

TREATIES: NEGOTIATIONS AND RIGHTS

Introduction

In what is now the Canadian state, eleven numbered agreements took place between Indigenous Nations and the British Crown from 1870-1921. In contemporary times Treaty¹ is greatly misunderstood from both Indigenous Peoples and non-Indigenous Peoples alike. What took place at these historical meetings has been a source of contention from the outset. The central issue is the land. Who had authority and jurisdiction over the land? What was agreed to in terms of the Treaty? Another issue is whether Indigenous Peoples signed away their right to govern themselves according to their laws and customs. The source of this contention is based on oral understandings versus the written understandings of Treaty. An explanation as to the reasons why Treaty is misunderstood is in the following quote:

For an understanding of the relationship between the Treaty Peoples and the Crown of Great Britain and later Canada, one must consider a number of factors beyond the treaty's written text. First, the written text expresses only the government of Canada's view of the treaty relationship: it does not embody the negotiated agreement. Even the written versions of treaties have been subject to considerable interpretation, and they may be scantily supported by reports or other information about the treaty negotiations.²

The oral understanding of Treaty is not taught in colonial mainstream education systems; instead the written version is supplanted as the only understanding. The oppression of the Elder's knowledge has led to further ignorance on the subject of Treaty. The written version of Treaty leads to further lack of knowledge as it is commonly understood that Indigenous Peoples ceded and surrendered the land to the British Crown. This essay will discuss both Indigenous Peoples and Crown perspectives of Treaty. What did the negotiations conclude and what were the rights agreed to by the Indigenous Nations and the Crown?

Before Treaty

Before Treaty, Indigenous Peoples' history starts from the Creation and the placement of Indigenous Peoples by the Creator on the lands known as Great Turtle Island, also known as the North

American continent.³ Oral understandings affirm that Indigenous Peoples have occupied their homelands since the beginning of time.⁴ Indigenous Nations are organized into different legal, political, economical and social societies and live according to the natural laws given by the Creator. Indigenous Peoples way of life relate directly to their relationship with the land.⁵ Indigenous legal systems are intended to “protect and honour the land.”⁶ The land is fundamental to Indigenous legal systems. This way of life was in place at the time the Crown representatives came to Indigenous Peoples’ lands and territories to make Treaty.

The Land Question

An incorrect view is that Christopher Columbus discovered America; however, “he sailed his ships into waters occupied and used by Indigenous Peoples.”⁷ One of the beliefs held by colonial society is that the territories and homelands occupied by and under the protection of Indigenous Peoples when the Europeans arrived, were a free for all. The assumption that the land was for the taking is acknowledged by the Crown in current treaty discussion taking place in what is now Saskatchewan. The Office of the Treaty Commissioner (OTC) in the report *Treaty Implementation: Fulfilling the Covenant* explains:

- It was widely assumed by Crown officials, that, prior to the treaties, the Crown was already sovereign over First Nations’ traditional territories through unilateral assertion or through treaties with European powers.
- It was assumed, therefore, that the Crown had the power to extend its laws to First Nations.⁸

The unilateral assertion is based on the lie that Britain had sovereignty over Indigenous Peoples’ homelands, but how this came to be is an interesting question. In modern times a person cannot walk into a stranger’s home and claim ownership of the house and the furnishings without committing a crime.

Sharon Venne in her book entitled, *Our Elders Understand Our Rights*, explains the impact the doctrine of discovery had on Indigenous Peoples and their lands. The dehumanizing view held by colonizing powers was that they were “bringing civilization and prosperity”⁹ to Indigenous Peoples. However, Indigenous Nations were not “waiting to be discovered or colonized.”¹⁰ The doctrine of

discovery as a guiding principle, even with its lack of legal legitimacy, gave rise to the European invasion and expansion into Indigenous Peoples' lands without regard or respect for the Peoples and Nations that had been in place on Turtle Island since time immemorial.¹¹ Venne explains this Eurocentric "world view has also dominated the formulation of European legal systems,"¹² and this had the effect of

...[nullifying] the legal values of peoples who do not share this world view, including the Indigenous Peoples of the Americas. Historical and legal writings about America that are based on the belief that Columbus discovered the lands of millions of Indigenous Peoples deny the rights of these people.

