

Foundations and Lessons: The Canadian Treaty Making Experience

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1. Why Canada: Points of Comparison and Difference
2. A Brief History of Treaty Making in Canada
3. The Status of Canadian Treaties
4. A Broader Rights Framework
5. Lessons for Australia
6. Our Own Path
7. Footnotes

As the judicial reasoning of the majority of judges in *Mabo v. Commonwealth* showed, when Australian courts look to fill the silences of our common law, they may look to international law and comparative jurisdictions². This often, sometimes inevitably, leads to consideration of Canadian jurisprudence. Developments in Canada can illuminate the way in which Australian courts may seek to develop and define Australian common law, especially in the area of Indigenous rights.

This paper briefly explores the extent to which Canada remains a useful point of comparison for developments of Indigenous rights in Australia. I will look at the history of treaty making in Canada, view the Canadian legal framework more broadly and then focus on what the Canadian experience may be able to teach us as we look towards the option of a treaty or treaties for Australia.

Why Canada: Points of Comparison and Difference

Canada has played a prominent role as a mirror for jurisprudential and policy developments in Australia because of its origins as a colony, primarily and then solely ruled by the British Empire. Like Australia, it is an invaded and colonised country, that, in its modern period, has had a constitutional history that has seen the gradual devolution of power from colonial power to colony. Both countries work with a common law system that often refers to and adopts the precedents of each other's jurisdiction. Both jurisdictions share a history of colonisation that was powered by similar ideologies of European racial supremacy, ideals of assimilation and cultural imperialism.

Like Australia's Indigenous community, First Nations, Inuit and Metis are a numerical minority making up 3.6 per cent of the total Canadian population. As in Australia, Aboriginal peoples in Canada rank poorly on all socioeconomic indices. The Royal Commission on Aboriginal Peoples describes this poor ranking as a systemic legacy of the colonisation of Indigenous communities³. This is particularly so since the historical policy making eras follow similar ideological trends in

both jurisdictions.

Government policies in both countries are designed to meet the relatively poor health, high unemployment, cyclical poverty and low levels of education faced by their Aboriginal populations. Like Australia, Canada experienced periods of frontier violence, assimilation and integration. Dispossession of land was accompanied by the removal of children to be assimilated into European culture. Movement of Indigenous people was highly regulated by the state and many rights enjoyed by Canadian citizens were not extended to Indigenous people.

Despite these parallels, Canada is often seen as being a jurisdiction that is not easily translated into Australian law. This is usually asserted on two bases:

- that Canada made treaties with Indigenous people, and
- that Canada recognises treaty and Indigenous rights in its Constitution.

However, both of these reasons for differentiation are premised on misunderstandings. First, although treaties were made with Indigenous people throughout Canada, there are many areas in which no treaties were made. In these areas, such as most of British Columbia, common law understandings of Indigenous rights prevail.

Secondly, the Constitution of Canada only protects Aboriginal and treaty rights that are already found to exist. The Supreme Court of Canada has been very careful to explain that Aboriginal and treaty rights do not derive from the Constitution; they are merely protected by it⁴. The inherent Aboriginal rights held by Indigenous peoples in both jurisdictions should be similar since they are sourced in a common law tradition with roots in the same jurisdiction.

The real difference between Australia and Canada lies not in the rights held by Indigenous people in each jurisdiction but in the way in which those rights are being recognised and protected. That is, the inherent rights of Indigenous people in both countries should be the same; it is the difference in recognition and respect of the rights that has been the main differentiating factor between Australia and Canada.

The Canadian treaties, for their recognition of Indigenous sovereignty, are evidence of this recognition and protection. Similarly, the *Indian Act 1985* provides that Indian lands are exempt from taxes and have limited self-government. These provisions are reflective of the way in which the sovereignty of Canadian Aboriginal communities is recognised, at least to a limited extent, and is a stark contrast to the lack of recognition of any sovereignty held by Indigenous Australians⁵.

Treaties, the reserve systems and the provisions of the *Indian Act* provide some basis for land rights which have been, by comparison, relatively recently recognised in Australia, first by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), then by State land rights legislation in various State jurisdictions⁶. Native title was not recognised by common law until 1992⁷.

Viewed in this light, Canadian treaties should be seen as a different form of recognition and protection of Indigenous rights alongside mechanisms such as constitutional protection and legislative recognition. The history of treaty making in Canada bears out the premise that the treaties are predicated on recognition of existing common law rights. In this way, treaties become a rich source of comparison with our existing mechanisms and potential for treaty making in Australia.

A Brief History of Treaty Making in Canada

There have been three primary periods of treaty-making in Canada.

