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Chapter Six: Treaties versus terra nullius: Sovereignty and Indigenous rights in Canada

A house built upon a foundation of sand is unstable, no matter how beautiful it may look and how many people may rely upon 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 (Borrows 2001: 38-39).

Introduction

The previous chapters have demonstrated the various ways in which the relationship between sovereignty, nationhood, and Whiteness is played out when Indigenous people assert their inherent sovereignty in Australia. These chapters have shown the various tools and strategies that White people employ to deny Indigenous peoples’ demands for recognition of their sovereignty. These tools or strategies constitute a discursive repertoire of Whiteness that functions to reinforce and maintain White race power and privilege in Australia. The preceding chapters have also shown the similarities between different strategies and tools in the discursive repertoire across time, place, and political spectrum.

This chapter aims to examine and compare the relationship between Whiteness, sovereignty, and nationhood in the Canadian context, by examining the treaty-making process currently underway in the Canadian province of British Columbia. The rationale for this comparison is threefold. First, Canada’s various approaches to Indigenous-White 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 recognising Indigenous peoples’ rights. As Chapter One explained, I generally use the terms “Indigenous” and “First Nations” in this thesis to denote an “all-embracing identification for those peoples who are descendants of the original inhabitants of what is now known as Canada” (Pertusati 1997: xi). The Canadian Constitution Act 1982 recognises three Aboriginal groups – Indian, Métis (people of mixed Indian and French ancestry), and Inuit (Asch 1993a: 37). Where applicable, I use these
the Indigenous populations, and, as a result, there are currently many ongoing treaty negotiations between governments and Indigenous people in Canada. The Inuit in Canada's north recently brokered an agreement that provides for effective Inuit self-government in and jurisdiction over the Nunavut territory (Jull 1999; Jull 2001). The 1996 Canadian Royal Commission on Aboriginal Peoples - according to Ivison, Patton, and Sanders (2000: 17), possibly the most comprehensive study of relations between Indigenous and non-Indigenous people ever undertaken - recognised that Indigenous people in Canada have a right to self-government (Royal Commission on Aboriginal Peoples 1993: 24). In Canada, unlike Australia, Aboriginal rights are protected by the Canadian Constitution. Consequently, many commentators - academic and non-academic, Indigenous and non-Indigenous - have argued that Australia would do well to follow Canada's lead.

The second reason for the comparison with British Columbia is that, despite the overt differences, Indigenous-state relations in Australia and Canada share many historical and contemporary similarities, particularly in the sorts of public and political terms in this Chapter as well. I also wish to include here a brief note on the terms "Aboriginal title," "native title," and "Aboriginal rights" in Canada and Australia. "Aboriginal rights" is a broad term that is used to refer generally to the rights that exist and that Aboriginal people assert by virtue of their original occupation of the land, which therefore "comprise everything necessary to ensure the survival of aboriginal people as aboriginal people, including the right to use the land and its natural resources, to preserve and foster aboriginal languages and economic and cultural practices, and to practice [their own] forms of law and government" (McKee 1996: 5). Therefore, the term "Aboriginal rights" can be used with regard to both Australia and Canada. A specific type of Aboriginal rights is Aboriginal peoples' title to land, which was recognised in the Calder (discussed in more detail below) and Delgamuukw decisions of the Supreme Court of Canada (Persky 1998). This is referred to as "Aboriginal title" in Canada, whereas, in Australia, Indigenous title to land is referred to as "native title," following the High Court of Australia's Mabo (1992) decision. Although there is some contention over the meaning and content of native title in Australia and Aboriginal title in Canada, each of these terms broadly refer to Aboriginal peoples' right to occupy, use, and enjoy the land and its resources, which derives from their originary occupation (Bartlett 1998; Goldberg 1998b; LaSelva 1998: 51; McKee 1996: 5; McNeil 1997). Therefore, "Aboriginal title" in Canada and "native title" in Australia are roughly equivalent concepts.

134 Section 35 of the Canadian Constitution states that "existing Aboriginal and treaty rights are hereby recognized and affirmed." As Asch points out, however, it does not specify how these rights should be defined (1993a: 37). Consequently, this question has been the source of much contention and several judicial decisions (Asch 1999).

discourses that have framed Indigenous rights debates. As Coates points out, it is
therefore important to recognise that, "although the path was different, the results
proved to be substantially the same" (1999: 156). The BC treaty process provides a
particularly interesting and important point of comparison because, as the following
historical outline shows, the history of Indigenous-White relations in BC parallels that
of Australia more closely than it does the history of these relations in the rest of
Canada. This is because most of BC was occupied by non-Indigenous people on the
basis that it was thought to be terra nullius. The BC treaty process provides an example
of how a modern-day treaty process might be expected to work, and it is often cited in
Australia as a model of good practice. As the previous chapters have demonstrated,
Australia has a consistent history of resistance to the notion of treaty-making, and
many of its opponents cite the impossibility of negotiating treaties with groups inside
the "Australian nation" as a reason for refusing to consider such an approach. Because
it appears able to deal with these issues, the BC model is often used to show that these
claims are fallacious.

The third reason for undertaking this comparison, however, is to apply the
arguments I have made in the preceding chapters to circumstances beyond the
Australian context. When the BC treaty process is examined in the context of the
relationship between sovereignty, nationhood, and Whiteness, it emerges as
considerably more limited and conservative than its proponents would suggest. This
chapter argues that, as in Australia, White discourses of nationhood and sovereignty
fundamentally limit the Canadian state’s approach to its relations with Indigenous
people. I argue that the concept of hegemonic Whiteness is applicable to the Canadian

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136 Coates argues, for example, that the non-Indigenous occupation of Canada was not always
accompanied by the same level or extent of frontier violence that characterised the invasion
of places such as Australia (1999: 156). He also points out, however, that this was not
because the incoming population was any more generously disposed to the Indigenous
peoples or because they viewed them in a more favourable light. Rather, as this chapter will
demonstrate, the non-Indigenous occupiers’ approach to dealing with the Indigenous
populations in Canada in the eighteenth and nineteenth centuries was usually motivated by
the same economic imperatives, and justified by the same colonial and racist ideologies, that
pervade Australia’s history of Indigenous-White relations. And Indigenous peoples in
Canada were subject to the same sorts of “protection,” “civilisation,” and assimilation
policies in the twentieth century that characterised Aboriginal peoples’ experiences in
Australia (see, for example, O'Connor 2000).
context in the same way that the concept has been applied to the Australian situation in the preceding chapters. This is because of the similarities in the discourses and ideologies which have been used to justify White occupation in each place. These discourses and ideologies mean that, as in Australia, in Canada Whiteness operates as unspoken, yet omnipresent norm, and source of power and privilege. As a result, the BC treaty process in some ways reinforces rather than challenges the colonial ideologies and assumptions upon which the Canadian state's very existence is based. In fact, as the chapter shows, the BC treaty process exhibits many of the features that are shared by – and criticised in – its Australian analogues, including the native title process and the government policy of reconciliation. And, as previous chapters argued in relation to the Aboriginal Tent Embassy and the Aboriginal Provisional Government in Australia, this chapter shows that Indigenous organisations and activists who choose to challenge state-endorsed frameworks are often marginalised, silenced, and ignored. Therefore, this chapter demonstrates that, despite their differences in the matters of treaties and terra nullius (where treaties underpin White occupation of Canada and terra nullius underpins the same in Australia), Canada and Australia have in common a more important feature – the institutionalisation of White power and privilege.

It should be pointed out from the outset, however, that the following critique of the BC treaty process should not be read as a criticism of the First Nations who choose to participate in it. Rather, this critique is of the structures within which the treaty process operates. In particular, my critique of the negotiations being carried out under the auspices of the BC Treaty Commission is not a criticism of the First Nations at the negotiating table or of the Indigenous people involved in the Treaty Commission itself. Neither is my critique of the Nisga’a Final Agreement a criticism of the Nisga’a nation. For a White person to criticise Indigenous people who choose to participate in processes such as the BC treaty negotiations would be the height of arrogance, because White power and privilege derive from the very structures within which processes such as the BC negotiations operate. As Lancaster explains,

colonized 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 lands 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 (Lancaster 2000: 11).

By identifying the limitations of the BC treaty negotiations process in terms of the relationship between Whiteness, sovereignty, and nationhood, this chapter will analyse the structures that, in Lancaster's words, allow the process of colonisation to continue (2000: 11).

This chapter is divided into three parts. The first provides a brief historical background to treaty-making in Canada. Second, the chapter examines the modern-day treaty-making process currently underway in Canada's British Columbia by focusing on three distinct modes by which First Nations' relationship to the process can be characterised. Third, the chapter explores the BC process in terms of the relationship between sovereignty, nationhood, and Whiteness. It discusses how the manifestation of this relationship in the BC process highlights the importance of challenging and critiquing hegemonic Whiteness.

Trick or treaty? A historical background to treaty-making in Canada

To begin a discussion on how Indigenous peoples' demands for the recognition of their sovereignty or nationhood are met in Canada, and specifically in British Columbia, it is necessary first to briefly describe the historical context from which contemporary demands for the recognition of sovereignty and contemporary approaches to Indigenous-state relations arise. This section of the chapter demonstrates the distinction between treaties and terra nullius as the respective bases on which the Canadian and Australian states initially (or at least historically) approached their respective relationships to the original inhabitants and from which contemporary state approaches to Indigenous–White relations largely emerge.

The Royal Proclamation of 1763

According to Foster (1999: 355), the status of Indigenous sovereignty or title in Canada has been contested since the "Royal Proclamation" of 1763. The proclamation, issued by King George III, was designed to "normalise conditions in [the new British] colonies ... and to avoid a costly Indian war on the frontier" (Foster 1999: 355). The
Royal Proclamation "decreed that Indian peoples should not be disturbed in their use and enjoyment of the land," that land held by Indians was to be purchased by the Crown only (not by individuals), and that such purchase could occur only with the Indigenous peoples' consent. Tully suggests that the Royal Proclamation constitutes an important example of mutual recognition on the part of the Indigenous people and the British colonisers of each other's status as independent and self-governing nations (1995: 118-119). This is in line with the definition of "treaty" given in Chapter Two. Consequently, the Royal Proclamation is often still referred to by First Nations people in Canada as a "positive guarantee of First Nation self-government" (Borrows 1997: 155), and therefore as evidence of their sovereignty and rights to land and resources. Furthermore, its determination that Indigenous lands could be acquired by the Crown only is often cited as one of the main reasons that treaty-making in Canada has taken place (First Nations Education Steering Committee, B.C. Teachers' Federation & Tripartite Public Education Committee 1997: 8). Thus the Royal Proclamation is an important marker for contemporary debates about recognition and sovereignty. Yet, Foster points out that, although the proclamation appears to affirm Aboriginal title and sovereignty, it was careful to limit it at the same time (Foster 1999: 355). And, as we shall see, British and Canadian governments have not always abided by the principles of mutual recognition, consent, and continuity in the ensuing periods of relations with Indigenous people.

