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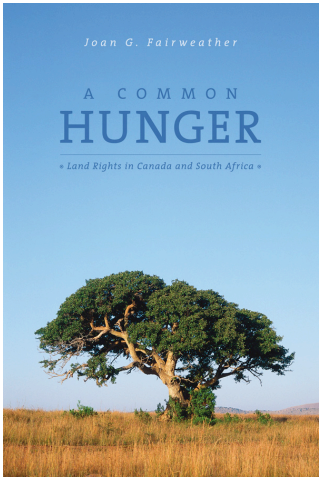

A COMMON HUNGER:
LAND RIGHTS IN CANADA AND SOUTH AFRICA
by Joan G. Fairweather
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Chapter Two

Land Rights and Treaties

> We have both outraged the natural sense of right and the feelings of independence, always remarkably strong in wild people, by taking their all without attempting a compensation; and, after this violent exclusion of the rightful owner, we have almost exclusively re-appointed every acre to white people.
>
> *Report of the Select Committee on Aborigines (British Settlements), Vol. 16, 1836.*

INTRODUCTION

In the early 1830s, British colonialism came under the critical scrutiny of a group of British reformers. The British humanitarian movement had just won a significant victory against slavery and now saw ominous parallels between the wholesale slaughter and dispossession of indigenous peoples and slavery. As Sir Thomas Buxton of the Aborigines Protection Society declared, "I hate shooting savages worse than slavery itself."[1] The re-direction of the passion and zeal which had achieved the abolition of slavery was clearly expressed in the Society's first Annual Report in 1838:

> The abhorred and nefarious slave traffic, which has engaged for so long a period the indefatigable labours of a noble band of British philanthropists for its suppression and annihilation, can scarcely be regarded as less atrocious in its character, or destructive in its consequences, than the system of modern colonization as hitherto pursued.[2]

Under pressure from the Aborigines Protection Society, the British government established an inquiry: the Select Committee on Aborigines (British Settlements) which published its report in several volumes between 1836 and 1838. The conclusion the Select Committee reached was

that, rather than being the blessing many had hoped for, colonialism had been a dreadful blight on the history of the British Empire and on the lives of the so-called uncivilized nations of the world. In their testimony to the Committee, missionaries, traders and military officers warned that if the destructive trends continued, indigenous populations would "melt like snow before the advancement of European settlement."

However, the reformers were not against colonization *per se* – far from it. They believed it was the Christian duty to "civilize the dark corners of the earth." What seemed to be required was some form of protection for the " Inferior Races" against unrestrained colonial aggression. The recommendation of the Select Committee was that local authorities in the colonies make an effort to negotiate treaties with the indigenous inhabitants for the alienation of their lands and to set aside "reserved lands" for their sole use and benefit. The idea of treaties was not new. Hundreds of peace and friendship treaties had already been signed between indigenous chiefs and British consuls and agents in colonies throughout the Empire, but these were largely related to securing military allies (or trading partners in the case of North America) and seldom involved the acquisition of native lands.

Thus the idea of negotiating with aboriginal peoples for the alienation of their land through legal treaties became accepted policy in most parts of the British Empire. These agreements came within the accepted definition of a nation-to-nation treaty and were taken seriously by the British Colonial Office. Between 1820 and 1924, the Librarian and Keeper of the Archives of the Foreign Office in London compiled and published a series of thirty volumes of treaties known as *Hertslet's Commercial Treaties*.

CANADIAN TREATIES

The earliest treaties in North America between European powers and Indian nations were primarily concerned with peace and friendship; land was secondary, if mentioned at all. In New France, land never became an issue because the fur-trading French were more interested in preserving good relations with their Indian allies than acquiring land for settlement. In British North America, on the other hand, land was a factor because the colonized territories were occupied by aboriginal farmers who were less likely to allow even usufructuary rights (the use but not ownership of land) to the Europeans without adequate compensation. The Treaty of Halifax (1752) with the Mi'kmaqs of Nova Scotia was among the most important of the early peace treaties negotiated by the British. Not only did the treaty terminate the war which the Mi'kmaq had initiated against the British, but it also guaranteed hunting and fishing rights for the

Indians and regular gift distributions, which would later be transformed into annuity payments for surrendered lands.[3]

After defeating France in 1760, the British took possession of vast territories of North America previously under French control, including Acadia (Nova Scotia). The assumption seemed to be that, having defeated France, Britain had not only acquired sovereignty over New France but was also released from the obligation to compensate local people for their land. When New Brunswick was separated from Nova Scotia and became a colony in its own right in 1784, the British colonial authorities refused to recognize the only land grant that had been made to King John Julian of the Mi'kmaq by the previous administration, twenty thousand acres (8,094 hectares) along the Mirimachi River.

