The Different Approach to Native Title in Canada

Professor Richard Bartlett
University of Western Australia

FUNDAMENTAL DIFFERENCES

Government and judicial attitudes to native title have been dramatically different in Canada from those prevailing in Australia. Critical differences in Canada have derived from

- benign imperial influence in the eighteenth and nineteenth century;
- the conferral of exclusive jurisdiction on the federal government and the denial of provincial jurisdiction over Indian matters and lands;
- the lesser susceptibility of the federal government and the courts, particularly the Privy Council and the Supreme Court of Canada, to local settlers' antagonism towards Aboriginal people; and
- the greater reluctance to deny property rights by legislation, probably derived from United States influence, and the resultant absence of any equivalent of the *Native Title Act*

The essence of native title in Canada is a treaty or agreement process. Litigation in Canada, despite or perhaps because of its recognition for over two hundred years, has been much less than that provoked in Australia.[1]

[1] Sources of material with respect to Canadian contemporary settlements are most readily found on the web. They include the sites of:
Department of Indian Affairs and Northern Development, Canada, www.inac.gc.ca
BC Ministry of Aboriginal Affairs, www.gov.bcca/aaf
Assembly of First Nations, www.afn.ca
Unquestionably the most substantial, accessible and up to date law report series with respect to indigenous matters in Canada is the *Canadian Native Law Reporter*, available at a modest price ($90 p.a.) from the Native Law Centre, University of Saskatchewan, www.usask.ca/nativelaw. The web site gives access to a web page entitled 'Resources for Aboriginal Studies', which includes the ability to search Canadian native law cases.
The authoritative guide, including text, to the treaties of the nineteenth century is Morris, A. 1971 (1880), *The Treaties of Canada with the Indians*, Coles Publishing Co, Toronto

IMPERIAL INFLUENCE

Early British Imperial policy in North America dictated recognition of native title to traditional lands. In 1763 following the Treaty of Paris the Imperial Government issued the Royal Proclamation of 1763 to ensure due regard for traditional lands. The preamble declared that it was

> just and reasonable, and essential to our interest, and the security of our colonies, that the several Nations or tribes of Indians with whom we are connected, and who live under our protection, should not be molested or disturbed in the possession of such parts of our Dominion and Territories as, not having been ceded to or purchased by us, are reserved to them or any of them as their hunting grounds.

The Royal Proclamation of 1763 is the most significant Imperial instrument of the policy which dictated that only the Crown could acquire traditional Aboriginal lands, and only upon the consent of the Aboriginal peoples. It enshrined the policy of entering into treaties and agreements with the Aboriginal peoples with respect to their traditional rights. The policy was sustained by the 1888 Privy Council decision in *St. Catherines Milling v R*[2] which affirmed the concept of native title in Canada.

DEVELOPMENT OF SETTLEMENT PROCESS UNDER EXCLUSIVE FEDERAL JURISDICTION

The settlement process developed under Imperial direction was continued by a federal government in which is vested exclusive jurisdiction with respect to 'Indians and lands reserved for Indians'.[3] The jurisdiction enables the federal government 'to safeguard one of the most central of native interests – their interests in their lands'.[4]

The early and 'Numbered' treaties and agreements

Initially, treaties and agreements provided merely for the payment of monies for the surrender of the native title. Reserves would be created merely by the fact that

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[2] (1888) 14 App Cas 46 at 48

[3] *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 1118–1119 para 176–178.

[4] *Ibid*, 1118, para 176.

they lay outside the boundaries of surrendered lands. But as settlement reduced the available land, express provision was made for reserves.

