Economic Development through Treaty Reparations in New Zealand and Canada

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Abstract

In Canada, Treaty 1 First Nations brought a claim against the Crown for land debt owed to them since 1871. In 2004, Crown land in Winnipeg became available that, according to the terms of the settlement, should have been offered for purchase to Treaty 1 Nations. Similarly, in New Zealand, the Waikato-Tainui claim arose from historical Crown breaches of the 1840 Treaty of Waitangi. In 1995, a settlement was reached to address the unjust Crown confiscation of Tainui lands. Despite being intended to facilitate the return of traditional territory, compensate for Crown breaches of historic treaties, and indirectly provide opportunity for economic development, in both cases, settlement was met with legal and political challenges. Using a comparative legal analysis, this paper examines how the state continues to use its law-making power to undermine socio-economic development of Indigenous communities in Canada and New Zealand, thereby thwarting opportunity for Indigenous self-determination.

Keywords: Kapyong, Treaty 1, Treaty of Waitangi, economic development, treaty implementation

Résumé

Au Canada, les Premières Nations signataires du Traité n^{o} 1 ont intenté une réclamation contre la Couronne pour la dette foncière qui leur est due depuis 1871. En 2004, les terres de la Couronne, à Winnipeg, qui auraient dû, selon les termes de l'accord, être offertes aux nations signataires du Traité n^{o} 1 sont devenues disponibles. De manière similaire, en Nouvelle-Zélande, la réclamation de Waikato-Tainui fut le résultat des violations historiques par la Couronne du Traité de Waitangi de 1840. En 1995, un accord fut conclu pour remédier à la confiscation

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injuste des terres de Tainui par la Couronne. Or, en dépit de l'intention de faciliter le retour des territoires traditionnels, de compenser les violations des traités historiques par la Couronne et de fournir indirectement des possibilités de développement économique, dans les deux cas précédents, les accords furent confrontés à des défis juridiques et politiques. À l'aide d'une analyse juridique comparative, cet article examine comment l'État continue d'utiliser son pouvoir législatif pour saper le développement socioéconomique des communautés autochtones au Canada et en Nouvelle-Zélande, entravant ainsi les possibilités d'autodétermination des peuples autochtones.

Mots clés : Kapyong, Traité n° 1, Traité de Waitangi, développement économique, application des traités

Introduction

Initially defined by treaty, the Crown's relationship with the Indigenous peoples of Canada, and the Māori peoples of Aotearoa New Zealand, today is instead shaped by legal and political contest. In Canada, Treaty 1 First Nations were successful in bringing a claim for Crown breaches under the 1997 *Manitoba Treaty Land Entitlement Framework Agreement* for land debt owed to First Nations outstanding since 1871. In 2004, Crown land in the City of Winnipeg became available that, according to the terms of the settlement, should have been offered for purchase to Treaty 1 Nations. Nevertheless, the federal government blocked its purchase, and the matter has been before the court since 2008. Likewise, in New Zealand, the Waikato-Tainui claim arose from historical Crown breaches of the 1840 *Treaty of Waitangi*. In 1995, a settlement was reached to address the unjust Crown confiscation of Tainui lands. Land that was returned to Tainui in the City of Hamilton was already being developed into a shopping complex, when the municipal government attempted to halt the project.

In both countries, settlement agreements were intended to facilitate the return of traditional territory, compensate for Crown breaches of historic treaties, and indirectly provide opportunity for economic development for the respective Indigenous communities. However, in each instance, completion of the settlement was met with legal and political challenges initiated by the Crown or other government players in an attempt to hinder efforts by Indigenous peoples to uphold their treaty rights and to provide economic opportunities for future generations. Such challenges demonstrate the propensity of Crown and government actors' attempts to reify a colonial narrative of treaty as a historical artifact under a singular sovereign for the benefit of the Crown and her subjects, and therefore, not as a living agreement of mutual benefit between modern nations. Using a comparative legal and historical analysis, this paper examines how the state continues to use its law-making power to undermine socio-economic development of modern Indigenous communities in Canada and New Zealand, thereby thwarting opportunity for Indigenous self-determination.

Canada – Treaty Implementation

In Canada, the colonization project was well underway by the time of the Numbered Treaties. By the 1870s, Indigenous nations had already been dealing

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with European explorers, missionaries, traders and government officials for more than 150 years. First Nations entered treaty negotiations with the Crown with experience garnered from negotiating treaties with other Indigenous nations, and negotiating trade agreements with the Hudson's Bay Company (HBC). The Crown had also been dealing with Indigenous nations in North America (and other colonies) for hundreds of years and had a long history of negotiated agreements. While initial agreements were peace and friendship treaties, the *Royal Proclamation of 1763* shifted the focus to land cession treaties, which became a policy requirement of colonial expansion.

Beginning in 1871, Treaty 1 promised a new phase—a new kind of relationship—between Her Majesty the Queen and, initially, the "Chippewa and Swampy Cree Indians of Manitoba" (or more correctly, the Anishinaabe and Nehiyaw peoples). The Numbered Treaties, as they have come to be called, went beyond the "peace and friendship" treaties of earlier years and defined a means to peacefully share land and resources with the anticipated droves of settlers.[1] While the Crown continues to describe these treaties as "simple land cession treaties," even the most cursory reading of the text of Treaty 1 reveals a vision for an enduring relationship.[2] Treaty Nations expected to continue their traditional ways but, moreover, expected to participate in a rapidly changing economy.[3] These provisions included (at the very least) access to traditional hunting and fishing grounds, farming implements, and livestock for each community, and annuities that, at the time of signing, far exceeded the mere symbolic payments of today.[4] Of key importance to this analysis is the Treaty 1 *per capita* land allotment of 160-acres per family of five, leading to a protracted legal conflict placing the Honour of the Crown in serious question.

Sadly, the negotiation of the Numbered Treaties was a high-water mark of sorts in Crown-Aboriginal relations. While First Nations have consistently asserted that the written texts of the Numbered Treaties failed to accurately record the negotiations, yielding grossly exaggerated terms favouring the Crown, even then, the Crown neglected to adhere to its own rendition of the terms, and essentially nullified the treaties.[5] Throughout the late 1800s and in the decades that followed,

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1 Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014), 100–05.

2 Aimee Craft, *Breathing Life into the Stone Fort Treaty* (Saskatoon: Purich Publishing, 2013).

3 Myra Tait, "Kapyong and Treaty One First Nations: When the Crown Can Do No Wrong," in *Surviving Canada: Indigenous Peoples Celebrate 150 Years of Betrayal*, ed. Kiera L. Ladner and Myra J. Tait (Winnipeg: ARP, 2017) 103–04.

4 Treaty 1 promises included, among other things, a $5 per Indian annuity, and $20 for each Chief. Following the merger of the Hudson's Bay Company and North West Company in 1821, the "less fortunate" officers of the new company received salaries that "varied from twenty to over a hundred pounds annually,," in Jennifer SH Brown, *Strangers in Blood: Fur Trade Company Families in Indian Country* (Vancouver: UBC Press, 1980), 111. One can then surmise, for example, that a family of four, or a Chief alone, would receive annuities that approximated an annual base income.

5 Peter Russell, *Canada's Odyssey: A Country Based on Incomplete Conquests* (Toronto: University of Toronto Press, 2017) 42–53, 167–210. Michael Coyle, "As Long as the Sun Shines: Recognizing that the Treaties Were Intended to Last," in *The Right Relationship: Reimagining the Implementation of Historical Treaties* ed. John Borrows and Michael Coyle (Toronto: University of Toronto Press, 2017), 48–51. Canada, *Report of the Royal Commission on Aboriginal Peoples, Vol. 1 Looking Forward, Looking Back* (Ottawa: Royal Commission on Aboriginal Peoples, 1996), 114–22, 228–396.

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while First Nations continued to negotiate treaties in good faith, the Crown was concurrently enacting legislation to effectively displace the treaties with oppressive legislation.[6] Instead of fostering respect for a shared existence that allowed each Nation to prosper, prejudicial terms for Aboriginal-Crown relations found expression in the *Gradual Civilization Act*,[7] the *Indian Act*,[8] the *Natural Resource Transfer Acts*,[9] and the *Canada-Ontario Welfare Services Agreement,*[10] to name just a few, effecting the Crown's vision for the dehumanization, dispossession, and destruction of First Nations peoples.[11]

Inarguably, grave injustices have resulted from the Crown's decision to depart from the Treaty relationship, but two themes are of particular interest herein. First, the abuses exacted on Aboriginal peoples were then, as they continue to be now, brought about through the unilateral exercise of state power, and more specifically, through policy and legislation that defy solemn nation-to-nation relationships and fiduciary obligations established through treaties.[12] Second, these 'legal' exercises of power have brought immeasurable damage to Indigenous individuals and their nations.[13] Indigenous peoples in Canada, not unlike other colonized peoples, consistently rank well behind their non-Aboriginal counterparts in every indicator of socio-economic well-being.[14] This is no accident. Legislation was explicitly intended to disadvantage and destroy First Nations' cultures, identities, governments, and economic vitality and, consequently, continues to devastate the individual and national lives of its target.

