

TREATIES WITH ABORIGINAL MINORITIES

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(An earlier version of this paper has been published in the *Canadian Journal of Native Studies*.)

Introduction

Developing a title for this paper presented a number of problems. It was found difficult to combine succinctness with semantic accuracy: the author did not wish to translate the title into a minor paragraph. A number of alternatives were scouted and that which is here presented was the final selection. However, scrutiny will reveal a number of shortcomings, the first of which becomes apparent in the first word.

Both the Oxford English Dictionary and Webster's Dictionary emphasise the inter-state - or inter-nation - ingredient in a 'Treaty' and, indeed, it was that essential that caused the United States of America to cease the practice of formulating 'Treaties' with Native Americans in 1871. At that time it was considered that the word over-dignified the aboriginal party. The Oxford English Dictionary, however, offers a minor definition which is more appropriate to the intention of this paper: 3.a. *a settlement arrived at by treating or negotiation: an agreement, covenant, compact, contract*. But even this definition has a failing: a contract is, perforce, a covenant between two individuals - albeit corporate individuals - and, because aboriginal bands are not considered by the Canadian courts as corporate individuals, the enforcement potentials of contracts cannot apply to Canadian aboriginal treaties. This paper will, however, abide by the O.E.D.'s 3.a definition as quoted above, but without the legal implications of the word 'contract'. Thus, even the so-called 'Niagara purchases' of 1764 and 1781, through which the Western bank of the Niagara River and a considerable depth of littoral was purchased from the Chippewas and Mississaugas for 300 suits of clothing, may be included.

The next problem area is the term 'aboriginal minorities'. It refers, of course, to a current position. In the recent past, the term 'Fourth World' was coined to define those aboriginal peoples who have been so swamped by the tide of colonisation as to become minorities in what they consider to be their own land. The term enjoyed a brief journalistic hey-day and then became politically hackneyed. As the second and third worlds become indistinctly separate, numerate definitions become inadequate. However, in using 'aboriginal minorities', two caveats present themselves: first, in the early stages of colonisation and when the first so-called 'Treaties' were formulated, aboriginal people were in a majority status; it was their disorganisation which rendered them prey to small groups of better organised interlopers. At the start of the colonisation process, aboriginal minority status was charismatic rather than quantitative. It is impossible - for lack of any form of census - to define the date at which the colonisers, the settlers, assumed a population majority status, but it can be safely estimated as considerably after the commencement of the colonial process.

The second caveat is best presented in the form of two questions: 'Is there a statute of limitations on the act of colonisation?' and 'When does a colonising race become indigenous or even aboriginal?'. Because there is no established or definitive formula, those questions must be left unanswered. For instance, the people of the Sino-Yayoi culture

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moved up from the south of Kyushu and through the isles of Japan and displaced the Ainus and the people of the Jomon culture at about the start of the Christian era. There are still a small number of people in the north of Hokkaido who consider themselves Ainus and it must be asked whether they constitute a politically defined aboriginal minority - or have the Japanese, after two thousand years, become aboriginal? By the same token, albeit very much later in time, the Bantu moved south from Bulawayo and dispossessed - largely by extermination - the less bellicose Bushmen (San) and Hottentots (Khoikhoen) who were dominant in the Cape when the first Dutch traders attempted colonisation in 1652. Who, then, can claim aboriginal rights in the far south of Africa?

Beyond those two examples and the four most blatant groups, there are many other aboriginal minorities across the globe - the tribes of the South American rain-forests, the Saki of the Malayan Peninsular, the Dyaks of Sumatra and, in probability or cultural folklore, many others. However, this paper cannot include them, either because history has, thus far, produced no evidence of any form of aboriginal treaty having been concluded or because of the lack of vociferous complaint voiced by aborigines has not led the colonising powers to the necessity of negotiation of 'rights' in any serious manner. There are also the Saami of Finland, Norway and Sweden; the Kurds of Iraq, Iran and Turkey and the aboriginal minorities of Siberian Russia, but, because the claims and aspirations of the Saami and the Kurds seek solutions which transgress existing national boundaries, and, because the Yakut and other Siberian minorities have, at least until recently, been cowed, the accommodations which they pursue must come outside the scope of this paper.

Outstanding, therefore, are the four-blatants' referred to above: the four non-Caucasian groups which have been submerged, in terms of population, by the colonising fervour of Caucasian - largely Anglo-Saxon - races. These four are the Maoris of New Zealand, the Aborigines of Australia, the Amerindians of the United States and the Amerindians and Inuit of Canada. Treaties - or the lack of treaties - are important to these people's political activism.

It is hoped that the looseness of the title is thus vindicated.

The Genesis of Aboriginal Treaties

The aboriginal treaty is the child - but not the only child - of colonisation, and colonisation is the child of land-hunger. Thus, the aboriginal treaty is a grandchild of land-hunger. That analogy, though perhaps banal, is apt because there are a number of siblings, deriving from the same genesis, which have to be taken into account.

There is extermination such as was practised by the Bantu and, almost synchronously, by the Anglo-Irish settlers of Tasmania. Beyond brutal and deliberate genocide, there is another involuntary, but no less virulent, form of extermination, that of imported disease. Many aboriginal communities have been virtually exterminated by respiratory and sexually transmitted diseases and by alcoholic excess. Indeed, in 1856, it was feared that the Maori of New Zealand would be among their number: Dr Isaac Featherston, the Superintendent of Wellington, wrote in that year:

Our plain duty as good compassionate colonists is to smooth down their dying pillow. Then, history will have nothing to reproach us with.¹

A second sibling is disregard. In the conduct of such an approach, aboriginal people are scarcely seen by the colonisers; if seen, they are not acknowledged. In 1787, Australia was established as a penal colony and such officials as ventured there were more of the nature of warders of assorted felons or assumed felons than benevolent wardens of an unsophisticated

¹ MacDonald 1990:5.

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(in European eyes) race of Aboriginal people. It was no part of their brief to enter into any form of land-claim treaty and it seems unlikely that it ever crossed their minds to do so. The attitude persisted after the demise of the penal settlement, so much so that until 1971 the Commonwealth constitution provided that Aborigines were not to be counted in the official population of Australia²

A third progeny of the genesis under consideration is assimilation, a route sought in many colonial regimes. It is a convenient and economic aspiration that those aboriginal people who are to be imposed upon by an alien culture should evolve as clones of the agrarian peasantry upon which the leaders of the colonisers depended in their home countries. In order to prosper, the would-be colonial master must create a class over whom to exercise mastery: who could be more appropriate than the aboriginal people of the country which they propose to colonise? As far as British colonisers were concerned, the system had successful historic precedent: it had worked for the Normans, it had worked in Ireland and it had worked, to a noticeable degree, in India. It did not have, by any standards, the same measure of success where the aboriginal people were culturally nomadic. Efforts to induce the nomads of the American continent to till the soil and wash the dishes were so unsuccessful as to breed the necessity of the importation of semi-agrarian aboriginal people from Africa and else-where - hence the iniquities of the slave trade and the subsequent practice of indentured labour. Of course, integration implicitly involved social levels outside the peasant/servant class but that was considered a price worth paying for the acquisition of an economic labour-force.

The sibling enslavement has been, for a century or so, deceased; but it was nurtured, albeit unsuccessfully, by the Spanish and the French in both the Caribbean and on the southern mainland of the North American continent. It was also introduced by the British in the early stages of Jamaican colonisation. Its inefficiency, rather than its inhumanity, caused it to be abandoned in favour of imported slavery.

The fifth - and, for this paper, final - product of the genesis under scrutiny is that which may be entitled moral and cultural degradation. The concept of deliberately pursuing this route is so distasteful that it is only overtly ascribed to the villains of history - Hitler, Caligula and Mao Tse Tung, in his 'Cultural Revolution' phase, rank among them - but it is a tragic fact that degradation is frequently found in association with assimilation. Where religion, lifestyle, tradition and language are attacked by an alien and dominant culture, deculturation is the precursor of a moral vacuum which can only be filled by depths of degradation up to and including self-destruction by one means or another. When, phoenix-like, political activism arises from that shabby state, it is a sign that the nadir has passed and reculturation is a possibility. However, before that time, the need for political acknowledgement is absent. The saga of Nunavut is illustrative of the progression.

Thus aboriginal treaties may be counted as the most liberal of the five potentials which spring from colonisation and, like it or not, colonisation - which inevitably leads to the involuntary loss of aboriginal sovereignty - is an inescapable historic fact. The ultimate, in treaty terms, would be the restitution of full aboriginal sovereignty and national integrity, as achieved in the decolonisation phases of the 1960s, but there are powerful forces which prevent that ultimate attainment where aboriginal people are in a minority status. The object of treaties should have been the preclusion of the four remaining siblings. It was not always so.

The Legal Rationalisation of the Colonial Process

² Brennan 1991:40.

All treaties embody a redistribution of rights - either property rights or political rights or, frequently, both. Aboriginal treaties were no exception. For example, when Peter Minuit purchased Manhattan Island in 1625 from the Brooklyn tribe of Indians for goods to the approximate value of 60 guilders, he transferred his property rights in those goods to the Indians and they, in turn, transferred all their rights in Manhattan Island to the New Netherlands, as represented by Peter Minuit. In Minuit's opinion those rights, once he had acquired them, were legal rights. Before he acquired them and while they remained vested in the Brooklyn Indians, he may have considered them rights under Indian law, natural rights, moral rights, usufructory rights, *bona fide* legal rights or the rights inherent in might. Whichever interpretation was in his mind, there was no Romano-European legal definition of the Indian rights extant, so the package was wrapped up with the formula 'all rights, real or imagined'. The fact remains, however, that Peter Minuit considered that the Indians had some form of right which they were empowered to negotiate and which they conveyed to him in exchange for goods.

In considering aboriginal treaties further, therefore, it becomes necessary to assess the legal nature of the negotiable assets which were vested with aboriginal people. It must be stressed that the rights which will be considered are limited to those defined by the legal codes of the colonisers: they do not include any amalgam of natural right, moral right or any right assumed by way of aboriginal religious or cultural lore.³ In order to make the assessment, it is necessary to revert to the quasi-legal, quasi-Christian tenets of early international law. Malcolm Shaw lays the foundation:

The collapse of the Byzantine Empire, centred on Constantinople, before the Turkish army in 1453, drove many Greek scholars to seek sanctuary in Italy and enliven Europe's cultural life. The introduction of printing during the fifteenth century provided the means of disseminating knowledge ... Europe's developing self-confidence manifested itself in a sustained drive overseas for wealth and luxury items. By the end of the fifteenth century the Arabs had been ousted from the Iberian peninsular and the Americas had been discovered.⁴

This expansionary stage introduced a need for some international understanding, the establishment of some self-defensive code of practice, among Europe's would-be colonial powers. However, there was no secular legislative body capable of verbalising and codifying the concise terms of any such understanding: so it devolved on the jurists of the only pan-European organisation - the Holy Catholic Church of Rome - to translate precedent and necessity into a quasi-Christian set of rules. It must be remembered that the Church was, through the actions and influences of a series of innovative Popes, a European power which, in terms of political significance, far exceeded most of its European counterparts, with the power to act on its own account. Nonetheless, in relation to the codification of some sort of international language relating to colonisation standards it did not do so; it allowed various national ecclesiastics to pontificate, with the result that the rules - or, as they were dignified, the laws - were framed by a coterie of European interested parties for the benefit of themselves, their monarchs and their consciences. The pontificant who set the scene was a Spanish theologian of the University of Salamanca by the name of Franciscus de Victoria (1480-1548) who, in a series of lectures - *relectia* - expounded an extraordinary set of dicta, which were so integral to the process of colonisation that they and their

3 We shall witness Earl Grey's dilemma over this dichotomy of law and morals when considering the *Treaty of Waitangi*.

4 Shaw 1991:19.

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successors must be afforded considerable space. A translation of his first *relectio*, delivered in 1532, some four decades after Columbus's American landfall, includes the following:

2. Second conclusion: Granted that the Emperor were lord of the world, still that would not entitle him to seize the provinces of the Indian Aborigines and erect new lords there and put down former ones or take taxes. The proof is herein, namely, that even those who attribute lordship over the world to the Emperor do not claim that he is lord in ownership, but only in jurisdiction, and this latter right does not go so far as to warrant him converting provinces to his own use or in giving towns or even estates away at his pleasure.⁵

The lecture continued at some length in this liberal vein stressing, surprisingly enough, that even the fact that aboriginal people continued to reject Christianity - though they must listen to reasonable argument - was insufficient to warrant extinguishment of title to their lands.

However, in the Third Section, the tone changes as the 'natural' rights of the Spanish 'traders' are considered. At that point the lecture enters into an area where any curtailment of the interloper's 'natural' rights by the benighted heathens, might well bring about a situation leading to almost unlimited expropriation of title. First, 'the Spaniards have a natural right to travel into the lands in question and to sojourn there, ...' and 'by natural law running water and the sea are common to all ...' Hence it follows that aboriginal people would be doing mischief to the Spaniards, if they were to keep them from their territories. And 'mischief' of that magnitude was a punishable offense.

