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Tenuous Foundations: Historical lessons for modern land agreements

David Goodwin, Mick Strack
School of Surveying / Te Kura Kairūri,
University of Otago, Dunedin

ABSTRACT

THE PAST DECADE HAS SEEN A WAVE of land leases, sales and concessions unparalleled since colonial times. Concurrently, many countries are embroiled in ongoing remedial and restitutive work over historical land leases, sales and concessions that have failed or had unforeseen consequences. This raises the question of whether historical agreements can provide insights into long-term outcomes of latter-day land deals. Three cases are reviewed of agreements between British authorities and indigenous groups, and the outcomes are compared critically. The article concludes that the terms of such agreements are often far broader than the written words, and that if modern agreements are to avoid complications in the long term they should be closely attuned to the longevity of verbal commitments, cultural protocols and trust relationships.

Keywords: Treaty negotiation, land tenure, land grabs, legal evidence, indigenous land rights; aboriginal land tenure.

Introduction

IN THE PAST DECADE, a wave of large scale land agreements has taken place globally (Karsenty 2010, Cotula and Vermeulen 2011, World Bank 2010, Zagema 2011, Geary 2012). These land transactions often take the form of complex packages with embedded expectations about investment and employment creation (Cotula et al. 2009: 6), and although dominated by the private sector rather than by governments, they contain elements in common with land agreements negotiated between British authorities and indigenous groups as a part of colonial expansion. Comparable features include the fact that some of the granted land is already utilised (or at least claimed); there is a tendency to treat land as commodified property, which may be foreign to indigenous perspectives; there is frequently an absence of legal mechanisms to protect local interests (Cotula et al. 2009: 4,7), so agreements may 'legitimize and entrench the claims of external investors over those of poor local rights-holders' (Cotula and Vermeulin 2011: 47), and well-resourced purchasers today still also tend to acquire land from under-resourced land occupiers. Furthermore, just as historical treaties and concessions were sometimes simplistic, so too is there a tendency for latter-day contracts to be 'short and simple compared to the economic reality of the transaction' (Cotula et al. 2009: 7); to be complicated by factors such as the complexity of local customary land rights (Cotula et al. 2009: 8); and to be couched in terms of formal conveyancing law without recourse to indigenous title and social tenure institutions (Berry 1989).

Where land agreements go awry, legal remedial measures are sometimes resorted to, for example between the State and indigenous peoples of New Zealand and Canada. These legal measures typically employ detailed legislative provisions that suggest a reaction against complications arising from lobse wording and from insufficient attention paid to balancing the

diverse understandings of legally savvy newcomers with indigenous land occupiers. Alternatively, where land access is perceived to be unjust, the remedy chosen may be that of violent redress, for example in Zimbabwe and Brazil. Both avenues are costly and best avoided, and since it seems reasonable to assume that latter-day land transactions may in years to come be burdened with legacies comparable with historical treaties and concessions, this raises the research question of whether a close inspection of colonial land agreements could provide insights capable of informing policy in contemporary agreements. This article explores three historical cases – namely New Zealand, Canada and Zimbabwe – with a view to capturing both the spirit of what was agreed and details of how those agreements have fared in intervening years. In all three cases, evidence is drawn from the literature supplemented by interviews, which took place in New Zealand (2001 – 2012), Canada (2001 and 2003) and Zimbabwe (2005, 2009, 2012 and 2014).

Methods

Special difficulties are associated with getting to the heart of historical agreements. In practice, written documents with appended signatures or written marks are still often accorded more weight than other forms of evidence, but this may be a mistake. As Shortland comments, of New Zealand: ‘We who have so long trusted to the authority of books, are, I am persuaded, too suspicious of the credibility of the traditionary history of a people who have not yet weakened their memories by trusting to a written language’ (Shortland 1997 (1851): 95). A variety of forms of evidence are admissible in law, and current interpretations acknowledge that the spirit of agreements is paramount. Certainly, verbal evidence, preserved by oral tradition or records of debates about discussions and promises offered prior to signing and frequently couched in figurative or metaphorical language, often carried considerable weight in swaying opinion of contracting parties. In fact, a person’s word was often paramount from an indigenous point of view, especially when ratified by some form

of cultural protocol such as smoking a pipe of peace. Alternative evidence strands such as these are borne in mind as the three cases are now considered.

The Treaty of Waitangi, New Zealand

The Treaty of Waitangi (Te Tiriti o Waitangi) was signed in February 1840 by representatives of the British Crown and some Maori chiefs, more of whom signed later. It led to the declaration of British sovereignty later that year. The English version of the Treaty comprises three relatively simple articles, namely sovereignty (ceded to the British Crown), property rights (retained by Maori as long as they wished) and citizenship (protected for all people). In the Maori language version, Te Tiriti is more explicitly about kawanatanga (governing authority granted to the Crown), rangatiratanga (Maori authority over their own property and lives) and tikanga (protection of Maori custom). Semantic discrepancies and multiple understandings have been widely debated – for example, the absurdity of Maori signing the Treaty if it meant relinquishing rangatiratanga and mana (personal and tribal authority) (Palmer 2008: 70) – yet these remain largely unresolved except for general agreement that the focus should be on Treaty principles rather than the exact words.

