

New relationships, old certainties:

Australia's reconciliation and treaty-making in British Columbia

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Philosophy.

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Abstract

This thesis investigates the search for new relationships between indigenous and settler peoples in Australia and Canada. Both reconciliation and the treaty-making process in British Columbia are understood as attempts to build such relationships. Yet these are policies that have arisen in response to the persistence of indigenous claims for recognition of rights and respect for identity. Consequently, I consider what the purpose of new relationships might be: is the creation of new relationships to be the means by which settlers recognise and respect indigenous rights and identities, or is there some other goal?

To answer this, I analyse the two policies as the opening of negotiations over indigenous claims for recognition. That is, the opening of new political spaces in which indigenous people's voices and claims may be heard. Reconciliation opened a space to rethink Australian attitudes to history and culture, to renegotiate Australian identity. Treaties in British Columbia primarily seek to renegotiate ownership and control of lands and resources. Both policies attempt to re-legitimise the polities in which they operate, by making new relationships that provide for mutual recognition.

However, the thesis establishes that these new spaces are not nearly as expansive or inclusive as they are made out to be. They are in fact defined by the internal struggles of settler society to make life more certain: to resume identities that are secure and satisfying, and to restore territorial control and economic security. This takes place with little regard for the legitimate claims of indigenous peoples to be recognised as people and to enjoy dynamic, flourishing identities of their own. Building new relationships becomes the path to entrenching old certainties.

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Declaration

This is an original work based entirely on research I have conducted. None of the material herein has been submitted for the award of any other degree.

Ravi de Costa

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A note on terminology

Writing about indigenous affairs in both Canada and Australia presents challenges in finding a consistent language to designate peoples. In Australia, the term ‘native’ is now only used in the context of entitlements at common law: ‘native title’. No longer does it denote individuals or groups of indigenous people. The orthodoxy has been to use Aboriginal or (Torres Strait) Islander (capitalised). Quite recently, the term Indigenous (capitalised) has come into vogue, so that phrases like ‘Indigenous Australians’ are becoming more common.

Conversely, in Canada the term ‘aboriginal’ appears to most frequently refer to indigenous people in legal and administrative contexts eg. ‘aboriginal title and rights’ (not capitalised). The terms ‘Indians’ and ‘Natives’ (the latter sometimes capitalised and taking on a more consciously political edge when it is) have a more general usage, though some academic work seems to be moving toward the capitalised ‘Aboriginal’ and ‘Indigenous’. Other phrases, such as ‘first peoples’ or ‘First Nations’, are also common.

For clarity, I use the term ‘indigenous people’ to make general references in both the Canadian and Australian contexts – I do not use the term ‘Indigenous people’, preferring Aboriginal and Islander for explicitly Australian references. For Canada, I adopt the term ‘Natives’, though I also use the term ‘First Nations’ to refer only to those indigenous groups who are participating in the British Columbia treaty process (the term has a wider currency in the rest of Canada). Where appropriate, I refer to specific indigenous peoples by their traditional names, such as Tsawwassen or Haisla.

The term ‘settlers’ may cause some discomfort. Alternatives, such as ‘Europeans’, ‘whites’ or ‘non-indigenous’ are, I feel, less satisfactory. An abiding theme of this thesis is that the creation of new relationships is to bring about final settlements: that they will *settle* the indigenous problem once and for all.

List of abbreviations used in this thesis

AIP	Agreement-In-Principle
AFN	Assembly of First Nations
AFR	Australians for Reconciliation
ANTaR	Australians for Native Title and Reconciliation
ARC	Australian Reconciliation Convention
ATC	Aboriginal Treaty Committee
ATSIC	Aboriginal and Torres Strait Islander Commission
BCANSI	British Columbia Association of Non-Status Indians
BCTC	British Columbia Treaty Commission
CAR	Council for Aboriginal Reconciliation
BNA	British North America Act
CHRC	Canadian Human Rights Commission
COAG	Council of Australian Governments
COFI	Council of Forest Industries
DIA	Department of Indian Affairs
DIAND	Department of Indian Affairs and Northern Development
DONT	Defenders of Native Title
FMC	First Ministers' Conference
FNS	First Nations Summit
FTNO	Federal Treaty Negotiation Office
HREOC	Human Rights and Equal Opportunities Commission
ICC	Indian Claims Commission
JBNQA	James Bay and Northern Quebec Agreement
LMTAC	Lower Mainland Treaty Advisory Committee

MOU	Memorandum of Understanding
NAC	National Aboriginal Conference
NBBC	Native Brotherhood of British Columbia
NDP	New Democrat Party
NFA	Nisga'a Final Agreement
NFF	National Farmers' Federation
NIWG	National Indigenous Working Group
NTA	Native Title Act
NTC	Nuu-chah-nulth Tribal Council
PCNA	Premier's Council on Native Affairs
RAC	Regional Advisory Committee
RCADC	Royal Commission into Aboriginal Deaths in Custody
RCAP	Royal Commission on Aboriginal Peoples
SCC	Supreme Court of Canada
SoCred	Social Credit Party
SOI	Statement of Intent
TAC	Treaty Advisory Committee
TFN	Tsawwassen First Nation
TNAC	Treaty Negotiation Advisory Committee
TRM	Treaty-Related Measure
UBCIC	Union of British Columbia Indian Chiefs
UBCM	Union of British Columbia Municipalities
UNN	United Native Nations

Introduction.

The question

This thesis investigates the call for a *new relationship* between settler and indigenous peoples and asks: what kind of relationship is being pursued through Australia's reconciliation process and the treaties under negotiation in British Columbia? Is the proposed relationship a state of affairs that needs to be brought into being, or a permanent process that embeds power-sharing as the key principle of relatedness?

In Canada, the search is on for "a new relationship which recognizes (that) the unique place of aboriginal people and First Nations in Canada must be developed and nurtured."¹ In the Australian context, the emphasis of reconciliation has been relational: "What is reconciliation? Reconciliation is about understanding how history has shaped the *relationship* between Indigenous and non-Indigenous Australians, and developing more harmonious and co-operative relations for the future."² Other ways of addressing treaties and reconciliation are certainly possible, but I will demonstrate throughout this work that the idea of relationships between peoples is fundamental to the way that both policies have been conceptualised and continue to operate.

A paradox then arises in that the response to indigenous demands for autonomy (for the purpose of enabling the restoration and maintenance of indigenous life as *indigenous*) is to envisage structures of relating between peoples. This appears to be common sense: very few people, either indigenous or settler, now call for complete separation or isolation. An extra-state solution is not widely thought to lead to a desirable form of indigenous autonomy.

¹ Province of British Columbia, Ministry of Aboriginal Affairs. 1991. *The Report of the British Columbia Claims Task Force* (hereafter the Task Force Report), S. 1.

² Human Rights and Equal Opportunity Commission, 'Aboriginal peoples and Torres Strait Islanders, What is reconciliation?', *Face the facts: Some questions and answers about immigration, refugees and indigenous affairs*, http://www.hreoc.gov.au/racial_discrimination/face_facts/sect3.htm (November 15, 2001) (emphasis in original).

One way to respond to this is to ask, ‘what is the purpose of the new relationship’? From the first penetration of Europeans into the New World, relations of varying degrees of formality were established between settlers and the original inhabitants of the territories they settled in. The practice of reaching formal agreements, frequently called treaties, became widespread, reflecting both prevailing and developing international law and norms of behaviour between sovereign entities in the era of ‘contact’.

Of course these agreements differ markedly in content and effect. Primarily differences indicate the changing balance of power between the parties: the level and spread of settlement is important, as is indigenous peoples’ awareness of the terms of the agreement and their power to refuse agreements or to withhold consent.

Fundamentally, the purpose of all agreements is *to exchange consent*. The exchange of consent by each party recognises the other’s right to live securely and in prosperity, to an existence as a self-defining identity. This is the basis of a relationship between peoples that is respectful and not simply a function of power. A residue of ‘sovereignty’ persists, even where sovereignty, in the idiom of Western jurisprudence and international law, may have departed the scene.

However, concluding agreements has not guaranteed that good relationships are cemented. The experience of such agreements in North America and New Zealand, for example, is largely a history of settler fraud and neglect. This thesis attempts in part to evaluate contemporary policies which aim to create new relationships between indigenous and settler peoples; relationships that are consensual, durable, and even that are capable of being consented to by future generations.

So more specific questions must be asked of this sought-after new relationship. Is it to be a relationship of equals, and on what would such an equality be based? How will the relationship acknowledge, accept and respect differences? Will limits of allowable difference be set, and if so, by whom? On an empirical level, a further set of issues arises. In seeing the need for a relationship between indigenous and settler peoples, is there agreement that certain patterns of relating have long existed, and that

such patterns may need to be adjusted, radically altered or abandoned? Does the ‘new relationship’ destroy the old ones, and those currently in place?

If certain fundamental institutions are to be maintained (such as singly constituted nation-states) is there agreement about this between the parties? What concessions are proposed to justify the creation of a new relationship within those *a priori* institutions? Implicit in these latter questions, given the realities of settler domination and indigenous disempowerment, is an interest in how indigenous peoples will organise and represent their claims to settlers. How will settlers recognise and make space for those representations and organisations?

Chapter 1 sets out the method by which I propose to answer these questions about relationships between peoples. The thesis is an analysis of the political space in which the claims of indigenous peoples are to be negotiated by settler peoples and their institutions. I theorise identity, territory and legitimacy as three political spaces or ‘fields’. This theoretical approach arises out of a dissatisfaction with the adequacy of liberal theory to explain and address the particular situation of indigenous peoples. I argue that an ontological approach is better equipped to deal with the complexity of relationships between peoples. I further demonstrate that the existing literatures on treaties (though rich) and reconciliation, have not offered any analysis of them as relationship-building policies. The chapter concludes with a consideration of the methodological challenges of a comparative study of reconciliation in Australia and the treaty process in British Columbia.

Chapter 2 begins the substantive analysis of the policy of reconciliation in Australia. It begins with the ‘pre-history’ of reconciliation, to argue that the policy emerged out of a series of political compromises of the 1970s and 1980s that had to do with claims in Australia for an agreement between indigenous and settler peoples: an act of consent-exchange. A conclusion was reached that the Australian community was ‘not ready’ to accept the institutional and political change that such recognition would

require: a process of ‘reconciliation’ was seen as a way to bring about a new Australian *identity* that could enable that change to take place.

In **Chapter 3** I survey the range of intentions and meanings with which reconciliation became associated, and the deployment of the concept around particular social and political events during the nine years of ‘official reconciliation’ during the life of the Council for Aboriginal Reconciliation (CAR). Of particular concern is the way the ideas of community and renewed national identity were developed and put to work by the CAR. What becomes clear is that reconciliation became widely understood only through a series of major national discussions, on native title, constitutional reform and the ‘Stolen Generations’. Opportunities for reconciliation were certainly offered by each of these debates as each represented a new political space for indigenous recognition; yet frequently reconciliation appeared to turn away from substance. In fact these debates show how reconciliation could be used almost as a veto by established political interests, to prevent outcomes adverse to them.

Then in **Chapter 4** I turn to examine the way in which reconciliation has been used by individuals, community groups, and local government. I also examine some of the qualitative and quantitative evidence about public attitudes to reconciliation. I make the observation that frequently these developments reveal reconciliation to be less concerned with recognition of indigenous peoples than with the creation of personal identities and forms of nationalism that are secure and satisfying. Again, reconciliation became a device by which individuals could limit and deny obligations to indigenous peoples.

Chapter 5 presents two broad critical responses to reconciliation, those of settlers and indigenous persons. Though these were minor contributions during the period of official reconciliation, their conclusions are extremely useful for an assessment of post-reconciliation politics in Australia, particularly the role played by reconciliation in debates about political *legitimacy*. The chapter closes by evaluating the success of the policy in creating a new relationship between indigenous and settler peoples. My conclusion is that the limited success of reconciliation is because a concern

for collective or harmonious identities became a device for settlers to confine indigenous claims.

The analysis of the British Columbia treaty process commences in **Chapter 6**, with an examination of the historical factors that led to the creation of the process in 1992. This is a history in which the Native peoples of British Columbia were able to force open the political space in which to make their claims, also forcing settlers to respond. They achieved this through the disruption of *territory*: ownership and control over lands and resources in the province was made ‘uncertain’.

Chapter 7 begins a detailed study of the process, setting out its formal aspects and emphasising the consequences of those arrangements. Several features of the process that were designed to mitigate the inherent power imbalance of the parties – funding and ‘interest-based’ negotiations – are also evaluated. It is certainly the case that the major structural features of the treaty process have a significant impact upon the character of the agreements and relationships being negotiated.

Chapter 8 presents an analysis of the main points of conflict at treaty tables: land, self-government, compensation and interim measures. Not surprisingly, these disputes are all over the control of territory: land and resources. Conflict concerns past, present and future distributions of the territory of British Columbia. Here, I also consider the role of the Nisga’a Final Agreement as a possible ‘template’ for resolving conflicts and furthering the relationship-building process. I conclude the chapter with an extended discussion of the philosophical core of disputes between indigenous and settler peoples: conflicting understandings of the concept of ‘certainty’.

Chapter 9 concludes this thesis’ examination of the treaty-making process in British Columbia by considering its immediate and long-term prospects. Its essence as a relationship-building policy appears in grave danger in 2002, as extreme pressure is applied by both indigenous and settler critics and a referendum on the whole process is begun. No longer is it clear that the treaty process offers a way of restoring political *legitimacy* to society and state in BC.

The **Conclusion** of the thesis offers a consideration of the general project of relationship-building between peoples. By examining the different policies of reconciliation and treaty-making through an interrogation of the spaces in which new relations are supposed to take place, the embeddedness of old forms of relating can be seen. Renegotiating either Australian identity (the policy of reconciliation) or territory (treaties in British Columbia) were thought to be ways to relegitimise democratic societies and states by offering respectful recognition of indigenous peoples. What emerges is that these are more limited than previously thought; more radical forms of relating are necessary.

1.

A new relationship between indigenous and settler peoples

Identity, territory and legitimacy

The term ‘relationship’ and its many derivations have become a *lingua franca* in recent years. The idiom recurs throughout both the Australian policy of reconciliation and that of treaty-making in British Columbia. In the conceptual framework of each, in the adorning language that attaches to and promotes both, and in the practices and activities each gives rise to, these words have a talismanic and orienting role. Most of all they express a desire for better forms of social organisation, a desire based in the abiding fear that current forms of relating are ineffective, disrespectful and destructive. This thesis will develop an understanding of what is thought by settlers to satisfy that desire.

To be of use as a descriptive and analytical device, however, the term ‘relationship’ must operate in a given context. That is, we must recognise that relationships are not abstractions: they exist within institutions, networks of distribution and in physical locations. This thesis argues that any ‘new relationships’ between indigenous and settler peoples will be constrained and defined by the fact that they must take place within *political space*. Political space refers to the location where indigenous peoples may express their identities, make claims and politically represent themselves within the ex-colonial polities in which they are stuck – this is the space of the politically possible. Analysis of political space requires an understanding of how it is defined and policed. This approach makes possible an understanding of the range of engagements indigenous peoples may make with settler peoples and their societies, thereby revealing the character of relationships both existing and proposed.

In the analysis of reconciliation and treaties that follows, I have sought answers to the questions about relationships by adopting a spatial analysis, using three ‘fields’

of *identity*, *territory* and *legitimacy*. The first two fields help to answer the tranche of questions I asked in the introduction: what is the specific character of the relationship, with regards to equality and difference in particular? The third field, of legitimacy, helps to consider the larger or more general question: what purpose does the relationship have?

Identity, as a field for the resolution of indigenous claims, is primarily the mode in which reconciliation has operated in Australia. Chapters 2-5 analyse the policy accordingly. The goal of reconciliation is the reconstruction of the space of Australian national identity, so that it becomes inclusive and respectful of indigenous peoples. I will argue that this goal originally had a specific manifestation: the preparation of the Australian community for political and constitutional change. The creation of new forms of identity was presumed to constitute such preparation.

The field of *territory* is deployed in the analysis of the British Columbia treaty process in Chapters 6-9. The goal of those treaties, I will argue, has been the re-establishment of clear jurisdiction over territory, conceived of as ownership or control of land and resources. Indigenous claimants have opened political space in that province considerably since the 1960s, destabilising state control through a combination of direct action, litigation and new political forms. Treaties in British Columbia seek to both constrict and re-regulate that space.

Finally, *legitimacy*: this is a field that applies to both policies and both societies. Thinking about the purpose of a new relationship, legitimacy clearly is its underlying aim, to be reached through acts of consensual recognition. The facts of indigenous deprivation and the persistence of indigenous claims for recognition both exert tremendous pressure on the legitimacy of settler states and societies. Treating legitimacy as a field allows an understanding of whose assumptions come to define the space of what is legitimate and who can be recognised.

Developing each of these fields – identity, territory and legitimacy – allows the general patterns of the proposed new forms of relationship to come into view. Each field helps to locate the shifting borders within which indigenous people are to be

heard. The locations of these borders therefore act as statements of capacity, what these political spaces can 'carry' or 'hold'. Many indigenous claims are considered fundamentally disruptive; others are perceived as capable of being expressed within existing spaces as borders are adjusted.

What becomes clear is that the location of these borders and the shape of political space does not reflect a respectful interaction of indigenous and settler peoples through negotiation. On the contrary, political space is defined by the conflicts and oppositions that exist within settler society itself. If the essential feature of a relationship is its ongoing character and not its content at a given moment, then current projects give cause for concern.

Take for example the Australian concept of 'one nation': under Paul Keating it denoted a project of inclusion and diversity; under Hanson and Howard it symbolised an assimilationist agenda, seemingly snapping back Australian possibilities further than they had been before Keating's attempt. Yet both definitions operate with a set of assumptions that derive from a committed settler nationalism. The contest over how to unify the nation does therefore reflect the interaction of two forces for settler identification. Using the three fields gives the opportunity to see such assumptions and forces, and to gauge the possibilities of truly new forms of relationship.

My thesis is that the claims of indigenous peoples run great risks when they are translated into a consensual language of relationships. Reconciliation in Australia, contrary to its intentions and the beliefs of many of its indigenous supporters, has hindered, if not imperilled the pursuit of indigenous autonomy. In British Columbia, treaties contemplated have prioritised the creation of rigid and permanent structures which provide for state control, over respectful relations of co-existence between peoples.

The reason for this is not a failing in the concept of relationships. Indeed, I maintain that the creation of respectful, effective and durable relations between

indigenes and settlers remains a crucial project for the emancipation of all people in former colonies like Australia and Canada. The problem is that a particular form of relationship has been institutionalised and has become the dominant settler response to indigenous claims. An enthusiasm for ‘new relationships’ conceals the belief that these are to become the new sites where indigenous peoples’ lives and behaviour will be made predictable, certain, and subject to control.

Liberals and indigenous peoples

Prior to examining the possible outlines of new relationships as they can be observed in Australia’s reconciliation and the treaty process in British Columbia, it is necessary to consider some of the existing thinking about indigenous claims. Though there is an extensive political literature which addresses the predicament of indigenous peoples in both Australia and Canada, it has hardly considered the idea of a relationship between indigenous and settler peoples. What scholarly writing exists to theorise and analyse relationships, has occurred within the disciplines of psychology and marketing research, and emphasises relations between individuals, or between individuals and organisations. There is very little literature in social science considering *relationships between peoples*. In what follows, I consider the way some writers in political science and political theory have addressed minority rights and indigenous rights in particular.

Liberal political theorists and philosophers have consistently addressed the question of minority rights. However, the question of indigenous rights in settler states exposes limits in this tradition. Nineteenth-century liberals, in searching for viable social arrangements to manage ethnic and other conflicts, disagreed as to whether there were different kinds of individuals, or simply free and equal individuals expressing themselves in different ways. Mill for example suggested that peace could be ensured by the drawing of boundaries along ethnic lines and that it was the struggle

over control of the state by different peoples that led to (proto-)nationalist conflict.¹ Conversely Acton argued that ethnic groups should be intermingled among states, and that it was the separation of people into ethnic enclave states that sponsored jealousy and distrust.²

In a recent chapter entitled ‘The liberal idea of the nation’, William Connolly has argued that these early liberals were appealing fundamentally to an idea of a social aggregate, a departure from classically liberal tenets: “even when race does not provide the explicit basis of the nation it symbolizes the degree of unity to be embodied in other principles of nationhood.”³ For many liberals the nation-state is a stable platform from which to espouse universal values. Sanjay Seth explored this argument at some length by examining the ‘Declaration of the Rights of Man and the Citizen’.⁴ However, this is no longer a debate about where borders should be drawn, and which ‘stable’ sets of individuals should be contained within. Cultural difference, it is now understood, has a post-colonial implication, as well as needing to take into account centuries of mass migration, voluntary and forced.⁵

More recently, liberals returned to the twin pillars of their thinking, freedom and equality, to renegotiate their bases. They have the resurgence of communitarian argument to thank for the demise of an abstract liberal individual, and a new orthodoxy of liberal conventionalism now seems to hold sway.⁶ Put simply, this is the

¹ Mill, J. S. 1962. *Considerations on representative government*, Regnery, Chicago, p. 230.

² Acton, J. E. E. D. A. and Fears, J. R. 1985-1988. *Selected writings of Lord Acton*, Liberty Classics, Indianapolis, p. 432.

³ Connolly, W. 2000. ‘The liberal image of the nation’. In *Political theory and the rights of indigenous peoples* (D. Ivison, P. Patton, and W. Sanders, Eds.), pp. 183-198. Cambridge University Press, Cambridge, Melbourne, p. 184.

⁴ Seth, S. c1995. ‘Rethinking the State of the Nation’. In *The state in transition: reimagining political space* (Camilleri, J.A., Jarvis, A.P. and Paolini, A.J., Eds), Lynne Rienner, Boulder, Colo., London.

⁵ Kymlicka, W. 1995. *Multicultural citizenship: a liberal theory of minority rights*, Clarendon Press, Oxford, Ch. 2.

⁶ Guttman, A. 1985. ‘Communitarian critics of liberalism’. *Philosophy and Public Affairs* 14, 308-322; Caney, S. 1992. ‘Liberalism and communitarianism: a misconceived debate’. *Political Studies* 40, 273-289. Also see, Kymlicka and Wayne Norman, ‘Citizenship in diverse societies: Issues, contexts, concepts’, in Kymlicka, W. and Norman, W. 2000. *Citizenship in diverse societies*, Oxford University Press, Oxford,

view that meaningful choices – the prerogative of a free individual – arise only in situations of cultural and social stability. Great importance is thus placed onto national-cultural formations as the sites from which we can expect rational contributors to safe and prosperous societies to emerge.⁷ Russel Hardin puts this into the language of a game: “it is in my interest that others around me are also followers of the home team so that I may have a context in which to enjoy my own commitment.”⁸ This is given a national context by Yael Tamir who suggests that “the liberal tradition, with its respect for personal autonomy, reflection and choice, and the national tradition, with its emphasis on belonging, loyalty and solidarity ... can indeed accommodate one another.”⁹

This has been a sustained feature of the work of Canadian political philosopher Will Kymlicka. His book *Multicultural citizenship: a liberal theory of minority rights*, attempts a comprehensive statement about diversity in liberal-democratic societies. Here we find that liberal goods of freedom and equality are best identified within a context described as “more or less institutionally complete ... (a) societal culture”.¹⁰ “(I)n the modern world, for a culture to be embodied in social life means that it must be institutionally embodied – in schools, media, economy, government.”¹¹ These embodiments take shape in early modernity and enable the survival of a culture.

pp. 30-45, where the authors argue to minimise the inherent conflict of minority rights with nation-state based citizenship.

⁷ Tamir, Y. 1993. *Liberal nationalism*, Princeton University Press, Princeton, N.J., pp. 16-34. See also Viroli, M. 1995. *For love of country: an essay on patriotism and nationalism*, Clarendon Press. Oxford University Press, Oxford, New York; Falk, R. 1996. ‘Revisioning cosmopolitanism’. In *For love of country: debating the limits of patriotism* (M. C. Nussbaum and J. Cohen, Eds.), pp. 53-60. Beacon Press, Boston; Putnam, H. 1996. ‘Must we choose between patriotism and universal reason?’ In *ibid.*, pp. 91-97; Taylor, C. 1996. ‘Why democracy needs patriotism’. In *ibid.*, pp. 119-121; even the cautious note struck by Sanford Levinson in Levinson, S. 1995. ‘Is liberal nationalism an oxymoron? An essay for Judith Shklar’. *Ethics* 105, pp. 626-645.

⁸ Hardin, R. 1995. *One for all the logic of group conflict*, Princeton University Press, Princeton, N.J., p. 54.

⁹ Tamir, p. 6.

¹⁰ Kymlicka 1995, p. 11.

¹¹ *ibid.*, p. 76.

Migrants to the New World leave these tools behind them, while indigenous peoples are presumed to possess them.¹²

However, a consistent understanding of ‘institutional completeness’ as the principle guaranteeing collective rights to indigenous self-determination is difficult to achieve. An initial problem is that the political strategies used by indigenous activists in the contemporary world are aimed at creating the space in which indigenous life and society can be *reconstructed*. The destruction of aboriginal societies has been widespread, enduring and profound, and consequently the social challenges are massive. Indigenous peoples are unlikely to see those aspects of traditional existence that survived colonisation and are now maintained in the face of immense pressure as a sufficiently good life. Much of the advocacy on this point in both Canada and Australia has focussed on the redevelopment of communities, the renewal of traditions, languages and law as the way to improve indigenous lives.¹³ As important is the struggle by indigenous peoples to have existing traditional practices and law recognised and respected.

Thus a strong implementation of this ‘societal culture’ justification for recognition may be simply to deny current claims because the customary organisations in which they are based have been damaged too severely.¹⁴ That is, history has made these ‘societal cultures’ institutionally ‘incomplete’. If the passage of history denies the societal culture of indigenes, then the effect of these liberal justifications for minority recognition will be to reduce indigenous populations to the status of ‘mere’ disadvantaged minority in a multicultural society. Doubly unjust because their

¹² *ibid.*, pp. 76-80.

¹³ See for example Queensland. Aboriginal and Torres Strait Islander Women's Taskforce on Violence Report. December 1999. Section 2, pp. 46-51. Also Canada. Royal Commission on Aboriginal Peoples. Final Report. 1996, (hereafter RCAP) Volume 1, Chapter 8 – ‘False assumptions’. More generally see Rowley, C. D. 1986. *Recovery: the politics of Aboriginal reform*, Penguin, Melbourne, esp. Ch. 8.

¹⁴ Contemporary jurisprudence in Canada is becoming alert to this conundrum. In the *Delgamuuk’w* decision, Lamer CJ noted, “It would be perverse, to say the least, to use the refusal of the province to acknowledge the rights of its aboriginal inhabitants as a reason for excluding evidence which may prove the existence of those rights.” *Delgamuuk’w v. British Columbia* [1997] 3 S.C.R. 1010, (at para. 106).

position simply is not the ‘new life in a new land’ scenario accorded to the migrant experience by Kymlicka – indeed it is not accounted for in his study.¹⁵ The ‘societal culture’ approach is, finally, circular. We see it in Kymlicka’s summary comments about the relationship between freedom and culture:

It is one thing to learn from the larger world; it is another thing to be swamped by it!¹⁶

The inference is that indigenous people are not already swamped by the relentless expansion of colonial nations – the point merely being to avoid it happening now. Partly, the stress on societal culture comes from the proposition that nations no longer rely on shared values.¹⁷ The process of modernisation has meant that traditional lives and shared values are no longer necessary. Yet Kymlicka suggests that modern nations are “appropriate units for liberal theory ... a domain of freedom and equality, and a source of mutual recognition and trust, which can accommodate the inevitable disagreements and dissent.”¹⁸ That is, a stable entity or identity which can take considerable internal bruising, while protecting its inhabitants from the flux of the world.¹⁹ Unfortunately, it is this stable, incorporating entity that is the primary problem for indigenous freedom. How settler states determine institutional completeness thus becomes a crucial question for liberal theory.

An orthodox liberal response in the Australian context is provided by Chandran Kukathas, in his *Multiculturalism and the idea of an Australian identity*. He notes, “In the case of Australia, a national identity is given by an ancient Aboriginal inheritance, a history of European colonisation, a common-law legal tradition, and liberal-democratic political institutions. However, this political community, and so

¹⁵ Australian Aboriginal leaders are under no illusions about the dangers of conflating the rights of indigenes and migrants: “the cause of reconciliation would be done fearful damage if it was ever to be seen as just another multicultural issue.” Keynote Address by Evelyn Scott, Chairperson, Council for Aboriginal Reconciliation, at the Annual General Meeting, Victorian Arabic Network, Melbourne, (November 19, 1998).

¹⁶ Kymlicka 1995, p. 104.

¹⁷ *ibid.*, p. 105.

¹⁸ *ibid.*

¹⁹ Tamir, pp. 153-163.

‘national identity’, has been shaped primarily by Britain, which bequeathed not only a common language but the legal and political vocabulary in which public affairs have been conducted.’²⁰ His is a good example of the parameters to ‘nation’ employed by liberals. No account is offered of how these separate domains are connected or made intelligible to each other. Yet it is clear enough that on matters of politics and law, one culture and tradition is paramount.²¹

However, the situation of indigenous peoples in the developed world does not appear responsive to calculations made under this liberal-national ‘realism’. The reason has been elaborated at length in two major reports of recent times – perhaps the most comprehensive studies of what Marcia Langton has called ‘the Aboriginal predicament’. In Canada, the Royal Commission on Aboriginal Peoples²² was an exhaustive investigation into the interconnectedness of Native disadvantage and institutional discrimination; the Australian analogue, the Royal Commission into Aboriginal Deaths in Custody²³ began with a more specific focus, but drew similar conclusions. Seeing single aspects of indigenous disadvantage as isolated pathologies, both reports concluded, is misleading. Indigenous peoples suffer a barrage of discriminations and structural disadvantage that combine to produce multiple effects; comprehensive approaches, in which settler practices and institutions must frequently be the objects of reform, are essential.²⁴

²⁰ Kukathas, C. 1993. *Multicultural citizens the philosophy and politics of identity*, Centre for Independent Studies, Sydney, p. 149.

²¹ Other writers make similar calculations. See Poole, R. 1998. ‘National identity, multiculturalism, and Aboriginal rights’. In *Rethinking nationalism* (J. Couture, Ed.), pp. 407-438. University of Calgary Press, Calgary; Mulgan, R. 1998. ‘Citizenship and legitimacy in post-colonial Australia’. In *Citizenship and indigenous Australians: changing conceptions and possibilities* (N. Peterson and W. Sanders, Eds.), pp. 179-195. Cambridge University Press, Melbourne.

²² RCAP.

²³ Australia. Royal Commission into Aboriginal Deaths in Custody. *National report*. c1991. Canberra, Australian Govt. Pub. Service (hereafter RCADC).

²⁴ “Throughout this report my discussion of each of the issues addressed in its chapters, and in the recommendations, constantly relates to a central theme -- that substantial change in the situation of Aboriginal people in Australia will not occur unless government and non-Aboriginal society accept the

These recommendations both discount the prospect for indigenous peoples of individual freedom pursued solely under a ‘truer’ liberalism, rendering the fundamental challenges as those of building relations that recognise and value indigenous difference as a way to enlarge the possibilities for indigenous life. This is but a short distance from the recognition of indigenous rights: rights that may have been extinguished or denied; rights that exist in various states of modification or duress; and rights that may need to be renewed or rebuilt. James Tully has written some important work in this mode. His *Strange multiplicity* demonstrates the incomprehension of indigenous rights that underpinned the constitution of liberal nation-states, and the persistent denials that result. Later work expands this approach, seeing only limited commensurability between indigenous and settler practices of self understanding and self-reflection.²⁵

Other writers have similarly emphasised the need for a politics of recognition and respect.²⁶ Recent theoretical and practical innovations include the notions of ‘indigeneity’ and indigenous cosmopolitanism. These are recognitions of the deep limitations of settler states when faced by indigenous rights claims: they articulate concern that recognition will be limited to understandings of indigenous identity as primitive, pre-contact or ‘authentic’. Numerous writers have urged indigeneity as a way of maintaining an indigenous rights stance based on dynamic indigenous identities after a history of colonialism; Roger Maaka and Augie Fleras see it as a response to the

necessity for Aboriginal people to be empowered to identify, effect and direct the changes which are required. The process of empowerment is at the same time the process of self-determination.”

RCADC, *National Report 2 - 20.1 The Reality of Control*; also, *Final Report of the Royal Commission into Aboriginal Deaths in Custody – A summary*, Part C, Chs 10-20. Compare RCAP, ‘Volume 1 - Looking Forward, Looking Back’, Ch. 13; Volume 2 - Restructuring the Relationship’, Ch. 6.

²⁵ Tully, J. 1995. *Strange multiplicity constitutionalism in an age of diversity*, Cambridge University Press, Cambridge, New York; Tully, J. 2000. The struggles of Indigenous peoples for and of freedom. In D. Ivison, P. Patton, and W. Sanders, Eds., pp. 36-59.

²⁶ See for example Walker, R. 1999. ‘Maori sovereignty, colonial and post-colonial discourses’. In *Indigenous peoples' rights in Australia, Canada, & New Zealand* (P. Havemann, Ed.), pp. 108-122. Oxford University Press, Auckland, Oxford.

stifling sovereignty of settler states.²⁷ Indigeneity also emphasises the need for indigenous peoples to contest not only their relative deprivation, but also the political and institutional spaces in which disadvantage and denial are embedded.²⁸

Implicit in this is the (re)politicisation of all points of indigenous-settler engagement. In so doing, there is a need to examine the way the democratic setting has already described or determined the opportunities for participation. Analysis of political space has proved fruitful by revealing the way the grounds of democratic argument and negotiation are presented as merely formal or unproblematic – and that this can only be so to the extent to which they have already been inhabited and ‘civilised’.²⁹ Political theorists since Foucault have pursued this, asking questions such as, “how authority comes to constitute, inscribe and invest itself in the different ways we produce true and false statements about who we are and who we should become.”³⁰

A consistent theme in societies committed to deal with minority claims using democratic means, is diversity. This is the reauthorisation, or relegitimation of liberal-democratic states through a form of recognition of others. Connolly offers an alternative explanation for this innovation, and theorises limits to its operation:

Diversity is valued because putative grounds of unity (in a god, a rationality, or a nationality) seem too porous and contestable to sustain a cultural consensus ... But what about the larger contexts within which the pattern of diversity is set? To what extent does a cultural presumption of the normal individual or the pre-existing subject precede and confine

²⁷ Roger Maaka and Augie Fleras. 1999. ‘Engaging with indigeneity: Tino Rangatiratanga in Aotearoa’. In D. Ivison, P. Patton, and W. Sanders, Eds, pp. 89-109.

²⁸ Barcham, M. 1999. ‘(De)Constructing the politics of indigeneity’, in *ibid.*; Fleras, A. 1999. ‘Politicising indigeneity: ethno-politics in white settler dominions’. In *Indigenous peoples' rights in Australia, Canada, & New Zealand* (P. Havemann, Ed.) Oxford University Press, Auckland, Oxford pp. 187-234; Maaka, R. C. A. and Fleras, A. J. 2000. ‘Reconstitutionalising indigeneity: Restoring the Nations within’. *Canadian Review of Studies in Nationalism* XXVII, pp. 111-130.

²⁹ Shapiro, M. J. 1992. *Reading the postmodern polity: political theory as textual practice*, University of Minnesota Press, Minneapolis, Ch. 1.

³⁰ Dean, M. 1996. ‘Foucault, government and the enfolding of authority’. In Andrew Barry, Thomas Osborne and Nikolas Rose (Eds) *Foucault and political reason: liberalism, neo-liberalism, and rationalities of government*, University of Chicago Press, Chicago, p. 212.

conventional pluralism? How are subjects territorialized by operational codes of conventional pluralism?³¹

Australian anthropologist Ghassan Hage's recent work, *White Nation*, makes this point from another direction. He explores the space in which the debate about immigration and multiculturalism is conducted in Australia, and is highly critical of the way multiculturalism has developed, as a form of inclusion that is already highly prescriptive: "White multiculturalism works to mystify, and to keep out of public discourse, other multicultural realities in which White people are not the overwhelming occupiers of the centre of national space."³² The problem, as others have noted, is the liberal virtue of tolerance.³³

Advocating tolerance always leaves the power to be intolerant intact; as Hage argues, "tolerance reasserts a belief in the capacity for intolerance."³⁴ However, developing Pierre Bourdieu's notion of 'strategies of condescension', Hage observes tolerance becoming "the symbolic negation of distance" between tolerator and tolerated. The liberal virtue of tolerance is on this reading an invitation not to exercise one's power in the absence of formal measures to ensure compliance.³⁵ Hage reviews the conventional attitude to tolerance, now seeing it as a threshold to acceptable experience, rather than a virtue somehow disconnected to exclusion.

Though they are obscured by the bonhomie of public multiculturalism, limits and boundaries always define the empowered spatiality of toleration.³⁶ So, both statements, 'I don't mind them' and 'I do mind them', exist as forces within the same field, a nationalist management of space. A 'national fantasy space' comprising differently-empowered categories is thus revealed. It enables white Australians to

³¹ Connolly, W. E. 1995. *The ethos of pluralization*, University of Minnesota Press, Minneapolis, p. xiii.

³² Hage, G. 1998. *White nation: fantasies of white supremacy in Australia*, Pluto Press, Sydney, p. 19.

³³ Goldberg, D. T. 1993. *Racist culture: philosophy and the politics of meaning*, Blackwell, Oxford, Cambridge, Mass., p. 7.

³⁴ Hage 1998. p. 86.

³⁵ *ibid.* p. 95.

³⁶ *ibid.* pp. 88-97.

classify from a position of national totality and dominance, repositioning and restricting tolerable 'others'.

Hage's analysis, while restricted to the issue of immigration and multiculturalism, allows some inferences to be made about the indigenous position: while a marker of nationality, it is always non-political, incapable of taking a governing position in national space. In this context, indigenes remain mere objects to be shifted around in the national space, according to notions of 'desirability' and their capacity to 'fit'. Eva Mackey has demonstrated the Canadian discourse which "utilises" the idea of Canada's tolerance and justice toward its minorities in order to construct a new national identity.³⁷ She has precisely the same concerns about the cultural domination of the 'inclusive' project as Hage:

(T)he presumption of its natural and universal authority – its entitlement – to define all others as 'cultural', marginal and subordinate to its unmarked centre, and to authorise which differences are allowed within its projects. It is their historically constituted authority to define when and how others may be similar or different that people defended with the discourses of reason, rationality, equality and progress.³⁸

On this basis a range of different modes of settler identity and will can be asserted, sponsoring strategies to deny any loss of control. Hage describes this latter-day nationalism as, a "constant struggle to eradicate not otherness as such, but the capacity for any otherness to constitute itself into a national counter-will."³⁹

Anthony Moran has recently provided a useful taxonomy to consider these questions.⁴⁰ Using arguments from psychoanalysis, particularly the work of Melanie Klein, Moran finds two types of nationalism in Australia: *assimilationist* and *indigenising* nationalisms. The former attempts to ingest, absorb and dissolve

³⁷ Mackey, E. 1999. *The house of difference: cultural politics and national identity in Canada*, Routledge, London, New York, p. 2.

³⁸ *ibid.* p. 161.

³⁹ Hage, p. 110.

⁴⁰ Moran, A. F. *Imagining the Australian nation : settler- nationalism and aboriginality*. 2000. Ph.D. Thesis, Dept. of Political Science, University of Melbourne, p. 127.

difference; the latter seeks to control difference through appropriation of it as a new form of identity.

Connolly has suggested that such tendencies within political projects of inclusion arise from a ‘congealment’ of the good: what has previously been achieved as reform is thought of in overly sanguine terms, while current reformist or pluralising agendas are seen as disruptive and contrary to the ‘stable pluralism’ in place.⁴¹ Connolly’s ontological approach – a concern with the type of *being* individuals come to have in particular places – rejects two assumptions: firstly, the view that the basic assumptions of modernity are universally held (for example, the route Kymlicka takes to his primary idea of ‘societal cultures’ as the basis of freedom). A second argument he refutes is the pastoral mode of hermeneutics, “a rhetoric of harmonization, responsiveness, articulation, depth, fulfilment, realization and community.”⁴² The positioning of true or authentic Aboriginality as passive or harmonious within a European-directed polity, sees precisely these two themes intersect. In the policies to be examined by this thesis, the approach is to seek or to manufacture a cultural consensus, one that can easily be portrayed as politically rational:

(T)hey fear that if no such basis is found for morality, the web holding society together will become unstrung ... There is too little emphasis, within this matrix, on the positive value of maintaining contending positions in a relation of restrained contestation.⁴³

Connolly’s work attempts to develop a notion of *ethos*, something to deploy in the space between the self and others. Where solidity cannot be taken for granted, there justice might be revealed or approached. He champions relationships and association over possessions, objects or characteristics perceived as such, and by so doing, the identity of the self is only completed in the context of mutable relations: “To alter your recognition of difference, therefore, is to revise your own terms of self-

⁴¹ This insight helps to explain, as I discuss in Chapter 2, the way many Australians misunderstand the significance of the 1967 referendum that empowered the federal government to make laws pertaining to Aboriginal people and for their inclusion in the national census.

⁴² Connolly 1995. p. 13.

⁴³ *ibid.*, p. 12.

recognition as well ... The ethos of critical responsiveness ... does not reduce the other to what some 'we' already is."⁴⁴

This is a view that places a high value on uncertainty and ambiguity – the risky encounter essential to democratic life. In my study of reconciliation and treaties I focus closely on the desire for 'certainty' that is expressed repeatedly. While certainty can be understood as a commitment to 'consensus' or 'rationality', it is not easily drawn from a desire to build new relationships between peoples and across difference.

In measuring the effectiveness and ethics of the relationship-building policies of reconciliation and treaties, it is fruitful to use these theorisations. A crucial question to ask of these projects is what new relationships will mean for the old patterns of relating. Considering these policies as attempts to open or redefine the political spaces in which to develop new relationships, reveals the deeply sedimented character of old relationships.

Treaties and reconciliation; British Columbia and Australia

Many writers have addressed the patterns of relating between indigenous and settler peoples from empirical positions, acknowledging that the chief setting for indigenous claims is likely to remain the nation-state for some time. That is, the long tradition of reaching agreements between settler nation-states and indigenous peoples is likely to continue. A massive historical literature exists on such treaties, much of it explaining the rationale of settlers, and documenting the practice of treaty-making in early colonial North America.⁴⁵

⁴⁴ *ibid.*, pp. xvi-xvii.

⁴⁵ Brown, G., Maguire, R., Canada, Indian and Northern Affairs, Corporate Policy, and Research Branch 1979. *Indian treaties in historical perspective*, Indian and Northern Affairs Canada, Ottawa; Jansen, C. 1991. 'French sovereignty and native nationhood during the French regime'. In *Sweet promises: a reader on Indian-White relations in Canada* (J. R. Miller, Ed.), pp. 19-42. University of Toronto Press, Toronto; Trigger, B. G. and Swagerty, W. R. 1996. 'Entertaining strangers: North America in the Sixteenth century'. In *The Cambridge history of the native peoples of the Americas* (B. G. Trigger and W. E. Washburn, Eds.), pp. 325-398. Cambridge University Press, Cambridge, New York;

Other writing on treaties has questioned their integrity and effectiveness as mechanisms to ensure indigenous rights and to enable the maintenance of healthy and secure indigenous identities.⁴⁶ Typical is the work done on the neglect of agreements made in plains Canada.⁴⁷ Robert Williams' work *Linking arms together*, demonstrates the different standpoint of indigenous people, who saw treaties as an opportunity for sharing 'the common bowl'.⁴⁸ Barsh and Henderson have also documented the conflicting rationales for treaty-making.⁴⁹

A number of works have explored the way that constructed images of Indians were built into the rationalisations for dispossession, particularly those of indigenous

Jennings, F. 1984. *The ambiguous Iroquois empire the Covenant Chain confederation of Indian tribes with English colonies from its beginnings to the Lancaster Treaty of 1744*, Norton, New York, esp. Ch. 5, pp. 58-64 and Ch. 19; Hagan, W. T. 1979. *American Indians*, University of Chicago Press, Chicago, Ch. 2, pp. 39-73; Prucha, F. P. 1994. *American Indian treaties: the history of a political anomaly*, University of California Press, Berkeley, pp. 41-84; John Leonard Taylor, 'Canada's North-west Indian policy in the 1870s: traditional premises and necessary innovations', In Miller 1991b, pp. 207-211; Prucha, F. P. 1986. *The great father the United States government and the American Indians*, University of Nebraska Press, Lincoln Neb., London, pp. 44-60; Miller, J. R. 1991a. *Skyscrapers hide the heavens: a history of Indian-white relations in Canada*, University of Toronto Press, Toronto ; Buffalo, pp. 35-58; Shannon, T. J. and New York State Historical Association 2000. *Indians and colonists at the crossroads of empire: the Albany Congress of 1754*, Cornell University Press. New York State Historical Association, Ithaca, N.Y., Cooperstown, Chs 4-6.

⁴⁶ Jones, D. V. 1982. *License for empire: colonialism by treaty in early America*, University of Chicago Press, Chicago, pp. 93-119 and pp. 157-186; Miller 1991a, pp. 152-188; Merrell, J. H. 1999. *Into the American woods: negotiators on the Pennsylvania frontier*, Norton, New York, esp. Ch.7, pp. 253-301; Prucha, 1994, pp. 334-358; Jacobs, W. R. 1972. *Dispossessing the American Indian: Indians and whites on the colonial frontier*, Charles Scribner's Sons, New York, pp. 151-172; Samson, C. 1999. 'The dispossession of the Innu and the colonial magic of Canadian liberalism'. *Citizenship Studies* 3, pp. 5-23.

⁴⁷ Taylor, J. L. 1987. 'Two views on the meanings of Treaties Six and Seven'. In *The Spirit of the Alberta Indian treaties* (R. Price, Ed.), pp. 9-45. Pica Pica Press, Edmonton, pp. 9-45; Daniel, R. 1987. 'The spirit and terms of Treaty Eight'. In *ibid.*, pp. 47-100; Spry, I. M. 1983. 'The tragedy of the loss of the commons'. In *As long as the sun shines and water flows: a reader in Canadian native studies* (A. S. Lussier and I. A. L. Getty, Eds.), pp. 203-228. University of British Columbia Press, Vancouver.

⁴⁸ Williams, R. A. 1997. *Linking arms together: American Indian treaty visions of law and peace, 1600-1800*, Oxford University Press, New York, pp. 126-137.

⁴⁹ Barsh, R. L. and Henderson, J. Y. 1980. *The road: Indian tribes and political liberty*, University of California Press, Berkeley, pp. 31-49.

‘infancy’ or childishness.⁵⁰ Howard Adams has written about how such rationalisations were experienced by indigenous people, as have Vine Deloria and Clifford M. Lytle.⁵¹

Regarding the particular experience of British Columbia, the literature is somewhat less extensive. While much anthropological and historical work has been done⁵², the question of indigenous political organisation and rights is under-researched.⁵³ The exception remains Paul Tennant’s *Aboriginal peoples and politics: the Indian land question in British Columbia, 1849-1989*. On the current treaty process, the only extended study remains Christopher McKee’s general introduction, *Treaty Talks in British Columbia: Negotiating a mutually beneficial future*. Korsmo has recently explored the state’s representations of itself in indigenous rights debates in BC.⁵⁴ However, the question of treaties in BC as relationship-building policies has not been consciously addressed.

Very little scholarly material yet exists on reconciliation as pursued in Australia. Much of what has been done consists of biographical or personal reflections.⁵⁵ A number of earlier works have been updated to deal with the emergence

⁵⁰ Wallace, A. F. C. 1999. *Jefferson and the Indians: the tragic fate of the first Americans*, Belknap Press of Harvard University Press, Cambridge, Mass., Ch.3-4; Rogin, M. P. 1975. *Fathers and children: Andrew Jackson and the subjugation of the American Indian*, Knopf : distributed by Random House, New York.

⁵¹ Adams, H. 1995. *A tortured people: the politics of colonization*, Theytus Books, Penticton, B.C., pp. 25-45; Deloria, V. and Lytle, C. M. 1984. *The nations within: the past and future of American Indian sovereignty*, Pantheon, New York, pp. 7-15, Ch. 2.

⁵² Duff, W. and Royal British Columbia Museum 1997. *The Indian history of British Columbia: impact of the white man*, Royal British Columbia Museum, Victoria; Fisher, R. 1977. *Contact and conflict: Indian-European relations in British Columbia, 1774-1890*, UBC Press, Vancouver; Seguin Anderson, M. 1995. ‘People of salmon and cedar’. In *Native peoples the Canadian experience* (R. B. Morrison and C. R. Wilson, Eds.), McClelland & Stewart, Toronto; Harris, R. C. 1997. *The resettlement of British Columbia essays on colonialism and geographical change*, UBC Press, Vancouver, esp. Chs 1-3, 5.

⁵³ A paper prepared for the Canadian federal government in 1981 discusses the few treaties that have relevance in British Columbia: Madill, D. *British Columbia Indian treaties in historical perspective*. 1981. Ottawa, Research Branch, DIAND.

⁵⁴ Korsmo, F. 1999. ‘Claiming memory in British Columbia: Aboriginal rights and the state’. In *Contemporary Native American political issues* (T. R. Johnson, Ed.), AltaMira Press, Walnut Creek Calif., pp. 119-134.

⁵⁵ Tickner, R. E. 2001. *Taking a stand: land rights to reconciliation*, Allen & Unwin, Sydney, esp. Chs 2 and 16; Gordon, M. 2001. *Reconciliation: a journey*, UNSW Press, Sydney; Grattan, M. 2000.

of reconciliation in the 1990s, such as David Day's *Claiming a continent* and Scott Bennett's *White politics and black Australians*. Some have translated spiritual and environmental projects into the new idiom: "a geocentric reconciliation ... a sacred geography; a place of connections; a series of homelands; a terrain pitted with violence, sudden death and extinctions; a maze of intersecting vectors of love."⁵⁶ One writer considered reconciliation before it was officially in existence, presciently warning that for indigenous people, "reconciliation can seem like yet another way of bringing them into a state of acquiescence."⁵⁷ Most scholarship has been critical or equivocal at best.⁵⁸

However, a large body of work emerged during the 1990s on the pursuit of reconciliation between peoples in the context of oppressive colonial relationships. Much of this has focused on the South African experience through its Truth and Reconciliation Commission.⁵⁹ Here reconciliation is considered in the context of acts of recent violence that may be pursued through a criminal process. Each emphasises the need for comprehensive, shared understandings of the discriminatory and violent practices that had taken place, and prioritises the voice of the victims in this process. In Australia, I will argue that the notion of victims and victimhood is now often inverted; whereas in South Africa, the victims were the centrepiece of the truth and reconciliation process and their moral power was undeniable. There is also an

Reconciliation: essays on Australian reconciliation, Bookman Press, Melbourne; Bunbury, B. and Australian Broadcasting Corporation 1998. *Unfinished business: reconciliation, the republic and the constitution*, ABC Books, Sydney.

⁵⁶ Bird Rose, D. 1999. 'Social justice, ecological justice'. In *Reconciliation: voices from the academy* (L. Manderson, Academy of the Social Sciences in Australia, and Symposium, Eds.), Academy of the Social Sciences in Australia, Canberra, p. 31.

⁵⁷ Brady, V. *Towards reconciliation? National Council for Reconciliation*. Briefing Paper 3. 1991. Indian Ocean Centre for Peace Studies, p. 7.

⁵⁸ Jacobs, J. 1997. 'Resisting reconciliation: the secret geographies of post-colonial Australia'. In *Geographies of resistance* (S. Pile and M. Keith, Eds.), Routledge, London, New York, Ch. 10; Moran, A. F. 1998. 'Aboriginal reconciliation: transformations in settler nationalism'. *Melbourne Journal of Politics* 25, pp. 101-131; Colin Tatz 1998. 'The Reconciliation bargain'. *Melbourne Journal of Politics* 25, pp. 1-8; de Costa, R. 2000. 'Reconciliation or identity in Australia'. *National Identities* 2, pp. 277-291.

⁵⁹ Boraine, A. 2000. *A country unmasked*, Oxford University Press, Cape Town, New York, esp. Chs. 1 & 10; Deegan, H. 2001. *The politics of the new South Africa: apartheid and after*, Longman, Harlow, England, New York. For a personal account, see Krog, A. 1998. *Country of my skull: guilt, sorrow, and the limits of forgiveness in the new South Africa*, Times Books, New York.

extensive literature that attempts to theorise notions of restitution in a decolonising context.⁶⁰ Though these literatures on national memory, reconciliation and transitional justice have flourished in response to the recent decline or collapse of racist or totalitarian regimes, their lessons are still relevant for Australia: they stress the importance of the victims' position and the requirement that reconciliation be explicitly linked to justice. It is the task in part, to apply these tests to the Australian case, asking has reconciliation led from a shared understanding of national identity to restitution for the injustices of that history? Will it lead to the recognition of indigenous rights?

A comparative interest in the practices of Australia and Canada on indigenous affairs is a dynamic literature indeed (often in combination with the New Zealand case). The reasons for this are fairly obvious: both Canada and Australia are former British colonies with large land masses and historically resource-dependent economies. They share climatic extremes and many demographic similarities, particularly the uneven distribution of their populations. The system of common law applies in both countries and their federal constitutional arrangements are highly similar. The institutional and cultural proximity of the two countries is therefore compelling. In addition, the study of reconciliation and the British Columbia treaty process allows a focus on contemporaneous policies, both of which are the culmination of events throughout the 1980s and which commenced in the early 1990s.

However, there are significant differences between the two policies analysis of which will require different methods. Reconciliation's goals are much more diffuse than those of British Columbia's treaty process, where a concluded treaty is a textual statement of indigenous rights protected under s.35 of the Canadian constitution. The

⁶⁰ Barkan, E. 2000. *The guilt of nations: restitution and negotiating historical injustices*, Norton, New York; Minow, M. 1998. *Between vengeance and forgiveness: facing history after genocide and mass violence*, Beacon Press, Boston, Chs 4-6; Guttman, A. and Thompson, D. 2000. 'The moral foundations of truth

passage toward the specific document of a treaty, through a clearly-defined six-stage process of meetings and discussion, can be monitored in a straightforward manner. The research of this thesis combines observation of those meetings, textual analysis of the supporting documentation and a series of in-depth interviews with key participants.

Researching reconciliation, specificity is contingent on particular choices: there is no six-step program that has as its unambiguous goal ‘reconciliation’. The choice made for this thesis was to examine the usage of the concept in both national and political debates, as well as in personal and local settings, those of the ‘community’: how have Australians internalised the idea of reconciliation in these various settings, and do these responses offer any coherence? Some interviews were conducted for this research but the prevailing method is textual analysis of the statements and writings of participants in and observers of the reconciliation process.

The variations in approach and method are minimised by the chapter structure: Chapters 2 and 6 provide the historical background to reconciliation and treaties respectively; Chapters 3-4 and 7-8 provide substantive analysis of the policies as they developed through the 1990s. Chapters 5 and 9 offer an analysis of the likely prospects of each policy as a relationship-building exercise in the early twenty-first century.

The purpose of this thesis is not then contrastive. It attempts to move beyond the differences in the way Australia and British Columbia have responded to indigenous claims, to posit the existence of significant similarities in each policy’s attempts to create new relationships. It does this through an analysis of the political spaces each attempts to create and control.

commissions’. In *Truth v. justice: the morality of truth commissions* (R. I. Rotberg and D. Thompson, Eds.), pp. 22-44. Princeton University Press, Princeton, N.J.

2.

The reconstruction of Australian identity

The pre-history of reconciliation

Reconciliation in Australia is a concept, a word, a national policy and a social movement. It stimulates Australians to learn about the circumstances of other people that live in their country, particularly for settler people to learn about the experiences and situation of indigenous people. It consciously seeks to build a ‘shared history’ – a new national story that unifies through its courage to tell long-buried truths. It asks individual Australians to take this new-found knowledge and historically-informed solidarity into their homes, their workplaces and social lives. That is, reconciliation hopes to alter the individual values and behaviour of Australians through experiences that are collective or shared in diverse contexts. Such alteration is hoped will enable proper recognition of indigenous peoples and create a new relationship between them and settlers. The reconstruction of Australian identity precedes the recognition of indigenous peoples – it enables it.

This is the breath-taking ambition of reconciliation. Before establishing this and considering the extent to which Australian personal and national identities have been changed, an account of the genesis of reconciliation is necessary.

The philosophical ancestry of reconciliation can be found in the first sustained attempts to bring Australia into alignment with other ex-colonial nations, by seeking an agreement between indigenous and settler peoples. Those calls for a treaty were made in 1979. Since that time, the idea of an agreement has flitted through the political landscape of this country, sometimes taking centre stage, but mainly existing in shadow. Reconciliation as the reconstruction of Australian identity is charted from that point in 1979 up until the introduction of the Council for Aboriginal Reconciliation Act (1991). A very specific understanding of new indigenous-settler

relations became dominant in this period: that is, that settler Australians must reach a stage of enlightenment as precursor to indigenous recognition.

Apparently Aboriginals have used the concept of reconciliation since the 1960s.¹ Journalist John Pilger used it at several points in his 1985 book and documentary film *The secret country*. However, it becomes an idea central to indigenous affairs in Australia in the late 1980s, when it provides a political escape route from the rigidities of the Australian debate over treaties or an agreement.

Any call for an agreement between indigenous and settler peoples articulates two phenomena: first, the claim expresses awareness and acceptance of a history of such agreements – the recognition of the responsibility of colonial powers to the peoples whom they encountered and dispossessed was sensible to the Australian Senate in 1983: “Demands for some form of a treaty have their conceptual basis in the absence of any negotiated agreement by Aboriginal people to the British occupation and settlement of Australia and the subsequent dispossession and ill-treatment of the Aboriginal people by the settlers and their descendants.”²

Secondly, for indigenous peoples an agreement is always the basis for ensuring their autonomy: it expresses the intention to create or maintain a political space free from the vagaries and whims of the colonial power; the very essence and foundation of self-determination.³ That right to autonomy, when recognised by settler institutions,

¹ This is the claim of CAR member Jackie Huggins. ‘An evening with Jackie Huggins’, Speech to Sutherland Shire Reconciliation Community Leaders Meeting, Gympie, NSW (October 5, 2000).

² Australia, Parliament, Senate, and Standing Committee on Constitutional and Legal Affairs 1983. *Two hundred years later: report by the Senate Standing Committee on Constitutional and Legal Affairs on the feasibility of a compact or 'Makarrata' between the Commonwealth and Aboriginal people*. Australian Govt. Pub. Service, Canberra (hereafter the Senate Report), p. 12. The impetus for indigenous-settler agreements in both history and international law is explored at length in Chapter 1.

³ In his submission to the Senate Report, Garth Nettheim addressed the need to achieve “the sort of security... that the importance of such a document requires.” p. 69.

creates the basis for the latter's legitimacy. This is the politics of consent.⁴ Tim Rowse has observed this argument in the political thought of Nugget Coombs, which he evaluates in the following terms:

The essential move in Coombs' argument was to imagine that in the moment of the treaty's signing, ceded Aboriginal sovereignty would become the substance of non-Aboriginal legitimacy ... (Coombs) urged Indigenous Australians to set a high price for this transfer of symbolic substances.⁵

Elsewhere, Rowse has wondered about both the validity and practicality of such an approach, under which, "indigenous Australians are understood to claim an uncompromised power to grant or withhold consent to non-indigenous use of the continent." Rowse argues that an amicable or courteous exchange of consent is no longer possible; he wonders over what issues 'consent' is still a useful political claim.⁶ This chapter documents the problems faced by indigenous peoples and manipulated by mainstream political leaders when translating the politics of consent "into short and medium term objectives which have some prospects of success."⁷

Prior to narrating this history, an understanding of the ideological productivity surrounding events in the reform of indigenous affairs is necessary. Recent thinking about the 1967 referendum indicates that for many that moment has taken a retrospective importance in the reconciliation process. As Andrew Markus has observed that, "markers are so difficult to find on the field of desolation that is the

⁴ Both these ideas are accepted in an early discussion document produced by the government. Department of the Prime Minister and Cabinet, *Aboriginal reconciliation – an historical perspective* (1991) <http://www.austlii.edu.au/au/other/IndigLRes/1991/2/> (April 2, 2002).

⁵ Rowse, T. 'An Australian treaty, then (1979-83) and now'. (August 2000) ms, p. 22.

⁶ Rowse, T. 1994. The principles of Aboriginal pragmatism. In *Make a better offer: the politics of Mabo* (M. Goot and T. Rowse, Eds.), Pluto Press, Sydney, pp. 185–186.

⁷ *ibid.*, p. 186.

history of Aboriginal-White relations.”⁸ There is a need to amplify those few events that could possibly be seen as the basis for change.

Consequently the change brought through the referendum of May 1967 is written large into cultural history. The two most significant events of the official reconciliation process - the Australian Reconciliation Convention of 1997, and Corroboree 2000 - were both held on the anniversary of that referendum as an explicit recognition of its impetus.⁹ Reflecting on his own contribution, Robert Tickner (Minister for Aboriginal and Torres Strait Islander Affairs in the Keating government) saw 1967 as, “a template for what I later hoped to achieve with the Council for Aboriginal Reconciliation Act.”¹⁰ The historians Bain Attwood and Andrew Markus have explored 1967 remembrance at length, noting both the original distortions among pro-referendum campaigners as well as the subsequent mythologising:

With the exception of the first decade after the referendum - when there was much disillusionment about its value among its proponents, particularly Aborigines whose expectations had been raised so high - the passing of time has seen the precise terms of the referendum disappear from historical consciousness, only to be replaced by myths which uncannily resemble the campaigner’s representations of it at the time.¹¹

While the ‘1967 effect’ may be no different to other tendencies for nostalgic distortion, it does put a spotlight on the critical point to be explored in these chapters:

⁸ Markus, A. 1994. *Australian race relations 1788-1993*, Allen & Unwin, St Leonards, NSW, p. 177.

⁹ Many speakers during that conference invoked the referendum, without exploring what it might mean: Then Democrats Leader Cheryl Kernot made a typical reference: “Thirty years after the historic referendum of 1967 it’s important to recognise what’s at stake for our nation.” Council for Aboriginal Reconciliation 1997. *Australian Reconciliation Convention: The Australian Reconciliation Convention, the peoples movement for reconciliation, proceedings of the Australian Reconciliation Convention, 26-28 May 1997*, Council for Aboriginal Reconciliation, Kingston ACT (hereafter ARC 1997). Mick Dodson, speaking at Corroboree 2000 offered a critical view: “In 1967 a Referendum was held which arguably killed off the assimilation policy and the sinister laws supporting it, but it did not stop the removals and it did not stop assimilationist thinking. Our high hopes of a ‘bran nue dae’ were dashed and our aspirations were plunged into darkness.” Corroboree 2000, Sydney (May 27, 2000).

¹⁰ Tickner 2001, p. 9.

¹¹ Attwood, B., Markus, A., Edwards, D., Schilling, K., and Australian Institute of Aboriginal and Torres Strait Islander Studies 1997. *The 1967 referendum, or, When Aborigines didn't get the vote*, Aboriginal Studies Press, Canberra, p. 65.

the belief amongst settler Australians that an initial alteration in their own self-perception and historical memory would precede change for indigenous peoples.

The ideological and cultural production that now surrounds the 1967 referendum, including the startling errors maintained in recent journalism, scholarship and creative work¹², is surely indicative of this inflation of claims. Typically, what is remembered is that the vote bestowed citizenship and/or the right to vote. That ‘achievement’, and by such a massive majority, was obviously a much greater act of national maturity than merely allowing indigenous people to be counted in the census and to be the objects of Commonwealth legislation, which is what actually took place. Former Prime Minister Bob Hawke described the referendum result as “the first formal recognition of the special position of the Aboriginal and Islander people.”¹³ In fact it removed all reference to indigenous peoples from the Constitution. That Hawke invoked the referendum to conjure support for one of the many non-binding statements of indigenous recognition in Australian political history, attests to the extent of the ‘1967 effect’.¹⁴

Of course, the importance of indigenous peoples participating in a national political campaign should not be underestimated,¹⁵ but visible in that willingness to make error and to inflate the consequences of 1967 is an intention that finds its apotheosis in the idea of reconciliation: the desire of Australians to resume authorship of their identity and destiny as a people; to see themselves reflected in their generosity

¹² Some amongst the many who should know better: Barry Cohen, P.P. McGuinness, Charles Perkins, Mike Seccombe, Peter Howson, Tony Stephens and Tim Winton. See Attwood, B. and Markus, A. 1998. Representation matters: the 1967 referendum and citizenship. In *Citizenship and indigenous Australians: changing conceptions and possibilities* (N. Peterson and W. Sanders, Eds.). Cambridge University Press, Melbourne, pp. 118 - 140.

¹³ Hawke, R.J.L. *Commonwealth Parliamentary Debates*, House of Representatives (August 23 1988), p. 137.

¹⁴ The speech was in support of the first resolution of the new Parliament House. Indeed Hawke moved the motion on August 23, 1988. The issues involved in that resolution are discussed below.

¹⁵ Attwood and Markus et al, 1997. See particularly Chapters 5-8 and Postscript. The writers make the claim that the only indigenous people to whom the referendum was relevant were those involved in the campaign with organisations such as FCAATSI, p. 53.

toward Aboriginal peoples and their inclusion of them; a mature people finally honest to their self-descriptions.

So, reconciliation as a ‘reimagining of the nation’ is hardly altruistic. Though we shall see that the idea for some is meaningless without substantial social justice for indigenous people, it is not true for all supporters of reconciliation. Few are able to avoid the attempt to muster support for reconciliation without the appeal to the anniversary of a heavily mythologised event. As sober a commentator as Frank Brennan fell victim to the ‘magic date’ syndrome, when in 1991 he projected forward to the centenary of Federation: “looking ahead to the next big date on the national calendar (sic)... we need to do more so that even Aborigines might be proud to proclaim that we are ‘living together’ in this land.”¹⁶

Notions of celebration and anniversary do not usefully lend themselves to programs of reform. The very idea of commemorating 100 or 1000 years of the existence of any institution is an endorsement of the orthodox narrative. In the case of a nation it is a testament to its durability, that something right was done and that those now celebrating are the beneficiaries. It would be absurd to insist that Australia as a society is a failure, it manifestly is not. But a policy that would require a fundamental re-evaluation of national history, and for that re-evaluation to coincide with a moment of anniversary, must be a policy that was destined to fail: “Pride and shame are opposite ends of the spectrum.”¹⁷

First, I offer a straight narration of the significant events in the debates about an agreement between indigenous and settler peoples in Australia. Then, I consider three themes that develop the idea that there are real limits to both the scope of an agreement and the character of indigenous autonomy: the limits in the approach of the two main parties, the ALP and the Coalition (Liberal-National); a consideration of

¹⁶ Brennan, F. 1994. *Sharing the country*, Penguin, Melbourne, p. 90.

indigenous diversity and the internationalisation of indigenous claims; and finally a reflection on three commissions of inquiry that addressed the issue of an agreement and their recommendation to transfer the burden of an agreement onto the Australian public. These three themes help explain how the push for a substantial recognition of rights and obligations turned into the less material process of reconciliation.

They also illustrate the perpetual problem faced by indigenous people in Australia: the fact that frequently when their concerns are discussed they are overwhelmed by the concerns of settlers. The lack of a bill of rights, or a treaty, or some other constitutionally protected instrument will mean that this remains the case. That very idea of the need for consent had only been a minor current in Australia from the earliest days of the colonies.¹⁸ The relationship between a formal document and the concept of reconciliation, in particular the ability for one to prevent or promote the other, was to become a key battleground in contemporary life.

Chronology of events

Neville Bonner's resolution in the Senate in February 1975 called for acceptance of prior occupancy and the payment of compensation.¹⁹ It was passed unanimously, and was frequently to be invoked as a 'starting point' for negotiations.²⁰ The ALP was to invoke it in years to come as a reminder to the Coalition of its history. 1979 is recalled as the beginnings of the modern debate about treaties in Australia, in a period when the cries of Aborigines for justice were answered by settlers concerned about the

¹⁷ Jones, B. ARC 1997, 'Seminar Session 3: Documents of Reconciliation and Constitutional Issues, Participation in Government'.

¹⁸ There was no requirement of the first colonial governor to seek a formal document, though events following settlement were to indicate 'official ambiguity' over the consequences of the arrangement. See Reynolds, H. 1999. 'New frontiers'. In *Indigenous peoples' rights in Australia, Canada and New Zealand* (P. Havemann, Ed.), Oxford University Press, Auckland, pp. 129-140.

¹⁹ Bonner was the first indigenous member of the federal parliament, a Coalition Senator appointed in 1971 to the Senate by the Queensland government to fill a casual vacancy. He was the first of two indigenous representatives in over one hundred years of the institution.

²⁰ Senate Report, p. 12.

fairness of their society. In the space of a few months in 1979, both the elected National Aboriginal Conference (NAC) and the settler collective, the Aboriginal Treaty Committee (ATC), argued the need for an agreement. The NAC passed a resolution in April 1979, calling for a treaty that would:

... be executed between the Aboriginal Nation and the Australian government. The NAC request, as representatives of the Aboriginal people, that the Treaty should be negotiated by the NAC. Accordingly resolved that we immediately convey our moral, legal and traditional rights to the Australian government and that we immediately proceed to carry from our people the suggested areas to which the treaty should be relevant and that we proceed also to draft a Treaty and copies of the Motion to be sent to the Prime Minister and to all members of the Australian parliament.²¹

Negotiations were to take place after indigenous people presented their rights claims to government, rather than be discussions about what those rights were. The ATC was concerned to make public their demand for a treaty, taking out a large advertisement in *The National Times* of August 25, 1979. In it, the ATC – whose supporters included Geoffrey Blainey, Richard Alston and Mary Durack – called on the government to:

... enable the National Aboriginal Conference to summon a convention of representatives nominated by Aboriginal communities ... who would propose the bases of negotiation and how any settlement should be confirmed ... organise the negotiations ... (and) submit any Treaty, Covenant or Convention to Parliament for ratification.²²

The subject matter of the treaty should include agreement as to the protection of Aboriginal cultural, language and land rights, control over mining on traditional territories, compensation for loss of lands and damage to traditional modes of life, and the right to self-determination.²³ ATC Committee Chairman H.C. Coombs was later to characterise their efforts as a way to “help bring an end to two hundred years of

²¹ NAC, ‘Makarrata Report’, extracted in Senate Report, p. 14.

²² Harris, S. and Aboriginal Treaty Committee 1979. *"It's coming yet ..." an Aboriginal treaty within Australia between Australians*, Aboriginal Treaty Committee, Canberra, p. 13.

²³ *ibid.*

aggression, injustice and inhumanity towards the Aboriginal people of this land.”²⁴ A book published in late 1979 by an ATC member argued the oddity of Australian history in this matter given events in Canada, the United States, New Zealand and even Papua New Guinea.²⁵ An understanding of any agreement as both historically necessary and the basis for indigenous autonomy was very much part of the ATC approach.

At this initial moment neither the Coalition Commonwealth Government nor the Opposition ALP opposed the concept in principle. Harris suggests that there had been some thinking within Labor circles prior to this, citing discussion papers that did not resile from the suggestion that a treaty should include “compensation ... (and) transfer of property,” in a manner to be negotiated.²⁶ Fraser indicated his “preparedness to discuss the concept of a treaty,”²⁷ and at a dinner in early 1980 organised for NAC representatives he “welcomed the makarrata initiatives.”²⁸

Brennan suggests that early pressure from the government convinced the NAC to change their claim from a Treaty of Commitment to a ‘makarrata’.²⁹ In March 1981, the government communicated to the NAC its discomfort with the word ‘treaty’, based on advice it had from the Attorney-General. That advice relied on the judgment in *Coe v The Commonwealth*, which ruled out the possibility that Aboriginal people were a nation in international law.³⁰ Earlier, however, the NAC had adopted the term ‘makarrata’. At the same time the NAC executive created a Makarrata subcommittee

²⁴ Coombs, H. C. *A treaty with Aboriginal Australians*. 1979. Canberra, Centre for Resource and Environmental Studies. Working Paper., p. 1. See also Rowse 2000 and Rowse 2001. ‘The treaty debate 1979-83’, ms.

²⁵ Harris 1979, pp. 13-19.

²⁶ ALP Aboriginal Policy 1978, cited in *ibid.*, pp. 73-74.

²⁷ Letter to Kevin Gilbert, provided in Department of Aboriginal Affairs submission, no. 16, to Senate Report, p. 14.

²⁸ *ibid.* pp. 15-16.

²⁹ A Yolngu word meaning roughly ‘cessation of hostilities’. Its appropriateness was questioned vigorously at the time. See below. Also Rowse 2000.

which would consult with Aboriginal people for 18 months in order to establish the indigenous position. In July of 1980, the NAC sub-committee issued an interim report, broadly outlining the main objects of concern.³¹ Compensation would take the form of mandatory Aboriginal education to recover culture, as well as the return of sacred sites and lands currently occupied by tribal people, and the transfer of reserves to inalienable freehold. There was also need for dedicated seats in Parliament, the public honouring of black history, affirmative action quotas in the public service, and the return of all indigenous artefacts.³²

In response the Minister for Aboriginal Affairs, Chaney, outlined the government position: negotiations would have to take place on the basis of “the special place of ATSI people within Australian society as part of one Australian nation.” On this point Chaney approved of the shift to makarrata. He also indicated that the Commonwealth was not prepared to act unilaterally: the question of land rights would have to be taken up with the States. Compensation, reserved seats and affirmative action were not considered appropriate.³³ The Chairman of the NAC sub-committee responded by saying that the government response would not prevent them from pursuing their agenda. Later that year they submitted further claims for tax exemptions, five per cent of GNP over 195 years as compensation, and ‘substantial’ freehold title over lands, resources and housing currently occupied by indigenous people.³⁴

A week prior, the government had referred to the Senate Standing Committee on Constitutional and Legal Affairs the entire matter of an agreement between

³⁰ “(T)here is no aboriginal nation, if by that expression is meant a people organised as a separate State or exercising any degree of sovereignty.” *Coe v. The Commonwealth of Australia and the Government of Great Britain and Northern Ireland* (1979) 53 ALJR 403, (1979) 24 ALR 118, at para. 22.

³¹ Senate Report, pp. 15-16.

³² *ibid.*, p. 17.

³³ *ibid.*, p. 18.

³⁴ *ibid.*, p.19. Some of the demands, including the construction of compensation as a proportion of GDP, had been first put forward by the activists involved in the Aboriginal Tent Embassy from 1972.

indigenous and settler Australians.³⁵ Rowse suggests this “was a measure of the impact of the treaty debate.”³⁶ The report, *Two hundred years later...* (hereafter the Senate Report), began from the premise that “traditional perceptions of the historical relationship between Aboriginal and non-Aboriginal people from the time of European settlement in this country require reappraisal ... (there was) a growing appreciation of evidence” that the orthodox story was no longer adequate.³⁷ During the hearings of that Committee on the issue and in subsequent material the NAC put a more developed position: indigenous sovereignty was asserted, and a strong sense of self-determination could be realised by indigenous people ‘governing themselves’. Several options were available, notably that of ‘international sovereignty’ arriving in a process of devolution or trusteeship; an addition to the federal system (such as occurred in Canada with the creation in 1999 of the territory of Nunavut); and modifications, such as the creation of regional governing structures based on existing communities holding powers similar to those of local government.³⁸

The Senate Report considered four legal positions for an agreement: a treaty in international law; an agreement that was constitutionally embedded; a legislative agreement; and a simple agreement or contract.³⁹ The first was rejected on the grounds that Aboriginal people did not constitute a nation. There is also explicit rejection of the first fundamental rationale for an agreement, the argument from historical practice: “not a great deal is to be achieved in attempting to see these past treaties as precedents for a compact between Aborigines and the Commonwealth.”⁴⁰

The legislative option was also considered, that is legislating under existing Commonwealth heads of power in Section 51 of the Constitution: (subsection xxvi)

³⁵ “An examination of the feasibility, whether by way of constitutional amendment or other legal means, of securing a compact or ‘Makarrata’ between the Commonwealth Government and Aboriginal Australians.” Terms of Reference of Senate Report, p. 2.

³⁶ Rowse 2000.

³⁷ Senate Report, pp. 7-12.

³⁸ Brennan 1994, pp. 62-63.

³⁹ Senate Report, pp. 29-30.

the ‘races power’; (xxix) the ‘external affairs power’; or (xxvii) the power to legislate on matters referred by the States. Of the races power the report concluded that after the 1967 referendum “the Commonwealth parliament was in no way precluded from taking unilateral action.”⁴¹ However, the Committee saw “obvious political limitation,” given that any statute would remain subject to subsequent parliamentary scrutiny. Undoubtedly, the Committee was contemplating an agreement that would exist in a realm of special protection – legislative review represented a “serious drawback to the use of existing powers as a method of implementation.”⁴² A similar concern was expressed over using the external affairs power, while the power in subsection xxvii was thought unlikely to arise due to the “inability of States to agree.”⁴³

The simple agreement or contract proposal was also explored, but problems were thought likely to arise over the question of enforcement and whether a highly technical contract would be understood by indigenous peoples. Finally it was indicated that such an agreement would be in the same position as the legislative option regarding the security of the agreement itself.⁴⁴

What that left was an agreement with explicit Constitutional support: an amendment of the type already successful in section 105A that gave power for the Commonwealth to enter into financial agreements with the States.⁴⁵ The advantages were clear. Such an agreement would be protected from “any damage due to short-term political and social expediency,” and it would enjoy the special status gained from the prior commitment of Australian electors to the concept of a compact. However, there was a problem:

(T)here was widespread lack of information and understanding among Aboriginal communities of the idea of a compact between Aboriginal people and the Commonwealth ... The Committee

⁴⁰ *ibid.*, p. 58.

⁴¹ *ibid.*, p. 83.

⁴² *ibid.*, p. 93.

⁴³ *ibid.*, pp. 103-104.

⁴⁴ *ibid.*, p. 112.

⁴⁵ Section 105A – This section was inserted by the *Constitution Alteration (State Debts) Act 1928*.

also found, in some instances, there was only a limited understanding of the concept even among informed non-Aboriginal witnesses.⁴⁶

Refusing to see that ignorance as an insurmountable obstacle, the Committee suggested that the way forward was through a process of community education and discussion, so that complexities and potential misunderstandings could be addressed.⁴⁷ Significantly though, for the process of reconciliation as it now is, the Committee received evidence that cautioned against “the idea of a single team ... well-versed in both the idea of a compact and of negotiating with the commonwealth, travelling from community to community ... (It) might not be successful because such a team may not be trusted by all communities.”⁴⁸ But the challenge was laid down: a process of community consultation and discussion that had the explicit goal of constitutional amendment – a kind of lengthy ‘pre-referendum’ campaign.

The report itself was not released until the government had changed, and the ALP, now in power, suggested it would use the findings of the report to give shape to government thinking on a treaty.⁴⁹ However, no such process of consultation and education was put in place. Indeed the government effectively ignored the proposal for a period of two years, which is noteworthy given that four authors of the Senate Report were to hold positions in the first Hawke ministry. The new government was to focus on their longstanding commitment to national land rights legislation.

The first use of the term reconciliation in the Australian parliament coincided with this new strategy. Incoming Minister for Aboriginal Affairs Clyde Holding described his government as one of ‘national reconciliation’, though the full quote is worth considering: “Although this is a government of national reconciliation and although we seek harmony in our relations with States, the demands of Aboriginal

⁴⁶ *ibid.* p. 151.

⁴⁷ *ibid.*, pp. 152-156.

⁴⁸ Paul Coe, evidence to *ibid.* p. 153.

⁴⁹ Discussed in Brennan 1994, pp. 62-63.

people for justice will no longer be denied.”⁵⁰ Holding’s reconciliation appeared wholly unrelated to the claims of Aboriginal people; that States’ rights may be subordinated to those of indigenous people seems a fair reading of his comment. With hindsight it is easy to see which rights triumphed.

The government set with vigour to effect passage of national land rights legislation, its party platform federally since 1982 (since 1978 in Western Australia).⁵¹ In 1985 the government released its ‘preferred model of national land rights legislation’, for which a major obstacle was the reluctance of State governments to cede authority. The ALP was to discover the limits of its own members, as well as the power of the mining lobby, in the strident opposition to the legislation from the WA Labor government. Ronald Libby has documented the period:

The Burke (WA) government refused to accept over-riding land rights legislation, and the federal government refused to abandon its national land rights policy without assurances that Western Australia would come up to national standards for land rights as determined by the federal government.⁵²

Throughout the period of Western Australia’s intransigence, the mining lobby found itself able to erode the provisions of the proposed legislation to the detriment of indigenous interests.⁵³ Coinciding with the acrimonious debate over land rights the government finally made a response to the Senate Report in May 1985, the thrust of which was to downgrade the idea of makarrata. Thereafter it would “be seen in the context of efforts required to promote community acceptance of national land rights legislation.”⁵⁴

Here then a shift in the story of an agreement: the basis of autonomy (in land rights) was now potentially contrary to the proposal for a negotiated agreement. Gaps

⁵⁰ Holding, A.C., *Commonwealth Parliamentary Debates*, House of Representatives (December 8, 1983), p. 3490.

⁵¹ Libby, R. T. 1989. *Hawke's law : the politics of mining and Aboriginal land rights in Australia*, University of Western Australia Press, Nedlands, W.A., p. 2.

⁵² *ibid.*, p. 151.

