Module #9 Treaties and Indigenous Rights

The origins of Indigenous Rights and Treaties in Canada can be traced to the Royal Proclamation of 1763. King George III was Monarch, and the Seven Years War had ended, resulting in France ceding Canada, Caribbean possessions, and possessions on the Indian sub-continent to England; and Louisiana West of the Mississippi to Spain. The Anglo-French hostilities of the Seven Year War were ended by the Treaty of Paris. Nobody expected the peace to last into the distant future, and the British Monarchy recognized the need for Indigenous Allies.

The Royal Proclamation of 1763 is central to the evolution and definition of Indigenous law in Canada. Britain needed economic, military, and political allies in North America. When this need was present, treaties were signed, when this need faded, treaties were neglected. As Canada was shaped from East to West this pattern is reflected in the history of Indigenous Treaties in Canada.

Early Treaties in Eastern Canada

Treaties of Peace and Neutrality (1701-1760) and Peace and Friendship Treaties (1725-1779)

In 1701 the governor of New York and the Iroquois confederacy entered into what Canada calls the 1702 Albany Deed, what Americans call the Nanfan Treaty, which placed Iroquois land along the Albany River under British Protection. In 1760 the Huron-Wendate agreed to remain neutral during the English invasion of Quebec. The British concluded Peace and Friendship treaties with the Mi'kmaq, the Maliseet, and the Passamaquoddy nations each on over half a dozen occasions between 1725 and 1779, primarily to counter the French before and during the Seven Years War, and to strengthen the British position after that war.

The Peace and Friendship treaties concluded in this period followed a similar pattern. They re-established peace and commercial relations. Indigenous peoples did not surrender rights to land or resources. Two of the treaties have a specific trade related clause not found in the others, known as the "Truck House" clause. In the 1752 and 1760-1761 Peace and Friendship treaties the British promised to establish a truck house, or trading post. While the trading posts were short lived, the clause became the central focus of two different court cases in the 1980s and 1990s. In both the *Simon* and *Marshall* cases, Aboriginal claimants argued that the Truck House clause guaranteed Aboriginal rights to hunt and fish in the region and to maintain a moderate livelihood there.

Upper Canada Land Surrenders (1764-1862/1923)

The Abishnawbe of the Upper Great Lakes had grave concerns with mining exploration by Canadians who had no rights to their lands. In 1847, they petitioned the Governor General requesting compensation for the lands lost to mining. Colonial officials moved to address the claim after a violent clash erupted between the First Nations warriors and miners at Batchawana Bay in 1849. After an expedition by Indian agents Vidal and Anderson throughout the area to inform the Abishnawbe of the upcoming treaty negotiations over the summer of 1849, a treaty meeting was scheduled for late summer 1850. In 1850 two separate Treaties were entered with the Anishnabe of Lake Superior, and with the Anishnabe of Lake Huron. The region's Aboriginal inhabitants retained hunting and fishing rights in the territory until the lands were taken up for development or settlement and the lands would be set aside for each group as a reserve. Additional agreements in Upper Canada/Northern Ontario were concluded by Treaty in between 1862 and the 1920's, building on the precedent of the previous agreements.

NUMBERED TREATIES (1871 – 1921)

Immediately following the proclamation of Confederation, the Dominion began negotiations with Britain and the Hudson's Bay Company for the acquisition of the Company's Charter to Rupert's Land. The charter was secured, and full control transferred by the British under the *Rupert's Land Act* of 1868 and the *Northwest Territories Transfer Act* in 1870. After the creation of Manitoba in 1870, the Macdonald Government proceeded to establish the administrative structure of the Northwest Territories. The *Northwest Territories Act* extended Canada's legal jurisdiction over the Territories outside of Manitoba and made provisions for an administrative structure and application of Canadian law throughout the Territories.

As part of the obligations created by the transfer of the HBC charter, Canada was responsible for addressing any and all Aboriginal claims to land. Taking the form established by the 1850 Robinson Treaties, the Crown negotiated eleven treaties between 1871 and 1921. These treaties covered the area between the Lake of the Woods to the Rocky Mountains to the Beaufort Sea. Similar to the Robinson Treaties, the so-called Numbered Treaties promised reserve lands, annuities, and the continued right to hunt and fish on unoccupied Crown lands in exchange for Aboriginal title.

At their base, the treaties were land surrenders on a huge scale. A total of 11 Numbered Treaties were negotiated during this period culminating with Treaty 11 in 1921. Furthermore, in the eyes of the Federal Government, the act of signing a treaty brought Aboriginal people of the Northwest under the jurisdiction of the Dominion of Canada and its laws. The early Numbered Treaties - Treaties 1 through 7 - became the vehicle by which the Department of Indian Affairs implemented existing and future assimilation policies in the Northwest while the latter treaties allowed for the opening of the North and access to valuable natural resources.