**Three periods of treaty-making**

Foster distinguishes three periods of treaty-making between Indigenous peoples and colonisers in Canada following the Royal Proclamation in 1763 (1999: 358). The first period consists of those treaties made prior to confederation in 1867; the second spans the period from confederation until the early 1920s; and the third encompasses

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137 Tully notes that the Royal Proclamation was used as a precedent in the famous US Supreme Court case, *Cherokee Nation v. the State of Georgia*, in which Chief Justice Marshall recognised the Aboriginal peoples of America as independent or "domestic dependent" nations (1995: 118). Tully points out that the Proclamation itself was not without precedent; among other things, it was based on Royal Instructions to colonial administrators since 1670 and the Board of Trade's recognition of Aboriginal sovereignty in 1696 (1995: 118).

138 For example, the document states that its principles were a matter of "Our Royal Will and Pleasure," which would hold only "for the present, and until our further Pleasure be known" (Foster 1999: 355).
the period of modern treaty-making — usually characterised as beginning with the James Bay Treaty in North Quebec in 1975 — and covers current treaty negotiations.

The pre-confederation treaties were initially made with First Nations in the southern and eastern parts of British North America during the armed struggle for land between France and Great Britain that took up much of the eighteenth century. These agreements became known as the “peace and friendship” treaties, so called because they were designed to secure peaceful relations between the British military and the First Nations. These treaties did not involve any cession of Indigenous peoples’ land (Foster 1999: 358-359). After Great Britain’s defeat in the American Revolution, “land in what remained of the King’s dominions in North America had to be found for His Majesty’s Iroquois allies”, whose traditional territories south of the new border between Canada and the United States of America were now in the hands of the Americans (Foster 1999: 359). Non-Indigenous loyalists who would or could not remain in the new American republic also needed land (Foster 1999: 358-359). Consequently, the Crown made treaties with various groups in Upper Canada and Nova Scotia, and the land procured was made available to the Iroquois and to the non-Indigenous British loyalists. Unlike the “peace and friendship” treaties which did not entail cession of Indigenous land, the arrangements made for the non-Indigenous loyalists were characteristic of what was to come: these treaties were designed to extinguish Aboriginal title in order to clear the way for White “settlement” and resource extraction (Foster 1999: 358-360).

The most important of the pre-confederation treaties for the purposes of my argument were the so-called Robinson treaties, which were made in 1850 with the Ojibwa people of what is now northern Ontario (Foster 1999: 359-360). Unlike some of the earlier southern treaties, which were initiated by the government to procure land for settlement, the Robinson treaties were prompted by First Nations who protested that their lands were being invaded by Europeans seeking to exploit mineral resources,

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139 People from the Iroquois nation were co-opted by both Great Britain and the Americans to be used in the war, often against one another (Foster 1999: 356).
140 The Robinson treaties are named after William B. Robinson, who negotiated them for the government (Foster 1999: 359-360).
from whom the Indigenous populations sought legal protection. They did not necessarily receive it, however, and the Robinson treaties became the basic model for future treaty-making in Canada. The Robinson treaties provided only for “small tracts of reserve land set aside for First Nations use but controlled, in trust, by the government” (Coates 1999: 146). These and other similar treaties subsequently became known as “cede, release and surrender” treaties, because they required First Nations to cede their land and “release” or surrender their rights to it (at least, this was the non-Indigenous governments’ understanding of these agreements) (Asch 1993b: 60). Although the terms of the Robinson treaties also included some provision for Indigenous peoples to access educational, economic, and medical assistance, the prevailing view of the government parties to the treaties was that the First Nations would remain isolated on the reserves until they were “ready” to integrate into the “mainstream” (Coates 1999: 146). It is important to note the disparity between this view and that generally held by the Indigenous parties to the treaties who, according to Coates, saw the agreements as the “foundation for a more equitable and substantial role within the rapidly changing colonial society, not as a means of retreating into permanent isolation” (1999: 146). Indeed, as Venne argues, the written versions of many treaties embody only the government’s interpretation of the treaty relationship (1997: 173); the treaty records kept by many First Nations in their oral histories often tell another story.141 As the remainder of this chapter will demonstrate, disparate expectations and understandings of the treaties – generally characterised by the Indigenous parties negotiating in good faith and the non-Indigenous parties seeking to establish their dominance and preserve their own interests – became a consistent theme in ensuing periods of treaty negotiations, up until and including those presently taking place.

The second period of Canadian treaty-making, from confederation until the early 1920s, mostly includes the so-called “numbered treaties” (treaties 1-11), negotiated by the new federal government with First Nations in the prairie districts and Hudson’s Bay territories further north and west. These treaties aimed to make way for the projected expansion of settlement and development into these areas (Coates 1999: 153;

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141 See also Venne (2000).
Foster 1999: 358). Like the Robinson treaties, as far as non-Indigenous people were concerned, the numbered treaties were designed to extinguish Aboriginal or native title to land, but they also aimed to placate Indigenous nations, who the government feared might “rise up” against the new dominion. Certainly, it seems paradoxical that this “placation” was apparently to be achieved through the extinguishment of Aboriginal title. Nevertheless, this approach demonstrates three important points. First, it reveals that White treaty-makers saw Indigenous peoples as inferior, because it was not considered necessary to negotiate with or treat them as equals. Second, it is an important indicator of how non-Indigenous governments viewed the treaty relationship as a means by which to uphold their own interests by extinguishing Aboriginal rights. Thus, treaties were mechanisms for the protection of White interests. And, third, it illustrates the White notion that the place of Indigenous peoples was within the emerging Canadian nation, not equal to it. To the government’s surprise, however, some of the Indigenous populations were more supportive of, and prepared for, the prospect of treaties than had been expected (Coates 1999: 150-151). Coates suggests that this was because Indigenous peoples were aware of, and wanted to avoid, the harsh impacts of the Indian wars in the USA (Coates 1999: 150-151). There was some Indigenous resistance, which was led by the Métis who opposed the federal government’s plans for the expansion of settlement further west and who therefore sought protection before the White population arrived. Their rebellion was quickly defeated, however, and the “settlement” of these areas proceeded (Coates 1999: 151). It was also around this time that the federal government assumed greater power over the Indigenous populations via the infamous Indian Act, passed by the federal parliament in 1876. The Indian Act gave the government and its officials administrative control over many aspects of Indigenous life, including lands, band councils, and resources. According to Coates, the Act and the treaties – which had extinguished Aboriginal title to lands or would do so in the future – combined to represent “a major intrusion of federal authority” into First Nations life (Coates 1999: 151; see also Foster 1999: 363-366).

The third period of contemporary treaty-making in Canada is usually characterised as beginning with the James Bay Treaty in North Quebec in 1975, initiated by the provincial government’s wish to exploit James Bay’s hydroelectric power potential.
(Foster 1999: 358). This third period also encompasses current attempts to negotiate treaties, and it therefore includes the treaty process in British Columbia, which is the focus of this chapter. The BC process belongs in this third category because – with the exception of a few land cession agreements, now known as the Douglas Treaties, which were made with some First Nations on Vancouver Island between 1850 and 1854142 – there was no treaty-making in British Columbia in the first two periods.143 The Douglas Treaties provided only that the First Nations people would retain their villages and hunting and fishing rights, but the remainder of their territories became the property of "the white people forever" (Foster 1999: 360). As with treaties negotiated in other parts of the country, however, the interpretation of the Douglas treaties continues to be contested, and the legitimacy of non-Indigenous peoples' occupation of Vancouver Island under the terms of the Douglas Treaties is still being challenged in the courts today.144

There were no such agreements or "treaties" signed on the British Columbian mainland, despite encouragement from the federal government when British Columbia entered the Canadian confederation in 1871 (on the assumption that native or Aboriginal title existed and that treaties were required to extinguish it). The BC provincial government, largely representing the interests of land-hungry settlers and capital, acknowledged neither the existence of Aboriginal or native title or, consequently, the need for treaties with the Indigenous populations. The federal government eventually backed down (Harris 1998: 2; Foster 1998: 18-19). Tennant argues that, because the non-Indigenous occupation of most of British Columbia proceeded without any form of treaty-making and because the notion of Aboriginal title in British Columbia was consistently rejected by the colonial and later provincial governments, BC, like Australia, was "settled" on the basis of the mistaken belief that it was *terra nullius* (Tennant 1996: 46). The notion that most of BC was *terra nullius* when

142 The Douglas Treaties are named after James Douglas, the then Chief Factor of the Hudson's Bay Company, which controlled Vancouver Island by virtue of a crown grant made to the company in 1849. Douglas made 14 formal land purchases from native groups near Victoria between 1850 and 1854, which the courts later held to constitute treaties (Foster 1999: 360; Harris 1998: 2).

143 British Columbia is Canada's most westerly province. Vancouver Island is part of the province but not of the mainland: it lies south-west off the BC coast.

144 See, for example, *National Post* (28 August 2001: A4); *Vancouver Sun* (25 August: A1, A8).
non-Indigenous people arrived was not overturned until the Supreme Court of Canada's decision in the famous Calder case in 1973 (Tennant 1996: 46; see also Asch 1999), discussed below. In many ways, therefore, the history of Indigenous–state relations in BC parallels that of Australia more closely than it does the rest of Canada.

*Treaties v. *terra nullius*

Although necessarily truncated, this history of Indigenous–state relations in Canada raises three important points. First, the Royal Proclamation's recognition of Indigenous peoples' sovereignty, and the fact that treaties were negotiated in (most parts of) Canada, represent important instances of political and legal recognition, from the beginning, of the fact that the existence of Aboriginal rights and title preceded 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 proceeded from 1788 onward on the basis that the entire continent was *terra nullius*. As previous chapters have discussed, the notion of *terra nullius*, as it was applied to whole Australian continent, was not overturned until the Australian High Court's *Mabo* (1992) decision. Further, *terra nullius* in Australia not only applied to the land; the concept shaped, and continues to shape, Australia's political and cultural landscape as well. Although the fact that no treaties were signed in BC is obviously of significance to this chapter, it is important to note that the case of BC is something of an anomaly in Canada: that is, the application of the notion of *terra nullius* was the exception rather than the rule. It is largely for this reason that treaty-making has been adopted as the approach to Indigenous–state relations in contemporary British Columbia. Conversely, as has been argued in previous chapters and will be further argued here, the norm of *terra nullius* explains why a treaty negotiations process has not been considered in Australia.

