Treaty how?

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ABSTRACT

Proponents of treaties in Australia have usually emphasised the principled relations between Indigenous and settler peoples that treaties may bring about. More recently, they have argued that treaty-making would be a more effective framework for Indigenous social policy. However, proponents of treaties have not carefully considered why the Australian state (or States) might need to enter into treaties. Historically, treaties have not been the high-water mark of the relationship between Indigenous and settler peoples. Rather, colonising states have entered treaties primarily as a means of managing their own (state) interests. Evidence from the history of treaty-making in British Columbia suggests that Australian treaty proponents need to demonstrate why treaties are in the best interest of the Australian state, and are unlikely to achieve their goal until they do.

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Introduction

A perennial question for Australians is how to progress the unfinished business between Indigenous and settler peoples. One approach currently in favour, and with a long history, is treaty or agreement-making. I consider the record of this approach here, arguing that although Indigenous peoples see treaties as ways of sharing land and resources that recognise their prior sovereignty (Williams 1997), states have always seen them differently. A brief overview of treaties from the 16th to the 19th centuries makes clear the history of state instrumentalism. Initially, balance of power situations saw respectful coexistence. As settlements expanded and state power grew, however, Indigenous peoples found that interest in their consent and wishes declined. Where treaties have been made, they demonstrate the settler state's calculation about the best way to apply power towards its goals of consolidated and expanded settlement. Such agreements do not show a settler impulse to respect the needs and wishes of their indigenous hosts; any such respect is incidental, and invariably the part of agreements that states consider least important.

However, in the 20th century, Natives[1] in British Columbia managed to overturn the intransigence of the Canadian and provincial governments, forcing a major recalculation of policy that has returned Indigenous and settler peoples to treaty tables to secure each other's consent. They did so through a campaign of systematic economic and political disruption. I examine this campaign in detail here, focussing on the links between strategies of direct action and litigation and evolving Indigenous identities.

I conclude by considering whether the experience of British Columbia might be relevant for a treaty campaign in Australia. Australian proponents of treaties have emphasised treaty-making as a moral act. More recently, they have presented to the state the communal dysfunction of many Indigenous peoples as a compelling reason to move towards agreements. I argue here that neither the moral argument nor the social policy argument for treaty-making engages the reasoning of colonising states, because states view treaties primarily as an instrument for managing their own interests.

Treaty-making: state rationale in historical context

From the 15th century onwards, the push towards agreements took place on two levels. A 'macro' level involved strategic statecraft, in which imperial states sought to establish their authority over territorial possessions against the claims of other European states. This macro rationale was a long time in forming. Initially it was constructed as a way of bringing newly discovered peoples into the universal commonwealth of Christ; the monarchs of Spain and Portugal would act as agents

[1] I use the terms Native(s)/Native peoples to refer to Indigenous people in British Columbia, except in quotations. The term Indigenous (peoples) is universal.

for universal papal authority through grants for conquest and monopolies over trade (Williams 1990, pp. 13–29). This doctrine[2] were to become the 'perfect instrument of Empire' (Williams 1990, p. 74) and had been thoroughly secularised by the mid-18th century as a Law of Nations. By the time of Australia's settlement, the chief imperial competitors to the British were the French, whose designs were certainly clear to early colonial officials (Day 1996, pp. 28–29).

However, the 'micro' level rationale for treaty-making—and what really concerns the treaty debate in Australia today—was about local function: in the colonial period treaties were meant to make sure that the settlements justifying imperial possession were secure from Indigenous predations. The French made some of the earliest contacts in North America in the second quarter of the 16th century. For them, functional relationships with the native inhabitants were essential. Historian Bruce Trigger explained why:

> native peoples constituted an overwhelming majority of North Americans at the time … they controlled the production and delivery of Canada's major export to European traders … their cultures, if less advanced technologically than those of Europe, were adapted to local conditions while Europeans were still learning to cope … [and] native peoples were militarily strong enough to expel the newcomers. If Europeans had gained a toehold in Canada, it was because a substantial number of native peoples wished them to do so (Trigger 1985, p. 298).

So relationships of that first period were sometimes harmonious, reflecting the 'largely compatible' interests of Indigenous and settler peoples (Miller 1989, p. 40). Larger-scale settlements were to change this. In the 18th century the rationale of colonial policy started to become 'one in which the dominant partner sought the removal of the Indian from the path of agricultural settlement' (Miller 1989, p. 84).

During the mid-18th century, growth in settlements and imperial ambitions in North America broke into extended war. The Seven Years War (of Natives, Canadians and French versus British and Anglo-Americans) ended in 1760 with the fall of Montreal to the British and Anglo-Americans. The 1763 Royal Proclamation set out the terms of the victors, which included the reservation for Indigenous peoples of parts of the British dominion not hitherto 'ceded or purchased'. The statement—it was made without negotiation—set out the new approach. The Crown would simply purchase full beneficial ownership of new territories in return for consent.

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[2] I mean doctrine in the sense of a statement of fundamental government policy especially in international relations.

Though not fully realised until the late 18th and early 19th centuries due to ongoing conflicts both in North America and in Europe (Jones 1982, pp. 157–86), this doctrine soon resulted in the transfer of vast areas of modern Quebec to the emergent state of Upper Canada; a pattern Miller describes as showing 'legal fastidiousness on the part of the whites, but little profit to the account of the Indians' (1989, p. 93). The Robinson treaties of 1850 followed the precedent, securing large territories in present-day Ontario. Miller explained the pragmatic and pecuniary rationale for acts of land cession as the Canadian state began to develop and as settlements moved further west: 'In the 1870s, when the United States was spending $20 million a year on the Indian wars, Ottawa's entire budget was only $19 million. How would the dominion bankroll a railway across the prairies if all its money was being spent battling the Indians of the region?' (Miller 1989, p. 162).

