

AN ANNOTATED GUIDE TO THE (MAL) INTERPRETATION OF CONFEDERATION ERA TREATIES IN CANADA

The national conversation on confederation-era treaties, and their neglect by Canada, is long overdue. In fact, this moment in our shared history might demonstrate better than any time in our recent past why treaties are so critically needed. Gina Starblanket and Dallas Hunt make this clear in the Yellowhead Institute Special Report, *The Numbered Treaties, COVID-19 & the Politics of Life*. While they discuss healthcare and mutual aid specifically, there is so much misinterpretation and misunderstanding around treaties generally. This annotation of a Numbered Treaty reveals the difference in expectations between settlers and First Nations, and the violence that has accompanied the enforcement of a very narrow interpretation of treaties. This narrow interpretation excludes First Nation perspectives but endures into contemporary policy and law.

AN INDIAN TREATY

- (1) **THE INDIANS** inhabiting the district do **hereby cede, release, surrender and yield** up to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors forever, all their rights, titles and privileges, whatsoever, to the lands included within the territory.
- (2) The tract comprised within the lines above described [are for Her Majesty the Queen and Her successors] to have and to **hold forever**.
- (3) **AND HER MAJESTY THE QUEEN** hereby agrees and undertakes to lay aside **reserves for farming** lands, for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada; provided, all such reserves shall not exceed in all one square mile for each family of five.
- (4) Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any Band as She shall deem fit, and also that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their **consent** first had and obtained; and with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians,
- (5) Her Majesty agrees to **maintain schools** for instruction in such reserves hereby made as to Her Government of the Dominion of Canada may seem advisable, whenever the Indians of the reserve shall desire it.
- (6) Her Majesty further agrees with Her said Indians that within the boundary of Indian reserves, until otherwise determined by Her Government of the Dominion of Canada, no intoxicating liquor shall be allowed to be introduced or sold to preserve Her Indian subjects from the **evil influence** of the use of intoxicating liquors.
- (7) It is further agreed between Her Majesty and Her said Indians, that such sections of the reserves may at any time be required for **public works or buildings**, of what nature soever, may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made for the value of any improvements thereon.
- (8) And further, that Her Majesty's Commissioners shall, as soon as possible after the execution of this treaty, cause to be taken an accurate census of all the Indians inhabiting the tract, and **pay to each Indian person the sum of \$4 per head yearly**.
- (9) It is further agreed between Her Majesty and the said Indians, that the following articles shall be supplied to any Band of the said Indians who are **now cultivating the soil**, or who shall hereafter commence to cultivate the land: hoes, scythes, whetstone, spades hay forks, reaping hooks, axes, saws, the necessary files. Also for each Chief for the use of his Band, a chest of ordinary carpenter's tools; also, for each Band, enough of wheat, barley, potatoes and oats to plant the land actually broken up for cultivation by such Band.
- (10) That in the event hereafter of the Indians comprised within this treaty being overtaken by any **pestilence, or by a general famine**, the Queen, on being satisfied and certified thereof by Her Indian Agent or Agents, will grant to the Indians assistance of such character and to such extent as Her Chief Superintendent of Indian Affairs shall deem necessary and sufficient to relieve the Indians from the calamity that shall have befallen them. A medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians at the direction of such agent.
- (11) They promise and engage that they will in all respects **obey and abide by the law**, and they will maintain peace and good order between each other, and also between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians or whites, now inhabiting or hereafter to inhabit any part of the said ceded tracts, and that they will not molest the person or property of any inhabitant of such ceded tracts, or the property of Her Majesty the Queen, or interfere with or trouble any person passing or travelling through the said tracts, or any part thereof, and that they will aid and assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded.
- (12) **IN WITNESS WHEREOF**, Her Majesty's said Commissioners and the said Indian Chiefs have **hereunto subscribed** and set their hands.

