THREE TREATY NATIONS COMPARED

Economic and Political Consequences for Indigenous People in Canada, the United States, and New Zealand

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INITIALLY ENGLISH COLONISTS could legally gain possession of indigenous lands in the New World merely by building fences, houses, and gardens. Such actions, however, could only secure a restricted territory, limited by the physical property boundaries. Furthermore, these activities only secured rights for individuals rather than for states. After the mid-seventeenth century, English officials became increasingly active in dispossessions. Lacking the ability physically to surround the entire territory they wished to command, colonial officials turned to a different method of expropriation that they called "treaties." While today we have a very clear idea of what constitutes a treaty, English colonial officials were in fact employing a culturally unique instrument in pursuit of native land—using cultural and linguistic assumptions not characteristic of other European colonial powers.[1]

By the start of the eighteenth century, officials regularly seized native land through this proceeding in the three English overseas colonies that became the United States, Canada, and New Zealand. As a result, indigenous communities today in these three contemporary nations must all employ the language of treaties in order to gain legitimate hearings for their grievances.

In arguing for restitution of land rights, however, these three treaty nations have encountered nationally distinct twentieth- and twenty-first-century interpretations of these earlier accords. Because each of these former English colonies—Canada, the United States, and New Zealand— considers its own viewpoint on these agreements as unassailably correct, each customarily fails to look beyond its own borders to see how its en-

forcement of indigenous people's treaties stands up against that of other former English colonies.[2] Such comparisons illustrate a considerable range of interpretations and differing roadblocks that indigenous communities have encountered.

In order to understand how these currently important features function, we will first describe the shared history of English colonial objectives and the culturally distinctive historical understanding of "treaty."

English-speaking colonists for centuries have, for reasons lying deep in England's past, sought land as the central economic goal of overseas colonization-. In the Middle Ages, writes William Holdsworth, "land law was the most important and the most highly developed branch of the common law" (145). The eminent legal historian F.F.C. Milsom observes that the first legal textbook in England in 1496 dealt with land law, adding that it was nearly four centuries before textbooks were written on other branches of law (3-4). The foundation of the English legal system lay in the ownership of soil, a trend that would be extended wherever Englishmen settled overseas. In English law at the time, the early moments of colonization, only the monarch enjoyed full dominion over the land and hence ultimate authority for control over it. Queen Elizabeth's letters patent, the first official legal acts of English sovereignty over the New World, established this pattern. Sir Humphrey Gilbert and Walter Ralegh were entitled to "have, hold, occupy, and enjoy all the *soil* of such lands, countries, and territories." It was soil in places that Gilbert and Ralegh received the right to hold and enjoy. As Gilbert's and Ralegh's patents both state, these lands were granted "with the full power to dispose thereof and in every part in fee simple or otherwise according to the laws of England." In other words, the land of the New World was given to use and distribute according to "the laws of England" (Hakluyt 8:18).

Land ownership constituted not merely the official, but also the cultural, heart of the English invention of America as theirs, undivided by class. Aspiring to own land in the New World cut across social ranks and constituted a socially desirable practice for all individuals, as well as a worthy public goal. Members of the upper classes as well as landless farmers could legitimately aspire to own the soil of the New World.

And when early colonial critics attacked their country's land expropriation policies, they limited themselves to criticizing the means but not the ends of land acquisition. Roger Williams criticized the Royal Letters Patent and the popular Puritan belief in the eminent domain of English agriculture, arguing *only* for a different process of acquiring native lands. Similarly, William Penn altered the means but, again, not the ends of English colonization in the Americas (Kent 9-10; Williams 1:120).

But other unique features of English colonization of land existed. Alone among the Western European traditions, early seventeenth-century English law did not require a written procedure for claiming ownership of land. Until near the end of the seventeenth century, Englishmen could claim that they had acquired ownership of land simply by exchanging other commodities for it and by performing physical labour upon it. Therefore, unlike all other Europeans, English colonists overseas understood actions such as handing over money, building a house, putting up fences, and planting crops, which they customarily called labour, as establishing individual legal dominion over a terrain—just as it had in England. Such belief in the transparent meaning of particular actions, without benefit of either a speech or a written document, made it possible for hundreds of illiterate or barely literate Englishmen to acquire plots of land at the start of colonization (Seed).

