## CHAPTER IV

# WHAT IS A TREATY?

To embark on the question of 'treaties' and of 'sovereignty' in 1979 was to enter a thorny and virtually unexplored area in which none of the group who assembled for the preliminary meeting in April 1979 were expert.

In the Coe case just dismissed, a claim was made for sovereignty on the part of the Aboriginal 'nation' on the ground of prior ownership. This claim had reference to certain precedents in North America and to events in Canada during the 1970s. Much of the recent case law in the USA relied on *Cherokee Nation* v. *State of Georgia* (1831), whose judgment had recognized the Cherokee people as a 'domestic dependent nation' — that is, a 'distinct political society' separated from others and in possession of its own laws and government.

The question of the kind of sovereignty asserted in the Cherokee Nation case (tribal or native sovereignty) was important in the thinking of the lawyers in the Coe case. In 1978 a definition of the concept was published in an article

in the *Texas Law Review*, which may help to clarify its implications.[1]

Sovereignty is a concept composed of two principal elements:

1. that a group of people, with dominion over a discrete territory, are self-governing in fact; and
2. that this circumstance is recognized by the world community.

As the author points out:

> By the mid-1880s most American Indian tribes ceased to be effectively independent, and since well before that they had ceased to enjoy international recognition. In a strict international law sense, then, they are not sovereign, although the term continues to be applied to the relations between Indian tribes and states [of USA] and also symbolizes a residual, though undefined, set of self-governing powers inherent in Indian tribes as aboriginally sovereign peoples... Whatever their technical status, tribes are subject to the legal and physical, or plenary, power of the US.

Dr Diane Barwick writes:

> Today the definition of treaty used by the United Nations is 'an international agreement concluded between States in written form and governed by international law'. But the British government for several centuries made treaties with tribal groups, at first as independent powers and later as subject 'domestic nations'. There are also modern examples of treaties made between states and their own subjects: the Irish Free State Treaty of 1921 was an agreement made by the British government with an ethnic minority in its dominions... There is much historical and legal evidence that the North American Indian treaties were not international treaties in the sense of

1 P. Gross 'Indian Self-Determination and Tribal Sovereignty: an analysis of recent Federal Indian policy'. *Texas Law Review* vol., 56, 1195, 1978, p.1235–7.

agreements between independent and sovereign peoples subject to their own law, who were capable as nations and tribes of forming and breaking alliances with colonial powers, and who had national or tribal territories under their control'.[2]

But claims to sovereignty were being made also by certain Canadian Aboriginal peoples, anxious over their future and the future of treaties made with them by England and France as the 'patriation' of the Canadian Constitution approached.

During 1978, the National Indian Brotherhood of Canada responded to a Bill to amend the Constitution with demands that Aboriginal and treaty rights be entrenched in the Constitution and that Indians be involved in the process of constitutional reform. Already, in 1975, the Dene people of northern Canada had asserted their 'nationhood'. These moves, running parallel with the events in Australia during the second half of the 1970s, had their influence both on Australian Aborigines in their own attempts to gain political recognition, and on their sympathizers here.

In Canada, as Professor Douglas Sanders wrote:

> The report of the Pepin–Robarts Task Force on National Unity, 'A Future Together', recognized 'native sovereignty' as one of the options facing Canadians. It described that option as follows:
>
> **Although formulations vary, native sovereignty usually entails the exercise of the principle of self-determination through the creation of autonomous institutions within the Canadian federal system. The Native communities possessing these institutions would receive a land and resource base adequate to provide a decent standard of life...**

2 D. Barwick, *Making a Treaty*. References given for the quotation are D. G. Smith (ed.), *Canadian Indians and the Law: selected documents 1663–1972*. Toronto, McClelland and Stewart, 1975; and A. Cumming and N. H. Mickenberg, *Native rights in Canada*. Toronto Indian-Eskimo Association of Canada, 1972.

Sanders suggested that

> both provincial and federal authorities should pursue direct discussion with representatives of Canada's Indians, Inuit and Metis, with a view to arriving at mutually acceptable constitutional provisions that would secure the rightful place of native people in Canadian society.[3]

But the three peoples — Canadian Indians, Inuit (once known as Eskimos) and Metis (part-Aboriginal people) — have historically been, and are still, subject to the overriding authority of the central government of Canada, as they were to the British Crown in the past. What then does 'native sovereignty' imply, for them and for the Canadian Government?