Second, inasmuch as things that belong to nobody are acquired by the first occupant ... it follows that if there be in the earth gold or in the sea pearls or in the river anything else ... they will vest in the first occupant.⁶

Once again, if aboriginal people disputed that, they contravened the Spaniards' God-given rights. Then follow a series of paragraphs which bear on religious causes. First it is pointed out that the principal purpose of the Church in authorising, and indeed encouraging, any territorial penetration is that of 'the salvation of souls', and that, therefore:

If any of the converts to Christianity be subjected to force or fear by their princes in order to make them return to idolatry, this would justify the Spaniards, should other methods fail, in making war and compelling the barbarians by force to stop such misconduct, and in employing the rights of war against such as continue obstinate, and consequently at times in deposing rulers as in other just wars.⁷

There then follows a total of eighteen religion-justified circumstances - such as the stamping out of 'vile practices' and the 'justice' of war when fought alongside aboriginal allies - under which expropriation of property was well merited.

Victoria's *Relectiones* became the basis of international law as it relates to aboriginal rights. That basis was expanded and amended by contemporary and future self-styled pundits but the skeleton, as constructed by Victoria, was the fundamental on which all colonising powers founded their practices over many centuries.

One of Victoria's contemporary churchmen opted to declare an even more vicious line of conduct by publishing, as embryonic international law, that it was both right and necessary to:

divide the Indians of the cities and the fields among honourable, just and prudent Spaniards, especially among those who helped to bring the Indians under Spanish

⁵ Victoria 1917:134.

⁶ Ibid.:152/3.

⁷ Ibid.:158.

rule, so that these may train the Indians in virtuous customs, and teach them the Christian religion. ... In return for this the Spaniards may employ the labour of the Indians in performing those tasks necessary for civilised life.⁸

Hugo Grotius, who is sometimes considered the father of international law outside the influence of the Roman Catholic Church, put a lay interpretation on Franciscus de Victoria's *Relectia* at the start of the seventeenth century, but did not change the basic nature of his tenets in any remarkable way⁹

A century and half later, in 1758, a Swiss jurist, Emmerich de Vattel (1714-1767), added a very potent contribution which still has cogency and pertinence to the world in general. His argument, which establishes the *terra nullius* contention, can be best followed by quotation from the original as translated by Charles G. Fenwick:

The earth belongs to all mankind; and being destined by the Creator to be their common dwelling-place and source of subsistence, all men have a natural right to inhabit it.¹⁰

The whole earth is destined to furnish sustenance for its inhabitants; but it cannot do this unless it is cultivated.¹¹

Those who still pursue an idle mode of life - (living on their flocks and the fruits of the chase) - occupy more land than they would have need of under a system of honest labour, and they should not complain if other more industrious Nations, too confined at home, should come and occupy part of their lands.¹²

It is questioned: can (a Nation) thus appropriate, by the mere act of taking possession, lands which it does not really occupy, and are more extensive than it can inhabit or cultivate. ... Hence the Law of Nations will only recognize the *ownership and sovereignty* of a Nation over unoccupied lands when the Nation is in actual occupation of them, when it forms a settlement upon them, or makes some actual use of them.¹³

There is another celebrated question which has arisen principally in connection with the discovery of the New World. It is asked whether a Nation may lawfully occupy any part of a vast territory in which are found to be only wandering tribes whose small numbers cannot populate the whole country. We have already pointed out, in speaking of the obligation to cultivate the earth, that these tribes cannot take to themselves more land than they have need of or can inhabit and cultivate. Their uncertain occupancy of these vast areas can not be held as a real and lawful taking of possession; and when the Nations of Europe, which are too confined at home, come upon lands which the savages have no special need of and are making no present and continuous use of, they may lawfully take possession of them and establish colonies in them.¹⁴

⁸ Quoted in Morrison 1985:20.

⁹ Grotius 1964.

¹⁰ Vattel 1916:84.

¹¹ Ibid.:37.

¹² Ibid.:36, line 10.

¹³ Ibid.:85, line 1.

¹⁴ Ibid.:85, line 16.

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When a Nation takes possession of a distant country and establishes a colony there, that territory, though separated from the mother country, forms a natural part of the State, as much as its older possessions.¹⁵

These dicta have been absorbed into the body of international law to such an extent that the interdependence of 'occupancy' and 'sovereignty' has been in the recent past - and is, indeed, to-day - a central consideration in Canadian northern policy.

Thus, in the early part of the sixteenth century, on the American continent, expropriation of the aboriginal people's land and other property was proceeding in accordance with established international law but, slowly, conscience - liberality - was entering the equation in a marked degree. In 1670, Charles II caused to be sent to his trans-Atlantic governors, the following:

Forasmuch as most of Our colonies do border on the Indians, and peace is not to be expected without the due observance and preservation of justice to them, you are in Our name to command all Governors that they at no time give any just provocation to any of the said Indians that are at peace with us, ... do by all ways seek fairly to oblige them and ... employ some persons, to learn the language of them, and ... carefully protect and defend them from adversaries ... more especially take care that none of our own subjects, nor any of their servants do in any way harm them. And that if any shall dare offer any violence to them in persons, goods or possessions, the said Governors do severely punish the said injuries, agreeably to right and justice. And you are to consider how the Indians and slaves may be best instructed and invited to the Christian religion, it being both for the honour of the Crown and the Protestant religion itself, that all persons within our territories, though never so remote, should be taught the knowledge of God and made acquainted with the mysteries of salvation.¹⁶

It might well be argued that Charles II, perennially short of funds in his exchequer, wished to keep the number of military engaged in colonial defence to a minimum. Obviously, a few missionaries preaching to contented congregations were administratively more economical than a hundred times their number, in soldiery, blundering about in uncharted forests.

Be that as it may, nearly a century later, in 1763, King George III in council, having concluded the Treaty of Paris by which the French ceded to him very nearly all their trans-Atlantic territory, issued a Royal Proclamation which had a profound effect on the then contemporary - and on all future - aboriginal treaty negotiations. The intention was to rationalise the vast territories over which the British Crown held sway. In order to appreciate the legal agility with which that end was accomplished, it is necessary to take into consideration the whole document and not confine attention to that paragraph which is so frequently cited by aboriginal activists.

First, the instrument set up *Four distinct and separate Governments, styled and called by the names of Quebec, East Florida, West Florida and Grenada*. Second, it gave bounty:

To every person having the Rank of a Field Officer	5,000 acres
To every Captain	3,000 acres
To every Subaltern or Staff Officer	2,000 acres
To every Non-Commissioned Officer	200 acres

¹⁵ Ibid.: 86, line 3.

¹⁶ Journals of the Legislative Assembly of Canada. Appendix EEE [8 Victoria, 20th March 1845] Montreal, Rollo Campbell 1845, quoted in Miller 1978.

To every Private Man

50 acres¹⁷

Although naval belligerents were proportionally rewarded, this generosity, in view of the size of the conquest, was trivial: but the acres had to come from somewhere. It was clear that George III considered that the whole land - the sum of the acreages of the four Governments, referred to above, and the astonishing tracts which his predecessor, James, had vested in the Hudson's Bay Company and the majority of the 'thirteen colonies' - was his to dispose of as he wished.

Beyond these grants of land, the Proclamation contains the paragraph which has exercised legal minds since its publication. It reads:

And whereas it is just and reasonable, and essential to our interest, and the security of our Colonies, that the several Nations or Tribes of Indians with whom we are concerned, and who live under our protection, should not be molested or disturbed in Possession of such parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, *are reserved to them, as their Hunting Grounds* ... We do therefore ... declare that no Governor ... do presume ... to grant Warrants of Survey, or pass Patents for any Lands ... whatever which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them ... And we do strictly forbid ... all our loving subjects from making any Purchases or Settlements whatever.¹⁸

That paragraph, which places restraints even on 'Governors', has been, and still is¹⁹ to a large degree, the lynch-pin of aboriginal claims to sovereignty and self-determination but it is, as pointed out earlier, a mistake to read it out of context with the next four sections. In order to make that point, they will be quoted.

And, We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve *under Our Sovereignty, Protection and Dominion*, for the use of the said Indians, *all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company*, and also all the Land and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid:

And We do hereby strictly forbid on Pain of our Displeasure, all our loving subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, *without Our special Leave and Licence for that purpose being first obtained*

And We do further strictly enjoin and require all Persons whatever who have either willfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.

And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; in order, therefore to prevent such Irregularities in the future, and to

¹⁷ Shortt and Doughty 1918:164.

¹⁸ Shortt and Doughty 1918. Volume 1:166, emphasis added.

¹⁹ The 1993-1995 Royal Commission on Aboriginal People in Canada feature the Royal Proclamation of 1763 heavily in their Reports. As well, Mr. Justice McFarlane of the Supreme Court of British Columbia, in his judgement on the *Delgamuukw* case, refers to it. See *Western Weekly Reports*, 1993, 5WWR:108.

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the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advise of our Privy Council *strictly enjoin and require that no private Person do presume to make any Purchase from the said Indians ... but that, if at any Time any of the Said Indians should be inclined to dispose of the said lands, the same shall be Purchased only for Us, in Our Name*²⁰

That, then, was a definitive statement of the legal land-property rights of all aboriginal peoples and particularly those of the North American continent. It elucidated the principal asset which aboriginal people could bring to the negotiating table. As such it deserves summarising.

First, it reserved to the Indians *their hunting grounds*, thus establishing their tenure as usufructory. It certainly conferred a property, but a property of considerably lesser value than that which would be applied to absolute title. In doing so, it preserved the *terra nullius* status of the continent and laid it open to settlers who were prepared to occupy through cultivation.

Second, it limited the right of alienation. While the asset was negotiable, it was only negotiable to one principal, the Crown. Thus, if circumstances made negotiation essential - hunger, for instance - a monopsony or the ultimate in buyer's markets was established.

Third, it made quite clear that any rights were given only under the *Sovereignty, Protection and Dominion* of the Crown. Thus was established the allodial rights of a basic ownership vested in the colonial power.

Fourth, it removed from the territory in which even usufructory right was acknowledged, the areas covered by the new-found 'Governments' of Quebec, North Florida and South Florida and also the 'Territory granted to the Hudson's Bay Company'. Thus, officially, were excluded the south-eastern freeboard of what is now the United States of America, the southerly part of the modern Province of Quebec and the majority of the modern provinces of Ontario, Manitoba, Saskatchewan and Alberta together with an unspecified part of the Northwest Territories.

The liberality of the intention of the 'Royal Proclamation of 1763' can, therefore, be open to doubt.

Since 1763, and within the four countries in which the principal interest of this paper lies, various instruments of government, either proposed or enacted, have flirted with the concept of aboriginal land rights but never has there been a legal definition which superseded that which was acknowledged in the Royal Proclamation.²¹

Outside the confines of those four countries, international organisations, such as the League of Nations and the United Nations, have been very largely successful in fostering the ideal of 'self-determination' and thus accomplishing decolonisation in one-time colonies where aboriginal people were in a population majority status: but each in turn has been constitutionally incapable of interference in internal affairs of member states. Thus, aboriginal minorities have been unable to benefit by other than moral international support.

A final point, in relation to treaties, must be made before leaving the general in favour of the specific. There must be two parties to any agreement which can be dignified with that name.

²⁰ Ibid.:167, emphasis added.

²¹ The passage of the Australian Native Title Act in December of 1993 might be considered an exception to this generality.

It is in the nature of the nomad that the social unit is small - perhaps confined to the extended family - and, therefore, the colonising power, if it wishes to expropriate territory with any form of conscience-soothing legality must create, albeit artificially, a hierarchical structure among those with whom it wishes to negotiate. Nevertheless, even an artificial pyramid has to be based on some minor degree of political consciousness among those designated for exploitation. In Australia that modicum was missing but in New Zealand and America there was enough to foster the tribal chief system.

One of the first acts of the English in colonial Virginia was the 'coronation', with cloak and crown, of Powhattan, leader of the confederacy that was nearest, most necessary and most threatening to the English.²²

In the remainder of this paper, the course of Treaty²³ development will be pursued in four countries: Australia, New Zealand, the United States of America and Canada. Because the volume of material written on the treaties, or lack of treaties, in each of these countries is encyclopaedic, this paper will, in order to fulfil its comparative function, present little more than a resume in each case, but it is hoped that resume will emphasise the similarities and dissimilarities inherent in each sequence.

Australia

In Australia, the lack of treaties is as inter- racially penetrating as is their existence in the other three countries. In fact it could be considered to be more so. The continent's early colonial status as a penal settlement introduced settlers who had sparse time for consideration of the legal niceties of Aboriginal rights. As far as the established European code was concerned, Australia was *terra nullius* and the visible human specie was considered little more than part of the original, and sometimes dangerous, fauna of a newly discovered land-mass.