In Canada, the cumulative effect on the socio-economic well-being of First Nations peoples of more than a century of repressive legislation is slowly being acknowledged and addressed by the Canadian government and others.[15] However, no real change to the *status quo* can come about until the unilateral application of state power over Treaty Nations is ended. When Aboriginal and Treaty rights were notionally entrenched as sections 25 and 35 of Canada's Constitution Act, 1982,[16]

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6 James (sakej) Youngblood Henderson, "O Canada: A Country Cannot Be Built on a Living Lie," in *Surviving Canada,* 278. Kiera L. Ladner, "Rethinking the Past, Present and Future of Aboriginal Governance," in *Reinventing Canada,* ed. Janine Brodie and Linda Trimble (Toronto: Prentice Hall, 2003), 46.

7 *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians,* S Prov C 1857, c 26.

8 *Indian Act,* RSC 1985 c I-5.

9 See for example: *Manitoba Natural Resources Transfer Act,* CCSM c N30; *Alberta Natural Resources Act,* SC 1930, c 3. NRTA transferred jurisdiction over natural resources from the Federal Crown to the Provincial Crown in the provinces of Manitoba, Saskatchewan, and Alberta.

10 The *Agreement* is alleged to have facilitated the 'Sixties Scoop,' as it has come to be called, involving the government-sanctioned removal of an estimated 16,000 Aboriginal children in Ontario, between the years of 1965 and 1984. See: *Brown v Attorney General* 2014 ONSC 6967.

11 Russell, *Canada's Odyssey*, 180–10.

12 Ibid at 180–91. Ladner, "Rethinking," 43–60.

13 Aaron Mills, "What is a Treaty: On Contract and Mutual Aid," in *The Right Relationship: Reimagining the Implementation of Historical Treaties*, ed. John Borrows & Michael Coyle (Toronto: University of Toronto Press, 2017), 218–23.

14 See: Mia Rabson, "Manitoba reserves the worst in Canada: Federal government remains silent on issue," *Winnipeg Free Press*, 30 January 2015, http://www.winnipegfreepress.com/opinion/analysis/manitoba-reserves-the-worst-in-canada-290301531.html.

15 Canada, *Principles Respecting the Government of Canada's Relationship With Indigenous Peoples* (2017) http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html

16 *The Constitution Act*, 1982, Schedule B to the Canada Act 1982 (UK) 1982 c11.

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it was hoped that a page was turned in Aboriginal-Crown relations.[17] In doing so, the Crown embarked on what appears will be a very long journey to establish respectful relationships, one that for many Aboriginal peoples points directly at the need for full implementation of the spirit and intent of the Numbered Treaties. Nevertheless, the Crown, bolstered by the Courts' indiscriminate acceptance of its assumed sovereignty, continues to exercise the right to define Aboriginal and Treaty rights according to its own purposes, thereby missing the entire intention of the treaties. Where meaningful treaty implementation is absent, there can be no peace between the two parties. An examination of New Zealand's treaty history demonstrates that it is possible to turn a page in Indigenous-Crown relations: the status of their treaty has been transformed from legal nullity to quasi-constitutional, and settlements have been negotiated to facilitate restitution (including considerations of the return of traditional lands).

New Zealand – Treaty Implementation

The *Treaty of Waitangi*, New Zealand's foundational document, was signed in 1840, between Britain and "Chiefs of the Confederation of the United Tribes of New Zealand."[18] By this time, Britain had already recognized the sovereignty of Aotearoa (or New Zealand as they later called it), as established through a Declaration of Independence and its flag under maritime law, and reflected in statements of the British Colonial office.[19] For Lieutenant-Governor Hobson, the Treaty ushered in "British sovereignty over all of New Zealand: over the North Island on the basis of cession…and over the southern island by right of discovery."[20] This proclamation defied the fact that Māori Chiefs from the South Island had also signed the Treaty and, moreover, that the Māori text of the treaty ceded neither sovereignty nor territory.[21] In the decade that followed, the Treaty appeared to have little meaning for British plans for colonization, which were carried out through unprovoked military actions and "legal" land seizures of Māori territory.[22]

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17 Kiera L. Ladner and Michael McCrossan, "The Road Not Taken: 25 Years After the Reimagining of the Canadian Constitutional Order," in *Contested Constitutionalism: Reflections on the Charter of Rights and Freedoms*, ed. James B. Kelly and Christopher P. Manfredi (Vancouver: UBC Press, 2009), 263–83.

18 New Zealand, *Treaty of Waitangi Act 1975*, Schedule 1 – The Treaty of Waitangi, English Text [*Treaty of Waitangi*].

19 See for example, Great Britain, House of Commons Parliamentary Papers, "Report From the Select Committee on New Zealand together with the Minutes of Evidence," 1840, at 55–60. Claudia Orange, *The Treaty of Waitangi* (Wellington: Allen & Unwin, 1987), 21–31. Mathew Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Wellington: Victoria University Press, 2008), 36–41. Atholl Anderson, Judith Binney, and Aroha Harris, *Tangata Whenua: An Illustrated History* (Auckland: Bridget Williams Books, 2014), 209–11.

20 Minister for Culture and Heritage, "Political and constitutional timeline," 13 November 2013, New Zealand History online, http://www/nzhistory/net/nz. M.P.K. Sorrenson "The Settlement of New Zealand from 1835," in *Indigenous Peoples' Rights: Australia, Canada & New Zealand,* ed. Paul Havemann (Auckland: Oxford University Press, 1999), 165.

21 Anderson *et al*., *Tangata Whenua,* 220–27. Mason Drurie, "Tino Rangatiratanga," in *Waitangi Revisited,* ed. Michael Belgrave, Merata Kawharu, and David Williams (Sydney: Oxford University Press), 3–18.

22 Orange, *The Treaty of Waitangi,* 93–113.

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Only a few short decades after the signing of the *Treaty of Waitangi*, its legal importance was forgotten by all but the Māori, who trusted in its promises and protection. By 1877, in a Māori land claims case, Supreme Court Chief Justice Prendergast declared the "alleged treaty…if it ever existed, was a legal nullity,"[23] rationalizing his position with the myth that "the aborigines were found without any kind of civil government, or any settled system of law…[thus] incapable of performing the duties, and therefore of assuming the rights, of a civilised community."[24] This landmark precedent would guide the Crown-Māori relationship for the next century, resulting in the systematic and unjust dispossession and oppression of Māori peoples. Prendergast used Canadian jurisprudence to support his determination: while the French (Canadians) enjoyed recognition of their own civil code, "in the case of primitive barbarians, the supreme executive government must acquit itself, as best it may, of its obligation to respect native property rights, and of necessity must be the sole arbiter of its own justice."[25] The Crown monologue on Māori, and indeed all Aboriginal, rights quickly dispensed with any notion of a treaty relationship.

Despite this typical experience of British colonization and the Crown's historic disregard for the *Treaty of Waitangi*, New Zealanders courageously embraced a paradigm shift.[26] In 1975, recognizing its legal, if not moral, obligation to uphold Treaty implementation, New Zealand took a different, and markedly bolder, approach to renewing and rebuilding the Treaty Crown-Māori relationship.[27] A number of factors contributed to this shift, not the least of which was the unyielding belief of Māori in the importance of the Treaty. The turning point in modern treaty interpretation came through the *Treaty of Waitangi Act 1975*, restoring the *Treaty* from "a simple nullity," to a status nearing constitutional authority.

Further, the 1975 Act established the Waitangi Tribunal, a permanent commission of inquiry, whose main function is to inquire and make recommendations concerning "claims that Maoris are prejudicially affected by legislation, policy or acts or omissions of the Crown inconsistent with the Principles of the Treaty of Waitangi."[28] The 1985 amendment[29] expanded these provisions to include inquiry into historic breaches, such as the illegal confiscations of Māori land by the Crown. Although Tribunal Report recommendations are (generally)[30] non-binding on

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23 *Wi Parata v Bishop of Wellington* [1877] 3NZ Jur (NS) 72 (SC) at 2 [Prendergast decision]. Orange, *The Treaty of Waitangi,* 93–113.