Although the written words of the Treaty have assumed great importance in the intervening years, words of explanation and endorsement would have carried considerable weight at the time. For example, the verbal endorsement of the proposed Treaty by the missionary Henry Williams would have been crucial in view of the trust relationship he had built up with Maori over many years. Williams said that the missionaries fully approved of the Treaty and that it was ‘the act of love towards them on the part of the Queen, who desired to secure to them their property, rights and privileges’, and it was ‘a fortress for them against any foreign power which might desire to take possession of their country’ (Rogers 1998: 165, Orange 1987: 45). For Maori, possession by a foreign power was a

real fear, and they had a particular dread of the French. This dated back to 1772, when ‘a French captain, Marion du Fresne, was killed by the Maoris, presumably for a breach of the Maori law of tapu. The French sent in a punitive expedition, which by its severity was to remain a stigma in the Maori mind’ (Rogers 1998: 90). Williams’s words would have carried particular weight in the light of rumours, in September 1839, that a French man-of-war was in the offing to annex New Zealand, rumours that were taken seriously enough for an English ship to be sent from New South Wales to deal with the threat (Rogers 1998: 89-90).

As well as the verbal endorsement of missionaries, words spoken at the signing ceremonies would also have been important. As each chief signed and shook hands with Captain Hobson, he announced ‘He iwi tahi tatou’ – ‘We are now one people’ (Orange 1987: 57), suggesting a spirit of a partnership between equal peoples. The signatures appended to the Treaty at Waitangi were followed by several months during which copies of the Maori versions of the Treaty were taken around New Zealand, gathering signatures. We know that the subsequent explanations were not always as clear as on that first occasion at Waitangi, and for the chiefs who signed, these verbal explanations probably carried far more weight than the written words (Moon 2002). Crown representatives, picked almost at random, were despatched to get Maori signatures on the Treaty, ‘like travelling quacks, selling some cure-all elixir’ (Moon 2002: 132). Maori consent was helped by ‘presents or other pecuniary arrangements’, for example ‘gifts’ of blankets (p112), that call into question the ‘free and intelligent consent’ initially called for by the British Colonial Office in the wake of their acknowledgement of the Declaration of Independence by the United Tribes of New Zealand (Orange 1987: 21). Consent was also meant to have been ‘expressed according to ... established usages’ (Orange 1987: 31), but the application of the Treaty by the Crown relied more on the established usages of English law, and later, Crown deeds to land regularly eclipsed native title (e.g. *R v Symonds* (1847) NZPCC 387 and *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur. (NS) 72).

So how did Maori envisage the Treaty guarantees and protections? One chief, Te Kemara, in the debate leading up to the signing of the Treaty, complained that the Governor (representing the Queen) would be ‘up’ and he would be ‘down low, small, a worm, a crawler’ (Caselberg 1975: 44). Clearly he was concerned that Maori signatories risked losing their mana. As Rogers comments, ‘All the implications of sovereignty in its legal sense they may not have understood, but that they were to become lesser chiefs under the Queen’s authority they could grasp quite well’ (Rogers 1998: 170). But authority was one thing, land use quite another. The northern chief Nopera Panakareao understood from the Treaty that ‘the shadow of the land goes to the Queen, but the substance remains to us ... We now have a helmsman for our canoe’ (Caselberg 1975: 25), which suggests an understanding of a benevolent and guiding Queen who nevertheless was a titular head only. A scant eight months later, Nopera Panakareao, observing the practical implementation of the Treaty, is quoted as saying: ‘The Substance of the land goes to the Europeans, the shadow only will be our portion’ (Ward 1968, Preface).

There is conflicting evidence about whether Maori understood the implications of selling land, and the exclusive rights that were subsequently claimed by settler owners. There was no Maori word for ownership (Waitangi Tribunal 1997: 73), and the phrase ‘tuku whenua’ had specific connotations of land assigned to people brought in to swell a hapu (tribe). Maori certainly recognised the importance of land to their continued way of life, and many understood the worthlessness of blankets, axes and pots in comparison with land (Te Waharoa in Caselberg 1975: 29). Europeans, on the other hand, saw land transactions as separating land from people – an absolute alienation of land. In short, ‘Western land sales were diametrically opposed to the traditional concepts’ (Waitangi Tribunal 1997: 74).