George III, who in 1763 had issued a Royal Proclamation conferring usufructory rights on North American Indians, confined his (1787) instructions to Captain Arthur Phillips, the first Governor of the New South Wales colony, to something very much more basic:

... all Our subjects [should] live in amity and kindness [with the Aborigines] and none should wantonly destroy them or give them any unnecessary interruption in the exercise of their several occupations.²⁴

Thus, it was considered that the pre-settlement indigenous humans had no territorial or political rights and, while some very small percentage of them were later employed on the emergent cattle-stations, they were not included in the official population figures until 1971. Subsequently, the liberalisation of world opinion and particularly that of the Australasian continent - had revised that doctrine and it is now becoming generally conceded that the Australian Aborigines have some rights above and beyond those rights which are common to all Australian citizens. The exact nature of those rights is, of course, still in contention but the fact that they are considered to exist, in some far from fully defined form or another, puts the Aborigines in a somewhat stronger position than the aboriginal-people of New Zealand and North America, because those Australian Aboriginal rights, whatever they might be, have never been ceded, although they may have been extinguished by edict.

²² Jones 1990:185.

²³ The same distinction of the word 'treaty' will be used, that is to say, the sub-definition 3a in the *Oxford English Dictionary* as quoted in the introduction to this paper, but without the enforcement potentials implied in the word 'contract.'

²⁴ Suter 1982:3.

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For some time, this strength has been realised by Aboriginal activists such as Kevin Gilbert and Michael Mansell. In 1982, the National Aboriginal Conference (NAC), which was government sponsored and subsequently disbanded, had been adamant in maintaining that distinct Aboriginal nationhood and sovereignty were the non-negotiable foundation of any treaty or agreement. What the NAC sought at that time was:

International sovereignty, perhaps introduced through a period of trusteeship; OR

The creation of an additional state within the [British ?] Commonwealth governed by Aboriginal and Torres Strait Islander people with current constitutional structures; OR

The creation of self-governing regions within the [Australian ?] Commonwealth comprised of self-governing communities involving powers of local self-government.²⁵

It seems that the inclusion of the third of these three options to a large extent evaded the non-negotiability of sovereignty and it was probably included as a back-stop to keep negotiations open in the likely event of the government's spontaneous refusal to enter into any discussion involving the diminution of its own sovereign position.

In 1986, the position of the extremists hardened.

Things were further complicated by the National Coalition of Aboriginal Organisations (established in May 1986) having circulated a draft treaty written by Kevin Gilbert, which was to 'be executed between us, the Sovereign People of This Our Land, Australia, and the Non-Aboriginal Peoples who invaded and colonised our lands'.²⁶

Though this approach was unrealistic for its time, it was a straw in the wind. Robert Hawke, who assumed the position of Prime Minister in March 1983 and held it for four terms, took an ambivalent stance on Aboriginal rights. While he was prepared to concede that Aborigines had some justification in making reasonable claims, he consistently watered down the concentration of concession on offer. Perhaps one of the most revealing public statements he made on the subject of Aboriginal affairs was issued at the National Press Club on 22nd January 1988, the bi-centenary year.

Nor is the [Aboriginal] cause advanced by attempts to draw up an indictment of criminality against the entire Australian nation. The Australian people should never be asked to accept that their entire history as a modern state was predicated on the notion of collective and irredeemable guilt.²⁷

Over the years of his Premiership, Hawke made several statements which advocated the negotiation of a 'treaty' - there were a number of semantic objections to the use of that word - and, at one time, appeared to be prepared to spell out Native rights in the non-binding preamble to the Aboriginal and Torres Strait Islander Commission legislation. However, he always ultimately bowed to the Opposition's 'One Australia' policy of equal rights for all Australian citizens. The definitive preamble was omitted in the final Bill. It has to be admitted that it is difficult for a popularly elected politician to favour, on a nation-wide - or even State-wide - basis, 1.5% of the electorate, to the potential disadvantage of the remaining 98.5%.²⁸

²⁵ Ibid.:62.

²⁶ Brennan 1991:76.

²⁷ Quoted in Brennan 1991:80.

²⁸ These figures suppose the accuracy of the approximation of 250,000 Aboriginal people among a total population of 18 million. There are problems in obtaining an accurate census in out-back areas.

The Australian Aborigines, who earnestly want a treaty, preferably an internationally recognised, or, at worst, a constitutionally recognised, instrument of State, appear to have appreciated the vacillating nature of the legislature and turned their attention to the judiciary. That organ of State could not, of course, provide them with a treaty but it was reasonable to hope that it might provide them with a negotiable property - that is, some form of legal rights - upon which a future treaty might be built. In that latter aspiration they appear to have been marginally successful.

The test-case arose from a dispute on a peripheral island. In 1606, a Portuguese sea captain named Luis Vaes de Torres 'discovered' a group of Islands which lay between what is now Papua New Guinea and Australia. These islands acquired the name of 'The Torres Strait Islands'. They which were rich in coral and pearlshell, two fashionable commodities in the mid-Victorian hey-day, and were annexed to the Crown in 1879, probably at the instigation of the coral and pearlshell traders, by the Governor of Queensland.

As a result of exploitation, the natural resource diminished, pearlshell became less fashionable and the short-lived boom in the islands faded. In consequence a large part, perhaps as much as 50%, of the population migrated to the mainland. In 1981 the population was 6,131.

In 1982 a group of Torres Strait Islanders ... initiated proceedings in the High Court of Australia, claiming that the annexation had not extinguished their rights which would mean that their continued rights were recognised by the Australian Municipal system of law.

In April 1985 the Queensland Parliament passed the Queensland Coast Island Declaratory Act ... 'to allay doubts that may exist concerning certain islands forming part of Queensland'. The Act declared that 'upon the islands being annexed ... the islands were vested in the Crown in right of Queensland, freed from all other rights, interests and claims of any kind whatsoever. ... No compensation was or is payable to any person in respect of any right, interest or claim alleged to have existed prior to the annexation of the Islands. ... The passage of this Bill will, it is hoped, remove the necessity for limitless research work being undertaken in relation to the position of the relevant Torres Strait Islands prior to annexation and will prevent interminable argument in the Courts on matters of history.'

The Queensland Coast Islands Declaratory Act was challenged in the High Court of Australia by Mr Eddie Mabo ... It was found to be contrary to the Racial Discriminatory Act, which had been enacted by the Commonwealth Parliament on 31st Oct. 1975.²⁹

The interplay between the Aboriginal rights issue and the *Racial Discriminatory Act* (1975) was central to the ultimate judgement of the High Court of Australia. On the substance of that judgement, a leading, pan-Australian, firm of solicitors - Blake Dawson Waldron - published, in March 1993, a succinct and informative 'Newsletter', which will form some of the basis of the following few paragraphs.

The meat of the judgement is contained in the following:

... the common law of this country recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands and that, subject to the effect of some particular Crown Leases, the land entitlement of the Murray Islanders ... is preserved, as native title, under the law of Queensland. ...

²⁹ Brennan 1991:29-30.

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native title, where it exists, is a form of permissive occupancy at the will of the Crown.

Where political power has not been exercised to expand the Crown's radical ownership in disregard of native title, there is no reason to deny the law's protection to the descendants of indigenous citizens who can establish entitlement to appropriate rights and interests that survived the Crown's acquisition of sovereignty. While sovereignty carries the power to create and extinguish private rights ... the exercise of a power to extinguish native title must reveal a plain intention to do so whether the action is taken by the legislature or the executive.

Per Toohey J - The idea that land which is in regular occupation may be '*terra nullius*' is unacceptable in law as well as in fact.³⁰

Having obliterated the *terra nullius* justification for colonisation and established a form of title to be known as 'Native title' - which was not precisely defined - the judgement then set about curtailing the value of that title.

the Crown extinguishes native title when it exercises sovereign power inconsistent with the rights associated with native title. The exercise of that power to extinguish native title must reveal a 'clear and plain intention' to do so, either by the legislature or the executive. ... Extinguishment can also occur by the grant of rights to third parties. An example is the grant of freehold land. Where this has happened, the native title is extinguished completely. (subject to the Racial Discrimination Act).

By a majority of 4:3, the High Court held that valid extinguishment of native title by legislation or inconsistent grant does not give rise to a claim for compensation. ... Once native title has been extinguished or lost [by extermination or migration, for example] it cannot be revived.

The high Court stressed that a State can extinguish native title by a valid exercise of sovereign power at will, and that the merits of such an exercise cannot be reviewed by the courts of that state.

However ... a State must not infringe federal law.³¹

The judgement further limited the title value by placing the *onus probandi* on the shoulders of the Aboriginal rights claimant. He or she must prove, first, that no legislative or executive action since 1788 had extinguished Native title and, second, that it was direct ancestors - and those of the people on whose behalf he or she makes claim - who were the specific tribe which occupied the particular tract of land on which he or she is claiming rights. Those two prerequisites make it very difficult for Aboriginal activists to substantiate their right to title, except, perhaps in the Torres Strait Islands, the Kimberleys, in Arnhem Land and the Gibson Desert.

However, where Native title might well have been established before 1975, it seems that the process of subsequent extinguishment is rendered more questionable by the *Racial Discrimination Act (1975)*. That item of federal legislation had, the judgement maintained, nullified the *Queensland Coast Island Declaratory Act (1985)* and might thus contribute to the reversal of land dispositions since 1975 and to similar dispositions in the future.

Thus, the judiciary has apparently conferred on the Australian Aborigines a form of negotiable asset which could possibly lead to the formulation of a treaty or treaties wherein that asset can be exchanged for compensation and more secure tenure of a diminished area over which they might be able to exercise a degree of self-determination. It is an uncertain and heavily qualified position, but it is a start.

³⁰ The Government of Australia 1992:401-402.

³¹ Blake Dawson Waldron 1993:3.

The uncertainty created by the High Court judgement led to rapid legislative reaction: December 1993 witnessed the passage of the *Native Title Act*. The *Act* goes beyond the judgement in that it defines Native Title as equating with freehold and it sets up a special tribunal, the National Native Title Tribunal - to determine whether and where Native Title can be considered to exist. It also establishes a comparatively simple protocol by which a right to negotiate can be claimed, together with a rather more complicated procedure to be followed in avoiding negotiation. Thus, it is possibly hoped that industry wishing to establish a presence on land where there might be a claim to Native Title, might be induced to 'do a deal' rather than follow a time-wasting formula.³²

The *Act* confirms the High Court's ruling in reference to the extinguishment of Native Title by legislative or executive decree prior to 1975 and it offers compensation to secure validation of any dispositions made after that date where prior Native Title can be established. It also confirms the ruling that the *onus probandi* rests on the claimant to Native Title to prove that the title had never - since 1788 - been extinguished and that the claimant had ancestral connection with a specific piece of land. In fact it increases that onus by establishing:

... the necessity for them [*the claimants to Native Title*] to provide an outline of the type of evidence they propose to produce to the Tribunal to support the claim, such as historical, anthropological and genealogical documents and other evidence.³³

Thus the Aborigines of Australia have achieved a negotiable property, if only one which will serve their interests in remote regions and islands when the pristine sanctity of those areas is in jeopardy from developers.

New Zealand

The Aboriginal Treaty status of New Zealand is dominated by three factors: the Waitangi Treaty of 1840; the Land Wars of the early 1860s; and the revival of judicial liberality in the latter quarter of the twentieth century. The three phases represent the cyclical manifestation of liberal intent.

The human habitation of the islands of New Zealand is not a matter of longstanding - maybe as little as seven to ten centuries. The evolution of the twinhulled, out-rigger canoe brought about the colonisation of the islands of New Zealand by people who, finding the moa, built a culture based on that wingless bird no earlier than the latter part of the first millennium. Upon extinction of such a vulnerable creature, a form of agrarian society emerged which, by the time of European intrusion, had developed the arts of ritual warfare, canoe-building, architecture and primitive agriculture.

European interest was not manifested until 1642, when the Westland was discovered and visited by the Dutchman Abel Janszoon Hobart but, because he was met by such hostility that several of his men were killed, he withdrew to the West, thinking that it was possible that he had discovered the west coast of a vast southern continent.³⁴

One hundred and twenty-seven years later, Captain James Cook circumnavigated the islands and, in his journal, referred to them as New Zealand.³⁵ He described the people as intelligent, talked of a system of semi-permanent settlements and chieftains³⁶ and praised

³² Blake Dawson Waldron 1994:16.

³³ Blake Dawson Waldron 1994:23.

³⁴ The word *australis* is, of course, Latin for 'south.'

³⁵ Cook, 1777.

³⁶ *Ibid.*:68.

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the timber resource: 'many of the trees [Kuri trees] are six to eight feet in girth and eighty to one hundred feet in height. Tall enough for the main-mast of a 50-gun ship'. He also described the islands, particularly the Northern island, as fit for colonisation.

During the following century, a few British settlers arrived, made real estate deals with the Maoris and commenced farming. To their number were added escaped convicts from the penal colony in New South Wales, deserters from trading vessels and whalers.³⁷ To this amalgam of expatriates and comparatively docile Aboriginal people came missionaries professing Christianity according to the Anglican, Methodist and Roman Catholic doctrine and dogmas. By 1839, there were several hundreds³⁸ of settlers, mostly Anglo-Saxon.

British politics, and particularly British colonial politics, in the late 1830s, were dominated by two humanitarians: Earl Grey, the Prime Minister, and Lord Glenelg, the Colonial Secretary. Earl Grey, however, was an adherent of Lockean liberality, especially as conceived by Dr Arnold, the founding headmaster of Rugby School.