In one other significant way, however, Englishmen shared a similar approach to other European colonizers. In all overseas possessions, colonizers (or their theorists at home) created a dividing line between humanity and quasi-humanity, separating colonizers from the natives. In describing the quasi-humanity of natives, colonists frequently employed animal metaphors. These images constitute what I call the colonial fiction of the not-quite-human aboriginal. Colonists from all European legal traditions invoked this distinction, but their fictions differed, for politically and culturally specific reasons.

The English colonial fiction of indigenous people centred on the image of the hunter who lacks a real home, having only animal-like "sties and dens" for housing (Mather 88). In this fictionalized depiction, natives simply cavorted on the land, chasing game across grass and meadows. The choice of this representation in the English colonial tradition of native as an almost-animal hunter was far from random. According to the very complicated history of English law and Norman law, even human hunters did not actually own the land on which they hunted. Hunting rights over land, in other words, were separable from land ownership. And under English law, only farmers had that right to own the land, not hunters. Thus began the English colonial fiction that all natives were hunters because hunting did not entitle them as individuals to legal ownership (Seed).

While a fiction is always a fiction, a colonial fiction remains a fixed idea despite overwhelming evidence that it is wrong. When the Cherokees were pushed out of the US state of Georgia in the 18305, many were growing cotton on huge plantations. Obviously, they were not hunters— but the colonial fiction overrode the reality even in the writings of the

judges. In their decision Supreme Court justices insisted these agricultural Cherokees were "hunters" (McLoughlin). To admit the reality of native farming would have meant acknowledging legitimate Cherokee ownership of land because in the English legal tradition the mere act of farming created legitimate ownership. Hence, in this and similar collisions between truth and fiction, fiction won, because admitting reality would have threatened settlers' desire to perceive themselves as acting legitimately when taking away land from Native Americans.

Other European settlers, however, behaved no better, only establishing their own separate colonial fictions. Spanish and Portuguese colonists, for example, created representations of indigenous people to pursue a different colonial economic objective, labour, rather than land (Seed).

While colonial fictions culturally satisfied Europeans and their successor citizens that they were justified in displacing or using the native inhabitants, fictions alone did not legitimate their actions. In the previous essay, Sharon Venne rightly stresses the importance of legal title to English occupation—a fact often overlooked in studies of colonization. In English law, the actions of farming or "improving" land actually created legal title for the individual performing these acts. But when English officials sought to exercise greater control over the process—and acquire dominion over larger tracts of land than an individual could control—they instituted a more formal written mechanism of expropriation.

Beginning in the second half of the eighteenth century and continuing into the following century, in Canada, as well as in the United States and New Zealand, a written document became increasingly common as the formal legal device for obtaining indigenous land. This document was denominated a "treaty," a legal form with a distinctly English flavour. To understand this distinctiveness, however, we need to understand the history of the word itself.

The word "treaty" in English has an historically distinctive meaning compared to other European languages. In the Romance (Latin-derived) European languages and some Germanic ones as well, "treaty" derives from a word meaning to deal with a person face to face. In Spanish, Portuguese, Dutch, and French, the word comes from the verb "to treat," meaning to relate to or deal with someone personally.[3] A treaty was thus something arranged in person, as opposed to communicated anonymously. Treaties, therefore, could only result from direct personal contact between one group and another.

While many European colonizers signed written accords with native peoples, these agreements frequently had other goals. Spanish treaties with indigenous people primarily sought protection for their own trade

goods and internal communication. By the end of the sixteenth century, after major native empires had surrendered, Spaniards increasingly encountered powerful native groups who practised guerilla strategies. Realizing that full-scale continued war was a fruitless effort and protection for caravans of trade goods and people extremely expensive, Spanish officials signed agreements with native people to ensure the continued flow of goods and services through regions dominated by hostile tribes. They termed these safe passage pacts "treaties."

Portuguese and then later Dutch officials used treaties with aboriginal people principally to manage commercial relations—to acquire everything from sugar to shellac (Biker). In these arrangements, control over commerce fell under governmental (Portuguese) or semi-governmental (Dutch) purview. Following in the footsteps of the Portuguese and the Dutch in both Africa and Asia, British and French trading companies (not their governments) subsequently imitated these trade agreements.

