

# Treaties vs. *Terra Nullius*:

## “Reconciliation,” Treaty-Making and Indigenous Sovereignty in Australia and Canada

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*In Australia, Canadian government approaches to dealing with Indigenous peoples' demands for recognition and justice are often lauded as being more progressive than those of their Australian counterparts. Drawing on aspects of the treaty-making process currently underway in British Columbia and the policies of “reconciliation” and Native title in Australia as examples, this paper compares Australian and Canadian approaches to their relationships with Indigenous peoples in terms of how each state handles demands for the recognition of Indigenous sovereignty and nationhood. This analysis shows that there are as many similarities as there are differences between Indigenous-state relations in Canada and Australia, and that in both cases there is need for a more genuinely inclusive approach to negotiations and debates over Indigenous peoples' rights.*

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## I INTRODUCTION

A house built on a foundation of sand is unstable, no matter how beautiful it may look and how many people rely on it. It would be better to lift the house and place it on a firmer foundation, even if this would create some real challenges for people in the house. Ultimately, this would benefit all within the house, by prolonging the life of the structure and creating benefits for its inhabitants for generations beyond what would be possible if it collapsed because of its unsupported weight.<sup>1</sup>

Canada's various approaches to Indigenous-state relations are often remarked upon in Australian public and academic discourse as models from which Australia might learn. Indeed, at first glance, Canada appears to be well ahead of Australia in its approach to recognizing Indigenous peoples' rights.<sup>2</sup> For example, historically treaties were signed in Canada with the Indigenous populations, and currently many treaty negotiations are taking place. The Inuit recently brokered a famous agreement that provides for Inuit self-government in, and jurisdiction over, the Nunavut territory.<sup>3</sup> Unlike in Australia, Aboriginal rights in Canada are recognized and protected by the Canadian *Constitution*.<sup>4</sup> As Australian Indigenous scholar Larissa Behrendt points out, this makes for a different political culture in which to manage Indigenous rights issues.<sup>5</sup> It is not surprising, then, that critics of Australia's seemingly limited and conservative framework for dealing with Indigenous-state relations point to these sorts of examples as evidence that Australia is lagging behind.

With this in mind, this paper compares particular aspects of the way that the political relationship between Indigenous peoples and the state is "managed" in

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1. John Borrows, "Questioning Canada's Title to Land: The Rule of Law, Aboriginal Peoples and Colonialism" in Law Commission of Canada & British Columbia Treaty Commission, eds., *Speaking Truth to Power: A Treaty Forum* (Ottawa: Law Commission of Canada, 2001) [hereinafter *Speaking Truth*] 35.
  2. For the purposes of this paper, the terms "First Nations," "Aboriginal peoples" and "Indigenous peoples" will be used interchangeably to denote an "all-embracing identification for those peoples who are descendants of the original inhabitants of what is now known as Canada and the United States" following Linda Pertusati, *In Defense of Mohawk Land: Ethnopolitical Conflict in Native North America* (Albany: State University of New York Press, 1997) at xi.
  3. Peter Jull, "Negotiating Indigenous Reconciliation: Territorial Rights and Governance in Nunavut" (1999) 13 *Arena Journal* 17; Peter Jull, "Embracing New Voices: Reconciliation in Canada" in M. Grattan, ed., *Reconciliation: Essays on Reconciliation in Australia* (Melbourne: Black Inc., 2000) 220. This treaty led to the creation of a new territory carved out from the Northwest Territories, with a new capital, Iqaluit, on Baffin Island, deep in Canada's north.
  4. *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c.11. Section 35(1) states that "[t]he existing [A]boriginal and treaty rights ... are hereby recognized and affirmed," but does not specify how these "rights" should be defined. See M. Asch, "Aboriginal Self-Government and Canadian Constitutional Identity: Building Reconciliation" in M. Levin, ed., *Ethnicity and Aboriginality: Case Studies in Ethnonationalism* (Toronto: University of Toronto Press, 1993) 29. Consequently, this question has been the source of much contention and several judicial decisions. See M. Asch, "From *Calder* to *Van der Peet*—Aboriginal Rights and Canadian Law, 1973-96" in P. Havemann, ed., *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Auckland: Oxford University Press, 1999) [hereinafter *Indigenous Peoples' Rights*] 428 [hereinafter "From *Calder* to *Van der Peet*"].
  5. Larissa Behrendt, "Treaty" (Sharing the Space: The International Australian Studies Association Conference, Flinders University, Adelaide, Australia, 13 July 2002).

Australia and Canada. It does so by drawing on what Fiona Nicoll has called the “ethical yardstick of Indigenous sovereignty.” As the opposite of *terra nullius*, Nicoll argues that Indigenous sovereignty can be understood as an ethical frontier, “a point beyond which non-Aboriginal Australians should never have invaded”; therefore, the acknowledgment and recognition of Indigenous sovereignty is a point against which contemporary policies and practices affecting Indigenous peoples should be evaluated.<sup>6</sup> That is, in this paper, I compare the Canadian and Australian frameworks in terms of the ways that demands by Indigenous people for recognition of their sovereignty and nationhood are dealt with by the state.

With respect to Australia, my comparison cites aspects of the policy of “reconciliation” and the Native title regime, and with respect to Canada, I focus on the treaty-making process currently underway in the province of British Columbia (“B.C.”). The B.C. process provides an interesting and important point of comparison for two reasons: first, the history of B.C. in some ways parallels that of Australia more closely than it does the rest of Canada; and second, the B.C. treaty process provides one example of how a modern-day treaty process might be expected to work.<sup>7</sup> Consequently, it is often cited in Australia by treaty proponents as a model of good practice in Indigenous-state relations, since demands for the recognition of Indigenous sovereignty and nationhood in Australia are often made in terms of calls for a treaty. But, unlike their Canadian counterparts, Australian governments have always been, at the very least, resistant—and usually outright hostile—to the possibility of a treaty or treaties between Indigenous and non-Indigenous people in Australia.