24 *Wi Parata v Bishop of Wellington* at 5.

25 Ibid at 7.

26 Augie Fleras and Tom Spoonley, *Recalling Aotearoa: Indigenous Politics and Ethnic Relations in New Zealand* (Oxford: Oxford UP, 1999), 15. Judith Pryor, *Constitutions: Writing Nations, Reading Difference* (Birkbeck Law Press, 2008), 94.

27 Anderson *et al*., *Tangata Whenua,* 419–25, 444–47. Jacinta Ruru, "A Treaty in Another Context: Creating Reimagined Treaty Relationships in Aotearoa New Zealand," in *The Right Relationship: Reimagining the Implementation of Historical Treaties,* ed. John Borrows and Michael Coyle (Toronto: University of Toronto Press, 2017), 305–13.

28 New Zealand, *New Zealand Māori Council v Attorney-General* [1989] NZCA 43, Judgment of Cooke at 6 [Lands Case]. While the Court of Appeal reached a unanimous decision, each member set out individual reasons.

29 *Treaty of Waitangi Amendment Act 1985* (1985 No 148).

30 The *Education Amendment Act 1990* and the *NZ Railways Corporation Restructuring Act 1990* are examples of exceptions, whereby the Tribunal is empowered to make binding recommendations regarding the return of certain education lands in the first instance, and railway lands in the second instance, to Māori.

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Courts, the Act itself is binding,[31] and the Tribunal holds "exclusive authority to determine the meaning and effect of the Treaty as embodied in the [English and Māori] texts and to decide issues raised by the differences between them."[32] This opportunity for substantive legal reparation, including the potential return of land and resources, held new hope for Māori revitalization.[33]

The "Principles" of the Treaty, which are of central interpretive value, came into focus in 1987, as the result of the challenge by the New Zealand Maori Council to the enactment of the *State-Owned Enterprises Act 1986*.[34] Facing severe national economic challenges, New Zealand introduced legislation requiring all State enterprises to become fiscally accountable; the "concept underlying the 1986 Act [was] that the directors operate the companies to make profits and without day-to-day Government interference."[35] The legislation provoked swift response from the Maori Council, with Mr. Graham Latimer representing "all persons entitled to the protection of Article II of the Treaty of Waitangi";[36] Māori applicants expressed concern that the Act allowed for alienation and sale of millions of hectares of Crown land and other natural resources, thus removing from consideration land for settlement purposes. The High Court noted the concern, which was also reflected in an interim report of the Tribunal, and the matter, despite the Solicitor-General's opposition, was expedited to the Court of Appeal.[37]

In his submission to the Court of Appeal, the Solicitor General "stressed the inconvenient practical consequences that would flow from an interpretation in favour of added Māori protection."[38] The court dismissed the Crown's convenience argument stating, "it has now become obligatory on the Crown to evolve a system for exercising the powers under the [*State Owned Enterprises*] Act,"[39] requiring state exercise of power to be consistent with principles inherent in the Treaty.[40]

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31 *Treaty of Waitangi* s 3.

32 *Treaty of Waitangi* s 5(2).

33 Mason Drurie, *Te Mana Te Kawanatana: The Politics of Maori Self-Determination* (Sydney: Oxford University Press, 1998), 115–40, 218–26. Carwyn Jones, "From Whitehall to Waikato: Kingitanga and the Interaction of Indigenous and Settler Constitutionalism," in *After the Treaty: The Settler State, Race Relations & the Exercise of Power in Colonial New Zealand*, ed. R.S. Hill, Brad Patterson and Kathryn Patterson (Wellington: Steele Roberts, 2016). Ruru, "A Treaty in Another Context," 305–24.

34 New Zealand, State-Owned Enterprises Act 1986 (NZ), 1986/124.

35 Lands Case, Judgment of Cooke, 4.

36 Ibid. Graham Stanley Latimer, "suing on behalf of himself and all persons entitled to the protection of Article II of the Treaty of Waitangi," is also as a party to the action. Also see judge's discussion of applicant at 2. An English translation of the Māori version reads: "The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures. But on the other hand the chiefs of the Confederation and all the chiefs will sell land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent." (Source: Te Ara—The Encyclopedia of New Zealand, "The three articles of the Treaty of Waitangi." www.teara.govt.nz.)

37 New Zealand, *New Zealand Māori Council & Latimer v Attorney-General* [1987] NZHC 78 at 14 [Latimer].

38 Lands Case, Judgment of Cooke, 18.

39 Ibid, Judgment of Cooke, 39.

40 Paul Havemann, "What's in the Treaty?: Constitutionalizing Maori Rights in Aotearoa/New Zealand 1975–1993," in *Legal Pluralism and the Colonial Legacy*, ed. Kathleen Hazlehurst (Sydney: Ashgate, 1995), 91–97.

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This renewed call to honour both Māori and Pākehā (non-Māori) perspectives is bolstered by the fact that the *Treaty of Waitangi* is a bilingual text. As opined by Court of Appeal Justice Cooke:

> The difference between the texts and the shades of meaning do not matter for the purposes of this case. What matters is the spirit. This approach accords with the oral character of Māori tradition and culture. It is necessary also because the relatively sophisticated society…could not possibly have been foreseen by those who participated in the making of the 1840 Treaty…. The Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas.[41]

Consequently, interpretation has moved away from a strict textual reading of treaty terms. Subsequent jurisprudence, multiple Waitangi Tribunal reports, and numerous government initiatives continue to contribute to the development of treaty "principles" that more fully express the "spirit" of the treaty.

The principles inherent in the *Treaty*, as articulated by the Court of Appeal, "were the foundation for the future relationship between the Crown and the Māori race,"[42] and the need for clarification of those principles was "perhaps as important for the future of our country as any [case] that has come before a New Zealand Court."[43] Ultimately, Justice Cooke reached two major conclusions: first, that the "principles of the *Treaty of Waitangi* override everything else in the *State-Owned Enterprises Act*…[and second] that those principles require the Pākehā and Māori Treaty partners to act towards each other reasonably and with the utmost good faith."[44] The principles are dynamic and developing, to provide "an effective legal remedy by which grievous wrongs suffered by one of the Treaty partners in breach of the principles of the Treaty can be righted."[45] This articulation of the purpose of the Principles underlines that the *Treaty* was a forward-looking document, intended to adapt and accommodate the needs and aspirations of both parties.

Notwithstanding the cumulative effects of legal, cultural, social, and economic oppression experienced by the Māori peoples, modern *Treaty* implementation has assisted in addressing some of the historic effects of systematic dispossession and discrimination, and opened new opportunities for a mutually respectful and beneficial relationship between Māori and Pākehā. In his closing remarks, Justice Cooke credits the legislature for enabling the Court to reach its conclusion, thus pointing to political will as the cornerstone of effective treaty implementation. As is demonstrated by the experiences of the Waikato Tainui discussed herein, the situation in New Zealand is by no means perfect, and its governments often lack political will and invoke sovereignty. As a nation, New Zealand nevertheless officially embraces the treaty as a quasi-constitutional document and has made tremendous advancements in implementation. Despite the overtures from Canadian governments, and the development of legal instruments to address treaty implementation, both process and political will in Canada remain well behind the example set by New Zealand.

41 Lands Case, Judgment of Cooke, 34–35.
42 Ibid, Judgment of Bisson, 19.
43 Lands Case, Judgment of Cooke, 3.
44 Ibid Judgment of Cooke, 44.
45 Ibid Judgment of Cooke, 47.

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The TLE Process – Manitoba, Canada

Under the 1997 Treaty Land Entitlement (TLE) framework agreement, the Province of Manitoba assumed the Crown's constitutional obligation to fulfill treaty land allotment promises to 29 First Nations, pursuant to Treaties 1 through 6, Treaty 5 Adhesions, and Treaty 10. All of the Numbered Treaties included a *per capita* land allotment, which would form the basis of "reserve" land set apart for the exclusive use of the signatory bands.[46] Despite the renewed and repeated commitment to meet its obligations, in 2007, the 1.4 million acres of TLE transfers owed to these First Nations remained outstanding. Highlighted in the 2007 Speech from the Throne, the Government of Manitoba admitted that settlement was as an "economic necessity for First Nations,"[47] pointing to the need to "support a long-overdue major acceleration of TLE claims through a more decisive settlement process."[48] It was clearly recognized by government that there remained a legal obligation to fulfill the treaty promises, but also that the breaches of the treaties had and continue to have a serious and significant impact on the well-being of those short-changed by the Crown.

