

Chapter 7

What is a Treaty? Definitions and Misconceptions

- I. Defining treaty
- II. The narrow conception of the treaty document

Treaties, or treaty-like agreements, have been a part of both Indigenous and non-Indigenous societies for centuries.¹ There is a rich heritage of principle and precedent available to a state such as Australia wishing to engage in a treaty process with Indigenous peoples for the first time. In particular, North America, where hundreds of treaties and agreements have been signed, provides a multitude of examples to illustrate the nature of a treaty document. These reveal the treaty to be a political instrument with a particular set of norms, yet retaining a great deal of flexibility. Patrick Macklem has suggested that beneath questions of form and interpretation lie 'deeper questions about the normative significance of the treaty process'.² It

¹ Though not, of course, Australian society.

² Patrick Macklem, *Indigenous Difference and the Canadian Constitution*, University of Toronto Press, Toronto, 2001, p.136. Lisa Strelein has recently adopted a similar approach to the conceptualisation of native title in Australia. She suggests the central questions in understanding Native Title are 'how' common law recognises it, and 'what' is recognised. 'Underlying these two questions, however, is a more fundamental question: 'why' does

is these 'deeper questions' about process which need to be investigated in Australia. Yet such a theoretical approach has often been missing in accounts of the Aboriginal-state relationship.³ Without such a focus, the possibility of such a process providing a new normative basis for relationships between peoples could remain hidden behind a narrow, restrictive interpretation of 'treaty' that serves only to maintain the colonial relationship.

I investigate these questions by developing a conception of treaty which focuses not on form and content, but on the creation of a just, enduring relationship between parties that are bound together through the treaty process, even as they retain their individual integrity and autonomy. Such a conception reveals treaties to be potentially far more than mere documents of land cession and restitution, or the cause of division, but the catalyst for new forms of consensual political association that reflect rather than suppress diversity. Robert Williams suggests that, at their heart, aboriginal-European treaties⁴ have historically been about 'establishing just paradigms for behaviour between different peoples'.⁵ They were 'acts of imagination',⁶ which aimed not just to establish peace and reconciliation, but to reconstitute society itself.⁷ Contemporary Canadian theorists like James Tully and James [sakej] Youngblood Henderson have suggested such conceptualisations may provide a practical and just basis for Indigenous-state relations today, which they describe respectively as 'treaty

the common law recognise native title? What is the purpose to which recognition is directed; what is the policy or jurisprudential foundation for native title?' Strelein, 'Conceptualising Native Title', *The Sydney Law Review* vol. 23, no. 1, March 2001, p.95.

³ For example, in the field of research into Aboriginal crime and the law, Sidney Haring noted '[t]he centrality of empiricism of Australian research...and the avoidance of broader theoretical issues...clearly reflects a theoretical blindness of scholars doing this work.' Haring, 'Australian Social Science, Aboriginal Peoples and the Criminal Law', *Australian Journal of Law and Society*, vol. 10, 1994, p.70. Lisa Strelein is a recent and welcome exception to this trend. (See note 1, above.)

⁴ The term 'aboriginal' (with a small 'a') is used here in the context of Indigenous peoples outside Australia.

⁵ Robert A. Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest*, Oxford University Press, New York, 1990, p11.

⁶ *ibid*, p.113.

⁷ *ibid*, p.50.

constitutionalism',⁸ or 'treaty federalism'.⁹ In this form of political association, the treaty creates a relationship where the autonomy of Indigenous and non-Indigenous peoples is maintained, even as they are bound together in such a way as to assure the unity of the state. What emerges is a truly legitimate, consensual constitution.

An overly narrow view of treaty, such as that which perhaps predominated amongst political leaders in Australia at the close of the last century, fails to capture the broader significance of creating a treaty relationship. This significance ultimately lies not in the recognition of Aboriginal rights, but the creation of a lasting, shared political culture based on the equality of peoples. Misconceptions about the nature of an Aboriginal treaty have, as part of the traditional role of Aboriginal affairs,¹⁰ been exploited in such a way as to maintain the current (colonial) dynamic of Indigenous-state relations. This 'politics of treaty perception' acts to deny the benefits that result for both Indigenous and non-Indigenous parties through the ongoing process of intercultural dialogue that embodies the treaty relationship. The normative framework suggested by such a relational conception of treaty – which both requires and facilitates a new form of mutual recognition – will be examined in detail after describing the contrasting narrow, or what some have called 'European', view.¹¹

⁸ See James Tully, *Strange Multiplicity: constitutionalism in an age of diversity*, Cambridge University Press, Cambridge, 1995.

⁹ See James [sakej]Henderson, 'Empowering Treaty Federalism', *Saskatchewan Law Review*, vol. 158, 1994.

¹⁰ Both Geoff Clark and Patrick Dodson argue Aboriginal issues must be removed from their current position at the mercy of party politics. See chapter 6.

¹¹ This distinction between an indigenous and a European view of treaties has been suggested by Taiaiaike Alfred (personal communication, February 22, 2001), as well as Isabelle Schulte-Tenckhoff, 'Reassessing the Paradigm of Domestication: The Problematic of Indigenous Treaties', *Review of Constitutional Studies*, no. 4, 1998.

I. Defining treaty

One of the founders of international law, Hugo de Groot (known as Grotius), suggested as early as the seventeenth century that the right to conduct treaties was 'a right so common' as to apply even to 'strangers to the true religion'.¹² Yet there has been such little agreement as to its precise constituents that the author of one study of the subject concluded it is next to impossible to actually define a treaty in a comprehensive manner.¹³ Similarly, the International Law Commission commented on the term 'treaty': 'an extraordinarily varied nomenclature has developed... there is no exclusive or systematic use of nomenclature for particular types of transaction.'¹⁴

This lack of precision means the treaty may be equally open to use by, or denial to, Aboriginal peoples, depending on the particular political position one takes. We have recently seen the Prime Minister's view that as an instrument of states, the treaty is not relevant to Aboriginal peoples,¹⁵ who, by contrast, have asserted they have the right 'to make treaties with anybody'.¹⁶

The definition of treaty according to international law does little to reduce ambiguity. The notion as defined by article 2, paragraph 1(a) of the Vienna Convention is 'an international agreement concluded between states in written form and governed by international law,

¹² Grotius cited in Russel Barsh and James Youngblood Henderson, 'International context of Crown-Aboriginal Treaties in Canada', Royal Commission on Aboriginal Peoples, Research Report, May 12 1995, p.61.

¹³ Jan Klabbers, *The Concept of Treaty in International Law*, Kluwer Law International, The Hague, 1996, p.8.

¹⁴ Cited in Klabbers, *op cit*, p.43.

¹⁵ In 1988 Howard described this as an 'absurd' proposition, and has maintained this position. See chapter 5, footnote 81, and surrounding text.

¹⁶ Clark, 'From Here to a Treaty', Hyllus Maris lecture, Latrobe University, 5 September 2000.

whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.’¹⁷

Such a definition would appear to preclude Indigenous peoples from having sufficient international legal capacity – that is, that of states – to conduct treaties. Yet, it has been suggested that the requirement that treaties be concluded between states is itself merely a logical consequence of the fact that under article 1 of the Convention, its scope does not extend beyond treaties concluded between states.¹⁸ Such a decision to limit the scope of the Convention was taken at a relatively late stage, and should not be held to indicate that treaties cannot be conducted between other subjects of international law, a fact states such as the US wished to be recognised in the Convention.¹⁹ Article 3 of the Convention says the fact it does not cover agreements by non-State parties ‘shall not affect the legal force of such agreements’, which Klabbers interprets as meaning they are not precluded from being called a ‘treaty’.²⁰

Black’s Law Dictionary defines ‘treaty’ as

a compact made between two or more independent nations with a view to the public welfare...[or] An agreement, league or contract between two or more nations or sovereigns, formally consigned by commissioners properly authorized and solemnly ratified by the several sovereigns or the supreme power of each state.²¹

¹⁷ Cited in Klabbers, *ibid*, p.42.

¹⁸ Klabbers, *op cit*, p.47.

¹⁹ Klabbers, *op cit*. James Crawford made similar comments with regards the ‘authoritative’ 4 part definition of a ‘state’ according to international law found in the Montevideo Convention on the Rights and Duties of states of 1933. He suggested ‘this was an inter-American convention with a limited number of parties, and the definition does not get us very far.’ Crawford, ‘Islands as Sovereign states’, *International and Comparative Law Quarterly* vol. 38, 1989, p.280.

²⁰ Klabbers, *ibid*, p.48.

²¹ Henry Campbell Black, *Black’s Law Dictionary* (5th ed.) West Publishing Co., Minnesota, 1979, p.1346.

The terrain covered by instruments that may be labelled as ‘treaties’ is indeed broad, with the ‘key’ appearing to be the intent of the parties to conclude a treaty,²² a factor which may override the alleged ‘incapacity’ of a non-state party.

It has been argued that the view ‘that it is only the collective federal state as such’ that has treaty-making capacity is wrong. Okeke suggests ‘component members of a federal state’ can and do have quasi-international personality, though one of limited independence or sovereignty.²³ For Indigenous peoples, the issue here becomes one of recognition as a ‘component member of a federal state’. Federal systems of governance allow space for recognising the right to self-government of an Indigenous people in a similar way to, say, a state or province, were the necessary political will present. There are a number of indications of increasing recognition of the international legal personality of Indigenous peoples, including recognition by the UN of ATSIC’s status as a non-government organisation,²⁴ as well the use by the Iroquois and other North America peoples of the own passports to travel between states. The fact that they are generally not seeking absolute sovereignty should assist Indigenous peoples in gaining such recognition.

There are historical precedents that treaties with aboriginal peoples should be treated as instruments of international law in a manner no different from treaties with other international

²² It is the ‘wider principle - intention of the parties, reflected by reference to the objects and purpose – that guides the law of treaties.’ Rosalyn Higgins, ‘Time and the Law: International Perspectives on an Old Problem’, *International and Comparative Law Quarterly*, vol. 46, part 3, July 1997, p.519.

²³ Chris N. Okeke, *Controversial subjects of Contemporary International Law: An examination of the new entities of international law and their treaty-making capacity*, Rotterdam University Press, Rotterdam, 1974, p.5.

²⁴ While consistently critical of both federal and state governments, the suggestion that ATSIC is a non-government organization belies facts such as its unilateral creation by federal parliament who continue to allocate and control key aspects of its budget. Until 1999 the head of ATSIC was appointed by the government of the day. See Patrick Sullivan (ed.), *Shooting the Banker: Essays on ATSIC and self-determination*, North Australia Research Unit, Australian National University, Darwin, 1996.

entities. In the 1832 case of *Worcester v State of Georgia*, Chief Justice John Marshall of the United States Supreme Court wrote:

The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.²⁵

In his concurring opinion in the same case, Justice McLean chose to take a broad, inclusive view of the issue when he asked:

What is a treaty? The answer is, it is a compact formed between two nations or communities, having the right of self-government.²⁶

This jurisprudence is part of a long experience with treaties between aboriginal peoples, and colonial governments and their successor states.²⁷ In the Canadian context, Kent McNeil notes the status, meaning, and effect of treaties signed with aboriginal peoples continues to be subject to debate.²⁸ Yet there has been a developing jurisprudence as to the nature of aboriginal treaties. Peter Hogg has succinctly summarised the characteristics of a valid Indian treaty in Canada:

1. Parties: Must be the Crown on one side, and an aboriginal nation on the other.
2. Agency: The signatories must have authority to bind their principals.
3. Legal Relations: Parties must intend to create legally binding obligations.

²⁵ Cited in Royal Commission on Aboriginal Peoples, *Volume 2: Restructuring the Relationship*, Canada, 1996, p. 47.

²⁶ Cited in RCAP, *op cit*, p.48.

²⁷ See Robert Williams Jnr, *op cit*, and Barsh and Henderson, *op.cit*. The comparison with Canada is facilitated by the fact that among other similarities between the two states, '[i]n many ways Australia's constitutional position regarding treaties has a character similar to that of Canada.' Torsten H. Strom and Peter Finckle, 'Treaty Implementation: The Canadian Game Needs Australian Rules', *Ottawa Law Review*, vol. 25, no. 1, 1993, pp.39-60.

²⁸ Kent McNeil, 'Aboriginal title and Aboriginal Rights: What's the Connection?', *Alberta Law Review*, vol. 36, no. 1, 1997, pp.117-148.

4. Consideration: The obligations must be assumed by both sides, so that the agreement is a bargain.
5. Formality: There must be a certain measure of solemnity.²⁹

In formulating these principles, Hogg relied primarily on two cases: *R v Simon*³⁰, and *R v Sioui*. In the latter case, the court provided a broad definition of an aboriginal treaty. It suggested 'it is clear that what characterises a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity'.³¹

Whether as an instrument of international or domestic law, the treaty is characterised by a great deal of flexibility. Even within the codified norms of the Vienna Convention, there exists a great deal of freedom in the international realm as to who negotiates a treaty, how it is negotiated, and what form it shall take.³² This is true also of Australia.³³ One commentator suggested that treaty-making is partly an art, partly a technique.³⁴ This freedom to be creative, even while observing international customary law, is regarded as an advantage of the treaty process in regards to the Indigenous-state relationship, where the need for novel approaches to intransigent issues has often been recognized.³⁵

²⁹ Hogg quoted in Thomas Isaac, *Aboriginal Law: Cases, Commentary and Materials* (2nd ed.), Purich Publishing, Saskatoon, 1999, p.117.

³⁰ *R. v.Simon*, [1986] 1 CNLR 153 (SCC)

³¹ *R v Sioui* [1990] 1 SCR 1025 at 1044.

³² See Klabbbers, *op cit*.

³³ Gunther Doecker points out there is no explicit codification in the Australian constitution as to which government agencies or persons have the power to negotiate treaties. Doecker, *The treaty-making power in the Commonwealth of Australia*, Martinus Nijhoff, The Hague, 1966, p.vii.

³⁴ J.G. Starke, *The ANZUS Treaty Alliance*, Melbourne University Press, Carlton, 1965, p.ix.

³⁵ Miguel Alfonso Martinez, *Human Rights of Indigenous Peoples: study on Treaties, Agreements and other constructive arrangements between states and indigenous populations*, 22 June, 1999, par. 54.

The treaty process is an inherently flexible one. Its parameters are defined by those party to it. This suggests the assertion that Indigenous peoples cannot negotiate treaties because they are not states is based more on political opinion than historical or legal evidence.³⁶ It is true that the creation of 'an Aboriginal people' as one party to negotiate an Australian treaty – as suggested by Dodson – is an abstract entity that may owe its existence as much to political strategy as any correspondence with 'objective' reality. Yet, Grammond points out that a 'state', too, is an abstract entity as far as the negotiation of treaties is concerned. Both 'the state' and 'the Aboriginal people' can only act through agents who will sign the treaty on their behalf.³⁷

Determining these agents is, again, somewhat ambiguous. Under the Vienna Convention, determining who has authority to sign treaties is largely left to the states in question. In Canadian jurisprudence, Grammond suggests the law is quite unclear as to the authority of native leaders to sign treaties. In the case he cites, the court appears to decide the source for such a decision is from aboriginal law. Grammond suggests this amounts to 'a recognition of the existence of political structures which do not derive their authority from the state legal system'.³⁸ A similar recognition is arguably contained in Australia in the Mabo case. In recognising the continued existence of Aboriginal law, and thus societies built around those laws, the court may effectively recognise both the Aboriginal right to determine their political destiny through the negotiation of treaties, and their right to decide for themselves representatives to take part in such negotiations.

³⁶ Isabelle Schulte-Tenckhoff, *op cit.*

³⁷ Sebastien Grammond, 'Aboriginal treaties and Canadian law', *Queens Law Journal*, no. 20, 1994, p.69.

³⁸ *ibid*, p.72.

What emerges from this brief look at the nature of both treaties generally, and aboriginal treaties in particular, is their ambiguous definitional nature. When ascertaining whether or not a particular document constitutes a treaty, Klabbers concluded that even 'the designation [as such] is of little use.'³⁹ As for the status of aboriginal 'treaties', some scholars assert they are neither 'international treaties' or agreements under international law, as Indigenous peoples lack the necessary international personality.⁴⁰ Yet Indigenous scholars in North America have put forth convincing arguments that the treaties should be viewed as instruments of international law,⁴¹ or even as a distinct branch of international law.⁴² I do not wish to join this 'chorus of legal treaty interpretation' by seeking to prove or disprove such claims.⁴³ Again, I would simply observe that the presence of such ambiguity should not present aboriginal peoples more than any other party with particular difficulties in negotiating such agreements, given the intention of parties to do so. This lack of consensus as to the fundamental defining features of a treaty suggests the withholding of such status to Indigenous-state agreements may be based more on a perception of aboriginal status, rather than being in line with accepted theory and practice of treaty.

In the face of such ambiguity, historian of aboriginal treaties, Father Francis Prucha suggested that when discussing the concept of treaty, 'it will not do to insist on univocal definitions

³⁹ Grammond, *op cit*, p.44

⁴⁰ Andree Lawrey, 'Contemporary Efforts to Guarantee Indigenous Rights Under International Law', *Vanderbilt Journal of Transnational Law*, vol. 23, no. 4, 1990, p.733.

⁴¹ For example see Sharon Venne, 'Understanding Treaty 6: An Indigenous Perspective', in Michael Asch (ed.), *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference*, UBC Press, Vancouver, 1997.

⁴² Barsh and Henderson, *op cit*.

⁴³ Thomas O. Hueglin, 'Exploring concepts of Treaty Federalism: A Comparative Perspective', Research Paper prepared for the RCAP, August 1994. Hueglin suggested, 'Constitutional gamesmanship has been played to the fringes of sanity by Euro-Canadian legal and academic experts and, as is now well known, with few or no results.' (p.4.)

while ignoring the multifaceted historical reality of the use of treaties...'⁴⁴. Yet this is precisely what has often happened when the issue of an Aboriginal treaty has been raised in the Australian context. These narrow definitions – which describe only the ‘most formalistic and superficial aspects of treaty making’ – have been positioned as a ‘Western’ view, which is opposed to a more ‘Indigenous’ view.⁴⁵ They may also currently be characteristic of an ‘Australian’ view which contrasts with accepted practice in places such as Canada. This narrow view of treaties was recently seen in Australia in John Hirst’s lecture presented as part of an important collection celebrating the centenary of Federation,⁴⁶ as well as recent work by conservative writer Keith Windschuttle.⁴⁷

II. The narrow conception of the treaty document

In outlining this narrow view of treaties, it is possible to discern echoes of the colonial viewpoint. Thus, the treaty is seen as ‘divisive’, or disruptive of an assumed unified, and perhaps uniform, political community. The second major objection to the treaty concept in Australia is the suggestion that (at least as it is narrowly presented) it is too simple an instrument to ‘solve’ the problem of Aboriginal disadvantage. The allegedly prohibitive

⁴⁴ Francis Paul Prucha, *American Indian Treaties: The History of A Political Anomaly*, University of California Press, Berkeley, 1994, p.2.

⁴⁵ Alfred, personal communication, February 22, 2001. The limiting of the treaty concept when it applies to Indigenous peoples is similar to the process observed by Lisa Strelein in Australian Native Title deliberation, where she notes a tendency to ‘deny a level of abstraction that we readily accept in other common law tenures’ resulting in a more vulnerable, inferior title. Strelein, *op cit*, p.106.

⁴⁶ John Hirst, ‘More or Less Diverse’, in Helen Irving (ed.), *Unity and Diversity: A National Conversation. Barton lectures*, ABC Books, Sydney, 2001.

⁴⁷ Keith Windschuttle, ‘Why there should be no Aboriginal treaty’, *Quadrant*, vol. 45, no. 10, October 2001. For a series of articles by Windschuttle attacking the concept of ‘Aboriginal separatism’ see <http://www.sydneyle.com/Separatism.htm>

difficulty of determining who should be a party to the treaty is presented as proof of both these propositions.

Echoing assertions of Prime Minister Howard, Hirst suggests the problem of precisely locating the Indigenous party to a treaty would be profoundly divisive. Here, the treaty is presented as a mechanism for distributing 'special legal rights' to 'a particular class of people' which must be created for this purpose.⁴⁸ A dispute over the Australian practice of self-definition,⁴⁹ is used to illustrate the difficulties of deciding who is or isn't Aboriginal.⁵⁰ With the focus firmly on the identity of one party, Hirst laments the fact that the signing of a national framework treaty 'would not be with a traditional grouping.'⁵¹ Yet, Aboriginal and non-Aboriginal peoples alike are bound by the fact that any treaty in Australia must be a product of twenty-first century realities rather than an attempt to replicate the features present in the eighteenth century. Given a history of ignorance, insensitivity and outright opposition toward traditional social and political groupings in policy and practice, it would be unjust to inflict a secondary penalty on Aboriginal peoples because of state imposed policies that facilitated the break-up of traditional political communities. Hirst also seems to assume that European Australians have the right to determine the legitimacy of the Aboriginal group signing a treaty, while the

⁴⁸ Hirst, *op cit*, p.127. Windschuttle similarly suggested a treaty would 'institutionalise social division on racial grounds'. Windschuttle, 'Why there should be no Aboriginal treaty', p.18.

⁴⁹ The three elements in defining who is Aboriginal refer to: self-identification, acceptance by an Aboriginal community, and having an Aboriginal ancestor.

⁵⁰ Hirst's use of one case in Tasmania where Aboriginality was challenged by the courts merely serves to illustrate how comparatively rare such an occurrence is, and how successful the policy of self-definition has been over three decades in Australia, although the issue has recently been prominent. (See Richard Flanagan, 'The lost tribe', *The Guardian*, 14/10.02.) In this area it seems that Australia is perhaps ahead of Canada, whose (state imposed) attempts at defining who is and isn't Aboriginal have lead to just the types of situation Hirst laments. As Larry Gilbert suggests, 'It is seldom that the state intervenes and declares persons are not who they really are. That is the legacy and the reality of the Indian Act.' Gilbert, *Entitlement to Indian Status and Membership Codes in Canada*, Craswell Thomson Professional Publishing, Scarborough, Ontario, 1996, p.iii.

⁵¹ Hirst, *op cit*, p.124. Windschuttle similarly points to the passage of time as denying the possibility of treaty when he argues 'Sociologically, it is too late to revive Aboriginal sovereignty' (*op cit*, p.21), and these days, Aboriginal 'sociological distribution does not support their separate political status.' (p.22).

identity of the non-Indigenous party is presumed as natural, an already present given. This 'we-know-best' approach has a long and sorry history in Australia: it is both characteristic of the colonial relationship, and appears contrary to the custom of treaties examined above.