Recent analysis of the effect of treaties with indigenous people (Waitangi Tribunal 1997: 386-388), supports the view that it is the understandings of the indigenous signatories that should prevail. There is strong evidence that the verbal discussions at Waitangi

focused on what would be protected for Maori – their rights to and authority over their lands (Orange 1987: 46). Furthermore, the statement from the Waitangi Tribunal with regard to land sales, that ‘there was also no contractual mutuality or common design, but a fundamental ideological divide’ (Waitangi Tribunal 1997: 399), can apply just as easily to the wider Treaty context. The legal and constitutional place of the Treaty of Waitangi is therefore still contested, although it is now widely accepted at a political level that the Treaty of Waitangi ‘is a valid international treaty and binding on the Crown at international law and as a matter of honour’ (Palmer 2008: 25). Furthermore, in the current constitutional debate in New Zealand (investigating whether New Zealand should develop a written constitution), although there is widespread acknowledgement that the Treaty will need to be incorporated into a constitution in some form, the scope of that form is highly contested and is thus likely to present a significant barrier to the acceptance of an entrenched written constitution.

Canadian Treaties

British sovereignty was asserted over the lands and the people of Canada by the Royal Proclamation of 1763. The possession of the lands of the Indians was not ceded, but the Royal Proclamation established that no lands could be purchased other than through the Crown. There is nothing especially remarkable about this; sovereignty over territory (*imperium*) is quite different from proprietorship of lands (*dominium*). However, the explicit statement of that fact reinforced the necessity for the Crown thereafter to negotiate, and record by treaty, the cession of lands from the Indians to the Crown. The negotiation of such treaties must therefore be put under the spotlight to determine what exactly was agreed upon and what was ceded.

Canadian treaty-making began in the eastern settlements, with several agreements allowing for British and French settlement there. Subsequently, a series of numbered treaties were negotiated and signed as part of the inexorable westward expansion of colonial

control and settlement of the interior prairie lands of central Canada.² Most of these treaties were similar in their official wording although they were signed under different circumstances. Treaty 7, signed in 1877 in southern Alberta, is used here as a representative example of Canadian treaties of that period. The Crown's sovereign authority over the prairie land was under threat because there was no actual presence of any Canadian authority in southern Alberta until the first arrival of the North West Mounted Police (NWMP) in 1873. The treaty commissioners were keen to establish the treaties over the Prairie Provinces to make their sovereignty claims apparent on the ground (Henderson 1997: 75).

The indigenous peoples of southern Alberta include the Siksika, Stoney, Peigan, Sarcee and Blood bands. They came together as the Blackfoot Confederation, under a well respected chief, Crowfoot, who had developed a close and trusting relationship with Colonel Macleod of the NWMP (Dempsey 1972). On this basis Crowfoot was able to call together the various bands to negotiate land sharing and access agreements with the treaty commissioners. The historical records indicate that the preliminary discussions leading to the treaty were almost exclusively concerned with what the chiefs and individuals of the nation would receive by accepting the treaty. There is 'no evidence to indicate that the issue of ceding or surrendering the land was ever raised by the commissioners in the discussions' (Treaty 7 Elders et al. 1997: 255) and it appears that the treaty was never read out in full (p258).³

The treaty commissioners, in their discussions with the Indians, were at pains to emphasise the expectation that the continuity of the Blackfoot way of life – their occupation, hunting and access to all their lands – would be assured (Morris 1880: 268). However, the written treaty presented to them included an agreement to 'cede, release, surrender, and yield up to the Government of Canada for Her Majesty the Queen and her successors forever, all their rights, titles and privileges whatsoever to (their) lands ...' (Treaty 7 text. Morris 1880).

The continuing conflict about the legal effect of the treaty is thus whether the written words of the treaty, validated by signatures

and recorded in the historical written records of the Crown, take precedence over the oral agreement, represented by negotiations and discussions, which was validated by the protocol of smoking the sacred pipe and is vividly recalled in the oral histories of the indigenous people. Several formal agreements across Canada were also recorded in Wampum belts – belts of shell beads, woven in patterns – that reinforced the stories and recorded the treaties with the Crown (Borrows 2006). However:

... marks on a printed sheet of paper had about as much significance for many aboriginal peoples as the colours and patterns of a treaty belt had for many English. The treaty was neither the written memorial nor the belt but the agreement reached by the parties during the oral exchanges (Slattery 2000: 208).

The language used in negotiations is of great significance to understanding the relative positions of both parties. The Crown commissioners regularly resorted to the language of fraternity. It is the language of a self-assured highly literate culture wishing to get agreement to its position by bolstering the status of the illiterate native (who nevertheless possesses what the Crown seeks). The Queen is portrayed as a benevolent mother figure for the Indians, and the settlers as their brothers. ‘Colonial officials participated in ceremonial exchanges and adopted the language of kinship to describe the relationships this confirmed, but it subsequently became evident that their view of what took place at these meetings differed profoundly from the Aboriginal understanding of events’ (RCAP 1996: 646).