⁵³ *ibid.*, p. 135.

were exposed between self-determination, the makarrata and the will of the community. An emphasis on land rights meant that the makarrata was being shelved, yet the federal government's pursuit of this goal left much to be desired. Neither the inducement of a carrot nor the 'application of the big stick', the federal pressure on the Burke government amounted to an "exercise in moral exhortation."⁵⁵ Perhaps the reason for this can be seen in two additional arguments noted by Goot and Rowse. First, there was evidence of public disquiet at the preferred model; the Department of Aboriginal Affairs had commissioned public opinion research which was interpreted to reflect poorly on the cause of land rights.⁵⁶ Secondly, it emerged that there was advice from Treasury that the passage of land rights legislation would expose the Commonwealth to "incalculable" cost.⁵⁷

It is a matter of record that the government did not legislate on the matter of national land rights. That it did not happen, Brennan describes as "the grossest breach of faith committed by any government towards Aboriginal people since white settlement. Never had so much been promised, with absolutely nothing being delivered, and with Aborigines themselves receiving the blame."⁵⁸ Libby argued that the Commonwealth Government is not in fact free to make policy pertaining to indigenous peoples as it chooses.⁵⁹ The national land rights debacle demonstrated that the power bestowed in 1967 did not include an overwhelming moral authority. In fact, the shift by the government after its re-election in 1987 from land rights to the creation of a new administrative authority, an Aboriginal and Torres Strait Islander Commission (ATSIC), signalled a resignation to the realities of politics and particularly the tenor of support for indigenous people's claims. That future agreements might

⁵⁴ Cited in Brennan 1994, p. 69.

⁵⁵ *ibid.*, p. 70.

⁵⁶ ANOP, 'Land rights: winning middle Australia' (1985). See discussion in Goot, M. and Rowse, T. 1991. 'The "backlash" hypothesis and the land rights option'. *Australian Aboriginal Studies* 1, pp. 5-6.

⁵⁷ Henry Reynolds, Oral Contribution to *A Just Settlement* Conference, cited in *ibid.*

⁵⁸ In parliament, Holding claimed that dissatisfaction amongst the Land Councils had prevented the passage of any legislation. See Brennan 1994, p. 72.

⁵⁹ Libby, pp. 154-155.

contain provisions about land rights was made unlikely by the actions of the Hawke government.

The factional, financial and opinion-poll induced ‘reality-check’ occasioned by national land rights did not, however, prevent the government from returning to talk of an agreement. Holding, and critically Hawke after re-election in 1987, again aired the possibility of an agreement.⁶⁰ Governor-General Sir Ninian Stephen opened the 35th Commonwealth Parliament of Australia on September 25, 1987, stating in part that “the government will explore how best to reflect ... recognition (of Aborigines) and the obligation which this involves for the whole community.”⁶¹ The language and sentiment were still non-committal but kept public interest high: polling in October 1987 showed 58% support for the idea of a compact.⁶² Brennan argued that Hawke was “content with the ambiguity” of his advocacy for an agreement and what it might entail.⁶³

The next Minister for Aboriginal Affairs, Gerry Hand, presented the government’s direction for its third term in ‘Foundations for the future’. It foresaw self-determination through the devolution of services to Aboriginal communities by introducing ATSIC. Also proposed was a series of discussions about an agreement that would take place in 1988. Hand indicated his preference for the word ‘compact’ to be used for the meetings, but with whom they would take place, and indeed what would be discussed was not made clear.⁶⁴ The priority seems to have been on passing the ATSIC legislation, the very issue causing strife in the parliament over questions like the fitness of indigenous people to look after themselves and the accountability of the

⁶⁰ On the 20th anniversary of the 1967 referendum Holding said he was not surprised that a treaty was ‘back on the agenda’. Michael Mansell interrupted him putting the case for sovereignty. See Attwood and Markus et al 1997, 68. Hawke thought that he “would like to see 1988 preceded by some sort of understanding,” cited in Brennan 1994, 74.

⁶¹ Griffiths, M. 1995. *Aboriginal affairs: a short history*, Kangaroo Press, Kenthurst, N.S.W.

⁶² *Sydney Morning Herald* (October 6, 1987), cited in Brennan 1994, p. 78.

⁶³ *ibid.*, p. 78.

⁶⁴ ‘Foundations for the future’, Ministerial Statement, *Commonwealth Parliamentary Debates* House of Representatives (December 10, 1987), p. 3152.

organisation to be put in place; even the preamble to the legislation absorbed a great deal of time and energy, before being discarded.

Hawke persisted with the need to seek an agreement into the Bicentennial year, describing it as “a process of national identity, national responsibility and national maturity;” it was not simply to be an attempt at international public diplomacy during the anniversary year.⁶⁵ However the acrid debate around the ATSIC legislation continued in the background of Hawke’s statesmanship. It was during that period that the word ‘reconciliation’ came into the political argot. Hawke and other members of government and the opposition were using it frequently. The Coalition’s spokesman on Aboriginal Affairs Chris Miles committed his side to reconciliation, seeking to improve relationships precisely by working against a treaty.⁶⁶ Coalition positioning at this point exposed the ALP; their position seemed different but was less clear. How long could the government continue to flag an agreement without either setting out what they meant or opening a process of negotiations?

It is not entirely clear what Hawke thought was possible when he addressed the ALP National Conference in 1988: “There is no doubt that a Bicentenary provides us with a golden opportunity to start serious work towards an agreement.”⁶⁷ It was at least an acknowledgment of failure in so far as the anniversary had come without an agreement being reached, the achievement of ‘some sort of understanding’ being the promise of 1987. Hawke immediately took his own inspiration into a meeting with Aboriginal elders in the Northern Territory, who presented him with the ‘Barunga Statement’. This was a document in which Aboriginal groups in central Australia called for the recognition and protection of their cultural rights; for self-determination and control of lands; for compensation for loss of lands; and for the negotiation of a “Treaty or Compact recognising our prior ownership, continued occupation and

⁶⁵ Brennan 1994, p. 80.

⁶⁶ On Australia Day 1988 both Hawke and Chris Miles, Opposition Spokesman on Aboriginal Affairs, saw fit to use the term. Reported in *ibid.*, p. 80.

⁶⁷ *ibid.*, p. 82.

sovereignty.” Such recognition was also in keeping with Australia’s international obligations under human rights instruments.⁶⁸ Hawke’s response was to commit his government once again to negotiate a treaty.⁶⁹ But the onus was now on indigenous people to speak with one voice and present a united front to the government in order for the negotiations to begin. Whether Hawke was being ‘decisive’, while forcing the other side to take an initiative that he must have known they were incapable of taking, is not clear. There was no immediate coalescing of opinion amongst indigenous commentators about Hawke’s proposal.⁷⁰

More than that, Hawke’s new stance had the effect of congealing settler opposition to a treaty. Then Leader of the Opposition, John Howard, issued a press release the following day in which he argued: “Such a treaty is a leap into the constitutional unknown.”⁷¹ He invoked the spectres of ‘uncertainty’ and endless obligation. The Liberal Party’s 1988 platform decried “the absurd proposition that government can make a treaty with itself in favour of some of the citizens it is elected to serve at the expense of others.”⁷² The debate was soon joined by right-wing intellectuals, ably supported by mining industry connections. The conservative think tank, the Institute of Public Affairs released a survey of opinions in December 1988.

Among them was that of Bob Liddle, an Aboriginal man and resource consultant in the Northern Territory, who argued that a treaty implied that Aboriginals were not Australians.⁷³ Historian Geoffrey Blainey – presumably having altered his views since his sponsorship of the ATC in 1979 – said it would promote division, that it was driven by emotion and not a practical issue, and questioned the

⁶⁸ Central and Northern Land Councils, ‘The Barunga Statement’, (June 12, 1988), reproduced in Tickner 2001, pp. 40-41.

⁶⁹ Brennan 1994, pp. 82-83.

⁷⁰ *ibid.*

⁷¹ *ibid.*, p. 83.

⁷² Liberal Party of Australia, ‘Future directions’ (1988), cited in Brett, J. The treaty process and the limits of Australian liberalism. June 4, 2001. AIATSIS Seminar Series <http://www.aiatsis.gov.au/rsrch/smnrs/papers/brett.htm> (April 1, 2002).

very idea of Aboriginality as the basis of difference: “who is an Aborigine?”⁷⁴ Even more strident was Hugh Morgan (Managing Director of Western Mining Corp.). In his revision of the history, he saw a treaty originating in the publication of the Communist Party of Australia’s ‘Draft Program of Struggle against Slavery’ in 1931. While Morgan did not seem to be supporting slavery, he was certainly encouraging any last convulsions of Cold War paranoia that might be possible:

A separate and sovereign state for the Aborigines, carved out of Australia, has been a settled and constant ambition for the communists and Bolshevik left generally, in Australia for over 50 years.⁷⁵

Morgan’s anxieties highlight a favoured tactic of the right: to represent indigenous claims for recognition, or the need for negotiations and an agreement, as an elaborate fantasy of leftists.⁷⁶ This is clearly designed to mitigate the point of Australia’s ‘exceptionalism’ in not having sought an agreement, thereby recovering Australian history ‘as it is’. As later debate on the CAR bill was to make clear, members of the Coalition openly expressed their hope that reconciliation would become a process to diminish the influence of ‘trouble-makers’ among ‘good’ indigenous peoples. Tickner offered the view in 2001 that “the proposal for a treaty was soon put into the too hard basket by the government until this and the associated issues were addressed through the strategic advancement of the reconciliation process.”⁷⁷

The ‘strategic advance’ had been worked on for some time: in early 1988 the Australian Heads of Churches presented politicians with a document entitled ‘Towards Reconciliation in Australian Society’. Written by Frank Brennan, it called

⁷³ Liddle, B. 1988. Aborigines are Australian too. In *A treaty with the Aborigines?* (K. Baker, Ed.), IPA, Canberra, pp. 13-14.

⁷⁴ Blainey, G. 1988. Fallacies weaken the case for a treaty. In *ibid.* pp. 15-16.

⁷⁵ Morgan H. 1988. The quest for Aboriginal sovereignty. In *ibid.* pp. 19-24.

⁷⁶ I return to this issue in Chapter 6. In the post-Cold War period, there is an attempt to create a new political target, that of the ‘elites’ against the ‘mainstream’. See also Brett.

⁷⁷ Tickner 2001, p. 26.

for a “formal acknowledgment of the nation’s Aboriginal heritage.”⁷⁸ The idea was that the resolution would become the first business of the Commonwealth parliament in its new Chambers – a poetic sanctification of the building to accompany the physical elements of recognition incorporated into the forecourt mosaic.⁷⁹ As noted above, politicians had made Australia Day speeches using the theme of a reconciliation between indigenous and settler Australians.⁸⁰

The Churches’ resolution carried with the concept of reconciliation religious connotations of a return to a ‘state of grace’ that underlay the more prosaic functions of the word and gave considerable force to it. Reconciliation would begin with a fundamental recognition of indigenous peoples: the state of grace that they, and then we, might enjoy, would come after that action. In theological terms, that recognition would be understood as an act of penitence – to prostrate oneself before God prior to being readmitted into His graces. Yet who would play Christ in this Australian passion play?⁸¹ Hawke’s introduction to the reconciliation motion gave a sense of the magnitude of claim:

At the same time, the Government is committed to a real and lasting reconciliation, achieved through full consultation and honest negotiation between Aboriginal and non-Aboriginal citizens of this nation. This will be recognised by the preamble to the Commission legislation. It will be recognised by the compact or treaty which we are committed to negotiating with Aboriginal and Islander people, and it will be recognised by our support for this motion.

⁷⁸ *Catholic Leader* (January 24, 1988), p. 10.

⁷⁹ Kurt Iveson, 'Symbolic Reconciliation?', *Belonging* Conference, Humanities Research Centre, Australian National University (November 12-14, 1999).

⁸⁰ A draft of the Council of Churches’ resolution was circulated in both parties during late 1987, supporting the idea that reconciliation had been gestating for some time. See John Gardiner-Garden *From dispossession to reconciliation*, (Commonwealth Parliament of Australia, Information and Research Services, Social Policy Group, 1999) <http://www.aph.gov.au/library/pubs/rp/1998-99/99rp27.htm> (May 17, 2002).

⁸¹ After the report into the ‘Stolen Generations’ was to lay considerable blame at the feet of Australian churches, the notion of contrition and a journey of healing had a massive impact on the conduct and spirit of reconciliation. This is explored in the following chapter.

Without this overall approach, without a proper settlement and proper recognition, there can be no real and lasting improvement for the Aboriginal and Islander people.⁸²

To summarise the ‘overall approach’: there was no preamble to the ATSIC legislation, there is still no compact or treaty with Aboriginal and Islander people, and the motion of acknowledgment, affirmation and reconciliation was forced through the house only by Government majority. It would not be the last time a dispute on a matter of little consequence would divide the major parties.⁸³

By 1990 the Government had learnt from the failure of the Bicentennial year resolution described above because they sought considerable input from the Opposition in the legislation that came to found the reconciliation process – the *Council for Aboriginal Reconciliation Act* (1991). Following the 1990 election which gave Labor its fourth term, Hawke sought to rebuild bipartisanship on Aboriginal affairs by writing to the leaders of all State and Territory governments as well as the federal Opposition Leader John Hewson, who indicated support and “left open the possibility of some instrument or document.”⁸⁴ In December of 1990, Hawke and Tickner issued a statement announcing a process of reconciliation would be begun and a discussion paper was released entitled ‘Aboriginal Reconciliation’.⁸⁵

Widespread support was said to exist for such a process (although as I discuss below, Tickner has flatly contradicted this recently), and came from a range of Aboriginal organisations as well as many groups in the wider community.⁸⁶ A treaty was no longer under consideration and an ‘instrument of reconciliation’ was seen to defuse the potential division inherent in a treaty. According to Hawke: “the nature of a treaty involves an agreement between two nations ... it has never been in the

⁸² Hawke, *Commonwealth Parliamentary Debates*, House of Representatives (August 23 1988), p. 137.

⁸³ See Chapter 5 for a discussion on the 1999 constitutional referendum for a new preamble.

⁸⁴ Tickner, *Commonwealth Parliamentary Debates*, House of Representatives (September 18 1990), p. 2037.

⁸⁵ Minister for Aboriginal and Torres Strait Islander Affairs, ‘Aboriginal reconciliation – a discussion paper’, (December 13, 1990). See also Tickner 2001, Ch. 2.

⁸⁶ Tickner, *Commonwealth Parliamentary Debates*, House of Representatives (May 15, 1991), p. 3778.

Government's mind that the reconciliation process lead to such an outcome."⁸⁷

Hewson for his part, stated that "material support"⁸⁸ was of greater importance than a treaty, thereby suggesting that improved services to indigenous peoples were to remain a matter of largesse, not of right.

Brennan's documentation of that period reveals one thing quite clearly: the Labor government had come up against the limits of what could be widely supported in the Australian community, and achieved through the political process. A treaty had no possibility of Coalition support, and could therefore become the source of major political confrontation over what Australia *was*. Hawke's climb down from a treaty, Hand's idea of a compact and the undeniably vaguer proposal of reconciliation, while indigenous leaders were calling for a treaty commission with UN involvement,⁸⁹ were each attempts to lock the Coalition into a process, making them live up to a basic commitment made in 1981: "a negotiated agreement with Aborigines subject to constraints and having no effect in international law."⁹⁰

All of the tensions and premonitions about what concessions to indigenous people might mean were by that time present in the Australian parliament. As we shall see, the work of the CAR has been influenced by these fears. What had taken place in the previous decade was the development of a variety of rhetorical strategies against an agreement, or that would impede its progress: the irrelevance of symbolic or treaty discussions to the lives of indigenous Australians; the need for a period of community healing; and the implicit divisiveness of any real acknowledgment of history or devolution of power. These tropes would be refined and widely disseminated through the reconciliation process of the 1990s. Prior to examining these, a study of the institutional factors underpinning them is required.

⁸⁷ Brennan 1994, pp. 102.

⁸⁸ Hewson, cited in *ibid.*, p.103.

⁸⁹ "The National Federation of Land Councils ... called for the establishment of a treaty commission independently funded and with UN involvement." *ibid.*, p. 100.

⁹⁰ *ibid.*, pp. 102-103.

The capacity for agreement

Party politics

The fluctuating commitments to indigenous claims by the major political parties, as well as the facts of a ‘two-party’ system could be insuperable problems on their own: from the outset the entity with whom indigenous peoples would have to treat and the holder of power to make those negotiations a reality, is divided into two. The very idea of bipartisanship or non-partisanship on Aboriginal affairs is an acknowledgment of that situation – a gesture to indigenous powerlessness. From the chronology above certain issues stand out with respect to the ideological coherence of the parties themselves. It is the case, however, that attitudes to the consequences and obligations of reconciliation acted as a differentiating force between the political parties.

The ALP remains the only party to both hold power and explicitly advocate a negotiated agreement while doing so. The party’s limits as a national voice with respect to Aboriginal affairs were exposed in the national land rights dispute during Hawke’s second term. Though Labor’s factional disputes are hardly limited to Aboriginal affairs,⁹¹ the fact that Hawke did not rein in the WA Labor government suggests not simply a leakage of solidarity; more likely was its non-existence, in this case between the dominant factions in WA and in Victoria. Libby emphasised “the differing ... assessment (of the factions) of the political costs of supporting Aboriginal

⁹¹ See inter alia, Crisp, L. F. 1978. *The Australian federal Labor Party, 1901-1951*, Hale & Iremonger, Sydney; Parkin, A. and Warhurst, J. 1983. *Machine politics in the Australian Labor Party*, Allen & Unwin, Sydney; Thompson, M. 1999. *Labor without class: the gentrification of the ALP*, Pluto Press in association with the Lloyd Ross Forum, Labor Council of New South Wales, Sydney. At a recent National Conference a significant divergence of opinion emerged over the way to ‘engage with the global economy’.

land rights legislation.”⁹² The failure of national land rights legislation was the defeat of a key plank of ALP policy for some years. Hawke had prioritised the rights of states, and of holding government in WA and federally, over a long-standing commitment to one aspect of self-determination. He had also, as noted above, shown a government sensitivity to public opinion polling on Aboriginal affairs that would continue to grow.

There was always more coherence in the Coalition: never have they accepted either the need for an agreement that carried with it obligations on them to enact self-determination provisions, or the proposition that Aboriginals were not already fully Australian. Judith Brett has recently addressed the paradox of the Liberal Party, awkward with persistent demands for indigenous recognition and rights, yet certain in “their own moral conviction that they are neither racist nor ethnocentric.”⁹³ Her analysis is, first, that it was the particular Protestant core of the Liberal imagination which resiled from the sectarian ‘combinations’ common to ‘Romanists’ – more than simply a commitment to classical liberalism – that underpinned discomfort with group identification.⁹⁴ Cultural difference could be maintained in family and community, but would not “impinge upon the fundamental values and structures of society,” the individualism of Australian settler nationalism. In addition, Brett emphasises the ‘temporal imagination’ of Liberal thinking, by which “the future is more real and more exciting than the past or present,” and that this explains current fascinations with indigenous ‘disadvantage’, a code for ‘backwardness’.⁹⁵

⁹² Libby, p. 1.

⁹³ Brett.

⁹⁴ Though in discussion Brett accepts that there are multiple strands of Protestantism, her point is that it is this variant that is key in the formation of the Liberals’ philosophy.

⁹⁵ In the following chapter I discuss the politics of apology and the project of ‘sharing history’; it is clear that this is a selective theme. For an analysis that explores the foundations of Howard’s views in Burkean conservatism, see Rundle, G. 2001. ‘The opportunist’. *Australian Quarterly Essay* 3, 1-65.

So, the distinction on the issue of agreements between ‘old’ or small ‘l’ liberals like Fred Chaney and Ian Viner, and the hard right represented in the 1980s by figures like John Stone, may be one of tone and the extent to which government should be involved. There is a consistency in the arguments put forward by Baume in the early 1980s, the one put forward in the late 1980s by the then Leader of the Opposition John Howard, and the one he now promotes as Prime Minister – an undifferentiated citizenship and identity. Even Chaney revealed in 1988 that he had militated against a treaty from the first appearance of it on the political landscape in 1979.⁹⁶ Whatever it is that Aboriginal and Torres Strait Islander peoples have, ‘all other Australians’ will have it too. The rhetoric that the Coalition offers to settler Australians is considerably clearer than anything the ALP has proposed. Frequently however, such as during the 1988 resolution described previously, this consistency makes them look very unreasonable.

That motion, sponsored by the Churches, and intended to be bipartisan and unanimous, could not enjoy Coalition support without the addition of the words, ‘in common with all other Australians’, at the end of a paragraph that affirmed: “the entitlement of Aborigines and Torres Strait Islanders to self-management and self-determination subject to the Constitution and the laws of the Commonwealth of Australia.” Brennan wrote that,

At best the proposed amendment was ambiguous suggesting that the entitlement to self-determination was universal but exercisable discretely by separate groups. At worst, it was ruthlessly assimilationist; it suggested that self-determination could be exercised only collectively by all Australians ... The cost of bipartisanship would have been a resolution that was unacceptable to Aboriginal leaders. (It) would have been so weak that it would not have affirmed the sole rationale for special laws and measures for aborigines... The only appeal of the amendment was to those who were party to the ‘One Australia’ debate in the joint party room of the Opposition.⁹⁷

⁹⁶ Fred Chaney, cited in Brennan 1994, p. 59.

⁹⁷ *ibid.*, p. 85.

Brennan had foreseen the re-emergence of a latent theme in Australian life, with his invocation of 'One Australia'. His treatment of the Coalition philosophy is worth considering: "loyalty to Australian institutions and values should transcend loyalty to any other set of values anywhere in the world." There was really only one direction in which this energy could go, culminating in the use of 'inclusiveness' as the idea to kill off any sense of an agreement based in difference:

I can think of nothing more divisive, nothing more fundamentally likely to increase tensions and divisions or to set group against group, person against person, institution against institution than a motion passed by the Commonwealth Parliament which says that we want to have an instrument of understanding and reconciliation.⁹⁸

The hope of the strategy is that it will progressively remove political institutions from the debate. If National Party Senator John Stone's description of an Aboriginal man of his acquaintance is recognisable at all as part of the narrative of an agreement I am suggesting, it is only as the point where the original terms have been completely inverted – it is now the Aboriginal who must be reconciled: "government had nothing to do with that gentleman's reconciliation and coming to terms with his fellow Australians."⁹⁹ An effect of this localisation and personalisation of the reconciliation process is the sidelining of government. Indeed, that is its primary goal because it makes the structure of obligation ever less clear. At the level of nations deserving of respect, a power differential and direction of obligation is difficult to disguise. But would individuals readily see themselves as heirs to dispossession, initiating the personal reflection that could lead to reform?

The strategy also sets up questions that must now be answered: will government's role in any agreement be effective? Is it justified? Might it lead to compensation? The unfolding of the argument in this way, a highly sophisticated presentation by the time the CAR began its operation, is a radical restatement of

⁹⁸ Coalition spokesman on Aboriginal Affairs, Senator Chris Puplick in *Commonwealth Parliamentary Debates*, Senate (October 17, 1989), p. 1972.

⁹⁹ John Stone, cited in Brennan 1994, p. 105.

agreements as approached in other contexts. Indeed, here is the spectacle of a government exhorting the reconciliation of individuals while retreating from the field. The major point here is that raised in my analysis of Ghassan Hage's work in Chapter 1 – through an artificial process of abdication, the Government is not forced to examine the conditions of its governance – it is democratic condescension.¹⁰⁰ This is the cementing of authority through devolution: *look what we're doing ... we're letting you take charge.*

Indigenous diversity and the internationalisation of claims

Less problematic at this point is the coherence of indigenous peoples, because the narrative of an agreement has been a regressive one – constantly in retreat from the two substantive rationales for any agreement: historical necessity and indigenous autonomy. One point to consider through this discussion – and considered at length in Chapters 6-9 on the attempts to reach agreements in British Columbia – is whether a single body representing indigenous interests would be appropriate. Another question posed is over the timing: Rowse cites the Tasmanian Aboriginal Centre as warning in 1980 against 'premature settlement':

Any agreement at this point in time will be seen as a charitable one ... Only when we represent such a threat to the stability and power of white Australia that they are forced to negotiate a treaty with us will a Treaty not be viewed as charitable.¹⁰¹

The diversity in indigenous positions was made more visible after the 1980 NAC proposal modified the proposal, from a treaty to a 'makarrata'. This was a word of the Yolngu people of Arnhem Land in the Northern Territory, and signified the ending of hostilities. It appeared that this was in response to representations by the Minister for Aboriginal Affairs, Senator Peter Baume, who indicated the need to keep

¹⁰⁰ Hage, Chs. 2-3.

¹⁰¹ Rowse 2000.

the debate within the context of the Australian nation-state.¹⁰² However, C.D. Rowley suggested the switch in terminology showed the naivety and fragile legitimacy of the NAC itself:

That the NAC agreed so easily indicated confusion on matters of policy, for in doing so it accepted the departmental rejection of the central idea on which its case depended: that there is a colonised people, deprived of their property and other rights, which is to be seen as a full negotiating legal person *vis a vis* the Commonwealth of Australia ... The Department went through the motions of assisting the NAC to canvass its electorate ... As the term is meaningless in law, and in all but some remote language, the publicity effort seems to have merely increased confusion – which could have been the official intention.¹⁰³

In fact the Senate Report was to make precisely this point: “in discussions of the subject, ‘treaty’ is probably the word with the widest currency.”¹⁰⁴ The value of the word ‘makarrata’ had been the legitimacy of its origins in an indigenous language. However there were many issues being obscured, as the Senate Committee found out during hearings in Yolngu country, from where the word came: “It was put quite strongly at that meeting that ‘makarrata’ was not the appropriate word; rather the word ‘garma’ should be used ... Makarrata relates to taking sides whereas ‘garma’ stands in the middle. It brings peace between groups.”¹⁰⁵ The consensus of the report was summarised by a submission by Pat Dodson:

I think that it is better to use a white man’s word in this regard. The translation of the word in the respective languages may approximate the white man’s understanding of it, but I think it is a futile exercise to get a word from one linguistic or law group that is acceptable to other linguistic or cultural law groups. It is as foreign as if you used a German or French word...¹⁰⁶

¹⁰² Rowley 1987, p. 43.

¹⁰³ *ibid.*

¹⁰⁴ Senate Report, p. 22.

¹⁰⁵ *ibid.*

¹⁰⁶ *ibid.*

And this yielding to government over terms did not go unnoticed by indigenous leaders outside the NAC, like Kevin Gilbert.¹⁰⁷ The NAC responded by presenting a paper at the World Congress of Indigenous Peoples in Canberra in 1981, where they argued thus: “We the Aboriginal nation plainly think of it as a treaty with the Aboriginal nation... (the Government) hopes to have the Aborigines accept from the outset... that they are part of the Australian nation as a whole.”¹⁰⁸

However the question of the Aboriginal voice, with whom to treat, did not recede from view. The land rights regimes based in State’s legislation and the development of an alternative power base, in Land Councils, ensured this issue was to remain unresolved. During the debate over national land rights in the mid 1980s, the inability of the NAC to speak for indigenous interests became quite obvious. Holding’s view that his government would be advised of the Aboriginal viewpoint by the NAC stimulated serious objections from the Land Councils. Then coordinator of the National Federation of Land Councils, Pat Dodson, attacked the proposal for its reliance on an organisation that “lacks credibility with the Aboriginal people of this country and represents no point of view but its own.” Dodson questioned the NAC’s means for inquiring into the Aboriginal position as well as expressing concern over its proximity to the federal government.¹⁰⁹

Later the lack of a coherent response from indigenous peoples across the country was evident after Hawke’s 1988 treaty proposal. This was significant because Hawke had placed the burden squarely on the shoulders of Aboriginal people. The dispute between Charles Perkins and Kevin Gilbert’s National Coalition of Aboriginal Organisations (NCAO) indicated there was still a wide range of opinion amongst Aborigines.¹¹⁰ Hawke’s entreaty at this point fell into a vacuum.

¹⁰⁷ Lippmann, L. 1991. *Generations of resistance: Aborigines demand justice*, Longman Cheshire, Melbourne, pp. 201-202.

¹⁰⁸ NAC Position Paper, cited in Brennan 1994, p. 61.

¹⁰⁹ Reported in Libby, p. 23.

¹¹⁰ Brennan 1994, pp. 76-77.

As the 1980s closed the problem of gaining consent remained hampered with the problem of where to look for it. Was it viable to create such a body? Certainly Hawke and the ALP thought that their creation of ATSIC would provide that consent. Its first Chairperson was eager to take the baton being offered when she spoke of ATSIC as the “voice of Australia’s Aboriginal and Torres Strait Islander people ... the beginning of a unique and productive partnership with the Government.”¹¹¹ Aboriginal people outside the new bureaucracy were alarmed, particularly when the Prime Minister confirmed that was his view of the arrangements during Treaty of Waitangi celebrations in 1990. Geoff Clark (now Chair of ATSIC in 1999 and pressing for a treaty from that position – see Chapter 5) reiterated the call for a separate treaty commission to be established, and for ATSIC not to be responsible for interpreting and funding the indigenous position.¹¹²

Others were starting to ask harder questions: Gary Foley pointed out that treaties were a guarantee of nothing at all, and that the history of treaty-making countries was a one of negligence and bad faith.¹¹³ As indigenous peoples all over North America knew only too well, the belief that a treaty provided inviolable recognition of indigenous rights is rarely shared by colonial powers. The flaw in the approach was the lack of compulsion on the colonial power to meet its treaty obligations. Locating an alternative source of authority was, for some indigenous activists, an essential first step.

According to Lippmann, one of Gilbert’s biggest concerns about the original NAC rollover was his belief that the implication of a makarrata was to “take away the right to go outside Australia to obtain support, so reducing Aboriginal affairs to a purely domestic matter.”¹¹⁴ This international appeal, though still inchoate, had been developing for several years. Attempts were made to draw international attention to

¹¹¹ *ibid*, p. 91.

¹¹² *ibid*, p. 92.

¹¹³ Gary Foley, cited in Cameron Forbes, ‘Black hole of a campaign’, *The Age* (March 23 1990), p. 11.

¹¹⁴ Lippmann, p. 207.

the situation in Australia, such as the appeal by the Federal Council for the Advancement of Aborigines and Torres Strait Islanders in 1965 to the UN Commission on Minorities and the Aborigines' Advancement League of Victoria petition to the UN in 1970 to uphold the collective rights protected by ILO Convention 107.¹¹⁵ A similar appeal was made in 1976 by the NAC¹¹⁶, and in 1978 the North Queensland Land Council led a delegation to the International Labour Organisation in London. Mick Miller, the Chairman of the NQLC at the time declared that "(we believe) our only hope of changing government policy is through international pressure."¹¹⁷ The practicalities of such an appeal required the formation of an indigenous liberation movement. Tatz explores the early dynamics of indigenous organisation at this level in *Race politics in Australia*:

In 1977 a group of Aborigines attended the Second World Black and African Festival in Lagos, Nigeria. Following discussions with Third World people, the Aboriginal contingent was advised they needed to be seen and heard as 'one voice', one body if they were to be supported by African states in world forums. They needed some image of political unity, of ideological movement, to obtain 'consultative status' at the UN and observer status at the World Council of Indigenous People. On their return to Australia, the concept of the National Aboriginal and Islander Liberation Movement was put to FCAATSI in 1977 and ... adopted in 1978.¹¹⁸

The effects of these efforts can be seen by the response of the Fraser government to the proposed visit by the NAC to the UN Subcommission on the Prevention of Discrimination and the Protection of Minorities, which met in Geneva in August of 1980.¹¹⁹ Lippmann suggests the government and Fraser in particular, strenuously lobbied the NAC not to send its delegation, but were unsuccessful in preventing the NAC Chairman from petitioning the body in the strongest terms:

¹¹⁵ *ibid.*, p. 207.

¹¹⁶ *ibid.*, p. 208.

¹¹⁷ Harris, pp. 26-27.

¹¹⁸ Tatz, C. 1979. *Race politics in Australia: Aborigines, politics, and law*, University of New England Publishing Unit, Armidale, N.S.W., pp. 103-104.

¹¹⁹ Also Corbett, H. 1994. 'International efforts'. In *Voices from the land* (M. Yunupingu and Australian Broadcasting Corporation, Eds.), ABC Books, Sydney, pp. 76-88.

In a climate of despair, the Aboriginal people of Australia turn to you, the men of international law, to assist in their struggle for equality and freedom ... The Australian government's non-acquiescence in this continuing search for human rights must see it condemned in the eyes of the world.¹²⁰

The rise of formal representations at bodies to which Australia was obliged, coincided with a growing scrutiny of the situation amongst international religious organisations, human rights groups and others. The Christian Conference of Asia approached Fraser to block a mining venture on sacred land at Noonkanbah.¹²¹ The World Council of Churches issued a report critical of the conditions in which many indigenous people lived, provoking an indignant response from the Coalition member later to become the Minister responsible for Indigenous Affairs and Reconciliation, Philip Ruddock, the thrust of which was that these people were 'blow-ins' who could not possibly have the understanding of the situation appreciated by locals.¹²² Also important was the threat of protest during the 1982 Commonwealth Games in Brisbane, which NAC Deputy Chairman Reverend Cecil Jacobs suggested might be boycotted by black nations.¹²³

Indeed the capacity to unsettle the establishment with an appeal to international embarrassment (if not actual scrutiny), was not limited to indigenous peoples themselves. Shortly before the Commonwealth Heads of Government Meeting (CHOGM) in 1981, Senator Susan Ryan "did not conceal the fact that the 'imminence of an important intentional event' ... was one of the reasons behind the introduction of her private member's bill."¹²⁴ The timing of her bill – a doomed attempt to introduce self-management on Queensland reserves – certainly exposed the central pressure point on Australian non-recognition of its indigenous populations. Indigenous people acting on the international stage in an increasingly organised fashion

¹²⁰ Reported *The Age*, September 11, 1980.

¹²¹ Lippmann, p. 209.

¹²² A precursor to ever-more systematic attacks on international bodies that would presume to know anything about the situation in Australia.

¹²³ Lippmann, p. 190.

put Australian statehood and the authority of its institutions in perspective; the edges of the nation become clearer such that the very act of challenging at that level provides a new energy to the claims of indigenous people.

Indeed the participation of indigenous peoples from Australia in such forums has only become a more important outlet in the subsequent years. If not, then the Commonwealth's hypersensitivity to and extensive lobbying of international bodies such as the UNCHR seems unnecessary.¹²⁵ The hypocrisy of a selective attitude toward international instruments and arrangements, such as the favoured disposition toward the WTO, is now stark. In any case, the claims of indigenous peoples at this level are not in retreat. As Nettheim and Simpson astutely observed in 1989, "(a)ny progress toward an Australian treaty will proceed not in a national vacuum but in the context of a rapidly developing set of international principles on the rights of indigenous peoples and an emerging international interest in the effectiveness and equity of such treaties."¹²⁶

Constitutional commissions and the maturing of community sentiment

The most significant hand guiding the transformation of a treaty into the process of reconciliation is the role played by three commissions of inquiry, through their emphasis on the need for an overhaul of community sentiment. That three commissions, each instructed to inquire into quite different problems, came to a similar conclusion requires some analysis.

The Senate Report already discussed concluded that the only just and effective way to serve indigenous claims as they were then being articulated, was for a

¹²⁴ Griffiths, p. 201.

¹²⁵ See Mark Riley, 'Canberra leans on UN over jailings', *The Age* (March 4, 2000); AAP, 'UN sentencing document never seen: Downer' (March 17, 2000); ABC News Online, 'Downer must resign over UN report pressure: Brown' (March 17, 2000); James Dunn, 'What is this petulance? Is this Australia or Iraq?', *The Age* (April 4, 2000).

¹²⁶ Nettheim, G. and Simpson, T. 1989. 'Aboriginal people and treaties'. *Current Affairs Bulletin* 65, p. 23.

constitutional amendment to enable a compact but that it was not likely to be achieved in the absence of widespread public confidence in the issues involved. The power to reach an agreement that was appropriate was not in fact available to the Parliament, suggested the Report. It was not transferred in 1967; the people had retained it. By setting the threshold to an agreement as ‘a majority of electors in a majority of states’, the Committee realised that wide community acceptance was essential.¹²⁷

However the Senate Report suggested a policy platform around which momentum might have been built. The report was delivered to an ALP government that chose not to follow its conclusions, but merely to lament them as obstacles to an agreement and reasons to pursue other courses. The arrival of the another report in 1987 added nothing more to this issue than an update on community intransigence.

During 1987 the Constitutional Commission (established by Attorney-general Lionel Bowen in 1985) submitted *The Constitutional Commission Advisory Committee on the Distribution of Powers Report* (hereafter the Distribution of Powers Report).¹²⁸ It had inquired into the issues surrounding the “inclusion of a new (Constitutional) power to remove potential limitations on the existing power eg. people of Aboriginal race or descent.”¹²⁹ It made three recommendations regarding constitutional amendment: i) the races power did not enjoy legal clarity as to its effect, due *inter alia* to jurisprudence in *Koowarta v Bjelke-Petersen*¹³⁰ (another muddying of the ‘1967 effect’); ii) the Constitution required amendment so that where the Commonwealth wished to acquire Crown land from the states currently reserved for Aboriginal use, it should not have to pay compensation; and iii) it was “too early” to seek an amendment allowing the type of constitutionally entrenched agreement envisaged by the Senate

¹²⁷ Rowse has approached this problem from a slightly different angle, that of the distribution of power in the Australian federation: “Are current understandings of Australia’s federal compact among the obstacles in the path to reconciliation?” Rowse 2000.

¹²⁸ Australia, Constitutional Commission, Advisory Committee on the Distribution of Powers, Australia, and Constitutional Commission 1987. *Report*, AGPS, Sydney (hereafter Distribution of Powers).

¹²⁹ *ibid.*, p. xiv.

¹³⁰ *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168.

Report.¹³¹ Quite why the Commission thought referenda were achievable on the first and second issues and not the third, was not made clear.

Two matters were outstanding on the agreement question: first, a cluster of “not insuperable” obstacles that had to do with technical matters in the process of negotiation (the question of Aboriginal representations and legitimacy, and whether that body would itself require constitutional protection), as well as questions arising out of amendment: did it imply an obligation to negotiate, or to legislate an agreement?¹³² The second of the difficulties was the lack of progress in community attitudes toward acceptance of the very notion of agreement. The Commission raised other issues, such as the non-comprehension of the term ‘makarrata’ among indigenous peoples, but their central point was the need for a “greater indication of support for the general concept of a compact” without the need to work out all the specifics of what an agreement would involve.¹³³

The road to an agreement that was meaningful and substantial, and that contained all the elements so apparent to the ATC and the NAC in the previous decade, was here doubly blocked: first of all, community support had to be built for the idea of a compact so that constitutional power could be conferred allowing such a compact to take place. The opportunities for misadventure in this formulation are considerable – even the most idealistic supporters of reform could recognise the improbability of success.

Was a constitutional amendment possible, say in 1984, had the ALP chosen to pursue the community education course argued for in the Senate Report, and not the disastrous national land rights legislation? It is impossible to know, but what can be said is that if a process of community consultation had been embarked upon at that

¹³¹ Distribution of Powers, p. xx.

¹³² *ibid.*, pp. 114-115. On the latter question the Canadian model of mandatory constitutional conferences is used as an example. However, the subsequent record of these negotiations at Meech Lake and Charlottetown is not encouraging. Subsequent jurisprudence on ‘good faith’ negotiations may be more instructive, see Chapter 9.

¹³³ Distribution of Powers, pp. 116-117.

time it would have been more difficult to prevent its outcomes from relating directly to the formal changes explicitly proposed by the Senate Report. The 1988 Report excused the government from investigating the limits of Australian political institutions, by pointing the blame at ‘the community’.

The precise form the campaign for public enlightenment was to take became clearer after the third inquiry, that of the Royal Commission into Black Deaths in Custody (RCADC), finally published in May of 1991: “If it is recognised that the cause of distrust and disunity is the historical experience of Aboriginal people and their continuing disadvantage, then, plainly, good community relations cannot be achieved without elimination of the disadvantage and the recognition of Aboriginal rights, Aboriginal culture and traditions.”¹³⁴

When tabling the report both Minister for Aboriginal Affairs Robert Tickner in the House and Peter Cook in the Senate noted, “the Royal Commission describes the reconciliation process as “the fundamental backdrop to reform and change.”¹³⁵ They went on to report that the Commission recommended that the principal focus of any reconciliation should be the “education of non-indigenous Australians about the cultures of Australia’s indigenous peoples.”

The Royal Commission recognises, as I do, four key issues essential to the process of reconciliation: first, the taking of concrete measures to tackle disadvantage and establish self-determination as being essential building blocks to that process of reconciliation; secondly, the reconciliation must have cross-party support and support from Aboriginal people; thirdly, the focus should concentrate on the process of reconciliation and not on a document or instrument which might be one of the outcomes; and finally, the process should not be impeded by either Aboriginal or non-Aboriginal people setting preconditions in advance.¹³⁶

¹³⁴ RCADC, *National Report Volume 5*, Part G: ‘The Process of Reconciliation’

<http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol5/>(September 10, 2001).

¹³⁵ Tickner, *Commonwealth Parliamentary Debates*, House of Representatives (May 9, 1991), p. 3411; Peter Cook, *Commonwealth Parliamentary Debates*, Senate (May 9, 1991), p. 3075.

¹³⁶ Tickner, *Commonwealth Parliamentary Debates*, House of Representatives (May 9, 1991), p. 3417.

Tickner appeared to be inverting the premise of the report: reconciliation was in his words not a *goal*, though the report made clear that such a state could be reached through a process that recognised both the historical injustice done to indigenous peoples and their inherent right to autonomy. In a passage of his memoirs on the importance of the Royal Commission, Tickner endorsed the view of Pat Dodson who said, “if the recommendations (of the Commission) were implemented by governments there would be no need for a reconciliation process, so far-reaching and decisive are its recommendations.”¹³⁷

Implicit in these conclusions is an argument about the *character* of modern Australian society. Drawn into doubt is the viability of modern institutions to enter into agreements with indigenous peoples – a dislocation of the traditional anchor of sovereignty in the people as expressed through democratic elections. The shunting of this major policy issue into the unstructured arena of public contestation acknowledged not simply the historical failure of Australian democratic institutions to do justice to the indigenous peoples but their incapacity to do so.

Once the ground shifted like this – to the soul, the psyche, the core of Australia in its very ordinariness – anything became possible. Hawke placed another nail in the coffin of a substantive agreement when he began the now familiar rhetorical strategy of finding contemporary Australia innocent. This was not to be a process “predicated on the notion of ... collective and irredeemable guilt” of settler society.¹³⁸ Rather than a debate focused on the just desserts of indigenous people, the challenge now is to establish limits to Australia’s guilt.

Another argument that automatically became more useful as the terms shifted to community, was the need for a consensual language. Certain terms carried too much ‘baggage’, thus preventing the cause being advanced; therefore an ‘interest-based’ approach would provide succour for all concerned. The ‘let’s not get caught up on

¹³⁷ Tickner 2001, p. 82.

¹³⁸ Brennan 1994, p. 80.

words' approach is of course favoured by people fond of the idea of consensus and the possibility that they might hold a special intuition in this regard.¹³⁹ Yet this is more than just pragmatic – it may be an avoidance of the obligations and consequences that these 'boo' words connote, and thereby a devaluation of indigenous motivations. For the sake of an agreement a neutral term becomes important, but it remains an over-casual elision of the central issues and accident-prone because of it. As discussed above, the Senate Report stressed the need for clarity in terminology on an agreement.

In the new environment the Coalition strategy of 'One Australia' has triumphed, by setting the terms as nation, identity and community. Rowley saw through this strategy, it was a false dichotomy, a 'zero-sum' conflict where there was none: "either the Aborigines get sufficient autonomy to destroy Australian democracy, or Australian society is 'saved' by the denial of any special rights."¹⁴⁰ One might think that the point here is to seek new terms of engagement, but for some the challenge is to re-evaluate their (and our) understanding of 'Australian society', 'Australian community, and 'Australian identity': "Aboriginal values and institutions may be unfamiliar to most Australians but they are definitely not alien."¹⁴¹

The principles of agreement set out at the start of this story are now far from view. It is necessary at this point to reiterate the social equation that was now underway in reconciliation: a change in public attitudes, brought about through public advocacy and education, must now precede the agreement itself. Any sense that either the historical necessity for agreement or indigenous rights to autonomy exist independently of the public capacity to appreciate them is now set aside. Whether one thinks that a treaty could have an instructive effect – the strong symbolism of a binding and enforceable agreement – the conditions of this policy were to move the point of indigenous subjection, from the hands of politicians and administrators, to the

¹³⁹ Bob Hawke frequently invoked this sort of language, most notably in his response to the Barunga Statement of 1988. See Brennan 1994, pp. 74-76. More recently it has been used by members of the CAR such as Gustav Nossal and Ray Martin.

¹⁴⁰ Rowley 1987, p. 149.

will of the Australian people. It was the inauguration of an argument about the parameters of Australian decency and maturity. Indigenous people are expected to wait for the conclusion of that argument.

Legislating reconciliation

By the late 1980s the federal ALP was exceedingly cautious about the consequences of acknowledging prior indigenous ownership and non-payment of compensation. Responding to the Victorian state government's request to pass legislation blocked by their uncooperative upper house, the federal party did so, but chose to disable the preamble.¹⁴² The legislation, the *Aboriginal Land (Lake Condah and Framlingham) Act 1987* and the Victorian *Aboriginal and Torres Strait Islander Heritage Protection Act*, had each included a sentiment in the preamble that the Commonwealth Attorney-General felt exposed the Commonwealth. It recognised that the lands in Victoria had been expropriated without regard to compensation or to Aboriginal law.¹⁴³ The reasoning was outlined by Peter van Hattem in 1988:

The recital of facts in the preamble to a statute is prima facie evidence of those facts: see *Dawson v The Commonwealth* (1946) 73 CLR 157. Accordingly, upon the enactment of a statute containing the proposed preamble, there would be prima facie evidence for the proposition that prior to European settlement, Australia was owned and occupied by the Aboriginal people. The onus would then be on any party disputing that proposition to produce evidence that in fact Australia was *terra nullius* at that time ... If Australia were to be reclassified as an occupied land at the time of European settlement, it would follow that, as a matter of international law, the existing legal system (if any) would continue to apply until overridden.¹⁴⁴

¹⁴¹ Brennan 1994, pp. 86-87.

¹⁴² See on this issue Chesterman, J. and Galligan, B. 1997. *Citizens without rights: Aborigines and Australian citizenship*, Cambridge University Press, Melbourne, pp. 201-201.

¹⁴³ Recounted in *ibid.*, pp.95 - 96

¹⁴⁴ van Hattem, P. 1988. 'Australia as *terra nullius*'. In *A treaty with the Aborigines?* (K. Baker, Ed.), pp. 30-31. IPA, Canberra.

The issue of the ATSIC preamble is instructive as well. Coalition hostility to that preamble reflected a concern of a ‘New Zealand style’ situation emerging.¹⁴⁵ What needs to be stressed is that legislators were conscious of the legal implications of their approaches to recognising indigenous prior occupancy and ownership; if change was to take place it would not be thrust upon them through a progressive judicial reading. The legislation passed in 1991 was to reflect this concern.¹⁴⁶

As noted above, the RCADC report was to provide the ideal context to rebuild bipartisanship in the most non-committal of ways. Tickner expressed ‘delight’ at the Report’s recommendation calling for reconciliation¹⁴⁷; his counterpart in the Opposition Dr. Wooldridge seemed equally pleased, being of the view that “in Aboriginal affairs we desperately need a win.”¹⁴⁸ They could both see a way forward that committed no-one to anything but retained bipartisanship. The two men were to shake hands on it:

At the end of a very difficult 9-month debate we leaned across this table and shook hands – the only time in this House that that has happened. We shook hands because we had been able to come to a joint position. It was not easy, but the Parliament spoke with one voice.¹⁴⁹

The quest for bipartisanship is the search for a policy that could avoid the first of the institutional restraints noted above. As the Minister candidly stated in his second reading speech to the CAR Bill: “the legislation has been carefully framed to achieve continuing cross-party commitment to the process of reconciliation through to the centenary of Federation in 2001.” Unanimity would “send a powerful message.”¹⁵⁰

¹⁴⁵ Brennan, p. 94.

¹⁴⁶ By the time of the referendum on a new constitutional preamble in 1999, this rationale was triumphant. See de Costa 2000, pp 277-281.

¹⁴⁷ Tickner, *Commonwealth Parliamentary Debates*, House of Representatives (May 15 1991), p. 3778.

¹⁴⁸ Michael Wooldridge, *Commonwealth Parliamentary Debates*, House of Representatives (May 9 1991), p. 341.

¹⁴⁹ Wooldridge, *Commonwealth Parliamentary Debates*, House of Representatives (May 27, 1997), p. 4142.

¹⁵⁰ Tickner 2001, p. 30.

This is clearly the intention of Section 14 by which the government (subsection c), the opposition (subsection d) and any other party holding five or more seats in either House (subsection e) all are guaranteed one appointment to the Council.¹⁵¹ Similarly, the appointment of the Chairperson and Deputy Chairperson is by the Governor-General on the advice of the Minister after consultation with the Leader of the Opposition and the Leader of any party holding five or more seats in parliament. In practice there has been only one dispute over the composition of the Council, caused by the refusal of the Coalition government to reappoint Patrick Dodson as Chairman for 1998-2000. No political figure from the major parties openly expressed opposition to the policy of reconciliation during its official period.¹⁵² As we shall see, there was simply no reason to.

It would be strange and regrettable and there would be grounds for suspicion if the quest for bipartisanship were to result in widespread Aboriginal disillusionment and complete satisfaction from the Queensland National party.¹⁵³

Charles Perkins described reconciliation as “a big lie and a sell-out.”¹⁵⁴ Pat Dodson said he would not have accepted the position if he thought a treaty or ‘instrument of reconciliation’ was not a possible outcome.¹⁵⁵ Dodson’s position may be thought odd, given the explicit ruling out of a treaty and ‘outcomes’ in the legislation and debate, yet there is a savour of duplicity about this: in rallying indigenous support for reconciliation, Tickner admits that in a crucial meeting to gain support for the legislation from the ATSIC board of commissioners, he told them that a treaty “was certainly not excluded by the terms of the reconciliation legislation”; he went so far as to assure the board that the real issues were not over terminology, but over the

¹⁵¹ *Council for Aboriginal Reconciliation Act* (1991), No. 127 of 1991.

¹⁵² Although Howard certainly attacked the Council during the lead-up to Corroboree 2000. See Chapter 5.

¹⁵³ Brennan 1994, p. 107.

¹⁵⁴ Charles Perkins, cited in James Morrison, ‘Reconciliation body a sell-out, says Perkins’, *The Australian* (18 December 1991), p. 3.

¹⁵⁵ Cited in Gardiner-Garden at note 54. Indeed, Dodson only agreed to participate in the Council after a personal phone call from Paul Keating. Tickner 2001, p. 39.

substance of agreement and the indigenous party to it.¹⁵⁶ While this may prove nothing other than Tickner's naivety or misguided faith in the transformative power of the legislation and council he was creating, it underlines indigenous determination for a substantial agreement, implicit in their understanding of the word 'treaty'.

The effect of the three reports discussed above was to place the CAR in the position of having to oversee nothing less than the complete transformation of Australian society's attitude toward and understanding of indigenous peoples. Tickner's memoir is on this point frankly revealing: "The challenges were formidable. The concept of a reconciliation process had no substantial base of support within the Coalition and, indeed, among Aboriginal and Torres Strait Islander people. Even in the Labor party there was virtually no support."¹⁵⁷

As we shall see, the CAR has had some success in resocialising sections of the Australian community. Of more impact by far on social attitudes, however, was the incoming Coalition government, which in 1996 began a systematic assault on the ALP legacy on Aboriginal affairs, most notably through amendments to the Native Title Act, intense scrutiny and funding cuts to ATSIC, and the issue of a just response to the 'Stolen Generations'. Such issues have polarised the Australian community.¹⁵⁸ Yet Tickner asserted that the architects of the process consciously built in safeguards against this: "It became clear that any reconciliation process should have its key objectives and processes enshrined in legislation that would survive a change in government."¹⁵⁹ The Coalition did not revisit the statute after taking office in 1996. What then were the functions of the legislation that were to fail?

In 1989 Frank Brennan and James Crawford gave a paper to the Australian Legal Convention. There they canvassed the option of an independent authority that would oversee a process leading to a 'charter of recognition'. The institution itself

¹⁵⁶ Tickner 2001, p. 38.

¹⁵⁷ *ibid.*, p. 28.

¹⁵⁸ See Chapter 4.

¹⁵⁹ Tickner 2001, p. 33.

could be based on the Australian Law Reform Commission – a body able to conduct research, take submissions and hold public inquiries, a statutory authority made up of appointees.¹⁶⁰ In a sense this is what the CAR is, though without a charter. In addition to public advocacy, education and promotion of reconciliation, the Council could *inquire into* the appropriateness of a document.¹⁶¹ Referring to the “principles” set out in the CAR Act, Tickner later wrote that he saw the legislation as providing “a tangible framework for a change in relations between indigenous and non-indigenous Australians.”¹⁶²

Yet given the emphasis on a process and not a specific outcome, the first question to answer then is why the Parliament chose to include in the legislation both the preamble d), “by Federation,” and Section 32, “This Act ceases to be in force on 1 January 2001.” Of course, the date was the centenary of Australia’s Federation, and so was freighted with symbolism. It is not clear that an open-ended process would have been supported, or even desired, but a time frame of nine years (once the Act and Council came into effect) seems arbitrary: no study benchmarking the time required by other post-colonial nations to achieve ‘reconciliation’ appeared to have been done. An indication of the truth was given by Liberal Senator Knowles: “I also very much welcome the fact that a sunset clause ensures that the Act will terminate at the end of the decade. The last thing that we need in the field of Aboriginal affairs is yet another self-perpetuating structure.”¹⁶³ As observers of reconciliation now realise, the CAR did establish considerable moral authority among many Australians. The creation of an organ into which that authority was partly transferred is dealt with in Chapter 5.

The actual Council itself was a response to the problems of voice and representation indicated above. It was hortatory: take a selection of the most able communicators from a representative spread of Australian society, but give it an

¹⁶⁰ Discussed in Gardiner-Garden at note 39.

¹⁶¹ *Council for Aboriginal Reconciliation Act 1991*, s. 6 (my emphasis)

¹⁶² Tickner 2001, p. 27.

¹⁶³ S.C. Knowles, *Commonwealth Parliamentary Debates*, Senate (August 15, 1991), p. 400.

indigenous majority. The impulse seems to have been to provide inspiration – if their betters could believe in this, perhaps the cowed masses could also believe, or have their beliefs altered. Why the legislation calls for *Aboriginal* reconciliation when the intention was so clearly the construction of a new *Australian* attitude, is also unclear. The model is a ‘Council of Elders’; by appropriating some distorted model of Aboriginal leadership perhaps some act of reconciliation was effected.¹⁶⁴ The consequence of this approach was that the CAR itself would have to embody a moral authority on which the process came to depend. That it succeeded had much to do with the charisma and dignity of the first Chair – the ‘father of reconciliation’ – Patrick Dodson.

Retrospectively, Tickner saw the legislation as having three tasks: an anti-racism agenda furthered through the education of settlers about Australian history and indigenous culture; the placement “on the nation’s public policy agenda” of a formal document; and creating the political basis for indigenous social justice and human rights to be addressed. Although the original concept was for a ‘Council for Aboriginal Reconciliation and Justice’, Hawke’s office vetoed the latter portion as “over the top.”¹⁶⁵ Tickner asserts that the connection was never lost in his own mind and activities. ‘Justice’ may have ensured substantive discussions and advocacy throughout the life of the Council. Certainly it would have brought the concept of reconciliation closer to that which underpinned the post-apartheid process in South Africa, as well as keeping the two fundamental rationales of an indigenous-settler agreement – historical necessity and indigenous autonomy – in plain view.

The first series of amendments to the CAR legislation accepted by the ALP were those that instructed the Council to pursue its policies at the ‘community-level’. These speak to the type of concerns for localisation and the sidelining of government

¹⁶⁴ Tickner alludes to a conversation he had with then Prime Minister Hawke’s son, Stephen, who had been close to the Noonkanbah community in WA. This conversation confirmed Tickner’s view about the format of the Council. Tickner 2001, p. 34.

¹⁶⁵ *ibid.*, pp. 28-30.

that were desired by John Stone and his ilk. Section 6(d) clearly proposed that the CAR focus its efforts in that arena, and much of the debate in the chambers supported that. During the debate, the Opposition had also foreshadowed amendments that would mandate the Council to undertake a role benchmarking indigenous peoples' social and economic status (a role seen as crucial by the Council in its last gasp of life)¹⁶⁶ but the Government declined it and the Opposition did not fight for it. Indeed as Opposition Spokesman on Aboriginal Affairs, Michael Wooldridge, noted at the time: "We wish to make the statement and are quite prepared to leave it at that."¹⁶⁷ In fact, the subsequent parliamentary debate is notable for the fact that most of the speakers seem to pursue not a process, but particular, if largely unrelated, outcomes:

Rob Hulls (Labor): "there is an urgent need to educate non-Aboriginal Australians about the cultures of Aborigines and Torres Strait Islanders. In particular, the tragic history of Aboriginal and Torres Strait Islander people must be told with the objective not of creating guilt but of fostering a compassion and empathy for Australia's indigenous people."

Fred Chaney (Liberal): "there are real and genuine difficulties out there in the community and there are some powerful attitudes, some of which are strongly supportive of Aboriginal Australians but others which clearly are not. There is a great deal of unhappiness and uncertainty and, at times, I think resentment. If this Bill is about anything, it is about our lack of success in weeding those things out of Australia in the past and the need to do something different."

Warren Snowdon (Labor): "The issue is that Aboriginal and Islander Australians have just demands. They have a right to be treated as equals and they have a right to argue that we deal with them through a process of negotiation. The process of reconciliation is extremely important... it must not be a question of the last common denominator in politics – what the worst people in our community will accept as legitimate."

Duncan Kerr (Labor): "The proposal is to see whether we can bring together all Australians to think hard about what we need to do in these areas. I hope the fact that the proposal is not controversial does not mean that the process of seeking reconciliation does not involve

¹⁶⁶ Council for Aboriginal Reconciliation and Benchmarking Workshop. 1998. *Towards a benchmarking framework for service delivery to indigenous Australians: proceedings of the Benchmarking Workshop, 18-19 November 1997*, Council for Aboriginal Reconciliation, Canberra.

¹⁶⁷ Wooldridge, *Commonwealth Parliamentary Debates*, House of Representatives (June 5, 1991).

controversial ideas. One of the things that I feel we have failed to do in this country in any significant debate is to work out how we can give effective political power sharing to Aboriginal Australians.”

J.P. Riggall (Liberal): “There are also the people whom I call the quiet Australians, the quiet Aboriginal communities, who are part and parcel of the townships. They are people who are working away at jobs, who are responsible people, who have dignity and who have no problems with their neighbours, whether they be white or black. It is great to see those success stories; but, unfortunately, they are not news. They never get the headlines in the newspapers; they are never mentioned at local council meetings. We see only the down side. The more we can see the achievers in the Aboriginal community taking a higher profile and taking the responsibility within communities, the better off we will all be.”

Peter Nugent (Liberal): “It is important to guard against activists taking over the structure we are now talking about ... The emphasis must be on community contact and the Council must concentrate on practical outcomes.”

Warren Truss (National): “Sadly, over the years, Aboriginals have been abused and used as political pawns by so many sectors of our community, manipulated in many instances by white advisers, often with the very best of intent, often with the objective of doing the best for the people. Aboriginal people have been, over the generations, a very trusting group. They have tended to believe what many people have said to them, even when that has not always been in their best interests. Those people have come from all sides. There have been those, sadly many on the Government payroll, who, rather than help the Aboriginal lot, have fed racial hatred and incited people to make demands which have done nothing whatever to improve the real welfare of Aboriginal people ... There would be no need for reconciliation if the divisions had not been created in the past. It is most regrettable that people, both white and black and every other colour, have contributed towards the development of those divisions in the past.”¹⁶⁸

John Coulter (Democrats): “Reconciliation must be the process by which we ... weld together those elements of the Aboriginal culture and other elements of the dominant European culture and build a totally new culture.”¹⁶⁹

Would the Council be able to satisfy these aims? The goals sought in the legislative debate are wildly conflicting by any measure: satisfaction of the just

¹⁶⁸ All of the quotes come from *Commonwealth Parliamentary Debates*, House of Representatives (June 5, 1991), pp. 4824-4852.

¹⁶⁹ John Coulter, *Commonwealth Parliamentary Debates*, Senate (August 14, 1991), p. 319.

demands of indigenous peoples; the need to accept the failure of past policies; the removal of residual racist fractions in society; the problem of meddlers from the 'aboriginal industry'; the creation of an Aboriginal-European cultural hybrid. Were these all features of an 'achievable' reconciliation, something in the bounds of what was practical? The legislation simply allowed people to assign it different values, because when the goal became the expression of mature community will, the perception of each and every person was equally valid.

3.

The process of reconciliation

As the Bicentenary approached and people began to reconstruct the history of pioneer settlement and its meaning for Australia, there was unease among both Aborigines and non-Aborigines. Aborigines did not look forward to celebrating the dispossession of their lands and the breaking up of their tribes, culture and way of life. Other Australians felt somewhat guilty about their ancestors' way of treating the Aborigines, but also uneasy about the implication that might follow from any constitutional or legal re-evaluation of the history of European settlement.”¹

Reconciliation might have overcome that unease, had it been able to travel a course imagined in the early 1980s, eroding settlers' fear and ignorance for the explicit purpose of enabling a substantial agenda of constitutional and legislative reform. In this chapter I consider the way ways in which reconciliation was deployed within national political debate over the claims of indigenous peoples. In the 1990s, the issues of native title, the Stolen Generations and constitutional reform all spent time at the centre of national life. Each of these debates was consistently related to Australian identity and were therefore ready-made for reconciliation to flourish within them.

What this chapter observes is the restrictions that were placed on reconciliation's capacity to influence these debates about identity, because of prior commitments to harmony, national unity and certainty. I extend this analysis with an observation of the spiritual applications of reconciliation. However, prior to this, it is necessary to document the limits to the process posed by the communitarianism of the Council for Aboriginal Reconciliation.

¹ CAR *Aboriginal Reconciliation: an historical perspective – the Bicentenary*
<http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/depts/historical/4.html> (June 9, 2000).

The Council for Aboriginal Reconciliation

A communitarian emphasis can be seen throughout the work of the CAR. Consider one of the major textual statements of reconciliation, *A Call to the Nation*, endorsed by the Australian Reconciliation Convention on May 28 1997:

... reconciliation between Australia's indigenous peoples and other Australians is central to the renewal of this nation as a harmonious and just society which lives out its national ethos of a fair go for all; and that until we achieve such reconciliation, this nation will remain diminished ... reconciliation and the renewal of the nation can be achieved only through a people's movement which obtains the commitment of Australians in all their diversity to make reconciliation a living reality in their communities, workplaces, institutions, organisations and in all expressions of our common citizenship.²

This is the organising principle of reconciliation: a link between personal or community responsibilities, and those of the nation.³ In this way, the project of the CAR was to test shared understandings, encouraging the transcendence of immediate self-interest, often through a commitment in one's immediate community.

Throughout the debate on the enacting legislation, the Coalition had stressed that the process of reconciliation must be conducted at the 'community-level'. Their demands were satisfied by the inclusion of a clause in Section 6.1(a), instructing the Council to direct its efforts with that focus. As Senator Michael Baume indicated:

The Opposition is particularly pleased that the Council will focus its work mainly on a process of reconciliation at a community level rather than at some other exalted level ... In the past, at the community level, many things worked in spite of governments, not because of them – and, I might say, without being too critical, in spite of some things that this Government has done,

² 'Renewal of the Nation', ARC 1997.

³ In Gough Whitlam's campaign speech of 1972 the idea of national diminution was introduced, with a distinct sense that Australia was diminished in the eyes of the world while indigenous justice had not been addressed. In the reconciliation process the diminution lies elsewhere: a slogan used repeatedly by the CAR in promotional material – "Reconciliation: it's up to us" – captures the link. A recently published book for secondary students, *Reconciliation: It starts with me*, apparently uses Nelson Mandela's life as a model of personal strength that influenced South African national life. Reported in Jamie Berry 'After Mandela, students walk for reconciliation' *The Age* (November 30, 2000).

not because of them. We are overjoyed to see that the concentration of this council will be at the community level.⁴

Baume's comments should be considered against a backdrop of Coalition opposition to constitutional or treaty recognition of indigenous claims. The task of the Council would not be to provide a perpetual source of criticism of Australia's failures broadly construed – a function of the 'sunset clause' that so pleased Senator Knowles.⁵ Here relationships are thought effective only within communities as they currently exist.

A good example of the idealisation of community is found in the publication *Reconciliation – A Streetwise Comic*, produced by the CAR to help children grasp the concepts. In one story, 'A place to rest', pastoralists who find indigenous remains on their property realise that the bones are evidence of a massacre.⁶ The metaphor of 'the drought breaking' is used to indicate that the time is nigh for the recognition of a shared and lamentable history; a motif continued by the reward of rain for a community that has done the right thing in allowing reburial. Other stories tackle issues like police and public attitudes to Aboriginal people, and racism in sport. In each tale, the sympathy and interest of settlers in the problems of Aborigines are eventually located and built upon in the interests of the whole community.

The development of this rhetoric of community was accompanied by the formation of a network of community organisations, under the CAR-assisted umbrella Australians for Reconciliation (AFR). It is difficult to gauge exactly the extent of these groups or their activities,⁷ though I consider the activities, and mixed results of one such group with a study of Rachel Lander's film *Whiteys like us*, in the following

⁴ Michael Baume, *Commonwealth Parliamentary Debates*, Senate (August 14 1991), p. 319.

⁵ See previous chapter. The CAR included among its National Strategies paper, *Finding common ground*, the intention to continue the process of reconciliation: Council for Aboriginal Reconciliation. *Finding common ground*. 2001. Sydney, ABC. See Ch. 5.

⁶ Streetwise Comics and Council for Aboriginal Reconciliation (Australia) 1997. *Reconciliation*, Streetwise Comics, Sydney, pp. 1-10.

chapter on the ‘reconciliation movement’. This amorphous movement includes those people who have signed ‘Sorry Books’ or who have taken part in ‘reconciliation walks’⁸, as well as those in activist organisations such as Australians for Native Title and Reconciliation.

However, at one significant point, the CAR switched focus with a set of demands not framed in terms of what the ideal community could bear. Developing a clear statement of indigenous rights, the document *Going Forward*, it should be noted, was reached in cooperation with ATSIC and the HREOC Social Justice Commissioner.⁹ It attempted to delineate a fair response based on the new legal reality after *Mabo*. Its intention was to set out a comprehensive understanding of social justice for indigenous people, and did so through a series of explicit definitions of justice in a wide range of policy areas, relying on consultations conducted with indigenous communities and organisations: constitutional protection for indigenous rights; governance issues, both within the federal structure and within indigenous communities; compensation; cultural heritage; economic development; and the acknowledgment of appropriate symbols. All are explained as crucial to a coherent understanding of indigenous social justice. Reconciliation, mentioned infrequently in the submission, was understood to be one outcome of the social justice strategy: “There can be no reconciliation without social justice.”¹⁰

There is some concern with the capacity of settlers to accept these notions of social justice, but it comes in a short statement that sets out the nature of a principled

⁷ In 2000, the number of groups was estimated at 396. Council for Aboriginal Reconciliation, Annual Report 2000. There are currently 57 in Victoria. Part of the difficulty in estimating the numbers is the overlap these groups have with existing social justice networks, religious and union groupings.

⁸ Such as the walk across Sydney Harbour Bridge the day after *Corroboree 2000*, which was said to have involved 500,000 people. Gerard Henderson, ‘Walking with the mainstream’, *The Age* (May 30 2000).

⁹ Council for Aboriginal Reconciliation, *Going forward – social justice for the first Australians* (Submission to the Commonwealth Government, March 1995). *Going Forward* was the response to the invitation foreshadowed in Keating’s second reading speech to the original native title legislation, where he saw the need to seek “formal advice ... constructive, realistic proposals.” Reprinted in Goot and Rowse 1994, p. 252.

¹⁰ *Going forward*, ‘What is social justice?’.

relationship: “measures of social justice can be assessed by the preparedness of the wider Australian community to shift from the historically-based regime of a welfare-based relationship with them to one based on an acknowledgment of the rights of the indigenous peoples of Australia and ensuring that they not only have access to their rights but are empowered to enforce them.” It is a rights-based approach: while recognising the disparities of power, it maintains the idea of a relationship in terms of its intrinsic justice, not its idealised harmony.

Yet the 1995 demands seem unusual, if not an aberration (at least until the CAR’s 2000 *Annual Report*, framed in a context of uncertainty about the value and future of the process). A major project of the Council from the outset was to fulfil the obligations of s. 6 of the CAR Act, which instructed it “to investigate the viability of a document of reconciliation.” However, an abiding confusion developed in the CAR material over the relationship between reconciliation and a formal document. On the one hand, the need for a document is imperative given the lack of a formal agreement in our history:

During the whole process of colonisation and settlement, neither Britain nor those in authority in the colonies ever concluded a formal treaty or agreement with the original inhabitants. Australia is the only Commonwealth country that never signed an official treaty with Indigenous peoples.¹¹

However, in the same publication comes a categorical statement of “what it won’t do ... The document will not be a Treaty.”¹² I maintain that the idea of any document setting out the indigenous-settler relationship only has rhetorical force because it slots directly into two related historical narratives: a global tradition of seeking consent, in which colonial powers made agreements with indigenous peoples in new colonies; and an understanding that such an agreement would recognise and protect indigenous autonomy. This was the intention of indigenous claims from the

¹¹ Council for Aboriginal Reconciliation, 1999. Finding common ground: the draft document of reconciliation, ‘Towards a Document for Reconciliation’.

¹² *ibid.*

NAC, through Kevin Gilbert's draft treaty, to the Barunga and Eva Valley statements.¹³ Lois O'Donoghue, the original chair of ATSIC and a member of the CAR, expressed hope that reconciliation could bring about "something more valuable than a treaty – a constitution which specifically recognised indigenous Australians and their rights."¹⁴ A 1993 discussion paper, *Making things right*, first canvassed ideas for a document. At the time, the CAR Chair wrote in the *Aboriginal Law Bulletin*, categorically ruling out any CAR involvement in such a document:

Under the Council for Aboriginal Reconciliation Act 1991 (Cth) the Council is required to seek the views on whether any document of reconciliation would benefit the community as a whole. If the Council considers that there would be benefit in such a document, the Council can make recommendations to the Minister on its nature and content. It has no mandate to negotiate such a document on behalf of ATSI peoples.¹⁵

Research conducted by the CAR in its first two terms convinced it of the appropriateness of a document, and the final term planning set out a strategy toward such a document.¹⁶ The CAR thus went outside its mandate in actually putting a document of reconciliation together. As Council member Jackie Huggins was later to state, "Council has gone beyond the call of duty by actually producing those documents to the nation."¹⁷ The motivations of the CAR in pursuing this task, and the relative acquiescence by the government, are extremely odd indeed, and strongly imply that the enacting legislation, the Council itself and its actions have not been taken seriously.¹⁸ In what other area of legislation pertaining to indigenous affairs would such

¹³ 'Eva Valley Statement' (August 5, 1993), reprinted in Goot and Rowse 1994, pp. 233-235.

¹⁴ Gardiner-Garden, at note 55.

¹⁵ Pat Dodson, 'Reconciliation and the High Court's decision on native title', *Aboriginal Law Bulletin* 3 (61) April 1993, p. 9. However, Pat Dodson has not been consistent on this point. He said "he would not have accepted the position if he thought a treaty or 'instrument of reconciliation' was not a possible outcome." Reported in Gardiner-Garden, at note 54.

¹⁶ *CAR Annual Report* (2000), Chapter 7.

¹⁷ Huggins, 'An evening with Jackie Huggins'.

¹⁸ I note Evelyn Scott's plea to the Prime Minister for the recommendations in the final report to 'be taken seriously'. Reported on ABC Radio National (December 7, 2000).

laxity over mandates be acceptable? I return to the Draft Document and the CAR's final year in Chapter 6.

The change of the federal government in 1996 had major ramifications for the CAR and reconciliation more generally. Events in issues like native title and the Stolen Generations were to massively affect the CAR's work. And it became clear that a reservoir of community good will was not in fact directing those debates; it was being used and depleted as part of the everyday political strife in indigenous affairs. Then Chair of the CAR, Pat Dodson, who was not to be reappointed by the new government, saw the point as pivotal: "Reconciliation is at a crossroads...(we risk) pulling apart the threads of reconciliation."¹⁹

But how could this be? The original project of linking the personal growth of Australians into a collective expression of national recognition could surely not be held back by the actions of a few determined racists. Tickner's 'fireproofing' appeared to have come unstuck. The election of the Howard government in 1996 began to expose the faults of the project in its original format, and the difficulty of reaching a national/communal enlightenment that could conquer political expediency and enable indigenous self-determination. From 1996 reconciliation came under pressure to take a more 'practical' focus. Though the Council remained a crucial institution through the 1990s, it is certain that it soon lost any capacity to keep the process of reconciliation on a more clearly-defined track. Reconciliation was put to work in national political life and its limits were quickly exposed.

Reconciliation and the issues

How was a process that was intended to transform the relationship between the indigenous and settler communities able to stand outside the conflict and vituperation of the 1990s? The answer is that it simply did not: reconciliation lost much of its

¹⁹ Cited in Moran 2000, p. 259.

unifying force, remaining neutral and bipartisan only while facile. Even at moments of symbolism such as *Corroboree 2000* or the Australian Reconciliation Convention in 1997, when provocation and embarrassment hardly seemed astute, the political manoeuvring and tone of statements by the Prime Minister strained credibility.²⁰ As I set out below, it became by turns a talisman or shibboleth; a concept imbued with an almost mystical force by politicians with the most meagre of ambitions.

Journalists and social researchers have noted ‘confusion’ between reconciliation and the wider realm of indigenous-settler affairs.²¹ But why does it make sense to talk of the confusion of these topics? Murray Goot wondered about the effects of quarantining these issues:

Presumably, these researchers also would describe as ‘confused’: the council’s own reference, in its *Going Forward* (1996) statement, to compensation and the possible recognition of separate indigenous sovereignty; Mr Howard’s view that unless it delivers substantial gains to indigenous people in terms of job opportunities, education and better health and housing, reconciliation is meaningless (*SMH* February 26); and a recent call by some Aboriginal leaders to have the repeal of mandatory sentencing laws included in any document of reconciliation – a link a ‘council source’ described as ‘obvious’.²²

It is the intention of this section to detail why and how such issues interact, and to argue that the quarantining of reconciliation is a deliberate strategy to steer the policy away from the fundamental rationale for an agreement: both its historical necessity and its potential to enable indigenous self-determination. As late as November 1999, the Minister for Reconciliation, Phillip Ruddock, was able to claim

²⁰ Howard’s hectoring style at the ARC in refusing to offer a national apology disgusted many; while his behind the scenes manipulation of the Corroboree 2000 event and demeanour on the day suggested an abiding ambivalence. See David Marr, ‘Corroboree camera missed pictures that told the full story’, *The Sydney Morning Herald* (May 29, 2000). After refusing to participate in the reconciliation walk in Sydney on principle, Howard then declined to walk in Melbourne because of a prior commitment in his electorate.

²¹ “Many who have thought about it ... confuse reconciliation with Mabo.” Newspoll, Saulwick and Muller, and Hugh Mackay. 2000. ‘Public opinion on reconciliation’. In Grattan 2000, p. 36; ‘Reconciliation research shows confusion and apathy’, ABC TV *The 7:30 Report* (March 3, 2000).

²² Murray Goot, ‘Reconciliation unreconciled’, *The Bulletin* (April 4, 2000), p. 39.

that the stolen generations were a “separate issue” to reconciliation.²³ Indigenous leaders, conversely, have usually tried to make explicit connections between reconciliation and social justice on various issues.²⁴ The partial connections that are allowed to remain between reconciliation and native title for example, reveal reconciliation’s limited capacity to influence the political agenda, and conversely the way political agenda-setters were able to appropriate reconciliation.

Reconciliation and Native Title

The very idea of indigenous rights to land is, at the very least, outside the purview of the assimilationist position. Moran charts from 1968 the development of a statutory land rights agenda in governmental thinking.²⁵ From the Woodward Royal Commission to the return of Gurindji land on the Vestey lease, through the establishment of the Northern Territory Land Rights Act (1976) and the states’ various legislative responses, there was a decided turning away from the practices of assimilation. Whitlam’s comment that Aborigines are “our true link with the region,” was the point where indigenising nationalism becomes the ascendant ideology.²⁶ The “livery of seisin” was political if not legal acknowledgment that there were rights that existed outside the Australian legal structure that continued to exist and were deserving of recognition.²⁷

Moran identifies the indigenising position as coming to maturity in the Woodward’s second report (April 1974) which recommended that indigenous rights to land should exist up to the point that the national interest demands their

²³ Cited in Rosemary Neill, ‘Howard reconciled to a curate’s egg’, *The Australian* (April 6, 1999), p. 15.

²⁴ See for example Margo Kingston, ‘Sentencing laws linked to reconciliation’ *The Sydney Morning Herald* (March 11, 2000): “Aboriginal leaders have called for the repeal of the Northern Territory’s mandatory jail terms to be included in the document for reconciliation, linking the laws’ repeal with reconciliation for the first time.”

²⁵ Moran 2000, pp. 174-176.

²⁶ *ibid.*, 174.

²⁷ Whitlam, p. 471.

limitation.²⁸ The first legislation saw indigenous rights as ‘filling up’ the unused portions of land and political control. It was not a challenge to the wider tenure or authority of the nation-state, but a completion and accommodated devolution.²⁹ That legislation and the subsequent statutory regimes established in the states provided either for grants of Crown land or the establishment of indigenous funds for the purchase of lands. Yet these concessions challenged Australian assumptions about identity and authority in only a minimal fashion, given what was ahead. In the 1992 judgement in *Mabo*, indigenous land title was expressed outside the largesse of government, recognising an older authority: the unextinguished traditions and culture of indigenous peoples.³⁰ The power to extinguish, however, remained with the Crown, whose grants of interest in land in most cases ended native title.

Mabo was seen very early on as having the power to “to both facilitate reconciliation and intensify conflict.”³¹ Many people both at the time of the judgment and since, have drawn obvious and positive connections: “the High Court decision recognising native title was one document of reconciliation.”³² The Aboriginal Peace Plan presented to the government during the negotiations called for Commonwealth legislation that recognised and protected indigenous rights and would lead towards their constitutional acknowledgment.³³ Speaking about the High court decision later in *Wik*, Henry Reynolds thought the principles of the judgment “took Australia up to the cross-roads and said you must get out now and find your own way. From there, where we had been left, it was possible to see in both directions, to see where we had

²⁸ Of course this is quite similar to the prescription in *Wik*, in which native title conveys entitlements subject to pastoral requirements. It is also the underlying jurisprudence in Canada. See my discussion of the *Delgamuuk’w* judgement in Chapter 9.

²⁹ Moran 2000, p. 179.

³⁰ *Mabo and Others v. Queensland* (No. 2) (1992) 107 ALR 1.

³¹ Pat Dodson, cited in Gardiner-Garden, J. *The Mabo debate: a chronology*. [No.23]. 1993. Canberra, Department of the Parliamentary Library, Parliamentary Research Service. Parliamentary Background Paper.

³² Campbell Anderson (Managing Director of North Limited and Chairman of the Minerals Council Of Australia Land Access Committee), ARC 1997: ‘Seminar Session 3: Documents of Reconciliation and Constitutional Issues – Native title’.

come from and where we might head in the future. We weren't sure about which way to go, but we knew we had to decide."³⁴

Shortly after the judgement, Keating took the reconciliation portfolio under his responsibilities. A government discussion paper makes the connection between reconciliation and native title explicit: "(t)here would be serious consequences for reconciliation if there was an inadequate response to Mabo."³⁵ It gave substance to the terms of recognition and made reparation a possible response within the context of reconciliation. The Coalition position, conversely, stressed the importance that "the issues of Mabo be settled separately from broader issues of reconciliation."³⁶ Others joined them in wanting to insulate the two, an executive member of the National Farmers' Federation lamenting that "(i)t would be unfortunate if Native Title became a major determinant of reconciliation policy."³⁷

Eventually three policies gained the support of the National Indigenous Working Group (NIWG) and thereby the backing of Green and Democrat Senators that could ensure passage of legislation: a Native Title Act (NTA), an Indigenous Land Fund, and a Social Justice Package³⁸: legislation would codify traditional rights and title; a land fund would enable the purchase of additional lands; and a social justice package would assist those who were not able to recover title, as well as support self-determination of all indigenous peoples.³⁹

³³ 'The Aboriginal peace plan', reproduced in Goot and Rowse 1994, pp. 218-219.

³⁴ Henry Reynolds, ARC 1997: 'Documents of reconciliation and constitutional issues'.

³⁵ 'The Cabinet's guiding principles on native title', reprinted in Goot and Rowse 1994, p. 225.

Similarly, the council of Australian Governments statement on Mabo spoke of the "broader aspirations" of Aboriginal and Torres Strait Islander peoples after Mabo, reprinted in *ibid.*, p. 228.