The principle admired by Earl Grey was based on Locke's philosophy that rights to land derive exclusively from the labour expended upon it. According to Arnold: - '... so much does right of property go along with labour, that civilised nations have never scrupled to take possession of countries inhabited only by tribes of savages - countries that have been hunted over but never subdued or cultivated - ... when our fathers went to America and took possession of the mere hunting-grounds of the Indians - of land on which man had, hitherto, bestowed no labour - they only exercised a right which God has inseparably united with industry and knowledge' The justness of that reasoning, Earl Grey declared, must be generally admitted and, if so, it could hardly be denied that it was applicable in New Zealand and that it was fatal to the rights claimed by the aboriginal inhabitants to the possession of the vast extent of fertile but unoccupied land in that country.³⁹

Earl Grey was therefore, perhaps against his better judgement, able to concede that Anglo-Saxon labour held precedence over the more relaxed occasional occupation of the Maoris. Lord Glenelg, however, was of sterner stuff: indeed, before attaining Cabinet rank, he had been a vice-president of the Church Mission Society. When, in 1837, the New Zealand Association proposed systematic colonisation of the islands, Glenelg countered with:

They are not Savages living by the Chase but Tribes who have apportioned the country between them, having fixed abodes, with an acknowledged Property in the Soil, and with some rude approaches to a regular system of internal Government. It may therefore be assumed as a basis for all Reasoning and all Conduct on this Subject, that Great Britain has no legal or moral right to establish a Colony in New Zealand without the free consent of the Natives. ... The Queen disclaims any pretension to regard their land as vacant Territory open to the first future occupant.⁴⁰

However, there were jurisdictional problems. The natures of the traders and the settlers were unruly but the curbing of that unruliness was difficult to accomplish. It proved impossible to make British subjects answerable under the law of acknowledged spheres of British jurisdiction - Sydney or London, for instance - for crimes perpetrated in allegedly

37 Kororareka - now Russell - towards the most northerly tip of North Island, was a stopping point/settlement for American, British and French deep-sea whalers in the late 18th and early 19th centuries.

38 Estimates range between 1,000 and 2,000.

39 Hackshaw 1989:104.

40 McHugh 1989:31.

independent New Zealand. The British government had tried to provide legal remedy with three statutes, passed in 1817, 1823 and 1828 but they proved unsuccessful. Those Statutes did, however, clearly make the point that the British government considered New Zealand to be 'not within His Majesty's dominions'.⁴¹, ⁴²

The missions, and through them, their converts, foresaw that only colonial status would provide an adequate hedge against the lawlessness which was rife and they therefore instigated a groundswell of Maori opinion which would ultimately culminate in colonial status being imposed at the request of the Maori people and their chiefs.

Two events tended to foster the missionaries' objective: first, the supposed threat of the French vessel *La Favorite* - which was presumed to be attempting annexation of the islands to France in retaliation against the killing of Marion du Fresne and his crew in 1772⁴³ - resulted in thirteen major North Island chiefs requesting King William IV to become 'a friend and the guardian of these islands'. The second event was the connivance of the captain and crew of the British trading vessel *Elizabeth* to join with a North Island chief in order to raid the possessions of a South Island chief. The raid resulted in torture and slaughter which not only shocked the sensibilities of the New South Wales authorities but, perhaps more importantly, was also seen to be a potential threat to future trade. As a result a Resident - one John Bushy - was appointed to New Zealand in 1832. His Residency was established at Waitangi.

Busby, conscious of - and his own inclinations reflecting - British liberal opinion, aimed at the establishment of a Maori national government, the acceptance of a national flag⁴⁴ and a system of extradition of British 'offenders'. However, the assumed threat of another Frenchman, M. le Baron de Thierry, induced him to assemble thirty-four North Island chiefs in order to sign a Declaration requesting the British Crown 'to be the parent of our infant state ... its protector from all attempts on its independence'. The Crown acknowledged the Declaration and promised - 'consistent with due regard to the just rights of others and to the interests of His Majesty's subjects' - the assumption of paternal protection.⁴⁵

In 1837, a serious out-break of inter-tribal fighting involving some of the local European drifters induced the Church Mission Society, the Wesleyan Missionary Society and over 200 British nationals to demand official Crown intervention. The demand was routed through the New Zealand Association. Lord Glenelg still set his face against the introduction of colonial status without the solicitation of all Maori chieftains but he did agree to the appointment of a 'governor' with limited powers. In 1839, Captain William Hobson accepted the post. It was widely assumed, particularly by the New Zealand Association - by that time, the New Zealand Company - that Hobson's function was first, to negotiate a cession of sovereignty and second, to clear up the matters of land-deals where the parties to those deals were in dispute. While Lord Normanby, who had taken over the Colonial Office from Glenelg, seemed to favour limited intervention, Hobson, himself,

⁴¹ This inclusion in the Acts is considered, by some, to be a recognition that New Zealand was, at that time, an independent sovereign state. That sentiment was reinforced by the British acknowledgment of a Maori Declaration of Independence in 1835.

⁴² Orange 1990:8.

⁴³ This rumour was fostered by the missionary William Yates and a local chief by the name of Rewa (Orange, 1990:11).

⁴⁴ White with a red St. George's cross, and in the upper left-hand corner, a blue field with four white stars (Orange, 1990:20).

⁴⁵ Orange, 1990:21.

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seems to have considered his function more active. On arrival, on January 30th 1840, Hobson set about asserting his position of Lieutenant-Governor prior to the prearranged meeting with Maori chiefs, scheduled to open at Waitangi on the 6th February. At the time of his arrival, Hobson was armed with a preliminary draft 'Treaty' which he intended to lay before the Maori leadership.

A final draft of that 'Treaty' - to which Bushy, now holding no official position, contributed - was ready by the afternoon of the 4th and Hobson took it to a missionary by the name of Henry Williams,⁴⁶ for translation into the Maori language as reflected in Roman script. Henry Williams was assisted by his son Edward, who was said to be an expert in the Ngapuhi dialect. Henry Williams, faced with a difficult task, took the attitude that:

'In this translation it was necessary to avoid all expressions of the English for which there was no expressive term in the Maori, preserving entire the spirit and tenor of the treaty'. This suggests that Williams may have decided to recast the English draft, as translators often do. A comparison of the English and Maori texts tends to confirm this view.⁴⁷

The Waitangi meeting opened on the 5th of February, a day earlier than was originally intended, with some 500 chiefs and attendants inside a tent and a further 200 or so outside. They were read the English text by Hobson and the Maori text by Williams. Discussion was conducted in Maori for few chiefs were adequately conversant with English. Nor were the Chiefs able to read their own language in Roman script; thus, where English participation was required, it was through an interpreter. By the evening of the 6th, after the expression of considerable reserve over the matter of 'sovereignty', the majority of the chiefs - in all, over 500 of them - signed or placed their marks upon the English copy, which was considered to be the definitive version.

In the English version, the chiefs of New Zealand 'cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of *Sovereignty* which ... [they] respectively exercise or possess, or may be supposed to possess ... over their respective territories ...' in exchange for 'the *full exclusive and undisturbed possession* of their lands and estates.' The Crown retained 'the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed ...'.⁴⁸

In the re-translated Maori version, the chiefs of New Zealand - the signatories and, through them, all the non-signatories - 'give absolutely to the Queen of England for ever the complete *governorship* of their land'. In return 'The Queen of England agrees to protect the chiefs and the sub tribes and all the people of New Zealand in *the unqualified exercise of their chieftainship* [*rangatiratanga*]⁴⁹ over their lands, villages and all their treasures. But, on the other hand, the chiefs of the Confederation and all the chiefs agreed that they would, on demand, sell land to the Queen at a price agreed by the person owning it and by the person buying it [the latter being] appointed by the Queen as her purchasing agent'. The

⁴⁶ Henry Williams and his Church Missionary Society colleagues had been urged by Bishop Broughton of Sydney, the help influence the Maori people to surrender their sovereignty (Orange, 1990:39).

⁴⁷ Orange 1990:40.

⁴⁸ Walker 1989:264.

⁴⁹ Rangatiratanga can be translated as the highest degree of chieftainship. It is the word used to replace 'Kingdom' in the phrase 'For thine is the Kingdom ...' contained in the Lord's Prayer.

crown agreed to protect all the people of New Zealand and give them rights of citizens of England.⁵⁰

Thus the Maori surrendered 'Sovereignty' where they thought they had surrendered 'Governorship' and they retained 'possession' of their property where they thought to have 'chieftainship'. The differences are more than semantic.

In the aftermath of the treaty, the Maoris expressed disenchantment: a chief by the name of Tareha emphatically proclaimed the feeling:

We - we only - are the chiefs, the rulers, We will not be ruled over. What ! thou a foreigner up and I down. Thou high and I, Tareha the great chief of the Nga Puhi tribes low ! No, no, never, never.⁵¹

On the other hand, the settlers regarded the treaty with a degree of scorn. In 1843, three years after the finalisation of the instrument, J. Soames, a governor of the New Zealand Company, wrote:

We have always had very serious doubts whether the Treaty Of Waitangi, made with naked savages by a consul invested with no plenipotentiary powers, without ratification by the Crown, could be treated by lawyers as anything but a praise-worthy devise for amusing and pacifying savages for the moment.⁵²

This situation was obviously unstable and the expropriation of land at prices almost dictated by the settlers, although, officially, through the Crown, bred a reaction. This was fuelled by the Constitution of 1852, whereby the arena for 'rights' contention was transferred from London to Auckland and wherein only the Crown right of preemption was restated. Furthermore, in that Constitution electoral rights were linked with property ownership but Maoris were excluded on the ground that they held such title as remained to them jointly and thus could not be individually enfranchised.

In response to what they considered to be an insulting and inequable Constitution, the Maoris elected a king of their own in the person of Te Wherowhero of the Waikato. The British Prime Minister, the Duke of Newcastle, is reported to have greeted the news, somewhat laconically, with 'Fine! Potato or Brian Boru, it matters not, provided they recognize the Queen'. The settlers, however, chose to view the ceremony as a gratuitous insult to their monarch and the situation worsened. By 1858, the *pakeha* - settlers - outnumbered the Maori who, thus became, in reality, an 'Aboriginal Minority.' From that position of increasing population majority, the settlers expressed open resentment of Maori land holdings and were unwilling to accommodate Maori sentiments.

To Maori the forests and fernlands were a food reserve. They provided berries and birds and had a spiritual significance. To the settlers the sombre 'bush' was but 'undeveloped land' ... In 1859, Governor Gore Browne warned the Foreign Office that: - 'The Europeans covet these lands and are determined to enter in and possess them "rightly if possible, if not, by any means at all"'.⁵³

Flashpoint was achieved in 1860, when Wiremu Kingi, the local chief of a Maori enclave at Waitara, physically resisted an attempt by the Governor to take possession of land which the Governor wrongly considered as having been purchased from the Maori. British soldiers and a detachment from a naval corvette attacked Kingi's *pa*⁵⁴ and the Land

⁵⁰ MacDonald 1990:11.

⁵¹ Quoted by Walker 1989:166.

⁵² Quoted in Williams 1989:73.

⁵³ MacDonald 1990:12.

⁵⁴ Fortress: Armed encampment.

Wars, which spread to a number of other Maori enclaves, became reality. There could be little doubt of the eventual outcome; the principal significance of the actions was the birth of another form of 'Treaty', one imposed by arms.

Following the Land Wars, the New Zealand Assembly, a legislative body dominated, of course, by the settlers, passed two Acts: first, the *New Zealand Settlement Act*, which allowed the confiscation of Maori lands as a punitive measure against those who had borne arms against the Queen. The overt and covert rationales for this measure were obvious: for the overt, the Maori had elected a monarch of their own and subsequently attempted to slaughter, in open rebellion, Her Majesty's soldiers and subjects. The covert rationale was that land-hungry would-be settlers were still flowing into Auckland and they wanted their land-hunger satiated. The second measure was the *Suppression of Rebellion Act*, which provided for country-wide sanctions to suppress an insurrection which had only materialised in isolated areas. For the purposes of these Acts, any tribe which had shown the least recalcitrance had rendered itself subject to punitive action. Some settlers went even further:

Fredrick Whittaker, an Auckland lawyer and a member of the Assembly was largely responsible for the repressive Acts ... In 1863, he opined that 'Maori lands were "Demesne Lands of the Crown", subject only to the occupation and use of the Maori; that Maori title was not cognizable in a Court of Law and could be overridden by an Act of the Colonial Legislature.⁵⁵

This type of sentiment prevailed for many years at all levels of settler society. In 1877, Chief Justice Prendergast, speaking from the bench on the subject of the Treaty of Waitangi, declared it a 'legal nullity' and, in doing so, consigned it to oblivion for the best part of a century.⁵⁶ Over that century there was constant, although underfunded, pressure from the Maoris to reinstate the Treaty.

The return to liberality was not smooth and undulated in accordance with political expediency. Maori enfranchisement produced the side-effect that the Labour governments of the early 1930s were kept in power by the votes of the Ratana - Maori - Members of Parliament. The Maori were therefore able to insist on full access to the benefits of the Welfare State brought in by those governments. In 1962 and 1965, *Native Lands Acts* shared out, under fee simple tenure, Native lands amongst aboriginal individuals and encouraged European-style farming of the small-holdings. In some instances, those holdings were too small to be viable propositions.