The US tradition of violence was well nurtured during the 19th century in its activities against the Indians, though the policy was ostensibly the purchase model. However, the Marshall Supreme Court decisions of the 1830s—widely celebrated as creating constitutional and legal space for Indians with the construction of 'domestic dependent nations' (see Langton 2000)—presented obstructions to colonial intentions. Yet Marshall's judgments came during a period of considerable enthusiasm for the forced relocation of Indians (Prucha 1984, pp. 179–213). Historians debate whether President Andrew Jackson dismissed one unfavourable judgment by saying, 'John Marshall made his decision: now let him enforce it.' However, it is certain that Jackson believed that the purpose of treaties of removal was to achieve military security and legal integrity for the expanding nation; allowing the survival of the Indians in the face of certain death was merely a satisfactory side-effect (Remini 1988, pp. 215–17). Certainly the Congress of the United States saw it that way: Prucha quotes the House Committee on Indian Affairs' description of the 1830 bill authorising the purchased removals of Indians to lands west of the Mississippi. It was 'the substitute which humanity and expediency have imposed, in place of the sword in arriving at the actual enjoyment of property claimed in right of discovery, and sanctioned by the natural superiority allowed to the claims of civilized communities over those of savage tribes' (Prucha 1962, p. 242).

The reference to 'humanity' points to another consequence of settlers' instrumental approach to agreements between peoples: rhetorical nods towards principle are a small cost when the agreements involve such measures of decisive finality as removal or extinguishment. The legislation of 1830—to remove the Creek, Choctaw, Chickasaw, Cherokee and Seminole Indians—'spelled the doom of the American Indian' (Remini 1988, p. 215). Indeed, the 20th century saw the establishment in the United States and then Canada of Indian Claims Commissions precisely to deal with the unprincipled and negligent behaviour of the states that were party to treaties (Deloria & Lytle 1983, pp. 5–6; Miller 1989, pp. 224–25).

Perhaps no better example can be found of the implicit power rationale of treaty-making than Aotearoa/New Zealand. As was the case elsewhere, a treaty represented the means to secure the territorial pre-eminence of the Crown against other nations, and over rapacious settlers, in a way that appeared to acknowledge the prior interests of Indigenous peoples.

On his early travels Cook had found the Maori a 'brave open and war-like people' (Owens 1981, p. 29). Belich, like Miller in the Canadian case, argued that in early days the balance between Indigenous and settler interests 'was not as unequal as it seemed' (Belich 1986, p. 19). Maori willingness to trade as well as to use exemplary violence made it so.

Originally settled from the 1790s, by the 1830s the local economy in New Zealand was booming. The first decades after European arrival had also seen a rise in intertribal violence among the Maori that was undoubtedly linked to the presence of Europeans. This was deemed unhelpful to the commercial expansion and occupation of the new colony (Owens 1981, pp. 43–46). Then concerns about American and French intervention 'rendered British annexation inevitable' (Owens 1981, p. 51). Moves by the Sydney speculators known as the New Zealand Association to grab further land led to swift steps by the British Lieutenant-Governor, William Hobson, towards a treaty that would give the Crown pre-emptive control over land (Orange 1987, pp. 32–35).

Though the Treaty reached at Waitangi in February 1840 had only secured the consent of some Maori chiefs of the North Island, within three months Hobson had unilaterally declared sovereignty and possession over the entirety of New Zealand (Owens, p. 52). His concern was with a breakaway administration of squatters on the South Island. Thus began the 'principled' exchange of consent in New Zealand. Walker suggests that for Maori, 'the real meaning of the treaty became manifest' in 1843, with the beginning of a long period of police and military action to secure land (Walker 1989, p. 270). Arguably, it was not until 1985, when the Waitangi Tribunal was authorised to consider infractions of the treaty dating back to 1840, that the intentions of the Maori who had signed the Treaty of Waitangi were finally recognised by the state.

If we consider briefly the few attempts to seek Indigenous consent in colonial Australia, the same state attitude is evident. Langton (2002) works through two instances where the 'micro-rationale' was visible within official circles. First, in Tasmania, and relying on Henry Reynolds' *Fate of a Free People*, she finds 'explicit discussion of the need for treaties'. The central figure was Governor George Arthur, who appeared enthusiastic for several reasons: because the alternatives would be too bloody; because treaties were being made elsewhere; and because it would be a good way of keeping the more feral of the settlers under control. Though his commission of George Augustus

Robinson to go and meet with the Aborigines may imply instructions to negotiate a treaty, Arthur's ruminations on the matter demonstrate less a principled concern about Indigenous consent and more a desire to achieve public order.

There is also the case of Batman's treaty with the Indigenous inhabitants around modern-day Melbourne. Langton quotes C.P. Billot's history:

> It was not, of course, expected that the treaty would be considered binding on the English government, but on previous experience, such action was considered to be proof of bona fides, and would justify approaching the home government for authorization of settlement, thus over-riding the local Sydney authorities (Langton 2002).

Whatever the personal motivations of Batman and his companions, they demonstrated considerable appreciation of what the colonial state might be prepared to consider and why.