³⁶ Extract of the Coalition Sub-committee's 'Mabo issue paper', reprinted in *ibid.*, p. 232.

³⁷ John Mackenzie (Chair, Aboriginal Affairs Task Force, NFF), ARC 1997: 'Seminar Session 3: Documents of Reconciliation and Constitutional Issues – Native title'.

³⁸ For a complete discussion of the politics of the original native title legislation see Rowse, 'How we got a Native Title Act', in Goot and Rowse 1994, pp. 111-132.

³⁹ Keating certainly acknowledged this in his statement that Mabo gave "little more than a sense of justice" and that a suite of responses was required. See 'Cabinet principles', paras. 28 and 31, in Goot and Rowse 1994, pp. 224-225.

After the passage of the NTA, the government power to extinguish native title was then restricted by the Wik judgement of 1996, which found that the pastoral leases granted by governments since the nineteenth century did not necessarily end native title.⁴⁰ Native title persisted up to the point that it affected pastoralists' needs unless explicitly extinguished. In this way, native title in no way degraded previously recognised tenures. However, the recently-elected Coalition government – perhaps then dimly aware of the mood of discontent in rural Australia – drew a line around the indigenising project with regard to indigenous rights to land. A vicious campaign was undertaken to make further entitlements difficult.

First the government railed against the decision itself, portraying the High Court decisions as regrettable and indicative of 'judicial activism'.⁴¹ There was unconcealed anger that a progressive judiciary had improved the possibilities for Aboriginal claims forever, and a campaign to delegitimise both the High Court and its decisions became a constant in 1997.⁴² It reached a crescendo when the government decided to amend the original native title legislation, ostensibly to accommodate the new factors raised in the Wik judgment.

Simultaneously, a concerted effort was being made by the pastoralists' industry group, the National Farmer's Federation (NFF), to sow fear and discontent among Australians. NFF President Donald McGauchie left no one in any doubt about the effects of truly recognising indigenous rights: "this decision has just about ended

⁴⁰ "(T)he basic argument, advanced for the Wik and the Thayorre, to sustain the suggested survival of their native title notwithstanding the pastoral leases granted in this case. Their argument was simple and correct. Pastoral leases give rise to statutory interests in land which are sui generis. Being creatures of Australian statutes, their character and incidents must be derived from the statute. Neither of the Acts in question here expressly extinguishes native title. To do so very clear statutory language would, by conventional theory, be required. When the Acts are examined, clear language of extinguishment is simply missing." Kirby J, *The Wik Peoples v The State of Queensland & Ors*.

⁴¹ Edgerton, G. 1998. 'Overcoming uncertainty: *Wik peoples v. Queensland*'. *Melbourne Journal of Politics* 25, pp. 34-37.

⁴² See Graham Richardson, 'Oh, what a tangled web they've weaved', *The Bulletin* (April 2, 1997), p. 31; also compare Mason, A. 1998. 'Should the High Court consider policy implications when making judicial decisions?' *Australian Journal of Public Administration* 57, p. 77.

Aboriginal reconciliation, certainly with the pastoral industry.”⁴³ However, the pastoral industry was not above blatant hypocrisy: it was revealed that the South Australian Farmers’ Federation was receiving CAR funding for an education ‘tour’ to assure pastoralists that the coexistence indicated by Wik would not threaten their enterprise; simultaneously they were giving public endorsement to the national NFF line.⁴⁴ The NFF produced a television advertisement at the cost of \$750,000 in order to personalise the issue for ‘ordinary Australians’⁴⁵: it showed a black and a white child both playing the game ‘Twister’, and left the viewer in no doubt that the development of native title was threatening the balance and fairness of the country.

What the pastoralists focused on was the idea of ‘uncertainty’. Edgerton has captured the usage neatly: “(t)he rhetoric of ‘uncertainty’ creates the impression that there must be something wrong with Wik and that pastoralists are being put in a vulnerable position. Claims of uncertainty give the impression of instability, unfairness, arbitrariness, and significantly, that ‘certainty’ is easily achievable.”⁴⁶ NFF activities reflected the tone set by the Prime Minister and Deputy Prime Minister, who, respectively went on national television holding up a map showing 70% of Australia ‘under threat’ of native title claims, and toured the country promising ‘bucketloads of extinguishment’. The PM indicated that as part of the legislative response to Wik, the *Racial Discrimination Act* was not sacrosanct, implying that it may be open season on indigenous people and their rights in order to re-establish ‘certainty’ of title to pastoralists.⁴⁷

Throughout 1997 and early 1998 the government attempted to draft a legislative response that could gain support in the Senate, where the government did not hold a majority. The spectre of a double-dissolution ‘race election’ on minority

⁴³ Donald McGauchie, reported in Asa Wahlquist, ‘Cultivating fear’, *The Weekend Australian* (October 25-26, 1997), p. 23.

⁴⁴ Wahlquist, *ibid.*

⁴⁵ *ibid.*

⁴⁶ Edgerton, p. 23. See also Bennett, pp. 54-55 on the general issues.

⁴⁷ *ibid.*

rights loomed large at several points.⁴⁸ Most commentators felt such an election would be a ghastly spectacle. However, one writer noted for his sympathies to indigenous people, Mungo MacCallum, was later to call for precisely such a poll: “What we need is an election in which a central question is just what has gone wrong in the past few years; why so much goodwill towards the reconciliation process has dissipated.”⁴⁹ His rationale was that it would force Australians to examine their values in the most searching and public method available, a general election.

What transpired in May 1998 was that a package of amendments to the original NTA passed the Upper House, with the vote of one independent Senator. These amendments were supported by no significant indigenous leader in Australia. As the Human Rights and Equal Opportunities Commission’s (HREOC) Social Justice Commissioner Mick Dodson commented: “What I see now is the spectacle of two white men – John Howard and (Senator) Brian Harradine – discussing our native title while we’re not even in the room. How symbolically colonialist is that?”⁵⁰ A race-based election had been averted but at a heavy price: native title as expressed in the two judgements was heavily regulated; government’s ability to extinguish it increased; pastoralists’ rights were upgraded; with power being transferred to state-based regimes of legislation, yet another erosion of the 1967 mandate. A major point of contention was over the indigenous ‘right to negotiate’, included in the original legislation but curtailed in Howard’s ‘ten-point plan’.⁵¹ The right to negotiate over the upgrading of pastoral leases, or exploration for minerals, had introduced a new recognition into the

⁴⁸ A full election of both houses held simultaneously. A normal election only elects half of the Senate each time, with Senators being elected for six years, or two House terms. The effect of a double dissolution is to halve the quota of votes needed to be elected, thereby increasing the chances for minor parties. In 1998 that raised a real possibility of the One Nation party holding the balance of power.

⁴⁹ Mungo MacCallum, ‘We need leaders on both sides with courage’, *The Australian* (September 17 1998), p. 17.

⁵⁰ Mick Dodson, reported in David Brearley and David Nason, ‘The long division’, *The Australian* (October 24-25, 1998), p. 25.

⁵¹ The question of ‘negotiation’ is a fraught one. As I will document in Chapters 6-9, a structure of negotiations relies on those negotiations being conducted in good faith. This is an absolute minimum acceptance of the disparities of power between the parties.

Australian political equation, giving a role to indigenous representative bodies. The episode illustrates a major divergence of views about indigenous peoples' ability to see their own interests (what I will later expand as assimilationist and indigenising positions).⁵²

A federal election was held in October 1998 in which Pauline Hanson's newly-formed One Nation party won the first preferences of nearly one million Australian electors.⁵³ This was a party explicitly committed to the abolition of all 'special rights' of indigenous peoples. They were denied parliamentary representation proportional to their electoral support through the open collusion of the major parties on preferences. One major party (the ALP) that had stressed the importance of native title to a meaningful reconciliation, conspired with another (the Liberal-National Coalition), that rejected such connections and kept the issues separate, to prevent a third party from gaining a parliamentary foothold from which they could call for the abolition of the lot.

In relief now was a constituency in rural Australia and on the fringes of the cities, that was finding a voice, and saying with a 'native' urgency that 'special rights' must end.⁵⁴ The Coalition was and is able to orient their policies to respond to this new constituency. The ALP, political backers of the indigenising project remain unable to formulate any coherent response. Clearly, the 'indigenising' of Australian title has reached limits. And for what? According to the President of the Native Title Tribunal⁵⁵ (NTT), native title is "a thing of shards and fragments when measured

⁵² For an indigenous view that moves beyond this distinction, see Dodson, M. 1994. 'Towards the exercise of indigenous rights'. *Race and Class* 35, pp. 71-74.

⁵³ Nationally, One Nation received 936,621 first preferences or 8.43% of those enrolled; 14.35% of electors in Queensland.

⁵⁴ Much was made of Hanson's inarticulacy and ignorance of political complexity. Scalmer, S. 'The production of a founding event: the case of Pauline Hanson's maiden parliamentary speech'. *Theory & Event* 3.2 http://muse.jhu.edu/journals/theory_and_event/v003/3.2scalmer.html (September 19, 1999); Rundle, p. 26. Undoubtedly this was part of her appeal.

⁵⁵ The instrument of the Federal Court set up under the NTA to determine the validity of native title claims.

against the richness” of traditional life.⁵⁶ Aboriginal activist Gary Foley maintained that the Wik judgment renders native title an inferior title to that held by cattle.⁵⁷

The Mabo judgment, and later the judgement in Wik, were obvious points at which reconciliation should have taken a more tangible role; for some of the benefits of the process to be demonstrated and drawn upon in the subsequent challenging discussion about substantive rights. The distinct lack of a conciliatory approach during the debate around the NTA amendments in 1997-1998 suggests fundamental boundaries were becoming clearer.⁵⁸ These were the limits of Australia’s reimagination of itself prior to undoing the injustice of *terra nullius*. The justification for all this, that Mabo and Wik had been destabilising and evidence of judicial ‘overreach’, also exposed the structure and limits of Australian political institutions as far as any future agreement was concerned. The reactions to the two decisions in Mabo and Wik reveals the dynamics between indigenisation and assimilation – and how this interaction has consolidated the debate as a choice between forms of national commitment or ways of ordering national space.

A preamble to reconciliation

It has been argued that a fillip for reconciliation – Aboriginal peoples’ constitutional recognition – became a real possibility, given that Australians voted on November 6, 1999 on two proposed constitutional changes:⁵⁹ the first, on the issue of a republic, dominated the campaign, though a second question to provide a new preamble

⁵⁶ Robert French, *The NTA and the NNTT*, cited in Moran 2000, p. 230.

⁵⁷ Gary Foley, oral contribution to a CAR community consultation meeting held at Dandenong Town Hall (November 1999).

⁵⁸ However, the explosion in the reconciliation movement appears to have been largely catalysed by the politics of the NTA amendments and the question of an apology in 1997 and 1998.

⁵⁹ Prime Minister Howard certainly saw the preamble as fitting constitutional recognition for indigenous peoples. *Commonwealth Parliamentary Debates*, House of Representatives (August 11, 1999), p. 8428.

containing reference to ‘the nation’s first people’, was also put.⁶⁰ Yet this argument bears little scrutiny. The proposals to amend the Constitution were arrived at tortuously during the Australian Constitutional Convention in February, 1998. A decision was reached in that forum to provide for a new constitutional preamble, to acknowledge a century of social and cultural change. It was to include recognition “that Aboriginal and Torres Strait Islanders have continuing rights by virtue of their status as Australia’s indigenous peoples.”⁶¹ Here was a simple yet strong statement of what Aboriginal Australia has long been denied. Yet its potential was completely undermined by what was immediately to follow:

Care should be taken to draft the preamble in such a way that it does not have implications for the interpretation of the Constitution... Chapter 3 of the Constitution should state that the preamble not be used to interpret the other provisions of the Constitution.⁶²

The breathtaking hypocrisy of these provisions added to the general apathy that surrounded the referenda. The government followed through the recommendations precisely in its amending legislation, the *Constitution Alteration (Preamble) Act 1999 (An Act to alter the Constitution to insert a Preamble)*.⁶³ Parliamentary debate on the bill ended any residual hope that the preamble would contribute to reconciliation. Leader of the Federal Opposition, the ALP’s Kim Beazley, vociferously opposed the bill as it did not contain the word ‘custodianship’, a

⁶⁰ One of the main parliamentary proponents of the preamble was Senator Aden Ridgeway, the only indigenous person in the Australian parliament. His maiden speech argued that a new preamble may have the effect of spurring the reconciliation process: “The preamble decision was not an act of arrogance but an act of national interest. It sought to remove the biggest obstacle to exclusion – our recognition in the national Constitution – but most importantly it needed to be done to provide the means by which reconciliation can now proceed.” *Commonwealth Parliamentary Debates*, Senate, (August 25, 1999), p. 7772.

⁶¹ Australia, Constitutional Convention, Australia, and Dept. of the Prime Minister and Cabinet 1998. *Report of the Constitutional Convention, Old Parliament House, Canberra, 2-13 February 1998*, Dept. of the Prime Minister and Cabinet, Canberra. (hereafter Constitutional Convention), p. 47.

⁶² *ibid.*

⁶³ Section 4 of that Act states, “The Constitution is altered by inserting after section 125 the following section: 125A Effect of Preamble – The preamble to this Constitution has no legal force and shall not be considered in interpreting this Constitution or the law in force in the Commonwealth or any part of the Commonwealth.” *Constitution Alteration (Preamble) Act 1999*, 4-10.

term sought by the CAR. Beazley's speech in the House of Representatives is suffused with the self-deception characteristic of reconciliation politics:

But in a no-risk preamble that has no legal meaning at all – no legal meaning whatsoever – which this unusual preamble would have, then to not do a reasonable job on this in terms of at least an opportunity for reconciliation, is a great pity; it really is a great shame.⁶⁴

However, not all parties made such an investment in this constitutional legerdemain. The Chair of ATSIC, Gatjil Djerkurra, suggested that he would be “very surprised if many Indigenous people share the view that this new draft preamble promotes reconciliation or in any way advances their aspirations.”⁶⁵ In the end not much was thought of the draft by the general public: the firm defeat of the republic question was greatly exceeded by that for the preamble.⁶⁶ Though it was styled by its proponents as a gesture of reconciliation, acceptance of that endorses the extremely limited character that the process now had. The Attorney-General, Darryl Williams demonstrated post-*Mabo* anxiety in comments made to parliament as part of the preamble legislation debate:

How laws should be developed ... must be a matter for judgment by the elected representatives of the people and the open processes of legislation. It should not be a matter for judicial determination based on the interpretation of what are necessarily broad statements and it should not be the occasion for judges to engage in the pursuit of personal agendas.⁶⁷

In its entirety the preamble episode reveals the limited sense of inclusion that a purely symbolic gesture can convey.⁶⁸ Recently, Howard has moved further away

⁶⁴ *Commonwealth Parliamentary Debates*, House of Representatives (August 11, 1999), p. 8435.

⁶⁵ ATSIC Media Release, ‘Proposed preamble a profound disappointment’ (August 11, 1999). However, the preamble became a source of serious conflict among Aboriginal leaders. See Stuart Rintoul, ‘Aboriginal leaders go both ways on republic’, *The Australian* (October 30, 1999).

⁶⁶ 45.13% voted for a republic, 54.87% against; while 39.34% endorsed the proposed preamble, 60.66% rejected it.

⁶⁷ *Commonwealth Parliamentary Debates*, House of Representatives (August 11, 1999), p. 8437.

⁶⁸ Guy Rundle has provided a useful critique of the ‘us’ and ‘them’ language in the proposed preamble. See Rundle, pp. 20-24.

from constitutional recognition, saying “you would have to query whether or not such an approach would further reconciliation.”⁶⁹

Reconciliation and the politics of apology

It is to the issue of an apology by settler society to indigenous peoples that reconciliation was most systematically joined. In 1997 blank books started appearing in Australian libraries. Called ‘Sorry Books’, they offered Australians an opportunity to reflect about the historical relationship between indigenous and settler Australians. In particular, the books allowed Australians to make personal apologies to the ‘Stolen Generations’, those indigenous persons removed as children from their families under child welfare legislation.⁷⁰ The extent and genocidal implications of the policy were made clear to Australians in the report of the HREOC inquiry, entitled *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*.⁷¹

Moran suggested that the *assimilationist* approach to settler nationalism reflects a type of persecution complex; while the *indigenising* urge is part of a syndrome of ‘depressive anxiety’, that arises in response to perceptions of damage to loved objects, either within or outside the self: the consequence is guilt and the desire to make

⁶⁹ Howard, reported in Mike Steketee, ‘It won’t happen this side of the next PM’, *The Australian* (May 5, 2000), p. 13.

⁷⁰ “Nationally we can conclude with confidence that between one in three and one in ten Indigenous children were forcibly removed from their families and communities in the period from approximately 1910 until 1970. In certain regions and in certain periods the figure was undoubtedly much greater than one in ten.” Australia, National Inquiry into Separation of Aboriginal and Torres Strait Islander Children from their Families, Wilson, R., Australia, and Human Rights and Equal Opportunity Commission 1997. *Bringing them home report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, Human Rights and Equal Opportunity Commission, Sydney. <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/stolen08.htm> (March 19, 2000).

⁷¹ The terms of reference for which were initially to “trace the past laws, practices and policies which resulted in the separation of Aboriginal and Torres Strait Islander children from their families by compulsion, duress or undue influence, and the effects of those laws, practices and policies”: <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/prelim.html#terms> (March 19, 2000).

restitution.⁷² The majority of responses to the question of a national apology are illuminated by that distinction.

The report, and the question of an appropriate response to it, were the focus of many speakers at the ARC in May 1997. The refusal of the PM to give a national apology (as opposed to a personal one) and the manner in which he did so caused many in the audience to turn their backs and jeer him. After counselling the delegates to forget symbolic, overblown gestures, and rejecting anything that smacked of difference, he said this: “We must not join those who would portray Australia's history since 1788 as little more than a disgraceful record of imperialism, exploitation and racism.”⁷³

Yet the readiness with which many Australians understood the implications of the HREOC report – the systematic removal of children from their families by powerful institutions of Church and State – meant that the Stolen Generations’ story quickly became a centrepiece of the movement toward reconciliation. Indeed it galvanised that movement, helping to form a reservoir of concern about the inherent injustice of the Australian story.⁷⁴ The numbers of books and contributors⁷⁵ showed the extent of support for the idea of personal contrition and a corporate form of apology. Howard’s refusal then became a focal point for the increasing sense of anger among reconciliation enthusiasts.⁷⁶ However, his stance helped to catalyse another response – opposition to apology and the refutation of those arguments. It is important to look at the reasons for this attitude prior to returning to a discussion of the implications and assumptions of an apology: ‘Why should I say sorry? I have done

⁷² Moran 2000, pp. 129-130.

⁷³ John Howard, ‘Opening Ceremony Speech’, ARC 1997.

⁷⁴ While no comprehensive study has yet been done on the Sorry Books, amongst a wide range of responses, from personal grief and statements of raised consciousness, was a thread of genuine anger. This was the case in three Sorry Books viewed by the author in Melbourne in late 1997.

⁷⁵ The figure is not known exactly, as some ‘official’ books were never returned, and other books were put together by groups other than ANTaR. Many estimates put the number of signatories at one million.

nothing to them- I didn't take their kids away, or steal their land. I wasn't even here, my ancestors didn't arrive until ...'

Many Australians will have had such thoughts in recent years. Indeed the CAR-commissioned research discussed in the next chapter proves it. Finding oneself innocent on these issues, however, requires a certain kind of productive listening. The requirement of an honest recounting of history, a shared history, is that we should not resile from 'unpleasantness', but should see of the nation-state its true arc through time. No one undertakes this sort of reflexive distancing with regard to other moments that celebrate national history and achievement, such as on ANZAC day or the public effusions for Don Bradman. Don Watson described such a contradiction in Howard's attitude to historical remembrance: "Some commentators insist he is sincere in his belief that there can be no such thing as 'cross-generational guilt'. We may conclude from his recent visit to Gallipoli and the battlefields of France that he is no less sincere in believing there is such a thing as cross-generational pride."⁷⁷ The distancing from an apology – conducted mostly in an abstracted or thematic way and without regard to specific events – exposes the danger of renewing national identities without an honest reckoning of the past. Shortly after concluding South Africa's Truth and Reconciliation Commission, Desmond Tutu laid such a response to rest in a visit to Australia: "We are connected in the things in which we glory, while connected in the things of which we are ashamed and we can't pretend there is not that connection."⁷⁸ Soon after the election of the Howard government, the CAR Chair offered the following approach to 'sharing history' and its consequences:

(People) asked whether reconciliation requires present generations of Australians to take on the guilt of their forebears. It doesn't. But nor should today's indigenous Australians continue to

⁷⁶ An official 'statement of regret' was subsequently passed in the House of Representatives in mid-1999, though after two years many consider the damage to have been done.

⁷⁷ Don Watson 'Howard's guilty secret', *The Age* (June 2, 2000).

⁷⁸ Desmond Tutu, *The 7:30 Report*, ABC Television, (November 25, 1999).

suffer the legacies of the past because the nation has not yet found the ways to overcome them.⁷⁹

Phrased in this way, shared history places emphasis not on the need to take responsibility for the actions of the past, but to ameliorate present consequences. The line chosen by the CAR fluctuated between robust statements of historical responsibility and the soft ground of contemporary anxiety. Indeed, only a minority of Australians are prepared to countenance the condemnation of aspects of history that is implicit in a national apology.⁸⁰ The reasons for refusal are these: firstly, that individuals cannot be responsible for acts they have not committed and that individuals cannot be held responsible for the consequences of previous generations' actions; or, that those actions of dispersal and forced removal were thought to be in the best interests of indigenous people at the time they were committed, so judgment by today's standards is inappropriate; or finally, that the acts committed actually *were* in the best interests of indigenous people, as a mechanism for their 'uplift' and civilisation.

The first view has a liberal flavour: what is the point of an apology from someone who has not committed wrong, by commissioning acts of dispossession or violence? The stance a major goal of reconciliation under the CAR's approach: that of 'sharing history' to realise that the injustice of the past has consequences in the present. Journalist Martin Flanagan has queried this strategy: "Howard refused to apologise on behalf of Australian governments for this policy, basically repeating his mantra that Australians had nothing to feel guilty about. But apart from Howard and people like him, who mentioned guilt?"⁸¹ The intention to answer questions that were not being asked reinforced a distinction between past and present, such that contemporary

⁷⁹ Pat Dodson, 'Reconciliation misunderstood', reprinted in Attwood, B. and Markus, A. 1999. *The struggle for Aboriginal rights a documentary history*, Allen & Unwin, Sydney, p. 347.

⁸⁰ 40% of respondents agreed with the proposition that "on behalf of the community, governments should apologise to Aboriginal people for what's happened in the past." 57% disagreed. Newspoll Market Research and Council for Aboriginal Reconciliation. *Quantitative research into issues relating to a document of reconciliation*. March 2000, s. 4.4.

indigenous disadvantage became more amenable to alternative explanations: the consequence of indigenous indolence, do-gooders ‘meddling’ in indigenous people’s affairs, or perhaps inherent racial or cultural backwardness.

The second response strives against anachronism, refusing to see the ‘Australian story’ as of a piece. Here also, a radical disconnection exists between ‘then’ and ‘now’, between prior social values and those we now cherish. An historical model is posited whereby successive ages of enlightenment become dominant, before being cast aside in an instant of deeper understanding. It is not at all a satisfactory historiography. The work of many recent historians dispels this. For example, Russel McGregor’s work *Imagined Destinies* shows the subtle interleaving of theorisations like the ‘doomed race’ with a growing fear of miscegenation and ‘half-castes’.⁸² Former HREOC Social Justice Commissioner Mick Dodson’s powerful speech at *Corroboree 2000* demolished this attitude: he used the narrative of his own life, profoundly affected by policies of assimilation, against that of a settler contemporary, Prime Minister John Howard, to expose both how recent now-unacceptable practices were to our own time, and how their consequences are still lived.

Where or who is this generation of Australians Mr Howard blames for the removals and the assimilation policies? Are my sisters part of this generation. Are not John (Howard) and John (Herron, Aboriginal Affairs Minister) part of this generation? Indeed, am I not part of this generation?⁸³

While only a minority of Australians openly proclaim the third view, the wisdom of the policy of forced-removals,⁸⁴ the vigour with which this view has been

⁸¹ Martin Flanagan, ‘Howard’s race record’, *The Australian* (September 17, 1998), p. 17.

⁸² McGregor, Chapter 3. Though the terms may change, such views are hardly absent from current political debate.

⁸³ Mick Dodson, ‘Our generation, Mr Howard’, *The Age* (May 30, 2000), p. 19.

⁸⁴ See for example Brunton, R. 1998. The ‘Stolen Generations’ Report’, *IPA Backgrounder* 10; P.P McGuinness, ‘A black mark against white parasites’, *The Sydney Morning Herald* (November 27, 1999), p. 46; Peter Howson, ‘The big *untouchable* issue’, *The Age* (April 5, 2000); also former Governor-General Bill Hayden in a recent speech argued that the HREOC Inquiry was the victim of a hoax. See Michelle Grattan, ‘Hayden attacks “gullible judge, black victimhood”’, *The Sydney Morning Herald* (October 12, 2000).

put in recent years has clearly affected the shape of the debate. Arguing recently that the state should never be reticent about removing children from negligent or abusive families, the *Daily Telegraph* suggested, “(t)he tragic irony is that the consequences of this debate and the impact of the flawed ‘Bringing Them Home’ report by Ronald Wilson has now created an environment in which needless deaths will occur, not because of government policy, but because of a reluctance to apply it.”⁸⁵

Defending the practice of forced removals as applied to indigenous peoples, even refusing to condemn it, reinforces positions of ‘development’. Norbert Elias noted that it is “characteristic of the structure of Western society that the watchword of its colonizing movement is civilisation.”⁸⁶ The relationship between reconciliation and the stolen generations (or more generally colonisation) hinges greatly on the understanding one holds of what it means to be civilised, and whether ‘civility’ or the civil society sought through the ‘civilising’ process justifies the destruction of Aboriginal society. If reconciliation can convey to settlers a sense of the limitations of their understanding of civilisations, it will have served a useful purpose. Bain Attwood has suggested we should recognise that “evil lies in our presumption that we know what’s best for Aborigines.”⁸⁷

However, the government response to the HREOC report showed no evidence of such an understanding.⁸⁸ It cavilled over issues such as whether one in ten children removed constituted a ‘generation’, and attacked HREOC’s research methodology.⁸⁹ Simultaneously, the government adopted another of these strands of denial in its defence during a ‘test case’, brought by two members of the ‘stolen generations’, Lorna

⁸⁵ *The Daily Telegraph*, ‘Crises that transcends politics (sic)’ (December 1, 2001)

⁸⁶ Elias, N., Jephcott, E., Elias, N., and Elias, N. 1994. *The civilizing process: The history of manners, and state formation and civilization*, Blackwell, Oxford, p. 509.

⁸⁷ Bain Attwood ‘The burden of the past in the present’. In Grattan 2000, p. 257.

⁸⁸ Lord Mayor of Brisbane, Jim Soorley, accused the government of playing a “sick statistical game”. AAP, ‘Howard accused of playing statistical game’ (April 4, 2000). Historian Peter Read debunked the approach on ABC TV. *The 7:30 Report* ‘Stolen generation politics’ (April 3, 2000).

⁸⁹ AAP, ‘Black myth’ report fuels anger (April 1, 2000); Debra Jopson, ‘Aboriginal disgust at denial of history’, *The Sydney Morning Herald* (April 3, 2000).

Cubillo and Peter Gunner, which began in the Federal Court in the Northern Territory in 1999. During the trial, the Commonwealth's defence team sought to have the case dismissed on the grounds of inadequate evidence and that witnesses were deceased, and then defended itself on the grounds of the enlightenment of previous policies. As Robert Manne has noted:

I do not know how far the Howard Government can legitimately separate itself from the historical arguments mounted in Darwin on its instructions and on its behalf. But if (lead counsel for the government) Meagher's attempt to portray child removal as noble and to rehabilitate the philosophy of assimilation has the support of his client, the Commonwealth Government, then the cause of reconciliation is dead.⁹⁰

It seems reasonable to ask what a project for 'sharing history' is likely to achieve – say a modern Australian history syllabus for secondary schools that incorporated material on the stolen generations – while in the wider world the government is actively avoiding any implication of contemporary responsibility. Is this likely to become a challenging alternative to learning the numbers of livestock transported with the First Fleet? In what sense might this stark contradiction help to change “the way the story of Australia is told and understood,” refashioning a shared national identity.⁹¹

Reconciliation was profoundly influenced by the range of attitudes adopted in the late 1990s to an official national apology. The CAR's approach, as we have seen, was to emphasise the education of Australians about the events of the past in such a way that it would alter their attitudes to contemporary indigenous disadvantage, stimulating an inter-generational identification with the renewal of national identity as inducement. The politics of apology in Australia from 1997 put this approach into

⁹⁰ Robert Manne, 'Stolen Lives', *The Age*, 27 February 1999; Manne 2001. 'In denial'. *Australian Quarterly Essay* 1, pp. 1-113.

⁹¹ Clark, I. D. and Council for Aboriginal Reconciliation 1994. *Sharing history: a sense for all Australians of a shared ownership of their history*, A.G.P.S, Canberra.

doubt. Just as had occurred with native title, an apology made by the national government became for some the threshold for participation. Former Chair of ATSIC Lowitja (formerly Lois) O'Donoghue suggested that "there can be no reconciliation while (Howard) refuses to apologise on behalf of the nation for the removal of children."⁹² A tactic adopted was to suggest that whoever became the next PM would give that apology.⁹³ More than three years after the release of the HREOC report, *The Weekend Australian* was still insisting that the apology was "the one last obstacle" on the road to reconciliation.⁹⁴

Defined in this way, the apology will continue to be the source of antagonism and erosion of reconciliation's potential to unify the Australian community. The Prime Minister has openly contradicted this definition of reconciliation,⁹⁵ and can rely on a majority of measured support. The question of an apology divides indigenisers from assimilationists; that so much diversity and dispute exists on this threshold issue surely undermined the prospects of meaningful reconciliation.⁹⁶

http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/car/infosheets/Inf_sht6.htm(April 12, 2002).

⁹² Lois O'Donoghue, reported in Richard McGregor, 'Resolving the discord', *The Australian* (December 5-6, 1998), pp. 30 – 31. The CAR Deputy Chair has also set that threshold: Peter Allport 'Nossal turns up heat on PM for apology', *AAP News Service* (April 8, 2000).

⁹³ This included Gus Nossal: ABC TV *The 7:30 Report* 'Sir Gustav Nossal on Reconciliation' (April 26, 2000); Mike Steketee, 'It won't happen this side of the next PM', *The Australian*, (May 5, 2000), p. 13; and Mungo McCallum 'No Aboriginal reconciliation under Howard', *Byron Bay Echo* (February 29, 2000): "John Howard's abandonment of the reconciliation deadline this year is really an admission that the process is stuck, and will remain stuck as long as he remains prime minister."

⁹⁴ *The Weekend Australian*, 'Howard takes hard road to reconciliation' (December 2-3, 2000), p. 18. However, some indigenous leaders such as Geoff Clark were already attempting to move beyond Howard's intractable attitude. See Margo Kingston and Amanda Vaughan, 'Failure to say sorry puts PM on notice' *The Sydney Morning Herald* (February 29, 2000).

⁹⁵ *AAP News Service*, 'Howard says reconciliation doesn't equal an apology' (October 16, 2000).

⁹⁶ The importance of a national apology was well-understood by the Canadian government. See the response to the RCAP report: Canada and Indian and Northern Affairs Canada 1997. *Gathering strength Canada's aboriginal action plan*, Minister of Indian Affairs and Northern Development, Ottawa.

The spirit of reconciliation

As I have pointed out, those committed to an apology saw in it the potential for it to give substance to the national project of renewal. Much of this was expressed in terms of the emotional and spiritual force of an apology and contrition, an approach confident in its understanding of national identity. Indeed, from its origins in the Australian Catholic Bishops' Statement in 1988, reconciliation has had overtly religious and spiritual links.⁹⁷ As the Catholic Archbishop of Melbourne later explained:

Reconciliation is a word that has great significance for Catholics and for all Christian people. It entails contrition for our failings and conversion of heart, a determination to put our relations with God and with other people on a firmer and better footing. Out of reconciliation there emerges a greater openness to other people, a better understanding of who we are and a renewed capacity to move forward.⁹⁸

Christian religious groups have become some of the most ardent promoters of reconciliation, while simultaneously criticising the Coalition government's policies on native title and an apology. Theirs is not simply a recognition of the spiritual possibilities of reconciliation, but also an acknowledgment of complicity.⁹⁹ Journalist Aban Contractor has written of a kinder more aware Church – with reconciliation a deeper embrace of its principles.¹⁰⁰ The role of religion in this policy is worth thinking about at length: in a secular society, the prominent role of the Churches both frames

⁹⁷ For an idea of the close proximity of the various Christian churches' leadership to the formation of the reconciliation policy and their strong support, see Tickner 2001, Ch. 2.

⁹⁸ George Pell, 'Into the new millennium together', *Walking Together* (November 1998) http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/car/wtsp_nov98/pages/WTnov26.htm (April 11, 2002).

⁹⁹ Human Rights and Equal Opportunity Commission, *Bringing them Home - Community Guide* 'Responses by governments and churches'. http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen_summary (April 11, 2002).

There has also been an attempt to stimulate a national apology, for example, by using the example of the Catholic Church's apology for its role in the Second World War. See Ray Cassin 'You don't have to feel personal guilt to say sorry', *The Age* (March 12, 2000); ABC News: 'ATSIC commissioner welcomes Pope's apology' (March 14, 2000).

¹⁰⁰ Aban Contractor, 'Forgive us our trespasses', in Grattan 2000, pp. 140-145.

the problems in a certain way, and makes certain responses seem appropriate, even essential. Obviously this alienates those who are reticent about such piety.¹⁰¹

However, a greater problem with aspects of the spirit of reconciliation is its tendency to use flawed categorisations. Peter Hollingworth has suggested that a future document of agreement would “express deep sorrow for the corporate sins and faults of the past.”¹⁰²

In theological terms one must describe this as a sin-stained history, and the present situation as a sinful one... sin is not only found in the lives and actions of individual human beings; it is also structured into societies... a racist society is a sinful society.¹⁰³

The language of sin, however, is not the language of criminal justice: sinners are spiritually in the wrong, perhaps morally (within a single religious tradition), but they are not legally culpable. It may not be fruitful to accuse a secular society of sin.¹⁰⁴ Another tendency is for appropriation, with writers indigenising Judeo-Christian doctrines and symbols in order to explain the central challenges of reconciliation:

The rock – symbol of the centre, the place of sacred power but also the place of historical shame – an indigenous Golgotha. The stolen children – the symbol of human suffering, indigenous pathos and deep healing, the symbol with whom many non-indigenous Australians now identify – an indigenous suffering servant. The land ... an indigenous holy land.¹⁰⁵

¹⁰¹ “Reconciliation ... has resonances of a religious and specifically penitential kind, which will no doubt appeal to the already penitent.” Christopher Pearson, ‘Aboriginal disadvantage’ in Grattan 2000, p. 262

¹⁰² ARC 1997: Seminar Session 3: Documents of Reconciliation and Constitutional Issues: A National Document of Reconciliation. Hollingworth, now Governor-General of Australia, was at the time Archbishop of Brisbane.

¹⁰³ Wilcken, J. 1992. A theological approach to reconciliation. In *Reconciling our differences: a Christian approach to recognising Aboriginal land rights* (F. Brennan, Ed.). Aurora Books/David Lovell Publishing, Melbourne, p. 66. “A Tasmanian Anglican priest yesterday accused Prime Minister John Howard of committing ‘the unforgivable sin’ by refusing to say sorry to Aboriginal people.” *The Mercury*, ‘Priest blasts Howard “sin” ’ (October 28, 2000).

¹⁰⁴ See on this point Haynes, R. D. 1998. *Seeking the Centre: the Australian desert in literature, art and film*, Cambridge University Press, Cambridge, Melbourne, pp. 278-280.

¹⁰⁵ Norman Habel, cited in Tim Costello, ‘An opening to new seasons’, in Grattan 2000, p. 157. On other spiritual appropriations of Uluru, see Marcus, J. 1988. The journey out to the centre: the cultural appropriation of Ayers Rock. *Kunapipi* 10, 254-274.

Norman Habel's book, *Reconciliation: Searching for Australia's Soul*, adopts the Old Testament motif of the search, a people wandering through spiritual deserts. In 2000, the final year of official reconciliation, journalists undertook 'journeys' to find the truth about indigenous lives; the Prime Minister was said to be on his own journey; even the nation itself was said to be on "a reconciliation journey."¹⁰⁶ Other participants have seen the individual-national connection as a space for shame: "National shame requires an historically deeper and more intense attachment, perhaps a more *defining* attachment, to country than citizenship."¹⁰⁷ Raymond Gaita raised the bar here, extending the idea of national diminution begun in Deane and Gaudron's *Mabo* judgement. This is a 'mature' patriotism with which we can speak in the first person plural about our roots in this land. Only with this type of depth can one truly feel shame. One must have enjoyed the benefits in the strongest sense of 'belonging to' the land – being 'belonged' by it.¹⁰⁸

The problem for this approach is that it becomes about who is 'nourished' by the country more; it is not shameful in any motivational sense that we simply see the suffering and denial of fellow human beings who share this territory. In any case, the

¹⁰⁶ Gordon 2001; Evelyn Scott, 'From ignorance to understanding: A perspective on the reconciliation journey', Speech at St John's College, University of Queensland (August 22, 2000). Christian imagery such as 'homecoming' and 'the promised land' also recur in Brendan Byrne, in Brennan 1992.

¹⁰⁷ Raymond Gaita, 'Guilt, shame and collective responsibility', in Grattan 2000, p. 279.

¹⁰⁸ Though the idea that reconciliation is an opportunity to resacralise an Australian identity made spiritually bereft by the injustice of colonialism appeals to some, it has not prevented a similar contrariness as that which opposes an apology. Presenting indigenous people in this way - as spiritually enriching to the nation - allows three counter-strategies: the 'equivalence' of indigenous spirituality with settler spiritual connections to land and place; the view that the special indigenous status was ended with settlement; or the total denial of such a special status. Moran 2000, 274. A conference in Canberra in 1999 devoted to the idea of non-indigenous 'belonging' struggled with the implications of the idea. One contributor, Tom Stannage, related a story about the visit of Aboriginal writer and CAR member Jackie Huggins to a class he was teaching: one student expressed his feeling about belonging as a desire to 'sink into the land'. Huggins responded by saying that was okay, just as long as he did not see himself as 'emerging out of it'. Tom Stannage, oral contribution to the 'Belonging' Conference, Humanities Research Centre, Australian National University (November 12-14, 1999).

intellectualisation of the problem via the creation of a ‘sublime territory’ will not likely trump the intuitive ‘belongings’ of the Australian settler.¹⁰⁹

Framed in these terms, reconciliation’s national project is exclusionary: those without this defining attachment (even those who are ‘technically’ citizens) cannot participate in this motivational shame. A moral selectiveness about attachment can hardly exist within an undifferentiated national space. The idea that a recently arrived Afghani or American migrant cannot see the injustice nor feel ashamed that they are about to enjoy a life long denied to the longest residents must be resisted. Indigene and territory are here woven into a new package that reworks the stifling idiom of ‘authenticity’.

From national ‘diminution’ comes a concern for ‘healing’. Healing has become a dominant motif of reconciliation; healing for the stolen generations and more generally the indigenous dispossessed: “The humane and right way may be to open all archives, government records and holding libraries to removed people. In the understanding that each person will come to their own healing in their own time. There can be no agendas or timetables put upon anyone. You simply open the door, and stand back, for as long as it takes. You must learn to let go, and in the letting go you will begin to heal and grow also.”¹¹⁰

Huggins saw the healing of nation as following that of victims: “let’s all bring them home, let’s all bring them home. Let’s bring them home and let the healing begin for not only them and us, but as a nation as a whole.”¹¹¹ Aboriginal writer Lillian Holt has written of the national sickness – “secrets keep us sick.”¹¹² Rowse recently offered an analysis of the healing and ‘walking’ metaphors, which sources them in the therapeutic ideology and practice prevalent in substance support groups such as

¹⁰⁹ Pauline Hanson, in her maiden speech to Parliament, monopolised this theme with her cry of “where do I go?”

¹¹⁰ Coral Edwards, ARC 1997: ‘Seminar Session 2: Human Rights and Indigenous Australians: Stolen Generations Inquiry’.

¹¹¹ Huggins, in *ibid.*

¹¹² Lillian Holt, ‘Reflections on race and reconciliation’ in Grattan 2000, p. 148.

Alcoholics Anonymous. A first step, which cannot be skipped over, is admitting you have a problem. In ‘twelve-stepping’ the process, reconciliation ‘links the recoveries’ of individual, indigenous people, and the nation.¹¹³

So reconciliation has been a ‘journey of healing’;¹¹⁴ another historian “glimpsed the faith that can heal our wounds”.¹¹⁵ The list of variations on this theme is long, covering references to psyche, conscience, soul, essence, core values and identity, heart, body, spirit and the face. The corollary is that these are damaged or lessened in some way: disfigurement, breakage, impairment, scarring, corruption, and diminution. Historian Inga Clendinnen has written of the scar that remains “on the face of the country.”¹¹⁶

Notions of disfigurement, scarring and healing all trade in an unstable construction of the problem that exists between indigenous and settler people: the presumption of wholeness: that what is damaged was formerly a functioning whole.¹¹⁷ The spirituality of reconciliation at times insists that we have all been damaged by colonial power. Andrew Lattas in his paper ‘Primitivism, nationalism and individualism in Australian popular culture’, sees this phenomenon as another aspect of the indigenising project, the aestheticisation of national identity: colonial history is still an injustice, though not simply the injustice of physical and psychological destruction of indigenous peoples and their culture, but an attack on the spiritual and sacred part of the settler psyche.¹¹⁸

¹¹³ Rowse 2000.

¹¹⁴ The former ‘Sorry Day’, May 27 (the anniversary of 1967), is now known as the ‘Journey of Healing’.

¹¹⁵ Martin Thomas, ‘Glimpse of the faith that can heal our wounds’ *The Sydney Morning Herald* (March 27, 2000).

¹¹⁶ Clendinnen ‘True stories and what we can make of them’, Grattan 2000, p. 253.

¹¹⁷ Naidoo, U. 1998. ‘The truth hurts: psychoanalytic speculations on reconciliation’. *Melbourne Journal of Politics* 25, p 139.

¹¹⁸ Lattas, A. 1992. ‘Primitivism, nationalism and individualism in Australian popular culture’. In *Power, knowledge and Aborigines* (J. Arnold, B. Attwood, Monash University, and National Centre for Australian Studies, Eds.), La Trobe University Press in association with the National Centre for Australian Studies, Monash University, Bundoora, Vic., p. 57.

Undoubtedly, the consequences of colonisation mean that indigenous people require a period of healing – an opportunity to repair or restore traditions and identity. What seems extraneous is the claim that the nation, or the national soul is also in need of repair: there is little attention directed at what ‘the national soul’ actually was, how it was formed, and whether a confessional, cathartic approach will have much impact on it.

In fact, the spirit of reconciliation appears to offer a ‘validation’ akin to the tangible validation of leases sought in the context of native title debates. The spiritual dimension of reconciliation asks non-Aboriginal people to ‘open their hearts’; Aboriginal people are asked to forgive and to sanctify. Colin Tatz pointed out the deceit that becomes possible:

...the victim must forgive the perpetrator, clearing the record and the perpetrator’s conscience. ‘Let’s turn over a new leaf and begin again’ is a commonplace in reconciliation rhetoric. Its proponents never acknowledge what the old leaf was or what it is that is to begin again. Nor do they spell out what it is that Aborigines should cease doing by way of injury to the mainstream. This must be the best imaginable bargain to the reconciliationists.¹¹⁹

The spirit of reconciliation also works on the assumption that, “there has been a change in the Australian mindset including a recognition that society only truly works when there is a generosity of spirit.”¹²⁰ That is unobjectionable, but part of the value of self-determination is its potential to liberate groups of people from the charity or generosity of others. It gives those people a chance to be something other than objects of the dominant power’s capricious benevolence. This in addition to the freedom from that power’s scapegoating, oppression and violence.

Throughout this approach to reconciliation is an abundance of metaphor, such as face, heart and soul. Each works at multiple levels: the individual, the communal, the national. This has been effective. Such figures maintain the connections between

¹¹⁹ Tatz 1998, p. 7.

¹²⁰ Co-organiser of Sorry Day, John Bond, reported in *Aban Contractor*, ‘Forgive us our trespasses’, in Grattan 2000, p. 145.

those levels set out by reconciliation's most notable proponents, such as William Deane. However, I argued in the previous chapter that the historical path of an Australian agreement has worked to accommodate more effectively the demands and needs of settlers than those of indigenous people: the individual growth and communal enlightenment stressed over institutional reform and the devolution of power. I have also argued that a campaign to denigrate 'black-arse history' makes the appeal to the national more fraught, less the site for consensus-building. Many indigenous people have worked through reconciliation with the assumption that these connections between levels of individual, community and nation could be built on and improved. It is possible to test the truth of this belief with a consideration of the 'reconciliation movement'.

4.

The reconciliation movement

The people's movement for reconciliation has brought hundreds of thousands of Australian people from all walks of life together ... What they do have in common is the commitment to creating a nation which is based on the unifying principle of respect for differences.¹

In the previous chapter I made clear the way that reconciliation was used by established political actors and institutions as they prosecuted their interests in indigenous issues. What must also be done in order to demonstrate how reconciliation became implicated in the setting of limits in debates about Australian identity, is to consider the new institutions and social connections that the policy of reconciliation hoped to create. The 'reconciliation movement' is a phrase employed to encompass a large range of social activism: some of this is highly organised and closely related to the work of the CAR; other examples are more diffuse. In this chapter, I explore the dynamics of reconciliation as it has evolved between individuals and in small groups, to consider the value of reconciliation's 'community-level' approach.

Reconciliation in the community

An important institutional setting stressed in CAR literature is local government; many local authorities have risen to the occasion.² For example, the joint statement by the Cities of Banyule, Manningham and Whitehorse in suburban Melbourne – typical of initiatives repeated by many local governments in Victoria. The stress of their

¹ O'Donoghue, in Grattan 2000, p. 293.

² The national peak body, the Australian Local Government Association, was a signatory to the Council of Australian Governments 1992 statement, *National commitment to improved outcomes for Aboriginal*

statement was on recognition and support, explicitly endorsing the CAR vision statement of a “united Australia which respects this land of ours.”³ Similar statements have been made by Nillumbik Shire Council and the City of Melbourne, in which both recognise the prior occupation and ownership of indigenous people.⁴

The councils committed to undertake programs of local cultural heritage education, provide support to community reconciliation groups, alter signage in Council buildings, and consider appropriate names within the council areas.⁵ The Victorian local government peak body, the Municipal Association of Victoria, produced a reconciliation kit – *Wurreker* – which provides a working outline of reconciliation practices and ideas for local government. Emphasis was placed on cultural awareness training; the need for consultation with indigenous people prior to Council implementing environmental or other policies; promoting indigenous-focused tourism opportunities; and the dedication of resources such as indigenous policy officers.⁶ Manningham City Council has since adopted an Indigenous Peoples’ Policy, benchmarking their achievements over several years, including archaeological and indigenous heritage research, conducting cross-cultural spirituality and awareness sessions for staff and community members, and the staging of exhibitions on indigenous cultural themes.⁷

But how much does local government have to stake on such an approach? One way of thinking about this is to consider the reconciliation efforts of Ipswich City

and Torres Strait Islanders peoples. See also CAR, ‘Partnerships in Reconciliation’ (1999) <http://www.austlii.edu.au/au/other/IndigLRes/car/1999/2/page7.htm> (April 2, 2002).

³ Cities of Banyule, Manningham and Whitehorse. 1997. Commitment to Indigenous People by the Cities of Banyule, Manningham and Whitehorse.

⁴ Nillumbik Shire Council. 1999. ‘Civic Recognition Protocol: Formal Acknowledgment Statement’; City of Melbourne. 1998. ‘Statement of Commitment to Indigenous Australians by the City of Melbourne’.

⁵ Nillumbik Shire Council. 1999. ‘Aboriginal Reconciliation Plan’; City of Melbourne. 1998. ‘Statement of Commitment to Indigenous Australians by the City of Melbourne’.

⁶ Municipal Association of Victoria and Milward, K. *Wurreker: Local government - indigenous partnerships resource guide*. c1997. Melbourne, Municipal Association of Victoria, pp. 89-141.

⁷ Manningham City Council. 1999. ‘Overview of Manningham City Council’s recent work with the Indigenous Community’.

Council: “Ipswich City Council has undertaken a number of initiatives, such as the establishment of an Aboriginal Advisory Committee, participation in the Reconciliation Study Circles, making meeting space available for ATSIC Regional Council meetings, and appointed a Community Cultural Development Officer with the support of ATSIC.”⁸ The endorsement of the CAR and the Australian Local Government Association would seem to indicate that a great deal has been achieved.⁹

Yet Pauline Hanson’s election in the seat of Oxley suggests a disjunction between the local authority and its community.¹⁰ The comments which had brought her notoriety – particularly that she would not represent Aboriginal people equally – are clearly at odds with the local government policy. One might conclude that the reconciliation measures and approaches that Ipswich City Council was championing were thought irrelevant or inconsequential by the local residents; alternatively, that the council was working in isolation from its community.

The dynamics of working at the level of ‘community’ can be brought more sharply into focus by evaluating at length the ‘See-Saw’ project conducted in Ceduna, South Australia over several years from 1994. While the project was not funded by the CAR, it was explicitly understood as a possible “community model for cross-cultural reconciliation.”¹¹ It began as an attempt at “recognising, as well as dissolving, cultural,

⁸ See Ipswich City Council. 1998. *Working out the Ipswich City Council Indigenous Australian Accord* <http://www.alga.com.au/ipswag.htm> (November 30, 2001).

⁹ “The Accord was national winner of an Australian Reconciliation Award in the Government category at the Australian Reconciliation Convention in May 1998 (sic), and has been selected as a ‘best-practice model’ in the Local Government Association of Queensland’s best practice manual.” In *ibid.*

¹⁰ Before redistribution of the seat of Oxley in 1998, Ipswich was the main population centre. In the 1996 federal election, Hanson won 54.66% of the vote after distribution of preferences. She was still nominally a ‘Liberal’ candidate on the ballot papers.

¹¹ Murphy, C. 1998. *See saw: a community model for cross-cultural reconciliation*, C. Murphy, Ceduna, S. Aust. The foreword is written by CAR member Jackie Huggins.

social and economic hierarchies.”¹² Two settler women working as community artists oversaw the project which worked with the following conscious commitments:

(D)escendants of first settlers and descendants of original, indigenous groups, are likely to have: common as well as distinct historical and cultural memories; interacted economically and spiritually with the same land and seas (but in culturally specific ways); chosen to intermarry or remain culturally separate; enacted the roles of the powerful and the powerless.¹³

Their methods were diverse: the first stage involved interviews with locals, making and displaying banners as part of a festival, and the production of a local radio program with indigenous content. The second stage involved the commissioning and development of the work of local indigenous and settler artists, which formed the basis of an exhibition in the town of Ceduna. Initially, this was to be structured around the theme of ‘land loss’, given that both indigenous people (through dispersal and dispossession) and settlers (via drought and economic downturn) had experienced the phenomenon. This was thought to be a good basis for cross-cultural dialogue and could provide a “useful and positive methodology.” So, the search for a common ground promoted an equation between different types of hardship: that brought about by colonial practices and institutions, with those attendant on the vicissitudes of climate and global commodity prices. Whatever one might think about the merits of such an equation, the project was not able to go ahead on that basis. As Catherine Murphy, one of the Project Initiator/Coordinators, explained:

(C)omplexities surrounding the ‘land loss’ theme began to emerge, which compelled us to rethink our theme. We became convinced that the effectiveness of our project relied on balance, which could more easily be achieved if our original intention of exploring the ‘land loss’ theme was abandoned. It appeared to have the disturbing effect of provoking barriers rather than effacing them. So we took the pragmatic step of shifting our theme from ‘land loss’ to the more generalised theme of ‘reconciliation’. This decision enabled us to continue working

¹² *ibid.*, p. 7.

¹³ *ibid.*, p. 56.

constructively as it demonstrated our flexibility and willingness to work with, rather than against, local intentions.¹⁴

Oddly, given the prevailing self-consciousness of the written documentation, Murphy is less than clear on the emerging ‘complexities’, that necessitated a more pragmatic approach. Yet in the search for effectiveness (indeed the very viability of the project is more than hinted at), a shift away from the stable ground of ‘land loss’ takes place, moving to the ‘more generalised’ notion of reconciliation. Given the wider point of this thesis, their decision seems a token of the pattern of reconciliation: two settler women, seeing the potential and necessity for an intercultural exchange, take on the advocacy and development of an historically challenging project; but ‘land loss’ is not the basis for community openness and interest; it was impractical and would mean working against ‘local intentions’. Reconciliation here resiled from challenge and confrontation, even challenges to the past in the implied sense of land that had been lost.

While the participants felt that the project was clearly in danger without a more pragmatic direction, it is also clear that their choices seem more directed to the political realities of the community than by a need to tell the truth about that community, or other artistic considerations. In the very pith of the project, then, was more of a willingness to recognise (and reinforce) existing hierarchies than to ‘dissolve’ them. It was after this experience that the two Project Initiator/Coordinators came up with the figure of the ‘see-saw’, as a way of demonstrating the new theme of reconciliation: sensitivity and balance.¹⁵

Stranger still was the decision to continue the project even though local indigenous people were withdrawing their support for the reconciliation process at large. This took place in 1996 when, shortly after the election of the Howard

¹⁴ *ibid.*, p. 58.

¹⁵ *ibid.*, p. 60. The figure of the ‘see-saw’ is eerily close to Howard’s preferred metaphor of the ‘pendulum’; see the discussion in Chapter 5.

government, major funding cuts were announced to ATSIC. Murphy's response is quite revealing:

... we resolved to continue with our original intentions, despite the feelings of gloom and despair which pervaded the town. Our Aboriginal friends were ultimately pleased about our decision to persevere. From our perspective, it was important to stand together with them, even if our chosen courses of action (at that point) were different.¹⁶

This prompts the observation that 'reconciliation' as a community-based project appears to be quite able to withstand the complete absence of indigenous participation and support: conceptually, it continues to work when the substantive interests of indigenous people, as they themselves see them, are being tampered with and damaged.

The project eventually did get back on track and the figure of the see-saw was explored at length through the conception and production of the sculptures. The process enabled the participants to reflect on the complexities of consultation, as some of the works were collaborations between indigenous and settler artists: issues such as the practicalities of dialogue between cultures, and the styles of speaking and listening were all worked through using the figure of a see-saw. Indeed, the final works themselves were all representations of actual see-saws.

Undoubtedly the project raised the profile of indigenous people in the Ceduna community and enabled a collaborative and inclusive project to be undertaken over several years. But it also demonstrated that at the level of specific communities reconciliation projects may have nothing to do with indigenous formulations of what is required, and rather than engaging and 'challenging hierarchies of domination', work within and condone them. The only representative of a political institution who contributed to the documentation on 'See-Saw' was the CEO of the Ceduna District Council, who believed that a proportionally-based employment regime for indigenous people exhausted the Council's responsibilities. Of course, See-Saw had no explicit

¹⁶ *ibid.*, p. 59.

political goals; its real ambition, seen both in the thematic ‘flexibility’ of the project and in the events referred to above, was consciousness-raising and the formation of new personal and local relationships:

I can see by the way you demonstrated respect and the way you’ve treated me that you’re not someone who needs to apologise to me because we’re on level pegging.¹⁷

That comment, from one of the indigenous artists involved to her settler collaborator, was highlighted as an example of interpersonal reconciliation. That is, the non-racism of settlers as validated by indigenous people. This hope for reconciliation was also felt by the former Democrat Senator, now social activist, Sid Spindler, for whom the process must lead to a state when indigenous people ‘will feel comfortable in our house’.¹⁸ Personalisation of this kind may have the effect of taking us away from a context of legal and political obligation. It may also put individual indigenous people into the invidious position of being asked to absolve settler society or individuals. The receipt of forgiveness or validation is thought to be a basis for supporting deeper social change, but the connections always remain unclear. Other groups devoted to reconciliation seem to endorse the same territory of personal growth and community maturity. The organiser of the ‘Stars’ project offered his perspective:

Reconciliation certainly does ask Australians to be more mature, to tap into deeply held values of decency, tolerance etc. and to do the right thing because they are Australians... The problem is that most Australians don’t know the pain of indigenous people or even that there is another nation within this one. Aboriginal people see the world differently, but the majority of people don’t know/belief/understand this (sic).¹⁹

Australia in the 1990s saw an explosion of small groups professing a desire to reconcile with indigenous people. There are many references to the number of such

¹⁷ *ibid.*, p. 33.

¹⁸ Sid Spindler, Transcript of Interview (May 5, 2000). While Spindler saw the importance of the personal, he has questioned the ‘good faith’ of reconciliation, given the ongoing discrimination against indigenous people. See Spindler, ‘Sorry, Sir Gus, we’re not worthy’, *The Age* (February 18, 2000).

¹⁹ Paul Tolliday, coordinator with Stars (a schools reconciliation group based in the NT), personal comment to author (July 20, 2000).

groups in Australia, with the CAR estimating 396 local reconciliation groups in 2000²⁰; over 1500 study circles.²¹ In Victoria in early 2002, there were 57 local reconciliation groups working with the CAR's successor, Reconciliation Australia.²² The CAR understood the importance of providing guidance for this community discussion. A 1993 publication set out themes for local groups to consider: the need for understanding; overcoming prejudice; 'finding common ground'; a 'new Australia'; and the importance of spirituality (an early appreciation of the importance Church and other faith groups would play in the movement).²³ The themes were amplified with personal stories and anecdotes.

However, it was the explosion of interest in indigenous issues from 1997 that saw the CAR begin to produce material more explicitly tailored to reconciliation groups.²⁴ Drawing on the success of learning circles in Scandinavia and the USA, the CAR envisaged "small self-managing discussion groups," and produced a series of straightforward information sheets in 1998, dealing with hot topics like the Stolen Generations and native title, but also advising how to set up such groups.²⁵ It was at this point that the CAR began its 'Ambassadors for Reconciliation' program, intended "to secure prominent Australians to represent and speak for reconciliation in their fields of work and interest." An 'outreach' version of the Council itself, it enlisted such notables as Gabi Hollows, Dick Smith and Tan Le.²⁶

²⁰ CAR. 2000. *Reconciliation: Australia's challenge*, Chapter 6.

²¹ Zubrycki, T., Landers, R., and Ronin Films. c1999. *Whiteys like us: a film*. Canberra, Ronin Films distributor.

²² Information provided by Reconciliation Australia, February 2002.

²³ CAR. 1993. *Working Together – a kit to help you work for change* (Australians for Reconciliation Information Kit).

²⁴ The report on the CAR's second term refers to "96 new reconciliation groups"; the figure in 2000 was estimated at 396.

²⁵ CAR. 1998. Reconciliation Information Sheets 1-10; Learning Circles Australians for Reconciliation Group meeting; How to start a Local Reconciliation Group; What you can do for Reconciliation <http://www.austlii.edu.au/au/other/IndigLRes/car/1998/index.html> (November 14, 2001).

²⁶ CAR *Media Release*, 'Prominent Australians Join the People's Movement for Reconciliation' (June 29, 1998).

The local groups strategy was consolidated the following year with the completion of a 'Learning circle kit', designed to give groups detailed resources that could be used as a framework for discussions, even a curriculum. The kit was divided into 8 modules, each with straightforward educational metaphors such as a 'roadmap' to orient the group on particular issues. The modules were thematic, such as 'Where are we headed?' and 'Protecting and valuing our heritage', and at an average 40 pages each, useful introductory devices. The module on 'Impact of the past', for instance, addressed multiple issues: acknowledgment of injustice; myths, stereotypes and racism; the gap between settler perceptions of indigenous existence and the reality; and different approaches to equality. The method was to present the major viewpoints on each of the issues using statements of key participants, and then to pose a 'Discussion starter' for each. Concluding questions allowed the group to evaluate what they had achieved and where limits to understanding remained, with further references provided.²⁷

One such group was that followed over its course of eight weeks by Rachel Landers, in her insightful film *Whiteys like us*.²⁸ The documentary followed the experience of the 11th Study Circle in 1998, at Manly Community College on Sydney's northern beaches. There were 15 participants at the outset, with a distinct emphasis on people with tertiary qualifications, including three schoolteachers and a research scientist, as well as an ex-missionary and a retired Anglican minister. Another bias was that nine members were female, six male, with two men dropping out after the first week. The circle was structured as a series of meetings where the ideas and materials of reconciliation were discussed, where they were worked through by the group itself largely without guidance.

As one member, Bere, pointed out, they all had "strong and distinct personal motives" for being there. However, the basic prism used in this work, that of

²⁷ The entire kit is available at <http://www.austlii.edu.au/au/other/IndigLRes/car/pubs.html#resource> (November 12, 2001).

²⁸ *Whiteys like us*.

indigenisers and assimilationists, remains useful: Hugh suggested that “despite being here 200 years, we don’t feel comfortable here;” Judith thought that “if you wanted a job in this country, it’s better to be a disabled lesbian with a dark skin colour;” Darren saw his participation as akin to that of a “shepherd.” The debate throughout, which was at times little more than bickering, consolidated the issues as a contest between enlightenment and defensiveness.

On the issue of what actually happened in the past, Leslie, an elderly ex-missionary, maintained that she “never saw anything but good done for Aborigines ... (we would tell them to) brush the flies out of the babies’ eyes.” Her comments caused the indigenisers visible discomfort, with one, Carolyn, saying afterward that she “felt quite sick.” The tone of the debate cooled down, but the issue was far from resolved. Rather than coming to some new understanding, Leslie maintained that “everybody was anti-England.” Bere thought that if it continued like that it would become destructive.

An Aboriginal man working as a heritage officer visited the third session. Most members were silent. Darren took up a hostile line of questioning, probing at the notion of Aboriginality. Another member, an epileptic with a significant speech impediment, reflected on what he had heard about the lack of education for indigenous people, relating it to discrimination he had experienced as a child in the 1960s, when it was thought ‘not worth it’ to educate people like him.

More than halfway through the course, an extended debate took place on ‘who was a real Aborigine?’ Darren asked, “Is an Aborigine anyone who is black, any part black, is that an Aborigine? Or is it someone who is a native indigenous Australian living and practising their culture and customs?” Bere provided the answer in administrative use in Australia: identification of the person as indigenous; evidence of descent; recognition by an indigenous community. Without considering the implications of the definition, Darren railed against discrimination in the provision of subsidised home loans and welfare, arguing, “this question for Australians is not just about Aborigines, it is about immigrants, it is about all the welfare groups – why do

they get more than me?” He is met with an almost mystified anger from the indigenisers, “who is ‘them and us’,” they asked him.

What followed illustrates one potential of this type of forum, and more generally, the conflation between individual and community or national concerns. Darren immediately lamented the fact that “we (are) deliberately divided” and proceeded to tell the group of his own sexually abusive childhood, finishing through a veil of tears, “we are all born the same!” The awkwardness in the group was palpable, with Sandy later saying that because he had used the forum “for his own personal experience ... it made him vulnerable and it made us vulnerable.” Later Megan was to speak candidly about the value of the group as ‘therapy’.

Even more troubling was the isolation that the group members were all feeling in relation to their friends, family and colleagues, with one woman leaving the group because she could not handle the ridicule at work. Sandy also lamented this development, “No one talks to me about it ... there’s this sort of ‘here she goes again’.” David Watts, the Aboriginal heritage officer, made some telling remarks in conclusion: “If these groups keep going a lot of good will come out of it ... but in the long run, black justice, land rights, those issues won’t be solved.”

The last publication relevant to the reconciliation movement produced by the Council was the *Local Reconciliation Group Toolkit*.²⁹ This was clearly part of an effort to “sustain” the reconciliation movement:

Reconciliation has not ended with the Council’s term ... The people’s movement will take reconciliation forward, continuing the work of building better relations between Aboriginal and Torres Strait Islander peoples and the wider Australian community. Local groups are central to this process.³⁰

²⁹ CAR. 2000. *Toolkit for Local Reconciliation Groups*
<http://www.austlii.edu.au/au/other/IndigLRes/car/2000/17/toolkit.pdf>(April 2, 2002).

³⁰ *ibid.*, p. 4.

The material itself moves beyond simple study of the issues to provide a framework for activism in formalised, permanent organisation. The material, a series of basic primers on community-based organisational methods, such as ‘networking’ or ‘telephone trees’, suggests that it is aimed at people who are unfamiliar with activist forms of civic participation.

However, the presumption being made was that reconciliation would be kept alive in these cells of locally-inspired action. The example of the Manly study circle suggests that this may prove to be a hard transition, and in fact, the ease with which the participants grasped the methodology was not matched by a capacity to reach collectively-agreed principles or responses. The ‘Toolkit’, by building on the earlier learning circle kit, hoped that a coherent connection would be made between this self-sustaining movement and the issues that are relevant to the concerns of indigenous peoples.

One Victorian organisation, Defenders of Native Title (DONT) has been consistently committed to maintaining explicit connections between education and awareness campaigns, and rights-focused activism. DONT has approximately 700 financial members, a mailing list of over 3000³¹ and has at least 26 local branches based on federal electorates in Victoria.³² It was built on an already existing network of community, union and solidarity groups and Churches around Victoria. Activities range from entering floats in festivals, running public seminars on local and state history, and providing clearing-houses for documents relating to indigenous rights. The emphasis is on raising the profile of indigenous claims in an intelligent and informed manner, with a particular focus on local activities. DONT also takes on more explicitly political campaigns, for instance its submission to the *Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund*, in which it argued for amendments to the NTA that brought it into compliance with

³¹ Defenders of Native Title. 1997. *Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund*, p. 2.

³² Defenders of Native Title, *DONT STOP* Newsletter (March 2000), pp, 9-14.

the United Nations Committee on the Elimination of Racial Discrimination report.³³ DONT's campaign strategy plan for 1999 did not feature the word reconciliation heavily, though it was certainly part of the organisation's motives through a focus on advocacy and education.³⁴ However, projects like the 'reconciliation flame', conceived as a counterpoint to the Olympic flame, were thought of in terms of the exposure they could give to the more substantive issues of native title, heritage protection and an apology. As an organisation, DONT appears not to give great weight to solely symbolic activities, and conceives of 'native title' as broader than simply a claim to land: it is more the deeds to a full identity and the basis of self-determination.

There is some reason for optimism about the reconciliation movement then. At least pockets of it have not become diverted by the ceremony, but are campaigning for real and lasting improvements and substantial alterations to political arrangements that would enable self-determination. Henry Reynolds has recently described himself as a 'convert' to the popular movement, becoming an 'Ambassador for Reconciliation'. The reasons he gives for his shift are that reconciliation has 'escaped' from its elite provenance, into the hearts of the community.

Even if the process at the national level doesn't lead to anything of great consequence, the local movement will go on, because I am certain that those hundreds and thousands of people who turn out to meetings are determined that something will happen now, in their lifetime.³⁵

How many of these are genuinely committed to difference, as opposed to the many anodyne variants of reconciliation already documented in this chapter? Are these people representative of the national will, or somehow estranged from it? An attempt needs to be made to answer these questions, to gauge the community's will.

³³ Defenders of Native Title, *Submission*, pp. 14-15.

³⁴ Defenders of Native Title. 1999. *Campaign Strategy Plan*.

³⁵ Henry Reynolds, 'A crossroads of conscience' in Grattan 2000, p. 54.

Qualitative and quantitative measurements of reconciliation

One way of gauging community opinion is to open a forum and listen to what people say. The CAR's process of consulting the community on its 'Draft Document of Reconciliation'³⁶ did exactly this. One initiative it undertook was the online forum that opened on the ABC website on November 26, 1999. I examine this forum partly because the proceedings of the 'more than 100' community meetings held around the country as part of the consultation process are not publicly available, but also because it exemplifies the typology of personal responses to reconciliation I have been using. Indigenisers and assimilationists were here joined by a third group, who found the premises of the debate to miss the point.

The forum was open for several months, but on the first day, members of the CAR including Gus Nossal, Jackie Huggins and Ray Martin joined online to answer questions and stimulate discussion.³⁷ The discussion that follows refers to particular contributions by their Post ID number.

Assimilationists attacked difference and social or political developments based on it: indigenous people leave rubbish (285); they never listen to 'us', even though we're all equal (49 and 55); biological and cultural stereotypes were given as explanations for disadvantage, as well as the role of 'white trouble-makers' and the fear of others to speak up, and the failure of indigenous people to take responsibility so that we can all live in harmony (all the subject of a long thread of posts - 153/155/202/211/249/283/294)

Indigenisers, conversely, promoted the idea of maturity, honesty and social growth: people must take up the baton in the community (17); the draft was poetic and profound (45); there was encouragement and hope for the process because of the

³⁶ What eventually became known as the *Document Towards Reconciliation*.

³⁷ The entire debate is available at <http://www2.abc.net.au/message/common/forum> (April 2, 2002). This research examined the forum up to post # 294.

prominent role of youth (73); the ‘dedication and honesty’ of the Draft (80); it ‘clarified identity’ (147); it should be laid on the table, though we might have to wait for society to accept it (104); and indigenous people have much to teach us (256).

Critics looked for specific outcomes, lamented confusion or the lack of effectiveness: they offered arguments against apathy and for the need for individuals to see reconciliation as a human rights issue and in that way relevant to their lives (25); that the society obsessed with not creating division may not be able to address injustice (31); the compromise and confusion of the Document, its awkward and meaningless language (30); its lack of legal grounding (34); there were attacks by an indigenous person on the document (106); reconciliation was ‘absolution’ (97); it did not deal with the facts (156); reconciliation was a ‘public relations exercise’ (116); ‘wreck-con-silly-nation’ (250).

Interaction between the positions may offer some hints about the potential for dialogue: one exchange between CAR member Ray Martin and Jodus Madrid, a member of the Bunjalung peoples of NSW, illustrated the interaction of an indigeniser and a critic. (106/110/119/121/124):

JM: I believe this to (be) legally ineffective and philosophically useless. Full of good intention but meaning absolutely nothing ...

RM: “...if it’s a keep Jonny (Howard) happy document then we’ve failed dismally... Now we’d all like strong words and action in the Constitution. We’d all like some LAWS changed. Maybe that’s possible ... but what is happening now is an important step in the right direction. Don’t get too cynical ... Keep the faith ‘bro ... we can do this together, if we try.

JM: One of the last on my list of agendas is to be a cynic ... but this game that we play if you are black is one where they can move the goal posts the game is not even defined. No hoops, hole, nor posts. How could I be anything but a realist?

RM: I didn’t mean to offend. It was more a plea, a cry from the heart. I can’t offer you certainties. No promises. Just the belief that things are changing. Not fast enough. Nowhere near fast enough. But, again – there is no alternative. We have to give it a go. The Council is one of the main games right now ... I’m on your side.

JM: Your alright mate, I would have a beer with you anytime.

While the conclusion is certainly conciliatory, the currency of the exchange is faith. What the indigenising position has to offer the critic is a ‘cry from the heart’ and the stark realism of ‘no alternative’. The claims of indigenous people to ‘play the game’ equally, which are implicitly treated as legitimate in this exchange, are simply to be taken on trust. Other exchanges between the indigenising and the assimilationist position are equally revealing: posts about the importance of difference are posed against those stressing equality, each as stridently put as the next. There were no threads or mini-dialogues that showed the commitment of the contributors to work toward compromise or even agreed statements of what needed to be faced. Some of the exchanges trail off into insult and incomprehension (210/294). The encounters between indigenisers and assimilationists often solidified their suspicions of each other, often in a contest over who understood Aborigines best or had had the most meaningful contact (211/249).

Read in its entirety, the online forum presents a strong *prima facie* case against the possibility of widespread reconciliation as shared understanding. This ‘perfect silence of incomprehension’ was observed, rather more scientifically, in the public opinion research that the CAR itself commissioned: for example, the research found a common view held by indigenous peoples was that the Draft Document of Reconciliation was simply to assuage “white guilt”; conversely, many settlers rejected it as an attempt by indigenous peoples to advance their own interests.³⁸

The CAR throughout its tenure, conducted quantitative opinion polling and qualitative focus groups to develop an empirical grasp on community attitudes toward and awareness of reconciliation. The first issue of importance concerns the process itself, as reconciliation had set itself the high standard of a country ‘united by respect’:

³⁸ An extremely ironic outcome, given the general thrust of this thesis. Irving Saulwick and Associates, Denis Muller and Associates, and Council for Aboriginal Reconciliation (Australia). *Research into Issues Related to a Document of Reconciliation: Report No. 2 Indigenous Qualitative Research*. May 2000, (hereafter Saulwick No. 2), p. 11.

‘brand recognition’ and understanding of the issues would have to be significant. Early research showed a level of support for reconciliation of about half the population, from 48% in November 1991 to 52% in March 1994. Also noted was the view that reconciliation was a difficult and abstract concept.³⁹

Awareness of reconciliation as a national policy was clearly sensitive to other issues like native title: “tracking research shows that awareness escalated sharply during 1993 (during the NTA debates) since then it has plateaued ... Mabo has to an extent set the scene for reconciliation by giving it a context, but it has also heightened concerns about loss of land to indigenous people.”⁴⁰ As I have suggested, this was likely a function of the diverse mobilisations of the concept during the NTA debates. Reconciliation had the greatest support when its definition remained unstated or there was no clear sense of obligation. In mid 1996 83% registered strong support for reconciliation, while in 2000 80% reckoned reconciliation to be important.⁴¹ However most felt reconciliation was “an Aboriginal issue, not an issue for all Australians.”⁴² The point made in the previous chapter – the Council for *Aboriginal* Reconciliation (as opposed to ‘Australian Reconciliation’) – takes on an unfortunate cast with this finding.

Soon after the results of the last major public opinion research on reconciliation was released, controversy erupted over the involvement of the Prime Minister’s office in the preparation of the polling questions. Senator John Faulkner told the Senate of “a grubby thread” connecting government advisers with the question on ‘special rights’ that appeared in the quantitative research conducted by Newspoll; Faulkner felt that

³⁹ CAR. *Annual Report 1992-1993* ‘Market Research’
<http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/car/ar1992-93/15.html>(April 2, 2002).

⁴⁰ Jeanette Johnson, Brian Sweeney and Associates. 1996. *Unfinished business: Australians and reconciliation*, conducted for the Council for Aboriginal Reconciliation.
<http://www.austlii.edu.au/au/other/IndigLRes/car/1996/3/unfinished.html>(April 2, 2002).

⁴¹ Newspoll 2000, s. 4.7.

⁴² Newspoll, Saulwick and Muller, and Hugh Mackay, in Grattan 2000, p. 36.

this was almost ‘push polling’ and that it invalidated the research as a whole.⁴³

Certainly the question itself should be discounted but the consistency of the general findings with the qualitative polling makes Faulkner’s larger criticism less troubling.

Of more concern is the striking contrast the findings create with the view of reconciliation held by indigenous people surveyed.⁴⁴ One of the conclusions the report makes in its executive summary – that the importance of unification was widely appreciated by indigenous communities – is not supported by the body of the report. On several occasions, respondents did feel that an apology was a precursor or step toward becoming a single people.⁴⁵ However, genuine consistency only existed on the question of social deprivation, a concern about the process of reconciliation itself and the validity of an indigenous leadership negotiating on the behalf of communities. For one group reconciliation was not an important issue. They asked whether Europeans were even ready for it.⁴⁶ Another group felt that their social problems overwhelmed any thoughts of reconciliation.⁴⁷ Some felt left out of the debate.⁴⁸ Others were cynical and thought reconciliation “remote.”⁴⁹ One group expressed real anger and frustration at social conditions – they felt distrustful of reconciliation – to support it you had to have a “stake in Australian society.”⁵⁰ Considering the relationship between the marginalisation of settlers and their enthusiasm for reconciliation, the authors of the

⁴³ John Faulkner, *Commonwealth Parliamentary Debates*, Senate (April 10, 2000), p. 13699.

⁴⁴ A theme picked up in the Australian media: “Well, to me, I reckon, it was new and we don't know nothing about it, the first time we heard it.” Jerry Jones, a traditional owner interviewed on *The 7:30 Report*, ‘The rocky path to Aboriginal reconciliation’, ABC TV (November 29, 1999). One could reflect sadly on the rationale for indigenous social research at the tail end of the reconciliation process: given the operative assumption of the previous chapter – that positive change for Aboriginal and Torres Strait Islander people was thought to be dependent on the mainstream community’s will for change – it is bizarre that the result after nine years is to quiz indigenous communities on whether they now supported a process about which they had barely been consulted. The widespread indifference the rapporteurs uncovered is tragic evidence of the conceptual failure of the policy.

⁴⁵ Saulwick (Report No 2), p. 95.

⁴⁶ *ibid.*, pp. 12-15.

⁴⁷ *ibid.*, pp. 18-19.

⁴⁸ *ibid.*, p. 25.

⁴⁹ *ibid.*, p. 28.

research noted, “(a)cross Australia, these are the people who are most resistant to reconciliation.”⁵¹

Moreover, the question of disadvantage revealed an abyss between settler and indigenous understandings. 52% thought Aborigines not ‘disadvantaged’, yet ‘special treatment’ was perceived to mitigate inequality; over 60% believed there is “too much special assistance;” while nearly 70% believe Aborigines “don’t do enough to help themselves.”⁵² Newspoll concluded that “there is a significant gap between the facts (of indigenous deprivation) and what many people believe.”⁵³ The empowering equation of events of the past and current evaluations did not appear to be materialising.⁵⁴

Saulwick’s explanation for this is that the indigenous predicament is “universally thought of as a tragedy,” though combined with very little empathy.⁵⁵ Mackay has written of “shades of racism ... people do not have the imagination to look at the world through the eyes of a victim.”⁵⁶ Observable in the research is a pronounced disparity among settler respondents: the Newspoll material shows that much less support for statements of Aboriginal disadvantage existed amongst rural respondents and blue collar workers (figure 3). Increasing wealth and differences in location produced pronounced increases in support for the questions on whether Aborigines have better or worse living conditions than other groups (figure 5); whether they should receive assistance (figure 7); whether the cause of disadvantage may be rooted in the past (figure 15); and the question of an apology (figure 18). These

⁵⁰ This group was explicitly motivated by an opposition to the renewal of national image that characterised reconciliation. *ibid.*, p. 31.

⁵¹ *ibid.*, p. 30. An emerging argument is that these marginal groups will begin to identify more with each other, than with more prosperous members of their own racial group. See Nicolas Rothwell, ‘Outback class action’, *The Australian* (May 22, 2000), p. 26.

⁵² Newspoll 2000, 4.2, Figure 6.

⁵³ Newspoll 2000, ‘Executive Summary of Findings: Stage I Findings’.

⁵⁴ Newspoll 2000, Figures 13 and 14.

⁵⁵ Irving Saulwick and Associates, Denis Muller and Associates, and Council for Aboriginal Reconciliation (Australia). *Research into Issues Related to a Document of Reconciliation* (hereafter Saulwick No.1), February 2000, pp. 7, 44-45.

⁵⁶ Newspoll, Saulwick and Muller, and Hugh Mackay, in Grattan 2000, p. 38.

variables were influential factors in the way perceptions of the problem were formed. As I develop in the next chapter, these differences are exploited in the criticisms of reconciliation made by conservative commentators.

In two interviews contrasting assimilationist with indigenising nationalisms done by Moran, there is a marked difference of tone and language skills: the assimilationist position is presented by 'Les', who has a highly colloquial expression with broken sentences, while indigeniser 'Paul' uses a larger vocabulary and speaks comfortably about concepts like spirituality and indigenous traditional knowledge.⁵⁷ While there are undoubtedly well-spoken assimilationists and intuitively inclusive but less articulate Australians, Moran's selection of these two interviews helps illustrate a connection between people's attitudes to race and their social status.⁵⁸ Moran also used his interviewee, 'Les' the publican, to show how assimilationist nationalism can invert the victim status when confronted by indigenous people making claims. Persistent is a correlation between class and attitudes to race.⁵⁹ The space occupied by reconciliation appeared to be defined by the interaction of these two putative groups, or at least the tendencies underlying their positions.

A strong sense of 'sides' comes through in the qualitative and quantitative research. That is, an 'us and them' idiom and conceptualisation of identity in Australia. The two versions of the 'Mackay Report' conducted in 1986 and 1998 made startlingly similar conclusions: "indigenous people were not really included in any consideration of social class and status by white Australians: they were either off the bottom of the scale, or in a separate category altogether ... Notwithstanding a growing awareness of the need for reconciliation, Aborigines were typically assumed to lack any social standing, to suffer from a kind of social dysfunctionality."⁶⁰ Such discoveries make the rough egalitarian self-perceptions that connect reconciliation to social justice even less

⁵⁷ Moran 2000, pp. 152-155.

⁵⁸ This rhymes with the argument above that Hanson's One Nation appealed to some precisely because of her inarticulacy, because it demonstrated her distance from the wiles of political elites.

⁵⁹ See also Jones, B. 2000-2001. 'Wedge politics'. *Dissent* 4.

tenable. Newspoll also captured these contradictory values: it appears that when Australians are asked direct questions on identity or rights, they will say we are all one people, but what emerges after deeper probing is a strong distinction between groups. The research conducted in indigenous communities gauged a similar social division, which was expressed by indigenous peoples as alienation.⁶¹ Exposed here are conflicting values, acceptance of difference as social reality, versus the desire to resolve the problems faced within the terms of one people, one nation and one identity.

