A Backgrounder on Treaties and Treaty Rights

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WHAT ARE ABORIGINAL RIGHTS?

Aboriginal rights are the inherent collective rights of all Aboriginal peoples in Canada – First Nations, Métis and Inuit – that arise from their continued use and occupation of the land. Some specific Aboriginal rights are recognized and were promised to be protected in historical treaties. Aboriginal rights are recognized in Section 35(1) of Canada's Constitution.

WHAT ARE TREATY RIGHTS?

Treaty rights derive from treaties made between First Nations and the British Crown from the 1700s to 1929. Such treaties cover all of Ontario and most of Canada. Treaties include hunting, fishing and gathering rights, access to traditional territory, and rights to education and medicine for Aboriginal people. While Canadian law denied Aboriginal treaty rights for many years, several Supreme Court of Canada decisions, upholding treaty rights to hunt, fish and gather food, for sustenance and ceremonial purposes were made in the 1980s and 1990s. One of the earliest treaties is the Two Path Wampum presented to the Dutch by the Haudenosaunee in 1613. For an example of how treaty harvesting rights work today see the Williams Treaties First Nations Harvesting Guide.

WHY WERE TREATIES MADE?

Indigenous as well as European communities each had their own histories of treaty-making between nations of varying languages and cultures. The long-standing practice of treaty-making between the British Crown and First Nations reflects the fact that the British recognized that First Nations were autonomous groups holding legal claim to the lands. This is seen in the Royal Proclamation of 1763, as well as in the 1764 Treaty of Niagara, also known as Gus-Wen-Tah. First Nations-Crown treaties were made over a long time of dramatic changes for First Nations and colonial societies. Motivations for treaty-making shifted notably throughout this time.

HOW WERE TREATIES MADE?

Treaties were made at meetings between First Nations leaders and Crown representatives. Meetings included ceremonial aspects of both First Nations and British governance practices. Oral agreements were made largely through translators. Later, written treaty texts originating with the Crown were presented orally (often inaccurately) to First nations leaders to be signed.

HOW ARE TREATIES INTERPRETED TODAY?

The Supreme Court of Canada (SCC) has stated that treaties between First Nations and the Crown are sui generis – which means they are unique and of their own kind. Significantly, treaties affirm inherent Aboriginal rights, rather than granting them, that is to say, the SCC acknowledges that these rights exist regardless of the SCC's decisions. Treaty decisions made by the SCC include the 2005 decision of Mikisew Cree First Nation, which held the decision that "the duty of consultation, which flows from the honour of the Crown, was breached." (pg. 389).

Treaties must be interpreted in a non-technical manner, relying on both oral histories and written records. Treaty terms should be interpreted flexibly, in light of changing times, and generously to the First Nations. The overall purpose of treaty interpretation is to give effect to the common intentions of the treaty-makers. To do so, treaty promises must be placed in the cultural, historical, and political contexts of the time. A good example of how hunting rights recognized in historical treaties can be exercised today is found in the Ontario Court of Appeal decision in R v. Shipman and the resulting MNR letter and policy.

WHAT WERE THE INTENTIONS OF TREATY-MAKERS?

Understanding the intentions of the parties entering the treaties at the time of agreement is not easy. While the concept of making agreements between nations about how to live together was common to all, cultural understandings of what kinds of relations treaties established, how they should work and what was being agreed to differed notably between First Nations and the British. A key area of cultural difference affecting how treaties were and are understood is each society's relationships to land.

WHAT DO TREATIES MEAN FOR INDIGENOUS-MUNICIPAL RELATIONS?

Aboriginal and treaty rights stretch over all of Canada and are constitutionally protected. Land use and development plans often affect the exercise of treaty rights in Ontario. Municipalities do not technically have a duty to consult and accommodate with First Nations and Metis communities. However, if those communities' treaty rights are breached, or if they are not consulted on the impact of development on their rights, they will have a range of legal remedies available, including court injunctions (such as occurred at KI First Nation against Platinex), against development. Municipal-Indigenous relations can be strengthened and conflict minimized or avoided when there are open channels of communication between municipalities and First Nations and Métis communities, and where municipal planners take the time to understand treaty rights from local Indigenous community perspectives.

ADDITIONAL RESOURCES

Please take a moment to watch these videos to further your understanding of the Indigenous-Municipal relations:

Hayden King on Treaties

Maurice Switzer on Treaties

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