By the turn of the nineteenth century, the leverage the aboriginal peoples had gained through trade and military alliances had declined dramatically. A hundred years after the signing of the Treaty of Halifax (1752), the Mi'kmaq complained about the miserly compensation the British had paid them for the "lands, forests and fisheries, long since taken from them." Moreover, the "permanent plots" promised to them when they "laid down their arms and smoked the pipe of peace" had never materialized.[4] Maritime Indians had been greatly reduced in number and had suffered drastic losses of political leverage as well as land since the early years of colonization. Their needs had been pushed aside to accommodate those of the new immigrants, especially the United Empire Loyalists fleeing the American Revolution.[5] In 1848, the Commissioner for Indian Affairs for New Brunswick reviewed the unhappy history of the Mi'kmaq and the Maliseet of the colony in these words:

> Both tribes were very numerous and powerful when New Brunswick was first entered upon as a British colony after the taking of Québec by General Wolfe. At the outset, whole districts of country were assigned to the Indians and treaties were made by which English settlers were restricted to certain areas. As settlement advanced, the Indians were driven back and tracts of land, called Indian Reserves, were set apart for their use and occupation which were gradually reduced in extent.… Land grants were made to Loyalists without treaties or surrenders being attained from the Indians.[6]

The situation of indigenous communities on Cape Breton Island in Nova Scotia was very similar. In 1845, a report to the Nova Scotia Legislative Assembly stated that

> These lands [Cape Breton Island] are eagerly coveted by the Scotch [*sic*] Presbyterian settlers. That the Micmac's fathers were sole possessor's [*sic*] of these regions is a matter of no weight with the Scottish emigrants. They are by no means disposed to leave the aboriginals a resting place on the Island of Cape Breton.[7]

By the turn of the nineteenth century, the purpose of treaties in North America had changed. The shifting ground of international law during the course of the nineteenth century – away from notions of equality to the rights of "discovery" – had a profound impact on the role and nature of treaties in North America. With declining aboriginal populations (resulting from disease, wars and above all, displacement from their ancestral lands), treaties of peace and friendship were no longer essential to the safety of colonists. The objective of negotiating agreements with Indian nations was now to clear the path for European settlement. During the period of colonial expansion just prior to and following Confederation in 1867, treaties provided a veneer of legitimacy to the wholesale alienation of Indian lands for European settlement.

In 1850, William B. Robinson, a former fur trader, entered into the first of a series of so-called numbered treaties on behalf of Upper Canada. Treaties One and Two, which encompassed vast areas on the north shores of Lake Huron and Lake Superior, set the pattern for future treaties by including hunting and fishing rights as part of the compensation package. After Confederation in 1867, the policy of treaty-making became a source of national pride, since it removed the necessity of entering into wars against Indian landholders, as was occurring in the United States.[8] In 1871, the Nova Scotian politician Joseph Howe stated to an approving House of Commons that "it was impossible to deny that the policy of the British North Americans has been not only just and generous but successful."[9]

Land alienation in Canada's west coast region of British Columbia, which joined Confederation in 1871, began with a set of treaties signed by Governor James Douglas on Vancouver Island in the 1850s. Unlike the Robinson treaties, which were at least nominally founded on the notion of aboriginal rights, the Douglas Treaties on Vancouver Island were based on a British legal precedent established in New Zealand. The Waitangi Treaty (1840) in New Zealand had effectively dispossessed the Māori of their land by designating all uncultivated land as "waste land" and making it available to colonists (see Appendix). Thus, in fourteen land sale agreements with the First Nations of Vancouver Island between

1850 and 1854, the Indians retained ownership only of their village sites and enclosed fields (land under cultivation). Their only right in the surrounding areas was a usufructuary right: the right to hunt and fish as before. The agreements were sealed with "payment" of blankets and promises of money.