On the Indian side, the figurative language employed illustrated their world view and regularly made reference to nature; the soil, rivers flowing, and the sun shining. “At the signing of the treaty at Blackfoot Crossing, Red Crow pulled out the grass and gave it to the White officials and informed them that they [would] share the grass of the earth with them. Then he took some dirt from the earth and informed them that they could not share this part of the earth and what was underneath it, because it was put there by the Creator for the Indians’ benefit and use”

(Treaty 7 Elders et al. 1997: 114).

There was no mention made to sell land; or to sell what is underneath the land; or to sell the mountains, trees, lakes, rivers, and rocks. And we didn't say to sell the animals that travel on the land – the ones that we eat – or the birds that fly, or the fish that swim. The Old People didn't get asked to sell these things. They were told 'the Queen will be like your mother, and she will take care of you until the Sun stops shining, the mountains disappear, the rivers stop flowing, and the grass stops growing'

(Calf Robe 1979: 21).

Red Crow's symbolism would by no means have been alien to the English, for whom a common law ceremony (valid in England until 1925) involved handing over a handful of earth or a twig in front of witnesses to transfer rights in land. However, while for the Europeans transferred rights were generally exclusive (other than for relatively minor easements), from the Blackfoot perspective, the 'magnificent gift' (Friesen 1999) to the Crown and the settlers was the opening up of their traditional hunting lands to some form of shared access. They were not alienating their land forever in a way that would exclude them from it. They were merely saying the Europeans could come onto the land to use it for their purposes, and the Indians would retain access to it for their purposes; in effect, 'we can all share this land'. It is obvious that the Blackfoot people could not have been aware of the incompatibility of uses and the Western requirement for private property and exclusive ownership; sharing was not what land-hungry settlers wanted.

Different cultural and legal traditions create different views about what gives an agreement validity, and for the Europeans, total emphasis was placed on the written text, duly authorised by signatures. Pomp and ceremony was an important adjunct to the signature, hence there was a good deal of formality attached to the process. This included dressing up (the presence of the NWMP assisted in this colourful display of formality) and making speeches. In fact, Indian signatures were not collected on Treaty 7, but a name was recorded and an X mark was inserted. Usually the Indian signatory did not even write the X but was merely asked to touch

the pen, a rather remote enactment of a signature. Furthermore, Dempsey relates the story that Crowfoot in his apprehension of being swindled by the treaty commissioners reached for the pen but did not actually make contact with it (Dempsey 1972: 105).

The treaty commissioners were prepared to add aboriginal ceremonies to their own to recognise that these were reciprocal bargains, and to this end they were comfortable indulging in the pipe ceremonies and allowing for Blackfoot celebrations. It is doubtful, however, if they understood the significance of an agreement made in the presence of the pipe. From an aboriginal point of view: 'The Indians have utmost and absolute belief in the sacredness of the pipe. In the presence of the pipe, only the truth must be used and any commitment made in its presence must be kept' (RCAP 1996: 64-5). In other words, for the Blackfoot, the pipe has intense spiritual and moral force, and it validated the oral agreement as the true interpretation of the treaty. But despite the treaty negotiations being conducted alongside the ceremony of the pipe, it is likely that the Treaty commissioners saw these aboriginal ceremonies as 'merely a picturesque preliminary favoured by Indian custom' (Taylor 1999: 18). For Treaty 7 elders, in contrast, the pipe solemnised a friendship and made scrutinising details unnecessary (Treaty 7 Elders 1997: 324-5). The treaty can hardly, therefore, be viewed as a meeting of the minds.

Zimbabwean treaties and concessions

Nineteenth century treaties and concessions in Zimbabwe need to be viewed in the light of the Matabele war which, by 1894, had established conquest as the method of acquiring territory rather than treaty-making. However, earlier agreements warrant scrutiny since grievances surrounding their signing continue, in particular over verbal assurances given at the time of signing, some of which are still contentious (e.g. Magaisa 2008).

The first recorded treaty over Zimbabwean soil, signed by Mzilikazi with the Boers in 1853, was primarily a right of way over Matabele territory. This was followed in 1870 by the Tati

and the Shashi concessions, signed by Mzilikazi's son, Lobengula. The former was over an area disputed with a Bechuana tribe, and by granting a concession Lobengula was tacitly asserting control over the area, and the latter was probably also a veiled territorial statement. Thereafter, apart from a minor concession in 1871 to Thomas Baines, no further concessions or treaties were granted until 1888, when Lobengula signed both the Moffat treaty (by which he agreed not to give away any part of his territories without the sanction of Britain), and the Rudd concession.