According to Professor Sanders' paper (p. 11 of draft), the notion that there were pre-existing rights of self-government has not been examined, but in neither of the two cases in which 'the question of a separate Indian political and legal order within Canada' has been raised was there any specific denial that the right of self-government existed.

In Australia, the judgment in the Coe case denied that the Aboriginal people of Australia (on whose behalf the case was brought) could be considered as a domestic dependent nation organized as a 'distinct political society separate from others which had been uniformly treated as a state'; and denied that they had legislative, executive or judicial organizations by which sovereignty might be exercised. If such organizations did exist, they would have no powers unless these were conferred by Commonwealth, State or Territory legislation. As to the claim to land, it was, said the majority judgment, 'fundamental to our legal system' that the Australian colonies became British possessions by settlement and not by conquest.

3 D. Sanders, 'The Long Road to a Fresh Start', The First Ministers' Conference on Aboriginal Rights, Ottawa, 3 April 1983 (draft quoted).

The last judgment, relying as it does on the application of British common law, followed the Blackburn judgment and apparently took no cognizance of severe criticisms raised by other lawyers.[4] It did not, and was not required by the case to reconsider the judgment of Mr Justice Blackburn that, although the Aborigines of the Yirrkala area at least did have a recognizable system of customary law, it did not allow of interpretation for proprietary interests in the land concerned. (This would have been an argument for prior ownership and 'native sovereignty', since rights in land — 'dominion over a discrete territory' — are closely bound up with the concept.)

The legal definition of sovereignty advanced by Gross and quoted above, and applicable in some American Indian and Canadian cases, raises problems when one tries to apply it in the Australian situation, and indeed there are already arguments over definition. Colin Tatz produces several differing definitions of sovereignty, from the dictionary definition of 'supremacy or pre-eminence in respect of power of domination as supreme', through 'legal sovereignty', 'legislative sovereignty', 'international relations sovereignty', sovereignty as 'supreme coercive power', to 'the strongest political influence'. He discusses all these in the context of the Aboriginal situation; but to introduce these differing definitions does not really clarify the situation which Tatz describes as 'a jurisprudential jungle'.[5]

Mr Justice Blackburn's judgment was based on rejection of legal arguments that certain clans' claims to title were valid in common law. Blackburn considered the claim as one for recognition of a form of 'communal native title',

4 See *Federal Law Review* 1964, p.855 ff, and *Alberta Law Review* 11, 1973,

5 C. Tatz, 'Aborigines and the Age of Atonement'. Paper given at Third International Conference on Hunter-gatherers, Bad Homburg 13–16 June 1983. *Australian Quarterly*, Spring 1983, pp.291–306.

which, he said, was not and never had been recognized in Australian law nor, apparently, by executive action. He also said that there was no requirement in English law to consider it. Only statutory recognition, he said, could provide such title for Aborigines. This feudal concept, that the basis of all title to land is a grant from the Crown, has been challenged, and was indeed contradicted in North American precedent for Indian treaty law:

> One of the most significant elements of Indian treaty law is that Indian treaties were not a grant of rights from the United States to the tribes, but rather a grant from the tribes to the United States.[6]

But the Blackburn judgment as it stands is still the chief Australian case and has indeed

> been cited in other jurisdictions for the proposition that not only did the civilized nations acquire sovereignty by their 'discovery' of lands but the right of inhabitants to continue in possession must receive executive or legislative recognition before it can be admitted to exist.[7]

Yet it could be argued that the apparently unique position of Australian Aborigines, in which Britain claimed to have acquired inhabited territory simply through annexation and occupation, with accompanying violence by the 'settlers', was the result of an act of seizure which could not be justified in international law either of the time, or later.