However, because this paper uses the recognition of Indigenous sovereignty as its analytical referent, the picture of the B.C. treaty process that emerges here is considerably more limited and conservative than some of its proponents would suggest. In fact, I argue that dominant non-Indigenous constructions of nationhood and identity in both Canada and Australia—and the discursive configuration of Indigenous entitlement within them—fundamentally limit the state’s approach to its relationship with Indigenous people. As a result, the state’s framework for managing Indigenous-state relations in both countries works to reinforce, rather than to challenge, the colonial ideologies and assumptions upon which its very existence is based. I wish to point out, however, that my criticisms of the B.C. treaty process and the Australian Native title and reconciliation regimes should not be read as a criticism of Indigenous people who choose to participate in them, or who strategically employ the relative merits of each

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6. Fiona Nicoll, “Beyond Reconciliation: *Terra Nullius* and the Ethical Frontier of Indigenous Sovereignty” (2001) [unpublished] [hereinafter “Beyond Reconciliation”].

7. It should be noted, however, that the B.C. treaty process is not the only Canadian example of how a modern-day treaty process might be expected to work, nor is it the only example of the possible conclusions to which a modern-day treaty or agreement-making process might lead: the Nunavut self-government agreement, mentioned briefly above, is another. However, this paper focuses on the B.C. process, because of the historical similarities between B.C. and Australia (which are explained more fully below).

approach to argue for further concessions from the state. As Phil Lancaster writes of the B.C. situation:

[C]olonized peoples face a terrible dilemma. They could stand on their rights for full and fair decolonization and wait. But that would require that they continue to withstand the devastation that comes with colonial status .... What is most shocking is that we non-Aboriginal [people] who have benefited so much from the taking of First Nations land and the attempted destruction of their nationhood allow [the process of colonization to continue] to happen and [that we] continue to reap always more benefits.<sup>8</sup>

This is not to say, though, that at least some Indigenous people do not engage in the B.C. treaty process (and the Native title and reconciliation processes in Australia) willingly: clearly many do (the commitment of many Nisga'a people to the Nisga'a treaty, discussed below, exemplifies this). It is certainly not my intention to suggest that all Indigenous people in Canada or Australia desire the same thing.<sup>9</sup> I also do not wish to suggest that the recognition of Indigenous sovereignty is the goal towards which all Indigenous people are (or should be) striving. Rather, this paper is a critique only of the *structures* within which the B.C. treaty process and the Australian Native title and reconciliation processes operate, and an attempt to come to terms with the logic of *white* peoples' refusals to engage with what Nicoll calls the ethical yardstick of Indigenous sovereignty.

For the purposes of this paper, sovereignty is defined as a people's *ability* and *authority* to govern themselves, where "ability" is derived from the existence of laws and customs *recognized by the group that is being governed*, and "authority" is derived from the *consent* of the group that is being governed. Nations can be broadly defined as peoples or groups who have established systems of governing themselves according to their own laws and customs, that is, as peoples having sovereignty. Treaties can essentially be defined as agreements between two (or more) nations.<sup>10</sup> Therefore, by these definitions, engaging in treaty negotiations constitutes recognition by each party of the other's nationhood and sovereignty.

To anticipate a possible criticism, I am aware that the concept of "sovereignty" originally derives from Western European political philosophy, where sovereignty has tended to be conflated with the state; that is, the state has typically been understood to be the only political unit in which sovereignty can reside. Indigenous intellectuals such as Australian Indigenous lawyer Noel Pearson and Mohawk scholar Taiaiake Alfred have critiqued the concept of "sovereignty" on this basis: Alfred, for example, argues that where sovereignty is conceptualized on the basis of an adversarial and coercive Western notion of power, it can't "be seen as an appropriate framework" for Indigenous peoples'

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8. Phil Lancaster, "The Nisga'a Treaty is Our Treaty" *Canadian Dimension* 34:2 (March 2000) 11.

9. I am grateful to one of the Indigenous Law Journal's anonymous referees for this point.

10. Kevin Gilbert, "Aboriginal Sovereign Position: Summary and Definitions" (1994) 13:1 *Social Alternatives* 16.

liberation.<sup>11</sup> Similarly, Pearson has written that the “concept of sovereignty developed in [the] western legal tradition to describe nation states is artificial if applied to the Aboriginal relationship to land which is at the core of the Indigenous domain.”<sup>12</sup> With the criticisms of scholars such as Alfred, Pearson and others in mind, I use the concept of sovereignty advisedly, and, rather than taking *state* sovereignty as its conceptual referent, base this paper on the broader definition of sovereignty outlined above, where *Indigenous sovereignty* and *state sovereignty* are considered to be two *equally legitimate* derivations. The purpose of adopting this broader definition is to avoid the traditional route in Western political theory that takes state sovereignty as the norm against which “other” understandings of sovereignty should be measured or justified. In this traditional discursive framework, assertions of Indigenous sovereignty are reduced to what Nicoll calls the “figurative expression” of Indigenous *opinion*.<sup>13</sup> Instead, this paper takes assertions of Indigenous sovereignty from what Nicoll describes as the “sphere of Indigenous rhetoric” and assumes them to exist as truth or fact.<sup>14</sup>

In the context of this discussion, it is important also to make explicit my own white-privileged background, because, as Australian Indigenous scholar Aileen Moreton-Robinson points out, our standpoints as academic analysts are inextricably related to our embodied subject positions.<sup>15</sup> In my case, this is the position of being white and, therefore, having inherited all the powers and privileges that being white in Australian society entails. There is a tendency in much of the work produced by white scholars on issues related to Indigenous people to see ourselves as somehow removed from the political relationships that are the focus of our work. As Dyer argues:

[I]t has become common for those marginalized by culture to acknowledge the situation from which they speak, but those who occupy positions of cultural hegemony blithely carry on as if what they [we] say is neutral and unsituated—human not raced.<sup>16</sup>

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11. Taiaike Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Toronto: Oxford University Press, 1999) at 54-55, 58-59.

12. Noel Pearson, “Reconciliation: To Be or Not to Be: Separate Aboriginal Nationhood or Aboriginal Self-Determination and Self-Government Within the Australian Nation” (2001) 5:11 *Indigenous Law Bulletin* 26. In the same article, Pearson also critiques the pursuit of the recognition of Indigenous sovereignty for pragmatic reasons:

[T]he absence of effective debate or development of these ideas by the Aboriginal community means that for the most part the ideology of nationhood remains retarded, having failed to progress beyond 1970s style rhetoric and sloganeering. As a consequence the sovereignty concept faces huge problems within the Aboriginal community and the realpolitik of jealous Aboriginal localism, let alone the realpolitik of the colonial state .... That the failure to deal with these difficult problems, and the continual assertion of ill-conceived slogans on sovereignty, will embarrass the Aboriginal rights cause is clear.