The right of Indigenous Peoples in the Americas to continue determining their way of life was denied through the acceptance of the doctrine of discovery, and this denial persists to the present day.¹³

The British Crown entered into to the Treaty negotiations with the false premise that Crown sovereignty was paramount, whereas, the Indigenous Peoples under international law at the time had complete jurisdiction and sovereignty of the land and their way of life.¹⁴

Indigenous Understandings of Treaty

Our sacred understandings of Treaty are transmitted through the generations orally by the Elders.¹⁵ According to the Elders, our rights are not granted by the Canadian Constitution; instead it is bestowed upon us by the Creator and recognized by the making of Treaty.¹⁶ Indigenous rights are inherent.¹⁷ The inherent authority to govern our Nations cannot be granted by any foreign government. The United Nations Special Rapporteur on Treaties Miguel Alfonso Martinez determined that the Treaties negotiated and concluded with the British Crown are international agreements.¹⁸ This is the same understanding as our Elders. From an Indigenous worldview, Treaty reinforces the inherent authority. It is the legal framework that Indigenous Peoples operate from. The Elders understand our Treaty as peace and friendship agreements, not land surrender agreements.¹⁹ These peace and friendship agreements provide for two parallel legal systems that were intended to co-exist, each party respecting the authority of the other.

At the time of Treaty, Indigenous Peoples had full authority over their way of life and the land. When Treaty was negotiated Indigenous law was the law of the land and used by the Crown to conclude Treaties. For example, in 1876 when Treaty Six was negotiated and concluded it was Cree laws that guided the negotiation process:

When Indigenous Peoples talk about the land and the making of treaty, we are talking about our life and the life of future generations. Land is central to that process. We have a relationship with our Creation based on a legal system designed to protect and honour the land. These are the laws that guided Cree Peoples when the Chiefs negotiated and concluded Treaty Six in 1876.²⁰

In terms of the relationship, Treaty was negotiated and concluded between Indigenous Peoples and the British Crown on a nation-to-nation basis. Each party to the Treaty was to co-exist with neither one interfering with the other. In other words, to live in peace and friendship for as long as the “sun shines and the waters flow.”²¹ Treaties were not made with Canada.²² Canada as a successor does not have the authority to alter Treaty without the consent of the Indigenous Peoples.²³

Today, the original Spirit and Intent of Treaty are questioned by the Crown. It is a very simple answer. Non-Indigenous People were granted the right to live in Indigenous Peoples’ territories so long as they maintained peace and respected the land.²⁴ In exchange, Indigenous Peoples were promised health care and education (to name a few).²⁵ It is the oral understanding and not the written version that captures the original understanding of Treaty if the Spirit and Intent is to be understood. As one great warrior has proclaimed, “Lies written on paper are not true for anyone.”²⁶ The relationship was to be a parallel relationship neither party impeding or oppressing the other. It becomes evident that the Crown has violated the terms of the Treaty by relying and imposing the written version of Treaty. How can the Crown claim title to lands that they did not own in the first place?

Crown’s Understanding of Treaty

The Crown came to Indigenous Peoples territories with the erroneous assumption they had sovereignty over Indigenous Peoples and their lands and resources. This is evident in the land transfer

that took place between the Hudson Bay Company and the colonial government in July 1869.²⁷

Indigenous Peoples at the time questioned this transfer of land:

...the Chiefs sent a message to the representatives of the Queen to inform her of the true situation. They stated that the Hudson's Bay Company could not gain control of their lands through its trading activities. These lands belonged to the Indigenous peoples who demanded that the Crown respect their rights before moving into their territory. They wanted the jurisdictional issue settled as soon as possible. They wanted the Crown to determine the exact nature of its agreement with the Hudson's Bay Company, which was undertaken without the consent of Indigenous peoples. They considered such an agreement to be invalid as a means of gaining access to their lands.²⁸