While English officials arranged treaties in similar circumstances as the Spanish, Portuguese, and Dutch—at the cessation of hostilities and to acquire beaver skins, canoes, or other trade goods—English treaties often contained an additional objective, unique to their political system, namely the relinquishment of native land. This requirement for land surrender rarely appeared in any of the treaties of other nations, but it dominates the English language treaties with indigenous people.

While signifying a discussion of terms or negotiations in English, and English alone of the Western European languages, the word "treaty" also signified *writing*. From the fourteenth century, when the word first appeared in English, until the middle of the seventeenth century, "treaty" primarily meant a form of inscription: a story, narrative, written account, treating a subject in writing. As a result, any *written* agreement between two English subjects could and indeed was called a treaty, not just an agreement between states *(Oxford English Dictionary).* Hence, while the earliest written agreements between English colonists and Native Americans were called treaties, at the time this word simply referred to the fact that the agreement (between individuals) was written down. The 1621 pact between Massasoit, leader of the Pokanoket near the Plymouth colony, was labelled a treaty at the time. But that word does not necessarily mean an accord between nations or political authorities but only an agreement written on paper (Morton 24).

This later (eighteenth and subsequent centuries) interpretation of treaties as written agreements had important consequences for native peoples everywhere. Showing such partiality for written accords demonstrated a disregard for the power of oral tradition in the native communities as

well as for any verbal agreement between U.S. or Canadian officials and an indigenous community.

When native communities protested the lack of correspondence between the oral agreement and the written text, British colonial and later American officials instead invoked their own recently developed (late seventeenth-century) legal rules, which rendered oral agreements often worthless and always gave the written text of an agreement priority over an oral one (Holdsworth 122). In 1793, Oneida leaders complained of this deceptive practice: "We return home after treaty negotiations possessed with an idea that we had leased our country to the people of the state, reserving a rent which was to increase with the increase of settlements on our lands, and then remaining a rent forever. This was our idea of the matter. We supposed at the time that we had reserved a sufficient tract of the country for our own cultivation, but since we had time to consult the writings and have them properly explained and seen the proceedings of your surveyors, we find our hopes and expectations blasted and disappointed in every particular. Instead of leasing our country to you for a respectable rent, we find that we have ceded and granted it forever for the consideration of the inconsiderable sum of six hundred dollars a year" (Hough 1:360-61).

This shift to an official written instrument to gain legal title to indigenous land occurred in the three colonial regions that became the United States, Canada, and New Zealand. Beyond the shift to written documents in legal culture, government officials had three different reasons for beginning the treaty process. First, they obtained greater political control over the process of acquisition of land. When individuals could independently establish claims (as they did in the early years of US settlement), lawsuits inevitably followed. Limiting land acquisition to political officials and enabling them to dispense new land grants tamped down the earlier squabbles among colonists.

This system had a second advantage over the earlier method, namely the political standing of the signatories. Unlike agreements between private individuals, agreements with government representatives as signatories created a politically more secure claim on indigenous territories.

Finally, the practices surrounding the written treaties differed notably in their ceremonial aspect from previous popular English legitimating strategies of land acquisition. Building houses and fences were activities lacking in ritual content. Negotiations and signing treaty purchases of land often included elements of indigenous ceremonies: circulating peace pipes, lengthy speeches, and even proper decorum during speeches. In all three treaty nations elaborate rituals accompanied formal signings of

treaties that placed control over land redistribution in colonial and post-colonial governments' hands.

But incorporating native rituals into the treaty signings did not occur out of respect, but as a means of coercing native leaders retroactively to accept terms that were not clearly spelled out orally at signing. Governor Clinton of New York state reminded the natives of "smoking our pipes together" when insisting that they had to abide by the terms of a written agreement totally at odds with the one they had verbally agreed to sign (Hough 1:355).

The most unique of all the treaties British colonial officials signed was in New Zealand. While in Canada and the United States such agreements were only signed in the English language, leaving the interpretation solely up to a single signatory, in New Zealand the Treaty of Waitangi, signed between the British Crown and the Maori in 1840, is bilingual. In other words, both a Maori version and an English version were composed at the time of signing. A record therefore exists of the accord that nineteenth-century Maori leaders agreed to.

