



In recent years, several Australian states have formally committed to treaty negotiations with the First Peoples whose traditional lands they claim. The emerging treaty processes in Australia build on both the comprehensive land claim agreements currently under negotiation in Canada as well as the historic treaties struck between First Peoples and colonial powers in North America and Aotearoa / New Zealand. Parties engaged in these negotiations appropriately view treaties as mechanisms through which First Peoples and non-Indigenous political communities can settle ongoing tensions surrounding political autonomy, citizenship, and pluralism. However, it is not clear whether these processes can produce such outcomes. In this article, we contend that, although fairer processes of negotiation may avoid some of the problems of historic treaties, modern treaty making in Canada, Australia, and elsewhere will fail to meet the parties' aspirations unless greater attention is paid to building relational characteristics. We do so by outlining the promises and perils in modern treaty making with an eye toward understanding the limits of the law.

Keywords: ethic, First Peoples, legal limits, recognition, settler states, treaty

I Introduction

Since 1973, Canada has sought to negotiate and settle First Peoples' rights through comprehensive land claims.¹ These modern treaty processes are conceived as a mechanism to recognize and reconcile 'pre-existing Aboriginal sovereignty ... with assumed Crown sovereignty.'² In recent years, several Australian states and territories have joined Canada in formally committing to treaty making with the Aboriginal and Torres Strait Islander nations whose traditional lands lie within their borders.³ In both states, modern treaty making seeks to rectify injustices and

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1 We use the term 'First Peoples' as a general term to refer to Māori, First Nations, Inuit, Métis, Aboriginal, Aboriginal and Torres Strait Islander peoples, and Indians or tribes, but we do use more localized terms where appropriate. We do not use the term 'Indigenous peoples' unless speaking of all of those peoples with regard to international law. See Stephen Young, *Indigenous Peoples, Consent and Rights: Troubling Subjects* (Abingdon, UK: Routledge, 2019) at 9–10.

2 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 20, [2004] 3 SCR 511 [*Haida Nation*]; Aboriginal Affairs and Northern Development Canada, *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights* (Interim Policy, September 2014) at 7.

3 Harry Hobbs & George Williams, 'Treaty-Making in the Australian Federation' (2019) 43:1 Melbourne UL Rev 178.

respond to generations of First Peoples' advocacy. In both cases, modern treaty making reveals the limits of the law.

First Peoples' demands for renewed treaty-making processes are, in part, a product of the contemporary legal context in which Indigenous peoples and communities live. Colonial massacres, dispossession, and marginalization have alienated many First Peoples from their traditional governance systems while disempowering them from structures of settler state political power. If effective, modern treaty making offers the potential to rebuild and re-empower First Peoples, enabling them to play a meaningful role in the development and implementation of solutions to problems faced by their communities. Institutional and structural reform to the state is therefore an integral element of treaty, but modern treaties can have broader significance. In encouraging and stimulating conversations, treaties can provide a common language for citizens within and across diverse political communities to engage and learn from each other.⁴ In doing so, they may help build a culture of respect that takes seriously the interests and aspirations of First Peoples.

These are lofty ambitions. It is not clear whether they can always be realized. The lengthy history of treaty making between First Peoples and colonial powers in North America and Aotearoa / New Zealand suggests that, even if there are 'glimmers of hope' in contemporary practices,⁵ modern treaty making should be approached with a degree of caution. As First Peoples have long argued, historical treaties failed to generate or produce the outcomes desired by the Indigenous signatories.⁶ Treaties were often negotiated on an inequitable basis, and states largely, though not entirely, avoided and downplayed the commitments that they made. How can modern treaty making avoid these challenges? Is modern treaty making simply 'an advanced form of control, manipulation, and assimilation'?⁷

4 Jeremy Webber, *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (Montreal & Kingston: McGill-Queen's University Press, 1994) at 192–3; Harry Hobbs, 'Constitutional Recognition and Reform: Developing an Inclusive Australian Citizenship through Treaty' (2018) 53:2 *Australian Journal of Political Science* 176.

5 Jacinta Ruru, 'A Treaty in Another Context: Creating Reimagined Treaty Relationships in Aotearoa New Zealand' in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historic Treaties* (Toronto: University of Toronto Press, 2017) 306 at 332 [Ruru, 'Treaty in Another Context'].

6 The modern treaty process emerged in Canada in 1973. We define historic treaties as those negotiated prior to this date. In North America, this includes early treaties negotiated by the Dutch, the Peace and Friendship Treaties negotiated in the early eighteenth century by the British and French, treaty making following the American Revolution in both the United States and Canada, and the Numbered Treaties, which concluded with Treaty 11 in 1921. It also includes the 1840 Treaty of Waitangi in Aotearoa / New Zealand. We recognize that this covers a vast period, which was often marked by very different attitudes and approaches to treaty making, but have adopted this definition in order to distinguish between the contemporary period where the state is more concerned with adopting fairer negotiation procedures than previously.

7 Taiaiake Alfred, *Peace, Power, Righteousness* (Toronto: Oxford University Press, 1999) at 119–20.

It is generally assumed that designing fairer processes of negotiations can address and rectify the problems that marred historic treaties. In this article, we challenge that assumption. We argue that if modern treaty making is to realize its promise, it must confront a broader challenge. Treaties between First Peoples and settler states are both legal and relational instruments, but because modern treaty making occurs within the framework of the state, the relational dimension can be overlooked. Without greater focus on rebuilding (or building) genuine relationships between First Peoples and settler states – both inside and outside treaty negotiation processes – the outcome of any negotiation may be to simply encourage First Peoples to ‘fit into’ the cultural normative ordering of the dominant society rather than to promote and protect their distinct normative orders and ways of living.⁸

Our argument proceeds in four parts. We begin in Part II, by outlining the dual legal and relational character of treaties between First Peoples and settler states. As we explain, treaties are legal texts to the extent that the parties accept a series of enforceable obligations and responsibilities that are intended to bind them to the agreement that they made. At the same time, treaties are relational documents, for they are not envisaged ‘as a finite contract but as the foundation for a developing social contract.’⁹ A treaty will only be effective and meaningful if it is able to realize both legal and relational goals. Where one party is unable to secure recourse for the other’s routine failure to uphold its obligations, that party may question whether a ‘shared understanding of and commitment to a normative framework for cross-cultural relationships’ has truly emerged.¹⁰ Similarly, if that agreement fails to build trust and mutual respect between the parties and, instead, is treated in sparing terms as a particular type of legal contract, the deeper value of the document is limited.¹¹

Modern treaty making is informed by its historic antecedents. For this reason, it is valuable to explore how the participants in historic treaty practices sought to meet the relational and legal dimensions of treaty. In Part III, we explore a snapshot of historic treaty making in North America and Aotearoa / New Zealand. Our review of the negotiation and implementation of historic treaties suggests two major challenges for contemporary treaty making. In some cases, inequitable negotiating processes meant that the agreement was never built on a firm base of trust and mutual respect. Without that base, many treaties failed to engender right relations. In other cases, while the parties may have initially committed to

8 Michael Coyle, ‘Establishing Indigenous Governance: The Challenge of Confronting Mainstream Cultural Norms’ in Ghislain Otis & Martin Papiillon, eds, *Fédéralisme et Gouvernance Autochtone: Federalism and Aboriginal Governance* (Quebec City: Presse de Université Laval, 2013) 141 at 142 [Coyle, ‘Establishing Indigenous Governance’].

9 Waitangi Tribunal, *Motunui Waitara Report* (Wai 6, 1983) at 52 [Waitangi Tribunal, *Motunui Waitara Report*].

10 Mark Walters, ‘Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History after *Marshall*’ (2001) 24:2 Dal LJ 75 at 78 [Walters, ‘Brightening the Covenant Chain’].

11 *Simon v The Queen*, [1985] 2 SCR 387 at 404; Brian Slattery, ‘Making Sense of Aboriginal and Treaty Rights’ (2000) 79 Can Bar Rev 196.

a just relationship, state building shifted the broader power dynamics between the parties. As a result of this shift, the colonial power qua state no longer felt relationally bound by their obligations. States disregarded their obligations in different ways in different places at different times. In Aotearoa / New Zealand, the treaty itself was declared to be of no legal effect.¹² In Canada, promises made in the 1763 Royal Proclamation were dismissed.¹³ In the United States, treaties remained law, but the state assumed the power to abrogate their terms at its pleasure.¹⁴ Notwithstanding this diversity in practice, common to all three cases is the fact that these nation-to-nation agreements were domesticated within the state's legal system.

The process of domestication allowed the state to remove 'the Indigenous question' 'from the sphere of international law' and place it within its own exclusive competence.¹⁵ In doing so, colonial powers could then seek to strip First Peoples of most of their attributes of sovereignty, including the control of land, the operation of their governing structures, as well as their status under international law.¹⁶ Significantly, however, this process had a particular effect on treaty making. By pivoting from its role as treaty partner and assuming the position of treaty adjudicator, the state displaced the fundamental relational character of treaty.¹⁷ As treaty adjudicator, the state was able to prioritize its own understanding of the instrument and downplay or ignore its obligations. The breakdown in the relational character of treaty thus inexorably affected its legal dimension.

In Part IV, we examine modern treaty practices in Canada, Australia, and Aotearoa / New Zealand and assess how they respond to the two challenges we identified. As we demonstrate, modern processes are cognizant of the relational character of treaty; states have worked to address key problems arising from treaty negotiation processes. However, because treaties between First Peoples and the state remain domesticated, modern processes have not been able to tackle the second challenge. Modern treaties may be appropriately characterized as 'nation-to-nation' agreements, but they secure their legal force through enactment of state legislation.¹⁸ Consequently, the terms of that agreement are ultimately defined and adjudicated by and under state law. Even if fair and equitable negotiation processes are established – and many First Peoples contend that this is not the case – the outcome of those negotiations empowers states with the legal

12 *Wi Parata v Bishop of Wellington*, (1877) 3 NZ Jur (NS) 72 (SC) [*Wi Parata*].

13 *St Catherine's Milling and Lumber v R*, [1888] UKPC 70, 14 App Cas 46 [*St Catherine's Milling*].

14 *Lone Wolf v Hitchcock*, (1903) 187 US 553 [*Lone Wolf*].

15 Miguel Alfonso Martinez, Special Rapporteur, *Studies on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations*, UN Doc E/CN.4/Sub.2/1999/20 (22 June 1999) at 24, para 192.

16 *Ibid* at 18, para 110.

17 John Borrows, 'Origin Stories and the Law: Treaty Metaphysics in Canada and New Zealand' in Mark Hickford & Carwyn Jones, eds, *Indigenous Peoples and the State: International Perspectives on the Treaty of Waitangi* (Abingdon, UK: Routledge, 2018) 30 [Borrows, 'Origin Stories'].

18 See e.g. *Nisga'a Final Agreement*, 4 May 1999 (entered into force 11 May 2000); *Nisga'a Final Agreement Act*, SBC 1999, c 2; *Nisga'a Final Agreement Act*, SC 2000, c 7.

authority to pivot from treaty partner to treaty adjudicator. Where this risk persists, relational and legal fractures may emerge.

Treaties purport to establish a shared framework that will ‘guide the parties’ relationship for the indefinite future, if not forever.’¹⁹ When given effect in state law, however, states can monopolize and unilaterally interpret what that framework means, potentially weakening the basis of that relationship. How then can First Peoples be sure that a treaty will protect their interests? How then can the relational character of treaty endure?²⁰ Recognizing that our answer is both provisional and partial, we argue in Part V that efforts to build positive and productive relationships both inside and outside treaty processes are part of the solution.²¹ Promoting right relations between First Peoples and the state may help frame how intercommunal disputes are resolved and how an agreement is interpreted, potentially ameliorating some of the challenges that state law continues to present. While it may not be possible (within state law) to legally preclude the state from acting in ways that unilaterally further state interests, acts of relationality may help foster an ethic that infuses the treaty process with moral and political pressure to work together. That ethic may enable non-Indigenous peoples to recognize First Peoples as valuable contributors and partners in governing. State action will remain an ever-present risk, but non-legal acts of relationality may help to recentre focus on the enduring promise of treaty – the opportunity to cultivate and create perpetual ‘peace, friendship, and respect.’²²

II *The dual character of treaties*

Treaties between First Peoples and states are complex, multidimensional instruments. While both parties enter negotiations in the desire to secure legal certainty over a range of claims and interests, these agreements are more than simply legal covenants. They are also declarations of enduring relations that seek to connect ‘different peoples through constitutional bonds of multicultural unity.’²³ Treaties therefore have a dual character; they are both legal and relational instruments. These twin characters are complementary and mutually reinforcing. Although

19 Michael Coyle, ‘As Long as the Sun Shines: Recognising That Treaties Were Intended to Last’ in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historic Treaties* (Toronto: University of Toronto Press, 2017) 39 at 40. But see Jeremy Waldron, ‘The Half Life of Treaties: Waitangi, *Rebus Sic Stantibus*’ (2006) 11:2 *Otago L Rev* 161.

20 Carwyn Jones, ‘Māori and State Visions of Law and Peace’ in Mark Hickford & Carwyn Jones, eds, *Indigenous Peoples and the State: International Perspectives on the Treaty of Waitangi* (Abingdon, UK: Routledge, 2018) 13 [Jones, ‘Māori and State Visions’].

21 Please note that while we acknowledge that there is merit in exploring whether and how bipartite neutral treaty implementation forums empowered to implement Indigenous values and to hear evidence in Indigenous languages could promote effective treaties, our focus in this article is on relationships rather than institutions.

22 John Borrows, *Law’s Indigenous Ethics* (Toronto: University of Toronto Press, 2019) at 38.

23 Robert Williams Jr, *Linking Arms Together: American Indian Visions of Law and Peace* (Oxford: Oxford University Press, 1997) at 105 [Williams, *Linking Arms Together*].

the terms of any modern treaty obtain their legal force through the enactment of domestic legislation, the moral and political power of the instrument arises from the process of negotiation and the strength of the relationship that it produces. Where that process is inequitable or that relationship uneven, the authority of the treaty itself is weakened. Significantly, then, an effective and meaningful treaty requires a relationship built on mutual trust and respect.