Although Governor Douglas' Indian policy is often portrayed as sensitive to Indian needs, it was strongly influenced by the positivist theory that the rights of "civilized" nations take precedence over those of aboriginal nations. Vastly outnumbered by the indigenous inhabitants of the west coast, the colonists used considerable force and intimidation to obtain the agreement of local people. The final Douglas Treaty was made with the Saalequun people, who were occupying the site of the Hudson's Bay Company's coal mining operation at Colvilletown, later named Nanaimo. The signing of that treaty was preceded by "random displays of gunnery" from a two-storey bastion Douglas had built close to the coal shaft. In his description of the land sale agreement with the Saalequun chiefs, Chris Arnett includes the testimony of a Saalequun elder, Quen-es-then, who was present at the signing as a boy:

> The Hudson's Bay Company men talked to the Indians: This coal is no good to you, but we would like it; but we want to be friends, so, if you will let us come and take as much of this black rock as we want, we will be good to you.… The Good Queen, our great white chief, far over the water, will look after your people for all time, and they will be given much money, so that they will never be poor.… Then they gave each chief a bale of HBC blankets and a lot of shirts and tobacco … these presents are for you and your people, to show we are your good friends.[10]

However, the promised payment never came. As another Saalequun witness stated, "We think there was some mistake at that meeting, or, maybe, our people did not fully understand what was said. Later when our people asked for some of the money for their coal, the HBC men said to them 'Oh, we paid you when we gave you those good blankets!' But those two chiefs knew that the men had said, 'The Queen will give you money.'"[11]

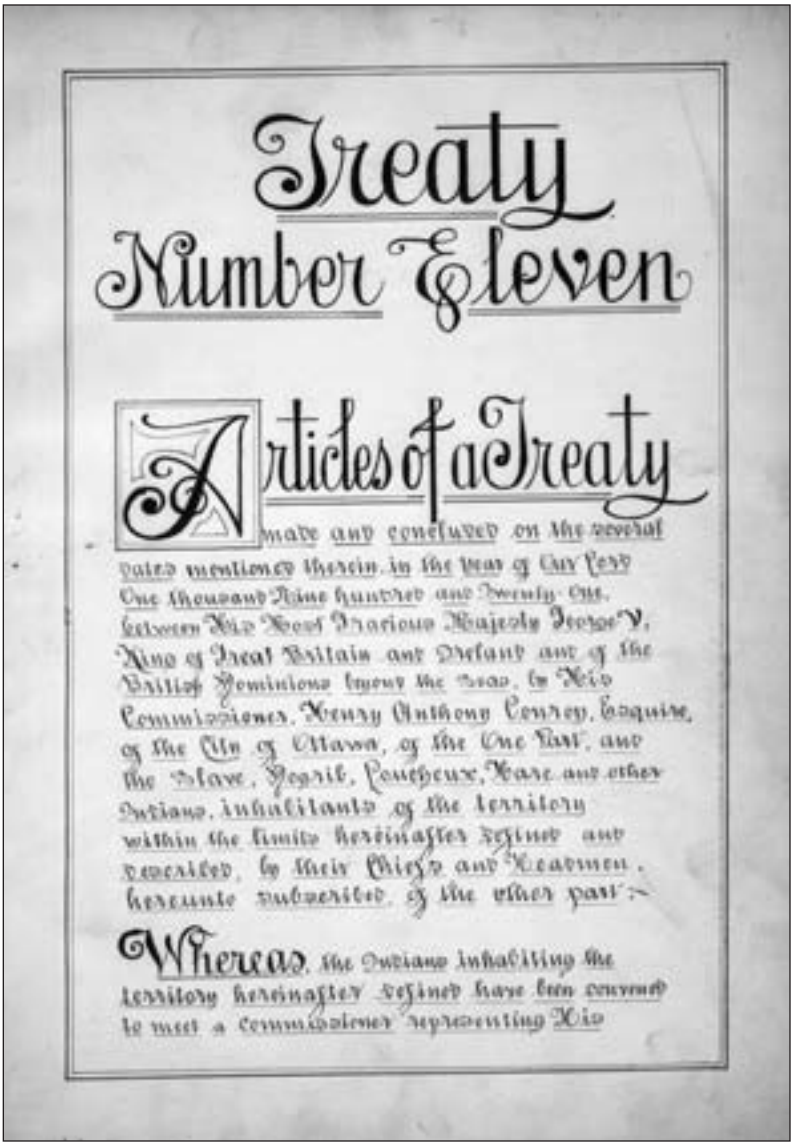
Because of their traditional dependency on the land for survival, many Indian communities entered into agreements because they saw few other options. This was especially the case with the Plains Indians. With the gradual disappearance of the bison, the mainstay of their traditional lifestyle, Indians entered into treaties in the hope of salvaging at least a portion of their territory and independence. An example is the 1874 deal

between Commissioner Morris and the gathered chiefs at Qu'Appelle, Saskatchewan. In this case, the chiefs were able to negotiate both reserves and the right to hunt and fish on land that was not yet settled. Even the terminology and patronizing tone used by the government officials when addressing the Chiefs could be interpreted as bargaining language tolerated by the Indians in order to gain the most favourable terms possible.