The suggestion that deciding who is party to a treaty is divisive assumes a uniformity that does not match the reality of the Australian society, which as we have seen, is made up of at least two distinct political communities, each drawing on their own differing philosophical traditions. It is also assumed that 'the state' is the legitimate holder of power and jurisdiction, and may thus distribute power or rights to such groups as it deems worthy of recognition. This precludes addressing the fundamental question Aboriginal peoples wish to be central to any political dialogue surrounding a treaty, that is, recognition of their distinct status within Australian society.⁵² It ignores the possibility that it will be European Australians as much as their Aboriginal counterparts who are to be the objects of rights and duties as a result of any treaty process. As it is thus conceived, this process remains at the whim of a non-Aboriginal majority who retain their privileged position away from the glare of difficult questions about their acquisition of power in a society that continues to exercise such power over Aboriginal peoples. The use of the 'divisive' argument to deny the possibility of a treaty contributes little to a national conversation on the issue. It forecloses the possibility of creative dialogue about the history and future of state power in such a way that serves only to maintain the *status quo*.

One of the most prominent arguments in Australia against a treaty, put forward by Hirst, is to assert the prohibitive difficulty of determining what it would contain.⁵³ Even in its more

⁵² See discussion of Dodson and Clark in chapter 6.

⁵³ Hirst, *op cit*, p.126.

sympathetic form, this argument suggests that Aboriginal entitlements and demands are so far reaching and complex, they simply cannot be resolved by compact 'or even a treaty between sovereigns'.⁵⁴ In this conception, the content or actual words contained within the treaty, are vital, for two reasons. First, because the treaty is positioned as a solution to 'the Aboriginal problem'. It is a 'new' initiative, 'the latest project' that aims to 'settle these difficulties'.⁵⁵ Secondly, words must be chosen with 'great care and specificity' lest the treaty be the subject of 'endless litigation'.⁵⁶ While the focus shifts from the difficulties of determining the treaty's subjects, to the difficulty of determining its content, the vision of treaty remains equally restricted.

Ultimately, such understandings of treaty see it only as the product of contemporary power politics dominated by Euro-Australian thinking. It is reduced to being another episode in the long history of imposed policies that were enforced upon Aboriginal peoples after being determined without their consent. The real possibility of litigation exists here as the expression of Aboriginal dissatisfaction, should their 'difficulties' in fact not be 'settled' by the treaty. Within this limited conception, this is a realistic assumption given the consistent failure of previous policy 'solutions' imposed on Aboriginal communities. Yet this conception of treaty fails to see outcomes as the mutually agreed result of negotiations between equals. While this restricted version of treaty actually shares much with historic policy, suggesting it is a 'new' initiative positions it as outside the normal realm of politics, thus requiring particular justification for creating 'special legal subjects', as Hirst describes them. Positioning the negotiation of a treaty as requiring 'special treatment' almost guarantees its failure to gain

⁵⁴ Colin Tatz, 'Aborigines and the Age of Atonement', *Australian Quarterly*, vol. 55, no. 3, 1983, p.301.

⁵⁵ Hirst, *op cit*, p.124.

⁵⁶ Tatz, *ibid*, p.299.

popular support in liberal democracies such as Australia and Canada, where opposition to such apparently inegalitarian treatment has been a key position of popular political parties of the right.⁵⁷ The suggestion by Hirst and Windschuttle⁵⁸ that the treaty idea is 'new' also effectively ignores the long history of aboriginal treaty-making in North America, Africa, Asia, the Pacific and elsewhere,⁵⁹ arguments for a treaty relationship in Australia among early colonists,⁶⁰ as well as three decades of Aboriginal demands for such negotiations in Australia.⁶¹ As Lawrey reminds us, even here, the idea of a treaty is 'not new'.⁶²

These arguments serve to illustrate what Taiaiake Alfred regards as the fundamental difference between Indigenous and non-Indigenous visions of treaty. He argues that while Europeans are mainly concerned with specific provisions and content, 'Indigenous notions of treaty do not focus on the specific terms of agreements, but on the process of creating relationships.'⁶³ This emphasis on the content of a treaty can be seen as indicative of a view of treaties as foundational documents whose significance and power is situated in the very words contained within them. They continue to be significant only in terms of the following or otherwise of the legal rights or obligations that they contain. It is important to get the terms of the 'contract' (as such a conception should perhaps more accurately be termed) right because of the legal ramifications that will result.⁶⁴

⁵⁷ The Reform, and latterly Canadian Alliance party in Canada, and One Nation in Australia.

⁵⁸ Windschuttle states incorrectly that 'The idea for a treaty was first mooted by H.C. 'Nugget' Coombs in 1979...', *op cit*, p.16.

⁵⁹ See Henderson and Barsh, *op cit*.

⁶⁰ See chapter 4 footnote 38 and surrounding text.

⁶¹ See Judith Wright, *We Call For A Treaty*, Fontana, Sydney, 1985, on early treaty history in Australia.

⁶² Lawrey, *op cit*, p.754.

⁶³ Alfred, personal communication, February 22, 2001. Similarly, Harold Cardinal suggested treaties are 'important, not so much for their content as for the principles they imply in their very existence'. Cardinal, cited in Bradford W. Morse (ed.), *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, Carleton University Press, Ottawa, 1991, p.147.

⁶⁴ An analogy with current government policy can be made. The Howard government's refusal to apologise to the Stolen Generations ignores the symbolic shift that may be achieved through such a gesture. Howard focuses on

This narrow conception appears to be vaguely aware of the transformative possibilities of the treaty process, but these are only conceived in a narrowly negative sense, in terms of ‘splitting the nation’,⁶⁵ or ‘jeopardising Australian sovereignty’.⁶⁶ As with a distinct Aboriginal status itself, treaty is seen as a threat to our founding project of ‘a nation for a continent and a continent for a nation.’ Windschuttle suggests the architects of Federation were ‘proved right’ that this assertion and assumption of homogeneity would guarantee ‘peace and stability’ in the new state.⁶⁷ To contain the possibility of fracturing this homogeneity, the political nature of Aboriginal status is ignored, or treated as ‘settled’, prior to the latter settlement of the problem of Aboriginal disadvantage. This resolution is to be achieved by a treaty which is conceived as a passive instrument to be applied to Aboriginal people who remain equally passive. Perhaps the greatest problem with this version of treaty is thus its conception of the status of Aboriginal peoples. They continue to be viewed *only as objects of policy*, rather than subjects who, through shared dialogue, contribute to the negotiation of an agreement, and continue to play an active role in shaping the ongoing relationship it denotes. This unimaginative portrayal relies on a view of treaty in which the state retains control of Aboriginal peoples – peoples incapable of ‘ownership’⁶⁸, whose interests ‘are better served by the Western legal system’ than their own.⁶⁹

the ‘legal ramifications’ of such an apology, despite the fact that these apparent ramifications did not prevent all state governments issuing formal apologies.

⁶⁵ ‘Treaty is the hard edge of reconciliation’, *The Australian*, editorial, 31/5/00. The editorial suggested the Prime Minister was correct in portraying the treaty issue as divisive: ‘Pursuit of a treaty would split the nation....it would be moving too far, too fast.’

⁶⁶ Windschuttle, *op cit*, p.12.

⁶⁷ *ibid*, p.23.

⁶⁸ Windschuttle, *op cit*.

⁶⁹ *ibid*, p.20. While Windschuttle is keen to suggest ‘the logic’ of self-determination led to the horrors committed by Hitler and Stalin (*ibid*, p.23), it is interesting to note the logic of his own portrayals. Windschuttle’s suggestion of Aboriginal people as incapable of ownership has strong similarities with Vattel, and before him, Locke. In describing Aboriginal peoples as effectively better off via colonisation, his argument bears a striking similarity to Locke’s suggestion that a ‘King of a large and fruitful Territory there [Native America], feeds, lodges, and is clad

While this idea of the state retaining control over Indigenous peoples through a particular use of treaty remains at the level of theory in Australia, it may have been achieved in practice in Canada. UN rapporteur Isabelle Schulte-Tenckhoff argues this reduction of the treaty entirely to the jurisdiction of the state is achieved by the differentiation between Aboriginal and other treaties made by designating the former as *sui generis*, as in Canadian law.⁷⁰ She views this as ‘the most eloquent expression’ of a form of ‘juristic essentialism’ which attempts to confine aboriginal treaties to the purely domestic context.⁷¹ This view of the unique or special nature of Indigenous-state treaties is contrasted with that of the UN study of treaties which concluded:

In 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 the time in international law.⁷²

At stake here is not just a legal difference of opinion as to the international status of aboriginal treaties. The competing classifications of the legal status of these treaties actually get at the heart of the juridical and political status of Indigenous peoples themselves. Whether referring to treaties negotiated in the past or future, the issue raises the key question as to whether Indigenous peoples are as capable as any other people of negotiating binding, internationally recognised agreements. For Schulte-Tenckhoff, the denial of such a right to Indigenous peoples relies on ‘the pre-eminence of political opinion over historical and legal evidence’.⁷³

worse than a day Labourer in England’. Locke, cited in Tully, *Strange Multiplicity*, p75. Windschuttle develops these arguments further in his latest book, *The Fabrication of Aboriginal History. Volume 1, Van Diemens Land, 1803-1847*, Macleay Press, Paddington NSW, 2002.

⁷⁰ *R v Sioui* at 404, cited in Isaac, *op cit*, p.159.

⁷¹ Schulte-Tenckhoff, *op cit*, p.259.

⁷² Cited in *ibid*, p.260.

⁷³ *ibid*.

This view of the 'inferiority' of aboriginal treaties is apparent in Francis Prucha's study on North American Indigenous treaties, which he regards as 'a political anomaly'.⁷⁴ Prucha is concerned that aboriginal treaties exhibited 'irregular, incongruous or even contradictory elements and did not follow the general rule of international law'.⁷⁵ Yet, as Schulte-Tenckhoff suggested, Prucha does appear to have a political agenda which is concerned to relegate (or at least regulate) the status of aboriginal treaties, and ultimately aboriginal peoples themselves. He is motivated by the desire to dismiss what he refers to as 'treaty fantasies'⁷⁶ promulgated in the rise of 'treaty-rights activism'. In an argument that has resurfaced in Australia in recent times under the guise of 'practical reconciliation',⁷⁷ again echoed by Windschuttle,⁷⁸ Prucha suggests that the recent focus on contemporary treaty making and interpretation in North America comes at the expense of Indigenous welfare 'on the ground': 'Such treaty fantasies may have raised ungrounded expectations among Indians and hindered the effective work that needed to be done to improve the social and economic conditions of Indians living today.'⁷⁹

⁷⁴ Francis Paul Prucha, *American Indian Treaties: The History of a Political Anomaly*, University of California Press, Berkeley, 1994.

⁷⁵ *ibid*, p.2.

⁷⁶ Prucha, *op cit*, p.410.

⁷⁷ This phrase refers to the Howard government's preference for focussing on housing, health, education and employment at the expense of distinct Aboriginal rights. For Behrendt's criticisms of the policy, see chapter 6. In this conception, as suggested by Deputy Prime Minister John Anderson, 'a treaty must be removed from the agenda or Aboriginal leaders risk dividing the nation in an acrimonious debate about issues that should not be on the agenda if we are serious about improving the lot of indigenous Australians.' Anderson cited in Debra Way, 'Political divide over treaty grows, *AAP*, 7/6/00

⁷⁸ Windschuttle suggests pursuit of a treaty will actually damage Aboriginal self-determination by promoting Aboriginal separatism which would 'discourage intervention by white educationalists, local government officials and the like, who would not want to interfere in separate, indigenous affairs.' *op cit*, p.19.

⁷⁹ Prucha, *op cit*. With apparent approval, Prucha cites Frank Carlucci, the US deputy director of the Office of Management and Budget, who suggested in January 1973 that '[t]o call for new treaties is to raise a false issue...diversionary from the real problems that do need our continued energies', p.410.

Treaties are thus positioned on the 'wrong' side of the rights versus welfare divide that was explored in the previous chapter. This (false) dichotomy merely serves to deny the particular status of Aboriginal peoples, reducing them to the position of citizens the same as everyone else. Ultimately, European hegemony is maintained in such a way that recognition of the political status of Indigenous peoples (in treaties) is actually presented as a barrier to their advancement.

This denial of status is suggestive of what Schulte-Tenckhoff regards as the 'fundamental' misunderstanding that exists between state and Indigenous parties to treaties. She suggests that while states have sought to use treaties 'initially to gain territorial or other advantages and ultimately to achieve hegemony', Indigenous peoples have consistently upheld a rationale of treaty-making based on the principle of mutual recognition and reciprocity.⁸⁰ In examining this latter understanding of treaty, in the following chapter I argue from a position that accepts the need to move from positions of 'hegemony' towards a shared mutuality. I am sympathetic to the view Alfred suggests is characteristic of Indigenous peoples, for whom 'treaties and treaty making are imbued with significance that transcends the mundane aspects of allocating resources or demarcating geographic boundaries'.⁸¹

The narrow understanding of the treaty concept ignores the wider framework. It relegates Aboriginal peoples to a passive role of mere recipients of compensation, with non-Indigenous Australians retaining their dominant position. According to Windschuttle, the only question for non-Aboriginal Australians to consider is what they would have to give up in order to

⁸⁰ Schulte-Tenckhoff, *op cit*, p.264.

⁸¹ Alfred, personal communication, February 22, 2001.

reach agreement, and would it be worth it?⁸² He concludes that 'mainstream Australia has nothing to gain from it and everything to lose'.⁸³ Yet the very dynamics of the treaty process imply it will be shaped by two equal, active participants, not dictated solely by one. Not only does Alfred's description of the Indigenous view of treaties offer Aboriginal peoples a position suggestive of some sort of equality, it also brings into the focus the broader, more important significance of negotiating treaties between Aboriginal and non-Aboriginal peoples. For in advocating the negotiation of treaties in disputed territories where they are lacking, Indigenous peoples are not merely seeking to improve their current socio-economic position within a state, they are looking to the establishment of a treaty relationship 'to legitimise the society for the first time'.⁸⁴ I now look in detail at the way treaty negotiations may facilitate a new relationship between Aboriginal and non-Aboriginal peoples in Australia.

⁸² Windschuttle, *op cit*, p.17.

⁸³ *ibid*, p.23.

⁸⁴ Alfred, personal communication, February 22, 2001.

Chapter 8

Normative Features of the Treaty Relationship

- I. The treaty (as) relationship
- II. A judicial or political process?
- III. Intercultural negotiations
- IV. Conclusion

Agreement on a treaty document by Aboriginal and non-Aboriginal peoples should be seen as the beginning of a process, rather than the end of one. In contrast to some of the views presented in the previous chapter, treaty is not seen as a panacea, but as providing an interpretive framework for engaging issues and viewing relationships. The existence of a particular document is significant only to the extent that it facilitates a new relationship that translates into concrete arrangements a number of principles fundamental to both Western and Indigenous political discourse. This is done in such a way as to promote the unity of the newly-formed political association, while retaining the autonomy of individual parties. Exploring the work of the Canadian Royal Commission on Aboriginal Peoples, James Tully and other North American scholars, I now chart the key features of the treaty relationship.

I. The treaty (as) relationship

Speaking of the Canadian situation, Tully defined the normative features of the treaty relationship as such: 'In it, Aboriginal peoples and newcomer Canadians recognize each other as equal, co-existing and self-governing nations and govern their relations with each other by negotiations, based on procedures of reciprocity and consent, which lead to agreements that are recorded in treaties or treaty-like accords of various kinds, to which both parties are subject.'¹

This view of treaties echoes to a significant degree the sentiments of both the Canadian Royal Commission on Aboriginal Peoples,² as well as the recently completed United Nations treaty study³ – both of which based their findings on extensive consultation with Aboriginal peoples themselves. The fact that it also 'provides the normative prototype of the just relationship' most Aboriginal peoples aim to achieve by their struggles⁴ suggests such a description of the treaty concept may be viewed as a something of a customary norm among Aboriginal peoples.

¹ James Tully, 'Aboriginal Peoples: Negotiating reconciliation', in James Bickerton and Alain-G. Gagnon (eds.), *Canadian Politics*, (3rd ed.), Broadview Press, Toronto, 1999, p.415.

² 'The treaty was the mechanism by which both the French and the British Crown in the early days of contact committed themselves to relationships of peaceful coexistence and non-interference with the Aboriginal nations then in sole occupation of the land. The treaties were entered into on a nation-to-nation basis; that is, in entering into the pre-Confederation treaties, the French and British Crowns recognized the Aboriginal nations as self-governing entities with their own systems of law and governance and agreed to respect them as such. For several centuries, treaties continued to be the traditional method of defining intergovernmental relations between Aboriginal and non-Aboriginal people living side by side on the same land. It continues to be the mechanism preferred by most Aboriginal people today.' Canada, *Royal Commission on Aboriginal Peoples Volume 2, Restructuring the Relationship*, Ottawa, 1996, p.2.

³ The special Rapporteur recognised treaties contribute to 'fostering new relationships based on mutual recognition, harmony and cooperation, instead of an attitude of ignoring the other party, confrontation and rejection.' Miguel Alfonso Martinez, *Human Rights of Indigenous Peoples: study on Treaties, Agreements and other constructive arrangements between states and indigenous populations*, 22 June, 1999, par. 297.

⁴ Tully, *op cit*, see also footnote 2.

The fact that any treaty negotiations in Australia will take place in the context of the growing ascendancy of such a conception means it retains added significance for the purposes of this thesis.

Mutual recognition

At the outset, it is important to recognise that the establishment of a treaty relationship is essentially a bilateral exercise. While the intention is the creation of a unified political association, the treaty process begins by acknowledging the existence of two parties, and proceeds along a mutually defined course. Because it reflects the will of both parties, this course cannot, at the outset, be fully known by either one, such as would be the case in a colonial relationship, where an outcome predetermined by one party is imposed on the other, with or without some superficial consultation. It is because of this profound mutuality that Tully suggested the ‘first and most difficult question’ in engaging in a just relationship is for the participants to agree on how they should recognize each other at the outset and relate to each other throughout.⁵ According to both Tully and the RCAP, each party to a treaty should recognise the other as equal, co-existing and self-governing peoples and cultures. In this vein, the UN treaty study suggests the onus should not be on Aboriginal peoples to prove their nation status (or ‘peoplehood’), but rather on those who deny it, to substantiate their claims.⁶ In negotiating a treaty with the state, Aboriginal peoples can be seen as exercising *the same*

⁵ Tully, *op cit*, p.418.

⁶ UN Treaty study, *op cit*, par. 285: ‘Hence, the Special Rapporteur is of the opinion that should those indigenous people who never entered into formal juridical relations, via treaties or otherwise, with non-indigenous powers (as did other indigenous peoples living in the same territory) wish to claim for themselves juridical status also as nations, it must be presumed until proven otherwise that they continue to enjoy such status. Consequently, the burden to prove otherwise falls on the party challenging their status as nations.’

rights as other peoples rather than some special rights, particularly the right to have their consent obtained before being subject to particular political arrangements. Yet Aboriginal peoples are also subject to the same obligations as other peoples. They are thus called upon to recognize the legitimate rights of non-Aboriginal peoples, lest we create a society where a resentful majority is simply forced from one concession to another by threats.⁷

Speaking of the Canadian experience, Tully suggests that non-Aboriginal peoples must recognise 'the distinctive presence' of First Nations in Canadian life. Aboriginal peoples are called upon to recognize that non-Aboriginal peoples are also of this land, and have equal legitimacy.⁸ Yet, for Australia, such a characterisation of the process of mutual recognition retains the danger of understating the political nature of the Indigenous *problematique*,⁹ for it is not merely different cultural groups that must recognize one another. If this characterisation adequately described the extent of the Indigenous-state dilemma, it could be more appropriately addressed in a way similar to (other) cultural minorities. Yet the fact that Aboriginal peoples today are political communities descended from distinct peoples who never ceded their sovereignty, *and continue to see themselves as such*, is the predominant feature which necessitates the treaty relationship.¹⁰ This issue of (continued, shared) sovereignty can be viewed as one of the prime differentiators between 'Indigenous' peoples

⁷ Michael Ignatieff, *The Rights Revolution*, Anasi Press, Toronto, 2000, p.84.

⁸ Tully, *op cit*.

⁹ This danger is avoided in Canada, the jurisdiction Tully writes most about, because both the history of treaty-making, as well as the constitutional recognition of the Aboriginal and treaty rights of Canada's Indigenous peoples means their distinct political status is doubly affirmed. The lack of such recognitions in Australia is suggestive of the need, I argue, to foreground the issue of Indigenous sovereignty.

¹⁰ Paul Chartrand notes this view was stressed in the RCAP. He suggested Aboriginal peoples 'are political communities in the sense that subjective elements help define both the groups themselves and their members. Objective factors, such as birth, 'race', and 'ancestry', are never a sufficient defining characteristic for a political community. This understanding is grounded in the experience of all societies, where spouses may come from other groups, and children may be adopted from biological parents. No useful social purposes are served by basing group definitions on the objective factor of birth alone. That is all that 'race-based' thinking has to offer, and proper understanding of the legitimate and legal claims of the Aboriginal peoples of Canada today requires that such notions be tossed into the dustbin of history.' Chartrand, 'On the Canadian Aboriginal rights Dialogue',

who seek recognition by the state of their inherent political rights, and 'minorities', who usually seek access to political rights delegated by the state as with other citizens.¹¹ This conception assumes the state (thought of here as a given territory) as incorporating distinct political communities with competing claims to sovereignty and jurisdiction. The treaty process should explicitly be about the mutual recognition of shared sovereignty within this given territory as a means of mediating this inevitable, though by no means unmanageable, competition. If a treaty were to be based upon such a mutual recognition, it would, in Australia's case, not only not be an instrument of division, but would facilitate a unified political community for the first time, by resolving what Henry Reynolds called the 'fundamental problem at the heart of Australian jurisprudence'¹² – the legitimate acquisition of European sovereignty.

It is in this sense that achieving mutual recognition through a treaty is very much a contemporary project – as opposed to the lament for a 'traditional ideal' seen in the previous conception.¹³ It is perhaps at this historical moment, in this era of 'post-colonial law, decolonisation, and the self-determination of peoples'¹⁴ that the process of true mutual recognition has its best chance of success for two centuries. While the prejudices of the age of imperialism remain present, they are seen as increasingly illegitimate. In this current period, a number of factors have coalesced to produce a climate that may be particularly sympathetic to

in Joseph Fletcher (ed.), *Ideas in Action: Essays on Law and politics in honour of Peter Russell*, University of Toronto Press, Toronto, 1999, p.76.

¹¹ See chapter 2 for discussion of this point by Iris Marion Young, Will Kymlicka and James Tully.

¹² Henry Reynolds, *Aboriginal Sovereignty: reflections on race, state and nation*, Allen & Unwin, St Leonards NSW, 1996, pp.13-14.

¹³ The treaty process embodies the quality of 'presentism', in 'speaking for the here and now' which Homi Bhaba suggested should be a part of decolonisation discourse. Bhaba, 'Culture's in Between', in David Bennett (ed.), *Multicultural States: Rethinking Difference and Identity*, Routledge, London, 1998, p.38.