This is the essential paradox of Australian communitarianism: a strong distinction between social status combined with the statistical evidence of massive disparities in social wellbeing, in absolute conflicts with the almost universally-held view that we should all be ‘one equal people’. Another slant can be read into these findings: that indigenous backwardness is so entrenched that a fair compromise or consensus about their difference could never be reached. Whichever reading we take, it is hard to see this as good grounding for reconciliation.

Nationalism framed in strictly egalitarian terms is capable of generating great support: “On some matters the community appears to be in general agreement ... a desire for equality and unity ... (recognition) that Aboriginal people were treated badly ... efforts to help Aboriginal people have been less than successful ... a desire to look to the future and move forward ... and that reconciliation between Aboriginal people and the wider community is important.”⁶² Mackay writes of a tolerance “bounded by the egalitarian ideal that we are, or should be, one people – one nation.”⁶³ The Newspoll researchers noted the fact that the most supported aspects of the document are those that were “at odds with ‘special treatment’.”⁶⁴ Again, comparison with the responses by indigenous people reveals a great disparity in the perceived importance that national

⁶⁰ Newspoll, Saulwick and Muller, and Hugh Mackay in Grattan 2000, pp. 46-47.

⁶¹ Saulwick (No 2), pp. 55-57.

⁶² Newspoll 2000, s. 3.

⁶³ Newspoll, Saulwick and Muller, and Hugh Mackay in Grattan 2000, p. 37.

⁶⁴ Newspoll 2000, s. 3, ‘Overview’.

unity has. Only one indigenous focus group, the elders of Elcho Island, explicitly endorsed the idea, but to them unity was ‘not conformity’.

As I suggested in my treatment of Hage’s work in Chapter 1, the major purpose of ‘bounded tolerance’ was to prevent alternative sources of authority or governance emerging in a given territory. That is, a categorical denial of ‘special rights’. A closer look at settlers’ comments only deepens the gloom: tolerance for difference exists up to the point where it begins to threaten one’s identity, while racism is not considered to be a problem.⁶⁵ In principle, only 28% supported any document that would imply legal obligations, which changed little after people had seen the actual Draft text.⁶⁶ Though figures 16 and 17 in the Newspoll research show that the more specific questions became, support tended to be eroded, even the questions with less overt consequences like the apology got only minority support. 63% thought “Australians today weren’t responsible... so today’s governments should not have to apologise.” When asked whether the government should apologise or do nothing, a factor of nearly 2:1 opted for the latter.⁶⁷

An accompaniment to these responses is the desire that something must be done, and a frustration that these problems have not been fixed. Mackay’s 1995 research, ‘Society now’, saw the emergence of a more ‘rueful’ attitude, a disappointment that the problem has not been sorted out yet, and embarrassment that the issue persists.⁶⁸ One related manifestation of this is the common sense of ‘yearning’ detected by the researchers, in both the ‘one nation’ theme and that of healing and renewal. This is a trope common to both the indigenising and assimilationist positions.

⁶⁵ Saulwick (No. 1), pp. 7, 25-34.

⁶⁶ Newspoll 2000, s. 4.8.

⁶⁷ Newspoll 2000, s. 4.4, Figures 16-17.

⁶⁸ Mackay, ‘Vox populi’, in Grattan 2000.

Much of the media response to this research saw it as evidence of the need for political leadership, and the cause of the poor results.⁶⁹ But as Goot has noted, the results do not inspire ‘courageous’ decision making: “None of those who offered their advice (in the media responses to the research) gave the Prime Minister grounds for thinking that voters could be ‘educated’ or that they wouldn’t punish his government in key marginals if he failed in his mission.”⁷⁰ More problematic is the repeated finding across both the Newspoll and Saulwick studies that respondents were concerned about actions that threatened reconciliation:

... people wanted it given some kind of meaningful status ... Endorsement by the parliaments – short of legislative enactment – was regarded positively on condition that sufficient political groundwork was done to ensure unanimous or near unanimous endorsement and provided it did not become a spring-board to further claims.⁷¹

Such a widely held belief shows the ever-growing differences between the intentions of the 1983 Senate Report and the logic of reconciliation. Support for a treaty was at 50% in the 1993-1994 market research, while at the height of official reconciliation in 2000 it was reported at 53%.⁷² Similarly, from November 1993 until January 2000, those who rated indigenous issues as ‘very important’ went from 32% to 30%.⁷³

Instead of building support around a national imperative of indigenous self-determination, the period of this process has seen a hardened and more articulate opposition to it. The arguments of the NAC/ATC remain in circulation,⁷⁴ but instead

⁶⁹ See *The Australian*, ‘Editorial: Society needs leadership on Aborigines’ (March 8, 2000), p. 12; Margo Kingston ‘A sorry state of affairs: waiting for leadership’, *The Sydney Morning Herald* (February 29, 2000); Morag Fraser, ‘A language of leadership Howard will never learn’, *The Age* (March 5, 2000).

⁷⁰ Murray Goot, ‘Reconciliation unreconciled’, *The Bulletin* (April 4, 2000), p. 39.

⁷¹ Saulwick (No. 1), p.11; Newspoll 2000, s. 4.8.

⁷² CAR *Annual Report 1993-1994* ‘Market Research’

<http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/car/ar1993-94/25.html> (August 6, 2000); Debra Jopson, ‘Surge in support for treaty with Aborigines’, *The Sydney Morning Herald* (November 8, 2000).

⁷³ Mackay in Grattan 2000, p. 45.

⁷⁴ See the discussion of the renewed treaty debate in Chapter 5.

of the cautious willingness to negotiate, or even reticence, there is now a highly motivated settler constituency of fear. Moreover, it is not clear which aspects of the reconciliation agenda the public might actually be open to persuasion on, and which issues are ‘closed off’ to discussion. Goot’s analysis highlights the dissipating function of reconciliation – at this stage the questions to ask are not about how to influence public opinion or merely to push the process along, but on what issues there is any real prospect of change? Which of the prejudices and certainties of settlers might be ameliorated so that reconciliation could produce some results for indigenous people?⁷⁵

The coexistence of these multiple settler attitudes may constitute a syndrome: the fixed idea of aboriginality as ‘tribal or trouble’, fused with a ‘passionate egalitarianism’ combine to oppose ‘any extension of benefits’. Clendinnen offered an analysis of this point in her 1999 Boyer Lectures: “To label such people ‘racist’ is to miss the point. Their egalitarianism and their obstinately independent empiricism are strengths, but strengths easily corrupted to bad conclusions. So what is to be done? They won’t be bullied by moralisers. Abuse, exhortation, rhetoric won’t work with them. Their powerful sense of justice, were it better informed, might, if they could hear some true stories.”⁷⁶

Yet it seems that the ‘true stories’ of the HREOC report have not yet softened these hearts. While Clendinnen’s analysis about the futility of morality is apposite, her conclusions beg the question, by concealing the limited power of those who would use conciliatory educative processes as weapons against the discriminatory past and present of Australia. The dynamics of interaction between the indigenising and assimilationist positions noted in the online forum gives little cause for optimism that the exchange of stories is a worthwhile endeavour if the eventual goal is the recognition of indigenous peoples.

⁷⁵ Goot, ‘Reconciliation unreconciled’, p. 39

⁷⁶ Inga Clendinnen, *The Boyer Lectures*, ABC Radio National, Lecture 2, ‘Pilgrims, saints and sacred places’ (November 21, 1999).

Part of the contention of this thesis is that efforts to capture the whole identity of the nation are destined to fail; these snapshots of national fracture and dissensus do appear to confirm this. We might recap those features of the Australian public's views on reconciliation that are widely shared, and consider how coherent or unified public opinion is: there is a capacity to see the past as having affected indigenous people badly, but there is little connection made to present disadvantage. There is a willingness to accept indigenous people as Australians provided that this does not involve any substantial changes to the political community. There is strong criticism of the refusal of indigenous people to integrate or assimilate, and their dependency on, or their exploitation of the welfare system. There is no great appreciation of the need for rights to land and many see the claim as having a 'pecuniary base'. An apology is not widely supported for fear of its implications, and an unwillingness to feel personally responsible. Reconciliation is an Aboriginal issue, not one for the wider community. The CAR was not widely known, or was viewed as an elite and aloof institution, out of touch with how ordinary people think and feel. There is 'confusion' about the difference between reconciliation and other issues such as native title, which causes anxiety. The draft document was not widely liked, 'many seeing it as divisive and backward-looking'.⁷⁷

The more marginal and impoverished the respondents felt, the less they felt the relevance of reconciliation or could support it, a finding consistent across both indigenous and settler groups.⁷⁸ If the process could unify neither settler nor indigenous peoples in their respective settings, what chance had it of expressing an overarching national will? It had become,

⁷⁷ Saulwick (No. 1), pp. 7-11.

⁷⁸ *ibid.*, p. 10.

... a rather tattered concept, one constantly invoked as magic mantra to ward off contentious legislation, double-dissolution 'race elections' and the like. Reconciliation is never defined: it is simply parroted, leaving assumptions to struggle for meaning and purpose.⁷⁹

⁷⁹ Tatz 1998, p. 2.

5.

The future of reconciliation

What of the process of reconciliation? It is manifestly a worthy objective but it is not completely clear who is to be reconciled to what or to whom. Presumably Aborigines and Islanders are to be reconciled to loss of land and sovereignty. If that is the case then they have already delivered. It is not immediately apparent what non-indigenous Australians are expected to become reconciled with. It can't relate to the fact that they have started treating Aborigines with justice and fairness, that belatedly they have begun to do the right thing. What might be expected is an acceptance of the existence and validity of indigenous nationalism and a commitment to seek ways in which it can be accommodated beneath the overarching roof of the Australian state.¹

... an instrument of reconciliation is a long way from being an achievable constitutional reform and will remain a Canberra abstraction ... Aborigines will be left with the empty consolation that the process is more important than the outcome.²

The objects and materials of reconciliation are subject to furious debate.³ This chapter considers the range of critical responses to reconciliation given its mixed results. They fall largely under two categories, those I call settler critics and indigenous critics. The striking feature of both critical positions is that they each see the identity project of reconciliation as the explanation for its limited success or indeed its failure, though of course the respective conclusions are different.

¹ Reynolds, H. 1996. *Aboriginal sovereignty reflections on race, state and nation*, Allen & Unwin, Sydney, p. 178.

² Brennan 1994, p. 108.

³ Gardiner-Garden: "Terms such as 'dispossession', 'assimilation', 'self-determination' and 'treaty', although introduced in different stages of the debate, are still used in the current debate, and the same forces which gave birth to the 'process of reconciliation' as a compromise way forward, are still at play producing very different agendas for reconciliation."

I conclude the chapter by reflecting on the future for reconciliation as the official process ended in 2000 and review the central question of this thesis: what kind of relationship emerged as the goal of reconciliation? My conclusion is that it is less a relationship that was and is sought, than a search for a renewed national or communal identity that is secure, stable and satisfying.

Imagining reconciliation; reimagining Australia

The creation of a new relationship had been the underlying instruction of the RCADC report in 1991, conscious of the lack of trust and respect indigenous people had for settler institutions and particularly the police. The importance of personalising that relationship was cemented by Paul Keating's 1992 'Redfern Speech', in which "we" is the refrain to rally support for a new dispensation in Aboriginal affairs: "We took the lands, we brought the diseases." The only indigenous person currently in Federal parliament, Democrats' Senator Aden Ridgeway, has often spoken about reconciliation in terms of the sharing of stories, to ask 'who are we? And what are we doing here?'

The art of storytelling is at the centre of reconciliation, and reconciliation is at the heart of Australian society. The twenty-first century gives us an opportunity to reflect on the past, to think about the Australia we learnt about at school and confront what is often an uncomfortable and unfamiliar past.⁴

(A)n Australian never challenged by reconciliation is one who never knows the truth of the past and will never know the meaning of the future. I hope you who have read my words, will tell your stories and listen to the meaning others may find in them.⁵

Journalist Michelle Grattan has written of the "road down which the nation's original citizens, and those who came after, are walking, bound together as members of the great Australian tribe, but still trying to get into step."⁶ Aboriginal woman Mary

⁴ Aden Ridgeway, 'An impasse or a relationship in the making?', in Grattan 2000, p. 13.

⁵ *ibid.*, p. 17

⁶ Michelle Grattan, 'Introduction', in Grattan 2000, p. 6.

Darkie saw reconciliation as “getting to know people as individuals and letting go of anger.”⁷ Why do these personal conceptions have such strong appeal? In the indigenising vision, the problems and limits of our national character deeply affect our ability to relate to it in a proud and unified way, and for some this impairs our individual wellbeing. Brennan, for example, argues that it is the realm of national identity into which we *all* can emerge; neither ‘side’ can be involved unless they agree to participate in a process of examining our very selves. That will ‘empower’ us to act upon our social deficiencies.⁸

This strategy appears to beg the question: both the problem and the means for its solution are identified in the same terms; we will fix this problem in our national character with a deeper reading of our national character. We will search for the true and the essential values of Australia and its people, and we will use these as a powerful solvent of contemporary prejudice. This is clearly the intention of placing reconciliation as an issue outside, above and beyond politics:

Reconciliation ... is above politics. It is an issue that goes to the heart of nationhood and identity ... There must be an agreement reached that fundamentally changes the relationship indigenous people have with other Australians and with governments – an agreement which recognises that any settlement will be between citizens of a united Australia and recognises that we are one people.⁹

It is important to stress that Reconciliation goes beyond politics. It is quintessentially a people’s movement – a change in mindset, an appeal to 19 million Australians.¹⁰

From the previous chapter it is clear that there are limits to these exhortations to renew Australian national identity. However, they do meet the criteria of those politicians I identified in the previous chapter, who advocated a minimal involvement for government, and stressed notions of community. Political figures always retain

⁷ Mary Darkie, ‘This is my life’, in Grattan 2000, p. 115.

⁸ “Reconciliation must be an empowering principle of our social relations.” Frank Brennan, ‘Reconciling our differences’, in Grattan 2000, p. 29.

⁹ Peter Yu, ‘Past truths are essential to future harmony’, *The Australian* (October 15, 1998), p. 15.

¹⁰ Gus Nossal, ‘The next steps in the long march to Reconciliation’, *The Age* (February 16, 2000), p. 15.

their right not only to prevent reconciliation from impacting on law-making or institutional reform, but to sum up its importance:

We may differ and debate about the best way to achieve reconciliation, but I think all Australians are united in a determination to achieve it.¹¹

Thus an alternative position emerged that simply reflected existing political contestation. ‘Practical reconciliation’ is no less ‘community focused’, though its special emphasis is on the socio-economic marginality of indigenous communities.¹² By taking the practical position, other crucial claims, such as for an apology or heritage rights, are rendered ‘impractical’.¹³ There are three planks to this approach: ‘improved social conditions’ - particularly the quartet of health, housing, education and employment; acceptance of inter-related histories; finally, ‘mutual acceptance of the importance of working together’.¹⁴

The first idea attempts to give reconciliation the solid grounding of specific policy measures. Yet, as is frequently pointed out, there is nothing particularly ‘reconciliatory’, or even conciliatory about a government fulfilling its basic obligations to its citizens:

Much of what passes for public comment on reconciliation is propaganda designed to whittle away the argument for change. So too is all the talk about achieving reconciliation by improved standards in health, housing, education and employment opportunities. It’s demeaning to reduce the core issues about why we are a divided society to basic citizenship entitlements.¹⁵

The second point of practical reconciliation works against revisionist trends in Australian history and their influence on public debate. I discussed the Howard government’s treatment of ‘shared history’ in the context of an apology, and return to it in the subsequent section on ‘settler critics’. These writers see a crisis of legitimacy

¹¹ John Howard, reported in Michelle Grattan, ‘Introduction’, in Grattan 2000, p. 6.

¹² Howard, ‘Towards a common destiny’, *The Sydney Morning Herald* (December 12, 2000).

¹³ Louise Dodson, ‘PM bids to capture reconciliation lead’, *The Age* (May 11, 2000).

¹⁴ Howard, in Grattan 2000, pp. 89-90.

¹⁵ Geoff Clark, ‘Not much progress’, in Grattan 2000, p. 229.

brought about because of a renewed interest in Australia's history, and lament it as unnecessary and destructive.

The third point is part of the rhetorical bulwark against indigenous autonomy. Practical reconciliation may be no more than the politics of condescension, where 'inclusion' in the mainstream justifies a continued refusal to make concessions to indigenous self-determination. That concept is a long-cherished ideological commitment of the Coalition, perennially argued over decades. An assumption made now is that indigenous citizenship is wanting, and that this is so after or even because of attempts at self-determination or separate development.

This strategy is the contemporary manifestation of assimilation. Prime Minister Howard's pledge, upon re-election in October 1998, that he and his government would be committed 'very genuinely to the cause of true reconciliation with the Aboriginal people of Australia by the centenary of Federation',¹⁶ requires some probing. What he has since had to say about how he will act on this commitment can be condensed to two points: an unequivocal belief that Aboriginality is simply a category of Australian identity; and the view that measures of social justice are far more important for Aboriginal Australians than measures of self-determination. Both of these are always represented as "middle Australia's thinking on the matter" as well.¹⁷

The first view denies differentiated citizenship or sovereignty in an absolute sense by stressing the formal aspect of identity: "we are equally together, one no better

¹⁶ Howard, Election Night Speech, Wentworth Hotel, Sydney (October 3, 1998).

¹⁷ One powerful metaphor Howard continues to adopt is that of the pendulum, borrowed from Geoffrey Blainey's Latham Lecture in 1993 – it allows him to embody balance and just compromise: "Once people start upping the ante and saying, we've got to go further, we've got to have custodianship mentioned, we've got to have ongoing rights, particular kinds mentioned, you lose me, you lose middle Australia because they would not want that and they would see that as pushing the envelope too far", Howard, Interview with Kerry O'Brien, *The 7:30 Report*, ABC Television (February 9, 1999); "Let's be frank, some of them will never be satisfied unless we provide words that are in turn unacceptable to the majority of the rest of the country", Howard, Interview with Vivian Schenker, *Insight*, SBS Television (February 19, 1999).

than the other, all Australians.”¹⁸ It is a view entirely synchronous with Hage’s critique, discussed in an earlier chapter, of a formally tolerant nationalism that symbolically denies repression. To paraphrase, how can we be repressive when one of us is no better than the other? Howard’s second theme emphasises the aspect of renewing or repairing the damage done by colonisation, but does so by opposing it to inherent rights – the view that there may be systems in conflict that must be reconciled is thus excluded from the current stance on reconciliation.¹⁹

The ideas about a renewed collective identity have a complex interaction with the straight ‘egalitarianism’ of practical reconciliation. A residue of social concern about the need for an agreement – a new basis for the indigenous-settler relationship – was now perversely engaged in dialogue with a neo-assimilationist doctrine masquerading as ‘citizenship’. The new tension of that struggle, between ‘practical’ and ‘symbolic’ reconciliations, obscures indigenous claims and prevents ‘shared understandings’ of the problem that retain much meaning or usefulness.

Obviously the assimilationist/indigenising distinction provides an excellent scaffold with which to examine reconciliation, but Moran’s treatment does not fully explore the dynamics between the two. The reconciliation process has definitely gone through phases of ‘calibration’ which have reconstituted an indigenising project closer to assimilationist lines. It is the contest between these two forces that defines the shape and extent of political spaces, obscuring and denying indigenous claims.

Reaching the limits

Not only did the CAR and the ‘reconciliation movement’ have to create community consensus out of ignorance and fear, they had to contend with discord and open hostility over developments such as native title and the acknowledgment of history in

¹⁸ Howard, Speech on the 50th Anniversary of Australian Citizenship, Brisbane City Hall, Brisbane, January 25, 1999.

the HREOC report. And as the CAR reached the end of its term, who would resolve these emerging antagonisms? The widely invoked metaphor of Stanner's 1968 Boyer Lectures, 'the great Australian silence',²⁰ may in fact misconstrue the character of settler responses to indigenes in Australia; within that silence robust voices were dormant, ready to denounce once more.

The contention that, contrary to its origins, reconciliation has taken Australia further away from institutional change enabling indigenous self-determination, can be illuminated in another way. By approaching the debate from the point of view of its harshest critics, we get a deeper appreciation of what happens when identity and community are invoked in order to serve policy ends.

Settler critics

The theme of settler critics of reconciliation is the need for 'realism': they say the success of such reconciliation measures as the 'Document Towards Reconciliation' will always be up to the overwhelming authority of the settler political community. Johns and Brunton put it like this: "If ... it remains an instrument of reconciliation, in the form of a motion of the Commonwealth parliament for example, then it is likely to have no more impact than the consent of the body politic will allow it at any given time."²¹ A similar observation is made by Richard Mulgan:

The reaction of the non-Aboriginal majority to Aboriginal claims is arguably the most significant political factor determining the extent of possible progress towards Aboriginal

¹⁹ For an indigenous critique of this wedge-politics see Pat Dodson, 'Howard's sinister strategy', *The Age* (May 13, 2000).

²⁰ Stanner, W. E. H. 1969. *After the dreaming black and white Australians--an anthropologist's view*, Australian Broadcasting Commission, Sydney.

²¹ Johns, Gary and Brunton, Ron. 1999 *Reconciliation: what does it mean?* Institute for Public Affairs, p. 2.

justice ... (but) Aboriginal people 'have an exclusive power to withhold their agreement to the moral legitimacy of the nation-state'.²²

These views from some of the more conservative commentators on public affairs are clear affirmations of the CAR's indigenising premise, its vision of "a united Australia." But they can rely on the support from some of the major pro-reconciliation figures including William Deane, who has spoken of the need for indigenous people to accept "certain realities," or Frank Brennan who called for indigenous demands to be "within the limits of what is achievable."²³ That proximity of such opinions to each other gives a strong indication of the shape the national space. Having used the sanctioned principle of national unity to set the tone as 'realism', these critics systematically undermine the work of the CAR and the premises of reconciliation more generally. One criticism is that of reconciliation's 'delegitimising' consequences. Mulgan proposes a theory of constitutional legitimacy that accepts

... that the existing Australian state and society were unjustly founded by colonial settlers and migrants but, nonetheless, have a right to be recognised, and to recognise themselves, as legitimately located on this continent and entitled to restrict the original rights of Aboriginal people in the name of protecting the rights of non-Aboriginal people.²⁴

The difficulties in any other approach are said to be too great: theoretical problems arise in the attempt to provide a comprehensive historical reckoning. There are the practical considerations of social disruption and an increased moral tension over the question of contemporary responsibility.²⁵ Frank Devine puts it this way: "A key element is missing from the proposed centenary document of reconciliation. This

²² Mulgan, R. 1998. 'Citizenship and legitimacy in post-colonial Australia'. In *Citizenship and indigenous Australians: changing conceptions and possibilities* (N. Peterson and W. Sanders, Eds.), pp. 179-195. Cambridge University Press, Melbourne, p. 180.

²³ William Deane quoted in CAR 1995-1996 *Annual Report*, p. 9; Brennan 1994, p. 57.

²⁴ Mulgan, p. 186.

²⁵ Jeremy Waldron, cited in Mulgan, pp. 186-187.

is a statement by Aborigines acknowledging their status as Australian citizens and pledging commitment to the nation's values and aspirations."²⁶

Mulgan also laments an alleged lack of validation: "there is little sense of the need for the non-indigenous to find some positive elements in their culture's past to help them get their bearings in this country and provide a secure basis from which (to) embrace the concept of Aboriginal rights."²⁷ Mulgan and Devine appear intent on invalidating the two fundamental rationales I have maintained give an indigenous-settler agreement and relationship meaning and purpose. The first is its historical necessity.

So, a reactionary attitude to revisionist Australian history becomes *de rigueur*. The current Prime Minister's favoured stylist is Geoffrey Blainey, for whom "important parts of Australian life are in danger of being thrown overboard," and who laments the "silence" in the face of an intellectual program of denigration.²⁸ Moran elaborated this assimilationist take on Australian history using the conference proceedings of the conservative discussion forum, The Galatians Group: Edgar French gives a typical treatment of the new history in which "the national heritage is constituted of things outworn and evil."²⁹

Of course, this politically enforced 'silence' cannot be tolerated. Johns and Brunton take up the cudgels to promote a new and 'fresher' politics that moves beyond the enervating obsession with a "victim/tyrant" thesis.³⁰ Mulgan also bemoaned the "somewhat bland and inevitably one-sided publications of the CAR."³¹ The finding in the Saulwick research that 'something must be done, but not more of the same' gives this phrasing some credibility. These critics go considerably further than the standard critique of the 'black-armband' history however:

²⁶ Frank Devine, 'Equivocal support for redress', *The Australian* (March 9, 2000).

²⁷ Mulgan, p. 192.

²⁸ Blainey, cited in Moran 2000, pp. 141-142.

²⁹ Cited in *ibid*, p. 140.

³⁰ Johns and Brunton 1999, p. 7.

A large element of reconciliation is the recognition on the part of Aboriginal people that their land was colonized by a people who fortunately did not attempt the genocide of the original inhabitants and who have brought with them the most respected means of governance devised, a most bountiful economy, the most brilliant intellectual traditions and an openness and tolerance unknown in Aboriginal culture.³²

Beneath the chauvinism is a determination that if these facts are not acknowledged, the ‘delegitimising’ effects of reconciliation will only “exacerbate hostility among the many Australians for whom a commitment to reconciliation is most desirable.”³³ Settler critics suggested that the process of delegitimising the past will not actually encourage support for historical self-reflection.³⁴ Clearly identified was a concern that reconciliation not be damaged by divisive proposals. “(A)t the very least, reconciliation should mean an acceptance by aborigines of the historical facts that have led to a single Australian nation, and the social and political consequences that flow from this.”³⁵ Mulgan wishes to problematise moves for full acknowledgment as damaging to national coherence: Australian legitimacy relies on the maintenance of historical injustice. It is a frank admission. Again, the CAR research seems to support this point.

Mulgan saw a danger arising from too strong a connection between past injustice and present disadvantage, between past actions and current responsibility.³⁶ Official reconciliation promoted these connections, though it transpires that there is little evidence that they are actually endorsed by an Australian majority. The ‘legitimation crisis’ does not appear to be widely feared as real.

Settler critics also reproduced the key compromise transition in reconciliation: the shift from organisational or institutional change to the realm of the personal. Just

³¹ Mulgan, p. 192.

³² Johns and Brunton 1999, p. 10; See also Frank Devine, ‘One man’s pain is a nation’s torment’, *The Australian* (April 17, 2000), p. 13.

³³ Johns and Brunton 1999, p. 2.

³⁴ Mulgan, p. 184.

³⁵ Johns and Brunton 1999, p. 4.

as John Stone invoked his Aboriginal friend's experience of being 'reconciled' (to the fact of being dispossessed), Ron Brunton, in his capacity as Director of the Institute for Public Affairs' Indigenous Issues Unit, promoted a joint venture with Western Mining Corporation and *Australian Geographic* magazine – a “reconciliation adventure” - in which one indigenous and one settler woman rowed down the Murray River together. An opportunity for “shared experiences” and “to hear each other's stories,” such projects are hardly without merit. But the subtext is the discrediting of the indigenous leadership, who trade in “flawed collectivist nostrums” that prevent these personal encounters.³⁷

This approach to the personal is bound up with the view that indigenous peoples are being misled by their current leadership and manipulated by ‘do-gooder’ liberals. The term “moralising liberals,” sourced in the work of Claus Offe and in Kenneth Minogue's description of groups able to hold feelings of “collective self-reproach,” is marshalled as support.³⁸ This is the special territory of columnist P.P. McGuinness: “(Reconciliation) was certainly worthwhile ... But it has been poisoned by exactly the same intolerance of popular feeling which has become the hallmark of the nagging progressives.”³⁹ McGuinness updates the Cold War delusions of Hugh Morgan noted in the previous chapter – that indigenous politics are really some sort of left-wing tactic – though today's trouble-makers are said to have a decidedly more ‘bourgeois’ status.⁴⁰

The critique equates the reconciliation movement with all the other social movements in which an elite has led an unwilling mass, a division between ‘thinkers’ and ‘doers’. So the dynamics of the problem become explicable solely within the terms of a settler sociology. By accepting the delegitimisation inherent in reconciliation,

³⁶ Mulgan, p. 182.

³⁷ Brunton, R. 1996. ‘Counter-productive council’. *IPA Review* 49, 24-25.

³⁸ Mulgan, pp. 184-185.

³⁹ McGuinness, P.P. ‘Reconciliation is a two-way street’ in Grattan 2000, p. 238.

⁴⁰ Pru Goward, ‘Reconciliation has become a phony debate’, *The Age* (June 27, 2001).

elites gain a moral superiority over the non-accepters; this is dressed up as “apologetic humility.” The entire language of ‘diminution’ and incompleteness is on Mulgan’s reading a direct criticism of national immaturity aimed squarely at those who have not accepted its terms. Those who have already accepted this premise of reconciliation have nothing still to do, those who have not must “shoulder the burden.” The ‘validation’ aspect of reconciliation I discussed in the critique of ‘See-Saw’ is an example of what offends Mulgan: “(M)oralising liberals find self-worth through self-abnegation and a sense of their own moral superiority.”⁴¹

This anti-progressivism has another tack: the disappointment and the ‘cruelty’ of impossibly raised indigenous hopes, brought on by the false prophets of indigenous communities. The IPA authors firstly note the ‘necessity of conflict’ in indigenous or minority politics: for them it is the organising principle, ‘payback not recovery’, and an identity of permanent victimhood. The US commentator Thomas Sowell is brought in to give a black perspective: “the position and influence of leaders of minority groups often depends on their ability to maintain a sense of resentment within their own constituency by making demands that they know will be rejected by the broader community.”⁴² The publicity generated through radical activism, suggests Mulgan, “tends to encourage governments into serious and constructive negotiations with the moderates as a means of defusing embarrassing public protests.”⁴³ This critique has the primary function of showing the ‘weakness’ of government in the face of scurrilous and immoderate indigenous claims, returning the debate to legitimacy and further consolidating the issue as a struggle over the shape of national space. Inevitably, this becomes an attack on the legitimacy of indigenous ‘peoplehood’:

A significant part of the political strategy is that there is an Aboriginal people, but Aboriginal people are voting with their hearts for integration. Sixty-four per cent of Aboriginal couple families are unions between Aboriginal and non-Aboriginal partners. The largest

⁴¹ Mulgan, p. 185.

⁴² Thomas Sowell, cited in Johns and Brunton 1999, p. 6.

⁴³ Mulgan, p. 191.

concentrations of indigenous people are in Sydney and Brisbane and in the main urban centres of NSW and Queensland. Does it really make much sense to talk about the people-hood of Aborigines or Aboriginal homelands.⁴⁴

These arguments are determined to be ‘pragmatic’ contributions: “The frayed family structures, lack of cultural background in formal education or mercantile society and divided clan and tribal structure of indigenous Australia do not provide good bases for successful participation in the wider economy.”⁴⁵ Taken with the social research reinforcing the sense of ‘us and them’, this strand reworks the racial paranoia and obsessiveness of an earlier assimilationist belief, the dying race theory: ‘they’ are losing their authenticity, their legitimacy, their identity and the source of their challenge to ‘us’.

The topos prioritises a distinction between a traditional, authentic and coherent indigenous identity, and the splintered and grasping postures of contemporary indigenous activists; the latter are intoxicated with their status *vis à vis* the dominant society. This strategy is essential to the settler critics because an abiding theme in indigenous politicisation has been the ‘resilience’ and ‘survival’ of culture.⁴⁶ A fulcrum is being put into place: the relegitimation of settler society against the delegitimation of contemporary indigenous demands.

Obviously, such critics see a way forward in the tempering of indigenous ‘rhetoric’ – it is time to give up the alienating vocabulary of post-colonial liberation: “Limitations on Aboriginal self-determination and land rights are *to be seen* not as practical concessions to *force majeure* but as the proper recognition of legitimate citizenship rights.”⁴⁷ Mulgan’s strategy is to avert the potential of a delegitimising elite betrayal, and its connivance in indigenous claims; a change of rhetoric that would bring about a disconnection of claims from an ‘anti-colonial critique’ to use instead a

⁴⁴ Johns and Brunton, ‘Separate path to division’, *The Australian* (April 12, 2000), p. 15.

⁴⁵ Michael Warby, ‘Australia has to find another way’, *The Age* (September 17, 1998), p. 17.

⁴⁶ Consider the counterpoint to Australia Day celebrations known as ‘Survival Day’. See also, CAR Information Sheet 2, Improving Relationships; ‘Celebrating our survival’; Lippmann 1991.

historical priority approach, recasting the legitimate claims of indigenous peoples as pertaining to their status of disadvantaged minority.⁴⁸

It is clear that many indigenous leaders now see the reconciliation process as having limited potential to effect an improvement of indigenous life. A more robust agenda has never been far from the surface and looks likely to be reactivated in the wake of reconciliation's limited achievements. Mulgan's intellectualised appeal appears to suggest that we will all be reconciled when we relegitimise a history of brute power and dispossession. The argument that processes for addressing indigenous rights claims become opportunities for the furthering of settler aims, is evinced in Mulgan's tremendous imperialism. He offers a reconstituted 'post-colonial' political community through the mystification of colonial power. The goal here is to achieve a "moral proprietorship" to sanction the "effective proprietorship" gained in the colonial history of the country.⁴⁹

However, since this strategy has been deemed necessary only in the political reconfiguration since *Mabo* exposed the falsity of the founding assumptions, we can be less sanguine about this late 'realism'. Nevertheless, Mulgan's argument appears to condense much of what is actually felt or believed by many settlers in Australia. Perhaps the most telling criticism against reconciliation as it stands, is that the normative analysis of it provided by such figures as Johns, Brunton and Mulgan, may be the most closely aligned to measured public opinion. As we saw, the public 'mood' recoils from any clear statements about difference. Basically these criticisms rework the assimilationist assault on the indigenising project's attempt to make national identity

⁴⁷ Mulgan, p. 187 (my emphasis).

⁴⁸ *ibid.*

⁴⁹ This thesis, of Australian history as the passage from 'legal' through 'effective' to 'moral proprietorship', is the work of David Day. 2001. *Claiming a continent a new history of Australia*, Harper Collins Publishers, Sydney.

more inclusive. The indigenising impulse in Australia appears to be easily restrained by the rough certitude of assimilation.⁵⁰ But what of other critics of reconciliation?

Indigenous critics

There is another set of criticisms entirely, overlapping with the ‘critical’ position in the discussion of the online reconciliation forum above. These are primarily criticisms made by indigenous people, though not exclusively. At its outset, Charles Perkins was reported as calling the reconciliation process “a big lie and a sell-out.” Bob Weatherall, head of the ‘Provisional Aboriginal Government’, called on Aborigines to boycott the Council’s first meeting.⁵¹

The indigenous critique has partly focused on reconciliation’s approach to history. Where Mulgan *et al.* saw a potential legitimisation crisis, Gary Foley saw a cover-up: the “belief that significant historical truths can be swept under the carpet in the rush for a swift resolution of an unpalatable past.”⁵² Foley saw the South African Truth and Reconciliation Commission as “a far more frank understanding and assessment of their past than has happened here.”⁵³

Foley also suggested that the whole reconciliation process is “politically and historically premature.”⁵⁴ Historian Bain Attwood related a story about a class in which a German exchange student identified the unreadiness of Australians to deal with their history through an apology because they largely remain in ignorance of it; this compared unfavourably with post-war attitudes in Germany.⁵⁵ The reasons are different: Foley stresses that a community so socially and economically dependent

⁵⁰ Mike Steketee, ‘Unstoppable force halted by immovable PM’, *The Australian* (January 21, 2002).

⁵¹ Reported in Gardiner-Garden, at notes 52-53.

⁵² Foley, G. Reconciliation: fact or fiction? http://www.kooriweb.org/foley/essays/essay_6.html (April 4, 2002).

⁵³ *ibid.* Of course, the very idea that Australia might be compared to any other nation’s approach is fiercely resisted.

⁵⁴ *ibid.*

⁵⁵ Attwood, ‘The burden of the past in the present’, in Grattan 2000, p. 254.

cannot enter reasonably into conciliation, the German student worries that the dominant party to reconciliation is not prepared to face its own history – but both reinforce the issue of relative levels of power and privilege, making the central dynamic of reconciliation clearer.

This theme of historical dishonesty is extended by Geoff Clark’s attack on an entire movement based on “preaching to the converted. There’s no effort to engage the whole community or challenge the status quo.”⁵⁶ It looks like a view shared by settler critics, but in fact shows massively different conceptions of not only reconciliation, but also of what society is. Some indigenous people see reconciliation as barely impacting upon social arrangements, while some settlers see the foundations being destroyed.

Just as Mulgan had attacked the CAR’s remoteness from ‘ordinary Australian’ aspirations, so too Foley lambasts its misrepresentation of indigenous people: “Many Koori activists would like to know who gave a government-appointed Aboriginal Reconciliation Council the authority to be negotiating anything on behalf of all indigenous groups in Australia?”⁵⁷ Pat Dodson had explicitly ruled out any such role for the Council, and the capacity for the process to divide indigenous peoples was highlighted by his decision, and that of several other major indigenous figures, to boycott the *Corroboree 2000* event, the ‘closing ceremony’ of reconciliation.⁵⁸ Moreover, the CAR’s research found a concern amongst indigenous communities that

⁵⁶ Clark in Grattan 2000, p. 231.

⁵⁷ Foley.

⁵⁸ See Debra Jopson, Mark Metherell, Michelle Grattan and Joseph Kerr, ‘Aboriginal leaders withdraw from Corroboree’, *The Sydney Morning Herald* (May 3, 2000). Criticism from respected indigenous leaders like Peter Yu and Pat Dodson drew an astonishing response from CAR Chair Evelyn Scott, revealing just how effectively reconciliation had divided indigenous peoples: “who are these black leaders anyway? Who made them leaders? No one has made them leaders.” Reported by David Nason, ‘The hijacking of Corroboree 2000’, *The Australian* (June 3, 2000).

they knew so little about it.⁵⁹ Saulwick reported that “the CAR is not widely known.”⁶⁰

Others saw the dependency of the reconciliation process as dubious – the fact the CAR was to be appointed by government was seen as “hijacking the process.”⁶¹ When the Coalition government refused to reappoint Dodson in 1997, indigenous people could only be “suspicious of government motives.”⁶² Foley criticised the structure of the CAR itself, and its relationship with the Australian Reconciliation branch of the Department of Prime Minister and Cabinet. The political limitations on the CAR and its work were not restricted to its research agenda: interventions were made to ensure that the Governor-General did not receive the *Document Towards Reconciliation* on behalf of the nation, and the government stressed the differences that lay between its views on the issues covered by the text and those of the CAR, even though it had exercised heavy oversight over the final drafting process.⁶³ Rowse argued that the CAR had been selected throughout its existence “to produce an ideological consensus,” yet it also became a source of competition with the indigenous leadership established in groups such as ATSIC and the National Indigenous Working Group.⁶⁴

To return to the question of a ‘relationship’, let us consider the oft-cited exchange between Henry Reynolds and Michael Mansell.⁶⁵ Reynolds suggested that the hard line then being promoted by the Aboriginal Provisional Government threatened

⁵⁹ Saulwick (Report No 2), p. 25.

⁶⁰ Newspoll, Saulwick and Muller, and Hugh Mackay, in Grattan 2000, p. 36. Although the poll was taken prior to the Corroboree events in May 2000, after eight full years of activity this must have been a cause for concern. The potential for the CAR to be either an indigenous or national voice was clearly being challenged by this evidence in early 2000, and allowed the government to be ambivalent about the 2000 event.

⁶¹ “It appeared to me the Federal Government was setting up yet another Aboriginal organisation with a fine set of principles and an agenda that could ultimately be controlled.” Geoff Clark, ‘We’re still waiting for your call, Prime Minister’, *The Age* (March 3, 2000).

⁶² Clark in Grattan 2000, p. 231.

⁶³ See Mark Metherell and Michelle Grattan ‘PM moves to rein in Deane’ *The Sydney Morning Herald* (April 28, 2000); ‘Howard’s fine points’, *The Sydney Morning Herald* (May 12, 2000).

⁶⁴ Rowse 2000.

the ‘legitimacy’ of indigenous peoples in the eyes of settlers. Yet according to Foley, “indigenous communities know that in the past real change has come only through direct political agitation, rather than the more contrived, government-sponsored, superficial manifestations like Reconciliation Conventions.”⁶⁶ The evidence from Canada, as we shall see in the next chapter, is that substantial programs of reform have *only ever* followed periods of litigation and physical confrontation. Clark begins his contribution to Grattan’s collection of essays with veiled threats, before moving back from the precipice to signal the possibility of an embrace.⁶⁷ For how long can settlers rely on indigenous passivity?

Fin de millénium reconciliation

Official reconciliation reached its zenith in the year 2000, though the fustian overload of Australian self-congratulation during 2001 appears to have obscured the events of 2000. That the ‘millennial’ year would usher in a new epoch had long seemed inevitable: extensive preparations for Australia’s centenary celebrations and the Sydney Olympics inflated social expectations to colossal proportions. The CAR placed great emphasis on the work that could be done in its final year.

What was planned for May 2000 was a weekend of ceremony, where speeches could be made and documents exchanged, and the public could walk in solidarity across Sydney Harbour Bridge. *Corroboree 2000* would focus on the document of reconciliation the CAR had identified as important at the ARC in 1997 and developed thereafter.⁶⁸ The CAR was confident that throughout the period of official

⁶⁵ A discussion that took place on ABC radio in 1989? See Rowse 1993. *After Mabo: interpreting indigenous traditions*, Melbourne University Press, Melbourne, pp. 23-24.

⁶⁶ Foley.

⁶⁷ Clark in Grattan 2000, p. 234.

⁶⁸ “This Convention believes that a national document of reconciliation is a desirable outcome of the work of the Council for Aboriginal Reconciliation and recommends that a national agreement be negotiated between indigenous and non-indigenous peoples first and then the Commonwealth Parliament and put into legislation.” ARC 1997: Seminar Outcomes, ‘Seminar topic: A national document of reconciliation’.

reconciliation, “the Australian community has embraced the concept of documents for reconciliation.”⁶⁹

In his Telstra Address of 1997, Pat Dodson hit many valedictory notes, but committed the CAR to the job of reaching a negotiated agreement: “The Council For Aboriginal Reconciliation will need to be bold about reconciliation in the next three years and not simply play ‘fetch and catch’ for the Government of the day. It needs to ... negotiate with the Parliament for a national agreement of reconciliation. I wish them well in their task.”⁷⁰

The Draft Document itself was hoped to be written in “inspiring and symbolic terms ... timeless and enduring.”⁷¹ When an early draft was leaked in 1999, it was reported as an attempt “to put Aborigines at the heart of national life.”⁷² Writing in *The Australian* though, Richard McGregor described the ‘Draft Declaration’ as “riddled with politics ... (its) construction goes some way to getting around a so far intractable political problem.”⁷³

An apology calibrated to Howard ... artfully gets around a roadblock ... In a formulation that has echoes of the careful calibration of Japanese politicians saying sorry for the war ... it does so by putting the word ‘apology’ into the mouths of indigenous people (and instead of self-determination) ... the right of Aboriginal and Torres Strait Islander people to remain responsible for their own destinies ... its careful weighing of the words make it a creative and moderate effort to steer a middle path.⁷⁴

On the same day as the draft documents were leaked and *The Australian* felt able to report the above, the Commonwealth sought to have a case brought by

⁶⁹ CAR *Annual Report 2000*, Chapter 7, ‘The concept of documents’

<http://www.austlii.edu.au/au/other/IndigLRes/car/2000/16/text07.htm> (April 2, 2002).

⁷⁰ Patrick Dodson, *Telstra Address*, National Press Club, Canberra (November 28, 1997). This does seem to contradict earlier statements by Dodson on the inappropriateness of the Council taking such a role.

⁷¹ CAR, *Walking Together Special Issue (November 1998) - Council's Newsletter*, ‘Issues for a declaration of reconciliation’ <http://www.austlii.edu.au/au/other/IndigLRes/car/1998/7/pages/WTnov09.htm> (April 2, 2002).

⁷² Richard McGregor, ‘Bid for indigenous heart’, *The Australian* (March 5, 2000), p. 1.

⁷³ *ibid.*

⁷⁴ Richard McGregor, ‘Apology calibrated to Howard’, *The Australian* (March 5, 1999), p. 2.

members of the stolen generations in the Northern Territory thrown out, citing the lapsed time making a fair case impossible because of lost documents and deceased witnesses.⁷⁵ Pat Dodson was later to say that a document of reconciliation that might be accepted by a government accused of racism by a UN body would be “absurd.”⁷⁶

As I argued in Chapter 3, the institutional power of the CAR was quickly demonstrated to be feeble. Consultation on the draft acknowledged that lack and also met the Council’s original rationale of a ‘community’ emphasis. Public meetings were conducted around the country, and factored into the final version.⁷⁷ However, it cannot be said that this process met any useful test in a tradition of indigenous-settler agreements.

The draft text written by two distinguished authors, Jackie Huggins and David Malouf, was extensively discussed and slightly reworked. Changes recognised that no treaty or consent for colonisation was reached, but did not call for such; assumed that an apology was being given by “one part of the nation,” and acceptance and forgiveness by “the other”; and included a strengthened statement of indigenous self-determination.⁷⁸ Writing in February 2000, CAR Deputy Chair Gus Nossal reflected on what that community consultation had produced: “Of course, the issues are too many and varied for any expectation of consensus, but strong support for the broad thrust of the document has been obtained.”⁷⁹

⁷⁵ *The Australian*, ‘Commonwealth pushes for end to stolen-generations case’ (March 5, 1999), p. 2. The case for compensation was rejected in the Federal court, a ruling appealed and upheld before the full bench. The plaintiffs are considering grounds for an appeal to the High Court.

⁷⁶ Dodson in Grattan 2000, p. 266. Dodson was referring to repeated criticisms made by the UNCERD about mandatory sentencing and the 1998 Native Title Act amendments.

⁷⁷ As I have noted, records of those meetings are not available. When asked in the online forum how the Council would deal with the records of 100 meetings as well as thousands of individual submissions on the Document, CAR member Ray Martin responded, “This weekend in Adelaide, the Council is meeting & we’ll be taking a look at comments from the public. We’ve had everything put onto computers & if we get a general theme running thru. comments then we’ll take note. It really is meant to ‘consultation’ (sic).” <http://www2.abc.net.au/message/common/forum> (April 2, 2002).

⁷⁸ The two documents are at <http://www.austlii.edu.au/au/other/IndigLRes/car/2000/12/pg3.htm> and <http://www.austlii.edu.au/au/other/IndigLRes/car/1999/9/#1>

⁷⁹ Gus Nossal, ‘The next steps in the long march to Reconciliation’, *The Age* (February 16, 2000), p. 15.

However, almost immediately upon meeting with the CAR and being presented the final text over which he would have no further influence, Howard publicly abandoned the reconciliation deadline.⁸⁰ A few weeks before the event itself, the Prime Minister felt confident enough in his approach to begin criticising the declaration and the CAR as “an advocate body rather than a vehicle for reconciliation,” while working behind the scenes on protocol for *Corroboree 2000* to minimise kudos for William Deane.⁸¹ *The Sydney Morning Herald* accused him of being “intent on making a virtue of the differences he has with the declaration prepared by the Council for Aboriginal Reconciliation.”⁸² Writing in May 2000, the ‘father’ of reconciliation was deeply pessimistic about the direction being taken:

Perhaps we have lost the war to regain our lands, but we now have an even greater threat to our rights: that of the right to be ourselves.⁸³

A week after Corroboree 2000, it was clear that no consensus was likely to arise amongst indigenous leaders about the possible purpose of the document nor how to harness the latent social and cultural power that reconciliation had nurtured.⁸⁴ CAR Chair Evelyn Scott attacked those leaders who had “hijacked” reconciliation for the treaty agenda, and was supported by other CAR members such as Ray Martin, who accused Pat Dodson of “(playing) politics now that he’s outside the council.”⁸⁵ Scott was particularly scathing about the efforts of Australians for Native Title and Reconciliation (ANTaR, the national network of which DONT is the Victorian branch) in launching their treaty campaign on the Opera House steps on the morning of the official event. She reworked the familiar theme of do-gooders who “come and

⁸⁰ Dennis Shanahan, ‘Howard abandons deadline’, *The Australian* (February 28, 2000); Debra Jopson, ‘Howard’s far horizon’, *The Sydney Morning Herald* (February 29, 2000).

⁸¹ Michael Gordon ‘Howard warning on black funding’, *The Age* (May 19, 2000); Megan Saunders ‘Simultaneous presentation’ *The Australian* (May 12, 2000), p. 2.

⁸² ‘Howard’s fine points’, *The Sydney Morning Herald* (May 12, 2000).

⁸³ Reported in Michael Gordon, ‘Dodson shuns celebration’, *The Age* (May 2, 2000).

⁸⁴ Megan Saunders and Stuart Rintoul, ‘Reconciliation body warns on treaty’, *The Australian* (June 2, 2000); David Nason, ‘The hijacking of Corroboree 2000’, *The Australian* (June 3, 2000).

⁸⁵ *ibid.*

go,” and was also greatly offended by the clandestine arrangement of a meeting between male indigenous leaders and the Prime Minister, about which she had not been consulted.⁸⁶

This dispute and even the document itself suggested some reticence within the CAR about the political potential of reconciliation in that key moment. The CAR’s essential communitarianism meant that any leap into the arena of political contestation would need to be well-handled. It appeared that the Council did not wish to harness its undoubted cultural and social power in that moment to return reconciliation to its conceptual and political origins in the need for negotiated agreement. Moreover, far from creating consensual understanding of the substantive issues that would need to be addressed in any proper agreement, the ‘Document Towards Reconciliation’ had clouded them and fractured indigenous opinion in the process.

Only a few months later it seemed the Olympics had restored some momentum: “The Olympics crossed that line and made a new beginning ... It’s now time to look forward.”⁸⁷

Dodson, who walked away from the reconciliation process disillusioned by the absence of real outcomes, also believes the Olympics have ‘changed the country dramatically’ and instilled a strong desire for ‘a resolution to past conflicts, a reconciliation and a celebration of those matters that bind us’.⁸⁸

Rintoul reported that 75% of Australians thought that reconciliation was helped by the Olympics. The visibility of indigenous culture in the ceremonies and Cathy Freeman’s gold-medal winning performance will long resonate in Australian popular culture: but before the medal ceremony the document was already fading into obscurity.

⁸⁶ *ibid.*

⁸⁷ Lead singer of the highly credible cross-cultural band Yothu Yindi, Mandawuy Yunupingu, reported in Stuart Rintoul, ‘Nursing the flame’, *The Australian*, (October 21-22, 2000), pp. 19–20.

⁸⁸ *ibid.*

At the same time as the *Document Towards Reconciliation*, the CAR also published its *Roadmap for Reconciliation*. That advocated four ‘national strategies’ to maintain the process after ‘official’ reconciliation ended on January 1, 2001. These were to sustain the process itself, which I referred to in the discussion of the Local Reconciliation Groups’ Toolkit; to promote recognition of Aboriginal and Torres Strait Islander Rights; to overcome disadvantage; and to build indigenous economic independence.⁸⁹

‘Promoting recognition’ would involve more education for governmental institutions; legislation should protect cultural heritage, respect indigenous and human rights, and customary law. A new preamble and the removal of section 25 was also recommended “within the broader context of future constitutional reform.”

The strategy to overcome disadvantage was to be furthered through benchmarking and better performance evaluation of government services, both by the Council of Australian Governments (COAG) and independently by HREOC. Partnerships between indigenous peoples and business groups should be extended and should enable the practices and principles of reconciliation to become entrenched in workplaces. Indigenous people were also urged to “take more responsibility for addressing the causes and consequences of disadvantage within their control.”

Finally, economic independence could be arrived at through a diverse set of approaches that increased indigenous access to economic activities; increased the value of indigenous knowledge, through intellectual property protection; ensured “effective business practices” in indigenous and joint venture enterprises; and emphasised the accumulation of extra skills for indigenous people.

The CAR’s Final Report, released in December of 2000, built on the *Document Towards Reconciliation* and the *Roadmap for Reconciliation*. Its conclusions were presented as meeting its obligations under section 6(1)h of the CAR Act, to report “on

⁸⁹ CAR. 2000. *Roadmap for Reconciliation*
<http://www.austlii.edu.au/au/other/IndigLRes/car/2000/10/>(January 16, 2001).

the nature and content of, and manner of giving effect to, such a document or documents.” The recommendations were as follows: first, a restatement of the Roadmap strategy involving COAG to benchmark and evaluate service and program delivery to indigenous people across government; all parliaments to commit themselves to the *Declaration and Roadmap*, passing legislation where necessary to implement those principles; a constitutional referendum to provide a new preamble, the removal of section 25 and a new section prohibiting racial discrimination. Finally it recommended that:

Each government and parliament: recognise that this land and its waters were settled as colonies without treaty or consent and that to advance reconciliation it would be most desirable if there were agreements or treaties; and ... negotiate a process through which this might be achieved that protects the political, legal, cultural and economic position of Aboriginal and Torres Strait Islander peoples.⁹⁰

Enough momentum was ensured to pressure the government into creating a post-CAR body, Reconciliation Australia Ltd. Seeded with government funding for its first three-year term equal to half of the CAR’s annual budget, the new body must then raise funds for its survival from the corporate and community sector.⁹¹ Its direction is very much to continue that of the CAR: “A fundamental role of Reconciliation Australia is to help educate and inform all Australians about the issues that go to the heart of achieving lasting reconciliation.”⁹² It is also to act as a resource and focal point for the reconciliation movement. Emphasis has also been put onto the issue of ‘a treaty and/or agreement’, and moves to support ATSIC’s ‘Treaty now’ campaign are flagged. Also there is a modest research agenda, that has so far emphasised the legal aspects of treaties.⁹³ It is too early to evaluate the work of this

⁹⁰ CAR *Annual Report 2000*, Chapter 10, Recommendation 5
<http://www.austlii.edu.au/au/other/IndigLRes/car/2000/16/text07.htm> (February 12, 2002).

⁹¹ Reconciliation Australia, *Strategic Plan 2001 — 2003*
http://www.reconciliationaustralia.org/textonly/ra_strategic_web.html (January 14, 2002).

⁹² Fred Chaney and Shelley Reys, ‘Fine words need national action’, *The Australian*, (February 16, 2001).

⁹³ Reconciliation Australia, ‘Treaty Project’, *Tracks to reconciliation*, Vol. 1 (2001).
http://www.reconciliationaustralia.org/docs/PUBS/tracks_11.01.pdf (January 18, 2002).

phase of reconciliation. Its ambit appears to be broader than that of the CAR, although its institutional power and resources are considerably less.

Elsewhere, there is a sense of the growing significance of an agreement: ATSIC chair Geoff Clark mobilised this campaign in 2000: “We need an explicit commitment that will endure changes in political fortunes ... Whatever title we choose to give it, it’s obvious that a document of this type would be a treaty.”⁹⁴ This is closer to the politics of indigeneity and a clearer idea of self-determination. Clark is switching on the points of confrontation, the things that must be addressed now, rather than waiting for national enlightenment to break out. In the discussion papers produced by ATSIC and the National Treaty Support Group for the ‘Treaty now’ campaign, *Issues and Frequently asked questions*, the term reconciliation is not used once. The current campaign appears to be proceeding almost without reference to settler anxieties about the implications of an agreement, or willingness to participate.

The premise of reconciliation was that this is a mistake. What is now clear is that the original claim for agreement that led to the policy of reconciliation is now only loosely related, through an independent ‘foundation’, to the decade of the CAR’s work and achievements. Where connections have been made, they are weak and easily marginalised by a concern for national unity and an idiom of ‘equality’.

From handshake to handprints

Official reconciliation began with a handshake between two settler Australian men, and reached its climactic moment in Sydney in May 2000, when political leaders from both indigenous and settler communities pressed their ochre-dipped hands against a

⁹⁴ Clark in Grattan 2000, pp. 233-234. He argues that ATSIC is the appropriate body to coordinate the indigenous negotiations: “ATSIC, as the voice of the indigenous population at a national level, is the appropriate body to negotiate the treaty document with the federal government.” This is a convenient change of heart since 1990, when Clark was a leader in an alternative political position, President of the NFLC, and rejected any such role for ATSIC. His championing of the legitimacy of his current institution simply exposes many of the older criticisms of ‘the indigenous voice’ raised in Chapter 2.

blown-up version of the Document Towards Reconciliation.⁹⁵ Through the last four chapters it has been argued that ‘the need for something to be done’ and the need to ‘bring along the community’, have interacted to produce the current complex of issues and associations that constitute reconciliation.

The merging of the two themes into ‘what will *this community* do about indigenous claims?’ has many people willing to lend their voice: “We have to ask ourselves what Australians want to be ... Where there is no room for national pride or national shame about the past, there can be no national soul.”⁹⁶ It is not evident what kind of answer to the question of national desires is likely to be widely endorsed and yet satisfactory to indigenous people. Rather than answering this, indigenisers rely on the ‘inevitability’ of change: “It is the debate we have to have, if for no other reason than the issues won’t go away. This will continue to fester and reduce our vitality as a nation until we deal with them.”⁹⁷ Rick Farley’s sense of having made a personal journey, gave him an expectation that everyone else would be able to do so, in their search for national and communal vitality.⁹⁸

As we have seen, the individual-national link made by indigenising nationalism attempts to be positive and legitimising, healing and cleansing.⁹⁹ Belonging again, or for the first time, legitimising and strengthening, indigenous peoples take the role of custodians of all that is unique about this country; separatism is avoided. The key techniques for the denial of indigenous claims in the last two decades in Australia have been simultaneously to abdicate leadership and heighten the importance of ‘the community will’, thereby creating a new populist style of leadership: as I have argued,

⁹⁵ The hand-printed document was recently given to the new National Museum of Australia as part of the CAR’s bequest of its major materials. Surely the irony of reconciliation as a museum exhibit will not be lost on those Aboriginal and Torres Strait Islander people who felt that reconciliation was misleading from the start. See Kerry Taylor, ‘Museum head calls for national treaty’, *The Age* (November 26, 2000).

⁹⁶ Linda Burney, ‘Not just a challenge, an opportunity’, in Grattan 2000, pp. 65-67.

⁹⁷ Rick Farley, ‘What’s the alternative?’, in Grattan 2000, p. 105.

⁹⁸ See also Rick Farley, ‘A Personal Journey’ The Inaugural Human Rights/Social Justice Lecture Speech at Newcastle University <http://www.newcastle.edu.au/humanrights.html> (November 30, 2001).

this process has been underway since at least 1983. Recently Michael Wooldridge declared that while he was in support of an apology, “the Australian public is not yet ready.”¹⁰⁰ The master of the rhetoric is, of course, John Howard:

The task of national leadership in these circumstances is not to impose a process and outcome on the community. The challenge is to communicate clearly the objectives of the reconciliation process, why reconciliation is in the national interest and the respective roles of government, indigenous Australians and the wider community in the process ... success in this process will ultimately be measured ... by the extent to which Australians develop a genuine personal commitment to reconciliation.¹⁰¹

His is the classic statement of abdication and distancing, the apotheosis of community. It also implies that indigenous autonomy, if it is ever reached, is unlikely to have followed the path of similar colonial settings. After a concerted campaign, no more people consider reconciliation important enough for them to support alternative constitutional or legislative arrangements than did so in the initial phases of the policy; this is without an explicit campaign around which opponents and spoilers can organise. More to the point, the lines of opposition are much clearer. Goot’s comments about the naivety of calls for leadership ring true. It also makes a lot of the criticism of Howard look less than rational. Howard-baiting only helps conceal the major divides in public opinion over key reconciliation issues.¹⁰² Calling him a racist seems especially fruitless since Hanson’s intrusion on the public scene gave rise to a rhetoric of ‘radical egalitarianism’. Another critique is that of ‘the dogwhistler’:

(Howard) is often accused of being poll-driven, but close companions say he believes he knows instinctively what most Australians feel on big issues. He sees his task as harvesting the largest crop of votes he can get by speaking whatever he sees as the language of the mainstream. If that means gathering the votes of those who hold racist views - well, he is a man of the people. It is a particular skill to accomplish this task without identifying directly with racially prejudicial

⁹⁹ Moran 2000, p. 137.

¹⁰⁰ Reported by ABC Online (November 29, 2000).

¹⁰¹ John Howard, ‘Practical reconciliation’, in Grattan 2000, p. 89.

sentiments. This, as Howard knows, would be disastrous for any politician in multicultural Australia. One of Howard's Liberal colleagues says the Prime Minister is clever in his ability to sound reasonable on most subjects, and has such mastery of the language that he can frame sentences that appear to say one thing while allowing the listener to interpret the words in another way ... The Americans call this "dog-whistle politics." (sic) Blow a dog whistle, and you won't hear much to get excited about. But the target of the whistle – the dogs – will detect a sound beyond the audible range of the rest of us, and will react to it. Two quite different messages are contained within the one action of blowing the whistle: the one benign, the other designed to be heard and heeded only by the ears tuned to it ... The beauty of this approach is that if your critics claim they have detected a secret message, you can deny it, and accuse your accusers of deliberately and mischievously seeking the non-existent.¹⁰³

Howard can simply offer his defence that, "I'm told that the only way I can show leadership on this issue is to do something I don't believe in."¹⁰⁴ Another writer, David Marr, has written about the mistaken connections critics of the Howard government are making between his refusals and the continued denial of indigenous claims, pointing elsewhere for a better understanding:

Those who rage against John Howard for refusing to take a lead on race, who despise him for his refusal to apologise and his decades-long campaign against 'privileges' for Aborigines opposing land rights, native title, ATSIC, a treaty between black and white Australia should look at what these polls are saying. If rage is still their response, they should start raging against Australia ... Black Australia is left to seek some permanent reconciliation with white Australia, not under the Constitution, nor in laws passed by parliament, but in the hopeful rhetoric of the declaration. What prospects are there that this deal might stick? This history of this place teaches us that vague and decent hopes are soon betrayed.¹⁰⁵

¹⁰² Howard frequently used such criticism aimed at him as evidence of the sectional interest of the critics. See for example Richard Zachariah 'Howard hits back at critics', *The Sunday Telegraph* (April 9, 2000).

¹⁰³ Tony Wright, 'The dog whistler', *The Age* (April 8, 2000) News Extra, p. 1. For a similar approach, see Mike Seccombe's analysis of NT electoral rhetoric, where "you can still catch a 'barra'" is code for "we are opposed to Aboriginal sea rights." 'The politics of division', *The Sydney Morning Herald* (April 8, 2000), p. 42.

¹⁰⁴ Michael Gordon, 'Reconciliation: An issue he didn't believe in', *The Age* (March 4, 2000).

¹⁰⁵ David Marr, 'Betrayal', *The Sydney Morning Herald* (May 20, 2000).

It is beyond doubt that the current government plays to those fears. It makes a failure of reconciliation as Tickner saw it, something fireproofed against “party-political point-scoring.”¹⁰⁶ Yet the view that the Howard government manufactured a climate of resentment to indigenous rights from nothing is inadequate. When Pat Dodson spoke of the ‘spirit of the ten percent’ that voted ‘no’ in 1967, as though this was some mutant strain in the Australian character, he reinforced the self-deception and deep denial that characterises the reconciliation process. CAR Deputy Chair Gus Nossal’s identification of a ‘redneck fringe’ evinced an uncritical analysis.¹⁰⁷ Certainly such groups exist but these cannot be said to be structurally discrete from the bulk of Australians, for whom interest in the issue is limited to seeing that nobody gets a better deal than they, nor from those people committed to reconciliation but who see it largely as a crisis of shared nationality. The belief that the intrinsic good will of the Australian community would be found and entrenched appears to have pushed indigenous people into a space that fluctuates according to the internecine struggles over settler identity.

It is not surprising that a recurring theme of Australian political life is the search for meaning. One of the most influential journalists in the country, Paul Kelly, has put it this way: “Howard’s greatest communications failure is his inability to make Australians feel content or proud or unified or reconciled to their lives, their challenges and their good fortune.”¹⁰⁸ While the ambit of Kelly’s remark is broader than Aboriginal affairs, it indicates the type of social renewal that people are said to want. We would like to feel fulfilled about ourselves and our society in a way that rejoices in the riches and diversity we have created. Whatever one thinks about the truth of this view it relies on a belief that such a renewal of national spirit is possible

¹⁰⁶ Tickner 2001, p. 43.

¹⁰⁷ Gustav Nossal, ‘A great Knight in the Great Hall’, Inaugural Hunter Lecture, Newcastle University (October 18, 2000).

¹⁰⁸ Paul Kelly, ‘A national disgrace’, *The Australian*, (February 19, 2000), p. 21.

and desirable. Certainly a sense of national malaise causes many of reconciliation's supporters to see in it a path toward the conquest of that feeling.

The danger is that these quests for social meaning overwhelm the campaigns to which they attach. The immediacy of deadlines and the coordination of anniversaries to coincide with policy outcomes smacks of a persistent national impatience. For those not intoxicated by the 'magic anniversary syndrome' it was selfish to tie the question of improving indigenous lives and relations with settlers, to the anniversary of the settler state.

Another problem is that the critical responses have not been dealt with. Indeed they have been abetted by the actions of major political figures who know that there is widespread national support for continued denial of indigenous claims. As Moran suggested, because of the paradoxical construction of nation which allows both illegitimacy and legitimacy to exist simultaneously, questions now need to be asked: how did a good country do so badly for so long? Wasn't the country founded on dispossession, limiting any full 'closure'?¹⁰⁹ We might also ask why the 'good' country is perceived to be in the ascendant now?

Clendinnen's 1999 *Boyer Lectures* took these questions from the point of view of 'authenticity': "Can a culture be inauthentic? Yes, if, for example, systematic injustice to a particular group is accompanied by a general conviction of a commitment to a 'fair go'."¹¹⁰ She exposes some of the "unobvious connections between my possibly idealised portrait of the egalitarian white Australian, and what I am coming to see as the systematic injustices still being inflicted on Aboriginal Australians today." McKenna's suggestion was that rebuilding historical narratives may be the way to repair authenticity:

(History can be) the bridge to a national community founded on shared experience and common values ... In a strange way, through their assault on black armband history, John Howard and Geoffrey Blainey have performed a service to the nation. They have helped us to

¹⁰⁹ Moran 2000, p. 149.

clarify what must be done if we are achieve meaningful reconciliation and a genuinely inclusive society.¹¹¹

Yet sharing history in any sense useful or motivational, seems beyond many Australians.¹¹² Notions of ‘balance’ have ensured the encounter is contested. Blainey’s metaphor of the ‘pendulum’ captures this impulse with its stress on “a balanced view of history.”¹¹³ Again, the problem in this formula is that of getting the story straight, so that our shared history can give our collective imagined community meaning and vitality. If these are the terms of reconciliation it is no surprise that the most robust argument, and the argument most grounded in evidence, is that of Johns and Brunton, whose answer to the question, ‘is the Australian community ready to accept a critical history of itself?’ is simply ‘No’. Nor should the nation be asked to do so, they say. This underlines why some indigenous people will always be suspicious of what settlers think is noble, helpful or just.

Indigenous people do not make their claims to settlers because they are the only ones who will listen or can do anything about it – increasingly this is not the case.¹¹⁴ They do so because of the strong connection between the injustices done in the past and their deprivation in the present; between the settlement of the nation-state and its contemporary prosperity. The quest to eradicate that part of our national character, its representations and institutions, that is felt by some to be no longer truly ‘what we

¹¹⁰ Clendinnen, ‘Pilgrims, saints and sacred places’.

¹¹¹ McKenna, M. 1998. ‘Metaphors of light and darkness: the politics of ‘Black armband’ history’. *Melbourne Journal of Politics* 25, pp. 77, 80.

¹¹² There have of course been many ‘statements of the obvious’, recognition that indigenous people were here prior to settlement. For example, Holding’s motion/policy statement in 1983; the Governor General’s statement opening parliament in 1987; the ‘unanimous’ resolution of 1988 discussed in Chapter Three; the contentious (but failed) preamble to the ATSIC bill; the preamble to the CAR bill; the Keating speech in Redfern Park and his Address to the Nation; the failed 1999 preamble to the Constitution; and the Document towards Reconciliation. All of these moments of recognition put no onus on non-indigenous people other than the onus of conscience. Whatever the last two decades may indicate to the impartial observer, it must be clear that appealing to the conscience of Australians is not a sufficient politics for change.

¹¹³ Blainey, G. 1993. ‘The Latham Lecture’. *Quadrant* 37 (July-August).

¹¹⁴ As frequent forays into the international arena attest.

are', is unlikely to lead to unity. It will certainly mean continuing denial of indigenous people.

Coda: a new relationship in Australia?

The project of reconciliation was a brave attempt to overcome the historical legacy of the frontier – the racially founded society. That project has failed because it has been reframed in the 'currency of the absolute'. Reconciliation is viewed by our Prime Minister and his responsible Ministers as a process for normalising the natives, for dismissing any difference which cannot be tolerated in their idea of the nation.¹¹⁵

Reconciliation could have been the 'period of mourning' for an old and discredited identity obsessed with its certainty, its enlightenment and its inherent progressivism.¹¹⁶ Lyotard noted the melancholy of facing the truth that your society is not tolerant or enlightened.¹¹⁷ But the mourning process here is yet to begin.

Consider Henry Reynolds' work *The whispering in our hearts*, about a series of figures in Australian history who challenged the ideology and practices of colonialism, its discrimination and dispossession.¹¹⁸ Are these enlightened individuals exemplars for change in society at large? Or is theirs a history of the failure of good conscience to actually halt injustice? The possibility that 'Australian decency' may always be a minor narrative suggests that confrontation and litigation (hardly 'unifying' processes) will always precede change in the relationship between settlers and indigenous peoples. This accords with the histories of other nations in similar circumstances, and describes the general dynamics of post-colonialism more accurately.

¹¹⁵ Langton, M. The nations of Australia. May 20, 2001
<http://www.abc.net.au/rn/deakin/stories/s300007.htm> (June 14, 2001).

¹¹⁶ Moran 2001, pp. 283-288.

¹¹⁷ *ibid.*, p. 284.

¹¹⁸ Reynolds, H. 1998b. *This whispering in our hearts*, Allen & Unwin, Sydney.

Australians are not experts when it comes to our own history, and politicians are no different ... Each political generation seems to have had to rediscover Aboriginal Australia, and the way has been littered with false starts.¹¹⁹

Did the intention to educate the community once and for all, to bring the nation onto a new plane of tolerance and inclusion, somehow obviate the reality of continual generational error? Beazley in his prolixity revealed a great deal: the resolution ideal, the 'once and for all', may not be viable; a perpetual negotiation and discussion must be undertaken. He hints at the durability of difference. If indigenous people expect justice and recognition to emerge naturally out of the interest of settlers in their own collective identities, then reconciliation will likely have been just one more false start.

¹¹⁹ Kim Beazley, 'Unfinished business', in Grattan 2000, p. 178.

6.

Towards a treaty process in British Columbia

The idea of British Columbia

Treaties such as those reached in North America are often considered a high-water mark for relations between indigenous and settler peoples. The following chapters observe the British Columbia treaty process in detail, arguing that many of the underlying features of reconciliation's search for a 'new relationship' are also present in the practice of treaty-making in British Columbia.

What emerges throughout this analysis of treaties in British Columbia is that the new relationships being offered are limited in specific ways: these limits reflect the capacity for settler peoples and political institutions to demand that treaties provide certainty. This desire to constrain the political space for resolving indigenous claims over territory is akin to that settlers in Australia have pursued in their attempts to renegotiate identity. The key difference in British Columbia is that indigenous peoples appear to have coherent alternatives available to them.

This chapter examines the conditions under which a treaty process became feasible and necessary in that province in the last decades of the twentieth century. It is absolutely clear that the search for a new relationship through the treaty process only became an urgent priority of government after indigenous peoples demonstrated that the old relationships were no longer acceptable, undermining the 'idea' of British Columbia.

There is a long and complex history of treaty-making in Canada. With only minor exceptions, this history does not encompass British Columbia.¹ The path

¹ 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

towards the current process in British Columbia appears to coincide with an investigation of what British Columbian culture and identity could actually mean.² Though current fashionable thinking appears to position British Columbia as part of the Pacific Northwest, or even “Cascadia,” Barman has provided an orthodox history of British Columbia which encourages the interpretation that the idea of BC as “a unified whole” was not widespread until after WWII.³ The first markers of the identity of British Columbia were those of natural resources, the industries which extracted them and the solidity of their 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.”⁴

The emphasis of WC Bennett’s Social Credit government, which governed the province from 1953-1972, supports this conclusion: the ‘SoCredits’ stimulated forestry enterprises by providing new infrastructure and expanding and diversifying markets through the 1950s and 1960s, but also introduced policies that favoured larger enterprises and the consolidation of the hinterland industries. They passed an *Instant Towns Act* in 1965 to provide support to nascent resource-based communities. Bennett himself appealed to “historical and regional claims for representation” as justification for inequitable electoral distributions that ensured a rural gerrymander.⁵

I will argue over the next three chapters that there are clearly elements of the rhetoric and practice of treaty-making in British Columbia that attempt to refashion provincial identity, but that they cannot escape these traditional moorings. Primarily,

an adhesion by the McLeod Lake Band in 2000, an issue I discuss further in Chapter 9. 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. I return in Chapter 9 to a consideration of whether the terms of treaties have fundamentally altered since the early colonial period.

² This is perhaps unsurprising, given my argument in Chapters 2-5 about the national renewal that followed the progressive organisation of indigenous political demands in Australia.

³ Barman, J. 1996. *The West beyond the West: a history of British Columbia*, University of Toronto Press, Toronto, Buffalo, p. 271.

⁴ *ibid.*, p. 356.

⁵ *ibid.*, pp. 279-294.

the impulse behind treaties remains that of securing the resources on which the province's prosperity still largely remains.

As late as 1968, the historian George Brown was able to write the triumphalist narrative *Building the Canadian Nation*, in which a mere two pages is devoted to the issue of Indians, chiefly on the alleged wisdom of the reserves policy and good relations fostered between Indians and the Royal Canadian Mounted Police (RCMP).⁶ While Brown's partial reading does not focus explicitly on the case of British Columbia, it indicates the ease with which indigenous political organisation and the expression of indigenous demands had been expunged from the record.

Paul Tennant, whose *Aboriginal people and politics* remains the only major survey of indigenous political activity in British Columbia, argues that the early colonial acknowledgment of Aboriginal title in such encounters as the Douglas treaties, was being actively suppressed by the 1920s. Indeed the hearings of the Duncan commission in the early 1920s into the size of reserves and the burgeoning land requirements of the ranching and resources industries, demonstrated the coalescence of interests in territory that were perceived to be threatened by indigenous claims. Shortly after those hearings, the federal government acted unilaterally in further dispossessing indigenous peoples of their land, and then in 1927, moved to outlaw any form of indigenous organisation around land claims or other political activity.⁷ Yet the restoration in 1951 of basic political rights did not exhaust Native demands. By the 1980s and into the 1990s, open violence over land and resource issues was frequently the tenor of relations between Natives and settlers in British Columbia.

⁶ Brown 1968, pp. 61-62.

⁷ The prohibition, in amendments to the Indian Act, stood from 1927-1951. It coexisted with cultural prohibitions passed in 1913 which outlawed activities such as the traditional potlatch feast. See Tennant, Chapters 2-3.

Imagining a new relationship

We pledged to take action in a concerted way to forge a new relationship with the first nations people of this province, a relationship that was based on trust and mutual respect, a relationship that will enable first nations communities to move forward toward greater self-reliance and self-determination; and a relationship that will allow us all – aboriginal and non-aboriginal – to move beyond conflict and confrontation and work together to address our common concerns and goals. We pledged to build that relationship based upon a recognition of inherent rights and upon a foundation of just and honourable treaty settlements.⁸

A language of relationships has long found place in the political responses of Canadian political responses to indigenous claims. However, the earliest comprehensive response to Native demands that were coherently and forcefully made from the 1960s was actually an attempt to end any notion of a relationship, to move away from any recognition of Native distinctiveness. The 1969 federal government White Paper, *A just society*, called for full equality through assimilation.

Yet Native peoples have always seen the encounter as one between peoples, in which respect for difference was the paramount factor. It is in this context that the notion of building a new relationship (or repairing the old one) must be evaluated. The *Report of the Special Committee on Indian self-government in Canada* stressed in 1983 that a new relationship was “both urgently needed ... (and would be) beneficial to Canada.”⁹ This was soon followed by the *Report of the task force to review comprehensive claims policy* (hereafter the Coolican Report) in 1985:

⁸ Andrew Petter (Minister for Aboriginal Affairs), British Columbia *Official Report of Debates of The Legislative Assembly* (May 19, 1993), p. 6438.

⁹ Canada, Parliament, House of Commons, Special Committee on Indian Self-Government, and Penner, K. 1983. *Indian self-government in Canada report of the Special Committee*, Queen's Printer for Canada, Ottawa (hereafter the Penner Report), p. 41.

We recommend a new policy based upon a relationship of sharing of power and resources ... The alternative is to return to land and cash deals and long delays in settlement, which both we and the aboriginal groups find unacceptable.¹⁰

Here the relationship is framed in terms of power and resources: a relationship is the means by which these things can be redistributed. Prior to this, the 1982 patriation of the Constitution had enshrined protection for aboriginal rights. Amendments made in 1983 required that negotiations take place to determine the specific meaning of those abstract rights. As Hamilton noted in his 1995 report to the federal government on achieving certainty in negotiations, “It should have triggered a major change in government’s approach.”¹¹ By 1990 however, the Canadian Human Rights Commission (CHRC) observed in the aftermath of the Oka crisis in 1990 that the evidence of dysfunction in the relationship was now too great to ignore, and that “a fundamental process of structural reform was now needed.”¹² An additional CHRC document, *A new commitment*, called for the relationship to be redesigned in collaboration between governments and Native communities.

The major investigation into the injustice and inequity of indigenous life in Canada under the auspices of the federal government, the Royal Commission on Aboriginal Peoples, also portrayed the question as one of an unsatisfactory relationship: “The time has come, (Canadians) told the Commission in briefs and oral presentations, to put the relationship between Aboriginal and non-Aboriginal on a more secure foundation of mutual recognition and respect and to plan together a better

¹⁰ Canada, Task Force to Review Comprehensive Claims Policy, Coolican, M., Canada, and Indian and Northern Affairs Canada 1985. *Living treaties, lasting agreements: report of the Task Force to Review Comprehensive Claims Policy*, Dept. of Indian Affairs and Northern Development, Ottawa, Letter to Minister (hereafter the Coolican Report), p. iv.

¹¹ Hamilton Report, A. C., Canada, and Indian and Northern Affairs Canada 1995. *A new partnership report*, Minister of Public Works and Government Services Canada (hereafter the Hamilton Report), Ottawa, p. 71.

¹² Cited in *ibid.*, pp. 78-79.

future for our children and our children's children.”¹³ The outcome of treaties then must be something that enables respectful relationships:

... treaties are about building durable, new relationships. Respectful new relationships, that are firmly rooted in understanding and respect, and the only way to do that is for people to interact with each other, to dialogue with each other and get to understand each other.¹⁴

Yet the problem remains that government controls both “the rules of the game and the negotiating context.”¹⁵ From the outset the relationship is dominated by one side. This is a constant criticism made by Native people and organisations committed to the treaty process . A publication of the First Nations Summit Task Group, while endorsing the language of relationship, remains candid about the exposed limits of this approach for sharing power and resources:

To negotiate treaties that will provide greater social stability, justice and economic certainty for all British Columbians ... (w)e seek to establish a new relationship ... (but) it is not acceptable to First Nations that governments are attempting to pre-determine the scope and structure of negotiations. The approach is a breach of the Crown's fiduciary duty and undermines the honour of the Crown.¹⁶

Dale Lovick, Minister for Aboriginal Affairs, speaking in 1999, expressed the current policy in the terms of political philosophy: “the relationship between aboriginal people and the rest of the provincial community is flawed, fatally flawed: we, the provincial government, must therefore negotiate *a new social contract* with First Nations ... that's what successful negotiations are all about ... what is the alternative?”¹⁷ Political figures alluded to metaphysical possibilities: treaties would “... unlock the soul of B.C.”¹⁸ The treaty process would be “a discovery of the soul of

¹³ RCAP. Volume 2 - Restructuring the Relationship, Chapter 1 Introduction
<http://www.indigenous.bc.ca/v2/Vol2Ch1s1tos4.asp>(November 4, 2000).

¹⁴ Miles Richardson, Chief Treaty Commissioner of British Columbia, Transcript of Interview (September 5, 2000).

¹⁵ Hamilton Report, p. 79.

¹⁶ First Nations Summit, ‘Treaty-making: the First Nations Summit perspective’ (June 1996), p. 1.

¹⁷ Dale Lovick, ‘Address to First Nations Summit’, Squamish Recreation Center (October 29, 1999)
<http://www.aaf.gov.bc.ca/news-releases/1999/Summit-Oct.29.stm>(January 11, 2000) emphasis added.

¹⁸ Mike Harcourt (former Premier of British Columbia), Transcript of Interview (October 11, 1999).

Canada; a discovery not of what people of Canada possess, but of what the people of Canada are – creatures of a great spirit who have the privilege and opportunity to share a common space in peace and in harmony.”¹⁹

Another emphasis is provided by the Tripartite Public Education Committee, which calls for treaties to “provide for a more certain relationship.”²⁰ The implication is that the relationship is now *uncertain*; a phrasing combining both the key elements of uncertainty and the need for a new relationship. A new relationship, therefore, is one in which uncertainty can be overcome. Rhetorically at least, relationships offer a way to address a multitude of interests. The history which precedes this historical flourishing must be documented.