13. Fiona Nicoll, *From Diggers to Drag Queens: Configurations of Australian National Identity* (Sydney: Pluto Press, 2001) at 155 [hereinafter *From Diggers to Drag Queens*].

14. *Ibid.*

15. Aileen Moreton-Robinson, *Talkin’ Up to the White Woman* (St Lucia, Qld.: University of Queensland Press, 2000) at xvi [hereinafter *Talkin’ Up*].

16. Richard Dyer, *White* (London: Routledge, 1997) at 4.

While we do this, thereby ignoring the fact that we are *part of* the relationships we write and speak about, I suggest that we risk being complicit in the oppressive structures and practices we seek to criticize. Instead, acknowledgment of white privilege brings with it a certain responsibility to evaluate and interrogate its source. Using the “ethical yardstick of Indigenous sovereignty” (rather than other frameworks, such as the sometimes vague and ubiquitous concept of reconciliation) is one way of doing this.

## II THE HISTORICAL FOUNDATIONS OF CURRENT FRAMEWORKS

To consider the issues of reconciliation, treaty-making and Indigenous sovereignty in Canada and Australia, it is necessary first of all to briefly describe the historical context from which these frameworks stem, and in which demands for the recognition of Indigenous sovereignty are based.

According to Hamar Foster, a source of Aboriginal title to land in Canada stems from King George III’s “Royal Proclamation” of 1763. The Proclamation was designed to “normalize conditions in [the new British] colonies ... and to avoid a costly Indian war on the frontier.”<sup>17</sup> Accordingly, the Royal Proclamation “decreed that Indian peoples should not be disturbed in their use and enjoyment of the land,” and that land held by Indians was to be purchased by the Crown only (not by individuals), and only with the Indian peoples’ consent.<sup>18</sup> James Tully suggests that the Royal Proclamation constitutes an important example of mutual recognition on the part of Indigenous people and British colonizers of each other’s status as independent and self-governing nations.<sup>19</sup> According to John Borrows, the Royal Proclamation is still often referred to by First Nations as a “positive guarantee of First Nation self-government.”<sup>20</sup> Consequently, the Proclamation is an important instance of recognition and its determination that Indigenous lands could only be acquired by the Crown is often cited as one of the main reasons that treaty-making in Canada has taken place.<sup>21</sup>

Foster distinguishes between three periods of treaty-making in Canada. The first period comprises those treaties made prior to Canadian confederation in 1867, which include the so-called “peace and friendship” treaties made with First

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17. Hamar Foster, “‘Indian Administration’ from the Royal Proclamation of 1763 to Constitutionally Entrenched Aboriginal Rights” in *Indigenous Peoples’ Rights*, *supra* note 4 at 355 [hereinafter “Indian Administration”].

18. First Nations Education Steering Committee (FNESC), B.C. Teachers’ Federation (BCTF) & Tripartite Public Education Committee (TPEC), *Understanding the B.C. Treaty Process: An Opportunity for Dialogue* (Vancouver: FNESC, BCTF and TPEC, 1997) at 8 [hereinafter *Understanding the B.C. Treaty Process*].

19. James Tully, *Strange Multiplicity: Constitutionalism in an Age of Cultural Diversity* (Melbourne: Cambridge University Press, 1995) at 185.

20. John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government” in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: University of British Columbia Press, 1997) at 155.

21. *Understanding the B.C. Treaty Process*, *supra* note 18 at 8.

Nations in the eastern and southern parts of British North America.<sup>22</sup> The second period includes those treaties signed from confederation until the early 1920s, and mostly includes the “numbered treaties” in the Hudson’s Bay Territories and the Indian territories in the prairie districts further north and west,<sup>23</sup> negotiated by the new federal government in order to “extinguish Indian title to the lands” of these “newly acquired regions.”<sup>24</sup>

The third period of modern treaty-making is usually characterized as beginning with the James Bay Treaty in northern Quebec in 1975, and comprises attempts to negotiate treaties presently taking place. This third period, therefore, includes the B.C. treaty process, which is the focus of the Canadian aspect of this paper. It is worth noting that there was almost no treaty-making in British Columbia in the first two periods, with the exception of Treaty Number 8, which applied to the north-east corner of B.C., and land cession agreements known as the Douglas Treaties. The latter were made with the First Nations of Vancouver Island between 1850 and 1854. These agreements provided only that the First Nations people would retain their villages and their hunting and fishing rights, but that the remainder of their territories became the property of “the white people forever.”<sup>25</sup> The legitimacy of non-Indigenous people’s occupation of Vancouver Island under the terms of the Douglas Treaties is being challenged in the courts today.<sup>26</sup>

The B.C. government knew it was required to sign treaties with Aboriginal peoples before “settling” on Aboriginal lands, but they simply refused to do so and blatantly ignored the presence of Aboriginal title. Paul Tennant argues that the fact that the non-Indigenous occupation of most of British Columbia proceeded without any form of treaty-making, hence denying Aboriginal title in British Columbia, means that, like Australia, B.C. was *effectively* “settled” using the doctrine of *terra nullius*.<sup>27</sup> This idea was not overturned until the Supreme

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22. The pre-confederation treaties became known as “peace and friendship treaties” because they were designed to secure peaceful relations between the British military and the First Nations. See “Indian Administration”, *supra* note 17 at 358-359.

23. These treaties are known as the “numbered treaties” because they were named (and are still prominently known) by their numbers (that is, Treaty No. 1, Treaty No. 2 and so on). The numbered treaties differed from the peace and friendship treaties in that, first, they were negotiated with the new federal government; and second, while the peace and friendship treaties were mostly designed to secure peaceful relations with the Indigenous populations, the numbered treaties were predominantly designed to make way for projected expansion of white settlement and development into these areas. See “Indian Administration”, *ibid.* at 358; see also Ken Coates, “The ‘Gentle’ Occupation: The Settlement of Canada and the Dispossession of the First Nations” in *Indigenous Peoples’ Rights*, *supra* note 4 at 153.

24. “Indian Administration”, *ibid.*

25. *Ibid.* at 360.

26. See e.g. Stephen Hume, “Legislature is on our Land: B.C. Natives” *The Vancouver Sun* (25 August 2001) A1.

27. Note, however, that some authors take issue with the argument that B.C. was colonized using the doctrine of *terra nullius*. See for example Cole Harris, *Making Native Space* (Vancouver: University of British Columbia Press, 2003).