¹⁴ Russel Barsh and James Youngblood Henderson, 'International context of Crown-Aboriginal Treaties in Canada', Royal Commission on Aboriginal Peoples, Research Report, May 12, 1995. Taking 'the long view' argued for in this thesis, Barsh and Henderson saw four stages in the development of international law: 1. The

the negotiation of treaty relationships between states and Aboriginal peoples. Most prominently, these include the process of globalisation, and the increasing internationalisation of both Indigenous struggles and their personalities. Also significant is the fact that this takes place at a time when the decline of absolute sovereignty is leading people to look 'beyond the sovereign state'.¹⁵ The purpose of treaty negotiations is not just to define title to land and resources, or to hand power over to legitimate Aboriginal authorities, but more fundamentally to find ways to share the sovereignty of the national territory.¹⁶

In a depiction analogous to Australia, Patrick Macklem reminds us of why it is important to conceive of a treaty as the mechanism for a just (re)distribution of sovereignty. He argues that Canadian sovereign authority owes its origins 'to a colonization project that assumed Aboriginal peoples were inferior to European peoples, and, to the extent it fails to recognize Aboriginal forms of sovereignty, the present distribution of sovereignty in North America is unjust.'¹⁷

If, as Macklem suggests, we adopt a 'non-absolute, pragmatic conception of sovereignty that contemplates a plurality of entities wielding sovereign authority' within the constitutional order, the treaty can be about the mutual recognition, as well as the redistribution, of sovereignty, or as he also describes it, constitutional authority. This is consonant with emerging views on the changing nature of contemporary sovereignty. Also, the legitimacy of state sovereignty requires sovereignty be conceived in this non-absolute way, because it (state sovereignty) ultimately rests on the 'constitutional recognition of territorial and jurisdictional

exclusive Christian order of the Holy Roman empire; 2. Expansion of independent, secular, sovereign states associated by treaties; 3. European colonialism or imperialism; and 4. The current period of decolonisation. (p.1).

¹⁵ Neil MacCormick, 'Beyond the Sovereign state', *Modern Law Review*, vol. 56, no. 1, 1993.

¹⁶ Ignatieff, *op cit*, p.80.

spaces' in which Aboriginal societies flourish.¹⁸ The realities of two peoples destined to share the same territory dictates that sovereignty must be viewed in non-absolute, or 'fundamentally federal',¹⁹ terms.

By explicitly foregrounding the concept of sovereignty, it is possible to view the treaty process as the practice of 'treaty federalism'²⁰ which aims to achieve a just distribution of sovereignty between peoples, thus fundamentally recasting the relationship between them. In acknowledging Aboriginal sovereignty as an integral, and even foundational²¹ part of the treaty process, the legitimacy of both political communities is affirmed.²² Long held, but long denied, Aboriginal sovereignty is properly recognised as the basis of Aboriginal peoples' inherent right to govern themselves according to their laws; also, the long assumed yet uneasy state sovereignty is given a legitimate basis through its recognition by the prior (Aboriginal) sovereign, in line with international law and practice.²³ The process of establishing a treaty relationship recognises Aboriginal peoples as equal partners in the distribution of constitutional authority, the establishment of new legal norms, and thus the remaking of (a legitimate, consensual, equalitarian) society. By addressing rather than finessing the

¹⁷ Patrick Macklem, *Indigenous Difference and the Canadian Constitution*, University of Toronto Press, Toronto, 2001, p.7.

¹⁸ *ibid.* In similar fashion, the Supreme Court of the US expressly held that an Indian treaty is 'not a grant of rights to the Indians, but a grant of rights from them.' *US v Winans* 198 US 371 (1905). Cited in Stephen L. Pevar, *The Rights of Indians and Tribes*, Bantam Books, Toronto and New York, 1983, p.32.

¹⁹ Peter H. Russell, 'High Courts and the Rights of Aboriginal Peoples: the Limits of Judicial Independence', *Saskatchewan Law Review*, vol. 61, no. 2, 1998, p.276.

²⁰ See James Youngblood Henderson, 'Empowering Treaty Federalism', *Saskatchewan Law Review*, vol. 158, 1994.

²¹ Benson [et.al.] suggest 'Under imperial treaties the Aboriginal peoples have always been the source of sovereignty' in the state. Marjorie L. Benson, Isobel H. Findlay, James (Sákéj) Youngblood Henderson, *Aboriginal Tenure in the Constitution of Canada*, Carswell, Toronto, 2000, p.433.

²² (Chief) Harold Cardinal suggested 'The treaties were the way in which the white people legitimised in the eyes of the world their presence in our country. It was an attempt to settle the terms of occupancy on a just basis' Cited in Bradford W. Morse, *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, Carleton University Press, Ottawa, 1985, p.144.

²³ Michael Ignatieff described this situation thus: 'At the moment, might lies with the majority, and right with the minority. Mutual recognition must rebalance the relationship, with both power and legitimacy finding a new equilibrium.' *op cit*, p.84.

fundamental issue of sovereignty, it is in fact seen to flow through the three elements of mutual recognition that are required of, and in turn, facilitated by,²⁴ the treaty process; equality of peoples; co-existence; and self-government.

Equality of Peoples

The first of these is the equality of peoples. That the treaty relationship is shown to foster such a value is critical in a society such as Australia where the alternative view has predominated, in line with general opposition to 'special rights'²⁵ for Aboriginal peoples. However, the very act of negotiating a treaty is a practical expression of that powerful view – that Aboriginal peoples should have the same rights (and responsibilities) as non-Aboriginal peoples. As such, the process is not about the creation of further distinctions between Aboriginal and non-Aboriginal peoples as Hirst suggested,²⁶ but the removal of such differential treatment. This does not mean that they will necessarily require the same treatment. This confuses equality with uniformity. Recognition of the same right to cultural autonomy does not require the adoption of the same culture. While this right has been increasingly accepted for multicultural minorities, the same has often not been the case for Aboriginal peoples who have demanded more than mere cultural equality. This principle of the equality of peoples has often fallen

²⁴ This dual dynamic has been recognised in the North America treaty process where Michael Jackson argues treaty making was seen 'as both a reflection and expression of Indian/Crown relationships based upon the principle of consent and judicial equality.' Michael Jackson, 'Aboriginal rights Litigation and International Law: The Gitksan Wet'suwet'en Case', in *Aboriginal Peoples in the Canadian constitutional context: application of International Law standards and Comparative Law Models*, Proceedings of a Conference at Montreal, Quebec, April 28/29 1995, p.14.

²⁵ Ivison (*et al*) suggest the term 'specific rights' might be more accurate than 'special rights'. Duncan Ivison, Paul Patton and Will Sanders, 'Introduction', in Ivison, Patton and Sanders (eds.), *Political theory and the Rights of Indigenous Peoples*, Cambridge University Press, Cambridge, 2000, p.18.

²⁶ It will be recalled that John Hirst suggested that a treaty was a mechanism for distributing 'special legal rights' to 'a particular class of people' which must be created for this purpose. Hirst, 'More or Less Diverse', in Helen Irving (ed.), *Unity and Diversity: A National Conversation. Barton lectures*, ABC Books, Sydney, 2001, p.127.

victim to political expediency where its recognition, with regard to Aboriginal peoples, raises fundamental questions about the legitimacy of the state. Yet the only real alternative to recognising the equality of peoples is to rely on outdated arguments suggesting the inferiority of Aboriginal peoples that formed the backdrop for much policy and practice discussed in previous chapters.

Substantial equality requires recognising Aboriginal peoples are capable of possessing the same element of sovereignty as European peoples, even if such sovereignty is exercised according to different laws and customs, with different institutional expression. The Australian Law Reform commission has pointed out the double penalty imposed on Aboriginal peoples by arguments which suggested that the recognition of customary ways of life should be denied as a function of previous denial. Specifically referring to the treaty issue, it suggested:

Had treaties been concluded initially with the various Aboriginal groups, it could not have been argued that the compliance with them was discriminatory because the other party to the treaty was composed of members of a particular race or ethnic group. Is the recognition now, to the descendants of those people, of rights or entitlements initially denied, less legitimate?²⁷

Co-existence

Recognising the equality of Aboriginal peoples does not necessarily entail a right to complete independence, or statehood. Contemporary realities are more suggestive of a 'regulated interaction' between Aboriginal and non-Aboriginal peoples than complete non-interference.²⁸

²⁷ Australian Law Reform Commission, *The Recognition of Aboriginal customary Laws*, Australian Government Publishing Service, Canberra, 1986, p.96. Similarly, the UN Treaty study concluded that it would be 'faulty...illogical...[and] against natural law' to link nation status to the conduct or otherwise of a treaty. *op cit*, par. 285.

²⁸ Thomas O. Hueglin, 'Exploring concepts of Treaty Federalism: A Comparative Perspective', Research Paper prepared for the RCAP, August 1994, p.10.

The formation of a treaty relationship can facilitate the means by which mutually recognised sovereignties may be shared rather than compete. Macklem describes a central feature of treaties between Indigenous and state parties is that they 'establish basic terms of Aboriginal and non-Aboriginal co-existence.'²⁹ For Tully, this means it is 'the governments and cultures' of Aboriginal and non-Aboriginal peoples that 'continue through all their relations and interdependencies over time'. This requires 'abandoning the strategies of the past', including beliefs that Aboriginal peoples became subject to state sovereignty without their consent.³⁰ Tully defines coexistence as 'a relationship in which Aboriginal peoples and Canadians live side by side, governing their own affairs in a relationship that values this form of political diversity.'³¹

The norm of co-existence ensures the recognition of equal, self-governing peoples does not mean they will necessarily function as discrete, fundamentally divided entities. Even sovereign states interact, and in 'the global village of the 21st century', interdependence is a fact rather than a trend.³² This is only likely to be more evident when political powers are to be shared within a discrete territory. In Australia, particularly, intercultural relations are already strong, as evidenced by Hirst's discussion of intercultural marriage.³³ Yet the previously described narrow view of treaties sees this interaction either as precluding the need for treaties, or alternatively, as rendering the project impossible due to a perception that amounts to the assumed assimilation of the Aboriginal party.³⁴

²⁹ Macklem, *op cit*, p.5.

³⁰ Tully, *op cit*, p.420.

³¹ *ibid.*

³² Robert N. Clinton, 'Redressing the Legacy of Conquest: A Vision Quest for a Decolonised Federal Indian Law', *Arkansas Law Review* vol. 46, no. 1, 1993, p.139. Clinton reminds us that 'in the global village of the twenty-first century, no sovereign, however large or small, will be a self-contained island needing no economic, political or cultural interaction with others.' (p.140.)

³³ Hirst, *op cit*, pp.127-128.

³⁴ See Ron Brunton, 'Gulf is neither wide nor deep', *Courier Mail*, 2 June 1998.

Any treaty must recognise, rather than deny, the relationships between individuals and peoples that are reinforced in the thousands of interactions that take place across the country every day. Given the history of relations outlined in the previous chapter, there is a danger that should these relations continue to be the product of unreflective thought and habit, they will merely perpetuate relations of inequality. Thus, habitual recognition becomes stultifying misrecognition.³⁵ In facilitating the transformation of this misrecognition, the treaty process does not seek to return to some pre-contact ideal from where relationships are negotiated from behind a Rawlsian veil of ignorance.³⁶ Differences – such as between cultural traditions – are explicitly acknowledged in the treaty process, but are not made the primary focus of attention, reducing the possibility of their being a continuing source of division. The major focus instead is on the (shared) relationship between parties, rather than individual identities. The objective for the new treaty relationship is ‘to lay the guidelines for the reform of these interrelations and the formation of egalitarian relations of interdependency’.³⁷ The treaty process acts as the formal mechanism which brings about this conscious reflection. In promoting this ongoing intercultural negotiation, the process further facilitates the creation of solidarity by concentrating attention on building relationships rather than protecting identities. This promotes Young’s ‘relational’ thinking.³⁸ It stands in stark contrast to what Adorno referred to as ‘identitarian thought’³⁹ characteristic of the colonial mentality where national identity

³⁵ James Tully, *Strange Multiplicity: constitutionalism in an age of diversity*, Cambridge University Press, Cambridge, 1995, p.23.

³⁶ John Rawls, *A Theory of Justice*, Belknap Press of Harvard University Press, Cambridge, Mass., 1971. For discussion of how Rawls’ concept may apply to the Indigenous problematique see Robert Williams, *Linking Arms Together. American Indian treaty visions of law and peace, 1600–1800*, Oxford University Press, Oxford, 1997. Williams suggests (p.27.) that on the ‘encounter period’ multicultural frontier, Indians and Europeans were in an original position of a rough equality on the continent. A new kind of society was emerging from this unique cultural landscape, in which place, class and status were largely irrelevant.’

³⁷ Tully, *Strange Multiplicity*, p.23.

³⁸ See chapter 2.

³⁹ Adorno cited in Edward Said, ‘Nationalism, Human Rights and Interpretation’, in Barbara Johnson (ed.), *Freedom and Interpretation: The Oxford Amnesty Lectures 1992*, Basic Books, New York, 1993, p.184. Said

discourse became conflated with the Imperial project. By contrast, the dialogic treaty process acts as the centre piece for what Cole described as a 'multicultural discourse'. Here, people 'listen to each other's voices and focus on a mutually beneficial project rather than the relative value of the voices – [it is] "a linking arms together" as opposed to an attempt to redistribute a finite handful of rights.'⁴⁰

Through the actions involved in mutually determining what is to be included in the new association, and then living with it, and when necessary, altering it, Aboriginal and non-Aboriginal peoples are actively remaking the relationship between them. Far from deeming the negotiation of a treaty irrelevant, as Hirst suggests, it is these interrelations – newly conceived – that are required for its actual success. As Peter Russell stated, 'when treaties are not just made by the representatives of two peoples, but also implemented and interpreted mutually and consensually by the peoples concerned, they can provide a foundation for a relationship that is consonant with the equality of peoples.'⁴¹

Self-government

While it remains controversial in societies such as Australia – where it has yet to receive any formal recognition at least at the national level⁴² – the right to self-government is critical to

points out the discourse of national identity was among the most powerful weapons of Imperial theorists. Therefore its deconstruction, as is possible through the treaty process, can be seen as a powerful act of 'decolonisation'.

⁴⁰ Melissa Cole, 'The colour-blind Constitution, civil rights talk, and a multicultural discourse for a post-reparations world', *New York University Review of Law and Social Change*, vol. XXV, no. 2, 1999, p.180.

⁴¹ Russell, *op cit*, p.295.

⁴² In fact, at the end of 2002 Australia remained the only country in the world to oppose use of the term 'self-determination' in the Draft declaration on Indigenous Rights. Australia preferred 'self-management'. Annabel Crabb, 'Stand off on Indigenous Rights', *The Age*, December 26, 2002.

any process of mutual recognition. This recognition is dictated by the fact of equality of peoples, the need for co-existence, as well as the continuity of Aboriginal sovereignty. As with other peoples, the source of Indigenous peoples' right to self-government is inherent, rather than delegated. As Tully suggests,

Aboriginal peoples were the first inhabitants of this continent. As a result of long use and occupation they have continuing rights to the land unless these rights are properly relinquished. Further, they have the status of independent, self-governing nations in virtue of prior sovereignty, grounded in the practice of governing themselves by their own laws...⁴³

Stressing this aspect of treaties as providing a 'specialised means of *political* accommodation'⁴⁴ between Aboriginal and non-Aboriginal peoples is vital, particularly in the Australian case. The inherently political nature of Indigenous-state relationships has largely taken a back seat to cultural and other considerations in Australia, yet as Webber suggests, reconciliation is 'at its core, a political process concerned with how indigenous societies, as societies, are to relate to the broader Australian society'.⁴⁵ This 'societal recognition' explicitly took place in the Mabo case, which recognised the existence of an independent Aboriginal legal order.⁴⁶ In this broader sense, native title refers to more than simply land ownership. It implicitly involves a recognition of Aboriginal societies *as societies*, and thus retains an 'inherent political dimension',⁴⁷ including self-government.⁴⁸ Self-government for

⁴³ Russell, *op cit*.

⁴⁴ Sebastien Grammond, 'Aboriginal treaties and Canadian law', *Queens Law Journal*, no. 20, 1994, p.57. Emphasis added.

⁴⁵ Jeremy Webber, 'Native Title as Self-Government', *University of New South Wales Law Journal*, vol. 22, no. 2, 1999, p.600.

⁴⁶ 'Native title has its origin in and is given its content by the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.' *Mabo v Queensland No 2* (1992) 175 CLR 1 at 58-9 per Brennan J.

⁴⁷ Webber, *ibid*.

⁴⁸ 'Native title is not just a property right nor merely an interest in the land. It is also a self-government right. It is a right or title in a group to order their own affairs, at least in relation to the land. It is a recognition under the common law of the law-making capacity of the group and it seeks to protect that capacity and make it enforceable.' Strelein, *op cit*, p.123.

Aboriginal peoples is properly perceived not as a gift from wider society, but the vessel through which Aboriginal laws are protected, practiced, and evolve.

Recognition of the existence in Australia of competing titles, and thus the co-existence of systems of governance which may be viewed as competing for jurisdiction, (belatedly) positions Australia's 'uninspiring'⁴⁹ federal democracy as part of the global reality where approximately 5000 different peoples must coexist in some 200 states. Webber reminds us that in common law, the presumed mechanism for resolving conflicts which arose in this context, such as over title, was 'through negotiations between the peoples'. The resulting relationship contemplated was 'of one society to another. Each society was presumed to be (within limits) the master of its own proprietary interests.'⁵⁰ It is just such a relationship that is both facilitated and regulated by the negotiation of a treaty between equal, co-existing, self-governing peoples. It may then be that, as Russell suggests, 'the key' to progressing toward a relationship between Aboriginal and non-Aboriginal peoples that is truly post-colonial is recognition of the fundamental autonomy of Aboriginal peoples as political communities.⁵¹

While the equality of peoples requires the self-government rights of Aboriginal peoples be recognised, it does not require that these rights be reflected in the same customs and institutions. As such, Justice McLean asked,

Is it essential that each party shall possess the same attributes of sovereignty to give force to the treaty? This will not be pretended; for, on this ground, very few valid treaties could be formed. The only requisite is, that each of the contracting parties shall

⁴⁹ Christine Fletcher suggested the Australian brand of federal democracy 'was probably the most uninspiring because it moved through the first phase of the 20th century within a framework of monocultural traditions'. Fletcher, 'Does Federalism Safeguard Indigenous Rights?', Discussion Paper no. 14, North Australia Research Unit, ANU, Darwin, 1999.

⁵⁰ Fletcher, *op cit*.

⁵¹ Russell, *op cit*, p.295.

possess the right of self-government, and the power to perform the stipulations of the treaty.⁵²

The RCAP suggested there was an 'essential link' between the right and power of a people to govern themselves and the act of treaty making.⁵³ But what the quotation above recognises is the use of a treaty to facilitate a relationship between two self-governing entities does not require them to exhibit the same institutions of government. Implicit in such a categorisation is the notion that while the parties will be integrated in some way by the conclusion of the treaty, they will retain powers of self-government unless these are relinquished in a consensual manner. It is also likely that different Aboriginal peoples in different situations will express their right to self-government in ways that differ not only from the European tradition, but also from each other. The RCAP outlined three broad models that may be available to Aboriginal peoples. These were the nation government model, the public government model, and the community of interest government model.⁵⁴ The model preferred by an Aboriginal community may differ, depending on whether they are the exclusive residents of a territory, they form a majority, or even where they are a disparate people dispersed amongst a dominant majority. The different models provide evidence of the possibilities that emerge when creative approaches are taken to questions of land, citizenship, jurisdiction, urban Aboriginal government, and inter-Aboriginal government.⁵⁵

When the Western convention of continuity is applied to Aboriginal peoples, it is the denial of their right to self-government rather than its recognition that appears arbitrary and unjust.

⁵² See footnote 17.

⁵³ RCAP, *Volume 2*, p.48. Australian Prime Minister Robert Menzies said in 1961, 'the process of treaty-making, be it signature, ratification or accession, is a matter for the Government and not for Parliament.' Cited in Gunther Doecker, *The treaty-making power in the Commonwealth of Australia*, Martinus Nijhoff, The Hague, 1966, p.98.

⁵⁴ For discussion see RCAP, *Volume 2*, 3.1 Models of Aboriginal government: an overview, pp.245-280.

⁵⁵ RCAP, *op cit*.

Strelein suggested that such denial is often based on opposition to the recognition specifically of Indigenous authority, rather than the existence another order of government per se.⁵⁶ It is little more than a continuation of the colonial assumption that the inferiority of Aboriginal peoples rendered them incapable of systems of governance.

II. A judicial or political process?

The perspective developed to this point agrees with the suggestion that we need to view Aboriginal treaties as more than the self-reflexive and limited definition of treaty found in international law.⁵⁷ In this context, treaties serve to explicitly recognise the particular political status of Aboriginal peoples in the states they now find themselves. Given the division of sovereignty and power inherent within federal systems such as Australia and Canada – where authority is already divided and shared – the barriers to recognition appear to be more conceptual than structural. This is due to the absence of imagination, rather than the presence of insurmountable institutional obstacles, as has proven to be the case elsewhere.⁵⁸ Aligned with this ability to imagine alternative arrangements, the establishment of a treaty process is likely to require strong political leadership to initiate the transformative process suggested by treaty negotiations.

⁵⁶ Strelein, *op cit*, p.235.

⁵⁷ Russel Lawrence Barsch and James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty*, University of California Press, Berkeley, 1980, p.270.

⁵⁸ Danish government representative Tove Sovandahl Peterson suggested the establishment of home rule for the Saami of Greenland was 'as much a psychological process as a legal process' whereby what seemed radical to Danes originally, gradually came to be demanded by the majority. 'The Home Rule Situation in Greenland', in Leo Van de Virst (ed.), *Voices of the Earth: Indigenous Peoples, New Partners and the Right to Self-Determination in Practice*, International Books NCIP, Amsterdam, 1994, p.122.

While there is likely to be a two-track path to development using both the courts and the legislature, this argument suggests the prominence of intercultural political negotiation over judicial pronouncements in determining the shape of a treaty relationship. There are at least three interrelated, but distinct reasons for this. Firstly, as Justice Brennan noted, the courts may have a 'limited' role in the reconciliation process, but 'its remedies are too blunt to undo all the effects of past injustices'.⁵⁹ Among others, Lisa Strelein has also noted limits to the flexibility of law, 'or more correctly, judicial decision making.'⁶⁰ Both the unusual and fundamental nature of the issues raised by questions pertaining to Indigenous-state relations mean judges are not practiced in determining appropriate remedies.⁶¹ A political process of negotiation would be free from the restrictions of the *stare decisis* doctrine which directs a judge towards replication rather than reform.⁶²

Secondly, the very nature of the Indigenous *problematique*, establishing of a just relationship between peoples, requires more than an adversarial process that creates a loser every time it determines a winner. Courts can arrive at decisions, but they cannot decide the precise shape of relations which flow from such decisions. Ongoing public deliberation, on the other hand, allows for the discovery of a 'common normative language', as will be examined below. Such an emergent discourse is likely to be perceived as more legitimate by those whose participation determines it, than when in Mabo (for example) the High Court rhetorically appeals to 'contemporary values' in support of what has been called its own 'moral

⁵⁹ Gerard Brennan, 'Reconciliation', *University of New South Wales Law Journal*, vol. 22, no. 2, 1999, p.595.

