforts of those sitting around that table.

For more Information

Olthius, Kleer, Townshend, Aboriginal Law Handbook: 3rd Edition (2008)

Indian and Northern Affairs Canada – Consultation and Accommodation
http://www.ainc-inac.gc.ca/ai/arp/cnl/index-eng.asp

Assembly of First Nations: National Chief's Task Force on Consultation and Accommodation
http://www.afn.ca/article.asp?id=4522

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Understanding Canadian Aboriginal Law

What is a Fiduciary Duty?

What is a fiduciary duty?

A fiduciary duty is a legal obligation. It arises when one person (called the fiduciary) is obligated to act for the benefit of another person (called the beneficiary). The fiduciary must act on behalf of the beneficiary in an *absolutely honest, open and trustworthy manner.*

The Supreme Court has stated that there is a fiduciary duty owed by the Canadian government, or Crown, to Aboriginal peoples. The duty arises out of the special relationship between the Crown and Aboriginal people, and the fact that the Crown protects and guarantees Aboriginal and treaty rights.

The Honour of the Crown requires that the government in all of its dealing with Aboriginal people do so *in a fair and open way* even if the specific circumstances are not ones that require the federal government to act as a fiduciary. This concept encompasses the idea of a fiduciary duty. Where there is a fiduciary duty owed, there are increased obligations on the government beyond what is demanded by the Honour of the Crown.

Why does the duty arise?

There are many instances when an Aboriginal nation has to place trust in the Crown. This creates a relationship of reliance, giving rise to a fiduciary duty.

An example of a situation where the duty arises is in the surrendering of land. Legally, Aboriginal people can only surrender title to their land to the Crown. The title to the land cannot be sold privately. The government therefore has a fiduciary duty to act in the best interests of the Aboriginal nation in dealing with the land upon surrender.

When does the duty arise?

At the very least, fiduciary duty will always arise when Aboriginal people voluntarily surrender land. There may be a more general fiduciary duty, but at this time the courts are still unclear on how far this goes. However, it has been made clear that not all dealings between Aboriginal people and the Crown are subject to a fiduciary duty, but they are subject to the "honour of the Crown".

Further decisions by Canadian courts will determine the nature and scope of the fiduciary duty. Currently, it is simply recognized that the duty varies with the nature of the interest affected.

How does the fiduciary duty impact the relationship between the Crown and Aboriginals?

The Royal Commission on Aboriginal Peoples stated in its 1996 report that "the government cannot treat Aboriginal peoples as if they were adversaries. On the contrary, it must be mindful of the trust-like relationship with them and recognize and protect their Aboriginal rights as a trustee would protect them."

When there has been a breach of fiduciary duty, the court will award compensation for the losses suffered.

For more Information

Leonard I. Rotman, Fiduciary Law (2005)

J. Timothy S. McCabe, The Honour of the Crown and Its Fiduciary Duties to Aboriginal Peoples (2008).

Mark R. Gillen and Faye Woodman, The Law of Trusts (2008)

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Understanding Canadian Aboriginal Law

Self Government

What is self-government?

The report of the Royal Commission on Aboriginal Peoples (RCAP) defines Aboriginal self-government as "the ability to assess and satisfy needs without outside influence, permission or restriction."

This concept flows from the principle of self-determination, defined by the RCAP as a people's "freedom to choose the pathways that best express their identity, their sense of themselves and the character of their relations with others."

What does self-government look like?

Different Aboriginal peoples advocate for different forms of self-government. For some, self-government may be complete independent governmental status, while for other Aboriginal people it may mean the ability to pass their own laws which cannot be overridden by Canadian laws. Still others regard self-government as the ability to establish institutions to provide community-based services.

Traditional forms of Aboriginal government and politics differ from the Canadian/Western models. Some forms of self-government operate within the Canadian governmental framework, while others are based in Aboriginal governance traditions.

The RCAP proposes three different forms of self-government including: a model which is based on the "public government" of Nunavut; a model in which individual Aboriginal nations govern their citizens and land base; and a community services model.

Do Aboriginal peoples have a right to self-government?

First Nations had their own systems of governance long before Europeans asserted control over Canada. Colonizing governments did not view First Nations as a conquered and colonized people, but rather recognized and negotiated with First Nations as independent nations. For example, they entered into treaties on a nation- to -nation basis. Aboriginal people argue that as they never agreed to be governed by non-Aboriginal people, and their rights to self-determination and self-government were never taken away, this right still exists today.

Aboriginal people argue that self-government is an inherent right. This means that it is not granted by the Canadian government, but stems from the traditions that Aboriginal peoples have had for thousands of years.

The Canadian government has explicitly recognized self-government as an inherent right that is protected under the Canadian Constitution. The government has not been clear on what this recognition means for Aboriginal groups in reality.

So far, Canadian courts have not ruled on whether self-government is protected by the Constitution as an Aboriginal right. Lower court rulings differ in their interpretations of this issue and the Supreme Court of Canada has not yet addressed this question directly.

For more Information

Report of the Royal Commission on Aboriginal Peoples, Volume 2, Part 1: Restructuring the Relationship

Aboriginal Self-Government (federal government policy guide) http://www.ainc-inac.gc.ca/al/ldc/ccl/pubs/sg/sg-eng.asp

Olthius, Kleer, Townshend, Aboriginal Law Handbook: 3rd edition(2008)

Assembly of First Nations: Recognizing and Implementing First Nation Governments. http://www.afn.ca/article.asp?id=1542

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