Mr Justice Murphy, in his dissenting observations in the Coe case, questioned the doctrine that Australia had been acquired by peaceful settlement or occupation. He quoted Professor J. G. Starke to the effect that 'territory inhabited

6 American Indian Policy Review Commission 1977: 95, quoted in Barwick, *Making a Treaty*.

7 G. Bennet, 'The Developing Law of Aboriginal Rights'. *International Commission of Jurists Review* 2, June 1979, pp.37–46.

by tribes or people having a social and political organization cannot be of the nature *terra nullius*'.[8] Murphy considered that in any case the Aborigines had not given up their lands peacefully. And he said that whether conquest or peaceful settlement had been the method of acquisition, the plaintiff was still entitled to argue that the sovereignty acquired by the Crown had not extinguished proprietary rights in land among the Aborigines.

Justice Murphy may here have been thinking of that principle (which underlay Mr McMahon's reply in 1972 to the Larrakia people's request for treaties) that all the inhabitants of a country claimed by Britain automatically became British subjects at the moment of declaration. As has also been pointed out, the peaceful-settlement claim implied that the Aborigines as British subjects had a right to protection under the common law, which meant that 'the expropriation of lands subject to customary tenure has been and still is contrary to the common law, unless the Crown can point to consent, compensation or some statutory authority.[9] As Britain claimed the continent under the *terra nullius* rule, the British Government was not only denying that Aborigines had any rights whatever in the ownership of land, but also that Aborigines had social or political organization amounting to any form of 'native sovereignty' such as had been recognized in North America from the sixteenth century and confirmed in British territories under the Royal Proclamation of 1763. But even if this judgment had been correct (as it more and more obviously was not) Aborigines were entitled to the privileges of British subjecthood. These were in effect denied them from the time of the first 'settlement'.

It is notable, however, that British instructions to early

8 J. G. Starke, *An Introduction to International Law*, 8th ed., London, 1977, p.185 and generally.

9 *Alberta Law Review* XI, 1973. See Harris, *It's Coming Yet*, pp.21-25 for a fuller examination of the Blackburn judgment and other reference.

governors of New South Wales from the time of Governor Darling (1825) enjoined on them to 'especially take care to protect (the natives) in their persons and in the free enjoyment of their possessions'.[10] This seems to indicate that the other legal claim known as *res nullius* (things belonging to nobody) at least was not officially pressed against Aborigines from that date. Before this, instructions merely directed governors

> if any of our subjects shall wantonly destroy them, or give them any unnecessary interruption in the exercise of their several occupations, it is our will and pleasure that you do cause such offenders to be brought to punishment according to the degree of the offence.[11]

Mr Justice Blackburn's rejection of the common-law argument by counsel for the Yirrkala has also been strongly questioned. Dr John Hookey declared that the Blackburn view that the common law had no doctrine of 'communal title' and that there would have had to be express recognition of Aboriginal land rights by statute or executive policy for the claim to succeed, was irrelevant to the claim under the common law. He pointed out that in North America, by 1850, a body of case law existed which recognized that Indian 'native rights' were valid; and he quoted the 'internationally recognized' proposition that a change in sovereignty does not affect existing private rights. He quoted Privy Council decisions in overseas cases, for instance in Africa, which presumed the existence of native rights except where they had been extinguished by purchase or conquest.[12] But the majority judgement in Coe in 1979 ignored this argument and put aside the precedent in the

10 *Historical Records of Australia*, xii, p.125.

11 *Historical Records of Australia*, I, ii, p.52.

12 J. Hookey, 'The Gove Land Rights case: a Judicial Dispensation for the Taking of Aboriginal Lands in Australia?' *Federal Law Review* V, 1, pp.855 ff.

Cherokee Nation case on the unelucidated statement that 'the history of relationships between whites and Aboriginal peoples' had not been the same in Australia as in the United States.

Despite these legal judgments, Australia has recently been forced, partly by public and international opinion, partly by the indigenous people themselves in such highly publicized action as that taken by the Aboriginal Tent Embassy in 1972, to begin a process of legislative recognition of land rights. However, legislation, including the Aboriginal Land Rights (NT) Act 1976, is subject to amendment, whittling down, and in extreme cases even repeal; and in fact by 1978 the Northern Territory legislature was already attempting to have the Commonwealth legislation altered through a process of pressure on the Commonwealth Government. Aborigines have no official right of participation in the framing of policy or of legislation, and there is no requirement that they even be consulted in either.