Court of Canada's decision in the famous *Calder* case in 1973.<sup>28</sup> In that case, the Supreme Court—while finding against the specific case brought by the Nisga'a claimants—reaffirmed the existence of Aboriginal title in Canada. They said—importantly—that it derives from the “fact of [Indigenous peoples'] occupation of their traditional territories before contact.”<sup>29</sup> Therefore, in many ways, the history of Indigenous-state relations in B.C. parallels that of Australia more closely than it does most of the rest of Canada, which had treaties.

While necessarily truncated, this history of Indigenous-state relations in (most parts of) Canada raises three important points for the purposes of this paper. First, both the Royal Proclamation's *recognition* of Indigenous people and the fact that treaties were negotiated in (most parts of) Canada represent important instances of legal and political acknowledgment of the fact that Aboriginal rights and title *pre-existed* non-Indigenous occupation. This stands in marked contrast to the beginnings of the state's relationship with Indigenous peoples in Australia, where the British invasion and occupation of Australia proceeded from 1788 onwards on the basis that the entire continent was *terra nullius*.<sup>30</sup> Since the assumption was that the land “belonged to no one,” there was no need for the colonizers to make treaties with the original occupants, and so the colonization of the continent proceeded without any regard to Aboriginal land title. The notion that the continent of Australia was *terra nullius* in 1788 was not officially overturned until the Australian High Court's 1992 *Mabo* decision, which belatedly recognized that Aboriginal and Torres Strait Islander people possess rights to land which pre-date and may, in certain circumstances, survive non-Indigenous occupation.<sup>31</sup>

The second point is that, almost without exception, Canadian treaties have been characterized by disparate interpretations by each of the parties of how the terms of the treaties should be understood. Further, the terms of the agreements (at least those in the first two periods) were usually ignored by governments seeking to protect their own interests in land and capital,<sup>32</sup> on the assumption that the land was/is theirs to occupy and Indigenous title to it theirs to extinguish. So, as Patrick Wolfe points out, the formal differences between the acknowledgment of Aboriginal or Native title in Canada and the denial of it in Australia “emerge

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28. Paul Tennant, “Aboriginal Peoples and Aboriginal Title in British Columbia Politics” in R.K. Carty, ed., *Politics, Policy and Government in British Columbia* (Vancouver: University of British Columbia Press, 1996) 46 [hereinafter “Aboriginal Peoples and Aboriginal Title”]. See also “From *Calder* to *Van der Peet*”, *supra* note 4.

29. “From *Calder* to *Van der Peet*”, *supra* note 4 at 428-432. Note that the Supreme Court in *Calder* split on whether the Royal Proclamation applied to British Columbia. The issue has not yet been resolved.

30. This was despite instructions from the British Colonial Office that the possession of the continent we now call Australia should be taken only “with the consent of the [N]atives.” J.C. Beaglehole, ed., *The Journals of Captain James Cook on his Voyages of Discovery: The Voyage of the Endeavour 1768-1771* (London: Cambridge University Press, 1999) at cclxxxiii.

31. *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1 (H.C. Aus.) [hereinafter *Mabo [No. 2]*].

32. H. Dickinson & T. Wotherspoon, “From Assimilation to Self-Government: Towards a Political Economy of Canada's Aboriginal Policies” in V. Satzewich, ed., *Deconstructing a Nation: Immigration, Multiculturalism and Racism in '90s Canada* (Halifax: Fernwood Publishing, 1992) at 407.

as secondary to the ideological continuity within which both possibilities are framed.”<sup>33</sup> This leads to the third point, which is that it is important to recognize that the histories of treaty-making and *terra nullius* in Canada and Australia respectively often made little *practical* difference to the lives of Indigenous people in each country during the initial phases of colonization, or in many cases for that matter, in their lives today. It will be clear by now that the aim of this paper is not to trumpet Canadian treaty-making as some sort of great white hope. Rather, the purpose of drawing this distinction is so that an informed comparison can be made about the way in which the political relationships between Indigenous peoples and the state in Canada and Australia are currently managed.

### III MODERN TREATY-MAKING IN BRITISH COLUMBIA

The process of treaty negotiation currently underway in British Columbia was established in the early 1990s. Until then, B.C. governments had consistently refused both to enter into negotiations with First Nations and to recognize Aboriginal or Native title.<sup>34</sup> However, in the 1970s and 1980s Aboriginal groups launched a series of successful court cases, including the 1973 *Calder* decision in which the Canadian Supreme Court ruled that Aboriginal title was not extinguished at sovereignty. As discussed above, while *Calder* did not find in favour of the Nisga’a nation of northern British Columbia’s specific claims, it reaffirmed the existence of Aboriginal title in Canada. In doing so, the effect of the judgment was to propel governments into action to deal with the issue of Aboriginal title.<sup>35</sup> When it became increasingly clear that issues of Aboriginal title would be the subject of protracted legal action in B.C., the provincial government announced in 1990 that it would enter into negotiations with Indigenous people in B.C. after all.<sup>36</sup> Since then, the shape the B.C. treaty process has taken can be characterized by three distinct modes of relationship between First Nations and the state.

First, after its announcement in 1990, the B.C. provincial government joined the negotiations that had begun between the federal government and the Nisga’a following the *Calder* decision in the mid-1970s. These negotiations resulted in the *Nisga’a Final Agreement*, or what is often called the *Nisga’a Treaty*, being signed in August 1998 (though not under the auspices of the British Columbia Treaty Commission, which is discussed below). The Nisga’a nation comprises about 5,500 people living along the Nass River in the Pacific north-west of B.C.<sup>37</sup> In short, the *Nisga’a Final Agreement* recognizes the Nisga’a as “an [A]boriginal

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33. Patrick Wolfe, “The Limits of Native Title” (2000) 59:3 *Meanjin* at 130.

34. The term “Aboriginal title” is used in Canada to refer to what is called “Native title” in Australia.

35. “From *Calder* to *Van der Peet*”, *supra* note 4 at 431-432.

36. “Aboriginal Peoples and Aboriginal Title”, *supra* note 28 at 53-56.