Indigenous organisation, awareness and activism

Much of the language of new relationships avoids any consideration of how the old relationship was structured. The following section explores the consequences for relationship-building of several issues: Native political organisation and the formulation of an alternative political philosophy; direct action and physical confrontation.

Native organisations and philosophy

Alone in the new world, with neither outside aid nor previous example to call upon, the Indians of British Columbia embarked upon sustained political action within the new political system, demanding that it live up to its own official ideals.²¹

¹⁹ V. Anderson, *British Columbia Official Report of Debates of The Legislative Assembly* (May 19, 1993), p. 6442.

²⁰ First Nations Education Steering Committee and British Columbia Teachers' Federation. *Understanding the British Columbia treaty process: an opportunity for dialogue*. October 1998. Vancouver, p. 3.

²¹ Tennant, p. 83.

Tennant's work remains the only systematic study of indigenous political history and organisation in British Columbia. I do not wish to review that here but to draw from it a sense of the emergence of indigenous political demands in BC that led to treaty-making becoming politically necessary. A major theme of that work and of Native political activity, is the notion of pan-Indianism – the idea of collective, cross-national or cross-clan political activity to present a united front to the absolutist settler state.²² Pan-Indianism goes beyond traditional attachments sometimes breaking with them.²³ 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.²⁴ As I shall explain, the treaty process has forced indigenous peoples in British Columbia to consider again what tradition is and how it is reflected in the creation of a new relationship with the settler state.

One of the most persistent of traditional divisions in the drive toward a pan-Indian identity, at least across the province, is the difference between the coastal and interior Natives in their political allegiances, strategies and outlooks. Tennant speaks of a “dual pan-Indianism,” and the analysis that follows is his.

First, pre-contact coastal politics were already sufficiently developed to greatly influence the patterns of interaction after contact. Increased commercial fishing activity offered opportunities for indigenous participation and success in the fisheries industry gave Natives political self-confidence *vis à vis* settlers. The subsequent increase of shipping throughout coastal communities reinforced coastal identities: only in the 1950s did Indians own enough cars to make transport in the interior realistic and political networking effective. In coastal areas, the difficulty of British Columbia's coastal terrain and the density of Native populations meant that Natives were in the

²² Hertzberg, H. W. 1971. *The search for an American Indian identity: modern Pan-Indian movements*, Syracuse University Press, Syracuse, pp. 6-27.

²³ Certainly the post-*Delgamuuk'w* activities I examine in Chapter 9 appeal to a notion of pan-Indianism. There I also provide a discussion of Taiaiake Alfred's ‘self-conscious traditionalism’.

majority in most places. Native commercial fishermen became an important information “node” during the era when political organisation was prohibited for Natives.²⁵

Another key point of difference was that Protestant missionaries monopolised the coastal zones. Anglicans, Tennant argues, were less concerned to abolish traditional practices, attempting more to synthesise them with European approaches: “Protestant churches gave sanctuary to the crucial traditional social and political traditions of the coastal tribal groups.”²⁶ This was different to the southern and interior zones of the province where religious contact was predominantly with Oblate Catholic missionaries, who took a less syncretic approach to indigenous cultural practice. In the interior commerce was quickly established and dominated by settlers; the land base favoured agriculture, especially pastoral activity, which, as in Australia, was able to expand swiftly. Larger towns were established where a secular commercial culture was able to influence the tenor of early indigenous-settler relations.²⁷

These differences mirrored anthropological distinctions between settled coastal peoples, who could rely on abundant material resources and who lived in large stable villages under a highly stratified rank system, and interior Natives who traditionally had lived in smaller family-based units, necessarily following migrating resources; and for whom an egalitarian social organisation was appropriate. Abetted by the circumstances and conditions of contact, Interior and Coastal Native peoples in BC were to develop distinct modes of political organising.

With the *Indian Act* (1876) Natives in Canada were divided into small administrative units known as bands. Mostly these administrative arrangements took little heed of indigenous political and social structures. Subsequently the Nisga’a and

²⁴ Tennant, p. 68.

²⁵ *ibid.*, pp. 70-77.

²⁶ See also Blake, L. A. 1998. ‘Oblate missionaries and the “Indian land question”’. *BC Studies* 119, 27-44.

²⁷ Tennant, pp. 76-78.

Nuu-chah-nulth Tribal Councils emerged to represent a challenge to the administration: the councils were a form of political organisation that was organised solely around indigenous needs and wishes on a tribal basis, contrary to the Department of Indian Affairs (DIA) and Indian Act modes of administration. Tennant refers to a return to “the tribalism that had been the original foundation of Indian political organisation in B.C.”²⁸ Attempts thereafter to create province-wide unity among Natives had to deal not only with cultural and anthropological differences, but also the varied patterns of asserting political autonomy and relationships with the state.

One of the first major organisations was the Native Brotherhood of British Columbia (NBBC), formed in 1931, but its links with commercial fishing and Protestantism prevented strong links being formed with the interior tribes.²⁹ In the mid 1940s interior Indians formed the Confederacy of Indian Tribes of British Columbia (CITBC). Rivalry between the two organisations became open in 1947 over attitudes to the granting of the provincial franchise to Natives and the special joint Parliamentary Committee on Indian Act amendments, which passed in 1951, repealing sections 140 and 141 of the Indian Act now thought potentially embarrassing. These were the prohibitions of indigenous cultural and political rights banned from earlier in the century.³⁰

Interior bands, dominated by the Shuswap nation, objected to the NBBC being their voice. The major source of political tension was always over Natives’ relationship to government and participation in their reforms. Whether on the question of the extension of the franchise, the patriation of the Canadian constitution which included explicit Aboriginal rights protection, or the current treaty process, Interior bands have remained wary, if not openly hostile to the intentions of the provincial government in particular. Mostly, the divisions between Native organisations in British Columbia

²⁸ Tennant, p. 124.

²⁹ *ibid.*, 119; also Manuel, G. and Posluns, M. 1974. *The fourth world: an Indian reality*, Free Press, New York, p. 97.

³⁰ Tennant, p. 122.

have had to do with differing approaches to the question of land, initially how to resolve claims for compensation, but increasingly the whole question of land claims.

The first truly province-wide effort was at the 1959 convention of the NBBC in Kamloops, and included interior groups. Yet the eventual failure of that forum to create a provincial organisation led to the pursuit by the Nisga'a of their own land claim.³¹ Again the main Native groups attempted in 1967-68 to create a 'unity constitution' for a committee to participate in the Indian Land Claims Commission process. At a meeting in February 1968 persistent tension existed about the creation of a body of Indian elites; when a Constitution was forced through at a private meeting, all the latent tension in Indian politics exploded, destroying the good will that had developed through the 1960s. These failed attempts refreshed what Tennant called the "dual pan-Indianism among BC Indians." That between coastal peoples (religious, clan-organised and stable, who had benefited from commercial fisheries, and whose leaders had experienced the residential schools system) and the Salish or southern/interior peoples (who had no political base in religion, nor firm clan lineages, no strong economic base, and a lack of deference and tradition).³²

The one period when this division seemed to be overcome was originated in government policy. A national process of consultation was undertaken in 1968-1969: meetings held in Indian country at which Natives were consulted by politicians and bureaucrats from the DIA. The outcome of that process was the 1969 White Paper, *A just society*, which I discuss in the next section. Its call for the abolition of Natives' special status was to have the immediate effect of stimulating a British Columbia wide Native political organisation.

The Kamloops conference in November 1969 was the most representative meeting of Natives ever held in the Province. In addition to a majority of the coastal

³¹ *ibid.*, p. 129.

³² *ibid.*, pp. 135-138.

and interior groups, the Minister for Indian Affairs attended, multiple government funding opportunities were identified, and the conference unanimously endorsed a new structure, the Union of BC Indian Chiefs (UBCIC). It would receive DIA funding and also money from the BC First Citizens' Fund, up until then a fund solely for cultural development, the first time the province had ever funded land claims. Though participating in the UBCIC the Nisga'a Tribal Council was meanwhile taking steps to pursue their land claims, retaining the lawyer Thomas Berger. Tennant suggests that a second assembly in 1970 saw the land question as a legal-historical 'back-grounding' exercise for UBCIC and not as the preparation of a single case. However this was to change as the organisation grew better resourced and more confident. Federal land claims funding reached millions, most of which was directed to the UBCIC land claims research centre in Victoria. At this time the UBCIC assumption was that there would be one big claim and that it would be for a compensated extinguishment.³³

It was at this time that the pan-Indian movement began to experience serious convulsions. An issue that could no longer be ignored was that of 'non-status' indigenous peoples: that is Natives living off-reserve and outside the purview of the *Indian Act*. The British Columbia Association of Non-Status Indians (BCANSI) argued passionately that their members had interests in the land issue as well.³⁴ BCANSI, led by Bill Wilson, repeatedly attacked both the corruption of core-funding arrangements, and the absurdity and unfairness of the 'status' distinction that tended to reinforce colonial structures. BCANSI advocated the replacement of both the Indian Act structure of bands, and the big organisations based on them, with tribal councils who would pursue land claims with a grassroots membership and philosophy.³⁵

By 1975 internal tensions in Native politics came to a head – Bill Wilson of BCANSI, George Watt of the Nuu-chah-nulth Tribal Council and others attacked the

³³ *ibid.*, pp. 156-169.

³⁴ *ibid.*, p. 173.

bureaucratisation of both UBCIC and BCANSI and the neglect of Native poverty. In an effort to restore the integrity of the UBCIC the decision was taken to reject all DIA funding and to merge the two organisations. Direct DIA funding to bands for land claims activity was resumed.³⁶

At roughly the same time, tribalism returned to the top of the Native political agenda: a personal and spiritual identification, tribalism came to be a way to assert unity and equality of all, regardless of imposed administrative status. It encouraged a sense of 'self-reliance'. While tribalism would not supersede local band administration in the understanding of their own needs, the benefits of common action were clear on the land question. There was a realisation that unity and self-sufficiency were important pre-requisites of tribal based land claims.³⁷

Several initiatives were taken. The Alliance of BC Indian Bands was formed in 1974: mainly body in the 'lower mainland' of the Province (although expanding around a Salish identity) it had both a tribal and political structure. BCANSI reformed as the United Native Nations (UNN), reaffirming tribalism and requiring membership of one-quarter Indian blood. Finally the NBBC, the UNN and the Alliance held a joint conference in April 1977 at which the BC Coalition of Native Indians was formed. The body was seen only as a coordinating forum and not as another paramount policy organ.³⁸

Meanwhile the UBCIC was reorganised and became dominated by the concerns of interior bands. George Manuel became its inaugural President, but tensions remained over the status question and the issue of tribalism. He and the Union lamented the 1978 attempts to create a tribally-based united front, during which he

³⁵ Tennant, pp. 176-177. See also Wilson, B. 1985. 'Aboriginal rights: the Non-status Indian perspective'. In *The quest for justice: Aboriginal peoples and Aboriginal rights* (M. Boldt, J. A. Long, and L. Little Bear, Eds.), pp. 62-69. University of Toronto Press, Toronto.

³⁶ Tennant, p. 180. That this remains the case is a major reason why small communities feel able to negotiate their treaty directly with the governments.

³⁷ *ibid.*, pp. 180-183.

³⁸ *ibid.*, pp. 184-189.

argued that “there isn’t any recognition of Bands and Band Councils as the governing structures with authority.”³⁹ He reaffirmed the importance of bands both under the Indian Act and the new land claims process⁴⁰, the irony being that it appeared DIA support for the new tribalism seemed to go against the colonial structures they were overseeing, while Manuel criticised the tribalists for pandering to government. This is perhaps a more complex issue than can be dealt with in this context, but there was clearly a desire that bands retain an explicit and direct connection with the federal government, reiterating the special relationship provided for by s.91(24) of the BNA Act. Other initiatives appeared to erode this by acknowledging a Provincial interest.

Establishment of the Aboriginal Council of BC in May 1979 (AbCo), led to the eventual creation of a provincial forum, that reflected both the concerns of particular tribal groups and those of the big Native peak organisations: the Tribal Forum was set up February 1980, and had the support of the DIA Regional Director for British Columbia.⁴¹ From 1980, the DIA/DSS changed their funding policies to reflect where real support in band councils lay: AbCo began assisting tribal groups to prepare land claims; the UNN also consolidated pushing the status question forward. The UBCIC meanwhile was becoming increasingly isolated; they viewed the new Forum as yet more evidence of DIA colonialism, and did not appreciate the ideas of tribalism or a new attitude toward the status issue.⁴²

In 1984 a new term entered the lexicon of Native political organisation in BC: the National Indian Brotherhood had become the Assembly of First Nations. The term ‘First Nation’ meant band east of the Rockies, but was not then meaningful in BC. It quickly evolved to mean any self-designating grass-roots council; that is, neither

³⁹ *ibid.*, p. 190.

⁴⁰ The comprehensive claims process became activated after the *Calder* judgment in 1973, and was made official policy in 1975. See section below on federal responses to Native claims.

⁴¹ *ibid.*, pp. 194-195.

⁴² *ibid.*, pp. 198-200.

province-wide nor peak Native bodies.⁴³ Subsequently the First Nations Congress (FNC) was established in October 1988. Yet the new peak body still reflected tension across the Native political scene. Interior bands remained outside the FNC and its 1990 reformation into the First Nations' Summit (FNS), one of the partners in the tripartite treaty process. The UBCIC was taking a more traditional and less cooperative approach, which remains in place in 2001. As will become clear in the next three chapters, divisions over tactics and philosophy amongst indigenous actors in BC limit the capacity for a full resolution of the issues.

Through the period of Native political organisations being formed there seemed to be emerging a coherent critical strategy within Native ranks. While this has not been the dominant response, nor the position taken by the First Nations Summit within the treaty process, it is important to understand the genesis of these political positions.

The first explicit articulations of indigenous hostility towards the 'inevitability thesis' suggested by Tennant arose in response to the modern land claims settlements.⁴⁴ Tennant's argument was that in the fullness of time, the Indian 'question' would be resolved through a negotiated extinguishment. Two political campaigns reveal the evolving complexity of indigenous positions, and the increasing stridency with which the anti-extinguishment argument was point.

First, the negotiation of several major agreements under the comprehensive claims policy revealed the kind of 'post-assimilation' approach favoured by government: this was to purchase extinguishment to remove institutional and legal impediments to development and to finalise indigenous grievances.

⁴³ *ibid.*, pp. 210-211.

⁴⁴ For Tennant's definition of a "claim" see Ch.1 and p. 204. The refusal of groups to participate in the treaty process is largely because of such extinguishment provisions.

The Yukon Indian Brotherhood presented their land claims immediately after the *Calder*⁴⁵ judgment and the shift in federal policy. It was to be the first time the government acknowledged the need to negotiate with non-treaty groups, but negotiations would only take place with specific groups, with extinguishment as a definite pre-requisite of these negotiations. DIA began to formulate policy on that basis.⁴⁶

George Manuel, by this time national chief of the National Indian Brotherhood (later to become the Assembly of First Nations) and a key figure in Native politics in the British Columbia interior, vigorously opposed these “bill-of-sale” treaties. His stance had been forged in the conflict over the James Bay hydroelectric development: Quebec’s huge hydroelectric “project of the century” was the first to test the comprehensive claims policy framework. Claiming that “the world would begin tomorrow,” Premier Robert Bourassa promised 100,000 jobs and began development on Cree and Inuit lands in Northern Quebec. Native organisations immediately took Quebec to court and in 1972 were granted an injunction, which forced the government to the table. Eventually, as fractures appearing in Indian political organisations led to the northern Cree pursuing their claims separately, the government revised its offer. A figure of \$100M and 2000 square miles became public in January 1974.⁴⁷ Miller suggests that the events signaled “a new era had arrived in government-Native dealings over resource-rich lands.”⁴⁸

Realising the deal would set a precedent, Manuel evoked the example of the Plains Cree chief Big Bear, and rallied against the “take what you can get” mentality that was prevailing.⁴⁹ He attacked the Trudeau government’s role for introducing the 1969 White Paper by stealth – “an unrealistic termination proposal.” Yet in 1975 the

⁴⁵ See section on jurisprudence below.

⁴⁶ McFarlane, P. 1993. *Brotherhood to nationhood George Manuel and the making of the modern Indian movement*, Between the Lines, Toronto, pp. 175-176.

⁴⁷ *ibid.*, pp. 176-180.

⁴⁸ Miller 1991a, p. 344.

⁴⁹ McFarlane, p. 170.

Cree signed a revised deal of \$150M, with a land base, some usufructuary rights and a ‘regional governance role’.⁵⁰ Manuel broke the *James Bay and Northern Quebec Agreement* (JBNQA) down as the purchase of extinguishment for \$805/person for the first ten years. He was bitter that such a deal could come after the Federal government had acknowledged the existence of Aboriginal title, post-*Calder*, by establishing a new policy; it appeared to seek the same colonial conclusions.⁵¹

The Yukon negotiations were to go the same way. Manuel realised the limits this would create for any British Columbia claims and in a joint cabinet meeting (one of Trudeau’s innovations) he explicitly ruled out giving AFN support to any extinguishment-based policy.⁵² In 1976 Manuel spoke to the Mackenzie Valley pipeline inquiry⁵³ and argued that the JBNQA was exactly what indigenous people did not need: “the opportunity has been lost for a new relationship to be established between the Indian people and Canadian society as a whole.”⁵⁴ Manuel’s second appearance lamented the way that the Court of Appeal had set aside Justice Malouf’s original injunction against the Quebec development as possible on “the balance of convenience.”⁵⁵

Though he had promoted “the legitimacy of struggle” over sell-out deals, it was clear that in the mid-1970s gatherings of indigenous leaders were wavering over the ‘fourth world’ politics of liberation that Manuel espoused.⁵⁶ However, more than a residue of this politics clearly remains available to Native leaders as circumstances

⁵⁰ See Rynard, P. 2000. ‘ “Welcome in, but check your rights at the door”: The James Bay and Nisga'a Agreements in Canada’. *Canadian Journal of Political Science* 33; McFarlane, p. 181.

⁵¹ McFarlane, p. 182.

⁵² *ibid.*, pp. 202-204.

⁵³ An inquiry conducted by Thomas Berger, who had acted for the Nisga’a in the *Calder* case.

⁵⁴ Oral submission by President of National Indian Brotherhood (April 13, 1976) to Mackenzie Valley Pipeline Inquiry, cited in McFarlane at p. 209.

⁵⁵ This is the crass utilitarianism of public benefit redux that remains such an instrument of colonial thinking in the *Delgamuuk’w* tests for infringement. It is of the same order of justification used by Locke some centuries previously. I return to this issue in the discussion in Chapter 9 of the implications of the *Delgamuuk’w* judgment.

⁵⁶ McFarlane, p. 183.

change. I return to this in a discussion of post-*Delgamuuk'w* strategies and self-conscious traditionalism in Chapter 9.

Direct action

Evolving organisational structures and political strategy of indigenous peoples in British Columbia were soon reflected in a rise in direct action across the Province. The most widely held view about the stimulus to make treaties is that the challenges Natives started to make to the industrial foundation of British Columbia – the resource sector – became too costly for the provincial government to ignore. The view of Tsawwassen First Nation Chief Kim Baird is typical: “In my personal opinion it’s the litigation that has gained the most momentum and roadblocks as well.”⁵⁷

Tennant suggested 1973 as the start of “the contemporary era of BC Indian political protest.”⁵⁸ He noted that although there had been earlier protests at Fort St. John and at Williams Lake, the timing seemed influenced by events at Wounded Knee in South Dakota. Activities soon mushroomed: a blockade of DIA offices in Vancouver; a traditional “illegal” fish weir was built by the Cowichan people on Vancouver Island; in June 1974 there was a protest march on the legislature to pressure the New Democrat Party (NDP) government to recognise Aboriginal title; DIA offices across the country were blockaded in 1974; the Nisga’a prevented a railway development on their territory; and a prolonged blockade of a highway near Cache Creek was maintained by armed Natives. 1975 saw an increase in confrontational actions, particularly the assertion of traditional resource rights.⁵⁹ This was a particular emphasis of interior groups under the leadership of Manuel. After the Lillooet “fish-in” of 1978, Manuel indicated that “sophisticated civil disobedience” would be an outcome

⁵⁷ Kim Baird, Tsawwassen First Nation, Transcript of Interview (October 12, 1999).

⁵⁸ Tennant, p. 174.

⁵⁹ *ibid.*, pp. 179-180.

of continued government intransigence; he also referred to an “army” of activists who would take up arms in the struggle if necessary.⁶⁰

In the early 1980s, a second phase of direct action began right across the province that was more strategically aimed to damage the resources industries. In 1984, first the Kaska-Dena people in the remote North east, then the Nuu-chah-nulth on Meares Island blocked logging access⁶¹; in 1985 the Haida obstructed logging on Lyell Island; the following year, the Kwakiutl protested on Deare Island; the Nisga’a, Lillooet and Nlaka’pamux all obstructed railway constructions; Bella Bella paddlers arriving at Expo in Vancouver in 1986 were met by protests and speeches by the Native Brotherhood of British Columbia, angered by the appropriation of Native culture during the exhibition⁶²; Indians threatened not to participate in the census, which meant that BC stood to lose up to \$3000/person in federal transfer payments⁶³; 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.⁶⁴ Gitksan-Wetsuweten roadblocks and standoffs made it clear that the government’s control was limited: David Mitchell, an MLA in the provincial legislature and Vice-President of the lumber company Westar was quoted as saying the system has broken down completely: “it is no longer certain who controls the forests in north-west BC.” Westar was eventually forced to reach a deal with tribal leaders.⁶⁵ The Nemaiah Chilcotin band forced Carrier Lumber Ltd to stop logging after unilaterally declaring their territory a wilderness preserve.⁶⁶

⁶⁰ McFarlane, pp. 249-250.

⁶¹ I discuss the Meares Island injunction granted in the jurisprudence section below.

⁶² Robert Weisnagel, ‘Paddlers met by angry natives’, *The Vancouver Sun* (September 2, 1986), p. B3.

⁶³ Larry Pynn, ‘Indian snub of census under review official says’, *The Vancouver Sun* (September 4, 1986), p. A10.

⁶⁴ Tennant, p. 207.

⁶⁵ Terry Glavin, ‘Westar joins Northwest timber protest’, *The Vancouver Sun* (February 23, 1990), p. B3

⁶⁶ Scott Simpson, ‘Indian court case prompts firm to halt logging’, *The Vancouver Sun* (December 18, 1990), p. B2.

The sudden re-emergence of conflict and direct action in the 1980s followed soon after Constitutional recognition of aboriginal rights in s.35. Tennant noted that Provincial politicians and resource groups were “puzzled” by this development: what Natives wanted was not only the expeditious dealing with their claims but also protection of traditional territories while claims were being settled. A key difference was that in the 1970s protests had focused on the administrative concerns of bands – typically on reserves – and there was little media or court involvement. By the 1980s the tribal basis of protest brought protests to non-reserve lands and targeted resource companies who were perceived to be 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. Litigation was begun to protect non-reserve lands pending settlement; major churches became sympathetic as well as environmental groups. This was especially the case on the west coast of Vancouver Island where a coalition opposed to logging was formed that included the local municipality.⁶⁷ According to an activist at the UBCIC the entire period “paved the way for Indians to take a stand.”⁶⁸ Explaining how the treaty process became imperative, David Didluck concurred: “... we were faced with a number of roadblocks, political challenges, a very confrontational time in the province’s history.”⁶⁹

However, as I shall discuss further, provincial concessions such as the treaty process have only been able to reduce the frequency of direct action: it has never disappeared. Indeed, while the British Columbia Treaty Commission (BCTC) agreement was being signed by Canadian Prime Minister Mulroney, British Columbia Premier Harcourt and the leadership of the FNS, the blockade of the Canadian National Line to Prince Rupert was being described as a disruption to the economy,

⁶⁷ Tennant, p. 208.

⁶⁸ Millie Poplar, UBCIC, Transcript of Interview (August 21, 2000).

⁶⁹ David Didluck, Executive Director Lower Mainland Treaty Advisory Committee, Transcript of Interview (August 14, 2000).

with the mayor of Prince Rupert attacked the NDP government for neglecting the law. Don Ryan, who as Gitwankat chief was involved in the blockade, described the BCTC as “all a farce and a myth.”⁷⁰

The Chief Treaty Commissioner of British Columbia, Miles Richardson, remains 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.”⁷¹ I will return and elaborate this theme in Chapter 9. It transpires that much direct action is taking place in Native communities who are determined to remain outside the treaty process.

Jurisprudence: Issues and history

The nature of aboriginal title – what it is and how it can be defined in Canadian jurisprudence and legislation – has become fundamental to the parameters of treaty negotiations. In his treatment of this jurisprudence up to 1990, Tennant asks two overarching questions: is there pre-existing title; and what is the burden it imposes on the Crown? That is, what would it take to extinguish it?⁷² These questions now have answers, though they are answers that may simply rework a colonial mentality indigenous peoples are seeking to banish to history. In this section I develop a brief narrative of the jurisprudence of aboriginal title, and how it pertains to both treaties and the prospect of a new relationship.

As I noted above, between 1927-1951, Canadian legislation made the pursuit of indigenous land claims a criminal offence. Immediately upon the 1951 amendments to the Indian Act there were neither land claims activity nor a sympathetic and ethical

⁷⁰ William Boei, ‘Gitwankat band members await arrest by RCMP over rail blockade’, *The Vancouver Sun* (September 22, 1992), p. B7.

⁷¹ Miles Richardson, Chief Treaty Commissioner of British Columbia, Transcript of Interview (October 12, 2000).

⁷² Tennant, p. 213.

judiciary. But by the 1960s both those things had changed. I will briefly outline the major case law and then summarise the position at the time of the treaty process being established.

Initially the province responded to land claims by refusing any acknowledgment and mobilising denials such as the ‘tense’ argument⁷³ and the ‘implicit extinguishment’ position.⁷⁴ In 1973, the Nisga’a claim, litigated by the Nisga’a Tribal Council since the 1960s, reached the Supreme Court of Canada. The *Calder* decision ruled that the Nisga’a had held aboriginal title before settlers came, though the judges 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.”⁷⁵

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.”⁷⁶ In 1978 the SCC ruling in *Kruger*, further answered Tennant’s second question: in this case rejecting the argument that provincial regulation of aboriginal rights did not amount to extinguishment.⁷⁷ Substantive jurisprudence about the proof of aboriginal title came in 1980 in the Federal Court ruling in *Baker Lake*. Evidence of social organisation, exclusive occupation and a specified territory at the time of the assertion of Crown sovereignty, comprised that proof.⁷⁸

1982-1983 saw the entrenchment of aboriginal rights in the Canadian Constitution in s.35. The initial act of patriation included the Charter of Fundamental

⁷³ The view that the act of Confederation had annulled aboriginal title.

⁷⁴ The view that any provincial assertion through legislation automatically extinguished title. See Tennant, pp. 216-218.

⁷⁵ *Calder v. Attorney-General of British Columbia* (1973) S.C.R. 313, at p. 375.

⁷⁶ Tennant, p. 221.

⁷⁷ *Kruger v. The Queen* [1978] 1 S.C.R. 104.

⁷⁸ *Baker Lake v. Minister of Indian Affairs and Northern Development* [1980] 1 F.C. 518.

Rights and Freedoms in which s.25 guarantees aboriginal rights that were 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. The 1983 amendments included s.35(3) enabling constitutional protection for aboriginal and treaty rights recognised after 1982.

In *R v Guerin* (1984) Dickson J confirmed the potential existence of Aboriginal title on all types of land, that is on and off reserves. The judgment also found that the Crown must meet its s.35 obligations because it had a fiduciary duty to do so.⁷⁹ Three weeks after the *Guerin* ruling the Nuu-chah-nulth blocked Macmillan Bloedel's access to timber on Meares Island; then the Clayoquot and Ahousaht bands took the matter to court, basically litigating their land claim.⁸⁰

The subsequent case, *Martin et al v R.* (1985) in the BC Court of Appeal, granted an injunction and developed the idea of "extensive use" that was important to Aboriginal title but was 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," underlining the need for pre-emptive injunctions where aboriginal title was in dispute.⁸¹ Furthermore the judgment chastened politicians for neglect and willful disregard and affirmed the public expectation of negotiations.⁸²

The effect of that injunction was to shut down developments across the Province; the BC Supreme Court soon granted injunctions in various corners of the territory: on Vancouver Island, in the remote Northeast of the Province, in the Okanagan Valley and on the North Coast, injunctions were granted allowing the possibility of persistent title across the Province. At McLeod Lake, a protest that involved unsanctioned logging gave rise to a ruling that allowed the band to sell their

⁷⁹ 'Chronology 3: Indigenous rights in the political jurisprudence of Australia, Canada and New Zealand Parallel Chronologies', in Havemann, p. 51.

⁸⁰ Tennant, p. 223.

⁸¹ *Martin et al. v. The Queen in right of the Province of British Columbia et al.* [1985] 3 Western Weekly Reports, 583-593; Tennant, p. 223.

⁸² *ibid.*, p. 224.

“illegal” timber. Tennant describes the authority of the Crown as being massively impaired.⁸³ Injunctions made it essential for future negotiations to take into account current resource-related activities with a mechanism that satisfied all parties. I deal with the ‘interim measures’ policy of the treaty process in Chapter 8.

Further jurisprudence in *Simon v the Queen* (1985) established the principle that treaties must favour indigenous peoples even if incomplete, extending a ruling in the *Nowegijick* case that treaties or statute law should be construed in a manner favourable to indigenous interests.⁸⁴ Then, the Supreme Court of Canada judgment in *Sparrow v R* (1990) entrenched the earlier interpretation made in *Baker Lake*, confirming the existence of Aboriginal rights (in this instance to fisheries) but subordinating their exercise to government regulation.⁸⁵

It also inaugurated a ‘case-by-case’ logic by which aboriginal rights have to be proved in every instance: “an extremely guarded judicial rendering of aboriginal rights.”⁸⁶ The court also held that s.35 aboriginal title may be infringed, if justified by a “valid legislative objective” which was to be balanced against that “special relationship between the Government and indigenous peoples.”⁸⁷ This endorsed the logic of superiority that had been used to set aside the James Bay injunction, and that remains the philosophical bedrock of the indigenous-settler legal relationship. *R. v van der Peet* concerned whether an aboriginal practice constituted a rights: rights are to be understood as those “to engage in an activity, practice or custom of the Aboriginal group at the time of contact with Europeans,” a fundamental endorsement of

⁸³ *ibid.*, 225.

⁸⁴ *Simon v. The Queen*, [1985] 2 S.C.R. 387; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29.

⁸⁵ *Sparrow v. R.* [1990] 1 S.C.R. 1075; *Baker Lake*.

⁸⁶ Boldt, M. 1993. *Surviving as Indians: the challenge of self-government*, University of Toronto Press, Toronto, Ont., p. 33.

⁸⁷ Behrendt, L. *The Protection of Indigenous Rights: Contemporary Canadian Comparisons*. (June 27, 2000) Canberra, Parliament of Australia, Department of the Parliamentary Library.

traditional rights within contemporary law.⁸⁸ Finally, *R. v. Gladstone* allowed the possibility that those traditional practices could support a commercial right.⁸⁹

At the beginning of the 1990s, extensive considerations of aboriginal rights in Canada were very much part of the legal-constitutional superstructure. The agreements being pursued in the treaty process are limited by this jurisprudence; some Native peoples seem to be attempting to escape its restrictions by trading extinguishment of title for other entitlements that will receive s.35 protection in a final agreement.

However, a judgment of seismic, *Mabo*-like effects remained in the future as the treaty process began its work: the Gitksan action known as *Delgamuuk'w* was to become “the longest, costliest case and most important land claim ever undertaken in Canada.”⁹⁰ I return to this case in my critical evaluation in Chapter 9, and consider what it means for the treaty process. But by 1990, Tennant rightly pointed out that “(a)n awakening judiciary was something that the British Columbia government could not ignore.”⁹¹

Political responses

The following section traces the responses that were made by the political establishment both federal and provincial, after the regrouping of Native claims in the 1960s. It also considers the debate over the involvement of the provincial government in negotiations over the rights of indigenous peoples in Canada.

⁸⁸ *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

⁸⁹ *R. v. Gladstone* [1996] 2 S.C.R. 723.

⁹⁰ Vaughn Palmer, ‘SoCredits can’t avoid latest land claims’, *The Vancouver Sun* (February 26, 1990), p. A8.

⁹¹ Tennant, p. 215.

Federal responses

Canada's history of treaties is an extensive one. Indeed, no nation has a longer continuous history of agreement-making with indigenous peoples. The claim that the *Nisga'a Final Agreement* (NFA) is the first modern treaty document requires some contextualisation, however.

Prior to the *Calder* discussed above, the federal government limited its negotiations with indigenous peoples to the resolution of specific outstanding grievances, particularly cases where existing treaties had been neglected. From 1965, the Indian Claims Commission (ICC) had taken this role.⁹² Yet growing activism and political self-confidence made this untenable; Natives in British Columbia had little or no recourse to the specific claims policy. The 1969 White Paper hoped to sweep all of this away, equalising all Canadians in the present: "we must not sign treaties ... we can't recognize aboriginal rights because no society can be built on historical 'might-have-beens'."⁹³ This 'final solution' to the problem of Native difference and exclusion from Canadian society explicitly rejected the pursuit of treaties or other settlements based on unextinguished aboriginal title; it was soundly rejected by Native peoples across Canada.⁹⁴

As noted above, its effect was to galvanise indigenous peoples into action which culminated in the growth of pan-Indian organisations in BC and a climate of confrontation. Initially, the abandonment of the White Paper led to a rise in self-government and land claims. According to Tennant, the Federal government was left in a policy vacuum, simply handing out money.⁹⁵ The final barrier to negotiations over the question of title was then overcome by the *Calder* judgment, which, as I pointed out above, gave the neo-colonialist denial of title a definite shelf-life.

⁹² Tennant, pp. 132-133.

⁹³ Pierre Trudeau, cited in Barman, p. 311.

⁹⁴ This is summarised in Cardinal, H. 1969. *The unjust society: the tragedy of Canada's Indians*, M.G. Hurtig, Edmonton.; See also Miller 1991a, pp. 336-339.

⁹⁵ Tennant, p. 166.

After *Calder*, Trudeau directed the ICC to start hearing non-treaty claims directly and the ‘comprehensive claims policy’ was begun.⁹⁶ Foster calls this the “third period” of treaty-making in Canada.⁹⁷ There have been a number of settlements reached under that process. It is worth briefly summarising them.

The terms of these “major contemporary treaties” in Quebec, Yukon and the North-West Territory are quite similar. In each, the major plank of the agreement is a straightforward cash for ‘extinguishment’ of aboriginal title to land⁹⁸: in Quebec 88c/acre in JBNQA; \$1.01/acre for the Inuvialuit agreement in the NWT; and for the Yukon agreement \$2.13/acre.⁹⁹ Rynard examined the terms of the JBNQA finalised in 1975 against the Nisga’a Final Agreement reached in 2000. In both he found the same thrust:

The intent and the effect of such clauses is to replace Aboriginal title, which was only vaguely defined in law at the time, with crown ownership to, and sovereignty over, the traditional lands of the Aboriginal Nation involved. At the same time, though, the extinguishment of Aboriginal title is explicitly bound to the various rights spelled out in the treaty; it is the price paid for the ‘new’ treaty rights.¹⁰⁰

However, according to the Canadian Human Rights Commission report of 2000, the Cree-Naskapi Commission established to monitor the self-government provisions of the JBNQA, has repeatedly criticised the federal government for failing to meet the “spirit and the letter of their obligations.”¹⁰¹ I conclude Chapter 6 with a questioning of the treaty process’ capacity to enforce agreements.

⁹⁶ *ibid.*, p. 172.

⁹⁷ 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. Hamar Foster, ‘Indian administration from the Royal Proclamation of 1763 to constitutionally entrenched rights’, in Havemann 1999, p. 358. There have been various adhesions, notably the McLeod Lake Band’s adhesion to Treaty 8 in the Northeast part of British Columbia in 2000.

⁹⁸ See my discussion of ‘certainty’ in Chapter 8.

⁹⁹ Tennant, p. 227.

¹⁰⁰ Rynard 2000.

¹⁰¹ Canadian Human Rights Commission. *Annual Report 2000*. Ottawa, The Commission, p. 15.

This comprehensive claims policy has been reviewed a number of times; first systematically in the Coolican Report of 1983. That report argued against the cash-for-land transactional approach to indigenous claims, seeing negotiations as the opportunity to start building self-sufficient communities. This changed strategy was reflected in the report's title, *Living treaties, lasting agreements*, and its view was that development revenues should be shared as well as the possibility for joint management arrangements for resources.¹⁰² The principles built on were those set out in the earlier Penner Report on Native self-government, which had recommended that full resource control and jurisdiction be given to Indians over reserve lands and over future lands: "exclusive Indian jurisdiction over activities on Indian lands."¹⁰³

The revamp of the process undertaken by government largely ignored Coolican's recommendations, adopting a new policy that left the transactional "buy-out" strategies intact. It also refused to countenance a true sharing of rights on wildlife and resource management, an issue still problematic for the offers being made as part of the treaty process. A concerted effort not to undertake any new financial commitments reflected the flavour of the times. Murray Angus, writing in 1992, saw the comprehensive claims negotiations over the creation of Nunavut in the Eastern Arctic in bitterly ironic terms: "If it is approved, Ottawa will have secured the biggest claim of all."¹⁰⁴ On this analysis, the comprehensive claims policy was simply an updated version of the Prairie treaties of 100 years before – a cash-for-extinguishment deal.¹⁰⁵

Federal policy was to negotiate only one claim at a time, resulting in a situation where, although many British Columbia Native groups had joined up through the

¹⁰² Coolican Report, pp. 53-60.

¹⁰³ Penner, K. 1988. 'Their own place: the case for a distinct order of Indian First Nation government in Canada'. In *Governments in conflict? provinces and Indian nations in Canada* (M. Boldt, J. A. Long, and L. Little Bear, Eds.) University of Toronto Press, Toronto; London, p. 36.

¹⁰⁴ Angus, M. 1992. 'Comprehensive claims: one step forward, two steps back'. In *Nation to nation aboriginal sovereignty and the future of Canada* (D. Engelstad and J. Bird, Eds.) Anansi, Concord, Ont., p. 77.

¹⁰⁵ *ibid.*, p. 69.

1980s, “the line had not moved.”¹⁰⁶ I return to the comprehensive claims policy in Chapter 9: as part of the reorganisation of Native demands after *Delgamuuk’w* there is a highly coordinated campaign to overturn the comprehensive claims policy or to radically overhaul it, in part as an alternative to the treaty process.

The second issue to raise is that of constitutional reform. From a comparative perspective the constitutional arena has provided considerably more succour for Natives in Canada than Aboriginal and Islander peoples in Australia. As early as 1978, Pierre Trudeau had seen that a push for constitutional reform was possible. His policy statement spoke of a “time for action,” though Miller argues that Trudeau thought the existing constitution – the *British North America Act* – was “generally satisfactory.”¹⁰⁷ What was required was the possibility of amending it within Canada, and the adoption of a bill of rights.

The NIB saw the potential for these changes both to threaten and improve their status, particularly the prospects for autonomy and meaningful self-determination, and the organisation insisted on participating in the negotiations being held by the First Ministers Conference (FMC) from 1978. Native participation was limited, particularly through the prairie and western provinces applying pressure over the very need for a document at all. The draft released in 1981 made no reference to indigenous rights.¹⁰⁸ Native leaders took their campaign to Europe and the UK. Westminster had to ratify the 1982 *Act of Patriation*, and would not do so if the Canadian parliament had split along party lines. This forced Trudeau to gain NDP support which meant that s. 35 was restored and on April 17, 1982 the Act became law. Boldt, however, rejected any sentimentality about indigenous recognition:

¹⁰⁶ Tennant, pp. 206-207.

¹⁰⁷ Miller, 1991a, p. 348.

¹⁰⁸ *ibid.*, pp. 348-350.

Canada is a stranger to principle ... Aboriginal rights were expediently entrenched in the Constitution Act, 1982, to facilitate patriation of the constitution, not to decolonize Indians.¹⁰⁹

As indicated in the previous section, an obligation to negotiate aboriginal rights was included in the revised constitutions. The history of these negotiations is long and complex¹¹⁰, but two moments need addressing. The first agreement, known as the Meech Lake accord was passed by the FMC in 1987, and granted Quebec status as a distinct society. Aboriginal leaders had called for an amendment recognising indigenous distinctiveness, whereupon the provincial leadership of Alberta threatened secession. The agreement passed the FMC without reflecting indigenous demands but failed to get ratification by the provincial legislatures by the required date in 1990.¹¹¹ A crucial role was played by a Native member of the Manitoba legislature named Elijah Harper.

Harper, a New Democratic MLA from the riding of Rupertsland in northern Manitoba and a former chief of the Ojibway-Cree community of Red Sucker Lake, was an obscure backbencher when the controversy began. But with adroit assistance of the Assembly of Manitoba Chiefs, he devised a strategy to block the accord in the provincial legislature. Carrying an eagle feather for spiritual strength, he quietly shook his head whenever the government asked for consent to introduce the accord in the legislature. When the Lake deadline expired on June 23, Elijah Harper had defeated the accord, and he had become a national hero to Canada's aboriginal people. The death of Meech Lake was hailed as a victory by Indians in every corner of the country. By strengthening the unity and militancy of aboriginal people, Harper laid the groundwork for the national support that the warriors enjoyed in the summer of 1990.¹¹²

¹⁰⁹ Boldt 1993, p. 37.

¹¹⁰ Throughout 1984 and 1985 the major indigenous political organisations in Canada – the AFN, the Inuit Tapirisat, the Native Council of Canada, and the Aboriginal Women's Organisation – pressured the First Ministers conference to express s. 35 rights: “filling in the empty box” and to put self-government on the agenda. See ‘Chronology’ in Havemann 1999, p. 51; Miller 1991a, pp. 357-361, 374-379.

¹¹¹ The procedures for amending the Canadian constitution are set out in the *Constitution Act*, 1982, Part V.

¹¹² York, G. and Pindera, L. 1991. *People of the Pines: the Warriors and the legacy of Oka*, Little, Brown, Boston, Toronto, p. 281.

In 1992 another agreement was reached at the conference held in Charlottetown, Prince Edward Island. It was a product of the meetings in the ‘Canada round’ of constitutional renewal begun in June 1991. This time it had the support of many of the major Native political organisations. A summary of the major provisions of the agreement that pertain to this study is as follows:

¶41 expressed the inherent right of self-government: “The constitution should be amended to recognise that the Aboriginal peoples of Canada have the inherent right of self-government within Canada.” It would include a new clause s.35.1, recognising Natives as “one of the three orders of government.” It also required that any court determining an inherent right conflict should take into account the “effort made to negotiate.” ¶45 also enshrined a commitment to negotiate in good faith. The process whereby negotiations would take place was set down in ¶46: First Nations should initiate or trigger negotiations; provisions would be made available for the varying needs of aboriginal communities; and provisions for agreements were to be set out in future treaties or land claims agreements, or declarations that aboriginal rights were to be s.35. ¶47 would have entrenched the principle that any aboriginal self-government model will have to be consistent with “those laws which are essential to the preservation of peace, order and good government in Canada.” And ¶48 indicated that the “spirit and intent” of the original treaties should be recreated.¹¹³

While the main indigenous organisations in British Columbia were supportive of it, significant pockets of Native resistance remained, not least among the Interior bands of British Columbia: Saul Terry of the UBCIC argued that Natives would be giving an endorsement of Canadian sovereignty that did not recognise aboriginal title.¹¹⁴ Menno Boldt put it this way: “(Natives) would have moved from ‘delegated’ to

¹¹³ *The Vancouver Sun*, ‘Charlottetown: The final text’ (September 21, 1992), pp. A5-8.

¹¹⁴ Stewart Bell, ‘Many natives leaning towards a Yes position’, *The Vancouver Sun* (September 24, 1992) p. A4.

‘negotiated’ authority, with an option of litigated authority. They would not have gained sovereign authority.’¹¹⁵

A national referendum was held on October 26, 1992 to entrench the Charlottetown agreement but it failed by a substantial margin. Nationally the vote went 54.3% for, 44.7% against. None of the heavily populated provinces supported it, only the Maritimes and the NWT. In BC for example, 67% of voters rejected it. A number of explanations are offered for this outcome: it was an elites reform¹¹⁶; the Western provinces had been left out during consultations; even fracture in the Native political community.¹¹⁷ Newspaper reports record the genuine anger of Native supporters of the reform, calling it “a kick in the face for the Indian struggle to end white domination of native communities.” First Nations Summit Chief Joe Mathias said the result “perpetuates class domination” and attacked the Native ‘No’ campaign led by Elijah Harper saying, “he took away freedom from our children’s hands.”¹¹⁸ What had been rejected was largely an explication of s.35. Had it been passed, much of the “uncertainty” of the treaty process and the post-*Delgamuuk’w* “new relationship” may have been less potent.

The involvement of the province

Historically, the posture of the province of British Columbia towards aboriginal claims has been a sore point both for aboriginal groups and for the federal government.¹¹⁹

¹¹⁵ Boldt 1993, p. 106.

¹¹⁶ Peter O’Neill, ‘No deal’, *The Vancouver Sun* (October 29, 1992), p. A1.

¹¹⁷ Some natives were not entirely comfortable with the idea of self-government; while others voted No because there was no proper consultation. According to the AFN, on-reserve Indians had voted No by 60-70%. Stewart Bell, ‘Aboriginals split over No result’, *The Vancouver Sun* (September 21, 1992), p. A4.

¹¹⁸ Doug Ward, ‘Rejection called kick in the face’, *The Vancouver Sun* (October 29, 1992), p. A3.

¹¹⁹ Coolican Report, p. 50.

Tennant suggested it was after the idea of the Claims Commission started to solidify that the question of the involvement of the provincial government in the resolution of Native claims first arose.¹²⁰ The Hawthorn report of 1966, which coined the phrase “citizens plus” argued that “Provincial governments should be encouraged to make the policy decision that Indians are in reality, provincial citizens in the fullest sense compatible with those aspects of Indian status found in treaties, the special nature of Indian land holdings, and certain historic privileges they have enjoyed under the Indian Act.”¹²¹ Partly, continued provincial reluctance was a function of the historical relationship between indigenous peoples and the federal government in Canada entrenched in s.91(24) of the BNA Act, which had granted the federal government exclusive power to regulate “Indians, and Lands reserved for the Indians.” This section outlines some of the issues.¹²²

The ‘special relationship’ was regulated in minute detail by the Indian Act.¹²³ Prior to WWII, provinces had acted as agents for the federal government in policing on reserves. From 1946-48 there was a push to greater provincial involvement in service provision; between 1949-65 Indians got the provincial franchise.¹²⁴ Boldt and Long argue that in the 1980s the federal government had been behind “the transfer of services for Indians to the Provinces ... The Provinces have steadfastly resisted accepting greater responsibility for Indian residents within their boundaries ... (though) they would like to increase their jurisdiction over Indian lands, and

¹²⁰ Tennant, p. 134.

¹²¹ Cited in Exell, R. 1988. ‘British Columbia and the Native community’. In *Governments in conflict? provinces and Indian nations in Canada* (M. Boldt, J. A. Long, and L. Little Bear, Eds.) University of Toronto Press, Toronto; London, pp. 97-98.

¹²² For a full explanation of Canadian federalism as it pertains to Native affairs see Rawson, B. 1988. ‘Federal perspectives on Indian-Provincial relations’. In *Governments in conflict? provinces and Indian nations in Canada* (M. Boldt, J. A. Long, and L. Little Bear, Eds.), pp. 23-30. University of Toronto Press, Toronto; Boldt, M. and Long, A. J. 1988. ‘Native Indian self-government: instrument of autonomy or assimilation?’ In *ibid.*, pp. 38-56.

¹²³ However, see Little Bear, L. 1988. ‘Section 88 of the Indian Act and the application of Provincial laws to Indians’. In Boldt, Long and Little Bear 1988, pp. 175-187.

¹²⁴ Boldt 1993, pp. 3-4.

particularly over resource development.”¹²⁵ In 1965 and 1972 the federal government proposed full service provision for Indians by the provinces, with the federal government paying for the arrangements. No province accepted the deal.

In 1943, the BC-Canada agreement had given the Province jurisdiction over mineral resources on reserve lands, and in 1977 the Fort Nelson Indian Reserve Minerals Sharing Agreement expanded that jurisdiction to include exploration, development and production on reserves.¹²⁶ A paramount issue is the question of land: over 90% of Crown land in British Columbia is vested in the Province, and the courts have determined that federal appropriations of provincial Crown land for reserves must be done with provincial agreement. This has meant that when agreements are made, provinces are able to retain leverage over resource decisions on lands.¹²⁷ Provincial control over the forestry sector is also significant.¹²⁸

Once the federal government had decided upon the comprehensive claims policy in 1973, their view was clearly that the provinces should be involved: “It is in the interest of those Provinces and their residents that claims respecting lands in the Provinces be settled, and it is, therefore reasonable to expect that Provincial governments should be prepared to provide compensation.”¹²⁹ Indeed the constitutional debates of the late 1970s and early 1980s made British Columbia’s political remoteness on Native issues seem less feasible.

Boldt and Long argue that the 1982 constitution “formalized (the) hidden agenda” that had been secreted away after the failure of the 1969 White Paper: the post 1982 Ministers’ conferences gave the provinces a direct say in the definition of

¹²⁵ ‘Introduction’, in Boldt, Long and Little Bear 1988, pp. 4-5.

¹²⁶ *ibid.*, p. 13.

¹²⁷ *ibid.*

¹²⁸ Approximately 95% of the lands used by for forestry are owned by the Province. In 1999, forestry activities generated \$9.0B, or 8.6% of total provincial GDP. British Columbia Ministry of Forests, *First Quarterly Report 2001/2002* <http://www.for.gov.bc.ca/HET/Softwood/softwood.pdf> (April 2, 2002), p. 16.

¹²⁹ 1973 Federal policy statement, cited in Boldt, Long and Little Bear 1988, p. 165.

aboriginal rights and title¹³⁰ (even a veto, considering the confrontations over s.35 and the acquiescence to the “existing rights” clause for the two recalcitrant provinces). Natives had participated in these conferences as non-voting delegations, seemingly endorsing the devolution of authority to the provinces and ending their exclusive dealings with the federal government. It was “a formal acknowledgment ... that the provinces have a legitimate role to play in the major policy decisions affecting their future.”¹³¹ Boldt and Long argue that the federal government’s strategy in the ministerial conferences on self-government was not to put a principled and clear position, but to seek a consensus among the provinces that could conceivably get entrenchment.¹³²

For the purposes of analysing the treaty process we should see these events as inaugurating the tripartite model of negotiations now in place. Bruce Rawson, then Deputy Minister of DIAND, saw the federal task as one of helping Indians in “repositioning themselves in Confederation.”¹³³ By the time the treaty process was in place, most of these concerns about the involvement of the province had been allowed to lapse amongst those First Nations that were choosing to participate. Given my argument about the traditional orientations of the province toward resources, the potential ‘abdication’ of the field by the federal government needs to be considered. Boldt and Long are critical:

Through constitutional development, judicial interpretation, incorporation of provincial laws by reference, and federal-provincial agreements, the implicit principle of federal government jurisdiction over Indians has been circumscribed, compromised, circumvented and trammelled – in effect, it has been reduced to a legal cliché.¹³⁴

¹³⁰ Given the necessity for all constitutional amendments to be ratified by provincial legislatures under s.38(1) of the 1982 Constitution.

¹³¹ ‘Introduction’, in Boldt, Long and Little Bear 1988, p. 15.

¹³² *ibid.* p. 16.

¹³³ Rawson, in Boldt, Long and Little Bear 1988, p. 24.

¹³⁴ ‘Introduction’, in Boldt, Long and Little Bear 1988, p. 8.

Provincial responses

The province has had a highly ambivalent attitude to these developments. After the NDP interlude of 1972-1975, the SoCreds were returned to provincial government and sought to resolve the outstanding 'cut-offs' issue.¹³⁵ The first settlements, reached in 1982, revealed a provincial willingness to deal with the injustices of the past, and comfort with the tripartite model: "The device of tripartite negotiations was exactly what the Indians and the federal government wanted to agree to in order to settle the issue of Aboriginal title."¹³⁶

By the 1980s, the growth of Native activism, the rise of the conservation movement and the collapse of markets for forestry commodities were clearly making the foundations of British Columbia's prosperity less solid. However, an old guard could be seen maintaining the rage as late as 1986: "British Columbians have always felt they are on proper legal ground."¹³⁷

This was the last gasp of what Sanders has called the provincial "avoidance strategy" on aboriginal policy. It was fully exposed during the First Ministers' Conferences where the Premiers had to give live television speeches – in 1983 British Columbia Premier WR Bennett, rather than addressing the substantive issues, spoke about his appreciation of Native art. The provinces' initial refusal to include s.35 protection for indigenous peoples as part of a western coalition with Alberta contributed to a widening gulf between Natives and British Columbia.¹³⁸

The SoCred's position was encapsulated by Garde Gardom, John Williams and Brian Smith as spokesmen on Indian Claims through the fractious 1980s.¹³⁹ They

¹³⁵ This was to resolve the claims arising from the expropriations of land made during the 1920s in the wake of the Scott Commission, Tennant, p. 202.

¹³⁶ Tennant, p. 202.

¹³⁷ Garde Gardom (former British Columbia Minister for Intergovernmental Relations), 'Land claims: harmony must begin in Ottawa', *The Vancouver Sun* (September 9, 1986), p. B6.

¹³⁸ Doug Sanders, in Boldt, Long and Little Bear 1988, p. 16.

¹³⁹ Tennant notes the "function" of ambiguity in Gardom's rhetoric and position in a way that recalls my discussion of "dogwhistle politics" in Chapter 5. Tennant, p. 229 at note 7.

ridiculed the land and title claims portraying it all as just money-grubbing and alluded to Neville Chamberlain-style appeasement and the early 1970s terrorism of the separatist Front de libération du Québec (FLQ).¹⁴⁰ Tennant noted Gardom's "deceit" in choosing not to portray the history of treaty-making as one of extinguishment.¹⁴¹ Regularly, the rhetorical strategy was to attack "the federally perpetuated Aboriginal claims swamp."¹⁴² *The Vancouver Sun* columnist Vaughn Palmer outlined the SoCred political aims: under the terms of Confederation the federal government would have to provide all compensation but no matter how the 'Constitutional' argument was resolved, the public would never stand for it anyway. Palmer also observed that the provincial government thought the Courts would probably resolve the issue in their favour.¹⁴³ Gardom's statements became increasingly erratic, even going so far as to accuse the federal government of not being involved, when they had been negotiating with the Nisga'a since 1976.¹⁴⁴

It was not until the election of the Vander Zalm government in 1986 that the SoCreds became more pragmatic; by 1989 figures like Jack Weisgerber and Eric Denhoff were able to reveal fresher thinking within the conservative party. In Weisgerber's speech endorsing the BCTC legislation in 1993, he acknowledged this prior "strategy of denial" at length: "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."¹⁴⁵

This is endorsed by Barman who notes that Vander Zalm was less confrontational (than the previous SoCred government) on economic policy but began

¹⁴⁰ Tennant, p. 230.

¹⁴¹ *ibid*, p. 231.

¹⁴² Gardom.

¹⁴³ Cited in Tennant, pp. 232-233. The view that courts will resolve jurisprudential uncertainty in the favour of government is one which all governments have been reluctant to disavow. I return to this in a discussion of Gurston Dack's 'attrition' thesis in Chapter 9.

¹⁴⁴ Tennant, p. 233.

¹⁴⁵ Jack Weisgerber, British Columbia *Official Report of Debates of The Legislative Assembly* (May 19, 1993), p. 6443.

to be more concerned with social and cultural issues.¹⁴⁶ In March 1987 the Native Affairs Secretariat was set up, and by July 1988 it had become a fully-fledged Ministry for Aboriginal Affairs. Vander Zalm went further in July 1989 creating the Premier's Council on Native Affairs (PCNA) and joining it on visits to Native communities, where he mooted the possibility of negotiations.¹⁴⁷

In July 1990, the PCNA released a progress report and interim recommendations, including a policy for the negotiated resolution of claims which the British Columbia cabinet endorsed on August 8, 1990. In October of that year, Native leaders met with Mulroney and then with the Premier of British Columbia in cabinet, urging the appointment of a trilateral taskforce. On October 3, 1990, BC announced it would join the Nisga'a negotiations that were underway under the comprehensive claims policy process.¹⁴⁸

Subsequently the British Columbia Claims Task Force (hereafter the Task Force) was established in December 1990. A land claims 'implementation group' and Native Claims Registry were then set up as part of the Ministry for Aboriginal Affairs. On January 31, 1991 the Minister Jack Weisgerber released principles that were to guide negotiations: settlements would be fair, consistent, affordable, final and binding; existing property interests should be respected; a framework for natural resources management and conservation would be developed; and comparable levels of service would be ensured for all British Columbians.¹⁴⁹

Through the 1980s non-parliamentary actors like the BC Federation of Labour and the Union of British Columbia Municipalities (UBCM) became strongly aligned with the push for negotiations. Tennant also suggested there was a growing willingness

¹⁴⁶ Barman, p. 328.

¹⁴⁷ Tennant, pp. 236-237.

¹⁴⁸ The Nisga'a negotiations, and the NFA finally made law in April 2000, was conducted wholly outside the treaty process and under the comprehensive claims policy arrangements, but with provincial participation. However, the slightest reverberations in those negotiations echoed loudly throughout the entire British Columbia treaty process. I examine this in Chapter 8.

in the resource sector for negotiations; not just over the pragmatic question either but also the ‘ethical’ dimensions of treaty negotiations. He discusses the conferences held in the late 1980s involving BC Council of Forest Industries, the Fisheries Council of BC and the FNC. Indeed the outgoing SoCred Attorney General Bud Smith was quoted as saying that business in British Columbia was coming around to the negotiating position; holding private meetings with Native leaders; there was “movement in the business community.”¹⁵⁰

Meanwhile the NDP had committed themselves as early as 1986 to negotiating with First Nations in good faith.¹⁵¹ When Harcourt became leader of the NDP he brought in former Chief Minister of the Yukon John Walsh as his chief adviser; Walsh had been instrumental in the latter stages of the Yukon agreement.¹⁵² The NDP was winning every by-election by the late 1980s and Dave Zirnelt’s victory in the Cariboo by-election¹⁵³ indicated that treaty negotiations might not be a vote loser.¹⁵⁴

A provincial election was held in October of 1991. The NDP took 51 seats out of 75 with only 40% of the vote, due to the first past the post electoral system and a splintering of the right. This even though the NDP had attracted a wider base by moderating its socio-economic line; the NDP was now “socialist by legacy alone.”¹⁵⁵ The incoming NDP immediately appeared to challenge two planks of the Bennett era: negligence of treaties and negotiations and fealty to resource industries.¹⁵⁶ Mike Harcourt was eventually to speak of the treaty process as “a long overdue package ...

¹⁴⁹ Ministry of Native Affairs News Release, ‘Province announces principles for land claims negotiations and establishes third-party advisory committee’ (January 31, 1991).

¹⁵⁰ Vaughn Palmer, ‘SoCreds can’t avoid latest land claims’, *The Vancouver Sun* (February 26, 1990), p. A8.

¹⁵¹ Former NDP leader Robert Skelly, cited in Tennant, p. 230.

¹⁵² Tennant, p. 230 at note 4.

¹⁵³ The Cariboo is the heartland of the pastoral industry in British Columbia.

¹⁵⁴ Tennant, p. 237.

¹⁵⁵ In fact the only time the NDP had held government in British Columbia was due to two periods where the conservative parties splintered their vote. Barman, pp. 330-331.

¹⁵⁶ *ibid.*, p. 323.

(there was) a real will to reform in the province.”¹⁵⁷ Extinguishment might not be necessary, but “treaties define ancient rights in modern terms ... bankers need that certainty.”¹⁵⁸

The Task Force report is the foundational text of the treaty process.¹⁵⁹ In the history of government-commissioned reports into indigenous affairs it is unusual in that government quickly endorsed it in its entirety. 19 recommendations frame the negotiations, though as I will show, these are subject to political interference and interpretation. The overall impetus is drawn from the desire for a new relationship: Section 1 is titled ‘A new relationship’ and argued that “a process of negotiation to establish a new relationship will be positive for all ... the status quo has been costly.”¹⁶⁰ The second recommendation, on the scope of negotiations, is also crucial: “any issue at the negotiating table which it views as significant to the new relationship” is to be part of negotiations.

The remaining 17 recommendations deal with the specifics of the negotiations: who shall negotiate, how other parties should be represented, what resources are needed, pre-treaty arrangements and public education.¹⁶¹ It is a comprehensive document to orient a negotiation process .

The foundations for a seismic shift in provincial policy had now been laid. The shifts were matched by an evolution of First Nation organisations, who quickly reconfigured themselves for the purposes of making treaties: “a new organizational structure known as the summit came forward precisely to organize itself for first nations that wished to participate in this process, to be an umbrella organization,

¹⁵⁷ Harcourt, Transcript.

¹⁵⁸ *ibid.*

¹⁵⁹ Task Force Report.

¹⁶⁰ *ibid.*, Recommendation 1.

¹⁶¹ I address each of these recommendations where they relate to the substantive analysis that follows in Chapters 7 and 8.

voluntary for those who wish to associate.”¹⁶² Negotiations between the Province, Canada and the First Nations Summit (FNS) moved swiftly, hardly pausing for a change in provincial government.

In September 1992 the *British Columbia Treaty Commission Agreement* (the Agreement) was initialled during a major public ceremony at the Squamish reserve in north Vancouver. The timing was lost on few observers: “The federal government has strategically scheduled several important treaty signings in the weeks leading up to the Charlottetown referendum.”¹⁶³ At the time it was easily misrepresented: “The 11-page British Columbia Treaty Commission Agreement ... commits the federal and provincial governments to negotiate all land claims by the year 2000.”¹⁶⁴ In fact the Agreement did no such thing. What it did was to translate the Task Force Report into an institutional description of the Treaty Commission. No substantive issues are discussed, in keeping with the principles of the Task Force Report noted above, that parties will decide the matters to be negotiated once at tables.

Though the legislative debate on the subsequent legislation (the British Columbia *Treaty Commission Act* 1993) hinted at several future problems for the treaty process, it was mostly the addition of rhetorical boilerplate onto an already concluded deal. The general British Columbia government strategy was to explain the process vs. substance distinction – that this legislation set up a process the substance of which could only be developed at negotiation tables. The government then responded to more targeted enquiries by underlining the role the Commission would have in coordinating the process and resolving those questions, such as on the readiness of parties to start negotiating. Simultaneously the government chose to celebrate the opportunity they were giving the parliament to debate the issues. Gordon Wilson,

¹⁶² Petter, British Columbia *Official Report of Debates of The Legislative Assembly* (May 25, 1993), p. 6495.

¹⁶³ Stewart Bell, ‘Many natives leaning towards a Yes position’, *The Vancouver Sun* (September 24, 1992), p. A4.

¹⁶⁴ Stephen Hume, ‘Mulroney, Harcourt sign historic treaty with natives’, *The Vancouver Sun* (September 22, 1992), p. B1.

then Leader of the Opposition, the BC Liberals, objected to the *fait accompli* that the bill appeared to have become:

This is a very complex bill that has been with this minister for well over two weeks and that is now before us in committee stage, with invitations already submitted to a reception to hail its passage tomorrow. I find that to be contemptuous of this parliament and the members that are elected to debate the issues in it.¹⁶⁵

The Minister's defence points to a pattern that emerges in modern treaties: "the purpose of the legislation is not simply to give effect to the agreement – the agreement could have stood without the legislation – but to provide an opportunity for the Legislature to debate its provisions, and to give them legislative legal status."¹⁶⁶ Yet none of the amendments put up by Wilson's Liberals were accepted. One amendment to make the reporting process more transparent and in real time provoked an exchange about notions of accountability: "If we were in a position of authority in government in this province, we would have a much more public reporting process for all expenditures of government moneys so that the people could see how their moneys were being spent in all capacities, not just this commission."¹⁶⁷ Wilson's and the Liberals' reservations did not prevent the legislation from getting unanimous approval. In the week during the BCTC legislation debate, the highest circulation newspaper in BC, *The Vancouver Sun*, carried two small news stories and no editorial or opinion space.

As I will show, the NFA debate in both provincial and federal legislatures demonstrated a similar pattern (though media and public attention was firmly focused by then). Lengthy debate revealed major differences of opinion but could not result in sought-after amendments. Of course this is hardly unique to legislative considerations of indigenous rights. The point is that it could not have been otherwise. Legislators are turned into either bureaucratic figures - rubber stamps - or intractable obstacles.

¹⁶⁵ Gordon Wilson, British Columbia *Official Report of Debates of The Legislative Assembly* (May 25, 1993), p. 6478.

¹⁶⁶ Petter, *ibid.*

Nuance is removed from their role entirely, preventing any amendments; principals to the final agreements simply would not allow it. This characteristic of modern treaty-making is poorly understood, little appreciated and easily criticised. I consider the general consequences of this in a lengthy discussion of the ‘democratic problem’ faced by treaty-making in Chapter 9.

Responses of Natives in British Columbia reflected the dual nature of indigenous politics and an abiding realism about government policy claimed to be for their benefit: Saul Terry from the UBCIC described the BCTC legislation as “a fraud,” while Gerald Amos of the Haisla said 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.¹⁶⁸

Legislating a treaty process

By the start of the 1990s the do-nothing attitude of the SoCred government had long since receded, overtaken by the political will to create a new relationship. In 1988 the scholars Frank Cassidy and Norman Dale were able to write that in “the last 30 years the intellectual environment within which the land claims question is discussed by native British Columbians has ... changed significantly.”¹⁶⁹ Writing soon after this Lawrence Berg spoke of “the combined effect of the Sparrow ruling, civil disobedience, concern on the part of business interests that unresolved claims would interfere with resource exploitation, and increasing public sympathy.”¹⁷⁰

¹⁶⁷ Wilson, *ibid.*, p. 6509.

¹⁶⁸ Justine Hunter, ‘Native official attacks commission’, *The Vancouver Sun* (May 27, 1993), p. A3.

¹⁶⁹ Cassidy, F. and Dale, N. 1988. *After Native claims? the implications of comprehensive claims settlements for natural resources in British Columbia*, Oolichan Books ; Halifax, N.S. Institute for Research on Public Policy, Lantzville, B.C., p. 8

¹⁷⁰ Berg, L. 1993. ‘Aboriginal rights and aboriginal people and ideology: the aboriginal land question in British Columbia’. *Indigenous rights in Commonwealth countries*. Christchurch, University of Canterbury, p. 37.

Prime Minister Brian Mulroney's address to Native leaders in April 1991 announced the speeding up of all British Columbia claims with the aim of complete settlement by 2000, somewhat pre-empting the treaty process. He also flagged the establishment of the Royal Commission on Aboriginal Peoples. It was now public knowledge that Quebec's confrontation with the Mohawk at Oka had cost the province \$112M, including \$72M in police overtime.¹⁷¹

On the day that the BCTC Agreement was signed, a lengthy article appeared in *The Vancouver Sun*, in which the coastal Native leaders who had been dominant in the cooperative activities of the First Nations' Summit, spoke in tones that suggested a real shift in the history of the province: "BC will gain almost 90,000 new citizens today ... (it will) mark an end to 130 years of frustration for British Columbian Indian tribes, who will for the first time give their formal consent to joining Canada." George Watts of the Nuu-chah-nulth Tribal Council said, "I'm actually going to be part of this country in a little while." Mathias acknowledged there would be some who refuse to participate, "fearing that bargaining will cost them their identity ... (but) to reach agreement is to make concessions."¹⁷²

Did the treaty process really signal a radical shift in the history of the province's dealings with Native peoples? The attempt to create a new relationship through modern treaties in British Columbia is the subject of the following two chapters.

¹⁷¹ A. Wilson-Smith, 'Fighting back', *Macleans* (May 6, 1991), pp.14-15.

¹⁷² Scott Simpson, 'Joe Mathias possesses the inner strength of a true, traditional leader' *The Vancouver Sun* (September 21, 1992), p. B1-2.

7.

The British Columbia Treaty Process

To achieve certainty, achieve clarity as to who had the legislative competence ... to achieve First Nations' consent, and they clearly thought that the most effective way of accomplishing that was through treaties.¹

The process should improve the relationship among the parties. This relationship is the foundation of treaty negotiations.²

The purpose of this chapter is to introduce the formal institutional features of the treaty process as it quickly developed in British Columbia. Subsequently, the chapter examines the possibility that certain structural elements of treaty-making are used by actors in the process, in ways that may not be conducive to the timely conclusion of negotiations over the creation of new relationships.

The BCTC and the treaty process

Once legislated for in 1993, the BCTC began its work, receiving Statements of Intent from First Nations who wished to participate, and declaring tables 'ready' to begin negotiations. The *Treaty Commission Act* set out the Commission's role and responsibilities: on 'readiness', the BCTC is to "assess the readiness of Her Majesty in right of Canada, Her Majesty in right of British Columbia and one or more first

¹ Richardson, Transcript 1999.

² BCTC, *Annual Report 1995-96*, 'Treaty making is hard work'.

nations to begin negotiations”;³ it must “encourage timely negotiations.”⁴ It must also be the keeper of records and the distributor of funds.⁵

The process of negotiating an agreement has six stages spelt out clearly in the Task Force Report at recommendation 5. Reflecting the principle of voluntary participation, First Nations must initiate the process by submitting a Statement of Intent (SOI). Stage 1 is complete when the SOI is accepted by the BCTC and notice given to the two ‘senior’ governments, BC and Canada. Stage 2 is to demonstrate readiness: that is, that each party has a mandate to participate and that both the major issues to be discussed and the procedures for ratification of agreements as they are reached are indicated. First Nations must also indicate potential overlaps with other indigenous groups and means of resolving them. When these issues are resolved to the Commission’s satisfaction and the parties have made written commitments to each other to negotiate a treaty, Stage 3 can begin.

This stage is both procedural and substantive: it sets out an agenda for negotiations and the structure of the “table” as a whole: for example, what side-tables or sub-committees will be required to discuss specific technical matters. During these discussions, several mechanisms are in place to enable the BCTC to monitor meeting frequency and attendance, public consultation, mandates and overlaps.⁶ This agenda constitutes a Framework Agreement, which is initialled by the negotiators, then ratified by each party according to its ratification protocols indicated at Stage 2, and

³ British Columbia, *Treaty Commission Act* (1993), s.5(3)(a)

⁴ *ibid.*, s.5(3)(d)

⁵ Section 5 entrenches all the duties contemplated by section 7 of the BCTC *Agreement*. A point on readiness: the BCTC was bound in this respect by section 7.1(f)(i)(b) which requires the parties’ negotiators to be equipped with a clear and comprehensive mandate. It is at least arguable that government mandates are neither clear nor comprehensive. Repeatedly, this research uncovered evidence from tables where agreements would then have to be returned to ministries to get final authorisation for what had been agreed. As I explain below the issue of First Nation ‘mandates’ is also a fraught one. Encouraging timeliness also poses certain challenges: how long should an Agreement-in-Principle (AIP) take to conclude, for example? What kinds of encouragement are either possible or appropriate? This is now a live concern for the BCTC as the provincial government backs away from its commitments at high speed.

⁶ BCTC, ‘Policies and procedures’ <http://www.bctreaty.net/files/policies.html> (August 9, 2001).

then formally signed by the three parties. Stage 4 can then begin to pursue an Agreement in Principle (AIP):

This is the agreement that will form the basis of the treaty. It should be the product of a thorough examination of the subjects set out in the Framework Agreement. The Agreement in Principle should contain the essential points of agreement among the parties ... It is anticipated that substantial agreements on specified subject matters, or chapters, may be reached by a table over the course of the negotiations.⁷

For example, if a First Nation wished to include in its final agreement affecting its tax status *vis à vis* governments, that would be indicated in an AIP. This would not mean, however, that a detailed new fiscal relationship would be finalised at this point. The substance is added in Stage 5 – negotiation of a Final Agreement. This is the phase where the actual text of the agreement is worked out – what exactly is to receive constitutional protection under s.35(3). Both stages 4 and 5 require formal ratification as indicated in the ‘readiness’ stage. Finally, Stage 6 is implementation. This involves the transfer of lands and moines, or other measures as the final agreement requires.

Treaty ‘tables’ and table issues

Initial thinking significantly underestimated how many First Nations would participate and hence of resources: “As many as thirty separate negotiations may take place, with many occurring at the same time.”⁸ The provincial government endorsed this number: “It’s our hope and expectation that the commission will be fully operational by the fall of 1993, and that the first treaty negotiations will begin under this process some time after that. Over time, it is likely the commission will handle as many as 20 or perhaps even 30 sets of treaty negotiations.”⁹

⁷ *ibid.*

⁸ Task Force Report.

⁹ Andrew Petter, British Columbia *Official Report of Debates of The Legislative Assembly* (May 19, 1993), pp. 6439.

That 1991 estimate was based on the 22 claims filed in the comprehensive claims policy to that point at 1991. However, after the Commission started taking SOIs in 1994, there were 43 tables quickly formed across the province. The level of subscription indicated optimism among some First Nations about the new model for negotiations after the shift in provincial policy.¹⁰

Another point should be made about the limits of governments' expectations: prior to the treaty process, the federal government had had in place the comprehensive claims policy, under which they would only negotiate one claim at a time.¹¹ At that time they were counting on the 'precedent factor – that First Nations would simply roll themselves into the first few frameworks that were set out – 'template' thinking that was to become anathema in the late 1990s. The treaty process was not expected to operate in a similar fashion, with First Nations queuing patiently and relying heavily on the types of agreement that had already been reached. What is certainly true is that there was a major miscalculation of how First Nations would choose to organise themselves and of how quickly each table would move through the early phases.

Over-subscription had other consequences as well. In its report the Task Force had recommended that treaty-making be funded using, "a system of payments ... which does not penalize First Nations or put them at a disadvantage." However, a decision to adopt an interest-bearing loan scheme was agreed to by the Principals. This was a departure from previous policies – even the comprehensive claims policy loan arrangements did not include interest accruing on debts. Such policy had long been rationalised in terms of indigenous empowerment: "The federal government has advocated the loan mechanism so that Aboriginal leaders will feel more accountable to the prospective beneficiaries of the agreements and less accountable to the government

¹⁰ BCTC, *Annual Report 1994-95*, VIII.

¹¹ Tennant, p. 205.

for the use of funds.”¹² It is a situation that many First Nations are not comfortable with:

The other processes that First Nations are involved in, the First Nations Land Management Act, the self-government negotiations, are funded by Canada. I don’t understand what the difference is with the BC treaty process, that it has to be borrowed funds. I find that objectionable. It also puts an unholy burden on the First Nation to weigh its progress against its loan ... so it’s a conflict situation. Canada and BC can sit there and screw around the process as long as they want, in the comfort that the taxpayers will continue to fund them. First Nations don’t have that choice. They’re at the mercy of the other two in terms of timing.¹³

The actual costs for First Nations are described here by Kim Baird, Chief of the Tsawwassen First Nation, and Bernard Schulmann, treaty analyst with Ts’kw’aylaxw band: “If the process fails, we’ve accumulated substantial debt. We don’t think that’s a very level playing field. There is some pressure to resolve treaties so that debts can be paid off. There’s terms in the loan agreements so that after a certain amount of time you have to start paying interest on this money. That’s why many First Nations haven’t entered into the process.”¹⁴

... the indebtedness issue is worst for those that did not have their treaty office completely separated from their regular office. That was the case with Ts’kw’aylaxw, and still is. Initially, for the purposes of the audit the treaty loans were not recorded at all. The treaty office stuff was done in a separate audit, was done separately, and DIA then at one point said ‘no, we want everything in consolidated records’. So the band in one year went from you know a typical band, moderately solvent, not doing well, but not bankrupt, to being on paper, completely bankrupt. The treaty debts make the band look like it has a net liability not net assets. On that basis the band can’t borrow money for anything. The Band is now unable to go to the bank and convince them that they are a good credit risk, because the band now has this \$1.7 million debt to the federal government on their books.¹⁵

¹² Coolican Report, p. 90.

¹³ Rick Krehbiel (Treaty Analyst, Lheidli T’enneh First Nation), Transcript of Interview (August 26, 2000).

¹⁴ Baird, Transcript.

¹⁵ Schulmann, Transcript.

Negotiation Support Funding, as this system is known, comes both as loans and grants. 80% of all funding is loaned by Canada, 20% is a contribution which Canada and the Province split 60-40. This reflects the proportionate arrangements set out in the British Columbia-Canada Memorandum of Understanding.¹⁶ Funding is intended to enable negotiations to be conducted on the basis of good information: First Nations are able to conduct strategy planning, oral history and traditional resource use studies, lands and resources management and governance training. The TFN for example conducted a major traditional resource use study as part of their treaty preparations; the Lheidli T'enneh band have been constructing a comprehensive genealogy of their people, as well as doing Geographic Information Systems research into land use.

Loans are subject to annual audit reports being submitted to the BCTC, covering all contributions received under the treaty process and accounting for expenditure. This in addition to a comprehensive certified financial statement detailing each First Nation's finances at the end of every fiscal year. Monies are due either when a treaty comes into force, 12 years after loans are first issued, or seven years after the signing of an AIP. The federal Minister can also demand payment if a funding agreement is broken for any reason. Interest accrues only once payment is due.¹⁷

In 1999 the BCTC again raised the question of adequate funding. It noted that \$122.5M had been distributed at that point. By the 2001 Annual report the BCTC had allocated \$186M in funds, of which \$149M was loans¹⁸: "Stage 4 negotiations will require many more resources: in the final stages, one dedicated team of negotiators and experts will probably be needed to conclude each agreement."¹⁹ The original guidelines

¹⁶ Canada, British Columbia. Memorandum of Understanding between Canada and British Columbia Respecting the Sharing of Pre-treaty Costs, Settlement Costs, Implementation Costs and the Costs of Self-Government (June 21, 1993).

¹⁷ BCTC, *Fact sheet: negotiation support funding* (June 1, 2001) <http://www.bctreaty.net/files/funding%20fact%20sheet.pdf> (June 16, 2001).

¹⁸ BCTC, *Annual Report 2001*, p. 5.

¹⁹ BCTC, *Update* (February 1998), 'What is system overload?'

developed by Canada and British Columbia for funding levels included a weighting for those First Nations who were advancing into the latter stages of negotiations, but rapid progress through the early stages meant that the weighting would have skewed funding away from First Nations in Stage 2. As the Commission noted, “The funding levels contemplated by the guidelines would require almost twice the actual funding presently available to the Commission.”²⁰

Recommendation 15 of the Task Force Report directed that there should be dedicated negotiators, that these people should represent the government *in toto*, not individual line ministries, and that they should be in possession of clear negotiating instructions. Bernard Schulmann explained the situation at the Ts’kw’aylaxw table:

Through much of 1996/1997 we were getting 1 day of negotiations every 6 weeks. It’s unrealistic. We’d made some estimates of the number of days realistically it would take to reach a settlement, and the estimates ran from 70 to 200 days of physical face-to-face negotiations. On that basis you can do the math and figure out how many years it was going to take to get a settlement.²¹

The consequence of sporadic meetings times at Ts’kw’aylaxw was to dissipate both the energy and focus. The nuances of issues become opaque once again. Most corrosive to good faith negotiations may be the turnover in personnel on government negotiating teams and the attendant loss of table ‘memory’. At a Gitanyow main table meeting at a Vancouver hotel in 1999, nearly 50 people representing the three parties were introduced at length. Over half of the government representatives were participating for the first time; the introductions alone took up 40 minutes of the first session. As the following description of the Ts’kw’aylaxw experience makes clear, this practice may be endemic:

How can you develop trust with people if they get changed every second day? I worked out at one point, when the Federal government changed their negotiator again – other than the chief

²⁰ *ibid.*

²¹ Schulmann, Transcript.

federal negotiator, everybody else has changed at least several times, and the Chief nearly blew a gasket saying ‘if you guys change another negotiator for any reason then don’t bother showing up any more’ ...

That’s obviously got a lot to do with the nature of bureaucracy. There’s just a lot of turnover in a lot of those jobs. Is there a way that sort of thing can be avoided?

If you negotiated quickly enough, then yes. The thing is a lot of these people are still working within the bureaucracy, they’re still here ... they could at least see this thing through to the end ... your problem is you build up this vocabulary and understanding, and then somebody new shows up and they’re talking with a vocabulary you don’t use ... certain terminology (the governments) use are prejudiced in favour of what they want to see as an outcome ... Like ‘treaty settlement lands’ – that’s terminology the Band felt was leading them in the direction of ‘land selection’ – another term the Band would not use – meaning you’re selecting lands so there’s some land you’re not getting, that means extinguishment and the Band is not interested in that. So we just talk about ‘land’, selection hasn’t happened because we haven’t agreed that there’s any selection we want, we haven’t agreed that. And so great, you convince these people of what the terminology is and then you have someone show up, and then you start all over again.”²²

For the First Nations in the treaty process there are issues of equity and effectiveness with the process structure itself, or at least in the way negotiations are envisaged by government. Before considering the substantive issues on treaty tables, it is necessary to consider in detail several further issues. As will become clear, the paramount concern of government is to maintain or confirm its legal and political jurisdiction, but there are other parties involved in the treaty process, with a variety of agendas. Not least of these are First Nations themselves.

