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GROUND-RULES: INDIGENOUS TREATIES IN CANADA AND NEW ZEALAND

JOHN BORROWS*

Treaties between Indigenous peoples and the Crown in Canada and New Zealand could be seen as vital to each country's creation. If interpreted in their best light they can build each country on principles of cooperation and consent. This perspective would make all people within Canada and New Zealand treaty beneficiaries. To facilitate this view, treaty interpretation should take into account factors beyond their historical genesis. Treaties should be seen as law. They should be interpreted in light of contemporary legal principles which respect Indigenous rights as a part of the rule of law. The alternative to this approach builds Canada and New Zealand on questionable ideas of discovery, occupation, adverse possession and conquest. Treaties provide an alternative access to ideas surrounding national formation and reformation. They can be regarded as among our highest laws and could strengthen and enrich Canada and New Zealand if viewed in this light.

1. Treaty distinctiveness in Canada and New Zealand

Indigenous laws and protocols facilitated treaties between First Nations in early North American legal relationships.¹ Subsequently, Indigenous laws were also instrumental in constructing treaties with people from other continents.² For example, various European powers transacted treaties with the Iroquois in accordance with Haudenosaunee legal traditions.³ The French entered into

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1 Victor Lytwyn, "A Dish with One Spoon: The Shared Hunting Grounds Agreement in the Great Lakes and St Lawrence Valley Region" in David H Pentland (ed), *Papers of the 28th Algonquian Conference* (1997) 210-227.

2 Robert Williams Jr, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (1997).

3 M A Druke, "Linking Arms: The Structure of Iroquois Intertribal Diplomacy" in Daniel K Richter and James H Merrell (eds), *Beyond the Covenant Chain: The Iroquois and Their Neighbors in Indian North America, 1600-1800* (1987); L M Feister, "Linguistic Communication between the Dutch and Indians in New Netherland," (1973) 20 *Ethnohistory* 25; W N Fenton, "Structure, Continuity, and Change in the Process of Iroquois Treaty Making" in Francis Jennings et al (eds), *The History and Culture of Iroquois Diplomacy: An Interdisciplinary Guide to the Treaties of the Six Nations and Their League* (1985); M K Foster, "Another Look at the Function of Wampum in Iroquois-White Councils," in Jennings et al (eds), *ibid*, 99-114; R L Haan, "Covenant and Consensus: Iroquois and English, 1676-1760," in Daniel K Richter and James H Merrell (eds), *ibid*, 41-57; N L Hagedorn, "'Faithful, Knowing, and Prudent': Andrew Montour as Interpreter and Cultural Broker, 1740-1772" in Margaret Connell Szasz (ed), *Between Indian and White Worlds: The Cultural Broker* (1994), 44-60; N L Hagedorn, "'A Friend to Go Between Them': The Interpreter as Cultural Broker during Anglo-Iroquois Councils" (1988) 35 *Ethnohistory* 60; F Jennings, "The Constitutional Evolution of the Covenant Chain" (1971) 115 *Proceedings of the American Philosophical Society* 88; P Marshall, "Colonial Protest and Imperial Retrenchment: Indian Policy, 1764-1768" (1971) 5 *Journal of American Studies* 1; M N McConnell, "Pisquetomen and Tamaqua: Mediating Peace in the Ohio Country" in Robert S

treaties with Aboriginal peoples of the northern Great Lakes using Anishinabek ideas and ceremonies.⁴ The British Crown secured Peace and Friendship agreements with the Mi'kmaq, Maliseet and Passamaquoddy Nations in what is now Atlantic Canada by following Indigenous protocols, procedures and practices.⁵ In 1764, when the British secured a stronger place in the heart of North America after the Seven Years War,⁶ they also used Indigenous legal traditions to create solemn commitments with First Nations.⁷ There have since been over 500 treaties in Canada.⁸ Many of these agreements draw on some form of Indigenous legal tradition, even in later eras when Aboriginal peoples enjoyed less political influence. Indigenous laws, legal perspectives and other frameworks have been present throughout much of the treaty-making process in Canada.⁹

When the Treaty of Waitangi was established between Māori and the Crown in New Zealand it was presented to accord with the parties' highest laws.¹⁰ The Treaty of Waitangi contained, *inter alia*, reference to sovereignty,

Grumet (ed), *Northeastern Indian Lives, 1632-1816* (1996) 273-294; Jon Parmenter, "L'arbre De Paix: Eighteenth-Century Franco-Iroquois Relations" (2003) 4 *French Colonial History* 63; D K Richter, "Native Peoples of North America and the Eighteenth-Century British Empire" in Wm Roger Louis (ed), *The Oxford History of the British Empire*, vol II: *The Eighteenth Century* (1998) 347-364; D K Richter, "Cultural Brokers and Intercultural Politics: New York-Iroquois Relations, 1664-1701" (1988) 75 *Journal of American History* 40; A F C Wallace, "Origins of Iroquois Neutrality: The Grand Settlement of 1701" (1957) 24 *Pennsylvania History* 223; Cynthia J VanZandt, "Mapping and the European Search for Intercultural Alliances in the Colonial World" (2003) 1(2) *Early American Studies* 72; R White, "'Although I am dead, I am not entirely dead. I have left a second of myself': Constructing Self and Persons on the Middle Ground of Early America" in Ronald Hoffman, Michel Sobel, and Fredrika J Teute (eds), *Through a Glass Darkly: Reflections on Personal Identity in Early America* (1997) 404-418.

- 4 Gilles Havard, *The Great Peace of Montreal of 1701: French Diplomacy in the Seventeenth Century*, translated by Phyllis Aronoff and Howard Scott (2001).
- 5 Sakej Henderson, *The Mi'kmaq Concordant* (1997). For a general history of these treaties, see William Wicken, *Mi'kmaq Treaties on Trial* (2002); Thomas Issac, *Aboriginal and Treaty Rights in the Maritimes: The Marshall Decision and Beyond* (2001).
- 6 Francis Jennings, *Empire of Fortune: Crowns, Colonies and Tribes in the Seven Years War in America* (1990); Seymour Schwartz, *The French and Indian War, 1754-1763: The Imperial Struggle for North America* (1994).
- 7 J Borrows, "Wampum at Niagara: The Royal Proclamation and First Nations Governance" in Michael Asch (ed), *Aboriginal and Treaty Rights in Canada* (1997); C Miller, "Gifts as Treaties: The Political Use of Received Gifts in Anishinaabeg Communities" (2002) *The American Indian Quarterly* 221.
- 8 For the text of many of these treaties, see *Canada: Indian Treaties and Surrenders, from 1680-1890* (Ottawa, Printer to the Queen's Most Excellent Majesty, 1891-1912; reprinted Toronto, Coles, 1971).
- 9 Arthur Ray, J R Miller and Frank Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (2000) 1-31; David Murray, *Indian Giving: Economies of Power in Indian-White Exchanges* (2000); Richard Price (ed), *The Spirit of the Alberta Indian Treaties* (1980); Sylvia Van Kirk, *Many Tender Ties: Women in Fur-Trade Society, 1670-1870* (1980); W Duff, "The Fort Victoria Treaties" (1969) 3 *BC Studies* 3; Janice Knighton, *The Oral History of the 1852 Saanich Douglas Treaty: A Treaty for Peace* (MA thesis, University of Victoria BC, August 2004); Dave Elliot Sr, *Saltwater People, as Told by Dave Elliot Sr*, Janet Poth (ed) (Saanich, Saanich School District 63, 1983).
- 10 E T Durie, "Will the Settlers Settle? Cultural Conciliation and Law" (1996) 8 *Otago Law Review* 449, 460-461; Moana Jackson, "Maori Law, Pakeha Law and the Treaty of Waitangi" in R Young (ed), *Mana Tiriti: The Art of Protest and Partnership* (1991) 14; F M

kāwanatanga, exclusive and undisturbed possession, taonga, rangatiratanga, rights, privileges and protection.¹¹ Throughout 1840 the Treaty was taken many places throughout the land to construct agreements around Māori and Pākehā legal concepts.¹² Since it spoke of future relationships, the Treaty of Waitangi formed the implied terms and conditions for subsequent agreements between the Crown and Māori people.¹³ Thus, the Treaty of Waitangi is relevant to further agreements signed after 1840.¹⁴ Though contested in their precise meanings,¹⁵ Treaty standards have received recognition and affirmation by Māori groups, Courts and Parliament at various times throughout history.¹⁶ While some believe the Treaty of Waitangi does not create legal rights and obligations except where given effect by legislation,¹⁷ this could change as New Zealand continues to develop as a country Indigenous to its territory.¹⁸ The Treaty of Waitangi is a “part of the fabric of New Zealand society”¹⁹ and is de facto functioning in a constitutional manner.²⁰ The Treaty’s standards can provide a common reference point in New Zealand’s ongoing creation, thus holding great potential for mediating problems between peoples.²¹

Brockfield, “Waitangi and the Legal Systems of Aotearoa New Zealand: Conflict and Change” in Michael Belgrave, Merata Kawharu and David Williams (eds), *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2005) 349.