37. Online: *Nisga’a Lisims Government Information Site* <<http://www.nisgaalisims.ca/home.html>> [date accessed: 28 April 2004].

people of Canada”<sup>38</sup> and provides for Nisga’a ownership and limited powers of self-government over about 2000 square kilometres of Nisga’a land, which is equivalent to less than 10 per cent of their traditional territory. One of the most significant things about the *Agreement* is the inclusion of a clause which states that the *Agreement* constitutes the “full and final settlement of those [A]boriginal rights [defined in the treaty] .... Any other rights that are determined to have existed, or may exist in the future, are released by the Nisga’a.”<sup>39</sup> That is, the *Agreement* provides for a limited form of self-government, in return for which the Nisga’a were required to agree to “release” (or surrender, as some critics have described it) any other future rights claims.<sup>40</sup>

The second mode by which B.C. First Nations have been involved in treaty negotiations since 1990 has been via the British Columbia Treaty Commission (“BCTC”), which was established in 1993. The establishment of the BCTC is analogous to the establishment of the National Native Title Tribunal (“NNTT”) in Australia after the *Mabo* decision in that it was designed to provide a framework for dealing with Indigenous title claims so as to avoid protracted litigation. The roles and functions of the two bodies are significantly different, however; the NNTT in Australia *adjudicates* Native title claims, whereas the BCTC *facilitates negotiations* between First Nations and the Canadian and provincial governments.

Treaty negotiations in the BCTC framework follow a six-stage process. By 1995, a majority 130 of the province’s 198 Aboriginal communities had entered the treaty process via the BCTC (although the number of separate negotiations required is less than the total number of communities involved because many Aboriginal communities chose to negotiate collectively—in April 2004, there were 45 sets of negotiations in progress). At last count, 40 First Nations had made it to the fourth stage (the negotiation of a draft treaty), five First Nations had made it to Stage 5 (reaching an agreement in principle), and none have yet reached Stage 6.<sup>41</sup> That is, no treaties have yet been successfully concluded under the BCTC process.

Both the *Nisga’a Agreement* and the BCTC have many proponents.<sup>42</sup> But not surprisingly, treaty negotiations in B.C. have been highly controversial, and both the *Nisga’a Agreement* and the BCTC have attracted their fair share of critics. After the *Nisga’a Agreement* was signed, for example, there were complaints similar to the hysteria witnessed in Australia after the *Mabo* decision: that the

38. *Nisga’a Final Agreement*, online: Government of British Columbia, Treaty Negotiations Office Website <<http://www.gov.bc.ca/tno/negotiation/nisgaa/default.htm>> [date accessed: 28 April 2004] [emphasis added].

39. *Ibid.* [emphasis added].

40. See e.g. Union of British Columbia Indian Chiefs, “Certainty: Canada’s Struggle to Extinguish Aboriginal Title” (1998) online: <<http://www.ubcic.bc.ca/certainty.htm>> [date accessed: 28 April 2004] [hereinafter “Certainty”].

41. Online: *British Columbia Treaty Commission Website* <<http://www.bctreaty.net>> [date accessed: 28 April 2004].

42. See e.g. Hamar Foster, “Honouring the Queen: A Legal and Historical Perspective on the Nisga’a Treaty” (1998/99) 120 BC Studies 11 [hereinafter “Honouring the Queen”]; and Joseph Gosnell, “Speech to the British Columbia Legislature” (1998/99) 120 BC Studies 5.

*Agreement* was racist (because it restricted the rights of non-Indigenous people on Nisga'a land), that it was akin to apartheid and that it was a "giveaway" by "compliant politicians."<sup>43</sup> One conservative newspaper columnist wrote that if the *Nisga'a Agreement* was used as a precedent for the BCTC negotiations, it would constitute a threat to the national agenda of such proportions that:

we may as well appoint [the] Assembly of First Nations Grand Chief ... Prime Minister and peg the Canadian dollar to the going rate for eagle feathers .... We will be buying the country back from ourselves.<sup>44</sup>

The configuration of Indigenous rights within this discourse is noteworthy for two reasons: first, the notion that Indigenous rights are some sort of "giveaway" relies on the assumption that the land and resources in question are non-Indigenous people's to give, and therefore that white people's colonization of them in the first place was somehow uncontested and unproblematic. Second, the tone of the above quote is reminiscent of a pronouncement on Native title in Australia made in a 1997 speech by Pauline Hanson, the extreme right-wing former member of Australia's federal parliament: "this whole Mabo, [N]ative title issue has gotten out of control and the inmates are running the asylum."<sup>45</sup> In this discourse, as Nicoll argues, a situation where Indigenous people have any sort of control over their own affairs, let alone those of the state apparatus more generally, is by definition "out of control."<sup>46</sup>

While these sorts of criticisms suggest that the *Nisga'a Agreement* and the B.C. treaty process go "too far," there are also many critics who say the *Nisga'a Agreement* and the BCTC process do not go far enough. One such group is the Union of British Columbia Indian Chiefs ("UBCIC"), who I argue represent the third mode of Indigenous relationship to the B.C. treaty process. The Indigenous groups that the UBCIC represent have refused to engage in any stage of the B.C. treaty process because of what they see as some fundamental shortcomings. For example, they reject the "release and surrender" clauses such as those in the *Nisga'a Agreement* I mentioned earlier, which, they argue, are demonstrative of the conditional nature of the entire process. They say that:

Canada's negotiation stance is "We will recognize your rights, but only if you first tell us how you will exercise them, and only if your promise that your rights will not interfere with our interests."<sup>47</sup>

They object to the role of the provincial government in the negotiations because "to accept a role for the province would be to accept the *de facto* displacement of [A]boriginal governments and their jurisdictions that had occurred when the

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43. "Honouring the Queen", *ibid.* at 29.

44. "A Treaty that Threatens the National Agenda: The Costly Nisga'a Land Claims Settlement Could Mean that we will be Buying our Country back from Ourselves" *Maclean's* 111:32 (10 August 1998) at 50.

45. Cited in *From Diggers to Drag Queens*, *supra* note 13 at 158.

46. *Ibid.*

47. "Certainty", *supra* note 40.

colony and province had been created.<sup>48</sup> Rather, treaty negotiations should be negotiated on a nation-to-nation basis, that is, directly between the First Nations and the federal government. They further argue that the treaty process is illegitimate because it “involves rights to land and resources that have never been ceded by First Nations to the Canadian governments.”<sup>49</sup> Consequently, the UBCIC argues that the B.C. treaty process is not a framework in which sovereignty will be meaningfully recognized.

