6. Aboriginal self-government should have the characteristics of local government, with powers delegated from Canada and British Columbia.

7. Treaties should include mechanisms for harmonizing land use planning between Aboriginal governments and neighbouring local governments.

8. The existing tax exemptions for Aboriginal people should be phased out.

It is important to note that the referendum results will be binding on the Province. Even more frightening for onlookers of the process is that the decision will be made on the basis of the majority or 51 percent of the returned votes. So in contrast to Australian referendums where it requires a majority of the voters (as voting is compulsory in Australia) – effectively a result that could have serious effects on the treaty process, governmental relations with First Nations and inter-governmental relations – could be achieved with a relatively low return. As voting is not compulsory in British Columbia, this process is attracting a considerable amount of interest. As at 10 May 2002 there had been over 683,000 returned votes.[15] The referendum process was to be conducted over a six week period with votes being required to be returned by 15 May 2002.[16]

The referendum has caused, and if accepted by the people voting, will further cause, a serious erosion in the relationship that exists between the government of British Columbia, the people of British Columbia and First Nations.'

If the referendum questions are answered in the affirmative, this will have a serious impact on the treaty process itself. One of the philosophies that underpin the treaty process is for the parties to act in good faith. The question that must be asked is, can the BC Government, with a negotiating position of denial of Aboriginal rights and title, negotiate treaties in good faith?

The referendum has placed the treaty process in a state of flux. The only way that this situation can be rectified is to see a restoration of the previous positions of the three parties – including all the First Nations - to the process. That is to negotiate in good faith.

Yorta Yorta – Court Report

By Dr Lisa Strelein, NTRU

History of the case

In February 1994, the Yorta Yorta Nations began their case in the Federal Court for a determination that native title exists in relation to land and waters along the Murray River in northern Victoria and southern New South Wales.

While the traditional boundaries of the Yorta Yorta claim appear quite large, the public land where native title may still exist within those boundaries, that is, where no extinguishing acts have taken place, remains quite limited (more recent maps produced by the National Native Title Tribunal reflect this smaller area). The Yorta Yorta people have maintained a presence in the area through continuous occupation of the former settlement at Cumeragunja, and constant use of areas within the Barmah forest and along the Murray River.

The judge at first instance, Justice Olney, found that despite the ongoing presence in the area, the Yorta Yorta Nations had ceased to occupy the land 'in the relevant sense', that is, they had ceased to observe the traditional laws and customs observed by their ancestors. He found therefore, that native title could not be determined because the foundation of the claim had been 'washed away'.

The appeals

15 www.gov.bc.ca.tno

16 *ibid*

The Yorta Yorta appealed this decision to the Full Federal Court where a majority (2-1) upheld the trial judge's decision. Although they were critical of the approach the judge took to the inquiry, they considered that the findings of fact in relation to the abandonment of traditional law and custom were open to the judge to make, regardless of the approach he had taken.

The Yorta Yorta received leave to appeal to the High Court in December 2001. The case was argued in Canberra on 23-24 May 2002.

The issues argued before the High Court were:
1. The proper construction and operation of section 223(1) of the Native Title Act;
2. Whether 'abandonment' is a part of the common law of native title; and
3. The concept of tradition and the treatment of oral evidence.

The parties and interveners

The Yorta Yorta appeal to the High Court was opposed by New South Wales and Victoria and a raft of other respondents. Victoria had held off joining the litigation until very late. They made some suggestion after joining as a party that they were still interested in negotiations, however, for the Yorta Yorta a negotiated settlement outside the Court could not result in a determination of native title. If the appeal had not continued, the determination against them would stand and they would have to find a solution outside of the native title context.

The main interveners were the Human Rights and Equal Opportunity Commission and the Commonwealth.

s223(1)

The impact of the definition of native title in the *Native Title Act* was central to the arguments in the High Court. The Court has been keen in a number of recent cases to emphasise that the Act is the appropriate starting point for an inquiry into the existence of native title. The Act directs the inquiry to the present, through section 223(1)(a) and (b), emphasising the laws and customs now acknowledged and observed.

Justice Olney had taken note of s223 but moved quickly to establishing the existence of native title according to the common law. Under this approach, Olney J began with the pre-contact traditional laws and customs, most clearly articulated, his Honour felt, in the writings of Edmund Curr. Olney J was criticised for attempting to trace activities identified by Curr through to the present and highlighting the discontinuities in their observance and the importance placed on different practices by the current Yorta Yorta community that were not highlighted in Curr's writings.

The Yorta Yorta argued that because of this approach Justice Olney had not paid sufficient regard to the contemporary laws and customs of the Yorta Yorta as required by the Act.