The treaties were entered into as the pressure of settlement and development demanded. Native title to lands in Northern Ontario, the Prairie provinces, north east British Columbia and parts of the Far North was surrendered by the 'Robinson' Treaties in 1850 and by the 'Numbered Treaties' that were signed between 1871 and 1930. The Robinson Treaties were entered into to allow entry for mining. Treaties Nos. 1 and 2, encompassing the region around Winnipeg and immediately to the west where settlement was expected imminently, were concluded in 1871. The preamble explained 'and whereas the said Indians have been notified and informed ... that is the desire of Her Majesty to open up to settlement and immigration a tract of country.' Treaty No. 3 was made in order to secure passage to the West and the mining potential of the region. It added a reference to 'such other purposes as to Her Majesty may seem meet.' These declared purposes remained essentially unchanged in Treaties Nos. 4 (1874), 5 (1875), 6 (1876), and 7 (1877), whereby native title to the agricultural land of the southern and central Prairies was surrendered to make way for settlement and immigration. In 1896 the Klondike gold rush began and prospectors travelled through northern Alberta and British Columbia to the Yukon. Treaty No. 8, concluded in 1899, provided for this increased traffic of 'traders, travellers to the Klondike, explorers and miners'. The preamble to Treaty No. 8 added 'trade, travel, mining and lumbering' to the expressed objectives of the treaty. The language was retained in Treaty No. 10 in 1906, whereby native title to northern Saskatchewan was surrendered. Native title to northern Manitoba was surrendered by an adhesion to Treaty No. 5 in 1908. Treaty No. 9 in Northern Ontario was signed in 1905, and extended to the shores of Hudson Bay in 1929–30 'due to the spectacular interest and activity in the mining industry'. Treaty No. 11 was entered into in 1921 when oil was struck in the Northwest Territories.

The terms of the numbered treaties were similar. They all provided:

- for reserves and the full beneficial interest in the land and resources therein,
- the right to hunt, trap and fish throughout the tract surrendered until occupied,
- promises of social and economic development aid.

The comprehensive land claims policy

In 1969 the federal government issued a White Paper on Indian Policy, which described the treaty promises as 'limited and minimal' and Aboriginal claims as 'so general and undefined that it is not realistic to think of them as specific claims capable of remedy.'[5] The White Paper was a rejection of the government's historic approach and contrary to *St Catherine's Milling*. But it was shortlived.

Just over a year later the Supreme Court of Canada re-affirmed in *Calder v Attorney General of British Columbia*[6] that native title existed at common law. On 8 August 1973 the federal government issued a Statement on Aboriginal Claims, in which it declared its willingness to negotiate with the representatives of Aboriginal peoples on the basis that where their traditional interest in the lands concerned could be established, an agreed form of compensation or benefit would be provided to native peoples in return for their interest

In December 1981 the federal government endeavoured to enunciate its policy with respect to land claims [7] It declared that settlements must be final and must consist of an exchange of 'undefined Aboriginal land rights for concrete rights and benefits'. In 1987 the policy was restated so as to allow the retention of Aboriginal title in reserved areas, rights to the off-shore and the negotiation of resource revenue-sharing, and to affirm the federal government's commitment to the resolution of comprehensive land claims through the negotiation of settlement agreements. Under the 1995 Inherent Rights Policy self-government arrangements may be negotiated simultaneously with land and resources as part of comprehensive claim settlement, and may be constitutionally protected by section 35 of the *Constitution Act*.

In January 1998 the federal government affirmed that treaties, historic and modern, will continue to be the foundation of the relationship between the

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[5] Canada 1969, *Statement of the Government of Canada on Indian Policy* Presented to the First Session of the Twenty Eighth Parliament by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development Department of Indian Affairs and Northern Development, Ottawa.

[6] [1973] SCR 313.

[7] *In all fairness: a native claims policy,* 1981 Queens Printer, Ottawa

Aboriginal people and the Crown.[8]

Contemporary Treaties and Agreements

Contemporary negotiations with Aboriginal groups began as a result of the August 1973 Federal Statement on Aboriginal claims but initially the Provinces were reluctant to participate. The federal government could proceed without provincial agreement in the Territories of the Yukon and the Northwest and did so.

Yukon and the Northwest Territories

On 13 October 1978, an agreement in principle was reached between the Committee for Original People's Entitlement (COPE), representing the Inuit in the western Arctic, and the federal government. The Inuvialuit Final Agreement was signed on 5 June 1984.

In November 1988 an umbrella agreement in principle was initialled by negotiators for the Council of Yukon Indians, the Yukon territorial government and the federal government. A final agreement was signed in May 1993. The umbrella agreement provided the basis for the negotiation of claims, settlements and a self-government agreement with individual Yukon First Nations. Settlements and agreements with eight of the fourteen Yukon First Nations have been reached.

In 1980 negotiations with the Inuit of the Central and Eastern Arctic on their land claim commenced, and in December 1989 an agreement in principle was reached (Nunavut). A final agreement was signed in 1993. The settlement covers the largest area of land claimed, nearly two million square kilometres and nineteen thousand Inuit. Agreement was also reached in 1992 on the establishment of a new Territory, Nunavut, which came into being on 1 April 1999.