- 11 See Richard Dawson, *The Treaty of Waitangi and the Control of Language* (2001).
- 12 For further discussion, see Claudia Orange, *The Treaty of Waitangi* (1987); generally I Kawharu (ed), *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (1989).
- 13 Waitangi Tribunal, *Rekohu: A Report on Moirori and Ngati Mutunga Claims in the Chatham Islands* (2001) 145.
- 14 Richard Boast, *A New Zealand Legal History* (2001) 134; Vincent O’Malley, “Treaty Making in Early Colonial New Zealand” (1997) 33 *NZ Journal of History* 137.
- 15 Michael Belgrave, *Historical Frictions: Maori Claims and Reinvented Histories* (2005); R M Ross, “Te Tiriti O Waitangi: Texts and Translations” (1972) 6 *NZ Journal of History* 129; Ruth Ross, “The Treaty on the Ground” in *The Treaty of Waitangi: Its Origins and Significance: A Series of Papers Presented at a Seminar Held at Victoria University of Wellington, 19-20 February, 1972* (Wellington, Department of University Extension, 1972).
- 16 *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA); Treaty of Waitangi Act 1975, ss 6(1)(d) and 8(1); State Owned Enterprises Act 1986, s 9; Conservation Act 1987, s 4; Education Act 1989, s 181(d); Maori Fisheries Act 1989, s 6(e)(2)(B); Crown Minerals Act 1991, s 4; Resource Management Act 1991, s 8; Land Management Act 2003, s 4.
- 17 *Heuheu Tukino v Aotea District Maori Land Board* [1939] NZLR 107, 120 (CA); [1941] NZLR 590, 596-597.
- 18 M Durie, “A Framework for Considering Constitutional Change and the Position of Maori in Aotearoa” in Colin James (ed), *Building the Constitution* (2000), 414; A Tunks, “Mana Tiriti” in L Trainor (ed), *Republicanism in New Zealand* (1996) 112. For a contrary view, see James Allen, “No to a Written Constitution” in Colin James (ed), *Building the Constitution* (2000). For a cautious view of Treaty entrenchment, see Paul McHugh, “Tales of Constitutional Origin and Crown Sovereignty in New Zealand” (2002) 52 *University of Toronto Law Journal* 69.
- 19 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 201.
- 20 Andrew Sharpe, “The Treaty in the Real Life of the Constitution” in Michael Belgrave, Merata Kawharu and David Williams (eds), *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2005) 308-329.
- 21 Patrick Snedden, *Pakeha and the Treaty: Why it’s Our Treaty Too* (2005).

This potential is present despite numerous treaty breaches by the Canadian and New Zealand Crowns.²² The profound history of painful and oft-times treacherous dispossession behind treaty implementation should never be overlooked.²³ To ignore, excuse or forget this tragic legacy would dishonour those who suffered and potentially run the risk of repeating our history.²⁴ We must learn from our past, even as we attempt to build better futures by drawing on its brighter moments. Honouring treaties is not about envisioning a utopian, heroic or mythic golden age; there was no such time in either country's past. Honouring treaties is about taking responsibility for our history, and constructing the rule of law from that experience based on the best available (and most persuasive) sources. Notwithstanding the many and often grievous flaws in treaty design and implementation, treaties are usually better than other available alternatives for constructing our respective countries.²⁵ Treaties can build our nations on the footing of consent rather than the violence of presumed military or cultural conquest. They establish ground-rules for future interactions with the lands and people. They provide a stronger normative base for creating and re-creating Canada and New Zealand than the morally inferior justifications of discovery, occupation and adverse possession, which assumes the inferiority of Indigenous populations relative to the Crown.

Indigenous peoples pledged their most sacred honour to abide by these treaties' terms in numerous negotiations. The Crown likewise promised they would honour the agreements in accordance with their highest principles. Each party referenced their own laws in reaching an accord.²⁶ The treaties did not

22 See the numerous reports of the Waitangi Tribunal. A representative sample includes: *Finding on the Waitangi Tribunal on the Kaituna Claim* (1984); *Findings of the Waitangi Tribunal on the Manukau Claim* (1985); *Findings of the Waitangi Tribunal Relating to Te Reo Incorporated Society (The Wellington Board of Maori Language)* (1986); *The Fisheries Settlement Report (Wai 307)* (1992); *The Mohaka Ki Ahurri Report (Wai 201)* (2004); *Muriwhenua Land Report* (1997); *The Ngai Tahu Report (Wai 27)* (1991); *Report of the Waitangi Tribunal on a Claim made by JP Hawke and Others of Ngati Whatua Concerning the Fisheries Regulations (Wai 1)* (2nd ed, 1989); *Report of the Waitangi Tribunal on the Orakei Claim (Wai 9)* (1987); *The Taranaki Report: Kaupapa Tuatahi (Wai 143) Muru Me Te Raupatu, the Muru and Raupatu of the Taranaki Land and People* (1996); *The Te Roroa Report, 1992 (Wai 38)* (1992); *Te Whanaganui a Tara Me Ona Takiwa: Report on the Wellington District*, (2003). Waitangi Tribunal Reports are accessible at <<http://www.waitangi-tribunal.govt.nz/reports>>.

For a Canadian overview of treaty breaches, see Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment* (1995); Royal Commission on Aboriginal Peoples, *Final Report: Looking Forward, Looking Back*, vol 1 (1996) ch 6.

23 The manipulation of history is a characteristic of totalitarianism; see George Orwell, *1984* (1984).

24 For an excellent treatment of the problem of forgetting or mythologising history, see Erna Paris, *Long Shadows: Truth, Lies and History* (2000). For the importance of remembering, see Henry Reynolds, *Why Weren't We Told: A Personal Search for the Truth About History* (2000); Iris Chang, *The Rape of Nanking: The Forgotten Holocaust of World War II* (1997); Samatha Power, *A Problem From Hell: America in the Age of Genocide* (2002); Anthony Hall, *The American Empire and the Fourth World* (2003).

25 James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995).

26 For example, in the first year of Canada's confederation the Quebec Superior Court affirmed the existence of Cree law on the Prairies and recognised it as part of the common law. Justice Monk arrived at this conclusion in *Connolly v Woolrich* (1867) 17 RJRQ 75, 79 (Quebec

erase the pre-existing laws of each party, though they did introduce a new legal framework to govern the relationship between these laws.²⁷ While Indigenous peoples would continue to make and remake their laws within their communities,²⁸ and the imperial Crown would implement its own laws within its jurisdiction,²⁹ the treaties contemplated the creation of a new body of overarching laws on an inter-societal basis.³⁰ This structure could permit all

Superior Court), affirmed as *Johnstone v Connolly* (1869) 17 RJRQ 266 (Quebec Queen's Bench), and wrote:

Will it be contended that the territorial rights, political organization such as it was, or the laws and usages of Indian tribes were abrogated — that they ceased to exist when these two European nations began to trade with [A]boriginal occupants? In my opinion it is beyond controversy that they did not — that so far from being abolished, they were left in full force, and were not even modified in the slightest degree ...

For the place of Māori law in Aotearoa, see Ani Mikaere, “The Treaty of Waitangi and Recognition of Tikanga Mao” in Michael Belgrave, Merata Kawharu and David Williams (eds), *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2005) 330.

- 27 In *R v Vanderpeet* [1996] 2 SCR 507, 546, Chief Justice Lamer of the Supreme Court of Canada wrote that Aboriginal rights are a “form of intersocietal law that evolved from long-standing practices linking the various communities”. Treaties are a part of this sui generis legal order. In *Vanderpeet* the Court stated:

The challenge of defining [A]boriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly different legal cultures; consequently there will always be a question about which legal culture is to provide the vantage point from which rights are to be defined ... a morally and politically defensible conception of rights will incorporate both legal perspectives.

See also Whata Winiata, “How Can or Should the Treaty Be Reflected in Institutional Design” in Colin James (ed), *Building the Constitution* (2000) 205; Alex Frame, *Grey and Iwikau/Kerei Raua Ko Iwikau: A Journey into Custom/Te Haerenga Me Nga Tikanga* (2002).

- 28 The Treaty Elders of Saskatchewan expressed these views in working with Harold Cardinal and Walter Hildebrandt over the past few years; see Harold Cardinal and Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is that Our Peoples Will One Day Clearly Be Recognized as a Nation* (2000). In summing up their experience, Cardinal and Hildebrandt wrote, at pp 6-7:

In view of the Elders, the treaty nations — First Nations and the Crown — solemnly promised the Creator that they would conduct their relationship with each other in accordance with the laws, values and principles given to them by the Creator. Treaty 6 Elder Norman Sunchild stated “When [Treaty 6 First Nations] finally agreed to the treaty, the Commissioner took the promises in his hand and raised them to the skies, placing the treaties in the hands of the Great Spirit”. Elder Jacob Bill of Treaty 6 also commented “It was the will of the Creator that the White man would come to live with us, among us, to share our lives together with him, and also both of us collectively to benefit from the bounty of Mother Earth for all time to come”.

For a discussion of the use of Māori law in Māori governance, Tikanga, in Aotearoa see Caren Wickcliffe and Matui Dickson, “Maori and Constitutional Change” (1999) 3 Yearbook of New Zealand Jurisprudence 9.

- 29 The Constitution Act 1867 (UK) sets out the powers of the federal and provincial governments in Canada. Further information about the Crown's perspective is found in Arthur Ray, JR Miller and Frank Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (2000). See also David Williams, “The Constitutional Status of the Treaty of Waitangi: An Historical Perspective” (1990) 14 NZULR 9.
- 30 The Supreme Court of Canada has written: “the law of aboriginal rights is ‘neither English nor aboriginal in origin: it is a form of intersocietal law that evolved from long-standing practices linking the various communities’”: *R v Vanderpeet* [1996] 2 SCR 507, para 42, citing Brian Slattery, “The Legal Basis of Aboriginal Title” in Frank Cassidy (ed), *Aboriginal Title in British Columbia: Delgamuukw v The Queen* (1992) 120-21. Elder Jacob Bill of

who live under treaties to become “one people”, harmonising a nation’s unity with its diversity.³¹

This is an ambitious aspiration. Nations struggle to solve problems of cultural, social, linguistic, political and religious difference. Many fail because of difficulties establishing common frameworks to guide effective dispute resolution. They often lack historical protocols, conventions, or traditions of communication or cooperation in dealings among diverse populations. As a result, countries struggle to establish better regimes without the advantage of reciprocal roots to cultivate intercultural understanding and association. While some attempt to plant entirely new cultures to revolutionise how people will relate to one another in society,³² most simply lack support from across the political field to produce such radical change. Thus, they are left with the arduous project of generating effective systems without ideas or institutions that have a shared resonance for disparate groups.