> The Queen knows that her red children often find it hard to live. She knows that her red children, their wives and children, are often hungry, and that the buffalo will not last for ever and that she desires to do something for them.… The Queen has to think of what will come along after to-day. Therefore, the promises we have to make to you are not for today only but for to-morrow, not only for you but for your children born and unborn, and the promises we make will be carried out as long as the sun shines above and water flows in the ocean. When you are ready to plant seeds the Queen's men will lay off Reserves … and you will have the right of hunting and fishing just as you have now until the land is actually taken up.[12]

The offer of seeds for planting and government assistance to train them in agriculture was a further incentive to sign treaties. However, as an Indian Affairs official observed in 1946: "While these treaties or agreements were bilateral in form, actually, of course, the Indians had to accept the conditions offered or lose their interest in the lands anyway."[13] The last numbered treaty to be signed in western Canada was Treaty Eleven in 1921.

Even though Canadian treaties tacitly acknowledged aboriginal rights, reserved lands were gradually whittled away by Orders in Council. New legislation frequently overruled treaty promises of annuities and other forms of compensation. For example, after the signing of Treaty Eight following the Klondike gold strike in 1898, the federal government introduced new legislation to restrict native hunting and trapping. Both the treaty and the provision of hunting and fishing rights had been insisted upon by the Yukon Indians. Thus, there was strong resistance when the Northwest Territories Games Act and Migratory Birds Convention Act were passed in 1918, restricting the hunting of caribou, moose and certain other animals essential to the economy of native people. Northern Indian groups regarded these laws as breaches of their treaties.


Treaty
Number Eleven
Articles of a Treaty
made and concluded on the several
dates mentioned therein, in the year of Our Lord
One thousand Nine hundred and Twenty-One,
between His Most Gracious Majesty George V,
King of Great Britain and Ireland and of the
British Dominions beyond the Seas, by His
Commissioners, Henry Anthony Conroy, Esquire,
of the City of Ottawa, of the One Part, and
the Slave, Fegrit, Louiseux, Hare and other
Indians, inhabitants of the territory
within the limits hereinafter defined and
described, by their Chiefs and Headmen,
hereunto subscribed, of the other part:-
Whereas, the Indians inhabiting the
territory hereinafter defined have been convened
to meet a Commissioner representing His

Western Treaty Number Eleven, 1921. Source: Library and Archives Canada, c107634.

TREATIES IN COLONIAL SOUTH AFRICA

The indigenous peoples in South Africa involved in treaty negotiations with their European invaders fared even worse than the first peoples of North America. Despite the seventeenth-century arguments concerning the illegality of foreign occupation, colonial policy at the Cape of Good Hope was established under the dictum that might was right. Under

Dutch East India Company rule, land was regarded as the legitimate "reward" of conquest, although "presents" were sometimes offered to chiefs who still posed a threat. This account from the journals of Jan Van Riebeeck is a typical example of early peace treaties in the Cape Colony:

> They [the Khoikhoi] dwelt long upon our taking every day for our own use more of the land, which had belonged to them from all ages.… They also asked whether, if they were to come to Holland, they would be permitted to act in a similar manner … I replied that the country had now been justly won by the sword in defensive warfare, and that it was our intention to retain it. But we concluded the peace by giving them presents, as well as a party, where the brandy flowed so freely that they were all well fuddled, and, if we had chosen, we could have easily kept them in our power.[14]

In 1780, the Company Directors in Amsterdam sent this directive to the Commandants of the Eastern Country:

> Should the kafirs not be disposed to adhere to and fulfill the treaty which the governor made with them regarding the boundary, and not be induced to comply thereto by arguments, you will at once assemble a respectable and well-armed commando and thus forcibly compel them to go to the further side of the Fish River and remain there.[15]

As white settlement spread into the interior, the colonists were faced with the powerful resistance of two well-organized and well-populated Nguni-speaking peoples – the Xhosa and the Zulu. Treaties were used by both the Voortrekkers (the Dutch farmers who migrated from the Cape in what became known as the Great Trek) and the British colonists, as well as African chiefs determined to protect their lands from foreign invasion. However, most of the competition for land was largely resolved through military conflict. Where treaties failed (and they usually did), well-armed commandos were the colonial solution.