Negotiations on a joint claim with the Indians (Dene) and Metis of the Northwest Territories commenced in 1981. A final comprehensive agreement was initialled in 1990. The agreement was not ratified by the Dene-Metis as a whole because of concern with the 'complete extinguishment' surrender clause in the agreement.

[8] *Gathering Strength,* 1998, Department of Indian Affairs & Northern Development, Ottawa

Agreements have been reached with some of the regions: The Gwich'in Comprehensive Land Claim Agreement, April 1992 and the Sahtu Dene and Metis Comprehensive Land Claim Agreement of September 1993. The Dogrib signed an Agreement in Principle on 7 January 2000. The Regional Agreements and negotiations are based on the 1990 Agreement. Negotiations with members of the Akaitcho Territory Tribal Council (Treaty 8 Dene) have not progressed.

Quebec

In Quebec no treaties or agreements had been signed with the Aboriginal peoples before 1975. The provincial government sought to develop the lands of northern Quebec without any agreement with the Aboriginal peoples.

On 15 November 1973, Mr. Justice Malouf issued an interlocutory injunction against the James Bay Development Corporation restraining the construction of the James Bay Hydro Project.[9] Malouf J. held that the chiefs of the Indian bands of the region had established clear rights of native title to the lands affected. On 20 November 1973 Quebec Premier Robert Bourassa announced the government's intention to negotiate an agreement with the Indians and Inuit of northern Quebec.

In November 1975 the Cree and Inuit of northern Quebec signed the James Bay and Northern Quebec Agreement. The substance of the provisions respecting land was not unlike the numbered treaties of a century before but with substantial compensation payable to be used for economic and community development. Similar terms were agreed upon with the Naskapi Indians of Quebec in the Northeastern Quebec Agreement, signed on 31 January 1978.

British Columbia

The Province of British Columbia denied native title to land and followed a pattern of allocating small reserves close to white settlements without any agreement with the Indians. British Columbia was able to contradict Imperial policy because of the remoteness of the colony and because Imperial direction of such matters was in its last days. There are historic similarities to local attitude in Western Australia.

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[9] *James Bay Development Corp v Kanatewat* [1974] R.P. 38; 8 CLNC 188 (Que. Sup. Ct.).

In 1973 the Supreme Court of Canada held in *Calder* that native title had existed at common law in British Columbia. In 1985 the British Columbia Court of Appeal issued an injunction in *Martin v The Queen*[10] restraining lumbering on traditional lands. The Province finally agreed to participate in settlement negotiations in 1990. A Task Force Report of 1991 recommended the establishment of a British Columbia Treaty Commission to facilitate the negotiation of the settlement of native title. The Report was accepted by both governments and the Commission was established. Negotiations to settle native title in British Columbia are now ongoing. As at January 2001, 51 Indian bands, First Nations and Tribal Councils were participating in the treaty process. Thirty nine were negotiating an Agreement in Principle having signed framework agreements. The Sechelt signed an Agreement in Principle in April 1999. Negotiations with the balance are in the preparatory stage.

A final Agreement with the Nisga'a, the plaintiffs in *Calder* was signed on 4 May 1999 and ratified by federal legislation in November 1999.

The negotiating table with the Gitxsan, the plaintiffs in *Delgamuukw,* remains in suspension.

Delgamuukw

Delgamuukw, a December 1997 decision of the Supreme Court of Canada, declared that the content of native title amounted to exclusive use and enjoyment, including minerals, but was subject to an overarching limitation related to the traditional connection to the land. The Order of the Court sent the matter back to a trial judge.

The decision has given greater strength to First Nations' negotiating position but as yet has not dramatically changed the settlements reached. Settlements, in any event, generally included minerals or compensation for minerals.