The second important point raised by the history of Indigenous–state relations in Canada is as follows. Although the Royal Proclamation partly recognised Indigenous sovereignty in Canada, and although treaty negotiations took place in most parts of the country, Indigenous–state relations have been characterised by disparate interpretations of how those agreements should be understood. The central issue here is the meaning of the concepts of sovereignty and nationhood, which are integral to
any treaty relationship, because treaties, by definition, are agreements between mutually recognised, consenting, and continuous sovereign nations (Tully 1995: 118-119), as Chapter Two discussed. Nonetheless, the terms of these agreements were usually ignored by governments seeking to assert control and protect non-Indigenous interests in land and capital (Dickinson & Witherspoon 1992: 407), on the assumption that Indigenous land was/is theirs to occupy, and Indigenous rights and title theirs to extinguish. That is, in both Canada and Australia, the colonising powers asserted sovereignty over the Indigenous peoples and their lands, and this was justified and normalised by the assumption that the Indigenous peoples were inferior (Henderson 2000: 27-30; Macklem 1993: 13). Therefore, as Wolfe points out, and as the remainder of this chapter demonstrates, "the formal differences between the acknowledgment and the denial of native title emerge as secondary to the ideological continuity within which both possibilities are framed" (2000: 130). As the following discussion demonstrates, struggle over the meaning of concepts such as sovereignty and treaty continues to be a theme of Indigenous-state relations as they are currently being played out in the modern BC treaty process.

Coates points out that, although the treaty process in Canada has been "long lauded as an appropriate and peaceful alternative to [other experiences] of land conflict and occupation," it was in fact for the most part characterised by the "strong hand of government in the negotiation process and a pattern of government neglect and mismanagement following the initial settlements" (1999: 141). The third point raised by this discussion of Canadian Indigenous-state relations, then, is 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 colonisation; in many cases, for that matter, they make little difference to their lives today. It is nevertheless important to draw the distinction between treaties and terra nullius, because this allows us to conduct an informed comparison of contemporary approaches to managing Indigenous-White relations in Canada and Australia. Using the theoretical tools outlined in Chapter Two, this comparative analysis aims to identify the common problems that pervade both frameworks and, in doing so, to shed light on the ways that White academic work might assist in a critique and reformation of those frameworks.
Modern treaty-making in British Columbia

This part of the chapter examines how contemporary treaty-making has been played out in the province of British Columbia. It begins by discussing the context out of which modern treaty-making in BC arose. It goes on to discuss the different forms that the BC treaty-making process, and its relationship to Indigenous peoples, has taken. It progresses to a consideration of how public discourse associated with the treaty-making process can be read in terms of the relationship between sovereignty, nationhood, and Whiteness.

The political context of modern treaty-making

In the Supreme Court of Canada’s Calder decision of 1973 (named after Nisga’a chief Frank Calder, who brought the case to the courts), the Nisga’a nation of Northern British Columbia asserted their rights to collectively use and occupy their traditional lands, arguing that those rights derived from their occupation of the land since time immemorial. In a landmark decision, the Court ruled that Aboriginal title did exist at the time of contact (Havemann 1999: 45; Tully 2000: 44-45). Justice Judson put it this way:

when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means (Calder et al. v. AG BC 1973 cited in Tully 2000: 45).

The Court did not uphold the Nisga’a’s claim to present-day Aboriginal title rights. Like the Australian High Court’s Mabo decision almost 20 years later, however, it raised the spectre of recognition by the legal system of Aboriginal title rights that exist by virtue of Aboriginal people’s prior and continuing occupation of lands and waters, rather than by virtue of their “creation” by a non-Indigenous court, legislature, or proclamation. Thus, the Calder decision’s recognition that Aboriginal title rights existed at the time of contact was something of a watershed in Canadian jurisprudence, and it was like Mabo in that it represented something of a “national psychological breakthrough (Jull 2000: 225).”145 As Tully (2000: 44) and Tennant (1996: 53-56) point out, Calder is now seen as marking the transition to the present period of treaty-making in British Columbia.

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145 See also Asch (1993b: 51).
At that time, the Canadian federal government's Aboriginal affairs policy was based on the principles contained in a 1969 White Paper, which outlined the government's intention to completely assimilate Aboriginal people by ending any special status for them (McFarlane 1993: 108-109; Tennant 1996: 52). This policy approach was similar to then Australian Prime Minister McMahon's policy on Aboriginal Affairs, announced in January 1972, which led to the establishment of the Aboriginal Tent Embassy. The 1969 White Paper can be seen as part of an explicit nation-building project, led by then Prime Minister Trudeau, which aimed to "unify" the disparate elements in Canada's conception of its national identity and, in particular, to counter Quebecois separatism. This project eventually culminated in the adoption of the Canadian Charter of Rights and Freedoms and the patriation of the Canadian constitution in 1982 (Kymlicka 1998: 148-149; LaSelva 1996: 85-89). This was the context for Trudeau's 1969 statement that, although the government would have to honour existing treaty rights, they "shouldn't go on forever" because it was "inconceivable that in a given society one section of the society [should] have a treaty with the other section of the society. ... They should become Canadians as all other Canadians" (cited in Asch 1993b: 63). After Calder, however, Trudeau was forced to acknowledge that the Court's judgment had indicated that "perhaps" Aboriginal peoples had more legal rights than his government "had considered when they formulated the [White Paper] in 1969" (Asch 1993b). So, although Calder was only a partial victory in legal terms for the Nisga'a Nation, it provided sufficient impetus for the federal government to substantially change its policy direction. The federal government subsequently commenced treaty negotiations with the Nisga'a in 1976 (Tennant 1996: 52).

The BC provincial government refused to participate in the negotiations, however, which made progress on the fundamental issue of land almost impossible because provincial governments in Canada control crown land (Tennant 1996: 53-54). During the 1980s, a series of development blockades and subsequent successful legal action brought by other First Nations in BC effectively suspended the provincial government's authority to allow resource development on crown land where treaties had not been negotiated (Tennant 1996: 55). This created a climate of considerable economic uncertainty for the province and political embarrassment for the provincial government. In 1988, the new Social Credit government created a Ministry of Native
Affairs, which represented an acknowledgment of the salience of First Nations' concerns and a shift, albeit slight, in the province's attitude toward First Nations peoples. At the same time, however, the new government followed its predecessors of 100 years before in reiterating the province's refusal to negotiate treaties or to recognise Aboriginal title. This demonstrates a steadfast adherence to the notion of *terra nullius* on which the occupation of most of BC was based.

By the end of the 1980s, it was clear that issues of Aboriginal title were likely to be subject to protracted legal action in BC for some time, and "the conviction grew that refusing to negotiate was becoming increasingly untenable" (Tennant 1996: 55). Meanwhile, during the Canadian summer of 1990, in the town of Oka in the eastern province of Quebec, an intense and sometimes violent confrontation erupted between the Kanehsatake Mohawks and the Quebec police and Canadian army, over a land dispute on the Kanehsatake's traditional lands (Pertusati 1997: 27-28). According to Tennant (1996: 56), the Oka "crisis" was the dominant political issue in Canada over those summer months, and Oka (as the incident is now widely known) has proved to be a critical moment in Indigenous-state relations in Canada (Haythornthwaite 2000: 34). For example, several Aboriginal communities in BC erected rail or road blockades as a demonstration of solidarity with and support for the Kanehsatake. The blockades also aimed to put pressure on the BC government to agree to enter treaty negotiations with the First Nations in the province. The BC blockades generated massive media coverage, which in turn created intense political and economic pressure for the provincial government (Tennant 1996: 56). Eventually, following a recommendation from his Native Affairs Advisory Council, the then BC Premier Vander Zalm announced that the province would enter into negotiations with First Nations after all. Significantly, however, the provincial government still declined to acknowledge the validity of Aboriginal title (Tennant 1996: 56). The process of treaty negotiation currently underway in British Columbia was established in the early 1990s as a result of Premier Vander Zalm’s announcement.

Since 1990, the shape taken by the BC treaty process can be characterised in terms of the three distinct forms of relationship that First Nations peoples have had to it. The first form of relationship is represented by the Nisga’a, whose negotiations with the
federal and BC governments resulted in the Nisga’a Final Agreement (NFA), or the “Nisga’a Treaty” of 1998 (Tennant 1996: 55). The second form is the treaty negotiations being carried out under the auspices of the British Columbia Treaty Commission (BCTC), which was established in 1993. And third is the group of First Nations, represented by the Union of British Columbia Indian Chiefs (UBCIC), who have refused to engage in any stage of the BC treaty process, because it does not constitute a recognition of Indigenous sovereignty. The UBCIC therefore provides an important referent for a critique in terms of the central themes of this thesis. These three modes of engagement with, or relationship to, the BC treaty process will now be discussed in turn.

The Nisga’a Final Agreement

The NFA was signed by Nisga’a Chief Joseph Gosnell, then BC Premier Glen Clark, and then federal Minister of Indian Affairs Jane Stewart in Aiyansh, BC, on 4 August 1998. It was ratified by the Nisga’a nation by referendum in November 1998, ratified by the BC legislature in April 1999, and finally ratified by the Canadian federal parliament and given Royal Assent in April 2000. The NFA was the direct result of more than 20 years spent at the negotiating table following the Calder decision of 1973. As Nisga’a Chief Joseph Gosnell pointed out in his speech to the BC Legislature in December 1998, however, it also represents the culmination of more than 100 years of political activism by the Nisga’a nation, who first went to the BC legislature seeking treaty negotiations in 1887, only to be turned away by then Premier Smithe (Gosnell 1998: 6-10). As such, the NFA can be read as the culmination of a century-long struggle for the recognition of Nisga’a sovereignty and rights to self-determination.