Initially, the purpose of commandos was to retrieve cattle allegedly stolen from the colonists by the Africans. The issue was complicated by the different approaches to land ownership of the contending parties. The colonists believed that when they obtained permission from the Cape to stake out a farm, it was theirs absolutely and beyond challenge. The

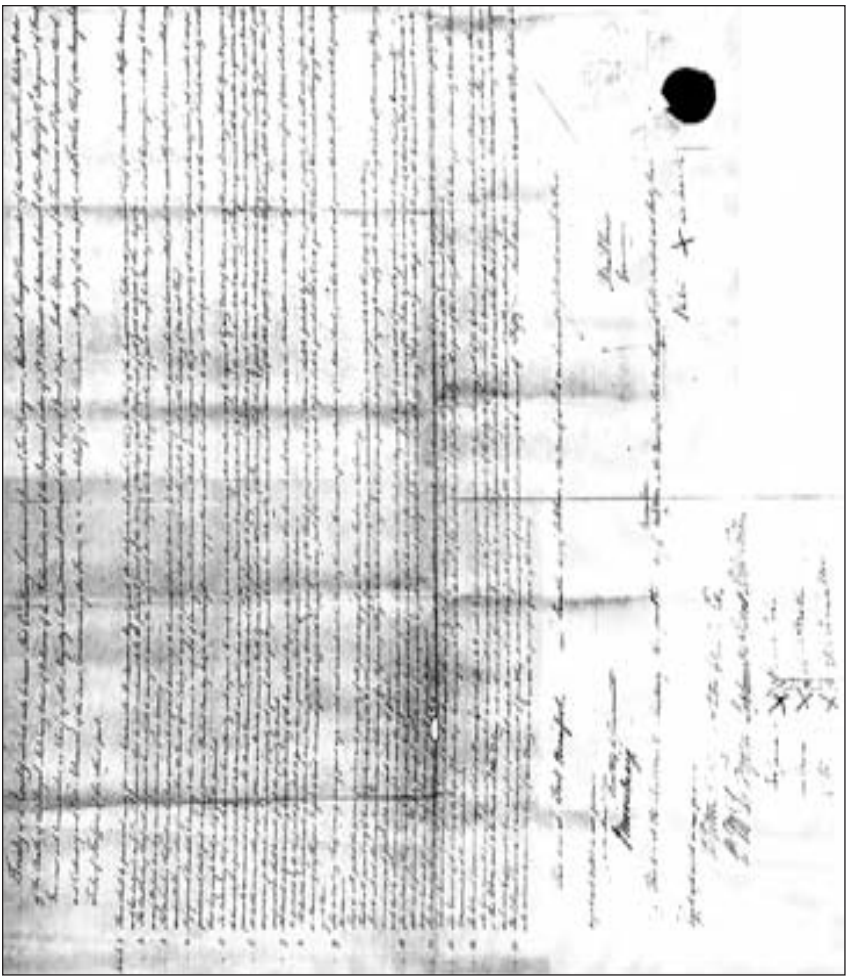
Xhosa had no such tradition or belief: the idea of fixed title and exclusive private possession was unknown to them. The land belonged to the chief, but the use of it was communal. Nevertheless, the chiefs preferred to wage war against the colonists than to relinquish control over more and more of their land. Chief Congo (Chungwa) of the Gqunukhwebe tribe expressed this view succinctly: "For our children have increased and our cattle have increased, and we must have that land, as it was formerly our country. We are determined to fight for it, sooner than be without it any longer."[16]

Military aggression against the Xhosa people began in the early 1800s, as small, independent Xhosa groups began to cross the Fish River boundary and settle in the Zuurveld and the eastern Cape. As one British officer reported in 1811:

> The country is on every side overrun with Kaffres, and there never was a period when such numerous parties of them were known to have advanced so far in every direction before; the depredations of late committed by them exceed all precedent … unless some decisive and hostile measures are immediately adopted … I apprehend considerable and most serious consequences.[17]