Such were the relative positions of Indigenous and settler peoples by the early 19th century. Either by purchase or by dispersal, colonial states had developed a model for expansion that ignored the aspirations of the original inhabitants. This distribution of power in settler colonies would not be changed easily.

How British Columbia got a treaty process

Treaties, Canada and British Columbia

As I have shown, the history of treaty-making in Canada is long. With few exceptions, this history does not encompass British Columbia.[3] However, the push towards modern treaty-making appears to have coincided with an examination of what British Columbian identity might be. Furniss' excellent study of pioneer communities in the interior of British Columbia makes territory a central issue: initial settler identifications were local, based on 'a selective historical tradition that celebrate[d] European expansion, settlement and industry' (Furniss 1999, p. 53).

However, Barman's history of British Columbia encourages the view that the idea of British Columbia as 'a unified whole' did not become widespread until after World War II (Barman 1996, p. 271). Not surprisingly, she argues that the first markers of

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[3] The main exceptions are the Douglas treaties reached on Vancouver Island in the 1860s, and Treaty 8 concluded in 1908, which straddled the Alberta-British Columbia border. The latter was the subject of an adhesion by the McLeod Lake Band in 2000. There are other agreements which are the source of some interest, notably the Barricade treaties reached between authorities and the Carrier peoples around the Prince George area in the early 1900s.

provincial identity were those of natural resources, the industries which extracted them, and their solidity as a political base: 'Historically, provincial governments have been little concerned with a broader vision of what B.C. might become, were they to venture beyond the immediate demands of a resource-based economy' (Barman 1996, p. 356).

The Social Credit government, which governed the province from 1953 to 1991 (with the exception of 1972–75) entrenched this emphasis: the 'SoCreds' stimulated forestry enterprises by providing new infrastructure and expanding and diversifying markets through the 1950s and 1960s, but also introducing policies that favoured larger enterprises and the consolidation of hinterland industries. They passed an *Instant Towns Act* in 1965 to provide support to nascent resource-based communities. Premier W.C. Bennett himself appealed to 'historical and regional claims for representation' as justification for inequitable electoral distributions that ensured a gerrymander in favour of rural voters (Barman 1996, pp. 279–94).

Contemporary British Columbia still reflects these origins in its politics and in its economy. The Province is heavily dependent on commodities and resources. Forestry products are especially important: Canada is the world's largest exporter of forest products, a third of which come from British Columbia (Council of Forest Industries 2000). This equates to over CAN$15 billion in export revenue, half the total value of exports from the Province, and nearly 5 per cent of total exports from the whole of Canada. Though employment in the sector is declining, over 100,000 people are still directly employed in forestry out of a workforce of 1.9 million (BC Statistics 2001).

While the interests of the resources industries, including forestry, have a strategic position in provincial politics, disruption in that sector translates swiftly into consequences for the provincial economy as a whole. Such uncertainty merely reconfirms the historical origins of provincial identity.

Native organisations and philosophy

A major marker in the growth of Indigenous political activism in British Columbia is the consolidation of broader and more inclusive political identities. From this came a realisation of the political and strategic value of natural resources as a leverage point in negotiations. Paul Tennant's study of indigenous political history and organisation in British Columbia helps expose the growth of these connections. A major theme of Tennant's work is the struggle for pan-Indianism—the idea of collective, cross-national or cross-clan political activity to present a united front to the settler state (Tennant 1991, Chs 7, 9, 10, 12–14; see also Hertzberg 1971, pp. 6–27). Pan-Indianism goes beyond traditional attachments, and sometimes breaks with them. But it is also an 'outgrowth of tradition' in that it has no place if it does not offer traditional leaders a useful way of ordering their claims (Tennant 1991, p. 68).

One of the most persistent obstacles in the drive towards a pan-Indian identity in British Columbia has been the difference between the coastal and interior Natives in their political allegiances, strategies and outlooks. Tennant speaks of a 'dual pan-Indianism': large settled coastal groups reliant on fishing, and whose first contacts were with Protestant missionaries, differed from the Natives of the interior, who lived in much smaller, family-based groups that followed migrating herds of animals, and whose contacts were with the early pastoralists and Catholic Oblate missionaries (Tennant 1991, pp. 70–77; Knight 1996, pp. 90–104; Fisher 1992, pp. 119–45). These different experiences were to shape the tensions of Native politics well into the future (La Violette 1993, pp. 145–61).

One period when this division seemed to be overcome, however, originated in government policy. In 1968–69, politicians and bureaucrats from the federal Department of Indian Affairs (DIA) consulted with Indigenous peoples across Canada. The outcome of that process was the 1969 White Paper, *A just society*. It called for the abolition of Indians' special status as 'bands' residing on reserves and entitled, under the *Indian Act*, to a range of government programs. This overt attempt at total assimilation had the immediate effect of stimulating a British Columbia-wide Native political organisation. Although the organisation created, the Union of British Columbia Indian Chiefs (UBCIC), was to have a chequered history, its creation drew two issues to a head: status and tribalism. And it did so in a way that made it more difficult for the state to ignore land claims.

