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# Anticipating and Weathering Challenges to Modern Treaties in Australia

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# Anticipating and Weathering Challenges to Modern Treaties in Australia

Harry Hobbs*

*Abstract*

*Modern treaties between Indigenous communities and the State are promises by diverse political communities to reconcile competing claims though dialogue and mutual agreement. In this sense, they are constitutional in character. Giving legal effect to these promises, however, requires legislation, which allows one party to unilaterally revise or revoke the settlement. This is the treaty paradox. Although it is not possible to resolve the paradox, it focuses attention on efforts to ensure the durability of modern treaties. As negotiations commence in Victoria, this article examines the first decade of treaty-making in British Columbia, Canada, which was marked by significant political and legal contestation. Drawing on this case study it identifies two lessons for modern treaty-making in Australia. Ultimately, anticipating and weathering these challenges is key to the success of Australian treaty processes.*

## I. INTRODUCTION

The first formal treaty negotiations between Indigenous communities and governments in Australian history are expected to commence in October 2024.[1] The product of a deliberate and structured process developed over the best part of a decade,[2] the negotiations between the First Peoples Assembly of Victoria and the Victorian government will represent a significant milestone in relations between Aboriginal and Torres Strait Islander peoples and the Australian state. This moment will also mark a shift in political and legal debate on treaty. Given the historical absence of treaty relationships on this continent, scholarship exploring Indigenous-State treaty making has largely adopted one of two approaches. On the one hand sits normative scholarship which explains what treaties are, why they are important, and seeks to build community and political support for negotiations.[3] On the other hand sits work with an institutional focus, which explores how an appropriate framework to facilitate fair negotiations

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[1] Dechlan Brennan, 'Aboriginal Nations Can Now Formally Request to Enter into Treaty Negotiations with the Victorian Government', *National Indigenous Times* (3 July 2024) <https://nit.com.au/03-07-2024/12317/aboriginal-nations-can-now-formally-request-to-enter-into-a-treaty-negotiations-with-the-victorian-government>.

[2] See Harry Hobbs, 'Taking Stock of Indigenous-State Treaty Making' (2024) 47(2) *UNSW Law Journal* 548, 552-557; George Williams and Harry Hobbs, *Treaty* (Federation Press, 2nd ed) 252-261.

[3] There is a significant literature. For a representative sample see: Stewart Harris, *It's Coming Yet…: An Aboriginal Treaty within Australia between Australians* (Aboriginal Treaty Committee, 1979); Hannah McGlade (ed), *Treaty: Let's Get it Right!* (Australian Institute for Aboriginal and Torres Strait Islander Studies, 2003); Marcia Langton et al (eds), *Honour Among Nations? Treaties and Agreements with Indigenous Peoples* (Melbourne University Press, 2004); Peter Read, Gary Meyers and Bob Reece (eds), *What Good Condition? Reflections on an Australian Aboriginal Treaty 1986-2006* (ANU E-Press, 2006); Harry Hobbs, Alison Whittaker and Lindon Coombes (eds), *Treaty-Making 250 Years Later* (Federation Press, 2021); Williams and Hobbs (n 2).

and the necessary public law institutions and mechanisms to promote treaty-making can be established.[4] Negotiations in Victoria give rise to a further issue: what happens after an agreement is reached? While it is by no means guaranteed that these talks will lead to a mutually agreed settlement, the time is ripe for considering what might happen next.

The treaty process in Victoria has drawn inspiration from Canada,[5] where modern treaty negotiations have been underway since the 1970s. Over this period, 26 modern treaties have come into effect.[6] But treaty-making in Canada has also come under pressure. In British Columbia, for example, modern treaties have been challenged in courts of law and public opinion.[7] Non-Indigenous opponents pushed for and held a provincial-wide referendum on treaty negotiations and initiated legal challenges to the self-government powers recognised by agreement.[8] Indigenous critics also levied objections. First Nations have refused to accept agreements struck by their negotiating team and sought to overturn ratified agreements in court.[9] It is likely that a treaty in Victoria will face similar challenges.[10] Many Australians reject the concept of Indigenous-State treaty-making,[11] and some Indigenous communities have already withdrawn from the Victorian process fearing any settlement will fail to meet their expectations and aspirations.[12] The success of the Victorian treaty process – and indeed, the future of treaty-making on this continent – relies on anticipating and weathering these storms. In this article, I look to the experience in British Columbia to identify lessons for Australian treaty processes.

The article is divided into three substantive parts. In Part II, I outline how a treaty is different from an ordinary contract or agreement. This distinction gives rise to many of the challenges that animate modern treaty-making and which centre on what I describe as the 'treaty paradox', which is a disconnect between the conceptual and formal status of modern Indigenous-State treaties. Conceptually, modern treaties are foundational accords negotiated between diverse political communities that set the ground-rules for ongoing mutually supportive relationships.[13] Formally, however, modern treaty-making operates within the legal order of the State and these

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[4] Again, there is a significant literature, some of which overlaps with the sources cited above. For a representative sample see: Michael Mansell, *Treaty and Statehood: Aboriginal Self-Determination* (Federation Press, 2016); Harry Hobbs and George Williams, 'Treaty-Making in the Australian Federation' (2019) 43(1) *Melbourne University Law Review* 178; Mark McMillan et al, 'Obligations of Conduct: Public Law – Treaty Advice' (2020) 44(2) *Melbourne University Law Review* 602. See also the series of Discussion Papers released by the Federation of Victorian Traditional Owner Corporations, especially, 'A Comprehensive Treaty Model for Victoria' (Discussion Paper 6, 2022).

[5] Dechlan Brennan, 'First Peoples' Assembly of Victoria Takes Key Step in Treaty Process', *National Indigenous Times* (22 May 2023) <https://nit.com.au/22-05-2023/6062/first-peoples-assembly-of-victoria-takes-key-step-in-treaty-process>.

[6] 'Modern Treaties', Government of Canada (Web Page, 18 March 2024) <https://www.rcaanc-cirnac.gc.ca/eng/1677073191939/1677073214344>.

[7] For an illustrative study of this criticism see John Borrows, 'Re-Living the Present: Title, Treaties, and the Trickster in British Columbia' (1998) 120 *BC Studies* 99.

[8] *Campbell v British Columbia (Attorney-General)* [2000] BCSC 1123 ('*Campbell*').

[9] *Sga'nism Sim'augit (Chief Mountain) v Canada (Attorney General)* [2013] BCCA 49 ('*Chief Mountain*').

[10] For discussion on potential legal threats to the validity of a treaty in Australia, see, Cheryl Saunders, 'Treaty-Making in Australia: The Non-Indigenous Party' in Harry Hobbs, Alison Whittaker, and Lindon Coombes (eds), *Treaty-Making: 250 Years Later* (Federation Press, 2021) 43.

[11] See discussion in Hobbs, n 2, 573-574; Harry Hobbs, 'The New Right and Aboriginal Rights in the High Court of Australia' (2023) 51(1) *Federal Law Review* 129.

[12] Yorta Yorta Council of Elders, 'Trick or Treaty?' (Press Release, 2019) <https://yynac.com.au/press-release-trick-or-treaty/>.

[13] John Borrows, 'Ground-Rules: Indigenous Treaties in Canada and New Zealand' (2006) 22 *New Zealand Universities Law Review* 188.

compacts obtain force through legislation enacted by Parliament. This means that despite their constitutional character they may be unilaterally amended, revised or revoked by the State. The treaty paradox cannot be solved, but it focuses attention on the need to develop political and legal mechanisms to promote the durability of modern treaties. In Part III, I turn to British Columbia and examine two major political and legal challenges that had the potential to destabilise and derail treaty-making in the province. Drawing on the Canadian experience and considering our own political and legal framework, in Part IV, I identify lessons for the process and structure of treaty settlements in Australia.

Before commencing, however, it is useful to make one general point on the nature of the comparison. In cases concerning Indigenous title, Australian and Canadian courts once routinely looked to one another.[14] This 'inter-jurisdictional trading back and forth' both 'reinforced common errors' and led to 'helpful breakthroughs'.[15] It has become less frequent, however, as Indigenous rights in Canada are now elaborated through the prism of the Constitution and modern treaty-making. Notwithstanding common colonial legal pasts, Australia and Canada have diverged substantially. A Victorian Statewide Treaty will not be constitutionally protected, but if it is successful, the significant and growing jurisprudence on modern treaties in Canada may offer an opportunity for convergence.

## II. The Treaty Paradox

Treaties between Indigenous nations and the State are different from ordinary legal instruments. This difference is often expressed in relational language. Indigenous peoples articulate treaties as a mechanism to draw diverse political communities together; to 'imagin[e] a world of human solidarity where we regard others as our relatives',[16] to build a society where we can 'live together in harmony'.[17] This relational understanding is shared by the State. As the Supreme Court of Canada has recently noted, treaties 'are living agreements embodying a relationship' that 'requir[es] ongoing renewal'.[18] Because that relationship is built on trust and mutual recognition, treaties represent 'an exchange of solemn promises'[19] now and into the future. In this sense, treaties are not just 'binding and inviolable agreements',[20] but constitutional accords between two or more distinct but equal political communities committed to sharing land and governance.[21]

This is true of both historic treaties negotiated in the colonial era and modern agreements. The problem, however, is that modern treaties operate within the legal order of the State.[22] Although these agreements remain 'sacred instrument[s]',[23] they obtain legal force through enactment in

[14] Kent McNeil, *Common Law Aboriginal Title* (Clarendon Press, 1989); Paul McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, 2011).
[15] I thank the anonymous reviewer for this language.
[16] Robert Williams Jr., *Linking Arms Together: American Indian Visions of Law and Peace* (Oxford University Press, 1997) 94.
[17] Wemba-Wemba and Noongar woman Carissa Lee. Cited in Harry Hobbs and Stephen Young, 'Modern Treaty-Making and the Limits of the Law' (2021) 71 *University of Toronto Law Journal* 234, 240.
[18] *Ontario (Attorney-General) v Restoule* [2024] SCC 27 [13].
[19] *R v Badger* [1996] 1 SCR 771, 793 [41] (La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ) ('*Badger*').
[20] Gordon Christie, 'Justifying Principles of Treaty Interpretation' (2000) 23 *Queen's Law Journal* 143, 151.
[21] Saunders, n 10, 57.
[22] Hobbs and Young, n 17. See further Harry Hobbs, 'Treaties and Agreements with Indigenous Peoples' in Mattias Åhrén et al (eds), *The Oxford Handbook of Indigenous Peoples and International Law* (Oxford University Press, forthcoming) doi: https://doi.org/10.1093/oxfordhb/9780192887658.013.22.
[23] British Columbia, *Parliamentary Debates*, Legislative Assembly, 2 December 1998, 10861 (Joseph Gosnell, Chief of the Nisga'a Nation).

domestic legislation,[24] and they may be revised or amended by the legislature as circumstances and interests change.[25] This is the treaty paradox. Giving legal effect to these constitutional compacts is necessary to ensure their operation but it simultaneously makes them vulnerable by opening them up to political and legal challenge.

The constitutional quality of modern treaties is visible in the formal conditions that distinguish them from other legal agreements. In earlier work, George Williams and I have outlined how international and comparative law provides a clear standard to assess whether a modern agreement is a treaty or not.[26] First, modern treaties are 'expressions of partnership'[27] between diverse political communities. Even though they are negotiated within the legal order of the State, a treaty is premised on the fact that Indigenous peoples are different from other citizens. As members of prior self-governing societies who owned and occupied the land now claimed by the state, Indigenous peoples are both citizens of the State and members of their own distinct political communities. This status distinguishes the agreement from other legal forms, and reflects international law as affirmed in the United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP).[28] While state law and policy once sought to eradicate Indigenous difference, Australian law now recognises Aboriginal and Torres Strait Islander peoples are discrete political communities who possess rights arising from within their own legal orders,[29] and are entitled to a distinctive political and legal regime in certain areas.[30]

The second condition is procedural, though it does impose substantive obligations. A treaty is an agreement reached through a fair process of negotiation between equals. Negotiation is the appropriate method for resolving differences between Indigenous communities and the State. It reduces the risk that important rights and interests will be ignored, brings all relevant information and perspectives to the decision-making process, and recognises that winner-take-all processes are unlikely to endure or to produce good policy. In ensuring the parties are in control of the process and ultimate resolution, it also promotes the development of creative and flexible outcomes.[31] While securing a fair negotiation process can be challenging, the UNDRIP articulates a standard predicated on respecting the status of Indigenous peoples as a distinct and equal political community.