In 2011, a Manitoba Government News Release claimed that approximately half of the claims were settled and reiterated that the TLE process "continues to be a provincial priority and … an important component in the future economic development plans of First Nations."[49] Nevertheless, neither legal force nor moral imperative appears to have generated any sense of urgency for the Crown to resolve the remaining claims. This is evidenced by the fact that, as of May 2016, fifteen First Nations with TLE agreements were still owed over 200,000 hectares (nearly half a million acres) of land.[50] Worse, during 2013 and 2014, "only a 0.046-hectare plot has been converted to reserve land."[51] With the election of a Progressive Conservative government in April 2016, the TLE Committee of Manitoba reported receiving a "vague and non-committal" response from the new government, when challenged to complete the TLE claims within a ten-year time frame.[52]

Notably, the Manitoba agreements, like all TLEs, are not new government initiatives designed to address the massive socio-economic disparity of Canada's First Nations communities. Rather, the settlement agreements are redress owed to Treaty signatories, arising out of historic Crown breaches. Having met the burden

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46 Canada, Manitoba & Treaty Land Entitlement Committee of Manitoba, *Treaty Land Entitlement Framework Agreement*, (29 May 1997) http://www.tlec.ca/wp-content/uploads/2017/12/TLE-Framework-Agreement-_1997__7.pdf.

47 Manitoba: Speech from the Throne, 1st Sess, 39th Leg Ass, 6 June 2007 (John Harvard).

48 Ibid.

49 Government of Manitoba, *"News Release: Province Makes Good Progress on Meeting Treaty Land Entitlement Obligations: Robinson,"* 30 June 2011, online http://www.gov.mb.ca/chc/press/top/2011/06/2011-06-30-134000-11913.html.

50 Treaty Land Entitlement Committee of Manitoba Inc., "TLE Land Conversion Update 2016," (2017). www.tlec.ca.

51 Mary Agnes Welch, "After Supreme Court ruling: a clash of claims between Métis, First Nations," *Winnipeg Free Press*, 14 February 2015. http://www.winnipegfreepress.com/local/clash-of-claims-on-metis-first-nations-291943961.html.

52 Treaty Land Entitlement Committee of Manitoba Inc., "Update," "Manitoba's new Premier non-committal on Treaty Land Entitlement Challenge," (Spring 2016). www.tlec.ca.

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of proof to support their claim before the Indian Claims Commission, First Nations negotiated TLE agreements, thereby creating a legal mechanism by which the Crown promises to fulfil its Treaty obligations. In the words of Federal Court Justice Douglas Campbell, "Canada promised to set aside a certain amount of land for [Treaty 1 Nations'] exclusive use. This promise created a Treaty right to land. The Aboriginal People kept their side of the bargain, but Canada did not."[53] The TLE agreements are thus intended to be the fulfillment, not a replacement, of the original Crown-Aboriginal treaties. While Treaty 1 Nations were required to negotiate with the Crown to find an acceptable process for the Crown to meet its obligations, New Zealand was moving forwards with actual settlements. The difference in state response and political will is very apparent in the case of the Waikato-Tainui land reparations.

Treaty of Waitangi and the Waikato-Tainui Settlement

The 1995 Waikato-Tainui settlement agreement was the first (and largest) of its kind in New Zealand. Guided by recent jurisprudence, and encouraged by the Minister in Charge of Treaty of Waitangi Negotiations, the Waikato iwi (tribe) began direct negotiations with the Crown in 1989, as an alternative to the Tribunal process. The Waikato-Tainui claim included, among other things, compensation for the illegal confiscation of approximately 1.2 million acres (480,000 ha) of Tainui land by the Crown in the 1860s. As a goodwill gesture, in 1992 the Crown returned two parcels of land, as an advance payment of the final settlement: Hopuhopu land, a 50.475-hectare parcel, formerly used as a military camp, and Te Rapa land, a 29.171-hectare parcel and former Air Force base, on the edge of the City of Hamilton. This transfer was later affirmed in the final settlement agreement.

The *Waikato Raupatu Claims Settlement Act 1995*,[54] gave effect to the terms of settlement, to acknowledge extensive historical research received by the Tribunal[55] and corroborate longstanding Māori claims of the insufficient compensation previously provided for their losses. The Act noted the Court of Appeal's disapproval of the 1926 Royal Commission Inquiry on Māori land confiscations (the "Sim Report"), as it

> …failed to convey "an expressed sense of the crippling impact of Raupatu [illegal Crown seizure of land] on the welfare, economy and potential development of Tainui," and that the subsequent annual monetary payments made by the government were trivial "in present day money values," and concluded that "Some form of more real and constructive compensation is obviously called for if the Treaty is to be honoured.[56]

According to Richard Hill, the primary shortcomings of the Sim Report were its narrow mandate to "examine whether the confiscations were *excessive*

[53] *Brokenhead First Nations v Canada*, 2009 FC 982, 2.
[54] New Zealand, *Waikato Raupatu Claims Settlement Act 1995*, 1995 No 58 (RS) [Waikato Settlement Act 1995].
[55] See the Manukau Report (Wai 8), 17.
[56] Ibid at Preamble section N (English text), quoting NZ Court of Appeal decision: *RT Mahuta and Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513.

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(rather than wrong),"[57] and a refusal to consider the return of land to respective iwis. The 1995 settlement instead sought to bring substantial correction to the "injustice of the Raupatu"[58] and the "grave injustice"[59] served on Waikato-Tainui through previous law and policy. The settlement terms included provisions for both the return of specific parcels of land and financial compensation.

Accordingly, a 200-plus-page "Deed of Settlement" provided, among other things (notably, an extensive apology from the Crown), for the immediate and future transfers of Crown lands to the Waikato Land Holding Trustee, along with annual cash payments, for a total value of 170 million dollars. This combination of land and monetary compensation was integral to a negotiated settlement:

> The Crown appreciates that this sense of grief, the justice of which under the Treaty of Waitangi has remained unrecognised, has given rise to Waikato's two principles 'i riro whenua atu, me hoki whenua mai' (as land was taken, land should be returned) and 'ko to moni hei utu mo te hara' (the money is the acknowledgement by the Crown of their crime). In order to provide redress the Crown has agreed to return as much land as is possible that the Crown has in its possession to Waikato.[60]

The settlement formally acknowledged Waikato's claim that raupatu land contributed at least twelve billion dollars to development in New Zealand, "whilst the Waikato tribe has been alienated from its lands and deprived of the benefit of its lands."[61] This admission stood in direct contrast to the recommendations of the Sim Report, which gave no admission of wrong-doing, provided limited compensation of approximately $275,000 through annual payments, and returned no Waikato land whatsoever. The central importance of land-for-land compensation is exemplified in section 16 of the settlement, which provides power to the Crown to "compulsorily acquire [Crown] property for purpose of settlement…as if the property were land required for both Government work and a public work,"[62] clearly prioritizing the return of Waikato land over general public purposes. In this way, the New Zealand Crown decisively demonstrated—through the restitution of land and financial compensation—the Principles of the *Treaty of Waitangi* and its commitment to its treaty relationship with Māori. In contrast to New Zealand's example, Canada, as a party to Treaty 1, has been less forthcoming in its commitment to First Nations. A Canadian example of the Crown's zealous refusal to live up to its promises is the legal and political battle that holds the Kapyong Barracks land in Winnipeg just out of reach of Treaty 1 First Nations.

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57 Richard S. Hill, *State Authority, Indigenous Autonomy Crown-Maori Relations in New Zealand/ Aotearoa 1900–1950* (Wellington: Victoria University Press, 2004), 136 (emphasis in the original).

58 Waikato Settlement Act 1995, Preamble (M).

59 Ibid at Preamble (R).

60 Her Majesty the Queen in right of New Zealand and Waikato – Deed of Settlement, 22 May 1995, s 3.4.

61 Ibid, s 3.5.

62 Ibid, s 16(1)(b).

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Fresh Injustices

Among those claiming a Treaty 1 right in land are Brokenhead First Nation, Long Plain First Nation, Pequis First Nation,[63] Roseau River Anishinabe First Nation, Sandy Bay Ojibway First Nation, and Swan Lake First Nation, collectively as Treaty 1 signatory nations. The Crown's failure to fully implement the 1871 Treaty 1 *per capita* land allocations has most recently been frustrated by a series of government decisions concerning federal Crown land in the City of Winnipeg. At issue is approximately 160 acres (64 hectares) referred to as the "Kapyong Barracks," which was designated "surplus" Crown land, following the transfer of the resident Canadian Forces troops to a new permanent home. Despite the fact that this parcel of land appeared to fit the criteria that would enable the Crown to make some progress on meeting its TLE obligations, the Crown instead made unilateral policy changes that effectively eliminated all possibility for Treaty 1 First Nations to purchase the land.