Since the Blackburn judgment in effect rested on the basis that there was no legal recognition of any form of 'native sovereignty' in Australia (a view which was itself to be questioned later in a High Court case, to be referred to in later chapters), the first meeting of the nascent Aboriginal Treaty Committee in April 1979 and its members' previous discussions might have seemed to be flying in the face of established opinion. Even the demand by Aborigines for self-management of their own affairs had received only the most minimal response (and in Queensland none at all). Their demand for actual self-determination and control of the policies that determine their destinies seemed far from succeeding. Since they had been regarded for almost two centuries as having no form of government or body of law, and as incapable of even owning land, the idea that they might become equal parties to the negotiation and conclusion of a treaty might have seemed impossibly novel,

even to those who held a misty view that some form of compensation and return of lands was necessary. And on what terms the word 'treaty' might be applicable was another stumbling block.

The United Nations' definition that treaties were solely international was an objection raised by one lawyer whom the Committee early approached for support. Yet the word was still freely used to refer to the early, and continuing, North American instances of agreements negotiated with 'tribes' — the most recent of which at the time (though not given the name of 'treaty') included the James Bay and Northern Quebec Agreement embodied in the James Bay and Northern Quebec Native Claims Settlement Act of 1977. We could see no reason to do more than suggest such alternative terms as 'covenant' or 'convention' for a settlement which we considered would have to be accepted as quite as binding as any treaty entered into between nations — and, we hoped, more so.

Canada, like the USA, was of course a long way down the track in negotiations with its indigenous peoples compared to Australia. The ongoing argument in Canada regarding the place and rights of Canadian 'status' Indians, Metis and non-status Indians (people to whom the Indian Act does not apply) and Inuit (Eskimo) was, in 1979, soon to reach the constitutional level. The agreements (treaties) which had come into existence in North America, and remained in force, had resulted in both countries inheriting a situation where at least some recognition of Aboriginal rights was traditional and inescapable. This seemed to argue that nothing less than treaty rights could do the same for Australian Aborigines.

For that reason, it is worth here following through the contemporary history of the argument in Canada, which ran parallel with the developments in Australia from 1979 to 1984. Throughout the years, contrasts and similarities have been illuminating.

From Canada's founding in 1867 (unlike the Australian situation) the Federal Government has had responsibility for Native Affairs. The patriation of the Canadian Constitution has been the chief catalyst of activism among the three native peoples since 1975. They feared that the treaties which recognized their existence and original ownership of land, the earliest of which had been made in 1680, would be abrogated under the new Constitution, and their fishing and hunting rights and special status might not be respected.

The situation leading up to the present ongoing discussions on the constitutional recognition and rights of the three peoples is summed up in a publication by the Institute of Intergovernmental Relations, written by Norman K. Zlotkin.[13] There are common features, as well as differences, in the historical relationships between governments and native peoples in Canada and Australia, and a brief comparison is worthwhile.

Zlotkin defines the term 'Aboriginal peoples' as describing 'all peoples who can trace their ancestry in Canada in time immemorial, i.e., before written records were kept'. As in Australia, tribes occupied territories whose boundaries were known and ordinarily respected. 'One common feature among diverse societies was a deeply felt connection between people and land' — a feature they share with Australian Aborigines, and which remains prevalent in the twentieth century. The Yukon Native Brotherhood, in a statement published in 1973 said, 'Without land, Indian people have no soul — no life — no identity — no purpose. Control of our land is necessary for our cultural and economic survival'.[14] Australian

13 Zlotkin, *Unfinished Business*, Aboriginal Peoples and the 1983 Constitutional Conference, Queen's University, 1983.

14 *Together Today for our Children Tomorrow*, a document issued by the Yukon Native Brotherhood, p.63.

Aborigines would echo that statement.

Also, the present social and economic condition of status and non-status Indian, Metis and Inuit people is similar to that of Aborigines here in that

> compared with other Canadians, they are undereducated, suffer from higher rates of unemployment, receive a much lower than average income, live in substandard housing, and have a life-expectancy which is much lower than the national average.[15]

The Inuit retained effective control of the Arctic, where Europeans took so little interest in their natural resources that they did not seek treaties to cede title and allot reserves. Canadian and other North American Indians on the other hand were in most regions signatories to treaties concluded with the British. The Royal Proclamation of 1763 confirmed Indian rights in all territory west of the then colonies and stipulated that no settlement could be made there. No land could be purchased anywhere otherwise than at Crown sales. This recognition was not, however, solely an act of enlightened compassion. During the Seven Years War with France, Britain had cause to fear that France might enlist the help and alliance of Indian tribes beyond the colonies. France also concluded some treaties of alliance, peace and friendship with eastern seaboard tribes, for example, the Mikmaq of Nova Scotia.