'Status' is a designation of the Indian Act for people having residence on reserves; it also includes access to federal programs. Non-status people were the many Indigenous peoples who had left the economic marginalisation of the reserves—many were living in urban areas—and were thus unable to access government support. Major conflict between the UBCIC and other organisations, including the British Columbia Association of Non-Status Indians (BCANSI), resolved to bring the concerns of non-status people into the greater Native political fold. Though it was not until 1985 that the Indian Act was amended to recognise the historical effects of status, and then not to the satisfaction of all (Joseph 1991, pp. 65–79), the Indigenous population was in the early 1970s being more broadly defined through a debate about the dispersal and discriminating effects of colonialism. By including the Indigenous urban diaspora, the colonial strategy of sequestered assimilation on reserves became a less effective position.

In the same moment, struggles over land saw 'tribalism' return to the top of the Native political agenda, where it had been before the Canadian prohibition on land claims activity from 1927–51. A personal and spiritual identification, tribalism came to be a way to assert unity and equality of all Indigenous people, regardless of administrative impositions of status. It encouraged a sense of self-reliance. While tribalism would not necessarily supersede local band administrations in the

understanding of particular community needs, the benefits of common action were made clear by the example of the Nisga'a Tribal Council (NTC), which had formed in 1955 explicitly to deal with the land question in a more democratic and inclusive way. In 1963, the NTC began its land claim, which resulted in the *Calder* judgment in 1973 (the first Supreme Court ruling that allowed for the possibility that aboriginal or native title persisted over non-treaty lands).[4] Unity, self-sufficiency and a scale of claim were important prerequisites for successful land claims (Tennant 1991, pp. 180–83).

Another strand of Indigenous political identity was exemplified by the critical responses to federal policy led by the highly influential British Columbia Native leader, George Manuel. As Grand Chief of the National Indian Brotherhood (NIB), Manuel challenged the types of agreements that were being negotiated after the government had absorbed the *Calder* judgment and abandoned the assimilation strategy set out in the 1969 White Paper. During negotiations such as those that led to the *James Bay and Northern Quebec Agreement* of 1975, Manuel attacked the approach favoured by government: a purchased extinguishment that would remove institutional and legal impediments to development on indigenous lands, thereby finalising, or at least ending the need to hear, their grievances (McFarlane 1993, p. 175–6).

Such agreements, Manuel argued, were exactly the same 'bills of sale' as had been reached during previous periods of treaty-making: 'the opportunity has been lost for a new relationship to be established between the Indian people and Canadian society as a whole' (McFarlane 1993, p. 209). Though not the dominant strand of Indigenous politics, more than a residue remains available to Indigenous leaders in contemporary Canada. The availability of a well-articulated strategy that brooked no compromise no doubt gave extra encouragement to moderate policy-makers keen to make negotiated deals.

Direct action

Explaining how a treaty process became imperative in British Columbia at the end of the 1980s, a treaty analyst working with local government offered a simple view: 'we were faced with a number of roadblocks, political challenges, a very confrontational time in the province's history' (Didluck 2000).

Tennant suggested 1973 as the start of 'the contemporary era of BC Indian political protest' (1991, p. 174). He noted that although there had been earlier protests at Fort St John and at Williams Lake, this timing seemed influenced by events at Wounded Knee in South Dakota. Activities soon mushroomed in response to the realisation that the brief change in provincial government (from 1972 to 1975) meant little movement on land claims policy: the Cowichan people on Vancouver Island built a

4 See the discussion of jurisprudence below.

traditional but 'illegal' fish weir ; the UBCIC, BCANSI and many smaller groups organised a protest march on the legislature in June 1974 to pressure the New Democrat Party (NDP) government to recognise aboriginal title; the Nisga'a prevented a railway development on their territory; and armed Natives maintained a prolonged blockade of a highway near Cache Creek (Tennant 1991, pp. 179–80).

In the 1980s, direct action was consistently aimed at damaging resource industries. In 1984, first the Kaska-Dena people in the remote northeast, then the Nuu-chah-nulth on Meares Island blocked access to logging roads; in 1985 the Haida obstructed logging on the Queen Charlotte Islands; the following year, the Kwakiutl protested on Deare Island; the Nisga'a, Lillooet, and Nlaka'pamux all obstructed railway constructions; Indians also threatened not to participate in the census, which meant that British Columbia stood to lose up to $3000 per person in federal transfer payments (Pynn 1986, p. A10); the Gitksan-Wetsuweten took offensive action, hurling marshmallows at fisheries officers in a confrontation; the McLeod Lake Band not only obstructed a logging road but actually started taking logs themselves (Tennant 1991, p. 207).

Interior groups that had come to political maturity under the influence of Manuel emphasised assertion of traditional resource rights. Such activities became an opportunity to make the links between Indigenous identities, culture, social organisation, and economy clearer. By asserting rights and confronting non-Native users of resources, these direct action protests revealed the contest at the heart of the colonial project.

After a 'fish-in' near Lillooet in 1978, Manuel indicated that 'sophisticated civil disobedience' would be a response to continued government intransigence; he also referred to an 'army' of activists who would take up weapons in the struggle if necessary (McFarlane, p. 249–50).

What Natives wanted was not only an expeditious response to their land claims but also protection of traditional territories while claims were being settled, as well as Native participation in ongoing resource activities. By the 1980s, the tribal basis of protest brought attention to direct action taking place on non-reserve lands. This action targeted resource companies that Natives saw benefiting from the Province's continuing refusal to negotiate. The media became more interested as protests offered the spectacle of traditionally garbed Indigenous peoples confronting resource developers and the state. Major churches and environmental groups became sympathetic. On the west coast of Vancouver Island, a coalition opposed to logging included the local municipality (Tennant 1991, p. 208). According to an activist at the UBCIC, the entire period 'paved the way for Indians to take a stand' (Poplar 2000). Another participant in these activities saw direct action as the only way to remove barriers to honest and respectful communication (Point 1991, p. 124–29).