Such advantages as there were in the *Native Lands Act* were limited, and sometimes negated, by the passage of the *Maori Affairs Amendment Act (1967)* which authorised compulsory purchase by the State of land-holdings considered 'uneconomic'. The effect of this Act, which was castigated as 'one of the most unjust laws passed by Parliament this Century', was to make more difficult the formation of 'land cooperatives'.⁵⁷ Robert Muldoon's National Party, which triumphed in the 1975 elections, preferred confrontation to appeasement at times of Maori militancy. They renamed 'Waitangi Day', the national public holiday which had been instigated by the previous Labour government, and called it 'New Zealand Day'. The previous government had also established the 'Waitangi Tribunal' under the *Treaty of Waitangi Act (1975)*, which was designed to advise the government on events and legislation which tended to contravene the terms of the Treaty. Under Muldoon's regime:

⁵⁵ Orange 1990:167.

⁵⁶ Kawharu 1989:x

⁵⁷ MacDonald 1990:15.

The Tribunal was dubbed a cynical gesture by some, and toothless by others, for it was not given power to adjudicate on past breaches of the treaty, and its recommendations were not binding on the government.⁵⁸

In 1985, David Lange's Labour government enacted the *Treaty of Waitangi Amendment Act* whereby the 1975 Tribunal was disbanded and replaced by a new body empowered to investigate claims going back to 1840, the date of the Treaty. However, its penetration into affairs of State remained subject to the interpretation of its puissance by the government in power.

As in the Australian experience, the liberality of the Courts proved more rewarding to the Maoris than that of popularly elected politicians. In 1983, the Courts found in favour of Eva Rickard, a Maori who claimed title to land which had been alienated for the construction of a war-time aerodrome and was subsequently being sold to the Raglan Gold Club.⁵⁹ Aila Taylor, another Maori, took on the government in a legal battle involving the right of authority to build a large synthetic fuel plant with an outfall which would pollute tribal fishing grounds. Judge Edward Taihakurei Durie pronounced that it was contrary to the Treaty of Waitangi and Taylor won her court action. The development was abandoned.

The Appeal Court ruled that the Tainui tribes had an interest in the Waikato coal-mines. This provoked such *Pakeha* resentment that Geoffrey Palmer, who had succeeded David Lange as Prime Minister, was forced to abandon his liberal policy in relation to the Maori and issue a surprisingly petulant statement:

'the Courts do not govern' he said 'The Executive governs. On matters relating to the Treaty of Waitangi, the Courts cannot govern'.⁶⁰

The covert rivalry between the judiciary and the legislature/executive would seem to continue into the 1990s. The *New Zealand Bill of Rights (1990)* contains no specific mention of Maoris or aboriginal people. Section 20 *Rights of Minorities* offers protection in matters of religion, language and culture to 'any person belonging to an ethnic, religious, or linguistic minority'.⁶¹ This would seem to portend an assimilationist policy and lump the Maori minority, some 17% of the total population, in with Vietnamese, Polish or any other of the many minorities and thus avoid any 'special relationship' status. On the other hand in *Paku v. The Ministry of Agriculture and Fisheries*, heard in the High Court before Mr. Justice Galen, the Court found in September 1991 in favour of the appellant, taking into cognisance 'The obligation imposed on the Crown by the Treaty of Waitangi ...',⁶² which might be construed as ethnicity-dependent.

Of course, there have been a number of initiatives over the years in relation to Maori/Pakeha accommodations, but this paper must confine itself to instruments of State which have 'Treaty' connotations. Nonetheless, one deserves mention. The change of government in October 1990 ushered in a new proposed policy stance - *Ka Awatea* (It is Daybreak) - which:

... included a continuing commitment to the Treaty of Waitangi as a 'founding document of New Zealand' that conferred on the Crown the right to pass laws,

58 MacDonald 1990:16.

59 A precursor to the Oka affair involving the Pine Hill Golf Club, just outside Montreal, Canada?

60 Quoted in MacDonald 1990:5.

61 The Government of New Zealand 1991:1688.

62 The Government of New Zealand 1992:224.

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subject only to recognition of Maori needs for self-determination, control over land and resources, and social equality.⁶³

If this reading of the burden of the Treaty of Waitangi, a reading which avoids the sovereignty issue, is accepted by Maori and *Pakeha* alike, there could be a period during which partnership might develop. But this paper would espouse optimism with caution. Cultural and social mores are still divergent.

The United States of America

The surface dimension of the Aboriginal issue in the United States, is well defined by Augie Fleras and Jean Elliott:

Aboriginal issues in the United States in recent years have not occupied centre stage to the same dramatic degree they have in Canada and New Zealand. The aboriginal people are relatively few in number, representing less than 1% of the total population, and are significantly overshadowed by those of African, Hispanic and Asian descent, who together represent more than one in five of all Americans. The more numerous racial and ethnic minorities - especially Afro-Americans, who comprise approximately 12% of the population - have tended to set the civil-rights agenda in the United States. Important as the civil-rights battle is for all Americans, however, it does not adequately encompass the pressing needs of the aboriginal peoples.⁶⁴

It was not always so. For nearly four hundred years, the lives of all or some part of the American aboriginal people were dominated by Treaties and, after 1871, when the international status of agreements was officially abandoned, by instruments of State which qualify for inclusion as 'Treaties'.

Prior to the onset of European colonisation of the North American continent, aboriginal social organisation was, in general, based upon small units. There were loose federations such as the Iroquois who ranged the eastern forests roughly between the 40th and 50th parallels and the Cherokee who had evolved an embryonic 'nation' framework further to the south, but due to the vast distances to be covered, the minimal population per square mile and the lack of script and scrip with which to record and pay centre-demanded levies, such imperia must have been figurative rather than firm.

Much more common were groups in which political power, such as it was, was concentrated in the village or band. These villages or bands, often quite large, might join together in occasional or seasonal enterprises such as hunts or ceremonies, but in general, while they shared language, culture and to some extent territory, they were autonomous, lacking in political integration at the tribal level - as that level is commonly perceived.⁶⁵

The quotation from Cornell speaks of villages but it must be remembered that the villagers were basically nomadic and the villages were mobile in that the conical skin-covered tents could be dismantled and re-erected elsewhere. Thus, a group encamped by a stream at any one time, might not be the same as that which occupied the same site a decade earlier or a decade later. This nomadic propensity and the lack of hierarchy made the maintenance of treaties problematic. There is a case on record of a New Netherlander, whose government was meticulous in drawing up deeds of conveyance, making a documented land deal with an aboriginal group of purported land-right owners and a Plymouth

63 Fleras 1992:195.

64 Fleras 1992:128.

65 Cornell 1988:74.

(Massachusetts) trader making a similar deal, in this rare case also documented, with another purported owner of the same stretch of terrain.⁶⁶ If firmer treaties or real estate deals were to be concluded, it was obviously necessary to either locate or establish some hierarchical centrality; thus the 'coronation' of Powhattan in Virginia, referred to earlier.

In the early seventeenth century, the eastern seaboard of the North American continent was spattered with European settlements. The French had claimed New France in the St. Lawrence estuary and a further colony at the mouth of the Mississippi River, where they experimented unsuccessfully with enslaving Aboriginal people, as did the English in Jamaica.^{67, 68} The English were established, first in 1607 at Jamestown in Virginia, which colony had established a Legislative Assembly by 1619, and then, through the arrival of the Pilgrim Fathers on the *Mayflower*, at Plymouth, Massachusetts in 1620. From this latter settlement sprang New England.

New Netherlands was centred on New Amsterdam on Manhattan Island, and took in parts of what is now New Jersey. New Sweden, which only existed from 1638 to 1655, covered the littoral at the head of Delaware Bay. The Spanish, who were active in Mexico, sought, with the aid of Plains Apache, a northern presence at the expense of the French, but were repulsed by a French/Indian coalition at Illinois.⁶⁹

The representatives and settlers of all these colonising groups were energetic in acquiring land and some form of title to it. The Dutch, and probably the Swedes who were closely associated with the Dutch, were diligent in obtaining documentation recording each conveyance; thus indirectly acknowledging a prior title vested in the vendors. The British attitude was very different.

Englishmen had no precedents for recognition of Indian right in land, 'Purchases' previously made in Virginia had merely been expedients to keep the natives quiet; no legal rights (civil rights) were then formally recognised and no deeds were written. As late as 1632, the English Crown had emphatically denied that Indians could have any legal rights to land claimed by Christian princes.⁷⁰

This attitude was supported by the contribution to early international law, made by Lord Coke in the *Calvin's Case* (1608). He said:

All infidels are in law perpetual enemies: for between them and the Devil whose subjects they be, and the Christian, there is perpetual hostility.^{71, 72}

The English record was not all bad: in a letter dated 1629, the Head Office of the Massachusetts Bay Co. in London wrote to its executive in America:

Above all, we pray you to be careful that there be none in our precincts permitted to do injury in the least kind to the heathen people: and if any offend in any way, they themselves receive due correction, ... if any of the savages pretend right of

⁶⁶ Jennings 1988:14.

⁶⁷ Both these experiments failed and were replaced by the importation of more amenable labour from Africa.

⁶⁸ Wade 1988:26.

⁶⁹ Wade 1988:37.

⁷⁰ Jennings 1988:14-15.

⁷¹ In justice to the British legal system, it should be recorded that Lord Mansfield in *Campbell v. Hall* (1774), termed Coke's dictum 'A strange extrajudicial opinion [that] will make reason, not reason, and law, not law. [it is] wholly groundless and deservedly exploded.'

⁷² Clark 1987:27.

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inheritance to all or any part of the lands granted in our patent, we pray you endeavour to purchase their title, that we may avoid the least scruple of intrusion.⁷³

It is possible that this communication might be considered as typical of a Head Office being out of touch with the realities familiar to the sharp end in the field of operations: it seems to assume deeds of testament and title as well as surveyed land holdings. Nevertheless, it resulted in a proliferation of deeds of sale - not between the Massachusetts Bay Co. and individual American Indians, but between the Company and 'corporate' tribes. A few of these documents still exist. However, it should be remembered that the Indians, for cultural reasons, did not understand the principle of alienation of title to land; to them it was not dissimilar to a deist being expected to sell his interest in God. In any event the deeds, at best, acknowledged no more than usufructory title being vested in the tribes at the time of sale: thus preserving the *terra nullius* status of the continent.

The 1629 stricture appears to have had an inconclusive effect: some forty years later, in 1670, the situation had got so far out of hand that it became necessary for the British parliament to frame legislation which placed the conduct of Indian relations in the hands of the Crown's various colonial Governors. The text of the legislation has been quoted earlier. It sought to pacify through the evangelical approach rather than through the perpetration of injustice.

However, the decline of the Stuarts and the insecurity of the early Hanoverians made the implementation and maintenance of a liberal British colonial policy - *qua* aborigines - ineffective and the 'Thirteen Colonies' grew by incremental usurpation of Indian lands to the east of the Appalachians. The validity of the 'treaties' by which this expansion was accomplished may be moot but it is so lost in the weft and warp of history that it can never be unravelled. Expansion in an alleged 'land of plenty' led to demands for participation from other European states, particularly France, and warfare broke out in 1754. After a number of reversals, the Hanoverians, under King George III, 'got their act together' and ultimately triumphed both in the Indian sub-continent and in North America. By the Treaty of Paris of 1763, France was obliged to surrender the vast majority of her North American holdings and, in rationlisation of a new American Continental empire, George III issued the Royal Proclamation, (see above). Whatever its original intention, that Proclamation had very material influence on the relations between European settlers and Indians in North America.

There was a further outcome to Britain's victory over France. George III, having acquired a larger empire than any previous British Monarch, set about governing and taxing it. That development led to dissatisfaction among the settlers, who had enjoyed a fairly free rein over the last decades, and provoked the American War of Independence which was to a large extent a rebellion against authority. That demand for minimal government and maximum freedom of the individual persisted into the formative years of the United States of America and forecast the early violation, by free and untrammelled citizens, of the various treaties entered into by the government of the United States and a plethora of Indian tribes and nations.

A further contributing factor to the instability of the post-independence Aboriginal Treaties arose from the War of Independence, itself.