The written terms of the Rudd concession were straightforward. It was a mining lease for an initial sum plus a fixed monthly amount, granted to three representatives of Cecil Rhodes' mining company, namely Rudd, Thompson and Maguire. About a year later this concession would provide the foundation for the Royal Charter from Britain that created the British South Africa Company. The document was drafted by Rudd, altered 'to suit the understanding of the native mind' (Rouillard 1977: 136), then couched in legal form by the inexperienced Maguire, who had 'not found it necessary to practice' after being called to the bar in 1883 (Hiller 1949: 151). A missionary, the Reverend Helm, was present during the negotiations to ensure they were fair and in the interests of the natives. He signed as a witness and to certify that the document had been fully interpreted and explained. In any case, there would have been little need to lie about the Rudd concession, which may have represented 'the thin end of the wedge' for the British but which in itself gave away little. Lobengula's motives are a matter of conjecture (e.g. Warhust 1973: 60-61) but certainly no land rights were conveyed other than in a negative sense of agreeing not to grant land without the permission of the grantees.

Verbal assurances given at the signing are less straightforward. Figurative language was employed at several junctures to convey exact shades of meaning, and the words have frequently been invoked in raising grievances in later years. Thompson, as interpreter for the Rudd concession, held the view that 'All discussion with natives on grave matters was in my time carried on more or less in metaphor, a style carrying much weight when skilfully used,'

(Rouillard 1977: 128) and he confined himself to metaphorical terms that he believed would be best understood by the Matabele, sticking mainly to guns and cattle. Thompson compared Lobengula's dominion to a dish of milk that was attracting flies (meaning countries wishing to secure mineral rights) and explained that what was sought was not land, only the right to dig for gold: 'I likened his country to a cow and said, "King, the cow is yours. If she dies the skin is yours, if she calves the calf is yours. I only want the milk." The Matebili (sic) regarded milk as only fit for children, and not food for men.' (Rouillard 1977: 188). Thompson repeated these words to Lobengula on a later occasion, and years later he sent a statement to the Privy Council repeating the metaphor in order to underline the fact that no rights to land were ever granted by the Rudd concession (Rouillard 1977: 188; Privy Council Judicial Committee, 1918).

Thompson used other figures of speech as well, and these have proved particularly helpful in conveying the spirit of what was agreed to. For example, Thompson tried to convey what was meant by the sole right to mine gold being requested, by pointing out that it would be inadvisable to have two bulls in one herd of cows, which one induna (chief) agreed was simply asking for the pair of them to fight rather than looking after the cows. Furthermore, in order to allay fears, he made the point that no one gives somebody an assegai if he expects to be attacked afterwards. In other words, if the whites planned to overthrow the Matabele they would hardly arm them with guns (Rouillard 1977: 130 - 131). Symbolic actions were also important, for example, Lobengula gave Thompson 'a lion's pad with the claws thrown back, a symbol that he, the Lion, had left me free without hurt', and on another occasion a solecism was narrowly avoided when 'a magnificent pair of Poll Angus' cattle were purchased as a gift for Lobengula, their black colouring 'conveying to the Matebili (sic) almost a declaration of war' (Rouillard 1977: 187).

Lobengula signed the Rudd concession, but in the following months further discussions took place that today help to throw light on discussions about what exactly the concession conveyed.

Rival concession-hunters at Bulawayo suggested that the King would do well to study the word 'land' used in the written concession, and one of the whites, at a council with 300 indunas, challenged Thompson to explain the word. Thompson slyly responded by asking the indunas if they could tell whether a beast is male or female when shown only part of its hide. When they replied that the rest of its body would need to be seen, Thompson said that he too, could only interpret the word 'land' if shown the context (Rouillard 1977: 176). Lobengula, seeking reassurance about how his territory stood in relation to Britain, decided to send two indunas to the Queen, bearing two letters. The first letter, authenticated by Helm, was a declaration of Lobengula's territorial claims (helpful to Rhodes, if anything, since it was easier dealing with one monarch than numerous petty chieftains) and a request to the Queen for protection under the Moffat treaty. The second letter, quite possibly a forgery since it bore Lobengula's official elephant seal which was kept by the trader Fairburn, who opposed Rhodes (Blake 1977: 49), said that the indunas were making the journey to confirm on Lobengula's behalf that there was indeed a queen, and to ask for someone to be sent by her to help with troublesome concession seekers. The reply, written by Lord Knutsford for the Queen, seems a veiled attempt to protect future British interests. Couched in figurative language worthy of Thompson himself, it cautions Lobengula not to put too much power into the hands of those who come first and exclude others equally deserving: 'A King gives a stranger an ox, not his whole herd of cattle, otherwise what would other strangers eat?' (Blake 1977: 50).