The economic potential of the barracks land remains considerable, given its proximity to two affluent neighbourhoods and zoning that allows for commercial development. In order to restrict the disposal of the Kapyong land, the government created the new designation of "strategic" land, which would "optimize the financial and community value of strategic government surplus properties through effective planning, including rezoning and site servicing for property development, so as to achieve the highest and best use of the land."[64] This designation had already been successfully used to convert other abandoned military lands into premier "legacy" neighbourhoods in Edmonton, Calgary, and Chilliwack. Clearly, the Government of Canada envisioned this "highest" and "best" use of the land to automatically exclude ownership for development by Treaty 1 First Nations.

As a result, the affected First Nations[65] initiated court action, seeking a declaration that the Crown was required to consult with them before excluding the parcel from TLE settlements. In the words of Federal Court Justice Campbell, "if the standard for meaningful consultation…is not met…the chain of legal dispute will not be broken, and disruption to the aspirations of Canada and the Applicant First Nations will continue."[66] Since first filing an application for judicial review in January 2008, this legal contest has included no fewer than seven hearings, with the Crown failing to justify its actions at every level.

In his 2009 decision, Justice Campbell, affirmed that "Canada's decision to act on the Treasury Board Directive [to remove Kapyong from the "surplus" listing] is unlawful and a failure to maintain the honour of the Crown."[67] He further noted

63 In 2006, Peguis First Nation signed a Treaty Entitlement Agreement with Canada, which is similar to, but not part of, the TLE Framework agreement.

64 Michael C. Ircha and Robert Young, ed., *Federal Property Policy in Canadian Municipalities* (Montreal: McGill-Queen's University Press, 2013), 19.

65 Canada has only recognized five claimants, all of whom have outstanding TLE claims: Long Plain FN, Swan Lake FN, Roseau River Anishinabe FN, Brokenhead Ojibway Nation, and under a separate agreement, Peguis FN. On 7 October 2011, Brokenhead FN filed a notice of discontinuance, and is no longer a party to the joint Application.

66 *Brokenhead First Nation v Canada*, 2009 FC 982, 38.

67 Ibid, 37.

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the record "establishes that from the beginning to the end of the decision-making with respect to the lands, it is clear that Canada had no intention to grant the First Nations any meaningful consultation."[68] In what has become the standard for dealing with Aboriginal peoples, and despite the clear duty upon the Crown to consult with First Nations, the Government responded by filing an appeal to the Campbell decision. This response is in clear contradiction to Crown promises to respect constitutionally entrenched treaty rights and the Crown's TLE obligations to rectify century-old Crown breaches of the treaties.

Thus, the matter proceeded to the Federal Court of Appeal, where Justice Marc Nadon found the reasons for the original order "rife with uncertainty and contradiction,"[69] and in the whole, "inadequate."[70] Nadon JA found, among other things, that the decision left Canada "in the position of being ordered to consult, but being unsure with whom it must consult."[71] He found that Justice Campbell "failed to adequately distinguish between the different circumstances of the respondents,"[72] and "it was an error on the Judge's part to fail to seriously consider Canada's alternative argument that its duty to consult had been fulfilled."[73] Finding "the Judge failed to seize the substance of the critical issues before him,"[74] Nadon JA ordered that the matter be referred back to the Federal Court, explicitly excluding Justice Campbell as a potential adjudicator, and despite his many criticisms aimed almost exclusively at the trial judge, awarded costs to the Crown.

Carefully working through the concerns raised by Nadon JA, in December 2012, Federal Court Justice Roger T. Hughes released his comprehensive decision concerning the Crown's duty to consult the affected First Nations. In his reasons, Hughes adopted verbatim nearly half of the Campbell J (Federal Court) decision, and added substantial detail to affirm the original finding that "Canada has failed to fulfil the scope of its duty to consult with the Applicants."[75] On this point, Justice Hughes was unequivocal: Canada, despite conceding it has a duty to consult,[76] "[e]ven at a minimal level…did not fulfil its obligations."[77] Further, the "matter is more egregious in the 2006 to 2007 period. Canada simply ignored correspondence written by and on behalf of the Applicants."[78]

The legal challenge to the Crown's decisions regarding this land indeed "has an unhappy history,"[79] as Justice Hughes termed it. To emphasize this point, his order contained a request for submissions on costs, a signal to the Crown that the Court was displeased with the course of litigation. In 2013, a separate hearing was held as to costs, wherein Justice Hughes determined appropriate costs, based largely on

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68 Ibid, 28.
69 *HMTQ v Brokenhead*, 2011 FCA 148, 34.
70 Ibid, 50.
71 Ibid, 38.
72 Ibid, 40.
73 Ibid, 48.
74 Ibid, 51.
75 *Long Plain First Nation v HJTQ*, 2012 FC 1474 at 80.
76 Ibid, 66.
77 Ibid, 78.
78 Ibid, 69.
79 Ibid, 4.

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the belligerent behaviour of the Crown: "Had that concession [regarding the *prima facie* duty of the Crown to consult] been made earlier, substantial effort and evidence could have been saved. The respondents failed to make full and candid disclosure of the documents relating to the decision at issue. This made the argument and decision difficult."[80] Clearly, the warning issued earlier by Justice Campbell went unheeded. Quoting the Crown's oral argument at length, Hughes noted this belligerence, wherein counsel boasted,

> …if we can't reach an agreement [through consultation] or we can't reach accommodation, well, we'll then just proceed to sell the property to the Canada Lands Company. We'll do whatever it is that we had to do. If my learned friends have an objection at that point to our transferring the property because the consultation in their opinion was not thorough enough or satisfactory, it's open to them to bring the matter back to the Court for review.[81]

This "unhappy history" of Crown-Aboriginal relations is not unique, and sadly demonstrates the Canadian government's interpretation of acting in accordance with the "Honour of the Crown." Defined by the Court and constitutionally entrenched, the Crown's duty to consult with Aboriginal peoples is only meaningful where persistence and financial resources support the legal challenge necessary to force the Crown to submit to its own law. When called to account for the lack of substantive reparation for breaching the treaty relationship, the Crown is both insolent and impotent in its response to meeting its obligations to Treaty 1 Nations. A settlement that would provide for the sale of the sixty-four-acre Kapyong land parcel to Treaty 1 Nations would go a long way towards a renewal of the treaty relationship. By way of contrast, this was the view taken by the New Zealand Crown in the Waikato-Tainui settlement.

Waikato-Tainui Injustice to Economic Development

The 1995 Waikato-Tainui Raupatu settlement was intended "to begin the process of healing and to enter a new age of co-operation."[82] Beginning in 1995 with 170 million dollars in assets, by 2014 the Waikato Raupatu Lands Trust, acting as Tainui Group Holdings (TGH), surpassed one billion dollars in assets. After some difficult years of financial mismanagement, TGH developed a number of business projects that have yielded significant benefits to their membership. Since 2004, "53 percent of all dividends—the equivalent of $55 million—has been distributed back to [Waikato] people to support education, health, sports [and other cultural] events and programmes."[83] The TGH investment portfolio quickly expanded to include industrial and agricultural land, forest and fishery interests, and the hotel and service industry. The "jewel of the settlement crown for Tainui,"[84] however, is Te Awa—The Base shopping complex on the outskirts of the City of Hamilton.

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80 *Long Plain First Nation v HMTQ*, 2013 FC 86, 7.
81 *Brokenhead First Nation v Canada*, 2009 FC 982, 38.
82 New Zealand, Her Majesty the Queen in right of New Zealand and Waikato-Tainui, *Deed of Settlement*, 22 May 1995, "Apology by Crown," s 3.6. https://www.govt.nz/dmsdocument/3778.pdf.
83 Waikato-Tainui Annual Report 2014. http://versite.co.nz/~2014/17393/files/ assets/basic-html/index.html#16.
84 Latimer, 88.

