



Treaty Relations as a Method of Resolving IP Issues

Project Summary

This case study examined the political relationship established between First Nations and Canada through historical treaties as a possible framework within which to consider issues associated with the appropriation or the taking of some thing without the consent of the owner. More specifically, the central focus of this study was on whether the treaty relationship included, either directly or indirectly, a shared understanding of how the cultural heritage of Indigenous peoples would be treated by Settlers and by the governments they established.

Study Approach and Methods

This study is grounded in an approach to treaty interpretation outlined by the Supreme Court of Canada in the case of *R v Badger*, [1996] 1 SCR 771. In that decision, the court argued that the interpretation of historical treaties must start from the assumption that the Crown was acting in good faith when negotiating such agreements, and that its representations are honest and truthful. The decision also asserts that, rather than interpreting words in a treaty text in a technical way, the text must be understood “in the sense they would have naturally held for the parties.” The court makes clear that an interpretation must remain “sensitive to the unique cultural and linguistic differences between the parties” and that the words in a treaty text must be interpreted in a non-technical way. At the same time, although unstated, one must assume that a valid treaty, being the product of a meeting of the minds¹ and reflecting an intention to reconcile the interests of both parties, must be based on a shared understanding between the parties of the agreement reached.

In contrast to standard approaches to the interpretation of historical treaties, this study begins with the understandings of First Nations as reflected in their contemporary explanations of what transpired at the time treaties were negotiated. The reasoning behind this alternative approach is that, as the

¹ When two parties to an agreement (contract) both have the same understanding of the terms of the agreement. Such mutual comprehension is essential to a valid contract (source: thefreedictionary.com).

Supreme Court admits, historical treaties were negotiated orally and therefore not all the terms of these agreements may have been incorporated into the written text of treaties. Our approach here, then, is to start with what First Nations leaders and Elders say today were the terms of the treaties and to examine these understandings in the light of the historical (written) record of treaty negotiations. The sample of historical treaties examined in this study was limited to those in which such contextual information was readily and abundantly available. As well, it was thought prudent to include treaties negotiated at different times and in different locations.

Reports

The study includes analysis or interpretation of six historical treaties. For each treaty, the analysis draws on published primary and secondary sources to examine the perspectives of the parties at the time the treaties were negotiated and, more specifically, to explore any confusion surrounding any agreement to the surrender of Indigenous sovereignty and/or jurisdiction. Report 1, written by Allyshia West, considers the Manitoulin Island Treaties of 1836 and 1862. Report 2, written by Neil Vallance, examines treaties negotiated between 1850 and 1854 on Vancouver Island. Report 3, written by Aimée Craft, looks at the Stone Fort Treaty (or Treaty 1) of 1871, covering southern Manitoba. Report 4, written by Michael Asch, considers Treaty 4, an agreement negotiated in 1874 and covering much of south-central Saskatchewan as well as portions of Manitoba and Alberta. Report 5, written by Kelsey Wrightson, examines Treaty 6 (1876), extending across central Alberta and Saskatchewan. Report 6, written by Michael Asch, looks at Treaty 11, an agreement negotiated principally in 1921, and encompassing eight major communities along or near the Mackenzie River.

Findings

A key finding of the study is that there is no evidence that, during negotiation of any of the historical treaties examined, the Crown requested that First Nations were to cede sovereignty or transfer jurisdiction over their ancestral territories. Rather, close examination of the historical record supports the view that the Crown understood that there would be a nation-to-nation relationship between First Nations and Canada based on sharing the land.

Furthermore, at least with respect to the numbered treaties negotiated by Treaty Commissioner Alexander Morris at the time of Confederation, there is no question that, from the Crown's perspective, whether or not jurisdiction was claimed, the intent was that, in return for allowing settlement, Canada would act in ways that were beneficial to Indigenous peoples, and certainly cause no harm. The image presented, for example in the 1836 Manitoulin Island treaty, is one akin to that between New Zealand and Canada – that is brothers to each other and children of the Queen. This relationship was reinforced, in the case of the treaties negotiated by Morris for example, by the use of the term “brother” to describe the relationship between the negotiating parties. Given the Supreme Court's direction that the interpretation of historical treaties must start from the assumption that the Crown acted in good faith, the study was sensitive to any evidence that might contradict this point. The study found that there is every reason to believe the Crown was acting in good faith when it negotiated these agreements.

Implications for Policy on Cultural Heritage

While none of the historical treaties examined in this study speak directly to the question of appropriation of Indigenous cultural heritage, taken as a whole they establish a pattern of relationship over time and space that provides firm guidance as to an approach to take on this matter. Canada claims to have final legislative authority over Indigenous cultural heritage based on its assertion of sovereignty and jurisdiction over Indigenous peoples and their lands. It is well-known that such assertions derive from a rationale that invokes colonial era images of the political status of Indigenous peoples in places where there are no treaties. This study casts significant doubt on the standing of such assertions in areas in which treaties were negotiated, notwithstanding the existence of clauses in the texts that appear to assert that these were legitimately acquired in the form that gave Canada blanket authority to act as it pleases in regard to Indigenous peoples.

Further to this point, the research in this study indicates that even if treaties were interpreted as having transferred sovereignty and jurisdiction over Indigenous peoples, the information concerning negotiations, where it exists, clearly indicates that the intent was to establish a partnership guided by the principle that settlement would cause no harm. In that regard, this study supports the understanding that this includes cultural heritage, for:

What could be more reasonable than a desire to ensure that you are the custodian of your own cultural heritage? And what could be more unreasonable than holding another people's cultural heritage, of ongoing significance to them, in your hands? (Asch 2009: 394)

Over the past few decades, many of those who curate and examine cultural materials professionally have become sensitized to the issue. Among other initiatives, this has led the Glenbow Museum in Calgary to curate sensitively and cooperatively (see Bell 2009: 46). Often, critics of such approaches describe them

as a bow to “political correctness” or “historical revisionism” that is based on the power of an “aboriginal orthodoxy” to bend rules to its advantage (see Flanagan 2000). The findings of this study indicate that, to the contrary, the Glenbow and other institutions are following a policy that adheres to long-standing understandings of the kind of relationship entailed through treaties.

So assertions of jurisdiction matter not, for what would be more unkind and therefore out-of-keeping with the relationship we established through such historical treaties than to insist on unilateral control over cultural materials that are of on-going significance to Indigenous peoples? And what would not be more in keeping with that promise if, at least as a first step, all museums, like the Glenbow, established an advisory council, and, as well, ensured that sacred objects held by that institution were at the very least made available to “First Nation communities for use in traditional ceremonies that are vital for the survival of their cultures” (Bell 2009: 46).

In the future, regardless of what legislation might say, this research underscores that the ultimate authority for how to deal with the cultural heritage of First Nations ought to rest with the First Nations themselves. Whether or not we claim sovereignty and jurisdiction, we will need to constrain our actions so as to conform to the understanding that nothing “could be more reasonable than a desire to ensure that you are the custodian of your own cultural heritage.”

Participants

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Learn more

This summary was drawn from the final report of the “Treaty Relations as a Method of Resolving IP Issues” project. The full report and other resources created by the project team can be found here: <http://bit.ly/1BJz7FX>

Works Cited

- Asch, M. 2009. Concluding Thoughts and Fundamental Questions. In *Protection of First Nations Cultural Heritage: Law, Policy, and Reform*, edited by C. Bell and R. K. Patterson, pp. 319-410. UBC Press, Vancouver.
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