Many officials of the prewar Indian Department remained loyal to the crown, thereby helping to enlist Indian support for the British, and many Indians themselves realised that the revolutionaries were the representatives of those advancing farmers who were

⁷³ Morrison 1985:15.

destroying the Indian way of life. ... The Treaty of Paris [of 1778⁷⁴] which ended the revolution, gave the United States her independence and a western boundary on the Mississippi River. ... The Indian tribes by joining the British in the Revolution had forfeited their right to possession of land within the limits of the United States: the new country would be justified in compelling the Indians to retire to Canada or to the unknown areas beyond the Mississippi ... it was emphasised that the 'right of soil' as well as territorial sovereignty now belonged to the United States, and that the Indians could remain only on her sufferance.⁷⁵

The original western boundary of the United States was the Mississippi River. The territory between that western limit, and the eastern boundary of the embryonic thirteen States - roughly along the crest-line of the Appalachians - was known as 'Indian Territory.' First, those tribes living to the east of the Appalachian line were moved, some by treaty and some by way of punishment for their support of the British, into Indian Territory. However, settlers continued flooding into the much publicised 'Land of the Free' and the chief expectation of those new arrivals, after years of privation in the peasant economies of Europe, was land. But the land-stock of the founding States was already largely distributed and new land could only be realised west of the Appalachians. The fact that Indians had been settled there was not allowed to interfere with the satiation of land-hunger. This usurpation frequently led to armed resistance by the invaded: the settlers mobilised to meet what they considered an insurrection and an 'Indian War' broke out. Though the aboriginal people enjoyed notable victories from time to time, they lacked the organisation of the settlers and, inevitably, were the ultimate losers. In order to terminate the 'War', a new treaty was entered into and the Indians were pushed further west.

The pattern repeated itself time after time.

Some 370 treaties with Indian Tribes were formally ratified or perfected and passed into law before making of treaties with Indians was terminated in 1871. ... It is estimated that 96 of the treaties dealt with the establishment or reaffirmation of peace. ... 230 of the treaties concerned land cessions or related matters; 76 of these called for Indian removal and settlement in the West. ... In 1972, when militant Indian leaders organised the 'Trail of Broken Treaties', nearly 1,000 Indians Converged on Washington D.C..⁷⁶

The ratification process referred to above was also a bone of contention. It was the practice of the American government to consider that a treaty, as far as Aboriginal people were concerned, came into force at the moment it was signed by the Chiefs and the negotiating agents. However, in relation to the adoption of government obligations, there was a lengthy bureaucratic procedure to be followed before ratification. The draft treaty was sent to the President who forwarded it to Congress, where it was debated and, possibly amended. Having received Senate approval, the final draft was dispatched to the President, who ultimately signed the document and sent it back to the field where it was presented to the representatives of the tribe or nation who were the other party. That procedure might take two years and, in the mean time, settlers felt that they were even less bound by an unratified agreement than they were by one on which the President had placed his signature.

As with all elected representative bodies, Congress was reluctant to spend taxpayer's money so that aboriginal benefits were frequently cut during the ratification process.

74 This Treaty of Paris should not be confused with the Treaty of Paris 1673, which terminated what is still referred to as the 'French and Indian War' (Kelly, 1990:21).

75 Horsman 1988:29.

76 Kvasnika 1988:195.

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Underpayment of the original treaty obligations often led to famine. The tight-fisted attitude of Congress is well illustrated in the debate on President Grant's Peace Policy:

The estimate of the joint congressional committee appointed in 1865 was that it would cost \$30,000,000 and would require an army of 10,000 men over two or three years to subdue the plains Indians. Senators and Congressmen might rail at the idea of taxpayers supporting Indians in idleness, but the argument that it was more economical than fighting them finally won the day for the Peace Policy.⁷⁷

The Peace Policy - which envisaged compact Reservations to be cultivated in settler fashion rather than extensive tracts of potential hunting land - also proved a financial disappointment.

The long-run effects of Grant's Peace policy were minimal. ... Congressmen, who had been led to believe that the treaties negotiated in 1865-1868 would enable White occupation of the West at minimum expense to the taxpayer, were rebelling against the mounting cost of supporting Indians on reservations. By 1872, 31,000 Indians were being totally subsisted by the government, and another 84,000 partially. Senators Benjamin F. Butler and John Sherman called for the end of the treaty system. Early in 1871 Congress ended the practice of negotiating treaties with tribes as though they were independent powers.⁷⁸

Thus, in 1871, the formation of treaties in their inter-nation connotation was abandoned. There were, however, other instruments which could conceivably constitute 'Treaties' although they were rather more openly one-sided.

By 1871, the 'Native Land' allocations were approximately those of to-day's Reservations but there was a considerable difference in most of the comparable acreages. These reductions were brought about by the passage through Congress of two Bills: the *Dawes Severalty Act* of 1887 and the *Burke Act* of 1906. Between these two Acts, Reservations were divided into allotments and the non-alienability of those allotments, particularly those allocated to quarter- and half-breeds, was watered down. For instance:

The Pine Ridge Reservation, established in 1868, consisted of 2,721,597 acres. Allotment, which took place in 1904-1916, divided the reservation into 8,275 individual tracts that accounted for 2,380,195 acres [287.6 acres each, on average]. Another 182,653 acres were classified as surplus and sold to the government, and 146,633 acres remained as tribal land.

... In the period 1907-1920, 32,150 patents-in-fee were issued under the *Burke Act* and restrictions on the sale of 4,213,000 acres were removed.

... In 1907, the last piece of legislation dealing with the alienation of Indian lands was passed (34 US Stat 1015). By the provisions of this Act, Indians who were too old, sick, disabled, or 'incompetent' were permitted to sell them and to use the money obtained to better provide for their needs. From 1908-1920 another 720,000 acres of land passed from Indian to white control.⁷⁹

Following the *Burke Act*, there was a trend away from solving the 'Indian Problem' by means of legislation. Congress was able to abrogate its responsibility by increasing the discretionary powers of the Secretary of the interior and the Commissioner of Indian Affairs. This trend, which allowed consecutive Commissioners to pursue policies of assimilation and the imposition of settler-type agriculture, terminated the 'Treaty' phase, as instruments of government were forsaken.

⁷⁷ Hagan 1988:53.

⁷⁸ Hagan 1988:55.

⁷⁹ Kelly 1988:68.

In illustration of the saga recounted thus far, the enforced peregrinations of the Cherokee deserve brief mention. At the time of original settler contact, they inhabited the littoral of what is now Georgia and South Carolina. Pre-Independence land deals moved them eastward across the Savannah River into the foothills of the Appalachians. In the War of Independence - and, unfortunately for them, in the War of 1820 and in the Civil War (1861-1865) as well - the Cherokee backed the losing side and they paid the consequences. In the years between 1778 and 1837, eighteen major treaties were entered into and between 1838 and 1871, a further two were contrived.⁸⁰ As a result of these Treaties, the Cherokee moved out of Georgia, across Alabama, Mississippi and Arkansas, to Oklahoma, where they were led to believe the whole state would be their territory. By 1987 their territory was substantially reduced.

The sequel to Treaty No. 18 is particularly revealing. The Cherokee had integrated with the settlers to such a degree that their notables had taken up the settler's culture to the extent of maintaining substantial plantations, worked by African-American slaves while their style of dress rivalled that of the Southern Gentleman.⁸¹ Further, in 1827, they had assumed a Constitution similar to that of the United States. In fact, the Cherokee were numbered amongst the Five Civilised Tribes. Yet, under the terms of Treaty No. 18 (1835), the tribe were required to cede all their territory in Georgia and move westwards to the new frontier of Oklahoma.⁸² The Cherokee elite sued the State of Georgia for violation of sovereignty.

In *Cherokee Nation v. Georgia* (5 Peters 1) in 1835, Chief Justice John Marshall found that the Cherokee were not an independent nation and could not, therefore, bring suit allegedly involving sovereignty in any federal court. He did, nevertheless, in his review of Indian/White relations and in his definition of aboriginal tribes as 'domestic dependent nations', indicate a willingness to entertain a differently worded plea. That differently worded plea was presented in *Worcester v. Georgia* (6 Peters 515). Worcester was a missionary among the Cherokee.) Marshall found in favour of the Native 'domestic dependent nation' in declaring Georgia out of order in demanding the land cession. However, President Jackson declined to enforce the decision of his own Supreme Court and the expulsion was effected. Thus justice was subordinated to the pressure of White-dominated land hunger.

Finally, in this section on aboriginal treaties with the United States of America, a new form of treaty, which manifested itself as the *Alaska Native Claims Settlement Act* (1971), must be mentioned. The Alaskan aboriginal people had never been subject to any treaty, the territory in question was in the far north and was little in demand for settlement, the people involved were largely subsistence-economy dependent and the time was ripe, internationally, for a display of liberality. As a result of these inputs, the State of Alaska was divided into twelve - thirteen, counting one non-territorial unit for expatriate Native people - regions which were constituted on a commercial corporate basis. These regional corporations were endowed with a total of \$964 million, 50% of which was to remain with the regional corporations and the remainder to be distributed to an echelon of Village Corporations which were subordinate to the Regional Corporations, with 44 million acres of the total 365 million acres in Alaska, and with almost unlimited wildlife harvesting rights. The shares in these corporations, both regional and village, were allocated to the aboriginal inhabitants and were to be non-negotiable for a period of 20 years, after which

⁸⁰ Commissioner of Indian Affairs 1975:vii; Starr 1969:137; 167.

⁸¹ Prucha 1988:46.

⁸² Gold had been founded on Cherokee land in 1824 (Prucha, 1988:45).

they could be alienated at the stock-holder's will. Complicated formulae, including pan-regional participation, were evolved for the commercialisation of renewable and non-renewable resources.

This initiative seemed to wish to convert recently nomadic tribesmen into corporate stock-holding citizens. Except amongst a very few, there was no commercial or corporate experience within the Aleut, Indians and Inupiat who constituted the aboriginal population of Alaska, some 12% of the total population, and after an initial euphoria, bewilderment set in. It was realised that land tenure, far from being secure, was, after the passage of 20 years, to be at the mercy of corporate whim; that there was no provision for the up-coming generation; and that the land selection process was fraught with legal impediment.

Mr. Justice Berger of British Columbia was engaged to look into the many apparent injustices of the original settlement and his report⁸³ provoked action in amendment of the original settlement. The most blatant inconsistencies were eliminated. Though lawsuits and consultant's fees have milked a lot of the original cash-benefits, the *Alaska Native Claim Settlement Act* remains the most liberal, in terms of money, land and self-determination, among the 'Aboriginal Treaties' entered into by the United States of America.

Canada

In 1604, the geographer/explorer Samuel de Champlain, who was to become the true founder of New France, led a body of Micmac Indians and a few Frenchmen southwards from the Gaspé Peninsula and what is now New Brunswick, in order to extend the French sphere of influence to the Atlantic seaboard of what was to become the United States. On the borders of Massachusetts, he was repulsed by hostile Indians and was forced to return to the colder and less fertile regions of the north.⁸⁴ The repulse of this minor excursion was to play an important part in the development of aboriginal relations in Canada.

In the vast northern forests to which the French turned their attentions, the needs of the original settlers were very different to those of the land-hungry immigrants to the productive temperate zones. The staple of New France was fur and the labour force best able to harvest that popular commodity was the indigenous population. Thus the necessary settler constituent of the population was confined to a comparatively small number of traders and a few military to impress the natives, plus, of course, missionaries to cater for the souls of the traders, the soldiers and the Indians.

The Gallic style of intrusion was different from that of the Anglo-Saxons who predominated in Atlantic America and were to predominate in Australia and New Zealand. Francis Parkman, contrary to his more usual, near xenophobic, approach, wrote: 'Spanish civilisation crushed the Indian; English civilisation scorned and neglected him; French civilisation embraced and cherished him'.⁸⁵ This opinion is supported to a large degree by the evidence. Instead of adopting an assimilationist policy, whereby the Indians were encouraged to integrate within the colonist's culture, the French stance was that the traders should integrate themselves into the aboriginal culture. Thus, French youths and even children were 'lent' to Native tribes,⁸⁶ and intermarriage was encouraged, for as Champlain said at Lachine Rapids: 'then our young men will marry your daughters, and we shall be

⁸³ Berger 1985.

⁸⁴ Wade 1988:21.

⁸⁵ Parkman 1897: Volume 1:131.

⁸⁶ Amongst them, Étienne Brulé, who was to become the first of the so-called 'coureurs de bois', was placed, by Champlain, among the Algonquins in exchange for two Indian youths who were taken to France and returned to their tribes the following year (Wade 1988:23).

one people'.⁸⁷ Native languages were learned and widely used by the French. Nonetheless, there was an underlying confidence among French colonists that by right of Champlain's discovery the St. Lawrence estuary, and wheresoever it led, was solely a French sphere of influence.

It was unnecessary to enter into formal treaties whereby land was ceded in exchange for goods in order to support this form of colonisation.⁸⁸ The French preferred to enter into alliances based upon friendship and partnership rather than exploitation with tribes such as the Micmacs, the Algonquin, the Huron and the Montagnais. These alliances were frequently of a military nature, so that French muskets supported the hostile excursions of their allies, principally against the war-like and threatening Iroquois. This provocation of the Iroquois led that 'nation' into perpetual enmity with the French and, consequently, into alliance with the English.

During the seventeenth century, French colonisation of Atlantic Canada was largely unmolested.⁸⁹ British fur-traders, whose market penetration was enhanced by the formation of the Hudson's Bay Company in 1670, operated principally to the west of Hudson Bay and south of the Great Lakes. While in active competition with their French rivals, they tended to adopt the Gallic approach to integration: probably 50% of Metis surnames are French and, of the remainder, more than half are Scottish. It was not until 1755, when the British established the Indian Department under the leadership of Sir William Johnson, an executive from New York, that a British presence was felt in Canada; and then largely materialising as a response to French hegemony in enlisting aboriginal allies.