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Te Awa—The Base takes its name from the "Te Rapa" land parcel, a former Air Force Base, vested to Waikato-Tainui as part of its 1995 settlement. By 1998, TGH plans were underway to redevelop the abandoned facilities into a major retail-shopping complex. Between 2004 and 2007, the multi-stage, multi-million dollar project was undertaken in partnership with a major retail chain, and "in accordance with four resource consents issued by the [City of Hamilton] Council."[85] Moreover, development had proceeded in full compliance with the *Hamilton City Proposed District Plan* (HCPDP),[86] albeit not without resistance from Hamilton City Council and complaints from business owners of the central business district (CBD). In response, Council abruptly introduced *Variation 21* as a means to halt, or at least slow, the draw of retail consumers away from the CBD businesses, the vast majority of which were established long before any *Treaty* settlements were contemplated.

It was the view of Hamilton City Council that the "liberal HCPDP rules (and particularly those directly affecting Te Awa—The Base) were undermining the sustainable and efficient operation of the Hamilton CBD."[87] However, expert evidence put before the Environment Court in 2002 revealed, "there had already been substantial decline in retail in the CBD between 1997 and 2002 before retail activities at The Base commenced."[88] Although expert witnesses for the Council suggested that Te Awa—The Base had the effect of drawing customers "away from the CBD and other suburban business centres,"[89] Council's solution to declining consumer interest in Hamilton's non-iwi owned businesses was to strengthen the HCPDP rules. Believing there was a "rapidly growing problem,"[90] Council introduced "Variation 21,"[91] creating new assessment criteria designed to "maintain the CBD as the principle retail and commercial hub of the city,"[92] and impose "greater restrictions on retail and office activity…[and] significantly greater discretion in respect of the future development of The Base."[93] Council expressed its urgent concern over:

> …the possible loss of public confidence in the existing CBD…safeguarding and maximising long standing and recent significant public investment… [and that] the benefits of that liberalisation (market-led change) have 'run its course' and a more 'managed' strategy needs to be incorporated in to Plan policy to promote an integrated and sustainable future urban environment for Hamilton."[94]

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85 New Zealand, *Waikato Tainui Te Kauhanganui Inc v Hamilton City Council* CIV 2009-419-1712 (3 June 2010) [Waikato Tainui v Hamilton] at 8.

86 The New Zealand *Resource Management Act 1991* No 69 (RMA) requires all city councils to oversee development in accordance with a District Plan, pursuant to section 73 of the RMA.

87 Waikato-Tainui v Hamilton, 14.

88 Statement of Evidence of Harold Francis Bhana, submission by Tainui Group Holding Ltd on the Proposed Waikato Regional Policy Statement 2010. http://www.waikatoregion.govt.nz/PageFiles/21512/11%20May/May%2011%20Item%2014.pdf at 9.2.

89 Waikato Tainui v Hamilton, 14.

90 Ibid, 16.

91 See: Hamilton City Council—Te kaunihera o Kirikiriroa, "Variation 21: Hamilton Central Business District – Strategic Alignment with Future Proof and Hamilton Urban Growth Strategy," 2013. http://www.hamilton.govt.nz/our-council/council-publications/operativedistrictplan/Pages/Variation-21.aspx.

92 Waikato Tainui v Hamilton, 16.

93 Ibid, 17–18.

94 Ibid, 23.

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Moreover, Council intentionally excluded Waikato-Tainui (and TGH) from consultations, despite the fact that the proposed changes were almost exclusively targeted at preventing financial growth and future development of Te Awa—The Base. Council's view was that notice "would be likely to result in the plaintiff making applications for protective resource consents…[and] would have allowed the plaintiff to secure its position under the pre-Variation 21 HCPDP rules in a manner which would largely defeat the purpose of Variation 21."[95] This action would have allowed Council to pre-emptively eliminate the opportunity for Tainui to complete its development plans. The legislation would significantly impair Tainui's ability to move forward financially, but more disturbing, it revealed that Council regarded Waikato-Tainui as an outside competitor, rather than an integral part of the Hamilton community.

In response, Waikato-Tainui challenged the legality of Variation 21, claiming Council breached *Treaty of Waitangi* Principles entrenched in the *Resource Management Act*. The Principles require, among other things, the Crown and its agents to consult with Māori authorities when the latter may be affected by changes in policy.[96] As the High Court saw it, the "crux of the issue is whether the Council should be able to prevent a party from preserving its rights and opportunities,"[97] thereby subordinating Tainui's rights "to what Council regards as the greater public good."[98] In assessing the impact of the Council's decision on Tainui, the High Court noted the importance of Te Awa—The Base and "its importance as an asset that is able to further the goals and policies of Tainui by providing a future income stream for the tribe."[99] The fact that Te Awa—The Base was "not formerly land of exceptional significance to Tainui"[100] was irrelevant, since it was the aspirations of Tainui that were jeopardized. The "new age of cooperation" envisioned in the settlement clearly required Hamilton City Council to consult, and at the earliest possible opportunity, in order to avoid "serious adverse effects."[101] The High Court declared Variation 21 "unlawful, invalid and of no effect,"[102] thereby reinforcing the Principles of the *Treaty*. The court resoundingly reaffirmed that it was not the *Treaty* that was invalid, but instead declared the Crown's wilful disregard for it to be unlawful and of no effect. The direction of the New Zealand High Court for government to act in accordance with both the letter and the spirit of the *Treaty* paved the way for Waikato-Tainui to move forward with rebuilding its economic base.

Rebuilding Amidst Dishonour

In both Canada and New Zealand, and indeed throughout the Commonwealth, courts have wrestled with interpreting historic treaties, doing their best to maintain the mirage of unmitigated Crown sovereignty, despite clear evidence that

95 Ibid, 25.
96 See RMA, Schedule 1 s 3.
97 Waikato Tainui v Hamilton, 71.
98 Ibid.
99 Ibid, 88.
100 Ibid, 90.
101 Ibid, 95.
102 Ibid, 103.

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treaties were and continue to be agreements between sovereign nations. In doing so, the court promulgates an indisputable, indivisible Crown sovereignty, propped up by a historical justification myth designed to deny Indigenous sovereignty. This deliberate lack of political and legal will to engage in any discussion of multiple sovereigns effectively quashes any questioning of the assumed sovereignty of the Crown. Treaty 1 and the *Treaty of Waitangi* are two examples of treaties that emerged during nineteenth-century British colonial expansion. However, neither international nor domestic law can justify the colonial policy that degraded their importance as legal instruments. In Canada, while the validity of the Numbered Treaties is begrudgingly conceded, the Crown's interpretation of them as simple land cession agreements remains. This view is simply fraudulent, the consequences of which continue to be devastating to First Nations. In contrast, New Zealand recognized that honouring the spirit and intent of their treaty is crucial to the future of Māori and Pākehā, and their success is inseparably linked. Until such time as the spirit and intent of the Numbered Treaties is implemented with seriousness and integrity, the Aboriginal–Crown relationship shall remain grounded in the dishonour of the Crown.

When Aboriginal–Crown treaty agreements were entered, they were intended to define a relationship, and both present and future dealings would be guided by the terms of these treaties.[103] As Joe Williams, High Court Justice and Former Chief Judge of the Māori Land Court explains:

> In the final analysis, indigenous rights, no matter where in the world they might be claimed, are about the protection of indigenous peoples and their way of life. Cultural, economic and political survival in New Zealand is the most pressing issue facing tribes today. In my opinion, it was also the primary concern of the chiefs in 1840.[104]

At its core, the spirit and intent of Treaty 1 likewise set the terms of that relationship, envisioning a vibrant cultural, economic prosperity and independent political life for First Nations. Signatory nations negotiated "peace and good order," by means of shared, not ceded, land with the Queen's people. Moreover, assistance from the Queen's "bounty and benevolence" promised to provide for the success of future generations of Indigenous nations, indeed "for as long as the sun shines and the waters flow."[105] As Aimee Craft notes, this forward-looking vision is extremely significant, as "Anishinabe generally think of the impact of their actions in terms of future generations, often seven generations ahead."[106] Craft goes on to question, "Is the treaty relationship we are living today that which our ancestors would have envisioned for us?"[107] Volumes of Indian Claims Commission Reports and

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[103] John Borrows, "Canada's Colonial Constitution," in *The Right Relationship*, 21–22. Heidi Stark, "Respect, Responsibility & Renewal: The Foundations of Anishnaabe Treaty Making with the United States and Canada," *American Indian Culture and Research Journal* 34, no. 2 (2010): 147–52.

[104] Joe Williams, "Back to the Future: Maori Survival in the 1990s," in *Te Ao Marama: Regaining Aotearoa*, ed. W. Ihimaera (Auckland: Reed Books, 1993), cited in: Havemann, "What's in the Treaty?" 74.