A treaty creates binding and enforceable obligations, but it is not an ordinary legal instrument. Unlike contracts, partnership agreements or service delivery arrangements, for instance, treaties speak in a different register. Consider the Noongar Treaty in Australia as an example.²⁴ On 30 March 2015, the Noongar people of southwest Western Australia voted to accept a settlement agreement negotiated with the Western Australia government. The settlement is significant. Involving about thirty thousand Noongar people and covering around two hundred thousand square kilometres, it is the largest and most comprehensive agreement concerning Aboriginal interests in land in Australian history.²⁵ Its value is approximately 1.3 billion Australian dollars, and it ‘includes agreement on rights, obligations and opportunities relating to land, resources, governance, finance, and cultural heritage.’²⁶ In exchange for this package, the Noongar people agreed to surrender all current and future claims relating to historical and contemporary dispossession.²⁷

Agreements like the Noongar Treaty have legal consequences, but, self-evidently, they are more than simply legal texts. As political agreements reached via a process of respectful negotiation that ‘articulate basic terms and conditions of social co-existence,’²⁸ treaties are also relational instruments. This character is present across and beyond the agreement. As part of the settlement, the Western Australian Parliament enacted legislation drafted in Noongar language for the first time in history.²⁹ The Noongar (Koorah, Nitja, Boordahwan)

24 *South West Native Title Settlement*, 8 June 2015 (not yet entered into force). *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA); *Land Administration (South West Native Title Settlement) Act 2016* (WA).

25 Gian De Poloni, ‘WA Premier Signs \$1.3 Billion Noongar Native Title Settlement,’ *ABC News* (8 June 2015), online: <<http://perma.cc/B3SJ-KULX>>.

26 Harry Hobbs & George Williams, ‘The Noongar Settlement: Australia’s First Treaty’ (2018) 40 *Sydney L Rev* 1 at 31.

27 Note that the settlement has not yet entered into effect. Although the settlement was approved by the Noongar people and enacted in state legislation, several Noongar people have challenged the settlement in Australian courts. The settlement will only commence if those applications are dismissed. Calla Wahlquist, ‘“It Is Not About Money”: Australia’s Largest Native Title Settlement Challenged Again,’ *The Guardian* (30 November 2018), online: <www.theguardian.com/australia-news/2018/nov/30/it-is-not-about-money-australias-largest-native-title-settlement-challenged-again>.

28 Patrick Macklem, ‘The Constitutional Identity of Indigenous Peoples in Canada: Status Groups or Federal Actors?’ in Jean Cohen, Andrew Arato & Astrid von Busekist, eds, *Forms of Pluralism and Democratic Constitutionalism* (New York: Columbia University Press, 2018) 117 at 124 [Macklem, ‘Constitutional Identity’].

29 Western Australia, Legislative Council, *Parliamentary Debates* (22 March 2016) at 1496 (Peter Collier, Minister for Aboriginal Affairs).

(Past, Present, Future) Recognition Act 2016 (Western Australia) recognizes the Noongar people as the traditional owners and occupiers of southwest Western Australia, and their continued relationship with country.³⁰ On the day that the bill was introduced into the Parliament, Noongar elder Elizabeth Hayden, told reporters: ‘My heart is weeping with joy. We live with hope because we’ve been knocked from pillar to post for generations. We’ve always lived in hope that we would get to a point of being acknowledged as the first people of this nation. ... The past is past, but we need to move forward to a better future.’³¹

Members of Parliament also recognized the need to acknowledge past wrongs in order to construct a more just future. In his speech during the bill’s second reading, the minister for Aboriginal affairs, Peter Collier, spoke of the deep injustices that had been done to the Noongar people since the arrival of the British in 1826. He recounted the ‘one-sided struggle over land and resources,’ the ‘devastating spread of introduced diseases,’ the hardening of attitudes toward Aboriginal people at the turn of the twentieth century, and the ‘repressive and coercive system of control’ mandated by the Aborigines Act 1905 (Western Australia), the impact of which ‘still resonates throughout Western Australian society.’ And, yet, despite this ‘history of oppression and marginalisation,’ the ‘Noongar people have survived’ and continue ‘to assert their rights and identity.’³² Deputy Opposition Leader Roger Cook spoke in a similar language, explaining that the settlement represented ‘a coming together between two nations to agree upon certain things and, in doing so, finding a way forward together and recognizing each other’s sovereignty.’³³

These statements are important for they signal the deeper resonance of First Peoples-State treaty making. Although the terms struck are significant for both parties, the value of the agreement extends beyond the text. As Robert Williams Jr has argued, a treaty is ‘a way of imagining a world of human solidarity where we regard others as our relatives,’³⁴ and it encompasses the ‘idea of being able to live together in harmony.’³⁵ It is through sitting around a table and talking that relationships built on trust and communication across and between distinct political communities can be developed. It is through those relationships that participants are able to envisage and share in the design of a shared future, where political power is consensually distributed.³⁶

30 *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA), s 5.

31 Australian Associated Press, ‘WA Introduces Bill Recognising Noongar People as Traditional Land Owners,’ *Guardian Australia* (14 October 2015), online: <www.theguardian.com/australia-news/2015/oct/14/wa-introduces-bill-recognising-noongar-people-as-traditional-land-owners>.

32 Western Australia, Legislative Council, *Parliamentary Debates* (22 March 2016) at 1496–7 (Peter Collier, Minister for Aboriginal Affairs).

33 Western Australia, Legislative Assembly, *Parliamentary Debates* (19 November 2015) at 8688 (Roger Cook, Deputy Opposition Leader).

34 Williams, *Linking Arms Together*, supra note 23 at 94.

35 Wemba-Wemba and Noongar woman Carissa Lee. Cited in Victoria, ‘Deadly Questions: What Does a Treaty Mean to You?’ online: Government of Victoria <<https://deadlyquestions.vic.gov.au/deadly-question/what-does-a-treaty-mean-to-you>> [‘Deadly Questions’].

36 Russel Lawrence Barsh & James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley: University of California Press, 1980) at 270. That parties strive for

The relational character of First Peoples-State treaties recurs in the contemporary discussion on treaty making in both Canada and Australia. It is reflected in the preamble to the Nisga'a Final Agreement, which notes that a treaty is a symbol of 'equal partnership,' based on 'mutual recognition and sharing.'³⁷ It is also present in the preamble to the Victorian Act that creates a legislative basis for negotiating a treaty with Aboriginal people in the state:

Through this historic Act, all Aboriginal Victorians and the State are building on this and other good work and embarking on a renewed and mature relationship. This relationship is one of equal partnership, founded on mutual respect and a commitment to justice and equality for Aboriginal Victorians, and to promoting reconciliation between Aboriginal and non-Aboriginal Victorians.³⁸

The same language has been adopted in the preliminary phases of treaty making in the Northern Territory. In the Barunga Agreement, the Northern Territory chief minister and the four Aboriginal Land Councils agreed to develop and implement a consultation process leading to treaty negotiations. The agreement envisages treaty as a substantive means for empowering Aboriginal communities with real decision-making authority. At the same time, it upholds treaty as offering the potential to ground 'lasting reconciliation between the First Nations of the Territory and other citizens with the object of achieving a united Northern Territory.'³⁹ As this language suggests, through its dual character, treaty making is the process by which non-Indigenous political communities obtain the moral and legal right to 'share the land'⁴⁰ and by which 'unresolved issues of reconciliation can be resolved.'⁴¹ For this reason, the Supreme Court of Canada has recognized that a treaty is more than a legal contract; 'a treaty represents an exchange of solemn promises ... [and] an agreement whose nature is sacred.'⁴²

consensus about how to distribute political power does not mean consensus or fair distribution is achieved. As a political project, agreement making will be 'agonistic,' meaning that there will be continual disappointments and ongoing conflicts. See Chantal Mouffe, *On the Political* (Abingdon, UK: Routledge, 2005). As applied to treaties within a public law context, see Mark Hickford, 'The Historical, Political Constitution: Some Reflections on Political Constitutionalism in New Zealand's History and Its Possible Normative Value' (2013) 4 NZLR 585 at 594–5.

37 *Nisga'a Final Agreement*, supra note 18, preamble. See further Patrick Macklem, 'Indigenous Peoples and the Ethos of Legal Pluralism in Canada' in Patrick Macklem & Douglas Sander-son, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) 17 at 21–3 [Macklem, 'Indigenous Peoples'].

38 *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic).

39 *Barunga Agreement* (Aboriginal Land Councils–Northern Territory Government), 8 June 2018 (memorandum of understanding) at 6.

40 Michel Asch, *On Being Here to Stay* (Toronto: University of Toronto Press, 2014) at 97.

41 Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge – Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament* (Canberra: Council for Aboriginal Reconciliation, 2000) at 10.

42 *R v Badger*, [1996] 1 SCR 771 at para 41, La Forest, L'Heureux-Dubé, Gonthier, Cory, and Iacobucci JJ majority [*Badger*].

Contemporary relational understandings of treaty making draw inspiration from historic treaties negotiated between First Peoples and colonial powers in North America and Aotearoa / New Zealand. The force of those agreements was not simply in the final settlement of their terms but, rather, in the process of their negotiation and continuing renewal; they were intended as dynamic and responsive sites of negotiation and recorded and revitalized through ritualized performances that drew the parties together into an 'ongoing personal relationship.'⁴³ While a treaty may have been finalized at a council fire, it was never final. Rather, it was considered the starting point for 'ongoing discussion and reassessment.'⁴⁴ In North America, for instance, in the years following agreement, both parties would travel and meet to polish the Covenant Chain,⁴⁵ to exchange wampum belts, and to 'maintain the conditions of peaceful relations.'⁴⁶ In these actions, the parties purported to bind themselves into an enduring relationship.

First Peoples often expressed the treaty relationship in 'ecological terms' to underscore its permanence.⁴⁷ During negotiations, First Peoples' chiefs repeatedly emphasized that the agreements struck would 'last as long as the sun shines and the river runs'⁴⁸ or 'as long as the moon brightens the night, as long as water runs and the grass grows in spring.'⁴⁹ Colonial negotiators echoed this imagery. Alexander Morris, the primary Canadian negotiator for several of the numbered treaties, expressed settler conceptions of these agreements in similar terms. On 19 August 1876 near Fort Carlton, Morris explained to Cree and Salteaux chiefs: 'I told you also that what I was promising was not for to-day or to-morrow only, but should continue as long as the sun shone and the river flowed.'⁵⁰ Treaty is the means through which two or more parties agree to act in a certain way with the goal of building an enduring partnership. But what sort of partnership is envisaged?

43 Jones, 'Māori and State Visions,' supra note 20 at 26.

44 Waitangi Tribunal, *He Whakaputanga me te Tiriti – The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 460 [Waitangi Tribunal, *He Whakaputanga*].

45 G Peter Jemison, 'Sovereignty and Treaty Rights: We Remember' (1995) 7:3 *St Thomas L Rev* 631.

46 Bruce Morito, *An Ethic of Mutual Respect* (Vancouver: UBC Press, 2012) at 68 [Morito, *Ethic of Mutual Respect*]. See further Susan Hill, *The Clay We Are Made Of: Haudenosaunee Land Tenure on the Grand River* (Winnipeg: University of Manitoba Press, 2017) at 98.

47 James Sákéj Youngblood Henderson, 'Interpreting *Sui Generis* Treaties' (1997) 36:1 *Alta L Rev* 46 at 51. Sharon Venne argues that this terminology is more appropriately understood in biological and genealogical terms. Cf Sharon Venne, 'Understanding Treaty 6: An Indigenous Perspective' in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 173 at 194.

48 Cree Chief Mis-tah-wah-sis in negotiations that led to Treaty 6. Reproduced in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (Toronto: Belfords, Clarke and Company, 1880) at 213 [Morris, *Treaties of Canada*].

49 Blackfoot Chief Zoatze-Tapitapiw in negotiations that led to Treaty 7, reproduced in Morris, *The Treaties of Canada*, supra note 48 at 271.

50 Ibid at 208. This formulation was repeated at several different negotiations. See also negotiations that led to Treaty 1 (at 29).

Reflecting differences in worldviews, First Peoples and colonial powers may have had diverse opinions. The Two Row Wampum Treaty, signed in 1613 by the representatives of the Five Nations of the Haudenosaunee and representatives of the Dutch government in what is now upstate New York, is often upheld as an example of the ideal equitable relationship built by and through treaty making. Even here, however, Haudenosaunee tradition, which records their reply to the Dutch treaty proposal, reveals challenges:

You say that you are our Father and I am your Son. We Say, We will not be like Father and Son, but like Brothers. ... Neither of us will make compulsory laws or interfere in the internal affairs of the other. Neither of us will try to steer the other's vessel.⁵¹

Recognizing that treaty is a precursor to 'a just relationship,'⁵² and a way to engender right relations, emphasizes that one party's failing to substantively meet the commitments they have made will risk that relationship. Equally, those commitments must themselves be substantive or else the relationship will be cheapened. In earlier times, this required commitments to avoid trying to steer the other's vessel. Today, developing an enduring partnership not only requires a suite of forward-looking mechanisms that empower First Peoples to build contemporary institutions of self-government, but it also requires acknowledgement and apology for 'political commitment to a more just future can only be secured by acknowledgement of past wrongs and the promise of reparative action.'⁵³

Modern treaties thus promise to be 'relationship-building instruments as well as rights-defining instruments.'⁵⁴ As legal texts, treaties empower First Peoples by recognizing or establishing institutions of self-government. At the same time, in serving as a forum for engagement and in striving to formally distribute political power between and among political communities, treaties seek to renew relationships and create a bridge for diverse peoples to converse. For this reason, this legal instrument should not be understood as merely reflecting a 'standard contractual commercial interaction' but, rather, an articulation of a deeper culture of respect and relationship.⁵⁵

Historical and contemporary treaties aim to develop these dual characters, but contemporary treaty negotiations take place in a very different context from their historic forms. Power asymmetries mean that modern treaty practices occur within a framework that presupposes state law as the default. For instance,

51 Cited in Williams, *Linking Arms Together*, supra note 23 at 83.

52 Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Toronto: University of Toronto Press, 2005) at 156.

53 Harry Hobbs, 'Locating the Logic of Transitional Justice: Native Title in Australia' (2016) 39:2 UNSWLJ 512 at 513 [Hobbs, 'Locating the Logic'].

54 Julie Jai, 'Bargains Made in Bad Times: How Principles from Modern Treaties Can Reinvigorate Historic Treaties' in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historic Treaties* (Toronto: University of Toronto Press, 2017) 105 at 139.

55 Matthew Palmer, 'Constitutional Realism about Constitutional Protection: Indigenous Rights under a Judicialized and a Politicized Constitution' (2007) 29 Dal LJ 1 at 29 [Palmer, 'Constitutional Realism'].

though many Noongar people voted in favour of their treaty, the scope of the potential agreement was always limited by the state. The Noongar lead negotiators recognized these limits and adopted a pragmatic approach; their aim was ‘to secure recognition and cultural and customary rights over our traditional lands, and consequently, to lay a platform of self-determination.’⁵⁶ Whether that platform proves sufficiently sturdy largely depends on the quality of the relationship that the treaty helps establish. As we trace in the following Part, a review of historic treaty making demonstrates that where negotiations are inequitable or unfair, or where one party monopolizes the interpretation of the agreement, the relationship can sour and its promises can be lost.