⁶⁰ Strelein, *op cit*, p.196.

⁶¹ Strelein, 'Conceptualising Native Title', *Sydney Law Review* vol. 23, no. 1, March 2001, p.103.

⁶² But for a chapter arguing the limits of precedent are not as great as has often been suggested, see Michael Asch and Catherine Bell, 'Challenging assumptions: The impact of precedent in Aboriginal rights litigation', in Asch (ed.), *Aboriginal and treaty rights in Canada: Essays on law, Equality and respect for difference*, UBC Press, Vancouver, 1998.

entrepreneurship'.⁶³ Treaty as political process satisfies Brennan's demand that 'the pace of change and the balancing of rights and the public interest should lie principally with the people through their elected representatives, while the judges maintain the rule of law, and avoid politics-smuggled-into-law.'⁶⁴

Whether or not one places the judgement in this context, the political storm that followed Mabo indicates why the judiciary in Canada has constantly stressed its preference for negotiation over litigation in reshaping relations between Aboriginal and non-Aboriginal peoples.⁶⁵ Here the proper role for the judiciary may be as the arbiter of disputes that arise in the course of negotiation, rather than as a first alternative to those negotiations.

Finally, there is the broader question of the role of the judiciary and even more fundamentally, the (European) law, in relation to Aboriginal peoples as a whole. It would be difficult to overstate the devastating impact on Indigenous peoples of the dual process of historical attempts to destroy Aboriginal laws, and impose European law. Harring suggested in the Australian context, this process has amounted to the criminalisation of an entire people.⁶⁶ He argues that when the criminal law has come to define the relationship between the state and Aboriginal peoples to such an extent, the legitimacy of that society is called into question.⁶⁷ It is true that the tide has turned in recent years, and some important wins have led some to

⁶³ Robert Van Kreiken, 'From *Milirrpum* to *Mabo*: The High Court, *Terra Nullius* and Moral Entrepreneurship', *The University of New South Wales Law Journal*, vol. 23, no. 1, 2000.

⁶⁴ Frank Brennan, *Legislating Liberty: A Bill of Rights for Australia?* University of Queensland Press, Brisbane, 1998, pp.187-88.

⁶⁵ For example in the *Delgamuukw* case, Justice Lamer (at 186) noted litigation had been expensive, 'not only in economic but in human terms as well'. He suggested, 'ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgements of this Court, that we will achieve...reconciliation...Let us face it, we are all here to stay.'

⁶⁶ Sidney Harring, 'Australian Social Science, Aboriginal Peoples and the Criminal Law', *Australian Journal of Law and Society*, vol. 10, 1994, p.69.

⁶⁷ 'No society can prosecute whole peoples and maintain legitimacy' *ibid*.

suggest the best hope for Aboriginal peoples lies with the judicial, rather than the political process.⁶⁸ Yet, even when they 'win', Aboriginal peoples may ultimately lose at the hands of the legal system. Russell pointed out the 'bittersweet' nature of using non-Aboriginal courts. While they have often been vehicles of Aboriginal advancement, particularly in Australia, even these victories are a reminder of the subordinate place of native societies within the larger settler societies within which they are embedded, and their dependence on the courts to determine their rights in that larger society.⁶⁹ Significantly, Russell identifies an 'ideological core' present in even the most progressive decisions – that is a 'unitary, monopolizing, and hierarchical concept of sovereignty', that is antithetical both to Aboriginal aspirations, and the project of decolonisation.⁷⁰

It is just this monopoly of sovereignty that must be broken, not only through the gradual reform of the common law (and custom), but just as significantly, through the increased recognition of Aboriginal law (and custom). It is only when Australian customary norms are the reflection of engagement between these two systems of law that we can begin to see ourselves as a postcolonial state. By definition, this process of decolonisation cannot be based on the continued denial of the Indigenous legal order – the existence of which, it will be recalled, was explicitly recognised in *Mabo*.⁷¹

Yet, the court's view of law and title perhaps inevitably retains many limitations suggestive of its approach of recognising native title as a creature only of the common law.⁷² For the

⁶⁸ See Colin Tatz, 'Aborigines and Civil Law', in Peter Hanks and Brian Keon-Cohen (eds.), *Aborigines and the Law: Essays in Memory of Elizabeth Eggleston*, George Allen and Unwin, Sydney, 1984.

⁶⁹ Russell, *op cit*, p.247.

⁷⁰ *ibid.*

⁷¹ See footnote 46 above.

⁷² For discussion of *Mabo* see chapter 5 footnote 99 and following text.

purposes of this argument, I wish to focus on the subsequent implications of the 'judicial ownership' of native title, both for Aboriginal and non-Aboriginal peoples. Firstly, native title jurisprudence arising from *Mabo* has resulted in a narrow conception of native title as a competing, yet *less secure* interest, with other property interests in Australia.⁷³ This outcome, which recognises only an inferior form of title absent any notion of sovereignty or jurisdiction, is in line with the reasoning in *Mabo* which ignored the question of sovereignty,⁷⁴ and thus left the colonial hierarchy of cultures intact.⁷⁵ It has been suggested that 'the normative tradition of legal reasoning in the common law has probably done what it can for native title. For the future protection of native title we must look to the political process'.⁷⁶

As for non-Indigenous Australians, the political process has the advantage of embodying ideals of public deliberation, at least in a way judicial processes cannot. Brennan's recognition of Aboriginal traditional law as the source of their right to land is, of course, hugely important. Yet despite *Mabo*, the contemporary existence of (at least) two systems of laws in Australia remains little understood by the wider public, and thus remains a site of contention. This is partly a reflection of the fact that Brennan's recognition took place in a way that, for some, suggests native title is of 'merely anthropological or sociological interest to everyone but indigenous people themselves'.⁷⁷ The courts cannot be expected to explain the moral and normative significance of recognising Aboriginal rights to land and political status. The development of such recognition, particularly when placed in the context of establishing a

⁷³ This is largely due to its susceptibility to 'extinguishment'. See Strelein, 'Conceptualising Native Title', p.103.

⁷⁴ The establishment of sovereignty was in fact, regarded as an 'act of state' that could not be questioned in a municipal court. *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at p.69, per Brennan J; and pp. 78, 95, per Deane and Gaudron JJ.

⁷⁵ Paul Patton, 'Mabo, freedom and the politics of difference', *Australian Journal of Political Science*, vol. 30, 1995, p.111.

⁷⁶ Pat Kavanaugh, 'Native Title as an issue in moral philosophy', *Australian Journal of Law and Society*, vol. 14, 1998-99, p.100.

⁷⁷ Kavanaugh, *op cit*, p.93.

treaty relationship, must reflect as well as contribute to, an ongoing dialogue between peoples. The unique nature of the treaty project – establishing a (re)new(ed) political association between different peoples with different, though interrelated cultures – requires a process of mutual political negotiation which identifies areas of jurisdiction exclusive to, and shared by, Aboriginal and non-Aboriginal laws and peoples.

The Australian common law must be viewed as a *subject* of these negotiations, rather than constituting the boundaries within which they take place. It is in recognising true legal pluralism as ‘an ongoing process of conflict and compromise’ that the Australian Law Reform Commission’s 1986 report on recognising customary law⁷⁸ has been regarded as a new departure from previous attempts at conceptualising plural legal systems, which have been ‘limited’ by the ‘colonial approach’.⁷⁹ Here Strelein’s comments on native title are equally true of treaty. She suggested the unique character of native title (or for our purposes, treaty):

as a reconciliation of competing sovereignties should not result in the assertion of dominance of one legal system over another to the extent that Indigenous rights are subordinated to all competing rights and interests. To do so would be to unnecessarily perpetuate precisely the discrimination within the common law that the recognition of native title [or the negotiation of a treaty] should seek to eliminate.⁸⁰

⁷⁸ Australian Law Reform Commission, Report No. 31, *The Recognition of Aboriginal Customary Laws* AGPS, Canberra, 1986.

⁷⁹ Campbell McLachlan, ‘The Recognition of Aboriginal Customary Law: Pluralism Beyond the Colonial Paradigm – A Review Article’, *International and Comparative Law Quarterly*, vol 37 part 2, April 1988. McLachlan noted the Commission rejected both the general incorporation of Aboriginal law into statute, as well as the general exclusion of state law from Aboriginal peoples. Instead it was concerned with ‘the problems of interaction between’ the two systems of law. [emphasis in original] (pp.372-373.) This recognition of dual legal systems is regarded by Youngblood Henderson as ‘a first principle of treaty federalism’. James [sakej] Youngblood Henderson, ‘Treaty-Making as an exercise of the Right to Self-Determination’, in *Aboriginal Peoples in the Canadian constitutional context: application of International Law standards and Comparative Law Models*, Proceedings of a Conference at Montreal, Quebec, April 28/29 1995, p.19.

⁸⁰ Strelein, ‘Conceptualising Native Title’, p.124.

III. Intercultural negotiations

This brings us to what is perhaps the most important feature of the notion of treaty developed here: that is, it acts through, even while helping to promote, the norm of intercultural negotiation. In the course of treaty negotiations, relationships between Indigenous and non-Indigenous peoples (and laws) are determined 'through dialogues of negotiation in which they meet as equals'.⁸¹ This form of constitutional dialogue between representatives of Aboriginal and non-Aboriginal peoples is one where each negotiator participates in his or her language, mode of speaking and listening, form of reaching agreement, and way of representing the people for whom they speak.⁸² It is a situation where Aboriginal and non-Aboriginal peoples present themselves to each other, with receiving parties under the obligation to listen both to what is said, but importantly, also, how it is said. This removes the possibility of 'mistranslation' evident in dominant European conceptions based on the inherent inferiority of Aboriginal peoples. It is a process of speaking *with* rather than *for* Aboriginal peoples, replacing the 'appalling' system of consultation which meant little more than telling Aboriginal peoples what 'we' were doing to them or for them.⁸³ This characteristic of the colonial relationship, if it is dialogue at all, is truly a 'dialogue of the deaf.'⁸⁴

Two primary features contribute to the practical realisation of this notion of intercultural dialogue. Firstly, as indicated even by Hirst, dialogue of this type between cultures is always

⁸¹ Tully, 'Aboriginal Peoples: Negotiating reconciliation', p.426.

⁸² Tully, *Strange multiplicity*, p.129.

⁸³ Colin Tatz, 'A question of rights and wrongs', in Oliver Mendelsohn and Upendra Baxi (eds.), *The Rights of Subordinated Peoples*, Oxford University Press, Delhi, 1994, p.173.

⁸⁴ Roger Maaka and Augie Fleras, 'Engaging With Indigeneity: Tino Rangitiriranga in Action', in Duncan Ivison, Paul Patton and Will Sanders (eds.), *Political theory and the rights of Indigenous peoples*, Cambridge University Press, Cambridge, 2000, p.96.

taking place in multicultural, multi-national societies such as Australia and Canada. The high percentage of Aboriginal people married to non-Aboriginal Australians is surely proof of that. The treaty process places these dialogues in a new, constitutional context. This complex, messy, 'polyphony'⁸⁵ is possible because cultures are not hermetically sealed, distinctly bounded entities. The process allows cultural pluralism to be seen not as a problem for the national culture, nor as a transitional stage, but as a condition in itself of complete, fragmented, and multiple identities.⁸⁶ For not only do a number of cultures exist simultaneously within the state, but also perhaps within an individual who is in a sense conducting a kind of intercultural dialogue within.⁸⁷

Secondly, the aim of the intercultural dialogue is not to arrive at a set of universal principles and institutions that suppress rather than recognise diversity, but to develop what Williams's terms 'paradigms for behaviour'.⁸⁸ This is again suggestive of an ongoing process rather than a concrete outcome. We are certainly not referring to the ideal speech situation presented as the basis of some political philosophies, but a more realistic description of dialogue that renews itself according to the changing needs of its interlocutors, akin to the Haudenosaunee tradition of 'polishing the chain'.⁸⁹ Politically, these paradigms for behaviour will be reflected in 'forms of association' that accommodate peoples' differences in appropriate institutions,

⁸⁵ B.W Powe, *A Canada of Light*, Somerville House, Toronto, 1997, p.48. Powe described the 'polyphony' as 'the genuine plurality of different approaches and interpretations...In the polyphony every individual has one voice with which to speak, two ears with which to listen. Each voice carries a portion of the truth. No one person, government, ideology or transnational can dominate the whole.' (p.48.)

⁸⁶ Parekh, Bikhu, and Jan Nederveen Pieterse (eds.), *The Decolonization of Imagination: Culture, Knowledge and Power*, Zed Books, London, 1995, p.15.

⁸⁷ For example, retired Australian rugby league star Arthur Beetson once stated, 'I'm a Queenslander first, an Aboriginal second, and an Australian third.' Cited in Colin Tatz, *Obstacle Race: Aborigines in Sport*, UNSW Press, Sydney, 1996, p.26.

⁸⁸ Williams, *op cit*, p.5.

⁸⁹ The first treaty was signed with the Haudenosaunee, Iroquois, or 'Six Nations' in 1692. An actual silver chain was made to symbolize the new relationship. In 1755, Sir William Johnson renewed the concept of the covenant Chain at a council with the Iroquois, restating the symbolic meaning of that agreement, calling it the 'covenant Chain of love and friendship'. He stated that the chain has been attached to the immovable mountains and nearly

and their similarities in shared institutions.⁹⁰ Societal as well as personal transformation is achieved, in that Aboriginal and non-Aboriginal peoples are engaged in mutually agreeing to the norms by which they both shall live, then continue the ongoing process of 'living' these norms, and reassessing them according to their utility.

The federal system in place in Canada and Australia may be ideally suited to the recognition of different political arrangements through the treaty process. It has been suggested that federalism and transnational associations will be for the twenty-first century what nation-states were for twentieth century, and empire and colonialism for the nineteenth.⁹¹ Yet, the project of decolonisation in the twenty-first century must address the fact that the institutions now embodied by the state are a product of these times. The negotiation of a treaty in which the inherent authority of Aboriginal peoples is recognised suggests the creation of a new federation to supersede the previous one which, as Aboriginal leaders have not let us forget,⁹² was built on the explicit exclusion of the first peoples.⁹³ This new federation would in contrast be built on the consent of Aboriginal peoples, and be shaped by their ongoing contribution to shared, mutually accepted ways of interacting. In this sense, Barsch and Henderson suggested in the context of the United States, Aboriginal treaties be viewed as 'political compacts irrevocably annexing tribes to the federal system in a status parallel to, but not identical with,

every year the British and Iroquois gather to 'strengthen and brighten' the chain. See http://sixnations.buffnet.net/Lessons_from_History/

⁹⁰ Tully, *Strange Multiplicity*, p.131.

⁹¹ Brian Galligan, *A Federal Republic: Australia's constitutional system of government*, Cambridge University Press, Cambridge, 1995, p.240.

⁹² See discussion of the views of Geoff Clark and particularly Patrick Dodson in chapter 6.

⁹³ It may be more correct to suggest such exclusion was already so entrenched within Australian society, that Constitutional exclusion was, rather, 'implicit', in that it sought to sustain the status quo in which Aboriginal people were largely 'invisible'. Thus Garran could write in 1897, 'We have one origin, one history, and one blood; we have kindred laws and institutions; and we have sole possession of a continent...the only possible alternatives are between federal and complete union...[Federation] involves less disturbance of the old order... Federated Australia is a foregone conclusion.' Garran quoted in David Meale, 'The History of the Federal Idea in Australian Constitutional Jurisprudence: A Reappraisal', *Australian Journal of Law and Society*, vol. 8, 1992, p.32.

that of states'. These authors recognise the significance of treaties lies in the fact that they are a form of political recognition, and a measure of the consensual distribution of powers.⁹⁴ The flexibility and responsiveness of the federal system⁹⁵ mean it is the ideal vehicle to facilitate such a redistribution via the treaty process whereby Aboriginal and non-Aboriginal peoples are actively involved in the ongoing process of remaking their relationship.

It has been suggested that far from being unrealistic or purely theoretical, the treaty in this sense actually values experience over (more abstract and perhaps culturally specific) logic.⁹⁶ The creation, maintenance and recreation of this shared normative world is perhaps the predominant advantage of the treaty process, and stands in stark contrast to the colonial relationship discussed previously. Treaty deliberation not only determines what is worthy of inclusion in the document – the necessary though mundane element of 'content' – but it also develops through participation, peoples identification with, and the stability of, a diverse federation.⁹⁷ The skills of accommodation essential to any multicultural, multinational society concerned with justice, are thus learned through practice.⁹⁸ We do not need to become 'a people' to maintain unity and stability, but 'a federal people'.⁹⁹ When a treaty is conceived as an ongoing conversation, rather than in the Lockean tradition of a foundational, good-for-all time contract, it can achieve the twin aims of respecting autonomy while creating solidarity between peoples who become true partners in the treaty process.

⁹⁴ Meale, *op cit.*

⁹⁵ Fletcher, *op cit.*

⁹⁶ Thomas O. Hueglin, 'Exploring concepts of Treaty Federalism: A Comparative Perspective', Research Paper prepared for the RCAP, August 1994, p.141.

⁹⁷ James Tully, 'Democratic Constitutionalism in a Diverse Federation' in Joseph Fletcher (ed.), *Ideas in Action: Essays on Law and politics in honour of Peter Russell*, University of Toronto Press, Toronto, 1999, p.47.

⁹⁸ *ibid*, p.40.

⁹⁹ Tully, 'Democratic Constitutionalism ...', p.39.

Lest the description of the treaty relationship appear utopian, it must be remembered that such a process does not guarantee a haven of justice and equality for all. Its strength may also be its weakness, in that it is entirely dependent on the will and ability of the parties to a treaty to negotiate in good faith. The establishment of a treaty doesn't assure ongoing justice between the parties, suggesting the need for mutually agreed mechanisms of dispute resolution – a role foreshadowed above for a plural judiciary. It does assure the legitimacy of each people with respect to each other, and in the previous absence of the consent, it establishes a legitimate political community. As Michael Ignatieff suggested, by reinforcing the legitimacy of joint decision-making, 'the effect of sharing sovereignty over these decisions would not be to balkanise the country, but the reverse; to increase the felt legitimacy of the decisions and choices that a country has to make'.¹⁰⁰

That the sharing of sovereignty with Indigenous peoples in a state characterised by treaty federalism may seem utopian to some is not surprising. This is a function not only of the current disparity in political power held by the two parties, but also of the continued grip of Williams' 'discourses of conquest'.¹⁰¹ In seeking alternatives to these colonial discourses, an increasing number of scholars are looking not merely to reform current arrangements, but are seeking inspiration from a time before the unquestioned dominance of these ways of thinking, in order to go 'back to the future'.¹⁰² While I have attempted to detail some of the normative

¹⁰⁰ Michael Ignatieff, *The Rights Revolution*, Anasi Press, Toronto, 2000, p.82.

¹⁰¹ Williams, *The American Indian In Western Legal Thought: The Discourses of Conquest*, Oxford University Press, New York, 1990.

¹⁰² This phrase is being used often enough to be of more than passing significance. See for example, Steven Paul McSloy, 'Back to the Future: Native American Sovereignty in the 21st Century', *New York University Review of Law and Social Change*, vol. XXV, no. 2, 1999; Rennard Strickland and Kathy Supernaw, 'Back to the Future: A Proposed Model Tribal act to protect Native cultural Heritage', *Arkansas Law Review*, vol. 46, no. 1, 1993; and James W. Zion and Robert Yazzie, 'Indigenous Law in North America in the Wake of Conquest', *Boston College International and Comparative Law Review*, vol. XX, no. 1, Winter 1997, p.83.

aspects of the treaty process, the ability to be creative and imagine alternatives to the *status quo* will be a prerequisite of the post-colonial era.¹⁰³

In looking at the history of Indigenous-state relations in North America, Robert Williams has illustrated that the treaty relationship always required such acts of imagination. If treaties were to be successful, he suggests, both sides had to engage in great acts of imagination 'so that the two sides could move to see themselves as related in their needs and sufferings as fellow human beings'.¹⁰⁴ Such a conception can be expanded beyond the realm of Indigenous-state relationships. Thus the philosopher Richard Rorty suggested that solidarity is 'achieved not by inquiry but by imagination, the imaginative ability to see strange people as fellow sufferers'.¹⁰⁵ As far as the treaty process goes, the act of imagination necessary in Australia refers again to the question of Aboriginal status – it is as simple and as difficult as rejecting the discourses of domination that have traditionally structured relationships, and listening to the way Aboriginal peoples describe themselves as part of an intercultural treaty dialogue.

IV. Conclusion

The RCAP provides a useful summary of the nature of treaty making:

Making a treaty does not require the parties to put aside all their political and legal differences, much less adopt each other's worldview. A treaty is a mutual recognition

¹⁰³ President of the National Native Title Tribunal, Justice French indicated the mindset necessary for this time when he recognised Indigenous demands for 'recognition and respect' underlying specific title claims: 'The particular visions of the ways that recognition and respect can be given practical effect are various...the range of responses is limited only by the creativity of those who negotiate with each other.' Cited in Anthony Mason, 'The Rights of Indigenous Peoples in Lands Once Part of the Old Dominions of the Crown', *International and Comparative Law Quarterly*, vol. 46, part 4, October 1997, p.830. Piertese and Parekh suggested this 'freeing the imagination' means replacing one set of (imported) vectors of community with another (self-generated). *op cit*, p.6.

¹⁰⁴ Williams, *op cit*, p.113.

¹⁰⁵ Rorty, quoted in *ibid*, p.92.

of a common set of interests by nations that regard themselves as separate in some fundamental way. Treaty relationships will evolve organically, but there must be no expectation that one worldview will disappear in the process. On the contrary, treaty making legitimises and celebrates the distinctiveness of the parties while establishing their bonds of honour and trust.¹⁰⁶

If we are truly to reject the age of imperialism and colonialism, we must also reject the political relationships that predominated in this era that are based on assumptions of inherent superiority backed by little more than an argument that amounts to 'might makes right'. James Tully notes that in the 'post-imperial dawn, treaties and agreements have begun to take on some of their former lustre'.¹⁰⁷ I hope I have shown why this may be so. Once the eurocentric assumptions of the colonial relationship are set aside, basic principles common to both European and Aboriginal societies emerge which require that a shared society must be based on negotiation and consent, which itself must be constantly renewed.

The establishment of a treaty relationship brought about through the formal conclusion of a particular document will be a beginning rather than an ending.¹⁰⁸ The ongoing process of establishing a treaty relationship is not conceived as a 'solution' to the 'Aboriginal problem'. Rather, it is intended to create a particular 'nomos', or 'normative universe'¹⁰⁹ based on the norms of mutual recognition, the equality of peoples, co-existence, and self-government. The transformative potential of the treaty process is evident in the recognition by Robert Cover that 'an act signifies something new and powerful when we understand that the act is in reference

¹⁰⁶ RCAP, *Volume 2*, p.54.