Approximately 5500 members comprise the Nisga’a Nation, and most of these live in four villages and three urban centres along the Nass River (the third-largest salmon-producing river in the province) in the pacific north-west of BC (Nisga’a Tribal Council 2002). In short, the Nisga’a Final Agreement (2000) provides for Nisga’a ownership and limited powers of self-government over 1992 square kilometres of land. Under the NFA, the Nisga’a can make laws governing culture and language, public works, regulation of traffic and transportation, land use, and solemnisation of marriages. The Nisga’a will also continue to provide health, child welfare, and education services.
With the approval of the provincial Cabinet, the Nisga’a government can provide policing services on Nisga’a Lands and establish a Nisga’a Court, providing that these meet provincial standards and requirements. Significantly, the NFA recognizes the Nisga’a Nation as “an aboriginal people of Canada” (Nisga’a Final Agreement 2000, my emphasis). Additionally, it

constitutes the full and final settlement of those aboriginal rights [defined in the treaty], including aboriginal title. Any other aboriginal rights that are determined to have existed, or may exist in the future, are released by the Nisga’a (Nisga’a Final Agreement 2000, my emphasis).

The NFA constitutes some recognition of the Nisga’a nation’s rights to self-government and self-determination. This clause from the Agreement, however, highlights the limitations of White peoples’ preparedness to acknowledge these rights when Indigenous people assert their sovereignty through a treaty-making process which is controlled by the state, as I argue below.

Since it was first signed in 1998, the NFA has been roundly praised by several groups within BC. In his speech to the BC legislature, Nisga’a Chief Gosnell pronounced the Agreement a “triumph for all British Columbians” and a “beacon of hope for Aboriginal people around the world” (1998: 5). At the initialling ceremony, then BC Premier Clark described the Agreement as a document that would begin “the healing that will bring us all into the twenty-first century a stronger, prouder and more united country” (1998). Clark said that the NFA signified that “we are determined to complete the unfinished business of the past century[,] that we will strive for justice and to reconcile divided communities[,] and that we will achieve the certainty and opportunity that all British Columbians desire” (1998, my emphasis). Significantly, for Clark and the provincial government, the NFA seemed to be largely a nation-building exercise, aimed at formally incorporating the Nisga’a into the overarching structures and institutions of White society: it will produce a “stronger, prouder and more united country.” At the same time, the Agreement would protect dominant interests: it will “achieve the certainty and opportunity that all British Columbians desire.” As earlier parts of this thesis have argued, “certainty” in this kind of context means the protection of White interests, particularly those in land and capital.\(^{146}\) Thus, as discussed below, the

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\(^{146}\) See also Stevenson (2001).
NFA can be seen as an instrument that is as much about the protection of White privilege as it is about the recognition of Indigenous peoples’ inherent rights to land and self-government.

Nonetheless, according to Foster, the NFA is years overdue, and it is, “by any reasonable standard, a good one” (1998: 11). Foster argues that the NFA stands out as a “model of compromise and moderation” when one looks around the world to see how other nations have dealt with their colonial pasts (1998: 11). Perhaps most significantly, Foster argues, the NFA constitutes recognition by the province of BC that “Aboriginal title is compatible with Crown sovereignty and that the province’s long-standing opposition to this view is, and always has been, legally wrong” (1998: 13). To the extent that this is true, it is a significant acknowledgment indeed, and certainly it seems more than could be achieved currently in the Australian context. Thus, the NFA exemplifies why advocates of treaty negotiations in Australia so frequently look to Canada for inspiration.

Notwithstanding the praise that it has received, the NFA has been the subject of intense controversy in British Columbia (Wood 1998: 27), and its development and the Agreement itself have attracted considerable criticism. Critics of the Agreement can be divided very broadly into two categories – those who say the Agreement went “too far” and those who say it did not go nearly far enough. Here I consider some examples in each category in relation to the central theme of this thesis – the relationship between sovereignty, nationhood, and Whiteness. This discussion highlights the continuities in discursive strategies employed by White people, which have been outlined in the preceding chapters.

The chorus of complaint that the NFA went “too far” by “giving away” too much to the Nisga’a nation has been led predominantly by the conservative BC Liberal Party (in opposition during the negotiations but elected to government in the province in 2001). When an Agreement in Principle was reached in the Nisga’a negotiations in February 1996, the BC Liberals threatened that they would renegotiate the parts of the Agreement they objected to if elected to government in the provincial elections held later that year (Ajello 1996: 24). When the NFA was reached in 1998, the BC Liberals
(still in opposition) demanded that it be put to a province-wide referendum before being ratified by the BC Legislature (Lewis 1998: 4). And when then BC Premier Clark refused to put the Agreement to a parliamentary vote, the Liberals challenged the constitutionality of the deal in the BC Supreme Court (Wood 1998: 27). The source of their angst over the NFA is twofold. First, the Liberals have argued that the Agreement is in conflict with the Canadian constitution, because it "gives" powers to the Nisga’a that in some areas (such as Nisga’a culture and language) would exceed those of the federal or provincial governments. The Liberals argue that the NFA therefore constitutes an amendment to the constitution, which can only be approved by referendum (Hall 1996; Maclean’s, 27 July 1998: 12; Maclean’s, 10 August 1998: 50). Second, the Liberals oppose the NFA on the basis that it is racist against non-Indigenous people. They claim, for example, that the NFA restricts voting rights on Nisga’a territory to people who belong to the Nisga’a nation (Maclean’s, 23 November 1998: 87; Maclean’s, 17 May 1999: 31).

Although the BC Liberals have voiced one of the loudest protests against the NFA, they have certainly not been alone. Conservative political commentators have asserted that the Agreement is a "giveaway" by "compliant politicians" to a "new brand of militant aboriginal leadership" (Foster 1998: 29, my emphasis). If used as a precedent for other negotiations, so the argument goes, the NFA constitutes a threat of such proportions to the national agenda 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 our country back from ourselves (Maclean’s, 10 August 1998: 50, my emphasis).147

Furthermore, commentators such as Gibson argue that the NFA’s bias toward community property over private property is antithetical to Canadian practice (1998: 60) and to the "great" democratic principles of individual political rights and private property as "the surest [bases] of freedom and productivity" (1998: 69, my emphasis). And, in a crude but logical extension of the argument that the Nisga’a treaty is racist, other politicians and at least one prominent BC newspaper publisher have argued that the

147 The Assembly of First Nations (AFN) is the peak body of Indigenous groups in Canada.
Agreement constitutes the establishment of "apartheid throughout British Columbia forever" (Goldberg 1998a: 6; Lewis 1998: 4).

These objections to the NFA raise several important points. The first is to do with the notion that the NFA is a "giveaway," both in terms of the resources that it provides for the Nisga'a nation and in terms of the argument that the NFA "gives" the Nisga'a rights that are not provided for by the Canadian constitution, thus creating a new level of "race-based" government. In response to the former point, Nisga'a Chief Gosnell points out that the terms of the Agreement pale in comparison to the "billions of dollars worth of timber, fish and mineral resources taken from his people's territory over many years" (Maclean's, 3 August 1998: 29). Indeed, a study by accounting and economics firm Price Waterhouse Coopers estimated that the resources taken from the Nisga'a over the years would be worth some $4.3 billion in total (Wood 1998: 27). Foster argues that the very point of the NFA is to "translate the rather vague Aboriginal rights that the Constitution recognises the Nisga'a already have into treaty rights that are more clearly defined and enforceable" (1998: 29). Perhaps the most significant aspect of the "giveaway" notion in terms of my argument, however, is that it relies on the assumption that those resources and those rights are White peoples' to "give." That is, the state is imagined to have underlying title to all the land within its domain. This assumption demonstrates a complete failure to comprehend the inherent nature of Indigenous peoples' rights. It also implies a conception of Canadian nationhood in which the usurpation of Indigenous rights and resources is viewed as unproblematic and the process of usurpation by which Canadian nationhood and sovereignty was established is considered to be entirely legitimate. Furthermore, it suggests that Indigenous peoples should be incorporated into the White nation, on the dominant group's terms. In this understanding of nationhood, White peoples' interests are therefore privileged, and the recognition of Indigenous peoples' rights to land and resources is constructed as an unreasonable affront to White entitlement.

My second point is about the ascription of "militancy" to Aboriginal people who seek to have their inherent rights recognised – that is, the idea that the NFA is a

\[148\] See also Taylor (1998: 40).
concession to a "new brand of militant aboriginal leadership" (Foster 1998: 29, my emphasis). This discourse of militancy is reminiscent of the kinds of discursive strategies that have been used to marginalise Indigenous activists who have argued for the recognition of Indigenous sovereignty in Australia. As Chapters Three and Five demonstrated is the case in Australia, the politics of the Aboriginal Tent Embassy and the Aboriginal Provisional Government are similarly constructed as "radical," extremist, and disruptive. This is another example of how the "spectre of delinquent Aboriginality" is used to justify attempts to extinguish Aboriginal and native title (Nicoll 1998: 181) or to argue against its recognition. In this discursive framework, Indigenous people who argue for recognition of their inherent rights are seen as combative or aggressive, because they challenge the discursive constructions of Indigeneity and Indigenous entitlement on which White dominant understandings of their place within the White nation depend.

This leads to my third point, which is that the White dominant constructions of nationhood within which this discourse occurs are based on the assumption of homogeneity – that is, on the assumption that "we are all homogenous in our rights" (Taylor 1998: 39). The function of this, according to Taylor (1998: 39), is to "[assume] away Aboriginal rights" by appealing, as Goldberg argues, to the populist rhetoric of "equality," "democracy," and "civil rights" (1998a: 6). The assertion of inherent Indigenous rights presents a manifest challenge to the assumption of homogeneity and, as a result, "special" rights are perceived to be antithetical to Canadian/non-Indigenous nationhood. In particularly conservative or extremist manifestations of this discourse, the recognition of "special rights" – such as in the NFA – is seen as racist or akin to apartheid. This discursive configuration of Indigenous rights is reminiscent of the rhetoric used by Pauline Hanson and her One Nation party to describe Indigenous affairs policy in Australia in the mid-to-late 1990s.150

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149 There are many examples of the ascription of militancy to Aboriginal activism: see, for example, a report in the Globe & Mail newspaper on an Aboriginal protest at the Sun Peaks ski resort in British Columbia in 2001. The article describes how a "group of young native people, some dressed in army fatigues, halted traffic for three hours yesterday on a road leading to the ... resort" (Globe & Mail, 25 August 2001: A7, my emphasis).