III *Historic treaties and inequities*

The practice of historic treaty making between First Peoples and colonial powers in North America and Aotearoa / New Zealand informs and motivates modern treaty processes. As many First Peoples have noted, however, historic treaties often failed over time to maintain the relational element necessary to ground sustainable and meaningful settlements. In this Part, we outline two common, interrelated problematic areas of treaty practice that emerged in these sites in the eighteenth and nineteenth centuries. Although not a comprehensive review of centuries of treaty making, nor a full account of the factors that led to inequities, our snapshot highlights two key relational failings. We demonstrate how inequitable treaty negotiation inhibited the formation of just relations and how unilateral treaty interpretation challenged the maintenance of peace and mutual respect. In Part IV, we turn to how modern practices are responding to the limitations of their historical antecedents.

A NEGOTIATION

Three broad challenges that arose at the negotiation stage inhibited the ability of many historic treaties to promote and develop enduring relationships. First, negotiations did not always culminate in a clear set of expectations and understandings on both sides. Second, negotiation did not always occur, with some treaties essentially proposed on a take it or leave it basis or even drafted before an agreement was actually reached.⁵⁷ Third, and perhaps most commonly, negotiations were not always conducted in good faith, as colonists often sought to coerce, intimidate, or manipulate their counterparts. In each case, some form of inequity at the earliest stage of treaty making meant that the agreement struck was never infused with the necessary trust and mutual respect. In the absence of that grounding, right relations were difficult to maintain. Of course, treaties between First Peoples and settler states, like all relationships, can be messy and complicated. The quality of the relationship that is created by and through the

⁵⁶ Glen Kelly & Stuart Bradfield, ‘Negotiating a Noongar Native Title Settlement’ in Sean Brennan et al, eds, *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Annandale, Austl: Federation Press, 2015) 249 at 250.

⁵⁷ Walters, ‘Brightening the Covenant Chain,’ *supra* note 10 at 78.

negotiated instrument can flourish or founder, depending on the commitment of each party. This commitment too can wax and wane over time. Fair settlements can be broken, and bad bargains struck in difficult times can be reimaged, if the relationship is strong enough.

The process of negotiation has differed across many historic treaties. In several cases, what we would today describe as a ‘treaty’ largely comprised of only oral discussion and debate. Although the agreement was understood to bind the parties, it may not even have been recorded because all sides recognized that its power and authority lasted only as long as their relationship endured.⁵⁸ This was the case for the Covenant Chain, an alliance between Aboriginal and European parties in North East America during the seventeenth century.⁵⁹ Initially, the agreement emerged as an economic arrangement, but, over time, it expanded to address military and political issues. As Bruce Morito explains, its effectiveness depended on both parties’ willingness to redress concerns and renew relationships, while its evolution revealed the development of an ‘intercultural sensibility’ and ‘shared culture.’⁶⁰ Agreement was often embodied in physical objects, like wampum belts, but the parties’ respective legal rights and obligations were never precisely outlined.⁶¹ The absence of a clear text did not detract from, or diminish, the authority of the agreement, however, because its strength was its relationship. Reflecting that character, the settlement was never final, but it had to be renewed. It was through annual meetings that the parties could ‘strengthen and brighten the chain of friendship.’⁶²

When parties are committed to renewing relationships and there are relational practices in place, eschewing clear legal obligations is not necessarily problematic. However, as power dynamics shifted for various reasons, state actors could rely on the absence of clear legal obligations to downplay the commitments that they had made. For this reason, while modern treaties must retain the key relational character of their antecedents, they must also outline a series of mutual

58 Aaron Mills / Waabishki Ma’iingan, ‘What Is a Treaty? On Contract and Mutual Aid’ in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historic Treaties* (Toronto: University of Toronto Press, 2017) 208: ‘A treaty is the relationship itself.’

59 Morito, *Ethic of Mutual Respect*, supra note 46 at 24–30. John J Borrows & Leonard I Rotman, *Aboriginal Legal Issues: Cases, Materials and Commentary*, 4th ed (Markham: LexisNexis, 2012) at 16–17 [Borrows & Rotman, *Aboriginal Legal Issues*] (also identifying the 1664 Articles between Colonel George Cartwright and the NewYork Indians as the first indication of the Covenant Chain).

60 Morito, *Ethic of Mutual Respect*, supra note 46 at 30.

61 Of course, the general agreement was clear. Consider the Two-Row Wampum, which undergirds a relationship of peace, friendship, and respect between Haudenosaunee and colonial powers. For a discussion, see Robert Williams Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford: Oxford University Press, 1990) at 327, citing House of Commons, Special Committee on Indian Self-Government, *Indian Self-Government in Canada: Report of the Special Committee* (1983) (chair: Keith Penner).

62 Collections of the Massachusetts Historical Society, *Journal of the Proceedings of the Congress Held at Albany, in 1754* (John H Eastburn, 1836) at 30; Walters, ‘Brightening the Covenant Chain,’ supra note 10 at 82.

rights and responsibilities. Modern treaties are relational instruments, but they are also ‘highly technical blueprints for future systems of rule,’ ensuring that the parties can be clear about the terms of their agreement.⁶³ Without this clarity and enforceability, it may be difficult for parties to trust one another.

In other cases, actual negotiations between parties may not have taken place. For instance, it is difficult to say that the Treaty of Waitangi is a negotiated instrument as it is not clear that the Māori had any influence over the drafting of its terms. William Hobson, the lieutenant governor of New South Wales and the British consul to New Zealand, prepared the document with the assistance of James Busby, the British resident in New Zealand, and translated it into Te Reo Māori on 4 February 1840. This was the document that forty-three Māori chiefs assented to on 6 February.⁶⁴ Hobson and others then travelled throughout the North Island to secure a further 450 signatures from *hapū* (clan) chiefs.⁶⁵ While the Māori discussed whether they should accept it or not, and Hobson and his colleagues relied on their understanding of *tikanga Māori* (the Māori way of doing things) to draft the instruments, its terms were not negotiated. Many chiefs did accept it,⁶⁶ and Hobson, as governor, would later proclaim that it applied to all Māori. The absence of any negotiation, however, undoubtedly contributed to inconsistencies between the English and Te Reo Māori texts. In fact, several experts have argued that because of these differences Te Tiriti o Waitangi and the Treaty of Waitangi are ‘best regarded as “two very different documents.”’⁶⁷

Finally, in many cases, historic treaties failed to lead to positive settlements because the negotiations were not conducted in good faith or were even outright fraudulent. Countless examples exist. Consider the 1737 Walking Treaty. In 1736, brothers John and Thomas Penn claimed that, under a 1686 deed (its validity itself in question), the Lenape Nation had promised to sell a tract of land running from a certain point to as far west as a man could walk in a day and a half.⁶⁸ After some negotiations, the Lenape agreed to honour the deed, assuming

63 Ravi de Costa, ‘History, Democracy, and Treaty Negotiations in British Columbia’ in Alexandra Harmon, ed, *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest* (Seattle: University of Washington Press, 2008) 297 at 313; Sari Graben & Matthew Meaffey, ‘Negotiating Self-Government over and over and over Again: Interpreting Contemporary Treaties’ in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historic Treaties* (Toronto: University of Toronto Press, 2017) 164 at 165 [Graben & Meaffey, ‘Negotiating Self-Government’].

64 Robert Miller et al, *Discovering Indigenous Lands* (Oxford: Oxford University Press, 2010) at 212 [Miller et al, *Discovering Indigenous Lands*]; Claudia Orange, *The Treaty of Waitangi* (Wellington: Bridget Williams Books, 2010) at 24–47 [Orange, *Treaty of Waitangi*].

65 Orange, *Treaty of Waitangi*, supra note 64 at 60–91.

66 Notably, many also did not. See e.g. Rawina Higgins, “‘Ko te mana tuatoru, ko te mana Motuhake”” in Mark Hickford & Carwyn Jones, eds, *Indigenous Peoples and the State: International Perspectives on the Treaty of Waitangi* (Abingdon, UK: Routledge, 2018) 129.

67 See discussion in Tiopira McDowell, ‘Diverting the Sword of Damocles: Why Did the Crown Choose to Settle Māori Historical Treaty Claims’ (2018) 64:4 *Australian Journal of Politics and History* 592 at 592, n 1 [McDowell, ‘Diverting the Sword of Damocles’].

68 Francis Jennings, ‘The Scandalous Indian Policy of William Penn’s Sons: Deeds and Documents of the Walking Purchase’ (1970) 37 *Pennsylvania History* 19 at 29.

that a walk through the dense forests at a conventional pace would cover around twenty miles. However, as Stuart Banner explains, the chief justice of the Pennsylvania Supreme Court surveyed and cleared a route through the forest and hired the three fastest runners in the colony.⁶⁹ Accompanied by horses carrying provisions, the men travelled 55 miles, leading to cession of around twelve hundred square miles of Lenape land.⁷⁰ Despite protestations that the amount was far greater than intended, the 'treaty' stood. Its consequences still stand today: in 2004, the US District Court belatedly acknowledged that Lenape title had been extinguished by fraud but nonetheless dismissed their case.⁷¹ This decision was affirmed by the US Court of Appeals for the Third Circuit, holding that Aboriginal title can be validly extinguished by fraud.⁷²

Negotiations were not any more equitable following independence. In 1778, the United States entered into its first treaty, reaching an agreement with the Delaware Nation, led by White Eyes, at Fort Pitt. A wampum belt was exchanged, committing the parties to perpetual peace and friendship and legally recognizing territorial rights for both polities.⁷³ However, the Delaware complained about the final version of the treaty. We cite from Colin Calloway at length:

The Delawares complained that the American commissioners 'put a War Belt & Tomahawk in the hands of said Delaware Nation & induced some of their Chiefs to sign certain Writings' that contained 'declarations & Engagements they never intended to make.' They returned the belt and tomahawk. The speaker for the Delaware Council said he had 'looked over the Articles of the treaty again & find that they are wrote down false, & as I did not understand the Interpreter what he spoke I could not contradict his interpretation, but now I will speak the truth plain & tell you what I spoke.' George Morgan [a trader and later congressman], who was not present at the treaty, said the Delawares had 'a very wicked false Interpreter,' and he denounced the treaty as 'villainously conducted.' ... The peace and friendship pledged at Fort Pitt did not last long. White Eyes died in November, murdered by American militia. William Crawford ... who had attended the treaty, died four years later, ritually tortured to death by Delaware warriors exacting vengeance for the slaughter of their relatives.⁷⁴

As a political agreement struck by distinct normative communities with widely divergent motivations and expectations, disputes were always going to arise over the meaning of the bargain reached between the Delaware and the United States. Significantly, however, inequities during the negotiation stage precluded the settlement from constructing a lasting peace and friendship. These inequities thus enhanced the likelihood that both parties would question their relationship rather than the terms of the settlement. Where a party concludes that the relationship itself is at issue, the document is worthless.

69 Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge, MA: Harvard University Press, 2005) at 67.

70 Ibid.

71 *Delaware Nation v Pennsylvania*, 2004 WL 2755545 (ED Pa 2004) at para 414.

72 *Delaware Nation v Pennsylvania*, 446 F3d 410 (3d Cir 2006).

73 Colin G Calloway, *Pen and Ink Witchcraft: Treaties and Treaty Making in American Indian History* (Oxford: Oxford University Press, 2013) at 96 [Calloway, *Pen and Ink Witchcraft*].

74 Ibid at 97.

B INTERPRETATION

First Peoples and colonial representatives or settler states entered into treaties with the hope of securing certainty. Where one party breached their obligations, the other was entitled to obtain redress. Yet whether an alleged breach was admitted or redress provided depended on how the dispute was determined and who was positioned to determine it. The ability to conclude whether the treaty had been breached and an obligation for redress was owed, therefore held considerable power over the meaning of the terms of any settlement. In the early years of treaty making, colonial powers recognized First Peoples as partners, and disputes were determined on that basis. Consider again the Covenant Chain. As Morito explains, the Covenant Chain may not have been the ‘product of a golden age of Crown-Aboriginal relations,’ but it ‘was a distinctive type of intercultural arrangement.’⁷⁵ Established ‘in the context of war, intrigue, hard-edged and often illicit trading practices, and an array of related conflicts,’⁷⁶ both parties, at different times, accused the other of breaching their agreement. For instance, in the 1680s, Virginia Governor Baron Howard of Effingham claimed that the Five Nations broke the Covenant Chain when they killed two hundred cattle. He later asserted that they ‘deceived English folks by using white flags of truce to gain entrance to forts and, after being fed, raid[ed] the forts, killing its inhabitants, and taking prisoners.’⁷⁷ To avoid war, representatives of the Mohawk – the eastern-most of the Five Nations – intervened. Despite asserting their own innocence, the Mohawk ‘accepted blame on behalf of their brother nations’ for having breached their bond.⁷⁸ They then engaged in acts to renew the Covenant Chain, which involved ‘an unusual amount of gift giving’ and admonishing the other nations.⁷⁹ Morito notes that this example demonstrates that disputes were determined ‘like proceedings at a court of law between interlocutors willing and able to sue, negotiate, and construct narratives in an attempt to gain legal advantage,’⁸⁰ but it also reveals the essentially relational character of the agreement.

The Covenant Chain was not perfect, but decisions were made ‘by consultation and treaty,’ and both parties committed to renewing relations more or less as equals.⁸¹ This did not last. In North America, as imperial Britain fragmented into settler states, those new states sought to domesticate the nation-to-nation agreements that they had made with the First Peoples. While continuing to recognize treaties as legal instruments, domestication allowed the United States and Canada to monopolize the role of arbiter of disputes. The unilateral reinterpretation

75 Morito, *Ethic of Mutual Respect*, supra note 46 at 19. See further Walters, ‘Brightening the Covenant Chain,’ supra note 10.

76 Morito, *Ethic of Mutual Respect*, supra note 46 at 19.

77 Ibid at 22–3.

78 Ibid at 23.

79 Ibid.

80 Ibid.

81 Calloway, *Pen and Ink Witchcraft*, supra note 73 at 24; John Borrows, ‘Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self-Government’ in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997) 155 at 161 [Borrows, ‘Wampum at Niagara’].

of treaties by colony-qua-state courts displaced the relational character of the agreements and marginalized First Peoples' understanding of the terms that they had struck.