- **Friendship Treaties**

Treaty-making as a way of dealing with Indigenous people has a long tradition in Canada. Canada had historical imperatives that made treaty making an attractive way of approaching the First Nations people on the east coast of North America. Conflict with the French and the economic

advantages of the lucrative fur trade saw 'Friendship' and 'Peace' treaties negotiated with First Nations who were seen as allies against rival colonial powers and as contacts through which to create trade routes. These self-interested motives provided the impetus to negotiate treaties of friendship and loyalty and the military had primary responsibility for procuring treaties during this period. Although the treaties would be later treated as though they surrendered sovereignty and land, this was rarely the intention of the Indigenous signatories.

Before 1830, British policy in relation to Aboriginal peoples was formulated in the *Royal Proclamation of 1763*. While the Royal Proclamation did not apply to the whole of the territory that is Canada today, it did expound policy in relation to purchasing lands from Aboriginal peoples and stated that Aboriginal land could only be purchased by the Crown:

In order, therefore, to prevent such Irregularities for the future, and to 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 Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where. ... [I]f 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 ...

The Royal Proclamation had also stated that land could only be purchased from the First Nations for the Crown, in the Crown's name, at a public meeting with the relevant First Nations people.

Fidelity to the Royal Proclamation had facilitated the setting aside of reserves for Aboriginal people, usually created by treaty or agreement with the First Nations community. The number of reserves increased as the Imperial Government sought to control the large numbers of settlers who began arriving in Canada after the War of Independence. In an attempt to further prevent the encroachment of white settlers onto Indian land, the *Crowns Land Protection Act 1839* declared all 'Indian lands' to be Crown lands. Reserves for Aboriginal people in Canada were set aside in a larger scale than they were in Australia and many reserves were set up on the First Nations' traditional land.

Jurisdiction over 'Indian' matters was handed to Canada in 1860. Section 91(24) of the *Constitution Act 1867* affirmed the sole jurisdiction of the Federal Government over 'Indians, and Lands reserved for Indians.'⁸ Laws relating to Indians were consolidated in the *Indian Act 1876*. It classed 'Indians' as 'minors', similar to the 'wards of the State' status given to Indigenous Australians, and was predicated on a philosophy of assimilating Indians into broader Canadian communities. This aim of assimilation was implemented through a policy of removing Aboriginal children to Residential Schools, usually church-run educational institutions, where Aboriginal children were taught European values and ideals⁹.

• **The Numbered Treaties**

The *St. Catherines Milling* case¹⁰ in 1888 reiterated the notions that land could only be alienated to the Crown and that Indigenous people did hold certain rights in land. It reaffirmed the view that relationships should be started with Indigenous peoples through treaties in order to secure land. This process led to the 11 numbered treaties across the middle of Canada. This process was undertaken about 100 years ago and the numbered treaties are revealing. They saw the Indigenous people forfeit their title to land in exchange for small reserves, small payments and rights to hunt and fish. They look like attempts to set up Indians as small landowners with clauses providing the chiefs with suits and the men with land, horses and farm equipment. These treaties contain provisions for land cession, cash grants, reserves, education, hunting, fishing, farming and, in the case of Treaty 6, a medicine chest.

However, Indigenous people signing these agreements thought that they were arrangement of coexistence, not surrenders of land and sovereignty¹¹. There are conflicts between the written text

of the documents and the oral histories of the understandings in the agreement. Treaty 9 is a good example of this. It was drafted in complex legal language and, despite adamant expressions by the First Nations that their hunting rights be protected – and reassurances that they would be – there was no reflection of these agreements in the text¹². Consider the observations of the Ontario District Court in *R. v. Batisse* (1978)¹³:

When Treaty No.9 was negotiated, the parties to the Agreement were on grossly unequal footings. Highly skilled negotiators were dealing with illiterate people, who, though fearful of losing their way of life, placed great faith in the fairness of His Majesty, as represented by federal authorities.

These earlier treaties are problematic in many ways. They were ‘represented as solemn and just, they were erratically and unequally conceived, imperfectly understood and inadequately performed’¹⁴. They were negotiated in unequal bargaining positions, contain inconsistencies and had uncertain legal status. The First Nations signatories often placed great weight on the oral communications of the Crown representatives and these were often not repeated on paper. Language and cultural differences complicated communication and understanding. The provisions were meagre and not kept. In addition, some groups were completely left out of these processes.

- **Land Claims Processes and the Inherent Right to Self-Government Policy**

Treaty making has re-emerged as a way in which to define the relationship between First Nations and the Crown in right of Canada. Canada implemented an *Inherent Right to Self-Government* policy in 1995¹⁵ which allows for processes to reaffirm and renegotiate treaties that are already in existence and to negotiate treaties where they were not entered.