²² *ibid.*

The terms of participation

First Nations' participation

Several questions remain outstanding with regard to the participation of indigenous peoples in the treaty process. The dual pan-Indianism outlined in Chapter 7 has reproduced itself in the process, dividing Natives who are participating from those adamantly opposed.²³ What, for the purposes of the treaty process, is a First Nation?

Tennant has written that at contact there were more than 30 separate indigenous groups in what is now BC, but notes that none of the terms tribe, nation, or people are “completely satisfactory.”²⁴ Some of the divisions I discussed in Chapter 5 – between “rank societies” and “band equalitarian societies” remain visible, but the patterns of early colonial administration focused on local communities, ignoring tribal affiliations and cooperation where they existed.²⁵ In 2002, DIAND records 198 bands under the Indian Act in British Columbia.²⁶

The term First Nation, however, was not in popular use in British Columbia until the 1980s. The Task Force report consolidated the usage and began to develop it using the principle of self-definition, with an emphasis on democratic organisation: “It is essential that the same people who will ratify the treaty support the organization which is negotiating on their behalf. The manner in which First Nations organize and structure themselves for treaty negotiations must be left to them to decide.”²⁷

Recommendation 7 stated that each First Nation should autonomously organise its negotiating structure and arrangements. The BCTC legislation developed this further:

²³ Very few of the interior groups are participating, and those groups that had made some progress by 2001 were overwhelmingly coastal First Nations.

²⁴ Tennant, p. 4.

²⁵ *ibid.* p. 9. See also Fisher, *Contact and conflict* on early administrative rationales, pp. 146-173.

²⁶ DIAND, formerly the DIA. Sourced from DIAND http://esd.inac.gc.ca/fnprofiles/FNProfiles_List.asp?Province1=BC (April 2, 2002).

²⁷ Task Force Report, Recommendation 6.

‘(F)irst nation’ means an aboriginal governing body, however organized and established by aboriginal people within their traditional territory in British Columbia, that has been mandated by its constituents to enter into treaty negotiations on their behalf with Her Majesty.²⁸

Though principles of voluntarism and popular authority are incorporated in this, the conceptual looseness was not lost on Liberal opposition members who raised it at several points in the legislative debate. Wilson first criticised the limitations of the treaty process’s application being based on territorial status rather than identification: “There are a substantial number of aboriginal people, indeed the majority, who live outside of traditional lands. They are non-status, and this bill does nothing for non-status aboriginal people in this province.”²⁹ That the BC Liberals would ever have considered a process based on indigenous self-identification rather than a continued connection to a particular traditional territory, can only be the subject of speculation. The issue, however, is a real one: what possibility is there for the treaty process to renew the relationship on just terms when so many indigenous persons are actively excluded? A related point was raised by Liberal MLA Val Anderson: “How does the minister define and give meaning, in this particular sense, to traditional territory? How that is arrived at seems fundamental to the recognition of the first nations people who are part of the negotiation. It’s a kind of circular discussion.”³⁰

That is to say, a definition of First Nations based in part on a notion of ‘traditional territory’ was then contested by governments.³¹ First Nations were expected to participate by indicating their traditional rights in a process where those rights were not then necessarily and explicitly recognised. The mantra of government has consistently been that treaties “exchange” undefined aboriginal rights for clearly defined s.35 entitlements. Organise around what you assert, the governments appear to

²⁸ British Columbia, *Treaty Commission Act* (1993), s. 1(1).

²⁹ Wilson, *British Columbia Official Report of Debates of The Legislative Assembly* (May 19, 1993), p. 6446.

³⁰ V. Anderson, *ibid.*, (May 25, 1993), p. 6479.

³¹ Indeed, in the *Delgamuuk’w* proceedings in the Supreme Court, not resolved until 1997, British Columbia continued to cast doubt on the existence of unextinguished traditional territory.

say to First Nations, and we will use this process not to recognise those assertions but to extinguish the possibility of any future assertion.

The BCTC endorses this reasoning, noting in its 1998 Annual Report that “There may be as few as 10 or as many as 200 First Nations in BC, depending on the definition used ... The Treaty Commission has now accepted 51 First Nations into the process, organized around 43 negotiating tables. Among these First Nations, 35 are band-based, 13 are tribal groups (of which two are Yukon-based), and three are based on hereditary systems.”³²

That is to say that 70% of the First Nations participating in the treaty process are organised according to the historical administrative units established under the colonial legislation that they now seek to get away from. This obviously raises difficult questions about Native identity and rights. During the federal government’s push for self-government through the late 1980s and early 1990s this criticism was spelt out frequently: “Existing band councils cannot be the prototype for Indian self-government. Band councils were established by the Canadian government as mechanisms for exercising colonial control over Indians and Indian lands. They were designed as an administrative arm of the federal government, not to represent Indian people.”³³ This has been a major criticism of the Native groups outside the treaty process as well. Millie Poplar of the UBCIC argued that only nations (akin to Tennant’s original definition) can negotiate, not Indian Act bands³⁴; problems arise when negotiation teams go back to the people, as they have on the only tables where AIPs have been reached – Sechelt, Sliammon and Nuu-chah-nulth.

The philosophical question is central to this thesis: do the policy approaches considered herein simply reproduce colonial relations, or do they allow for a flourishing of indigenous identities on their own terms, given space, time and resources

³² BCTC, *Annual Report 1998*, ‘What is a first nation?’

³³ Asch, M. 1992. Political self-sufficiency. In *Nation to nation: aboriginal sovereignty and the future of Canada* (J. Bird and D. Engelstad, Eds.) Anansi, Concord, Ont., p. 50.

³⁴ Poplar, Transcript.

to do so? A further question is that of the role the state is playing in unpicking the old and unsatisfactory forms of relating as part of the process of creating ‘new relationships’.

I return to this at length in Chapter 9, focusing on the critique made by Alfred and others of the Canadian situation. It is worth considering various First Nations’ stated rationales for participating. Rick Krehbiel puts the general position: “Basically, there’s only one process to work in. The Band was interested in getting itself built into the twentieth century in Canada, and there’s really no other way to do it at this point. It’s the only game in town.”³⁵ Similarly, Ts’kw’aylaxw were motivated by economic isolation and dependence:

Ts’kw’aylaxw ... entered the process in May 1994, and much of it has to do with the fact that they are sitting on 2000 hectares of rocks. Their land is utterly useless, they are in no position to pick up any other land through any other method, and they want to move on from the past. They also want to get rid of DIA – they’ve been having real problems with the Department of Indian Affairs so they just want to get rid of them.³⁶

Tsawwassen First Nation (TFN) appear keen to take advantage of their proximity to Vancouver.³⁷ Former Chief Sharon Bowcott expressed their desire for political autonomy and economic development in a 1997 interview with *BC Business* magazine: “We are not just another developer. We are an emerging government.”³⁸ TFN’s approach to the treaty process is worth considering in more detail. They undertook a lengthy planning process to determine their mandate: “Our approach was to find out what we’d actually need as far as to meet future needs. And the planning horizon – we had arguments as to whether it should be 20 years to ‘seven generations’,

³⁵ Krehbiel, Transcript.

³⁶ Schulmann, Transcript.

³⁷ Delta, where the TFN is located, is about 20 miles from central Vancouver off the main Seattle-Vancouver highway, and is the location of the main ferry terminal that services Vancouver Island and the provincial capital, Victoria.

³⁸ ‘In your face: when Tsawwassen Indian Chief Sharon Bowcott wants something, she doesn’t let diplomacy get in her way’, *BC Business* (February 1997), pp. 16-17.

which is Aboriginal philosophy. This treaty is supposed to be for all time, but we thought going much past 100 years wouldn't be very accurate at all."³⁹

In legal advice given to the UBCIC in 1996, it was pointed out that the definition of a First Nation used by the BCTC process made no reference to the holders of Aboriginal rights.⁴⁰ In 1999, the BCTC conducted a confidential report for the Principals responding to the new environment created after the *Delgamuuk'w* judgment.⁴¹ *Strengthening First Nations for Treaty Purposes* raised a series of issues that have the potential, "to alter the very political foundations on which the treaty process rests."⁴² Initially the report acknowledges the stresses on the process caused by self-definition noted above: capacity of government (especially the Province) was stretched by a subscription of the policy along different lines to that envisaged; the multiplication of overlaps; and the capacity and cohesion of some First Nations was suspect.⁴³ The latter confirms a comment made by Chief Commissioner Miles Richardson on the need for all parties to act as *de facto* governments: "if you're going to have an actual nation-to-nation negotiation and eventually a treaty that operates on a government to government basis, all 3 parties have to de facto act as governments. The fact is there's a lot of first nations around here that are very used to acting through delegating authority as Indian bands - and I know this is a controversial statement but it's fact - who are in a more reactive mode at the treaty table than actually acting as a government."⁴⁴

Subsequently, the BCTC called for a re-examination of "the structure, organization and defining elements of First Nations for treaty purposes." It goes on to make suggestions about the requisite features of indigenous nationhood. Each First

³⁹ Baird, Transcript.

⁴⁰ Janice Switlo: B.C. Treaty Process - 'trick or treaty? Giving effect to the 'spirit and intent' of treaties - abandoning treaty rights (February 1, 1996), p. 10.

⁴¹ See Chapter 9 for a thorough treatment of the judgment.

⁴² BCTC, Interim report: Strengthening First Nations for treaty purposes (1999), p. 6.

⁴³ *ibid.* p. 3.

⁴⁴ Richardson, Transcript 2000.

Nation should have: “a distinct traditional territory that is neither wholly shared nor disputed.” There should be a clear mandate reflecting internal cohesion and enabling effective consultation; an unambiguous cultural coherence, involving “law, language, social, religious and economic institutions which contribute to a collective sense of identity”; and the First Nation should have the capacity to both conclude a treaty, and to adapt to the new circumstances that reaching it would bring. First Nations should also be of an appropriate size to deal with existing government thresholds for governments to take on jurisdiction.⁴⁵

This definition moves significantly beyond the laissez-faire approach in operation. One reasonable inference is that First Nations will want self-government. At Ts’kw’aylaxw, however, this was not part of the agenda, indeed the band did not feel itself ready for self-government, concentrating its table on land and resource issues and development.

Finally the confidential report contradicts a repeated mantra of the public face of the treaty process, certainly as promoted by the BCTC, that the process should not be a forum for the assertion of legal rights, but a space for dialogue and negotiation of ‘interests’. The public castigation by the BCTC of the conduct of the Gitxsan in 1996, is justified by this view.⁴⁶ Yet it is severely undermined by the following private comment: “ultimately treaties are not only political documents but also legal ones ... each party needs the assurance in treaty negotiations that the other parties have the legal capacity to deliver.”⁴⁷ Reviewing *Delgamuuk’w*, the report raises “the spectre of negotiations being carried out with a First Nation that is not coterminous with the nation that holds title to a particular territory.”⁴⁸

⁴⁵ BCTC, *Interim report*, pp. 4-5.

⁴⁶ BCTC, *Update* (April 1996), ‘Treaty commission releases report on suspension of Gitxsan negotiations’.

⁴⁷ BCTC, *Interim report*, p. 6.

⁴⁸ *ibid.*

This dawning realisation reanimates the divisions among Native people over their approach to the state. The confidential BCTC report appears to offer succour to the radical Native leader Wolverine, a Shuswap elder, who maintained that “(i)t should be hereditary people who are signing these agreements. The tribal council is a civil servant who takes orders from the federal government.”⁴⁹ But a shift in the policy to address these issues would be seismic, though perhaps not as disruptive as a successful legal challenge to a concluded Final Agreement. Whether the treaty process could deal with such a change to the existing process – the possibility that some tables should combine, the complexity of existing interim and stage agreements at tables, and the debts already incurred – is a dizzying prospect for a process already under pressure. The report finally suggests that regional negotiations may allow some of these obstacles to be resolved.⁵⁰

The current situation is not encouraging. What few substantive results were secured at treaty tables were quickly rejected by Native communities. This is the case in the only tables to reach Stage 5 in the treaty process: the Sechelt and Sliammon tables on the Sunshine coast north of Vancouver; and the Nuu-chah-nulth on the west coast of Vancouver Island. There is also some evidence of systematic misrepresentation of indigenous communities’ needs across the entire process, particularly those of Native women.⁵¹ In 1999 the BCTC convened a focus group on indigenous women’s views about the treaty process. While not a comprehensive survey, its conclusions echo in part the findings of the CAR’s research into the perception of reconciliation in aboriginal communities.⁵² Women, the report concluded, played a highly subsidiary role in treaty negotiations, and felt isolated from them:

⁴⁹ Wolverine, quoted in ‘One does not sell the earth upon which the people walk: against the treaty process’ (unsigned and undated pamphlet in UBCIC Vertical file: ‘British Columbia Treaty process’).

⁵⁰ I consider such possibilities in Chapter 8 on the NFA and templates.

⁵¹ Irene James, ‘Women’s concerns about treaty process’, *Native Issues Monthly* (March 1996), pp. 8-9.

⁵² See the qualitative research commissioned by the CAR discussed in Chapter 4.

There are concerns that the process has been imposed on communities, that aboriginal communities have internalized the paternal values of a colonial society and are in danger of perpetuating them through the treaty process. Some participants wonder if the treaty process is just another way of ‘shutting us up’.

The focus group expressed concern that there was a range of issues that were not finding a place in the treaty process discussions. These included issues like child welfare, domestic violence and family health. Underlying these views was the concern that the process was dominated by a male Native policy elite.⁵³ However it has been suggested that some First Nations saw such matters as best addressed within the context of Canadian national standards.⁵⁴

Potential for misrepresentation within indigenous communities was raised briefly during the BCTC Act legislative debate on First Nation self-definition by Gordon Wilson, who suggested “it (was) unlikely that those who control the power base are going to hear an appeal.”⁵⁵

The issue of overlaps between First Nations is a further concern. Recommendation 8 of the Task Force Report made clear that disputes over the extent of traditional territories were things to be resolved by First Nations themselves. As I noted above, the BCTC has mechanisms for monitoring that this is taking place. The BC government has made clear that it “will not support a treaty settlement package where overlaps exist.”⁵⁶ Indeed there is evidence that some overlaps are being resolved. The BCTC points to successful inter-tribal negotiations over the issue of overlaps within the treaty process: the Te’Mexw Treaty Association’s with its Sliammon and

⁵³ BCTC, Focus Group on Aboriginal Women and Treaty Making, *Focus Group Report* (March 9, 1999).

⁵⁴ Discussions at tables have therefore focused on ensuring First Nations have options over future service-delivery arrangements rather than being substantive debates of the actual issues. Personal comment by Rick Krehbiel (January 2, 2002).

⁵⁵ Wilson, British Columbia *Official Report of Debates of The Legislative Assembly* (May 25, 1993), p. 6491.

⁵⁶ Ministry for Aboriginal Affairs, ‘British Columbia’s approach to treaty settlement lands and resources’ (June 12, 1996), s.III.8: ‘Overlaps’ <http://www.aaf.gov.bc.ca/aaf/pubs/context.htm> (December 16, 1999).

Nuu-chah-nulth neighbours reached a protocol agreement in May of 1997, noting in part that “the mountains that are out there now that are the natural boundaries for us.”⁵⁷ A First Nations Summit process was adopted in 1997 involving mediation and arbitration by Elders. Obviously the NFA, conducted outside the treaty process, became law without these being resolved.

I deal with the contentious issue of the NFA and overlaps in Chapter 8, but as I will argue, the NFA is no guide here: the treaty process has produced no final agreements and does not extensively evaluate the claims made by indigenous peoples as to the scope and size of their traditional territories. The potential that agreements could be declared voidable by a court because of territorial infringements or a lack of good faith negotiations, raises immense problems given the participation of self-defined First Nations already, their accumulated debts and interim agreements. Chief Commissioner Richardson’s covering letter apparently notes “the serious process and legal implications of (the current) definition (of First Nation) for treaty negotiators in B.C.” UBCIC Chief Stewart Phillip pointed out that these are “issues that those of us who chose not to be a part of the treaty process raised four or five years ago, yet we were ignored. I think at the end of the day all our concerns have been validated by this document and demonstrated that the entire B.C. treaty process is not viable and is wide open to many legal challenges.”⁵⁸

A thirst for certainty and finality in these negotiations, their government-to-government, even nation-to-nation character, and the legal and technical complexity of issues both addressed and avoided, make confidence about the parties who are participating absolutely essential. As we shall see the courts have chosen not to give general direction about title, but have instructed the parties to negotiate. All of this bodes poorly for a coherent policy solution to the issues confronting British Columbia. The issue of ‘who should treat’ is a question that haunts the treaty process.

⁵⁷ BCTC, *Update* (October 1998), ‘Overlap agreements a must in treaty negotiations’.

⁵⁸ Cited in Terry O’Neill, ‘Feet of clay’, *BC Report* (May 1999).

Mandates and openness

Mandates are “instructions that provincial treaty negotiators receive from the Province of British Columbia. They provide ... general direction and/or a range of realistic policy options.” There are two types: province-wide; and table-specific. Provincial mandates were: that the constitution will apply to all arrangements; no private property will be on the table; compensation will be available for commercial interests that are disrupted; provincial standards on environmental and resource management will be maintained; access to hunting and fishing on a recreational basis will continue; and certainty will be “spelled out.” The form of mandates does not seem to have any space for intercultural exchange borne of a recognition of a complex, shared history; nor interestingly, any sense of the fiduciary responsibility held by the Crown. Specific mandates are to “fit within the framework established by province-wide mandates.”⁵⁹

At the special Summit meeting in October 1999, First Nations heard the provincial government offer some clarity on their mandates in response to serious disaffection in the First Nations Summit toward the treaty process as a whole. Two positions underline the Province’s hypocrisy and inflexibility. First, on shared revenues for resource enterprises off *treaty settlement lands*⁶⁰: “resource revenues are a dubious form of financing for a government ... We think First Nations ought to have a more stable and predictable source of revenues to finance self-government and economic development.” Coming from the provincial government, historically so dependent upon natural resources, this must seem disingenuous to Native peoples.

⁵⁹ Ministry for Aboriginal Affairs, ‘Provincial treaty mandates’ (undated) <http://www.aaf.gov.bc.ca/aaf/treaty/principles.htm> (December 16, 1999). These mandates were developed by the former NDP government. The referendum process will attempt to establish a new set of provincial mandates, see Chapter 9.

⁶⁰ The term used by government to describe the lands which will be under exclusive Native jurisdiction regarding resources.

Moreover, on co-jurisdiction⁶¹, the NDP government felt that “this approach would seriously undermine the provincial government's ability to make resource use decisions that reflect the interests and needs of all residents of our province.”⁶²

The notion of a mandate to reach treaties is fetishised. Yet there are reasons for thinking that mandate theory is flawed. British Columbia obsessively styles its mandates as democratic, and reflective of popular (settler) will, though Canada takes the ‘confidential negotiations’ approach. At the TFN table in 1999, in response to general concern over the lack of knowledge about what was being discussed and the federal government’s thinking, Pauline Tassone of the Federal Treaty Negotiation Office (FTNO) asserted that “we don’t discuss the specifics of mandates.”⁶³ Meanwhile Vicki Huntington, of the local government in the Delta region spoke of the development of a “local government mandate.”⁶⁴

However, even the most transparent mandate formulation simply begs the question: what occurs if one party does not achieve its mandate? Have they failed, rendering any agreement impossible? How can this be reconciled with recommendation 2 of the Task Force report, which includes *any* issues for discussion (consider BC’s mandate on ‘fee simple’ or private property)? Why, for example, is the general mandate to govern not sufficient to enable the conclusion of agreements between government and specific communities? These are questions mandates raise but cannot resolve. The development of mandates reveals the character of the hoped-for new relationship only too well: by setting out the absolute position of a democratic and transparent government, it entrenches a form in which intangible aspects of the encounter between peoples can have no place. There is discord between a rhetorical

⁶¹ The idea that off treaty settlement lands, new institutions with both indigenous and settler involvement, could be set up to co-manage resources.

⁶² Lovick, ‘Address to the First Nations Summit’.

⁶³ Perhaps the federal government feels it can get away with this argument, given the peripheral status BC plays in national electoral politics. The federal Liberal party – a distinct entity to the BC Liberals – has no sitting members in British Columbia.

⁶⁴ Tsawwassen public meeting, Best Western Hotel, Delta, British Columbia (September 21, 1999).

atmosphere of new relationships, and a mandated series of positions. I return to this point on the question of interest-based negotiations below.

Related to this is the question of “openness” of tables. During the NFA negotiations several issues remained confidential; the actual text of the Nisga’a constitution remained so until its ratification. An insistence that there be a transparent approach to the treaty process however, is there from the start:

The commission has an obligation to ensure that each and every British Columbian knows what’s going on, knows what kind of negotiations are going on and knows the details of those negotiations. ... it’s absolutely essential to this process that the claims be laid out on the table and that everyone understand the position that the claimants are bringing to the table ... it’s particularly important that British Columbians know the position being taken to the negotiations by our negotiators – by the province.⁶⁵

The Task Force did not make explicit recommendations about public access to treaty negotiations, preferring to emphasise the need for all parties to engage in public education.⁶⁶ However, most tables have adopted an ‘Openness protocol’.⁶⁷ The advent of web-based technology has seen the mass availability of many treaty documents: framework agreements, AIPs, joint reports and Final Agreements are all made available once initialled unless a special case is made by one of the parties. Similarly, main table and some side-table or sub-committee meetings are open to the public. A vigorous public relations strategy has been adopted; the TFN for example has an agreement with the local cable TV company to televise treaty meetings. The BCTC regularly updates the treaty process and the provincial ministry maintains access to many of the major research reports done into treaties.⁶⁸

⁶⁵ Jack Weisgerber, *British Columbia Official Report of Debates of The Legislative Assembly* (May 19, 1993), p. 6443.

⁶⁶ Task Force Report, Recommendations 17-19.

⁶⁷ See for example Heiltsuk First Nation, *Openness Protocol: Heiltsuk Treaty Negotiations* (June 19, 1996) <http://www.gov.bc.ca/tno/nations/heiltsuk/openness.asp> (April 2, 2002).

⁶⁸ In this respect, the Province has been much more open than the Federal Treaty Negotiation Office. However, the change in government in 2001 saw a severe curtailing of publicly available material, with large numbers of documents removed from the Ministry of Aboriginal Affairs website (reshuffled into Attorney-General and Treaty Negotiations).

It is striking then that a persistent criticism faced by the treaty process is that it is shadowy and unobserved. In fact, as far as policies for the negotiation of indigenous rights can be compared, this process is more open to public scrutiny than most. The criticism only begins to make sense when we consider the following conclusion from the Select Standing Committee report: “People want to learn about the process and the best way to do this is to ensure that people have a meaningful stake in the process.”⁶⁹

What could such a stake be? The policy rhetoric of ‘creating a new relationship’ powerfully co-opts people into thinking they must have a stake, but cannot overcome the non-involvement of the public that the institutional arrangements require. The bifurcated character of treaties is the cause of great resentment amongst those not directly involved. I set these issues out conclusively in Chapter 9.

Third parties

A continually vexed question for the treaty process has been that over the inclusion and involvement of ‘third parties’.⁷⁰ The Task Force Report at Recommendation 10 made clear that the ‘government-to-government’ relationship required that “(n)on-aboriginal interests are to be represented at the table by the provincial and federal governments.” This appeared to build on the understanding of the Coolican Report, that “direct representation of third party interests would be impractical ... negotiations

⁶⁹ British Columbia. Select Standing Committee on Aboriginal Affairs. *First Report – Towards Reconciliation: Nisga’a Agreement-in-Principle and British Columbia Treaty Process*. July 1997 (hereafter Select Standing Committee Report): ‘Issues related to the treaty process - Education and awareness’ <http://www.legis.gov.bc.ca/CMT/36thParl/cmt01/1997/1report/related1.htm> (December 11, 2000).

⁷⁰ This blanket term refers to basically all organised interests in treaties other than the two ‘senior’ governments, the First Nations Summit and the individual First Nations themselves. That is, resource industries, organised labour, environmental groups, local government, and others. In their book *After native claims?*, the scholars Frank Cassidy and Norman Dale describe the term as “unfortunate”, p. 17. However, it is difficult to see why in a ‘government-to-government’ process the term should carry such odium.

would become more complex and lengthier.”⁷¹ However, the Province has pursued another approach.

At the top of a pyramid of consultation is the Treaty Negotiation Advisory Committee (TNAC), a group of 31 resource industry, labour, social and environmental organisations, which work with Canada and BC to ‘identify’ the interests on which province-wide negotiating mandates are based. Regional Advisory Committees (RAC) are similar bodies of representatives from key economic and social sectors that support clusters of negotiations in particular regions and localities. There are 18 RACs or Local Advisory Committees in the province.⁷² A special role has been given to municipalities – because of their delegated authority for local government matters – through the creation of Treaty Advisory Committees (TACs). Representing all the municipalities in 17 regions of British Columbia. A single member of each TAC sits on the province’s negotiating team as an ex-officio member, which reflects the particular status of local government. In addition, there are access arrangements for the public that I noted above. In this section I consider at length the involvement of local government, which is I think, important to, and illustrative of the character of the treaty process. I then return to a general consideration of the role and behaviour of third parties, and the attitude of First Nations toward them.

Local government⁷³, both through TACs and particularly through the peak-body, the Union of BC Municipalities (UBCM) has seen the treaty process as of extreme importance. At the UBCM annual conference in 1992, held just days after the signing of the BCTC Agreement, then UBCM President Joyce Harder got a standing ovation for criticising the provincial government over the BCTC deal: “Instead of municipal government being officially recognised as the third-level of government in

⁷¹ Coolican Report, p. 62.

⁷² Ministry for Aboriginal Affairs, ‘Advisory Committees’ <http://www.aaf.gov.bc.ca/aaf/treaty/process/comitees.htm#RACs> (December 16, 2000).

⁷³ Similar to local government in Australia, it exists at the pleasure of the province.

Canada, our aboriginal people have apparently gained this recognition.”⁷⁴ A UBCM document released at the time noted the joint stewardship agreements with the Xax’lip, Cowichan and Haida that were reached prior to the treaty process, and expressed concern that these new mechanisms allow indigenous peoples to assume “new powers and roles ... It is hard to imagine that these agreements will be rolled back.”⁷⁵ The UBCM agenda right from the start, before the Commissioners had been employed or the Commission taken a single SOI, was that “municipalities ... need to be directly involved ... What are we going to look like when this thing is finished?”⁷⁶ According to UBCM Senior Policy Analyst Alison McNeil, local government “most definitely” mobilised its resources in response to the potential political impacts of the treaty process.⁷⁷

By 1993, the UBCM had concluded a Memorandum of Understanding (MOU) with the Province which set out the special role local government would play in negotiations.⁷⁸ Local government representatives would be treated as “respected advisors of provincial negotiating teams” on transitional cooperation; public information; and British Columbia budget allocations. Section 4.c of the MOU establishes the TAC hierarchy: after notification of an SOI, all local governments affected by the SOI send one representative; then one TAC member will become the TAC liaison to the provincial negotiating team. Subsequent provincial policy

⁷⁴ Jeff Lee, ‘BC government accused of keeping cities in dark’, *The Vancouver Sun* (September 24, 1992) p. B6.

⁷⁵ UBCM, Local government and aboriginal treaty negotiations (September 1992), p. 7.

⁷⁶ Jeff Lee, ‘Municipalities want to be part of talks’, *The Vancouver Sun* (September 23, 1992), p. B1.

⁷⁷ Alison McNeil, Senior Policy Analyst UBCM, Transcript of Interview (August 17, 2000). A 1991 UBCM document, *Local government and aboriginal treaty negotiations*, recommended the creation of a UBCM Treaty Office through the imposition of a surcharge of up to 20% on local government annual membership dues.

⁷⁸ Ministry of Aboriginal Affairs, Province of British Columbia: *Union of British Columbia Municipalities Memorandum of Understanding* (March 22, 1993).

documents indicate some internalisation of these principles, particularly the difference between local governments and other third parties.⁷⁹

However, the UBCM had developed policy documents long before the MOU was reached, indeed just months after the Task Force handed down its final report. That document ‘Local government and aboriginal affairs’ is both a survey of other approaches and a summation of local government interests. It acknowledged that the Coolican report rejected as “impractical” third-party involvement, because it made negotiations even lengthier and more complex.⁸⁰ However, it argued that although “Native groups have made clear their view that third-party interests should not be at the table ... experience in other jurisdictions has shown that participation by local governments in land claims negotiations can be critical to the success of the settlement.”⁸¹ The evidence offered for this is the MOU between the Association of Yukon Communities and the Yukon, as part of the negotiations which finally led to *The Council of Yukon Indians Umbrella Final Agreement* in 1993. Later reference to this MOU in the same document appears to contradict this conclusion, noting that the “conflict between confidentiality and the desire to inform the community (was) very often a problem.”⁸²

The recurring rationale though is that local government involvement will make treaties more likely to actually be effective once implemented. David Didluck, Executive Director of the Lower Mainland TAC explains why this is so: “a sustainable long-lasting treaty in an urban setting will likely have to involve the day-to-day issues like garbage delivery, water, sewers, all the things that local governments do. So to make a lasting treaty you need to involve us, because when you guys go away, it will

⁷⁹ For example, Ministry of Aboriginal Affairs, ‘Treaty negotiations and third-party interests’ (undated), which refers to those that have a “direct stake” in the negotiations of treaties or interim measures in an area.

⁸⁰ UBCM, *Local government and aboriginal affairs* (September 1991).

⁸¹ *ibid.* p. ii.

⁸² *ibid.* p. 9.

be the local communities that have to deal with the implications of what's been negotiated.”⁸³

The 1994 UBCM document *Local government and aboriginal treaty negotiations: defining the municipal interest* is the primary document for local government involvement. Initially, it seeks the “completion of the process of addressing outstanding First Nation claims.”⁸⁴ Agreements must also be affordable; community stability is to be maintained; the Charter of Rights and Freedoms must apply; provincial and federal standards must apply on treaty settlement lands within or adjacent to local government boundaries; fee simple land is not to be included in discussions; adequate compensation must be paid for all disruption; agreements must provide clarity of jurisdiction over resources; there must be good communication and information mechanisms during the process; and formal dispute resolution procedures must be established. Largely these “general interests”⁸⁵ are the same as the positions developed by the Province.

Taking the specific case of the Lower Mainland TAC (LMTAC), these interests become highly developed. The ‘First Principles’ adopted by LMTAC reveal the extent of articulation. One of the most notable may be the styling of local government not as a third party but as “an independent, responsible and accountable order of government” – an excerpt from the *Local Government Act* [RSBC 1996] Part 1, 1.⁸⁶ Amongst the other ‘interests’ held by the Lower Mainland local governments, are that agreements should mainly comprise cash (Recommendation 10); that Crown lands in possession of local governments should not be included in settlements (Recommendation 11); and that local government regulatory and taxation authority

⁸³ Didluck, Transcript.

⁸⁴ UBCM, *Local government and aboriginal treaty negotiations: defining the municipal interest* (September 1994), p. 10.

⁸⁵ I deal with the issue of ‘interests’ vs. ‘positions’ in the next section.

⁸⁶ Interestingly, the next phrase “within its jurisdiction” is not included.

must persist on *treaty settlement lands* (Recommendation 12).⁸⁷ The ‘Principles’ document called for constitutional protection of local government.⁸⁸

A tension exists between treaties not infringing local government ‘rights’ (indeed, attempting to expand them), and the recognition of an indigenous order of jurisdiction. Local government as a sector is keenly aware that something has to give. Not surprisingly, much of what constitutes the ‘principles’ is pure politics. McNeil saw in the Lower Mainland context “areas of fundamental disagreement” between First Nations and LMTAC.⁸⁹ Didluck addressed this straightforwardly:

There was certainly a strong political motivation behind why those principles were developed ... I would be the first to agree with you that some of them are just not realistic. Frankly some of them could be seen as offensive, certainly from First Nations’ perspectives. But I think our members realise that and they have been going through a fair amount of discussion in the last few months saying you know we need to look at these more realistically. Saying, ‘are these lines in the sand, absolute bottom lines?’ I think they felt that, there’s negotiations going on here so their strategy is, we put out our hard-line stuff first. You don’t put out the soft stuff.⁹⁰

Here, and in later policy documentation, LMTAC and the UBCM reproduces at a lower level the tension extant between the functional and the formal aspects of treaties that the Province falls into: for example, on one hand UBCM sees treaties in the most *realpolitik* terms, yet it trumpets that “(r)ather than political polarization, there must be political stability. Rather than social disintegration there must be social harmony.”⁹¹ The juxtaposition of hard-headed realism and moralising about community is a curious, and I would argue, incoherent combination. Two comments from local government figures appear to endorse this. Clint Hames, Chair of Fraser Valley TAC has noted that, “We’ve all grown up together and played soccer together,

⁸⁷ LMTAC, *Considerations: A guide for Lower Mainland Area Local Government Interests in Treaty Negotiations* (July 2000), p. 10
<http://www.lmtac.com/publications/papers/LMTAC%20Considerations%20for%20Local%20Govts%20-%20July%202000.pdf> (April 2, 2002).

⁸⁸ *ibid.* p. 8.

⁸⁹ McNeil, Transcript.

⁹⁰ Didluck, Transcript.

so it's kind of frustrating to be sitting across the table from your band neighbours. Maybe at the end of the day, we'll all go away and go back to being a community again."⁹² McNeil, however, stopped short of seeing the two in fundamental opposition:

There's a lot of empathy and when it comes to relations with First Nations people, you have nothing but enthusiasm among local government folks. Treaties are kind of a different business because everybody's got to define what they want and work out an arrangement, and land's going to change hands and money's going to change hands, and that's serious business. But when it comes to living with neighbours local governments couldn't be any more eager to forge and build those relationships.⁹³

Treaties are being conceived of as high-stakes *moments* that threaten existing, stable communities. The whole stance taken by local government is that it is fundamental to democratic life in British Columbia. This is undeniable and appropriate. What the UBCM does ably reveal however, is the further obstacles this places for First Nations: it is not surprising that some Native groups look at adhesions or litigation, because although unfavourable, the terms are set and clear, and they can thereby avoid having to deal with social forces absent from the earlier period. I note that of the five tables in the LMTAC region, only two – that of the TFN and the Katzie Indian Band⁹⁴ – are showing any signs of life whatsoever. The Tsleil-Waututh signed a framework agreement in 1997 but have not progressed; the Musqueam, still technically in Stage 2 have in fact disbanded their treaty office; while the last agreement at the Squamish table was an openness protocol signed in 1995. This is not local governments' doing, but as an indication of what parties involved in the process feel can be achieved, it would seem local government is considerably more enthusiastic than First Nations. The negotiation process has already provided the reward of municipal representation while exposing First Nations to claims of 'intransigence' and belligerence for not progressing.

⁹¹ UBCM: Local government and aboriginal affairs, pp. 1-2.

⁹² BCTC, *Update* (February 1998), 'Local governments consulted on treaty negotiations'.

⁹³ McNeil, Transcript.

⁹⁴ The Katzie Indian Band reached a framework agreement in March 2001.

Local government policy documents reveal that their interests are in negotiations that cost them as little as possible, that neither diminish revenues nor increase costs; that do not undermine or alter standards; and that promote further growth and infrastructure that is of economic benefit to all. They are to use their ‘special’ status and position at the table to lobby for these outcomes. Could such principles help to reconstitute the relationship in a fair and respectful way?

A history in which Native nations signed treaties with the Crown now appears remote: the inclusion of the specific rationality of local government is a significant factor. Some First Nations have consistently resented the involvement of local government specifically and third parties more generally. The Gitanyow at a meeting in 1999 articulated a “one window” concept: one channel for interaction between Gitanyow and all settler institutions.⁹⁵ The metaphor evokes the history of treaties made between the ‘elders’ of each side: a single moment of recognition and exchange. Clearly a highly diverse, democratic polity like contemporary BC will not abide such arrangements. However, the dual responsibility of government for Natives on one hand, and all Canadians or British Columbians on the other is the source of growing anger elsewhere:

We asked Ron Irwin, when he was the minister of Indian Affairs, how he could negotiate in the best interests of aboriginal people and at the same provide representation to other Canadians? He said: ‘Don't worry, I just take my hats off.’ ... On the law, we would prefer to go to court any time on these issues than trust either the federal or provincial governments to deal with us fairly.⁹⁶

Eidsvik, of the BC Fisheries Survival Coalition, seems to have a well-founded fear: FTNO Chief negotiator Eric Denhoff bemoaned the increasing complexity caused by the addition of local governments to provincial negotiation teams and the

⁹⁵ Gitanyow negotiator, Gitanyow Main Table meeting, Wedgwood Hotel, Vancouver (September 17, 1999).

⁹⁶ Phil Eidsvik, testimony reported in Canada, *Proceedings of the Standing Senate Committee on Aboriginal Peoples* (March 21, 2000) http://www.parl.gc.ca/36/2/parlbus/commbus/senate/com-e/abor-e/06eva-e.htm?Language=E&Parl=36&Ses=2&comm_id=1 (April 2, 2002).

growing sophistication of ‘fourth-party’ demands like resources groups.⁹⁷ The special pleading goes to extraordinary lengths. At a public meeting to discuss the Tsawwassen negotiations, one apparently well-known local saw the particular rights of “pioneer farmers and families.”⁹⁸ A common strand is to adopt the position of minority:

There is a new group trying to peer through that window. For them, not only are the images unclear, but they are becoming increasingly indiscernible. The group to which I refer is the other stakeholders, conveniently designated as third parties, people immersed in the land claims issue ... we view the federal government as systematically abandoning the rights of rural, farming and ranching people in the government's efforts to achieve a politically correct solution to an extremely complex problem ... What has the government done to protect our minority rights?⁹⁹

In the same way that every level of the community is expected to become historically and emotionally enlightened before indigenous recognition can be considered in Australia, popular concerns about treaties now force the treaty process to become expressive of a range of grievances that were not part of the original transactions between settlers and indigenous peoples in Canada.

Interest-based negotiations

Interests are underlying principles or fundamental goals. If the parties do not understand each other's underlying interests, then the chances of reaching fair agreements are substantially reduced.¹⁰⁰

⁹⁷ Eric Denhoff, comments included in the documentary film *Making treaties in B.C.* (Vancouver: Motion Visual Productions, 1998).

⁹⁸ Doug Massey, Oral contribution to Tsawwassen public meeting (September 21, 1999).

⁹⁹ Bruce Nelson (Pinantan-Pemberton Stock Association Land Claim Committee), testimony reported in Canada, *Proceedings of the Standing Senate Committee on Aboriginal Peoples* (March 21, 2000) http://www.parl.gc.ca/36/2/parlbus/commbus/senate/com-e/abor-e/06eva-e.htm?Language=E&Parl=36&Ses=2&comm_id=1 (April 2, 2002).

¹⁰⁰ BCTC, *Annual Report 1995-96*, ‘Treaty making is hard work’.

How are these disparate agendas, tactics and rationales to be co-ordinated, fostering the fabled new relationship in British Columbia? The answer is, or was supposed to be, through *interest-based negotiations*. In the forum ‘Speaking Truth to Power’, philosopher Trudy Govier discussed the ethics of negotiation, and particularly the work of the Harvard Negotiation Project.¹⁰¹ An ‘idealistic’ model in Govier’s account, three issues are considered paramount: respect (for the other party); representativeness (of one’s own); and capacity to make binding commitments. Each of these are supposed to be addressed in the treaty process during the readiness phase – Stage 2. Subsequently, parties are to come together with ‘interests’, not positions. Didluck explained the distinction:

Essentially there’s two models of negotiation, there’s interest-based, and there’s the typical competitive labour-union kind of model. And we came into the process saying ‘no, we don’t want to compete, we don’t want to hide our cards and only put the ones out on the table that we think we should’.¹⁰²

As he notes elsewhere, this was an approach “championed” by the senior governments.¹⁰³ Negotiations would be conducted by each party leaving its mandates aside, and “through an interest-based form of questioning, to determine interests and brainstorm ways to start implementing what those shared interests are. What happened was that we used that language, but all the parties came to the table then with what they knew best, which was the traditional process of getting a mandate, the you don’t put out all your mandate cards on the table first, you withhold some of them ... and that becomes a very adversarial kind of a process.”¹⁰⁴ It is a view endorsed by Schulmann, who saw “(a) total lack of understanding of what was meant by

¹⁰¹ Govier, T. Trust, acknowledgment and the ethics of negotiation (March, 2001) <http://www.lcc.gc.ca/en/ress/part/200103/govier.html> (April 2, 2002).

¹⁰² Didluck, Transcript.

¹⁰³ David Didluck, *The British Columbia treaty negotiation process considered* (October 1, 2000), pp. 1-2.

¹⁰⁴ Didluck, Transcript.

interest-based negotiations.”¹⁰⁵ Rick Krehbiel of the Lheidli T’enneh Band goes considerably further on the subject:

The first big lie! ... if I ever get involved in litigating this process, the first issue I will raise on the bad faith issue is the myth of interest-based negotiations. There’s never been interest-based negotiations, there’s no room for interest-based negotiations. First Nations were lied to by Canada and BC ... A number of First Nations had confidence in the interest-based approach. Everybody knows that it works, it’s the way business is done in the 20th century, but a lot of us were sceptical that it would work as well. The only time First Nations have got anything in the past was through confrontation or court action, and even that has been only partly useful. You can win all the court cases in the world and everybody just ignores them. You’re not much better off at the end of the day anyhow. Interest-based negotiations should have been the way these negotiations worked and had the government been committed, as they said they were, and lied about it, then we might have been further along.¹⁰⁶

Without respect – Govier’s first principle – ‘interest based negotiations’ become a new vocabulary of deceit. Indeed Didluck has actively questioned the viability of the approach, particularly “whether interest-based processes are an effective model for rights-based discussions, or more appropriate for land and cash negotiations.”¹⁰⁷ He calls for an effective procedure that is limited to certain resolvable discussions. I return to the suggestions he makes in the section ‘After *Delgamuuk’w*’ in Chapter 9.

Most of this discussion of interests presumes two equal, undifferentiated parties.¹⁰⁸ The reality is a palpable imbalance of power and resources between First Nations and governments; a situation only partly redressed by the obligation held by government to see the relationship as a fiduciary one. The courts, as I also discuss in Chapter 9, have noted that this obliges government to negotiate in good faith. Whatever process or system is in place, it will be subject to the behaviour of the parties to it. Schulmann pointed this out in regard to the Ts’kw’aylaxw draft chapter on ‘dispute resolution’, which BC insisted needed to be an elaborate affair: “If you have a

¹⁰⁵ Schulmann, Transcript.

¹⁰⁶ Krehbiel, Transcript.

¹⁰⁷ Didluck, *The British Columbia treaty negotiation process considered*, p. 3.

dispute you either resolve it because you agree to resolve it, or you can go through whatever process you want, I can make life hell for you and make sure it never works.”¹⁰⁹ Richardson reflected on this point in a way that questions governments’ willingness:

I think that the confrontations that we’re seeing escalating around the province are really ... a function of the political will to negotiate. On the First Nation side of the table, and we’ve heard this repeated and repeated and repeated, in the media and at the treaty tables for the past few months, is that First Nations are not satisfied with the Crown’s willingness to negotiate ... they view generally that the principles by which the three parties originally entered into this BC treaty process are not being lived up to by Canada and British Columbia.¹¹⁰

The patterns of relating at treaty tables during the period of negotiations are frequently cause for concern that good new relationships can be forged. This is even before a consideration of the substantive issues being discussed: the basic features of future relationships between indigenous and settler peoples.

¹⁰⁸ See Govier.

¹⁰⁹ Schulmann, Transcript.

¹¹⁰ Richardson, Transcript 2000.

8.

Challenges for treaty-making in British Columbia

The breadth of discussions at treaty tables is considerable; this was always the intention, as the Task Force made clear: parties may include “any issue at the negotiating table which it views as significant to the new relationship.”¹ This echoed the recommendation of the Coolican report made seven years earlier: “Scope ... should include all issues that will help in the achievement of the objectives of the claims policy. Building a new relationship between aboriginal and non-aboriginal societies in Canada will require negotiation of more matters than either cash settlements or exchanges of land.”²

In this Chapter I restrict my analysis for reasons of space only: difficult questions arising out of wildlife, forestry and fisheries and other resource management issues, taxation, and cultural heritage for example are not treated. Land, interim measures, compensation and self-government are discussed: in each, the desire to secure territory for existing patterns of economic development bears heavily on the character of any possible ‘new relationship’. Then I consider what example the NFA might play in resolving these challenges and the general issue of ‘templates’ for treaty-making. I conclude the chapter with a study of the most profound obstacle to the negotiation of new relationships: the obsession with ‘certainty’.

Land quantum

Wherever indigenous peoples are in conflict with settler states, land is a central issue.³ In the treaty process, the negotiations over the amount of land and cash to comprise

¹ Task Force Report, Section 2: Scope of negotiations (Recommendation 2).

² Coolican Report, p. 53.

³ The persistence of customary tenures may be the most widely supported feature of any generalised definition of indigenous peoples.

treaty settlements have consistently been the most contentious at treaty tables. As I showed in Chapter 5, it was the movement for land claims that forced the provincial hand during the late 1980s, and resulted in the comprehensive negotiations under the treaty process. The federal government remains opaque as to its approach to lands and cash, while the Province has been assiduous in setting out what it considers to be the provincial interest. A December 1996 document sets out the general approach:

Each First Nation involved will file a statement of intent ... this statement includes a map or description indicating the territory in which they historically lived and carried out traditional activities. The traditional territory is not the basis the province uses to calculate final treaty settlement land ... When all treaties have been signed, the amount of land held by First Nations ... will be about five percent of British Columbia, a figure proportionate to their population ... Private property – land held in fee simple – is not on the table ... Treaty negotiations will exchange these relatively undefined aboriginal rights with clearly-defined rights to land and resources in a manner that fits with contemporary realities of economics, law and property rights in British Columbia (s.II) ... “First Nations’ ownership will not be absolute or unconditional. Treaties will define the areas of specific First Nation jurisdiction on these lands, and will ensure that areas of provincial interest – such as environmental management (assessment and protection) – will be subject to provincial standards. The Province will not negotiate sovereignty.” (s.III.1) ... A per capita approach is not appropriate to British Columbia because of a “due to the very wide range of market values and natural resource values in different areas of the Province. Treaties must take into account the difference in land values in different locations.” (s.III.2) ... Overall, the total land held by First Nations -- including the area of present Indian Reserve lands -- will be less than five percent of the Province’s land base ... “(i)f treaties are to be meaningful in a contemporary world, they cannot be based solely on evidence from the past. The current and future interests of all parties will determine the final land area of each treaty.”⁴

For all of these statements of intention, First Nations struggle to work out what it actually means on their tables. I illustrate this with commentary from Schulmann on the Ts’kw’aylaxw negotiations:

⁴ Ministry for Aboriginal Affairs, ‘British Columbia’s approach to treaty settlement lands and resources’.

We were going through the draft chapters as quickly as possible to get the government to put their idea of land on the table. They would not put their idea of land on the table until you had done some work, so it looked like you were progressing. And the Band wanted to know from the start, ‘ok, what are you coming to the table with, how much land, what do you think a settlement’s going to look like?’ They wanted to know that in 1995, in 1996. They wanted to know that the whole way along, so they could assess whether there was any point in negotiating. They’re not fools. And they realised that the only way you can get it is if you pretend to be negotiating all these wonderful great chapters which are just identical – well, not identical, but very similar – to the Nisga’a agreement, only with the word Nisga’a crossed out and the word Ts’kw’aylaxw written in. Which is what I did. So I said ‘okay, draft one of the chapter, I’ll take that on’. I took the Nisga’a agreement, crossed out Nisga’a put in Ts’kw’aylaxw, and said ‘ok let’s talk’.

So a lot of the things you’ve got draft chapters on are just peripheral issues really?

The issue for the Band is regaining control of the land, regaining control over probably about 30-45,000 hectares of land. If they can get that then most of the other stuff can probably be lived with. If they can’t get that scale of land it doesn’t matter what the rest of it says, it’s irrelevant.⁵

The First Nations Summit has vigorously put its own central positions: “we will not allow British Columbia to use the treaty process to acquire jurisdiction where none now exists.”⁶ Most people I spoke to had no desire to remove people from their homes, but as Gerald Wesley of the Tsimshian Nation said, nothing should be ruled out in particular negotiations: “fee simple (is) not a major issue, but we need to keep looking at it.”⁷ Miles Richardson characterises the general positions as follows: “it’s clear that each of the parties comes to the table with a position. It’s only when that position becomes a pre-condition, and it’s ‘take it or leave it’ that it becomes a problem ... Let’s just be clear about it: British Columbia has made public statements and talked to their constituents about a five per-cent limit on the lands that are available. First Nations have never accepted that. But First Nations certainly know the position that

⁵ Schulmann, Transcript.

⁶ First Nations Summit, Treaty-making: the First Nations Summit perspective, p. 2

⁷ Making treaties in B.C.

British Columbia is coming with. On the other hand First Nations say they are not giving up an inch of their territories, so you know, it goes both ways.”⁸

The Liberal MLAs who wrote the Select Standing Committee Minority Report on the NFA were critical of the five per-cent argument, noting that the Indian Register records an indigenous population of only three per-cent of the provincial total. Moreover, the principle of a land per capita ratio is criticised because the rest of the province is not evenly distributed across the settler population, with private land ownership accounting for approximately five per-cent of the provincial landmass only.⁹ Even were we to overlook the anthropological naivety, proportionate land policy is not workable. The very idea of such proportional redistribution is ethically unsound: it rewards settlers for populating to the extent they have, penalising First Nations for being overwhelmed; it also encourages sharp dealings such as the dispute between the Nisga’a and the Gitksan; and it has nothing to do with the legal and historical facts of aboriginal title or the current needs of aboriginal communities. It entrenches a bizarre pseudo-egalitarian ideology – Natives are getting land proportional to their number – an unbalanced equation that promotes antagonism by not dealing with the reality of indigenous cultural difference and the clashes that arise and must be dealt with. Moreover, exact amounts will vary according to the location, value of the lands and the resources on it, but also “local, provincial, public and private needs.”¹⁰ It may be argued, however, that the issue is less to do with amounts of land *per se*, than with the status of that land post-settlement. I return to this question in my discussion below on ‘certainty’.

Regardless, treaty process First Nations have been underwhelmed by British Columbia and Canada’s offers on treaty settlements so far. Of seven major offers, four were rejected outright by the First Nation negotiating teams, and three were rejected

⁸ Richardson, Transcript 1999.

⁹ Select Standing Committee, ‘Appendix II: Minority report’.

¹⁰ Ministry for Aboriginal Affairs, ‘Provincial approach to treaty negotiation of land and resources’ (October 1995).

when the First Nation negotiators took the deals back to their communities. For example, the offer made to the Snuneymuxw was for 1862 ha in addition to existing reserves of 266 ha; the Snuneymuxw treaty proposal sought 18750 ha.¹¹ Many First Nations now openly suspect that there is a formulaic approach to the offers they are receiving. The Gitanyow were highly critical of the offer made to them, considering it “a fixed model that ignores their perspective on an appropriate treaty partnership throughout their traditional territories.”¹² Similarly the TFN has been quite sceptical of the way offers appear to have been constructed:

A per capita formula is unacceptable as a treaty settlement. Our assessment of recent offers, based on the land value and population of these communities, suggests strongly that a combined land and cash per capita value of between \$65,000 and \$70,000 is being used. How were these offers arrived at? If they were not based on \$65-\$70,000 per Indian head, then what was the basis for this calculation?¹³

The experience of the Lheidli T’enneh Band near Prince George is quite revealing: negotiating since 1993, the band had by January 1998 reached a stage of talks where an indication of the government package was given. This ‘scoping session’ revealed to the band the inadequacy of the parameters then set by government, in terms of the Lheidli T’enneh’s own perceptions of a needs-based settlement. Over the next two years, the parties seemed to be working toward a settlement more likely to be acceptable to the Lheidli T’enneh, and that factored in the post-*Delgamuuk’w* environment. In the band’s publication of early 2000, ‘Toward a treaty’, there is some optimism that this would eventuate.¹⁴

When the offer arrived in August 2000, it was massively disappointing to the band. What the governments proposed was a total land quantum of 2903 ha, of which 2662 ha would be treaty settlement lands, including the 684 ha that was currently the

¹¹ BCTC, *Update* (February 2000), ‘Treaty proposals reveal wide gap between parties at Nanaimo’.

¹² BCTC, *Update* (February 2000), ‘Treaty offer disappoints Gitanyow’.

¹³ Tsawwassen First Nation, ‘Treaty Negotiation Proposal’, a document tabled at the Tsawwassen First Nation, Canada, and British Columbia Main Table Meeting, Tsawwassen First Nation Community Hall (July 28, 2000) <http://www.tsawwassen-fn.org/tre/comp2/toc.html> (April 2, 2002).

band's reserves. Part of the package would be 240 ha at an agricultural station outside Prince George that had been unused for some time, and a Treaty Related Measure (see next section) of \$70,000 for an economic development potential study into how best to use that land. The cash component was to be \$7.5M, and underlying the agreement would be the 'standard certainty clause'.¹⁵ Chief Barry Seymour was fairly candid about his views on this settlement offer:

It will come as no surprise that we find the quantity and quality of the land offered to be inadequate. Specifically ... Had we entered into treaty 100 years ago, we would have been entitled to approximately 14,000 ha of land, all of which would have been reserved for our use and benefit. While we appreciate that history has moved forward, and that processes differ, we are struck by the obvious disparities with other First Nations in Canada and the local area ... we continue to have serious concerns about the lack of an interest-based approach to negotiating certain aspects of these issues ... We continue to take very seriously the unwillingness of Canada and British Columbia to provide their negotiators with mandates that reflect the Rule of Law and our common interests ... The proposed scope and area of our involvement off-Treaty Settlement Land still smacks of a "bigger reserve" approach to treaty making. As expected, this Offer does not provide for the economic, environmental and social sustainability of Lheidli T'enneh.¹⁶

Lheidli T'enneh felt they had been deceived since 1998 into thinking that they would get a "beefed up offer." Analyst Rick Krehbiel offered the view that the government approach to settlement negotiations lacked both integrity and consistency:

Well we were trying to take the high road and that was a slap in the face. The Minister lied, I mean the Minister, Lovick came to Prince George, met with the Chief and said "we're going to beef up an offer for you, we hope you can deal with that". He didn't beef up the offer. He lied about that. They gave us the same range that they had scoped out for us in January 1998 before *Delgamuuk'w* was factored into their approach, so Lovick lied ... One of the real problems with the process is that the land and cash stuff is never negotiated. It comes out of a cost-sharing formula, it's created by shadowy people who live in the basement in Victoria and Ottawa. It's

¹⁴ Lheidli T'enneh Band, *Toward a treaty* (March 31, 2000).

¹⁵ Ministry for Aboriginal Affairs, 'Canada and British Columbia: land and cash offer to the Lheidli T'enneh' (August 2, 2000).

not made by the treaty process, it's simply a financial tug-of-war between the lowest forms of bureaucrat ... those 2 key things, the key to the whole process, are never negotiated. They come out of a different corner of 'the federal mansion'. And that's very difficult to deal with because those people have no relationship to the process, they have no relationship to the table. They have a bizarre memorandum of understanding, and they play bureaucratic games between Canada and British Columbia about how much land and how much cash is on the table.¹⁷

The financing of the treaty process, as I discussed in the section on funding First Nations treaty preparations, is subject to a fiscal agreement between Canada and British Columbia. This 'Memorandum of Understanding' provides for a division of settlement costs on a 60-40 federal-provincial split; also that there will be no 'cost-shifting'.¹⁸ The effect of this is that 'offers' made by the two governments become inscrutable.¹⁹ Treaty settlement packages comprise a mix of cash and land. However, the Crown in respect of the Province controls the vast bulk of non-fee simple lands in British Columbia, and is therefore obliged to contribute less cash.²⁰

As the Lheidli T'enneh pointed out in their 'counter-offer' document, during this process the Band had accumulated "several hundred thousand dollars of debt and diverted a considerable amount of our nation's energies to these negotiations. This is hardly good faith negotiating ... we will never be persuaded to exchange our aboriginal rights and title in 4.6 million hectares of British Columbia for a pittance and a ghetto of useless land. Our expectations are straight forward: to get ahead in Canada and to have the parties live up to the commitments agreed to in the 1991 BC Claims Task

¹⁶ Lheidli T'enneh Band, Response to Canada and British Columbia Land and Cash Offer (August 2, 2000).

¹⁷ Krehbiel, Transcript.

¹⁸ McKee, pp. 35-38.

¹⁹ Lheidli T'enneh are currently pursuing a Freedom of Information action, attempting to obtain the documents used by British Columbia to appraise the value of their territory. Personal comment from Rick Krehbiel (January 2, 2002).

²⁰ McKee estimated between 10-25% of the cash contribution. However British Columbia fixed on the figure of 17.5%. Ministry for Aboriginal Affairs, 'Federal-provincial cost sharing for treaties' (November 1997). Given that the calculation must factor in the value of land though, it would seem a margin is more appropriate.

Force report.”²¹ A scenario acceptable to the Lheidli T’enneh would be approximately 280,000 ha, or 6% of Lheidli T’enneh territory; the Band rejected the “bigger reserve” idea underlying the government offer, and felt that the cash component was “essentially meaningless” less than twice the Lheidli T’enneh annual budget under current DIAND service agreements. On the ‘standard’ certainty clause the Lheidli T’enneh rejected it completely: “Lheidli T’enneh does not see the certainty of this relationship being predicated on blanket extinguishment of our existing interests and are prepared to negotiate certainty provisions which reflect the ... April 28, 2000 Tripartite Political Accord.” That document was negotiated after the Westbank First Nation began an “illegal” logging campaign.²² These developments put the discussions over territory that are to lead to new relationships in a different light:

The governments at this point, the only reason they will do anything for anybody is if you threaten them with some significant disobedience. Westbank was just offered 55,000 cubic metres of wood a year and \$300,000. They went logging last year – from the provincial point of view, illegally – so this year they go and give them this much money and this much wood. Fine. That’s more wood than Pavilion would have seen on a land settlement that *it* would have put forward. So Westbank now is getting – *off the table* – more wood and resources than Pavilion could have got through a treaty, because they went last year and challenged the government.²³

Interim measures

The parties entered the treaty process knowing that treaties would take time: the NFA, begun in 1976 was eventually concluded in 2000. Recommendation 16 of the Task Force Report on interim measures was expressed as essential to ensure that

²¹ Lheidli T’enneh Band, *Lheidli T’enneh Treaty Negotiations: Counter-offer* (October 4, 2000), pp. 1-2.

²² Strangely, the government of BC declined to pursue a legal response with any vigour. A view seems to be emerging in Canadian jurisprudence on native rights, that the question of title could be approached in another way: that is, rather than trying to prove aboriginal title in court, First Nations could somehow force government into the dock to prove that it had jurisdiction in a particular area. See my discussion of Kent McNeil’s paper, ‘The onus of proof’, in Chapter 9.

²³ Schulmann, Transcript.

current conflicts were resolved in a balanced way enabling negotiations to proceed. A range of interim measure options was contemplated: 1) notification of potential impacts on negotiation topics through unilateral action; 2) consultation over that action; 3) consent for such initiatives; 4) joint management processes requiring consensus; and 5) moratoria on land and resource use.²⁴ The spectrum conceived of here is clearly associated with the industrial activities of the resource sector in BC and with the need to balance development with measures for indigenous control. The very principle of interim agreements clearly causes some difficulties, however. As I suggested in the previous chapter, interim measures caused “apprehension” in the local government sector, a “fear that agreements will not in fact, be interim but simply rolled into the final treaty.”²⁵

Barman suggests that “interim agreements encouraged an erroneous perception that jurisdiction and authority had already been obtained over claimed territories.”²⁶ Indeed the First Nations Education Steering Committee identified the one perception that could fundamentally erode government confidence in the process: “some fear has been expressed that Interim measures would act as moratoria on resource development.”²⁷ It was an argument put candidly by AC Hamilton, the federally appointed ‘fact finder’ on certainty, who expressed his concern that, “what appear to be urgent issues ... (may) permit one party to stop negotiating when they have achieved the results that are of greatest significance to them.”²⁸

However, the function of interim measures was to enable a long-term, conclusive system of negotiations to take place at all, ending a rolling crisis of confrontation in the province that brought the need for a reforming policy in the first

²⁴ Task Force Report.

²⁵ UBCM, *Local government and aboriginal affairs*, p. 7.

²⁶ Barman, p. 341.

²⁷ *Understanding the British Columbia treaty process: an opportunity for dialogue*, p. 13.

²⁸ Hamilton Report, p. 72.

place, and that could be renewed at any moment.²⁹ Government intransigence over interim measures is thus one of the features of the treaty process least conducive to ‘relationship-building’. In fact, the history of interim measures in the process has been fraught, prompting the view that government is all too conscious of the criticisms made above. Seen as a matter of honouring the spirit of the Task Force Report and the BCTC Agreement, the evidence is feeble. The BCTC *Annual Report* for 1995-96 strongly criticised the provincial government for their *de facto* policy of refusing to commit to interim measures before a First Nation had reached stage 4, a practice clearly opposed to the spirit of the Task Force Report.³⁰ The First Nations Summit identified this as a problem clearly in 1996: “The continued alienation of land and resources by governments is undermining the treaty process. Governments have an obligation to set aside lands other than existing reserves for all First Nations ... (treaty-making is not) an excuse for not dealing with First Nations.”³¹

At a Gitanyow Main Table meeting, the continued extraction of resources was described as a “form of taxation.”³² Indeed the Westbank decision to commence logging (discussed above) was prompted in part by lack of progress on an interim measure agreement. This general intransigence was a significant factor in the decision by the Summit to hold an extraordinary meeting in October 1999, where they considered (but rejected) a motion to withdraw from the treaty process entirely. Then Minister Dale Lovick addressed the meeting, promoting a new \$20M province-wide fund for interim measures and Treaty Related Measures (TRM), that would emphasise “joint ventures , access to forest tenures and capacity building in First Nations’ communities.”³³ The new dispensation on the interim measure issue and the new TRM

²⁹ In Chapter 9 I deal with the actual renewal of direct action in British Columbia.

³⁰ A policy still dear to the hearts of some parties. See LMTAC, *Considerations*.

³¹ Note the emphasis on lands being *set aside* for First Nations. First Nations Summit, ‘Treaty-making: the First Nations Summit perspective’, p. 4.

³² Gitanyow Main Table (September 17, 1999).

³³ Ministry for Aboriginal Affairs News Release, ‘Treaty measures offer resource opportunities for First Nations’ (October 29, 1999).

policy³⁴ are worth considering at some length. Numerous agreements have been reached in the period since October 1999, coming in a veritable deluge late in 2000.³⁵

The \$20M has been partly disbursed on such activities as a forestry resources management study for which the Heiltsuk received \$75,000. Tsay Keh Dene got \$52,000 for ‘environmental monitoring’ on a development already underway, and a further \$60,000 to maintain an access road to one of their villages. The Lheidli T’enneh TRM as I discussed above was for \$70,000 to “assess the potential of the Prince George agricultural research lands offered to the First Nation by B.C. and Canada in August ... the measure will allow the Lheidli T’enneh to study B.C. and Canada's proposal to include these lands in a treaty.” Lheidli T’enneh will also receive \$148,000 to enable them to set up a ‘wildlife advisory management committee’ in the northern interior. Kaska Dena Council expects \$400,000 over two years, to develop jobs in the forestry industries underway in their territories, and to identify how they will fit into forestry management into the future; a further \$170,000 will fund a two-year land study to identify future treaty settlement lands for the council. There are many other similar agreements.³⁶

Much of the money is for training and capacity-building, though some would appear to be for the provision and maintenance of basic services³⁷, a practice redolent of ‘practical reconciliation’, where recognition of difference is conflated with the provision of basic citizenship rights. Moreover the \$20M is spread fairly thin: the dollar amounts prevent any capital-intensive outcomes. One agreement, the Lheidli T’enneh TRM, appears to be aimed at locking the band into part of a treaty offer they

³⁴ Treaty related measures are a type of interim measure – a temporary arrangement, but one negotiated within the treaty context and formalised if necessary in any Final Agreement. Ministry for Aboriginal Affairs News Release, ‘Treaty related measures’ (November 10, 2000).

³⁵ Which is not to say that no interim measures were reached prior to 1999, simply that there was a policy of extreme reticence toward them.

³⁶ Ministry for Aboriginal Affairs News Release, ‘Interim and treaty-related measures since February 2000’ (January 16, 2001).

³⁷ See for example the Tsay Keh Dene interim measure, reached in December 2000, which provides funding for an access road to be maintained during winter. BCTC, *Update* (March 2001).

had just rejected. Nowhere is land *set aside* for the use and economic benefit of First Nations during negotiations. Krehbiel suggests the persistence of some underlying motivations:

(The Lheidli T'enneh Band leadership has) always been of the view interim measures if necessary but only if necessary. If there's something really important that has to be protected then you should go for it. But there never was clear government policy, in fact there was clear government policy to undermine the principle all along. So clearly, if you wanted to get into that discussion then you had to be prepared to put in a lot of time and effort. Unless you really needed the interim measures it wasn't worth the frustration.³⁸

What has been achieved seems at odds with the understanding of interim measures set out at the beginning of the treaty process. That characterisation, of industrial development of resources requiring First Nation approval or at least scrutiny of the process, does not appear to describe the types of agreements being reached. The experience at Ts'kw'aylaxw certainly demonstrates the reluctance government seems to have with stopping any development activities. The Band had been negotiating,

(d)ay in day out since almost the beginning of the process to protect one 5000 hectare watershed. The band had numerous promises that they would get an interim measure to protect it from the provincial and federal governments. The first time round was 1995. Now, luckily that meeting was videotaped, and if you look at that videotape in another way you can see that, maybe, the negotiator was fudging. That he really wasn't meaning to protect it, but frankly in the room, the way he said it, the implication was that yes, he was going to try and protect it. They didn't do anything ... In 1996 it came up again. It became a huge hassle, to the point of almost destroying the negotiations. Finally the band agreed to negotiate a consultation protocol on forestry issues with the provincial government. In return the provincial government would protect Pavilion Creek. Which they didn't do. Then they came out with their Treaty-related Measures ... they said Pavilion Creek would be the first one. So "come up with a treaty-related measure" they said. Well, we had no idea what they looked like, so we said to them "we have no idea what you want, we just want the area protected". So they didn't do anything, the government said "you didn't bring anything forward". We said "how can we – we have no idea what it looks like. The band wants the 5000 hectares protected – that's all you

³⁸ Krehbiel, Transcript.

need to write. This area will not be logged, there's nothing else to negotiate. You can either deliver or you can't." Then the feds said maybe they could pull something off and the provincial government said "if you vote to stay in the process we might be able to do something ... we could start negotiating." There's nothing to negotiate you people! Either you protect it or you don't!³⁹

In an interview in 1999, former Premier Mike Harcourt stressed the need for trust-building and cooperative mechanisms between First Nations and local communities, calling for "1000 projects in 100 communities."⁴⁰ Richardson was fairly dismissive of this: "there's a 1000 projects going on 100 communities in the course of business everyday. But when you talk about interim measures you're talking about doing things on a government to government basis in a way that recognises the competing interests of each of those governments, of First Nations and BC, and balances those competing interests in a mutually acceptable manner. That's what makes an interim measure not just doing something."⁴¹ The First Nations Summit continues to attack the "business as usual" approach to resource development that they perceive is in place.⁴² Continued unilateral alienation of lands and resources diminishes the integrity of indigenous rights and entitlements, as was pointed out in the judgement of the Meares Island case. The fact remains that all parties but First Nations have mechanisms in place able to legally access or preserve resources prior to the conclusion of agreements:

Right now First Nations are largely saying, and I think quite legitimately that, "it's just not on that we continue sitting negotiation at treaty tables accumulating huge amounts of debt when the very assets, the very resources that we're talking about are rolling by our offices on logging trucks".⁴³

³⁹ Schulmann, Transcript. Ts'kw'aylaxw voted themselves out of the treaty process, mainly over this issue, in October 2000.

⁴⁰ Harcourt, Transcript.

⁴¹ Richardson, Transcript 1999.

⁴² First Nations Summit, Discussion paper on Interim Measures (November 18, 1999) http://www.fns.bc.ca/pdf/p_inter-meas1199.pdf(April 2, 2002).

⁴³ Richardson, Transcript 1999.

Recommendation 16 was an explicit recognition of the inadequacy of current legislation and policy for the protection of indigenous rights to land and resources. What the Summit wants are interim measures that can show “tangible benefits” to First Nations, that are able to “resolve contentious issues” and “balance conflicting interests.”⁴⁴ The Summit considers alternative sources of funding such as proportionate arrangements for royalty payments including stumpage fees for forestry enterprises, and that government utilities be expected to pay property taxes to First Nations whose lands they are using.⁴⁵ It is arguable that the recent spate of TRMs and interim measures in the province are indicative of something else: the piping of small quantities of money to maintain participation amongst increasingly fractious indigenous communities but that neither alter the structural poverty and dependence of First Nations in British Columbia, nor show good faith that is intended. In its 2001 review of the interim measures policy, the BCTC noted that of 60 recently concluded measures, only one was a land protection agreement.⁴⁶

Compensation

A seminal decision was made at that point on treaty negotiations which had commenced. That decision was to try to avoid considerations of the past, to try to avoid dealing with title and compensation because they were said to be impossible and too vague to deal with and possibly very costly. Instead, it was decided to try to deal with the future. The result of that decision has been to put everything on the table regarding the future with no guidelines. In effect, there have been no principles for treaties. It has just been a question of how can you make a deal.⁴⁷

⁴⁴ First Nations Summit: Discussion paper on Interim Measures, p. 3.

⁴⁵ See recommendations 7 and 8, in *ibid.*, p. 7.

⁴⁶ BCTC, *Looking back looking forward*, p. 11 <http://www.bctreaty.net/annuals/Review.pdf> (November 12, 2001).

⁴⁷ Gordon Gibson (Fraser Institute), testimony reported in Canada, *Proceedings of the Standing Senate Committee on Aboriginal Peoples* (February 23, 2000)

Just as it is in Australia, compensation is the source of tremendous tension in contemporary Canada.⁴⁸ In one sense it is surprising that it presents such a challenge in a treaty process which from the outset was so self-consciously draped with a sense of overcoming injustice: “The bargaining that takes place must also be in good faith and must be based on a recognition of the history of this province and of the failure to address longstanding aboriginal rights.”⁴⁹ At almost exactly the same moment the Minister introduced the real rationale:

If I may borrow from George Bernard Shaw, I think we’ve been presented with a choice between looking at the way things are, and asking why, or looking at the way things could be in a better future, and asking why not. Today in this Legislature we are choosing to say: why not. We are choosing to say yes, we can move beyond the legacy of the past to forge a new, positive relationship with aboriginal peoples in this province; yes, we can create a society in which aboriginal peoples and non-aboriginal peoples have the same access to social and economic opportunities and the same opportunities to celebrate and share their culture and heritage; yes, we can build a stronger, fairer and better B.C. for all British Columbians.⁵⁰

Wanting to restore justice (or being seen to want it) while ‘moving beyond’ or ‘looking forward’ is the paradigmatic settler condition. As an intellectual and conceptual view it offers little coherence; as a policy setting it is an unstable amalgam of good intentions and bad faith.

The Task Force Report, however, was absolutely clear. Recommendation 2 allowed for discussions without ‘unilateral restriction’. Moreover, negotiations are likely to “include consideration of a financial component to recognize past use of land and resources and First Nation’s ongoing interests ... The task force encourages the

http://www.parl.gc.ca/36/2/parlbus/commbus/senate/com-e/abor-e/04evb-e.htm?Language=E&Parl=36&Ses=2&comm_id=1 (April 2, 2002).

⁴⁸ In excess of 7000 separate actions are pending against the State and the Anglican church over the residential schools issue. See William Johnson, ‘Seeking residential school justice’, *The Globe and Mail* (July 28, 2001), p. A13.

⁴⁹ Andrew Petter, British Columbia *Official Report of Debates of The Legislative Assembly* (May 19, 1993), p. 6440.

⁵⁰ Petter, *ibid.*, p. 6441.

parties to reach a negotiated solution by bargaining with good will and good faith in the determination of compensation.”⁵¹

At every stage of contact indigenous peoples have claimed compensation for lands appropriated without consent. Tennant points out multiple instances of indigenous political organisation on issues of compensation, for example the 1913 letter of the Nisga’a Land Council sent to the British Privy Council.⁵² The idea that outstanding indigenous claims might be resolved without compensation on the agenda is historically unsupportable. The Summit has given the issue considerable emphasis, describing the issue as “a legal, political and moral obligation ... it is discriminatory for Canada and British Columbia to take the position that First Nations cannot be compensated for our losses while assuring non-aboriginal people that their interests will not be expropriated and that they will receive fair and timely compensation for any losses they suffer ... (without compensation the treaty process) ignores one of the fundamental reasons for treaty-making.”⁵³

Indeed in May 1998, the Summit passed a resolution that no agreement would be reached that did not explicitly address the requirement of fair compensation for past infringements of aboriginal rights. In November that year, they reiterated this in a resolution that called on government to change the mandates for negotiation to reflect the need to include issues of compensation.⁵⁴ And the peak body is certainly representative of individual First Nations on this issue: “All the time the people have been in our territory, making money, building businesses, there’s been no compensation for our people, and it will not be discussed in the treaty process.”⁵⁵ Kim Baird of TFN offered similar reasoning: “I wouldn’t want to see a bunch of people

⁵¹ Task Force Report, Recommendation 2: Financial component.

⁵² Tennant, p. 90 and *passim*.

⁵³ First Nations Summit, *Treaty-making: the First Nations Summit perspective*, p.3.

⁵⁴ First Nations Summit, *The road to treaty negotiations in British Columbia* <http://www.fns.bc.ca/files/t-chronology.html> (July 14, 2001).

⁵⁵ Denise Smith, Sliammon Chief, Island Coast Summit, ‘Summary of proceedings/treaty panel’ <http://www.islandcoastsummit.gov.bc.ca/> (August 9, 2000).

displaced from their homes that they've invested into ... (but) as far as the principle of being compensated for those lands that have been in our view wrongfully taken away from us that's a different issue entirely. That's something that's a very contentious issue at every table across the province ... compensation is the issue that sort of represents reconciliation and all that kind of stuff for First Nations. The province and Canada refuse to deal with that issue.”⁵⁶ Schulmann described the prevailing government rationale as follows:

They have no actual interest in what the existing aboriginal rights and title of the community are ... Basically, the federal and provincial governments, if they don't know what the aboriginal rights and title are, they can make a whole lot of treaties, say “all the aboriginal rights are gone, we never actually knew what they were, so we can't quantify what the First Nations are being asked to give up in return for what they get.” So then, they can make it look like the federal and provincial governments are giving everything, First Nations are not giving up anything, and therefore the feds and the province look like they're being magnanimous to the First Nations.⁵⁷

Governments did not stumble upon this tactic recently however. The 1985 Coolican Report spoke of “the absurdity of working out a formula for compensation in determining values for pre-contact or future lands ... the federal government should drop the concept of a cash-for-land transaction or compensation for past or future use of the land ... direct land claims payments should be geared to the building of self-sufficient communities.”⁵⁸ The federal government has continued to build on this suggestion. Canada's current Minister for Aboriginal Affairs and Northern Development, Robert Nault, responded to the issue of compensation in the following way: “Canada negotiates the financial component of treaties as part of a package of economic benefits designed to contribute to the creation of an economic base from which First Nations can realize self-reliance and sustainable communities. Ultimately, First Nations will determine whether the proposed financial component of a treaty is

⁵⁶ Baird, Transcript.

⁵⁷ Schulmann, Transcript.

⁵⁸ Coolican Report, p. 68.

acceptable.”⁵⁹ The federal government believes it has exhausted its obligations for reparation with ‘Gathering Strength’, their response to the RCAP report, released in 1999.⁶⁰ As it was candidly put at a treaty table in 1999, “history was dealt with by Canada in the Statement of Reconciliation; treaties must be forward-looking.”⁶¹ Tom Molloy, of the FTNO, has commented that the cash settlement in the NFA should not be understood as “compensation for past wrongs,” rather as an exchange of “value for value.”⁶²

The province has been more ambiguous at times. As I discussed in the section on provincial mandates, compensation that is ‘fair and timely’ will be provided to those adversely affected by treaty settlements.⁶³ However, “(t)he Province will not calculate the cash component of treaties on this basis, and provincial negotiators will not have a mandate to enter discussions on such calculations.”

However, during the threshold Summit meeting in 1999 (where the motion to withdraw was considered), Lovick acknowledged that “while the Province sees treaty making as being aimed at establishing new relationships, we also acknowledge that First Nations believe treaties are intended as settlements of past claims.”⁶⁴ On this basis the BCTC 2000 Annual Report characterised the situation as a ‘blend of approaches’: that is a mix of indigenous understanding of compensation as recompense for injustice, and the government view of compensation as the basis for economic development, not a legal obligation for restitution.⁶⁵

⁵⁹ BCTC, *Update* (November 1999), ‘Compensation a key issue in negotiations’.

⁶⁰ Related measures included a statement of reconciliation; a community-healing fund; and a major public education campaign. See Canada and Indian and Northern Affairs Canada 1997. *Gathering strength: Canada's aboriginal action plan*, Minister of Indian Affairs and Northern Development, Ottawa.

⁶¹ Eric Denhoff, FTNO, Gitanyow Main Table Meeting, Vancouver (September 17, 1999).

⁶² Burke Lewis, ‘Into the billions and beyond’ *BC Report* <http://www.axionet.com/bcreport/web/980202f.html> (December 11, 2000).

⁶³ Ministry for Aboriginal Affairs, ‘British Columbia’s approach to treaty settlement lands and resources’, s. III.7.

⁶⁴ Lovick, ‘Address to First Nations Summit’.

⁶⁵ BCTC, *Annual Report 2000*, ‘Challenges and opportunities’.

As an aside here, I note Justice Williamson's 2000 judgment on the constitutionality of the NFA, in which he remarks on the rationale of compensation in self-defining terms: "the payment of money ... can be seen as compensation for what the Nisga'a have given up or possibly for the negative impact upon the Nisga'a which followed upon the arrival of the Europeans."⁶⁶ The point is that this leaves the definition of compensation unstated.

It is perhaps not odd then that in its November 1999 update the BCTC reiterated the Task Force position on compensation as "endorsing a political – not a legal – approach to the negotiation of the financial component of treaties, including compensation."⁶⁷ Yet in other documents the BCTC acknowledges the legal foundation to indigenous claims for restitution; considering the effect of the *Delgamuuk'w* decision the BCTC raises the question of compensation very openly: "the court's decision clearly suggests that there are private lands in BC that are subject to aboriginal title, or at least were wrongly sold. This is because the court confirmed that the province had no authority to extinguish aboriginal title after union with Canada in 1871, yet the province has been selling land to private interests since 1849. Still, the remedy for First Nations is more likely to be the payment of compensation than any adjustment to private ownership."⁶⁸

In a 1999 discussion paper on compensation, the Summit laments the circularity of the argument that is coming from the settler state: rather than negotiating over the issue, the governments have repeatedly told First Nations to prove their claims prior to any discussion about what has or will be infringed, and is therefore compensable. Yet the courts have consistently advocated that the parties negotiate not litigate. This ensures indigenous peoples seeking compensation in good faith as part of negotiations

⁶⁶ *Luuxhon v. Canada et al.* [1998] (B.C.S.C.), per Williamson J., at paragraph 36.

⁶⁷ BCTC, *Update* (November 1999).

⁶⁸ BCTC, *Annual Report 1998*, 'A lay person's guide to *Delgamuuk'w*'.

must remain in a subordinate position, where their claims are volleyed around like a 'hackey sack'.⁶⁹

The *Delgamuuk'w* principles add further pressure, highlighting the “inescapable economic component of aboriginal title,” and noting that there are clear principles that compensation must be paid for infringement and that it will be worked out on a case by case basis.⁷⁰ One commentator reviewing the case law on compensation sees it as “a pre-requisite to the valid, constitutional exercise of power.”⁷¹ It is abundantly clear that Canadian jurisprudence now considers that compensation for the unilateral actions of settler governments and their institutions – not least those charged with the care and trust of indigenous interests – is payable.

One thing that may be established is the effect of good faith obligations arising from previous commitments: the Summit notes the *Council for Yukon Indians' Umbrella Final Agreement* which contains a chapter on 'Financial Compensation'.⁷² Existing principles of 'good faith' would seem to oblige Canada to address the issue frontally.⁷³

It is clear that the different approach taken by government in this context highlights the different understanding of loss, entitlement and the character of the new relationship held by the parties. The notion of justice I am applying requires at least a more explicit statement of responsibility, if not its complete definition and carriage at the hands of the victims – the indigenous peoples of the new world. We might reflect on the kind of relationship that allows parties openly to differ on their interpretations of measures within the process. At one level that might appear an appropriate recognition of the rights attaching to difference, but in fact it does not take into

⁶⁹ First Nations Summit, *Discussion Paper on Compensation*, p. 2
http://www.fns.bc.ca/pdf/p_comp1199.pdf (December 11, 2001).

⁷⁰ I develop the major issues arising from *Delgamuuk'w* in Chapter 9.

⁷¹ Joanne Lysyk, 'Compensation after *Delgamuuk'w*', Pacific Business Law Institute (May 13, 1999), pp. 1-2.