The decision has had more immediate impact in the declaration of the requirements of the fiduciary obligation owed by the Crown to First Nations in the

[10] [1985] 2 CNLR 58 (BCCA)

context of s 35 *Constitution Act 1982*. The Court emphasised the minimum requirements of consultation and compensation, and in some circumstances the requirement of consent. Jack Woodward, a counsel in *Delgamuukw* has observed that *Delgamuukw* is likely to lead to 'co-management, shared access to resources and participation in profits' with respect to resources on Crown lands within the traditional territory of indigenous people.[11]

THE TERMS OF THE SETTLEMENTS

A Homeland: A Reservation including all the resources of the land. Freehold or freehold equivalent

The terms of the numbered treaties in Canada promised full beneficial ownership of the lands set apart. The objects of the reserves and the promises made with respect to them are evident in the assurances made to the Indians by the treaty commissioners. In 1871 Lieutenant Governor Archibald declared in the course of the discussions preceding Treaty No. 1:

> Your Great Mother, therefore, will lay aside for you 'lots' of land to be used by you and your children forever. She will not allow the white man to intrude upon these lots. She will make rules to keep them for you, so that as long as the sun shall shine, there shall be no Indian who has not a place that he can call his home, he can go and pitch his camp, or if he chooses, build his house and till his land.[12]

The Indians were also assured of their entitlement to the minerals and timber on reserves.

The contemporary settlements generally provide grants of freehold including minerals, to a small percentage of traditional land, plus a much larger percentage of freehold without minerals e.g. Nunavuit, 14,000 square miles (2%) including minerals, plus 122,000 square miles (15%) excluding minerals.

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[11] Woodward, J. 1999, 'Obligation of Crown to Consult with Aboriginal groups', in *Aboriginal Law in Canada,* Conference Papers, Native Investment and Trade Association, Vancouver

[12] As quoted in Morris, pp. 28-9. Estey J. in the judgment of the Supreme Court of Canada in *R v Horse* [1988] 2 C.N.L.R. 112 at 128 (S.C.C.) observed that 'The concept behind the reservations was that the Indians were to be given the opportunity to learn agricultural skills and in order to cultivate the land and facilitate their continued survival'.

The compromise contemplated in the treaties and agreements, whereby the Aboriginal people surrendered native title over their traditional lands, has generally contemplated that traditional rights should survive as far as was possible consistent with settlement and development. Accordingly the treaties and agreements have provided for the continuance of the right to hunt and fish over unoccupied lands. The provision took different forms according to the particular circumstances.

The contemporary settlements have affirmed the traditional pattern and maintained traditional rights *throughout* the traditional lands.

The agreed rights under treaties and contemporary settlements are a dramatic contrast to the very limited rights allowed to Aboriginal people over their traditional lands in Australia under the *Native Title Act*.

Social and economic development aid and funding

The treaties and agreements in Canada provided for:

- annuities and lump sum payments
- education and medical services
- farming equipment, seed and livestock.

At Treaty No. 6 in 1876 the Treaty Commissioner explained:

> I impressed strongly on them the necessity of changing their present mode of life, and commencing to make homes and gardens for themselves, so as to be prepared for the diminution of the buffalo and other large animals, which is going on so rapidly ...[13]

In contemporary settlements provision for social and economic development funding is more explicit and more substantial e.g. Nunavut - $580 million (1989) to be paid over fourteen years, $35,000 per capita.

[13] Morris, p. 183

The monies are to be used for various forms of social and economic development by regional and community governments and corporations. All of the contemporary settlements make substantial provision for assistance in the development of training, employment and business.

Certainty

- All the settlements recognise native title throughout the settlement area.
- All the agreements provide for the surrender and exchange of native title in return for the rights conferred by the Agreements.
- All the settlements provide that existing third party interests are protected and given effect to.

THE ROLE OF LEGISLATION

Legislation is relied upon today to ensure comprehensive binding effect is given to settlements. There is no equivalent to the Australian *Native Title Act*, because it has never been accepted by the Canadian federal government that native title rights should be legislated away and that agreement should thereby be dispensed with. Despite suggestions that the *Native Title Act* promotes agreement, its essence is the denial of any requirement of agreement for development on native title lands. The *Native Title Act* entails the legislative subordination of native title to the property rights of others. Historically no such approach was ever adopted in Canada, and today it would seem constitutionally impossible because of the provisions of section 35 of the *Constitution Act* of 1982 which entrenched 'treaty and Aboriginal rights' existing at that time.

CONCLUSION

The policy and practice in Canada was and is dramatically different from that in Australia. The Canadian policy of reaching settlements by agreement has worked and is working as the settlements described above make clear. The objectives of securing a bridge between traditional and contemporary approaches to development and providing certainty and clarity for land and resource use and management are being achieved. Moreover the objectives are achieved without the denial of equality and of property rights dictated by the *Native Title Act*.