One last treaty should be mentioned in the Zimbabwean context, namely the Lippert Concession, obtained from Lobengula in April 1891 on behalf of Lippert, a German financier (Cherer Smith 1978: 35). Strictly, granting this concession was untenable either in written or customary law, for it reneged on the Rudd concession by which Lobengula had contracted not to grant land without the permission of the grantees (at that stage, effectively the British South Africa Company, since its creation on October 29th 1889), and in any case Lobengula did not really have the power in

custom to grant land rights in Matabeleland (Palmer 1977: 27). The concession, probably an attempt to outmanoeuvre Rhodes by securing the land rights to the country, granted 'The sole and exclusive right, power, and privilege for the full term of 100 ... years to lay out, grant, or lease ... farms, townships, building plots and grazing areas; to impose and levy rents, licences and taxes thereon, and to get in, collect and receive the same for his own benefit; to give and grant Certificates ... for the occupation of any farms, townships, building plots and grazing areas' (Palmer 1977: 27). Subsequent confirmation of the concession by John Moffat was probably not an endorsement of it but was motivated rather by Moffat's belief that 'only the disappearance of their military state could save the Ndebele' and that the end justified the means (Warhurst 1973: 64). When Rhodes bought the concession it served to buttress the Rudd concession, whose weakness was in not giving control over land. There is some doubt about whether the terms of the Lippert concession were explained fully to Lobengula. Thompson, when asked by Rhodes about the signing of the Lippert concession, replied that, knowing Lobengula's feelings about land, he was probably unaware of what he had put his signature to (Rouillard 1977: 189).

In summary, in Zimbabwe the written terms of land agreements are plain but words spoken and taken as binding continue to be a source of contention today. In early land dealings, Europeans acted as if no one really expects marketplace talk to be other than inflated and hyperbolic, and it is the responsibility of buyers to examine goods carefully before purchase. For the Europeans, the written words were the goods. For the illiterate Matabele, however, the spoken word carried greater weight, and in later years when Francis ('Matabele') Thompson was accosted by one of Lobengula's indunas and asked, 'Ou Tomoson, how have you treated us, after all your promises, which we believed?', Thompson had no answer (Rouillard 1977: 193).

Outcomes of the land agreements

Are any patterns discernible in the historical land agreements summarised above and their aftermath? Could these inform policy on new land agreements entered into today? A broad pattern emerges in the three countries over the century or century-and-a-half since the founding land agreements, namely:

- i) An initial period in which large areas of land changed hands
- ii) An extended period of grievance with more or less open objection, and
- iii) A recent period of legal and/or extra-legal redress of perceived injustices.

Considering these in order:

i) An initial period in which land changes hands: In Zimbabwe, the large scale dispossession of Shona and Ndebele from their customary lands occurred in a more blunt and forcible manner than for Maori, where a veneer of legality was preserved by the fact that land was purchased. Maori had at least nominal control over land alienation, although processes were heavily biased in favour of the settler (Gilling 1994, Williams 1999), and many land sales were characterised by a ‘combination of sharp trading, devious tactics, and deliberate swindles ...’ (Fleras and Spoonley 1999: 134). The New Zealand wars in the North Island in the 1860s were the result of Maori resistance to selling their land, and these provided the justification for the punitive annexation of land following uprisings. In Zimbabwe, land grabbing by Europeans commenced even prior to the Lippert concession of 1891 (Palmer 1977: 35), and gained momentum in the three years following the partial conquest of the Matabele in 1893. In 1896-7 the Ndebele and Shona rebelled, with one positive result being that land reserves were created to safeguard indigenous peoples (Palmer 1977: 66). In both countries, the net effect was much the same. By 1891 Maori lands amounted to only 17 per cent of the country, much of which was marginal and effectively useless (King 2003: 258), and by 1914 Europeans controlled 75 per cent of Zimbabwe (Chitsike 2003: 2). In Canada, vast tracts of land transferred to the Crown to be allocated to

settlers, while relatively tiny portions of land were set aside as Indian Reserves to accommodate the Indians and enforce their cultural transition to settled agriculturalists.

ii) A period of objection: In New Zealand, Maori have a history of over a hundred and fifty years of calling upon the Crown to honour the Waitangi Treaty. Regular petitions, disputes taken to court and protest marches about non-adherence to Treaty promises have prompted successive governments to revive the Treaty as a basis for the Crown's interactions with Maori. In Zimbabwe there were a variety of protests over the years, commencing with the Matabele and Shona rebellions. Later protest was sometimes through the voices of Native Commissioners and sometimes by other European advocates (for example, missionaries such as Arthur Shearly Cripps, and by John Harris, secretary of the Aboriginal Protection Society). Then in 1919 the Ndebele National Home Movement sent a petition to George V (Palmer 1977: 112), and in the 1950s and 1960s, African Nationalist protest became increasingly strident. In Canada, in the nineteenth and early twentieth centuries, the segregation of Native peoples on reserves where many aspects of their lives were controlled by government agents left a people with little political power to defend their land, although band leaders regularly petitioned the Crown to restore their autonomy, actively protested against Crown policy, and successfully lodged claims to the Federal courts. Generally there was no widespread armed resistance although there have been several confrontations – for example, the confrontations in Oka Quebec in 1990 and Gustafsen Lake BC in 1995 – that stand as a warning to Canada that the First Nations people will continue to defend their rights.