¹⁰⁷ Tully, *Strange Multiplicity*, p.137.

¹⁰⁸ As such, the RCAP suggested: 'It is self-defeating to pursue a policy that supposes that the terms of a land claims agreement can be fixed for all time. There can be no acceptable final definition of the compromises that must be made between societies over succeeding generations. The conclusion of a modern land claims agreement must be seen as a beginning, not as an end.' *Volume 2*, p.58.

¹⁰⁹ Robert M. Cover, 'Nomos and Narrative', *Harvard Law Review*, vol. 97, no. 1, November 1983. 'A nomos is a present world constituted by a system of tension between reality and vision.' (p.9.)

to a norm'.¹¹⁰ This may be particularly so when, for example, the exercise of Aboriginal authority is understood in the context of the inherent right to self-government based on continued Aboriginal sovereignty, rather than as a 'special' right delegated from the state. The treaty relationship seeks to alter the context of the Indigenous-state relationship by providing the overarching framework which facilitates such understandings. The intercultural dialogue taking place between peoples in a multinational state will then reinforce what Webber describes as 'relations of justice', rather than previous 'relations of force'¹¹¹ shifting the emphasis from our contingent histories to 'the invention of a shared and dynamic present'.¹¹² This use of the treaty process to facilitate this shift, provided it is based on the broad notion of a treaty relationship, is regarded as critical in a country such as Australia which has no real tradition of negotiating agreements with Indigenous peoples, where what debate there has been about the treaty concept has generally been the function of limited normative understanding, and has thus remained narrowly focused and generally 'acrimonious'.¹¹³

Peter Russell eloquently describes this treaty relationship in such a way that should serve to illustrate the key is the establishment of a just, legitimate, unified association where no single people's tradition dominates. Speaking of the Canadian context, he reminds us that the treaty relationship allows us to recognise:

the common principles and institutions which Aboriginal and non-Aboriginal Canadians must share if their post-colonial relationship is to be based on a shared citizenship in a single, though deeply federal, over-arching Canadian political community. A relationship built solely on respect for difference meets only one of the two ideals expressed in the two-row wampum belt; it satisfies the separateness aspect, but not the interconnectedness aspect. The two canoes, Aboriginal and non-Aboriginal are fated to share the same river. Giving that river a shape and substance that is truly

¹¹⁰ Robert M. Cover, 'Nomos and Narrative', p.8.

¹¹¹ Jeremy Webber, 'Relations of Force' and 'Relations of Justice': The Emergence of Normative Community between Colonists and Aboriginal Peoples', *Osgoode Hall Law Journal*, vol. 33, no. 3, 1995, pp. 623-660.

¹¹² Guyatri Chakravorty Spivak, 'Teaching for the Times', in Piertese and Parekh, *op cit*, p.178.

¹¹³ Andree Lawrey, 'Contemporary Efforts to Guarantee Indigenous Rights Under International Law', *Vanderbilt Journal of Transnational Law*, vol. 23, no. 4, 1990, p.757.

post-colonial is as important as ensuring that one of the canoes no longer threatens to swamp the other.¹¹⁴

I now examine two contemporary attempts to redefine Indigenous-state relationships. Recent attempts at agreement making under the native title act have been described in these broad terms, to the point where the negotiation of Indigenous Land Use Agreements has been likened to a *de facto* treaty process. In Canada, British Columbia (BC) has instigated a fully-fledged modern day treaty process in the last decade. Given that this province was negotiating treaties for the first time, it can be expected that there would be lessons for Australia. It is with this in mind I now examine the British Columbian treaty process.

¹¹⁴ Peter Russel, book review of Michael Asch (ed.), *Aboriginal and Treaty Rights In Canada: Essays on Law, equity and respect for Difference*, UBC Press, Vancouver, 1997, in *Alberta Law Review*, vol. 36, no. 1, 1997, p.299.

Chapter 9

Contemporary Treaty-Making in British Columbia: Beginnings, Process and Practice

- I. Historical context
- II. The British Columbia Claims Task Force
- III. Treaty-making in British Columbia: process and practice

After centuries of the denial of Aboriginal rights and title in British Columbia, the establishment of a treaty process in the last decade of the twentieth century can be seen as something of a revolution. Rejecting previous assumptions of the inferiority of Aboriginal societies, the negotiation of treaties would take place on the basis of assumed equality, with ‘government to government’ talks between First Nations and the state. The resulting relationship would be characterized as ‘nation-to-nation’, implying a level of equality, co-existence and mutual respect. Given the weight of history, any attempt to establish a new mode of interaction between Indigenous and non-Indigenous peoples would be profoundly difficult – nearly a decade after it commenced, the British Columbian treaty process has yet to produce its

first treaty.¹ Despite this, the establishment of a treaty *process* in BC represents a useful point of comparison for Australia. I examine the steps that led British Columbians to move from denial to recognition of Aboriginal peoples right to negotiate treaties.

Several elements will be highlighted as particularly relevant to Australia, including the issue of ‘capacity’, the negotiation of interim agreements prior to the conclusion of a treaty, and the role of the wider public and ‘third parties’. As suggested earlier, the profound contribution a treaty process can make to a society made up of different peoples cannot be measured merely by the number or nature of completed documents. Here, I continue to focus on the broader question of the relationship between peoples as engendered in, and facilitated by, the process of treaty negotiation in British Columbia. Initially, I address the history that led up to the current treaty process.

I. Historical context

In dealing with ‘the land question’, the long denial of Aboriginal title and the lack of treaties sets British Columbia apart from the rest of Canada.² The absence of a tradition of treaty-making means it is probably more akin to the Australian situation than any other part of Canada. While Indigenous peoples signed the first of several Canadian treaties along the eastern seaboard between 1725 and 1779, treaty-making in BC did not begin in earnest until

¹ The Nisgaa Final Agreement, or ‘treaty’, which was finalised in 1998 was conducted entirely outside the process overseen by the British Columbia Treaty Commission. For full text of the Nisgaa Final Agreement, background, and chronology of events, see http://www.ainc-inac.gc.ca/pr/agr/nsga/index_e.html

² What follows is a necessarily brief treatment of a rich and complex history. For a full account of the BC land question see Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia*

the 1990s.³ As in the Australian case, orders from the British Crown to seek the consent of the natives at the time of settlement were ignored. For decades, provincial authorities took the position that Aboriginal title did not exist in BC because the Royal Proclamation of 1763 (which it argued was the source of Aboriginal title) did not apply to the province. Even if title had existed prior to this, the argument continued, it was implicitly extinguished by colonial legislation prior to BC joining the confederation in 1871. Native opposition to this argument was consistent and sometimes confrontational, with protests and rallies of the 1870s and 1880s leading to the formation in 1916 of the Allied Tribes of British Columbia, the first of a number of subsequent province-wide and regional Aboriginal political organizations.⁴

Long held provincial arguments about the non-existence of Aboriginal rights and title which formed the basis both of policy and, importantly, thinking about Aboriginal peoples, were severely challenged by the *Calder* case of 1973.⁵ Chief Frank Calder argued that his Nisgaa people held Aboriginal title to their traditional lands in the Nass Valley prior to the assertion of British sovereignty in 1849; and further, that this title had not been lawfully extinguished. The case was subsequently appealed to the Supreme Court of Canada, where the Nisgaa lost on a technicality. However, the significance for British Columbia and Canada lay in the fact that six of the seven Supreme Court justices ruled that Aboriginal title had existed prior to the

1849-1989, University of British Columbia Press, Vancouver, 1990. See also J. R. Miller, *Skyscrapers hide the heavens: a history of Indian-White relations in Canada* (3rd ed.), University of Toronto Press, Toronto, 2000.

³ Between 1850 and 1854, Vancouver Island Governor James Douglas, acting on behalf of the Hudson's Bay Company, arranged 14 'purchase treaties' on the island. These were centred on the settled areas of Victoria, Sooke, Saanich and Nanaimo, and covered about 3 per cent of the land mass of Vancouver Island. Christopher McKee argues they were 'consistent with British policy and International law at the time.' McKee, *Treaty talks in British Columbia*, UBC Press, Vancouver, 1997, pp.11-13. Then between 1899 and 1910, the federal government signed treaties with a number of northern BC First Nations, as 'adhesions' to Treaty 8 which covers much of present day northern Alberta. The provincial government played 'no significant role' in the conclusion of treaty 8. McKee, pp.19-22.

⁴ McKee, *op cit*, p.24.

⁵ *Calder v Attorney General of British Columbia* [1973] SCR 313.

assertion of British sovereignty. Moreover, three of the justices found it continued to exist. This prompted the federal government to proactively implement its comprehensive claims policy aimed at settling Aboriginal land claims – a far cry from its position in 1969 denying all such specific treatment.⁶ In a telling phrase indicative of the significant shift taking place in Canada, Prime Minister Trudeau admitted to some Indian leaders, that ‘perhaps you had more legal rights than we thought’.⁷

While Aboriginal peoples had always asserted their inherent rights, they were nonetheless buoyed by this development, as well as subsequent judicial affirmations such as in the 1985 *Guerin* case.⁸ Protests and blockades continued to raise the political temperature in the province, and in 1985, the Nuu-Chah-Nulth nations successfully obtained an injunction to halt logging on their traditional territory.⁹ In a forerunner of things to come, Justice MacFarlane in the BC Court of Appeal stated:

The fact there is an issue between the Indians and the Province based upon Aboriginal claims should not come as a surprise to anyone. Those claims have been advanced by the Indians for many years...I think it is fair to say that, in the end, the public anticipates that the claims will be resolved by negotiations and by settlement.¹⁰

This was but the first of a number of injunctions which raised serious doubts as to the sense of the province’s (continued) policy of ignoring the issue of Aboriginal title. The critical, and perhaps definitive role the courts played in getting both provincial and federal governments to

⁶ For discussion of this period see Sally Weaver, *Making Canadian Indian policy : the hidden agenda, 1968-70*, University of Toronto Press, Toronto, 1981. In language which was mirrored by John Howard, Trudeau said: ‘It’s inconceivable I think that in a given society, one section of the society have a treaty with the other section of the society.’ Cited in J.R. Miller, *op cit*, p.329. Howard substituted the word ‘absurd’ for ‘inconceivable’. See chapter 5 footnote 81.

⁷ Cited in Miller, *ibid*, p.343.

⁸ *R. v. Guerin* [1985] 1 CNLR 120 (SCC).

⁹ *Martin et al. v the Queen in Right of the Province of British Columbia et al.* [1985] 3 *Western Weekly Reports*, (BCCA).

¹⁰ *ibid*, p.607.

the negotiating table was later recognized by one of the British Columbia Claims Task Force members, Chief Ed John.¹¹ In a series of landmark rulings, Canadian courts confirmed the existence and deepened understanding of Aboriginal rights and title.¹² It is critical to note that the courts were not 'giving' rights to First Nations, but 'recognising and protecting continuing rights'.¹³ As to the broad question of Aboriginal rights, beginning with the Calder case, the courts have over time confirmed that:

- Aboriginal rights exist in law;
- they are distinct and different rights from other Canadians;
- they include unique property rights (Aboriginal title) which are communally held;
- they take priority over rights of others, subject only to conservation needs;
- rights can only be extinguished through strict legal tests, not simple legislation;
- Aboriginal status 'derives not from their race, but from the fact that they are the descendants of the peoples and societies that were resident in North America long before settlers arrived'.¹⁴

While the courts confirmed the existence of Aboriginal title, they did not indicate where it exists. The suggestion has been made that this can only be determined through a treaty process, or determined by the courts on a case by case basis.¹⁵ Just as the Canadian government responded to the Calder case of 1973 by instituting a Comprehensive Claims Policy, so too

¹¹ John said, '...the only reason that they [governments] have been able to move is not out of the goodness of their hearts, but because the courts in this country have said, 'there is an unresolved issue here, which you need to sit down with Aboriginal peoples and resolve.' 'Playing with Fire', *The National Magazine*, CBC TV, July 9 1996.

¹² Seminal Aboriginal title cases in the period following *Calder* included *Hamlet of Baker Lake v Minister of Northern Affairs and Northern Development* [1979] 3 CNLR 17 (FCTD); *R. v. Guerin* [1985] 1 CNLR 120 (SCC); *Roberts v Canada* [1989] 2 CNLR 146 (SCC); *R v Sparrow* [1990] 3 CNLR 160 (SCC); and later *Delgamuukw v British Columbia* [1998] 1 CNLR 14 (SCC). For commentary see Thomas Isaac, *Aboriginal Law. Cases, Materials and Commentary*, (2nd ed.), Purich Publishing, Saskatoon, 1999.

¹³ BCTC, Media Handbook: Why are we Negotiating Treaties?, 2000, p.1.

¹⁴ *ibid*, p.2.

¹⁵ *ibid*.

was the BC government following the judicial lead to a certain extent. The decision to establish the British Columbia Treaty Commission (BCTC) was 'spurred by court recommendations that existing aboriginal rights are better defined through negotiation than through the court process...'¹⁶ The commencement of the treaty process did not happen out of the goodness of the previously recalcitrant province's heart, but was, rather, 'a constructive alternative to litigation and direct action'.¹⁷

As a sign of the changing political climate, the province's first Ministry of Native Affairs was created in 1988. Prior to this, a Price Waterhouse study had calculated the cost to BC of not settling claims to be in the order of \$C1 billion in lost investment, and 1500 jobs a year in the mining and forestry sectors alone.¹⁸ These costs were borne mainly from the impact of direct action and court rulings over the nature and scope of Aboriginal rights, which delayed resource-development projects, especially in resource sectors which are a key area of the BC economy.¹⁹ As a result of the economic uncertainty created by direct action involving the 95 per cent of BC that is Crown land, gradually even the major natural resource developers began to suggest negotiation was 'the way to go'.²⁰

It is no coincidence that major shifts in policy towards First Nations by both Canadian and BC governments took place in the wake of the most famous of these incidents of direct action, the so-called 'Oka crisis'.²¹ On 11 July 1990, Quebec Provincial police tried to dismantle a

¹⁶ The Benefits and Costs of Treaty Settlements in British Columbia: A Summary of the KPMG Report, December 1995. <http://www.gov.bc.ca/tno/rpts/kpmgsum.htm>

¹⁷ BCTC Media Handbook, *op cit*.

¹⁸ *ibid*.

¹⁹ *ibid*.

²⁰ See Tennant, *op cit*, pp.218-225.

²¹ See Geoffrey York and Loreen Pindera Little, *People of the Pines: The warriors and the legacy of Oka*, Brown & Company, Toronto, 1991.

roadblock set up by members of the Mohawk First Nation, who sought to prevent the expansion of a golf course onto Mohawk territory at Kanehsatake. During the 78-day stand off, one police officer was killed, and the Canadian Armed Forces were called in, creating reverberations across the state of Canada. While some highlighted the negative impacts of Oka, such as increased racism towards Aboriginal people, loss of public support, and increased militancy among Indigenous youth, others argued that the crisis raised the stature of Aboriginal concerns in a way Aboriginal leaders had previously been unable to achieve.²² The Mohawks voluntarily withdrew the blockade just days after the Canadian government announced 'a new agenda to improve Canada's relationship with Indigenous peoples', including renewed attention to key issues of land and Aboriginal status in Canadian society.²³

Once public support for this shift in policy reached 80 per cent, the Social Credit government of Premier Bill van der Zalm began cabinet discussions about negotiating with First Nations.²⁴ The First Nations Summit (then called the First Nations Congress) then had meetings with both Premier Vander Zalm and Prime Minister Brian Mulroney. These 'cooperative' meetings sought creative approaches to solve the land question in BC.²⁵ With Aboriginal leaders concerned about a lack of negotiating experience, they suggested the creation of a tripartite body to 'recommend appropriate procedures and principles on which to base negotiations.'²⁶ Both governments agreed, and on 3 December 1990, the British Columbia Claims Task Force was established.

²² Indian and Native Affairs Canada, *First Nations in Canada*, INAC, Ottawa, 1997, p.108.

²³ *ibid.*

²⁴ McKee, *op cit*, p.30.

²⁵ *ibid.*, p.32.

²⁶ *ibid.*

The report of the Task Force is examined in some detail, for two major reasons. Firstly, as a tripartite exercise, the process by which it came to recommend the establishment of a treaty process has a great deal of merit. In itself, the task force and its resulting report may be viewed as concrete examples of the power of intercultural negotiation leading to mutually agreed conclusions. In both its process and output, the report contains a good deal of information as to the preferred philosophy of treaty negotiations. It has recently been suggested as a possible model for Australian treaty negotiations.²⁷ Secondly, given the difficulties experienced by the British Columbia treaty process in recent times, it has been suggested that this significant document be revisited in the current context. Current chief Commissioner Miles Richardson called for 'a review of and rededication to the fundamental commitments made at the outset of the process in the British Columbia Claims Task Force Report'.²⁸ It is worthwhile detailing what those commitments were.

II. The BC Claims Task Force

The task force consisted of two appointees from the federal government, two from the provincial government, and three from the First Nations Summit, the peak body representing Aboriginal peoples who entered the treaty process. These individuals were not to represent only the interests of their constituency, reflecting a perspective that free and open negotiations represent the most effective route to articulating First Nations rights, achieving certainty, and

²⁷ Peter Jull, 'Treaty, Yeah, Treaty, Now!', *Arena Magazine*, no. 48, August-September 2000, pp.20-21.

²⁸ Miles Richardson, 'Review of the treaty process', in *Speaking Truth to Power II, a Treaty Forum*, BCTC, Vancouver, 2000, p.7. The full text of the report can be found at <http://www.gov.bc.ca/tno/rpts/bcctf/toc.htm>

developing positive relationships.²⁹ In line with the often conflicting interests of Indigenous peoples, governments, private land owners, forestry and mining workers, and so on, it met with a variety of people, and made a Province-wide call for input. Based upon consideration of these materials, the Task Force made nineteen recommendations, the first of which pointed to the need for a totally new basis for dealings between Indigenous peoples and the state. It recommended 'the First Nations, Canada, and British Columbia establish a new relationship based on mutual trust, respect, and understanding – through political negotiations'.³⁰

The task was to reconcile 'fundamentally different philosophical and cultural systems'.³¹ Aware of the broad philosophical challenge, the task force suggested the issue at hand was not just the resolution of competing rights to land, sea, and jurisdiction, which had been the focus of much disputation. Rather, '...the ultimate solution lies in a much wider political and legal reconciliation between aboriginal and non-aboriginal societies'.³² This required acknowledging both the history of the relationship between Aboriginal and non-Aboriginal peoples, but also, importantly, 'how this history has shaped the political and legal reality of today'.³³

The task force was unambiguous in its rejection of previous mechanisms for determining relations between peoples. This old relationship was to be 'cast aside'.³⁴ It was equally firm

²⁹ The B.C. Teachers Federation, and the Tripartite Public Education Committee, *Understanding the B.C. Treaty Process: An Opportunity for Dialogue*, Prepared for the First Nations Education Steering Committee, Second Edition, February 1988, p.16.

³⁰ BC Claims Task Force, *The Report of the British Columbia Claims Task Force*, BC Ministry for Aboriginal Affairs, Vancouver, June 21, 1991, p.19. Text of the report is available at <http://www.gov.bc.ca/tno/rpts/bcctf/toc.htm>

³¹ *ibid*, p.5.

³² BC Claims Task Force, *op cit*.

³³ *ibid*.

³⁴ *ibid*, p.16.

about the characteristics of the new relationship. It asserted 'recognition and respect for First Nations as self-determining and distinct nations with their own spiritual values, histories, languages, territories, political institutions and ways of life must be the hallmark of this new relationship'.³⁵

The task force acknowledged the inevitability of conflict in the context of British Columbia as home to different peoples with competing interests. The explicit preference was for such matters to be resolved politically rather than through violence or the legal process. In a statement that goes to the heart of the treaty relationship as it was developed in the previous chapter, the task force suggested:

Whatever the issues may be, it is crystal clear that any new relationship must be achieved through voluntary negotiations, fairly conducted, in which the First Nations, Canada and British Columbia are equal participants. The negotiations will conclude with modern-day treaties.³⁶

The task force was adamant that no single party should dictate the issues that would be negotiated, and there should be no unilateral restriction by any party on the scope of negotiations. It recognized that full and frank consideration of all items of importance would contribute to the creative and practical solutions necessary to foster the new relationship.³⁷ This point is critical. It suggests both parties are coming to negotiations with an open mind, willing at least to listen, if not agree, to all that the other party has to say. Such a position is crucial if negotiations are to proceed on anything like a good faith basis. Yet, as will be seen, the temptation of state parties to exercise the power characteristic of previous relationships by

³⁵ BC Claims Task Force, *op cit*, p.16.

³⁶ *ibid*, p.16-17.

³⁷ *ibid*, p.21.

determining the scope of negotiations would prove to be a substantial stumbling block for the resultant treaty process in British Columbia.

As to the actual scope of negotiations, the task force suggested this would be up to the parties concerned. Yet it did not hesitate in identifying self-government as 'an essential component of a new relationship'.³⁸ This concept was clearly distinguished from recent initiatives which had 'marginally increased' administrative responsibility to First Nations while legal authority remained with the federal government.³⁹ Pointing to some of the complexity that would arise in later negotiations, the task force suggested treaties would have to be 'explicit' in matters of jurisdiction⁴⁰ as a means of avoiding 'uncertainty'.⁴¹

This issue of 'certainty' is another that would recur in the BC treaty process. The task force suggested achieving certainty, particularly over ownership and jurisdiction of land and resources, was a shared 'common objective' of First Nations, federal and provincial governments. It was thought to create confidence and understanding, 'and facilitate constructive developments on the social, political and economic fields'.⁴² Yet there is little detail on what the concept actually refers to. The task force does categorically reject the previous approach of achieving certainty – that of 'blanket extinguishment' of Aboriginal rights and title.⁴³ Instead, the parties 'must strive to achieve certainty through treaties which state precisely each party's rights, duties and jurisdiction'. Yet the ambiguity in achieving this

³⁸ BC Claims Task Force, *op cit* p.22.

³⁹ *ibid.*

⁴⁰ *ibid.*

⁴¹ *ibid.*, p.25.

⁴² *ibid.*, p.28.