Consider the Sioux treaties as an example. The Sioux entered into treaties with the United States in 1851 and 1868.⁸² The 1868 Treaty acknowledged the Great Sioux Nation's powers of self-government and criminal jurisdiction.⁸³ It also included an article regulating land cession. Under Article XII, 'at least three-fourths of all of the adult male Indians occupying or interest[ed] in the' land must provide their consent before territory could be ceded. While clear on its face, the provision would not be interpreted by US actors in a manner favourable to the Sioux. In 1877, following the Battle of Little Bighorn and the Great Sioux War, the United States forced the Sioux to sign a subsequent agreement.⁸⁴ Although the earlier treaties set out a legal requirement governing alienation, the 1877 agreement purported to cede the Sioux Nation's Black Hills to the United States with signatures from only 10 per cent of all adult male Indians. Despite protestations, the United States simply ignored the Sioux. It was not until 1980 that the Supreme Court of the United States recognized the agreement was an illegal taking under the US Constitution.⁸⁵

A similar fate befell the Kiowa, Comanche, and Apache Nations. All entered into treaties with the United States in the late 1860s, which provided that land could only be transferred with three-quarters consent of the adult male population. However, following congressional enactment of the Indian Appropriations Act 1871,⁸⁶ and the Dawes Act 1877,⁸⁷ the United States reduced the tribes' reservations without that consent. In *Lone Wolf v Hitchcock*, the US Supreme Court upheld those state actions, confirming that Congress had '[p]lenary authority' over Indian affairs, including the power to unilaterally abrogate treaty obligations and appropriate land without Native American consent.⁸⁸ The Court held further that this power was political and not subject to judicial review.⁸⁹ In reaching this conclusion, the United States transformed the character of the agreements that they had signed with these nations. No longer *a priori* legal instruments

82 Stephen Young, 'The Sioux's Suits: Global law and the Dakota Access Pipeline' (2017) 6:1 *Am Indian L Rev* 173 at 182-4.

83 *Treaty of Fort Laramie*, 15 Stat 635 (1868), art 1.

84 *Agreement of 1877*, 19 Stat 254 (1877) at 256.

85 *United States v Sioux Nation*, 448 US 371 (1980). The US Supreme Court held that the Sioux were entitled to receive interest on compensation payments owed. The Sioux have not accepted the award as it would terminate their demand for the return of their land. Their award continues to accrue compound interest and now stands at over one billion US dollars. 'Why the Sioux Are Refusing \$1.3 Billion,' *PBS News Hour* (24 August 2011), online: <www.pbs.org/newshour/arts/north_america-july-dec11-blackhills_08-23>.

86 25 USC § 71.

87 Ch 119, 24 Stat 388.

88 *Lone Wolf*, supra note 14 at 565, White J majority. See also Walter R Echo-Hawk, *In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided* (Golden, CO: Fulcrum, 2010), ch 7.

89 *Lone Wolf*, supra note 14 at 565, White J majority.

negotiated between equal political communities through which the United States secured the right to settle Native American land, treaties became domestic legal instruments entirely subject to the US Constitution.

The relational character of nation-to-nation agreements was also transformed in Canada. Following British victory in the French and Indian War, King George III issued the Royal Proclamation of 1763. It restricted colonial expansion and guaranteed Aboriginal 'Nations or Tribes' undisturbed possession of their territories, unless purchased by the Crown or ceded via treaty by delineating 'boundaries and jurisdiction between Aboriginal people and the Crown.'⁹⁰ As John Borrows and Leonard Rotman explain, the Royal Proclamation sought 'to convince Indians that the British would respect existing political and territorial jurisdiction ... implying that no lands would be taken from Indians without their consent.'⁹¹ More than twenty-four First Nations assented to the Royal Proclamation when it was presented to them as the Treaty of Niagara in 1764.⁹² Over the following 150 years, imperial Britain and later Canada would enter into treaties with various First Peoples to encourage peaceful relations and, later, to secure territory for colonial settlement.⁹³

The negotiation of the Peace and Friendship Treaties and the Numbered Treaties may have suffered from inequities at times, but the larger problem was that Canada domesticated those agreements and assumed the power to unilaterally interpret their terms. A clash over a logging licence served as the trigger for this pivot in Canada. Several years after Confederation, a dispute arose over which level of government obtained the beneficial interest in land acquired by treaty. The federal government had issued a permit to a lumber company allowing it to harvest trees on territory ceded by the Ojibwe people and within the province of Ontario. The Ontario government challenged the permit. In *St. Catherine's Milling and Lumber Co v R.*,⁹⁴ the Judicial Committee of the Privy Council found for Ontario. While the decision rested on the interpretation of the British North America Act 1867, the judges took the opportunity to remark on the nature of Aboriginal title.⁹⁵ Abrogating the spirit of the Royal Proclamation, they held that 'the tenure of the Indians was a personal and usufructuary right, dependent

90 *Royal Proclamation of October 7, 1763*, reproduced in RSC 1985, Appendix II. See generally Borrows, 'Wampum at Niagara,' supra note 81. The Royal Proclamation also applied to the American colonies, but its effect ceased after the American Revolution when Great Britain ceded the land to the United States in the *Treaty of Paris* (1783).

91 Borrows & Rotman, *Aboriginal Legal Issues*, supra note 59 at 20.

92 Borrows, 'Wampum at Niagara,' supra note 81.

93 Christina Godlewska & Jeremy Webber, 'The *Calder* Decision, Aboriginal Title, Treaties, and the Nisga'a' in Hamar Foster, Heather Raven & Jeremy Webber, eds, *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) 1 at 12–15; JR Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009).

94 *St Catherine's Milling*, supra note 13. See further Kent McNeil, *Flawed Precedent: The St Catherine's Case and Aboriginal Title* (Vancouver: UBC Press, 2019).

95 *St Catherine's Milling*, supra note 13 at 57–8, Lord Watson majority; *British North America Act 1867* (UK), 30 Vict, c 3, ss 91(24), 92(5), 109.

upon the good will of the sovereign.⁹⁶ No representatives of the Ojibwe people, or, indeed, any First Peoples, were heard.⁹⁷

A similar interpretive process occurred in Aotearoa / New Zealand. In 1848, the Ngāti Toa *iwi* (tribe) provided land to the Anglican Church on the promise that it would construct a school. The Ngāti Toa understood that they had made a ‘*tuku* of land – akin to a conditional gift – to the Bishop’ in exchange for a church school that ‘required the maintenance of ongoing mutual and reciprocal relationships.’⁹⁸ The church failed to build a school and later obtained a Crown grant to the land without the consent of Ngāti Toa. In *Wi Parata v Bishop of Wellington*, Chief Justice Michael Prendergast dismissed the *iwi*’s challenge to recover their land, holding that Native customary law must be supported by a Crown grant.⁹⁹ In reaching this decision, Prendergast CJ considered the legal force of the Te Tiriti o Waitangi. Drawing on the fact that there was not ‘a single Māori “nation,”’ Prendergast CJ asserted that ‘no body politic existed capable of making a cession of sovereignty’ so that ‘as the instrument purported to cede the sovereignty ... it must be regarded as a simple nullity.’¹⁰⁰ Considering the Māori signatories ‘primitive barbarians,’¹⁰¹ Prendergast CJ unilaterally annulled the treaty.

The *Wi Parata* decision highlights the length to which state actors went to avoid their legal obligations under treaty. Indeed, in 1901, Aotearoa / New Zealand’s highest court, the Judicial Committee of the Privy Council overturned *Wi Parata*, pointing out that the state had statutory authority to recognize customary rights.¹⁰² In response, the parliament passed two acts to extinguish any Native title rights in the land at issue in the case and imposed a statutory limitation to prevent a claim.¹⁰³ As David Williams notes, New Zealand’s judiciary ‘flatly rejected the admonition of the final appellate court for the empire and resolutely refused to distance themselves from *Wi Parata*,’ which would be New Zealand’s stance until it was conclusively overruled in 2003.¹⁰⁴ Contemporary scholarship now

96 *St Catherine’s Milling*, supra note 13 at 54.

97 It was not until 1973 that the Supreme Court of Canada confirmed that Aboriginal title could exist in Canadian law. *Calder v Attorney-General of British Columbia*, [1973] SCR 313 at 328–9, Martland, Judson & Ritchie JJ majority; at 394, Hall, Spence & Laskin JJ dissenting.

98 David V Williams, ‘Maori Social Identification and Colonial Extinguishments of Customary Rights in New Zealand’ (2007) 13:6 *Social Identities* 735 at 741 [Williams, ‘Maori Social Identification’].

99 *Wi Parata*, supra note 12; Grant Morris, ‘James Prendergast and the Treaty of Waitangi: Judicial Attitudes to the Treaty during the Latter Half of the Nineteenth Century’ (2004) 35:1 *VUWLR* 117.

100 *Wi Parata*, supra note 12 at 78. See also *R v Symonds*, [1847] NZPCC 387 at 390; Miller et al, *Discovering Indigenous Lands*, supra note 64 at 214–20. David Williams argues that the ‘simple nullity’ *obiter dictum* has overshadowed the more important aspects of the *Wi Parata* case. David Williams, *A Simple Nullity? The Wi Parata case in New Zealand Law and History* (Auckland: Auckland University Press, 2011), ch 3.

101 *Wi Parata*, supra note 12 at 77.

102 *Nireaha Tamaki v Baker*, [1901] UKPC 18.

103 Williams, ‘Maori Social Identification’, supra note 98 at 743.

104 *Ibid* at 746–8, discussing *Wallis v Solicitor-General*, (1903) NZPCC 23, the *Native Land Act 1909* and then referencing *Attorney-General v Ngati Apa*, [2003] 3 NZLR 643.

recognizes that the Māori signatories to the Treaty of Waitangi did not cede sovereignty¹⁰⁵ and that the treaty's principal drafters understood and accepted this position.¹⁰⁶ Nonetheless, just like in the United States and Canada, state actors in Aotearoa / New Zealand monopolized the interpretative function, avoided their legal obligations under the Treaty of Waitangi and entirely abrogated their relational responsibilities.

States domesticated treaties in different ways. In each case, however, the pivot from treaty partner to treaty adjudicator proved crucial in furthering domestication. As Dale Turner argues, 'treaty rights were interpreted solely by reference to non-Indigenous legal norms and values,' to the extent that treaties were 'textualized in the language of the dominant European culture.'¹⁰⁷ These treaties may always have been inequitable, but, as the power of the settler states increased, 'respect for Indian custom and concerns diminished and long-standing practices and rituals of reciprocity eroded.'¹⁰⁸ When states pivot, they prioritize their own interpretations of the treaty and fail to recognize or respect First Peoples' understanding. When this occurs, the treaty may be law, but it will not lead to, nor produce, positive relationships.

IV *Modern treaties and the law*

Modern treaty practices offer immense potential. The promise of respectful negotiation culminating in meaningful settlements presents an opportunity to rectify ongoing injustice and create the possibility of right relations. For these promises to be realized, however, the challenges and limitations that marred historic treaties must be avoided or resolved. First Peoples and some states have primarily responded to those challenges by attempting to establish fairer negotiation processes. Process is important. As we articulated above, many historic treaties struck between First Peoples and colonial powers were one-sided and unjust because their negotiation was not fair. And, yet, structuring treaty processes to minimize power imbalances within the negotiations will not resolve all challenges. Fairer processes of negotiations may enhance the likelihood of an equitable outcome, but it cannot guarantee fair settlement terms, let alone meet

105 Waitangi Tribunal, *He Whakaputanga*, supra note 44.

106 Ned Fletcher, 'A Praiseworthy Device for Amusing and Pacifying Savages? What the Framers Meant by the English Text of the Treaty of Waitangi' (PhD Dissertation, University of Auckland, 2014); David Williams, 'Originalism and the Constitutional Canon of Aotearoa New Zealand' in Mark Hickford & Carwyn Jones, eds, *Indigenous Peoples and the State: International Perspectives on the Treaty of Waitangi* (Abingdon, UK: Routledge, 2018) 57 at 65; David Williams, 'The Pre-history of the English Laws Act 1858: *McLiver v Macky* (1856)' (2010) 41:3 VUWLR 361.

107 Dale Turner, 'From Valladolid to Ottawa: The Illusion of Listening to Aboriginal People' in Jill Oakes et al, eds, *Sacred Lands: Aboriginal World Views, Claims, and Conflicts* (Edmonton: Canadian Circumpolar Institute, 1998) 53. Cited in Macklem, 'Constitutional Identity,' supra note 28 at 8.

108 Calloway, *Pen and Ink Witchcraft*, supra note 73 at 99.

First Peoples' expectations over sovereignty and self-government, for example.¹⁰⁹ Similarly, clear rules governing the process and conduct of negotiations will not prevent the state from pivoting from treaty partner to treaty adjudicator at some point in the future. Where this risk remains, First Peoples may question the quality of the treaty relationship.

A DEVELOPING FAIRER PROCESSES OF NEGOTIATION

Securing a fair process of negotiation is essential for modern treaty making. As a relational instrument, the moral and political authority of any treaty is directly related to the process of its development. Recognizing this, states and First Peoples have responded by structuring the negotiation process in a manner that aims to remedy the power imbalances that First Peoples would otherwise bear in treaty talks. In many cases, the process has been divided into two phases: (a) developing a negotiation framework and (b) negotiating under that framework. In this subpart, we explore these two phases. In the following subpart, we examine the limits inherent to the legal structures within which those negotiations take place.

The first phase is concerned with developing a framework for negotiations. Setting up a standardized procedure under which treaty talks will be conducted serves several goals. First, it seeks to prevent *ad hoc* discussions and enables all parties to converse on the basis of clearly established rules and criteria.¹¹⁰ In this respect, it attempts to rectify some of the problems of historic treaties by standardizing conditions for negotiating terms and ensuring that representatives from both First Peoples and the state are empowered to negotiate on behalf of their representatives. At the same time, however, a negotiation framework also looks forward by responding to structural inequities experienced by First Peoples today. While First Peoples have traditionally been alienated from, and unable to have their voices heard within, the processes of government, a negotiation framework is developed in consultation with their representatives. As such, it offers First Peoples an opportunity to have their interests considered in the design and implementation of law that affects them.¹¹¹ Finally, it also ensures that treaty talks do not commence until both sides are ready to start negotiations. Before commencing, First Peoples, for example, need to develop a clear sense of what a treaty might mean for their communities as well a broad consensus on their negotiating position. Importantly, preparing for treaty negotiations can also enable First Peoples to engage in nation (re)building, consistent with their values and aspirations, which is valuable regardless of the content, or even the completion, of a treaty.¹¹²

109 Harry Hobbs, 'Treaty Making and the *UN Declaration on the Rights of Indigenous Peoples*: Lessons from Emerging Negotiations in Australia' (2019) 23:1–2 *Intl JHR* 174.

110 Christopher McKee, *Treaty Talks in British Columbia*, 3d ed (Vancouver: UBC Press, 2009) at 112 [McKee, *Treaty Talks*].

111 Marcus Stewart, 'A First People's Assembly Could Deliver What Our People Have Been Demanding for So Long,' *Guardian Australia* (13 June 2019), online: <www.theguardian.com/commentisfree/2019/jun/13/a-first-peoples-assembly-could-deliver-what-our-people-have-been-demanding-for-so-long>.