This builds upon the processes that existed before the implementation of the *Inherent Right to Self-Government Policy*: the Comprehensive Claims Process and the Specific Claims Process. Both were introduced in 1973. The Comprehensive Claims Process was implemented where claims to Aboriginal title have not been addressed through treaty or agreement with the Aboriginal community. Sometimes these land claims are accompanied by claims for varying forms of self-government. (The Nunavut Land Claims Agreement, reached in 1993 and coming into force in 1999, was part of this process.¹⁶) The Specific Claims Process was implemented where First Nations felt that there was non-fulfilment of Indian treaties and lawful obligations or improper administration of lands and other assets under the *Indian Act*. However, these processes have been criticised for being developed without substantial consultation or input from the First Nations and for being biased, unfair and inefficient with too much control being given to the Federal government. There is a large backlog of claims waiting to be determined and the process is costly and time-consuming.¹⁷

These modern land claim processes have resulted in modern treaties, a process that continues under the *Inherent Right to Self-Government Policy*. The policy recognises that self-government is an inherent right held by Aboriginal people that predates the 1982 Constitutional amendment and therefore attracts constitutional protection¹⁸. The Canadian Government has defined the right of self-government as follows:

Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.¹⁹

The Federal Government emphasises its preference for negotiating the content and implications of the inherent right to self-government with Indigenous peoples at a community-based level, viewing litigation as a last resort. The Supreme Court of Canada has emphasised that the legislature, rather

than the judiciary, is the appropriate arbiter of this matter²⁰.

The *Inherent Right to Self-Government* policy identifies the matters that the Federal Government will negotiate on and this is an interesting guide for future discussions about the content of a treaty in Australia. The policy lists:

- *Subject matters that constitute the inherent right to self-government.* These matters are defined as being matters 'internal to the group, integral to its distinct aboriginal culture, and essential to its operation as a government or institution'. Included are marriage, education, health, adoption and child welfare, Aboriginal language, tradition and religion, social services, administration of Aboriginal laws, including the establishment of Aboriginal courts or tribunals and the creation of offences of the type normally created by local or regional governments for contravention of laws, policing, land management, natural resource management, agriculture, hunting, fishing, trapping, management of public works, housing, local transportation, and the licensing, regulation and operation of businesses located on Aboriginal lands.
- *Subject matters considered by the Federal Government to be beyond the internal matters of the First Nations but which it has conceded are negotiable.* These include matters such as divorce, labour/training, penitentiaries and parole, environmental protection, fisheries co-management, gaming, and emergency preparedness.
- *Subject matters considered to be outside of the inherent right to self-government.* These include matters such as powers related to Canadian sovereignty, defence and external relations, management and regulation of the national economy, maintenance of national law and order and substantive criminal law, navigation and shipping, and postal services.

Modern treaties mirror the earlier treaties in that they seem to cede land in exchange for benefits. The 1996 *Royal Commission on Aboriginal Peoples* emphasised treaties as a way of formalising a new approach to treaty making. It proposed a model of mutual recognition of Aboriginal and Crown rights in relation to land and government.

The Status of Canadian Treaties

The status of Canadian treaties is *sui generis* or unique. The Canadian jurisdiction treats them as more than a contract (since a contract will only bind the signatory parties) but less than the international legal doctrines that the First Nations signing them would have seen them to be (that is, an agreement between two nations).²¹

Although they have not been fully enforced in the past, modern Canadian jurisprudence has taken a more liberal and flexible approach to the interpretation of treaties. Greater emphasis has been given to the power imbalance between the parties, the oral communications made to parties and the extrinsic material available to shed light on the content of the treaties. This has included giving weight to the way in which the First Nations parties would have understood the provisions of the treaties²².

Treaty provisions can prevail over provincial laws when there is a conflict between treaty rights and legislation. For example, the provisions of a treaty may override licensing laws that infringe on the ability to hunt and fish. Although treaty rights can be overridden by federal laws enacted before April 17, 1982, the date of the operation of s.35, they are subject to constitutional protection against federal laws are enacted after April 17, 1982²³. Despite the apparent conclusive ambit of s.35, the court in *R. v. Sparrow* introduced a strict test for the circumstances in which the Federal government could limit treaty rights. There has to be a good public interest reason to do so and the law has to infringe upon the treaty right in the least intrusive manner²⁴. Through this test, the Canadian courts have construed the Federal government's power to infringe on or extinguish treaty rights in a restrictive manner, requiring that it show a 'clear and plain intention' to do so²⁵.

This new era of judicial support for treaties was reflected in the 1985 case of *Simon v The Queen*²⁶, in which the Court noted that treaties should be given 'fair, large and liberal construction' in favour of the First Nations. This marked the introduction of a presumption in favour of the Aboriginal interpretation. This liberal approach was confirmed and extended to a presumption against extinguishment in *A.G. (Quebec) v. Sioui et al*²⁷ in which the court also emphasised the oral understandings of treaties.