150 See, for example, Perera and Pugliese (1997).
The assumption of homogeneity in conservative liberal democratic discourses of rights relies on an understanding of the sovereignty and legitimacy of the Canadian state, the jurisdiction from which those rights derive, as unproblematic and uncontested. This assumption depends in turn upon the notion that sovereignty can be vested only in the state. These assumptions constitute the "incontestability of the state" myth. The assertion by Indigenous peoples of their sovereignty, and of their inherent rights to self-determination and self-government, challenge the liberal norms of individualism, universalism, and state sovereignty on which the maintenance of the incontestable state myth relies. This challenge can provoke anxiety in White people and White institutions, because a change to the configuration of power in liberal democratic societies might bring a loss of White entitlement. This anxiety reveals itself in a conservative political discourse about Aboriginal entitlement, demonstrated by the view in Maclean's magazine that White Canadians may have to begin "buying the country back" from themselves (Maclean's, 10 August 1998: 50).

Foster argues that "there is something distinctly hypocritical about stripping a people of their resources and then describing a complex and careful attempt to restore some of those resources as 'apartheid' or as a violation of equality before the law" (1998: 34). Further, he argues, such thinking reveals a political philosophy with roots that "reach back to colonial times" (1998: 34). This is no doubt true, but it does not sufficiently delineate the problem, which is that, within a philosophy of nation that views all citizens as homogenous and all citizen rights as undifferentiated, this characterisation of Indigenous rights makes sense. Hypocritical it may be, but it is internally logical nonetheless. This is an example of what Gramsci describes as the "common sense" aspect of hegemony (Simon 1982: 25), whereby the existing order of things seems both natural and inevitable and comes therefore to constitute the invisible norm. These points thus demonstrate how important it is to challenge and critique these discourses of nationhood and rights and to interrogate hegemonic Whiteness, all of which keep the invisible norms in place.

The criticisms that the NFA went "too far" by "giving" too much away provide grounds for critiquing the public discourses in which Indigenous rights are often framed. Critics who fall into the second category identified earlier - those who argue
that the NFA did not go “far enough” – also raise some significant issues with respect to questions of Indigenous sovereignty and dominant constructions of non-Indigenous nationhood. In particular, these critiques highlight the ways that the NFA can be seen to reinforce, rather than challenge, many of the problematic assumptions embedded in dominant White constructions of nationhood and sovereignty.

According to BC-based Aboriginal lawyer and activist Ardith Walkem (2000: 24), the NFA falls short of adequate recognition of Indigenous peoples’ rights for several reasons. First, it contains far less than what the Nisga’a are entitled to inherently and at common law. Second, despite its limitations, Walkem is concerned that the NFA will form a blueprint or “high water mark” for other BC treaty negotiations (2000: 23-25). Furthermore, the NFA provides that the Nisga’a nation “releases all title and rights not specifically set out in the agreement,” which, Walkem argues, constitutes a modern version of the “cede, release, and surrender” treaties negotiated in the eighteenth and nineteenth centuries (2000: 23-25). The terms of the NFA specifically include a “release” clause, as discussed above. As the historical background in the earlier part of this chapter discussed, the “cede, release, and surrender” treaties were explicitly designed to extinguish Aboriginal rights and title, in order to preserve and protect White interests. That is, the “cede, release, and surrender” treaties were instruments geared toward the institutionalisation of White power and privilege. The sum of these problematic parts, according to Walkem, solidifies the dominance of the Canadian rule of law over Nisga’a land, government, and citizens; that is, it consolidates the place of First Nations within and as subordinate, rather than equal, to the White Canadian nation. Therefore, Walkem argues, the NFA provides a model that is essentially assimilationist (2000: 23-25). For these reasons, and as the following discussion of the British Columbia Treaty Commission process shows, many other BC First Nations do not wish to enter into NFA-style agreements (Haythornthwaite 2000: 34).
Similarly, Tully argues that the NFA’s “release” clauses, which have the legal effect of extinguishment, constitute a neocolonial governmental approach to Indigenous-state relations (2000: 49-50). This approach, according to Tully, is aimed at extinguishing Indigenous peoples’ inherent rights and then incorporating them into the dominant society:

[a]s far as I am aware, this is the first time in the history of Great Turtle Island [North America] that an Indigenous people, or at least 61 per cent of its eligible voters, has voluntarily surrendered their rights as Indigenous peoples, not to mention surrendering over 90 per cent of their territory, and accepted their status as a distinctive minority with group rights within Canada (Tully 2000: 50).

Therefore, as Walkem (2000) and Tully (2000) suggest, the Nisga’a treaty does not constitute a recognition of Indigenous sovereignty and nationhood, as would be the case with a treaty negotiated according to the definition posed in Chapter Two. Genuine recognition of Indigenous sovereignty and nationhood would entail changes to the configuration of power and authority within the state. At best, the NFA makes minimal changes to the structures and institutions of the Canadian state. Rather, the NFA takes Canadian sovereignty as an unproblematic given, and Indigenous peoples are consequently recognised as First Nations of Canada, who are ultimately subject to the laws of the Crown. They are not recognised as First Nations in their own right. That is, the NFA is based on a construction of nationhood in which Indigenous peoples are incorporated into the Canadian nation and not recognised as self-determining people with sovereignty and nationhood(s) of their own. As the following sections of the chapter demonstrate, this critique of the NFA is also a theme in critiques of the BC Treaty Commission-endorsed negotiations, as attested by the position of the UBCIC on the BC treaty process, discussed below.

**The British Columbia Treaty Commission**

In December 1990, around the same time that the BC government was preparing to join in the Nisga’a negotiations that had commenced between the federal government and the Nisga’a nation, the British Columbia Claims Task Force was established. The

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151 It is important to note that criticism of the NFA has also come from the Nisga’a’s Indigenous neighbours, the Gitanyow and Gitksan peoples. They argue that the land area claimed by the Nisga’a in the Agreement was greatly expanded at the expense of their tribal neighbours. See, for example, Sterrit (1998), Hume (2000), and Walkem (2000: 25). Similar criticisms have also been made of the Nunavut self-government arrangements (Hume 2000: 64).
Task Force was formed by agreement between the federal and provincial governments and the BC First Nations Summit (FNS) to make recommendations about how the treaty negotiations should proceed. The tripartite Task Force (comprising representatives from the federal and provincial governments and the FNS) reported in June of the following year. Among its most significant recommendations were that treaties – the "blueprints" for a "new relationship" between First Nations, BC, and Canada to be based on "mutual trust, respect, and understanding" – could deal with any issue "viewed as significant" by the negotiating parties. This was important because it left open the possibility of negotiations over issues such as self-government (British Columbia Claims Task Force 1991: 1; Tennant 1996: 58). The Task Force also recommended the establishment of the British Columbia Treaty Commission (BCTC) to facilitate the process of negotiations and to ensure that they proceeded in a fair, impartial, and effective manner. That is, the role of the BCTC was not to negotiate treaties but to be the "keeper" of the treaty process – to facilitate it by encouraging timely negotiations, assisting in dispute resolution where necessary, and ensuring that First Nations have access to the resources necessary to take part in the negotiations (First Nations Education Steering Committee, B.C. Teacher's Federation & Tripartite Public Education Committee 1997: 19). The Task Force's report also included the recommendation that treaty negotiations follow a six-stage process:

1. Submission of the Statement of Intent by the First Nation or nations to negotiate
2. Assessment by the BCTC of each party's "readiness" to negotiate (for example, having identified subject matters to be negotiated) and assistance with preparation where they are not
3. Negotiation of a Framework Agreement (the subject matter outline of the treaty)
4. Negotiation of an Agreement in Principle (a draft treaty)
5. Negotiation to finalize a treaty, followed by formal ratification by the groups represented by the three parties

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152 The FNS is a group of First Nations and Tribal Councils in BC, which formed in 1990 to represent the interests of First Nations in the treaty process and to provide a forum for addressing issues related to Treaty negotiations (First Nations Summit 2003). It was previously known as the First Nations Congress (Tennant 1996: 57).
The Task Force’s report was accepted by the FNS and the federal and provincial governments, and all three parties worked to implement its recommendations and prepare for treaty negotiations to begin over the next several years. Subsequently, the British Columbia Treaty Commission was constituted in April 1993 and began accepting “statements of intent” to negotiate from First Nations in December of 1993. Negotiations commenced in 1994 (Tennent 1996: 61-63). According to Tennant (1996: 63), by 1995, a majority of 130 of the province’s 198 Aboriginal communities had entered the treaty process (although the number of separate negotiations required was only 47, because many Aboriginal communities chose to negotiate collectively). Like the Nisga’a’s negotiations, the engagement of these First Nations with the BCTC process might be read as an assertion of these nations’ sovereignty through the treaty process (since treaties, by definition, are supposed to be nation to nation negotiations based on mutual recognition). By February 2003, 42 First Nations had reached Stage 4 in the negotiations process, and only one had reached Stage 5 (British Columbia Treaty Commission 2003). None had reached Stage 6; that is, no treaties have yet been successfully concluded under the BCTC process. As I demonstrate here, another similarity between the BCTC process and the Nisga’a negotiations is that the BCTC process highlights the conditional nature of White recognition of Indigenous rights. This is because power and authority within the state – the framework for recognition – is not altered or reconfigured in any meaningful way.

Since 1993, the BCTC treaty negotiations have been subject to similar criticisms as those levelled at the NFA and the negotiations which led to it, as I discuss below. Additionally, the negotiations have been criticised for being too “secretive,” because they allegedly exclude the non-Indigenous public from the process (Hume 2001a: B5; McKee 1996: 57-59). Concerns that the financial costs of negotiating and concluding treaties are too high, and will cost Canadian and British Columbian taxpayers too much, have been common.\footnote{153 As Haythornthwaite points out, the “fiscal defense of the non-Aboriginal citizen is a common theme of the right-wing opposition to the BCTC.”}

\footnote{153 See, for example, Vancouver Sun (24 October 1994: A7). In response to this sort of criticism, however, many people have argued that the cost of not pursuing treaty settlements will be far greater in the long term (McKee 1996: 63).}
Conservative commentators such as Mel Smith have complained that governments have “offered” more in treaty negotiations than is strictly “necessary” and more than the Canadian courts have recognised is the extent of Aboriginal entitlement (Smith 1995). Along similar lines, Tom Flanagan argues that, through treaty negotiations, the government “shamefully” bows to a special interest group consisting of the “privileged aboriginal political class,” who are “pretending to be leaders of nations in their own right” (2001b: A14, my emphasis). These conservative criticisms – which suggest that the BCTC process is a costly giveaway and that non-Indigenous people do not have sufficient control over the process – have much in common with criticisms of the NFA. As such, they indicate a similar anxiety about the threats to White entitlement apparently posed by treaty negotiations. The construction of those Indigenous people who advocate recognition of their rights as some sort of privileged political elite is also similar to the conservative criticisms that have been levelled at organisations such as the APG in Australia.