A similar standard has developed in Canada and Aotearoa New Zealand. In these two states, courts have adapted fiduciary principles to ground the constitutional relationship between Indigenous peoples and the State.[32] These 'trust-like'[33] responsibilities require the Crown to

[24] *Williams v Commonwealth* (2012) 248 CLR 156; *Williams v Commonwealth (No 2)* (2014) 252 CLR 416; Ken Hayne, 'Government Contracts and Public Law' (2017) 41(1) *Melbourne University Law Review* 155.
[25] In Canada, given constitutional recognition of treaty rights, this is subject to an infringement test: *Sparrow v The Queen* [1990] 1 SCR 1075, 1111-1113 (Dickson CJ and La Forest J) ('*Sparrow*'). See also *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 257, 295.
[26] Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40(1) *Sydney Law Review* 1, 7-14.
[27] *First Nation of Nacho Nyak Dun v Yukon* [2017] 2 SCR 576, 582.
[28] GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) arts 6, 9, 33.
[29] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
[30] See for example *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).
[31] Steven Haberfeld, *Power Balance: Increasing Leverage in Negotiations with Federal and State Governments – Lessons Learned from the Native American Experience* (University of Oklahoma Press, 2022).
[32] Kirsty Gover, 'The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism' (2016) 38(3) *Sydney Law Review* 339.
[33] *Guerin v The Queen* [1984] 2 SCR 335, 386 (Dickson, Beetz, Chouinard and Lamer JJ).

avoid 'sharp dealing[s]',[34] and conduct negotiations under principles of 'good faith, reasonableness, trust, openness and consultation'.[35] No similar constitutional principles exist in Australia, but the Victorian process has sought to minimise power imbalances through the development of legally enforceable negotiation standards.[36] These standards mirror the requirements in Canada and Aotearoa New Zealand, demonstrating the vitality in Australian treaty processes, their attention to comparative lessons and the special character of these agreements.

The standards are set out in a Treaty Negotiation Framework that was itself the product of negotiation between the First Peoples' Assembly and the State government. The framework outlines a series of benchmarks developed against the background of a history of poor conduct by the State and the reality of an ongoing power imbalance. Among other elements, the standards provide that negotiations will 'foster fairness, trust and good faith', be 'inclusive', and 'occur in a safe, supportive and culturally appropriate forum', while also recognising 'Aboriginal Lore, Law and Cultural Authority'.[37] The standards further seek to 'recognise and address the imbalance of power'[38] between the State and First Peoples by requiring the State to meet additional conditions. The state must, inter alia, provide non-material support to their negotiating partners, participate in negotiations with an open mind, be honest about its interests and limitations, refrain from exercising discretionary powers for the purpose of unduly influencing matters under negotiation, and address issues in a timely fashion.[39]

The third condition is most important for the purposes of this article. A treaty is mechanism to formalise 'a coming together between two nations to agree upon certain things and, in doing so, finding a way forward together and recognising each other's sovereignty'.[40] While the content of any negotiated settlement will differ in accordance with the aspirations of each party, a treaty must recognise that Indigenous nations retain an inherent right to sovereignty. As an exercise of that right, a treaty will recognise or create structures of culturally appropriate governance and establish means of decision-making and control that amounts to a form of self-government.

The effect of this third condition means that the proposed Statewide Treaty between the First Peoples Assembly and the Victorian government will need to recognise and empower the Assembly with law-making authority over prescribed subject matters. This will be a significant development. Australian law has never recognised that Aboriginal and Torres Strait Islander peoples possess a right to self-government. In fact, the High Court of Australia has consistently maintained that the assertion of sovereignty by the British Crown 'necessarily entailed…that there could thereafter be no parallel law-making system'.[41] While this does not prevent the Victorian government reaching an agreement with the Assembly to recognise a domain of law-

[34] *Badger*, n 19, 793 [41] (La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ).
[35] *New Zealand Maori Council v A-G (NZ)* [2008] 1 NZLR 318, 337 [81] (O'Regan J) (Court of Appeal).
[36] *Treaty Negotiation Framework*, First Peoples' Assembly of Victoria–State of Victoria, (signed and entered into force 20 October 2022) cl 24.1(b) <https://content.vic.gov.au/sites/default/files/2022-10/Treaty-Negotiation-Framework.pdf> ('*Treaty Negotiation Framework*'); *Advancing the Treaty Process with Aboriginal Victorians 2018* (Vic) s 34.
[37] *Treaty Negotiation Framework*, n 36, 24.1(a)(i), (ii), (iii) and (v).
[38] *Treaty Negotiation Framework*, n 36, 24.1(a)(iv).
[39] *Treaty Negotiation Framework*, n 36, 24.2(a), (e), (b), (c) and (g).
[40] Western Australia, Legislative Assembly, *Parliamentary Debates* (19 November 2015) 8688 (Roger Cook, Deputy Opposition Leader).
[41] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 444 [44] (Gleeson CJ, Gummow and Hayne JJ).

making power,[42] it does suggest that it will be politically sensitive. Indeed, more limited institutional attempts to empower Indigenous Australians with decision-making authority or a voice in policy-development and law-making have foundered on criticism that such mechanisms breach principles of equality and unfairly discriminate against non-Indigenous Australians. The experience of the Aboriginal and Torres Strait Islander Commission and the failed referendum on a Voice to Parliament demonstrates that many Australians are uncomfortable with recognising distinctive rights for Indigenous peoples.[43]

The experience in Canada amplifies this concern. As we will see in Part III, the self-government provisions in the first modern treaty negotiated in British Columbia served as a focal point for opposition among non-Indigenous Canadians, with some critics charging the treaty as establishing a 'race-based' institution.[44] These claims were made despite constitutional recognition and affirmation of 'aboriginal and treaty rights',[45] a long history of treaty-making,[46] and federal government policy supporting the recognition of Indigenous self-government.[47] In the absence of similar constitutional, historical and political grounding for treaty and self-government, this challenge may be magnified in Australia. Mechanisms to promote the durability of a Statewide Treaty must be considered.

## III. Contesting Treaty in Canada

British Columbia occupies a unique position within Canada. Despite a long history of treaty-making across the North American continent, authorities in the western-most province remained implacably opposed to acknowledging the existence and survival of Aboriginal title and refused to negotiate with First Nations until relatively recently. A series of court cases and direct action in the 1980s prompted the province to announce an abrupt policy shift in the early 1990s. British Columbia would establish its own treaty process and formally participate in negotiations at the federal level that had been occurring since the 1970s. This policy shift did not command uniform support or quell opposition across the province. Over the following years, modern treaty-making would come under attack by both Indigenous and non-Indigenous critics. In this part, I provide a concise background to treaty-making in British Columbia before examining two major challenges that surfaced in the first decade and have periodically reappeared.

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[42] See, for example, *Coe v Commonwealth* (1979) 53 ALJR 403, 408 (Gibbs J, Aickin J agreeing).

[43] Ian McAllister and Nicholas Biddle, 'Safety or Change? The 2023 Australian Voice Referendum' (2024) 59(2) *Australian Journal of Political Science* 141; Harry Hobbs, *Indigenous Aspirations and Structural Reform in Australia* (Hart, 2021) 118-156.

[44] See e.g. Evidence to Standing Committee on Aboriginal Affairs and Northern Development, Parliament of Canada, Ottawa, 18 November 1999 (Gordon Gibson, Senior Fellow, Fraser Institute) <https://www.ourcommons.ca/Content/Committee/362/AAND/Evidence/EV1039820/aandev12-e.htm>. See further below Pt III.B.

[45] *Canada Act 1982* (UK) c 11, sch B ('*Constitution Act*') s 35(1).

[46] John Borrows, 'Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government' in Michael Asch (ed), *Aboriginal Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (UBC Press, 1997) 155, 169.

[47] Canada, *Aboriginal Self-Government: Federal Policy Guide* (1995). For a more recent reiteration of this policy see: *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (15 September 2010) <https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136>.

## A. Treaty-Making in British Columbia

In North America, extensive relationships between Indigenous nations and European colonists were initially built on trade and strategic alliances. In these encounters, governed by complex diplomatic protocols and rituals, Indigenous nations sought to bind the newcomers into existing networks of reciprocity and obligation.[48] While the parties to these agreements differed in their motivations and the terms and character of the settlements varied over the years,[49] these agreements stand as political and legal recognition of First Nations peoples' rights to land and governance. They also served as the means through which the Crown lawfully acquired title to land.[50] Between 1701 and 1923, when the Canadian government ceased to enter treaties with Indigenous nations, hundreds of agreements were reached.[51]

Treaty-making was not conducted evenly across Canada. In the western province of British Columbia there was little sustained effort to negotiate with Indigenous communities. Fourteen agreements of limited scope were negotiated in the south of Vancouver Island between 1850 and 1854,[52] and Treaty 8 (signed in 1899 between the Crown and 39 First Nations) extended partially into the north-eastern part of the province. The remainder of British Columbia, comprising around 85 per cent of its territory, had never been subject to treaty. When the colony joined Canada in 1871, the Dominion government did not insist that the new province rectify this anomaly.[53] Over the next century, First Nations including the Nisga'a of the Nass Valley of north-western British Columbia, continued to press the federal and provincial governments,[54] seeking recognition of their rights to land and governance. For their part, local officials in British Columbia 'vociferously denied' that any Aboriginal title survived colonisation and confederation.[55]

Sustained pressure from Indigenous nations forced reassessment. In 1967, the Nisga'a Tribal Council sought a declaration that their Aboriginal title had never been lawfully extinguished. The Nisga'a lost at first instance and unanimously on appeal. The British Columbia Court of Appeal blithely dismissed the Nisga'a claims, noting they 'were undoubtedly at the time of settlement a very primitive people',[56] and were nothing more than 'trespassers' on lands in the

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[48] Bruce Morito, *An Ethic of Mutual Respect: The Covenant Chain and Aboriginal-Crown Relations* (UBC Press, 2012).

[49] See JR Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (University of Toronto Press, 2009).

[50] *Royal Proclamation Act of 1763* (1763) 4 Geo 3.

[51] Note that the Canadian government formally recognises 70 treaties: Canada, 'About Treaties' <https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231>. However, the number of treaties is likely much higher because the government may wrongly deny agreements negotiated with Indigenous nations the status of 'treaty'. For example, in *R v White and Montour* (2023) QCCS 4154, the Quebec Superior Court held that the Covenant Chain is a treaty, despite arguments by federal and provincial lawyers that it was not: at [884]-[1052]. The decision has been appealed.

[52] Although these agreements were not articulated as formal treaties but land transfers, the British Columbia Court of Appeal accepted that they were treaties in *R v White and Bob* (1964) DLR (2d) 613. On the Douglas Treaties see Paul Tennant, *Aboriginal People and Politics: The Land Question in British Columbia, 1849–89* (UBC Press, 1990) 18–30, 218–9; Christopher McKee, *Treaty Talks in British Columbia: Building a New Relationship* (UBC Press, 3rd ed, 2009) 11-16.

[53] Hamar Foster, '"We Want a Strong Promise": The Opposition to Indian Treaties in British Columbia, 1850-1990' (2009) 18(1) *Native Studies Review* 113, 119-123

[54] Carole Blackburn, *Beyond Rights: The Nisga'a Final Agreement and the Challenges of Modern Treaty Relationships* (University of British Columbia Press, 2021) 15-19.

[55] Foster, n 53, 114.

[56] *Calder v Attorney-General of British Columbia* (1971) 13 DLR (3rd) 64, 66 (Davey CJBC).

Colony.[57] The decision not only reflected a court 'confident in its assumption that Aboriginal rights had little bearing on the province', but provincial policy and broader public sentiment.[58] Nonetheless, the Tribal Council appealed to the Supreme Court.