iii) Redress of perceived injustices: In 1975 the Treaty of Waitangi Act was passed, establishing the Waitangi Tribunal as a forum to ensure that the Treaty partnership was observed, particularly in relation to Crown actions affecting the rangatiratanga of Maori. In 1985, the jurisdiction of the Tribunal was extended to allow Maori to seek redress for past actions of the Crown, back to 1840. This Tribunal (supported by various court decisions) has been criticised for being revisionist or presentist in its interpretations of

the past relationship between Maori and the Crown (Oliver 2001), but it has nevertheless allowed Maori to air their grievances, has established a basis for settlement negotiations with the Crown, and been focused on the principles of the Treaty arrangement rather than a strict reading of the Treaty words. There are some beacons of success for Maori and the Crown, with some iwi now being able to move forward with a new awareness that the Treaty is more than just the face-value words, but is an agreement to share and protect various rights of governance and self-determination for the Crown and Maori.

In Canada, the 1982 Constitution provided for the recognition of the 'existing aboriginal and treaty rights of the aboriginal peoples of Canada' (sec 35 Constitution Act 1982) and, since 1973, the Comprehensive and Specific Land Claims process has allowed for negotiation between First Nations people and the Crown to settle past grievances. Much of the wider acknowledgement of aboriginal rights, treaty and title claims has derived from the regular resort to the higher level provincial and federal courts. The courts are increasingly recognizing the validity of oral evidence to support the understandings of custom and traditional positions. For example, in allowing for an aboriginal perspective to be considered in court, the Canadian Supreme Court decision of *Delgamuukw* 1997 (v. British Columbia [1997] 3 S.C.R. 1010) finds that the oral evidence of the Indians is an essential part of evidence and must be admissible by the courts. Lamer C.J. ordered a new trial of the *Delgamuukw* case specifically because the trial judge had erred by not allowing for the oral evidence of fact in the initial trial. Lamer C.J. quoted from his own judgement in *Van der Peet* ([1996] 2 S.C.R. 507): 'a court should approach the rules of evidence and interpret the evidence that exists, with a consciousness of the special nature of Aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records ...' This ruling has provided a very significant boost for indigenous people; allowing their oral evidence to be accepted and validated by the courts and supporting their negotiations with the Crown in recent treaties in British Columbia

and in the land claims process.

Land agreements in Zimbabwe are founded on a more shaky legal footing than in New Zealand and Canada, and the redress of perceived wrongs, when it came, was done by recourse to violence (the guerrilla war of the 1970s) and by extra-legal land occupations which began in the late 1990s and evolved into the Fast Track Land Reform Program (FTLRP) which in the first decade of the twenty first century settled around 150,000 households in smallholder areas (A1 schemes), 30,000 households on medium-scale A2 farms, in addition to other informal settlement (Scoones 2015: 191). Political rhetoric in the last two decades has been strongly anti-British, and supportive of black Zimbabweans, for example through affirmative action and favouring of previously disadvantaged groups. Robert Mugabe has regularly stressed the importance of African solutions to African problems, a stance generally supported by leaders in the region even where it entailed a crippling economic cost and unconstitutional selective application of the law. Of particular significance in this article is that fact that in all three countries feelings still run high about the exact intention of land agreements, and that the land question has never finally been laid to rest. Two main issues are at stake: first, whether the spirit rather than the letter of agreements was honoured; and second, what steps have been taken to redress grievances.

Treaty making questioned

Even prior to the Treaty of Waitangi, treaty-making was already questioned as an appropriate way for European power to obtain the consent of the distant indigenous people to the cession of their sovereignty and their lands. In 1837, the House of Commons Select Committee on Aborigines resolved that treaties were generally inappropriate:

Compacts between parties negotiating on terms of such entire disparity are rather the preparatives and the apology for disputes than securities for peace: as often the resentment or the cupidity of the more powerful body may be excited, a ready pretext for complaint will be found in the ambiguity of the language in

which their agreements must be drawn up, and in the superior sagacity which the European will exercise in framing, in interpreting, and in evading them (Palmer 2008: 42).

But where treaties were signed, Europeans acted as if what was written and signed was of paramount importance, and seemed to see no impediment to exaggeration or even verbal misrepresentation in order to gain consensus. The natives, on the other hand, appeared to set more store by verbal discussions and assurances supported by whatever trust relationship had developed. Verbal assurances and explanations often drew on figurative language, with references to soil, rivers, grass, mountains, sun, cattle and motherhood. The use of such natural symbols suggests that these aspects of the natural world were viewed as being more universally understood and therefore represented the nature of agreements better than the culturally biased jargon of written documents.