(It might be interesting to consider what could have happened in early Australia if the French expeditions of the first years of the British occupation had in fact challenged British rights, or attempted to enlist Aborigines as allies against the tiny settlements of Van Diemen's Land and Sydney.)

The Treaty of Paris, concluded in 1763, ended the war with the cession of Quebec. Both before and after this, the British made large reservations of land as hunting-grounds

15 Zlotkin, *Unfinished Business*, p.6.

for Indians (thus, as has been pointed out, in effect acknowledging the right of hunter-gatherer peoples to the occupation and use of land — as was not done in Australia and not done by Captain Cook). The proclamation, the reservations and treaties are still seen by Indians as implicit acknowledgment of prior Indian sovereignty as well as an explicit recognition of their rights as a people.

These treaties did not cover all Indians. But they were protected in the 'British North America Act' (now the patriated Canadian Constitution), and twenty-two further treaties were made in the years following confederation of the provinces. There are, however, many anomalies as between the three main peoples under the Federal legislation. These were shown up when, in 1969, the Minister of Indian Affairs released proposals to terminate the 'special status' of certain Indian people by abolishing the Indian Act. The Prime Minister argued that to achieve Indian equality all special legislation should be abolished. But the then National Indian Brotherhood (renamed in 1982 the Assembly of First Nations) set out on a programme of opposition to the proposals, and, supported by public and parliamentary outrage, succeeded in forcing a formal withdrawal from the Prime Minister in 1971. With government funding, the Brotherhood then began a programme of research into, and assertion of, land claims. During the 1970s, the Canadian Federal Government acknowledged the importance of treaty rights and in 1973 agreed to settle 'comprehensive claims' of all groups who had not made treaties. But its intentions were still distrusted although northern land claims were negotiated from 1975–78.

This action coincided in time with the Fraser Government's betrayal of Labor's and its own land rights legislation in the Northern Territory, and with the pressures on the Northern Land Council over the uranium issue.

In October 1980 the Prime Minister of Canada

announced a constitutional resolution which did nothing to protect Aboriginal or treaty rights. These were to be postponed to a 'second stage' of constitutional reform. The National Indian Brotherhood set up an office in London to lobby British parliamentarians, and brought several lawsuits in an attempt to stop patriation.[16]

Though these did not succeed, the publicity they and the other activist movements excited caused the Canadian Government to amend the constitutional resolution in 1981. This time the existence of Aboriginal and treaty rights was to be recognized, including for the first time the rights of the Metis people (considered ineligible to make treaties in the nineteenth century and given land allotments instead). There was provision for future involvement of the Aboriginal peoples in the constitutional process, but there was no recognition of their demands that their consent had to be obtained for any constitutional change which affected them.

The assimilationist stance of the Canadian Government during the years leading up to the patriation of the Constitution gave the Indian, Metis and Inuit organizations little confidence in its intentions. But in March 1983, as promised in obtaining provincial consent to patriation of the Constitution, the Prime Minister called a conference of Indians and Provincial premiers in Ottawa 'to deal with constitutional issues directly affecting Aboriginal people in Canada'.[17] The Assembly of First Nations (formerly NIB), representing most Indian organizations, and native leaders directly participated in the discussions with first ministers. This was the first of a series of constitutional meetings scheduled to take place over a four-year period, and resulted in a 'constitutional accord' calling for a number of

16 Zlotkin, *Unfinished Business*, p. 33.

17 *Intercom*, Department of Indian and Northern Affairs, Canada, April 1983, special edition.

amendments to the *Constitution Act* 1981, with the full participation of representatives of the various national associations of indigenous people.[18] During these days of debate, televised nationwide, the Canadian public was generally deeply impressed by the Native leaders.