In *Calder v Attorney-General of British Columbia*,[59] the Supreme Court issued a landmark decision. Six justices held that the Nisga'a possessed Aboriginal title to their lands at the time of colonisation. Aboriginal title flowed from the fact that the Nisga'a had possessed the land 'from time immemorial'[60] and that they had been 'organized in societies and occupying the land as their forefathers had done for centuries'.[61] Nevertheless, these six split evenly on the question as to whether this title had been lawfully extinguished, and a fourth justice did not consider the question, instead deciding that the Court did not have jurisdiction to hear the case.[62] *Calder* was a technical defeat, but it marked the first time that a Canadian court held Aboriginal title existed prior to and may have survived colonisation. The federal government recognised this significance; in the aftermath of the decision the government announced it would:

> negotiate with the representatives of Aboriginal peoples on the basis that where their traditional interest in the lands concerned can be established, an agreed form of compensation or benefit would be provided.[63]

The modern treaty period dates from this policy announcement. Since 1973, Canada has sought to recognise and reconcile 'pre-existing Aboriginal sovereignty…with assumed Crown sovereignty'[64] by negotiating comprehensive land claims with First Nations communities. These modern treaties draw on long practices of treaty-making across the North American continent, but they differ in fundamental ways. Most significantly, process of colonisation and state formation mean Indigenous-State treaties have been 'domesticated'.[65] Negotiations take part within the constitutional framework of the State, and agreements obtain their legal force through Parliamentary enactment of legislation implementing the Treaty.

The federal government's decision was not followed across the country. In what Hamar Foster describes as a 'remarkably consistent tradition of intransigence',[66] British Columbia contended that the Supreme Court decision in *Calder* was 'inconclusive'.[67] Preferring to follow the unanimous decision of the Court of Appeal, the province refused to recognise that Aboriginal

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[57] *Calder v Attorney-General of British Columbia* (1971) 13 DLR (3rd) 64, 94 (Tysoe JA).
[58] Douglas Harris, 'A Court Between: Aboriginal and Treaty Rights in the British Columbia Court of Appeal' (2009) 162 *BC Studies* 137, 138, 143-44.
[59] [1973] SCR 313 ('*Calder*').
[60] *Calder*, n 59, 375 (Hall J).
[61] *Calder*, n 59, 328 (Judson J).
[62] *Calder*, n 56, 427 (Pigeon J).
[63] Government of Canada, 'Statement of Aboriginal Claims' (Statement, Department of Indian Affairs and Northern Development (Canada), 8 August 1973) quoted in Lisa Palmer and Maureen Tehan, 'Shared Citizenship and Self-Government in Canada: A Case Study of James Bay and Nunavik (Northern Quebec)' in Marcia Langton et al (eds), *Settling with Indigenous Peoples: Modern Treaty and Agreement-Making* (Federation Press, 2006) 19, 23.
[64] *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511, 524 [20] ('*Haida Nation*').
[65] Miguel Alfonso Martinez, Special Rapporteur, *Studies on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations*, UN Doc E/CN.4/Sub.2/1999/20 (22 June 1999) 24 [192]. See further *Simon v The Queen* [1985] 2 SCR 387, 404: 'An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law'.
[66] Foster, n 53, 116.
[67] Foster, n 53, 115.

title was part of the law of Canada. In 1978, the government issued a statement reiterating its position:

> The provincial government does not recognize the existence of an unextinguished aboriginal title to lands in the province, nor does it recognize claims relating to aboriginal title which give rise to other interests in lands based on the traditional use and occupancy of land.[68]

Over the following decade, constitutional patriation, a series of court decisions elaborating the doctrine of Aboriginal title and protest activity placed increasing pressure on the province.[69] In 1982, the Canadian Constitution was patriated and updated. As part of this process, s 35 was added. It provides that:

> (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
> (2) In this Act, aboriginal peoples of Canada includes the Indian, Inuit and Métis peoples of Canada.
> (3) For greater certainty, in subsection (1) treaty rights includes rights that now exist by way of land claims agreements or may be so acquired.
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.[70]

Section 35 did not create Aboriginal or treaty rights, but it did confirm that existing rights that had not been surrendered or extinguished obtained constitutional protection.[71] In *Guerin v The Queen*, four justices of the Supreme Court held that Aboriginal title existed on traditional lands not subject to treaties.[72] Thus, by virtue of s 35, these undefined rights were now constitutionally protected. Several years later in *R v Sparrow*, a unanimous court affirmed the view that s 35 of the Constitution 'calls for a just settlement for aboriginal peoples'.[73]

At the same time, Indigenous and non-Indigenous supporters set up blockades to obstruct logging operations, contending that the government had no authority to issues licenses on unceded land. These protests focused on the provincial government's dismissal of Aboriginal title and refusal to enter negotiations.[74] The evolving jurisprudence on Aboriginal title fortified their actions. In *MacMillan Bloedel Ltd v Mullin*, the Court of Appeal of British Columbia issued an injunction to stop logging on Meares Island to allow Clayoquot and Ahousaht bands to record and preserve evidence of their title.[75] Resource companies and the Government began to wonder whether negotiation might better serve their interests.[76] Indeed, one economic report

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[68] Cited in Evelyn Stokes, 'The Land Claims of First Nations in British Columbia' (1993) 23 *Victoria University of Wellington Law Review* 171, 173.
[69] Harris, n 58.
[70] *Canada Act 1982* (UK) c 11, sch B ('*Constitution Act*') s 35.
[71] Aboriginal and treaty rights can be infringed subject to a three-part test in *Sparrow*, n 25, 1111-13.
[72] [1984] 2 SCR 335, 379 (Dickson, Beetz, Chouinard and Lamer JJ).
[73] *Sparrow*, n 25, 1106 (Dickson CJ and La Forest J), quoting Noel Lyon, 'An Essay on Constitutional Interpretation' (1988), 26 *Osgoode Hall Law Journal* 95, 100.
[74] Darcy Mitchell and Paul Tennant, 'Government to Government: Aboriginal Peoples and British Columbia' (Paper prepared as part of the Research Program of the Royal Commission on Aboriginal Peoples, October 1994) 22. See also Nicholas Blomley, '"Shut the Province Down": First Nations Blockades in British Columbia, 1984-1995' (1996) 111 *BC Studies* 5.
[75] [1985] 3 WWR 577.
[76] Mitchell and Tennant, n 74, 23; McKee, n 52, 29.

estimated that 'almost CAD 1 billion' of proposed resource investment was affected by the uncertainty over the province's assertion to title.[77]

It may have only been 'simple, expedient politics',[78] but growing pressure resulted in a policy shift. In August 1990, BC Premier Bill Vander Zalm, leader of the centre-right Social Credit Party, announced the province would negotiate with First Nations. Nonetheless, the government continued to deny that Aboriginal title existed.[79] It was not until the election of the centre-left New Democratic Party the following year, that the province finally accepted that Aboriginal title had survived colonisation and confederation.[80] Acknowledging the need for a 'new relationship which recognises the unique place of aboriginal people', the new government established a process to negotiate 'fair and honourable' 'modern-day treaties'.[81]

Since 1993, treaty-making in British Columbia has been conducted under the auspices of the British Columbia Treaty Commission (BCTC).[82] Characterised as the 'keeper of the process',[83] the Commission facilitates negotiations between First Nations, and the provincial and federal governments by providing support to the parties, allocating funding to First Nations, and educating the public. Treaty-making proceeds through a six-stage process that commences with First Nations lodging a formal statement of intent to negotiate. Once an agreement is reached, the First Nation must ratify the settlement, and then the provincial and federal legislatures pass a bill to implement the treaty. While it was expected that no more than 30 claims would be submitted to the BCTC across its life, within one week of the process opening 'almost 40 statements of intent had been submitted to the commission'.[84]

The BC treaty process had formally commenced but treaty talks had been ongoing within the province for some time. In *Calder*, the Nisga'a had sought a declaration that their Aboriginal title existed to encourage Canadian authorities to enter negotiations.[85] They were partially successful. Although the province refused to countenance talks, the federal government's new comprehensive land claims policy created an opening. In 1974, the Nisga'a submitted their claim to the federal government, and negotiations between the Nisga'a and Canadian government began in 1976.[86] British Columbia did not participate but attended discussions as an observer.[87] Without the active participation of BC officials, the scope of negotiations was limited; the Nisga'a could only discuss matters within federal jurisdiction. For example, title to Crown land is vested in the provinces,[88] meaning that negotiations on self-government could only extend to existing reserves, which are a federal responsibility, rather than a larger portion of their traditional territory.

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[77] Price Waterhouse, *Economic Value of Uncertainty Associated with Native Claims in B.C.* (Report prepared for Indian and Northern Affairs Canada, March 1990) 30.
[78] First Nations Congress, cited in Stokes, n 68, 181.
[79] Mitchell and Tennant, n 74, 29; McKee, n 52, 30; Stokes, n 68, 187.
[80] Mitchell and Tennant, n 74, 5, 27.
[81] Joe Mathias et al, *The Report of the British Columbia Claims Task Force* (1991) 9-10.
[82] *Treaty Commission Act*, SBC 1993, c 4; *British Columbia Treaty Commission Act*, SC 1995, c 45.
[83] British Columbia Treaty Commission, *The First Annual Report of the British Columbia Treaty Commission for the Year 1993-1994* (1994) 3.
[84] Mitchell and Tennant, n 74, 45.
[85] Harris, n 58, 142.
[86] Over the following 12 years, 11 more First Nations from BC lodged claims under the federal process: Stokes, n 68, 173. Note that the initial policy provided that only six land claims could be negotiated at any one time, and only one per province, drastically inhibiting the efficacy of the process.
[87] Mitchell and Tennant, n 74, 1994) 21.
[88] *Constitution Act*, n 45, s 92(5).

British Columbia formally agreed to join the Nisga'a negotiations in October 1990. This decision ensured negotiations could cover a broader range of issues, and notwithstanding some delays, talks proceeded more rapidly. There was also a concerted effort to involve the community. Over the next five years 'almost 200 consultations and public information meetings' were held in northwest British Columbia.[89] In 1996, an Agreement in Principle (AIP) was finalised, and the settlement itself was reached in 1998. The Nisga'a Nation approved the treaty at a special assembly in October 1998, and in a referendum held the following month.[90] Legislation to give effect to the treaty passed the BC legislature in April 1999,[91] and in the federal Parliament in April 2000.[92]

The Nisga'a Final Agreement was the first modern treaty negotiated in British Columbia. In exchange for a 'full and final settlement'[93] in respect of their Aboriginal rights, the Nisga'a obtained a comprehensive settlement recognising rights over land, resources, culture, and self-governance, alongside a financial package. Under the Treaty, the Nisga'a obtained fee simple ownership of 2000km$^2$ of their traditional territory (comprising around 7 per cent of their total claim).[94] They also obtained rights to hunt for food, social and ceremonial purposes and the right to fish, over an additional 16,000km$^2$ and 20,000km$^2$, as well as the right to make laws to regulate these activities.[95] The financial settlement comprised two parts: a $280 million capital transfer to be paid over 14 years; and a five-year fiscal financial agreement totalling $38 million per year to ensure the Nisga'a government can provide public services 'at levels reasonably comparable to those generally prevailing in northwest British Columbia'.[96]

The most significant aspect of the Treaty is its self-government provisions. The Nisga'a exercise self-government through the Nisga'a Lisims Government, 36-member Wilp Si'ayuukhl Nisga'a (WSN) (legislature) and four village councils. The treaty empowers this government with relatively extensive concurrent law-making authority. The WSN may enact laws over matters relating to Nisga'a identity. This includes the administration and management of their government, citizenship, the preservation of their culture and language, land and assets, as well as the organisation and structure of health, child and family services, adoption and education.[97] In these domains, where a Nisga'a law is inconsistent with a federal or provincial law, the Nisga'a law prevails. Although in some cases, the Nisga'a law will need to be consistent with federal or provincial standards,[98] it speaks to the significance of the Nisga'a law-making power, and their status as a co-equal governing partner. The Treaty also empowers the WSN to enact laws over a broader field, including for example, to establish police services (with the approval of the Attorney-General of British Columbia),[99] a Court (with

[89] Mary Hurley, 'The Nisga'a Final Agreement' (Library of Parliament, 9 February 1999, PRB 99-2E) 8.
[90] *Nisga'a Final Agreement* signed 4 May 1999, (entered into force 11 May 2000) ('*Nisga'a Treaty*'). 61% of eligible voters cast a ballot, with a majority of 73% endorsing the treaty: Blackburn, n 54, 21.
[91] *Nisga'a Final Agreement Act*, SBC 1999, c 2.
[92] *Nisga'a Final Agreement Act*, SC 2000, c 7.
[93] *Nisga'a Treaty* ch 1(22). Criticism of this language and approach has led to a range of drafting techniques to avoid 'full and final' extinguishment: See, Douglas Eyford, *A New Direction: Advancing Aboriginal and Treaty Rights* (Report of the Ministerial Special Representative on Renewing the Comprehensive Land Claims Policy, 2015) 72-75.
[94] Blackburn, n 54, 23.
[95] *Nisga'a Treaty*, n 90, ch 6(4)-(7), ch 8.
[96] *Nisga'a Treaty*, n 90, ch 15(3).
[97] *Nisga'a Treaty*, n 90,ch 11(36), (40), (43), (45), (49), (55), (84), (91), (99) and (101).
[98] See, for example, *Nisga'a Treaty*, n 90, 11(46), (89) and (129).
[99] *Nisga'a Treaty*, n 90, ch 12(6).

the approval of the provincial cabinet),[100] and to regulate the sale of alcohol. In these areas, however, an inconsistent federal or provincial law will prevail over a Nisga'a law.