In the 19805, a legendary Maori attorney, Sir Hugh Kawharu, painstakingly retranslated the Maori version. Not surprisingly, his translation of the Maori text does not entirely accord with the official English publication also composed in 1840 (Kawharu). According to the Maori-language version of the treaty, native peoples ceded something called *raratanga* to the English. What is *raratanga?* In Maori, *raratanga* consists of a kind of authority, but it encompasses all authority over neither the islands nor all of its resources (Walker). The English version declares that the Maori have granted something else. In English, the Maori cede sovereignty (i.e. all authority) over *land* to the Crown. Having a bilingual treaty has opened the door for the Maori to enter into legal debates and sometimes lengthy negotiation. In New Zealand more than three decades of discussion have ensued over what exactly was meant by *raratanga* at the time the treaty was signed and precisely what, if any, other natural resources the Maori ceded in this treaty besides land (Maaka and Fleras; Pocock, "Law," 486; Orange; Sharp).

Having a bilingual treaty, however, would have remained irrelevant had it not been for the decision of the New Zealand government in 1975 that the treaty was binding on the government and that Maori had a right to seek redress for violations of its provisions. The bilaterally binding status of the Treaty of Waitangi contrasts with the legal standing of treaties with natives in the United States this past century. Readers might be familiar with the 1993 US Supreme Court case *South Dakota v. Bourland.* In that case the court reiterated that treaties with aboriginal people and

signed by representatives of the United States government are upheld "simply at the *whim* of Congress" *(Tee-Hit-Ton Indians v. U.S.).* In other words, United States Congress can unilaterally nullify a treaty on a *whim.* Congress does not even have to have to supply a reason for abrogating the treaty, something ordinarily needed to justify disregarding an official accord entered into by government representatives. Were this policy of unilateral revocation applied to other treaties, international respect for the U.S. would sharply decline.

In between the two poles of bilateral acceptance (New Zealand) and unilateral revocation (the United States) lies Canada. Here in Canada treaties have some official standing, although not binding recognition as in New Zealand. The Constitution Act of 1982 validates the treaties Canada has signed with First Nations and affirms the land claims established by such compacts. However, the Constitution Act does provide for altering these provisions through a constitutional conference—again, not as extreme as the US position that these can be shifted merely "at the whim of Congress." Furthermore, representatives of First Nations must be invited to attend these conventions. While more generous than the US, these provisions remain less generous than those of New Zealand, where a national tribunal composed of Pakeha and Maori makes binding decisions regarding interpretations of the treaty. Nothing in the Canadian Constitution Act requires that First Nations must approve such changes before they can be enacted into law. Moreover, the prime minister, rather than the Assembly of First Nations, selects leaders invited to the conference (Constitution Act, 1982 Schedule B, Constitution Act, 1982, Part 2 sec. 35). Again, unlike the United States, there remains a role for First Nations, but that role is not as powerful as in New Zealand.

In another respect, Canadian officials differ from their U.S. and New Zealand counterparts. In New Zealand, only a single community, the Maori, inhabited the entire country, necessitating only a single treaty. But in Canada, as in the United States, hundreds of different ethnic and religious communities comprise the Native Americans and First Nations. Many of these groups became part of Canada and the United States without any formal agreements. The Canadian government, unlike the US, has sought to negotiate accords with those First Nations lacking such an arrangement and to enter into written agreements with First Nations on a variety of issues, ranging from self-governance in Manitoba to economic development. The ongoing negotiations leading to signing measures called "written constructive agreements" in various parts of British Columbia signify a willingness to enter into presumably

binding negotiated settlements with First Nations. While contemporary New Zealanders have gone the farthest of any former English colony in respecting the bilaterally binding aspects of treaties with natives, and the US in showing disrespect for them in equal measure, Canada, in perhaps typical fashion, falls between the two extremes.

In addition to the political benefits secured by signing treaties, a culturally significant reason also adhered to the process. Colonial governments could and did claim that by physically writing their names on the document, native signatories agreed to the treaty. This claimed consent served to perpetuate the cultural myth of a consensual English takeover of territory. Protests over the absence of real consent have met with differing responses in each of the three treaty nations.

Since 1975, Maori who could prove the lack of consent to earlier land transfers have been allowed compensation in accord with the Treaty of Waitangi (1840). Maori cannot regain ownership of valuable land lost in earlier eras; they must settle for compensation. But they have acquired a right to consent to future losses of territory. Communities have the first refusal (to purchase) when traditional Maori terrain, leased to others, becomes available.