The jurisprudence of treaty interpretation was further developed in *R. v. Badger*²⁸ in which the court noted that the honour of the Crown is at stake in dealing with First Nations people and it must be assumed that the Crown intends to fulfil its promises. The court confirmed that ambiguities in wording must be resolved in favour of the First Nations and that any restrictions must be narrowly construed. The Court went on to add that the Crown bears the onus of proving a treaty or Aboriginal right has been extinguished and this must be shown by 'clear and plain intention.' This liberal and flexible approach has included looking beyond the text of the documents to consider the intention of the signatories and the history of the treaty. For example, in the 1998 decision, *R v. Marshall*²⁹, the Court found a right to fish commercially, even though it did not appear in the text of the treaty.

Because of the modern treaty processes, old treaties are being given new life, new treaties are being negotiated and both have constitutional protection.

A Broader Rights Framework

A consideration of treaty-making in Canada requires attention to more than just an overview of historical practices in order to understand the forces that have brought the Canadian government to see treaty making as a way of dealing with First Nations communities and their issues in contemporary Canada. It is important to consider the broader legal frameworks in Canada to understand that treaties and treaty-making are really just one part of a legal framework of rights recognition and protection in that jurisdiction.

There are several other legal mechanisms that can be invoked to protect the rights of First Nations peoples:

- **A Bill of Rights**

Canada has had a constitutional Bill of Rights that existed in legislative form for twenty years before it became enshrined in the Canadian constitution in 1982. This has created a culture of rights and an ability to see others as rights-holding entities. This conceptualisation has facilitated some acceptance for the entrenchment of Indigenous rights in the Canadian constitution.

- **Specific Constitutional Protection**

Constitutional protection of common law and treaty rights of First Nations, Metis and Inuit people occurs through section 35 of the *Constitution Act, 1982*. Aboriginal rights recognised by the common law, including native title interests, and rights derived from treaties have had constitutional protection in Canada since 1982.

Section 35(1) of the *Constitution Act 1982*³⁰ states that:

The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognised and affirmed.

This section provides protection to all Aboriginal rights, whether derived from common law or treaty, if they existed at the time this constitutional amendment was passed. Any rights or interests extinguished before that date have no constitutional protection. The Canadian courts have been careful to emphasise that the section does not create rights but only gives protection to those common law and treaty rights that existed at the passing of the *Constitution Act 1982*.

Protection under this constitutional provision is not absolute. The Canadian Supreme Court has developed a test that delineates the circumstances in which infringement of Aboriginal common law and treaty rights are permissible. In *Sparrow v. The Queen*³¹, the court held that the protection offered by s. 35(1) could be overridden in certain circumstances, namely if the infringing Federal legislation could be 'justified'. The Supreme Court of Canada developed a two-stage test in determining whether s. 35(1) rights could be infringed by Federal legislation. Often referred to as the *Sparrow* 'justification' test, it prescribes that:

- first, the Court consider whether Federal legislation interferes with an Aboriginal or treaty right
- second, if such interference is found, the Court must determine whether the infringement is 'justified'. This involves:
 - considering whether there is a valid legislative objective, and
 - balancing that legislative objective against the special trust relationship between the Government and Indigenous peoples.

The Court has given guidance as to what circumstances would override the s.35(1) protection. These include: development of agriculture, forestry, mining and hydro-electric power, general economic development, protection of the environment or endangered species, and the building of infrastructure³².

• **A Fiduciary Obligation owed by the Crown to Indigenous Peoples**

A recognised fiduciary obligation owed by the Crown to Indigenous people and is based on both the inalienability of native title and the historical relationship of Indigenous people to the Canadian government. Canadian common law recognises that the Crown owes a fiduciary obligation to Aboriginal people. The seed of this obligation lies in the *St. Catherine's Milling case*³³ which noted that all vacant lands were vested in the Crown which had an exclusive right to grant them. Aboriginal peoples did not have the capacity to alienate their land or to confer title to those lands. Chancellor Boyd referred to a trust-like relationship between the Crown and Aboriginal people when he held that reserves and proceeds of reserves, when surrendered or sold, were held by the Crown as Royal Trustee for the Indians. This was interpreted as defining the relationship between the Crown and Aboriginal peoples and their lands as 'a political trust of the highest order'³⁴, but one that gave rise to no legal consequences.

The consideration of the relationship between the Crown and Aboriginal people as one of a political trust altered with the 1984 decision of the Supreme Court of Canada in *Guerin v. The Queen*³⁵. In 1955, the Musqueam Indian Band approved a surrender of land in Vancouver by lease to a golf and country club. The transaction had been discussed with the Band but the Crown's agents concluded the lease on terms not authorised by the Indian Band and on terms much less favourable to them. When the true terms of the lease were disclosed, the Musqueam brought an action for breach of trust and the Supreme Court of Canada found in their favour.

Justice Dickson³⁶ held that the Crown's obligations were not in the nature of a trust, but were 'trust-like'. The nature of Aboriginal title, that is, that it was inalienable except to the Crown, and the provisions of the *Indian Act* that give this feature of Aboriginal title legislative form³⁷ impose certain duties on the Crown which are enforceable by the courts. Justice Dickson described this as a fiduciary duty and concluded that if the Crown breached this duty, it would be liable in the same way and to the same extent as if a legal trust were in effect³⁸.