During the years of Franco/British warfare which followed 1755, the Indian Department became a paramilitary body and its agents held military rank. Their function was to enlist, at best, support and, at worst, neutrality among Indian tribes.

The Peace of Paris, which terminated those wars on the 10th February, 1763, reflected the magnitude of the British victory.⁹⁰ Large tracts on the Coromandel Coast of the Indian sub-continent and in Bengal and in the Decan were ceded to George III's Crown (Article XI). Foremost among the French renunciations were pretensions to Nova Scotia (Acadia) and all of the North American continent east of a line drawn down the middle of the Mississippi River - saving only the islands of St. Pierre and Miquelon and the city of New Orleans (Articles VI & VII). In the Caribbean, Granada and a number of other islands became British, as did Minorca in the Mediterranean, while Guadeloupe, Martinique and Belleisle became French and Cuba was ceded to Spain (Articles VIII; IX; XIX.)

The Royal Proclamation of October 1763 confirmed the imperial incorporation of Canada under the title of the 'Government of Quebec', distributed substantial acreages to the naval and military personnel who had participated in the North American theatre of operations, created a monopsony whereby only the Crown was entitled to acquire lands from Aboriginal people, and that only with their consent, and established Indian usufructory rights to their 'hunting grounds' throughout the continent, except in the areas covered by the new 'Governments' of Quebec, East Florida, West Florida and Granada and

87 Wade 1988:25.

88 In any event, the French were strong adherents of the principle of *terra nullius*, combined with the Right of Discovery which Jaques Cartier had assumed on behalf of the French Crown, in 1835/36.

89 Surtees 1990:84.

90 The British Crown 1763.

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the lands placed under the protection of the Hudson's Bay Company by Charles II in 1670.⁹¹

The extent of those last-mentioned lands is pertinent to the 'Treaty' saga of Canada. Charles II, by the issuance in 1670 of the Charter of Incorporation of the Hudson's Bay Company, passed into the 'Power and Command of the ... Governor and Company'⁹² 'all those Seas, Streights (sic), Bays, Rivers, Lakes, Creeks and Sounds, in whatever latitude they shall be, that lie within the entrance of the Streights commonly called Hudson's Streights, together with the Lands, Countries and Confines of the Seas, [etc.], aforesaid, which are not now actually possessed by any of Our Subjects or the Subjects of any Christian Prince or State'.⁹³ The king also passed into the same custodianship, 'all Havens, Bays, Creeks, Rivers, Lakes and Seas into which they [the Company's factors, servants and Agents] shall find Passage by Water or Land out of the Territories, Limits and Places aforesaid'.⁹⁴

That comprehensive conveyance would seem to have no confines and obviously reflects the limitations of the king's - or, for that matter, any other European's - geographical knowledge. It is sometimes assumed that his real intention was to confine the grant to the lands served by the waters flowing into Hudson's Bay, which would cover most of continental Canada east of the Rocky Mountains, except the Mackenzie River drainage area, the Eastern half of what is now Quebec Province, Newfoundland and New Brunswick. It should be pointed out that the liberal interpretation of the Royal Proclamation does not include the Hudson's Bay Company exclusions.

One further factor in the Royal Proclamation merits consideration. Colonial acquisition of territory over which the aboriginal people exercised some form of title, albeit only usufructory title, could only be effected through the Crown and then, only with the consent of the original title holders. This proviso in no way inferred that it could only occur through aboriginal initiative. There was nothing in the Proclamation which prevented any British official, or even a British private individual, from approaching a tribal Chief and saying something of the following sort: 'My king would like some of your hunting grounds. What do you want for it?' In fact, it seems likely that, in the early instances, all negotiations were opened from that starting point, as evidenced by the fact that colonial expansion was strategically deliberate and incremental rather than haphazardly sporadic.

The process of Treaty-making in Canada is conveniently divided into three - or, if future possible treaties are to be included, perhaps four - epochs. The first series, which started the year following the Royal Proclamation with an abortive essay, were more in the nature of straight real estate deals: so much *quid* for so much *quo*. That phase, if the aborted first attempt is excluded, comprised 29 agreements⁹⁵ and lasted from 1781 to 1836. The first of the series appropriated a corridor of land along the Niagara River which links Lake Ontario to Lake Erie; the navigation of which demanded a lengthy portage to outflank the Falls. Then followed the establishment of strategic posts and islands along the Canadian littorals of the three most eastern of the Great Lakes (Huron, Erie and Ontario) and the infilling of the Southern Ontario peninsula, and terminated with the Bruce, Grey and

⁹¹ For the wording of the *Royal Proclamation*, see above.

⁹² King Charles II 1816:16.

⁹³ Ibid.:2.

⁹⁴ Ibid.:12.

⁹⁵ Some times the Robinson-Superior, the Robinson-Huron and the Manitoulin Island treaty of 1862 are included in this group. In view of the slightly more elaborate concessions by the Crown, it might be better to count them among the next group of 'Numbered Treaties'.

Wellington Counties Agreement of 1836, under which latter agreement the Crown not only provided each of six specific Chiefs with five shillings, but also undertook to build some houses and to give assistance to Indians in agricultural enterprises to be pursued in the vicinity of settlements located on the Bruce Peninsula.

It is difficult to isolate any progressive pattern, in terms of payment for ceded lands, in these treaties. It would seem that the end result depended on three factors: first, the depth of desire felt by the Crown party; second, the opportunism of the aboriginal vendors; and third, the negotiation skills of the individual principals. For instance, the land on which Toronto now stands was ceded to the Crown first in 1787, but there are no details extant of the exact boundaries nor the form or scale of the compensation. It was not until 1805 - Toronto, then called York, having become the capital of Upper Canada in 1793 - that boundaries were set to the original purchase in exchange for a payment of ten shillings, then about \$2, and the right to fish in the Etobicoke River. On the other hand, in 1790, the northern littoral of Lake Erie between Windsor and somewhere just east of St. Thomas, realised £1,200 in goods as well as Reserves at Bois Blanc and Knagg's Creek. The greatest payment recorded is in 1815, when £4,000 was paid for the lands south-east of Georgian Bay and west of Lake Simcoe, which is now largely agricultural, though it was probably forested at the time of negotiation.⁹⁶

A slight pattern does emerge after 1818, when compensation became payable in some instances in the form of annuities rather than lump sums. In 1818, for land to the south of Georgian Bay, an annuity of £1,200 was agreed. That sum was reduced, the following year, to £300 in specie and £300 in goods for an area of approximately equivalent size some distance to the north of Lake Ontario. There appears to have been no going rate, while a lack of communication, or possibly a lack of openness, between the tribes made any coordination of bargaining practice impossible.

The second phase of Canadian Aboriginal treaty-making came after the consolidation, by means of the *British North American Act*, of the colonies of Nova Scotia, New Brunswick, Quebec and Ontario⁹⁷ to form the Federation of Canada. In order to obtain British Columbia's accession to the Federation, in 1871, Sir John A. Macdonald had been induced to promise the British Columbia government that he would build a transcontinental railway.⁹⁸ That promise, fuelled by the possibility of United States preemption and coast-to-coast imperial dreams, soon became a firm commitment. The project would involve crossing the southern part of the Canadian Shield, the practically uncharted prairies and, of course, the Rockies. Whatever the detailed route, the grand design would necessitate the disturbance of large bodies of Indians.

Bearing in mind the lawlessness and Indian resistance to westward expansion in the United States, and spurred by the Red River Métis Insurrection led by Louis Riel, the Canadian government opted for the wise procedure of establishing order - and at the same time establishing sovereignty - by settling the Indian question before introducing settlers into the vast new horizons. Robert Surtees summarises the development succinctly:

⁹⁶ It has been suggested that this particular tract of land had strategic importance as the start of a 'short-cut' route to take furs from the Lake Huron catchment to the northern littoral of Lake Ontario.

⁹⁷ These latter two Provinces had been a single colony known as Canada. There had been divisions into Upper and Lower Canada and, later, into East Canada and West Canada, but the whole had been governed from Ottawa.

⁹⁸ Berton 1971:188

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Changes to the Western Indian position took place with frightening alacrity. Between 1871 and 1877, commissioners sent by the federal government concluded seven major land cession treaties with western tribes, thereby securing the bulk of the lands between Lake Superior and the Rocky Mountains. The Canadian Pacific Railway was completed in 1885, settlement had begun over a decade earlier. By 1880 the mainstay of western Indian life - the buffalo - had almost completely disappeared and all segments of the Cree, Assiniboin, Peigan, Sioux, Blood and Blackfoot bands had been forced, through circumstances, to take up residence on the lands provided by the treaties.⁹⁹

The seven treaties to which Surtees refers were the first of a sequence known as the 'Numbered Treaties', of which there were a total of eleven spanning the years from 1871 to 1921. Roughly, they marched just ahead of the railhead and the settlers filled in just behind the railhead. In front of the railhead, too, was an extraordinary body of young adventurers who had been raised in the early 1870s, the North West Mounted Police. That paramilitary law enforcement corps, under the inspired leadership of men like James Farquar MacLeod and Colonel French, became the evidence of territorial sovereignty, while at the same time they shepherded Indians to their Reserves, policed the United States border against gun-runners and rum-runners, saw that settlers observed the Treaties and generally earned the respect of all who lived or ventured out toward the Rockies.

Another group of pioneers who preceded the railhead were the missionaries; they too played a part in the treaty saga.

By the numbered Treaties, Indians ceded really enormous tracts of their 'hunting grounds' in exchange for very minor Reserves and limited facilities. Because of the magnitude of the sessions, verbatim transcription of the content must be included: the extracts from Treaty No. 5 (1873), printed below, are not untypical.

... it is the desire of Her Majesty to open up for settlement, immigration, trade and such other purposes as to Her Majesty may seem meet, a tract of land.

The Saulteaux and Swampy Cree Tribe of Indians and all other Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender, and yield up to the Government of the Dominion of Canada, ... all their rights, titles, and privileges whatsoever to the lands included within the following limits. ...

Her Majesty hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present being cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada; provided that all such reserves shall not exceed in all 160 acres for each family of five or in that proportion for families larger or smaller. ... but reserving the free navigation of the said lake and river, and free access to the shores and waters thereof for Her Majesty and all her subjects ... and ... provided however, that Her Majesty reserves the right to deal with any settlers within the bounds of any land reserved for any band as she shall deem fit, and also that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians ... with their consent first had and obtained. .. with a view to show the satisfaction of Her Majesty with the behaviour of her Indians she ... makes a present of 5 dollars for each man, woman and child.

⁹⁹ Surtees 1990:91.

And further Her Majesty agrees to maintain schools for instruction in such reserves hereby made as to her Government of the Dominion of Canada may seem advisable, when the Indians of the reserve shall desire it.

Her Majesty agrees with her said Indians that they ... shall have the right to pursue their avocations of hunting and fishing throughout the tract surrendered ... subject to such regulations as may, from time to time be made by her Government ... and saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering, or any other purpose by her said Government of the Dominion of Canada, or any of the subjects thereof duly authorised therefore by the said Government.

Then follow the subsidies granted under the Treaty:

- \$5 per year per capitum
- \$500 per year for ammunition, nets, etc.
- 2 hoes for every family cultivating
- 1 spade
- 1 plough for every 10 families
- 5 harrows for every 20 families
- 1 scythe
- 1 pitsaw with appurtenances for each band
- 1 chest of carpenter's tools for each chief
- seed wheat, barley, potatoes, etc.
- 1 yolk of oxen, 1 bull and 4 cows per band
- \$25 per year per chief
- \$15 per year per sub-chief (max. 3)

In the final paragraph, the chiefs contract to keep the peace and surrender any law-breaking Indian to the Queen's justice and punishment.¹⁰⁰

The questions have to be asked. Why did the Chiefs sign Treaties which were, by to-day's standards, so inequable? Why did they surrender hundreds of thousands of square miles in exchange for a few hundred square miles with dubious tenure, the chance of education which they did not understand, a few dollars cash in hand and some agricultural appurtenances with which they were culturally unfamiliar?

Commentators have provided a range of disparate answers:

1. On the prairies their life-style staple, the buffalo, had been virtually eradicated by Europeans, the Metis and the rifle in their own hands. As a result they were hungry, bewildered and open to any suggestion which brought immediate relief.
2. The pace of events had effectively robbed them of initiative and they were in a spiritual vacuum where the advice of missionaries, who urged a settled, non-nomadic existence, and the Mounties were pervasive. The implied promise that they could continue their subsistence style of life tended to allay too deep concern.
3. In their own culture, they themselves did not own the land they surrendered. It was the property of the Creator and they were merely part of the Creator's design, as were the total flora and fauna, by which the land was filled harmoniously. They were, therefore, 'getting something for nothing' in accepting the baubles offered.
4. The relations with the agents of the Hudson's Bay Company had always been marked by good faith and the treaty ceremony was akin to the annual gatherings sponsored by that trading organism. The manner in which fur prices were set by the Hudson's Bay Company did not encourage the process of bargaining.

¹⁰⁰ Hertslet 1920-1924.