These Treaties were initiated by Canada to secure a land base comparable to and competitive with the emerging land base of the United States of America. The overriding concern of the Canadian government was not the well-being of the Indigenous signatories to the Treaties; but, was the economic advantage of access to resources. For this reason, the various numbered Treaties were not uniform, some Treaties saw land set aside for families at the rate of 160 acres per family, others at the rate of 640 acres per family. Treaty 6 included a “medicine Chest”, while the other numbered Treaties didn’t.

The Medicine Chest in Treaty #6 has since been interpreted by Canadian Courts to mean a commitment to the health of the Indigenous signatories. Neglected Treaty payments from the numbered Treaties have been the subject of recent litigation too. The pattern of interpreting Treaties through the courts results from the British and Canadian governments motivation to enter treaties being economic opportunity, not the well-being of the Indigenous signatories to the Treaties.

Over time this neglect became abuse. Musqueam is not a Treaty Nation. Our great-Grandfather sent a delegation to London to request a Treaty, and they were simply ignored. When Musqueam went to court in the Guerin case we litigated against the crown based on Canadian law and proved the fiduciary obligation of the Crown. We joined the BC treaty Process, yet still have no Treaty.

The history of Canadian/Indigenous Treaties has been a history of Canadian economic expediency. In the next section of this module we consider the Douglass Treaties. These were entered into by

the British Crown and their colony of Vancouver Island. With confederation they were brought into Canada along with the unfinished business of the Non-Treaty Nations.

DOUGLAS TREATIES

With the signing of the Oregon Treaty in 1846, the Hudson's Bay Company (HBC) determined that its trapping rights in the Oregon Territory were tenuous. Thus in 1849, it moved its western headquarters from Fort Vancouver on the Columbia River (present day Vancouver, Washington) to Fort Victoria. Fort Vancouver's Chief Factor, James Douglas, was relocated to the young trading post to oversee the Company's operations west of the Rockies.

This development prompted the British colonial office to designate the territory a crown colony on January 13, 1849. The new colony, Colony of Vancouver Island, was immediately leased to the HBC for a ten-year period, and Douglas was charged with encouraging British settlement. Richard Blanshard was named the colony's governor. Blanshard discovered that the hold of the HBC over the affairs of the new colony was all but absolute, and that it was Douglas who held all practical authority in the territory. There was no civil service, no police, no militia, and virtually every British colonist was an employee of the HBC.

As the colony expanded the HBC started buying up lands for colonial settlement and industry from Aboriginal peoples on Vancouver Island. For four years the governor, James Douglas, made a series of fourteen land purchases from Aboriginal peoples.

To negotiate the terms, Douglas met first in April 1850 with leaders of the Songhees nation and made verbal agreements. Each leader made an X at the bottom of a blank ledger. The actual terms of the treaty were only incorporated in August, and were modelled on the New Zealand Company's deeds of purchase for Maori land, used after the signing of Treaty of Waitangi.

The Douglas Treaties cover approximately 930 square kilometres (360 sq mi) of land around Victoria, Saanich, Sooke, Nanaimo and Port Hardy, all on Vancouver Island that were exchanged for cash, clothing and blankets. The terms of the treaties promised that they would be able to retain existing village lands and fields for their use, and also would be allowed to hunt and fish on the surrendered lands.

These fourteen land purchases became the fourteen Treaties that make up the Douglas Treaties. Douglas didn't continue buying land due to lack of money and the slow growth of the Vancouver Island colony. Along with Treaty 8, the Douglas Treaties were the last treaties signed between the crown and the First Nations in British Columbia until the Nisga'a Final Agreement in 1998.

The treaties are endlessly disputed for a number of reasons and have been subject to numerous court cases. One of the major controversies regarding the treaties is that the actual terms of the treaties were left blank at the time of signing and a number of clauses and pages were instead inserted at a later date.

The Douglass Treaties are vague and oppressive in the extreme. Three of the Treaties; Snuneymuxw, Songhees and Pauquachin, do not identify the amount of money given in consideration for land surrendered, and two of those three treaties, Snuneymuxw and Songhees, do not even identify the land surrendered. For the sum of approximately 475 pounds 930 sq kilometers of land was acquired under the Douglas Treaties.

MODERN TREATIES

Comprehensive land claims are modern-day treaties made between Indigenous peoples and the federal government. They are based on the traditional use and occupancy of land by Indigenous peoples who did not sign treaties and were not displaced from their lands by war or other means. The goal for land claim negotiations as part of the treaty process is to provide jurisdiction and resolve ambiguity over the ownership and use of land and resources. A treaty will codify the rights and obligations of the parties. At the core of the process are negotiations between Indigenous groups and the federal government, and in some cases the provincial and territorial governments, as well as on occasion other third parties whose presence requires the consent of First Nations. The process, which aims to make economic and social adjustments between two different societies is formally based on legal concepts such as land title, Indigenous rights and treaties. Modern treaties, or comprehensive land claim settlements, include provisions that enable Indigenous groups to own land, participate in managing land and resources, share in revenue generated from resource development and govern themselves.