The fiduciary concept was extended in the 1990 *Sparrow* decision, mentioned above³⁹. In *Sparrow*, the court held that s. 35(1) rights were not absolute rights but can be overridden in certain circumstances, namely if the infringing legislation can be 'justified' on the basis of a two-staged test. This is done by determining whether there is a valid legislative objective in the offending

legislation and balancing that objective against this ‘special trust-like relationship’. This relationship becomes an important element of the ‘justification’ test and comes into play in every judicial consideration of whether a right held by Aboriginal people can be infringed.

This extends the Crown’s obligations beyond the limited area of Aboriginal title to temper the Federal Government's ability to infringe Aboriginal and treaty rights. This has led to a stream of cases that have found that the Crown has a duty to consult with Indigenous peoples before taking actions that may destroy the Indigenous rights. The obligations on the Crown that flow from the trust-like relationship have been extended by the judiciary, particularly to encompass a duty to consult with Aboriginal peoples.

In *R v. Jack*⁴⁰, the court held that there existed a duty to provide the Indian band with full information on conservation measures and their effect on the band, as well as a duty to inform itself of the fishing practices of the band and the band’s views of the conservation measures.

This notion of consultation was extended that same year in *R v. Noel*⁴¹. In that case it was held that consultation requires the Government to carry out meaningful and reasonable discussions with the representatives of the Aboriginal people involved. The fact that the time frame for legislative action is short does not justify the Government pushing forward with the proposed regulation without proper consultation.

A further development in this notion of consultation occurred in *R v. Nikal*⁴². It emphasised that the concept of reasonableness is an integral part of the ‘Sparrow justification test’ and must also come into play in aspects of information and consultation. The need for the dissemination of information and a request for consultations cannot simply be denied by either party. The Court added that so long as every reasonable effort is made to inform and consult, such efforts would suffice to meet the justification requirement.

Although a fiduciary relationship was originally found in *Guerin* to derive from the fact that Aboriginal title is inalienable except to the Crown, the ‘Sparrow justification’ test has expanded the circumstances in which a ‘special trust-like relationship’ between the Crown and Aboriginal peoples is said to exist.

Australian courts have remained undecided about whether a fiduciary obligation is owed by the Crown when dealing with native title interests⁴³ and there has been no acceptance of a more general trust-like relationship. Similarly, there has been no recognised duty to consult owed by the Government when infringing existing native title interests. In fact, the obligation to negotiate with native title holders has been eroded by the *Native Title Amendment Act 1998* (Cth)⁴⁴.

In Canada, this fiduciary obligation has been an impetus for getting the Federal government to the negotiating table. This issue has been a clear motivation for the negotiating of treaties by the federal government and is highlighted in the policy document on the *Inherent Right to Self Government*⁴⁵. That policy document notes the Federal Government expectation that the nature of the fiduciary obligation will alter as Indigenous self-government is achieved.

- **Emphasis on Oral History**

Other streams of Canadian jurisprudence also give greater protection of Indigenous rights and greater deference to Indigenous culture. In particular, there is a common law emphasis on the need to employ flexibility in the rules of evidence to ensure the proper receipt into court of the oral evidence of Indigenous culture and history.

In *Delgamuukw v. British Columbia*⁴⁶, one of the issues before the Supreme Court of Canada was the weight that should be placed on Aboriginal oral history in native title cases.

The majority of the Court held that the factual findings of the trial judge could not stand because of his treatment of various kinds of oral history which ignored the rule in *R v. Van der Peet*⁴⁷ where Chief Justice Lamer had stated:

... a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of Aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in ... the courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform with the evidentiary standards that would be applied [in other areas of the law]⁴⁸.

In the *Delgamuukw* case, Chief Justice Lamer emphasised the need for flexibility when receiving evidence given by Aboriginal witnesses, especially in cases where rights are being asserted. He held that:

Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents.⁴⁹

This emphasis is in stark contrast to developments in Australia. Although the *Mabo* case defined native title as deriving from the customs of Indigenous Peoples, rules of evidence are applied in relation to evidence of these practices. Lower Court judges have discretion on how to deal with Aboriginal oral evidence, and, while this may be done in a sensitive manner in some instances, this is not always the case. The High Court has not yet made a pronouncement on this matter in the same way that the Canadian Supreme Court has.

• **A Comparative Note on Native Title**

There are several aspects to Canadian Aboriginal title that are similar to native title as it was formulated by the High Court of Australia:

- it is inalienable except to the Crown
- it is *sui generis* and not equated with fee simple ownership
- it is held communally.