112 Harry Hobbs, Alison Whittaker & Lindon Coombes, 'As the Federal Government Debates an Indigenous Voice, State and Territories Are Pressing Ahead,' *The Conversation*

The Victorian treaty process is currently in this first phase. Although the state government committed to entering treaty negotiations in 2016,¹¹³ Aboriginal Victorians explained that they were not ready to commence any process, given considerable uncertainty as to what any treaty might look like. As such, the government provided substantial funding to enable First Peoples in Victoria to discuss and reach agreement on an appropriate state-wide representative body where a common position over these preliminary matters could emerge. Throughout late 2016 and early 2017, Aboriginal Victorians discussed the principles that should underpin a representative body that would work with the state to develop a negotiation framework.¹¹⁴ These discussions were held in regional and urban centres across the state and were complemented by informal community-run conversations organized by self-nominated individuals¹¹⁵ as well as an online ‘message stick’ that allowed those who could not attend to voice their opinions. Estimates suggest that around 7,500 Aboriginal Victorians were consulted or directly engaged with this process.¹¹⁶ Although only comprising around 15 per cent of the 2016 self-reported total of 47,788 Aboriginal Victorians, this number was relatively considerable for public consultation processes.

However, because treaties are relational, their ultimate negotiation and success will also rely on the support of non-Indigenous peoples.¹¹⁷ Conscious of this, the state government has sought to promote awareness of, and build support for, treaty among non-Indigenous Victorians during the first stage. Two elements are worth noting. First, the government established a Victorian Treaty Advancement Commission (VTAC), whose primary role was to ‘maintain momentum of the treaty process.’¹¹⁸ Led by a Gunditjmara woman, Jill Gallagher,¹¹⁹ the VTAC led consultations with Aboriginal and non-Aboriginal Victorians, undertook research, provided advice on the process, and was required to keep all Victorians informed.¹²⁰ The state government also initiated an innovative public education campaign involving digital, radio, print, and billboard advertising. Under the campaign, prominent Aboriginal Victorians invited non-Indigenous Australians

(16 July 2019), online: <<https://theconversation.com/as-the-federal-government-debates-an-indigenous-voice-state-and-territories-are-pressing-ahead-120411>>.

113 Aboriginal Victoria, *Summary of the Aboriginal Victoria Forum, 26–27 May 2016, Melbourne* (2016) at 1.

114 Aboriginal Treaty Working Group, *Aboriginal Community Consultations on the Design of a Representative Body* (December 2016).

115 Aboriginal Treaty Working Group, *Treaty Circle Facilitators Handbook* (2017) at 27.

116 Aboriginal Treaty Working Group, *Aboriginal Community Consultations on the Design of a Representative Body — Phase 2* (June 2017) at 6.

117 Ravi de Costa, ‘Treaty How?’ (2003) 4:1 Drawing Board: An Australian Review of Public Affairs 1.

118 Victorian Treaty Advancement Commission (VTAC), ‘About the Commission,’ online: <<http://victreatyadvancement.org.au/about-commission>>.

119 Luke Donnellan, ‘New Commissioner to Advance Journey to Treaty,’ Media release from the acting minister for Aboriginal affairs (13 December 2017).

120 The VTAC was abolished when the state-wide representative body was established.

to ask them ‘deadly questions.’¹²¹ Despite some concern that racist opinions might be amplified, the questions were overwhelmingly respectful.¹²² Almost four thousand questions were asked, with queries spanning Aboriginal culture, history, and relations with non-Indigenous Victorians. What a treaty would mean for First Peoples was a recurring question.¹²³ Independent research has suggested that the campaign has been relatively successful, with 51 per cent of surveyed Victorians agreeing or strongly agreeing that ‘the “State Government should formalize new relationships with Aboriginal Victorians,” an increase of seven percent from before the campaign.’¹²⁴

These initial steps were formalized in June 2018, when the Victorian Parliament passed Australia’s first treaty bill. The Advancing the Treaty Process with Aboriginal Victorians Act 2018 (Victoria) creates a legislative basis for negotiating a treaty with Aboriginal people in the state. Under the Act, the government is obligated to recognize an Aboriginal-designed representative body that will administer a self-determination fund to support Aboriginal Victorians in treaty negotiations.¹²⁵ Established as a not-for-profit organization, the First Peoples’ Assembly of Victoria will retain structural independence from government. It will not negotiate on behalf of Aboriginal Victorians but, rather, will work with the state to develop a treaty negotiation framework. Reflecting the crucial relational character of treaty, this framework must accord with several guiding principles set out in the Act: self-determination and empowerment; fairness and equality; partnership and good faith; mutual benefit and sustainability; and transparency and accountability.¹²⁶ Elections for the First Peoples’ Assembly were held in late 2019. In December 2019, the Assembly held its inaugural meeting in the Victorian Parliament’s Upper House chamber.¹²⁷ The next step involves developing the negotiation framework.

British Columbia adopted a similar approach.¹²⁸ Following the provincial government’s announcement that it intended to negotiate treaties, a First Peoples

121 Victoria, ‘Deadly Questions,’ supra note 35; Samantha Hutchinson, ‘Victoria Launches Campaign in Support of Indigenous Treaty,’ *The Australian* (2 June 2018), online: <www.theaustralian.com.au/nation/victoria-launches-campaign-in-support-of-indigenous-treaty/news-story/8b9bdc2714621b3244271906376d6dd7>.

122 Natalie Hutchins, ‘Deadly Questions Shifts Focus to Treaty,’ Media Release from the Minister for Aboriginal Affairs (21 September 2018).

123 Victoria, ‘Deadly Questions,’ supra note 35.

124 Aboriginal Victoria, *Advancing the Treaty Process: Annual Report and Plan 2018–19* (2019) at 18.

125 *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic), ss 8–10.

126 *Ibid*, ss 21–5.

127 As Gallagher explained, the location was chosen because ‘Parliament House is the centre of power in this state. It is fitting that our assembly shares the same stage.’ Madeline Hayman-Reber, ‘Victoria’s First Peoples’ Assembly to Meet at “Colonial Power Structure,”’ *NITV* (1 November 2019), online: <www.sbs.com.au/nitv/article/2019/11/01/victorias-first-peoples-assembly-meet-colonial-power-structure>.

128 For a discussion on what the entire comprehensive land claims process looks like, see Christopher Alcantara, ‘To Treaty or Not to Treaty? Aboriginal Peoples and Comprehensive Land Claims Negotiations in Canada’ (2007) 38:2 *Publius* 343 at 345–6 [Alcantara, ‘To Treaty or Not to Treaty’].

representative organization proposed the ‘creation of a tripartite task force to recommend appropriate procedures and principles on which to base the negotiations.’¹²⁹ This position was accepted. In 1990, the British Columbia Treaty Claims Task Force was established largely to support First Peoples, whom did not want ‘to be caught without a thoughtful, strategic position or to be put into a position where they could be outflanked by more skilled government negotiators.’¹³⁰ The taskforce comprised seven commissioners, two appointed by the federal and provincial Canadian governments, and three by First Peoples. Although this extra appointee was intended to ‘counteract a potential power imbalance between Aboriginal and non-Aboriginal representatives,’ as well as more accurately represent interests of First Peoples located across British Columbia,¹³¹ non-Aboriginal governments retained a majority position on the taskforce. Nonetheless, following six months of consultations, the taskforce recommended that the parties commit to ‘a new relationship based on mutual trust, respect, and understanding’ by establishing a treaty commission to facilitate political negotiations.¹³² In 1993, the British Columbia Treaty Commission (BCTC) was inaugurated.¹³³

Establishing a negotiation framework is critical. However, legacies of dispossession and extermination mean that many First Peoples may nonetheless be both distrustful of, and ill-prepared to, enter negotiations with the state. The second phase is designed to remedy resource and material disparities by ensuring that First Peoples are capable of ascertaining their aspirations and carrying them out through the arduous negotiation stage. Among other elements, it involves the provision of focused legal, financial, and other support for individual First Peoples. Since no formal treaty negotiation process in Australia has yet reached the second stage – the Noongar Treaty was achieved outside an explicit treaty process – it is useful to explore the approach pursued in Canada.

In Canada, federal and provincial governments provide funding to First Peoples to prepare themselves for negotiations. In British Columbia, funding is allocated by the BCTC,¹³⁴ while, in other treaty processes, the funding is provided directly via the central government following an application process. Funding is critical to balance inequities at the negotiation stage so that First Peoples can participate. However, several problems have emerged. For instance, in its second annual report, the BCTC noted:

In no case could the Commission provide the level of funding requested by any First Nation. The amount of funds provided over the long term does not appear to be sufficient to

129 McKee, *Treaty Talks*, supra note 110 at 32.

130 Ibid.

131 Andrew Woolford, *Between Justice and Certainty: Treaty Making in British Columbia* (Vancouver: UBC Press, 2005) at 194, n 2.

132 British Columbia Claims Taskforce, ‘The Report of the British Columbia Claims Task Force,’ Report (Vancouver: British Columbia Claims Taskforce, 28 June 1991) at 42, Appendix 6, recommendations 1, 3.

133 *British Columbia Treaty Commission Agreement*, 15 May 1992; *Treaty Commission Act*, RSBC 1996, c 461; *British Columbia Treaty Commission Act*, SC 1995, c 45.

134 *Treaty Commission Act*, supra note 133, s 5(3) (b); *British Columbia Treaty Commission Act*, supra note 133, s 5(3) (b).

accomplish the goals expressed by the Task Force. Even with savings through such steps as information sharing, the gap between First Nations needs and available funds will widen because the financial needs of First Nations are expected to increase as they progress through the process.¹³⁵

Total funding has increased. In its 2018 annual report, the BCTC identified that since 1993 730 million Canadian dollars in negotiation support funding had been allocated,¹³⁶ though it is not clear whether this quantum has been sufficient for First Peoples to manage the process.

In any case, even with increased funding levels, the larger problem is that the majority of funding initially came in the form of a loan. Only 20 per cent of funding allocated to First Peoples consisted of a non-repayable contribution,¹³⁷ with the remaining 80 per cent treated as an ‘advance on the cash transfer component’ of a treaty.¹³⁸ Of the 730 million Canadian dollars that has been allocated via the BCTC, for example, some 567 million Canadian dollars was to be repaid.¹³⁹ Unsurprisingly, this meant that the anticipated capital transfer for many First Peoples would be ‘substantially offset by their loan debt.’¹⁴⁰ This is especially true for numerically smaller nations as well as those engaged in negotiations for substantial periods of time.

Inquiries into the modern treaty processes in Canada have indicated that the debt burden is an ‘unsustainable barrier to progress.’¹⁴¹ Indeed, reports suggest that some communities find themselves in a type of limbo: they have decided to no longer actively engage in negotiations, but they have chosen not to formally withdraw ‘because of concerns that Canada will seek repayment of their loans.’¹⁴² Accordingly, the special rapporteur on the rights of Indigenous peoples argues that the processes ‘have contributed to a deterioration rather than renewal of the relationship between indigenous peoples and the Canadian State.’¹⁴³ Recognizing the practical and symbolic challenges inherent to this policy, the federal government has reassessed its approach in recent years. In the 2018 budget, the federal government announced that it would no longer fund First Peoples participation

135 British Columbia Treaty Commission, *Second Annual Report 1994–1995* (1995) at 15.

136 British Columbia Treaty Commission, *Annual Report 2018* (2018) at 57 [BC Treaty Commission, *Annual Report*].

137 *Ibid.*

138 Douglas Eyford, Ministerial Special Representative on Renewing the Comprehensive Land Claims Policy, *A New Direction: Advancing Aboriginal and Treaty Rights* (2015) at 61 [Eyford, *A New Direction*].

139 BC Treaty Commission, *Annual Report*, supra note 136 at 57.

140 Eyford, *A New Direction*, supra note 138 at 61.

141 James Lornie, *Final Report with Recommendations Regarding the Possibility of Accelerating Negotiations with Common Table First Nations That Are in the BC Treaty Process, and Any Steps Required* (30 November 2011) at 29.

142 Eyford, *A New Direction*, supra note 138 at 61.

143 James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples: The Situation of Indigenous Peoples in Canada*, UN Doc A/HRC/27/52Add2 (4 July 2014) at 16, para 61. See also Inter-American Commission on Human Rights, *Report No 105/09 Petition 592/07 Admissibility Hul'qumi'num Treaty Group Canada* (30 October 2009) at para 37.

in treaty negotiations via loans; instead, the government would directly support groups in these negotiations through non-repayable contributions.¹⁴⁴ In 2019, this commitment was extended, with the government committing to forgive all outstanding loans and reimburse First Peoples who had already repaid their loan, at a total cost of 1.4 billion Canadian dollars.¹⁴⁵ This is a significant step that recognizes the relational character of modern treaties. An enduring relationship is not built on a policy that requires First Peoples to borrow money in order to ‘get their land back.’¹⁴⁶

The manner in which states approach treaty talks can also heighten or diminish power imbalances. This is true of all negotiations between the state and First Peoples. In Australia, for example, negotiations often take place between governments and Aboriginal and Torres Strait Islander communities over the recognition of Native title. While the majority of native title determinations are ultimately reached through agreement,¹⁴⁷ this does not mean that talks are free from confrontation. Governments of all persuasions frequently adopt a single-minded and defensive focus on technical issues such as whether Native title has been extinguished or whether the community can demonstrate an ongoing connection to the country rather than a holistic approach to tackling land needs, disadvantage, and development. Indeed, as Jon Altman and Francis Markham have noted, state and Commonwealth governments continue to oppose Native title claims, ‘contesting them at every point.’¹⁴⁸

In the attempt to overcome similar shortcomings in treaty talks in Canada, Michael Coyle argues that negotiators should adopt an ‘interest-based’ or ‘integrative’ negotiation strategy rather than a ‘positional’ one. As Coyle explains, positional bargaining is structured on an assumption ‘that successful claiming by one party will inevitably leave less value available to the other,’ leading negotiators to adopt rigid strategies and an adversarial approach.¹⁴⁹ In contrast, an integrative approach begins from ‘a joint review of each party’s goals, priorities and preferences’ and ‘explores, without commitment, a wide range of settlement options that might advance these goals.’¹⁵⁰ Compared to positional bargaining, integrative strategies are more likely to take into account the interests of both parties and address substantive issues in a collaborative way, enhancing the likelihood

144 Canada, *Budget 2018* (Ottawa: Department of Finance, 2018) at 140.

145 Canada, *Budget 2019* (Ottawa: Department of Finance, 2019) at 129.

146 Eyford, *A New Direction*, supra note 138 at 62.

147 Hobbs, ‘Locating the Logic,’ supra note 53 at 533.

148 Jon Altman & Francis Markham, ‘Burgeoning Indigenous Land Ownership: Diverse Values and Strategic Potentialities’ in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Annandale, Austl: Federation Press, 2015) 126 at 141. See also Toni Bauman & Lydia Glick, eds, *The Limits of Change: Mabo and Native Title 20 Years On* (Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies, 2012)

149 Michael Coyle, ‘Negotiating Indigenous Peoples’ Exit from Colonialism: The Case for an Integrative Approach’ (2014) 27:1 Can JL & Jur 283 at 287–8 [Coyle, ‘Negotiating Indigenous Peoples’].