The Nisga'a Treaty exemplifies the treaty paradox. The product of 'intense negotiations' conducted over many years,[101] the agreement recognises the authority of the Nisga'a and Canadian State and establishes 'frameworks for right relationships'.[102] Efforts to give legal effect to the agreement, however, prompted strident political opposition and legal challenge, threatening the durability of the settlement and the broader treaty process.

### B. Opposition

On 2 December 1998, Nisga'a chief Joseph Gosnell was invited to address the British Columbia Legislative Assembly to speak to the significance of the Nisga'a Final Agreement and encourage the Parliament to pass the implementation bill. Describing the treaty as a 'triumph', and a 'beacon of hope for aboriginal people around the world' Gosnell explained what the agreement meant to him, to the Nisga'a Nation, and to the broader British Columbian and Canadian people.[103] The agreement 'proves beyond all doubt', Gosnell argued, 'that negotiations – not lawsuits, not blockades, not violence – are the most effective, honourable way to resolve aboriginal issues in this country'.[104] At the same time, however, Gosnell issued a note of caution:

> We are not naïve. We know that some people do not want this treaty. We know that there are naysayers – some sitting here today. We know that there are those who say Canada and British Columbia are giving us too much, and a few who want to reopen negotiations in order to give us less. Others, still upholding the values of [former Premier William] Smithe and [former deputy superintendent of Indian Affairs Duncan Campbell] Scott, are practising a wilful ignorance. This colonial attitude is fanning the flames of fear and ignorance in this province and reigniting a poisonous attitude that we as aboriginal people are so familiar with'.[105]

Opponents of the Nisga'a treaty sought to unwind the agreement and destabilise the broader treaty process through both legal and political means.[106] Non-Indigenous voices dominated this debate;[107] their attention centred on the self-government provisions of the Nisga'a settlement and their fear that this agreement would be a template for future treaties.[108] Critics argued that First Nations self-government is inconsistent with the Universal Declaration of Human

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[100] *Nisga'a Treaty*, n 90, ch 12(34).
[101] *Campbell*, n 8, [6].
[102] Aaraon Mills, 'What is a Treaty? On Contract and Mutual Aid' in John Borrows and Michael Coyle (eds), *The Right Relationship: Reimagining the Implementation of Historical Treaties* (University of Toronto Press, 2017) 208, 225. See further Edward Allen, 'Our Treaty, Our Inherent Right to Self-Government: An Overview of the Nisga'a Final Agreement' (2004) 11(3) *International Journal on Minority and Group Rights* 233, 234.
[103] British Columbia, *Parliamentary Debates*, Legislative Assembly, 2 December 1998, 10859 (Joseph Gosnell, Chief of the Nisga'a Nation).
[104] British Columbia, *Parliamentary Debates*, Legislative Assembly, 2 December 1998, 10859-60.
[105] British Columbia, *Parliamentary Debates*, Legislative Assembly, 2 December 1998, 10861.
[106] Hamar Foster, 'Honouring the Queen's Flag: A Legal and Historical Perspective on the Nisga'a Treaty' (1998) 120 *BC Studies* 11, 27-33.
[107] Douglas Sanders, '"We Intend to Live Here Forever": A Primer on the *Nisga'a Treaty*' (2000) 33(1) *University of British Columbia Law Review* 103, 104.
[108] See, for example, Gordon Gibson, 'Comments on the Draft Nisga'a Treaty' (1998) 120 *BC Studies* 55; Gordon Gibson, 'Fundamental Principles for Treaty Making' in Owen Lippert (ed), *Beyond the Nass Valley* (Fraser Institute, 2000) 497.

Rights,[109] violates democratic principles,[110] and 'entrenches inequality' in the Canadian Constitution by creating a 'racially based government'.[111] Some First Nations peoples were also unhappy with the treaty, arguing that those same provisions were inadequate.[112] Others were concerned with the territorial delimitation. Gitksan leader Neil Sterritt noted his concern that the treaty improperly recognised Nisga'a ownership over portions of Gitksan country.[113] In this section, I explore two major challenges that treaty-making in British Columbia weathered over the first decade with the aim of anticipating issues that Australian treaty processes may encounter.

1. A Referendum on Treaty Negotiations

The first major challenge to treaty-making in British Columbia was political. Legislation establishing the BCTC obtained unanimous approval in the BC legislature in 1992.[114] Over the course of the 1990s as negotiations began to focus on substantive issues, however, bipartisan support for treaty-making within the province broke down. A 'chorus of disapproval',[115] initially led by resource industry groups but also including the provincial opposition, argued that the process was mired in secrecy and that agreements would constitute a 'give away' by 'compliant politicians'.[116] In 1996, when several details of the draft Nisga'a AIP were leaked to the press, opponents attacked the proposal as providing 'racially-based' entitlements.[117] Although the draft AIP was reviewed and endorsed by a parliamentary committee,[118] criticism firmed. BC Liberal Opposition Leader Gordon Campbell called for a public vote. Campbell argued:

> a province-wide referendum on either the proposed Nisga'a Final Agreement, or a comprehensive provincial negotiating mandate for all treaties, must be provided as an essential element for establishing the legitimacy of the treaty process.[119]

[109] British Columbia, *Parliamentary Debates*, Legislative Assembly, 2 December 1998, 10862 (George Abbott).
[110] Mike Scott, 'Groundbreaking Nisga'a Treaty Violates Democratic Principles', *The Hill Times* (9 August 1999) 12.
[111] Robert Matas and Craig McInnes, 'Critics of Nisga'a Treaty Call for Vote: Cost of B.C. Deal Jumps to $488-million', *The Globe and Mail* (23 July 1998) A1; Craig McInnes, 'Nisga'a Deal is Apartheid: Reform MP', *The Globe and Mail* (24 July 1998) A6.
[112] Union of British Columbia Indian Chiefs, 'Certainty: Canada's Struggle to Extinguish Aboriginal Title' (1998) <https://www.ubcic.bc.ca/certainty_canada_s_struggle_to_extinguish_aboriginal_title>.
[113] Neil Sterritt, 'The Nisga'a Treaty: Competing Claims Ignored!' (1998) 120 *BC Studies* 73.
[114] British Columbia, *Votes and Proceedings*, Legislative Assembly, 26 May 1993, No 59.
[115] Ravi de Costa, 'National Encounters between Indigenous and Settler Peoples: Some Canadian Lessons' in Peter Read, Gary Meyers and Bob Reece (eds), *What Good Condition? Reflections on an Australian Aboriginal Treaty 1986-2006* (ANU Press, 2005) 15, 24. See further J. Rick Ponting, *The Nisga'a Treaty: Polling Dynamics and Political Communication in Comparative Context* (University of Toronto Press, 2006).
[116] See, for example, Peter Newman, 'A Treaty that Threatens the National Agenda: The Costly Nisga'a Land Claims Settlement Could Mean that we will be Buying our Country Back from Ourselves', *Macleans* (10 August 1998) 50; Ross Howard, 'B.C. Premier Lukewarm to Nisga'a Agreement Plans to Open Pact to Public Debate May Indicate Divided Cabinet', *The Globe and Mail* (14 February 1996) A11. See further Borrows, n 7.
[117] Ross Howard, 'Nisga'a Agreement Sure to be Vote Issue: Deal on Fishing Called a Betrayal', *The Globe and Mail* (16 February 1996) A11; Miro Cernetig, 'B.C. Deal must still run Gauntlet of Public Opinion', *The Globe and Mail* (13 February 1996) A4.
[118] Select Standing Committee on Aboriginal Affairs, *Towards Reconciliation: Nisga'a Agreement-in-Principle and British Columbia Treaty Process* (Legislative Assembly of British Columbia, 36th Parliament, 3 July 1997).
[119] Ibid, Appendix II, 'Minority Opinions' 96.

First Nations and government officials rejected these calls.[120] In a press release, the BCTC also cautioned against the use of a public poll, arguing that a referendum 'is the wrong tool to use for ratification of treaties' because 'treaties are about rights, not about voter preferences'.[121] Nevertheless, opponents continued to press. The bill to implement the Nisga'a Treaty attracted over '120 hours of debate' in the BC legislature, 'more than any bill in the history of the province'.[122] After dismissing the 'myriad amendments' proposed by the opposition,[123] the government relied on its majority to close debate and force a vote on the bill before many of its clauses had been considered.[124] The opposition rallied against the 'menacing, autocratic, undemocratic assault on this place'[125] but were unable to prevent the bill's passage. Similar events played out in Ottawa. The conservative Reform Party introduced 471 amendments to the federal bill implementing the Nisga'a Treaty.[126] These were defeated.

The Nisga'a Treaty entered into force in May 2000, but this only strengthened the vigour of opponents' critiques. The BC Liberals secured a landslide victory in the 2001 provincial election and moved quickly to implement their promise to hold a mail-in referendum on the practice of treaty-making in the province. The 2002 Referendum on the Principles for First Nations Treaty Negotiations sought to clarify public support for the treaty process and guide the government in its negotiations. Voters were asked whether they supported eight principles:

1. Private property should not be expropriated for treaty settlements.
2. The terms and conditions of leases and licences should be respected; fair compensation for unavoidable disruption of commercial interests should be ensured.
3. Hunting, fishing and recreational opportunities on Crown land should be ensured for all British Columbians.
4. Parks and protected areas should be maintained for the use and benefit of all British Columbians.
5. Province-wide standards of resource management and environmental protection should continue to apply.
6. Aboriginal self-government should have the characteristics of local government, with powers delegated from Canada and British Columbia.
7. Treaties should include mechanisms for harmonizing land use planning between Aboriginal governments and neighbouring local governments.
8. The existing tax exemptions for Aboriginal people should be phased out.

Reflecting on the referendum several years later, Campbell argued the poll was an attempt to 'build a province-wide consensus' and criticised the previous government for failing to include 'the non-Aboriginal community' in the process.[127] Others saw the referendum as a 'cynical' exercise designed to draw support from non-Indigenous opponents of treaty.[128] Critics noted

[120] Richard Price, 'The British Columbia Treaty Process: An Evolving Institution' (2009) 18(1) *Native Studies Review* 139, 154.
[121] British Columbia Treaty Commission, 'Referendum is the Wrong Way to Ratify Treaties' (News Release, 30 July 1998).
[122] Paul Willcocks, 'B.C. Government Pulls Plug on Debate of Nisga'a Treaty: Opposition Enraged After Decision Forces Passage of Bill Today', *The Globe and Mail* (22 April 1999) A2; British Columbia, *Parliamentary Debates*, Legislative Assembly, 21 April 1999, 11928 (Glen Clark, Premier).
[123] de Costa, n 115, 24.
[124] British Columbia, *Votes and Proceedings*, Legislative Assembly, 21 April 1999, No 161.
[125] British Columbia, *Parliamentary Debates*, Legislative Assembly, 21 April 1999, 11930 (Gordon Campbell).
[126] McKee, n 52, 97.
[127] Joel Fetzer, 'The Politics of British Columbia's 2002 Aboriginal Treaty Negotiations Referendum: Democratic Governance or Electoral Strategy?' (2016) 48(2) *Canadian Ethnic Studies* 157, 159-60.
[128] Fetzer, n 127, 161.

that several of the principles were vague,[129] or 'transparently malicious'.[130] No party had suggested that private property would be part of any settlement; courts and the federal government had already accepted that First Nations possess an inherent right to self-government that is more substantial than the characteristics of local government; and taxation is a federal responsibility.