Canada and New Zealand can be different. While treaties between Indigenous peoples and the Crown have many rationales,³³ subject to cross-cutting interpretations and debate,³⁴ one of their primary purposes was to promote peace and order across cultures.³⁵ This objective makes them

Treaty 6 commented: “It was the will of the Creator that the White man would come to live with us, among us, to share our lives together with him, and also both of us collectively to benefit from the bounty of Mother Earth for all time to come”: Cardinal and Hildebrandt, above n 28, p 7.

- 31 When Governor Hobson signed the treaty he shook the hand of each of the original 43 Māori signatories and said: “*He iwi tahi tatou* — We are now all one people.” Sakej Henderson has called this concept “Treaty Federalism”, see J S Y Henderson, “Empowering Treaty Federalism” (1994) 58 *Saskatchewan Law Review* 241.
- 32 David Hume, *A Treatise on Human Nature*, L A Selby-Bigge and P H Nidditch (eds), (2nd ed, 1978) Book III, Part II, s ii, p 489.
- 33 For critiques of the Treaty of Waitangi, see Stuart Scott, *The Travesty of Waitangi: Towards Anarchy* (1995); David Round, *Truth or Treaty: Commonsense Questions About the Treaty of Waitangi* (1998); Kenneth Minogue, *Waitangi: Morality and Reality* (1998). For a critique of Scott’s work, see P G McHugh, “A history of Crown sovereignty in New Zealand” in A Sharp & P G McHugh (eds), *Histories, Power and Loss* (2001) 248, n 46.
- 34 Ruth Ross writes: “the Treaty of Waitangi was hastily and inexpertly drawn up, ambiguous and contradictory in content, and as a freestanding contract entirely unenforceable”: R M Ross, “Te Tiriti O Waitangi: Texts and Translations” (1972) 6 *NZ Journal of History* 129. See also J G A Pocock, “Law, Sovereignty and History in a Divided Culture: The Case of New Zealand and the Treaty of Waitangi (1998) 43 *McGill Law Journal* 481.
- 35 The English Text of the Treaty of Waitangi reads: “HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of *Peace and Good Order*.” (Emphasis added.) The translation by Sir Hugh Kawharu of the Māori text reads: “Victoria, the Queen of England, in her concern to protect the chiefs and the subtribes of New Zealand and in her desire to preserve their chieftainship and their lands to them and to maintain *peace and good order* considers it just to appoint an administrator one who will negotiate with the people of New Zealand to the end that their chiefs will agree to the Queen’s Government being established over all parts of this land and (adjoining) islands and also because there are many of her subjects already living on this land and others yet to come.” (Emphasis added.) The Māori text to the Treaty uses the word “rongo” which implies peace and goodwill. The texts of the Canadian Numbered treaties contain peace and order clauses.

important to these countries' formation and continual reformation.³⁶ Canadians and New Zealanders are fortunate to have historic agreements that can provide mutually recognised conventions for dispute resolution between peoples. Treaties can provide a strong normative platform for solving challenges relating to difference.³⁷ It is credible to regard our countries as initially being created through multi-juridical meetings that attempted to mediate disparate differences.³⁸ On this view, people from diverse cultures can benefit from a shared context of political, social and legal connectivity, while maintaining respect for their differences. Much of the world is not founded on such high ideals.

Without treaties we might be like the people of Guatemala, in principle *not* circumstance.³⁹ Guatemala has no shared body of intercultural law to allow Indigenous peoples to flourish together with others within that country. This may be one reason why two million Indigenous peoples were displaced or disappeared through the past two decades.⁴⁰ Alternatively, we might be like the people of South Africa,⁴¹ Russia,⁴² Nicaragua⁴³ or Thailand,⁴⁴ again in principle but not circumstance. These States have all struggled to build societies with Indigenous peoples based on participatory or consensual legal frameworks. Closer to home, we might be like Australians striving to come to grips with laws that hold the taking of Aboriginal land without agreement was "unjust and discriminatory".⁴⁵ Or, we might be like Canadians in areas where treaties

36 While this article draws comparisons between Canada and New Zealand for the purpose of regarding treaties as founding acts, the social, political and legal differences between each country mean that treaty interpretation and implementation will not be the same within each country. This article should be understood as examining the normative foundations of Crown/Indigenous relationships.

37 Judge David Arnot, "Treaties as a Bridge to the Future" [2001] UNBLJ 58.

38 Paul Moon and Peter Biggs, *The Treaty and its Times: An Illustrated History* (2004).

39 In principle, not circumstance, because conditions are collectively much worse for Indigenous people in Guatemala — in terms of life expectancy, poverty and violence — than in Canada or New Zealand.

40 Jonathan Moller et al, *Our Culture Is Our Resistance: Repression, Refuge, and Healing in Guatemala* (2004); Daniel Wilkinson, *Silence on the Mountain: Stories of Terror, Betrayal, and Forgetting in Guatemala* (2004).

41 *Richtersveld Community v Alexkor Ltd* 2001 (3) SA 1293 (Land Claims Court, 22 March 2001); *Richtersveld Community v Alexkor Ltd* (unreported, Supreme Court of Appeal, 24 March 2003); *Alexkor Ltd v Richtersveld Community* (unreported, Constitutional Court of South Africa, 14 October 2003); Marcia Berry, "Now Another Thing Must Happen: Richtersveld and the Dilemma of Land Reform in Post-Apartheid South Africa" (2004) 20 *South Africa Journal on Human Rights* 355.

42 See, generally, James Forsyth, *A History of the Peoples of Siberia: Russia's North Asian Colony, 1581-1990* (1992); Yuri Slezkine, *Arctic Mirrors: Russia and the Small Peoples of the North* (1996).

43 *The Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Inter-Am Ct HR (Ser C) No 66 (2000); S James Anaya and Claudio Grossman, "The Case of Awas Tingni v Nicaragua: A New Step in the International Law of Indigenous Peoples" (2002) 19 *Ariz J Int'l & Comp Law* 1.

44 R H Barnes, A Gray, and B Kingsbury (eds), *Indigenous Peoples of Asia* (1995).

45 *Mabo v Queensland* (1992) 175 CLR 1. See the work of Henry Reynolds chronicling non-Indigenous historical views about the legality and morality of colonisation, *The Law of the Land* (3rd ed, 2003). For attempts to move Australia towards a treaty framework, see Sean

have not yet been secured. For example, most British Columbians live on First Nations' lands without First Nations' permission.⁴⁶ They live there because of the unmitigated force of colonialism — a violence that displaced people from their land without their participation or consent. It is not peaceful to live in such a state; there is much uncertainty.⁴⁷ This is one of the reasons treaties are being negotiated within the province today.⁴⁸ Of course, one should acknowledge that other parts of Canada and New Zealand also have colonial elements and face uncertainty in their relationships, even with treaties. However, colonialism can be more effectively undermined through treaties, if their spirit and intent was acknowledged and implemented. Peace and order could be created, extended or restored if people applied their highest principles.

2. *Treaties: A higher law*

Treaties between the Crown and Indigenous peoples can be a vital part of Canada's and New Zealand's political and legal geology. They could be said to underlie the countries' political orders because they allowed for settlement and development of large portions of country, while at the same time promising certainty for Indigenous peoples' possession, governance and livelihood. They are also crucial because they can implement Indigenous law by grounding Indigenous peoples' deepest obligations to the Creator and others in a framework of reciprocity and mutual exchange.⁴⁹

These promises are relevant in the contemporary context. In Canada they received protection through section 35(1) of the Constitution Act 1982, which proclaims the "existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognised and affirmed".⁵⁰ The identification of treaties as occupying a prominent place in the country's legal hierarchy can constrain government action that does not have a valid objective or sustain the honour of the Crown.⁵¹ The constitutional entrenchment of treaty rights can provide

Brennan et al, *Treaty* (2005) (reviewed in this issue of *New Zealand Universities Law Review*); Marcia Langton et al, *Honour Among Nations: Treaties and Agreements with Indigenous Peoples* (2004); Australian Institute of Aboriginal and Torres Strait Islanders Studies, *Treaty: Let's Get it Right* (2003).

46 Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia 1849-1989* (1989).

47 Roslyn Kunin, *Prospering Together: The Economic Impact of Treaty Settlements in British Columbia* (2nd ed, 2001).

48 Christopher Mckee, *Treaty Talks in British Columbia* (2nd ed, 2000).

49 Cardinal and Hildebrandt, above n 28, pp 6-7.

50 Constitution Act 1982, RSC 1985 (Canada); Canada Act 1982 (UK), c 11.

51 *R v Badger* [1996] 1 SCR 771; *R v Marshall* [1999] 3 SCR 456; *R v Marshall II* [1999] 4 CNLR 301. Contrast these protections with the situation in Canada that existed prior to 1982. Lord Watson held in *Attorney-General of Ontario v Attorney-General of Canada: Re Indian Claims* [1897] AC 199, 213 (PC):

Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities ... beyond a promise and agreement, which was nothing more than a personal obligation by its governor.

Prior to 1982 the Crown could easily ignore treaty promises by failing to perform treaty obligations or by passing inconsistent legislation.

significant protection. However, treaties' high placement in Canada's legal regime is also important because it helps them operate as more than just constraints on political actors. With their secure legal status, though subject to justifiable infringement, treaties can actually facilitate government activities, and provide a firmer base for building harmonious relations.⁵² A view of treaties as both limiting and authorising activity is an important perspective to remember when considering our countries' creations.