The UBCIC’s position demonstrates that support for the treaty process among Indigenous communities in B.C. is far from universal. It also clearly points to some important limitations of the process in relation to the issue of sovereignty. Where “treaty” is understood as a nation-to-nation negotiation between equals in which the sovereignty and nationhood of each party to the negotiations is recognized, from this fairly quick survey of the B.C. process, it seems fair to conclude that it does not measure up. In fact, the term “treaty” as applied to the B.C. process is a misnomer. The B.C. negotiations are characterized by a massive imbalance in power and resources, and are heavily geared towards the protection of non-Indigenous interests.<sup>50</sup> It appears to me that the government, in essence, dictates the terms, then negotiates only with those who agree on those terms and, as the conservative B.C. Liberal Party’s election victory in 2000 showed, those terms can change at any time. After it took office, the Liberal provincial government issued negotiators with a new set of instructions curtailing the range of issues that could be the subject of negotiations; these instructions focused specifically on limiting talks over the rights of Indigenous people to self-government.<sup>51</sup> The B.C. government ignored, however, the fact that it was *invited* to the negotiating table by the federal government, in which is imbued the ultimate authority to negotiate treaties (and stipulate terms) under the *Canadian Constitution*.

Further, in 2002, the new government held a referendum to seek the B.C. population’s advice on the principles that should inform the provincial

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48. “Aboriginal Peoples and Aboriginal Title”, *supra* note 28 at 63.

49. Christopher McKee, *Treaty Talks in British Columbia: Negotiating a Mutually Beneficial Future* (Vancouver: University of British Columbia Press, 1996) at 39.

50. Haythornthwaite argues, for example, that the “treaty process is supposed to be about fostering ‘government-to-government’ talks, yet this PC language disguises a bitter reality wherein two governments with a tax base of millions and monster bureaucracies at their disposal face peoples numbering several hundreds of thousands whose governmental structures are entirely dependant on their negotiator adversaries”: G. Haythornthwaite, “Tossing the Template: BC Natives Reject Nisga’a-Style Treaties” *Canadian Dimension* 34:5 (September/October 2000) 33 at 34. See also A. Lajoie, “What Constitutional Law Doesn’t Want to Hear About History” in *Speaking Truth*, *supra* note 1, 19; and Ardeth Walkem, “The Nisga’a Agreement: Negotiating Space in the Master’s House” *Canadian Dimension* 34:1 (January 2000) 24 [hereinafter “Negotiating Space”].

51. Further, when in opposition, the B.C. Liberal Party brought a lawsuit to the B.C. Supreme Court challenging both the *Nisga’a Final Treaty*, and the provincial government’s right to negotiate it. The case was only dropped after the Liberal Party was elected to government, and in essence was suing itself. See Vance Palmer, “Liberals Finally Converted on the Road to Nisga’a” *The Vancouver Sun* (30 August 2001) A18.

government's approach to the treaty negotiations process.<sup>52</sup> Voters were asked to answer eight questions, including whether they "agree that future treaties should ensure that private property is not expropriated, that hunting and fishing on Crown land will be maintained for all British Columbia residents and that [A]boriginal self-government will have the characteristics of municipal government."<sup>53</sup> While the results of the referendum affirmed all the government's propositions contained in the referendum questions,<sup>54</sup> leading Canadian pollster Angus Reid points out that this was likely because of the misleading questions, not because the referendum was an accurate measure of public opinion on the issue of treaties.<sup>55</sup> Reid describes the referendum as a "flimsy exercise," "one of the most amateurish, one-sided attempts to gauge the public will that I have seen in my professional career."<sup>56</sup> Further, only 34 per cent of ballots sent out were returned, which means only about half of B.C.'s usual voting population chose to participate in the referendum.<sup>57</sup> John Dixon also points out that there are difficulties in using referenda on issues of policy and principle, particularly when the issues in question are about matters that have already been decided by the Courts.<sup>58</sup> (In 2003, however, the B.C. Liberal Government experienced an apparent reversal of sentiment and issued a public apology for the way Indigenous people in B.C. have been treated by the province.)<sup>59</sup>

To return, then, to my definition of sovereignty, it is clear that, for the B.C. government at least, the BCTC process bears little relationship to Indigenous sovereignty. In fact, it seems that the province's involvement in the process is premised on the grounds that the question of Indigenous sovereignty (or more to the point, the question of *Canadian* sovereignty) will not be part of the

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52. British Columbia Legislative Assembly Select Standing Committee on Aboriginal Affairs, *Revitalising the Provincial Approach to Treaty Negotiations: Recommendations for a Referendum on Negotiating Principles* (Victoria: Legislative Assembly of British Columbia, 2001).
  53. Ken MacQueen, "Referendum Madness: The Debate is Lively, but not Quite what the B.C. Government Hoped for" *Maclean's* 115:19 (13 May 2002) 42.
  54. For example, the majority of returned ballots indicated agreement that future treaties should ensure private property is not expropriated for treaty negotiations.
  55. Angus Reid, "Treaty Referendum is no Laughing Matter" *The Vancouver Sun* (5 April 2002) A15 [hereinafter "Treaty Referendum"]. See also Barbara Yaffe, "Referendum Doesn't Offer Citizens a Real Say" *The Vancouver Sun* (12 April 2002) A14.
  56. "Treaty Referendum", *ibid.* See also H. Kajlich, "The British Columbia Treaty Referendum: An Appropriate Democratic Exercise?" (2002) 5:17 *Indigenous Law Bulletin* at 11.
  57. Glenn Bohn & Neal Hall, "34 Per Cent of Ballots Returned: Referendum on Treaty Talks sent to 2.1 Million People" *The Vancouver Sun* (16 May 2002) B4. Several influential groups within B.C., including churches, trade unions and Indigenous groups such as the FNS and UBCIC, boycotted the referendum. K. Goldberg, "Pacific Edge: Referendum & Dumber in BC" *Canadian Dimension* 36:3 (May/June 2002) 4.
  58. John Dixon, "Whatever the Referendum is, it's not an Exercise in Democracy, say Civil Libertarians" *The Vancouver Sun* (24 April 2002) A23. See also Thomas Berger, "Why I won't be Voting: The B.C. Treaty Referendum Raises Serious Legal Issues for a Former Judge" *The Vancouver Sun* (15 April 2002) A11.
  59. Canadian Broadcasting Corporation, "B.C. Offers Apology to First Nations for 'Inequity, Intolerance, Isolation and Indifference'" (12 February 2003), online: CBC News Website <<http://www.cbc.ca/stories/2003/02/11/apology030211>> [date accessed: 29 April 2004].