⁴³ *ibid.*, p.29.

task is recognized when the task force admits ‘certainty’ is ultimately an aspirational goal. It would be impossible to achieve ‘absolute certainty in all areas’.⁴⁴

The task force suggested that treaties ‘will document the relationship between the parties at one point in time’, but need to be capable of amendment to reflect changing circumstances.⁴⁵ Yet, again, the difficulty of ‘documenting’ a complex, vibrant, and fluid relationship may be too great a task. This focus on ‘one point in time’ appears to be inconsistent with the overarching goal of reconsidering and recontextualising a ‘new’ relationship. In fact, the attempt to pin it down smacks of procedures and processes of the old relationship, such as the control inherent in the laborious documentation of the *Indian Act*, and such like bureaucratic apparatus. This static conception of treaty is continued in the task force’s suggestion that the parties ‘must identify topics which will and will not be open for amendment, and the method of amendment’.⁴⁶

The role of the wider public has also emerged as a contentious issue. The task force recognized that a ‘well informed public is important to the overall success of the process.’⁴⁷ As such, it suggested ‘a wide range of [non-aboriginal] groups’ ‘should be encouraged’ to participate in the treaty process.⁴⁸ Yet it is the extent, or nature, of this participation that is critical. The report noted the difficulty non-Aboriginal people often have in understanding the issues of First Nations people, given the differences that exist in ‘values and perspectives’, as well as the fact that non-Indigenous impressions are often based on ‘superficial exposure to aboriginal

⁴⁴ BC Claims Task Force, *op cit.*

⁴⁵ *ibid.*

⁴⁶ *ibid.*, p.30.

⁴⁷ *ibid.*, p.16.

⁴⁸ *ibid.*, p.54.

people and lifestyles'.⁴⁹ For this reason, perhaps, as well as the 'impracticality' of having non-Aboriginal interest groups present, the task force recommended that 'non-aboriginal interests be represented at the negotiating table by federal and provincial governments'.⁵⁰ This recognises the self-government rights of non-Aboriginal people are exercised in the election of these representatives, who then have the responsibility to effectively inform and consult with non-Indigenous interest groups. Similarly, the self-government rights of First Nations people are given substance through the participation of their representatives in the treaty process.

As this issue of self-government illustrates, the BC Claims task force describes a treaty relationship that largely corresponds to that developed in the previous chapter. Yet its discussion of implementing a treaty relationship also reveals the tensions that can emerge through different visions of treaty. The focus on 'documenting a relationship at a point in time' is suggestive of an approach that seeks finality and certainty as an end goal of a finite process. Yet the task force also envisages a new, ongoing relationship reflecting norms of self-government, co-existence and equality of peoples. This is a more relational rather than foundational view. The mutual recognition implicit in such a relationship is squarely based on the rejection of historic colonial relations, seen most obviously in the equal role afforded First Nations. The critical commitment was that both government and Indigenous parties to the process should be 'equal partners', with no one party having control.⁵¹ In order for this to be achieved, the treaty process was to be open, fair and voluntary, with First Nations negotiators relishing their recognition as equals.⁵² The extent to which the practice of treaty-making

⁴⁹ BC Claims Task Force, *op cit*, p.49.

⁵⁰ *ibid*, p.55.

⁵¹ *ibid*, p.34.

⁵² Chief Joe Mathais of the Squamish Band said on December 11 1991: 'What we're talking about is nation-to-nation, government-to-government negotiations...we're not coming there picking up crumbs on our knees. We're

corresponded with these ideals was dependent in part on the 'keeper of the process',⁵³ the newly created BCTC.

III. Treaty-making in British Columbia: process and practice

In keeping with its tripartite conception, the BCTC was established by federal and provincial legislation, as well as by a resolution of the First Nations Summit. While it does not formally take part itself, it is designed to facilitate treaty negotiations by monitoring developments, and where necessary, providing methods of dispute resolution. A chief commissioner is appointed by the three principals, and commissioners do not represent particular parties, with decisions requiring both a quorum, as well as the support of one appointee of each of the principals. The BCTC heard its first statements of intent from First Nations wishing to enter into a treaty in December 1993.

The BCTC oversees a six-stage negotiation process, which will be described briefly below. The number in square brackets indicates the number of First Nations at each stage of the process as at November 28, 2002:⁵⁴

Stage One: Statement of Intent. This statement filed by First Nations identifies the group's governing body, its members, and illustrates that it has a mandate to represent these people. It also describes the geographic area of traditional territory, as well as identifying any areas of

coming there as equals.' cited in Mel Smith, *Our Home or Native Land? What government's Aboriginal policy is doing to Canada*, Stoddardt Publishing, Vancouver, 1996, p.16.

⁵³ BCTC Media Handbook, *op cit*.

lands contested by other First Nations. This issue of 'overlap' was especially prominent in the negotiation of the Nisgaa Treaty (which took place outside the BCTC), when the Gits'kan Wetsuwet'en people challenged the treaty.

Stage Two: Preparation for Negotiation. Within 45 days of receiving a Statement of Intent, the Commission convenes a meeting of all three parties. This enables an initial sharing of information, consideration of issues of concern and confirms the commitment of the parties to negotiate a treaty. BC and Canada are required to submit identification of community interests. The Commission then determines that the table is ready to move on to the next stage. [4]

Stage Three: Negotiation of a Framework Agreement. This has been described as the 'table of contents' for the negotiation of a comprehensive treaty.⁵⁵ The three parties identify issues agreed to be negotiated, objectives, procedures, and a timetable, including possible milestones to be reached at certain times. This is the stage where public consultation and information accelerates. Canada and BC engage in public consultations through regional advisory committees. Municipal governments participate through Treaty Advisory Committees, and at the Provincial level a Treaty Negotiation Advisory Committee represents various interests, such as business, labour, environmental and recreation groups. [5]

Stage Four: Negotiation of an Agreement in Principle. Substantive negotiation really begin at this stage. The AIP will identify and define a range of rights and obligations, including complex areas of interests in land and resources, governance structures and fiscal

⁵⁴ BCTC site accessed on this date. <http://www.bctreaty.net/files/status.html>

⁵⁵ BCTC, *Understanding the BC Treaty Process*, BCTC, Vancouver, September 1997, p.19.

arrangements. It looks forward to ratification procedures which should allow each party to seek modifications or amendments to the emerging agreement, as well as providing negotiators with a mandate to conclude a treaty. The large number of First Nations at this stage [42] indicates the complexity of completing the AIP.

Stage Five: Negotiation to Finalise a Treaty. After the signing of an AIP, outstanding legal and technical issues are resolved at this stage. The treaty is then signed and formally ratified.[1]

Stage Six: Implementation. This will differ from agreement to agreement, and will require long term commitment and good will to continue. The table remains active after signing to oversee implementation, as ‘the new relationship [between First Nations, BC and Canada] will be brought to maturity’ at this final stage.⁵⁶

Now nearly a decade old, the process has experienced a number of difficulties. Measuring the success or otherwise of the BC treaty process depends in part on whether one focuses on substantive outcomes, or the possibilities created by the new process. Eight years after the creation of the Commission, it is yet to facilitate its first modern treaty in BC. The only modern day treaty negotiated in British Columbia remains the Nisgaa agreement, which was concluded entirely outside the framework of the Commission after negotiations began long before its creation. Yet, 70 per cent of First Nations have chosen to participate in the treaty process, which remains the preferred option for all parties to reconcile the assertion of sovereignty by the state of Canada with the prior occupation of Indigenous peoples. Given the complexity of creating a new relationship in the context of resolving this overarching issue, it

⁵⁶ BCTC, *Understanding...*, p.20.

is probably not surprising the conclusion of new treaties has proven to be a supremely difficult task. Of deep concern are a number of conceptual and philosophical differences between First Nations and governments which the BCTC has referred to as 'conflicting treaty visions'.⁵⁷ These will be examined later. However, the process has also been dogged by a number of more practical 'procedural' difficulties which often revolve around the issue of parties maintaining both commitment and resources over a longer than expected period of time. This issue of 'capacity' is the first to be examined. Secondly, I look at problems surrounding the negotiation of interim measures, and finally, the breadth of third party and public involvement, which has also been the subject of much controversy.

The capacity of all principals in the treaty process to continue to participate effectively, as well as the BCTC itself, has been the subject of speculation.⁵⁸ Thus, the 2000 Annual Report of the BCTC reveals that a substantial number of the 51 First Nations involved in 42 sets of negotiations have had no tripartite discussions in the preceding year, or even longer.⁵⁹ This may be because groups are involved in bilateral negotiations with the Province over resource issues such as forestry, or with private companies who wish to develop disputed territories. A number of internal issues have also prevented First Nations from taking their place at the negotiating table. These include reorganisation caused by the withdrawal of an individual Band, the renewal of its mandate to negotiate on behalf of its people, the negotiation of 'interim measures' agreements, as well as the building of 'capacity' to enable it to sustain long term negotiations.

⁵⁷ BCTC, 'Letter From the Commissioner', *2000 Annual Report*, BCTC, Vancouver, 2001, p.7.

⁵⁸ For example, see Hamar Foster, 'Getting There', *Speaking Truth to Power: a treaty forum*, Law Commission of Canada, Vancouver, 2000.

⁵⁹ BCTC, *2000 Annual Report*, *op cit*.

The longer the process continues without being able to show any substantial outcomes, the more pressure is placed upon it. Frustration has built up among First Nations peoples who watch their resources dwindle both due to the loans required for ongoing negotiation, as well as the continued alienation of the very lands they are attempting to reclaim.⁶⁰ In response, the federal government has allocated \$15 million over three years to build First Nations capacity to achieve and implement treaties.⁶¹ Concern over the ability of First Nations to sustain themselves through long and often gruelling negotiations led to the creation of the Capacity Initiative Council in 1999. This is made up of First Nations, government, industry and labour representatives, who review proposals from First Nations and allocate funding for individual economic projects. This is aimed at increasing each group's capacity to undertake strategic planning, lands and resource management training, as well as specific projects which deal with the fundamentals of fisheries, forestry, and related governance training.⁶²

Among proposed solutions to these long term problems is the negotiation of interim agreements or 'treaty-related measures'. The BC Claims Task Force foreshadowed a number of problems which would arise due to the length of the negotiating process. As such, it recommended that agreements be reached prior to the full negotiation of a treaty. Noting both the impact disputes could have on development efforts as well as alienation of disputed territories, the Task Force viewed the completion of interim measures as 'an important early indicator of the sincerity and commitment of parties to the negotiation of treaties'.⁶³ They have

⁶⁰ For example see Sherryl Yaeger, 'Land Claims could lead to Assassinations: Chief', *The Province*, December 6, 1995, in which Penticton band chief Stewart Philip suggested frustration in Native communities was so high it could lead to political assassinations.

⁶¹ BCTC, *2000 Annual Report*.

⁶² BCTC, *op cit*.

⁶³ Cited in BCTC, *Understanding...*, p.12.

proven at times to be important in creating working relations between Aboriginal and non-Aboriginal peoples. In 1996, the First Nations Summit indicated the importance of interim agreements to Indigenous peoples, when it called the failure to negotiate these agreements 'the greatest threat to the treaty-making process'.⁶⁴ It argued that for First Nations peoples, 'interim measures are necessary in order to facilitate the successful negotiation of treaties by protecting and enhancing lands, waters, air and resources which might form part of a treaty settlement and by protecting and enhancing Aboriginal rights, title or interests pending any treaty settlement.'⁶⁵

It has only been more recently that local governments, business and industry have supported the call for interim measures, as the economic benefits of creating a stable environment for investment have become increasingly apparent.⁶⁶ Interim measures recognise that treaties take time to negotiate, but in the mean time, there are many issues to deal with. The federal and provincial governments are pushing a type of interim measure known as 'treaty related measures', which may be used to protect Crown land to be included in a Treaty, provide for land purchases, or increase Aboriginal participation in resource management or economic development.⁶⁷

These interim measures have the potential to act as a catalyst in establishing new working relationships between individuals and peoples. Yet, as each table moves further into the detail of negotiations, the differences between groups are becoming more and more obvious. This

⁶⁴ First Nations Summit, 'Interim Measures: Getting the Process Back on Track', Oct. 28, 1996. Cited in *ibid.*

⁶⁵ *ibid.*

⁶⁶ BCTC, 2000 *Annual Report*, 'Opportunities', p.1.

⁶⁷ BCTC, 2000 *Annual Report*, p.7.

has, at times, been reflected in the negotiation of interim measures. Substantial problems have occurred over the Province's opposition to co-management of traditional lands adjacent to treaty lands, as well as to sharing revenue generated from resources in and on these traditional territories. Disagreements have also emerged about the amount of monies offered to First Nations, but also the purpose it is meant to serve. While First Nations argue they should be compensated for lands they are giving up, as well as for wrongs done to them in the past, the federal and provincial governments deny this historical aspect of treaties, and prefer to view fiscal issues in terms of looking forward to 'building strong communities into the future'.⁶⁸

The announcement of a number of completed interim measures in the early years of the process also ignited the issue of public participation in the treaty process. In 1994, members of the treaty negotiation advisory committee (TNAC), a consultative body of major third party interests, wrote to Aboriginal affairs ministers detailing their concerns about the confidentiality of the process, a lack of input into interim measures agreements, accountability and public education.⁶⁹ When this letter was leaked to the media, it produced instant results guaranteeing a broader role for the public. This included members of TNAC having direct access to federal departments involved in negotiations, providing comments for negotiations options, and the guarantee that any agreements in principle would be explained to the public, and be subject to discussion prior to ratification.⁷⁰ For its part, the provincial government opened up negotiations by expanding the role of local governments who could establish regional advisory committees.⁷¹ Yet despite governments moving quickly to address non-

⁶⁸ BCTC, *op cit.*

⁶⁹ McKee, *op cit.*, p.58.

⁷⁰ *ibid.*, p.59.

⁷¹ *ibid.*

Indigenous concerns, many third parties continue to see their overall role in negotiations as marginal.⁷² Meanwhile, the 'government-to-government' tenor of negotiations is apparently compromised. Aboriginal leaders are increasingly concerned that the treaty process is being altered in such a way that allows it to be sabotaged by parties who have a bias against the negotiation of treaties.⁷³ This fear has largely been realised following the recently elected Liberal provincial government's referendum on the treaty process. The Campbell government claimed it was simply seeking a mandate to continue treaty negotiations.⁷⁴ Yet at least one legal opinion suggested 'many of the questions are unconstitutional, in the sense that the area and scope of the questions falls outside the jurisdictional powers of the Province'.⁷⁵ This process was vehemently opposed by First Nations leaders who saw it as a further diminution of their status as nations.⁷⁶

In terms of both its structure and its recommendations, the BC claims task force presented a coherent vision for a new relationship between peoples, based on mutual respect and co-existence. The treaty process itself has found it difficult to replicate that vision in practice. While procedural difficulties must be resolved to improve the effectiveness of the British Columbia treaty process, they may themselves only be symptoms of deeper problems within the process. These underlying issues raise real doubts about the possibility of a break with previous colonial relationships. They reveal conflicting visions of the treaty process which

⁷² For example, see Council of Forest Industries, *Council of Forest Industries Response to British Columbia's Discussion Papers*, August 1995, p.19.

⁷³ McKee, *op cit*, p.61.

⁷⁴ The referendum questions can be found at http://cbc.ca/news/features/treaty_referendum1.html

⁷⁵ Louise Mandell, Q.C., 'Recommended Referendum Ballot: A legal analysis', paper prepared for the Union of British Columbia Indian Chiefs, February 25, 2002, p.1.

⁷⁶ For example, First Nations Summit leader Bill Wilson labelled it 'a sham'. CBC News online, 'Native leaders blast referendum', posted November 30, 2001.

http://vancouver.cbc.ca/template/servlet/View?zone=Vancouver&filename=bc_ref011130

suggest a continuation of historic misrecognition, rather than the establishment of a mutually agreed dialogue. These underlying issues will be investigated in the following chapter.

Chapter 10

Contemporary Treaty Making in British Columbia: A New Relationship?

- I. A new relationship or old policy?
- II. A war of attrition?
- III. Conclusion: back to basics

It is clear the negotiation of treaties in British Columbia was intended to establish a 'new relationship' between aboriginal peoples and governments.¹ According to the BC Claims Task Force, negotiations were to be 'open, fair and voluntary', and result in treaties which would be the blueprint for the new relationship.² Yet it is apparent that the success of the treaty process, however that is to be measured, has been constrained by fundamental

¹ Many organisations and groups have described the treaty process in terms of building a 'new relationship.' See for example, *Understanding the B.C. Treaty Process: An Opportunity for Dialogue*, Prepared for the First Nations Education Steering Committee, The B.C. Teachers Federation, and the Tripartite Public Education Committee, Second Edition February 1988. It stated treaties are about 'building a new relationship between First Nations and non-Aboriginal governments and people.' See also: *Living Treaties: Lasting Agreements, Report of the Task Force to Review Comprehensive Claims Policy*, 1985: 'treaty-making is an essential cornerstone in the strategy for moving forward to build a new relationship'; Robert Louie, First Nations Summit presentation to the [BC] Select Standing Committee on Aboriginal Affairs, Dec 4 1996: '[treaty making] can be an essential cornerstone in a strategy for moving forward to building a new relationship. That new relationship, we believe, must be based on mutual trust, respect and understanding; the recognition of aboriginal title and rights; and the principles of peaceful coexistence and sharing.' (p.11.) <http://www.legis.gov.bc.ca/cmt/36thParl/cmt01/1997/hansard/ab1204.htm>

² BC Claims Task Force, *The Report of the British Columbia Claims Task Force*, BC Ministry for Aboriginal Affairs, Vancouver, June 218, 1991, p.1.

philosophical differences in the position of governments on one side, and First Nations on the other. The emergence of these ‘conflicting visions’³ raises real doubts as to whether the BC treaty process, as it is currently conceived, can in fact bring about the new relationship that its rhetoric promises. The extent of the continued gap between ‘treaty partners’ is highlighted by former commissioner Barbara Fisher: she suggests governments and First Nations have ‘a different concept of what a treaty is’, to the point where they are ‘speaking different languages at the treaty table’.⁴

In addressing the BC treaty process, a number of key issues are examined. Chief among these are the apparent tendency to control the process by governments, the concepts of certainty and extinguishment, and the role of ‘third parties’ in the process. The implicit approach in this analysis is to determine what lessons Australia can learn from this case study. Does the BC treaty process represent a true treaty process, thereby initiating an important break with past denial of aboriginal status, and securing the just position of non-aboriginal peoples? Or is the so-called treaty process really a modern-day land settlement policy concerned more with economic considerations and legal responsibilities that shares much with previous historic models rather than representing a break with them?

I. A new relationship or old policy?

The first, and perhaps most significant difference apparent between the two parties⁵ is in the conception of ‘aboriginal rights’ they take to the negotiating table. Alfred suggests

³ James Tully, ‘Reconsidering the BC treaty process’, in *Speaking Truth to Power: a treaty forum*, Law Commission of Canada, Vancouver, 2000, p.3.

⁴ Barbara Fisher, ‘Treaty negotiations: Where do we go from here?’, *Vancouver Sun*, June 16, 2000.

⁵ There are of course, three principals to the negotiating process, but as has been noted, to this point there has been little difference evident in provincial and federal positions. As such, I will generally refer to them as one party – ‘governments’.

basic philosophical agreement by all parties on the nature and source of the rights of indigenous peoples is a 'precondition of any just settlement'.⁶ Yet it is clear that no such agreement is present. The attitude of governments largely represents a reflection of, rather than a departure from, the colonial mentality seen historically. This may be unsurprising when it is remembered that the official policy of the province at least, denied the existence of aboriginal rights and title until the early 1990s. Governments then, have tended to view Indigenous rights primarily as a burden on economic activity in the province, and thus something to be denied, or minimised. According to this view, these rights have only recently been 'created' by a number of judicial decisions; they are themselves 'uncertain' and 'ill-defined', contributing to economic uncertainty in the province, which results in lost revenue through investment in resource development and other projects. The primary purpose of the treaty process is to convert these ill-defined aboriginal rights into explicit, codified 'treaty rights', thus achieving the goal of 'certainty'. This has replaced the previously preferred term 'extinguishment', which has been deemed inappropriate by aboriginal peoples and others,⁷ yet the practical difference between 'certainty' and 'extinguishment' remains unclear to some.⁸

First Nations, on the other hand, take a view of aboriginal rights that is found in similar form elsewhere among Indigenous peoples. They contend today, as they always have, that their aboriginal and title rights are inherent. Although they are often not conceived primarily in those terms, in an international legal sense they are the rights of peoples.⁹ While their contemporary form may differ from times past, they are rights given to First

⁶ Taiaiake Alfred, 'Deconstructing the BC Treaty Process', unpublished paper prepared for the Assembly of First Nations, August 2000, p.30.

⁷ See Canada, *Treaty Making in the Spirit of Coexistence – An Alternative to Extinguishment, interim report of the Royal Commission on Aboriginal Peoples*, Ottawa, 1994.

⁸ Alfred cites Fisher: 'In all other treaties so far entered into in Canada... the First Nation surrendered its Aboriginal rights and title in exchange for treaty rights... The Nisgaa treaty sets out to exhaustively define all of the rights that are protected... The practical effect... is the same.' Alfred, *op cit*, p.16.

⁹ See Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto*, Oxford University Press, Oxford, 1999.

Nations peoples by the Creator, and as such, are not conceived as vague, uncertain, or ill defined. What remains to be resolved is not the existence of these (secure, inherent, inalienable) rights, but how these rights are to be negotiated alongside the rights of other peoples who have latterly come to share their traditional territory. It is this ongoing intercultural negotiation that forms the basis of treaty negotiations. Thus, the idea of full and final 'resolution' of the issues is anathema to this conception of aboriginal rights.¹⁰ Treaties, once finalized, are viewed in more pragmatic terms as forming the basis for a continuing relationship, and are thus open to revaluation and renegotiation of the terms of the agreement as the circumstances of the parties alter.

It is apparent that the parties to the British Columbia treaty process do not have a shared vision of the process. Not only are their visions different though, Alfred suggests their agendas are in fact 'completely opposite in intended effect.'¹¹ This can be seen in the way that the treaty process has been played out, raising doubts as to whether negotiations are really being conducted in good faith.

It will be recalled that the task force report suggested the scope of negotiations was to be determined by both parties, and there should be 'no unilateral restriction by any party...' Implying the norm of equality of peoples, its second recommendation suggested 'each of the parties be at liberty to introduce any issue at the negotiation table which it views as significant to the new relationship'.¹²

¹⁰ Williams' analogy with treaties creating kin-like relations is useful here. He suggested one view of treaty in traditional North American societies was as a 'rite of making relatives'. (Robert A. Williams Jr., *Linking Arms Together: American Indian treaty visions of law and peace, 1600-1800*, Oxford University Press, Oxford, 1997, p.50.) This was a form of 'social insurance'. (p.63.) It also suggests it is no more realistic to expect 'full and final settlement' of issues between Aboriginal and non-Aboriginal peoples than it is to establish once and for all an unchanging relationship between brother and sister, or father and son.

¹¹ Alfred, 'Deconstructing...', p.16.

¹² BC Claims Task Force, *op cit*, p.21.

It is apparent that from the outset that provincial and federal governments have used their positions of power to restrict the scope of negotiations. In establishing strict parameters for negotiations through both explicitly stated policy, as well as implied but powerful assumptions, governments have exercised a profound influence over the course of the treaty process from its beginning. The most important implication of this control has been to foreclose the possibility of creative new solutions arising through the mutual dialogue that can be facilitated by the treaty process. Instead, governments have done little to encourage such possibilities by engaging instead in what appears to more accurately resemble the old imperial monologue. This has been seen in two major ways.