In this sense, the cliché that 'money is the only thing they understand' is apposite: roadblocks and standoffs made it clear that the provincial government's control over resources was tenuous indeed. David Mitchell, a member of the Provincial Cabinet and Vice-President of the lumber company Westar, suggested that the system had broken down completely: 'it is no longer certain who controls the forests in north-west BC' (Glavin 1990, p. B3).

Legal and constitutional reform

From 1927 to 1951, the pursuit of Indigenous land claims was a criminal offence under Canadian legislation. A land claims litigation strategy developed rapidly after repeal of this prohibition. Here I briefly outline the major case law and indicate the momentum it created for the treaty process.

Initially, the government of British Columbia responded to land claims by refusing to acknowledge them, and by mobilising denials such as the 'tense' argument (the view that the *Act of Confederation* had annulled aboriginal title) and the 'implicit extinguishment' position (that any provincial assertion through legislation automatically extinguished title). In 1973 the Nisga'a litigation reached the Supreme Court of Canada. The *Calder* decision found that the Nisga'a had held aboriginal title before settlers came, though the judges were split over the question of the continuing existence of their title. In their *obiter dicta*, the judges decided that aboriginal title did not depend upon the 1763 Royal Proclamation, but on proof of occupation since 'time immemorial'; extinguishment by the Crown must be 'clear and plain' (*Calder*, at para. 375).

Tennant points out that after 1973, 'the province had clearly lost the legal argument over pre-existing title, and had almost lost on the issue of continuing title. It now had good reason to fear future court decisions' (1991, p. 221). Substantive jurisprudence about the proof of aboriginal title came in 1980 in a Federal Court ruling: *Baker Lake v Minister of Indian Affairs and Northern Development* was brought by an Inuit community in the Northwest Territories which sought an injunction against economic development in order to safeguard the traditional resources on which they depended. In granting that relief, the judgment found that proof of title relied on evidence of social organisation, exclusive occupation and a specified territory at the time of the assertion of Crown sovereignty (Miller 1989, p. 254). In 1982–83 aboriginal rights were entrenched in the Canadian Constitution: s.25 guaranteed aboriginal rights as set out in the 1763 Royal Proclamation; s.35 recognised existing aboriginal and treaty rights; and s.37 set up a constitutional amendment process by which Natives could participate in reform that affected them. Amendments in 1983 included s.35(3), which provided protection for aboriginal and treaty rights recognised after 1982.

Constitutional protection of Indigenous rights was really an unintended consequence of Prime Minister Trudeau's desire to remove the threat of separatism in Quebec, which took on new urgency after the election of the Parti Quebecois in 1976 (Miller

1989, pp. 237–43). Indigenous organisations—especially the NIB, which had been shaped by the leadership of George Manuel—were independent enough and well enough developed to exploit the opening of constitutional debate at the highest levels. During the argument about putting the concept of respect for Francophone language and cultural rights into the Constitution and thus beyond provincial meddling, Native organisations lobbied for the inclusion of an Indigenous difference as well; it was a difference that their campaigning over land rights had by now made clear.

The content of the new constitutionally entrenched rights soon started to take shape. In *R v Guerin*, in 1984, Dickson J confirmed the potential existence of aboriginal title on all types of land—that is, on and off reserves—and contributed to jurisprudence about government's fiduciary duty. The case saw the Musqueam Band in Vancouver sue the government of British Columbia over the fraudulent leasing of some of their reserve lands for a golf course. Three weeks after the *Guerin* ruling, the Nuu-chah-nulth (a tribal grouping) blocked lumber giant Macmillan Bloedel's access to forests on Meares Island; then the Clayoquot and Ahousaht bands (members of the Nuu-chah-nulth) took the matter to court to litigate their land claim (Tennant 1991, p. 223).

The subsequent case, *Martin et al v R* (1985) in the British Columbia Court of Appeal, granted an injunction and developed the idea of 'extensive use' that characterised aboriginal title as fundamentally threatened by resource activities. Justice Seaton wrote, 'I cannot think of any native right that could be exercised on lands that have recently been logged', thereby endorsing the Native strategy of linking traditional identity to resources and demonstrating the need for pre-emptive injunctions where aboriginal title was in dispute. The judgment also chastised provincial politicians and pointed to a public expectation of negotiated outcomes (Tennant 1991, p. 224). The injunction shut down developments across the Province. Lower courts soon granted further injunctions in various corners of the territory: on Vancouver Island, in the remote northeast of the Province and in the interior Okanagan Valley. On the north coast, injunctions allowing for the persistence of aboriginal title were granted. At McLeod Lake, a case that involved unsanctioned logging gave rise to a ruling allowing the band to sell their 'illegal' timber. Tennant describes the authority of the Crown as being massively impaired (Tennant 1991, p. 225). Injunctions made it essential that future negotiations take current resource-related activities into account and create a mechanism that satisfied all parties. This was the stimulus for the 'interim measures' policy under the treaty process (McKee 1996, pp. 41–42; de Costa 2003).