In contrast, the absence of native consent to treaties or land transfers makes no difference to either past or present agreements in the United States. Contemporary refusals to consent to the sale of even marginally valuable land are unapologetically ignored in the United States. For a quarter of a century, the Western Shoshone struggled to hold onto their land—a battle they kept losing, refusing to give up. Their land is western scrub, arid and rough; the brush is prickly and hard to digest, even for most animals: a large stretch of this desert nourishes just a few animals. But despite apparently lacking minerals or anything else of significant economic value, the United States government has steadfastly insisted since the 19705 that the Western Shoshone may not keep their marginal rangeland—despite a treaty allowing them to remain. Two Shoshone sisters repeatedly took their case to the Supreme Court. In its final decision on the matter, the Court stated unequivocally that refusing to consent was not an option the Shoshone Dann sisters had (*United States v. Dann).* Their only option was to accept compensation (at a value a thousand times lower than its lowest fair market value).[4]

In rare circumstances, individual communities in the United States have sometimes managed to regain lost terrain—usually by playing upon the stereotype of the economically unambitious Native American, "the ecological Indian," or the "guardian of sacred sites." Such arguments were

successfully employed in 1970 and 1972 when the Nixon administration returned Blue Lake to the Taos and Mount Adams to the Yakama.

In all three nations, native people usually lost ownership of land, the asset most prized by British colonial and subsequent national governments. Furthermore, all three contemporary treaty nations repeatedly deny the possibility of restoring full land ownership to native communities. While the door remains closed to land ownership, no such consensus exists on native ownership of other natural resources.

In New Zealand, Maori and Pakehas (the immigrant-descended New Zealanders)[5] agreed upon shared ownership of fishing rights. While arguing over the meanings of sovereignty and *raratanga*, both sides decided that the treaty clearly excluded the Crown from owning fishing rights. As a result, Maoris have obtained a right to profit from commercial fishing. Today two different types of Maori communities, *iwi* and *hapu*,[6] have what amounts to about a 27% share of the gross profits of Sealord, the major commercial fishing organization in New Zealand (Tribunal, *The Whanganui River Report Wai* 167; Tribunal, *Ngai Tahu Seas Fisheries Report Wai* 27).[7]

While the government of New Zealand remains unique in its willingness to allow Maoris a continuing economic interest in fishing revenues, Canadian and U.S. governments have reacted differently, depending upon a sliding scale of the value of the resources. When oil, the most valuable of all natural resources in the modern world, was discovered in native territories, both the U.S. and Canadian governments sought to terminate those economic interests by a carefully negotiated, agreed upon, one-time payment. The Alaska Native Claims Act in 1971 extinguished the Yupi'k and Inuit claims to aboriginal hunting, fishing, and land rights, and thus cleared the way to the Prudhoe Bay and North Slope oil reserves *(Alaska Native Claims Settlement Act).* In Canada, one quarter of the remaining discovered petroleum and one half of the country's estimated potential petroleum are located north of sixty degrees latitude. In order to obtain ownership of these hydrocarbon-rich parts of otherwise desolate tundra, the Canadian government agreed to create the indigenous province of Nunavut, meaning "our land." Yet Nunavut now controls only seven hundred and seventy thousand square miles of ice and snow. Such carefully scripted accords ensure that natives will be unable to make a future claim upon revenue from these resources.

In the United States the ability to reclaim some small amount of revenue exists with less valuable resources such as timber. In 1974, a previously undiscovered treaty signed by George Washington surfaced in Maine. The treaty granted half of the state to two tribes: the Passamaquoddy and the Penobscot. Shortly after authentication of the treaty, the federal government instantly, and without any explanation, reduced the acreage these two tribes could claim from the treaty-designated twelve and a half to three million acres and excluded from compensation consideration both the populated coast and the valuable timber regions that George Washington had granted them. Instead of twelve and a half (or at the lowest ten) million acres of what had become valuable timberland, the tribes received only three hundred thousand acres of "average quality timberland," plus the option to purchase another two hundred thousand acres of such timberland at their *market* prices (US Comm. on Civil Rights).