This conservative public scepticism about treaty negotiations reached a new height after the Nisga’a Agreement in Principle was reached in 1996 and the NFA was reached in 1998. Haythornthwaite argues, however, that limited views of the treaty process are not restricted to the right (2000: 34). Rather, he suggests that debate about the BCTC negotiations has been framed by two “colonialist positions”:

- The liberal viewpoint advocates the buying of social peace by refurbishing Indian Act segregation with land, money, municipal-style powers and limited resource rights, while the Right argues that First Peoples already enjoy too many privileges (Haythornthwaite 2000: 34).

In other words, even apparently “progressive” commentaries are inherently conservative, because they take the “Canadian nation” as an uncontested space and Indigenous peoples’ incorporation into it as unproblematic. This demonstrates the continuities across the discursive repertoire of Whiteness that I have described in earlier chapters. Implicit in the liberal viewpoint to which Haythornthwaite refers is the idea that the BCTC negotiations are a sufficient means of acknowledging Indigenous peoples’ grievances against the state. The right-wing view described by Haythornthwaite suggests the BCTC negotiations go “too far”, to use the rhetoric

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154 See also Flanagan (2001a).
ascribed to the NFA. The argument that the BCTC process is limited and inherently conservative is supported by the fact that several First Nations have withdrawn from the BCTC process. The Sechelt Native Band, for example, pulled out of negotiations in May 2000 in favour of litigation against the BC and federal governments; this was after rejecting a “Nisga’a-style” treaty offer whereby land, resources, money, and municipal-like powers would be “exchanged” for the renunciation of any future Indigenous claims to land and resources rights (Haythornthwaite 2000: 34). Five other groups also rejected Nisga’a-style treaty offers around the same time (Haythornthwaite 2000: 34). As Haythornthwaite points out, the inclusion of so-called “release and surrender” clauses in treaty offers “is called ‘certainty’ by the governments and ‘extinguishment’ by Aboriginal oppositionists” (2000: 34).

This situation should be familiar: it is another example of the discourse of “certainty” functioning to protect White interests and to reinforce White power and privilege. Stevenson argues that, in this context, the concept of “certainty” is underpinned by the notion of a “land surrender or an exchange of very specific treaty rights for the complete and absolute cession of all undefined rights to the land and the territory” (2001: 114). Therefore, the rhetoric of “certainty” is framed almost exclusively in terms of non-Indigenous (usually economic) interests. For example, the Economist reported in August 2000 that “businessmen are getting fed up” with declining investments in BC as a result of the “native lands issue” (Economist, 5 August 2000: 38). Similarly, in July 2001, the National Post reported of concern among business leaders that failure to resolve Indigenous claims in BC would result in “economic rot” in the province (25 July 2001: A6; see also The Province, 22 June 2001: A7). Even left-leaning commentators have often uncritically adopted the rhetoric of economic “certainty” (see, for example, Hume 2001b).

This worrying over the need for “certainty” to provide for non-Indigenous investment is reminiscent of the public debate that took place following the High Court of Australia’s decision in Wik Peoples v. Queensland (1996) ("Wik 1996"). Wik (1996) recognised that native title can coexist with pastoral leases, although it determined that, in the event of a conflict between a pastoralist and native title holders, the pastoralists’ rights would prevail every time (Hiley 1997: 2). Nonetheless, the federal
government's legislative approach, and much focus of public debate following the Wik (1996) decision, was framed in the context of the mining and pastoral industries' need for "certainty" about land tenure (Byrne 1997: 91). Within this discourse, Indigenous peoples' need for certainty about their rights and access to their resources is of secondary importance. Arguably, the discourse of "certainty" is also underpinned by a desire for certainty about the legitimacy of White occupation of, and sovereignty over, land, which would be achieved through the extinguishment of Indigenous peoples' rights to land. This demonstrates how discourses associated with both the BCTC negotiations process and the native title process in Australia are similarly geared toward the protection of White "entitlement," at the expense of Indigenous rights where necessary. On this point, the UBCIC argues that

Canada's strive for certainty reflects a desire that Indigenous Peoples assimilate into Canada, that we sever our connection to the Land. Canada asks that we dig up the roots connecting us to the Land and replant them through treaties. This lack of understanding and fear about our connection to the Land is what Canada strives to address through certainty (1998).

There are several other features of the BCTC process that reveal how the negotiations are predominantly weighted in favour of the protection and privileging of White interests. For example, many First Nations have been aggrieved that the governments have prejudiced the results of the negotiations by selling disputed land to third parties and setting preconditions, such as those precluding private land from being the subject of negotiations (Haythornthwaite 2000: 34). This is similar to the native title process in Australia, in which freehold land – that is, approximately 95 percent of the Australian continent – cannot be subject to native title claims (Byrne 1997: 91). Another source of contention has been the requirement that local governments give permission to include some lands in their jurisdiction as treaty settlement lands, which effectively amounts to a third-party right of veto. This issue prompted the formation of the First Nations Treaty Negotiations Alliance (FNTNA) in 1999, an alliance of First Nations involved in the treaty process, including those such as the Sechelt, Sliammon, and Snuneymuxw First Nations, all of whom have received "offers" from the governments during negotiations. The FNTNA aims to work cooperatively toward common objectives of

fair, honourable, workable and sustainable treaties that enable First Nations to achieve social, political, and economic self-sufficiency on an integrated basis within their regional economies and communities, without compromising their aboriginal rights and title (First Nations Treaty Negotiations Alliance 2000a: 1, my emphasis).

It seems that governments are intent on asking First Nations to compromise their inherent Indigenous rights and title, however. Several post-Nisga’a government land “offers,” including those made in the Sechelt, Sliammon, and Snuneymuxw negotiations, amount to less than 1 percent of the traditional territories of these nations. This is even less than the land conceded by the provincial and federal governments in the NFA, which was criticised by many First Nations for including only 5 to 8 percent of the Nisga’a’s traditional territory (Haythornthwaite 2000: 34). The very discourse of governments “offering” land to Indigenous peoples reaffirms the notion that it is theirs to offer or to give. This illustrates how treaty negotiations occur within a framework that affirms, rather than challenges, the “legitimacy” of White occupation of Indigenous land. In effect, this rewards the process by which Indigenous lands were usurped during colonisation, because it seeks to extinguish Aboriginal title and confirm non-Indigenous title to most of that land. This is similar to the way that the APG described the Mabo (1992) judgment in Australia: the Court did not “overturn anything of substance, but merely propounded White domination and superiority over Aborigines by recognising such a meagre Aboriginal form of rights over land” (Mansell 1992b: 6).

Thus, the decision of the Sechelt First Nation to withdraw from the BCTC process and the rejection by other First Nations of treaty offers both point to some important limitations of the BCTC-endorsed negotiations. These events also created something of an impasse in the BCTC process, which led the FNS to organise a series of protest actions, including information pickets, in 2000. The protests were aimed at forcing the government to change its stance on what it was prepared to “offer” in treaty settlements (Haythornthwaite 2000: 34). Increasingly, First Nations people in BC are also strategically engaging in the rhetoric of “certainty” by threatening to create

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156 See, for example, First Nations Treaty Negotiations Alliance (2001a).
“maximum economic uncertainty” through the use of rail and road blockades. However, they are usually chastised by conservative commentators for doing so. For example, Barbara Yaffe, a Vancouver Sun columnist, wrote in July 2001 that, regardless of the controversy surrounding any given issue, “the way to fight it is not to unilaterally declare a modern-day version of war” (2001a: A12). That Aboriginal peoples in BC “feel so free” to do so, she argues, “suggests aboriginal people somehow have come to believe they are exempt from society’s rules, a dangerous notion indeed” (Yaffe 2001a: A12, my emphasis).

Yaffe’s commentary exhibits several features of the discursive repertoire of hegemonic Whiteness that earlier chapters have outlined. First, her suggestion that Indigenous protests – and Indigenous peoples’ appropriation of White discourses of Indigenous rights – amount to a declaration of a “modern-day version of war” exemplifies the discourse of delinquency. Second, her statement that this kind of activism is not “the way to fight” is also patronising and paternalistic: she positions herself as having access to knowledge about the right and wrong ways to “fight” and Indigenous people who pursue what she perceives to be the “wrong” ways as foolish and naïve. Third, this suggestion highlights the limits of White tolerance: Indigenous demands will only be listened to if they are made in ways that White people find appropriate and acceptable. Fourth, Yaffe’s assertion that it is “dangerous” for Indigenous people to see themselves as “exempt from [White] society’s rules” indicates White separatist anxiety. This anxiety, as previous chapters have shown, arises in the wake of challenges and disruptions to constructions of nationhood in which White people and White interests are central.

Problems in the treaty process were further exacerbated in May 2001, when the BC Liberal Party was elected to government (after 10 years of the National Democratic Party being in office) and promptly changed the terms on which negotiations would be based. After it took office, the new government issued BC negotiators with a new set of instructions limiting the range of issues that could be the subject of negotiations and

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157 See, for example, The National Post (24 July 2001: A1, A6) and The Vancouver Sun (23 June 2001: A3).
limiting, in particular, negotiations on Aboriginal self-government (Plant 2002). When
in opposition, the BC Liberal Party brought a lawsuit to the BC Supreme Court
challenging the NFA, which it has only very recently decided to drop (Palmer
2001: A18). In 2002, the new government held a referendum to seek the BC
population’s advice on the principles that should inform the provincial government’s
approach to the treaty negotiations process (British Columbia Legislative Assembly
Select Standing Committee on Aboriginal Affairs 2001). It was particularly concerned
about providing for greater “certainty, finality and equality” (Nanaimo Daily News, 22
February 2001: 1). It also planned to seek “direction” from the Supreme Court of
Canada on the constitutionality of Aboriginal self-government before it proceeds with
further negotiations on this issue. It is not surprising, then, that the FNTNA has
argued that the new government has effectively suspended negotiations in the
province, because the government’s actions leave “virtually nothing of substance to
negotiate” (First Nations Treaty Negotiations Alliance 2001b).