Aspects of Aboriginal title in Canada that differ from the Australian concept of native title⁵⁰ are:

- modern uses are proof of Aboriginal title so long as they are not inconsistent with traditional uses
- when dealing with the Aboriginal title, the Crown owes the title holders a fiduciary obligation
- Aboriginal title is a right to the land itself, and includes rights to sub-surface minerals.

Lessons for Australia

Although there is much that can be learnt by careful analysis of Canadian treaties and the Canadian treaty process, one question that is often asked is, if treaties have not been successful in Canada, why do should the path of treaty making be followed in Australia?

Despite the shortcomings of the Canadian experience, treaty making can be a useful option as a way forward for Australia if the history of treaty making in Canada is approached from three different directions.

Firstly, it is incorrect to view the Canadian experience as completely negative. Treaty making in Canada provides evidence that:

- Even where treaties have not been enforced, they have provided the basis of a claim when

- there was no other recognised basis.
- Even when treaties have not been enforced or when they have been treated as domestic documents, notions of rights and sovereignty have permeated the dialogue between Indigenous and non-Indigenous Canadians. There has never been the denial of Indigenous sovereignty in Canada that has occurred in Australia. Rights have also been conceptualised in a more holistic way as a result of the treaties. When native title was found to exist as part of the common law in Canada, its extension to hunting and fishing rights was readily accepted because the treaties had always emphasised the inter-relationship between land and livelihood in claims against the Canadian state.
- Treaties have been successful in protecting rights to land and to hunt and fish.
- Governments can recognise an inherent right to self-government and enter into meaningful negotiations with Aboriginal communities to implement it. This process is designed to produce forms of internal self-determination, that is greater autonomy, within Canada.

Secondly, it is important to understand that there is a difference between the historical treatment of treaties in Canada – with the lack of faith in negotiation and failure to fulfil promises – and the modern treaty era which sees parties renegotiating the terms of treaties, and the new, more inclusive treaties being entered into and a more liberal and flexible environment of judicial interpretation of treaties. There are, in Canada today, greater mechanisms for enforcement and protection of treaty rights that have developed in part because of constitutional protection, which has only been in place since 1982. With centuries of colonisation and with racist ideologies embedded in the institutions of the State, there needs to be a longer time to overturn the impediments to rights protection.

The third perspective that the Canadian experience can provide to Australian considerations of a treaty making path are lessons from the mistakes and failures of the process in Canada. Lessons can be learnt for the process, structure, content, status and interpretation of a treaty or treaties in Australia from what has happened to the First Nations of Canada who entered treaties in good faith. To note just three such lessons:

- *The identity impact:* The benefits that flow from a treaty have meant that the issue of band membership is now a contentious one and the difference between status and non-status Indians is a matter of great tension in Aboriginal communities in Canada. A treaty or a series of treaties will bring the issues of identity and qualification for inclusion to the forefront and mechanisms will need to be in place to deal with this emerging phenomena.
- *The need for a broader legal framework to provide a mechanism for enforcement:* One of things that the Canadian experience can teach is that treaties are just one part of a network of mechanisms for rights protection. In seeking to protect a vision in a treaty, consideration must be given to the context in which the treaty is being made and the protection and support it will receive. The Canadian experience might also indicate the need for an independent body to adjudicate a treaty. If the courts can be conceptualised as an arm of the dominant colonial power (and in Canada they actively contributed to the domestication of the treaties), they may not be objective enough to be the arbiters of dispute about interpretation and implementation.
- *Inclusion of the states at the table:* Treaties were traditionally between the First Nations and the Federal Government and s.91(24) of the *Constitution Act 1867* arguably gives full and exclusive power to the Federal Government to negotiate treaties. The *Inherent Right to Self-Government Policy* is concerned that the negotiations now take place between the provinces, Federal Government and First Nations people. This is justified on the basis of the Natural Resource Transfer Agreements that have seen control of natural resources returned to the provinces⁵¹. However, the result is a power shift. It leaves the Federal Government often in the middle ground, rather than the opposition, since the provinces are often more conservative and more antagonistic to the rights of First Nations. This is a clear move away from the Federal Government's exclusive jurisdiction over Aboriginal matters under s.91 (24) of the *Constitution Act 1867*. Inclusion of the provinces at the negotiation table has

meant that the First Nations' bargaining position is eroded. Although we have a different constitutional structure here, it is important that we ensure that any attempt to increase the number of parties at the table is not successful in Australia.⁵²

Our Own Path

The claim that since treaty making was not successful in Canada, it should not be pursued here places much reliance on the Canadian experience in determining Australia's future. It seems to imply that Indigenous people in Australia want a treaty because they have them in Canada. A blind copying of treaty processes and content in Canada is not the motivation for a consideration of a treaty in Australia. To assert so is to belittle and ignore the detailed debates that have occurred and are continuing in Indigenous communities across the country about whether a treaty is the right way forward for the Indigenous rights agenda in Australia.