The Supreme Court of Canada judgment in *Sparrow v R* (1990) entrenched the earlier federal court interpretation made in *Baker Lake*, confirming the existence of aboriginal rights (in this instance to fisheries) but subordinating their exercise to government regulation. This made visible the limits of Indigenous mobilisation through the courts: the assertion of rights based on traditional identities could give rise to contemporary rights justiciable at Canadian law, but these would be managed

within the overall Canadian state. But although it came up against these legal limits, the strength of Native mobilisation lay in the connections being made—and, more to the point, *demonstrated*—between political identity and action. Anchoring autonomous Native political organisations was an Indigenous identity that grew in coherence during the 20th century. The institutional memory and capacity of these organisations enabled strategies of direct action that asserted Native legitimacy. The obverse of this coin was non-Native illegitimacy: if legitimacy for the Province lay in control over natural resources and the economy that depended on them, then the widespread and strategic nature of Indigenous activism suggested that this might be a fragile thing. In law as well as on logging roads, the Province would soon have to acknowledge the demands of Native people.

Political responses

The federal government responded quickly to the changing legal and political environment. The disaster of their 'final solution'—the 1969 White Paper—and the *Calder* judgment of 1973 soon resulted in a new rationale at the highest levels.

After *Calder*, Trudeau began the comprehensive claims policy. Foster calls this the 'third period' of treaty-making in Canada (Foster 1999, p. 358).[5] Federal policy was, however, to negotiate only one claim at a time. This meant that although many B.C. Native groups had entered the federal process in the 1980s, 'the line had not moved' (Tennant 1991, pp. 206–207).

There is a long debate in Canada about the relative roles of provincial and federal governments regarding Indigenous peoples and their interests. Section 91(24) of the original Constitution reserved for the federal government all legislative powers pertaining to Indians although provincial control over lands and resources suggested their involvement was necessary. However, success in the comprehensive claims process had come mostly in the territories, where federal power was less dispersed.

As I have noted, postwar provincial governments were not enthusiastic about these developments. An old guard maintained the rage as late as 1986: 'British Columbians have always felt they are on proper legal ground' (Gardom 1986, p. B6). The SoCred position was encapsulated by Garde Gardom, John Williams and Brian Smith as spokesmen on Indian claims during the fractious 1980s. They ridiculed the land and title claims, portraying them as money-grubbing, and alluded to Neville Chamberlain-style appeasement and the early 1970s' terrorism of the separatist Front de Libération du Quebec (Tennant 1991, p. 230). *Vancouver Sun* columnist Vaughn Palmer summarised the SoCred political aims: under the terms of Confederation the federal

[5] The first being the treaties made prior to Confederation in 1867; the second the 'numbered treaties' from Treaty 1 in southern Manitoba in 1871 to Treaty 11 in the NWT in 1921.

government would have to provide all compensation, but no matter how the 'constitutional' argument was resolved, the public would never stand for it. Palmer also observed that the provincial government still felt that the courts would resolve the issue in its favour (cited in Tennant 1991, pp. 232–33).

It was not until the election of the Vander Zalm government in 1986 that the SoCreds began to accept reality; by 1989, figures such as Minister for Aboriginal Affairs, Jack Weisgerber, and his Deputy, Eric Denhoff, demonstrated the new pragmatism within conservative ranks. In Weisgerber's speech endorsing legislation to establish the British Columbia Treaty Commission in 1993, he acknowledged this prior 'strategy of denial': 'We maintained that there was no issue there to discuss. If there was, it was in our minds clearly a federal responsibility and shouldn't involve the province, and we tended to avoid it' (Weisgerber 1993, p. 6443).

The conservatives had clearly been influenced by shifts in the provincial power structure. In the 1980s, non-parliamentary actors such as the British Columbia Federation of Labour and the Union of British Columbia Municipalities had become strongly aligned with the push for negotiations, the former out of solidarity (Georgetti, cited in Cassidy 1990, pp. 12–14), the latter out of concern that its (local government) members' turf might be encroached on during negotiations (Fox, cited in Cassidy 1990, pp. 10–11).

Much more significant was the extent of 'movement in the business community' (Palmer 1990, p. A8). Major resource industry and labour groups attended a conference held in early 1990 to discuss the situation. The Council of Forest Industries, an influential peak body for logging and milling interests, put the provincial position as follows:

> By refusing to participate in negotiations with Indian claimants, the provincial government … faces the prospect of eventually being forced into negotiations with court-imposed determinations as guidelines. The choice of the provincial government is to agree to negotiations voluntarily, and have a free hand in shaping the process and outcome, or continue to stall until the courts have made the determination (cited in Cassidy 1990, p. xiii).

The foundations for a seismic shift in provincial policy had now been laid. In September 1992 the *British Columbia Treaty Commission Agreement* was initialled during a major public ceremony at the Squamish reserve in north Vancouver. The shift was matched by an evolution of First Nation organisations, who quickly reconfigured themselves for the purposes of making treaties: the First Nations Summit (FNS) was formed expressly for first nations that wished to participate in the process.

Responses of Natives in British Columbia to the creation of a treaty commission reflected the division in Indigenous politics between coastal and interior groups and an abiding realism about government policy claiming to be for their benefit: Saul Terry, from the UBCIC, described the process as 'a fraud', echoing George Manuel's position a decade before; Gerald Amos, of the Haisla, suggested that 'it may turn out to be an historic occasion. I say that because it really only is another step. It depends on the good-will of the negotiators'. The Okanagan Nation blockaded a highway in protest (Hunter 1993, p. A3).

Irresistible force

By the start of the 1990s, the intransigence of the Province of British Columbia had been broken down, overtaken by the political will to create a new relationship through negotiation. In 1988 the scholars Frank Cassidy and Norman Dale were able to write of significant change in 'the intellectual environment within which the land claims question is discussed' (Cassidy & Dale 1988, p. 8).