discussion.<sup>60</sup> As James Tully points out, as far as the federal and provincial governments are concerned, they are entering into negotiations with “minorities” *within* Canada; that is, Indigenous people are understood

as minorities already in a relationship of subordination and some form of subjection to the Crown in Canada and B.C. .... For many of the First Nations, this is to foreclose precisely what the negotiations should be about.<sup>61</sup>

It is for this reason that Indigenous activists in B.C. such as Ardeth Walkem argue that the denial of Indigenous sovereignty and nationhood that Canada was founded on is perpetuated by the modern-day treaty process in B.C. “[I]nstead of challenging this history,” she says, “through modern treaties Indigenous peoples ‘negotiate space in the basement of the Master’s house’: they negotiate into a state that makes no changes to its structures and laws to allow for our unique Indigenous reality.”<sup>62</sup>

#### IV RECONCILIATION AND NATIVE TITLE IN AUSTRALIA

The policy of “reconciliation” was established in Australia by the *Council for Aboriginal Reconciliation Act 1991*, which was passed unanimously by the Australian federal parliament. The aim of this legislation was to

promote a process of reconciliation between Aborigines and Torres Strait Islanders and the wider community, based on an appreciation by the Australian community as a whole of Aboriginal and Torres Strait Islander cultures and achievements and of the unique position of Aborigines and Torres Strait Islanders as the [I]ndigenous peoples of Australia, and by means that include the fostering of an ongoing commitment to co-operate to address Aboriginal and Torres Strait Islander disadvantage.<sup>63</sup>

It is important, however, to see the establishment of the reconciliation process in Australia in the context of an earlier series of events. First, the then centre-left Labor government, under Prime Minister Bob Hawke, had come to power in 1983 promising to introduce a national system of land rights for Aboriginal people. In the political context of the time, this was an enormously significant

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60. This also appears to be the position of the Supreme Court of Canada. In *R. v. Sparrow*, for example (the first case before the Supreme Court dealing with Aboriginal rights under section 35 of the Canadian *Constitution*), the Court denied any proposition that the existence of Aboriginal rights raises any question about the legitimacy of Canadian sovereignty: “It is worth recalling that while British policy towards the [N]ative population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands is vested in the Crown” (*R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1103). This has also been the position of the High Court of Australia, as expressed in *Mabo [No. 2]*, *supra* note 31 and in *Coe v. Australia* (1979), 53 A.L.J.R. 403 and *Coe ex rel. Wiradjuri Tribe v. Australia* (1993), 68 A.L.J.R. 110, 118 A.L.R. 193.

61. James Tully, “Reconsidering the B.C. Treaty Process” in *Speaking Truth*, *supra* note 1, 3.

62. “Negotiating Space”, *supra* note 50 at 24-25.

63. *Council for Aboriginal Reconciliation Act 1991*, Section 5.

promise, but Hawke couldn't get the state government leaders to agree on the form land rights legislation should take. As a result, the government backed down on its promise in the mid-1980s. The second event of significance in the context of the reconciliation legislation was a promise Prime Minister Hawke made in 1988 to negotiate a treaty with Australia's Indigenous people. However, there was considerable resistance among white Australians to the idea of a treaty because it allegedly posed a threat to "national unity"<sup>64</sup> and the government reneged on this promise as well. It was after both of these events that the notion of "reconciliation" began to gain currency instead.

As I have argued elsewhere,<sup>65</sup> since the policy of reconciliation's official establishment, the idea has become a normative discourse in Australian politics. That is, reconciliation is an idea designed to fit in with the norms and values that shape dominant constructions of Australian nationhood. As a result, this discourse of reconciliation can work to marginalize Indigenous (and other) voices who do not conform to these norms. Subsequently, since the reconciliation process was established, calls by Indigenous people for the negotiation of a treaty and/or treaties (and the recognition of Indigenous sovereignty) have been met with a consistent response. This has been that treaties are made between nations and, therefore, a treaty cannot be negotiated between the government and a minority group *within* the Australian nation-state. For example, in May 2000, the Council for Aboriginal Reconciliation organized a public reconciliation walk—an event in which hundreds of thousands of Australians turned out to walk across the Sydney Harbour Bridge in support of the reconciliation process.<sup>66</sup> When some Indigenous leaders seized the momentum of the Bridge Walk to reiterate their demands for a treaty, the idea was once again rejected by many Australian politicians ostensibly because of the threats a treaty would pose to national unity and reconciliation. Then-Minister for Immigration, Multiculturalism, Aboriginal and Torres Strait Islander Affairs and Reconciliation Phillip Ruddock, for example, responded by saying that "nations make treaties and we are about uniting Australia, not dividing it,"<sup>67</sup> and then-Northern Territory Chief Minister Denis Burke labelled the push for a treaty a "disgrace."<sup>68</sup>

Like the "reconciliation" process, it can be argued that the Australian Native title regime is similarly premised on the denial of Indigenous peoples' sovereignty and nationhood. The *Mabo* decision, for example, explicitly refused to countenance the issue of Aboriginal sovereignty; like the B.C. treaty process,

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64. Department of the Prime Minister and Cabinet, *Aboriginal Reconciliation: An Historical Perspective* (Canberra: Australian Government Publishing Service, 1991) at 19.

65. Angela Pratt, Catriona Elder & Cath Ellis, "Papering Over the Differences: Australian Nationhood and the Normative Discourse of Reconciliation" in M. Kalantzis & B. Cope, eds., *Reconciliation, Multiculturalism, Identities: Difficult Dialogues, Sensible Solutions* (Altona, Victoria: Common Ground Publishing, 2001) 135.

66. The Council for Aboriginal Reconciliation was the body set up by the 1991 legislation to be the "vehicle" of the reconciliation process.