In New Zealand, the Treaty of Waitangi also occupies a place of high prominence.⁵³ Parliament has implemented its principles through numerous pieces of legislation.⁵⁴ Courts and tribunals have recognised the Crown's duty of active protection and duty to remedy past breaches.⁵⁵ Unfortunately the seabed and foreshore controversy shows the vast gulf that can exist between Treaty ideals and practice.⁵⁶ Recent efforts towards extinguishing Māori rights deviate from standards of participation and consent in creating legal relationships where pre-existing rights are present in Aotearoa.⁵⁷ Ironically, however, if the foreshore and seabed rights now purportedly extinguished were protected within the Treaty, Parliament's actions demonstrate that the Treaty exerts de facto constraints on the Crown: Parliament can not act contrary to the Treaty without clear and plain legislative expressions⁵⁸ (though some would argue Parliament should not even be able to act in this respect).⁵⁹ Alternatively, if foreshore and seabed right existed as reserved rights outside of the Treaty (because the Treaty was silent with respect to them), Parliament's Foreshore and Seabed Act 2004 recognised and affirmed a parallel Indigenous source of law within the country.⁶⁰ Inherent, pre-existing Māori rights can create legal

52 Judge David Arnot, above n 37, p 59.

53 It might even be said the Treaty of Waitangi is a constitutional document if we regard it as affecting Crown sovereignty. As Dicey wrote: "Constitutional law, as the term is used in England, appears to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state." A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1960) 23. For a document recognising the Treaty of Waitangi as part of New Zealand's Constitution, see New Zealand Cabinet Office, *Cabinet Manual 2001* (Wellington, 2001) 1-6, available at <<http://www.dpmc.govt.nz/Cabinet/manual/intro.html>> (last accessed 18 May 2006).

54 See Janine Hayward, "Flowing From the Treaty's Words: The Principles of the Treaty of Waitangi" in J Hayward and N Wheen (eds), *The Waitangi Tribunal — Te Roopu Whakamana I te Tiriti o Waitangi* (2004) 29.

55 *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA).

56 Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, Wai 1071 (2004); Claire Charters and Andrew Erueti, "Report from the Inside: The CERD Committee's Review of the Foreshore and Seabed Act 2004" (2005) 36 *Victoria University of Wellington Law Review* 257.

57 United Nations Committee on the Elimination of All Forms of Racial Discrimination, "Decision 1(66): New Zealand Foreshore and Seabed Act 2004" (11 March 2005) CERD/C/66/NZL/Dec.1.

58 *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, 691-692 (HC); *Te Runanga o Muriwhenua v Attorney-General* [1990] 2 NZLR 641, 655 (CA); *Attorney-General v Ngati Apa* [2003] 3 NZLR 643, 684.

59 A Tunks, "Mana Tiriti" in Luke Trainor (ed), *Republicanism in New Zealand* (1996) 113-132.

60 For further discussion of the presence of Māori Law within the wider New Zealand legal system, see New Zealand Law Commission, *Maori Custom and Values in New Zealand Law*

relationships and obligations in Aotearoa that constrain Parliament,⁶¹ though again it is widely believed they can be overturned by clear and plain legislation.⁶² Either way, Māori laws and customs continue to exist inside or outside the Treaty and thus create pre-existing constraints on the Crown, demonstrating their high placement within the country's legal hierarchy.

3. Identifying treaty beneficiaries

In exploring the reserved rights nature of treaties in greater depth, it is important to remember who the beneficiaries are under such agreements. Most discussions of this issue have focused on Indigenous peoples' rights under the treaties. For example, people have debated the meaning of Indigenous rights to education, treasures, and intellectual property.⁶³ There has also been much focus on Indian rights to fish, hunt, log, mine, and receive assistance through money, goods, or services.⁶⁴ While these are important inquiries, they miss a fundamental aspect of the treaty relationship. *Indigenous peoples are not the only beneficiaries under the treaties. Non-Indigenous peoples also have treaty rights.* As the Supreme Court of the United States recognised in the *Winans* case: "treaty rights are a grant of rights *from* the Indians, not *to* the Indians".⁶⁵

This approach to treaties implies non-Indigenous peoples received rights in Canada and New Zealand from a grant to the Crown by the Indians (as well as other sources such as Crown prerogative, the common law and imperial legislation). Both groups are recipients of promises and bearers of obligations made in the negotiation process; both have treaty rights and responsibilities. As noted, this mutuality is frequently overlooked because Indigenous peoples are most often striving to assert their rights. The Crown has had an easier time because they control the legislative and judicial processes. However there are a number of potential inheritors of treaty rights beyond Indigenous nations: iwi, hapu, bands and individuals. The Canadian and New Zealand Crowns certainly received many benefits from the treaties. Their citizens were able to settle and develop large parts of the country with the prior residents' permission. Non-Indigenous people could trace many of their entitlements to the consent granted to the Crown by Indigenous peoples in the treaty process.

Yet, the notion that non-Indigenous peoples might trace certain rights to land or governance through the treaties is, for many, still an emergent concept. Because people have not been exposed to Indigenous treaty perspectives, or have not had the time to learn about them, they are only now considering them in this light.

(NZLC SP9, Wellington, 2001); Moana Jackson, "Justice and Political Power: Reasserting Maori Legal Processes" in Kayleen M Hazelhurst (ed), *Legal Pluralism and the Colonial Legacy* (1995).

61 Moana Jackson, *Self-Determination: The Principle and the Process* (2002).

62 Richard Boast, *Foreshore and Seabed* (2005) 45.

63 D Opekokew and A Pratt, "The Right to Treaty Education in Saskatchewan" (1992) 12 Windsor Yearbook of Access to Justice 3; Graeme Austin, "Re-Treating Intellectual Property? The WAI 262 Proceeding and the Heuristics of Intellectual Property Law" (2003) 11 Cardozo J of Int'l & Comp L 333.

64 S Grammond, "Aboriginal Treaties and Canadian Law" (1994) 20 Queen's Law Journal 57-87.

65 *United States v Winans* 198 US 371 (1905) (USSC).

For example, Professor Noel Lyon, who taught for thirty years at Queen's Law School in Kingston, Ontario, Canada, illustrated this point after listening to First Nations elders in Saskatchewan. He said:⁶⁶

Over the last couple of days as I've listened to the Elders, I have begun to understand that what I've learned about Aboriginal peoples and their situation in Canada has largely come from written sources, from books, and there are a lot of things that were embedded in my legal education that I haven't overcome. The most important one, I think, is that law school indoctrinated me with the belief that the Crown is all powerful, and I think that's a real problem, because I think legal education has a tendency to regard the Crown almost in the way that the First Nations people regard the Creator — as being the source of all things. And from that flows the proposition that the treaties are seen by the non-Aboriginal community as just another body of laws that define the status and rights of Aboriginal peoples, rather than seeing the treaties as a nation-to-nation partnership, intersocietal law. ... It had never occurred to me until Elder Crowe said this yesterday or the day before, that the right of the "white" people to be on this land is founded in the treaty.

Justice Eddie Durie expressed this sentiment in a similar way when he said: "We must remember that if Māori are the *tangata whenua*, the original people, then Pākehā are the *tangata Tiriti*, those who belong to the land by right of the Treaty".⁶⁷ Professor David Williams has called it a "parity covenant".⁶⁸

Some may still only weakly understand the mutuality upon which the treaty relationship might be built. Though some courts have recognised the reserved rights nature of treaties,⁶⁹ and while governments are once again speaking as if treaties are reciprocal agreements,⁷⁰ people outside of these circles may not

66 To its credit, the Saskatchewan Office of the Treaty Commissioner recognised this gap in understanding, and highlighted the mutuality of the treaty relationship in its 1998 report in the following terms:

The people of Saskatchewan can benefit from learning more about the historical events associated with the making of the treaties as they reveal the mutual benefits and responsibilities of the parties. There is ample evidence that many people are misinformed about the history of the Canada-Treaty First Nations relations, and about the consequent experiences of Treaty First Nations communities and individuals. Until recently, the perspective of many Canadians has been to view treaties as remnants of antiquity, with little relevance to the present. Treaties were seen as frozen in time, part of Canada's ancient history. Some no doubt still hold this view of treaties as primarily "real estate transactions" modeled on business contracts and British common law. *Non-Aboriginal Canadians forgot that they, too, gained rights through treaty — rights to the rich lands and resources from which they have benefited greatly. They also forgot about the partnership formed at the time of treaty-making. The benefits of the treaties were to be mutual, assisting both parties. The wealth generated from these lands and resources has provided little benefit to Treaty First Nations.* [Emphasis added.]

Peace and Order Treaty Symposium, October 2001 [on file with author].

67 Chief Judge E T Durie, Waitangi Day address, 6 February 1989.

68 I H Kawharu (ed), *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (1989) 43-44, 64.

69 *Ngati Apa v Attorney General* [2003] 3 NZLR 643, 688. *Delgamuukw v The Queen* [1997] 3 SCR 1010, para 174: "Lord Watson's reference to 'all lands' encompasses not only reserve lands, but lands held pursuant to aboriginal title as well."

70 See *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (1995): "Treaties create mutually binding obligations and commitments which are constitutionally protected."

fully appreciate they are beneficiaries too.⁷¹ Regarding treaties as agreements that create mutual obligations, that alternately constrain and benefit, is an important interpretive lens through which to view our respective countries' creations. They can be founded on the idea of peoples equally participating in their construction with the knowledge that none should be unjustifiably subordinated or privileged in relation to the other.⁷²

For these reasons, all people in Canada and New Zealand could benefit from calling the treaties their own. It could add an important dimension to our self-understanding as countries. It could build them on a normative base of peace, friendship, respect, consent and cooperation. In this light, the histories of Canada and New Zealand are about more than conquering the wilderness, slowly separating from England, and building (then partially dismantling) the welfare state. The two countries have broader normative foundations than guarantees of individual liberties through rights documents. If treaties are considered foundational agreements, they allow all to claim their place in their country, not through force, but through peace and agreement.