Firstly, governments have unilaterally declared a list of items that are non-negotiable, 'bottom lines', that are to guide negotiations. Non-Indigenous interests are prominent in the list, which dictates among other things, that treaties are to be 'affordable'; private property is not on the table; the Constitution, Charter of Rights and Freedoms, and the criminal code are to apply in all agreements; the post-settlement amount of land held by First Nations should be roughly proportional to their population (less than 5 per cent), and access to roads, land and resources for recreation purposes is guaranteed to all British Columbians.¹³

¹³ In full, the principles state that:

Private property is not on the table;

Continued access to hunting, fishing, and recreational opportunities will be guaranteed;

The Canadian Constitution and the Charter of Rights and Freedoms will continue to apply equally to all British Columbians;

Fair compensation for unavoidable disruption of commercial interests will be assured;

Jurisdictional certainty between First Nations and local municipalities must be clearly spelled out;

Province-wide standards of resource management and environmental protection will continue to apply;

The federal government's primary constitutional and financial responsibility for treaties must be maintained;

Agreements must be affordable for all British Columbians;

The Province will maintain parks and protected areas for the use and benefit of all British Columbians;

All the terms and conditions of provincial leases and licenses will be met;

The existing tax exemptions for aboriginal people will be phased out.

The Criminal Code will apply equally to all British Columbians;

These 'bottom lines' may be viewed as a reasonable and realistic backdrop to treaty negotiations. For, while Alfred views the condition of affordability, for example, as a 'strategic decision: framing the issues within the contemporary fiscal situation of the Canadian state'¹⁴, it is difficult to see what other framework can be used.¹⁵ Given both fiscal realities and the apparently unappealing (and unattainable) option of sovereign independence, the future of Indigenous peoples does indeed lie as a constituent element within the contemporary state – determining the shape of this relationship is the very situation which necessitates the negotiation of a treaty relationship. The protection of private property also seems a necessary concession to the rights of non-aboriginal land holders, as well as serving to increase the legitimacy of the treaty process in the eyes of these 'third parties'.

In an important sense, the unilateral assertion of any fundamental principles conflicts with the notion of true treaty negotiations in that it is incompatible with a process that is profoundly bilateral. This imposition by governments raises basic questions about the extent to which outcomes of the process really reflect negotiations undertaken in 'good will'. This has been explicitly questioned by Indigenous negotiators,¹⁶ and breaches what Patrick Macklem suggests may be an implied duty of the crown.¹⁷ The danger of this

When the treaty process is complete, the total area of land held by First Nations will be proportional to their population. Ministry for Aboriginal Affairs, Principles guiding Treaty negotiations, Jan 31, 1991.

¹⁴ Alfred, 'Deconstructing...', p.10.

¹⁵ The constraint of affordability does not of course preclude payment of compensation or restitution per se, but may merely recognise the fact that given the scope of colonialism, 'fair' compensation for Indigenous peoples may be beyond the capacity of even such comparatively wealthy states as Australia and Canada. This point appears to be conceded by Chief Joe Gosnell when he stated, 'We know that the people of Canada do not have the cash to pay the back rent, that is the money properly owed to us for the seizure of our land and the plunder of its natural resources without consent or compensation. But we are not about to settle for the twentieth century equivalent of trinkets and beads.' Cited in Mel Smith, *Our Home or Native Land: What government's Aboriginal Policy is Doing to Canada*, Crown Western Publishing, Victoria, 1995, p.98.

¹⁶ For example, Chief Gary Feschuk of Sechelt said of talks he participated in, 'all the time that we thought we were negotiating on the issue [of tax status] we weren't. Canada and BC had decided long ago how this was to be done. A shameful strategy.' Cited in Stephen Hume, 'Sechelt Indians see fiscal chaos in Ottawa's proposed tax deal', *Vancouver Sun*, September 3, 1997.

¹⁷ Patrick Macklem, *Indigenous Difference and the constitution of Canada*, University of Toronto Press, Toronto, 2000, pp.274-279.

practice for the process as a whole can be seen in the second way in which governments have determined the scope of treaty negotiations according to their interests, rather than as a result of fair, open, equal negotiation. This refers to the contentious and related issues of history and sovereignty.

The negotiating policy of governments is stated explicitly in a paper prepared by the provincial Ministry of Aboriginal Affairs in 1995. In it, the province stated it is 'not interested in recreating the past.' As such, 'the province will not calculate the cash component of treaties on this basis [of damages arising from past use and alienation of traditional lands], and provincial negotiators will not have a mandate to enter discussions on such calculations.' Negotiations, instead, would be focused on 'the current and future interests of the parties',¹⁸ effectively banishing the worst of the colonial experience from being revisited. This has the effect of profoundly and effectively limiting the scope of the treaty process in terms of its ability to facilitate the 'new relationship' its rhetoric promises. Not only are Indigenous peoples not able to use the treaty process to express their experience in their own terms, as it is thus conceived, the process actually *prevents* First Nations from describing themselves in their own ways, thus representing an inherent limitation on the process as a whole. For, as James Tully suggests, the treaty process must involve a 'diplomacy of rituals and story-telling' in which it is vital that participants explain to each other who they are, their cultures and ways, how they relate to the land, and how they might negotiate and join arms together while respecting differences.

The treaty negotiations are about constructing a genuinely bi-cultural treaty process. It is not only an interest-oriented practice governed by one set of procedures, but also an identity-oriented practice aimed at mutual understanding by the exchange of stories. This is not a contingent, pre-negotiation exercise in burning sweet-grass. It is the heart of transforming the relationship among aboriginal

¹⁸ The report, B.C.'s Approach to Treaty Settlements: Lands and Resources, Ministry of Aboriginal Affairs, May 12, 1995, cited in Stewart Bell, 'Treaties to focus on needs 'rather than past injustices', *Vancouver Sun*, May 24, 1995.

peoples and British Columbians because it is the way to unseat deeply sedimented misunderstandings of history and relationships.¹⁹

The practice of the treaty process actually works against fostering this mutual understanding because control is exercised by governments to limit the process in such a way that fails to recognise it as an identity-oriented practice. By preventing 'dialogues in which narratives and histories are honestly exchanged', the process of negotiation fails to generate the requisite trust and solidarity. Aboriginal peoples continue to feel misrepresented as 'another minority' as they are prevented from telling their own stories in their own ways – stories which they tell us illustrate that 'the past' or 'history' simply cannot be excluded from contemporary identity in any way that is meaningful to them. For their part, non-Indigenous peoples cannot look to the treaty process as a source for new understandings of aboriginal peoples. In a related way, they are unable to utilize the process as a vehicle projecting them towards their own decolonised identity. Thus relationships between aboriginal and non-aboriginal peoples remain determined by misrecognition and confusion. That is to say, they remain fundamentally untransformed.

As it is currently conceived, the treaty process may create further distrust, particularly on the part of aboriginal peoples. For while they are told the process is about 'future relations', hence the attempted exclusion of the past, it is evident that government parties bring their own version of history to the negotiating table in the form of Crown title and sovereignty, whose continued recognition remains a non-negotiable issue.²⁰ The anomalous situation was described by Govier, thus:

Aboriginal negotiators are supposed to leave the past behind them, at the door, while non-aboriginal negotiators speaking for (predominantly) White governments insist that they have sovereign power over the land, thus bringing into the room not

¹⁹ Tully, *op cit*, p.11.

²⁰ See D. Hinz and Associates, *Investigation of Crown Range in Comprehensive Treaty Negotiations*, BC Ministry of Agriculture, Fisheries and Food, May 30, 1996. 'The Province will not negotiate sovereignty', p.7.

to be questioned this absolutely central aspect of what they take to be their rightful heritage.²¹

This position directly contradicts the task force recommendation about the importance of ensuring a truly bilateral negotiation agenda.²² It also dismisses the need to address rather than ignore history, which is seen by some observers as *the* fundamental issue.²³ The link between the historical legacy and today's treaty process was previously recognised by Aboriginal Affairs Minister, Cashore.²⁴ Similarly, at the beginning of the process, Premier Vander Zalm spoke of the provinces 'strong moral obligation to set the historical record right in our dealings with Indian people.'²⁵ Yet, despite this recognition of the significance of history, and the need to address it, the treaty process has failed to heed these principles. The effective control of the process exercised by federal and provincial governments through explicit and implicit agendas, including their unwillingness to directly confront the colonial past, has set the tone for subsequent negotiations. This has led to a narrowing of the focus of the negotiation process, away from that which is likely to establish a true treaty relationship. Frank Cassidy suggested that early on in the process

the federal and provincial governments gradually narrowed their approach to the treaty process in terms of a 'land settlement model'. The model is based on the assumption that aboriginal peoples will accept cash, land and governance 'considerations' for what is effectively the extinguishment of all other aboriginal rights.²⁶

²¹ Trudy Govier, 'Trust, acknowledgement and the ethics of negotiation', in *Speaking Truth to Power: a treaty forum*, Law Commission of Canada, Vancouver, 2000, p.106.

²² Recommendation 2 suggests: 'Each of the parties be at liberty to introduce any issue at the negotiation table which it views as significant to the new relationship.' See Task Force Report, Appendix 6, Recommendations.

²³ Hamar Foster suggested, '...to me the fundamental issue in that [BC treaty] process has always been how we are going to share the burden of history that our colonial past has bequeathed to us.' Foster, 'Getting there!', in *Speaking Truth to Power: a treaty forum*, Law Commission of Canada, Vancouver, 2000, p.165.

²⁴ Cashore is quoted as saying, 'Without an understanding of the history of aboriginal peoples, it is difficult to make sense of the current federal and provincial government efforts to negotiate self-government and land claims with Canada's First Peoples.' Kim Bolan, 'Cashore lashes out at land claims foes', *Vancouver Sun*, May 1 1995.

²⁵ Vander Zalm, August 8 1990, cited in Smith, *op cit*, p.83.

²⁶ Cassidy, 'BC government faces three aboriginal challenges', *Vancouver Sun*, June 13 1996.

The decision of governments not to revisit historical claims, or the nature of Crown sovereignty means the treaty process begins from a position which accepts rather than addresses the colonial hierarchy of relations. This places Indigenous people in a position as familiar as it is unwanted – as objects of policy, rather than equal and active subjects contributing to a mutually agreed process. The apparent failure of treaty negotiations to facilitate new relationships led one Native negotiator to suggest, ‘all too often it seems that colonialism is still present at the table – and respect is not.’²⁷ With this as a starting point, the possibility for establishing a true treaty relationship is severely constrained at the outset of ‘negotiations’, if not entirely prevented. Despite the rhetoric of ‘government-to-government’ relations, in no other context could it be assumed that one ‘nation’ control a process of negotiations with the aim of defining the rights of the other ‘nation’. In the British Columbia treaty process, this approach effectively denying the equality of peoples is legitimised as the pursuit of ‘certainty’. The prominence of this concept as an often unquestioned goal of the treaty process suggests it requires further examination.

Certainty

As stated, the establishment of ‘certainty’ in BC has been one of the key goals of the BC treaty process. In fact, the province stated its ‘primary objective in treaty negotiations is to resolve current legal uncertainties regarding rights to land and resources...’²⁸ This is not to say it is simply a non-aboriginal goal however. First Nations representatives, too, have stated their desire for increased certainty.²⁹ It is a shared goal of the treaty process. I do not

²⁷ Cited in Govier, *op cit*, p.109.

²⁸ D. Hinz and Associates, *op cit*, p.8.

²⁹ This is often a different kind of certainty, such as recognition of the rights First Nations people see as ‘certain’. See Union of British Columbia Indian Chiefs, ‘Certainty: Canada’s struggle to extinguish Aboriginal title’ at <http://www.ubcic.bc.ca/certainty.htm>

wish to suggest here that the concept of certainty is, in itself, incompatible with the idea of a treaty relationship. Indeed, it was previously argued that basing relationships on stable, shared norms of mutual recognition, equality of peoples, self-government and co-existence results in increased stability and predictability between parties by mediating inevitable differences and conflicts. I wish to argue here that it is the BC treaty process's promotion of an historically contingent, narrowly economic, and ultimately exclusionary conception of certainty, as well as the prominence given to this goal at the expense of other desirable outcomes, that acts against the establishment of a 'new', treaty relationship. In ultimately serving to maintain the *status-quo* – where non-Indigenous interests take precedence over aboriginal interests – the pursuit of this particular form of certainty is actually counterproductive. In accepting unequal relations as the starting point for the treaty process, as it is currently conceived, the concept negates the possibility of the certainty it purports to achieve.

The precise definition remains somewhat vague, but former provincial negotiator, Mark Stevenson, suggested 'in the context of treaty discussions, the term certainty is generally used to describe a legal technique that is intended to define with a high degree of specificity all of the rights and obligations that flow from a treaty and ensure that there remain no undefined rights outside the treaty.'³⁰

There are a number of issues that arise for a treaty process driven by the dynamic of achieving this kind of certainty, implying as it does, a sense of finality and settlement. Firstly, even the idea that complete certainty can be achieved may be far fetched.³¹ Stevenson suggests that even when treaty negotiations are reduced to consideration in a

³⁰ Mark Stevenson, 'Visions of Certainty: Challenging Assumptions', in *Speaking Truth to Power: a treaty forum*, Law Commission of Canada, Vancouver, 2000, p.114.

³¹ Stevenson asserts that 'absolute security of tenure and certainty about the future is beyond the promise of the law', *op cit*, p.121.

property law context, the variety of things that might have to be covered and the full description of legal arrangements that are going to be required becomes ‘mind-boggling’.³² The attempt to capture, constrain, and limit these rights – that is to exhaustively define them³³ – has fuelled an obsession with detail. The result across Canada in the comprehensive claims settled to this point has been the production of multi volume agreements that are rarely read, let alone understood by ‘ordinary’ Indigenous or non-Indigenous individuals who then feel detached not only from negotiations, but from the results of negotiations that are meant to provide the blueprint for the ways they will interact. The extent to which some of these agreements delivered greater certainty is debatable.³⁴ In pursuit of this elusive certainty, Stevenson suggests then, negotiations have simply become too complex.³⁵

A second difficulty with the concept of certainty, as it is now conceived, concerns the trajectory it creates for treaty negotiations which tends more towards the historic colonial relationship, rather than a decolonised treaty relationship, which remains largely aspirational. Rather than bringing into shared view a range of creative solutions to the problem of competing jurisdiction, the current concept of certainty actually serves to close off creative, mutually agreed outcomes. As stated above, while certainty has replaced extinguishment as the explicit goal, the ‘basic model is the same’ as the extinguishment model seen in clauses of the historic numbered treaties which dictated First Nations ‘cede,

³² Stevenson, *op cit*, p.121.

³³ Dacks suggests in pursuing this approach, the ‘ultimate purpose’ of the treaty process is to ‘circumscribe their [Aboriginal] rights and title.’ Gursten Dacks, ‘Litigation and Public Policy: Lessons from Delgamuukw’, paper presented to the joint AGM of the Canadian Political Science Association and the Soci  t   Quebecoise de Science Politique, Quebec City, August 1, 2000, p.10.

³⁴ For example, the James Bay Agreement, which contained ‘cede, release, and surrender’ language, was the subject of seven legal challenges, and needed to be amended subsequent to its conclusion. See Stevenson, *ibid*, p.114.

³⁵ *ibid*, p.121. The link between the increasingly detailed agreements and the pursuit of certainty was explicitly stated by Indian and Northern Affairs Canada: ‘Modern land claim agreements are very precise and detailed in order to maximise the level of certainty for all of the parties to the agreements and for third parties who might be affected by the exercise of aboriginal rights.’ Indian and Northern Affairs Canada, *Bill C-9: Nisga’a Final Agreement Act, Issue Paper No.2: Aboriginal and Treaty Rights in Canada*, p.2.2. (sic), n.d.

release and surrender' all inherent rights.³⁶ Certainty is to be achieved, not through the recognition of inherent rights aboriginal peoples have for centuries argued exist, but, rather, by the 'modification'³⁷ of these rights by the state. They emerge in a form determined not by the holders of those rights, but by those who wish to manage these newly recognized rights in such a way as to minimize disruption of the *status-quo*. For Alfred the implications of this type of negotiations for the status of Indigenous peoples is clear: 'Indigenous rights and identity are surrendered then delegated through the established governmental process, leaving no substantial or effective protection for their continuing existence as nations.'³⁸

Despite the rhetoric of government-to-government negotiations, and recognition of a nation-to-nation status for First Nations, the treaty process acts to effectively contain Indigenous peoples within existing structures as 'another minority' within the Canadian state, thereby ultimately maintaining the status-quo. Yet, by merely returning us to the position which initially necessitated the negotiation of a new relationship, the pursuit of certainty (read extinguishment) above all other considerations offers no point of exit from what Alfred describes as the endless dynamic of colonialism and resistance,³⁹ thus perpetuating rather than mediating uncertain relations. Here, the only certainty guaranteed to aboriginal peoples is that their rights and title will continue to be regarded as inherently inferior and vulnerable ('uncertain') when measured against non-Indigenous interests. Furthermore, the state – not aboriginal people – will ultimately and unilaterally determine the scope of these rights which then assume the character not of inherent and inalienable

³⁶ Stevenson, *op cit*, p.114. The fact that many of these treaties are the current focus of demands for renegotiation and reinterpretation brings into question the nature of any long term certainty achieved by this strategy. For discussion of this point see Sharon Venne, 'Understanding Treaty 6: An Indigenous Perspective', in Michael Asch (ed.), *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference*, UBC Press, Vancouver, 1997.

³⁷ This is the term used in the Nisgaa Final Agreement. For full text see http://www.ainc-inac.gc.ca/pr/agr/nsga/index_e.html

³⁸ Alfred, 'Deconstructing...', p.14.

³⁹ *ibid*.

rights, but delegated, contingent rights. Their rights are not affirmed as they seek, and in a fundamental sense, they retain the status only of 'uncertain citizens'.⁴⁰

Thus, Stevenson concludes that 'extinguishment as a means to achieving certainty is problematic'. It has not worked historically, and it

will not work for treaties negotiated in British Columbia in the 21st century. It is problematic because it does not address some of the very deeply rooted concerns and beliefs of the aboriginal peoples whose rights are most affected. And, if some of the most basic elements of the treaty do not genuinely reflect a mutual agreement, then the treaty will not work. Certainty will only be a temporary illusion.⁴¹

The deep-seated problem here becomes the inevitably narrow parameters created by a treaty process effectively controlled by one party focused on a 'final goal' of reaching 'certainty'. This fails to see the treaty process in a broader context than 'ordinary policy'. Yet Stevenson properly reminds us that treaties are 'constitutional documents outlining the relationships' between aboriginal peoples and the state. While Stevenson recognizes a need for certainty, he suggests there is a greater need to be flexible in order to allow the relationship to grow and evolve with time. Similarly, Brian Slattery reminds us that despite the often narrow conception of the issues,

in reality, the question of aboriginal land rights is not a narrow matter of private right but a subject of far-reaching constitutional significance. It calls into question the basic status and rights of indigenous nations and the nature of their relations with the Crown. These matters are necessarily governed by foundational legal principles, which must be applied flexibly in light of the general principles they serve. This approach allows us...to entertain a variety of intermediate solutions.⁴²

Yet, in foregrounding the pursuit of certainty of predominantly non-Indigenous interests, achieved through the extinguishment (or 'modification') of aboriginal rights, the BC treaty

⁴⁰ John Borrows, 'Uncertain Citizens: Aboriginal Peoples and the Supreme Court', *Canadian Bar Review*, vol. 80, 2001, pp.15-41.

⁴¹ Stevenson, *op cit*, p.130.

⁴² Brian Slattery, 'First Nations and the Constitution: A Question of Trust', *Canadian Bar Review*, vol. 71, 1992, p.261-293.

process is largely focussed on these narrow contexts of 'property law' and 'private right'. For some, it is not surprising that representatives of the state have, despite their rhetoric, sought to limit the scope of the treaty process to these areas where they have traditionally exercised control over aboriginal peoples, despite – or rather because of – the fundamental nature of the issue raised in crown-aboriginal treaty negotiations.⁴³ Along these lines, former British Columbia Deputy Minister of Aboriginal Affairs, Doug McArthur, suggested the full extent and magnitude of this conflict in ownership and jurisdiction 'is seldom acknowledged by government, in part due to a fear that such acknowledgment will create a sense of crisis.'⁴⁴ The British Columbia treaty process is perhaps indicative of governments attempting to avoid this 'crisis' by limiting the scope of the treaty process to parameters within which it can maintain control.

Yet such an approach is ultimately doomed because it fails to move dialogue toward any sense of 'middle ground'. It ultimately serves only to entrench the 'extreme' Indigenous and non-Indigenous positions Brian Slattery argues are equally unviable.⁴⁵ On the one hand, extinguishment sees the original, inherent rights of aboriginal peoples 'terminated at the stroke of a pen'.⁴⁶ On the other hand, the questioning of Crown title ultimately suggests most industrial, commercial, agricultural and resource activity is *prima facie*, unlawful. Yet Slattery suggests this approach views the issues in narrow terms of 'rigid legal logic

⁴³ Alfred ('Deconstructing...', p.4) suggests federal and provincial governments are 'seeking to consolidate the assimilation and control' they have exercised historically, 'by consciously ignoring questions on the fundamental principles upon which Canada bases its relations with indigenous peoples...'

⁴⁴ Cited in Stevenson, *op cit*, p.124. This was apparently admitted by Aboriginal affairs Minister Cashore in 1994, when he stated: 'Most of this tax base rests on crown land which was never legally obtained, by treaty or by war, from the aboriginal people who occupied it for centuries before European settlement.' Cited in Smith, *op cit*, p.97.

⁴⁵ These two 'extremes' can perhaps be seen in the views of Taiaiake Alfred and the BC Cattlemans Association. For Alfred, the problem is in the fact that Indigenous people do not accept 'the founding premise' of the BCTC process, namely, that 'indigenous nations must surrender their independent political existence and ownership of their lands to Canada.' ('Deconstructing...', p.3). The BCCA on the other hand, refuses to admit First Nations ever had any such 'independent political existence', demanding '...First Nations should have the same privileges and associated responsibilities as other Canadians.' BCCA Position Paper, Oct 1995, cited in Hinz and associates, *op cit*, p.23.