On 8 August 1973, the federal government, responding to the claims of the Nisga'a and the James Bay Cree and Inuit, and wishing to clear the way for industrial development of the North, announced a new policy for the settlement of land claims. The policy confirmed the responsibility of the government to meet its lawful obligations through fulfilment of the terms of the treaties and to negotiate settlements with Indigenous groups in those areas of Canada where Indigenous rights based on traditional use and occupancy of the land had not been dealt with by Treaty. The policy emphasized that the co-operation of provincial and territorial governments would be required.

In order to carry out the new policy, an Office of Native Claims was created in 1974 within what is now Crown-Indigenous and Northern Affairs Canada (CIRNAC). Under the leadership of an assistant deputy minister, negotiators, lawyers and researchers dealt with two main types of claims; specific and comprehensive.

Specific and Comprehensive Claims

Comprehensive claims are based on the traditional use and occupancy of land by Indigenous peoples who did not sign treaties, and were not displaced from their lands by war or other means. These claims, which are settled by negotiation, involve the two territories and the large sections of some provinces, and almost all of British Columbia west of the Rocky Mountains. The areas of land and the number of peoples involved are usually greater than in the case of specific claims. Settlement of these claims comprises a variety of terms including money, land, forms of local government, rights to wildlife, rights protecting language and culture, and joint management of lands and resources.

The federal government provides funding in the form of contributions to Indigenous associations for the research and presentation of their claims. Once claims are submitted, lawyers of the Department of Justice and officials of CIRNAC determine the acceptability of each claim. Upon acceptance, further funding is provided to the associations for research and negotiation.

FUTURE TREATIES

One of the oldest of Musqueam's ancient laws is that the world is in a continuous state of transition. This is clearly evident in the history of Crown/Indigenous Treaties in Canada. From the early treaties of peace and friendship on the Atlantic coast to the more recent and bizarre Douglass Treaties of the West Coast there is an evolution in time and geography of Canada's social values that marks the treaty texts.

Canada has also been influenced by the treatment of claims and Indigenous rights in other countries. In 1946, the United States government created an Indian Claims Commission and in 1971 legislated the Alaska Native Claims Settlement. Australia passed an *Aboriginal Land Rights Act* in 1976; and in 1978 Denmark granted home rule to Greenland. Of equal importance has been the evolution of basic human rights around the world.

The Atlantic Charter was a statement issued on 14 August 1941 that set out American and British goals for the world after the end of World War II. The joint statement, later dubbed the Atlantic Charter, outlined the aims of the United States and the United Kingdom for the post-war world as follows: no territorial aggrandizement, no territorial changes made against the wishes of the people (self-determination), restoration of self-government to those deprived of it, reduction of trade restrictions, global co-operation to secure better economic and social conditions for all, freedom from fear and want, freedom of the seas, abandonment of the use of force, and disarmament of aggressor nations. The charter's adherents signed the charter on 1 January 1942, and this document also became known as the *"Declaration by United Nations*", and was a precursor to the United Nations.

The Atlantic Charter was the outcome of negotiations held from 9 to 12 August 1941 by Churchill and Roosevelt, and their respective advisers. It took place aboard the US cruiser *Augusta* and the British battle-cruiser *Prince of Wales* in Placentia Bay Newfoundland. London was recovering from the Blitz, and on the eastern front Operation Barbarossa - the Nazi invasion of Russia, had been launched and 300,000 soviet soldiers had been captured at the battle of Smolensk. The United States of America was still not in the war, and things looked bleak for the British Empire.

In early December 1940, Churchill wrote in a personal letter to President Franklin D. Roosevelt. "*The moment approaches, when we shall no longer be able to pay cash for shipping and other supplies*." By the time of the meeting in Placentia Bay it was clear that without Lend-Lease Britain couldn't continue to wage war without access to America, in Roosevelt's phrase as the, "Arsenal of Democracy". There were eight principal clauses of the charter:

1. No territorial gains were to be sought by the United States or the United Kingdom.
2. Territorial adjustments must be in accord with the wishes of the peoples concerned.
3. **All people had a right to self-determination.**
4. Trade barriers were to be lowered.
5. There was to be global economic co-operation and advancement of social welfare.
6. The participants would work for a world free of want and fear.
7. The participants would work for freedom of the seas.
8. There was to be disarmament of aggressor nations and a common disarmament after the war.

The Atlantic Charter became a foundational document of the future United Nations. Churchill was aware that this was the plan and was deeply concerned about clause "*3. All people had a right to self-determination."*