Nevertheless, the impact of the referendum is hard to assess. First Nations groups and many supporters boycotted the poll, labelling it 'fundamentally flawed'[131] and 'an abuse of the referendum process'.[132] Although all eight principles received a Yes vote of more than 84 per cent, only 35 per cent of the electorate returned their ballot.[133] One pollster derided the experience as 'one of the most amateurish, one-sided attempts to gauge the public will that I have seen in my professional career'.[134] Even if the government did not obtain its mandate, however, First Nations participants considered that the referendum 'strengthened [the government's] hand' in negotiations.[135]

At the same time, two factors diminished the potential impact of the poll. First, the government recognised in the aftermath of the result that it needed to moderate its posture to shore up its relationship with First Nations. Focusing its attention on talks that were proceeding effectively and developing new initiatives to support and encourage negotiations, the years following the referendum were – strangely enough – marked by 'solid progress'.[136] Judicial decisions also strengthened First Nations bargaining position. In two decisions handed down in November 2004, a unanimous Supreme Court held that the Crown has a legal duty to consult with Aboriginal peoples and accommodate their interests, even where title has not been proven.[137] By 2005, bipartisanship appeared to have returned. At his re-election swearing-in ceremony, Premier Campbell announced that his government 'will forge new relations with First Nations, founded on reconciliation, recognition and respect for aboriginal rights and title'.[138]

Political challenges remain. For instance, the Lheidli T'enneh First Nation joined the BC process in 1993 and initialled a Final Agreement in 2006. In March 2007, however, the community rejected the treaty in a ratification vote.[139] Three factors appear to have motivated opposition: members were concerned that the First Nation did not yet have the capability to exercise self-government, the settlement itself was inadequate, and insufficient information

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[129] Tony Penikett, *Reconciliation: First Nations Treaty Making in British Columbia* (Douglas and McIntyre, 2012) 131-2.
[130] de Costa, n 115, 24.
[131] 'B.C. Treaty Vote Results Favour Government', *CBC* (4 July 2002) <https://www.cbc.ca/news/canada/b-c-treaty-vote-results-favour-government-1.328911>.
[132] Ken MacQueen, 'BC Referendum Controversy', *Macleans* (17 March 2003) <https://www.thecanadianencyclopedia.ca/en/article/bc-referendum-controversy>.
[133] Linda Johnson, *Report of the Chief Electoral Officer on the Treaty Negotiations Referendum* (Election BC, 2002) 6.
[134] 'B.C. Treaty Vote Results Favour Government', n 131. See further, Angela Pratt, 'Treaties vs. *Terra Nullius*: "Reconciliation", Treaty-Making and Indigenous Sovereignty in Australia and Canada' (2004) 3 *Indigenous Law Journal* 43, 55.
[135] Feltzer, n 127, 163.
[136] Price, n 120, 157-8.
[137] *Haida Nation*, n 64; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* [2004] 3 SCR 550.
[138] British Columbia Treaty Commission, *Changing Point: Treaty Commission Annual Report 2005* (2005) 1.
[139] Patrick Brethour, 'Treaty Rejection by Tiny Band Blow to Land Claims', *The Globe and Mail* (online, 1 April 2007) <https://www.theglobeandmail.com/news/national/treaty-rejection-by-tiny-band-blow-to-land-claims/article20395483/>.

was available to inform voters.[140] Although the parties returned to the negotiating table the Lheidli T'enneh First Nation voted 'No' again in 2018.[141] Clearly First Nations must support the process and settlement if modern treaty-making is to be effective. However, the repeated failure to ratify an agreement reached by the Lheidli T'enneh negotiating team has not imperilled the idea of treaty-making in British Columbia. Surviving the referendum and the most focused period of political opposition has 'firmly entrenched'[142] the treaty process.

2. Legal Threats

Opponents of treaty-making did not limit their campaigns to the public sphere; the febrile political atmosphere of the late 1990s also prompted legal action to unwind the treaty process or amend aspects of the settlements. At least four challenges to the Nisga'a Treaty were filed in court by 2000, including two by First Nations critics and another by a non-Indigenous fisheries group who had been actively protesting Indigenous fishing rights for several years.[143] The major challenge, however, was led by Gordon Campbell. In *Campbell*, three members of the BC legislature sought an order declaring that the legislation giving effect to the self-government provisions of the Nisga'a Treaty was inconsistent with the Canadian Constitution. The British Columbia Supreme Court ultimately dismissed the challenge, but it was revived and inherited a decade later by several members of the Nisga'a Nation in *Chief Mountain*. Given *Chief Mountain* reiterated the principal arguments raised in *Campbell*, the two cases will be dealt with together.

In *Campbell* and *Chief Mountain*, the plaintiffs challenged the self-government provisions of the Nisga'a Treaty on several grounds. In essence, they contended the Treaty and legislation giving effect to the Treaty impermissibly established a 'third order of government' outside the constitutional structure.[144] The most significant grounds for our purposes are as follows: that a modern treaty which purported to bestow legislative and executive power upon the governing body of a First Nation: (1) was inconsistent with the exhaustive division of legislative powers provided for under the Canadian Constitution;[145] (2) amounted to an improper abdication of legislative power;[146] and (3) interfered with the concept of Royal Assent.[147] Each submission will be considered in turn.

Sections 91 and 92 of the *Constitution Act 1867* distribute legislative power between the provincial and federal parliaments. The plaintiffs contended that these provisions are exhaustive, such that any inherent right to self-government First Nations may have possessed was extinguished by the Act, and that a constitutional amendment is required to empower First Nations governments with the authority to make law that prevails over federal and provincial

[140] John Curry, Han Donker and Richard Krehbiel, 'Land Claim and Treaty Negotiations in British Columbia, Canada: Implications for First Nations Land and Self-Governance' (2014) 58(3) *The Canadian Geographer* 291, 301; Janna Promislow, 'Deciding the Future: First Nations Ratification Processes, Crown Policies and the Making of Modern Treaties' in Richard Albert and Richard Stacey (eds), *The Limits and Legitimacy of Referendums* (Oxford University Press, 2022) 202, 228

[141] 'Lheidli T'enneh First Nations Votes No to Government Treaty', *CBC* (online, 24 June 2018) <https://www.cbc.ca/news/canada/british-columbia/lheidli-t-enneh-first-nation-votes-no-to-government-treaty-1.4720082>.

[142] Price, n 120, 161.

[143] Sanders, n 107, 105-106.

[144] *Chief Mountain*, n 9, [5].

[145] *Campbell*, n 8, [62]; *Chief Mountain*, n 9, [19].

[146] *Chief Mountain*, n 9, [5].

[147] *Campbell*, n 8, [12]; *Chief Mountain*, n 9, [24].

laws. In *Campbell*, Williamson J dismissed this submission. The Court held that 'the unique relationship between the Crown and aboriginal peoples'[148] meant that First Nations law-making power and their inherent right to self-government 'survived as one of the unwritten "underlying values" of the Constitution outside of the powers distributed to Parliament and the legislatures in 1867'.[149] The *Constitution Act* divided 'internal' legislative authority between the Dominion Parliament and the provincial assemblies,[150] and did not touch or consider First Nations self-government.

In *Chief Mountain*, the Court of Appeal sidestepped this question, considering it unnecessary to inquire into the source of First Nations' right to self-government. Rather, Harris JA held that it was appropriate simply to consider whether the parties had the lawful authority to enter into an agreement that provided for self-government. This meant that it resolved the issue by examining whether the self-government provisions amounted to an improper abdication of legislative power. Justice of Appeal Harris explained:

> The source of the treaty rights, whether they are rooted in Aboriginal rights or rights delegated from either federal or provincial governments, is not, therefore, the critical question in assessing the validity of a treaty. What matters is that the rights have been agreed to by parties with the necessary capacity and authority.[151]

The key issue for the Court of Appeal thus concerned the characterisation of the self-government provisions of the Treaty. The plaintiffs submitted that the Treaty conferred a legislative power on the Nisga'a Government that is paramount to federal and provincial laws in certain fields (such as the organisation and structure of child, health and family services). Pointing to provisions of the Treaty that provide amendments require the consent of all three parties,[152] the plaintiffs submitted further that this power cannot be altered or withdrawn by the Parliament or the provincial legislature without the consent of the Nisga'a.[153] The Court rejected this reading, finding that the Parliament maintained the right to infringe, modify or withdraw any right conferred on the Nisga'a government.[154] The Parliament and legislature did not abdicate their legislative sovereignty – even in cases where Nisga'a laws prevail over inconsistent federal and provincial laws – because the Parliament and legislature 'retains the exclusive authority' to infringe treaty rights.[155]

The Court of Appeal rejected a further submission that the agreement breached the inter-delegation rule which prohibits a parliament from delegating law-making powers to another legislature. Consistent with his Honours interpretation of the Treaty and Act, Harris JA explained that the Nisga'a government 'is not a legislature for the purposes of the division of powers. It is a subordinate body to which law-making powers have been granted in a manner similar to other valid delegations of rule-making power'.[156]

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[148] *Campbell*, n 8, [80].
[149] *Campbell*, n 8, [81] quoting *Reference re Secession of Quebec* [1998] 2 SCR 217 [82].
[150] *Campbell*, n 8, [81].
[151] *Chief Mountain*, n 9, [51].
[152] *Nisga'a Treaty*, n 92, ch 1(36).
[153] *Chief Mountain*, n 9, [62]-[67].
[154] *Chief Mountain*, n 9, [80].
[155] *Chief Mountain*, n 9, [84].
[156] *Chief Mountain*, n 9, [95].

The Royal Assent argument offered by the plaintiff also failed. Laws enacted by the Nisga'a Nation come into force after they have passed the WSN and been signed by the President.[157] They do not require the assent of the Governor General or Lieutenant Governor. The plaintiffs in *Campbell* and *Chief Mountain* submitted that this breached 'the fundamental constitutional framework underpinning the right to legislate and make laws in Canada'.[158] In *Campbell* and *Chief Mountain*, the Courts dismissed this submission. Both held that the requirement of Royal Assent applies only to laws passed by the Parliament and provincial assemblies, not 'to other law-making bodies'.[159] In any event, as Harris JA noted in *Chief Mountain*, the legislation giving effect to the Nisga'a Treaty and Constitution and which conferred law-making powers on the Nisga'a government, obtained Royal Assent.[160]

The decisions in *Campbell* and *Chief Mountain* ensured the treaty process would continue unaffected. Nevertheless, the approach in *Chief Mountain* highlights the treaty paradox. As we saw earlier, a treaty is an agreement between two or more political communities to share land and governance. Without investigating the source of First Nations right to self-governance, however, and instead reading the Nisga'a Treaty as a simple instrument of delegated authority, the Court of Appeal in *Chief Mountain* 'presumes an asymmetrical relationship'.[161] As Joshua Nichols has noted, the decision conceives of a treaty as capable of being unilaterally 'withdrawn or amended' by the Crown.[162] The Nisga'a Treaty represents a constitutional covenant between the Nisga'a and Canadian authorities, but formally it is merely an exercise of delegated legislation. This interpretation preserves the Treaty as a legal instrument but downplays its constitutional character. The Supreme Court has adopted a similar posture. In two recent decisions, the Court has refrained from conclusively determining whether Indigenous self-government is constitutionally protected.[163]

## IV. Lessons for Victoria

Treaty-making in British Columbia survived serious political and legal challenges in the first decade of its operation. Although the treaty process still weathers significant critique,[164] it has become firmly embedded as a mechanism to achieve reconciliation and 'operationalize the UN Declaration' on the Rights of Indigenous Peoples within the province and the nation.[165] In Australia, treaty-making processes have already run into strong headwinds. The defeat of the referendum on an Aboriginal and Torres Strait Islander Voice led some governments to delay commitments to pursue treaty and opposition parties to abandon their support,[166] but the absence of bipartisanship on the question of treaty challenged processes long before the referendum. In this part, I consider two lessons for the Victorian treaty process that can be gleaned from a study of the early years of treaty-making in British Columbia. These lessons seek to promote the durability of modern treaties and thus respond to the treaty paradox.

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[157] *Nisga'a Constitution* s 34(1).
[158] *Campbell*, n 8, [144].
[159] *Campbell*, n 8, [150]; *Chief Mountain*, n 9, [107].
[160] *Chief Mountain*, n 9, [110].
[161] Joshua Nichols, 'A Reconciliation without Recollection: *Chief Mountain* and the Sources of Sovereignty' (2015) 48(2) *University of British Columbia Law Review* 515, 517.
[162] Nichols, n 161, 518.
[163] *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5, [111]-[112]; *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 [47].
[164] See, for example, James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples: The Situation of Indigenous Peoples in Canada*, UN Doc A/HRC/27/52Add2 (4 July 2014) 15-16 [61]-[66].
[165] British Columbia Treaty Commission, *Annual Report 2023* (2023) 6.
[166] Hobbs, n 2, 551.