⁴⁶ Slattery, *op cit*, p.288.

drawn from the law of expropriation, when in fact the subject calls for flexible principles suited to large questions of constitutional law.⁴⁷ When a commitment to flexibility is placed in this broader constitutional context, a number of 'intermediate solutions' come into view, including the often temporary, though nonetheless critical, interim measures.⁴⁸ Others suggested by Stevenson include options such as Co-jurisdiction, Recognition Model, Fundamental Breach, Exhaustive Definition Model.⁴⁹ James Tully has also suggested it is the current model of certainty that should be rejected, rather than the entire concept itself. The goal, he suggests, is to aim for 'a different and distinctive kind of *'certainty'*'; more akin to the familiar certainty of renewable business contracts, in contrast to the certainty of a final and definitive settlement of aboriginal rights that the present model promises, but has yet to deliver except in one case.'⁵⁰

The BCTC's Chief Commissioner regarded the willingness of all parties to bring mandates flexible enough to address their differences as 'the ultimate litmus test for the treaty process.'⁵¹ Yet despite apparent indications at the outset of the process of 'a willingness to review seemingly entrenched positions',⁵² governments have subsequently been criticized by the BCTC for their 'rigid and often unchangeable' mandates.⁵³ Thus, the failure of governments to explore alternatives to the certainty-extinguishment model raises questions about the nature of its unwillingness to explore creative possibilities. One possible explanation brings into view governments' complex and symbiotic relationship with the wider public. For governments, of course, ultimately depend on carrying a

⁴⁷ Slattery, *op cit*, p.289.

⁴⁸ On the need for interim measures, Foster suggested 'given the complexity of the issues involved, and the reality that many First Nations will lack the capacity to make an effective treaty for years to come, shouldn't there be a strong and well-resourced commitment to reconciling Aboriginal title and Crown sovereignty now, on an interim basis?' *op cit*, p.174.

⁴⁹ Stevenson, *op cit*, pp.127-129.

⁵⁰ Tully, 'Reconsidering...', pp.12-13.

⁵¹ Miles Richardson, 'Review of the treaty process', Speaking Notes for chief Commissioner, Speaking Truth to Power II, Simon Fraser University, March 1, 2001.

⁵² BCTC, *Annual Report 1993-94*, Vancouver, 1994, p.4.

⁵³ BCTC, *Annual Report 1995-96*, Vancouver, 1996, p.22.

majority of people with them for their electoral survival. The treaty issue, however, necessarily involves an element of leadership in uncharted territory that some, at least, have appeared reluctant to explore. All parties acknowledge the important role public perception plays in the treaty process, yet few agree as to how it should be managed.

Stevenson suggested that:

If treaty making is to succeed, the tendency to envision treaty making as 'giving lands to Indians' is problematic... It is more accurate to view treaty making as an attempt to achieve certainty by redefining the relationship of governments and aboriginal peoples and so clarifying the different parties' rights with respect to the ownership and use of land in the province.⁵⁴

This view of the treaty process as 'more special treatment' has been prominent throughout the life of the BCTC. This has led to calls such as that from Rod McDonald of the Canadian Law Commission, for a wider dialogue so that the general public in British Columbia could better understand the character of the treaty process as symbolizing a new relationship, not just as a means to hand over resources, land and money.⁵⁵

Yet, it appears that relatively little has been done to explain the underlying premises of the treaty process to the wider public. On the contrary, the public education agenda seems to have been driven by opponents of the process who are not satisfied with guaranteed protection of sovereignty and private property. The focus on a narrowly defined certainty, as well as the policy parameters imposed on the treaty process, are elements of an interdependent relationship where they both reflect and influence the crucial element of public perception.

⁵⁴ Stevenson, *op cit*, p.125.

⁵⁵ Cited in 'Closing comments', *Speaking Truth to Power: a treaty forum*, Law Commission of Canada, Vancouver, 2000, p.191.

After studying treaty and settlement deals in a number of countries, Ken Coates concluded that the level of non-indigenous support for, or acceptance of, treaty negotiations is closely related to the availability of information.⁵⁶ This however, does not tell us much about the critical issue of the nature of information the public is brought into contact with. To this end, it is regarded as important to make a distinction between involving and educating the public on the one hand, and having them determine scope and limitations of treaties on the other hand. It seems in the BC treaty process, the role of the public has been evident in the latter rather than being confined to the former.

As stated, governments began negotiations identifying both their moral responsibility, and their debt to address history.⁵⁷ Yet, it was not long before broader conceptions of justice came under threat from the general majority who perceived their interests to be threatened by the treaty process. As early as 1993, during the early stages of negotiations, concerns of non-aboriginal peoples took the form of questioning 'third party' involvement in the process. In 1994, members of the TNAC presented their concerns in a letter to both federal and provincial ministers, which was then leaked to the media, prompting sympathetic government action.⁵⁸ In 1995, Jerry Lampert of the Business Council of BC suggested there was a 'growing distrust' with the treaty process, particularly that 'governments do not represent, let alone consider third party interests.'⁵⁹ Early on, principals were faced with the force of non-aboriginal interests, and how this was to be addressed within what was touted as a 'government-to- government' process.

⁵⁶ Ken S. Coates, *Summary Report, social and Economic Impacts of Aboriginal Land claims settlements: a case study analysis*, December 1995, p.7.

⁵⁷ See footnotes 73, 74 and accompanying text.

⁵⁸ McKee, *op cit*, p.58.

Attention has not, however, focused on the implications of a 'nation-to-nation' relationship to any great extent. Public education, such as it has been, has all but ignored focusing on the fundamental, philosophical basis for the treaty process, a criticism levelled by aboriginal and non-aboriginal parties alike.⁶⁰ This paucity of information as to the fundamental basis for 'aboriginal rights' led the well-resourced BC Chamber of Commerce to develop and circulate a series of policies on aboriginal affairs.⁶¹ Not unexpectedly, given the interests of a group such as this, the focus has *not* been on educating the wider population as to the status of aboriginal peoples as peoples, with the same inherent rights as other peoples, including particular expressions of these rights, such as the right to their own forms of government. This status has been clearly stated by the Canadian judiciary, as well as being constitutionally protected by s.35's recognition of the existence of aboriginal and treaty rights. Yet, the treaty education campaign has instead tended to focus on the narrow interests of non-Indigenous people which are perceived to be under threat. Thus it reinforced the constant refrain that private property is to be protected, and sovereignty is not up for negotiation, positioning First Nations people as 'the same' as other Canadians. This approach has had a number of implications.

Firstly, it has antagonized First Nations peoples who see themselves being portrayed only as a minority within Canada. As such, the treaty process serves to reinforce historic misrecognition of First Nations, denying the possibility of mutual recognition of the equality of peoples. Because of this misrecognition, treaty settlements are not perceived as due to aboriginal peoples by right of justice, but rather as (another) handout from the government. In the minds of the public this places the undoubtedly costly process, not in the particular realm of constitutional negotiation where their (the public's) influence may be limited, or at least indirect, but rather remaining in the more familiar public policy

⁵⁹ Vaughan Palmer, 'Third party in aboriginal talks finds its not invited', *Vancouver Sun*, March 27 1995.

⁶⁰ McKee, *op cit*, p.61.

context of welfare payments. Here, 'special treatment' can continue to be criticized by a public who serves a useful role for governments by acting to limit the scope of final treaty settlements in terms of self-government rights and cash payouts – both of which have been criticized by many as insufficient.⁶²

Yet, while the treaty process remains situated only in this context of private right and property law, even these limited 'gains' made by aboriginal peoples remain the target of criticism. Many non-Indigenous critics of the treaty process have taken little comfort in government guarantees about the limited nature of self-government, protection of non-Indigenous interests, as well as compensation for loss of these interests (compensation not available to aboriginal peoples). Perhaps the most significant effect of government's ignoring aboriginal status to instead focus on non-Indigenous concerns has been to encourage this vocal minority.⁶³ It is only in this context of a lack of understanding about the fundamentals necessitating the treaty process that the position of a group such as the BC Cattleman's Association can be understood. For them to demand that land actually play no part in the treaty settlement process is not only a reflection of their self-interest, but displays a complete failure to recognize the nature of issues examined by the treaty process.⁶⁴ Yet, in a sense, it does follow government's unstated policy of viewing First Nations not as peoples, but as minority Canadians. This logic is explicit in the Council of Forest Industries request that land transfers to First Nations be matched by similar

⁶¹ British Columbia Chamber of Commerce, *Policy on Aboriginal Land Claims*, (n.d).

⁶² For example, on December 11 2000, the Nuu-chah-nulth peoples offered Canada a settlement which included land and C\$950 million. See

http://www.nuuchahnulth.org/treaty/ncn/ncnlandselection/documents/NCN_General_Presentation.htm

⁶³ The receptivity of governments to non-Indigenous concerns, and the effect it can have was seen after the Vancouver media published a report that (due to overlapping claims) 111% of the province had been claimed by First Nations. Premier Harcourt quickly moved to announce the all settlement lands, including reserve land, would amount to just 5 per cent of the province. The Council of Forest Industries then moved swiftly, not to applaud this recognition of their interest, but to question whether the public would support the notion of an Aboriginal population of 3 per cent of the province holding some form of title to 5 per cent of BC. McKee, *op cit*, p.70.

⁶⁴ Position quoted in D. Hinz and Associates, *op cit*, p.18.

opportunities for non-aboriginal people and entities to increase their land holdings.⁶⁵ Such positions, which view equality only as sameness, are encouraged by governments not explaining the foundational nature of treaty issues (those that are identity-oriented), but focussing instead on reassuring third parties (interest-oriented issues).

To some extent, these developments were anticipated by a number of First Nations who have chosen to remain outside the treaty process. Many object both to the presumption of Crown ownership of traditional (or disputed) territory, as well as the prominent role of the province in negotiations that are ostensibly 'nation-to-nation'.⁶⁶ There is some precedent for their argument that the treaty process should take place between First Nations and the federal government, excluding the provincial government. This is the way in which Treaty 8, which includes part of north eastern BC, was concluded in 1910. Furthermore, section 91(24) of the Constitution Act 1867 gave Ottawa exclusive jurisdiction over 'Indians, and land reserved for Indians'.⁶⁷ While this exhibits at least some parallel with Australia since the 1967 referendum, there remains one great difference to the Australian case which may suggest the need for Provincial involvement in treaty negotiations. Unlike Australia, Canadian the provinces hold title to all public lands. McKee has suggested that this fact, together with the assumption that the province will desire to play a continued role in sharing benefits that may accrue from aboriginal economic development of such lands, means the argument to exclude the province from treaty talks should be rejected as 'unrealistic'.⁶⁸

⁶⁵ Council of Forest Industries, *Resolving Aboriginal Land Claims: Council of Forest Industries Position paper*, Vancouver, August 2001, p.10.

⁶⁶ The UBCIC position is that: 'Only the federal government has the power or authority to treaty with Indigenous Nations with respect to our Aboriginal Title.' See UBCIC paper, 'Aboriginal Title Implementation', at <http://www.ubcic.bc.ca/implementation.htm>

⁶⁷ Cited in McKee, *op cit*, p.20.

⁶⁸ *ibid*, p.23.

This option remained all but unexplored, however, in a treaty process in which certain questions were not to be discussed. By contrast, the provincial government reacted swiftly to non-Indigenous concerns, but not by reiterating the Task Force position on the role of Provincial and Federal governments in representing non-aboriginal interests. Instead, they announced a renewed commitment to 'openness' in the treaty process, and guaranteeing a deal with the Union of British Columbia Municipalities that saw increased participation of local government and regional councils.⁶⁹ This merely served to intensify the interest-oriented nature of the process at the expense of broader identity-oriented questions. Paul Chartrand has suggested that aboriginal rights are most vulnerable when open to such local influence, and similarly, most liable to be protected by governments 'from afar'.⁷⁰ Using what may be termed 'diplomatic' language, McKee suggested these efforts to open up negotiations resulted in a prominent role for those who were 'unfamiliar with the range of issues' before them, and had 'little prior knowledge' of the topics being negotiated.⁷¹ This can, perhaps, be seen in the positions of the BCCU and COFI, discussed above, which completely fail to recognize what lies at the heart of the treaty process – the significance of intercultural negotiation.

Governments' focus on appeasing non-Indigenous interests may be a factor of their own self-interest, in terms of ensuring both their own re-election, as well as the continued economic prosperity of the province. In this sense, the interests of governments and third parties can be seen to be closely aligned. It may not then be in the governments interests to have a well-informed, supportive, unfearing public who understands the context for a lengthy, expensive treaty process. Its agenda, if it is defined in terms of merely incremental change to the *status-quo*, is rather served by a public who sees treaties in terms of 'special

⁶⁹ McKee, *op cit*, p.40.

⁷⁰ Paul Chartrand, personal communication, 12 February, 2001.

⁷¹ McKee, *ibid*, p.59.

rights' for some Canadians at the expense of others. This may help explain the absence, after the early days, of conceptual analysis and education as to the fundamental basis for treaties. When this is absent from the process, opposition is much easier to understand to a treaty process that is positioned as the 'solution' to 'the aboriginal problem', but appears not to benefit anyone, at least in the foreseeable future. It has been suggested that the emergence of the treaty process as a long, drawn out settlement of land claims is no accident, but rather reflects the considered policy agenda of governments.

II. A war of attrition?

In a significant paper based partly on a series of interviews with federal and provincial officials, Gurston Dacks argued governments have, after a simple cost-benefit analysis, come to view settlement of aboriginal claims through the British Columbia treaty process in terms of a 'a war of legal attrition'.⁷² Thus, despite the apparent affirmation of the continued existence and strength of aboriginal title contained in the *Delgamuukw* case, neither government significantly altered their negotiating position following this shift in the legal landscape. Some alteration may have been expected, particularly, for example, on the issue of compensation for loss of title. However, as Dacks points out, *Delgamuukw* did not confirm the actual existence of aboriginal title on any particular area or parcel of land, and did not therefore alter the status of any of the lands under consideration. For this reason, and because of what has been described as the 'onerous and multi-faceted'⁷³ burden of proof, governments believe it will be difficult for aboriginal peoples to prove title, thus they (governments) have not felt the need to alter their basic positions at

⁷² Dacks, *op cit*, p.16.

⁷³ Alfred, 'Deconstructing...', p.16.

negotiating tables to encourage First Nations to remain inside the process.⁷⁴ As stated above, judicial direction was a significant factor in bringing about the treaty process, yet the decision in *Delgamuukw* did not explicitly compel governments to alter their negotiating position.⁷⁵ Dacks suggests maintaining such a position has thus been calculated simply as the lowest cost option.⁷⁶ He concludes:

...government's enjoy considerable ability to hold their ground in the face of an adverse but not definitive court judgement, and...they will do so when doing so serves their policy objectives better than do the alternatives.⁷⁷

If it is to be accepted, the implications of Dacks' analysis are profound. It reveals the current treaty process to be little more than a continuation of traditional policy toward aboriginal peoples whereby European parties deal strategically in order to protect the status quo. This, at least, is the picture it suggests is held by federal and provincial negotiators. As such, the treaty process acts as a 'holding pattern' for governments which have moved forward from the outright denial of title that for centuries characterised at least the provincial position, but have not yet embraced concepts of equality and co-existence suggested by genuine attempts to share jurisdiction.⁷⁸ While the unedifying prospect of the courts remains, the British Columbia treaty process is the only game in town for those First Nations willing to participate in a dialogue aimed at the resolution of competition between the right of aboriginal and non-aboriginal peoples.⁷⁹ The intransigence of federal and provincial governments, the willingness to rely on their position of power, and their

⁷⁴ Alfred, 'Deconstructing...', p.6.

⁷⁵ *ibid*, p.1.

⁷⁶ *ibid*, p.2.

⁷⁷ *ibid*, p.17.

⁷⁸ For an Indigenous perspective on co-existence following *Delgamuukw*, see the Confederacy of Nations, (Assembly of First Nations) Resolution 3/98 passed at Edmonton, Alberta, March 11, 1998. It includes the principle that 'Aboriginal and Crown title co-exist, therefore the objective of negotiations should be to reconcile pre-existing Aboriginal title with the Crown's presence'. <http://www.afn.ca/resolutions/1998/con-mar/res3.htm>

⁷⁹ For Alfred, this fact raises real doubt as the 'voluntary' nature of the process which he suggests First Nations have entered only due to 'blatant compulsion'. Alfred, 'Deconstructing...', p.2.

explicit and implicit control of the treaty process all suggest the non-aboriginal parties to treaty process are well aware of this.

These factors suggest that, as it is currently conceived, the British Columbia treaty process falls short of both the notion of treaty developed in the previous chapter, as well as many of the principles stressed by the task force. The process presently fails to achieve certainty for non-Indigenous interests, it has yet to return significant amounts of land or jurisdiction to First Nations. Perhaps most importantly, it has not proven to be the catalyst for a new relationship between aboriginal and non-aboriginal peoples based on a rejection of injustices of the past. Yet it has succeeded in focusing attention on the importance of such a relationship. Even by foreshadowing the possibility of a nation-to-nation relationship, the process has irrevocably moved things beyond previous policies of non-recognition. Unsurprisingly perhaps, the current treaty process should be described accurately as representing neither 'the same old policy', nor 'a new relationship', but lying somewhere in between these two extremes. History may show it sowed the seeds of decolonisation in British Columbia, but the key to establishing this relationship, as well as the certainty many seek, lies in a reappraisal of the fundamentals of the treaty relationship.

III. Conclusion: back to basics

This review of the BC treaty process has revealed a number of problems inherent within the process that currently render unlikely achievement of a new relationship between aboriginal and non-aboriginal peoples in British Columbia. The commitment shown to negotiate this new relationship suggests at the beginning of the process there existed an amount of goodwill that could still be drawn upon to maintain the existence of the process.

Given the complex nature of the issues explored, the failure of the process to not yet be able to point to a completed treaty – and only one Agreement in principle⁸⁰ – should not necessarily be regarded as fatal. Miles Richardson's suggestion that the process be viewed as 'a work in progress' may be fair, but his assertion that the process is 'fundamentally sound' needs closer examination.⁸¹

In reviewing the conduct of federal and provincial parties to the treaty process, it appears the primary effect has been to maintain the colonial hierarchy of relations, rather than fundamentally reject it. Thus, despite its foundational and ongoing rhetoric, the British Columbian treaty process fails to exhibit many of the characteristics implicitly present in the establishment of a true treaty relationship, as examined in the previous chapter. Thus, even calling it a 'treaty' process has been attacked as an attempt to imbue the process with a rhetorical significance it does not deserve.⁸² Alfred suggests this 'non-treaty strategy' exemplified by Canadian land claims agreements generally is 'the mechanism used when settler governments feel sufficiently confident in the trend of assimilation to disregard the inherent political rights of indigenous peoples and impose a final internal solution to the problem of colonization.'⁸³

In controlling the development of the process by determining limits of negotiations, federal and provincial parties violate the norm of equality of peoples. Self-government is limited to what is decided for aboriginal peoples rather than being an organic, or negotiated expression of their free will. Similarly, the form of co-existence established through the process is flawed, not the least because it is the product of unequal negotiation. Ultimately,

⁸⁰ At the time of writing (January 2003) the Sechelt were the only first Nation to have completed an AIP. See <http://www.bctreaty.net/nations/sechelt.html>

⁸¹ Richardson, *op cit*.

⁸² Alfred, 'Deconstructing...', p.3. See also Isabelle Schulte-Tenckhoff, 'A Brief Note on Treaties, Real and Fictitious', *Indigenous Law Bulletin*, September 2000.

⁸³ Alfred, *ibid*, p.5.

as it has been conducted up to this point, the BC treaty process fails the test of mutual recognition, as instead of non-aboriginal negotiators listening to how aboriginal peoples present themselves, First Nations are forced to conform to European visions of their status and their future. By continuing, rather than altering this misrecognition, the treaty process negates the possibility of a relationship based on the equality of peoples. Thus non-aboriginal critics have been equally scathing about the treaty process as creating 'bogus nations'⁸⁴, establishing 'permanent special status...based on race' where aboriginal peoples in 'dozens of fiefdoms'⁸⁵ are granted such power as to create 'a province of quasi-provinces'.⁸⁶ This indicates the treaty process has thus far done little to create mutual understanding between aboriginal and non-aboriginal peoples, and suggests paradoxically, that the conclusion of treaties by a process where mutual respect is absent may in fact mean a true treaty relationship is as far away as ever.

Yet, the amount invested in the treaty process by all parties (in financial, emotional and other terms) suggests calls to entirely abandon it may be unrealistic. Despite its obvious difficulties, the process still holds out the prospect of establishing a just treaty relationship to replace colonial relations of domination. It is evident that the BC treaty process's 'failure' is not a failure of treaties *per se*, but rather the particular conception of treaty that has been pushed mainly by those parties seeking to protect their interests in a short sighted focus on 'certainty'. The potential of the treaty process to transform Indigenous and non-Indigenous identities, and thus relations between them, has been subsumed to this narrow, interest-based approach. By finessing rather than addressing the fundamental issues of competing jurisdiction and title – the very issues that necessitated the treaty process – governments may have used their power to guarantee the certainty of title in the short term,

⁸⁴ Trevor Lautens, 'Bogus nations created by governing class', *Edmonton Journal*, October 1, 1994.

⁸⁵ Smith, *op cit*, p.104.

⁸⁶ Gordon Campbell, 'We should all get to vote on Nisgaa agreement', (Victoria) *Times Colonist*, August 6 1998.

but in doing so they entrench the 'colonialism-resistance' dynamic that will ensure such certainty is short lived. It has been suggested that unless government negotiators can persuade their principals to reframe the treaty process as something greater than a means to settle land claims, the process would only incompletely address First Nation concerns and would be unlikely to yield creative outcomes.⁸⁷ When the treaty process is narrowly conceived through this lens of short term policy interest, it fails to focus on nurturing the underlying relationships that, ultimately, are the only way to ensure future harmony, prosperity and certainty. As James Tully suggested, 'if the treaty process was reconceived more along the lines of an ongoing, democratic relationship of reconciliation, in which the parties negotiate and renegotiate their specific partnership over time, it might overcome some of the present difficulties *and* gain more public support on both sides.'⁸⁸

In seeking to reinvigorate the treaty process, First Nations and governments may need to look no further than the report of the task force which established the process, where the norms of mutual recognition, self-government, equality and co-existence are strongly affirmed. This conception suggested by Tully and others appears to share much with the findings of the BC Claims Task Force – findings which it should be stressed, were themselves the outcome of intercultural negotiations between aboriginal and non-aboriginal peoples. The task force recognized these peoples represent 'fundamentally different philosophical and cultural systems.' Yet, far from being irreconcilable, the future for British Columbia lay in the ultimate 'political and legal reconciliation between aboriginal and non-aboriginal societies.' It was this reconciliation that the treaty process was designed to facilitate: 'Whatever the issues may be, it is crystal clear that any new

⁸⁷ Rod MacDonald, cited in 'Closing comments', *Speaking Truth to Power: a treaty forum*, Law Commission of Canada, Vancouver, 2000, p.191.

⁸⁸ Tully, 'Reconsidering...', p.14.

relationship must be achieved through voluntary negotiations, fairly conducted, in which the First Nations, Canada and British Columbia are equal participants.’⁸⁹

It is these three principles – the recognition of difference, the commitment to reconciliation, and the practice of fair and equal negotiations – that must now guide the British Columbian treaty process. The following chapter will investigate whether these principles are also present in contemporary Australian agreement making.

⁸⁹ BC Claims Task Force, *op cit*, pp.16-17.