Outright war against the Xhosa was delayed temporarily by the Napoleonic wars in Europe, but the colonists were determined to drive them out. Soon after his arrival as Governor of the Cape in 1811, Sir John Cradock, gave orders to expel the Xhosa people from across the Fish River. On Christmas Day 1811, the colonists launched the first of nine frontier wars on the Xhosa people. Armed with rifles and assisted by the newly formed (Khoikhoi) Cape Regiment, the combined British and Boer forces confronted the impressive Xhosa army united under the leadership of Chief Ndlambe. Two months later, the colonists had accomplished their objective. This was the first great removal in South African history. Twenty military posts were established across the Zuurveld to secure the Fish River border as well as two settler villages, Grahamstown and Cradock. (Map 2, *xvii*.)

After their expulsion from the Zuurveld, the Xhosa suffered acute hardship. A severe drought had set in and the Xhosa people, whose cattle had been taken and crops and gardens burned by the colonial forces, were severely affected. Not surprisingly, relations with the colonists deteriorated as the dispossessed Xhosa raided farms and stole cattle to sustain their people. Despite the clamour of the settlers for reprisals,



Treaty of Amity between Chief Kreli of the Amagcalike and the British, 1834. ß
Courtesy RSA State Archives, Cape Town. ß

the new Cape governor, Sir George Napier was determined to avoid war at any costs. It was cheaper in his view to compensate farmers for their losses than incur the bloodshed and expense of war. In this he had the total support of the British government and of the British humanitarian movement.

In 1834, when Sir Benjamin D'Urban was sent out as Governor of the Cape Colony, his instructions were to preserve the peace by establishing a system of alliances with the principal chiefs. The peace treaties with Xhosa tribes made by Andries Stockenstrom, Commissioner General

and Lieutenant Governor of the Eastern Cape in the mid-1830s were an attempt to satisfy the grievances of the colonists and create a just solution to the frontier problem. Historian George McCall Theal lists at least twenty treaties between colonial officials and African chiefs negotiated between 1834 and 1866. However, the Stockenstrom treaties appear to have satisfied neither the colonists nor the Xhosa. Through these agreements, the British pushed back the boundaries between colonial and tribal territories and created buffer zones between the warring factions. Traditional law was retained in the tribal territories; but the presence of a diplomatic agent near the residence of the chief was effective in establishing Colonial control. The intention of these peace treaties with loyal chiefs was to separate them from rival tribesmen and thus break the solidarity of the Xhosa front.

When Sir Peregrine Maitland arrived at the Cape as its new governor in September 1844, his first priority was to pacify the colonists. They were demanding to be given back the power of armed reprisals (for cattle thefts) and to adjust the frontier territories to allow them access to more land. In other words, to abrogate the Stockenstrom treaties altogether. The new system of treaties introduced during Maitland's tenure gave the colonists exactly what they wanted. Stockenstrom's policy had been that the Xhosa should be treated as independent peoples and dealt with through his diplomatic agents. Maitland, on the other hand, simply dictated treaties as though to a subject people and tore up the standing agreements without prior notice or consultation.

One example is the Treaty of Amity with Xhosa Chief Kreli of the Amagcalike signed by Maitland on 4 November 1844. Under the terms of this treaty, Kreli was required not only to give free access to British subjects wishing to travel through his territory "without hindrance or molestation" but also to return or compensate them for any animals they claimed to have tracked inside his territory.

> The cattle, horses, or other property stolen in any British Territory in South Africa, and traced into the territory of the contracting chief, shall, if found therein, be restored on demand of any proper British authority, together with full compensation for the entire value of whatever property, not found, shall yet be proved to have been stolen at the same time, and in case none of the stolen property traced into the chief's territory shall be found therein, full compensation shall be paid for all the property so traced.[18]

As happened in British North America, the Colonial Government promised an annual present of useful items or fifty pounds sterling per annum "to be paid to the chief as long as he continued to observe the terms of this Treaty and to remain a faithful friend of the colony." But as the Xhosa people lost their capacity to resist the colonizers, treaties disappeared accordingly. Like Governor Douglas on Vancouver Island, the colonial authorities at the Cape were not above a display of intimidation to achieve their objectives. In 1848, the newly appointed Cape Governor, Sir Harry Smith, brought the short-lived treaty policy to an end. After the Seventh Xhosa War ended in 1848, Smith gathered the Xhosa chiefs and announced the annexation of British Kaffraria to the Crown: "I make no more treaty. I say this land is mine!" To make his point, he exploded a wagon load of dynamite. As historian William MacMillan put it, "with a stroke of a pen (and a spectacular show of Sir Harry's fireworks) treaties were finally swept aside."[19]