⁷² First Nations Summit, *Discussion Paper on Compensation*, p. 3

⁷³ Good faith is also discussed in Chapter 9.

account the reality of First Nation desires for compensation nor the disparities of power. The tacit ‘agreement to disagree’ around compensation is disingenuous in the extreme. Surely such an ‘interest-based’ attitude toward compensation for past injustice defeats its purpose. As the Summit has argued: this is an issue for which there is little or no negotiating space. Compensation is fundamentally a positive recognition of the difference that justified a colonial history of subjection and abuse and the disadvantage that has resulted; without this recognition, the treaty process will certainly struggle to create the new relationship that is sought.

Self-government

Most Indian groups regard such municipal type governments as inadequate and dangerous. They are inadequate because they do not confer jurisdiction over a sufficiently wide range of responsibilities, the broad spectrum that Indians believe they must control if they are to direct economic development and social programs in ways compatible with their values, aspirations and judgment of what is likely to succeed. Self-government on the municipal model is also dangerous symbolically and as a precedent. In the Canadian constitution, municipalities are the legal creatures of and are answerable to, the provinces. Besides, the experience that most Aboriginal groups have had with the provinces has been negative. As the Inuit explained in an advertisement in *The Times* of London during the lobbying over constitutional reform in 1980, “Provinces in Canada have power over lands, resources and local matters. Ottawa did not have a good record of employing its powers on behalf of native peoples” but “the Federal responsibility has been the closest thing native Canadians have had to any guarantee of rights”. In the long shadow of the White Paper and the Nielsen task force report, Native organizations were understandably suspicious that acceptance of municipal-style self-government might be the prelude to their being abandoned constitutionally by Ottawa and consigned to the provinces.⁷⁴

The character of Native governance within British Columbia and Canada exercises much interest both at treaty tables, and in general thinking about the treaty process. It

⁷⁴ Miller 1991a, p. 362

is to be expected given the attention on self-government and constitutional reform throughout the 1980s and 1990s across Canada. Here I focus on one issue: the type of self-government that has been contemplated so far in the treaty process.⁷⁵

Native critics have always been concerned about the implications of a delegated or contingent model of political power.⁷⁶ Asch set out the policy's underpinning rationale: 1) give greater autonomy by devolving DIAND responsibilities to band/tribal councils; 2) allow Indian separate administrative, political, economic and legal structures at the local level; 3) phase out the most separate structures and incorporate them into "the prevailing administrative, political legal and economic institutions of the Canadian state."⁷⁷

This type of self-government would mean that Indians became simply another community group competing for services within line departments' budgets. Without DIAND, bureaucrats will not see their personal or professional interests solely as providing Native welfare; it would be another way for Indians' special status to be eroded. Asch concludes presciently: "stripped of all high-sounding and dissimulating rhetoric, the federal government's basic model for Indian government is that of municipal status within the framework of Canadian federalism ... If Indian leaders persist in pursuing self-government objectives through the Canadian constitution

⁷⁵ For wider studies of the issue of self-government see Weaver, S. 1984. *Indian Government: A concept in need of a definition*. In *Pathways to self-determination: Canadian Indians and the Canadian state* (L. Little Bear, M. Boldt, and J. A. Long, Eds.), pp. 65-68. University of Toronto Press, Toronto; Whyte, J. D. 1984. *Indian self-government: a legal analysis*. In *ibid.*, pp. 101-112; Mawhiney, A.-M. 1994. *Towards aboriginal self-government: relations between status Indian peoples and the government of Canada, 1969-1984*, Garland, New York, esp. Chs. 3-4; Hawkes, D. C., Peters, E. J., Queen's University (Kingston, Ont.), and Institute of Intergovernmental Relations 1987. *Issues in entrenching aboriginal self-government*, Institute of Intergovernmental Relations, Queen's University, Kingston, Ont.; Cassidy, F. and Bish, R. L. 1989. *Indian government: its meaning in practice*, Oolichan Books ; Halifax, N.S. Institute for Research on Public Policy, Lantzville, B.C.

⁷⁶ Asch, M. 1992. *Political self-sufficiency*. In *Nation to nation: aboriginal sovereignty and the future of Canada* (J. Bird and D. Engelstad, Eds.) Anansi, Concord, Ont., pp. 46-47.

⁷⁷ *ibid.*, p. 48.

process, they will achieve only as much as the provinces are prepared to concede – that is, municipal status.”⁷⁸

The provincial government did “politically recognize the inherent right to self-government and . . . stated that it intends to define the meaning of self-government within the current treaty negotiation process.”⁷⁹ The Province articulated its positions at length in a document released in the mid-1990s: ‘British Columbia’s approach to Treaty Settlements – self-government’. Similarly, the federal government’s 1995 policy, which for the first time acknowledged the “inherent right” of aboriginal peoples to self-government, sees the content of self-government powers being worked out through negotiation processes.

It is difficult to evaluate practical understandings of Native self-government as it has been conceived in the treaty process, other than through the rhetoric. I deal with the NFA’s governance provisions in the next section, but the terms used within the treaty process itself so far are still far from clear. Of the three AIPs that have been reached, there appears to be little to distinguish the treaty process from the approach adopted in the Nisga’a agreement. The Sliammon AIP relies heavily on substance to be added in the Final Agreement; similarly the Nuuchah-nulth AIP offered a set of powers all described in the NFA.⁸⁰ Lastly, the Sechelt AIP simply confirms the status of the Sechelt Indian Band Self-government Act (1986), which was the object of many commentators criticisms about the delegated, municipal model being offered by government.⁸¹

Since the change of government in 2001 the provincial document on self-government has been withdrawn; self-government will very likely be included in the Liberals’ attempt to derive a new mandate via referendum. Moreover, the Liberals also intend to seek clarification from the Supreme Court on the question of indigenous self-

⁷⁸ *ibid.*, pp. 48-55.

⁷⁹ Ministry for Aboriginal Affairs, ‘British Columbia’s approach to Treaty Settlements self-government’.

⁸⁰ The Nuuchah-nulth and the Sliammon rejected their AIP at the community ratification stage.

⁸¹ In any case, the Sechelt suspended their participation in the treaty process in July 2000.

government at law. In Williamson's judgement in the *Campbell* case, brought to challenge the NFA on constitutional grounds, self-government was confirmed as an aboriginal right protected under s.35. The *British North America Act* had distributed all of the powers that had belonged to the colonies prior to Confederation in s.91 and s.92; it had not distributed the aboriginal right to self-government, which remained an underlying principle retained from the 1763 Royal Proclamation's recognition. However the BC government chooses to deal with self-government in the treaty process, they will have to acknowledge its constitutional significance.

Templates and models

This section draws together some of the disputes flagged through the previous sections by looking at how some of them were resolved in the *Nisga'a Final Agreement*. The whole question of a 'template' then arises.

The Nisga'a Final Agreement

The Nisga'a experience of forging a treaty is a long one. Pursued since 1887, when Nisga'a chiefs travelled by canoe to meet Premier William Smithe in Victoria, actual negotiations with Canada began in 1976. British Columbia joined those negotiations (part of the comprehensive claims policy) in 1990 during the policy shifts I discussed in Chapter 6. The *Nisga'a Final Agreement* was not then reached through the treaty process, though its relevance to the policy can hardly be overstated. An AIP was reached in 1996, and a Final Agreement drafted in 1998, ratified by the Nisga'a in November that year, by British Columbia in April 1999, and by Canada in April 2000.⁸² It came into effect on May 11, 2000. Though it is too early to evaluate the

⁸² The relative rapidity of the negotiations after the province became involved lends support to the principle of tripartite negotiations.

‘success’ of the NFA, it is worth considering it in terms of the points of contention being raised across the Province by those parties in the treaty process.

Firstly, on the question of authenticity. In this respect, the Nisga’a may not be typical. Their history of political organisation around land claims, and continuity into the Nisga’a Tribal Council (NTC, formed in 1955), as well as the success of the *Calder* case in the Supreme Court, their position as ‘first out of the blocks’ to both litigate and then negotiate under the comprehensive claims policy, have all given the Nisga’a something of a talismanic status in Native-state relations in British Columbia. This combined with the strength of leadership from such individuals as Frank Calder and Joseph Gosnell – men who were heavily influential in both Native and mainstream politics across the Province – makes the question of the NTC’s ‘mandate’ to enter negotiations perhaps less than useful. This is not to say that the NFA has not been subjected to challenges from within. Ratification of the NFA by the Nisga’a gives a clue here: of 2376 eligible voters, 61% voted for and 23% against. 15% did not vote.⁸³ The Minister put a spin on it: “It isn’t an overwhelming majority. The reason for that is because it is a difficult decision for Nisga’a ... they have been cross-pressured from people in their own community as well as from others who say ‘You gave away too much’.”⁸⁴

In part the concerns stemmed from inherent arguments about the nature of aboriginal rights and responsibilities: one Nisga’a woman, Mercy Thomas, commented that “(the negotiators) don’t have the right to surrender, extinguish, modify or release 93 per cent of our ancestral lands.”⁸⁵ Critics also lamented the mode in which the ratification introduced a constitution that had not then been seen by those ratifying it:

⁸³ Peter Murrey, ‘The Nisga’a treaty: Victory for Native rights or threats to Native sovereignty’, *On Indian Land* (Spring 1999).

⁸⁴ Diane Rinehart, ‘Close vote on Nisga’a deal “disappointment”’, *The Vancouver Sun* (November 12, 1998).

⁸⁵ Murrey.

“the Nisga’a will be voting on a lasting document that they do not understand the implications of.”⁸⁶

Several Nisga’a individuals served suit against the NFA.⁸⁷ In *Chief Mountain v HMTQ* they sought an injunction preventing royal assent for the enacting federal legislation.⁸⁸ Their argument was that the NFA extinguished their aboriginal rights and subjected them to a ‘third order’ of government; both these effects rendered it unconstitutional.⁸⁹ In rejecting their petition, Williamson indicated the “substantial number” of eligible Nisga’a voters who endorsed both the NFA and the constitution for the new Nisga’a government.⁹⁰

More instructive for the treaty process is the issue of territorial overlaps. The NFA had to deal with this centrally: s.34 of Chapter 2 on ‘General Provisions’ allows for the accommodation of other aboriginal groups’ rights, but only where those rights have been determined by a superior court.⁹¹ Thus the onus is placed on any groups who wishes to contest the agreement, thereby putting the Nisga’a into the position formerly taken by the government, saying ‘prove your title; prove that it has been infringed’. Two First Nations in the treaty process assert territories that may fall into this category, the Gitksan⁹² and the Gitanyow Hereditary Chiefs.

Noting that “over the past 30 years” both the Gitksan and Gitanyow had attempted to negotiate with the Nisga’a “to resolve a constantly expanding claim by the Nisga’a Tribal Council,” Charlotte Sullivan of the Gitksan attacked the outcome in the Senate Hearings on the NFA: “the Gitksan cannot call the matters at issue an

⁸⁶ Frank Barton, a Nisga’a man quoted in Dianne Rinehart, ‘Nisga’a head to polls’, *The Vancouver Sun* (November 6, 1998).

⁸⁷ Neil Seeman, ‘Nisga’a land claim challenges by band dissidents’, *National Post* (March 23, 2000).

⁸⁸ *Chief Mountain v. HMTQ In Right of Canada* [2000] BCSC 659.

⁸⁹ As becomes clear below, this is a similar type of reasoning used by the settler opponents of the NFA, and of the treaty process as a whole, in similar actions pursued during the aftermath of the British Columbia legislature’s passage of Bill 22 that gave effect to the NFA.

⁹⁰ *Chief Mountain v. HMTQ*.

⁹¹ *Nisga’a Final Agreement*, s.II.34 (a-b)

<http://www.gov.bc.ca/tno/treaty/nisgaaa/docs/GENERALPROVISIONS.asp>(April 2, 2002).

overlap. In our eyes, and according to Gitksan laws, the action of the Nisga'a, in which Canada and British Columbia are complicit, amount to an outright land grab. As has been stated by some of our chiefs, such actions amounted in the past to a declaration of war. The Crown is a party to an act of aggression."⁹³

Another senior Gitksan described it as, "a land grab at the expense of their tribal neighbours to increase the amount of land they would retain under the provincial government's five per-cent land selection policy."⁹⁴ Sterritt criticised the NTC for not revisiting their AIP post-*Delgamuuk'w* because they had "acquired rights and benefits in their neighbours' lands that they would not have received if the provincial and federal governments had demanded 'good faith negotiations.'"

During the debate to ratify the NFA in the provincial legislature the Gitanyow Hereditary Chiefs wrote an open letter to the MLAs to express that: "the Gitanyow Nation still stand united that they do not want their children's future stolen for the sake of political expediency."⁹⁵

The Nisga'a response to these concerns has been to refuse to negotiate with the Gitanyow before the British Columbia and Canadian governments make an offer to the Gitanyow, and not while litigation is pending. Given the treaty process policy that First Nations should resolve their own disputes, the experience of First Nations in the Nass watershed so far sets a poor example.

Third parties also challenged the provisions of the NFA. Upon the very news that the Nisga'a had reached an AIP (Stage 4) in 1996, one forest company was

⁹² Two spellings: Gitksan or Gitxsan.

⁹³ Charlotte Sullivan, testimony reported in Canada, *Proceedings of the Standing Senate Committee on Aboriginal Peoples* (February 23, 2000) http://www.parl.gc.ca/36/2/parlbus/commbus/senate/com-e/abor-e/04evb-e.htm?Language=E&Parl=36&Ses=2&comm_id=1 (April 2, 2002). For thorough argumentation on the way the NFA assumed an aggrandised Nisga'a traditional territory, see Sterritt, N. J. 1998. *Tribal boundaries in the Nass watershed*, UBC Press, Vancouver; also Sterritt, N. J. 1998-1999. The Nisga'a Treaty: Competing claims ignored! *BC Studies* 120, 73-97.

⁹⁴ Neil Sterritt, 'It is an act of aggression', *The Vancouver Sun* (November 21, 1998), p. A21.

⁹⁵ Gitanyow Hereditary Chiefs, 'An open letter to all members of the legislative assembly' (November 30, 1998).

demanding compensation, saying that the Nisga'a deal would decrease "the amount of secure fibre."⁹⁶ After that AIP, an increasing coherence in the third-party anti-treaty movement is discernible.⁹⁷ By the time the NFA had been reached in 1998, it was able to mount two court actions: "One is a lawsuit by the B.C. Fisheries Survival Coalition that argues the treaty is either unconstitutional or a constitutional amendment, that would in turn force a provincial referendum. The other case is a class action suit filed by Lloyd Brinson and the B.C. Citizens First Society that argues the treaty violates the rights of non-natives in the Nass Valley."⁹⁸

These legal challenges, and the one mounted by the BC Liberals, have focused on the constitutionality of the agreements – whether the NFA was ratified in a constitutional way, and whether the NFA self-government provisions create a 'third-order' of government. Williamson's dismissal⁹⁹ of these actions may in fact discourage future challenges, although, the provincial government has said that it will seek clarification from the Supreme Court of Canada as part of its renewal of mandates in the treaty process.

The NFA repackages 62 sq. km of old reserve with an additional 1930 sq. km. These lands will be held by the NFA in fee simple. Native positions on the NFA sections on lands appears to divide according to the attitudes to the general principles. Saul Terry of the UBCIC for example, attacked the NFA underlying principles of 'modification' for "denying to our future generations the benefits of Title from our homelands."¹⁰⁰ Another indigenous commentator pointed out, "legally speaking, the Nisga'a are agreeing to far less than what they're entitled to inherently and under

⁹⁶ Repap BC spokesman, cited in 'Forest company demands compensation', Canadian Press Newswire (January 27, 1996).

⁹⁷ I document in particular the growth of the pseudo-populist referendum push – groups like BCFIRE and Citizens First - in the next chapter.

⁹⁸ 'Nisga'a in on treaty suits', *The Terrace Standard* (March, 1999).

⁹⁹ *Campbell et al v. Attorney-General of British Columbia/ Attorney-General of Canada & Nisga'a Nation et al.* [2000] BCSC 1123.

common law.”¹⁰¹ However many were simply encouraged that the Nisga’a had got something they were happy with.

Recently, the NDP government’s offer to the Nuu-chah-nulth was influenced by the NFA in the sense that it was “roughly the same quantum of settlement.”¹⁰² However, due to the cost-sharing agreement between the governments, it is very difficult to draw general conclusions about the amount and value of land that will be the basis of agreements made under the treaty process.

The NFA approach to compensation offers little direction either. The language of the agreement speaks of ‘capital transfer’ and the word compensation is not used. As I noted in the compensation discussion above, there has been a tacit ‘agreement to disagree’ on this issue. First Nations in the treaty process who want compensation explicitly addressed will find little comfort in the NFA.

Finally, the issue of self-government: as I noted, the NFA was subjected to legal challenge by the Liberals in BC. Rather than being unconstitutional, Bruce Ryder has pointed out, the rights conveyed to the Nisga’a in the NFA “have been acquired according to the very process contemplated by the constitutional amendments ratified by Canadian governments and representatives of aboriginal peoples in 1982 and 1983.”¹⁰³ The Nisga’a powers do not receive a criminal jurisdiction, nor the kind of commercial powers that were commonplace in the United States. Doug Sanders attacked the ‘massive jurisdiction myth’ in testimony to the Senate Hearings:

The self-government powers of the Nisga'a are: a) matters already recognized under the Indian Act. b) matters already recognized under intergovernmental agreements, for example, policing, corrections, education and child welfare. c) matters such as language and culture in which the

¹⁰⁰ Saul Terry, ‘Why the Nisga’a treaty must not be a blueprint’, *Khatou News* (August 1998).

¹⁰¹ Ardith Walkem, ‘The Nisga’a agreement’, *Canadian Dimensions* (February 2000), pp. 23-25.

¹⁰² Rafe Mair, ‘Interview with Dave Zirnhelt, Minister for Aboriginal Affairs’, CKNW Radio (December 19, 2000).

¹⁰³ Bruce Ryder, testimony reported in Canada, *Proceedings of the Standing Senate Committee on Aboriginal Peoples* (March 22, 2000) http://www.parl.gc.ca/36/2/parlbus/commbus/senate/com-e/abor-e/06evb-e.htm?Language=E&Parl=36&Ses=2&comm_id=1 (April 2, 2002).

Nisga'a are the logical level of government from any point of view. d) new matters such as the sale of liquor or gaming, but only as the province may allow.¹⁰⁴

The NFA powers appear to reinforce the argument that the self-government options are solely those of delegation; constitutionalising them is obviously another step, but given the powers are minimal, an arrangement that few First Nations may consent to.¹⁰⁵

On 'certainty' (see discussion below), the NFA, as example *pour encourager les autres*, holds little promise. The document provides good evidence of what the governments' intentions:

s.22: "This Agreement constitutes the full and final settlement in respect of the aboriginal rights, including aboriginal title, in Canada of the Nisga'a Nation;" s.23: "This Agreement exhaustively sets out Nisga'a section 35 rights, the geographic extent of those rights, and the limitations to those rights, to which the Parties have agreed, and those rights are: a. the aboriginal rights, including aboriginal title, as modified by this Agreement, in Canada of the Nisga'a Nation and its people in and to Nisga'a Lands and other lands and resources in Canada; b. the jurisdictions, authorities, and rights of Nisga'a Government; and c. the other Nisga'a section 35 rights;" s. 24: "the aboriginal rights, including the aboriginal title, of the Nisga'a Nation, as they existed anywhere in Canada before the effective date, including their attributes and geographic extent, are modified, and continue as modified, as set out in this Agreement;" s. 25: "For greater certainty, the aboriginal title of the Nisga'a Nation anywhere that it existed in Canada before the effective date is modified and continues as the estates in fee simple to those areas identified in this Agreement;" s. 26 & 27: release Canada and British Columbia from future claims; s.28: government has a duty to consult only

¹⁰⁴ Sanders, testimony reported in Canada, *Proceedings of the Standing Senate Committee on Aboriginal Peoples* (March 22, 2000).

under the NFA; s.30: an indemnity against all “acts or omissions’ that may have infringed aboriginal title “before the effective date;” s.31: provides an indemnity against any infringements or still existing rights not protected and set out in the NFA.

Lovick’s rebuke to the First Nations Treaty Negotiation Alliance (FNTNA)¹⁰⁶ at the 1999 Summit meeting that extinguishment is not the model in the NFA and that the FNTNA ‘misunderstood’ the NFA ‘certainty’ language, does seem quite bizarre after even a cursory reading of sections 22-31 of the NFA.¹⁰⁷ One of the Standing Committee Report recommendations was that certainty language be addressed at province wide negotiations. This raises the possibility that those First Nations opposed to any such *de facto* extinguishment of aboriginal rights will never participate in the treaty process, simply entrenching the differences. As I indicated above, the Minority report to the SSC openly questioned the possibility of an effective linguistic formulae for certainty. Gordon Christie has lamented this outcome:

The release in the Nisga’a Agreement purports to hand over rights whose very *nature* is unknown. Can one give away something of which one knows not what? What if certain of those rights are *inalienable* to one and all?¹⁰⁸

This raises the question of the ultimate goals and ends sought by Native peoples as they reach agreements. The promise made under the contemporary arrangements for decolonisation is far from unqualified. John Borrows has put this most succinctly: “an appropriate question to ask is whether escaping the *Indian Act* is the only relevant standard for judging the agreement ... it is perhaps relevant to ask whether the Nisga’a Final Agreement should also be judged by the scope it allows to the Nisga’a to pursue

¹⁰⁵ However, there were soon reports that the model was being considered by the Meadow Lake Tribal Council in Saskatchewan as the basis for a self-government agreement. ‘Native deal could be template for self-government’, Canadian Press Newswire (March 4, 1999).

¹⁰⁶ A loose confederation of First Nations on Vancouver Island that convene to address treaty issues on a regional basis.

¹⁰⁷ Lovick, ‘Address to First Nations Summit’.

¹⁰⁸ Gordon Christie, ‘Delgamuuk’w and modern treaties’, p. 25 at note 91 <http://www.delgamuukw.org/research/moderntreaties.pdf>(February 6, 2002).

a path to development that is different to Canada's own pervasive economic, social and political structures.”¹⁰⁹

Templates

There is little consensus about the effect of the NFA on the future options that may arise under the treaty process: the idea that some of the most contentious problems in the creation of the ‘new relationship’ are resolved – that it could become a ‘template’ – seems difficult to sustain. There is great tentativeness in British Columbia about drawing conclusions on this issue: *The Vancouver Sun* described ‘template’ as, “a new cuss word” in the local language.¹¹⁰ However, the Federal government has funded Nisga’a Chief Gosnell to undertake a European tour to promote the Canadian approach to treaties.¹¹¹ And former BC Premier Glen Clark described the NFA as “a complex and serious matter which lays down a bit of a template for other possible settlements.”¹¹² Later he indicated to First Nations that, “We cannot give you any more than we gave the Nisga’a.”¹¹³

Others in the treaty process have more than dallied with templates: Jack Ebbels (BC Treaty Negotiation Office) suggested that aspects of NFA such as the certainty clause would be “transportable”; when approved the NFA “would undoubtedly set the basic negotiation points even if the specifics are mutable.”¹¹⁴ Wilf Adam, a Treaty Commissioner, proposed that the NFA “sets all the parameters ... First Nations have a

¹⁰⁹ John Borrows: ‘Delgamuuk’w treaties: an overview’, p. 24
<http://www.delgamuukw.org/research/treatiesoverview.pdf> (February 6, 2002).

¹¹⁰ ‘Nisga’a treaty isn’t a settlement blueprint’, *The Vancouver Sun* (November 30, 1998).

¹¹¹ Stewart Bell, ‘Nisga’a negotiation gets global attention’, *National Post* (October 30, 1998).

¹¹² Justine Hunter, ‘Clark to launch campaign on treaty’, *The Vancouver Sun* (April 18, 1998).

¹¹³ Clark, cited in Walkem, ‘The Nisga’a agreement’, p. 23.

¹¹⁴ Quoted in ‘Nisga’a treaty isn’t a settlement blueprint’.

better idea of what's on the table."¹¹⁵ Commissioners saw benefits for treaty tables in the vast amount of technical work that had been done in the NFA.¹¹⁶

One Native leader offered a useful distinction: "It is a precedent in the sense that a treaty is do-able. It is not a precedent in the sense that it offers a formula for other treaties."¹¹⁷ As Kim Baird put it, "The more treaties that happen, the more that is accomplished then the nay-sayers will have a hard time stopping the process, right?"¹¹⁸

Much of the phobia about templates was aimed to avoid antagonising First Nations, for whom any such talk minimises the creation of a new relationship on a 'nation-to-nation' basis. Yet no less a problem is the growth in settler opposition to treaties associated and stimulated by the passage of the NFA:

Glen Clark's final major selling point of the treaty is that it is what he calls a 'template' for the other treaties he hopes to sign around the province. Besides greatly offending most of the other native groups in the province, he has frightened many people with this characterization of the Nisga'a treaty. Although there are currently no other native groups in the late stages of treaty negotiation, the precedent the Nisga'a treaty sets makes for a volatile future. The final result could be 50 or 60 native governments based on race and funded by the people of British Columbia. They would live in what Clark himself called 'gated communities' which would exist largely outside of the province's jurisdiction. They would control over 25 percent of the wildlife in the province and over 30 times more land than their populations represent. With land ownership in question the futures of the forestry, fishing, and mining industries are anything but certain. Glen Clark's treaty is bad for BC. No one knows if it is good for the Nisga'a. But as Clark says, it's too late to turn back.¹¹⁹

The wildness of the distortions seems to have gotten greater, if anything, than in the early phases of the treaty process. In 1997 the Select Standing Committee Report concluded that "despite the best efforts of all three negotiating parties to educate the

¹¹⁵ BCTC, *Update* (October 1998).

¹¹⁶ BCTC, *Update* (October 1998), 'Nisga'a treaty fuels public debate'.

¹¹⁷ Alvin Dixon (Executive Director Native Brotherhood of B.C), cited in 'Reaction to Nisga'a AIP', *Dreamspeaker* (Spring 1996), p. 22.

¹¹⁸ Baird, Transcript.

¹¹⁹ Peter Topolewski, 'The Nisga'a: Native Lands Under Political Siege', *The Laissez Faire City Times* (December 21, 1998), p. 30.

public, lack of awareness and understanding of the Nisga'a AIP and the treaty process is a problem in both aboriginal and non-aboriginal communities ... people want to learn about the process and the best way to do this is to ensure that people have a meaningful stake in the process."¹²⁰ Consequently there was considerable expense and government promotion of the NFA once it had been agreed. British Columbia undertook a 'Treaty Implementation Project', spending \$5M on promotion of the NFA, including a 17 minute video sent to 2000 schools, yet the NFA was not in the top five issues relevant to voters at the time.¹²¹

The BCTC persisted with a positive line during this period: Commissioner Peter Lusztig saw consciousness-raising benefits through the "intense media coverage (that was) focusing public attention and the level of debate (was) helping to raise public understanding of treaty negotiations as the preferred alternative to litigation and confrontation."¹²² This may be no more than sheer assertion however.

During the BC legislative debate, polling was showing that 58% of British Columbia residents wanted a referendum on the NFA.¹²³ Later polls during the debate in the Canadian parliament suggested that 43 per cent of British Columbians wanted their Federal MP to vote against the Nisga'a enacting legislation; only 36 per cent wanted it passed.¹²⁴

Despite this disquiet the debates were not opportunities for revision nor amendment. As a treaty, this was necessarily the case. However the NDP decision, using weight of numbers, to close the legislative debate was easily portrayed as undemocratic, even though it had had more time than any other bill in the history of

¹²⁰ Select Standing Committee Report report, 'Issues related (1 of 6)'.

¹²¹ Vaughn Palmer, '\$5M in spin not enough to distract voters', *The Vancouver Sun* (November 21, 1998).

¹²² BCTC *Update* (October 1998), 'Nisga'a treaty fuels public debate'.

¹²³ Diane Rinehart, 'Close vote on Nisga'a deal "disappointment" '.

¹²⁴ Barbara Yaffe, 'Politicians perform an end run on the Nisga'a treaty', *The Vancouver Sun* (November 16, 1999).

the Province.¹²⁵ Gary Farrell-Collins (the Liberals House Leader) decried an “open season on democracy,” while the UBCIC attacked the “jackboot approach.”¹²⁶

The forced closure meant ratification by Canada would take another 18 months. Federal Minister Jane Stewart, appeared to be euphemising when she suggested that the “British Columbia legislature took too long to ratify the landmark agreement.” As Mike Scott (the Federal Reform Party’s Aboriginal Affairs Critic) pointed out, “We don’t think (the federal government) would have come to this conclusion if it hadn’t been for the pressures we exerted on them over the past couple of months ... I think they recognise that there’s a real taint to the treaty now.”¹²⁷

In a 1999 editorial *The Vancouver Sun* accurately described the public attitude toward the NFA and treaties in general: “The federal and provincial governments wrongly believe that once the Nisga’a treaty is passed, public favour will follow. In a recent poll commissioned by the federal government, only 50 per cent of British Columbians considered aboriginal welfare to be a high priority. The level of public support will erode further and provide less political legitimacy for this and future land claim settlements if the federal government curtails debate.”¹²⁸

Throughout this period of increased “awareness” of treaties, the logic of a referendum was being consolidated. The Select Standing Committee on Aboriginal Affairs Minority Report had set this out several years before:

Until such time as there has been a genuine province-wide dialogue aimed at developing a comprehensive negotiating mandate for treaties, it is unlikely that any clear consensus on the broader purpose of treaties can ever be established. Nor is it likely that, in the absence of such a discussion, a consensus will emerge around the compromises that treaties will necessarily entail ... Without a genuine province-wide debate as a *society* on the values, principles and basic rights

¹²⁵ Paul Willcocks, ‘B.C. government pulls plug on debate of Nisga’a treaty’, *The Globe and Mail* (April 22, 1999).

¹²⁶ Craig McInnes, ‘Nisga’a closure enrages Liberals’, *The Vancouver Sun* (April 21, 1999).

¹²⁷ Peter O’Neil and Criag McInnes, ‘Ottawa blames B.C. for delay in Nisga’a debate’, *The Vancouver Sun* (May 1, 1999).

¹²⁸ ‘Silencing dissent will not help treaty’, *The Vancouver Sun* (November 16, 1999).

that treaties should forever enshrine, we fear the treaty process is in serious long-term jeopardy.¹²⁹

By 1997 a referendum was firmly on the political map, put there both by established political forces and by the anti-treaty fringe, represented by such organisations as BCFIRE and Citizens First. The Majority report concludes, rather unfortunately considering the later closure of the legislative debate, with a bromide about the principles of representative democracy and a recommendation for a ‘free’ or ‘conscience’ vote, so that MLAs are better able “to represent the interests of their communities.”¹³⁰ NFA ratification raised talk of an early election and the need for a renewed mandate for treaty-making now the issue was more developed and comprehensible to the general public.¹³¹ Simon Fraser University political scientist Paddy Smith suggested that, “even if the Nisga’a deal gets pushed through in the next few years, this will make other ones harder.”¹³²

In the mid-1960s a common assumption was that a province-wide agreement would be reached, though each tribe would then go and negotiate its own terms.¹³³ The assumption that a set of general provincial positions could be *democratically* arrived at strains against the evidence; acceptance of such positions or mandates by First Nations seems highly unlikely given stated commitments to the ‘nation-to-nation’ relationship (something neither understood nor appreciated by the public). Yet the view that solutions need to be found on a wider basis has considerable support.

¹²⁹ Select Standing Committee Report, ‘Appendix II – Minority Opinions’, emphasis in original.

¹³⁰ *ibid.*, Recommendation 32.

¹³¹ Patrick Nagle, ‘Nisga’a Treaty is more honourable than Vander Zalm’, *The Vancouver Sun* (November 29, 1999).

¹³² Dianne Rinehart, ‘Feuds over native lands flaring up across BC’, *The Vancouver Sun* (January 16, 1998).

¹³³ Tennant, p. 134. This approach appears to have considerable purchase in early Australian discussions about a ‘framework agreement’. See Patrick Dodson, ‘Lingiari - Until the chains are broken’, *The Fourth Vincent Lingiari Lecture*, Northern Territory University (August 27, 1999).

Several key areas of the Select Standing Committee report point to province-wide negotiations, on fisheries, land quantum, third-party compensation and certainty, as well as regional discussions with regard to wildlife, and government-wide strategies for negotiating interim measures.¹³⁴

In 1999 the BCTC spoke favourably of the First Nation Treaty Negotiation Alliance initiative to resolve treaty issues among First Nations on a regional basis.¹³⁵ That regional coalition was formed in 1999 in anger at disputed land sales on traditional territories on Vancouver Island.¹³⁶ Much more will need to be done in other contexts. For example, the urban/rural divide is a significant one. As Joanne Monaghan of the Kitimat-Stikine Regional District¹³⁷ pointed out during the Nisga'a AIP stage, some tables may face less complex tasks: "In terms of the present relationship between the Nisga'a and Kitimat-Stikine regional district it is relatively simple. Electoral area A, the Nass valley, participates in the regional district's general government function: planning, economic development and refuse sites. There is very little in terms of special service delivery. The area is not covered by an official community plan; there is no zoning by-law, just a subdivision by-law."¹³⁸ Compare this with the Lower Mainland where the situation will be totally different: "in urban settings you have more competing interests, you have more subscribed land-use, the land has been used and encumbered by a whole variety of different things, roads, sewers and so on. Resources are largely depleted, replaced with urbanisation and growth."¹³⁹

Is there a template for the new relationship between indigenous and settler peoples? In the current phase of the treaty process it seems unlikely. Underlying any

¹³⁴ Select Standing Committee Report report, 'Appendix 1 – Summary of Recommendations'.

¹³⁵ BCTC, 'After Delgamuuk'w: The Legal & Political Landscape' (November, 1999), p. 2.

¹³⁶ Haythornthwaite, G. 2000. Tossing the template: British Columbia natives reject Nisga'a-style treaties. *Canadian Dimension* 34, pp. 33-36.

¹³⁷ The local government overlapping with the Nisga'a.

¹³⁸ UBCM/First Nations Summit, *Community to community - a joint forum: A dialogue between First Nations and local governments in British Columbia* (undated report, forum held January 24, 1997).

innovative responses to the challenges of treaty-making is the massive philosophical obstacle of ‘certainty’.

Certainty

determined, fixed, not variable, definite, exact, sure, reliable... beyond possibility of doubt... that which cannot be questioned.¹⁴⁰

There were differences in the meaning of the term ‘certainty’ used by witnesses.¹⁴¹

In his political history of aboriginal rights and organisation in British Columbia, Paul Tennant asked two fundamental questions about aboriginal title: is there pre-existing title; and what is the burden it imposes on the Crown? That is, what would it take to extinguish it?¹⁴² The construction of Tennant’s approach to defining aboriginal title, is I think, revealing: the history of indigenous claims in British Columbia is best read as a series of government attempts to restore finality. To make the ‘problem’ go away, and to be certain it will not come back: “The federal government has consistently approached agreements with aboriginal groups ... with the objective of finality. It has aimed to secure clear title to the land for development and to guarantee that no future claim based upon aboriginal title could be made upon the land.”¹⁴³

This applies since 1850: in the Robinson treaties, the ‘certainty’ language is evident: “the said Chiefs ... surrender, cede, grant and convey unto Her Majesty ... all their rights, title and interest in the whole of the territory above described.” In the

¹³⁹ Didluck, Transcript.

¹⁴⁰ ‘Certain’, in Simpson, J. A. and Weiner, E. S. C. 1989. *The Oxford English dictionary*, Clarendon Press; New York. Oxford University Press, Oxford.

¹⁴¹ Select Standing Committee Report, ‘Certainty’.

¹⁴² Tennant, p. 213.

¹⁴³ Coolican Report, pp. 5-6.

post-1876 ‘numbered’ treaties a similar logic applies: “the Indians ... do hereby cede, release, surrender and yield up to the government of the Dominion of Canada ... all their rights, title and privileges whatsoever.” By the time of the JBNQA in 1975, extinguishment is still intended but it is ‘balanced’ by the idea of rights being ‘granted back’: “the James Bay Cree and the Inuit of Quebec hereby cede, release and surrender and convey all their Native claims, rights and title, whatever they may be ... Quebec and Canada, the James Bay Energy Corporation, the James Bay Development Corporation and the Quebec Hydro-electric Commission hereby give, grant, recognize and provide to the James Bay Cree and the Inuit of Quebec the rights, privileges and benefits specified herein.”¹⁴⁴ Current AFN Grand Chief Matthew Coon Come described all of these approaches as extinguishment:

Extinguishment has injected a fundamental instability into the relationship between the Cree and the other signatories of the James Bay and Northern Quebec Agreement. For Aboriginal peoples, extinguishment is brutal conquest attempted with a fountain pen. It is a fundamental wrong, entrenched in provisions and laws that are fundamentally wrong ... Extinguishment is simply terra nullius (empty land -- an old colonial rationalization for expansion) applied after the fact ... Many of our collective and individual rights are to a large degree linked to our lands and resources. Extinguishment attempts to sever our relationship with our lands, undermining our identity and status. It attempts to deny us beneficial enjoyment of our resources, while making others wealthy and us dependent upon them for our basic needs. It puts the power to make decisions about our lands and waters, and thus about us, exclusively in the hands of others. Its imposition is thus a profound denial of our fundamental rights.¹⁴⁵

In 1995, the federal government commissioned a ‘fact-finder’ on the question of certainty. His report acknowledged that,

It is clear that aboriginal peoples in Canada here, and have always had a very different view of their rights and responsibilities and of their relationship to land than has the Canadian government ... The whole (claims) process is incomprehensible to them. Part of the reason for their confusion is the inconsistency between the promises for a ‘new relationship’ and the lack

¹⁴⁴ Treaty text reprinted in *ibid.*, pp. 37-39.

¹⁴⁵ Matthew Coon Come, Grand Council of the Cree, Presentation to the Royal Commission on Aboriginal Peoples, Montreal, Quebec, November 18, 1993, cited in Rynard 2000, at note 60.

of real change in federal government policies that affect their lands and lives. On the one hand, the federal government promises to recognize their rights, while on the other hand it demands they ‘surrender’ those same rights ... Clauses to ‘extinguish’ aboriginal rights have now been eliminated, but clauses requiring ‘surrender’ still remain. They are not very different and no different when it comes to the giving up of rights. A sense of paternalism continues to permeate the policy and to poison relations between Canada and Aboriginal peoples.¹⁴⁶

Hamilton went on to examine the certainty model used in the comprehensive claims policy, particularly after its revisions in 1986. He characterised it as “insulting” to indigenous people, who are obliged to forego their rights according to an arbitrary schedule devised with neither consent nor participation.¹⁴⁷ He writes that certainty “used to reflect a need to know that various rights and interests are secure ... to express the need to be assured that ‘my rights’ are secure and that ‘their rights’ cannot interfere with ‘mine’.”¹⁴⁸ Whereas under the comprehensive claims policy it had come to mean “an end to any question over title.”¹⁴⁹ The need for a “final resolution” was frequently indicated by governments.¹⁵⁰

An apparent objective of post-Confederation treaties and modern claims agreements has been the final settlement of all aboriginal claims. Legally, this goal has been achieved through the blanket surrender-of-rights clauses that appeared in the numbered treaties ... In practice, finality has never been achieved. The federal government is now faced with many petitions to restore the spirit of previous agreements, which are no less compelling by virtue of their grounding in arguments of social and moral justice rather than in law. Agreements set in legal concrete have left a residue of frustration and bitterness. Today’s agreements must aspire to more positive and lasting results.¹⁵¹

The Task Force Report did not resile from the issue: “Aboriginal rights not specifically dealt with in a treaty should not be considered extinguished or impaired.” Any blanket indemnity or ‘release’, however phrased, does this in effect if not also in

¹⁴⁶ Hamilton Report, p. 31.

¹⁴⁷ *ibid.*, p. 26.

¹⁴⁸ *ibid.*, p. 35.

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid.*, p. 55.

intention. British Columbia's explicit objective in the treaty process is set out in 'British Columbia's approach to treaty settlement lands and resources': it was to secure private property (even though there is no jurisprudence that has put fee-simple lands under threat); to confirm the Crown's authority to dispose of lands and resources for the benefit of all British Columbians; to replace the abstract jurisprudence of aboriginal rights with workable and efficient definitions; and to enable clear relationships between interests such that economic development is secure.¹⁵² As it was put in discussions about the NFA in 1998, the "treaty will exhaustively set forth all the section 35 rights of the Nisga'a nation, including the manner of their exercise."¹⁵³

The Province also stated that, "once treaties have been concluded they should not be re-opened; however, if it becomes clear that components of treaties require modification to adapt to new circumstances, amendments will be possible on the agreement of all three parties."¹⁵⁴ That means modifications of those rights set out only in the agreement; there is no accommodation for jurisprudential, cultural or demographic change. The BC government view of aboriginal rights was neatly captured in a recent exchange on CKNW Radio: "we say that the treaty represents the definition of their rights that continue to exist, and it is only those that are defined that end up with constitutional protection."¹⁵⁵

This construction of certainty becomes dogma for some: in testimony to the Hamilton report a coalition of business interests, the British Columbia Utilities Advisory Council, suggested certainty was the "establishment of a final, precise and

¹⁵¹ Coolican Report, p. 35.

¹⁵² Ministry of Aboriginal Affairs, 'British Columbia's approach to treaty settlement lands and resources'.

¹⁵³ Ministry of Aboriginal Affairs, 'Certainty summary' (Draft discussion paper on the NFA presented to TNAC, April 30, 1998), p. 1.

¹⁵⁴ Ministry of Aboriginal Affairs, 'British Columbia's approach to treaty settlement lands and resources', s. III.9.

¹⁵⁵ The speaker was Dave Zirnelt, then Minister in the NDP government. Rafe Mair 'Interview with Dave Zirnelt'.

binding settlement of all outstanding substantive issues.”¹⁵⁶ TNAC rejected any models that did not accord with the existing (comprehensive claims) policy: the exchange of “vague Aboriginal rights” was an essential precursor to economic development.¹⁵⁷

This is something sought consistently by the UBCM: “Local governments believe that British Columbia should not be expected to accept a level of certainty that is less than what exists elsewhere in Canada.”¹⁵⁸ In their presentation to the Hamilton inquiry, UBCM offered testimony that presented certainty against a clearer background: “Governments must be prepared to compensate for the level of uncertainty they require ... A settlement which provides little certainty should have an economic cost to the First Nation.”

UBCM also put the argument that certainty may not simply be a matter of finding the right phrasing: “(is) language ... the only problem or do First Nations object to any surrender of their rights as a matter of principle. If so, they are bringing little certainty to the table and there would not seem to be good reason to enter into constitutionally-protected treaties.”¹⁵⁹ Here surrender is equated with certainty. The same point was reiterated in the Minority report on the NFA prepared by the Select Standing Committee on Aboriginal Affairs: “Whether a more benign legal technique for achieving certainty can be agreed upon remains to be seen, for the issue is really not about the phraseology, but the requirement for extinguishment. As we see it, treaties should continue to require the extinguishment of aboriginal rights on Crown land not specifically identified as treaty rights. Without that expressed ‘clear and plain intention’, the uncertainty will remain that unextinguished rights might one day be asserted and upheld.”¹⁶⁰

¹⁵⁶ Hamilton Report, p. 36.

¹⁵⁷ *ibid.*, p. 58.

¹⁵⁸ UBCM, UBCM’s response to Provincial Government’s Mandates: British Columbia’s approach to treaty settlements (October 1997), p. 17.

¹⁵⁹ UBCM, ‘Achieving certainty in treaty negotiations: Presentation to the Federal Fact Finder’ (April 1995), p. 6.

¹⁶⁰ Select Standing Committee Report report, Appendix II -- Minority Opinions.

These positions make the niceties of phrasing immaterial; they are in stark contrast to understandings of certainty that First Nations have been developing. What is perhaps of most concern is these views come from the BC Liberals, who produced the minority report and now hold a massive majority in the British Columbia legislature, and local government: the only two provincial institutions with direct involvement in the negotiation of treaties under the treaty process.

First Nations are extremely hostile to the argument that their rights are not to be continuing to ensure development and investment security and jurisdictional coherence. The NTC submission to the Hamilton inquiry noted the irony that “certainty is the primary goal of government when indeed it has been the First Nations’ position as well ... our need for certainty exceeds that of the federal and provincial governments.”¹⁶¹ Other indigenous contributors “expressed caution over the use of the term,” noting that it was complicit with the facts of extinguishment.

When we hear the federal government insisting upon ‘certainty’ we must ask – certainty for whom? Certainty to exclude the First Nations for all time to come? As a result of its past insistence on ‘certainty’, First Nations have historically been excluded from Canada’s economic development, robbing Canada of the energetic participation of the First Nations in achieving economic well-being. It is ‘certainty’ which is behind the scandalous dependency which now so tragically characterises the relationship and ‘certainty’ which makes correcting the problems so difficult.¹⁶²

The UBCIC and Labrador Inuit Association chose to use terms like ‘legal predictability’ in the processes for making development decisions and stressed the total abhorrence of extinguishment: title was “not ours to surrender.”¹⁶³ Legal advice given to the UBCIC characterises the governments’ approach as like a “drift net fishery.”¹⁶⁴ One Native contributor in Nova Scotia pointed out that treaties should be “living and

¹⁶¹ Hamilton Report, p. 48.

¹⁶² *ibid.*, p. 49.

¹⁶³ *ibid.*, pp. 49-53.

¹⁶⁴ Louise Mandell, ‘Treaty-making: certainty through consent not extinguishment’, Discussion paper submitted to UBCIC (January 9, 1991).

breathing things.”¹⁶⁵ The Gitksan have said that they “do not want a treaty. We want a set of living agreements that would enable us to reconcile our interests with the Crown. The Crown does not have to bury us in order for us to be good Gitksan within Canada.”¹⁶⁶ Many have pointed to the failure of the JBNQA and other agreements to provide finality and justice, while resulting in ongoing bitterness and dispute.¹⁶⁷

In 1998 the Province altered its stance, abandoning “cede, release and surrender.”¹⁶⁸ Since then the treaty process has attempted to use a certainty policy known as ‘modify and release’: it is the approach taken in the NFA, which I examine in the following section. Two of the BCTC commissioners have submitted that such a “modification (of aboriginal title) removes uncertainty.”¹⁶⁹ Gordon Christie has pointed out that in “a process of modification some of the properties of a thing alter, while others remain the same. The *same thing* exists after the modification.”¹⁷⁰ Yet this may simply shift the burden onto the meaning of “modification.” In the Gitanyow negotiations, the First Nation proposed a “non-assertion” of aboriginal rights model that would apply as long as there was no “material breach” of the terms of the agreement.¹⁷¹ The response from both senior governments was to question the specifics of “material breach” and the range of aboriginal rights that would or would not be asserted.¹⁷² Krehbiel offers a cautionary note on the types of discussion now taking

¹⁶⁵ Transcript of public meeting in Halifax NS, cited in Hamilton Report at p. 53.

¹⁶⁶ Elmer Derrick, testimony reported in Canada, *Proceedings of the Standing Senate Committee on Aboriginal Peoples* (February 23, 2000) http://www.parl.gc.ca/36/2/parlbus/commbus/senate/com-e/abor-e/04evb-e.htm?Language=E&Parl=36&Ses=2&comm_id=1 (April 2, 2002).

¹⁶⁷ See also Canadian Human Rights Commission *Annual Report 1999*, on continued dissatisfaction in the Cree-Naskapi Commission about the observance of government obligations under the JBNQA.

¹⁶⁸ Craig McInnes, ‘British Columbia changes treaty approach’, *The Globe and Mail* (May 14, 1998).

¹⁶⁹ ‘Speaking Notes for Kathleen Keating, Commissioner and Debra Hanuse, Commissioner, to the Prime Minister’s Caucus Task Force on the Four Western Provinces’, Vancouver (May 17, 1999), p. 4.

¹⁷⁰ Christie, ‘Delgamuuk’w and modern treaties’, p. 28.

¹⁷¹ Gitanyow Hereditary Chiefs, Gitanyow Main Table meeting, Wedgwood Hotel, Vancouver (September 17, 1999).

¹⁷² Lyle Verick (British Columbia), Eric Denhoff (FTNO), Gitanyow Main Table meeting (September 21, 1999).

place: “I think that the Nisga’a modification approach goes some distance, but I’m not sure that it protects that fundamental interest. But nobody really knows. It’s got to be thought through, litigated probably.”¹⁷³

Such commentary illustrates that different notions of what certainty is may only be reached with different means: the political recognition sought by First Nations is of a different order to the legal certainty that is the primary goal of government. In any case, how certain is certain? The *Sparrow* judgement had set down principles for the justification of infringement, based not on inherent rights but on the mode of infringement: “a valid legislative objective must be served ... (it) must uphold the honour of the Crown.”¹⁷⁴ Yet, reviewing the history of treaties across Canada and the case law, Hamilton noted that “many Aboriginal people who have signed a (surrender) clause ... minimize its effect. Some totally reject the surrender clause. They describe it as a conditional surrender only ... If the Crown breaches the treaty process, they say surrender no longer applies.” He notes that in the *Simon* case of 1985, Dixon J had ruled that “in certain circumstances a treaty could be terminated by a breach of one of its fundamental provisions.”¹⁷⁵ Hamilton argued that such caveats or ‘outs’ are not conducive to certainty.¹⁷⁶

Obviously the search for certainty does not exist in a legal vacuum. Perhaps a simpler way to understand the issue is to ask, for example, whether any development application has an appropriate place to be lodged, not whether it will be approved according to current provincial norms. Does the treaty process establish a system where developers can be confident of outcomes because they know are framed in a jurisdiction with a particular institutional bias? Hamilton suggests that the causes of uncertainty are that we do not know how to answer certain questions, such as where can an indigenous person can fish or hunt; or others about commercial and public

¹⁷³ Krehbiel, Transcript.

¹⁷⁴ Boldt 1993, p. 35.

¹⁷⁵ Cited in Hamilton Report, at p. 41.

¹⁷⁶ *ibid.*

rights. Who can issue permits? Who can grant and protect third-party interests? What kinds of co-management boards are needed or likely?

There is a pragmatism here, but the presumption is still that there are simply areas of conflict or disagreement, rather than any systematic intercultural incomprehension that underpins uncertainty. In that context, the simple ‘ending’ of uncertainty seems like the best thing to aim for, and many interested parties do:

We are not concerned so much here with the substance of the relationship between First Nations and local government, as we are concerned that the relationship be clearly addressed and not left for post-treaty speculation.¹⁷⁷

The Federal Treaty Negotiation Office has made the argument that uncertainty exists because of s.35, which does not explicitly set out what aboriginal and treaty rights are.¹⁷⁸ But are s.35 rights any more in need of explication than say the “right to free speech” or freedom of religion? These things have clarity or certainty because there is confidence in an legal and socio-political architecture that has evolved to determine their status as ‘rights’. The ‘certifying’ approach to indigenous rights, suggests either that this has simply not happened yet, or, more troublingly, that indigenous rights should never be understood as human rights at all.

The thing about certainty is that everyone appears to want it: indigenous people certainly want their rights formally recognised and constitutionalised by treaty – an evolving resource for indigenous social, cultural and political development; settler institutions conversely, want the certainty that indigenous peoples will not exercise rights in the future, other than those set out explicitly by the treaty – a certainty akin to black-letter law. The difficulty arises in the definition, not of certainty, but of uncertainty. If uncertainty is anathema because it makes us anxious about our commitments or our livelihood, then the way we consider our anxieties and that of

¹⁷⁷ UBCM, ‘Achieving certainty’, p. 5.

¹⁷⁸ DIAND/FTNO, *Treaty news* (June 2000), ‘Policy: the Nisga’a treaty and certainty’.

others is fundamental to our perceptions of how to restore or achieve certainty. Indigenous claims appear to arise out of the historically legitimate anxiety that without a major process of decolonisation the destruction of indigenous identity will not stop.

Settler anxieties meanwhile are conflated with the systemic limits and failures of modern society and economy, and are thus less tangible; perhaps only truly visible in their encounter with difference. The way governments are determined to behave is to establish all aspects of the relationship (that is aboriginal rights as a component of the larger society), all set out in the most explicit codes. This project has as its goal the finalising of indigenous difference; autonomy then appears to be the ‘freely taken’ option of assimilation, an inexorable movement toward settler norms. There is a contemporary analogue available to settlers: is this a conceivable political platform for democratic nation-states attempting to address the ‘norms’ of globalisation?

‘Senior’ governments in the treaty process seek Native acceptance of something that not only would be unacceptable to the mainstream (a spatially fixed political identity, economy and culture) but that could never work. Pushed by political elites, though bounded by settler anxieties, this discrimination in the evolutionary capacity of cultural groups – the collective rights of peoples – is a recognition of difference of sorts: yet it is a dim awareness, a thin and meagre consciousness that takes neither pleasure in the mystery of difference nor respects it. All that becomes truly clear in the encounter are the absences of contemporary settler experience. The accusation that Native peoples disrupt political stability or resource-based economic security often conceals an abiding ambivalence about the intrinsic honour and durability of current practices and the identities reliant upon them.

The types of anxiety then are of a different order: one an historically-based fear of continued abuse, accompanied by no end of evidence of the effects of that history and a fear that future generations are locked into that or must give up their sense of difference; the other an untethered set of fears, free to take the shape of overtly racist imagery or liberal concerns for the practical and realistic as circumstances dictate – an ontological anxiety expressed only through the institutionalisation of “certainty.”

What's the fundamental nature of this new relationship we're building? ... First Nations and the Crown are in two solitudes about that as we speak, seven years into negotiation!¹⁷⁹

¹⁷⁹ Richardson, Transcript 2000.

9.

The future of treaty-making in British Columbia

The issue certainly is to make first nations people the same as everyone else. That is, to make the year 2000 and the century we are coming into the century for first nations people ... to better their world.¹

The status quo

In its 2000 Annual Report, the Treaty Commission for the first time acknowledged fundamental conflicts it saw as part of the process. However, the Chief Commissioner was optimistic that those conflicts were being resolved: “The parties I believe are working on those fundamental divides, those fundamental conflicts or gulfs between them, I think they’re working on them very hard and very sincerely.”²

Since then it is not clear what has been achieved through this hard and sincere work. As I later explain, the change in government in May 2001 could actually entrench these differences. Putting a spotlight on the BCTC approach to their role reveals the foundational impediment available to the parties whenever they wish to activate it: the withdrawal of their own will to make treaties.

It’s been agreed that each of the parties will not come to the table, that they will be open to listen to the views and perspectives of the other parties, and really strive to reach common ground, common understandings and agreements ... it’s natural for a party to come with a position ... (but the Treaty Commission does not) have the authority to compel any party to do anything – and that’s as it should be ... I would say this, if any of the parties just stubbornly stuck to ‘take it or leave it’, it would put the Commission in a position where at some point

¹ Bob Nault, newly appointed as federal Minister for Indian Affairs and Northern Development. ‘The cabinet shuffle’, *The Globe and Mail* (August 4, 1999), p. A5.

² Richardson, Transcript 2000.

we'll have to speak out and speak out loudly. But we wouldn't do that quickly, because once we do that the negotiation is very close to being over.³

The fundamental assumption being made is that political good will animates the process, thereby making the BCTC institutionally effective. Yet it may be that the Commission does not enjoy that position. On the question of the identity of First Nations allowed to participate for example, the Commission has acknowledged that it has "limited discretion" to return Statements of Intent.⁴ One analyst points out problems with the BCTC's self-styled role as "the independent 'voice' of the treaty process"⁵: "It could have been meaningful. I don't think they have honestly tried to make it meaningful. I don't think they are serving any useful purpose at this point. I think that the only useful purpose they can serve now would be to go and do something that would dramatically force the governments to reassess how they deal with the process."⁶ The problem is that in the circumstances the treaty process now finds itself, of government vacillation combined with Native anger, it has no effective function. It relies solely on the will of the parties to negotiate in good faith. A question to be asked in 2002 is how the BCTC can fulfil its legislative obligations where the process is riddled with structural and political problems.

Richardson has spoken of touchstones, acts of good faith, accepting that they "have been too few and far between."⁷ As at April 2002, there are no modern treaties in BC other than the NFA. Eight years into the treaty process, 49 First Nations are in negotiations with the senior governments at 40 treaty tables. The overwhelming majority of tables remain in the first substantive phase of talks, stage 4, grappling with the conceptual and practical challenges outlined in the previous two chapters. Of the 40 tables, the BCTC's 2001 *Annual Report* could identify only 12 that have made *any*

³ *ibid.*

⁴ BCTC, Interim report: Strengthening First Nations for Treaty Purposes, p. 2.

⁵ BCTC, 'About the Commission' <http://www.bctreaty.net/files/bctreaty.html>(April 2, 2002).

⁶ Schulmann, Transcript.

⁷ Richardson, Transcript 2000.

progress through the stages in the last year, noting that 25 tables are either stagnating or pursuing ‘non-treaty’ activities.

Only one First Nation has joined the process since 1997 (coincidentally the year of the *Delgamuuk’w* judgment), the Hupacasath First Nation having left the collective Nuu-chah-nulth negotiations (on the edge of stage 5) to pursue their own treaty agenda. Those First Nations in or nearing stage 5 are facing a community backlash: Sechelt Band’s AIP was rejected in July 2000, in favour of a return to litigation; the NTC AIP, initialed on March 10, 2001 failed to gain ratification by their communities in mid-2001; and finally the Sliammon, who reached a draft AIP also in March 2001, narrowly rejected it in a community referendum on November 21, 2001. Some tables have been effectively disbanded by First Nations, in addition to the three First Nations – In-SHUCK-ch/N’Quat’qua, Ts’kw’aylaxw, and the Xaxli’p – who formally withdrew from the treaty process in 2000-2001. Another Band, at McLeod Lake near the province’s north-east border with Alberta, reached an adhesion to one of the early 20th century ‘numbered’ treaties. They secured a significant land quantum and resource access through bilateral negotiations with Canada.⁸ The tripartite treaty process has never looked less healthy since its inception.

I have considered the pressures that exist within the treaty process as tables struggle to find common ground. In this chapter I examine the political pressures from without: from indigenous peoples seeing their needs and entitlements in ways not adequately expressed by the treaty process under current approaches; and from settler antagonism to public expenditure on indigenous rights processes, and increasingly to the very rights themselves. Each set of political positions adopts a radically different stance to the general principles for resolving territorial disputes that have had such limited success within the process. The pursuit in these recent approaches does not appear to be for ‘new relationships’ at all.

⁸ Ministry of Aboriginal Affairs, ‘Overview of the Final McLeod Lake Adhesion to Treaty No. 8 and Settlement Agreement (March 27, 2000) <http://www.aaf.gov.bc.ca/news-releases/2000/mcleodover.stm> (June 14, 2001).

After Delgamuuk’w

I would love to engage in a philosophical debate with the member on the question of title and ownership, but it’s simply not germane to the issue at hand.⁹

If that was thought to be the case in 1993, it is clearly not so in 2002. The important consequences of the *Delgamuuk’w* judgment arise in the richer description of aboriginal title, and the requirements for its proof; and in the system of extinguishment it has entrenched.

In December of 1997, the Supreme Court of Canada gave its judgment in the case known as *Delgamuuk’w*.¹⁰ While the court gave no determination to the specific matter at hand, referring the question of the aboriginal title of the Gitskan-Wetsuweten back the British Columbia courts, its ruling has profound ramifications for the treaty process which continue to be grappled with. While formally ordering a new trial, the Supreme Court encouraged that a solution be reached “through negotiated settlements with good faith and give and take on all sides.”¹¹ The judgment then establishes a new context for such negotiations, by developing a clearer definition of aboriginal title: it is neither an inalienable form of fee simple nor the minimal notion of usufructuary rights, but is “somewhere in between these positions.” Title is a right in land itself, and can encompass a range of practices “not all of which need be ... integral to the distinctive cultures of aboriginal societies.” The opening provided here is the source of ongoing dispute, though such practices cannot include those which would threaten the aboriginal way of life itself.¹²

⁹ Petter, British Columbia *Official Report of Debates of The Legislative Assembly* (May 25, 1993), p. 6489.

¹⁰ *Delgamuukw v. British Columbia* [1997] 3 S.C.R. For a comprehensive analysis of the judgment see the range of scholarly articles available at <http://www.delgamuukw.org/> Also Persky, S. and David Suzuki Foundation 1998. *Delgamuukw: the Supreme Court of Canada decision on aboriginal title*, Greystone, Vancouver.

¹¹ *Delgamuukw v. British Columbia* at para. 186.

¹² *ibid.* at para. 110-111.

In order to demonstrate this title at law, the court set out three criteria which must be met: an aboriginal claimant group must show evidence of occupation of lands at the time of the assertion of British sovereignty through the Oregon Boundary Treaty of 1846, at which time occupation must have been exclusively held. Also, if current occupation is relied on as the basis of claim, then a line of continuity must be shown going back to 1846. Conceived of as a burden on the Crown's radical title, aboriginal title "crystallized" at the moment of sovereignty. This is not to say that title is granted by Canada, but is meaningful in Canadian law from the moment of recognition. Importantly, this supports the view that aboriginal title is not subject to the s.91(24) powers under which jurisdiction over aboriginal matters is exclusively held by the federal government. Indeed, *Delgamuuk'w* established that the 1763 Royal Proclamation did not distribute all power that existed on the territories it described, even though it asserted sovereignty over them.¹³

These rights which comprise aboriginal title in the court's reckoning give shape to the meaning of s.35 protection, but one thing that they are not is immune from state infringement. In fact the opposite is true:

(T)he development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.¹⁴

As Persky pointed out, the wide scope of the phrase "economic development" is later minimised by the requirement to consult, and the obligation to pay compensation where infringement occurs.¹⁵ Provincial governments do not have the power to infringe title. Persky also noted that many questions remain: over the range of activities and the character of aboriginal jurisdiction or self-government over title

¹³ See also *Campbell v. British Columbia* [2000] B.C.J. No. 1524 (B.C.S.C.), at para 152-157.

¹⁴ *Delgamuukw v. British Columbia* at para. 165.

¹⁵ Persky, p. 20.

lands; the specifics of good faith consultation and an appropriate level of compensation for extinguished title.

One of the ways to read *Delgamuuk'w* is to draw together the court's exhortations to negotiate with its rulings on the more open possibilities of title and the duty to consult prior to any unilateral action by the federal government. McNeil saw the combination as resulting in "an emphasis on Aboriginal participation in resource development."¹⁶ Gordon Christie also sensed a new footing, if not a new procedure, for negotiations: "a First Nation with a recognized claim to Aboriginal title finds itself capable of demanding that certain procedural and substantive measures be undertaken by Canadian governments contemplating, or engaged in, interference with the rights that fall under that title."¹⁷

There are, however, many Natives and their supporters who see *Delgamuuk'w* as a poisoned chalice. An Australian Federal court judge has written fatalistically about the general role of jurisprudence on aboriginal title: "once the courts acknowledge the rights of indigenous inhabitants over their traditional lands, the judicial branch must play its part in specifying the irreversible consequences of conquest or settlement."¹⁸ It is the new context into which title has been cast that concerns many critics:

Delgamuuk'w and the current understanding of the treaty process place aboriginal title and Aboriginal people in a wider vision of Canada that is not shared by either the Report of the Canadian Royal Commission on Aboriginal Peoples or by many Aboriginal people who expressed their views at this conference and at the Royal Commission.¹⁹

This is entrenched by the judgment's 'crystallisation' at the time of the assertion of imperial sovereignty: *Delgamuuk'w* confirms that "distinctive aboriginal

¹⁶ McNeil, 'Defining aboriginal title in the 90s: Has the Supreme Court finally got it right?', Twelfth Annual Robarts Lecture, Robarts Centre for Canadian Studies, York University, Toronto (March 25, 1998) p. 13 <http://www.delgamuukw.org/perspectives/defining.pdf> (April 2, 2002).

¹⁷ Christie, 'Delgamuuk'w and modern treaties', p. 10.

¹⁸ Sackville, R. 2000. The emerging law of native title: some North American comparisons. *The Australian Law Journal* 74, p. 823.

¹⁹ McNeil, cited in James Tully, 'Two Visions of Aboriginal Title and Reconciliation' <http://members.tripod.com/arcbc/delg-tully.htm> (April 2, 2002).

societies exist within, and are a part of, a broader social, political and economic community.”²⁰ A great closure has taken place, that the rights of indigenous peoples are to be seen only in relief against a backdrop of Canadian sovereignty and constitutional law. Michael Asch and Norman Zlotkin presciently warned against the underlying assumption being made:

The idea that Aboriginal rights are ‘undefined’ and that their ultimate definition must be a product of judicial interpretation and constitutional amendment in turn rests on an underlying assumption about the relationship of Aboriginal rights and title to the Canadian constitutional and legal framework. The assumption is that the framework is fixed ... (and) Aboriginal rights are already subsumed under its jurisdiction.²¹

As I have repeatedly argued, a constant political position of government has been that aboriginal title and rights are undefined and that treaties set out and make ‘certain’ what rights are under provincial and federal jurisdiction within the constitution. The Supreme Court ruling consolidates that logic, from which a number of conclusions follow. First, the view that aboriginal title is limited to practices which do not threaten traditional forms of life on which title is based: initially, this would seem to extend the jurisprudence in the Meares Island case viz. that clear-felling a territory for example would leave little possibility for the enjoyment of aboriginal title. In fact it further opens title to the scrutiny of the Canadian courts, a prospect some reject as simply a deeper entrenchment of colonialism and paternalism: “Canadian courts should not sit in judgment over social change in Aboriginal communities, deciding what is and what is not necessary for their cultural preservation.”²²

Not only is the character of Native society subject to settler institutional confirmation, but the evolution of settler needs are well-catered for through the notion

²⁰ *Delgamuukw v. British Columbia* at para. 165.

²¹ Asch, M. and Zlotkin, N. 1997. Affirming Aboriginal title: A new basis for comprehensive claims negotiations. In *Aboriginal and treaty rights in Canada essays on law, equity, and respect for difference* (M. Asch, Ed.) UBC Press in association with the Centre for Constitutional Studies, University of Alberta, Vancouver, B.C., p. 212.

of valid infringement, or simply, extinguishment. Christie suggested that the construction of title in *Delgamuuk’w* is “subject to development activities, regardless of the willingness of the Aboriginal party to participate in the process.”²³

(M)odern treaties aim to achieve certainty in relation to legislative infringement. Taken as a whole ... the decision in *Delgamuuk’w* would seem to describe forces which make it very difficult for Aboriginal peoples to maintain their spiritual connections to the land. These are powerful forces – *economic forces* – which the court accepts as inevitably and inexorably intruding on the worlds of Canada’s Aboriginal peoples. The court presents a simple resolution to the conflict between these forces and the traditional lives of Aboriginal peoples – Aboriginal surrender to the inevitable and ‘inexorable’.²⁴

The fatalism inherent in this construction is disingenuous at best, naked racism at worst: McNeil asked, “has anyone ever heard of someone’s ranch or resort lands being taken by the government and transferred to someone else because it would be economically beneficial to the community.”²⁵ Moreover, it is ‘constitutionally radical’ by “allowing interests which are not Constitutional to trump rights which are.”²⁶

What also worries some critics is that although the judgment takes Native traditional culture and law into account, indeed entrenches it into Canadian jurisprudence, the title that emerges is not in fact defined in Native terms.²⁷ The intention of the Gitksan, indeed the hope of many Natives across the province, was to have their different legal traditions recognised but not assimilated.²⁸

The dependence of aboriginal title on government *largesse* implicit in the judgment simply begs the question: in what way does *Delgamuuk’w* break with the colonial legal history? Retaining and entrenching the absolute right of the state to expropriate indigenous lands simply makes the concessions on the nature of title and

²² McNeil, ‘Defining aboriginal title in the 90s’, p. 7.

²³ Christie, ‘*Delgamuuk’w* and modern treaties’, p. 19.

²⁴ *ibid.* p. 22.

²⁵ McNeil, ‘Defining aboriginal title in the 90s’, pp. 11-12.

²⁶ *ibid.* p. 10.

²⁷ Christie, ‘*Delgamuuk’w* and modern treaties’, p. 12.

on oral history into modest alterations in the current system of legal management of the indigenous-settler relationship. As Alfred has put it, *Delgamuuk'w* can be seen as “a mere refinement of the traditional logic of dispossession that has lain beneath Canadian policy for generations.”²⁹

The kind of arguments so far approached in the treaty process and exemplified by the NFA – broad extinguishment and indemnification in return for s.35 protection of a fraction of traditional territory – now may seem even less attractive to Native peoples. That is to say, after concluding their unfinished business and building a ‘new relationship’ with the state, Natives have not even purchased their own peace and security, but a permanent dependence and enforced participation in the norms and practices of settler society. It is of little surprise that alternatives are being pursued. I describe these alternatives and the consequences for the treaty process after considering how governments have responded to *Delgamuuk'w*.

Government and state responses

I don't blame the courts. I blame the governments. The governments have had a strategy of delay – not willing to accept their responsibility. The courts are telling us what we need to hear ... what I'd like to see is governments take their responsibility and get to the table.³⁰

The provincial minister at the time of the judgment appeared to also have understood the point: “Some say we should leave it up to the courts to decide – one slow and expensive detail at a time. But let's remember what the courts said in *Delgamuuk'w* –

²⁸ Personal comment to author by Taiaiake Alfred.

²⁹ Taiaiake Alfred, *'It's All a Farce Anyway': Deconstructing the British Columbia Treaty Process, A First Nations Survival Strategy*, p. 13 <http://www.delgamuukw.org/research/bctreatyprocess.pdf> (April 2, 2002).

³⁰ Federal Minister for Indian Affairs and Northern Development, Bob Nault, on the occasion of his appointment. Cited in John Geddes, ‘Turmoil in Native affairs’, *Maclean's* (November 1, 1999), pp. 24-26.

negotiation is the way.”³¹ Again the government rhetoric is at odds with the reality of policy and practice.

A tripartite review of the judgment was immediately begun by the three principals in early 1998, but it is not at all evident what has been achieved to this point: in its 1998 annual report the BCTC described the review process as “at a standstill,” while in 1999 recommendations had been developed that the principals were “now considering.”³² In 2000, the Commission identified a series of “creative approaches emerging” and pointed to several examples.

One of these is the joint statement on certainty of April 2000, an agreement of the principals, the nub of which is to allow tables to defer definitions of certainty until the final stage is reached, rather in negotiations that precede an AIP being reached.³³ Effectively this simply prolongs the agony, and while it may allow tables to make progress, it does not resolve the central complexities of treaty-making. Indeed it contradicts the view of the Chief Commissioner who has stressed that the reluctance of tables to deal with the hard issues is “really unhealthy.”³⁴

A second example proffered by the BCTC is that of the ‘Accord’ signed by the two governments and the Westbank First Nation – an agreement reached after the Westbank started ‘illegal’ logging in September of 1999. That document commits the government to a form of certainty that does not include “extinguishment ... (or) cede, release and surrender.” In giving the Westbank certain benefits (logs and cash) it is effectively an interim measure, one reached through direct action and the threat of litigation. As such, the BCTC enthusiasm for the Accord as a “creative” post-*Delgamuuk’w* strategy is either trite, or a repudiation of the principles of making a new relationship through trust and negotiation rather than conflict.

³¹ Lovick, ‘Address to First Nations Summit’.

³² BCTC, *Annual Report 1999*, ‘The legal and constitutional landscape after *Delgamuuk’w*’.

³³ Ministry of Aboriginal Affairs, ‘Joint communiqué: principals make important progress on the British Columbia treaty process’ (May 1, 2000).

³⁴ Richardson, Transcript 1999.

Indeed, given my analysis in Chapter 8 of the post-*Delgamuuk'w* interim measures granted by government – thinly spread and with little focus on substantive Native participation in resource decision-making – it is difficult to see any major policy shift. Based on my consideration of the judgment above, it would seem that *Delgamuuk'w* obliges treaties to become more open instruments: the range of activities beyond traditional practice need some attention, but rather than ruling things out, new institutions require establishment so that the changing needs of Native communities can be articulated fairly.³⁵ Interim measures take on a hugely important role: given the court's approach to the nature of title and valid extinguishment, as well as compensation, it would seem essential that interim measures policy is given more than a cosmetic injection of funds.

Yet something else may actually be taking place – a phenomenon that better explains the lack of progress in the face what is ostensibly a 'clarification' of the issues at stake. As one treaty analyst has put it, "The government simply denies that the other side has any bargaining chips ... First Nations have proved nothing and therefore bring nothing concrete to the table and have nothing to extinguish."³⁶ As a policy approach, a number of critics are wondering what, if anything, has changed: "It can be argued that nothing is gained that the people did not enjoy, in principle, as entitlements, before entering an Agreement ... *Delgamuuk'w* comes upon the scene as jurisprudence sanctifying the entire process, so that governments of Canada can be seen as discharging their responsibilities as democratic and liberal institutions."³⁷ The critique has been endorsed by government: speaking about the Sechelt AIP reached in 1999, then minister Lovick suggested that "this proposed treaty is as good as it gets ... *Delgamuuk'w* gave unrealistic expectations."³⁸

³⁵ As I noted, *Delgamuukw* offers little guidance on self-government, something the new British Columbia government has vowed to pursue in a reference to the Supreme Court.

³⁶ Schulmann, 'Getting treaty talks off square one', *Policy Options* (October 2000), pp. 59-62.

³⁷ Christie, '*Delgamuuk'w* and modern treaties', pp. 39-40

³⁸ Lovick, cited in 'First Nationalism', *The Economist* (August 5, 2000), pp. 38-41.

One scholar has probed deeply into these questions, conducting interviews with bureaucrats in the Canadian Department of Justice. The strategy he discovers is alarming: the government is making a calculation about uncertainty and First Nations' capacity to litigate their rights. Of course, government must calculate whether they will consult before acting in a way that may infringe title, whether that consultation will be sufficient, and whether the infringement meets the justification test set down in Lamer's majority judgment in *Delgamuuk'w*. However, Dacks emphasises government perceptions of First Nations' attitude to litigating their claims:

(Governments) anticipate that Aboriginal title will be recognized only over modest areas of land. Bolstering this confidence is their calculation that First Nations will be reluctant to test the Aboriginal title waters for fear of an unfavorable judicial decision that will weaken their position at the claims negotiating tables. This reticence may well counter the momentum that the *Delgamuuk'w* decision created in favour of First Nations' claims. While the *Delgamuuk'w* decision has not softened the two governments' bargaining positions, it has strengthened the confidence and the determination of the First Nations, the public credibility of their position and pressure on the governments to resolve what is now seen as a more pressing and consequential policy issue than it used to be considered ... (but) if the option is to alter their negotiating positions in the face of court judgements, they may prefer to tough it out by using the uniqueness of each First Nation's circumstances to compel a very large number of them to take their claims to court ... Governments can take considerable comfort in the *Delgamuuk'w* decision. While their resources are not endless, they are better able to fight a war of legal attrition than are most First Nations. There are good reasons for First Nations to avoid litigation.³⁹

It is difficult to see how this approach constitutes a desire to build a 'new relationship', as opposed to entrenching institutional power and mutual antagonism. Miles Richardson suggested that if Dacks' characterisation was correct,

It would be the death knell of this process ... the scenario you laid out is not good faith: taking advantage of the weaknesses of one party, waiting them out, and just getting your way by waiting them out. But one thing I know, and we're seeing that with the escalation in litigation

by First Nations, the escalation in direct action, confrontation ... Assume that that is the strategy of the Crown, then this province is in trouble - economically, politically, on a really shaky legal foundation... and if that was the situation this process, or any process, could not resolve that.⁴⁰

Native dissatisfaction

What we thought was a very good decision and a very good acknowledgment by the Supreme Court of Canada, is turning into little polka dots all over. We have to prove every little area in our traditional territory.⁴¹

Not surprisingly, many Natives find the central premises of the approach totally objectionable. One woman writing to a Native newspaper felt that after *Delgamuuk'w* the governments were taking “diametrically opposed views” to those held by First Nations, and were totally distorting the possibility of settlements based on equality.⁴² It would be inaccurate, though, to suggest that Native peoples were of one mind in their responses to their situation; consistency exists only in the dissatisfaction, and in the rising intensity of anger. It might be expected that the UBCIC – consistent critics of the treaty process – would see *Delgamuuk'w* and the governments’ response in the following way: “Government doesn’t understand Aboriginal title – they only understand rights.”⁴³ In this quarter, the government strategy is seen as an attempt to

³⁹ Gurston Dacks, ‘Litigation and Public Policy: Lessons from the Delgamuukw Decision’. Paper presented at the Joint Annual Meeting of the Canadian Political Science Association and the Société québécoise de science politique, Quebec City (August 1, 2000).

⁴⁰ Richardson, Transcript 2000.

⁴¹ Elizabeth Hunt, Kwakiutl First Nation treaty negotiator, quoted in Island Coast Summit, ‘Summary of proceedings/treaty panel’.

⁴² Vina Starr, Letter to the editor, *Kahtou News* (August 2000) pp. 4-5.

⁴³ Poplar, Transcript.

have Natives administer Canadian laws on themselves, denying the benefits of aboriginal title to succeeding generations.⁴⁴

If you ask any First Nation groups currently participating in this process if their Nation has a mandate to negotiate away 90-95% of their lands and resources, the answer will be a resounding NO!⁴⁵

As I have already noted, Ts'kw'aylaxw left the treaty process in 2000, citing the "five years of chicanery, deceit and disregard" to which they were subjected. Chief Robert Shintah said at the time that "our community has clearly spoken and told us to stop wasting our time and money."⁴⁶ The Band is unlikely to return to the process, according to their analyst Bernard Schulmann, without "a change in the provincial government. And I doubt if the band would re-enter the process if it had to borrow more money. And I think that the band would like to re-enter the process together with the other ten St'at'imc communities, on more of a tribal basis."⁴⁷

Meanwhile the First Nations Summit responded with sympathy to the abandonment at stage 5 of the Sechelt table, the Band returning to litigation: "when the government positions are based on complete denials of who we are as a people they're driving us back into the courts."⁴⁸ Sechelt raised a new totem pole to signify the change. Another group, the Carrier-Sekani Tribal Council, are grappling openly with their view of governments' bad faith after *Delgamuuk'w*. Arguing that the CSTC had incurred \$5.9M in treaty negotiation fees so far, of which 80% is repayable, Leonard Thomas suggested it was pointless to pursue negotiations without there being a strong commitment to close the deal: "If the governments continue the same pattern it may also be advisable to suspend these current negotiations rather than getting further into

⁴⁴ Terry, 'Why the Nisga'a treaty must not be the blueprint'.

⁴⁵ Reg Moody, 'After we are gone, our children will carry on with this fight', *First Nations Drum* (July 2000), p. 5.

⁴⁶ 'Ts'kw'aylaxw vote to end treaty negotiations', *First Nations Drum* (July 2000), p. 9.

⁴⁷ Schulmann, Transcript.

⁴⁸ Ed John of the First Nations Summit, cited in Daniel Girard, 'BC Aboriginal band leaves talks for court', *The Toronto Star* (June 1, 2000) p. 1.

a liability situation.”⁴⁹ Similarly Gary Albany, the newly elected chief of the Songhees Nation, one of the bands on the Te’Mexw table on Vancouver Island, declared upon taking up his mandate that the treaty was not among his priorities, and he was focussing on the education of Songhees youth.⁵⁰

A view repeatedly encountered in British Columbia is that First Nations are only kept in the process after seven years because of the debts that they have incurred.⁵¹ Even First Nations committed to the process are prepared to entertain alternatives that have more direct and tangible outcomes. The Lheidli T’enneh, for example, have certainly considered the recent adhesion to Treaty 8 reached by their neighbours the McLeod Lake Band:

It would be an alternative. Certainly the outcome of McLeod Lake was far better than the outcome, than the offer that Lheidli got in terms of land and resources. Treaty 8 has some limitations. It’s a Victorian treaty, the self-governance part is not in there. But it would provide a large land quantum and a larger cash quantum, tax exemption, and a clear hunting and fishing right. That isn’t easy to achieve in the other process.⁵²

However a negotiated agreement is still the preferred approach of many Natives in BC. At a major demonstration outside the BC parliament in May 2000, First Nations Summit leaders urged a renewal of the treaty process that worked according to four principles: recognition of aboriginal title (that is non-extinguishment); interim measures; compensation; and constitutionally-protected self-government.⁵³ Kathryn Teneese, a member of the First Nations Summit executive and chief negotiator for the Ktunaxa-Kinbasket Treaty Council, while not “looking for someplace else to go,” felt that there should be a commitment to the rules that had

⁴⁹ Leonard Thomas, ‘Vice-tribal chief comments on CSTC treaty structure’, *Tuz beyaduk (Talking Stick)* (January 2000), p. 5.

⁵⁰ Reported on Turtle Island Native Network <http://groups.yahoo.com/group/TurtleIslandNativeNetwork/messages> (July 19, 2001).

⁵¹ Stewart Phillip, cited in Kim Pemberton, ‘Treaty talks reach impasse, chiefs report’, *The Vancouver Sun* (September 15, 1999).

⁵² Krehbiel, Transcript.

originated the process and secured Natives' participation.⁵⁴ The rationale for remaining in the process is put lucidly by Christie:

The impact of *Delgamuuk'w* may also be minimized by a desire on the part of Aboriginal peoples to settle in order that they might begin to full participate in the economic development of their territories.⁵⁵

Absent a treaty, and Aboriginal people might be capable of demonstrating Aboriginal title over a large expanse of 'traditional territory', but threats against their traditional ways of life would continue unabated, and the people would always find themselves frustrated in their attempts to slow the advance of resource exploitation.⁵⁶

There are other strategies as well.