4. Historic revisionism or contemporary law?

Some might call this historic revisionism; they may be uncomfortable with judging treaties by legal and not strictly historical standards. Some may say circumstances have changed and, as a result, it is now time to question the treaties' relevance.⁷³ Others may regard treaties as mere expedients to buy off First Nations and Māori people while the country was settled.⁷⁴ There is even a law and economics literature on this point, arguing that it was more efficient to work with Indigenous peoples than fight against them.⁷⁵ There is no doubt many today regard treaties in this light, as trite transactions with no legal force.⁷⁶ Maybe even some who entered into treaties had this belief.

There are a few points to consider regarding these potential criticisms. First, the Crown did not represent treaties as temporary agreements when they

71 Office of the Treaty Commissioner, *Statement of Treaty Issues: Treaties as a Bridge to the Future* (1998) 74.

72 Article Three of the Treaty of Waitangi guarantees equality. In the Canadian context, the requirement for justification for infringements of Aboriginal rights could be deployed as an anti-subordination principle (though this has not explicitly occurred).

73 J Waldon, "The Half-Life of Treaties: Waitangi, Rebus Sic Stantibus" (2006) 11 *Otago Law Review* 161.

74 This idea was expressed in the United States context; see Governor George Gilmer, cited in Robert M Utley, *The Indian Frontier of the American West, 1846-1865* (1984) 36: "Treaties were expedients by which ignorant, intractable and savage people were induced without bloodshed to yield up what civilised people had the right to possess by virtue of that command of the Creator delivered to man upon his formation — be fruitful, multiply and replenish the earth, and subdue it".

75 See D W Allen, "Homesteading and Property Rights: or How the West Was Really Won," (1991) 34 *Journal of Law and Economics* 1; F S McChesney, "Government as Definer of Property Rights: Indian Lands, Ethnic Externalities and Bureaucratic Budgets" (1990) 19 *Journal of Legal Studies* 297; T Anderson and P Hill, "The Race for Property Rights" (1990) 33 *Journal of Law and Economics* 177.

76 For an explanation and critique of this process, see Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (2004). For proponents of this position, see Melvin Smith, *Our Home and Native Land* (1995).

were signed. In the Canadian context they were to be for as long as the grass grows, the river flows, and the sun shines.⁷⁷ The Supreme Court of Canada has said the Crown's honour is always at stake in its dealings with the Indians.⁷⁸ In the Ngai Tahu settlement, the New Zealand Crown apologised and acknowledged that Treaty of Waitangi breaches were unconscionable. The honour of the Crown should be preserved; in this respect, treaties should be viewed in their best light.⁷⁹ The Supreme Court of Canada has also counselled that interpretations of treaties should "be liberally construed and any uncertainties, ambiguities or doubtful expressions should be resolved in favour of the Indians".⁸⁰ The Crown's representations should be taken seriously, "resolving ambiguities in the favour of the Indians" because of differences in legal language and technicalities in the written versions.⁸¹ A large, liberal and generous construction of treaties would recognise their contemporary force. As Justice Black of the United States Supreme Court said about Indigenous treaties in the 1970s, "great countries, like great men, should keep their word".

Secondly, treaties should not just be about history and the past.⁸² The signing of treaties should be understood as being distinct from their implementation. They are signed once, they are applied repeatedly. The Supreme Court of Canada has written that treaty implementation is an ongoing process, not a singular event.⁸³ Treaties should be living agreements,⁸⁴

77 Rene Fumoleau, *As Long as This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939* (1975); A L Getty and A S Lussier, *As Long as the Sun Shines and the River Flows* (1983); D T McNab, "The Promise That He Gave to My Grandfather Was Very Sweet: The Gunshot Treaty of 1792 in the Bay of Quinte" (1996) 16 *The Canadian Journal of Native Studies* 293, citing AE Williams/United Indian Bands of Chippewas and Mississaugas Papers, F 4337, Provincial Archives of Ontario, Toronto, Inventory, dated October, 1995, microfilm reels MS 2604-2607, available at <<http://www.brandonu.ca/native/cjns/16.2/mcnab.pdf>> (last accessed 19 October, 2006); Treaty 7 Elders and Tribal Council with Sarah Carter, Dorothy First Rider, and Walter Hildebrandt, *The True Spirit and Original Intent of Treaty 7* (1996).

78 The Supreme Court of Canada has written: "the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of 'sharp dealing' will be sanctioned." *R v Badger* [1996] 1 SCR, para 41. See also *Haida Nation v British Columbia* [2004] 3 SCR, paras 16, 19.

79 The Supreme Court of Canada has written that when interpreting treaties it should "choose from among the various possible interpretations of the *common* intention [at the time the treaty was made] the one which best reconciles" Indigenous interests and the Crown: *R v Sioui* [1990] 1 SCR 1025, 1069.

80 *R v Badger* [1996] 1 SCR, para 52; *R v Simon* [1985] 2 SCR 387, 402.

81 *R v Nowegijik* [1983] SCR 29, 36.

82 Treaties between Indigenous peoples and the Crown are not just "history", they are "law", and thus deserved to be interpreted not just by historical methods, but by legal methods; see P G McHugh, "Law, History and the Treaty of Waitangi" (1997) 31 *NZ Journal of History* 38; R P Boast, "Lawyers, Historians, Ethics and the Judicial Process" (1998) 28 *Victoria University of Wellington Law Review* 87.

83 *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2005] 3 SCR 388, para 33; "Treaty making is an important stage in the long process of reconciliation, but it is only a stage." *Ibid*, para 54.

84 "Treaty rights of Aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide

promises about a future to which both parties aspire.⁸⁵ Therefore, their interpretative context is not primarily historical but legal, because treaties contain promises and obligations — the substance of law. If treaties were not lived up to in their first hundred years that does not mean they should be discarded today. If their provisions require further clarification, adhesions could be made to build upon their participatory framework. As mutually negotiated agreements they should not be subject to unilateral revision by Parliament, legislatures or First Nations. If the parties did not or cannot subjectively agree on the stated promises and obligations, law not history should supply the interpretative framework.⁸⁶

I have taught contracts law in the past. Agreements are often tenuous and subject to differing interpretations and expectations. The failure to achieve subjective consensus (an actual meeting of the minds) does not preclude their enforcement.⁸⁷ Even old contracts can be judged by objective standards relating to reasonable implications drawn from the surrounding context, interpreted in light of contemporary legal standards.⁸⁸ The prime function of contract law is to protect promises relating to a future state of affairs; if law can do this for corporations and individuals then why not for nations?⁸⁹ Most people would not abandon foundational legal tenets even though we have not yet realised their full potential. Law creates the structure around which we build our future relationships. Treaties should be regarded as law in this sense.

All law is of necessity revisionist. Historical understandings of the law's frameworks are continually re-interpreted and re-applied in each generation to remain relevant to changing conditions.⁹⁰ Law would become unjust and

for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context: [*R v Sundown* [1999] 1 SCR 393], at para 32; [*R v Simon* [1985] 2 SCR 387], at p 402." Cited in *R v Marshall* [1999] 3 SCR 456, per McLachlin J.

85 K Coates and P McHugh, *Living Relationships, Kokiri Ngatahi: The Treaty of Waitangi in the New Millennium* (1998).

86 Law should also be understood in its broadest framework, as including Indigenous laws; see John Borrows, *Indigenous Legal Traditions in Canada* (2006).

87 See *Smith v Hughes* (1871) LR 6 QB 597, 607: "If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that the other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms". For the use of reasonable assumptions in construing treaty promises in Canada, see *R v Sioui* [1990] 1 SCR 1025, 1040.

88 *The Swan* [1968] 1 Lloyd's Rep 5, 12-13 (CA); *The Antclizo* [1987] 2 Lloyd's Rep 130, 146; *Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25, 27; *OT Africa v Vickers* [1996] 1 Lloyd's Rep 700, 702; *St John Tug Boat Co v Irving Refining Ltd* [1964] SCR 614, 622; Stephen Waddams, *The Law of Contracts* (3rd ed, 1993) 97-100; P S Atiyah, "Contracts, Promises and the Law of Obligations" (1978) 94 LQR 193, 203.

89 In making contractual or international law analogies regarding treaties it is important to note that courts have written such analogies are helpful by way of analogy, though not necessarily determinative, *R v Simon* [1985] 2 SCR 387, 333; *R v Badger* [1996] 1 SCR 771, para 76. Indigenous treaties are sui generis, unique; having their own interpretative rules, *R v Marshall* [1999] 3 SCR 456, para 78.

90 Eric Hobsbawm, "Introduction: Inventing Traditions" in E Hobsbawm and T Ranger (eds), *The Invention of Tradition* (1983) 1; J G A Pocock, "Time Institutions and Action; An Essay on Traditions and Their Understanding" in *Politics, Language and Time. Essays on Political Thought and History* (1972) 233.

irrelevant if it was not continually revised. The Quebec Civil Code recently abandoned inequality between spouses, and added privacy rights, personality rights, and (trust-like) patrimony of affection powers.⁹¹ The common law no longer sanctions trial by ordeal, trial by battle, sexual or racial discrimination, and numerous other human rights abuses.⁹² Law continually places ancient concepts in a new light. The Supreme Court of Canada has written: “‘frozen concepts’ reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.”⁹³ There is a continual reshaping of freedom of association, conscience and religion, as well rights to life, liberty, security and equality within our jurisprudence. Revision occurs in every legal tradition, including systems similar to ours, such as the United Kingdom and the United States. We must jettison stereotypes that imply that any legal relationship created with Indigenous peoples must remain rigidly retrospective.⁹⁴ Such views have the potential to draw upon or reinforce troubling notions that characterise anything Aboriginal solely in the past tense.⁹⁵ Treaties should not only be measured by how closely they mirror the perceived past; they should be judged by their contemporary value in promoting peace today.