- (1) **"hereby cede, release, surrender and yield"** | The concept of surrender is an imposed one. Oral and archival records of treaty negotiations and promises describe sharing lands, jurisdiction and mutual aid. It is only in the written version of treaties where surrender appears. But as such, it has been privileged by bureaucrats and courts though time to project a very one-sided view of treaties and ignoring Indigenous perspectives.
- (2) **"hold forever"** | First Nations used concepts such as, "as long as the world stands" or "the sun shines" and "rivers flow" as references to our obligations to the land, water and future generations. In many ways, treaties were only valid so long as the land was in good health. Rather than a possessive ownership of lands, First Nations expressed an inter-dependency. This does not validate the romantic "Indians don't believe in land ownership" trope, but rather, speaks to jurisdiction as much more complicated set of relationships linking treaties to the creation and maintenance of life.
- (3) **"reserves for farming"** | In the initial negotiations of most treaties, reserves were lands set aside for exclusive First Nation use (for farming or otherwise), not areas for permanent settlement or the zones of exclusion that they become post-confederation. In earlier treaties First Nations chose the location of reserves but as treaties moved westward, their input was not considered.
- (4) **"consent"** | In many cases, Indigenous peoples expected settlers to abide by Indigenous laws and relationships when they entered into treaties, meaning that consent for activities in a given treaty area was the lowest possible threshold for using or selling any lands or resources. Instead, from Confederation into the present, the notion of consent has been evacuated all-together by the Crown and replaced by paternalism, coercion, and a "duty to consult."
- (5) **"maintain schools"** | For some First Nations at the time of treaty, new forms of education were welcome. In 1840, First Nation leaders in Ontario were committing funds towards schools so that "white traders might not cheat them." This in addition to support for Indigenous visions of education as well. But the requests were not for coercive and genocidal form this commitment took the shape of in residential schools.
- (6) **"evil influence"** | While some First Nation leaders did request support to prevent substances from entering communities, this ethic of "protection" soon extended beyond alcohol to tobacco, dance and pool halls and basically all interactions with settlers would be prohibited by the *Indian Act*. None of these subsequent restrictions were discussed in treaty negotiations.
- (7) **"public works or buildings"** | It was understood that any infrastructure needs that communities required would be supported by Canada. But since treaty, this infrastructure clause has been interpreted by the Crown as a tool to appropriate reserve lands for neighbouring municipalities. In fact, the 1911 Oliver Act allowed whole reserves to be re-located so that municipalities could expand infrastructure and thrive. First Nations protested the Act and Parliament was aware of the breach to treaties but proceeded regardless of any obligations. Today the public works in most First Nations, from water to electricity or Internet, is inadequate.
- (8) **"pay to each Indian person the sum of \$4 per head yearly"** | Somehow this commitment avoided inflation over the years. While First Nations expected this figure to increase on a scale relative to the wealth generated in the treaty area, the Crown maintained these paltry contributions, keeping the First Nation share for the benefit of Canadians instead. Some confederation-era treaties, like the Robinson Huron and Superior treaties actually included a specific clause to increase the annuity and Canada refused to interpret fairly even the written versions of the treaties that contained these clauses.
- (9) **"now cultivating the soil"** | Like the discussion of education, many did seek the tools to participate in a different type of economy. This was the case in Treaty #8 where the buffalo had been decimated by settlers and governments. And yet, as many did cultivate the land, they did so well that neighbouring farmers felt threatened and petitioned federal officials to cut these provisions and limit what First Nation farmers could sell. Despite the treaty commitments, parliament did as they were asked.
- (10) **"pestilence, or by a general famine"** | While the Crown has generally avoided the pestilence clause, which was invoked during the COVID-19 pandemic by Maskwacis leadership, and has in court referred to the medicine chest as merely a first aid kit, records of the negotiation, accounts from Elders, and even internal government outline that healthcare was indeed a treaty commitment made in treaties 5, 6, 7, 8, 10 and 11. Yet, to date, the Crown views healthcare not as treaty rights but at the Minister's discretion.
- (11) **"obey and abide by the law"** | In oral accounts of Treaty 6, settlers simply wanted four things: grass for their cows, timber for their homes, land no deeper than the depth of a plow, and to live in peace and friendship with First Nation neighbours. In exchange First Nations would receive some of the provisions mentioned above.

The demand that First Nations subscribe to foreign laws, or subject themselves to alien notions of belonging or justice, does not appear in First Nation interpretations of confederation era treaties.

- (12) **"hereunto subscribed"** | As more research is undertaken and land claims are filed, it is clear that treaties—as they have been written, interpreted and enforced by Canada—were not the versions that any said Indian Chief ever subscribed.

SOURCES

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