In Canada and New Zealand, governments have permitted native communities to retain limited rights over other natural resources because such dominion provides these same administrations with greater political leverage. For example, a handful of corporations control mining and marketing of natural resources, such as copper, zinc, or aluminum. When new finds are uncovered, these corporations usually pressure governments into accepting relatively small payments or royalties. By allowing indigenous communities to retain rights in these regions, governments are able to gain greater leverage over the corporations. In Canada, the government introduces into the negotiations a different arm of the government that claims to represent native people. In Australia and New Zealand, native communities are directly included in negotiations (MacDonald; Stephenson). Only rarely have indigenous communities been able to halt federal initiatives, and then only regarding environmental impact studies *(Taku River Tlingit First Nation v. British Columbia* [Project Assessment Director], [2004] 3 S.C.R. 550, 2004 SCC 74).

Once their negotiating usefulness concludes, however, national or provincial governments customarily secure only a nominal portion of mining revenues for native communities. Later, they fail to exercise reasonable care in seeing that the natives receive what is owed them. In 1998, a conservative federal court judge in the United States found that US government officials, including an internationally famous economist in charge of the US treasury (Robert Rubin), were unable to account for two and a half *billion* dollars in revenues owed Native Americans from oil and gas exploration in Oklahoma *(Cobell v. Kempthorne).*

At the other end of the spectrum, when the resources constitute dangerous contaminants, governments remain largely indifferent. Underneath Native American lands in the United States, for example, are almost all of the United States' uranium supplies. Uranium mining usually causes

immense environmental damage, ensuring that the natives will never again be able to use the land for profit. Native communities seeking to become nuclear storage sites have not faced federal opposition.

While British colonial officials often used the formal written agreement to secure indigenous land, in Canada and the United States they sometimes also employed the colonial fiction of native "hunters," that is, "economically unproductive users of the land," to displace aboriginal occupants. While employed piecemeal in Canada and the United States, English colonial officials used this fiction to occupy one entire continent, Australia.

In the eighteenth century, just as British government treaties were beginning to gain purchase, a version of the colonial fiction of native hunters was tried out in Australia. To justify occupation of Australia, the prominent English legal scholar William Blackstone created a new legal fiction called *terra nullius* from a Justinian era law regarding the ownership of hunted animals *(res nullius)* pursued onto another person's property (Blackstone; Seed 155-56, 165). *Nullius* means "of no one," so *terra nullius* means "land of no one"; in other words, there was no one in Australia in 1788, meaning no one capable of owning land.

That legend has been altered (but not entirely eliminated) in the twentieth century. In 1992, the Australian High Court's famous Mabo decision ended the reign *of terra nullius* as officially legitimating English occupation of Australia. In the decision, High Court judges made the surprising observation that in fact Aboriginal people did inhabit Australia prior to the arrival of the English *(Eddi Mabo v. Queensland,* 1992). With *terra nullius* eliminated, another fiction was needed to legitimate the later immigrants' occupation of the territory and to sustain the conviction that Aboriginal communities inherently lacked the right to own land. This new rationale needed to perform the same function as the hunter myth, namely to establish that Aboriginal communities could never have enjoyed legitimate ownership of lands.

The new doctrine created a category of property rights misleadingly termed native, or aboriginal, title. Interestingly enough, this unique device has emerged in all four of the former major English colonies—the three treaty countries, United States, Canada, and New Zealand, as well as Australia. This new regime of property permits natives only contingent use rights. In the United States, Australia, and New Zealand, the arrangement is called "native title" and in Canada "aboriginal title." The US Supreme Court declared that aboriginal interest simply constitutes permission from the whites to occupy the land, and is not specifically recognized as ownership. The Canadian Constitution Act of 1982 similarly defines aboriginal title as the right to exclusive use and occupation of the land, but not ownership. After the celebrated Australian Mabo case *(Mabo v. Queensland),* native title preserved "only an entitlement to use or enjoyment under traditional law or custom" for the Aboriginal people (Australia).