The transfer of land from the Hudson Bay Company to the Crown is fraudulent. The Hudson Bay Company was a trading company and how they came to have ownership over Indigenous lands is suspicious: "In present circumstances, it would be tantamount to Pepsi Cola or another such company gaining title to the lands of another country merely by engaging in trading."²⁹

Where did the Crown acquire the so-called authority to legislate its control over the land and Indigenous Peoples? According to the OTCs discussion about treaty implementation, the *Royal Proclamation*, 1763, established the following:

- Recognized that First Nations had rights in their lands;
- Established imperial control over settlement on Indian lands whether those lands were within the boundaries of the established British colonies of North America;
- Prohibited private purchase of Indian lands and required that alienation of Indian rights in their lands by way of surrender to the Crown; and
- Established a process by which surrender of Indian land would be made to the Crown....³⁰

How did the Crown establish control over Indigenous lands without the consent of the Indigenous Peoples? By an enacted piece of legislation the British Imperial Crown has complete jurisdiction, just because they say so? According to the Indigenous standpoint, the *Royal Proclamation* affirmed their nation-hood:

Nearly one-third of the text is devoted to British relations with Indigenous nations. The Proclamation recognized Indigenous Peoples as 'Nations,' as distinct societies with their own forms of political organization, with whom treaties had to be negotiated. It also enshrined the protection of Indigenous lands by the British Crown, and a process of seeking Indigenous consent to European settlement through treaty-making. Finally, the Royal Proclamation clearly spelled out that Indigenous nations had an inalienable right to their lands.³¹

Another important aspect to the Indigenous understanding is that the Proclamation did not bind Indigenous Peoples; in fact, the British Crown was bound to follow rules with respect to Indigenous peoples and their lands and territories.³² Most significantly, the Proclamation was a “codification of the norms of customary international law for entering into treaties. International law required that a sovereign enter into formal agreements with another people’s sovereign prior to entering lands occupied by those peoples.”³³

The British Crown contends that the land was ceded and surrendered by the Indigenous Peoples at the time Treaty was negotiated. Why does the Crown perpetuate this myth? In other words, one party cannot come to a treaty making process with the flawed assumption that they have sovereignty over another nation’s territory without that nations consent. The Crown came to the treaty negotiations without legitimizing their sovereignty. However, under international law the Europeans were “establishing formal legal relationships with indigenous North Americans, the European parties were absolutely clear [...] about a very important fact; namely, that they were indeed negotiating and entering into contractual relations with sovereign nations, with all the legal implications that such a term had at that time in international law.”³⁴ It becomes clear that the Crown was operating in a deceitful manner.

Negotiations and Rights

What are the negotiations and rights that were agreed to in the Treaty? Historically, and in modern times, the government retains the view that Crown sovereignty is paramount when discussions about treaty implementation take place. In treaty agreements, the Crown assumed it was granting land to Indigenous Peoples because of the assumption that it’s so called title was already solidified.³⁵ The Royal Proclamation set out the treaty process that was to take place between the Indigenous Nations and the Crown. The Crown’s intent for negotiating the numbered treaties is as follows:

Each of the western numbered treaties began by stressing “The desire of Her Majesty, to open up to settlement” a particular tract of country by obtaining the consent of “her Indian subjects inhabiting the said tract” through a treaty resulting in “peace and goodwill” between the Indians and her Majesty, since they could be assured of “her Majesty’s bounty and benevolence.” In

effect, this language indicates the objectives of the treaty making process: opening areas for settlement in exchange for the Crown's bounty and benevolence thereby ensuring peace and goodwill.³⁶

According to the OTC, the Crown's intent was to "clear [Indian] title to the land"³⁷ and in exchange:

The [Crown] intended to reciprocate in a generous and benevolent manner. Reserves would be set aside for the exclusive use of First Nations. First Nations would continue to pursue their traditional lifestyle; hunting, fishing and trapping would not be jeopardized. If First Nations people decided to take up agricultural activities, assistance would be provided. From the Crown's perspective, each First Nation would be entitled to an annual annuity as well as education and health care. The intent of all these commitments was to gain title to the land in a peaceful manner, thereby, facilitating the influx of settlers and, in turn, ensuring the First Nations would gain skills necessary to participate in and benefit from the new economy.³⁸