[105] Arthur J. Ray, Jim Miller, and Frank Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal: McGill-Queen's University Press, 2000), 67.

[106] Craft, *Breathing Life*, 17.

[107] Ibid 17.

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government-commissioned Treaty Research Reports, as well as numerous scholars, have provided a robust response.[108]

Even relying solely on the government-recorded version of the treaty negotiations, the answer is a definitive "no." During negotiations in July 1871, Lieutenant Governor Archibald stated, "Your Great Mother wishes the good of all races under her sway. She wishes her red children to be happy and contented. She wishes them to live in comfort."[109] Indian Commissioner Simpson similarly followed with reassurances: "Her Majesty is perfectly willing and anxious to provide for the welfare of her Indian subjects…. The Government will give to the Indians, reserves amply sufficient. The different bands will get quantities of land as will be sufficient for their use in adopting the habits of the white man, should they choose."[110] On this point there appears to be agreement that the proposed treaty relationship would continue to protect and benefit future generations of First Nations.[111]

This record reflects the skill of shrewd Cree and Anishinaabe negotiators, who held to a vision of a treaty grounded in a history of resilience, and who demonstrated an understanding of what was required to adapt and rebuild.[112] Treaty 1 First Nations negotiators demanded that Indigenous nations retain, for their sole use, reserves consisting of two-thirds of the landmass of the province, in addition to assistance with adapting to a new way of life in a post-buffalo economy.[113] Ultimately, compromises were made, with First Nations negotiators agreeing to share more land with settlers, in exchange for other concessions.

First Nations accepted Crown promises that made sense, given the pressures of dwindling food supplies and changing economic realities, a belief in Indigenous resiliency, and trust in the ability of Anishinaabe and Cree people to rebuild their once prosperous nations.[114] This vision for future prosperity included an educated, industrious, and healthy Indigenous population, free from governmental interference. First Nations would maintain access to, and a living from, shared lands, excluding only those lands taken up by farmers.[115] Thus, adapting to agriculture was viewed as a viable economic alternative to the previously bountiful buffalo economy and the lucrative fur trade.[116] Evidence shows that there was no agreement to limit the size of the reserves, as a promise was secured that more lands

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108 *Report of the Royal Commission on Aboriginal Peoples Vol. 1* 94–176; Indian Claims Commission, Vol. 14, (2001), Roseau River Anishinabe First Nation Inquiry Medical Aid Claim; Craft, *Breathing Life*; Ray *et al*., *Bounty and Benevolence*; Tait, "Kapyong and Treaty One First Nation"; Asch, *On Being Here to Stay*; Stark, "Respect, Responsibility and Renewal," 145–64.

109 Indian Claims Commission, 22.

110 Ibid.

111 Stark, "Respect, Responsibility and Renewal," 156–57.

112 Donald Fixico, *Indian Resilience and Rebuilding: Indigenous Nations in the Modern American West* (Tucson: University of Arizona Press, 2013).

113 Department of Indian Affairs, *Annual Report 1871*, Lieutenant-Governor Archibald to Secretary of State Howe, July 19, 1871, at p 15, quoted in Wayne E. Daugherty, *Treaty Research Report: Treaty One and Treaty Two (1871),* (Canada: Treaties and Historical Research Centre Research Branch, Corporate Policy, Indian and Northern Affairs Canada, 1983), 7–9, https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/tre1-2_1100100028661_eng.pdf.

114 Fixico, *Indian Resilience*, 15–45.

115 Indian Claims Commission, 31–32.

116 Treaty 7 Elders and Tribal Council with Walter Hildebrandt, Dorothy First Rider, and Sarah Carter, *Treaty 7: The True Spirit and Original Intent of Treaty Seven* (Montreal: McGill-Queens University Press, 1996), 219–23.

would be available as the First Nations population grew. Most importantly, there was no vision of poverty or dependency.[117]

Indian Claims Commission (ICC) reports document a long list of other Treaty terms, deemed "outside promises" that, while agreed to during treaty negotiations, never came to be recorded by government officials. The 2001 ICC Roseau River Claim report, for example, while dealing with health-care benefits, focuses on the outside promises that would secure the best and brightest future for the coming generations. Similarly, First Nations reliance on promises concerning education was a means to equalize their relationship with the settlers, and expand opportunity to compete with the traders, settlers, government officials, and missionaries who occupied and prospered in their territory. Treaty 1 promised an ample, and when necessary expanding, land base for agriculture, as well as training and resources to enable future economic participation and prosperity.[118]

However, given that treaty promises were never fulfilled, particularly those pertaining to *per capita* land allocations and agricultural economic opportunity, Treaty Nations now look towards modern means of securing this vision. This is a treaty right. Construing Treaty 1 to forcibly limit First Nations to a life of dependence and poverty, whose economic potential is limited to scraps of land relegated to them in 1871, supplemented with a symbolic annuity payment of a mere five dollars per person, is simply incomprehensible. Leaving aside the claim that reserves were to be expanded generationally, TLE settlements are at least one opportunity to empower Treaty Nations to take up lands in urban centres, thereby creating potential for economic participation and prosperity for future generations.

Numerous First Nations are already capitalizing on this potential, through the establishment of thriving economic ventures, either in urban reserves, or in the proximity of urban centres. For example, Membertou First Nation,[119] which is located on the periphery of the City of Sydney, Nova Scotia, began in the 1990s to develop an array of small owner-operator businesses, a major insurance company, a seafood processing company, an entertainment complex, and other major enterprises, including an international financial data storage centre.[120] Similarly, Muskeg Lake Cree Nation invested its 1993 TLE settlement into several urban reserves in the city of Saskatoon, which now includes two gas stations, three business office complexes, a holding company, a golf course, and a casino.[121] In 2005, Western Economic Diversification Canada reported that Muskeg Lake's initial urban reserve "started with raw land and no infrastructure. Today, the asset value

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117 Myra Tait, "Examining the Provisions of Section 87 of the Indian Act as a means to Promote Economic Participation and Treaty Implementation" (LLM Thesis, University of Manitoba, 2017).

118 Craft, *Breathing Life,* ch. 2, 5, and 6; Asch, *On Being Here to Stay,* 73–81, 92–99; Stark, "Respect, Responsibility and Renewal."

119 Donald Marshall Jr.'s wrongful conviction settlement brought an initial surge of investment into the community in 1990. This was followed in 2000 with the so-called 'Marshall monies,' which Mi'kmaw communities received as compensation from the Federal Government, following the Supreme Court's decision in *Marshall*, which found the government in breach of its treaty obligations under a 1725 treaty.

120 Membertou Corporate Division. www.membertoucorporate.com/companies-divisions.asp.

121 See: Muskeg Lake Cree Nation, "Business," 2013. www.muskeglake/business/.

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of the land, infrastructure and buildings is approximately $18 million."[122] While there is no question as to the capacity of First Nations to economically thrive, it is also "obvious that this type of development and infrastructure could not occur on the parent reserve of the Muskeg Lake Cree Nation and continue to sustain itself due to its rural and isolated location."[123] Cooperation with and participation in the larger economy is essential.

As these examples, and so many others, demonstrate, First Nations use urban reserves to facilitate economic growth and development. More importantly, they are using their economic successes to rebuild their nations politically, economically, and socially. Treaty settlements have been a key part of Indigenous economic success, not only in Canada, but even more so in New Zealand. Though only twenty years post-settlement, Waikato-Tainui has led this trend for other iwis in New Zealand. Profits from corporate operations under Tainui Group Holdings (TGH) continue to provide financial resources to rebuild in a modern economy. The benefits of Māori success have flowed to Māori and Pākehā alike.

It is crystal clear that urban reserves are having a tremendous economic, social, and political impact for the both Indigenous nations and settler societies. As noted by Evelyn Peters:

> The creation of Urban Reserves in Saskatoon has resulted in benefits to the City in the capacity of financial, political and social advantages. Financially, the City benefits directly from revenue generated through services it provides to Urban Reserve developments and indirectly from taxation revenue and job creation generated by off-reserve spin-offs. Politically, the creation of reserves within Saskatoon has created positive relationships between First Nations and the City. Socially, Urban Reserves within the City stand as a symbol that First Nations people are making a positive contribution to the community.[124]

This outcome stands in stark contrast to the dishonourable Crown conduct in Winnipeg, where Kapyong holds enormous potential for Treaty 1 Nations. The legal and administrative costs associated with fighting Treaty 1 Nations over the proposed land acquisition have been staggering, and resulted in tremendous losses to both parties. Additionally, as of 2013, the Federal Government has spent nearly fifteen million dollars just to maintain the abandoned site.[125] As media coverage

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122 Western Economic Diversification Canada, *Urban Reserves in Saskatchewan*. (Western Economic Diversification, 2005), 11. Quoted in Evelyn J. Peters, "Urban Reserves," Research paper for the National Centre for First Nations Governance 2007. http://fngovernance.org/ncfng_research/e_peters.pdf.