Before examining these lessons, however, it is important to highlight two key differences between the case studies.[167] First, the treaty process in Victoria has not been catalysed by constitutional reform or court action.[168] Rather, it is driven by democratic politics. This carries both potential disadvantages and advantages. On the one hand, the absence of judicially established treaty guardrails in Australia may leave the process especially vulnerable to shifts in political support. Without judicial prompting it will be more difficult to ensure a reluctant government continues to engage. At the same time, however, it does suggest broader and deeper commitment among government and the community to the principle of treaty-making, which as I discuss below, may prove valuable in promoting durability.

Second, the Australian process is characterised by the absence of the federal government. As we saw in Canada, the federal government was critical to the development of modern treaty-making. Modern treaties are tripartite agreements negotiated between a First Nation, and the provincial and federal governments. While federal involvement has not been an unalloyed good,[169] it does ensure that these agreements cover a more comprehensive suite of issues of importance to First Nations. It is preferable that Australia adopts a similar tripartite structure for negotiations and settlements.[170] Modern land claims agreements in Canada also obtain constitutional protection under s 35,[171] but no similar constitutional guarantee exists in Australia. Unlike the Canadian provinces, however, Australian States have their own constitutions. As I explore below, State Constitutions may be used to protect a state treaty, even if only by providing a deterrent effect.

### A. Framing Self-Government

A Statewide Treaty could recognise the inherent sovereignty of Aboriginal Victorians and empower the First Peoples Assembly of Victoria with law-making authority over prescribed areas. In its constitutional character the Treaty will serve as a 'social and political compact[]'[172] between Aboriginal Victorians and the State, establishing a firm foundation of partnership and mutual recognition. However, legislation to implement the Treaty will need to be consistent with the Australian Constitution. It is here that lessons from Canada can assist.

Courts in Canada dismissed the submissions in *Campbell* and *Chief Mountain*, in part, because of the distinctive constitutional relationship between the State and First Nations peoples. In *Campbell*, Williamson J held that First Nations self-government is constitutionally guaranteed by s 35 of the Canadian Constitution which recognises and affirms 'aboriginal and treaty

[167] I thank Cheryl Saunders for prompting these thoughts.
[168] Though note that the process was catalysed by frustration at the national constitutional recognition process: Williams and Hobbs, n 2, 58-59.
[169] See discussion in Hobbs and Young, n 17, 257.
[170] Hobbs and Williams, n 4, 227-230.
[171] Modern land claims agreements are protected under s 35(3) of the Canadian Constitution. However, the status of post-1982 Crown-Indigenous agreements that are not 'land claims agreements' is uncertain. As the anonymous reviewer noted, if these agreements confirm or elaborate upon non-treaty 'aboriginal rights' they should be protected by s 35(1). Nonetheless, the scope of s 35(1) non-treaty aboriginal rights is unclear. In two recent decisions, the Supreme Court of Canada raised but did not conclusively determine whether an inherent right to Indigenous self-government is an Aboriginal right protected by s 35(1): *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5, [111]-[112]; *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 [47]. Without clarity, self-government agreements struck outside of land claims agreements may not be constitutionally protected. I thank the anonymous reviewer for this clarification.
[172] Blackburn, n 54, 130.

rights'.[173] Even if the Supreme Court has not held similarly, the constitutional relationship in Australia is materially distinct. This means the constitutional window the implementing legislation must pass through to empower the First Peoples Assembly with law-making authority will be smaller. For this reason, in the interests of pragmatism, the approach in *Chief Mountain* which understates the constitutional nature of modern treaties by reading self-government powers as instances of delegated authority, offers a securer path forward. This approach does not mean that the special character of the agreement should be ignored but acknowledges the legal framework of self-government must be constitutionally sound.

The Victorian Parliament may legislate to give effect to a treaty negotiated between the government and the First Peoples' Assembly.[174] This is because the Parliament, like all Australian State Parliaments, is invested with general plenary legislative power. The form of words adopted in the Victorian Constitution, which provides that the Parliament 'shall have power to make laws in and for Victoria in all cases whatsoever',[175] differs from the more common formulation empowering a legislature to make laws 'for the peace, welfare/order and good government' but the result is the same. These are not words of limitation.[176] Nevertheless, two questions emerge when considering this issue. First, would delegation of law-making power to an external representative assembly constitute an abdication of legislative power? And second, could legislation implementing a Statewide Treaty be entrenched in the Victorian Constitution through manner and form requirements. Each will be considered in turn.

### 1. Delegating Law-Making Power

The Australian Constitution distributes the 'plenitude of executive and legislative powers between the Commonwealth and the States'.[177] As the High Court has explained, the legislative powers of these two levels of government 'covers every subject that is susceptible of legislative regulation and control'.[178] Does this mean that legislative power is exhaustively distributed such that recognition of First Nations law-making would constitute a 'third order of government' inconsistent with the Constitution? This is doubtful. Although it is unlikely an Australian court will find that First Nations self-government survived colonisation as an 'underlying value' inherent within the Constitution,[179] it is likely that a Court will, consistent with the approach in *Chief Mountain*, consider this question by characterising the Act implementing the Treaty. It is accepted that state governments may establish and confer powers and functions on local government,[180] and a Court will examine the structure of the Act purporting to confer law-making powers on the Assembly.

Legislative power in Victoria is vested in the State Parliament.[181] Given State Parliaments exercise 'plenary powers, as large, and of the same nature, as those of the Imperial Parliament itself',[182] the Victorian Parliament may delegate legislative power. The Parliament has done so

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[173] *Campbell*, n 8, [137].
[174] I note here that the Statewide Treaty does not involve the exercise of the external sovereignty of Australia. It is thus within the constitutional authority of a State to legislate to implement a treaty. See Saunders, n 10, 49.
[175] *Constitution Act 1975* (Vic) s 16.
[176] *Union Steamship v King* (1988) 166 CLR 1.
[177] *Davis v Commonwealth* (1988) 166 CLR 79, 93. See *Colonial Sugar Refining Co. Lt v Attorney-General for the Commonwealth* (1912) 15 CLR 182, 214-15 (Isaacs J).
[178] *Gould v Brown* (1998) 193 CLR 346, 373-74.
[179] See *Campbell*, n 8, [81].
[180] *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208.
[181] *Constitution Act 1975* (Vic) s 15.
[182] *R v Burah* (1878) 3 App Cas 889, 904; *Powell v Apollo Candle* (1885) 10 App Cas 282.

in many cases, including empowering councils to make 'local laws' within the scope of their authority.[183] There are two relevant limits to the extent to which Parliament may delegate. First, Parliament must always retain the power to control, withdraw or rescind any delegation.[184] Second, while the Parliament can confer 'very wide powers', it cannot 'surrender its law-making authority' by investing a body with an 'exclusive power to legislate'.[185]

This suggests some scope for conferring a subordinate law-making function on the First Peoples' Assembly of Victoria. The Act could confer delegated law-making authority on the Assembly in prescribed areas, such as cultural heritage. A legislative instrument enacted by the Assembly would be an exercise of legislative power 'which is referable to, derived from and part of the power of the [Victorian] Parliament'.[186] The Parliament would retain control because it could unilaterally rescind the delegated authority. Although doing so would run counter to the spirit and intent of the Statewide Treaty it is necessary to ensure constitutional validity.

Nevertheless, framing self-government powers as an instance of delegated legislative authority does not mean that the constitutional character of the agreement should be entirely displaced. Given the nature of the settlement, the Parliament should adopt distinctive procedures when exercising its obligation to supervise the Assembly's law-making. The precise approach should be determined by negotiation as part of the treaty process, but several options can be considered. For example, subordinate legislation can ordinarily be disallowed by a resolution of either House of Parliament.[187] In virtue of the sui generis nature of the Treaty, however, instruments passed by the First Peoples Assembly should only be disallowed on the resolution of both Houses with an accompanying statement explaining the reasons for the resolution and following a recommendation from the Scrutiny of Acts and Regulations Committee. Similarly, some instruments or class of instruments made by the First Peoples Assembly could be exempted entirely from the requirements of the *Subordinate Legislation Act 1994* (Vic).[188]

At least one potential complication exists. Delegated powers are ordinarily exercised by the executive. As Anne Twomey has noted, the Governor acts 'on the advice of the Executive Council, which is comprised of Members of Parliament'. In practice, this means the Parliament has delegated legislative powers to a 'Committee of both Houses'.[189] A legislature may delegate legislative powers to subordinate bodies that are 'not necessarily [part of] the Executive Government',[190] but this is generally limited to bodies that the Parliament itself has established, such as local governments.

The First Peoples' Assembly of Victoria is not part of the executive, and nor is it a statutory body or municipal council that owes its existence to an Act of Parliament. It is not clear if it

[183] *Local Government Act 2020* (Vic) s 71.
[184] *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, 263 (Mason CJ, Dawson and McHugh JJ) ('*Capital Duplicators*'); *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365, 373 (Barwick CJ).
[185] *Crowe v Commonwealth* (1935) 54 CLR 69, 94 (Evatt and McTiernan JJ); Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 211; Greg Taylor, *The Constitution of Victoria* (Federation Press, 2006) 217-218.
[186] *Capital Duplicators*, n 184, 263 (Mason CJ, Dawson and McHugh JJ).
[187] *Subordinate Legislation Act 1994* (Vic) s 25C.
[188] *Subordinate Legislation Act 1994* (Vic) s 4A(1)(c).
[189] Twomey, n 185, 210. Citing Edward Jenks, *The Government of Victoria (Australia)* (MacMillan and Co, 1891) 260.
[190] *Victorian Stevedoring and General Contracting Co Pty Ltd v Meakes and Dignan* (1931) 46 CLR 73, 118-9 (Evatt J).

can be analogised to these sorts of institutions either. This is because its role is to represent distinct political communities as part of treaty negotiations with the State. Formally, the Assembly is a public company established under the *Corporations Act 2001* (Cth) that is 'recognised' by the State as its negotiating partner.[191] As such, the Parliament would be conferring legislative power on a body that it has not authorised or established – though it has 'recognised' it. While this may be novel, returning to first principles suggests that it can be validly conferred so long as the Parliament can withdraw the conferral of law-making powers.[192]

2. Protecting the Treaty

Australian States have their own Constitutions. Can the Victorian Constitution be amended to entrench or protect a Statewide Treaty? The general rule is no. State Constitutions are flexible and capable of being amended by passage of ordinary legislation. As the Privy Council observed in *McCawley v The King*, the Victorian Constitution occupies 'precisely the same position as a *Dog Act* or any other Act, however humble its subject matter'.[193] In practice, this means that even if the Victorian Parliament amended the State Constitution to protect legislation giving effect to a Statewide Treaty, a subsequent Parliament could repeal that protection. Alarmingly, the Parliament would not even have to express an intention to revoke the protection; it could do so by implication. Constitutional protection of treaty rights in Victoria would – at best – provide only a political impediment.

The plenary nature of legislative power exercised by State Parliaments is, nonetheless, limited in certain respects. State Parliaments may entrench legislation through manner and form requirements, which impose restrictions on a future Parliament's authority to make or amend laws.[194] These restrictions do not confine the subject matter over which Parliament may legislate, which remains plenary, but the procedure for passing laws. Manner and form requirements were originally introduced by s 5 of the *Colonial Laws Validity Act 1865* (Imp) but are now governed by s 6 of the *Australia Act 1986* (Cth). That provision provides:

> …a law made after the commencement of this Act by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament, whether made before or after the commencement of this Act.

There are at least two problems with introducing manner and form provisions to entrench legislation giving effect to a Statewide Treaty.

First, manner and form provisions are only valid in relation to laws relating to the 'constitution, powers or procedure of the Parliament'. The scope of these words has not been definitively resolved, but it is not clear that it would encompass legislation giving effect to a Statewide Treaty or Traditional Owner Treaties with Aboriginal Victorians.