150 Ibid at 288.

that an agreement will endure ‘particularly in contexts of deep conflict.’¹⁵¹ Integrative bargaining appears to offer clear advantages, including the capacity to broaden the attitudes and perspectives of treaty negotiators. As we explore below, however, the legal structures in which those negotiations take place will continue to prove problematic.

B LEGAL LIMITATIONS

It is vital that power imbalances are minimized in any fair negotiation. However, because ‘no negotiation framework can alter the external power relations between parties,’ not all imbalances can be resolved by remedying resource disparities or adopting a more collaborative negotiation posture.¹⁵² As we saw in Part III, modern treaties have been domesticated; negotiations take place within the law of the state. This structural limitation has been criticized by many First Peoples and non-Indigenous scholars. Taiaiake Alfred, for instance, has argued that, by framing negotiations within the context of Canadian law, the adopted treaties lack an international element and deny Indigenous nationhood.¹⁵³ Similarly, James Tully contends that Canadian governments consider themselves ‘entering into negotiations with “minorities” within Canada,’ presupposing a ‘relationship of subordination and some form of subjection to the Crown’ and consequently ‘foreclos[ing] precisely what the negotiations should be about.’¹⁵⁴ More recently, Robert Hamilton and Joshua Nichols have noted that the modern treaty process ‘has been hamstrung by ... an insistence on the part of the Crown of fitting Aboriginal peoples into a judicially mediated rights framework that fails to evenly allocate bargaining power to the parties.’¹⁵⁵

Legal limitations damage the capacity for treaties to reset relationships. For First Peoples who choose to walk away from negotiations, the concern is that structural inequities within the negotiation framework may infect the quality of the relationship that the document purports to create. Even when negotiation protocols are developed in consultation with First Peoples, they too readily reflect non-Indigenous understandings of land and governance and exclude from negotiation many areas of jurisdiction that First Peoples would like to discuss in treaty negotiations. Indeed, because these inequities include even the ‘forms of knowledge, proof, and discourse’ through which the parties converse,¹⁵⁶ the normative ordering of the state risks ‘becoming the presumed baseline from which

151 Ibid.

152 Ibid at 300.

153 Taiaiake Alfred, ‘Deconstructing the British Columbia Treaty Process’ (2001) 3 *Balayi: Culture, Law and Colonialism* 37 at 39–43.

154 James Tully, ‘Reconsidering the BC Treaty Process’ in British Columbia Treaty Commission, *Speaking Truth to Power: A Treaty Forum* (Vancouver: British Columbia Treaty Commission, 2001) 3 at 8.

155 Robert Hamilton & Joshua Nichols, ‘The Tin Ear of the Court: *Ktunaxa Nation* and the Foundation of the Duty to Consult’ (2019) 56:3 *Alta L Rev* 729 at 733, n 13 [Hamilton & Nichols, ‘Tin Ear of the Court’].

156 Alcantara, ‘To Treaty or Not to Treaty,’ *supra* note 128 at 353.

new ideas are developed and adjudged.¹⁵⁷ As we saw in Part III, treaty relationships built on marginalizing or ignoring First Peoples' worldviews will fail to last. In this Part, we identify a related, but distinct, point: states must enact legislation to give the treaties legal effect, but, as domestic settlements, modern treaties cannot prevent the state from pivoting from treaty partner to treaty adjudicator. Where this occurs, the value of the agreement is lost as the treaty becomes an 'instrument[] of assimilation or amalgamation' rather than of 'connection and association.'¹⁵⁸

Consider the situation in Canada. Section 35(1) of the Constitution Act, 1982 recognizes and affirms the 'existing aboriginal and treaty rights of the aboriginal peoples of Canada.' Appropriately, this provision requires Canadian state actors to consider First Peoples' treaty rights when contemplating action that may affect or interfere with those rights. However, while treaty rights are constitutionally protected, courts have held that they can be infringed by ordinary legislation. Under the three-part *Badger/Sparrow* test,¹⁵⁹ if First Peoples establish that a treaty right has been limited, the onus falls on the government to justify the infringement. If the government can demonstrate a compelling and substantial legislative objective,¹⁶⁰ and that its actions are nonetheless consistent with upholding the honour of the Crown,¹⁶¹ the Court will find that infringement constitutionally valid. While the Court has rejected the notion that the 'public interest' could serve as a valid legislative objective,¹⁶² it has nonetheless confirmed that the conservation of natural resources,¹⁶³ and even the 'pursuit of economic and regional fairness,'¹⁶⁴ could justify infringement. As Kent McNeil notes, this broad formulation may allow constitutional rights to be 'overridden on broad policy grounds.'¹⁶⁵ Of course, over time, negotiated agreements may need to be updated, and the terms struck may need to be amended. It should be uncontroversial to argue that this should occur between the parties to the agreement rather than through the unilateral determination of state courts.

In grappling with these complex issues, Canadian courts have developed a public fiduciary-like obligation characterized as the honour of the Crown. Derived from the Crown's 'assumption of sovereignty over lands and waters'

157 Coyle, 'Establishing Indigenous Governance,' supra note 8 at 149; Michael Coyle, 'Transcending Colonialism? Power and the Resolution of Indigenous Treaty Claims in Canada and New Zealand' (2011) 24 NZULR 596.

158 Jones, 'Māori and State Visions,' supra note 20 at 15; Graben & Meaffey, 'Negotiating Self-Government,' supra note 63 at 167.

159 *Badger*, supra note 42 at para 73, Cory J; *R v Sparrow*, [1990] 1 SCR 1075 at 1113 [*Sparrow*].

160 *Sparrow*, supra note 159 at 1113.

161 *Ibid* at 1118.

162 *Ibid* at 1113.

163 *Ibid*.

164 *R v Gladstone*, [1996] 2 SCR 723 at para 75, Lamer CJ majority.

165 Kent McNeil, 'How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?' (1997) 8:2 Const Forum Const 33 at 39. See also *R v Marshall (No 2)*, [1999] 3 SCR 533 at para 6. See also John Borrows, 'Sovereignty's Alchemy: An Analysis of *Delgamuukw v British Columbia*' (1999) 37 Osgoode Hall LJ 537; John Borrows, 'The Durability of *Terra Nullius: Tsilhqot'in Nation v British Columbia*' (2014) 48 UBC L Rev 701 at 740.

formerly held by sovereign First Peoples,¹⁶⁶ the principle requires that the Crown act honourably ‘in all its dealing with Aboriginal peoples.’¹⁶⁷ It gives rise to several obligations, including a duty to consult with and accommodate the interests of First Peoples when contemplating conduct that might adversely affect potential or established Aboriginal or treaty rights.¹⁶⁸ The duty ostensibly reflects a commitment to acknowledge historical injustices and a desire to right relations by promoting collaboration and partnership.¹⁶⁹ Nonetheless, while the application of a fiduciary-like relationship can produce positive results in individual cases, it remains conflicted. Conceptually, fiduciary-like principles are generally applicable in cases of vulnerability and are incongruous to the notion of equal partnership.¹⁷⁰ Further, in practice, the Supreme Court of Canada’s jurisprudence has not moved away from conceiving the Crown’s duty to consult and accommodate Aboriginal rights as part of a broader project of ensuring that its ability to ‘extinguish’ those rights is consistent with the Constitution.¹⁷¹ As much as the Canadian Constitution recognizes and affirms the rights of First Peoples, state law positions First Peoples as subjects rather than as equal partners. Whatever relationality may arise through the negotiation of a treaty, the state’s ability to adjudicate disputes weakens that character.

These same challenges are identifiable in other supposedly positive approaches to treaty interpretation. For instance, courts in the United States and Canada, and the Waitangi Tribunal in Aotearoa / New Zealand, have developed principles of treaty construction that advantage First Peoples, including by resolving ambiguities or unclear expressions in their favour as well as narrowly construing terms that seek to restrict their rights.¹⁷² These canons are positive, particularly when considering historic practices, but concerns remain.¹⁷³ For one, interpretive presumptions construed against the state do not necessarily benefit First Peoples as claimants, for disputes are still determined by state courts who may fail to appreciate Indigenous concerns or limit Indigenous rights when attempting to

166 *Haida Nation*, supra note 2 at para 53.

167 *Ibid* at para 17.

168 *Ibid* at paras 16–25; *Mikisew Cree v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388. See generally Dwight Newman, *Revisiting the Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich Publishing, 2014).

169 Brian Slattery, ‘Aboriginal Rights and the Honour of the Crown’ (2005) 29 SCLR 433 at 436.

170 For an analysis of New Zealand’s fiduciary duty, as imported from Canada’s jurisprudence, see Nicole Roughan, ‘Public/Private Distortions and State-Indigenous Fiduciary Relationships’ (2019) 42:1 NZLR 9.

171 See e.g. *Delgamuukw v British Columbia*, [1997] 3 SCR 1010; *Haida Nation*, supra note 2; *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot’in Nation*]; *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 SCR 386; *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 SCR 1069; *Chippewas of the Thames v Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 SCR 1099.

172 *Montana v Blackfoot Tribe of Indians*, 471 US 759 at 766–8 (1985); *Badger*, supra note 42 at para 41; Waitangi Tribunal, *Motunui Waitara Report*, supra note 9 at 49.

173 See e.g. Borrows, ‘Origin Stories,’ supra note 17 at 41–2. Note also that this interpretive presumption does not apply to modern treaties because it is assumed that First Nations signatories are sophisticated partners.

incorporate them into existing frameworks.¹⁷⁴ Similarly, it is not clear that the judiciary is the proper forum to be examining these issues. The judiciary is unable to account for the historical and ongoing roles that courts and legislatures played in assuming for themselves the authority to unilaterally interpret those agreements on behalf of the other party and their interests. Nation-to-nation relationships have already been transformed into state-to-subject relationships. Interpretative presumptions cannot rectify this history.

Aotearoa / New Zealand has also struggled to respond to the limits of the law in giving effect to the Treaty of Waitangi. From the 1950s through to the 1970s, many Māori and their supporters called on the government to ‘Honour the Treaty.’ This public campaign eventually led to the formation of a tribunal to investigate breaches of the treaty.¹⁷⁵ The Waitangi Tribunal is composed of both Māori and Pākehā members. It is charged with inquiring into, and making recommendations in relation to, claims from Māori that they have been prejudicially affected by legislation or Crown action that is inconsistent with principles of the treaty. Initially, the tribunal was empowered to investigate alleged breaches by the government or any state-controlled body occurring after 1975. The tribunal could make recommendations about how to redress those breaches, but it did not have legal authority to enforce remedies.¹⁷⁶ In 1985, the Act was amended to provide the tribunal with retrospective jurisdiction dating from 1840,¹⁷⁷ though its enforcement powers were not strengthened. Instead, after the tribunal has made findings on a complaint, the Crown and the *iwi* were to engage in settlement processes to address and rectify breaches of the treaty.

Significantly, and much like modern treaty making, these settlements provide important economic benefits for relevant *iwi* and *hapū* as they attempt to cultivate the relational character of the treaty.¹⁷⁸ In recognizing that state law could both inhibit the development of innovative and productive settlements as well as challenge their resolution, a ‘deliberate strategy to return Treaty issues to the political arena, rather than relying on the Tribunal or a court of law’ was adopted.¹⁷⁹ Much like the Covenant Chain, which hinged on acknowledging wrongdoing and providing recompense, these modern settlements foreground apologies in both English and Te Reo Māori.¹⁸⁰ Consider,

174 See e.g. Hamilton & Nichols, ‘Tin Ear of the Court,’ supra note 155.

175 Nicola R Wheen & Janine Hayward, ‘The Meaning of Treaty Settlements and the Evolution of the Treaty Settlement Process’ in Nicola R Wheen & Janine Hayward, eds, *Treaty of Waitangi Settlements* (Wellington: Bridget Williams Books, 2012) 1 at 17 [Wheen & Hayward, ‘Meaning of Treaty Settlements’; Wheen & Hayward, *Treaty of Waitangi Settlements*]; McDowell, ‘Diverting the Sword of Damocles,’ supra note 67.

176 *Treaty of Waitangi Act 1975* (NZ), s 5(1)(a).

177 *Treaty of Waitangi Amendment Act 1985* (NZ), s 3, amending *Treaty of Waitangi Act 1975* (NZ), s 6(1).

178 Ruru, ‘Treaty in Another Context,’ supra note 5 at 312–13.

179 Mason Durie, *Te Mana, Te Kawanatanga: The Politics of Maori Self-Determination* (Oxford: Oxford University Press 1998) at 188.

180 See Maureen Hickey, ‘Apologies in Settlements’ in Wheen & Hayward, *Treaty of Waitangi Settlements*, supra note 175, 80.

for instance, a small part of the apology recorded in the Ngāi Tahu Claims Settlement Act 1998 (New Zealand):

The Crown recognises the protracted labours of the Ngāi Tahu ancestors in pursuit of their claims for redress and compensation against the Crown for nearly 150 years. ... The Crown hereby acknowledges the work of the Ngāi Tahu ancestors and makes this apology to them and to their descendants.

The Crown acknowledges that it acted unconscionably and in repeated breach of the principles of the Treaty of Waitangi in its dealings with Ngāi Tahu in the purchases of Ngāi Tahu land. The Crown further acknowledges that in relation to the deeds of purchase it has failed in most material respects to honour its obligations to Ngāi Tahu as its Treaty partner, while it also failed to set aside adequate lands for Ngāi Tahu's use, and to provide adequate economic and social resources for Ngāi Tahu.¹⁸¹

Apologies can be effective in recognizing past wrongs in important and meaningful ways,¹⁸² but similar structural challenges that affect the process in Canada are present in Aotearoa / New Zealand.

First, Waitangi Tribunal reports are not binding. Their effectiveness relies on the state determining to engage. Although the government has sometimes accepted Māori claims and enacted appropriate laws, reports indicate that tribunal recommendations 'are frequently ignored.'¹⁸³ In 2018, for instance, Te Puni Kōkiri, the Ministry for Māori Development, revealed that only twenty-one out of 130 reports had been 'settled.'¹⁸⁴ The full picture is a little more complex, but it does not resolve the larger problem. For many claims, the tribunal generally recommends that the state enter into negotiations toward a treaty settlement. The aim of these agreements is to settle alleged breaches of the treaty in a manner consistent with the spirit of the tribunal's recommendations. The report from the Waitangi Tribunal's inquiry will usually play an important role in negotiations between the group and the state, but 'the purpose of a settlement is to reflect the interests of the parties concerned, and who freely enter into those settlements' and not necessarily to directly implement the tribunal's recommendations.¹⁸⁵

Second, the state has rejected offering full compensation for the extinguishment of Māori rights because to do so would 'place too great a burden on the present and future generations of taxpayers.'¹⁸⁶ Instead, the Crown views redress

181 *Ngāi Tahu Claims Settlement Act 1998* (NZ), s 6.