The treaties and land agreements in the three countries discussed have had significant adverse effects both on historical and current relationships between the State and indigenous peoples. An important aspect of the spirit of land agreements was the trust relationships between the contracting parties around the time of the treaty proceedings, in the same way that a trusted conveyancer may reassure a client that the fine print of a mortgage bond is innocuous and not worth reading. Lobengula sought reassurance from Thompson that his ‘heart [was] white towards the Matebili’ (Rouillard 1977: 186), the words of Henry Williams that the Treaty of Waitangi was ‘the act of love towards (Maori) on the part of the Queen’ carried considerable weight because Williams had proved trustworthy over a number of years, and Crowfoot’s trust relationship with Colonel Macleod was instrumental in enabling negotiations for Treaty 7. Any misunderstandings and grievances often stem from discrepancies between indigenous understandings of verbal agreements and the Crown’s stress on written documents.

In asserting their inherent superiority over the indigenous tribes, colonial authorities stressed the centrality of honourable behaviour. In all three countries, the British Queen is invoked by the Europeans as representing a level of justice higher than

governments, almost one of ideal justice, divinely ordained. The natives often acknowledged the overriding authority of the Queen and were led to expect that the Europeans would act honourably, and both Maori and Ndebele made representations directly to the Queen to record grievances. Natives were often surprised when the Europeans and their Queen failed to act honourably. For example, 'What took Ngai Tahu by surprise was that ... promises were broken, when according to their 'savage' code of behaviour the promises of rangatira like Kemp or Mantell were sacrosanct' (Evison 1993: 492-3), and Lobengula accuses Thompson of 'having two words,' i.e. lying (Rouillard 1977: 196).

Honourable intentions were expected from the cross-cultural agreements considered here, and after completing various cultural protocols, honourable implementation was assumed. In Canada's case, indigenous protocols such as the smoking of a sacred pipe were a significant symbol of honourable intention, while in both New Zealand and Zimbabwe the formalities enhanced an expectation of the honourable implementation of the verbal understandings.

Conclusions

There are clear messages concerning land agreements today. First, considering land as commodified property within an expanding globalised market-place is still often at variance with an indigenous perspective on land as the basis of interpersonal and environmental relationships. Just as the indigenous view was generally incompatible with the colonial mind-set, it is now largely incompatible with the mindset of the global entrepreneur seeking land for a foreign people or state that has no stake in local community, land or environment. It is now recognised that the indigenous view may require state protection from the forces of economic imperialism. Second, the spirit of what is agreed to is by no means confined to written agreements; it is the understanding between contracting parties, including anything which helps to impart and communicate that understanding and to preserve it in memory. Third, perceived unfairness and injustice has a very long lifespan, passing from

one generation to the next. Fourth, where there is gross disparity in living standards and in access to resources (including land), grievances are likely even if overt consensus was reached in the past between representatives of contracting groups.

The figurative language used at the time of negotiation has proved itself pithy, well suited to capturing the essence of negotiating points, and capable of providing enduring mental images that should rightly be drawn on to colour legal interpretation today and to guide new land agreements. It is apparent that perceived injustices that still fester today frequently trace back to the verbal exchanges just as much as to the written agreements. This suggests that legal and administrative processes and settlements today, as well as being cognisant of the written word and black-letter law, should pay greater attention to verbal commitments, cultural protocols, ways in which trustworthiness is established and to unwritten forms of evidence. A holistic approach to land agreements that recognises and factors in these attributes could avoid serious complications in the long-term.

Notes

¹ For example, the Native Lands Acts of the latter part of the nineteenth century which required Maori to claim their customary title in court and exchange that for an individualised fee simple title deriving from the Crown (see Williams 1999).

² Treaty 1 was signed in 1871 in Manitoba and subsequent treaties were signed in Saskatchewan and central Alberta, before treaty commissioners reached southern Alberta, and ultimately into north-eastern British Columbia.

³ Local missionaries likely knew about the Blackfoot resistance to land surrender issues, and they probably sent warnings to the commissioners about the potential for disagreement. This may be why the land surrender was never raised for discussion and was only written into the treaty after the discussions and negotiations. Furthermore “First Nations would not consider making a treaty unless their way of life was protected and preserved. This meant the continuing use of their lands and natural resources” (RCAP 1996, 174).

⁴ Text of Treaty 7: “Her Indian people may know and feel assured of what allowance they are to count upon and receive from Her Majesty’s bounty and benevolence.”

⁵ As illustrated by the oral testimony of Lazarus Wesley (Treaty 7 Elders 1997, 90): “The government was just allowed to use the land for growing things not given (it). This story has been handed down from the people not from any documents.” See also Taylor 1999, 43.

⁶ And see comment by Gordon Lee “The importance of the sacred pipe ceremony” in Price 1999, 111 and in Williams 1997, 47-48: “A treaty sanctified by the smoking of the pipe of peace became, in essence, a sacred text, a narrative that committed two different peoples to live according to a shared legal tradition – an American Indian vision of law and peace.” Also in Treaty 7 Elders 1997, 68: “The smoking of the pipe is similar to the non-Natives swearing on the Holy Bible” and at 89 quoting Turning Robe: “No one can just smoke it. We cannot lie when we smoke it.”

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