Native alternatives: self-conscious traditionalism, assertion of rights

Some indigenous peoples in the province stress different motivations: under these, notions like partnership and resource or investment security are not in view. Such groups are rejecting absolutely the public policy rationale promoted by the state, its agencies, most third-parties and the media in British Columbia. Taiaiake Alfred is a major figure associated with this strategy. For him the treaty process is a manipulation of indigenous peoples' "post-epidemic weakness," overwhelming their identity and binding it to that of the Canadian state.⁵⁷

The critical analysis of *Delgamuuk'w* seems to endorse this, with its spectre of a binding and subsuming statism. The actual practice of the treaty process, as I set out in Chapters 7 and 8, makes this compelling: institutional and political pressures are

⁵³ 'First Nations Summit says rally at the legislature reflects a serious lack of progress at treaty tables', *Tuz beyaduk (Talking Stick)* (Summer 2000), p. 12.

⁵⁴ Kathryn Teneese, 'Treaty negotiations stall during provincial election' <http://www.kkbc.ca/current%20news.htm> (May 14, 2001).

⁵⁵ Christie, '*Delgamuuk'w* and modern treaties', at note 10.

⁵⁶ *ibid.* at p. 38.

⁵⁷ Alfred, 'It's All a Farce Anyway', pp. 3-5.

calibrated to reduce the space for discussion of key conceptual issues in the relationship, ranging from historical challenges such as that presented by claims for compensation, to those concerned with shared understandings of the future character of the relationship, such as over notions of ‘certainty’. Yet this approach is not simply taken by people attempting to defend themselves against the latter-day tyrannies of Canadian settler institutions. The pith of this movement is the assertion and renewal of indigenous identities in their own terms. Menno Boldt has put this challenge lucidly:

Unless Indians can revitalize their traditional philosophies and principles they will become extinct as *Indians*; they will survive only as Indians, that is, as a legal-racial category defined in the Indian Act.⁵⁸

Antithetical to this view, and explicitly criticised by Boldt, are those indigenous leaders who are prepared to transact their identities, who see their “treaty heritage in terms of property values for land taken ... Land claims settlements based on some concept of market values constitute not only a betrayal of the spirit and intent of the chiefs who marked the treaties, but also a sell-out of the birthright of future generations of Indians.”⁵⁹ This rationale for treaty participation as the relinquishment of tradable goods (the target of the critical politics adopted by George Manuel as AFN Grand Chief in the 1970s) contrasts with the understanding of the earliest treaties as recognition and shared access to resources. Contemporary treaty-making on this reading wants the lot: to remove the indigenous right of reply, and make indigenous peoples speak only as aspects of the national whole; where indigenous differences that might maintain difference are removed but those that will ensure cultural stasis are maintained. This is an extension of the “reserve geography” that Cole Harris described

⁵⁸ Boldt 1993, p. xvi.

⁵⁹ *ibid.* pp. 43-44.

as both “a remnant of Native space and a tactic of social control.”⁶⁰ Alfred has taken up Boldt’s call, setting out a new political project for indigenous peoples.⁶¹

The central idea of this work is ‘self-conscious traditionalism’.⁶² Not simply the self-consciousness of an indigenous display, but the coming to awareness of self through indigenous traditions; the formation of identity through the renewal of Native cultures; the expression of personal freedom as the practice of indigenous social, economic and political norms. It is a thoroughly ‘positive’ understanding of freedom and of identity. It does not, as Alfred notes, exclude intercultural cooperation and sharing. Indeed indigenous traditions, and especially the Mohawk tradition to which Alfred is personally heir, have concepts and practices of formal cooperation more ancient, while more subtle and respectful than those settler traditions that now predominate.⁶³ Much needs to be said about the philosophical and political implications of such inter-culturalism. However, at this point in the political project the emphasis is clearly being placed elsewhere.

One Native commentator has recently identified “a coherent Native strategy to undermine this fortress of mainstream indifference.”⁶⁴ The main peak indigenous organisations in British Columbia issued a joint “Consensus Statement” in early 2000, calling for the total abolition of the current comprehensive claims policy (the context of the NFA and the operative premise for the BC treaty process) and the establishment of “a new policy of recognition, affirmation and implementation of aboriginal title.”⁶⁵

The consensus of the UBCIC, the Interior Alliance and the First Nations Summit over these key principles should be understood as the conclusive withdrawal of Native consent for the basic approach of the state. The setting aside of the dual pan-

⁶⁰ Harris, C. 1998-1999. Editorial. *BC Studies*, p. 3

⁶¹ Alfred, G. R. 1999. *Peace, power, righteousness: an indigenous manifesto*, Oxford University Press, Don Mills, Ont, New York.

⁶² See also the discussion of ‘traditionalism’ as a political strategy amongst Hopi Indians in the southwest USA from the 1940s. Richard Clemmer, *Roads in the sky: the Hopi Indians in a century of change*, Ch. 7

⁶³ Alfred, *Peace, power, righteousness*.

⁶⁴ Haythornthwaite 2000, pp. 33-36.

Indianism I outlined in Chapter 6 has a single historical precedent: the coalition of Native groups in response to the Trudeau government's White Paper of 1969, a fact that should alarm those hoping for some eventual Native acquiescence. Tactics, however, differ: the parties to the First Nations Summit, as noted, have not left the treaty process, though they have canvassed such a step at a meeting in 1999. It is difficult to imagine that such thoughts do not continue to reside within the organisation and amongst its members. Another calculation is currently in operation: that the treaty process can be reformed, or at least rebuilt according to its foundational principles, so that recognition replaces the radical constriction if not extinguishment of aboriginal title. As I point out below, it is a strategy that may not endure the current provincial government's open disavowal of a post-*Delgamuuk'w* conception of indigenous rights and resort to the crass populism of a referendum.

A more tangible implementation of the ideas of the Consensus Statement is the strategy of the AFN and the Interior Alliance. It reflects both Native frustration, exemplified for example by the closure of band's treaty offices, while also stemming out of a realisation that First Nations are not adequately prepared to assert their rights confidently and effectively, and emphasises the need for an education and capacity-building program.⁶⁶ The *Delgamuuk'w*/Gisday National Process, as it is being called, aims to "provide assistance and organisational capacity for First Nations considering asserting their title consistent with the *Delgamuuk'w* decision."⁶⁷ Most crucially, it is an enactment of the view that the implementation of *Delgamuuk'w* "lies solely with every First Nation that holds their own unique title."⁶⁸ That is to say, it is a process that cannot be managed by yet another peak-body or central policy-making organ for Native concerns; it must be enacted at the grassroots of communities.

⁶⁵ 'Consensus Statement, January 29, 2000'. Reproduced in *Interior Alliance News* (July 2000), p. 10.

⁶⁶ Dene Moore, 'Bands grow weary of treaty process', *The Canadian Press* (July 13, 1999).

⁶⁷ Assembly of First Nations, 'The *Delgamuuk'w*/Gisday National Process: Questions and answers', p. 1 <http://www.delgamuukw.org/news/qa.pdf> (April 2, 2002).

⁶⁸ *ibid.* p. 4.

The purpose of the AFN initiative is to act as a clearing-house for relevant *Delgamuuk’w* research and to aid in Native capacity-building. Six basic principles comprise a complete post-*Delgamuuk’w* assertion of Native title, rights and interests:

- community participation and public education – aimed at keeping First Nations up to date with *Delgamuuk’w* research and enabling them to relate it to their individual circumstances
- pre-litigation and political negotiation – an openness to further negotiations (although without much hope for a satisfactory overhaul of government policy) because the jurisprudence has insisted on negotiated outcomes
- litigation – a national challenge to the comprehensive claims policy on the grounds of its unconstitutionality after *Delgamuuk’w*, as well as the assertion of each individual nation’s legal interests where necessary;
- policy development – particularly working out the implications of *Delgamuuk’w* in terms of traditional law;
- direct action – such as resource harvesting, actions which “fulfil an essential ingredient of the *Delgamuuk’w* decision by demonstrating our inalienable connection to all of the lands in our traditional territories, and to all of the resources they contain. The continuous peaceful exercising of our traditional rights – social, cultural and economic – is an essential ingredient in any campaign to reaffirm our traditional ownership of our lands”;
- and finally, an international campaign – to challenge Canada’s image as an international defender of human rights.⁶⁹

⁶⁹ AFN *Delgamuuk’w* Implementation Strategic Committee, ‘New *Delgamuuk’w* plan of action’, *Interior Alliance News* (July 2000), p. 1.

There is definitely coherence here: community education about what the law is, development of policy appropriate to traditional law, and the actual usage of traditional resources all form an affirmation of indigenous identity, indeed are practices that could bind and stabilise such identities. The other three strategies, openness to negotiation, pursuit of litigation where necessary, and organisation on an international level, all attest to the status of Native nationhood *vis à vis* Canadian and provincial institutions.

Another consequence of the *Delgamuuk'w* judgment is that it may potentially alter the burden of proof of title. McNeil has argued that the type of strategy countenanced by the AFN/Gisday approach may segue into a radically different legal strategy.

If an Aboriginal nation is primarily in possession of land, there does not seem much reason for them to bring on action for declaration of their title to it. They can generally act as landholders do, and use the lands for their own purposes, in accordance with the collective needs of their community ... if an Aboriginal nation brought an action, not for a declaration of Aboriginal title, but for trespass on that Aboriginal title lands, the evidential requirements would be different as well because in that situation they would only have to prove that present possession, not their title.⁷⁰

As Alfred has pointed out, “At least going to court is a challenge ... a way of saying ‘we have our rights’.”⁷¹ There is a new stridency amongst Native peoples in British Columbia, indeed across Canada as a whole. Perhaps it is an old stridency, reactivated by the stubbornness of a desperate state and a desire by Natives not to waste a further generation waiting upon the good will of settlers. Many Native groups are leaving the treaty process or at least de-emphasising it. This is the context of the treaty process from the perspective of indigenous peoples in the province. Yet the gulf between indigenous concerns and those of settlers seems only to get wider.

⁷⁰ McNeil, K. 1999. ‘The Onus of Proof of Aboriginal Title’, p. 30.

A democratic problem?

We will do what we must to make the government live within the letter of the law and our Canadian constitution. This is our province, our future, our Constitution and our treaty too, and damn it, the people of BC deserve a say.⁷²

Since *Delgamuuk'w* and the passage of the NFA, a growing campaign has been conducted against the treaty process from another quarter. There are several different aspects to this campaign. The first is the legal challenges mounted against the NFA. I referred to these in Chapter 8. These challenges to the constitutionality of the NFA were dismissed in the British Columbia Supreme Court. The Liberals appealed to the Supreme Court of Canada, although they have subsequently dropped the challenge after taking government. Phil Eidsvik of the Fisheries Survival Coalition argued at the time, “the average British Columbian will still have their day in court through us or through the Liberals or the British Columbia Citizens’ Front.”⁷³ There was determination to use all possible legal obstacles to the NFA, understood as a threshold issue.

The BC business community, particularly the resource sector, sends out mixed signals. A frequent theme of which the mining sector is especially fond is that of business as an innocent bystander in the internecine squabbles of vested interest groups: “We’re the meat in the sandwich.”⁷⁴ Tom Waterland, President of BC Mining Association said there was “nothing scary” about land claims – “we’re not afraid of a different landlord. I would feel as comfortable with some kind of native tenure-

⁷¹ Alfred cited in Wendy Cox, ‘Huge wins, huge losses possible in land claims taking cases to court’, *The London Free Press* (June 5, 2000), p. A11.

⁷² Gordon Campbell cited in ‘Liberals will take Nisga’a deal to court, Campbell pledges’, Canadian Press Newswire (September 24, 1998).

⁷³ Dianne Rinehart, ‘Court challenges of Nisga’a treaty faces delays’, *The Vancouver Sun* (February 6, 1999).

granting system in BC as with the provincial tenure-granting system.”⁷⁵ However the distance from passivity to a maintenance of existing practices is a short way indeed:

Simply put, the industry just wants these contentious issues settled. Exploration needs access to the largest land base possible ... We need to work hard toward preventing ... another set of regulatory hoops to jump through.⁷⁶

Another resource group, the Council of Forest Industries (COFI), has consistently taken a tougher line, particularly after *Delgamuuk’w*. They see litigation as inevitable because the treaty process “has not provided any concrete deliverables.”⁷⁷ It is “unreasonable, irrational and counter-productive for native groups to claim the benefits of aboriginal title before such title is proved in court.”⁷⁸ Most pointedly, “the treaty also does not provide enough certainty that land claims issues will be extinguished.”⁷⁹ Jerry Lampert of the BC Business Council announced that “there have been major disappointments in achieving the certainty we are looking for.”⁸⁰ Some business figures do not seem to endorse the rhetorical stance that ‘they will work with anybody’.

However, while there is some variation in tactics, Natives close to the treaty process are uniform in their disappointment about the role business has played: “the main efforts of the business community have been to maintain and protect the status quo, and that’s been an unfortunate drag on the government’s ability to act because if

⁷⁴ Gary Livingstone President/CEO of Mining Association of B.C., cited in Chris Wood: ‘History in the making’, *Maclean’s* (July 27, 1998), pp. 12-13.

⁷⁵ Terry Glavin, ‘Way out of land claims impasse disclosed’, *The Vancouver Sun* (February 22, 1990), p. B8.

⁷⁶ British Columbia and Yukon Chamber of Mines, ‘An informal guide to understanding First Nations and the treaty-making process’ http://www.bc-mining-house.com/aborig/Fn_guide.htm (February 12, 2001).

⁷⁷ COFI spokesperson Marlie Beets cited in Stewart Bell, ‘Fragile détente on land claims fades away’, *The Vancouver Sun* (June 27, 1998).

⁷⁸ Beets cited in Drew Hasselbank, ‘Aboriginal title fight’, *The Financial Post* (June 27, 1998), p. 16.

⁷⁹ A COFI press release cited in ‘Forest industry worried about Nisga’a deal’, Canadian Press Newswire (November 12, 1998).

⁸⁰ Lampert quoted in Justine Hunter, ‘Testy exchange reveals tensions’, *The Vancouver Sun* (May 28, 1999).

anybody knows the stakes that are on the table, that knows the opportunities that are in front of us, it's business."⁸¹ Ed John of the First Nations Summit argued that "The business community should disabuse itself of the idea that this is about a real-estate transaction and at the end of the day there will be a surrender of Indian interests."⁸²

A number of groups were established in the 1990s for the sole purpose of attacking the operative premises of treaty-making from the right. CANFREE (Canadians For Reconciliation, Equality and Equity) and FIRE (Federation for Individual Rights and Equality, particularly the BC chapter) are two such groups. CANFREE enlisted the support of a former justice of the Supreme Court, Willard Estey to appear before the Senate hearings on the NFA with a presentation he described as, "so simple it is illusory."⁸³ His advice was to refer the matter of the constitutionality of the NFA's self-government provision to the Supreme Court. Interestingly, it seems CANFREE worked with the Nisga'a dissidents in their actions against the NFA in the British Columbia courts.⁸⁴ BCFIRE is a larger, if less observable formation. Its rationale is to influence or obstruct treaty negotiations in the province, and has pursued both a publicity and an institutional agenda, supporting the participation of members in RACs.⁸⁵ President Greg Hollingsworth has stressed the essential 'racism' of treaties: "We're building racial walls inside our province."⁸⁶

While it is to be expected that sections of public debate are given over to this sort of opinion in an open society, the "unprecedented" actions of one newspaper

⁸¹ Richardson, Transcript 1999.

⁸² John quoted in Hunter, 'Testy exchange reveals tensions'.

⁸³ Willard Estey, testimony reported in Canada, *Proceedings of the Standing Senate Committee on Aboriginal Peoples* (February 23, 2000) http://www.parl.gc.ca/36/2/parlbus/commbus/senate/com-e/abor-e/07ev-e.htm?Language=E&Parl=36&Ses=2&comm_id=1 (April 2, 2002).

⁸⁴ See Molloy, T. and Ward, D. 2000. *The world is our witness: the historic journey of the Nisga'a into Canada*, Fifth House. Fitzhenry & Whiteside, Calgary, Allston, Mass., Ch. 14. Molloy was the chief negotiator for Canada during the NFA negotiations.

⁸⁵ This information is sourced from Quaker Aboriginal Affairs Committee, 'Friends, FIRE and Aboriginal rights' <http://www.quaker.ca/cfsc/qaac/fire.html> (May 20, 2000).

⁸⁶ Hollingsworth quoted in 'Why no Nisga'a Referendum? Government's response to fear that a pan-BC vote would kill the deal' *BC Report* (April 15, 1996), pp. 8-13.

proprietor deserve special mention.⁸⁷ David Black, owner of some 60 community newspapers across British Columbia told his editors not to write editorials in favour of the NFA, and to take copy opposing it.⁸⁸ Moreover he hired Mel Smith to “explain” the NFA to his readers.⁸⁹ Mel Smith had been the intellectual guru for the anti-treaty campaign from the right; his book *Our home or native land?* (a play on the opening words to the Canadian national anthem) is the ur-text for conservative opposition to aboriginal rights.

There are at least four strands to this argumentation, all of which resonate with the Australian experience, though there such arguments can be located with more openly mainstream support. The first is that treaties reflect a racist approach to contemporary political conflicts. Such an insight – the tritest of liberalism – manifests itself as an egalitarianism under siege from atavistic social experimentation: “the greatest disservice done to our native people was that done by the Fathers of Confederation in singling out Indians in the constitution to be dealt with differently.”⁹⁰

The political arrangements which foster and enlarge on that distinction will work against concepts of Canadian citizenship for the polity as a whole. They will work against the interests of the Indian people. Indeed, they are the culmination of 133 years of policy failure. I say that, casting no aspersions on the goodwill of those who have designed this treaty. The evidence of history and all logic and reason and the development of western political thought all say that this is wrong in these terms.⁹¹

On this basis there are frequent references to, even comparisons made with the twentieth century’s synecdoches for racism, South Africa and Nazi Germany: treaty agreements will introduce “constitutionally entrenched apartheid,” “PCB’s - Politically

⁸⁷ Professor Robert Hackett, SFU, cited in Cindy Harnett, ‘Publisher accused of anti-Nisga’a campaign’ *Times-Colonist* (September 21, 1998), p. A5.

⁸⁸ John Schreiner, ‘Nisga’a treaty debate is a minefield for BC publisher’, *The Financial Post* (September 25, 1998), p. 13.

⁸⁹ Paul Barnsley, ‘Nisga’a deal becomes political football’, *Windspeaker* (October 1998), p. 3.

⁹⁰ Smith, M. H. 1996. *Our home or native land? what governments’ aboriginal policy is doing to Canada*, Stoddart, Toronto, p. 253.

Correct Bantustans,”⁹² with entitlement requirements akin to the “tests imposed by the government of Germany in the 1930s to determine who was and was not a Jew.”⁹³ The effect of this is to make rational discussions about the acknowledgment of difference ever more remote.

The second part of this topos is ‘paternalism’: “Paternalism, for so long the bane of native policy, is now being visited on all Canadians.”⁹⁴ Building on the apartheid comparisons, this is, however, an acknowledgment of history; current policy-making has not freed itself of colonial shackles. The argument is put to the service of the liberal individualist project: “removing the shackles of government dependency ... and replacing it with individual opportunity, self-reliance and success, and national unity instead of fragmentation.”⁹⁵ One aspect of this strategy is to distinguish Native individuals from collectivities: “the paradox in dealing with Canada’s Indians is that individually they are downtrodden and dispossessed, but collectively they are surprisingly powerful.”⁹⁶

A third strand focuses on the Native ‘industry’, a cabal Smith saw as made possible by the capitulation and craven retreat of government⁹⁷, the sequestered enlightenment of “higher purpose politicians” and a “cloistered” judiciary.⁹⁸ Into this vacuum steps “a new brand of militant aboriginal leadership that has rejected the Uncle Tonto approach of their forefathers ... First Nations are about to take over the national agenda.”⁹⁹ Political patronage for views hostile to the aboriginal ‘industry’

⁹¹ Gibson, testimony to Standing Senate Committee on Aboriginal Peoples.

⁹² Documented in David Crary, ‘British Columbia attempting pacts with 47 tribes’, *The Memphis Commercial Appeal* (March 31, 1996), p. 9A.

⁹³ ‘Just think: half a dozen international boundaries between Calgary and Vancouver’, *Western Report* (December 9, 1996), p. 44.

⁹⁴ Smith, p. vi.

⁹⁵ *ibid.*

⁹⁶ Peter Newman, ‘A treaty that threatens the national agenda’, *Maclean’s* (August 10, 1998), p.52.

⁹⁷ Smith, p. 249.

⁹⁸ Mel Smith, ‘Unholy mess: current treaty-making process will bankrupt the province’, *BC Business Report* (August 1998), pp. 55-56.

⁹⁹ Newman.

frequently comes from the Reform party: “These become 20-year projects with a huge vested interest in keeping negotiations going.”¹⁰⁰

A related focus is on the cost of these negotiated settlements: “Incredible sums of money are spent – worse, even larger amounts are committed to be paid by future generations.”¹⁰¹ The apotheosis of the argument is that, “(w)e will be buying our country back from ourselves”; David Hilton, a Victoria doctor, suggested that approval of the NFA could simply be put as a referendum question onto the next income-tax return.¹⁰² The thrust of this critique is not simply against the cost of negotiations and mooted cash settlements, but is concerned about the very foundation of Canadian prosperity itself: “Canadians will wake up to discover that their federal and provincial governments have substantially altered forever our economic, social and political fabric. We will discover that our governments have greatly diminished Canada's public land and resource base, the greatest source of our wealth.”¹⁰³ As Peter Newman has put it in the mainstream Maclean’s magazine, after treaties are signed you may as well “peg the Canadian dollar to the going rate for eagle feathers.”¹⁰⁴

These four arguments have some traction: the ‘racist’ point evinces both a commitment to an archaic political philosophy as well as a studious lack of interest in contemporary social reality; the paternalist case is stronger, echoing some of the critiques made by Native and jurisprudential scholars, but is limited by the purveyor’s philosophical commitments; the third and fourth appeal as further ammunition against oppressive over-taxing government. There is certainly a constituency for these views in all contemporary settler societies. Taken together, these criticisms point toward a troubling phenomenon: the growing illegitimacy of the Canadian state.

¹⁰⁰ Federal MP John Duncan of Reform, cited in ‘No treaty deals but costs reach \$30M’, Canadian Press Newswire (August 18, 1995).

¹⁰¹ Smith, p. ii.

¹⁰² Cited in Newman.

¹⁰³ Testimony given on behalf of Mel Smith, in Canada, *Proceedings of the Standing Senate Committee on Aboriginal Peoples* (March 22, 2000).

¹⁰⁴ Newman.

Political legitimacy

Although the treaty process originated in concessions made by the SoCred government in the late 1980s and early 1990s, the actual operation of the process did not take place until the New Democrats took government. In May 2001 this changed decisively, when the BC Liberals routed all other political parties, taking 77 seats out of the provincial legislature of 79, and leaving the NDP with just two seats, not enough even for official party status.

Some part of this result, though by no means the whole, should be attributed to the delegitimation of the NDP and their strategy towards treaties. The combination of a resurgent Native opposition and lack of actual progress in a costly public policy exercise ensured there were few votes the NDP could win on the treaty process and its promise of a ‘new relationship’ in the province.¹⁰⁵ This did not prevent the British Columbia government from spending upwards of \$5M promoting the NFA prior to its ratification in 1999/2000.¹⁰⁶

Public support shows a mixed picture at first glance: MarkTrend polls taken every three months since 1989 show support for treaties finalising the problem never went under 80%; while 50% thought that the British Columbia government would pay too much.¹⁰⁷ By the time the NFA reached the federal parliament in October 1999, an

¹⁰⁵ The latest independent assessment of the fiscal impact of treaties was conducted by Grant Thornton Management Consultants: ‘Financial and economic analysis of treaty settlements in British Columbia’ (March 1999). It suggested that total settlement costs would range between \$9.2-9.4B, and that the net benefit to the British Columbia economy would be in the range of \$3.8-4.7B. The figures are based on calculations not only of explicit transfers, but also projections of lost and gained revenue from resource enterprises unlikely to take place for some years, if at all. Given the layering of hypotheses here, not to mention the instability of global commodity prices, it is difficult to place much faith in these calculations.

¹⁰⁶ Jim Beatty, ‘The ‘facts’ on the Nisga’a deal’, *The Vancouver Sun* (October 30, 1998); ‘Nisga’a treaty promotion costs could double to \$5M’, Canadian Press Newswire (October 17, 1998).

¹⁰⁷ Chris Wood, ‘Protest politics’, *Maclean’s* (August 7, 1995), pp. 10-11.

Angus Reid poll showed only 43% national support.¹⁰⁸ There is an orthodox explanation for these types of numbers: that people are socially progressive but economically conservative. Joining the dots, ‘anyone can have anything as long as it does not cost anyone anything’. Canadians, like Australians, are mostly well-meaning ‘nimbys’ in this respect; as the process of ‘building a new relationship’ moves from rhetoric to ratification, public support can be expected to fall away.

Social and economic conservatives have always been able to harness these public ‘opinions’ much better than progressive groups: right at the outset of the BCTC Act legislative debate, then Liberal leader Gordon Wilson worked firmly in this vein:

The fact is that negotiations around the aboriginal question are not a public process in B.C. The vast majority of British Columbians haven’t got a clue what’s being negotiated. They don’t know what land is under claim. They have absolutely no understanding of what this Treaty Commission is all about and of what it means to them. They have no understanding of what the long-term impact is going to be not only on their own properties, some of which fear for it, but they have no understanding of what it’s going to mean to the resource base in this province and how it’s going to involve future generations of British Columbians in a massive payment of moneys – if that’s what is negotiated through this process.¹⁰⁹

During the Senate hearings on the NFA, then Aboriginal Affairs Critic¹¹⁰ for the Liberals, Mike de Jong, pursued the theme with vigour, asking why governments were afraid of debate: “Why are governments reluctant to answer questions about the treaty? Two possibilities come to mind. One possibility is that they do not have the answer; the second possibility is that they do have the answers but are reluctant to share those answers with British Columbians and Canadians. Either way, I think that

¹⁰⁸ Barbara Yaffe, ‘When the public speaks, Liberals only have ears for Chretien’, *The Vancouver Sun* (August 16, 2000), p. A15.

¹⁰⁹ Wilson, British Columbia, *Official Report of Debates of The Legislative Assembly* (May 25, 1993), p. 6511.

¹¹⁰ British Columbia term for Shadow Minister or opposition spokesperson.

is unacceptable. You cannot, with respect, in my view, impose treaties and expect them to work.”¹¹¹

The argument becomes even more explicit with the constant referencing to the 1992 Charlottetown referendum I discussed in Chapter 6. Again, this was a reference made from the outset of the treaty process, with Wilson raising the spectre of an undemocratic policy approach: “it was brought forward in a national referendum and was rejected by both non-aboriginal people and aboriginal people in this country.”¹¹²

Rafe Mair prefaced Smith’s book with his vision of the Canadian constitution being “arrogantly cast aside.”¹¹³ Terry O’Neill sees the government having taken in the NFA a position “that recognized aboriginal sovereignty – exactly what Canadians rejected.”¹¹⁴ There is certainly misrepresentation here but in a context where the base of public knowledge of and interest in the legal and political status of indigenous peoples is negligible this may be beside the point: people do not feel consulted, do not feel ‘ownership’ of the issue. Not only this but the people rejected Charlottetown even though all the ‘opinion-makers’ had urged a Yes vote, and this is why they will never risk it again.¹¹⁵ A journalist on a local newspaper in Vancouver invoked what he felt was his basic democratic rights:

Today’s treaty opponents are not bashing the Nisga’a. They are challenging the faceless Treaty Commission bureaucrats and their NDP masters who would deny us our most basic democratic right – the right to know, and approve in advance by referendum, the road they’re leading us down.¹¹⁶

¹¹¹ Mike de Jong (B.C. Liberals’ Critic on Aboriginal Affairs) in Canada, *Proceedings of the Standing Senate Committee on Aboriginal Peoples* (February 23, 2000).

¹¹² Wilson, British Columbia, *Official Report of Debates of The Legislative Assembly* (May 19, 1993), p. 6443.

¹¹³ Rafe Mair was a Minister in the SoCred government during the 1980s. His comment in Smith, p. ii.

¹¹⁴ Terry O’Neill, ‘Get ready to pay \$200B’ *Alberta Report* (November 8, 1999), pp. 10-11.

¹¹⁵ ‘Why the establishment dreads referendums and why we need them in Canada’, *Western Report* (August 8, 1994), p. 44.

¹¹⁶ Noel Wright, ‘Nisga’a OK – but not the process’, *North Shore News*, (December 7, 1998).

And the evidence for the view seems in abundance, at least for those who either do not understand, or do not accept the premises for the ratification of agreements. This was a problem flagged by Wilson during the original legislative debate:

I invite the minister to think back to this last constitutional round when there was a lot of closed-door meetings, a lot of negotiations and something that the political elites in this country came up with.¹¹⁷

The problem with legislative scrutiny of these settlements arises because of the relocation of power that takes place under treaty-making: legislatures traditionally transmit their intentions to the populace where it is digested by interest groups who lobby their responses. Treaties appear to turn the parliaments into interest groups, comprising frustrated opposition members and bored, even embarrassed governments. In one sense though, this executive power is akin to that of the earlier treaties, where the wise men who held sovereignty in their seal made solemn undertakings to each other.

The evidence is that the legislatures are not making and cannot make decisions or amendments to what is actually agreed at treaty tables. The passage of the *Treaty Commission Act* in the provincial legislature was simply to enact the provisions of the Agreement made by the three principals; that which Wilson criticised as “contemptuous.”¹¹⁸ Similarly, the passage of the NFA through both provincial legislature and federal parliament demonstrated that on each occasion democratic legislatures have had the opportunity to scrutinise, they have not been able to turn their criticisms into amendments or rejections. Indeed the intransigence of all parties in the British Columbia legislature over the NFA led to the closure of the debate.

¹¹⁷ Wilson, British Columbia, *Official Report of Debates of The Legislative Assembly* (May 25, 1993), p. 6482.

¹¹⁸ Wilson, *ibid.*, p. 6478.

Canadian politicians have shown us that, when it comes to aboriginal issues, they're prepared to run roughshod over public opinion and pursue their own agenda, accountability be damned.¹¹⁹

Treaties attempt to create a jurisdictional relationship through accommodation of indigenous rights within state powers; that is the 'new relationship' of First Nation rights under the aegis of the state. However, state policy seems aimed at ensuring the continuation of its own power, by promoting a new relationship between fractious communities – and doing so simply by fiat. The accumulated tension and the current BC Liberal policy for a referendum on treaties can hardly come as a surprise. But can there be any other approach to treaties? Gurston Dacks, writing in 2000, suggested not:

Should BC come to be governed by the likeliest alternative, the Liberal Party of BC, the province's policies regarding Aboriginal claims are unlikely to change significantly ... because current policy reflects the objective circumstances of the province and of its government ... the province has an interest in maintaining the BC treaty process for several reasons ... the (promise) of building a healthy relationship between governments and First Nations and advancing the First Nations economically and socially. Narrower and more tactical considerations include the desire, if settlements acceptable to the province cannot be reached, to discourage First Nations from litigation and to protract negotiations so as to avoid unsatisfactory settlements unsatisfactory to the province. To abandon the negotiating process or to drive First Nations away from it by reducing the existing provincial offers that First Nations already consider inadequate will inflame Crown-First Nations relations, probably drive the First Nations to litigate, and heighten social tensions and the uncertainties facing resource development in the province.¹²⁰

The federal minister was confident the BC Treaty process would survive the uncertainty of the Provincial election, and that a BC Liberal government would not scuttle the process.¹²¹ The Chief Commissioner of BC was unconcerned: "You just deal with whoever is there when you get up in the morning. That's just reality and I don't

¹¹⁹ Barbara Yaffe, 'When the public speaks, Liberals only have ears for Chretien'.

¹²⁰ Dacks, 'Litigation and public policy'.

¹²¹ Reported on CKNW Radio News (March 7, 2001).

tell the electorate who to vote for ... you get one perspective in government and the other side is out in the hinterland raising hell ... But having a government that is open to dialogue that is open to full communication and debate on these issues is healthy, it's a heck of a lot healthier than having a government that would suppress that healthy dialogue."¹²² It is difficult to imagine the "objective circumstances" Dacks identified as not being affected by a referendum on what the provincial government will be 'mandated' to discuss at treaty tables. The Liberals appear to be painting themselves into a corner but perhaps this is their intention.

The referendum

If you're going to call for a referendum going into an election, you should say what the questions are. To say that it's going to a legislative committee, which is made up of, of a majority of your own supporters, just doesn't make any sense.¹²³

As noted in Chapter 8, the call for a referendum or referenda on treaties became a live issue soon after the Nisga'a AIP was signed in 1996. There have only been two referenda in British Columbia since 1952: on daylight savings and on pub closing times.¹²⁴ The 1997 Select Standing Committee report included minority opinions from the now government members, advising this policy. It was not until 1999 that the Liberals formally committed to a policy of 'bringing people into it':

I am committed to giving all British Columbians a one-time province-wide referendum on the principles that will guide the province's negotiating mandate for future treaties. Make no mistake, the government under my leadership will not accept this Nisga'a treaty as a template for future treaty settlements. We will not endorse any treaty until there has been a genuine

¹²² Richardson, Transcript 1999.

¹²³ Rafe Mair, CKNW Radio (March 13, 2001).

¹²⁴ Reported on CBC Online, 'British Columbia Votes 2001' (May 20, 2001).

attempt to engage all British Columbians in a meaningful debate on the principles that they expect treaties to embrace.¹²⁵

Prior to the election, Campbell refused to commit to the kind of things likely to be put to referendum, but when pushed, thought that “the question of equality is an important question, I think the question of whether people want us to move forward with creating a brand new third order of government is an important question, I think the question of whether we’re going to be protecting private property through treaty negotiations is an important question.”¹²⁶ The Liberals platform going into the election developed the policy somewhat. A Liberal government would,

Ask an all-party committee of the Legislature to consult with British Columbians, including First Nations, to draft the referendum questions ... Fast-track treaty talks, to conclude fair treaty settlements ... Offer to negotiate a delegated, municipal-style of self-government with any First Nation ... Seek clear direction from the Supreme Court of Canada on constitutional questions about aboriginal self-government ... Introduce a legislative framework for legally respecting aboriginal rights protected under the Constitution in the absence of treaties.¹²⁷

‘All British Columbians’ was unlikely to include many Native people. The CBC reported that Campbell “waded into rough water” when he presented his referendum proposal to an election forum at the First Nations Summit. NDP Premier Ujjal Dosanjh challenged him to name one Native leader who supported his proposal, and he could not.¹²⁸

The arguments against a referendum are many. Waldemar Braul of the activist group the Aboriginal Rights Coalition has collated them: a referendum retrospectively changes the rules; through delays it will create further uncertainty for business; it is

¹²⁵ Gordon Campbell, cited by de Jong in Canada, *Proceedings of the Standing Senate Committee on Aboriginal Peoples* (February 23, 2000).

¹²⁶ Gordon Campbell, on Rafe Mair, CKNW Radio (March 13, 2001).

¹²⁷ BC Liberals: ‘A New Era for British Columbia: A New Era for First Nations’ at http://www.bcliberals.com/Campaign_2001/Platform/First_Nations.shtml (April 2, 2002).

¹²⁸ CBC Radio, Regional News (March 8, 2001). Campbell might have mentioned the former chief of the Musqueam band, Gail Sparrow, who ran as Liberal candidate for the riding of Mount Pleasant. It was one of the two seats that Liberals did not win. Reported on CBC Online, ‘British Columbia Votes 2001’.

not legally necessary; it is discrimination against the constitutionally protected rights of a minority; indigenous peoples did not hold a referendum to ratify the settlement of their lands; a referendum is a blunt instrument that “cannot reflect the give and take of negotiations”; it will be divisive and costly.¹²⁹ As Bill Wilson of the First Nations Summit asked, “what would have happened had there been a referendum on gay rights? Where would gay people be in this province if there was a referendum on that?”¹³⁰ Miles Richardson foreshadowed what the commission’s response was likely to be to the referendum policy:

We’d be reminding them of the commitments that they’ve made and the substantial investment that each of the parties has made over the past seven years to negotiations, and we’d encourage them to uphold their commitments and to make this treaty negotiation process work ... Canada and British Columbia’s institutions and legitimate processes for giving effect to (treaty commitments) are well articulated in the constitution and the traditions of the federal and provincial bodies ... You don’t need to count hands amongst the democratic majority to determine what the rights of a numerical minority are. That just seems mischievous.¹³¹

In its 2001 review of the process, *Looking back looking forward*, the Commission points out that there can be no provincial referendum on Aboriginal rights, which are constitutionally protected.¹³² By seeking a mandate on what it can and presumably cannot discuss, the provincial government is setting down the path toward a confined debate. This contrasts starkly with the undertakings made by governments at the outset of the treaty process, such as that of former DIAND minister Tom Siddons in 1992: “Let me reiterate that when actual negotiations begin, there will be no limits or constraints imposed on the kinds of issues that First Nations

¹²⁹ Waldemar Braul, ‘The view from the ARC’ ? <http://arcbc.tripod.com/principles.htm> (September 21, 2001).

¹³⁰ Bill Wilson, cited in Allison Dunfield, ‘Ottawa to respect referendum on B.C. treaty talks’, *The Globe and Mail* (July 25, 2001).

¹³¹ Richardson, Transcript 2000.

¹³² BCTC, *Looking back looking forward*, p. 19.

may bring to the table. The process will be open.”¹³³ The federal government has opposed the policy.

Yet the consequences are already evident: in a letter sent to First Nations in July 2001, new Premier Gordon Campbell claimed that a “referendum on basic principles is meant to produce understanding as well as agreement and will assist in accelerating the negotiation process”; simultaneously, Campbell ruled out consideration before the referendum of anything other than a “delegated, municipal-style of self-government.”¹³⁴ Provincial negotiators have confirmed this to First Nations at treaty tables, also ruling out whole areas for discussion: over lands on a ‘willing buyer/willing seller’ basis, fiscal relations; jurisdiction; taxation; Constitutional status of land; and the need for a freeze on crown land sales during treaty talks.¹³⁵

Not surprisingly, Native opposition from those groups within the treaty process is gathering pace with creation of “a steering committee of the First Nations Summit ‘war council’ (that) aims to create the maximum economic uncertainty.”¹³⁶ Richardson took an unequivocal position:

I want to be really clear. British Columbians and Canadians are not going to referendum the need for treaties, or the need for a new relationship with First Nations out of existence. If we don’t take the negotiating option – and it is just an option. I mean, we could end up fighting this out in the courts; we could end up fighting it out at road blockades, or whatever. If that’s the case, everybody loses.¹³⁷

¹³³ Tom Siddon: ‘Notes for an address to the First Nations’ (March 5, 1992). [UBCIC vertical file on the British Columbia treaty process].

¹³⁴ ‘British Columbia Premier’s Letter to First Nations’, reprinted on Turtle Island Native Network (July 5, 2001).

¹³⁵ Reported on Turtle Island Native Network (July 25, 2001).

¹³⁶ Cited in Damian Inwood, ‘War council to battle land-claim referendum’, *The Province* (July 20, 2001).

¹³⁷ Bruce Strachan, ‘Interview with Miles Richardson, BC Treaty Commissioner and David Zirnhelt, BC Minister of Aboriginal Affairs’, CJNI Talkback News (February 14, 2001).

The referendum plan proceeds. On April 2, 2002 the BC government announced its intentions. The referendum would be conducted by mail-in ballot; votes must be cast by May 15, 2002. The question is as follows:

Whereas the Government of British Columbia is committed to negotiating workable, affordable treaty settlements that will provide certainty, finality and equality; do you agree that the Provincial Government should adopt the following principles to guide its participation in treaty negotiations?

1. Private property should not be expropriated for treaty settlements.
2. The terms and conditions of leases and licences should be respected; fair compensation for unavoidable disruption of commercial interests should be ensured.
3. Hunting, fishing and recreational opportunities on Crown land should be ensured for all British Columbians.
4. Parks and protected areas should be maintained for the use and benefit of all British Columbians.
5. Province-wide standards of resource management and environmental protection should continue to apply.
6. Aboriginal self-government should have the characteristics of local government, with powers delegated from Canada and British Columbia.
7. Treaties should include mechanisms for harmonizing land use planning between Aboriginal governments and neighbouring local governments.
8. The existing tax exemptions for Aboriginal people should be phased out.¹³⁸

The referendum will be conducted under the *BC Referendum Act* [RSBC 1996], section 4 of which means that any of the eight principles that are endorsed by greater than 50% of valid votes will become legally binding on the government. That is, the Province is giving voters the opportunity to bind it to eight positions on treaty tables. On these matters there will be no space for negotiation at all; no ‘new relationship’ will be possible.

Of course, First Nations and their supporters, including the NDP, are boycotting the referendum.¹³⁹ Their aim is to delegitimise the government's populist strategy; the fact that it is to be a postal vote may also distort the result, potentially further reducing the number of ballots cast by those without prior commitments. So, overwhelming endorsements of any of the principles is unlikely to offer greater 'certainty'. Moreover, failure to gain endorsement on any of the principles does not mean that its opposite then becomes policy. However, it may be worth briefly considering the consequences of endorsement of each of the principles, for the general project of building new relationships.

The first two principles would, if endorsed, confirm the majority of private and commercial tenures in the province. That is, no agreement could then be reached through the tripartite process which sought to use state power to redistribute interests in land from those privately-held to indigenous peoples. This would leave open the question of willing transactions with appropriate compensation. The consequence on urban treaties would be significant, probably raising the cash component of future settlements to incredible levels. One could expect the federal government to be very concerned by this prospect.

Principles 2 and 5 maintain the status quo over resource-industry decision-making and control, while 3 and 4 retain provincial control over other forms of land and resource use. That is, future agreements could not legally include any devolution of power to new indigenous governments on these matters.

Principle 7 would mandate that all agreements provide mechanisms for future decisions about land-use made by indigenous and local governments together; thereby further delimiting the scope of indigenous governance in advance of such institutions coming into existence. Principle 6 does that rather more explicitly. Endorsement of

¹³⁸ Ministry of Attorney-General Treaty Negotiations Office, *Backgrounder: Referendum on treaty principles* (April 2, 2002).

such principles would restrict the spaces for future indigenous governance before it was even discussed at treaty tables. Principle 8 seeks to bring indigenous communities into the mainstream economy and taxation system, a bold mandate considering that tax-exempt status exists largely as a function of the special relationship between indigenous peoples and the federal government.

The passage of any of these principles would certainly result in massive changes to the treaty process. They should not be seen as minor adjustments to make the process more ‘democratic’. Very few, if any, Native groups would abide the passage of Principle 6; not many more would accept Principle 8. Many groups would wonder whether the passage of numbers 1-5 and 7 did not severely undermine their rationale for participation. The main obstacles I identified in Chapter 8 – land quantum, interim measures, compensation and self-government – are all addressed by this referendum but not in any way that is likely to lead to their removal and the timely completion of negotiations.

A number of commentators have argued that this referendum will infringe upon constitutionally-protected indigenous rights.¹⁴⁰ The passage of principle 6 may indeed be unconstitutional; it certainly contradicts the 1995 federal government policy on the inherent right of self-government. Moreover, a delegated model would seem to conflict with the *Delgamuuk’w* ruling on both the nature of aboriginal title and the manner of its legal infringement. What will happen to existing agreements and financial obligations if groups start to leave? What about the issue of ‘good faith’ negotiations?

The government has frequently said that the referendum will not be a majority vote on minority rights, but this is disingenuous: treaty-making has the intention of defining the undefined, of giving content to s. 35; limiting the scope of negotiations

¹³⁹ See First Nations Summit, ‘Do NOT Vote in Gordon Campbell's referendum on treaty negotiations’ http://www.fns.bc.ca/pdf/FNS_3359_ad.pdf (April 2, 2002); Aboriginal Rights Coalition, ‘Should I vote No?’ <http://members.tripod.com/arcbc/index.htm> (April 2, 2002).

¹⁴⁰ Mandell, L. *Recommended referendum ballot: a legal analysis* (February 25, 2002).

necessarily limits the character of rights defined by treaty, and cannot therefore be seen as anything but a vote on minority rights.

In democracies everywhere, majorities reserve the right to eventually impose reasonable ground rules on minorities if that is the only way to resolve urgent and important problems.¹⁴¹

Coda: a new relationship in British Columbia?

It is essential to the success of this initiative that the negotiations be conducted in an atmosphere which will contribute to the development of a new relationship between the aboriginal and non-aboriginal people of British Columbia. In large measure the atmosphere will depend on the public awareness and the understanding of the history of British Columbia, and the dissemination of accurate information about the negotiations.¹⁴²

The referendum will push any final agreements under the treaty process out until at least 2003; it will take all of 2002 at the very least to conduct the referendum and then digest the consequences of any new 'mandate'. That is an optimistic scenario. A realistic account would see the tensions already latent within the treaty process combine with new politically-inspired antagonisms, to push out the negotiation of final settlements many years, even decades into the future. A pessimistic view would see a 'poor' referendum result as the final straw for an over-extended public policy.

¹⁴¹ Gibson, in Canada, *Proceedings of the Standing Senate Committee on Aboriginal Peoples* (February 23, 2000).

¹⁴² Task Force Report, Recommendations 17-19.

There are other arguments that can be mobilised in order to keep the treaty process from the political abyss. One theme certain to galvanise pro-treaty rhetoric is the boon of treaties for the future prosperity of the province.¹⁴³

Yet the strategy of assuaging settler fears about prosperity and job security is a fraught one for indigenous peoples. It asks British Columbians to see treaty settlements as really the funding of large infrastructure projects, largely in the absence of cultural, historical and moral dimensions: pump-priming for particular communities. This strategy relies on the presence of a good will, or at least a neutrality toward indigenous peoples that can often appear hard to locate. That is to say, if your fundamental rationale for negotiating is not the recognition of difference and is primarily a way to increase prosperity and ameliorate disadvantage, then economically marginal settler groups and those vying for their support will find this an easy strategy to contest.

Moreover, settler visions of Native identity are primarily focused through a lens of racial difference and superiority which assumes that indigenous peoples will always struggle to cope with the pressures of modernity while they remain indigenous. A rich tapestry has descended between communities, acting as an opaque screen on which settlers project their own combination of doubt about indigenous capacities to cope (a pathology of indigenous unemployment, sickness, indolence and lawlessness), and conversely, their own successes.

In the circumstances, a taxpayer-funded transfer to indigenous communities is too easily portrayed as fiscal irresponsibility. Recoupling this with a sense of grievance and alienation at a world of 'culturally-based demands', many become susceptible to the worst forms of manipulation. An 'economic' strategy has been forced upon Natives by governments' determination to recreate certainty for investment and development, but clearly First Nation complicity in this process is a feature. Only a fragment of the material on or around the treaty process could be said to show interest

¹⁴³ "Accounting firm Grant Thornton recently calculated that uncertainty caused by not settling land claims could cost BC as much as \$1 billion in lost investment and jobs." 'Premier Ujjal Dosanjh's Television Address', BCTV, (February 27, 2001).

in the questions of cultural difference that are the only real purpose behind the attempt to build a new relationship at all.

The penetration of this rationale deep into the philosophical core of treaty-making in BC does not augur well for the repeatedly-stated goal of creating a ‘new relationship’ between indigenous and settler peoples. Primacy of a particular kind of certainty as the goal of settlement – territorial suzerainty of the state – may offer economic development for all British Columbians. But it can hardly comprise a new relationship between nations or peoples: at best this is a partial renegotiation of the terms for participation in an existing structure.

As some have pointed out, the latest attempts by the state to address Native grievances rationalise indigenous institutions within a ‘national interest’ language and policy framework¹⁴⁴: “the end of Indian policy means the triumph of Canadian policy; the charade will be over; “the government’s assimilation enterprise has not been dismantled; it has merely changed its address from ‘culture’ to ‘institutions’ ... Implicit in the ‘national interest’ policy paradigm is the prospect that Indians in Canada are unlikely ever to realize justice within a ‘national interest’ policy framework.”¹⁴⁵

Is it wise to think of Native demands as matters of ‘national interest’? I explored in earlier chapters the limits for Australian indigenous peoples of pursuing reconciliation – a vague policy for redefining national identity. The treaty process seems to put the same assumptions to work in the context of territory. It is buttressed by the jurisprudence entrenched by *Delgamuuk’w*, that places indigenous rights firmly into a national blueprint.

Moreover, the democratic necessities of making treaties in the early twenty-first century firmly situate Native claims in the national and provincial domain. As I have shown, the role of ‘third parties’ as well as resource constraints on First Nations have the effect of further entrenching this. Tully for example, has pointed out that “no

¹⁴⁴ Boldt 1993, pp. 66-79.

¹⁴⁵ *ibid.*, pp. 114-116.

treaty process will be legitimate and stable in a constitutional democracy if it fails to build public support among the citizens who will have to live and work in accordance with the arrangements agreed upon.”¹⁴⁶ Yet he has also stressed the underlying complexity of taking a ‘democratic’ approach to the repair of relations:

(T)he recourse to the remedies of representative government and democracy often further entrenches structures of domination as they regulate and alter them ... Instead of freeing indigenous peoples (from internal colonization) the struggle for recognition has tended to reproduce it in an altered and ameliorated form without effectively challenging, negotiating and modifying the forms of deeply sedimented conduct of both non-indigenous and indigenous peoples which sustain it.¹⁴⁷

The evidence from the treaty process after eight years is not wholly encouraging: an open and inclusive democracy (by world standards) has not been able to fully examine or dislodge the ‘sediments’ of colonialism. Indeed, the opposite could be said to be taking place. These sediments are being reinforced and built upon, in the name of public ‘ownership’ of treaties, of legislative competence and coherence, of democratic participation, and the necessity of economic development. The banal confidence, that better information and education for settler peoples will automatically generate greater support, fails to take into account the competing understandings: this is not simply a public interest in other groups’ concerns or policy goals, but the fundamental reliance of settler prosperity and identity on historic and continued denials of indigenous peoples. Patient analysis of the treaty process reveals the persistence of this even if obscured partly by a rhetoric of harmonious relationships.

It is clear that the treaty process is at a crossroads: with it the people of British Columbia, and those people all over the world for whom negotiated treaties are the high-water mark for indigenous peoples in their dealings with settler states. Others maintain that the approach has been too ambitious and abstract, that agreements must

¹⁴⁶ James Tully: ‘Reconsidering the B.C. treaty process’ (Paper to the Law Commission of Canada and BCTC, ‘Speaking truth to power: a treaty forum’, March 2-3, 2000)
<http://www.lcc.gc.ca/en/ress/part/200103/contents.html#contents-e>(April 2, 2002).

¹⁴⁷ Tully, ‘Democracy and globalisation: a defeasible sketch’, ms.

be more local and incremental.¹⁴⁸ Much of the preceding chapters' analysis seems to support such an argument.

The leitmotif of new relationships pursued throughout this work, attempts to highlight the fundamental aims of the treaty process. Yet the relations actually becoming possible make the accompanying rhetoric inappropriate. The treaty process elides consideration of the consequences of the old relationships, and the profound inequalities of the existing ones that continue to be exploited in current practices, most obnoxiously in systems for creating new institutions or attitudes. It equates settler anxieties about economy and security with Native claims, defined as claims against a coherent settler entity – indeed claims as the source of uncertainty. Indigenous claims must be ratified, not just by the highest political institutions, but in every institution, in every mind and heart.

Yet, in practice, treaties aim to enter indigenous peoples into contracts that are co-ordinated by settlers' laws and policed by settler institutions; they are deals over security and business or economic interests. But they do not speak with the one voice necessary to make treaties that are something other than business plans or vague statements about identity. The language of relationships disguises the underlying assumptions of settlers and needs to be rethought.

¹⁴⁸ See Didluck, 'Lessons from the Road to Self-Determination – What Treaty-Making Is Teaching Us - A Case Study from British Columbia, Canada', *Re-thinking Indigenous Self-determination*, Brisbane (25-28 September 2001).

10.

New relationships created through agreement?

The main justification for trying to order relationships between indigenous peoples and the state in which they reside by treaty-like agreements is that this is a requirement of freedom.¹

This thesis has examined two policies that arose in the early 1990s in response to the demands of indigenous peoples for recognition of their rights. Throughout, I noted the persistence of the theme of relationships in the ways that these two policies are both understood and implemented. I have maintained that the desire for relationships between indigenous and settler *peoples* is only meaningful, and can only approach justice, where the basis of the relationship is a consensual agreement that respects the identity of peoples, a people's rights to exist and to autonomy, what Russell describes above as freedom. This is the criterion against which to evaluate the achievements of Australia's policy of reconciliation, and the treaty process in British Columbia.

There are significant differences between the two cases: this can simply be drawn out by recalling that the rationale offered by Pierre Trudeau for his 1969 White Paper, *A Just Society*, was that one part of the nation could not have an agreement with the other. This is exactly the reasoning offered by John Howard in 2002. One difference is that where Trudeau's proposal was swiftly and massively repudiated by Natives across Canada, there is no such consensus among Aboriginal and Islanders. Moreover, Howard's position has received wide support amongst settlers.

Yet, reconciliation attempted to create a tacit social agreement, an attitude or disposition. It was to be expressed primarily as a matter of identity or nationality. The treaties so far contemplated in the British Columbia process, are both more specific and more technical, where relationships between First Nations and the State, the legal

¹ Peter Russell, personal comment to author (October 24, 2001).

system, local communities and so on, are created through the lengthy documentation of final agreements; agreements about the reorganisation or redistribution of territory. However, both remain consent-seeking exercises. The goal for settlers is incorporation of indigenous peoples into defined and governed political space.

Three fields

If we review the analysis of the two policies with the focus provided by the three fields of identity, territory and legitimacy, a pattern becomes visible: similar expectations are held by settlers in Australia and British Columbia that the relationships they seek to create will provide certainty: in the form of harmonious and satisfying identities; in the security and prosperity of a territorially-dependent economy and lifestyle; and in the re-legitimation of existing order.

Identity

Those that call for an expanded, more generous idea of Self, as the way to include the Other, quickly run up against significant barriers. Ethnic, linguistic, and religious sources of unity are all non-starters, given the self-conscious diversity of both indigenous and settler peoples. An appeal to the shared moral experience or the shared history of the nation often seems more fruitful. This was certainly the premise of reconciliation in Australia.

In a recent work, Rowse explored the difficulties inherent in the morality of justice as understood by settlers. The question of the 'original story' is outlined using Deborah Bird-Rose's 'Saga of Captain Cook': "the nub of the intellectual problem set out in the Saga is (that) Cook's book-government is a 'law', but it is based in immorality."² The clash between the mores by which Cook conducted his invasion,

² Rowse, T. 1993. *After Mabo interpreting indigenous traditions*, Melbourne University Press, Melbourne, p. 4.

and those of the people who suffered it, is fundamental. The effect of this original story is to challenge the very possibility of contemporary morality under the auspices of the Australian state (book-government).³

Throughout the early chapters of this thesis, I considered reconciliation's attempts to resolve this gulf, and concluded that many differences have been entrenched as a source of antagonism and denial, rather than as a basis for respect and recognition. The quantitative research discussed in Chapter 4 does not support any other conclusion: majorities of settlers in Australia are unwilling to make a connection between past dispossession and present disadvantage that is strong enough to justify substantive remedial action. Indeed, these findings in the CAR's research – that a majority of settlers thought Aborigines were *not* disadvantaged, that what disadvantage might exist was ameliorated by special assistance, that there was too much special assistance, and that Aborigines did not do enough for themselves – hardly provides the ground for a positive, shared identity, given that for indigenous peoples a major source of both pride and frustration is the fact of indigenous survival in the face of dispossession.

Such findings may suggest that a straightforward liberal-individualism underpins settler attitudes to indigenous peoples. Yet Mackay's analysis points to a more disturbing possibility: that in the eyes of many, Aborigines are simply 'off the scale', if we are thinking about social status or class; they are even "in a separate category altogether."

Though the political backers of reconciliation had not set as explicit goals the creation of majorities in opinion polls, the fact that the CAR in its final year was asking them suggests their importance. I have argued throughout this work that reconciliation took its original momentum from a global history of consent-exchange between indigenous and settler peoples; several indigenous leaders and the CAR's own

³ *ibid*, pp. 2-4.

publications explicitly endorsed this. Yet the CAR's research points to the unlikelihood of this happening in the foreseeable future.

One mechanism by which exchange of consent was to be made possible was through the 'sharing of history'. It is highly questionable whether the period of reconciliation has even brought clarity to this concept let alone implanted it in Australian hearts and minds. The campaign for a national apology – so crucial to the initial growth of reconciliation – has resulted in paroxysms of recrimination and loathing; a national, permanent structure of contestation now suffuses the debates over how Australian history shaped the colonial relations between indigenes and settlers. It is difficult to say whether there are many widely-held values or lessons that people in Australia draw from their history *and* actually implement in their lives; there are arguably none that arise from a coherent, national understanding about colonial history and its impact on the circumstances of indigenous people.

The 57% of settlers who disagreed with a national apology in the CAR research, perhaps provide a national analogue to the failure of the 'See-Saw' project in Ceduna, where the desire to build community harmony around the historical theme of land loss was defeated even before it was begun. The great difficulty with which the members of the reconciliation circle in *Whiteys like us* tried to agree on the basic patterns of Australian history echoes this.

Others sought to close the gap with the cement of a universal spirituality. The importance of a spiritual and emotional dimension to reconciliation – particularly for members of the Stolen Generations – should not be understated. Yet it seems equally unlikely that the approximation of shame, healing and belonging will bring about shared identifications. Much of the enthusiasm for indigenous spirituality is appropriative, appearing to issue from a desire to complete an Australian emptiness. Others see this as pious, even irrelevant to the dominant secular impulses in the society. A strong emphasis on spirit may not be the way to Australian unity; it is very unlikely to lead to a respectful recognition of indigenous peoples.

This research demonstrated that a division exists between indigenising and assimilationist attitudes to indigenous peoples. This is the gulf between those for whom aboriginality is the problem, because it prevents indigenous peoples from enjoying the considerable bounty of the contemporary Australian nation, and those who view indigenous peoples as presenting an opportunity for the nation to discover its true self.

In this construction of the identity debate, Aborigines are restricted to taking on the representations of settler nationalism. Moran argued that “Aborigines remain as threatening ‘cultural others’ ... or become a rather prized citizenry, whose absorption offers redemption.”⁴ Neither position is intrinsically interested in what indigenous identities might actually consist of without regard to settlers’ needs; neither is willing to make space for such identities. In their tug of war, both consolidate the boundaries of the political space in which to discuss Australian identity.

On the field of identity therefore, the success of reconciliation looks indifferent at best. Without doubt, some settlers in Australia are now more interested in indigenous life, though this is rarely more than a concern about the pathology of indigenous disadvantage or an enthusiasm for the palatable aspects of indigenous culture. Such new attitudes, however, are not necessarily drawn from a shared understanding of the historical foundations of the relationship between indigenous and settler peoples. There is certainly no collective moral experience of history that promises to bind future relationship-building projects.

Territory

The deception that arises in the search for new indigenous-settler relationships is no more clearly visible than in the reactions to indigenous claims for ownership or control of land and resources. Confronted with a reforming jurisprudence and

⁴ Moran 2000, p. 107.

increasingly effective indigenous activism, settler societies have undergone a seeming *volte face*. Yet in some instances this is actually a more complex assertion of settler authority and control. The British Columbia treaty process should be understood in this way.

Firstly, the question of with whom the state is prepared to negotiate. The voluntary basis of First Nations participation is appropriate: nothing here should be construed as exhorting the state to develop administrative or legislative approaches that restrict or demand indigenous participation. However, that the current approach may simply reproduce colonial relations has been observed. Some of those participating on behalf of Natives in British Columbia do not appear to have the confidence of their communities; in some cases, overlaps of claimed territories also manifest this problem; many groups simply have no interest in the process as it currently stands.

At issue is the distance that this may be being created between the content of negotiations and the basis of indigenous claims in traditional Native identities and rights. The tactic of aloofness – having First Nations resolve this issue – may look like justice, but in fact may be part of a politics of condescension. The state rationale, that the process is political and not legal, helps to consolidate its fundamental interests.

The dominant rationale of the state is that its interest in land and resources always underlies that of Natives. This is visible in several ways: obviously any sense that there is a quota or formula for the amount of land to be included in settlements is a profound statement about what the basis of the new relationship is to be and who will exercise power in it. Even the notion of ‘reasonableness’, a mandate that is likely to be part of the provincial referendum in 2002, cannot escape this. The provincial government in particular has promoted formulaic approaches in the past and many Natives are concerned by evidence that such an approach is actually in place. When one considers that of the joint offers made by the two governments to First Nations, that not one has been accepted, the consequences of the state’s position are now abundantly clear.

Interim measures reveal a further problem. The proximity of treaty settlement offers to interim measures granted, as in the Lheidli T'enneh case, reveals the intention of the state to co-opt First Nations into their plans. Interim measures were a basic prerequisite of participation as the British Columbia Claims Task Force saw it, not an opportunity for government to distribute *largesse* and manipulate Native need. It was a policy that explicitly left open the question of authority and ownership of lands and resources in the absence of final agreements. The failure of the interim measures policy to act as a protective device and its clear emphasis on cooptation of Natives in economic development strategies, indicate only too well the particular character of the new relationship envisaged by the state.

Refusal to compensate Natives for alienated territories as part of treaty settlements takes this further: not only does this miss the opportunity for symbolic acts of contrition to become part of settlements, it denies that any relationship existed prior to negotiations. The preparatory question posed about relationships, about the effect of creating new ones on those already in place, is avoided once more. Treaty negotiations over compensation offered the chance to address the question formally; refusal to do so empties potential agreements of much of the substance of new relations.

Finally, the agreements contemplated so far all attempt to make sure that they are conclusive. Considerable energy has been put into finding a perfect language to express this but the problem lies in the conceptualisation of the relationship that is held by the federal and provincial governments. Canada and British Columbia seek indemnifications from future claims and wish to limit future discussions to issues that arise only under the agreements currently being pursued.

That is to say that Natives are being asked to define themselves in a way the settler state finds manageable. Not surprisingly, many find this deeply objectionable and anathema to the basic principles of treaty-making they agreed to at the outset: had First Nations reached final agreements in the first few years of the process, they may, for example, have prevented themselves from benefiting from the *Delgamuuk'w*

judgment of 1997. The character of a relationship agreed under such conditions could hardly be said to be that between two equal peoples.

Ironically, it is that judgment (seen by many as radically extending the scope of aboriginal title in Canada) that embeds fundamentally the inequity of future relations. As Tully noted of *Delgamuuk'w*'s 'national interest' justifications for extinguishment of aboriginal title, "It is difficult to see in these objectives much difference from the early justifications of dispossession in terms of the superiority of European-derived societies and their developmental initiatives."⁵ He is not sanguine about the motives: "the ground of the relation is the appropriation of the land, resources and jurisdiction of the indigenous peoples, not only for the sake of resettlement and exploitation ... but for the territorial foundation of the dominant society itself."⁶

Some Native groups are abandoning the treaty table for the reassertion of title through traditional use. Little or no progress is being made on the project of creating new relationships through formal, comprehensive agreements in British Columbia. The general conclusion of this thesis about the failure of the relationship-building exercise in British Columbia is that the space in which it has been conducted – the field of territory – has largely been frozen. The treaty process represented a new political space carved not through compromise but through confrontation; as many have suggested during the course of this research, it was designed to be open in many ways. The 'frozen territory' is largely the result of the policy choices of the Canadian state, and its underlying vision of a future relationship with indigenous peoples: the ultimate state goal is the entrenchment of its sovereignty and jurisdiction as indubitable, which "does not question, let alone challenge, the continuing colonisation of indigenous peoples and their territories, but serve(s) to legitimate it."⁷ John Borrows has put this candidly:

⁵ Tully 2000, p. 48.

⁶ *ibid.*, p. 39.

⁷ *ibid.*

The notion of reconciliation ... is more concerned with reconciling Aboriginal peoples to Canada, than it is with reconciling Canada to the existence of different social, cultural and political entities within the state ... treaties are requiring Aboriginal peoples to conform to Canadian values and law, and not enjoining Canada to simultaneously conform to Aboriginal ideologies and law. The imbalance that is being replicated in contemporary treaty relationships does not bode well for the survival of social and political regimes that differ from those found in the rest of Canada.⁸

Legitimacy

The final field on which to assess the proposed new relationships between indigenous and settler peoples is that of legitimacy. Throughout this thesis the operative argument has been that agreements are all about legitimacy. That is, the exchange of consent is fundamentally an act of recognition that offers each party legitimacy in the eyes of the other. What is revealing and disturbing is the extent to which both policies' attempts to create consensual agreements have been tarred with the brush of illegitimacy. In both countries, this has become the subtext of significant criticism since the mid 1990s.

In Australia, the question of what is legitimate has overlapped significantly with questions of identity and territory. David Day's book *Claiming a continent*, sets out a chronological passage to legitimacy he describes as the achievement of legal, effective and moral 'proprietorship'; he concludes with a brief analysis of reconciliation as the hoped-for conclusion to that process.⁹

Throughout the present work, the claim has been that reconciliation is a policy more attuned to the needs and claims of settlers, than a genuine response to Aboriginal claims. Its redemptive possibilities, as we have seen, were lost on few of its committed supporters. On the other hand, its lack of specificity and its limited obligations ensured another tranche of support from the conservative side of Australian politics and society. The result was a policy for which there was bipartisanship. A better word is

⁸ Borrows, 'Delgamuuk'w treaties: an overview', p.22.

⁹ Day 2001, pp. 329-346.

non-partisanship: what was actually sought is the creation of a seamless state attitude towards indigenous need and indigenous claims. A consequence of this is that indigenous claimants find fewer political footholds from which to make claims.¹⁰

The figure of the ‘pendulum’, for example, is a classical example: it promotes a circumscribed limit to political action, defined by sides such as ‘progressive’ and ‘conservative’, or ‘left’ and ‘right’. Participating in the metaphor to agree or dispute how far to one side we are or have come, as some have done, merely confirms the limit of action – an assumption that we are all in this together and that our capacities to influence policy choices are equal.

One of the striking features of Australian politics in the late 1990s has been the apotheosis of ‘ordinary Australia’. It became part of the politics of reconciliation and is a construction with legitimacy as its pith. Thinking about this as an issue of political space – the bounds of what is politically possible – ‘ordinary Australians’ have clearly been mobilised to draw in the boundaries and to defend them. In the development of reconciliation an insurance policy has been provided for conservatives who were afraid of its original suppositions and its logical conclusions: recognition of indigenous rights. The technique in recent years has been to highlight the divide between political ‘elites’ and their constituencies.¹¹

However, as I argued in Chapter 5, it is naïve to suggest that political leaderships have totally directed public thinking on reconciliation. The evidence to the contrary is compelling. The dominant views of settler Australians appear to be assimilationist, while the prevailing approach of most of reconciliation’s central advocates has been indigenising. The bounded space in which the new indigenous-settler relationship is to be created and must exist is not then fixed: it fluctuates as

¹⁰ In ‘How we got a Native Title Act’, Rowse notes, “These gains have been made by indigenous people at the expense of the bipartisan alignment of the major parties of the federal Parliament in the 1980s. Given that the strongest feature of that bipartisanship had been reserve about, or hostility to indigenous land rights, it will no doubt be judged by many Australians ... as a price worth paying.” Rowse 1994a, p. 131.

¹¹ See on this issue Andrew Norton, ‘The logic of the labels’, *Quadrant* (April 2002), pp. 16-19.

‘elite’ and ‘ordinary’ understandings of legitimacy become dominant. This is the consolidating interaction of assimilating and indigenising forms of nationalism.

As I argued in Chapter 2, reconciliation took its force from a belief that the Australian community was not yet ready to entertain a substantive agreement, but that such an agreement was morally and historically necessary; especially so after the recognition of *Mabo*. The struggle between assimilationist and indigenising nationalists over the legitimate space in which the indigenous-settler relationship is to take place does not encourage a belief that such a readiness is being cultivated. Some have been able to juxtapose an indigenising nationalism with a focus on building support for the recognition of indigenous rights but there is no evidence that this is the position of even a majority of indigenisers. Assimilationists, on the other hand, build their position exactly on the denial of indigenous recognition. Some mainstream conservative figures have recently begun to point to the exhaustion of the project.¹²

The British Columbia treaty process now faces a similar threat. Throughout its tenure in provincial government, the NDP took the attitude that treaties were in the best interest of all parties and at particular moments in the 1990s took a unilateral approach to further the policy. The opposition Liberals were increasingly able to portray the policy as secretive and undemocratic, sweeping to power on the promise of accountable government.¹³

Their commitment to holding a referendum on treaty mandates threatens to shrink the political space of the indigenous-settler relationship to the point where it cannot express even the most basic of Native claims. However, the conceptual

¹² Tony Abbott, cited in Toni O'Loughlin, 'You're whingers and too defeatist, Abbott goads Left', *The Sydney Morning Herald* (January 5, 2002); Mark Day, 'Mea culpa Tony, we have sinned', *The Daily Telegraph* (January 9, 2002). See also Pru Goward, 'Reconciliation has become a phony debate', *The Age* (June 6, 2001); Mike Steketee, 'Unstoppable force halted by immovable PM', *The Australian* (January 21, 2002).

¹³ This is not to suggest that treaties were the sole, or even the primary, reason behind the Liberals' attack on the NDP as 'unaccountable'; treaties were one issue among many.

infrastructure to do this was long in place before the May 2001 provincial election, provided by the trope of certainty. For all the confusion attendant on the word, the British Columbian usage is largely the same as it is in Australian controversy over native title: restriction of the space in which indigenous people can make claims, with the primary and over-riding rationale of maintaining and extending settler privileges and control over land and resources.

The referendum is extremely hazardous. It is absurd to argue, as the provincial government continues to, that it is not a vote on constitutionally protected rights. Negotiations have explicitly aimed to define what s.35 aboriginal and treaty rights are, and to set out mechanisms for their enjoyment. The passage of a referendum that restricted provincial support only to a delegated, municipal model of self-government (a distinct possibility), stunts any future agreements about the content of self-government rights which are as yet undefined. Though a *mandate* is one approach to legitimacy, the likely consequence of its formal expression and limitation outside of the negotiations is that Natives in British Columbia will leave the process. They will return to the tactics which delegitimised existing practices in the first place, and that forced the state to the negotiating table.¹⁴

The struggle in British Columbia over legitimacy reveals just how awkward the creation of new relationships is. For Natives, legitimacy is to be achieved through a respectful relationship that recognises them as peoples. Conversely, many settlers see the legitimacy of the state only where certainty and absolute dominance undergird all of its activities and decisions. For settlers, their search is for “that sense of certainty necessary to push one’s fortune in the new world.”¹⁵

If we return to the question I posed in the opening chapter as encompassing all questions we might wish to ask about relationships between peoples – what is their

¹⁴ This thesis was completed in late April 2002. The ballot for the referendum closes on May 15, 2002.

¹⁵ Reynolds 1998b, p. xv.

purpose? – legitimacy certainly looks like a useful answer. Peter Russell’s comment that good relationships create freedom, gives a particular texture to legitimacy. That the recognition of indigenous rights may enable a freedom that legitimates is not a difficult concept: it is directly beneath the indigenising approach to reconciliation for example, and is celebrated as healing and renewal by its supporters, attacked as denigrating and divisive by its critics. Whether we should see such potential acts of legitimation as outcomes of the primary task of settler recognition of indigenous peoples, or conversely as the necessary inducement for settler peoples to participate, is an important argument. However, it is not this discussion that is at the political and philosophical core of either reconciliation or treaties in British Columbia. The argument that is taking place is whether such (re)legitimation is required or desirable at all.

Defining the boundaries of political space

I have used the device of ‘fields’ as a way of understanding the context in which new relationships between indigenous and settler peoples may be created. In each of the three fields a tension exists between different forms of settler response to indigenous claims. It is the contest between two types of settler response that creates the bounded space of each field, and which must impair the full functioning of a respectful relationship between peoples.

Within the field of identity, the tension is that between the assimilationist and indigenising modes of nationalism. At the outer edges of this space, indigenisers provide an enlarged response to rights claims, many seeing the potential of justice as a resource for a stronger and more satisfying national identity. In the central parts of this space, assimilationists insist on a set of political responses to claims that explicitly reject their basis: indigenous difference. From such a position, national identity must remain an unexamined commitment to egalitarian individualism. Neither appears significantly interested in responses that take seriously the source of claims in indigenous peoplehood.

On the field of territory, two positions interact in a similar way. Here the subtext is security of tenure, jurisdiction and prosperity, rather than stability of identity. The distance between the two positions is, in Canada, somewhat less than in Australia over questions of territory but the dynamics are the same. One force seeks the accommodation of indigenous claims within revised but extant structures. The development of aboriginal title in Canada and its protection under s.35 is certainly of this order: there are fundamental limits set by this position, the norms set by the imperatives of state development in the *Delgamuuk'w* judgment most obviously.

The alternative position, that akin to assimilation, is that this enlarged space of indigenous recognition is unacceptable as a permanent feature; finalisation of claims must be sought, and the space diminished once more. Those who openly argue that British Columbia treaties should impose certainty and codify indigenous rights and identities definitely aspire to a reduction of political space.

The field of legitimacy also is dominated by the struggle between two settler orientations to indigenous claims: in both cases the legitimacy of the settler state depends on policy reflecting popular will largely to the exclusion of any obligations that arise from the fact of indigenous rights. The 'enlarging' view here sees the potential for re-legitimation through the promise of a new relationship where indigenous peoples are brought into harmony, prosperity and certainty with settler norms. The restraining assimilationist core mobilises legitimacy as code for a majoritarian approach to minority rights.

One manifestation of this dynamic may be the variations in levels of measured public support for propositions to recognise indigenous rights. A pattern, while not fully explored in the present work, is certainly visible: general questions about indigenous recognition often get high level of public support in both countries under

study; more specific questions do not. As the sense of obligation that attends such recognitions becomes more clearly defined, support is eroded.¹⁶

Certainly the measurements taken by the CAR in 2000 encourage this supposition. It is not clear what 58% of respondents to an ATSI-commissioned poll thought they were supporting when they indicated their approval of a treaty later that year; I would argue that the majority of respondents who objected to a national apology have a clearer sense in their own minds about what that measure may entail. Similarly, the high levels of enthusiasm for government to consider Native claims in British Columbia in the late 1980s and early 1990s, has been whittled away by the facts and difficulties of treaty-making. The referendum threatens to be a culmination of that trend.

The passage of both policies I have examined has been from open structures and considerable optimism, to more tightly defined arrangements existing in an atmosphere of tension. As a precursor to the creation of ‘new relationships’ this hardly augurs well. Throughout this thesis, I have argued that settler interests have become better expressed in response to the thorough setting out of indigenous claims. This has taken place because of a contest between older and newer approaches to difference within settler societies, not because the settler society has entered into respectful negotiations with indigenous peoples, confident in the coherence of its own identity. The mistaken assumption of the relationship-building project has been that such a coherence is both possible and desirable.

The enlarging or progressive positions consolidate the idea of settler-imposed boundaries no less than the restrictive or assimilationist ones. Here the commitment to manage difference according to current distributions of power – that is the domination of the spaces or fields of the relationship by variants of settler attitudes – prevents that relationship from taking a mature form. New relationships appear to have the function

¹⁶ Bennett, pp. 32-33.

of managing indigenous difference as the problem. That this is its purpose limits it now and into the future.

Conclusion

Indigenous peoples can be forgiven for thinking that, rather than a relationship of equal peoples, governments in Australia and Canada are pursuing an entirely unequal relation: where one party diversifies and continues to prosper from the stasis of the other; where one party is rewarded by the other, where one party alters little or nothing *and* has its whole culture, identity and practice endorsed by the loss of the other: indigenous peoples validate settlers through the formalisation of their own loss.

The requirements for setting out one's political or cultural identity indefinitely and inflexibly into the future, reflect an attitude that is widely unfashionable in the western world: the disposition of the state towards its citizens, of employers towards their employees and of men towards women is now expected to demonstrate an appreciation of the less powerful party as a dynamic identity, as beings constantly revising and reforming perceptions of self and other. Laws and norms have altered significantly to accommodate that. While I do not suggest that the actual situation reflects those ideals, it is strange to see contrary motivations characterise settler peoples' attitudes (in and through their institutions) towards indigenous peoples.

Perhaps the problem is as simple as demographics: settlers in Australia and Canada vastly outnumber indigenous peoples and largely find it inconceivable to think in terms of the equality of peoples that must underpin mature relations. Korsmo indicates some of the obvious challenges:

The more aboriginal groups pursue their claims, the more terminology and conceptual categories they must adopt from dominant institutions, thus presenting their uniqueness in familiar terms ... Right now the state offers the forum to present one's stories and reserves the

right to accept or reject, in total or in part, to call them hoaxes or wounds in need of balm ... distance is fast disappearing as an option, as is absolute ignorance of the other.¹⁷

When the boot was on the other foot, as in South Africa, a post-apartheid regime respected the property and political rights of the former oppressors without exception. It would be unwise to forget that in many remoter territories such as Nunavut and Arnhem Land, indigenous people are the dominant population and the fastest growing group. In any case, majoritarian justifications are unlikely to make indigenous demands go away.

In the opening chapter I introduced some work from William Connolly which provided a useful theoretical background for this critical examination of new relationships. Connolly urged on us an ‘ethos’, a disposition to others. Ethos impels us to be more “responsive to the fugitive flow of surplus and difference in dominant constellations.”¹⁸ Paul McHugh has argued for a ‘post-structural relationship’, not so much an ideology as an awareness of complexity; relations conceived of as simply an “engagement of polities” will struggle to capture the range of experiences that indigenous and settler peoples now create together.¹⁹

Such ideas, of ‘dominant constellations’, seems a much better way of grasping the range of experiences that comprise the affairs of indigenes and the larger nations in which they live; a way out of the impasse of relationships based in certainties. Otherwise, how are we to comprehend the myriad identities of client, offender, service-user/provider, urban or traditional, hunter-gatherer, employee, representative, native title-holder, Australian, Canadian or custodian? Each of these (and many more) provides a point of engagement between two putative groups, with its own partial definition of the participants and invoking a range of laws and interpretive practices

¹⁷ Korsmo, p. 130.

¹⁸ Connolly 1995, p. xxv.

that may not easily be reconciled. On this account, democratic recognition of diversity implies a loss of control and certainty, because categories and the boundaries between them are less stable:

In a pluralizing culture the *sources* as well as the *mandates* of ethics will be marked by plurality: the essential ethical question is what kinds of relation bearers of each contestable orientation strive to enter into with their competitors.²⁰

Attempts to depoliticise debates about indigenous claims, through the harmonising rhetoric of identity or by fetishising ‘certainty’, are motivated by the same desire to normalise the sources of ethical relations. In the Australian context debate about reconciliation is distorted by a vocabulary of harmony in the misguided belief that a national consensus is the appropriate path to respectful indigenous recognition; similarly, in British Columbia the underlying state rationale of economic certainty makes a contestable ethics seem remote.

In both countries there are individuals and groups, both indigenous and not, who have advocated in varying ways principles of ethical pluralism. Baptist minister and activist Tim Costello appealed to a deep notion of diversity, using the metaphor of voice: we should be open to “discordant worlds that all project multiple voices into the same space.”²¹ A similar philosophy underlies recent criticisms of the British Columbia treaty process by the Aboriginal Rights Coalition of British Columbia, for whom certainty needs to be abandoned as a principle for agreements, and “a shared-use policy of land tenures, preserving both titles’ systems” be implemented in its place.²²

Refusal to entertain such an ethics inevitably leaves settlers in a state of anxiety and alarm: desiring only certainty, settlers are prevented from self-reflection; self-

¹⁹ Paul McHugh, ‘Aboriginal identity and relations in North America and Australasia’, in Coates, K., Durie, M., and McHugh, P. G. 1998. *Living relationships: the Treaty of Waitangi in the new millennium*, Victoria University Press, Wellington, pp. 107-186.

²⁰ Connolly 1995, p. xxv.

²¹ Costello in Grattan 2000, p. 154

²² Aboriginal Rights Coalition: ‘Reconciliation: an alternative to the treaty process?’ [<http://www.members.tripod.com/arcbc/reconciliation.htm>] (January 19, 2001).

reflection that, I would argue, is an integral part of a healthy relationship. It should manifest as a capacity to see that one's own institutional and cultural characteristics may be fundamentally destructive to the other. Bizarrely, it is what Mulgan and others urged on indigenous peoples as the price for settlers dealing with their claims. The inversion that takes place here is startling, denying both the fact that the indigenous search for agreement and the exchange of consent has always offered legitimacy for settlers, and the reality that it is settlers who have denied indigenous legitimacy since contact.

For settlers, their anxiety is based on a need for order – the characteristic mark of modernity. Yet this inevitably means limited forms of recognition for others, those who may bring different sources of meaning and order. Recognition of peoples is an acceptance of, if not disorder, then multiple ideas of how to achieve order: it means a commitment to permanent discussion and perpetual negotiation, as diverse 'orders' face changing circumstances and new challenges together. Without this, relationships that are 'new' will remain dishonest.

Many settlers are incapable of acknowledging that, rather than moral order emerging perfectly formed *ex aeternitate*, "shouts and fighting marred the birth of the world."²³ By extension, we might conclude that new relationships first require new spaces, even new worlds. More shouting, more fighting?

²³ Simon-Nicolas-Henri Linguet, *Theorie des lois civiles*, cited in Saint-Amand, P. 1996. *The laws of hostility: politics, violence, and the enlightenment*, University of Minnesota Press, Minneapolis, p. 3.

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