Although the various recalcitrant actions of the new BC Liberal government have
stalled the treaty process considerably, in many ways, this simply highlights some of
the inherent problems that have plagued the process since its beginnings. Two issues
are particularly important. First, one of the key stumbling blocks is disparate
expectations of the treaty process on the part of governments and First Nations (British
Columbia Treaty Commission 2001a: 6). This was identified by the BCTC in a review
of the treaty process in 2001, and, as discussed above, it has been a theme of
negotiations between First Nations and non-Indigenous governments in Canada since
the Royal Proclamation was issued in 1763. Like the early periods of treaty

158 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 aboriginal self-
government will have the characteristics of municipal government” (National Post Online, 5
April 2002). According to Goldberg, the referendum “ignited a fireball of protest and a
boycott campaign.” This included a wide cross-section of groups within BC, for example
churches, trade unions, and Indigenous groups such as the FNS and UBCIC (2002: 4). The
results of the referendum affirmed all the government’s propositions contained in the
referendum questions (for example, the majority of returned ballots indicated agreement
that future treaties should ensure private property is not expropriated for treaty
negotiations). Commentators such as Goldberg argued, however, that the result was likely
negotiations, the disparity in expectations in the BC process stems from disparate understandings of sovereignty and nationhood. As this discussion has demonstrated, the government approach is clearly based on the view that the sovereignty of the Canadian state is beyond question. One implication of this view is that any rights of Indigenous self-government negotiated as part of a treaty will be subordinate to the structures of the Canadian and provincial governments. This is different to the view of many First Nations, who argue that treaties should be "negotiated among equals. ... [O]ne Party cannot impose something on another" (First Nations Treaty Negotiations Alliance 2000: 2). This leads to the second important issue, which is, as Haythornthwaite argues, that many, if not all of the problems in the BCTC process stem largely from the massive power imbalance that exists between the negotiating parties:

> 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 citizen tax base of millions and monster bureaucracies at their disposal face peoples numbering several hundreds or thousands whose governmental structures are entirely dependent upon their negotiator adversaries (2000: 34).

Lajoie describes this state of affairs in a similar vein: “The moral of this story is that the story is not moral but political. ... It is governed by the rules of politics, namely power and goodwill” (2001: 27). The governments do not necessarily act toward First Nations with the respect due to equals, as should occur in a treaty. Rather, they dictate the terms and then “negotiate” only with those who agree on those terms. And, as the actions of the recently elected BC government demonstrate, those terms can change at any time. This demonstrates the way that White interests are privileged and White power is maintained by the treaty negotiations process.

I would argue that it is for these sorts of reasons that some Indigenous communities in British Columbia have chosen not to participate in any stage of the modern treaty negotiations. This position is most obviously demonstrated by the Union of British Columbia Indian Chiefs (UBCIC), who provide an important referent for further critique of the BC treaty process in relation to the central themes of this thesis.

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to be an inaccurate depiction of public opinion because of the large number of expected boycotts and spoiled votes (2002: 4).
The Union of British Columbia Indian Chiefs

The UBCIC, comprising Indian Chiefs mostly from the interior of British Columbia, was formed in 1969. This was partly in response to the federal government’s assimilationist objectives for Indigenous people, outlined in its 1969 White Paper, and “partly as an inevitable outcome of a growing conviction of many of our people that our survival in the face of such policies depended upon our ability to work together” (UBCIC 2001). Since the beginnings of the modern BC treaty process in 1990, the UBCIC’s members have desisted from any involvement in the process, because it does not meet the conditions upon which they are prepared to negotiate a coexisting relationship with Canada. Like other Indigenous peoples, the UBCIC argues that First Nations are original peoples and that their rights to their traditional territories, and to jurisdiction over those territories, flows from that status (UBCIC 1980). The UBCIC’s point of departure from First Nations who have chosen to engage in the treaty process is the principles that they argue should underpin any negotiations with Canadian governments.

The UBCIC argues that any negotiations between First Nations and governments should be based on four key principles. The first is recognition of Aboriginal peoples’ right to self-determination (as it is defined by both the International Covenant on Economic and Social Rights and by the International Covenant on Civil and Political Rights), by virtue of which any alienation from land, title, or jurisdiction can occur only with the consent of the affected Indigenous peoples. The second principle is recognition of the inherent sovereignty of First Nations, as it was recognised in the Royal Proclamation of 1763. Third is the imperative to move away from colonising structures of government – that is, the principle of decolonisation. And fourth is recognition of Canada’s conditional sovereignty – that is, that Canada’s sovereignty is conditional upon it protecting and adhering to the Crown’s obligation to First Nations (UBCIC 1980). The UBCIC’s objections to the BC treaty process can be summarised by their argument that it does not adequately take into account any of these fundamental principles. To underscore their scepticism about the effectiveness of the process in the absence of these principles, the front page of the UBCIC’s web site features a clock displaying how much time has passed without a ratified treaty in BC since the establishment of the BCTC (UBCIC 2001).
The UBCIC also rejects the inclusion of the so-called "release and surrender" clauses in BC treaties, where the Aboriginal group who is party to the treaty is required to agree to the extinguishment of any rights not included in the treaty agreement, as was the case in the NFA discussed above (David J. Hunt, UBCIC Administrator, pers. comm., 5 September 2001). The UBCIC argues that the inclusion of these clauses demonstrates that the Crown's willingness to negotiate land claims is premised on Indigenous peoples not being able to fully practice their rights:

Canada's negotiation stance is "We will recognise your rights, but only if you first tell us how you will exercise them, and only if you promise that your rights will not interfere with our interests" (UBCIC 1998).

The UBCIC also objects to the role of the provincial government in the negotiations process. For the UBCIC, "to accept a role for the province would be to accept the de facto displacement of aboriginal governments and their jurisdictions that had occurred when the colony and province had been created" (Tennant 1996: 63). That is, treaties should be negotiated on a nation-to-nation basis, which means directly between the First Nations and the federal government. Consequently, in the UBCIC's view, there is no place for British Columbia in the negotiations process (McKee 1996: 39), because it does not constitute a nation. Further, the UBCIC argues 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" (McKee 1996: 39).

Thus, the UBCIC directly and overtly challenges many of the limitations of the BC treaty process discussed above. In doing so, it demonstrates many similarities between the UBCIC and the Aboriginal Tent Embassy and Aboriginal Provisional Government, which were discussed in Chapters Three and Five.\(^{159}\) For instance, the UBCIC challenges the way that the negotiations process privileges White interests over Indigenous rights through the extinguishment clauses. This is similar to the APG's

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\(^{159}\) It is also important to point out that there are significant differences between the UBCIC and the Aboriginal Tent Embassy and the APG. For instance, because of the band council system in Canada and the fact that the UBCIC's members are band council chiefs, they necessarily must deal with government on service delivery and other issues that affect their local communities. Conversely, the Aboriginal Tent Embassy and the APG tend to sit outside the structures and institutions of the state (although individuals associated with these
critique of the native title process in Australia. The UBCIC also asserts Indigenous nations' inherent sovereignty, thereby challenging the basic assumption that Canadian sovereignty is uncontested. Moreover, in arguing that the treaty process involves negotiating over land and resources that have never been ceded, the UBCIC challenges the view that the Canadian state has underlying title to all of the land within its domain. Hence, the BC process does not meet the four conditions or principles under which the UBCIC would be prepared to negotiate with the Canadian government. The irony of White refusals to recognise Indigenous sovereignty and rights to self-government, according to the UBCIC, is that Aboriginal people of Canada already have a degree of self-government through their band councils within Canada (Manuel 1977). And, the UBCIC argues, recognition of Indigenous peoples' inherent sovereignty is not to be feared. Rather, effective implementation of their proposals for self-government would "resolve current political, economic, legal and social conflicts facing [Indigenous] people, and will mean that, for the first time, Indian people will share in the wealth of Canada" (UBCIC 1980).

Like the assertions of Indigenous sovereignty in Australia discussed in earlier chapters, the UBCIC position suggests that the recognition of Indigenous sovereignty in Canada would contribute to the process of resolving outstanding questions about the legitimacy of White occupation of the land now known as Canada. However, the responses provoked by challenges to normative frameworks in which Indigenous–White relations are managed – as demonstrated by the examples above – show how averse White people and institutions are to the acknowledgment and recognition of Indigenous peoples' inherent sovereignty. Thus, White Canadian responses to challenged normative frameworks can be understood in terms of the state of panic or anxiety that ensues when "established identities" are disrupted or challenged (Connolly 1995: xv). The UBCIC’s critique of the BC treaty process therefore highlights the ways in which the process shares many similarities with the Australian situation, as I have described it in this thesis. White responses to the UBCIC’s opposition to the BC treaty process also demonstrate the similarities in discourses and discursive

organisation organisations have participated in state structures in different capacities, as previous chapters have noted).
strategies used by White people in Canada and Australia to marginalise Indigenous groups who advocate recognition of their sovereignty. For example, the UBCIC, the Aboriginal Tent Embassy, and the APG are each constructed as “radical” organisations, because they operate outside the normative discourses in which Indigenous rights issues are framed. Consequently, as in the case of the Aboriginal Tent Embassy and Aboriginal Provisional Government in Australia, the UBCIC tends to be marginalised by White people and institutions: it is seen as having nothing important (from the politicians’ perspectives) or interesting (from the media’s perspective) to say.\textsuperscript{160}

As I noted at the chapter’s beginning, Canadian models for managing Indigenous–White relations are often lauded in Australia as more progressive than the approaches currently employed in Australia. However, the UBCIC’s position on the BC treaty process, and the White responses this position elicits, demonstrate that Canadian approaches, as far as they can be generalised by the BC experience, fall far short of the “ethical yardstick of Indigenous sovereignty” that I discussed in Chapter Two. That is, the BC treaty process does not acknowledge or recognise Indigenous peoples’ inherent sovereignty in any meaningful way. As I discuss below, this is because the BC process, like its Australian analogues, takes place within a state structure that is ordered by hegemonic Whiteness.