We are claiming a formal relationship with Australia on our own terms and claiming that, in the Australian context, treaty may be the right way forward. We need to emphasise the fact that we are not uncritically following what is happening in other countries but paving our own way from our own experiences and our own political vision. In forming that pathway, we can be informed by the experiences of other countries and in particular those of the Aboriginal peoples in Canada, but we are not confined by them.

Footnotes:

1. Thanks to Hannah McGlade and Lisa Strelein for reading drafts, discussing ideas and encouragement.
2. Note that the contrary view was taken by Justice Dawson in dissent. He asserted that historical difference made Canadian jurisprudence inapplicable to Australia.

For an overview of recent developments and debates in the international sphere concerning Indigenous policy in Australia see Hannah McGlade, "Not Invited to the Negotiating Table": The *Native Title Amendment Act* (Cth) and Indigenous Peoples Rights to Political Participation and Self Determination under International Law.' *Balayi*. vol.1, no.1, January 2000. At 97-113

3. The Royal Commission on Aboriginal Peoples (RCAP) is available at http://www.inac.gc.ca/ch/rcap/index_e.html. Although the Australian RCIADIC had a specific focus, like the Canadian RACP, it looked at a broad range of factors that contribute to the factors that lead to the over-representation in the criminal justice systems. Both reports look at the socioeconomic statistics of the Aboriginal populations and at the historical context for these interests. Both provide an exhaustive list of recommendations on changing policy, laws and practices that might begin to counter the systemic nature of Indigenous disadvantage. RCAP seems to have had a more pervasive impact than the RCIADIC. It is referred to in judicial decisions and legislative actions more often than its Australian counterpart.
4. *Delgamuukw v. British Columbia* (1997) 3 SCR 1010 and *Sparrow v. The Queen* (1990) 1 SCR 1075.
5. For a more detailed explanation of the differences between Aboriginal sovereignty recognised in other jurisdictions, see Paul Havemann (ed.), *Indigenous Peoples' Rights in Australia, Canada and New Zealand*. Oxford University Press: Oxford, Melbourne, 1999.
6. Including *Aboriginal Land Rights Act 1983* (NSW); *Aboriginal Lands Trust Act 1966* (SA) *Maralinga Tjarutja Land Rights Act 1984* (SA); *Pitjantjatjara Land Rights Act 1981* (SA). Reserves could be set up under *Aboriginal Land Act 1991* (Qld); *Torres Strait Islander Land Act 1991* (Qld); *Aboriginal Lands Act 1995* (Tas); *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Vic). Western Australia made no legislative provision for

- land rights.
7. *Mabo v. Queensland* [No.2] (1992) 175 CLR 1.
 8. The Provinces have no power under the Constitution to legislate on these matters but section 8 of *Indian Act 1985* provides that 'all laws of general application' passed by the Province apply to Indians. Laws such as traffic laws, welfare laws and environmental laws would fall into this category.
 9. The main difference between the removal policy in Canada and its counterpart in Australia was that in Canada children were not removed permanently from their families. While children boarded at the schools during the term, many retained contact with their parents and were returned home during recesses. However, the ideologies propelling the removal policies on both countries were identical.
 10. *St. Catherine's Milling & Lumber Co. v. Regina* (1888) 14 AC 46.
 11. See Sharon Venne, 'Understanding Treaty 6: An Indigenous Perspective', in Michael Ache (ed.) *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference*. Vancouver: University of British Columbia, 1997.
 12. Shin Imai. *Aboriginal Law Handbook*. (2nd edn.) Carswell: Scarborough: Ontario, 1999. At 31.
 13. *R. v. Battisse* (1978) 19 O.R. (2d) 145 (Ont. Dist. Ct.). Cited in Shin Imai. *Aboriginal Law Handbook*. (2nd edn.) Carswell: Scarborough: Ontario, 1999. At 31.
 14. David W. Elliot. *Law and Aboriginal Peoples in Canada*. (3 edn.). North York: Captus Press Inc., 1997. At 39.
 15. Department of Indian and Northern Affairs. *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, Department of Indian and Northern Affairs, Ottawa, 1995.
 16. The Nunavut Land Claims Agreement reached in 1993 provided 17,500 Inuit with 350,000 square kilometres in the North West Territories and provided for the establishment of the Nunavut, a distinct territory under its own government, as soon as possible; it came into being on 1 April, 1999. In addition, it provided for compensation of \$1.17 billion over 14 years and gave the Inuit rights to resource royalties, hunting rights and the management of land and environment. A copy of the Nunavut Land Claims Agreement Act, 1993 is available at: <http://canada2.justice.gc.ca/ftp/en/Laws/Chap/N/N-28.7.txt>.
 17. See Michael Asche, 'From Calder to Van der Feet: Aboriginal Rights and Canadian Law, 1973-1996' in Paul Havemann (ed.). *Indigenous Peoples Rights in Australia, Canada and New Zealand*. Oxford University Press, Oxford, Melbourne, 1999.
 18. Department of Indian and Northern Affairs. *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, Department of Indian and Northern Affairs, Ottawa, 1995. At 3.
 19. *Ibid.* At 3.
 20. This was the approach emphasised by the Court when remitting the case back to trial in *Delgamuukw v. British Columbia* (1997) 3 SCR 1010. *R v. Bob and White* (1964) 50 DLR (2d) 613 confirmed the contemporary Canadian view that Indian treaties do not establish a relationship between two or more sovereign states. A United Nations report by Miguel Alfonso Martinez, 'Study on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations', noted this trend in treating agreements and treaties that were signed on the understanding that they were between sovereign nations as 'domestic' instruments. A copy of the report can be found at: <http://www.treatynow.org>.
 21. *Simon v The Queen* [1985] 2 SCR 387.
 22. *R. v. Badger* [1996] 1 SCR 771.
 23. As per *R. v. Sikyea* (1964) 43 DLR (2d) 150; *R. v. Horseman* [1990] 1 SCR 901; *R. v. Badger* [1996] 1 SCR 771.
 24. The *Sparrow* justification test is elaborated on below.
 25. *R. v. Badger* [1996] 1 SCR 771.