The origins of the British Columbia process demonstrate the importance of the interlinked features of the struggle by Natives in the Province: first, they demonstrated their growing political confidence by willingness to innovate with organisational philosophies and frameworks. This enabled links between broadened constructions of Indigenous identity and lands and resources to be strengthened. On this basis, the Native challenge to government policy was not through participation, consultation or even negotiation in the first instance. The power of the Native challenge to the status quo in British Columbia lay in their ability to restrain the state. This was demonstrated by their endorsing of the 'rule of law' setting through litigation, as well as by their challenging of that rule of law through direct action. Contradiction was avoided through the growing coherence of Native political identity.

The Chief Treaty Commissioner of British Columbia, Miles Richardson, remained unsurprised by the origins of the process: 'that's a function of the will to negotiate. Sometimes it takes a little, persuasion, to get some parties to come to the table to negotiate' (Richardson 2000).

How to get a treaty in Australia

Langton and Palmer (2002) write of the need for rational states to be shown a 'mutually pressing reason' as the basis for their participation. What forms of persuasion are being brought to bear in the Australian campaign for treaties? Proponents of treaties appear to take two broad approaches: one is a moral case, the other is about the social and economic viability of Indigenous communities. Neither of these approaches can create within the Australian state(s) the 'micro' rationale—that is, a compelling reason to 'treat' with Indigenous peoples—that I referred to at the start of this paper.

It is logical that those committed to the morality of treaties will be inclined towards constitutional reform, which in turn reconnects the debate with popular sentiment (Gilbert and Tobin Centre of Public Law 2003, p. 2). In this sense, the constitutional option is a way to test shared values.

George Williams, director of a major research project on the public law implications of a treaty, spoke at the *National Treaty Conference* in 2002, pointing out that 'while the idea of a Treaty has been put back on the agenda, no clear political or legal strategy has yet emerged for achieving it' (Williams 2002). Williams urged a cautious approach in the wake of recent failed referenda, setting out '10 lessons' for reformers: inclusion, consultation, incrementalism, comprehensiveness, 'community ownership and involvement', education, straightforwardness, national support, bipartisanship, and flexibility of reform design. The essence of his argument is that if Australians wish to create the public law or constitutional conditions for a process in which peoples can respectfully negotiate their differences, they first require a pre-constitutional process of negotiation in which people respectfully negotiate their differences.

This approach assumes that Australian society as a whole is open to—or at least is neutral towards—the principles at stake. This view requires some belief that the status quo is not permanently embedded in the Australian legal landscape, in the history and the present of its prosperity, in its national imagination and psychology. Moreover, it relies on an assumption that a new status quo is possible if you bring together Australians in all their diversity and educate them towards a new moral consensus. This strikes me as wildly optimistic, if not actually contradictory. It is certainly paradoxical that a process designed to lead to the exchange of consent between peoples would begin with the harmonisation of the 'nation' as a whole. This was the fate of reconciliation, which arguably met many of Williams' criteria: it called for a national harmony that logically undercut the rationale for consent-exchange (de Costa 2002, pp. 397–419).

Natives in British Columbia did take up alliances with sections of the non-Native community—environmentalists and the labour movement, for example. They did not, however, attempt to rationalise or compromise the development of their political strategies in order to accommodate non-Native needs. Rather, they allowed non-Natives in solidarity with them to assist, as their struggles increasingly engaged settler institutions.

Marcia Langton has stressed the immorality of the status quo, noting that 'lack of consent and treaties remains a stain on Australian history and the chief obstacle to constructing an honourable place for indigenous Australians in the modern state' (Langton 2002). However, in another large research undertaking on treaties, Langton and others are interested in the growing number of agreements being reached under the *Aboriginal Land Rights (Northern Territory) Act (Cth)* and now the *Native Title Act*

(1993) (Cth): agreements between Indigenous peoples and local governments, corporations, utilities and so on, but not involving the general public (Indigenous Studies Program 2003).

It would be absurd to deny the role played by Indigenous activists in the emergence of existing land claims regimes. In the first instance, the Gurindji walk-off, the Tent Embassy, and numerous demonstrations undoubtedly presented the Whitlam government with the need to act (Whitlam 1985, pp. 463–66). However, as Langton notes, statutory land rights were 'acts of grace' (Langton 2002), based on the report of a white judge and not the negotiated seeking of Indigenous consent. The growth since then of an Indigenous 'sector'—of organisations and political identities—under the *Aboriginal Councils and Associations Act (1976) (Cth)* has largely occurred within a context of state funding and regulation. Recent events involving the Aboriginal and Torres Strait Islander Council (ATSIC)—the organisation that has promoted treaties in recent years—confirm this. This is quite different from the organisational development of Natives in British Columbia, where the structures and philosophies of the major bodies were established well in advance of government support or control.

The origins of the native title regime require further explanation. The 1992 High Court decision in *Mabo* to recognise native title at common law was similar to the Canadian Supreme Court decision in *Calder*, which found that aboriginal title preceded any acts of acknowledgment by the Crown. However, the policy responses to the two judgments were completely different. Indigenous Canadians saw the judgment as fruit of their political development, giving impetus to further litigation and direct action and forcing the federal government into comprehensive negotiations.

