Treaty Rights

The Concept of Treaty

Different legal orders — from the Canadian one to the many distinct Indigenous legal orders in Canada — give rise to different understandings of the concept of "treaty."[1] This key term focuses on the way in which "treaty" is understood in Canadian constitutional law. The Supreme Court of Canada says that a treaty between the Crown and one or several Aboriginal peoples of Canada "represents an exchange of solemn promises." [2] Treaty rights arise from these promises and are "recognized and affirmed" by section 35 of the *Constitution Act, 1982*.[3]

Rights that Arise from Treaty

Identifying treaty rights requires the courts to engage in treaty interpretation, with the goal of "choos[ing] from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed."[4] This is not an easy task, because the treaty text is often not determinative. Sometimes promises were made orally,[5] or the historical context requires the recognition of an implied treaty right.[6] Further, due to "significant differences in the signatories' languages, concepts, cultures and world views," Crown and Aboriginal actors will often have had "fundamentally different understandings of the exact nature of their agreements."[7] For these reasons, it is important for courts to look beyond treaty texts, to extra-textual information and context that can shed light on how different parties would have understood their rights and obligations under the treaty.[8]

To assist courts with navigating the difficult task of treaty interpretation, the Supreme Court of Canada in *Marshall* set out the following principles of treaty interpretation (quoted in full, with in text citations removed):

- Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation.
- Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the [A]boriginal signatories.
- The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed.
- In searching for the common intention of the parties, the integrity and honour of the Crown is presumed.
- In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties.

- The words of the treaty must be given the sense which they would naturally have held for the parties at the time.
- A technical or contractual interpretation of treaty wording should be avoided;
- While construing the language generously, the court cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic.
- Treaty rights of Aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context.[9]

Based on these principles, the Supreme Court of Canada in *Marshall* set out a two-step approach to establishing a treaty right. First, the courts must examine the treaty text, which may reveal "ambiguities and misunderstandings [that] may have arisen from [the parties'] linguistic and cultural differences."[10] The court must then consider the possible meanings of the text in light of the historical and cultural context.[11] Based on these two steps, the court determines which interpretation best reflects the parties' common intention.

[1] See eg Harold Johnson, *Two Families: Treaties and Government* (Saskatoon: Purich Publishing, 2007) at 13, 90-92; and Heidi Kiiwetinepinesiik Stark, "Respect, Responsibility, and Renewal: The Foundations of Anishinaabe Treaty Making with the United States and Canada" (2010) 34:2 American Indian Culture and Research J 145 at 147-49.

[2] *R v Badger*, 1996 CanLII 236 (SCC) at para 41 .

[3] *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 at s 35(1).

[4] *R v Marshall*, 1999 CanLII 665 (SCC) at para 78 (citing *R v Sioui*, 1990 CanLII 103 (SCC) at pp. 1068-69) .

[5] See *Badger*, *supra* note 2 at para 52.

[6] See *Marshall*, *supra* note 4 at para 44.

[7] *Quebec (Attorney General) v Moses*, 2010 SCC 17 (CanLII) at para 108.

[8] See *Badger*, *supra* note 2 at para 52.

[9] See *Marshall*, *supra* note 4 at para 78 (internal citations removed). See also James (Sákéj) Youngblood Henderson, "Interpreting *Sui Generis* Treaties" (1997) 36:1 Alta L Rev 46, online: <https://www.albertalawreview.com/index.php/ALR/article/view/1019/1009>; and Aaron James Mills (Waabishki Ma'iingan), Miinigowiziwin: *All That Has Been Given for*

Living Well Together: One Vision of Anishinaabe Constitutionalism (PhD Dissertation, University of Victoria, 2019) [unpublished] at 23-24, 38-39, and 267, online: <http://mars.library.uvic.ca/bitstream/handle/1828/10985/Mills_Aaron_PhD_2019.pdf?sequence=1&isAllowed=y>. Indigenous worldviews are often so different from Canadian legal traditions that to define them with certainty imposes an unreasonable risk of drawing improper inferences from misunderstood concepts or oversimplified generalizations.

[10] *Marshall*, *supra* note 4 at para 82.

[11] *Ibid* at para 83.