26. *Simon v The Queen* [1985] 2 SCR 387.
27. *A.G. (Quebec) v. Sioui et al.* [1990] 1 SCR 1025.
28. *R. v. Badger* [1996] 1 SCR 771.
29. *R. v. Marshall*, Supreme Court of Canada, September 17, 1999.
30. See Supreme Court of Canada decisions in *Sparrow v. The Queen* (1990) 1 SCR 1075, *R. v. Badger* (1996) 1 SCR 771, and *Delgamuukw v. British Columbia* (1997) 3 SCR 1010.
31. *Sparrow v. The Queen* (1990) 1 SCR 1075.
32. As per Lamer CJ, and Cory, McLachlin and Major JJ. in *Delgamuukw v. British Columbia* (1997) 3 S.C.R. 1010.
33. *Regina v. St. Catherine's Milling and Lumber Co.* (1885) 10 OR 196.
34. *Ibid.*, 213. This decision was approved by the Privy Council in *St. Catherine's Milling and Lumber Co. v. Regina* (1888) 14 AC 46.
35. *Guerin v. The Queen* (1984) 2 SCR 335. As a British Columbian case, common law rather than treaty principles applied.
36. With Justices Beetz, Chouinard and Lamer concurring.
37. Section 18 of the *Indian Act 1952* provided that reserves shall be held by her Majesty for the use of respective Bands for which they were set apart. Lands shall not be sold, alienated, leased or otherwise disposed of until they have been surrendered to the Crown by the Band. Section 18(1) states that:

Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.
- This section remains in the *Indian Act 1985*.
38. *Guerin v. The Queen* (1984) 2 SCR 335, 390.
39. *Sparrow v. The Queen* (1990) 1 SCR 1075.
40. *R v. Jack* (1995) 16 BCLR (3d) 201 CA.
41. *R v. Noel* (1995) 4 CNLR 78.
42. *R v. Nikal* (1996) 1 SCR 1013.
43. As per Justice Kirby in *Thorpe v. Commonwealth* (No.3) (1997) 144 ALR 677 at 688.
44. The right to negotiate held by Aboriginal title holders was eroded in several ways by the *Native Title Amendment Act 1998* (Cth). It reduces the circumstances in which the right to negotiate will apply. Next, it enables the States and Territories to replace the right to negotiate with their statutory schemes in relation to certain areas, for example, reserve land. Further, it is now more difficult for native title holders to satisfy the registration test and thus gain access to the right to negotiate. In addition, provisions in the original Act that provided for good faith negotiations by the government were omitted from the amended Act.
45. *Inherent Right to Self Government Policy*. At 12.
46. *Delgamuukw v. British Columbia* (1997) 3 SCR 1010.
47. *R v. Van der Peet* (1996) 2 SCR 507.
48. *Ibid.*, at para. 68.
49. *Delgamuukw v. British Columbia* (1997) 3 SCR 1010, at para. 87.
50. *Delgamuukw v. British Columbia* (1997) 3 SCR 1010.
51. *The Constitution Act 1930* entrenched the *Natural Resource Transfer Agreements* between the Federal Government of Canada and the Provinces of Manitoba, British Columbia, Alberta and Saskatchewan.
52. *Inherent Right to Self Government Policy*. At 23. The role of the Provinces as perceived by the Federal Government is set out in the policy document in 'Part III: Process Issues' under the heading of 'Establishment of Negotiation Process.' The policy notes that: 'Accordingly, the Government is prepared to enter into negotiations with duly mandated representatives of

Aboriginal groups and the Provinces concerned, in order to establish mutually acceptable processes at the local, regional, treaty or provincial level.’