Not all native communities have accepted this new expedient uncritically. In New Zealand, a leading Maori chief explained native title more favourably to his people and more poetically: "The shadow of the land passes to the Queen, but the substance remains with us" (Tribunal, *Muriwhenua Fishing Report* 10.3.3). In all four countries, however, natives are presumed legally to use but not to own land. First Nation claims have usually been transformed from ownership into a request for aboriginal title *(Delgamuukw v. British Columbia).*

But this new legal fiction of mere use rights severely limits the economic potential of native people in two different ways. First, in the Anglo-Saxon legal tradition, land ownership is one key to raising capital. Denying Indians ownership eliminates their ability to use either the land or the valuable assets it contains as collateral for loans for their economic development. Second, lacking legal ownership of the land and its contents, natives cannot sell their land to the highest bidder or take advantage of the market in order to receive a fair price for that land. From Jefferson to Carter, US presidents have fixed an arbitrary figure, considerably less than fair market value, as compensation to natives seeking to sell their lands to the federal government (US Comm. on Civil Rights). Even in New Zealand, the government in 1994 attempted to fix a fiscal or settlement envelope of one billion New Zealand dollars to settle Maori land claims.

When native peoples counter that they will be economically disadvan-taged by the inability to sell assets in the open market and at fair market value, opponents frequently charge aboriginal peoples with acting from mere economic motives. The irony never manages to dawn on these usual advocates of capitalism that they are attacking individuals for the right to pursue their own economic self-interest. Behind their incongruously negative attack on self-interest lies an insidious, unstated insistence that only they—non-natives—have the right to pursue profit-making activities. The comment thus marks the desire to retain the colonial fiction—that persistent barrier between natives and latter immigrants—that natives not be allowed to become financial successfully, by using the land, gold, silver, salmon, or even the valuable timber in their terrain. Asserting this thinly veiled ambition to retain economic superiority over indigenous people usually remains unchallenged, making it a classic form of colonial discourse still acceptable today in this seemingly postcolonial world.

A final comparison should emphasize the fact that neither the treaties, nor the colonial fiction of the hunter (not its successor fiction "aboriginal title"), nor the denial of land ownership to indigenous people should be considered inevitable. The contrasts between Anglo colonial attitudes towards native landownership and those in the Iberian world are striking. In Spanish America, popular opinion widely holds that native communities are firmly entitled to own, not merely to use, farmlands and pasturelands, as well other profitable resources, except, of course, for mineral deposits. Several national constitutions and presidential decrees throughout Spanish America in the 19805 and 19905 have reinforced indigenous ownership of traditional lands. The Indigenous Community Statute of Paraguay (1981), the Peruvian Native Communities Act (1974), and the Columbian Constitution of 1991 all recognize indigenous land ownership. The series of ministerial resolutions in Bolivia (1990), the 1994 Constitution, and the land grants by the Ecuadorian government in the 19803 were all passed with widespread public approval. Even the 1987 Philippine Constitution recognizes native ownership and not merely occupation. These principles garner more than official support.

Among the most politically popular aims of the 1993 indigenous uprising in the southern Mexican province of Chiapas (even among urban Mexicans) was the demand that owners of profitable farms return lands to indigenous communities. Leaders of the Chiapas revolt demanded that all poor quality land in excess of a hundred hectares and all good quality land in excess of fifty hectares be taken away from landowners, who would remain as smallholders or join the cooperative farmers' movement, farming societies, or communal land (Marcos).

Yet such .moves are decidedly unpopular in the United States. The Maine Congressional Delegation on February 28,1977 states, "There is no equitable way of forcing a return to [to natives of] land which has been settled, developed and improved in good faith by Maine people for two centuries" (Rights 130). The same argument, raised by hacendados in Chiapas who claimed to have the right to retain "settled, developed and improved" land, confronted political and cultural opposition; mere economic profit-making did not constitute an acceptable reason for refusing to return indigenous land that had been illegally acquired.

In Ibero-America, when documentation of a native claim to land is discovered, the burden of proof lies with the non-Indian owner. Current owners must prove that they and other non-Indians acquired the land legitimately. Some national governments are even committed to helping natives recover written or pictorial evidence of old titles. The National Archives of Mexico, for example, has a full-time staff fluent in native languages available to help Native Americans who have come to find and identify documentary evidence of land that they owned as recently as twenty years ago or as long ago as the sixteenth century. While the original Spanish Covenant with the subjugated communities guaranteeing such ownership applied only to agricultural communities, the tradition has created a contemporary presumption in favour of such rights, even in regions of mixed nomadic and sedentary peoples. Thus, formerly nomadic communities on the periphery of Mexico, Chile, and Ecuador can rely upon a tradition that favours native communities retaining their traditional lands. Relying upon that tradition allowed nomadic Mapuche to obtain more than a hundred and eighty-five thousand acres in a recent settlement from the government of Chile, and a still larger amount from the government of Argentina. Both governments actually returned land ownership to Indian communities.

