

Treaty Relations as a Method of Resolving IP Issues Project

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Project Overview

This case study looked into the political relationship established between First Nations and Canada through historical treaties as a possible framework through which to consider issues associated with the IPinCH project and, in particular, matters respecting the appropriation or the taking of some thing without the consent of the owner.

This research asks whether there is something in the treaty relationship that established, even indirectly, a shared understanding of how the cultural heritage of Indigenous peoples would be treated by the Settlers and the governments they established?

Methods

Project members studied a sample of treaties negotiated at different times and in different locations in Canada. They used published primary and secondary sources to examine perspectives of the parties at the time treaties were negotiated. The sample of treaties was limited to those in which there was sufficient contextual information on this matter available.

Researchers were asked to apply historical and anthropological methods, including the identification and analysis of relevant archival materials, published primary sources, published oral histories, and ethnographic materials, to distil aspects useful to the questions being addressed.

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 other people's cultural heritage, of ongoing significance to them, in your hands? (Asch 2009)

We made promises long ago in keeping with an understanding that to live on these lands is to have a kind and respectful relationship with those already here. The problem is that we have failed to keep our promises. The question is whether we will begin to keep them now, so that, little by little, we can develop a regime in which whatever policies we adopt are in keeping with an understanding that there is nothing more reasonable than to begin accepting that Indigenous peoples must be the ultimate decision-makers respecting the disposition of their own cultural heritage.

Research Focus & Findings

It is a self-evident fact that Indigenous peoples held legitimate underlying title, jurisdiction, and sovereignty prior to the arrival of Settlers. Notwithstanding the existence of Canada as a state, unless there is clear evidence that they were extinguished, such sovereignty, jurisdiction, and underlying title must be presumed to continue to exist today (Asch 1997). This report looks at number of agreements negotiated between Indigenous peoples and the Crown; these show over and over again that there has never been such a transfer of jurisdiction.

This fact impacts everything related to tangible cultural heritage. The question is: what do we do about it? This report considers issues related to cultural heritage given this fact and also offers us a way to figure out a way forward.

From the research, it is clear that the common intent of the treaties was to share, rather than to transfer authority, and that from the Crown's perspective sharing meant that in return for permission to settle in a particular area, the Crown would act in ways that were beneficial to Indigenous peoples. The issue, then, is not so much one of forging a new path. What is most pertinent here, is that even though we (as Settlers) may claim sovereignty and even jurisdiction today, however unjustly, this does not justify an assumption that we have the right to act unilaterally. The reason for this is that in historical treaty-making we made certain promises about how we would treat one another and these promises hold whether or not we claim sovereignty and jurisdiction.

Therefore, whether or not we say we have jurisdiction, we need to work collaboratively with Indigenous peoples to understand how they value their cultural heritage, and adapt to them. For what could be more unkind and therefore out-of-keeping with the relationship we established than to insist on unilateral control over cultural materials that are of on-going significance to Indigenous peoples?

Conclusion

We promised not to take things that belong to our treaty partners without first gaining their consent. To the extent that we have acted outside of this promise with respect to their cultural heritage, we have acted outside of this instruction. In that regard, amends may be required. But more to the point, the instruction tells us that in future we need to ensure that, regardless of what legislation might say, the ultimately authority for how to deal with the cultural heritage of First Nations ought to rest with them. Hence, whether or not we claim sovereignty and jurisdiction, we will need to constrain our actions so as to conform with the understanding that nothing "could be more reasonable than a desire to ensure that you are the custodian of your own cultural heritage."



"Indian chiefs medal presented to commemorate Treaties Number 3-8 [1873-1899]"
(Library and Archives Canada)

What does the treaty medal suggest about the Treaty relationship?

Researchers & Projects

• Michael Asch

Research and report on Treaty Four negotiated principally in Saskatchewan in 1874 between the Cree and the Ojibwa and the Crown, and on Treaty 11 negotiated between the Dene and the Crown in the Northwest Territories in 1921;

• Aimée Craft

(M. A. Law, 2011)
Research and report on Treaty One negotiated in Southern Saskatchewan between the Crown and the Anishinabe in 1871;

Neil Vallance

(Ph.D. Law, in process)
Research and report on the Vancouver Island Treaties negotiated between Governor Douglas (representing the Crown) and First Nations mainly on Southern Vancouver Island between 1850 and 1854.

• Allyshia West

(M.A. Anthropology, 2010)
Research and report on the Manitoulin Island Treaties negotiated between the Crown and the Anishnabek in 1836 (Treaty 45) and in 1862; and,

• Kelsey Wrightson

(M.A. Political Science, 2010)
Research and report on Treaty Six (with additional information by Michael Asch) negotiated in 1876 principally in Alberta in 1876 with Cree and the Crown.

• In addition, **Dr. Robert Hancock** organized the administrative aspects of the project and compiled a bibliography of the materials. I would also like to thank **Dr. Marc Pinkoski** and **Ms. Siku Allooloo** for their contributions to this research.