182 A Dirk Moses, 'Official Apologies, Reconciliation, and Settler Colonialism: Australian Indigenous Alterity and Political Agency' (2011) 15:2 *Citizenship Studies* 145; Ruru, 'Treaty in Another Context,' supra note 5 at 315–16.

183 United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Fourth Periodic Report of New Zealand*, UN Doc E/C.12/NZL/CO/4 (1 May 2018) at 2, para 8.

184 Te Puni Kōkiri, *The Section 81 Report: A Report on Progress Made in Implementation of Recommendations Made to the Crown by the Waitangi Tribunal* (2018) at 79–84.

185 *Ibid* at 5.

186 Office of Treaty Settlements, *Ka Tika a Muri, Ka Tika a Mua; Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Wellington: Office of Treaty Settlements, 2018) at 83. Other issues are also affected by Crown policy. For example,

as a means of ‘recognizing the claimant group’s historical grievances ... restoring the relationship between the claimant and the Crown, and ... contributing to a claimant group’s economic development.’¹⁸⁷ While providing full compensation may inhibit the government from meeting other policy objectives and a focus on restoring relations is an admirable goal that seeks to develop and encourage the relational aspects of the treaty, it is difficult to see how unilaterally precluding potential settlement outcomes from the negotiation will help achieve better partnerships or treaty promises. Essentially, indicative of inequities in bargaining power,¹⁸⁸ Māori must choose whether to accept less for the sake of economic benefits and promises of a better relationship in the future. This has been further complicated by the Treaty of Waitangi Amendment Act 2006, which required Māori to submit their historical claims to the tribunal before 1 September 2008 (later extended to 2014), with the aim of resolving all claims by 2020.¹⁸⁹

Third, where *iwi* or *hapū* decide to engage in these processes, there is no guarantee that the settlement will proceed smoothly or as they intend when given effect through legislative enactment. Indeed, the entire settlement process can be ‘fraught with conflict and dispute,’ as the settlements can become ‘subject to a range of different types of legal challenges from various parties who believe they are prejudiced by the negotiation process or its outcomes.’¹⁹⁰ Further, while settlement negotiations take place in the political arena, the settlements themselves only become effective through domestic legislation;¹⁹¹ each requires an Act of the New Zealand Parliament. Although political convention dictates that agreements are not substantively amended in Parliament, legislation ‘cannot bind future parliaments from revisiting Māori claims,’¹⁹² and the adjudication of any dispute arising from the settlement may be taken to the Waitangi Tribunal or state courts to be addressed.

Recognizing this problem points to a fundamental challenge facing all First Peoples contemplating modern treaty making. Under state law, the Treaty of Waitangi has no specific legal effect unless it is incorporated into legislation.¹⁹³ While this precludes *iwi*, *hapū*, and *whānau* (extended family) from relying on

generally speaking, the Crown has ‘ruled out the transfer of conservation estate land to Māori as part of a Treaty settlement.’ Katherine Sanders, ‘“Beyond Human Ownership”? Property, Power and Legal Personality for Nature in Aotearoa New Zealand’ (2018) 30 *J Environ L* 207, 214

187 Wheen & Hayward, ‘Meaning of Treaty Settlements,’ *supra* note 175 at 15.

188 Annie Mikaere, ‘Settlement of Treaty Claims: Full and Final, or Fatally Flawed?’ (1997) 17:2 *NZLR* 451.

189 *Treaty of Waitangi Amendment Act 2006* (NZ), s 6AA.

190 Baden Vertongen, ‘Legal Challenges to the Treaty Settlement Process’ in Wheen & Hayward, *Treaty of Waitangi Settlements*, *supra* note 175, 65; *Ngati Apa Ki Te Waipounamu Trust v R*, [2000] *NZCA* 45.

191 See e.g. *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992* (NZ), s 9(c); Philip A Joseph, *Constitutional and Administrative Law in New Zealand*, 4th ed (Wellington: Brookers, 2014) at 853.

192 McDowell, ‘Diverting the Sword of Damocles,’ *supra* note 67 at 607.

193 *Hoani Te Heuheu Tukino v Aotea District Maori Land Board*, [1941] *AC* 308 (PC); *Ngati Apa Ki Te Waipounamu Trust v Attorney-General*, [2003] 1 *NZLR* 779 (HC).

their interpretations of the Te Reo Māori version of the Treaty of Waitangi to vindicate their legal rights,¹⁹⁴ its considerable ‘moral and normative power can continue untouched, as a reference point for political agitation.’¹⁹⁵ Conversely, when the treaty is incorporated as law, it can protect Māori interests by constraining discretionary government decision making, but its legal effect will be ‘prescribed by the particular legislative words used.’¹⁹⁶ In other words, once it is ‘inside the law, it becomes an instrument of the legal system and a plaything for lawyers and judges.’¹⁹⁷ Of course, this does not mean that the treaty should not be codified in state law if that is what Māori people desire, but in concretizing their rights, *iwi* and *hapū* risk empowering the state with the capacity to pivot from its role as partner to adjudicator.¹⁹⁸

All First Peoples engaged in modern treaty processes must determine whether to take that same risk. Consider again the Noongar Treaty. Negotiated between the Noongar people and the Western Australian government, the settlement was approved by the Noongar people before being enacted in state legislation.¹⁹⁹ Inside that law, the treaty protects Noongar interests and requires the state to meet its commitments. At the same time, whether one party has failed to uphold its legal obligations will be determined solely by Australian courts. Additionally, as treaty rights are not constitutionally protected in Australia, the Western Australian and federal Parliament could enact legislation to unilaterally abrogate its terms.

V *An ethic of treaty making?*

For modern treaties to secure the parties aspirations for certainty, their agreement must have legal force. The domestication of nation-to-nation agreements means that legal force is obtained via the enactment of state legislation. As we have argued, however, the challenge is that legislating a treaty enables the state to pivot from its role as partner to adjudicator, displacing its relational character and potentially ultimately its legal strength. While modern treaty practices have sought to soften inequities at the negotiation stage, they have proven unable to

194 Ruru argues that ‘New Zealand Parliament has been at the forefront of ... incorporating ‘the principles of the Treaty’ in specific statutes. For the most part, however, Maori are more enamoured with the actual text, specifically the Maori language text.’ Ruru, ‘Treaty in Another Context,’ *supra* note 5 at 32.

195 Palmer, ‘Constitutional Realism,’ *supra* note 55 at 31.

196 Edward Willis, ‘The Treaty of Waitangi: Narrative, Tension, Constitutional Reform’ (2019) 2 NZLR 185 at 186.

197 Palmer, ‘Constitutional Realism,’ *supra* note 55 at 31.

198 Note, however, that because the *Treaty of Waitangi* has been domesticated, the state *de facto* takes on the role of treaty adjudicator in their actions whether treaty principles have been incorporated in legislation or not. We thank the anonymous reviewer for this point.

199 *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA); *Land Administration (South West Native Title Settlement) Act 2016* (WA). As the process was conducted under the framework of Commonwealth legislation, however, the treaty ultimately derives its force from registration under a Commonwealth Act. *Native Title Act 1993* (Cth).

avoid or rectify this larger challenge. In this Part, we argue that efforts to build positive and productive relationships both inside and outside treaty processes are vital to cultivating a culture that takes First Peoples' rights seriously. Acts of relationality may ameliorate the harsher effects of state law on modern treaties by constructing an ethic of treaty making. While an ethic of treaty making may not legally preclude states from acting in ways that it supposes are in its own interests, nor prevent a state court from adjudicating a dispute in accordance with state law, acts of relationality may help recentre focus on the broader promise of treaty.

Acts of relationality should be broadly conceived as measures that encourage or facilitate conversation and engagement between First Peoples and non-Indigenous peoples and communities. As some First Peoples have acknowledged, this requires that they 'engage the state's legal and political discourses.'²⁰⁰ However, if sites of encounter are to transform colonial structures and ways of thinking, it is primarily incumbent on non-Indigenous peoples to be engaged in breaking down settler frameworks, including a unilateral approach to interpreting and enforcing state law. One way of doing so is to learn from First Peoples about their cultures, laws, and forms of life or ways of being.²⁰¹ Doing so can help reveal the ways in which settler frameworks continue to be impediments to positive relationships and, importantly, that unilaterally relying on state law to resolve inter-communal disputes can be risky and potentially harmful.

Acts of relationality might begin with rituals and practices that acknowledge First Peoples' presence. For instance, it has become common practice in Australia for official functions to begin with a welcome to country or an acknowledgement of country. A welcome to country is performed by an Indigenous elder of the particular territory where the function is being held. Typically, the elder welcomes visitors by offering safe passage and protection while in the country. The welcome may also be accompanied by a smoking ceremony to cleanse the site and ward off bad spirits. An acknowledgement of country is given by a non-Indigenous person or an Indigenous person who is not connected to that country. It involves a short statement that focuses the audience's attention on the fact that the land where they are meeting is an ancestral country for a particular Aboriginal or Torres Strait Islander nation. Consider the statement read by the speaker of the Australian Parliament each morning (since 2010): 'I acknowledge the Ngunnawal and Ngambri peoples who are the traditional custodians of the Canberra area and pay respect to the elders, past and present, of all Australia's Indigenous peoples.'²⁰² An acknowledgement of country is a small gesture, but

200 Dale Turner, *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006) at 5.

201 We agree with scholars who argue that Indigenous legal traditions should play a role in modern treaty practices, and non-Indigenous peoples need to learn and apprehend what that means. See Sarah Morales, '(Re)defining "Good Faith" through *Snuwuyuthi*' in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historic Treaties* (Toronto: University of Toronto Press, 2017) 277.

202 DR Elder & PE Fowler, eds, *House of Representatives Practice*, 7th ed (Canberra: Department of the House of Representatives, 2018) at 253.

it is also ‘an opportunity for anyone to show respect for Traditional Owners and the continuing connection of Aboriginal and Torres Strait Islander people.’²⁰³ Despite anxieties that these rituals are ‘tokenistic’²⁰⁴ or ‘patronising,’²⁰⁵ research suggests that a majority of Indigenous Australians perceive these protocols ‘as a valuable, albeit belated recognition of Indigenous culture and history.’²⁰⁶ As New South Wales Aboriginal Land Council Chairwoman Bev Manton has argued,

[i]t’s simply wrong to suggest that recognising the Aboriginal custodians of land in this country is tokenistic or impractical. ... By showing a modicum of respect for traditional owners and their ancestors’ passed, you are doing a great deal to help bridge the gulf between black and white in this country. Using these words at official events may not heal the sick, or boost educational outcomes for Aboriginal kids, but it’s not supposed to. It does however show that our elected leaders have an understanding and an admiration for Aboriginal culture and people. It’s symbolism, but it’s essential symbolism.²⁰⁷

In tracing the development of these public rituals, Mark McKenna locates their emergence in the early 1990s. While they may echo the highly structured meeting protocols adopted and adapted by Aboriginal and Torres Strait Islander peoples over generations, the contemporary manifestation was explicitly intended to ‘create a national identity or ethos.’²⁰⁸ Even if there is a risk that not all invocations will be meaningful or sincere,²⁰⁹ their existence forces non-Indigenous Australians to pause, if only for a moment, and consider how colonization has shaped the lives of Indigenous Australians. Although relatively minor, ritual acts of relationality like these affect social and institutional attitudes and aid in the development of an ethic necessary to protect and promote treaty relations. Former chief justice of the High Court of Australia, Robert French agrees, noting that it would ‘be a bold conclusion that the Welcomes to Country and Acknowledgements of Country which are repeated day-in-day-out in countless events, public and private, across Australia have no impact upon societal and institutional cultures and awareness.’²¹⁰

203 Reconciliation Australia, ‘Welcome to Country: Acknowledgement of Country’ (14 December 2017) online: <www.reconciliation.org.au/wp-content/uploads/2018/03/welcome_acknowledgement_v4.pdf>.

204 See discussion in Emma Kowal, ‘Welcome to Country: Acknowledgment, Belonging and White Anti-Racism’ (2015) 21:2 *Cultural Studies Review* 173.

205 Kristina Everett, ‘Welcome to Country ... Not’ (2009) 79 *Oceania* 53 at 58.

206 Mark McKenna, ‘Tokenism or Belated Recognition? Welcome to Country and the Emergence of Indigenous Protocol in Australia, 1991–2014’ (2014) 38:4 *Journal of Australian Studies* 476 at 478 [McKenna, ‘Tokenism’]; Francesca Merlan, ‘Recent Rituals of Indigenous Recognition in Australia: Welcome to Country’ (2014) 116:2 *American Anthropologist* 297 at 297.

207 Cited in McKenna, ‘Tokenism,’ supra note 206 at 487.

208 Council for Aboriginal Reconciliation, ‘National Strategy to Sustain the Reconciliation Process’ (1998), cited in McKenna, ‘Tokenism,’ supra note 206 at 482.

209 John Stone, ‘Aboriginal Policy: 50 Years of Failure,’ *Quadrant*, vol 61 (11 November 2017) at 11, online: <<https://quadrant.org.au/magazine/2017/11/fifty-years-unremitting-failure-aboriginal-policy-since-1967-referendum/>>.

210 Robert French, ‘Book Forum: The Hon Robert French AC,’ *AusPubLaw* (14 August 2019), online: <<https://auspublaw.org/2019/08/book-forum-the-hon-robert-french-ac/>>.

A welcome to country may include a portion of an Aboriginal language, but, in Australia, it is likely that any speech will be conducted in English. Language itself is another critical element that speaks to the tenor of the relationship between Indigenous and non-Indigenous communities. As the Permanent Forum on Indigenous Issues has recently noted, '[I]nguistic diversity contributes to the promotion of cultural identity ... and to intercultural dialogue.'²¹¹ Promoting and using Indigenous languages can contribute to 'reconciliation and peace-building,' transmit knowledge to future generations, reduce inequalities, and mitigate discrimination.²¹² Revitalizing First Peoples languages and both promoting their public use and encouraging non-Indigenous peoples to study or engage could thus help cultivate acts of relationality between First Peoples and non-Indigenous peoples. While there is increasing engagement with, and interest in, First Peoples languages in Australia²¹³ and North America,²¹⁴ the Māori in Aotearoa / New Zealand have pioneered the revitalization of Te Reo Māori (Māori language). Since the 1970s and 1980s, Te Reo Māori has been viewed as an important but, at times, contentious medium for bridging and building relations. In the 1970s, Māori began speaking their language in their capacity as government employees, causing some controversy. New Zealand's Ministry for Culture and Heritage explains:

In 1984 national telephone tolls operator Naida Glavish (of Ngāti Whātua) began greeting callers with 'Kia ora.' When her supervisor insisted that she use only formal English greetings, Glavish refused and was demoted. The issue sparked widespread public debate. Not everyone was keen to hear 'kia ora' used commonly ... [others] called the tolls exchange to speak to 'the kia ora lady'. ... After Prime Minister Robert Muldoon intervened, Glavish returned to her old job. Eventually, she was promoted to the international tolls exchange, where she greeted New Zealand and overseas callers alike with 'Kia ora.'²¹⁵

The second article of the Treaty of Waitangi guarantees all Māori 'chieftainship over their lands, villages and all their treasures,' with the Te Reo Māori word for treasures (*taonga*) understood to mean not only more than merely physical possessions (as in the English text) but also other elements of cultural heritage.