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[191] *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) s 11; *First Peoples Assembly of Victoria Ltd Constitution* (adopted 22 March 2024).
[192] Saunders, n 10, 49.
[193] *McCawley v The King* [1920] AC 691, 706.
[194] See, generally, Jeffrey Goldsworthy, 'Manner and Form in the Australian States' (1987) 16 *Melbourne University Law Review* 403; Gerard Carney, 'An Overview of Manner and Form in Australia' (1989) 5 *Queensland University of Technology Law Journal* 69.

Some aspects of a treaty settlement may fall within this description. In *Attorney-General (WA) v Marquet*, the majority observed that the 'constitution' of a State Parliament 'includes … its own "nature and composition"'.[195] This extends, the majority considered, to at least legislation that 'deals with matters that are encompassed by the general description "representative"'.[196] This might encompass reserved seats in the Victorian legislature for Aboriginal Victorians. As part of a Statewide Treaty, the Victorian government may agree to amend the Constitution to introduce reserved seats in the legislature for Aboriginal Victorians.[197] Subsequent legislation seeking to abolish these seats would be a law that deals with matters relating to the 'representative' character of the legislature and thus would need to satisfy any manner and form restrictions.

Other potential outcomes of a treaty are less certain. Suppose legislation giving effect to a treaty empowers the First Peoples' Assembly to pass instruments of a legislative character in certain defined fields, such as cultural heritage. Would a subsequent law rescinding or revising this delegation be a law respecting the powers of Parliament? The answer will depend on the precise form and structure of delegation adopted but appears unlikely.

Second, in recognition of the constitutional character of a treaty as an agreement between two or more political communities to share land and governance, one party should not be able to unilaterally amend the agreement. As a matter of comity, the Victorian government and First Peoples' Assembly should reach agreement before any variation of the Statewide Treaty enters into force. Entrenching this requirement may prove challenging.

Consider the recent case of *Mineralogy v Western Australia*.[198] In 2001, Western Australia and Mineralogy Pty Ltd entered into a mining agreement (the 'State Agreement'). The State Agreement and a 2008 variation were included as Schedules to the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) (the 'State Act'). Section 4 of the State Act provided that the State Agreement 'is ratified' and 'takes effect'. Clause 32 of the State Agreement outlined a mechanism for the parties to vary the agreement. If the parties agreed to a variation, the minister must table the variation in each House of Parliament within 12 sitting days. If neither House passed a resolution of disallowance within 12 sitting days of the tabling, the variation was deemed to take effect. In 2020, Mineralogy initiated an arbitration claiming up to $30 billion in damages from the State government. In response, the Parliament amended the State Act altering any liability it owed. The 2020 Act was not introduced in accordance with cl 32 of the State Agreement. Mineralogy challenged the validity of the 2020 Act on several grounds, including that it was of no effect because it did not comply with the manner and form requirement set out in cl 32 of the State Agreement.

The High Court unanimously dismissed this submission. The plurality judgment of Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ explained that manner and form requirements impose restrictions on the process of making a law by Parliament. Clause 32 of the State Agreement did not 'in form nor in substance' impose any requirement on Parliament.[199] Rather,

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[195] *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 572 ('*Marquet*'). Citing *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394, 429 (Dixon J).
[196] *Marquet*, n 195, 573.
[197] Paul Sakkal and Jack Latimore, 'A "Black Parliament"? Victorian Government Discusses Indigenous Voice', *The Age* (online, 23 October 2021); Adeshola Ore, 'Historic Deal Struck to Begin Victorian Treaty Negotiations with First Nations Groups', *Guardian Australia* (online, 20 October 2022).
[198] (2021) 274 CLR 219 ('*Mineralogy*').
[199] *Mineralogy*, n 198, 252 [79]

it controlled the amendment of a contract signed between the government and a mining company, and prescribed a procedure that must be followed to give legal effect to that variation. The mere 'involvement of the Houses of Parliament does not make the process for which the clause provides a process of making a law by the Parliament'.[200] *Mineralogy* may not have made 'any great advances in the development or explication of manner and form',[201] but it does limit options parties to a Statewide Treaty have to protect the distinctive character of their agreement. A similar clause that (1) required the parties to agree before amending the Treaty, and (2) gave legal effect to that change by tabling and disallowance mechanisms would not constitute a valid manner and form provision because it would not be a law made by Parliament. Parliament would be free to amend or revise the treaty legislation without the approval of the First Peoples' Assembly.

An additional challenge emerges on Edelman J's separate concurring judgment. His Honour considered that given provisions of the State Agreement have the force of law, it is both contractual and statutory. In its statutory character, Edelman J held that cl 32 'plainly purport[s] to impose a constraint upon Parliament'.[202] Given the clause did not constrain Parliament from unilaterally amending the State Act, however, it imposed no manner and form requirement.[203] Critical to his Honour's reasoning was the fact that cl 32 was not the exclusive method of altering the State Agreement; it could also be amended through arbitration.[204] It is likely that this will be the case for a Statewide Treaty. Following the practice in Canada,[205] a dispute over the interpretation of the Victorian Treaty will likely be resolved, in the first instance, via arbitration. Arbitration is appropriate because it should ensure a greater role for First Nations Law, Lore and Cultural Authority.[206] Once again, this means a provision similar to cl 32, requiring agreement before the Treaty Act is revised, would be of no effect.

Yet, the absence of an arbitration clause would not help. As Edelman J explained, if cl 32 was the exclusive means of amending the Agreement, it would constitute an abdication of legislative power.[207] This is because Parliament would have made the validity of legislation amending the State Agreement conditional upon the concurrence of an extra-parliamentary corporation.[208] As such, a requirement that the First Peoples' Assembly agree to any amendment of the Statewide Treaty before legislation to give effect to the variation is introduced into Parliament would be of no effect.

Here is an example of the treaty paradox. A Statewide Treaty will represent a constitutional accord negotiated between representatives of First Peoples in Victoria and the Victorian State. As the first formal treaty struck on this continent and as a mechanism to formalise relationships and establish foundations based on mutual recognition and respect, the instrument would be of the most fundamental character. Yet, in giving legal effect to this agreement the Treaty would

[200] *Mineralogy*, n 198, 253 [79].
[201] Anne Twomey, 'Manner and Form Mysteries Highlighted but Unresovled in *Mineralogy v WA*', *AusPubLaw* (Blog Post, 1 December 2021) <https://www.auspublaw.org/blog/2021/12/manner-and-form-mysteries-highlighted-but-unresolved-in-mineralogy-v-wa-_>.
[202] *Mineralogy*, n 198, 276 [146].
[203] *Mineralogy*, n 198, 279 [154].
[204] *Mineralogy*, n 198, 278 [150].
[205] *Nisga'a Treaty*, n 90, ch 19.
[206] See discussion in John Borrows and Michael Coyle (eds), *The Right Relationship: Reimagining the Implementation of Historical Treaties* (University of Toronto Press, 2017) Pt III.
[207] *Mineralogy*, n 198, 278-79 [152].
[208] Adapting language from *West Lakes Ltd v South Australia* (1980) 25 SASR 389, 397.

become vulnerable. One party would always retain the legal authority to unilaterally revise or revoke the sacred promises it had made.

It is worth noting that the situation is slightly different in Canada.[209] There, the federal parliament and provincial legislatures may enact legislation that contain 'primacy clauses'.[210] These clauses provide that a statute may only be repealed or limited by a later statute if that later statute contains express language stating that the new law is intended to override the earlier statute.[211] Described as 'not quite constitutional but certainly more than ordinary',[212] these 'quasi-constitutional' statutes operate in a similar way to manner and form provisions in Australia. They do not prevent subsequent amendment but require it occurs in a certain form. Significantly, the content that may be protected by quasi-constitutional statutes is broader than the composition, powers and procedure of parliament.[213] Even if a modern Crown-Indigenous agreement did not obtain constitutional protection under s 35, it could include a primacy clause that would ensure supremacy over later statutes to prevent both implied repeal and impose a political deterrent on unilateral revision. This mechanism is not available in Australia.

In Australia, in the absence of federal constitutional reform to protect Indigenous-State treaties, the State will always retain the ability to unilaterally amend these constitutional accords. Nevertheless, State constitutional amendment may provide a deterrent effect. There are several provisions entrenched in State Constitutions across Australia that do not appear to meet the requirements in s 6 of the *Australia Acts* but nonetheless serve to make amendment politically challenging.[214] The Victorian Constitution, for instance, provides that a Bill to amend the prohibition on fracking and coal seam gas exploration and mining, or to privatise state water services, must obtain an absolute three-fifths majority in both Houses of Parliament at the third reading.[215] These provisions do not relate to the composition, powers or procedure of the Parliament and are thus likely of no effect, but they do signify the importance of the issue to the community. Entrenchment along these lines will speak to the character and quality of the Statewide Treaty. It may also help to promote community recognition and support for the Treaty, contributing to the development of a convention that the Parliament refrains from interfering or revising the terms of the settlement without the agreement of its negotiating partner.

### B. The Community Must Own the Treaty

Modern treaties are foundational instruments that establish frameworks to guide relationships between communities. Although they operate within the legal order of the State, as documents that possess a constitutional character, they engage basic and fundamental ideas about the locus of authority and power within the jurisdiction. The experience in British Columbia – alongside the challenges to legal entrenchment in Australia discussed above – demonstrate the need to promote community ownership over the treaty process and any eventual agreement. This is a

[209] I thank the anonymous reviewer for this prompt.
[210] See, for example, *Canadian Bill of Rights*, SC 1960 c. 44, s 2; *Charter of Human Rights and Freedoms*, RSQ 1975, c. 12, s 52. On quasi-constitutional statutes in Canada, see Vanessa McDonnell, 'A Theory of Quasi-Constitutional Legislation' (2016) 53(2) *Osgoode Hall Law Journal* 508; Richard Albert, 'Quasi-Constitutional Amendments' (2017) 65 *Buffalo Law Review* 739.
[211] See, for example, *Public Order Temporary Measures Act*, SC 1970, s 12.
[212] *Ontario Human Rights Commission v Simpson-Sears* [1985] 2 SCR 536, 547 [12].
[213] Though of course the level of entrenchment is weaker as overriding legislation requires only an ordinary majority vote in Parliament.
[214] Taylor, n 185, 470-520.
[215] *Constitution Act 1975* (Vic) ss 18(1A), (2)(fa) (2)(fab).

higher bar than mere awareness and understanding. It does not require all Victorians to support the Statewide Treaty, but it does necessitate an appreciation and acknowledgment that treaty-making is valuable, worthwhile, and – perhaps – unremarkable. Drawing on the theory and practice of global constitution-making, Cheryl Saunders has noted the symbolic and practical significance of the concept of ownership in relation to Indigenous-State treaty-making. It requires, Saunders explains:

> the need for a more inclusive local process, so that changes are 'owned' not only by the political leaders of the day but by others who may, ultimately, replace them, and by the society in which the changes must operate, immediately and over time.[216]

In this sense, community ownership may act to temper political effort to abandon treaty-making or discard hard-won settlements.

In Victoria, negotiations for the Statewide Treaty are occurring between 'the State' and 'the First Peoples' Representative Body'.[217] On the non-Indigenous side, this is led by the government acting for all Victorians, including Aboriginal Victorians. Consistent with all negotiations, talks are confidential to allow the parties to discuss matters freely and consider various proposals. Breaches in confidentiality will not only 'undermine trust [and] inhibit creative thinking',[218] but may also inflame community anxiety. When the draft Nisga'a AIP was leaked to the press in 1996, political opposition to the treaty began to coalesce. As Steven Haberfeld notes, 'it is too easy for people who are not present to take things out of context and treat something as done before there is agreement'.[219] While this is appropriate, it does inhibit community understanding. A concerted effort to bring the community into the process is required.

The Statewide Treaty will be implemented through legislation allowing the Parliament time and space to consider the agreement, but this inclusive process should begin before a bill is introduced into the legislature. It is important to remember that the Statewide Treaty represents the first time in Australian history that an Aboriginal representative body will be empowered with law-making authority over prescribed areas. It is likely to attract significant opposition.

Community education started slowly in British Columbia, with the first public information process not commencing until 14 months after the BCTC was established. In its 1994 Annual Report, the Commission criticised this delay, suggesting that it would only intensify the challenges facing the process. Declaring that treaty-making 'holds great importance for the future of the province and the country', the Commission considered it 'essential that the public be as fully informed as possible on the historic need for treaty making in British Columbia and on the ways in which this need is being addressed'.[220] However, the failure of the provincial and federal governments, and the First Nations Summit, to carry 'out their obligations to inform the public', 'will continue to lead to apprehension and resistance from interest groups and the public'.[221] The Commission concluded:

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[216] Saunders, n 10, 57.
[217] *Treaty Negotiation Framework*, n 35, 15.1(a).
[218] Haberfeld, n 31, 59.
[219] Haberfeld, n 31.
[220] British Columbia Treaty Commission, n 83, 24.
[221] British Columbia Treaty Commission, n 83, 24-5.