Indigenous peoples in Australia may have been able to do the same thing, occupying traditional territories, taking maximum benefit from the uncertainty created. But in fact they did almost the opposite, actively participating (when able) in the Keating government's legislative agenda to deal with the judgment (Rowse 1994, pp. 111–32). It is unlikely that native title legislation would have gained Senate approval via the minor parties without the endorsement of the National Indigenous Working Group, for instance. Indigenous Australians were prepared, moreover, to suspend the *Racial Discrimination Act (1975) (Cth)*—the basic guarantor against discrimination for Australian citizens—in order to validate past acts that had potentially infringed native title. The removal of uncertainty in Australia was purchased with a land fund and a social justice package; the latter has never materialised. When space for Indigenous people appeared to open once more, after *Wik*, the new federal government was able to rely on the existing regime, further amending it, this time in the face of near total Indigenous opposition; the possibility of an alternative politics was gone because of the prior act of Indigenous consent. Uncertainty—perhaps the only real power resource of Indigenous peoples—is now largely the province of non-Indigenous judges.

Not surprisingly, the process for determining native title has relatively few ardent admirers in the Indigenous community. While Langton et al. may find new cause for optimism in the Indigenous Land Use Agreements and other measures under the *Native Title Act* that allow for consensual outcomes, Jon Altman raised a key problem in this journal: 'A fundamental economic problem with land rights and native title laws is that they lack mechanisms for facilitating the redistribution of commercially valuable resource rights from the state (or private interests) to Indigenous interests' (2002, p. 67). By comparison, British Columbia Natives were able to bring about a treaty process by demonstrating that existing commercial frameworks not only excluded them, but actually degraded the economic basis of their societies.

Altman appears to adopt the second type of pro-treaty rationale: the need for arrangements that will allow Indigenous communities to function. He sees treaties such as those in the Torres Strait or New Zealand as 'leveraging devices' that have enabled Indigenous interests to become a priority in discussions over commercial fisheries. However, the point to be made here is that these opportunities come *after* treaties are reached. Altman appears to suggest that for Indigenous Australians, their only real 'power' is their ongoing dysfunction:

> Indigenous Australians face the challenge of finding ways to be politically persuasive without being dismissed as polemical. Their political opportunity rests with the duality inherent in the term 'right', which can refer to a claim or title that is either 'morally just' and/or 'legally granted'. Failure of legal avenues to establish resource rights might require political negotiations that emphasise social justice. The persuasiveness must come from the argument that the economic cost of continued Indigenous disadvantage to Australia, as a nation, is just too high and the potential benefits that will result from enhanced national capacity associated with improvements will be significant. Even if for self-interest alone, the nation must invest as soon as possible to address the issue of Indigenous underdevelopment (2002, p. 77).

Moral right, whether parlayed into enlightened self-interest or not, is simply not something that Indigenous peoples have much control over. Moreover, the expectation that Indigenous social desperation can be transformed into some process of respectful and negotiated consent exchange seems illogical: rather than demonstrate their power and political relevance, the assumption is that Indigenous people will rely on their powerlessness and marginalisation.

In recent writing, Tim Rowse, though ambivalent about treaties, has stressed the need to connect rights struggles with social policy. Evaluating recent conferences about treaties, Rowse (2003) argues that an effective model for a treaty should build with the materials at hand, rather than waiting for sovereignty and inherent rights to

condense into new sources of power. Moreover, Rowse argues that 'a treaty process should take seriously the distinction between the Indigenous sector and the Indigenous population', the latter he considers to be too permissively defined in Australia. His solution involves an 'evolved organizational autonomy' in which the thousands of Indigenous organisations, rather than Indigenous individuals, might hold 'rights' through negotiation.

Notwithstanding the current changes in federal policy Rowse's suggested solution is something that could attract the interest of Australian governments. Though such 'corporate rights' lose their obvious connection to liberal or human rights and seem remote from 'self-government' as I understand that aspiration, a set of permanent agreements between Indigenous organisations and Australian governments is perfectly plausible within a state rationale of managing Indigenous communities efficiently and accountably. This might be called a 'practical treaty'.

While we lament the exceptionalism of Australia as a settlement without Indigenous consent, we should not think for a moment that Indigenous peoples in treaty countries such as Canada, New Zealand or the United States see their acts of consent-exchange as having fundamentally placed them on the same basic path to recognition and justice. Grievances are the norm. Indigenous peoples understand that treaty-making has always been an instrumental exercise for the settler state: treaties are acts and calculations about power, not collective expressions of principle. In the genesis of treaties, in the means by which they were negotiated, in their partial implementations, but mostly in their neglect, treaties are well understood.

The last incarnation of the treaty campaign in Australia has largely avoided direct political engagement with the state institutions which would have to negotiate any agreements, while populist rhetoric about the inherent 'divisiveness' of treaties supports the status quo. Rather than simply promoting one variation or another of an agreement process, treaty campaigners must first demonstrate the necessity for the state to enter negotiations. Like the colonial administrations and the contemporary Canadian state, Australian governments are unlikely to enter comprehensive negotiations without a compelling reason.

Consequently, Indigenous peoples in favour of treaties in Australia must reflect deeply on what power they have to engage the state. They must work against a history of denial that has left them no constitutional space to work from; against highly conservative political institutions that devolved power in the common law a fraction only to legislate native title swiftly into rigidity; against an Indigenous political tradition that largely eschews violence and confrontation in favour of conciliation and accommodation; and against a mainstream political culture that has nagging suspicions about the coherence of Indigenous identity and the viability of Indigenous communities.

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