67. Steve Pennells, "Canberra Fears Treaty Split" *The West Australian* (29 May 2000) 10.

68. David Nason, "Push for Treaty a Disgrace" *The Australian* (29 May 2000) 4. See also "Burke Disappointed by Corroboree" *Northern Territory News* (29 May 2000) 2.

the Native title claims process is based on the assumption that the *Crown* holds underlying title to all land and resources on the Australian continent, and Aboriginal people can only make a claim to Native title where it has not previously been extinguished by an act of state. Even then, they can only make a claim if they can *prove* they have a continuing traditional connection to the land in question, using the white legal system's burden of proof requirements. That is, the onus of proof is on Aboriginal people, whereas in a system which *genuinely* recognized Aboriginal peoples' ordinary or inherent sovereignty and nationhood, it would have to be the other way round. Indeed, the very language of claims is demonstrative of the hegemony of state sovereignty on which denials of Indigenous sovereignty are based. As Taiaiake Alfred points out:

Indigenous people are by definition the original inhabitants of the land. They had complex societies and systems of government. And they never gave consent to European ownership of territory or the establishment of European sovereignty over them. These are indisputable realities based on empirically verifiable facts. So why are [I]ndigenous efforts to achieve legal recognition of these facts framed as "claims"?<sup>69</sup>

## V CONCLUSION

Clearly, there are important distinctions between the Canadian and Australian approaches, not least of which is the different *moral* frameworks within which Indigenous-state relations seem to be managed. This is demonstrated by what Behrendt calls a "culture of rights" approach in Canada and the conspicuous lack thereof in Australia.<sup>70</sup> But while treaties versus *terra nullius* might be the defining historical difference, which has made for the different frameworks within which Indigenous-state relations are managed today, what the B.C. treaty process and the policies of "reconciliation" and Native title in Australia have in common is a failure to come to terms with the continuing existence of Indigenous peoples' sovereignty. The paradox is that Australian governments have refused to negotiate treaties because that *would* constitute a recognition of Indigenous nationhood within the "nation"-state, yet the governments of British Columbia and Canada seem prepared to engage in treaty negotiations precisely because treaties are not a recognition of First Nations' sovereignty. To put this another way, Australian governments have refused to engage in any treaty negotiations with Indigenous people, whereas Canadian governments have engaged in negotiations with First Nations which are treaties only by name.

Judicial decisions in both countries have now recognized Indigenous peoples' title to land, which pre-exists and survives European invasion and occupation.<sup>71</sup> As Tully points out, if Indigenous people had title to land prior to

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69. Alfred, *supra* note 11 at 58.

70. Behrendt, *supra* note 5.

71. I am referring to *Mabo [No. 2]*, *supra* note 31 in Australia, and *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313 and *R. v. Delgamuukw*, [1997] 3 S.C.R. 1010 in Canada.

invasion, it follows that they must also have had sovereignty over it. It is thus surely inconsistent to recognize one but not the other.<sup>72</sup> Yet while this continues to be the prevailing view, Indigenous-state relations continue to be based on the internal colonization of Indigenous populations.<sup>73</sup> As a result, we remain seemingly suspended in an antiquated era where the prevailing view of “sovereignty” is that it must be vested in the state and that it is unable to be divided or shared. While this is the case, the unfinished business of *terra nullius* remains. That is, in Nicoll’s terms, the ethical frontier of Indigenous sovereignty remains one that non-Indigenous people assiduously continue to ignore and, in doing so, violate.

To conclude, I wish to return to the points I made at the outset of this paper about Indigenous sovereignty, whiteness and the role of white scholars in debates about Indigenous rights. Because we occupy positions of cultural hegemony, sometimes it can be too easy for white scholars to slip into a kind of pragmatic middle-ground, that is, a comfortable position from which to critically examine regressive state practices without subjecting the powers and privileges that we all derive from those processes and practices to the same level of criticism. As Moreton-Robinson’s work (and that of other theorists of whiteness) demonstrates, whiteness “needs to be interrogated as a specific form of privilege”: the challenge for white scholars is to theorize the relinquishment of our power, and thereby resist complicity in the perpetuation of the structures we seek to critique.<sup>74</sup>

When I talk about Indigenous sovereignty in conference and seminar papers, almost without exception someone in the audience challenges me on whether “sovereignty” is a “suitable” or “appropriate” conceptual framework in which to articulate Indigenous demands for social, cultural and political recognition. This response tends to take a variety of forms: for example, that sovereignty is inappropriate because it “is not an Indigenous concept”; that “Indigenous sovereignty” might be taken to mean independent Indigenous statehood (and that this, for some reason, would be an inherently undesirable thing); or, as one senior academic suggested to me once, framing demands for recognition in terms of sovereignty is simply “too hard” because it would require challenging and deconstructing the power and authority of the state.

There are many responses that can be made to these sorts of arguments. In response to the first suggestion, as Nicoll points out, in late 20<sup>th</sup> century Australia Indigenous and non-Indigenous subjectivities, concepts and destinies are inextricable.<sup>75</sup> It is therefore disingenuous for white academics to draw lines in

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72. James Tully, “A Fair and Just Relationship: The Vision of the Canadian Royal Commission on Aboriginal Peoples” (1998) 57:1 *Meanjin* at 159.

73. According to James Tully, “internal colonization” refers to the “appropriation of land, resources and jurisdiction of Indigenous peoples, not only for the sake of resettlement and exploitation ... but for the territorial foundation of the dominant society itself.” J. Tully, “The Struggles of Indigenous Peoples for and of Freedom” in D. Ivison, P. Patton & W. Sanders, eds., *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000).

74. *Talkin’ Up*, *supra* note 15 at 186.

75. “Beyond Reconciliation”, *supra* note 6.

the sand between the concepts we will and will not deem “appropriate” for Indigenous people to employ. In response to the point about sovereignty being a demand for Indigenous independence or statehood, I would counter that since Indigenous peoples never consented to their incorporation into the Australian state or to its colonization of their lives and lands, they do not need *our* consent to make a claim to independent statehood should that be their wish.<sup>76</sup> Indeed, there is a need to interrogate the seemingly “stable and fixed foundations” of state sovereignty on which denials of Indigenous sovereignty and nationhood are based.<sup>77</sup> But fundamentally, what each of these arguments against the concept of Indigenous sovereignty has in common is a refusal to relinquish the power of whiteness, in order to make way for Indigenous people to define the terms and conditions of their relationship with the state. The important issue is not whether demands for the recognition of Indigenous sovereignty are “appropriate” or “valid.” Rather, the more academically interesting—and politically and morally important—question is why we white people keep on failing to come to terms with them.

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76. Though I also note that independent statehood is not what most advocates of the recognition of Indigenous sovereignty have in mind.

77. R.L. Doty, “Sovereignty and the Nation: Constructing the Boundaries of National Identity” in T.J. Biersteker & C. Weber, eds., *State Sovereignty as Social Construct* (Melbourne: Cambridge University Press, 1996) 121.