However, even having established s223 as the starting point for the inquiry, the Court had to consider the construction of the section to determine if the judge's approach was so erroneous as to infect his assessment of the facts. There are two references in the statutory definition of importance in this regard. The first is the incorporation of 'common law recognition' into the statutory definition at subsection (c) and the second is the concept of 'traditional' in relation to laws and customs.

'recognised by the common law'

The Solicitor-General for the Commonwealth argued that though the inquiry may correctly start with the Act this does not mean that the Act has created a new right. Section 233(1)(c) incorporates reference to the common law as part of the statutory definition. This unusual construction caused a great deal of discussion before the Court as to how much of the common law was brought in by the reference.

In the Full Federal Court the majority had taken the view that (c) incorporated a series of common law requirements including:

1. the native title holders are members of an identifiable community identified by one another as members living under its laws and customs;
2. that the community has continuously possessed interests in the relevant land under its traditional laws and customs;
3. the refusal of the common law to recognise rights and interest that are -
   (i) fundamentally inconsistent with the principles of natural justice, equity and good conscience (repugnancy)
   (ii) extinguished, whether by -
      - positive exercise of sovereign power; or
      - expiry, either by cessation of acknowledgment and observance of traditional laws and customs that form the foundation of native title; or the native title holders as a community, group, or as individuals, cease to have a connection to the land.

The respondents supported the majority's view, arguing that if repugnancy, inconsistency and extinguishment by sovereign act were incorporated under (c) why not other bases identified in *Mabo* – 'one in all in'. Apart from McHugh J, most judges seemed to be of the view that to suggest that once (a) and (b) had been dealt with a full inquiry as to the common law requirements was then necessary under (c) would effectively make (a) and (b) redundant. They impressed upon Counsel that the common law of native title did not begin and end with Justice Brennan's judgement in *Mabo.* Any reference in (c) must therefore be to the common law as amended by the Act and developed through recent case law.

The appellants and interveners argued that (c) incorporated only the concepts of repugnancy, inconsistency with a fundamental principle as in *Yarmirr,* and the concept of extinguishment by sovereign act. Some of the judges were concerned about the concept of abandonment as a basis for extinguishment, they noted that while so much of the Act is devoted to extinguishment, no reference is made in the legislation to any concept of abandonment. Indeed, as Justice Gaudron noted, the Act stipulates that native title is not able to be extinguished contrary to the Act.

Many of the judges drew a distinction between observance and acknowledgment – the failure to exercise rights or observe laws did not necessarily equate with the cessation of acknowledgment. Separating out concepts of observance from existence of laws, the judges (including Callinan J who would not necessarily be expected to be sympathetic to the appellants' case) were concerned with the implications of this argument in circumstances where laws and customs have been suppressed by colonial administrators. Gaudron J appeared to prefer that the inquiry focus on whether the laws and customs were traditional under (a) and (b). Gummow J also suggested that a case may fail on questions of proof under (a) without any inquiry as to abandonment.

The concept of 'tradition'

If the Court accepts that the inquiry cannot start with the pre-sovereignty position and attempt to trace each right along an unbroken chain of acknowledgment and observance, and that there is no concept of abandonment incorporated by (c) there remains the reference in 223(1) (a) and (b) to the laws and customs being 'traditional'.

The Solicitor-General for Victoria pursued the approach of Olney J that it is not a matter of being on the land but being present 'in the relevant sense'. He argued that Olney had found a complete break in traditional law and custom because those customs relied on in the application for native title did not relate to anything that emerged in the history up to 1880. 'Traditional' he said, must be derived from pre-settlement. While he admitted that a law or practice may be modified or adapted, it must be maintained by a 'thread continuous from pre-settlement'.

The respondent parties adhered to the concept of a bundle of rights where the evolution of native title would be limited to the same class of rights from 1788 to the present. This 'spear to a gun' mentality freezes the content of native title under the guise of evolution of methods of exercise. This understanding of a 'traditional' Aboriginal society was criticised by the appellants as requiring a particular way of life or a certain character of occupation. The debate still awaiting the outcome in *Ward* as to whether native title reflects a bundle of distinct rights or a system of laws, is again central to the approaches on both sides.

Kirby J also raised concern about the impossible burden of proof that may be placed on native title applicants by a pre-settlement test, considering that the oral history of a group may only extend three, perhaps four generations. There was reference by a number of judges to a possible presumption of continuity, by which current laws and customs based on the oral history of the group would be presumed to extend back to the assertion of sovereignty. The discussion around non-observance and acknowledgment will also impact on the meaning attributed to the concept of 'tradition'.