Thus, while circumstances have changed since treaties were established, that should not necessarily negate their continuing operation.⁹⁶ Setting treaties aside on this basis could reward governments and individuals for their breaches and thus be unjust. It could also create future incentives for one party to purposely create a change in circumstances by betraying their agreement, thereby allowing the disloyal party to escape their solemn obligations. Some may argue that non-Indigenous governments created the most relevant changes in circumstances between the parties because of their failure to abide by the treaties. It may be said that present circumstances may not be as uneven between them if, consistent with most treaties, Indigenous peoples had retained a larger land base, enjoyed greater recognition for their governance, and received more equitable access to capital from natural resource use. While we can’t make the case with absolute assurance, circumstances might be better for Indigenous peoples today if their lands, resources and governance were respected in accordance with these agreements.⁹⁷ Governmental failure to

91 John E C Brierley and Roderick A Macdonald (eds), *Quebec Civil Law: An Introduction to Quebec Private Law* (1993); M McAuley and J Talpis, “The Quebec Trust in the ‘Real World’ ” in *Conférences sur le Nouveau Code Civil du Québec* (1992) 55.

92 Robert Bartlett, *Trial by Fire and Water. The Medieval Judicial Ordeal* (1986).

93 *Reference Re Same Sex Marriage* [2004] 3 SCR 698.

94 R Barsh and S Henderson, “The Supreme Court’s Vanderpeet Trilogy: Native Imperialism and Ropes of Sand” (1997) 42 McGill Law Journal 993.

95 John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (2002).

96 Jeremy Waldron would seemingly argue otherwise, for instance: that changes in population may render aboriginal rights or treaties unjust if they prevented distribution of lands and resources to others in a way that caused unfairness, see “Redressing Historic Injustice” (2002) 52 University of Toronto Law Journal 135 and Jeremy Waldron, “The Half-Life of Treaties: Waitangi, *Rebus Sic Stantibus*” (2005) 11 Otago Law Review 161.

97 Saskatchewan Office of the Treaty Commissioner, *Treaties: The Road of Reconciliation, Interim Report* (March 31, 2006) 105-108.

effectively implement their side of the agreements could be a fundamental cause of changed circumstance. Furthermore, we may not have paid sufficient attention to the present injustice (which can also be characterised as a continuation of past injustices) created by treaty breaches. This changed context may in fact signify that treaties are even more relevant today than when they were signed. Canada and New Zealand may be experiencing particular problems because of the failure to appropriately build them through continued Indigenous participation or consent. The denial of human dignity and the impoverishment of Indigenous groups contrary to treaty promises might demonstrate they are needed now more than ever. If we have failed in creating healthy countries for Indigenous peoples because assimilative laws and policies superseded treaties and dominated our approach, perhaps more assimilation is not the answer. Returning to a more consensual framework might better serve our nations and build a stronger rule of law culture in the future.

Treaties are about the future as well as the past. All citizens of Canada and New Zealand are beneficiaries. We could all trace contemporary rights to them, though we have significant work ahead to bring them into line with their potential. Nevertheless, treaties are capable of applying to the most recent immigrant from Jamaica or Samoa, the old family of French or Scottish heritage, as well as Indigenous people throughout our countries. The agreements to live in peace and order are something we should all expect and claim from them.

5. Critiques to creating countries without treaties

We must also consider alternative foundations to our countries' creations to better understand the treaties' potential power.⁹⁸ Without treaties, legitimate questions might be raised concerning the morality and justice of our countries' foundations. Participation and consent are keys to forming constitutions and governance.⁹⁹ Governor Hobson said at Waitangi: "as the laws of England gives no civil powers to Her Majesty out of her dominions, her efforts to do you good will be futile unless you consent".¹⁰⁰ Despite this principle, some aspects of national creation occurred without the participation of the

98 For further arguments relating to Canada's foundation, see John Borrows, "Questioning Canada's Title to Land: The Rule of Law, Aboriginal Peoples and Constitutionalism" in British Columbia Treaty Commission, *Speaking Truth to Power* (2001), available at <http://www.lcc.gc.ca/partnership/treaty_main_toc-en.asp> (last accessed 28 May, 2006); J Borrows, "Creating an Indigenous Legal Community" (2005) 50 McGill Law Journal 3; J Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v The Queen*" (1999) 37 Osgoode Hall Law Journal 537.

99 Principles of property, tort and contract law are, by and large, built upon consent (in the alienation and acquisition of land, the protection of the person, and the exchange of promises). Constitutional law depends on principles of consent to bring a constitutional order into being (*Reference Re Secession of Quebec* [1998] 2 SCR 217). See also Darlene Johnston, *The Taking of Indian Lands: Consent or Coercion?* (1989).

100 Hobson's instructions read: "The Queen, in common with Her Majesty's immediate predecessor, disclaims, for herself and Her subjects, every pretension to seize on the islands of New Zealand, or to govern them as a part of the Dominion of Great Britain, unless the free and willing consent of the native, expressed according to their established uses, shall first be obtained." Normandy to Hobson, Instructions 14 August 1839. See William Colenso, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (1971) 16-17.

Indigenous peoples. For example, the British acted as if they had sovereignty over New Zealand before the Treaty of Waitangi was signed.¹⁰¹ Governor Hobson was empowered by his letter of instructions to claim the South Island by right of discovery, and Letters Patent of 1839 “provided for the attachment to New South Wales of any territory annexed to New Zealand”.¹⁰²

In Canada, the Royal Proclamation of 1763 seemed to make consent a foundational principle in the relationship between First Nations and the Crown in North America.¹⁰³ For example, the Crown promised they would only settle lands “[p]urchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively”.¹⁰⁴ One year later the Treaty of Niagara followed the Proclamation and contained even broader promises to respect First Nations rights.¹⁰⁵ Unfortunately, these pledges were not ascendant when non-Aboriginal colonists went to Charlottetown, Montreal and London to debate and draft confederation terms.¹⁰⁶ The Imperial Parliament passed the British North American Act 1867 without Indigenous participation,¹⁰⁷ except from the Mik’maq leader Peter Cope who secured assurances that their treaties would be honoured.¹⁰⁸ While Aboriginal peoples were not fully included in some aspects of Canada’s confederation, there was nevertheless the rejection of an idea of forced cultural coercion on other fronts.¹⁰⁹ For example, there was an agreement to respect French and English juridical, cultural, religious and linguistic differences at confederation.¹¹⁰ The British North America Act 1867 knit a nation together along federal lines to protect these differences.¹¹¹ It enabled French and English speaking peoples to continue their unique political, religious, cultural, linguistic and legal traditions within provincial frameworks.¹¹² Minority educational rights were constitutionally enshrined to ensure that groups could practice their traditions, even in provinces where the

101 Alan Ward, *An Unsettled History: Treaty Claims in New Zealand Today* (1999) 13.

102 Ibid.

103 See generally Brian Slattery, “Aboriginal Sovereignty and Imperial Claims” (1992) 29 *Osgoode Hall Law Journal* 681.

104 RSC 1985, App II, No 1.

105 John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self-Government” in M Asch (ed), *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (1997).

106 Christopher Moore, *1867: How the Fathers Made a Deal* (1998).

107 Now titled the Constitution Act 1867 (UK).

108 Ken Coates, *The Marshall Decision and Native Rights* (2000) 45.

109 The Provisional Government under Louis Reil in 1870 likewise sought to ensure Metis rights were protected when Manitoba entered confederation: Clem Chartier, “Aboriginal Rights and Land Issues: The Metis Perspective” in Menno Boldt and J Anthony Long (eds), in association with Leroy Little Bear, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (1988) 57-60; *Dumont v Canada (Attorney General)* (1988) 52 DLR (4th) 25, per Sullivan; reversed [1990] 1 SCR 279.

110 Arthur Silver, *The French-Canadian Idea of Confederation, 1864-1900* (1982).

111 Of course, there were also other factors that led to confederation; see Garth Stevenson, *Unfulfilled Union* (3rd ed, 1989) 20-33.

112 Silver, above n 110, pp 33-50.

dominant culture was not their own.¹¹³ This was one of the constitutional bargains that brokered the nation's formation. Like treaties, these agreements enabled the country's creation and are still in force. The British North America Act (now the Constitution Act 1867 (UK)), while an incomplete governance instrument without Aboriginal participation, was nevertheless sufficient to unite disparate peoples.¹¹⁴

Indigenous treaties could be thought of as part of the mix of agreements and instruments that created Canada and New Zealand and allowed for unity amidst difference. Such recognition would make each country more complete. Some may even say the exercise of imperial power in these two countries is premised upon the treaties' existence. If "the Constitution of a country is an expression of the will of the people with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government",¹¹⁵ *then without treaties*, Indigenous peoples could legitimately

113 See s 93 of the Constitution Act 1867 (UK), 30 & 31 Victoria, c 3 (formerly British North American Act 1867):

In ... each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:

- (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:
- (2) All the Powers, Privileges and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissident Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:
- (3) Where in any Province a System of Separate or Dissident Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:
- (4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

114 George Etienne Cartier, one of the instrument's architects, observed:

It was lamented by some that we had this diversity of races, and hopes were expressed that this distinctive feature would cease. The idea of unity of races [is] utopian — it [is] impossible. Distinctions of this kind always exist. Dissimilarity, in fact, appear[s] to be the order of the physical world and of the moral world, as well as in the political world. But with regard to the objection based on this fact, to the effect that a great nation [can]not be formed because Lower Canada [is] in great part French and Catholic, and Upper Canada [is] British and Protestant, and the Lower Provinces [are] mixed, it [is] futile and worthless in the extreme In our own Federation we have Catholic and Protestant, English, French, Irish and Scotch, and each by his efforts and his success [will] increase the prosperity and glory of the new Confederacy ... [W]e [are] of different races, not for the purpose of warring against each other, but in order to compete and emulate for the general welfare.

Parliamentary Debates on the Subject of Confederation, 8th Provincial Parliament of Canada (1865) 60.