\textbf{Treaty-making in BC: “Negotiating space in the master’s house”?}

Ardith Walkem argues that modern-day treaties in British Columbia are simply a means by which Indigenous peoples “negotiate space in the Master’s house” (Walkem 2000: 25). This is because the denial of Indigenous sovereignty and nationhood upon which Canada was founded is perpetuated by the modern-day negotiations process in BC:

\begin{quote}
Instead of challenging this history, 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 (Walkem 2000: 24-25).
\end{quote}

\textsuperscript{160} See, for example, Yaffe (2001b).
Thus, as Walkem suggests, the BC treaty process does not involve any reconfiguration of power and sovereignty within the Canadian state, such as that necessarily entailed by the recognition of Indigenous sovereignty. In this part of the chapter, I wish to analyse in more detail the BC treaty process in terms of the relationship between sovereignty, nationhood, and Whiteness. I also wish to explore how the BC process subsequently highlights not the progressive nature of Canadian approaches to Indigenous-White relations but rather the importance of critiquing and interrogating the structures and frameworks within which Indigenous-White relations take place.

**Sovereignty, legitimacy, and treaty-making**

Chapter Two defined "treaty" as an agreement between two (or more) mutually recognised, consenting sovereign nations. The picture of modern-day treaty-making in British Columbia that has been painted here suggests that the BC treaty process is something else entirely: although the parties might be consenting, their negotiations are characterised by massive imbalances in power and resources. Neither does the process adhere to the other fundamental principles of treaty-making included in the definition: that is, the government parties refuse to recognise the First Nations' continuous sovereignty and nationhood. Why then, as Schulte-Tenckhoff asks, call it a treaty process, and a modern one at that? (2000: 12) And, if the treaties are not being negotiated on an equal, nation-to-nation basis, what implications does this have for the relationship between treaty-making and issues of sovereignty and legitimacy?

The first section of the chapter suggested that the term "treaty" is a misnomer when applied to historical treaties in Canada. This is also the case with modern-day treaty-making in BC. This is because a treaty is not a treaty when one or more of the parties to it (in this case, the governments of Canada and British Columbia) do not recognise the continuous sovereignty and nationhood of the Indigenous peoples with whom they are negotiating. These negotiations are called treaties because "treaties" have historically been the framework within which Indigenous-state relations in Canada have been defined. But, as de Costa argues, the BC process seems to be less concerned with questions of sovereignty and legitimacy than it is with "[settling] the indigenous problem once and for all" (2002: viii). As Tully points out, although nation-to-nation negotiations do not necessarily mean that First Nations are "outside" Canada, there is
an “irreducible international dimension” to treaty-making (2001: 9). As far as the federal and provincial governments are concerned, however, they are negotiating 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 BC” (Tully 2001: 8). As Tully points out, “for many of the First Nations, this is to foreclose precisely what the negotiations should be about” (2001: 8).

Furthermore, the state’s insistence that First Nations are groups within Canada can be seen as a refusal to relinquish ultimate authority over Indigenous peoples and Indigenous lands. For this reason, Alfred argues that, despite its progressive facade, the BC treaty process “represents an advanced form of control, manipulation, and assimilation ... based on the mistaken premise that Canada owns the land it is situated on” (1999: 119-120).

Thus, it is certainly true that treaties versus terra nullius might be the defining historical difference that has made for the different frameworks within which Indigenous-state relations are managed in Canada and Australia today. It is clear, however, that the BC treaty process is premised on a continuing refusal to recognize Indigenous peoples’ sovereignty and nationhood. Indeed, as Macklem argues, notwithstanding the Royal Proclamation and the history of treaty-making in Canada, the occupation of British North America has always proceeded on the assumption that the British and later Canadian governments had sovereignty over the land (and its people) and underlying title to all of it (1993: 13-19). As previous chapters have discussed, this is also the case in Australia. The paradox is that Australian governments have consistently refused to engage in treaty negotiations because treaties would constitute a recognition of Indigenous sovereignty or nationhood within the “nation”-state. This is exemplified by government responses to calls for a treaty in the early 1980s, as discussed in Chapter Three. It is also illustrated by Prime Minister Hawke’s reneging on his commitment to negotiate a treaty in response to the Barunga statement, discussed in Chapter Four. Yet, the governments of British Columbia and Canada seem prepared to engage in “treaty” negotiations precisely because they do not recognise Indigenous sovereignty and nationhood. In other words, Australian governments have refused to engage in treaty negotiations, whereas Canadian governments have engaged in negotiations that are treaties only in name.
This paradox points toward an explanation for the difference in the way the term “treaty” is generally deployed in Australia and Canada. Because the colonisation of Australia was based on the assumption that the entire continent was terra nullius, Indigenous peoples have tended to be homogenised in Australian political and public policy discourse. The concept of “treaty” with respect to Indigenous peoples has no legal precedent here. To the extent that it has been used in Australia, therefore, the concept of “treaty” has evolved to be understood generally to mean some sort of symbolic (rather than legal) agreement between the Commonwealth and Aboriginal peoples as a homogenous whole. ¹⁶¹ In contrast, as this chapter has shown, Indigenous peoples in Canada have been treated (or treated, as it were) on a case-by-case basis, hence the more specific use of the term in the Canadian context. Although this indicates important discursive differences, which have made for different approaches to managing Indigenous–White relations in Australia and Canada, there are also fundamental similarities, as this chapter has argued. The basis of these similarities is hegemonic Whiteness – that is, Whiteness as dominant subject position and source of power and privilege in Australian and Canadian society. The institutionalisation of White power and privilege is manifested in the state’s refusal to recognise Indigenous sovereignty and nationhood, which is in turn informed by the myth of the “incontestable state.” Thus, Indigenous sovereignty cannot be recognised, because doing so would challenge the assumption upon which its denial rests – the legitimacy of the sovereignty of the Canadian and Australian states.

Conclusions

This chapter has demonstrated that, rather than representing a radically progressive departure from its Australian analogues, the British Columbia treaty process exemplifies many of the problematic characteristics that previous chapters have shown to be the norm in Australia. That is, the state’s management of Indigenous–White relations as it is played out in the BC treaty process privileges White norms and values and is geared toward the protection of White interests. As it has been described here,

¹⁶¹ Some Indigenous people, such as Mick Dodson, however, have pointed out that a single treaty between the Commonwealth and the entire Indigenous population would be neither workable nor appropriate (2001).
therefore, the BC treaty process is not a model of good practice; it is, in fact, characterised by the same limitations that pervade the Australian native title regime and policy of "reconciliation." These limitations mean that Indigenous people and organisations such as the Aboriginal Tent Embassy, the Aboriginal Provisional Government, the UBCIC, and others, along with their visions for a reordering of Indigenous–White relations, are often marginalised, silenced, or ignored.

By focusing on the similarities between Australian and Canadian approaches to Indigenous–White relations, the analysis in this chapter has demonstrated that my earlier arguments about the relationship between sovereignty, nationhood, and Whiteness may apply beyond the Australian context. As is the case in Australia, Canadian approaches to Indigenous–White relations, as far as they can be generalised from the BC treaty process, often reinforce hegemonic Whiteness and shore up White power and privilege. Therefore, as I suggested above, the BC negotiations process is not necessarily a model that Australia should emulate, because, like its Australian equivalents, it falls short of the "ethical yardstick" of Indigenous sovereignty. That is, the BC process is not based on the premise that White people have an ethical obligation to recognise and acknowledge Indigenous peoples' sovereignty, as should be the case in treaty negotiations. As Ardith Walkem's critique of the process suggests (Walkem 2000), the federal and provincial governments' approach to the BC negotiations allows for little, if any, reconfiguration of sovereignty, power, and state institutions, which the acknowledgment and recognition of Indigenous peoples' sovereignty would necessarily entail.

This chapter's analysis demonstrates that the frameworks in which Indigenous–White relations are played out need reordering in line with the ethics of engagement that I outlined in Chapter Two. This means that these frameworks should not be geared toward the protection of White power and privilege but, instead, toward the possibility of genuine acknowledgment and recognition of Indigenous peoples' sovereignty. The need for reordering includes the theoretical and conceptual frameworks in which academic analysis and debate about Indigenous–White relations takes place. This requires some rethinking of concepts such as sovereignty and nationhood. It also requires careful scrutiny of the assumptions that underpin
dominant discourses around these concepts. And, as I discuss in more detail in the following chapter, it requires some rethinking of how academic analysis might most productively contribute to the work of undoing the White power and privilege that keeps intact the hegemony of dominant conceptualisations of sovereignty and nationhood.

Tully argues that governments who enter into negotiations with Indigenous peoples in good faith, respecting Indigenous peoples as equals, have nothing to fear from Indigenous peoples’ rights to self-determination (Tully 1998: 164). Nonetheless, as is the case in Australia, this chapter has demonstrated that governments, and White people in Canada more generally, become anxious when the prospect of Indigenous self-determination and sovereignty is raised. Anishinabe/Ojibway legal theorist John Borrows argues that this is because many non-Indigenous people in Canada are comfortable with the “state of the nation,” and there is little acknowledgment or concern that the nation/state “is built on a deeply troubling relationship with the land’s original owners and governors” (2001: 37). According to Borrows, many Canadians “may think that[,] since their experience of life in Canada is one of fairness and justice ... most people experience life in Canada in this same way” (2001: 37). The assertion by Indigenous peoples of their inherent sovereignty, and of their rights to self-determination and self-government, unsettles these assumptions about the universality of fairness and justice. But these assumptions are central to dominant constructions of White nationhood – the White sense of national self that I described earlier in the thesis. This is why assertions of Indigenous sovereignty and nationhood are resisted by White people and institutions, often vehemently. But this is also why it is important to challenge the assumptions on which White constructions of nationhood and claims to sovereignty are based.

As Borrows points out, Canada “is a country that does not have an ‘even’ experience of justice” (2001: 37). Indigenous peoples have never consented to the “wholesale transfer of their governance over and ... interest in land” (Borrows 2001: 36). As a result, he argues, Canada is built “on a foundation of sand” (2001: 39). This foundation is unstable, “no matter how beautiful it may look and how many people may rely upon it” (Borrows 2001: 38). Consequently, Borrows suggests that 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” (2001: 39). That is, recognising Indigenous peoples’ sovereignty and undoing structures and institutions of White power and privilege would place Canadian and Australian societies on a much more “stable, secure foundation” (Borrows 2001: 39), because the outstanding questions about the legitimacy of White occupation and sovereignty would be able to be resolved. Borrows acknowledges both the extent of this task and the significant disruptions and strains on existing institutions that a “shift of this magnitude” would entail (2001: 38). But the size of the task does not mean there are not good reasons for undertaking it:

serious disruptions to our socio-political relations is not the same thing as completely undermining these same relations, especially when the correction of injustice to Aboriginal peoples may ultimately set the entire society on the path to a more peaceful and productive future (Borrows 2001: 38).