It becomes apparent from the preceding quote the Crown claimed it had underlying title and that it granted Indigenous Peoples certain rights. This Eurocentric assumption begs a very important question. Who gave the Crown the authority to grant rights that did not belong to them? The truth is that Indigenous Nations operated as free and independent since time immemorial. The recent 500 plus year invasion of European nations onto Turtle Island did not grant them privilege or domination over the lands and territories of Indigenous Peoples. The arrival of Europeans did not magically trump the inherent authority and jurisdiction that Indigenous Peoples possessed and still possess to protect their lands, waters, and resources.

The Elders understanding of Treaty is simple. The Crown came to Indigenous Peoples' territories and lands asking for rights to share our land. Indigenous Peoples "did not go to England to make treaty."³⁹ The Elders are adamant that Treaty is an international agreement between sovereign nations. The Treaties are peace and friendship agreements. Indigenous Peoples did not consent to the ceding and surrendering of their land. According to the Indigenous understanding:

The Elders have long disputed many aspects of the government of Canada's version of Treaty 6. The main criticism of the written version has to do with the language used about the lands. The written version contains the wording "cede, surrender, and forever give up title to the lands.' The Elders maintain that these words were not included in the original treaty. The Chiefs and Elders could not have sold their lands to the settlers as they could only share the lands according to the Cree, Saulteaux, Assiniboine and Dene laws. When the Elders were told of the written words, they had difficulty understanding them. These words do not exist in their languages.⁴⁰

What rights were granted to the British Crown? The Elders understand that the Crown was granted rights to live in Indigenous Peoples territories (share the land) as long as the Crown respected the land and lived in peace with the Indigenous Peoples.⁴¹ The mountains, water, animals, birds, minerals and forests were not for negotiation.⁴² Our land belongs to Indigenous Peoples to protect and no agreement can ever take that responsibility away despite the underhandedness apparent in Crown dealings with Indigenous Peoples.

Conclusion

It is apparent from the discussion that the understandings of Treaty are divergent. It would be difficult to determine what rights were agreed to if one party comes to the negotiations with the assumption that they have control over the negotiations. What about the land? The Crown did not have underlying title or sovereignty despite what their imposed legal systems say about the matter. Indigenous Peoples have existed in what is now the North American continent for thousands of years or since the beginning of time. Indigenous Peoples have not violated the terms of the Treaty, but time and time again the Crown violates the Treaty through its resource development projects and imposition of its laws over Indigenous Nations. Pertaining to the question of authority and governance, Indigenous Peoples have the inherent authority to determine their own laws and customs, despite one party holding the destructive assumption that they have supreme law on a continent that they did not discover.

¹ From an Indigenous worldview, Treaty is the preferred term when making reference to Treaties 1-11.

² Sharon H. Venne, "Understanding Treaty 6: An Indigenous Perspective" in M. Asch, ed., *Aboriginal and Treaty Rights in Canada* (Vancouver: UBC Press, 2002) at 173.

³ H. Cardinal & W. Hilderbrandt, *Treaty Elders of Saskatchewan: Our Dream is that Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000) at 3, 5 for reference to our placement on the North American continent.

⁴ *Ibid.*, at 3.

⁵ *Ibid.*

⁶ Sharon H. Venne, "Treaties Made in Good Faith" in P. DePasquale, ed., *Native and Settlers – Now and Then: Historical Issues and Current Perspectives on Treaties and Land Claims in Canada* (Edmonton: University of Alberta Press, 2007) at 2.

⁷ Sharon Helen Venne, *Our Elders Understand our Rights: Evolving International Law Regarding Indigenous Rights* (Penticton, British Columbia: Theytus Books Ltd., 1998) at 1.

⁸ Office of the Treaty Commissioner, *Treaty Implementation: Fulfilling the Covenant*, (OTC: Saskatoon, 2007) at 22.

⁹ *Supra* note 7 at 1.

¹⁰ *Supra* note 6 at 3.

¹¹ *Supra* note 7 at 8.