In some comments there were echoes of the decisions of Deane and Gaudron JJ and Toohey J in *Mabo*, where there was almost a presumption of continuity in the situations where the applicants have maintained occupation. This is a development in Canadian jurisprudence which may be a useful way to reduce the burden of proof currently required.

Gleeson CJ made the comment that the meaning of the word 'traditional' should be taken, in part, from that which it is describing – that is, by reference to the nature of native title. While His Honour did not pursue this question, it is an important point because the concept of 'traditional' when used by colonial parliaments could be argued to be simply a way to describe distinctively 'Indigenous' rights.

On the weight to be given to oral evidence, reference was made to Canadian cases that have dealt directly with the issue. However, it did not receive a great deal of attention in argument but was dealt with in the written submissions.

The challenges for the appellants case

Despite the respectful and often impassioned response from the Bench in the hearing, there are considerable obstacles confronting the Yorta Yorta Nations' case.

'the finding of fact'

The High Court was not interested in rehearing the evidence. The role of the High Court in an appeal is only to hear questions of law. The appellants were confronted by the fundamental problem, as Justice McHugh pointed out when they sought leave for this appeal in December, that Justice Olney had made findings of fact in relation to the evidence. Counsel for the Yorta Yorta, Neil Young, argued that the Judge's assessment of the facts could not be separated from his approach to the inquiry. The Court may however, accept that the trial judge found that the current laws customs are not 'traditional' and therefore fail the test under (a). Any misdirection by his Honour in relation to (c) would therefore be immaterial to the outcome of the case for the Yorta Yorta.

Procedural fairness

The respondents argued that the way in which the applicants had presented the case invited the judge to conduct the inquiry in the manner he did. They could not then take the opportunity presented by an appeal to effectively put a new case. Their Honours were concerned about sending the case back for re-trial – the initial hearing took 114 days with 201 witnesses over 11,664 pages of transcript. However, Victoria argued that it would be unfair to have the case sent back without new evidence as the State had responded to the case as put.

Kirby J and Gleeson CJ suggested that perhaps it was equally unfair to keep the Yorta Yorta to a standard of proof that is too high.

Conclusion

It is difficult to read the outcome of the case. Gummow J and Gleeson CJ remained very quite during arguments. It is likely that the court will confirm a number of approaches that they have been foreshadowed. The are also likely to make some strong comments in relation to what constitutes 'tradition'. The fundamental question remains whether the Yorta Yorta will receive a positive outcome for their particular case. The Court is still faced with the dilemma of overturning findings of fact by a trial judge, something they will be loathe to do. They need to be confident that the test applied by Olney was so erroneous that it infected the assessment of the facts.

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NATIVE TITLE IN THE NEWS

New South Wales

Wyong Council is seeking confirmation from Darkinjing Land Council that the native title claim around Norah Head includes the historic buildings. Darkinjing has made a claim over the site including the historic lighthouse, and according to the Council the claim is for the whole site including the buildings. Both Wyong Council and Darkinjing Land Council are hoping to clarify this confusion. *Central Coast Express* 10 April 2002

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Victoria

A Federal Court in Melbourne has deferred the Wotjobaluk native title claim until the 17 June 2002. The Wotjobaluk claim has been in mediation since September 1999 and the Federal Court hearing was designed to decide whether mediation has run its course. The Federal Court has allowed until the next hearing in June to continue the mediation. The claim area is for 10,000 square kilometers of mostly Crown land and waterways. *Wimmera Mail Times* 22 March 2002

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South Australia

The NNTT is going to begin mediating in a claim for 95,869 square kilometers of land north of Lake Eyre National Park. The Wangkangurru/Yarluyandi people are seeking recognition of their native title rights over the area. They are not seeking exclusive rights or interests. The other parties involved in the mediation include representatives from pastoral, mining, telecommunications, apiarists and state and

local government groups. *Adelaide Advertiser* 3 April 2002

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In the Cooper Basin, the balance achieved between Indigenous land holders and mining interests has been a result of the future act regime or CO98 Agreements. Seven petroleum companies and three native title parties, namely the Edward Landers Dieri People, the Yandruwandha/ Yawarrawarka Peoples and the Wangkangurru/Yarluyandi Peoples, reached consensus in agreeing to petroleum exploration and royalties. *Oil and Gas Australia* 1 February 2002

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Queensland

A meeting in Brisbane with Mount Isa City Council will discuss the ongoing progress of Indigenous Land Use Agreements (ILUA's) in the Mt Isa region. The Mt Isa Council recognise that the next stage will be the formation of a group of representatives from the Kalkadoon Tribal Council, one of the key claimant groups in the area, to become part of the agreement process. *North West Star (Mt Isa)* 3 April 2002