123 Ibid.

124 Lorne Sully and Mark Eamons, "Urban Reserves: The City of Saskatoon's Partnership with First Nations,," Presentation to the Pacific Business and Law Institute Conference, Calgary, 22 April (City of Saskatoon: Planning Department, 2004); Evelyn J. Peters, "Urban Reserves," research paper for the National Centre for First Nations Governance (2007). http://fngovernance.org/ncfng_research/e_peters.pdf. See also: City of Saskatoon, "City of Saskatoon Urban Reserves: Frequently Asked Questions" (2016). https://www.saskatoon.ca/sites/default/files/documents/community-services/planning-development/future-growth/regional-planning/urban_reserve_faq_june_2016_final.pdf.

125 Mia Rabson, "Millions spent maintaining empty Kapyong Barracks during lengthy dispute," *Winnipeg Free Press*, 10 January 2013. http://www.winnipegfreepress.com/local/Millions-spent-maintaining-empty-Kapyong-Barracks-during-land-claim-dispute-186402951.html.

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attests, "Kapyong is a symbol of sabotage" such that the Federal Government's staunch refusal to act on its obligations to honour the spirit and the intent of Treaty 1 through the TLE settlement has also sabotaged race relations, economic prosperity, and political relations between First Nations and the state.[126] To date, no negotiated resolution has emerged, and the federal government is moving ahead with demolition plans of the Kapyong buildings.[127]

Roots of Resistance

In both Canada and New Zealand, courts have contended with treaty implementation and necessarily considered treaties within the purview of Crown claims to sovereignty. As a consequence, courts continue to uphold this underlying claim of an indisputable, indivisible Crown sovereignty, propped up by a historical justification myth. Peter Russell explains this myth as "legal magic" stemming from "a belief in the inherent inferiority of the Aboriginal peoples as peoples…[and] the bed-rock presumption of imperial rule."[128] This "historically validated arrangement," as Paul McHugh terms it, has infused the courts' understanding of treaties, such that "the sovereignty of the Crown-in-Parliament was put beyond any historical explanation."[129] This perspective invariably hobbles the Crown's willingness to consider, let alone implement, the true spirit and intent of its historical treaties with Indigenous peoples. In contrast, Harold Cardinal suggested that "[for] Indians of Canada, the treaties represent an Indian Magna Carta," and as Michael Asch points out, "Treaties, then, and not the constitution, are our charter of rights."[130] The inability of the courts, and indeed Parliament, to recognize the mutually sovereign basis of treaty agreements, and their forward-looking applications, relegates them to an inferior rendition of their original intent, forcing courts to become increasingly creative in justifying the lack of implementation and honour accorded the treaties.

In New Zealand, reacting to the Te Paparahi o Te Raki (Wai 1040) Report, wherein the Tribunal has stated that the *Treaty of Waitangi* could not have effected the relinquishment of sovereignty of certain iwis, Prime Minister John Key was emphatic. The mere idea that the Crown's sovereignty in New Zealand was anything but absolute came as an apparent surprise to the government. The slightest hint of Māori separatism provoked Key's response: "It's a very slippery slope, because you will get lots of people who will argue, when it's convenient for them, that gives them unilateral decision-making rights in certain areas. I can't see why New Zealanders would support that. I can't see how it would help what is a vibrant,

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126 Mary Agnes Walsh, "Kapyong is a Symbol of Sabotage," *Winnipeg Free Press*, 2 January 2015. http://www.winnipegfreepress.com/opinion/analysis/kapyong-is-a-symbol-of-sabotage-287317381.html.

127 CBC News, "Feds want to tear down Kapyong after millions spent maintaining abandoned barracks: Tuxedo homeowners notified over demolition plans of Winnipeg base," 17 November 2017. http://www.cbc.ca/news/canada/manitoba/ kapyong-barracks-feds-government-tear-down-1.3854930.

128 Peter Russell, *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (Toronto: University of Toronto Press, 2005), 31.

129 Paul McHugh, "Sovereignty this Century – Maori and the Common Law Constitution," *Victoria University of Wellington Law Review* 16 (2000): 31.

130 Asch, *On Being Here to Stay,* 99.

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growing, multicultural New Zealand to succeed."[131] Despite the fact that the state takes this privilege for granted, for Key, the mere suggestion that Māori could, or should, exercise self-determination according to their *Treaty* rights, was preposterous.

What is missed in this perspective is that treaties form a relationship between political equals. Asch states "while these [treaty] commitments were laid out, they were merely a tangible expression of a larger commitment to ensure that [First Nations] would benefit, not suffer, economically as a consequence of settlement."[132] Similarly, in New Zealand, the "Treaty was thus the means whereby the risk of assimilation and indeed decimation might be minimized, while yet retaining the advantages of contact."[133] This dynamic relationship, where continuous discussion and negotiation are essential, is not novel in Canadian or New Zealand jurisprudence.

The idea that treaties can and should be permeated with an inherent flexibility, able to develop and adapt, is essential. Both countries share a common constitutional lineage, one that dates back to the fields of Runnymede and the Magna Carta. While often viewed as the origin of the British Constitution, it is but one of many documents that have grown in meaning through ongoing interpretation. As Lord Sankey explained in his 1929 decision of the "Persons Case," the Canadian constitution represents a "living tree capable of growth and expansion."[134] This is the primary constitutional interpretive doctrine in Canada, which unsurprisingly coincides with Indigenous understandings of the spirit and the intent of the relationship that is established through treaty.[135] While Canada has yet to move beyond its self-serving understanding of both treaties and its Constitution, New Zealand has embraced the concept. In the "Lands Case," the court found that the *Treaty* "should be interpreted widely and effectively as a living instrument taking account of the subsequent developments of international human rights norms; and that the court will not ascribe to Parliament an intention to permit conduct inconsistent with principles of the Treaty."[136] Justice Cooke stated that the "Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas."[137] In New Zealand, this constitutional embryo seeded a tree that, although still green and young, with nurturing will continue to flourish. In contrast, Canada's constitutional tree lacks integrity, as a rootless body of law that has denied the necessity to connect through the treaties to the land it occupies.

For Canada's treaties to develop within a flourishing constitutional tree requires a paradigm shift. In Canada the "lingering strength of this presumption of cultural superiority remains the major barrier in moving towards a truly

131 Audrey Young, The New Zealand Herald, "Key: Little's Waitangi comments push 'separatism' (audio). http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11399086; 9 February 2015.
132 Asch, *On Being Here to Stay*, 94.
133 Williams, "Back to the Future," 85.
134 *Edwards v Canada (Attorney General)* [1930] AC 123, 1 DLR 98 (PC).
135 John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016), 128–59.
136 Land's Case, Judgment of Cooke at 14–15.
137 Ibid, 35.

post-colonial position for Indigenous peoples"[138] Failing this acknowledgement, treaty rights will continue to be interpreted by courts as benefits granted solely at the pleasure of the Crown. Alternatively, Asch urges the Canadian state to embrace the challenge to apply its own constitutional interpretive framework to treaties. By doing so, he argues, treaties can assume their proper legal importance:

> If we take the view that [the Crown] lied, the treaties become worthless pieces of paper and we are back to square one. But if we take the view that [as settlers] we meant what we said, they become transformative, for through them, we become permanent partners sharing the land, not thieves stealing it, people who are here to stay not because we had the power to impose our will but because we forged a permanent, unbreakable partnership with those who were already here when we came.[139]

This transformative potential, accepting that settlers meant what they said, then has great implications for the future prosperity of Indigenous nations in Canada. It is clear that self-determination and economic prosperity are inseparably linked. Given the resistance that Indigenous communities face, when attempting to take hold of the prosperity envisioned in the treaties, it is incumbent upon the Crown to will itself to act honourably. Canada's constitutional tree can only offer protection and prosperity to settler and Indigenous nations alike when the Crown ceases pouring poison on its roots by denying the spirit and intent of the treaties.

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[138] Russell, *Mabo Case*, 31.
[139] Asch, *On Being Here to Stay*, 99.

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