115 *Reference Re Language Rights Under the Manitoba Act* [1985] 1 SCR 721, 745.

question whether their will was expressed and whether sufficient restrictions were placed on governments respecting their fundamental rights at the time of confederation or union.¹¹⁶

For example, some believe that a European “discovery” of Canada and New Zealand provides the strongest justification for their creation.¹¹⁷ However, it can be argued that at the countries’ formation there was no *discovery* on the part of the Crown that would justify the extinguishment of most, if not all, powers of Aboriginal jurisdiction.¹¹⁸ Aboriginal peoples had already discovered most land within their territories and exercised jurisdiction over it prior to the arrival of Europeans.¹¹⁹ If any legal consequences flowed from so-called “discovery”, these consequences should vest in favour of Indigenous peoples, not the Crown.¹²⁰ The doctrine of discovery only gives rights over land if it is *terra nullius*, literally meaning “barren and deserted”.¹²¹ The lands that made up Canada and New Zealand at the time of the confederation or creation were not barren and deserted. Ani Makaere has written: “An insistence that Captain Cook ‘discovered’ Aotearoa and that the English settled here is a constant source of amusement to Maori, having discovered and settled in these lands a thousand years beforehand”.¹²² The New Zealand Court of Appeal has observed: “New Zealand was never thought to be *terra nullius* (an important point of distinction from Australia)”.¹²³ The Supreme Court of Canada has written: “At the time of the assertion of British sovereignty, North

116 For a discussion of the questions that can be raised about European treatment of Indigenous peoples in the creation of nation States, see Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (2003).

117 *R v Guerin* [1984] 2 SCR 335, 378:

The principle of discovery which justified these claims gave the ultimate title in the land in a particular area to the nation which had discovered and claimed it. In that respect at least the Indians’ rights in the land were obviously diminished; but their rights of occupancy and possession remained unaffected.

See also *R v Sparrow* [1990] 1 SCR 1075, 1103. This reasoning was derived from doctrines of the United States Supreme Court in *Mitchell v United States*, 34 US (9 Pet) 711 (1835); *Worcester v Georgia*, 31 US (6 Pet) 515 (1832), *Cherokee Nation v Georgia*, 31 US (5 Pet) 1 (1831); *Johnson & Graham’s Lessee v M’Intosh*, 21 US (8 Wheat) 543 (1823); *Fletcher v Peck*, 10 US (6 Cranch) 87 (1910).

118 For strong critiques of the doctrine of discovery, see R A Williams, Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest* (1990); Peter Fitzpatrick, “‘No Higher Duty’: Mabo and the Failure of Legal Foundation” (2002) 13 *Law and Critique* 233; B Clark, *Native Liberty-Crown Sovereignty* (1990); A C Hamilton and C M Sinclair (eds), *Report of the Aboriginal Justice Inquiry of Manitoba* (1991) 130-142.

119 David E Wilkins and K Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law* (2001) 19-63.

120 This is the thesis in Kent McNeil, *Common Law Aboriginal Title* (1989). The High Court of Australia has characterised the doctrine of discovery, tied to *terra nullius*, as “unjust and discriminatory”; see *Mabo v Queensland*, above n 45. The doctrine of discovery was rejected in *Island of Palmas* (1928) 2 RIAA 829.

121 William Blackstone, *Commentaries on the Laws of England* (21st ed, 1844) vol 2, 7.

122 See Ani Mikaere, “The Treaty of Waitangi and Recognition of Tikanga Mao” in Michael Belgrave, Merata Kawharu and David Williams (eds), *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2005) 341.

123 *Ngati Apa v Attorney General* [2003] NZCA 117, para 37.

America was not treated by the Crown as *res nullius*.¹²⁴ Canada's Royal Commission on Aboriginal Peoples recommended governmental recognition that the doctrine of discovery is "legally, morally and factually wrong".¹²⁵ Treaties provide a stronger justification for creating our countries because they are not based on the presumption of Indigenous legal, political or cultural inferiority.

Treaties also provide a stronger justification for national creation than the next commonly cited alternative: occupation. Occupation by a political grouping on a territorial basis is one reason for recognising broad political and legal rights over a territory.¹²⁶ If applied without bias most people would likely conclude that at Canada and New Zealand's formation, the Crown had not effectively *occupied* Indigenous lands in this manner such as to justify jurisdiction over them.¹²⁷ In fact, the Supreme Court of Canada recognised as much when it wrote: "When the settlers came, the Indians were there, organised in societies and occupying the land as their forefathers had done for centuries".¹²⁸ Unfortunately, the concept of occupation is often applied in an ethnocentric manner to read Indigenous people out of occupation.¹²⁹ For example, John Locke wrote that land is only effectively occupied and therefore capable of legal possession when a person "hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*".¹³⁰ Some believe Indigenous people did not mix their labour with the soil sufficient to secure occupation.¹³¹ Additionally, some have interpreted Blackstone as authority for the proposition that Indigenous peoples were insufficiently organised to claim sovereignty flowing from group occupation.¹³² Other theorists, politicians, lawyers and courts have fallen into

124 *R v Marshall, R v Bernard* [2005] 2 SCR 220, para 132.

125 See *Report of the Royal Commission on Aboriginal Peoples: Looking Forward and Looking Back*, vol 1 (1996) 696, recommendation 1.16.2:

Federal, provincial and territorial government further the process of renewal by:

(a) acknowledging that concepts such as *terra nullius* and the doctrine of discovery are factually, legally and morally wrong

126 John Singer, "Sovereignty and Property" (1991) 86 *Northwestern University Law Review* 1.

127 According to the *Island of Palmas* case, a claim based on occupation was incomplete until accompanied by "effective occupation of the region claimed to be discovered". The term "effective occupation" incorporates the notion of "uninterrupted or permanent possession". Based on this rule, the only ones capable of successfully advocating a claim of discovery and occupation of British Columbia at the time of Confederation were the Aboriginal peoples themselves. The *Western Sahara* case (1975) ICJ 12 precludes a region from being termed uninhabited if nomadic or resident tribes with a degree of social and political organisation are present in the area.

128 *R v Calder* [1973] SCR 313, 328.

129 James Tully, *An Approach to Political Philosophy: Locke in Contexts* (1993).

130 Peter Laslett (ed), *Two Treatises of Government: A Critical Edition with an Introduction and Apparatus Criticus* (1965) 329.

131 Thomas Flanagan, *First Nations, Second Thoughts* (2000).

132 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 201, per Justice Blackburn. See William Blackstone, *Commentaries on the Laws of England* (21st ed, 1844) vol 1, 36-27: society required authority "whose commands and decisions" all members were bound to obey otherwise it "still would remain as in a state of nature".

the same trap and regarded Indigenous occupation as insufficient to vest these groups with territorial sovereignty.¹³³ The subordination of Indigenous peoples on the basis of fictionalised constructions of their lower place on the so-called scale of civilisation is not a very constructive idea on which to build countries.¹³⁴ It does not foster morally or politically healthy relationships, and thus is greatly inferior to treaty expressions that aspire to create peace, friendship and respect.

Treaties are also a stronger foundation for Canada and New Zealand's existence than the next justification: adverse possession. Adverse possession requires that an area be openly occupied over a period of time and that the original owner acquiesces to such presence. It requires a de facto exercise of sovereignty which is peaceful and unchallenged.¹³⁵ This had not occurred in Canada and New Zealand at the time they were formed. At the countries' creation, the Crown had not exercised *adverse possession* over Aboriginal lands that resulted in complete jurisdictional powers over them.¹³⁶ Crown claims to use land without Aboriginal permission had been challenged on numerous occasions — there was no acquiescence. The Crown's claims to land or government prior to treaties were not peacefully received.

One might however make the case that adverse possession is more relevant in present circumstances than when treaties were agreed or countries created. The argument might be that the Crown could claim adverse possession today, thus making irrelevant earlier claims. In answer to this argument one may still have to establish Indigenous acquiescence to perfect such a claim, which could prove difficult in certain cases given Indigenous activism and opinion. Furthermore, even if the Crown could successfully establish adverse possession, one might still question its moral power as a satisfactory foundation for our respective countries. It is better to address the injustice of taking another's land without their consent, by securing an agreement about what justice requires today. Of course, some might recoil at this suggestion

133 It is my opinion that the Supreme Court of Canada took this approach in the case *R v Marshall, R v Bernard* [2005] 2 SCR 220, when it found the Mi'kmaq people had insufficient occupation to claim title to interior areas of the province. For more general critique on this approach, see Alex Frame, *Property and the Treaty of Waitangi: A Tragedy of the Commodities?* (2001); Michael Asch, "From Terra Nullius to Affirmation: Reconciling Aboriginal Rights with the Canadian Constitution" (2002) 17 *Canadian Journal of Law and Society* 23.

134 See *Amodu Tijani v The Secretary, Southern Provinces* [1921] 2 AC 389, 410 (PC): "There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely."

135 A C Hamilton and C M Sinclair, *The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba* (1991) 130-135.

136 Kent McNeil, "The Post Delgamuukw Nature and Context of Aboriginal Title", available at <www.delgamuukw.org/research>, p 38, n 43 has written: "Acquisition of title to Crown land by adverse possession was first allowed by *The Crown Suits Act*, 21 Jac I (1623), c 2. The *Nullum Tempus Act*, 9 Geo III (1769), c 16, set the limitation period for this at 60 years. The latter Act has been held to be applicable in overseas dominions of the Crown, including Canada: see *Attorney-General for British Honduras v Bristowe* (1880), 6 App Cas 143 (PC); *Attorney-General for New South Wales v Love* [1898] AC 679 (PC); *Hamilton v The King* (1917), 35 DLR 226 (SCC). ... For discussion, see *Common Law Aboriginal Title*, (Oxford: Oxford University Press, 1989) at 87-92."

because of the political effort, implications or financial cost of securing agreements today. While this reaction may fail to consider the effort and cost of not securing agreement, those who are content to build their countries on brute force or non-consensual displacement are free to hold this position. However, they must also contemplate the risk that this flaw could weaken the entire infrastructure upon which respect for law is built. It could lead to perpetual conflict over law's legitimacy, especially for those so displaced. Furthermore, those satisfied with building countries on this basis should at least not claim the honour of respectful or just relationships with Indigenous peoples in the absence of their participation.