The willingness of postcolonial Hispanic societies to allow indigenous land ownership, however, does not extend to identical rights over their labour. As a result, concern over labour abuses dominates historical studies and contemporary scholarship on indigenous people in Ibero-America. Just the opposite is true in Anglo North America. Alice Littlefield and Martha C. Knack write, "Studies of North American Indian economic life have largely ignored the participation of indigenous people in wage labour, even though for over a century such participation has been essential for the survival of native individuals and communities" (Littlefield and Knack 3). The central topic in scholarship in the three treaty nations remains land.

Throughout the Americas, nationalists often assert that their colonial or present-day treatment of natives is superior to others. Not only are they vying for the dubious honour of proving the advantages of one colonial project over another, they are also unquestioningly assuming the validity of their own judgements about the proper path to riches. For the belief that certain goods belong to others, while others can be appropriated, rests on nothing more solid than historically and culturally constructed judgements about economics. The belief that colonists can occupy native land lacks merit, just as does the conviction that colonists have a right to their labour.

But until citizens of former English and Iberian colonies understand that national traditions follow colonial ones, there will be no possibility of overcoming the still colonial position of native peoples within the nations of the Americas. Decolonization of the Americas and other lands requires that we no longer see each other as distorted reflections of each other, but as fellow humans on the planet. For indigenous peoples of the Americas, New Zealand, and Australia, there was and still is no perfect world.

NOTES

1 When referring to native communities generically, this piece employs the lowercase. When referring to a specific community, such as Native Americans, the upper case appears.

2 An exception is Roger Maaka and Augie Fleras.The Politics of I ndyeneity: Challenging The State in *Canada* andAotearoa, *New Zealand* (Dunedin, N.Z.: University of Otago Press, 2005).

3 The words are tratar (Spanish and Portuguese), trailer (French), and trakteren (Dutch). Another commonly used word in Dutch, *uerdrag,* came from the word meaning to endure or tolerate.

4 On the open market, the 27 million acres were worth between $250 and $1,000 an acre, makingthe entire area worth $144 billion dollars. The Indian Claims Commission offered $140 million. The effort to move the Shoshone off the land became more urgent when low grade gold ore was discovered in the 19905 near the Dann sisters' land.

5 A characteristic difference between European colonial settlements in Polynesia and in the Americas lies in the pattern of mutual naming. Unlike the Americas where Europeans initially named natives "Indians," throughout Polynesia immigrant communities adopted indigenous people's names for themselves. Thus the nineteenth-and twentieth century immigrant New Zealanders soon adopted the Maori term for non-Maori settlers, Pakeha. Similar processes occurred throughout the Polynesian areas—Tonga, Vanuatu, and Samoa, where variants of "papalangi" emerged. Since the 19905, however, increasingly greater numbers of people have identified themselves as simply "New Zealand" or "New Zealanders."

6 The distinction is under dispute—and does not easily fit into territorial, kinship, or descent categories. The Te Ture Whenua Maori Act of 1993 considers hapu to comprise groups of families sharing a common ancestor, and *iwi* territorial/ ancestral combinations of hapu. Complications exist because in the 2000 census, nearly a third of all Maori did not (or refused to) identify themselves as members of any iwi, and territorial boundaries of iwi often completely overlap (http://www.stats.govt.nz/products-and-services/Articles/changes-ethnicity-20oi-cens-pop-dwell.htm). A significant percentage of Maori identify themselves as members of more than one iwi..

7 These are my estimates, because New Zealand divides up fishing quotas by species, and the percentage of Maori profits varies according to the species. The calculations are complicated, but it winds up at about a 27% share of the profits.

8 New Zealand cancelled the overall fiscal envelope policy in 1996, following Maori protest. However, the government has since pursued the fiscal envelope strategy on an iwi by
iwi basis. "Consideration of Reports Submitted by States Parties under Article 9 of the Convention," Committee on the Elimination of Racial Discrimination, 6isted. (New York: M. Nijhoff, 2002).