¹² See *Ibid.*, at 1.

¹³ *Ibid.*, at 1-2.

¹⁴ Isabelle Schulte-Tenckhoff, "The United Nations Study on Treaties, Agreements and other Constructive Arrangement" in Sharon Venne, ed., *Honour Bound: Onion Lake and the Spirit of Treaty Six: The International Validity of Treaties with Indigenous Peoples* (IWGIA: Copenhagen, 1997) at 14.

¹⁵ *Supra* note 2 at 173. Venne refers to the oral record kept by the Nations about the Treaty agreements.

¹⁶ See generally H. Cardinal & W. Hilderbrandt, *Treaty Elders of Saskatchewan: Our Dream is that Our Peoples Will One Day be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000); see especially Sharon Venne, ed., *Honour Bound: Onion Lake and the Spirit of Treaty Six: The International Validity of Treaties with Indigenous Peoples* (IWGIA: Copenhagen, 1997).

¹⁷ From an Indigenous perspective, "inherent" means ownership and jurisdiction over lands, resources and the laws of Indigenous Peoples. It is the inherent right that of all Indigenous Peoples to determine their distinct laws, traditions and systems of governance. It is a right that is granted by the Creation.

¹⁸ See especially Miguel Alfonso Martínez, (Special Rapporteur), Final Report: Human Rights of Indigenous People Study on Treaties, agreements and other constructive arrangements between States and indigenous populations (E/CN.4/Sub 2/1999/20 (1999)).

¹⁹ See *Supra* note 2 at 187.

²⁰ *Supra* note 6 at 2.

²¹ *Supra* note 2 at 194.

²² *Ibid.*, at 189. According to Sharon Venne, "The Elders are entirely correct in their understanding of a traditional international treaty. Colonies could not enter into treaties without the authority of the Parliament that created them. Canada did not have the authority to enter into treaties in its own right until the Statute of Westminster was enacted by the British Parliament in 1932. Canada could not become a party to the treaty without the consent of both parties. The Indigenous Peoples never gave their consent to Canada to be a party to the treaty, and Canada did not sign Treaty 6."

²³ *Supra* note 6 at 9. Venne cites the Lord Denning's decision in *The Indian Association of Alberta v. The Foreign and Commonwealth Secretary* in which the House of Lords found that "[n]o parliament or legislature can change the Treaty without the consent of the Treaty Peoples." She further explains, "Because this decision was handed down before the parliament at Westminster patriated the British North America Act of 1867 to Canada, the court's decision came with the Constitution of Canada." See also Miguel Alfonso-Martinez, Special rapporteur, *Final Report: Human Rights of Indigenous People Study on Treaties,, agreements and other constructive arrangements between States and indigenous populations*, UN Commission on Human Rights, 1999, E/CN.4/Sub 2/1999/20 for a review of the international stature of our Treaty and for the reference to states such as Canada as a "successor".

²⁴ *Ibid.*, at 5-7.

²⁵ *Supra* note 2. For a detailed analysis please see Venne's paper entitled "Understanding Treaty Six" for a detailed account of the things promised to Indigenous Peoples.

²⁶ *Supra* note 6 at 7.

²⁷ Wayne E. Daugherty, *Treaty Research Report Treaty One and Treaty Two (1871)*, (Ottawa: Treaties and Historical Research Centre, Research Branch, Corporate Policy: Indian and Northern Affairs Canada, 1983) at 2, online: <https://www.aadnc-aandc.gc.ca>

²⁸ *Supra* note 2 at 184.

²⁹ *Ibid.*

³⁰ *Supra* note 8 at 23.

³¹ *Supra* note 2 at 185.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Supra* note 14 at 14.

³⁵ *Supra* note 8 at 22.

³⁶ *Ibid.*, at 25.

³⁷ *Ibid.*

³⁸ *Ibid.*, at 26.

³⁹ *Supra* note 6 at 3.

⁴⁰ *Supra* note 2 at 192-193.

⁴¹ See *Ibid.*, at 194-201. For a thorough explanation see Venne's paper.

⁴² *Supra* note 2 at 185-202.