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5. They were impressed or frightened by the display of moral and technological superiority displayed by the settlers and their officials, including the North West Mounted Police, and hoped to be able to emulate them in the seclusion of their Reserves.

None of these explanations seems, on its own, adequate but, in various combinations, they are more persuasive.

Whatever the cause, the 'Railway Treaties' - that is to say Numbers 1 to 7 of the 'Numbered Treaties' - were acceptable to both sides. The aboriginal people were contained in more administratively convenient areas and both schooling and - later - health-care became possible. Missionaries also found the concentration principle very much more felicitous. It was therefore decided to extend the system northwards¹⁰¹ to include the boreal forest lands, as and when they were needed for settlement.

Thus, between 1899 (Treaty No. 8) and 1921 (Treaty No. 11) the system was extended to include all land north of the Great Lakes and the 49th parallel up to (and in the case of parts of Treaty No. 8 and Treaty No. 11) beyond - the 60th parallel.¹⁰² This latter series of Treaties were not as acceptable as their predecessors. The land, not being required for immediate settlement,¹⁰³ remained available to the tribes and they were not required to move to the proposed, but not yet delineated, Reserves until they saw fit to do so. This made census and administration very much more problematical and a number of the terms of the Treaties were never fulfilled, a circumstance which was to cause dissension later.

Before considering the next phase of Canadian treaties, the Comprehensive Land Claim Settlements, one further point in connection with the 'Numbered Treaties' should be made. It is comparative. In the United States Treaties the emphasis on the relationships between two sets of peoples - 'the Commissioners plenipotentiary of the United States in Congress' and 'the Headmen and Warriors of all the Cherokees'¹⁰⁴ - and the terms of the Treaties, which often included land cession, were to be decided and effected through those two peoples. In the Canadian versions, the principal focus was on 'a tract of land' and 'the Saulteaux and Swampy Cree tribe of Indians and all other Indians inhabiting the district hereinafter described' were required to do whatever the Treaty demanded. In the United States, the land was subsidiary to the people while in Canada the people were ancillary to the land.

The course of treaty-making was deflected by a Supreme Court split decision in 1973.

An important court decision was handed down that strengthened the basis for aboriginal claims. *Calder et al. vs. Attorney General of British Columbia* (1973) involved the Nishga people in British Columbia. While technically the case resulted in a split decision, the judgement went a long way toward reinforcing aboriginal title due to occupancy prior to colonisation. This case strengthened the hand of native

¹⁰¹ Strictly speaking, Treaty No.5, which took in all the north of Manitoba, was not a 'Railway Treaty' but it might have been. A spur line was envisaged to run from Winnipeg up to the Hudson's Bay Co.'s principal trading post at York Factory.

¹⁰² Excluded from these latitudinal limitations, should be the whole of British Columbia, where no treaties - other than a few minor real estate deals around Vancouver and Victoria - were entertained.

¹⁰³ Both these Treaties anticipated a considerable settler demand in the wake of the Yukon goldrush. It was thought that the Mackenzie Valley might become arterial.

¹⁰⁴ Treaty concluded in November 1975 (Commissioner of Indian Affairs 1975:8).

groups, and, in August 1973, the government changed its policy toward land claims.¹⁰⁵

The basic alteration in direction was that, while aboriginal people should remain almost in the status of wards of the State, they should be considered as very much more adult wards and thus entitled to decide for themselves the style of life which they wished to pursue. Further that they should be given a degree of autonomy in the management of their own affairs. The process of change was not, of course, instant: it involved a lot of government proposals and policy statements over a decade and a half. It could, in fact, be said to be incremental. It was made plain that the new style of treaty could apply only to those lands where cession had not already extinguished Aboriginal rights. However, in those parts of Treaty No. 8 territory where the Federal government held prime responsibility - that is to say, those lands which were in the Northwest Territories - and in the area covered by Treaty No. 11 - also in the Northwest Territories - the government was prepared to re-negotiate.

The first of the new series of pacts was the James Bay and Northern Quebec Agreements with the Indians of the southerly section, the Inuit of the northern part and the Naskapi of the northeast.

When the boundaries of Quebec Province had been extended to the Hudson Straits in 1912, a term of agreement had been that the Provincial government should accept responsibility for aboriginal people in the extended territory. However, as there was no demand for expanded settlement area, the Quebec Provincial government saw no urgency and the formation of any form of treaty was left in abeyance.¹⁰⁶ In the mid-1970s, the requirements of Hydro Quebec and the conflicting requirements of the aboriginal people brought about a situation which culminated in litigation and, at one stage, an injunction against the Provincial Government which forbade the continuation of operations pending an equitable settlement of differences. That hiatus emphasised the need for consultation and consensus. The end result was an amalgam of old thought and new thought. While a degree of autonomy was allowed in a limited range of local affairs, the lands selected for domicile were placed under federal control while the remainder, the vast majority, were designated either for development or the continuation of subsistence hunting and were left in Provincial care. That lack of secure tenure along with the divided responsibilities rendered the agreements a limited success. Outside Quebec, aboriginal leaders were critical of the acceptance of 'extinguishment' clauses under which aboriginal people ceded their claims in the Agreements.

Following the issuance of the proposals and policy statements referred to above, a single massive settlement was envisaged, by both the Federal and Northwest Territories governments, which would effectively divide the Northwest Territories along the tree-line into two new Territories, to be called Nunavut - for the Inuit-dominated north-east - and Denendeh - for the Indian-dominated south-west. It was proposed that each of these new Territories would have its own Legislative Assembly and that, because in Denendeh there would be no aboriginal population majority - in Nunavut it was about 80% in favour of Inuit - various safeguards would be implemented in order to preserve native control.

Before that grand design could be accomplished internecine dissension occurred among aboriginal groups which led the Inuvialuit of the northwestern corner of the proposed Nunavut to split off and settle unilaterally, while Denendeh divided even further to produce

¹⁰⁵ Dickerson 1992:106.

¹⁰⁶ It should be observed that Ontario and Manitoba, both of which benefitted by northern expansion in 1912, did cause Treaties to be operative within their extended boundaries.

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the Sahtu and Gwich'in tribal claims, settled in 1992 and 1993 respectively, and the Deh Cho, North Slave and South Slave tribal areas which had not been settled by April of 1994.

Because the Denendeh area was so fragmented, the parts which did settle became 'counties' of the Northwest Territories and therefore assumed a lesser degree of autonomy than was originally envisaged. Nunavut alone was able to fulfil the promise of the grand design; on the 25th of May 1993, two Bills were enacted by the Parliament of Canada creating the Territory of Nunavut, to be finally established in 1999. They also legalised the Nunavut Land Claim Agreement which provided Inuit with a wide range of local control, surface rights to some 18% of their territory, subsistence hunting rights to the large majority of the remainder, sub-surface right to about 2% of the territory and the legal ability to monitor development throughout. It also provided 1.17 billion dollars in compensation for the 82% of the Territory which remained Crown land.

This robust Nunavut settlement would seem to provide an aboriginal people with the greatest autonomy and land tenure security to be found in any Treaty in the world, as defined in this paper.

In Canada, there are still areas which are not covered by any form of agreement, including most of British Columbia, the south central part of the Northwest Territories, Labrador and that part of the Atlantic littoral of Quebec Province which lies to the north of the St. Lawrence estuary. But, because it is improbable that any one of these areas will be either large enough to warrant Territorial status or possess an aboriginal population majority, the terms of the Nunavut Treaty are unlikely to be matched. As in the 'Numbered Treaties', the Nunavut settlement is essentially with a 'tract of land' and it is, officially, purely fortuitous that on that tract of land there is a substantial aboriginal racial majority, in terms of population. Thus the constitutional obligation to popular government is unsullied.

The Canadian Constitution, as amended to 1982, contains the assurance that 'existing aboriginal and treaty rights are hereby recognised and confirmed' (Section 35[1]). By the abortive Meech Lake and Charlottetown Accords, efforts were made to expand that clause by the inclusion of a more definite commitment to self-government. It is now argued by the Royal Commission on Aboriginal Peoples that further amplification is not necessary because the word 'existing' includes sundry rights to self-government which were acknowledged by the early fur-trading settlers, both French and British, and which were not specifically extinguished by the British North America Act of 1867. The Liberal government of Jean Chrétien, perhaps without the support of all the Provinces, seems prepared to accept that residual existence and allow self government of areas, such as Reserves, where there is a population majority in favour of any ethnic group, be they Indian, Inuit, Chinese or any other. But this is no innovation: it is part of the democracies of local government.

Conclusion

Three principal constituents would seem to obtrude from these summaries of aboriginal treaty trends in the four countries.

First, the principle of extinguishment by treaty is being maintained. In Australia, treaties have been as one-sided as is conceivable - executive or legislative decrees - but those measures are still considered to have extinguished all Aboriginal rights to the areas to which the decrees applied. It is only in the areas where extinguishment has not been specific that the new-found Native Title will be allowed to make its presence felt. In New Zealand, no rights other than those which survived the Treaty of Waitangi, are on the

agenda for governmental consideration. Further, those post-Waitangi rights which were extinguished in punishment for real or imagined involvement in the Land Wars of the 1860s will prove difficult to reinstate. In the United States, though it is widely accepted that treaty violation was largely instigated by settler action, the extinguishment clauses of the numerous treaties which diminished the possessions of the aboriginal people are not open to renegotiation. True, the administration of the remaining Reservations is being placed largely in the hands of inhabitants but the size of those enclaves is still diminishing rather than expanding. In Canada, all Constitutions, proposed Constitutions and policy documents have led with the statement that 'treaty rights will be recognised and maintained'. This is a two-edged commitment: it intimates that, while the Crown in Right of Canada will observed its obligations, it will also take into account the extinguishments which were essential to all those treaties. Even though it is now being mooted that certain rights survived extinction, those rights are not considered to be land rights.

Second, over the last five hundred years, time has been the yeast of liberalisation. In the United States, which was subject to the earliest land expropriations and which finished its treaty phase as Canada started hers in 1871, the blatancy of the exploitation of aboriginal innocence was marked. Nonetheless, the latest of Treaties, the *Alaska Native Claim Settlement* as amended led for nearly two decades the leader-list of liberal settlements. In Australia, where the principle of *terra nullius* failed to even consider the matter of Aboriginal rights and the indigenous people were considered little more than part of an original fauna, the *Native Title Act*, which recognises an Aboriginal title which survived 'Settlement' in 1788, only came onto the statute book in December of 1993. When that title is used as a negotiable property for the first time, the ensuing 'Treaty' will be an original and, therefore, the first step on a ladder which other Aboriginal nations have started to climb. New Zealand's *Treaty of Waitangi* was, for its time (1840), a high-tide mark for liberality. Lord Glenelg had renounced, on behalf of the people of New Zealand, the status of *terra nullius* and colonisation was, officially, at the request of the Chiefs of the Maori population. It is true that the liberality of the original treaty was not maintained, very largely due to the poor translation of the English text into the Maori language, but recent developments have tended to revive what remains of the Treaty and foster its spirit if not its specific terms. In Canada, the progression from the Niagara Purchases of 1764 and 1781 to the Nunavut settlement in 1993 has been largely, although not entirely, incremental in terms of liberality and, while demographics would seem to preclude further increments, retrogression is unlikely to be pronounced.

Third, it has proved to be the judiciary which acts as champion for Aboriginal rights rather than the elected legislative executive. This is probably due to the fact that the legal mind is not - or, certainly, should not be - influenced by pragmatism and is inclined to pass down judgements which reflect the legal rights and obligations written into the various Treaties. As early as 1835, it was the judiciary of the United States of America, in the person of Chief Justice John Marshall, which in *Worcester v. The State of Georgia* declared that the expulsion of the Cherokees from Georgia was out of order. It was not the judiciary which was to blame for the fact that the popularly-elected President declined to implement the decision. The change of direction of Canadian land claims in 1971 was directly due to a decision, albeit a split decision, passed down by the Supreme Court in *Calder et al. v. The Attorney General of British Columbia*. That decision went some distance towards the establishment of the contention that, where not specifically extinguished, Aboriginal rights might be deemed to have survived colonisation. It was the judiciary of New Zealand that found, in 1992, for the plaintiff in *Paku v. The Ministry of Agriculture and Fisheries*, on the strength of the Crown's obligations incurred under the

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Treaty of Waitangi. In the same year the legislature-inspired *New Zealand Bill of Rights* had accorded the Maori no 'Special status'. Finally, in 1992, it was the High Court of Australia that first pronounced the innovative concept of Native title; the legislature had to bestir itself in order to ratify the judiciary's initiative.

It is not essential to the content of this paper to prognosticate the future development of aboriginal treaties, but the opportunity to do so is tempting.

It seems possible that the judiciaries of the various countries will continue to read more and more into both the intention and the letter of past treaties and declarations so that the aboriginal position will be gradually strengthened. For their part, the elected executives of the nations will, through such slogans as togetherness, partnership, mutual commodation and one nationhood, seek to assimilate and integrate the aboriginal minorities within the fabric of the States before the superior courts can impose what the politicians suppose to be irreparable damage. It will be exciting for our children - or our children's children's children - to witness the end of the race.

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