> An important benefit to all British Columbians when treaties are concluded should be a new relationship between the non-aboriginal and aboriginal communities based on an understanding of each other. In the absence of accurate information to assist people to understand each other, the hope for a new relationship will fade.[222]

First Nations in British Columbia understood the need to build community ownership if the process was to succeed. In 1994, the Sechelt Indian Band signed an 'openness agreement', committing to allow the public 'to attend the band's treaty discussions'.[223] The Nuu'Chah'Nulth Tribal Council signed a similar agreement, permitting public attendance and media coverage of their talks and ensuring any decisions made during negotiations would be disseminated widely.[224] As Christopher McKee notes, most First Nations involved in the process agreed that the public needed to be meaningfully included; they worried, however, that public consultation could be employed by those opposed to treaty-making to derail talks.[225]

Education and awareness campaigns are a critical component of effective treaty-making. The 2002 Referendum on Treaty Negotiations, which had the potential to disrupt the treaty process was motivated, at least in part, by concerns that the broader public had been left behind. Geoffrey Plant, the Attorney-General who oversaw the referendum, notes that the poll was aimed at:

> a body of the public that felt disengaged from the treaty process and [were] concerned about and concerned that perhaps governments were going to make decisions on their behalf that they really didn't have any understanding of or control over.[226]

A referendum is an inappropriate tool for assessing public support for treaty processes. Rather than a sober assessment of public sentiment, referendums can become a proxy war for a larger political contest. They are blunt instruments that are unable to 'deliver meaningful input'[227] on complex and difficult issues that are prone to misunderstanding and manipulation, such as modern treaty-making.[228] They also suggest that the government is negotiating for only its non-Indigenous citizens.[229] In British Columbia, an effective First Nations-led boycott means analysis of the poll's impact is difficult. Nevertheless, that the referendum was held at all reveals that a significant portion of the community had concerns about the process. It is this audience that community education campaigns should target.

The Victorian process has made a strong start. Indeed, given the process has been prompted by democratic politics rather than court decisions, treaty-making in the State has been marked by the early and sustained role of Parliament, which has spent many days debating legislation to establish key treaty institutions. Some of these bodies, such as the Yoorrook Justice Commission are designed to complement and inform the treaty-making process. While the extent to which the Commission and its publicly accessible witness testimonies and hearings has penetrated the consciousness of the Victorian community is uncertain, the Commission is

[222] British Columbia Treaty Commission, n 83, 25.
[223] McKee, n 52, 59.
[224] McKee, n 52.
[225] McKee, n 52, 63.
[226] Feltzer, n 127, 162.
[227] British Columbia Treaty Commission, n 121.
[228] Saunders, n 10, 59.
[229] Price, n 120; Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (University of British Columbia Press, 2000) 198.

proving valuable in consolidating government commitment to treaty.[230] The Premier, and senior members of the executive, including the Commissioner of Police, have testified before the Commission, setting out their understanding of the continuing impact of colonisation on Aboriginal Victorians and their commitment to 'a future that is healed and reconciled'.[231]

The State has also provided more initial funding to the treaty process than the early years in British Columbia. This has ensured a larger professional and public footprint. The First Peoples Assembly, for instance, is a substantial organisation comprising more than 61 FTE positions,[232] with a large public profile and social media presence.[233] While the Assembly is a unique organisation with no exact comparator in BC, its profile markedly exceeds that of the BC Treaty Commission.[234]

The parties have built from this solid base. The State government has led two public education campaigns designed to build community awareness, understanding and support for the treaty process. These programs have had a slight but measurable impact, with research demonstrating both 'increased public engagement with treaty',[235] as well as increased support for the State 'formalis[ing] new relationships with Aboriginal Victorians'.[236] The First Peoples' Assembly has also conducted a significant community engagement campaign. In 2022 the Assembly hosted more than 360 community events and had more than 23,000 conversations with Victorians about treaty.[237] In 2023, the Assembly increased its engagement, hosting 450 events, including community forums, a comedy roadshow, music festivals, as well as visits to prisons and schools. Attendees at the Treaty Day Out music festival in Melbourne reported increased awareness and support of Treaty.[238] While these programs will need to expand as negotiations continue, particularly to reach broader sections of the Victorian community, they suggest relevant actors are aware of the need for ownership.

This issue is particularly pressing in Australia. As we have seen, treaty talks in British Columbia were prompted by court decisions upholding the existence of Aboriginal title within the province. During the early years of the treaty process, while political opposition continued to swirl, successive court decisions elaborating the scope and content of Aboriginal title strengthened the bargaining position of First Nations communities. In *Haida Nation v British Columbia (Minister of Forests)*, for instance, the Supreme Court explicitly held that the Crown must negotiate with First Nations to determine and recognise their constitutionally protected rights:

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[230] I thank Cheryl Saunders for this insight.
[231] Jacinta Allan, 'Premier's Witness Statement' (Yoorrook Justice Commission Hearing, 29 April 2014) 2 [14].
[232] First Peoples Assembly of Victoria Ltd, 'Annual Information Statement 2023', *Australian Charities and Not-for-Profits Commission* <https://www.acnc.gov.au/charity/charities/89c69757-b211-ea11-a811-000d3ad1f9f4/documents/13609087-509a-ee11-be37-002248110683>.
[233] @firstpeoplesvic has 20,500 followers on Instagram and 15,900 followers on Twitter (as of 6 August 2024).
[234] @BCTreaty has 1,200 followers on Instagram and 1,392 followers on Twitter (as of 6 August 2024). Note that the First Nations Summit (@FNSummit), which is comprised of a majority of First Nations in British Columbia and provides a forum to address issues related to Treaty negotiations, has 13,800 followers on Twitter (as of 6 August 2024).
[235] Department of Premier and Cabinet (Vic), *Self-Determination Reform Framework Report 2021* (Report, 2023) <https://www.firstpeoplesrelations.vic.gov.au/self-determination-and-reform-framework/actions-and-future-commitments-people>.
[236] Department of Premier and Cabinet (Vic), *Advancing the Victorian Treaty Process: Annual Report and Plan 2018–19* (Report, 2019) 18 <https://content.vic.gov.au/sites/default/files/2019-09/Advancing-the-Victorian-Treaty-Process-Annual-Report-and-Plan-2018-19.pdf>.
[237] First Peoples' Assembly of Victoria, *Treaty for Victoria* (Annual Report, 2022) 12.
[238] First Peoples' Assembly of Victoria, *Treaty for Victoria* (Annual Report, 2023) 17-26.

> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation.[239]

Indeed, one First Nations Treaty Negotiator considered that 'law and pragmatism' accounts for Premier Campbell's 'complete 180' on First Nations policy after his referendum.[240] Similar buttressing from Australian courts cannot be expected,[241] placing more pressure on the need to develop a truly inclusive process that the broader community feels part of.

Contemporary events in Aotearoa New Zealand further emphasise how community ownership can enhance the durability of a Victorian Treaty. The National-led government is developing a Treaty Principles Bill (as part of its coalition agreement with the ACT Party) which aims to redefine the principles of Te Tiriti o Waitangi (the Treaty of Waitangi) away from notions of a 'partnership' between the Crown and Māori. An early draft of the Bill proposed three new principles:

> **Article 1**
> Māori: *kawanatanga katoa o o ratou whenua*
> The New Zealand Government has the right to govern all New Zealanders.
>
> **Article 2**
> Māori: *ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou whenua o ratou kainga me o ratou taonga katoa*
> The New Zealand Government will honour all New Zealanders in the chieftainship of their land and all their property.
>
> **Article 3**
> Māori: *a ratou nga tikanga katoa rite tahi*
> All New Zealanders are equal under the law with the same rights and duties.[242]

A leaked justice Ministry memo recognised that the bill will be 'highly contentious' given the fundamental constitutional change it proposes and the absence of public consultation.[243] Apart from being potentially discriminatory and failing to satisfy the spirit and intent of the Treaty, the memo highlighted that given the lack of consultation, the Bill 'could be seen as one partner (the Crown) attempting to define what the Treaty means and the obligations it creates'.[244] While there is no legal impediment on the Parliament to enact the Treaty Principles Bill, it is expected that firm opposition may hinder its passage. One recent report suggests that '[c]ommunity

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[239] *Haida Nation*, n 64, 525.
[240] Feltzer, n 127, 163-64.
[241] Though the issue of compensation for the extinguishment of native title post 1975 may convince some political parties to reassess their opposition to treaty processes. See, *Northern Territory v Griffiths* (2019) 269 CLR 1; *Commonwealth v Yunupingu* [2023] FCAFC 75.
[242] 'The Treaty Articles', *Equal Rights for All* <https://www.treaty.nz/>.
[243] Adam Pearse, 'Leaked Ministry Advice Suggests Proposed Treaty Principles Bill "Highly Contentious"', *The New Zealand Herald* (online, 19 January 2024) <https://www.nzherald.co.nz/nz/politics/leaked-ministry-advice-suggests-proposed-treaty-principles-bill-highly-contentious/QIBNNLDMVZBK3HWNMJIGDJIZ6M/>.
[244] Pearse, n 243.

organisers are expecting an unprecedented level of mobilisation'.[245] Such opposition is only possible because of the status of Te Tiriti within the public life of Aotearoa New Zealand.

## V. Conclusion

Modern treaties establish foundational relationships that guide and shape the behaviour of peoples and communities and their understanding of government. In this sense they are constitutional in nature. They also possess a fundamental moral component.[246] Modern treaties constitute promises by diverse political communities to reconcile competing claims through dialogue and mutual agreement.[247] The effectiveness of the agreement – its settlement terms, its implementation, and its ongoing role as a framework to guide engagement – is 'anchored by shared commitment to that relationship'.[248] This character is not reflected in their formal legal status. This disconnect is the treaty paradox.

Modern treaties are both constitutional accords and legislated instruments subject to unilateral amendment or repeal. They require broad community ownership to ground the constitutional character of the instrument, but they also need to be consistent with the existing constitutional framework. This means settlement terms, particularly those relating to the recognition of self-government, must walk a fine line to survive legal challenge. The treaty paradox does not inhibit the promise of treaty-making, but it does emphasise the importance of learning lessons from comparative jurisdictions and applying those findings to the Australian context.

In this article I have outlined the treaty paradox and explored two major political and legal challenges to the treaty process in British Columbia. I have argued that the durability of a Victorian Treaty can be strengthened in two ways. First, by conferring delegated law-making power over prescribed areas on the First Peoples' Assembly. This approach recognises the inherent power of self-government Aboriginal Victorians possess but formally structures such power in a manner consistent with the Australian constitutional order. It is unlikely that these powers can be effectively entrenched through manner and form provisions, which leads to the second key lesson. An inclusive and open public education and awareness campaign that builds community ownership over the treaty process is critical to the ongoing effectiveness and durability of treaty. Even if modern treaties are not formally constitutional accords, if the broader Australian community perceives and understands them as such, treaties in Victoria may be insulated from unilateral amendment or revision. In this way, the First Peoples Assembly of Victoria may evolve into 'an autonomous partner in governance'.[249]

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[245] Laura Walters, 'Opposition Mounts Ahead of Draft Treaty Principles Bill', *Newsroom* (online, 17 July 2024) <https://newsroom.co.nz/2024/07/17/opposition-mounting-ahead-of-draft-treaty-principles-bill/>.

[246] Dwight Newman, 'Contractual and Covenantal Conceptions of Modern Treaty Interpretation' (2011) 54 *Supreme Court Law Review* 475, 485-6.

[247] Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, 2001) 155.

[248] Janna Promislow, 'Treaties in History and Law' (2014) 47(3) *University of British Columbia Law Review* 1085, 1086; Mark Walters, 'Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History after *Marshall*' (2001) 24(2) *Dalhousie Law Journal* 75, 78.

[249] Gurston Dacks, 'Implementing First Nations Self-Government in Yukon: Lessons for Canada' (2004) 37(3) *Canadian Journal of Political Science* 671, 689.