What is important to recognize here is that the activism of these associations forced on the Canadian Government the need for full constitutional recognition of Aboriginal rights, and for free and frank Aboriginal participation in all negotiations about their future. This is in contrast with the Australian situation, except in so far as Aboriginal activism is now a force to be considered.

Another significant feature is the importance placed by Indians on their treaty rights, in spite of the fact that some treaties were historically poorly drawn and poorly observed. In summarizing Indian views just before the March 1983 meeting, Zlotkin argued that Canadian Indians now wanted

> a constitutional statement of principle that the Federal Government is committed to negotiating treaties or agreements (including land claims settlements) with the aboriginal peoples, in accordance with broad general principles that recognize their rights to maintain and develop their respective cultures, languages and traditions; the right of self-government within the Canadian federation and the right to their lands and waters and to the natural resources there... To the extent that existing treaties are inconsistent with the proposed general principles, they would be renegotiated. Similarly, aboriginal peoples whose rights have been extinguished without treaties would have the right to enter into negotiations.[19]

18 *Ibid.*, p. 1.
19 Zlotkin, *Unfinished Business*, p. 71.

Zlotkin comments also that:

> If the [1983] conference were to be perceived as a failure by aboriginal peoples... aboriginal organizations would likely increase their efforts through the United Nations for international recognition of their rights and for the right to standing before international tribunals such as the World Court. Thus, the failure of the conference would not only be noted domestically; it would embarrass Canada in the eyes of the world.[20]

So far, the Canadian Government has laid down two provisos to the negotiations: it 'rejects the idea of assimilation of Aboriginal peoples just as firmly as it rejects absolute sovereignty as a basis for their relationship with any government within the federation'.[21] Within these limits, Prime Minister Trudeau indicated that there was a range of options on self-government by Aboriginal peoples and communities to be discussed. He mentioned as other important issues questions of land ('constitutional entrenchment of Aboriginal title and other land rights') language, religion and custom.

The national chief of the Assembly of First Nations, summing up its reaction to the discussions, said that 'there has been goodwill at this conference to allow us to go forward'. But the complexity of the issues to be discussed will necessarily require extensive negotiation, likely to continue for a number of years to come. The Native peoples of Canada are prepared to negotiate their future; they have established their *right* to negotiate with the leaders of the provincial and federal governments, as the leaders of bands and tribes living within the territory under Canadian sovereignty.

The tentative moves in Australia towards an overall

20 Zlotkin, *Unfinished Business*, p. 80.
21 *Intercom*, Special edition, summary of the Prime Minister's address, p. 1.

settlement with Australian Aborigines, which began with the inception of the Aboriginal Treaty Committee and with the National Aboriginal Conference's call for a treaty in April 1979, may perhaps run parallel with the continuing negotiations over the Canadian Constitution, and a comparison between Australian and Canadian approaches to the problem certainly throws light both on differences and similarities in the two countries. But at the time of the inaugural meeting, the members of the group which was to become the core of the Aboriginal Treaty Committee did not know much about the situation in Canada. Though the same factors were at work in both countries — the pressures of development in mining and energy resources with governmental co-operation and encouragement, and the newly roused resistance to them on the part of the indigenous inhabitants — there were, and are, also considerable differences in the past of the two countries and in their present stages of relationship with their Aboriginal people.

In Australia, to a significant extent, the problems faced by Aborigines (and Torres Strait Islanders) are more difficult to solve. For them, the period of colonial repression, and tutelage so-called, and the shocks of total deprivation and displacement have been, if anything, more severe than Canadian indigenous people have suffered; their lack of any remaining land base except in distant and isolated areas, and the powerlessness of poverty, have contributed to the difficulty of finding the kind of political and organizational unity that was achieved by the National Indian Brotherhood and other Canadian indigenous organizations. Considerations like these prevented, for instance, any coherent Aboriginal response to the call in the petition by the Larrakia people for 'all people of Aboriginal descent to join the tribe of their ancestors', and they weighed heavily with the newly formed Aboriginal Treaty Committee also.

It was evident, firstly, that Aborigines themselves must evolve their own organizational answers to their situation without any further well-intentioned attempts to tell them how to go about it; secondly, that the real problem they faced was not within their own society and communities, but in the actions and attitudes of the dominant society in which they had become a powerless enclave. It was there, if anywhere, that the work of the Committee could be of use.