Finally, treaties also provide a more realistic and palatable basis for Canada and New Zealand's creation than the oft-invoked idea of *conquest*. Most people in Canada and New Zealand likely believe they have rights over Indigenous peoples through conquest. This belief would be contrary to law. The Supreme Court of Canada has written: "Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered."¹³⁷ Similarly, in New Zealand, the courts have not proceeded on the basis that the Māori people were conquered.¹³⁸ Despite conflict between Aboriginal peoples and the Crown in Canada, and wars in New Zealand, neither country's legal framework treats Indigenous peoples as conquered peoples. Furthermore, the two countries would have had difficulty declaring rights by conquest because its use is only justified for a just cause, as when a nation's security or rights are threatened. While the armed conflicts at Batoche, Taranaki and Waikato (among others) may have threatened each countries' security or rights in a particular region, they were not sufficiently generalised to claim rights over the whole country through them.¹³⁹ Furthermore, the doctrine of conquest usually only has force if the conquered territory was annexed and formally possessed by the conqueror, and subsequent rights were described in a peace treaty that ended a war. These criteria were generally not met. Thus, the doctrine of conquest can be considered an inferior justification when compared to treaties for these countries' foundation.

Furthermore, if conquest is the operable framework for Canada and New Zealand's creation, this potentially sets Indigenous peoples in permanent opposition to the State. Some, made to feel vanquished under this paradigm, could cultivate bitter feelings of resentment towards their imposed country. Wealth, privilege, success and honour in the wider society may not eradicate the feelings of disposition. Furthermore, poverty, subordination, failure and prejudice within the State may continually rekindle this viewpoint. These feelings of enmity may then be passed on by friends and family through the generations. They may simmer until circumstances arise to turn the tables on their "oppressors" and seek to re-conquer the State regarded as the enemy. It is

137 *Haida Nation v British Columbia* [2004] 3 SCR 511, para 25.

138 Paul McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination* (2005) 166-173.

139 See *Status of Eastern Greenland Case* (1933) 3 WCR 148, 171:

[The doctrine of conquest] only operates as a cause of lack of sovereignty when there is a war between two states, and by reason of the defect of one of them sovereignty over territory passes from the loser to the victorious state.

easier to nurture these views in countries where conquest is the operative framework, in contrast with States where partnership and co-creation through treaties is the touchstone. Of course, if treaties remain a sham, resentment and animosity will also build. Propaganda about how enlightened Canada and New Zealand have been with regard to past treaties will not turn these feelings aside; there is a need for real participation in the nation State. At least treaties could provide a more acceptable footing for encouraging mutuality and participation than theories of conquest, which ask Indigenous peoples to accept the notion of defeat.

Thus, there are problems with theories of discovery, occupation, adverse possession and conquest when considering Canada's and New Zealand's founding principles. Treaties are a way out of this impasse. They build Canada and New Zealand on more solid ground. Māori tikanga and First Nations legal traditions were the first laws of our countries, and retain their primacy of place. At a second tier, treaties created an inter-societal framework where first laws intermingled with the imperial laws to foster peace and order across communities. Treaties at this level make it possible to say: The Constitution Acts and other imperial legislation partially created these countries, but First Nations and Māori laws also created them. The Constitution Acts transplanted British institutions onto Canadian and New Zealand soil, while Māori Tikanga and First Nations laws modified their operation and force through treaties. The Constitution Acts, and Māori and First Nations laws continue to construct our countries as they develop through time; but treaties also continue to construct them as new agreements are signed and historic treaties interpreted. Without treaties, these instruments remain colonial documents of forced dispossession. Imperialism wanes when Constitution Acts are seen as consistent with the preservation of Indigenous law and governance and the creation of inter-societal norms.¹⁴⁰ When constitutional instruments are regarded as resting upon treaties, then Canada and New Zealand's law are on the path to becoming truly Indigenous: home-grown in their place of application.¹⁴¹

140 For a discussion of the use of Māori law in Māori governance, Tikanga, in Aotearoa, see Caren Wickcliffe and Matui Dickson, "Maori and Constitutional Change" (1999) 3 Yearbook of New Zealand Jurisprudence 9.

141 Ani Mikaere, a highly respected Māori scholar, cautions that indigeniety is not achieved without recognising tikanga Māori as the starting point of human relationships in Aotearoa. See "Are We All New Zealanders Now? A Māori Response to the Pākehā Quest for Indigeniety", Lecture delivered at Maidment Theatre, Auckland, 15 November 2004, available at <http://twm.co.nz/nov15_Mikaere.html>:

For Pākehā to gain legitimacy here, it is they who must place their trust in Māori, not the other way around. *They must accept that it is for the tangata whenua to determine their status in this land, and to do so in accordance with tikanga Māori. This will involve sorting out a process of negotiation which is driven by the principles underpinning tikanga, a process which Pākehā do not control. There is no doubt that many Pākehā will find this challenging: their obsession with control over the Māori-Pākehā relationship to date could almost be categorised as a form of compulsive disorder. Giving up such control requires a leap of faith on the part of Pākehā. In my view, however, nothing less will suffice if they truly want to gain the sense of belonging they so crave, the sense of identity that until now has proven so elusive.*

Under this view, treaties may a necessary but certainly not sufficient condition for undermining colonialism in Canada and New Zealand.

6. Recognition and affirmation of treaties

To recognise the treaty-based nature of government, actions could be taken to proclaim our historic foundations. Canada could learn much from New Zealand on this front, where Waitangi Day is commemorated annually. Governments could explicitly proclaim, enact into law, and celebrate the idea that one important prong of their existence stems from the treaties. Such steps would concretise the fact that treaties are a foundational law governing all subsequent relations. This action would generate continued debate and comment about the treaties in the public, within the media, before the courts, and in the legislatures. Such comment would not always be positive, and acrimony and disagreement may be present from time to time. This should not discourage those who see consent and participation as foundation principles. Disagreement and discord are present in relation to any countries' foundational tenets. We should not expect higher standards in the treaty context. Treaty fatigue, like constitutional fatigue, will challenge our commitment to building societies on consent, as opposed to force. It will test our dedication to the rule of law, when coercion seems so much more efficient.

The people of the United States of America memorialise the drafting of their Constitution in Philadelphia in 1786 as a sacred event. United States law, politics, educational institutions and the media all spend a considerable amount of time and energy working out its meaning. The Glorious Revolution of 1688 in England, where the Crown's authority was made subject to Parliament, is held in high esteem in that country. Judges, lawyers, politicians and the public consistently refer to it as an important source of their laws. Many common law countries proclaim 1215 as significant because of the issuance of the Magna Carta, which gave certain classes of individuals rights relative to the Crown, which expanded through time. Magna Carta is a subject of proclamation, application and commemoration. Even in Canada, the Confederation of three colonies to form a united Dominion is looked upon with some significance.

Treaties are perhaps the most significant nation-founding event in Canada and New Zealand because they produced promises that the pre-existing population would live together in peace and order with those who followed. This is weighty stuff; not many countries in the world today are founded on such high principles. Many places in the world could only wish that they had such a rich heritage that allowed peoples to be reconciled and drawn together in peace. Though the treaties' promises have yet been fully realised — much as the promises in the United States Constitution, Glorious Revolution and Magna Carta have yet to be fully extended — they remain important signals from our ancestors of a better way. They are miles ahead of the outright coercive force, displacement and post-hoc justification found in many legal systems, where subsequent populations ousted previous ones.

When considering what must be done to ensure Canada's and New Zealand's continued strength, one cannot ignore these historically deep, constitutionally protected rights and traditions that foster its unity, difference and interdependence. Each strand of that fabric must remain strong to ensure the country's peace, order and good governance. Canadians and New Zealanders should strive to develop internal societal cohesion through common allegiance to this historical and legal framework. The Canadian constitutional goal reconciles unity and diversity to recognise peoples' continued

interdependence even in the face of difference.¹⁴² The New Zealand Parliament and courts have used the Treaty of Waitangi to resolve grievances, restore the well-being of Māori societies, and reconcile Māori communities with the State and other parts of society.

7. Conclusion

Treaties must continually be re-emphasised as part of Canada's and New Zealand's fabric. Indigenous voices once again must stand beside others to proclaim and point the way forward to peace and order in our lands.¹⁴³ Treaties provide access to alternative conceptions of our relationship to one another and the earth. They are among our highest laws and should be respected as such. Disputes regarding treaty interpretation and judgment should not be vested solely in the Crown or judiciary, but should return to the parties for negotiated, mutual settlements. The plurality of traditions reflected within treaties need not weaken, threaten or overwhelm historic and constitutional frameworks. All peoples can claim to be beneficiaries under the treaties, and each party has obligations to the other. It is not historic revisionism to judge treaties in a contemporary light because treaties are legal agreements. They are capable of being understood as aspirations about the future to which both parties aspire. The respect for participation and consent which they embody provides a better foundation for Canada and New Zealand than doctrines of discovery, occupation, adverse possession and conquest, which assume the inferiority of Indigenous peoples. Treaties are best preserved and strengthened by acknowledging and extending their framework through public debate and acknowledgement.

¹⁴² *Reference Re Secession of Quebec* [1998] 2 SCR 217, para 43.

¹⁴³ James (Sakej) Henderson, "Ayukpachi: Empowering Aboriginal Thought" in Marie Battiste (ed), *Reclaiming Indigenous Voice and Vision* (2000) 256.

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