211 Permanent Forum on Indigenous Issues, *Action Plan for Organizing the 2019 International Year of Indigenous Languages*, 17th Sess, UN Doc E/C19/2018/8 (21 February 2018) at para 3 [Permanent Forum on Indigenous Issues, *Action Plan*].

212 Ibid at para 31.

213 See e.g. *Aboriginal Languages Act 2017* (NSW), which promises to reconnect Aboriginal peoples in New South Wales with their culture and heritage 'by the reawakening, growing and nurturing of Aboriginal languages.' However, despite enactment in 2017, it has not yet entered into force.

214 See e.g. Serafin M Coronel-Molina & Teresa L McCarty, eds, *Indigenous Language Revitalization in the Americas* (Abingdon, UK: Routledge, 2016).

215 Ministry for Culture and Heritage, 'History of the Māori Language,' *New Zealand History* (10 October 2017), online: <<https://nzhistory.govt.nz/culture/maori-language-week/history-of-the-maori-language>>.

In 1985, Māori claimants to the Waitangi Tribunal asserted that Te Reo Māori was *taonga*, a position subsequently confirmed by the tribunal.²¹⁶

Alongside the Waitangi Tribunal process, Māori communities proactively sought to ‘regain or hold on to Maori language and culture’ through other means.²¹⁷ As Linda Tuhiwai Smith explains, ‘[w]hile the claims to the Tribunal were being made on the basis of tribal interests, and even these were contested within tribes,’ a language revival movement ‘was built on the more fundamental unit of *whanau* or extended family.’²¹⁸ Te Kōhanga Reo is a Te Reo Māori educational program designed for preschool children, which strives to transmit and revive Māori language and culture.²¹⁹ In its first year, 1982, the organization sought limited funding from the Department of Māori Affairs to start the program, with the ultimate goal of becoming self-sufficient.²²⁰ Political success through the Waitangi Tribunal, led to legal change; in 1987, Te Reo Māori was adopted as an official state language,²²¹ increasing state support. By 1994, there were eight hundred *kōhanga reo* (language nests), with many institutions also identifying adult learner needs.²²²

State support has led to some complications. In 2011, claimants brought a case before the Waitangi Tribunal, alleging that the Crown ‘had effectively assimilated the *kōhanga reo* movement into its early childhood education regime ... stifling its vital role in saving and promoting the Māori language, which led to a decline in the number of Māori children participating.’²²³ The tribunal largely accepted this allegation when it released its report in 2013. The report found that due to management and resourcing issues the Crown’s early childhood education system had failed to support the needs of the Te Kōhanga Reo, and, in doing so,

216 Waitangi Tribunal, *Report of The Waitangi Tribunal on the Te Reo Maori Claim* (Wai 11, 1986) at 43.

217 Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Dunedin, New Zealand: University of Otago Press, 2008) at 169.

218 *Ibid.*

219 Augie Fleras, ‘Te Kohanga Reo: A Maori Renewal Program in New Zealand’ (1989) 16 Canadian Journal of Native Education 78; Rachael Ka’ai-Mahuta, ‘The Impact of Colonisation on te reo Māori: A Critical Review of the State Education System’ (2011) 4 Te Kaharoa 195 at 216–18; Tania Rei & Cara Hamon, ‘Te Kōhanga Reo 1982’ in Anne Else, ed, *Women Together: A History of Women’s Organisation in New Zealand Nga Ropu Wahine o te Motu* (Wellington: Daphne Brasell Associates Press and New Zealand Department of Internal Affairs, 1993) 40 [Rei & Hamon, ‘Te Kōhanga Reo 1982’].

220 Rei & Hamon, ‘Te Kōhanga Reo 1982,’ supra note 219 at 40–2.

221 *Maori Language Act 1987* (NZ), s 3.

222 EY, *Te Kōhanga Reo National Trust Board: Independent Review of Financial Controls for Public Funding Received* (12 March 2014) at 4 [EY, *Te Kōhanga Reo*]; Kuni Jenkins & Tania Ka’ai, ‘Maori Education: A Cultural Experience and Dilemma for the State – a New Direction for Maori Society’ in Eve Coxon et al, eds, *The Politics of Learning and Teaching in Aotearoa: New Zealand* (Palmerston North, New Zealand: Dunmore Press, 1994) 148 at 168 (reporting a figure of 609 in June 1990).

223 Kelvin Davis, ‘Kōhanga Reo Post-Budget Announcement Speech,’ Speech (4 June 2019), online: New Zealand Government <www.beehive.govt.nz/speech/k%C5%8Dhanga-reo-post-budget-announcement-speech>.

had breached its duty under the treaty.²²⁴ Nonetheless, although Te Kōhanga Reo continues to face funding issues, it continues to transmit knowledge to a new generation. In 2014, around 460 Te Kōhanga Reo were operating, responsible for educating nearly nine thousand children across the country.²²⁵ It has 'led to flourishing networks of Māori centred educational institutions[,] it has been instrumental in increasing Māori participation in early childhood ... and has seen Māori emerge with the highest rates of participation in tertiary education of any group aged at twenty-five years and over.'²²⁶ More broadly, and due to the success of programs like this, Te Reo Māori is visible throughout Aotearoa / New Zealand.

Of course, there are challenges and significant room for improvement.²²⁷ While Te Kōhanga Reo has helped revitalize Te Reo Māori for some, scholars have argued that a 'strong monolingual (English only) attitude [persists] in the general population.'²²⁸ Māori remain the vast majority of Te Reo Māori speakers, and those who can 'hold a conversation in te reo dropped from 4.5 percent [of the entire New Zealand population] in 2001 to 3.7 in 2013.'²²⁹ It has become apparent that 'Pākehā need to embrace te reo me ngā tikanga Māori' too.²³⁰ Doing so would not just reveal unique ontologies and ways of seeing the world,²³¹ but would also encourage non-Indigenous New Zealanders to understand and confront the ongoing effects of colonization. Building relationality aims to transform how state actors view their interests and, hence, what state law can do to facilitate shared governance. For this reason, it may help inform the approach of treaty negotiators. A move toward integrative bargaining, as suggested by Coyle,²³² or

224 Waitangi Tribunal, *Matua Rautia: The Report on the Kōhanga Reo Claim* (Wai 2336, 2013) at 185.

225 EY, *Te Kōhanga Reo*, supra note 222 at 4.

226 Mason Durie, 'Māori Achievement: Anticipating the Learning Environment' (Paper presented at the fourth Hui Taumata Mātauranga, 5 September 2004, Taupo, New Zealand) at 9, online: Massey University <www.massey.ac.nz/~massey/fms/Te%20Mata%20O%20Te%20Tau/Publications%20-%20Mason/Maori%20Achievement%20Anticipating%20the%20learnong%20environment.pdf>.

227 Laura French Bourgeois, Roxane de La Balonnière & Donald M Taylor, 'Revitalizing Indigenous Languages: A Call for Community Action to Address Systemic Discrimination' in Peter Trifonas & Themistoklis Aravossitas, eds, *Handbook of Research and Practice in Heritage Language Education* (Cham: Springer, 2017) 771 at 781–2; Tamati Reedy, 'Te Reo Māori: The Past 20 Years and Looking Forward' (2000) 39:1 *Oceanic Linguistics* 157 at 166–7.

228 Martin East, 'Promoting Positive Attitudes toward Foreign Language Learning: A New Zealand Initiative' (2009) 30:6 *Journal of Multilingual and Multicultural Development* 493 at 494.

229 Statistics New Zealand, 'Māori Language Speakers,' online: <http://archive.stats.govt.nz/browse_for_stats/snapshots-of-nz/nz-social-indicators/Home/Culture%20and%20identity/maori-lang-speakers.aspx>.

230 Andrew Robb, 'What Is the Role of Pākehā in Supporting Te Reo Māori?,' *E-Tangata* (15 July 2017), online: <<https://e-tangata.co.nz/reo/what-is-the-role-of-pakeha-in-supporting-te-reo-maori/>>.

231 Permanent Forum on Indigenous Issues, *Action Plan*, supra note 211 at para 6.

232 Coyle, 'Negotiating Indigenous Peoples,' supra note 149.

even a shift in government policy not to aggressively contest First Peoples claims, could open up possibilities. While it would not directly change the legal framework in which negotiations are held, it could foster innovative and collaborative settlements and help promote good relations.

In developing an ethic of treaty making, acts of relationality could also affect how the state approaches the implementation of modern treaties. Research into the lived experiences of the Huu-ay-aht First Nations following the execution of the Maa-nulth First Nations Final Agreement confirms that, at present, 'colonial dynamics persist not only during [negotiation], but also through implementation.'²³³ Divergent approaches to the treaty has meant that the parties understood their relational obligations in very different ways, with potentially significant consequences:

After nearly two decades of active engagement and relationship-building at the negotiation table, the federal and provincial negotiating personnel were replaced with implementation personnel. Little protocol was outlined for this transition, leaving Huu-ay-aht feeling 'divorced' from a relationship that was purportedly based on mutual respect, not at all what was much-anticipated in the new 'nation-to-nation' relationship.²³⁴

The turnover of government personnel unaware of key details and problems obtaining relevant information led Huu-ay-aht First Nations to emphasize to the state the importance of relationships. Huu-ay-aht First Nations explained to government representatives responsible for implementation that, for the treaty to meet their aspirations, the state must 'develop a relational understanding of the territories (including lands, waters, and sockeye) as well as the basic geography of' treaty lands and signatories.²³⁵ For Huu-ay-aht First Nation, the state's failure to meet its relational obligations put the treaty's promises at risk. Notwithstanding these challenges, Huu-ay-aht First Nations continues to view the treaty 'as a tool for advancing the Nation's self-determination.'²³⁶

Of course, there are many other examples of relational acts than those we have described here.²³⁷ The key factor is that it involves non-Indigenous peoples engaging with, and learning from, First Peoples about their cultures, laws, and forms of life. In doing so, non-Indigenous peoples may come to appreciate how

233 Huu-ay-aht First Nations et al, 'Implementing a Modern Treaty in British Columbia: Lived Experiences from Huu-ay-aht First Nations – Maa-nulth Treaty Signatories' (2019) 6:2 Northern Public Affairs 41 at 41–2.

234 Ibid at 43.

235 Ibid at 44.

236 Ibid.

237 See e.g. John Borrows, 'Creating an Indigenous Legal Community' (2005) 50 McGill LJ 153; Amanda Woodrow, 'University of Victoria Offers First Combined Indigenous Law Degree,' *Canadian Lawyer* (7 March 2018), online: <www.canadianlawyermag.com/news/general/university-of-victoria-offers-first-combined-indigenous-law-degree/274981>; Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) at 319–37. It is worth noting that Borrows has argued that '[r]econciliation has problematically dominated the jurisprudence dealing with Indigenous issues and is a flawed metaphor in this field.'

settler frameworks continue to be impediments to shared governance and right relations. One of those impediments is an uncritical or unreflective use of state law to resolve disputes. As such, acts of relationality that break down settler frameworks and that aim to transform colonial structures can be useful in reframing modern treaty making.

VI Conclusion

Treaties between First Peoples and settler states have a dual character. On the one hand, treaties are legal instruments, which formally commit the parties to a series of mutual obligations. At the same time, however, treaties are more than simple legal agreements; they are testaments to a certain type of relationship governed by mutual respect and partnership. This is the promise of treaty. This promise can fail to materialize. Our review of the negotiation and interpretation of historic treaties revealed a challenge for modern treaty making. Treaties are only effective when they are able to realize both legal and relational goals. As the balance of political and military might swung toward the colonial powers, these nation-to-nation agreements were domesticated within state law and grounded in ‘a monistic account of constitutional order.’²³⁸ This process allowed the state to pivot from treaty partner to treaty adjudicator, breaking the relational dimension of treaty.

Modern treaty practices in Canada and Australia have attempted to avoid the challenges arising from their historical antecedents. These practices demonstrate respect for the equal status of First Peoples by seeking to develop fairer processes of negotiation. However, as these agreements are domestic instruments, they obtain their legal force through the enactment of state legislation. Consequently, even assuming that fair and equitable negotiation processes can be designed, state law does not and cannot prevent states from making that same pivot from treaty partner to treaty adjudicator. Can this challenge be resolved? We have argued that engaging in treaty negotiations without building relational characteristics inside and outside treaty processes will likely reproduce the problems associated with historical treaties. If modern treaty making is to lead to right relations and shared governance in a way that does not simply fit First Peoples into pre-existing state frameworks, it is important for non-Indigenous peoples to engage in acts of relationality.

By their nature, acts of relationality are ephemeral, provisional, and partial. They are efforts to engage, to stop, to listen, to understand. While they are not a panacea and will not inevitably lead to right relations in an era of drastic power

John Borrows, ‘Canada’s Colonial Constitution’ in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historic Treaties* (Toronto: University of Toronto Press, 2017) 17 at 20–1. This is why we argue that state law is problematic and limited – it can always dominate relational aspects or programs designed to be relational, as it has with the reconciliation discourse in Canada.

²³⁸ Macklem, ‘Indigenous Peoples,’ supra note 37 at 21.

asymmetries, acts of relationality may assist in building a particular ethic of treaty making and treaty interpretation. As Carwyn Jones has argued, such an ethic may lead state actors to consider modern (and historic) treaties in the constitutional traditions of the First Peoples signatories.²³⁹ This approach does not require negating the legal character of treaties, but it encourages state actors to understand treaties in a comprehensive and holistic fashion that does justice to both parties' intentions and aspirations. Acts of relationality may therefore help non-Indigenous citizens understand treaties as bridges between two worldviews rather than as contractual agreements that integrate First Peoples within state frameworks.

239 See Carwyn Jones, *New Treaty, New Tradition: Reconciling New Zealand and Maori Law* (Vancouver: UBC Press, 2016); Jones, 'Māori and State Visions,' supra note 20; Mark Walters, 'Rights and Remedies with Common Law and Indigenous Legal Traditions: Can the Covenant Chain Be Judicially Enforced Today?' in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historic Treaties* (Toronto: University of Toronto Press, 2017) 187.