Existing treaties, such as the agreement with Kreli, were soon abandoned to make way for white settlement. One of the first things Harry Smith's successor Lieutenant-General George Cathcart did on his arrival at the Cape was to call on the settlers to raise a force to "chastise" Kreli for pretending to be at peace while "plundering the colony." The settlers were prompt in their response: Kreli's principal village was burned to the ground and his cattle seized.[20] Other tribes met a similar fate. The chiefs were told that their locations (reserved lands) would be where they were sent. In return for the land, they had to solemnly pledge to repudiate witchcraft and the "sin of buying wives" (the Xhosa custom of *lobolo* involved the transfer of several head of cattle to the bride's father). They were also required to acknowledge no chief but the Queen of England. Thus the end of treaties in the Cape dealt a serious blow to African land power and self-determination.

The pattern of conquest and subordination took a slightly different form in the Boer republics. By the 1830s, the Boers had abandoned their isolated and precarious existence as farmers in the Cape hinterland and had trekked into the unknown interior intent on establishing their own independent states. While black land tenure was forbidden in both Boer republics, in the Zuid Afrikaansche Republiek (ZAR) every (white) man who had taken part in the Great Trek was entitled to two farms. As in the Orange River Sovereignty, white land ownership covered areas already settled by African communities. ZAR President M.W. Pretorius demonstrated this ownership when he repudiated the Keate Award of 1871. Pretorius had pledged to accept arbitration on whether the territory of the Bataplin and Baralong tribes should be part of the republic.

But when R. W. Keate, the Lieutenant-Governor, ruled that the African lands did not belong in the ZAR republic, Pretorius refused to be bound by his decision. The ZAR subsequently occupied the territory outside its boundaries and regarded the African owners as their subjects.[21]

Like the early Voortrekkers who followed the Khoikhoi (as if they were bloodhounds) to well-watered areas, the ZAR settlers knew there were advantages to claiming ownership of African-owned lands. Not only were these lands likely to be cultivated but they also offered the possibility of a labour supply. For example, the Kopa people were expected to pay rent in cash, kind and labour to the new owners of the land. When the Ndebele ruler, Mabhogo, denied the validity of the Boer claims to the land and refused to recognize their right to rent or tribute, armed conflicts ensued. In the early 1870s, only the chiefdoms within the Pedi domain remained unbowed. But this was not the case throughout the republic. In the more densely settled and controlled heartland of the ZAR a different picture emerged. A missionary who arrived in the Rustenburg area in 1866, for example, found that Africans were "living on Boer farms in kraals and had not an inch of ground they could call their own."[22]

The British colonial role in the alienation of African lands was not negligible. Before the Bloemfontein Convention of 1852 (which created the Orange River republic), a Royal Proclamation renounced British sovereignty over the Orange River Territory (including by necessary implication the territories of the chiefs). In granting unconditional independence to the new Orange Free State, Britain also backed down on its treaty promises of protection to the Griquas and undertook not to make further treaties prejudicial to the interests of the Orange River government. The land rights of Africans in the ZAR were similarly ignored. Under the terms of the Pretoria Convention of 1881 (which created an independent Transvaal state), a Native Location Commission was authorized to set aside African reserves. The 1881 Proclamation stated that "all paramount chiefs, chiefs and natives of the Transvaal" were permitted to buy land or acquire it in any manner, "but the transfer will be registered on their behalf in the name of the Native Location Commission."[23]

This breakup of tribal authority and power coincided with the industrialization of the country. After the unearthing of diamonds (in Griqualand West in 1867) and gold (on the Witwatersrand in 1886), African settlements or reserves were required in order to provide an essential reservoir of cheap labour for white-owned mines and industries. Pass Laws, effective in both the Cape and Boer republics in the late nineteenth century, provided the mechanism to control the influx

of labourers and maintain low wages. Failure to carry a pass in 1873 in the ZAR carried a penalty varying from one to ten pounds, and to a severe flogging.[24]

By negotiating treaties with African chiefs, the colonial authorities (both British and Boer) did initially acknowledge the inherent rights of African chiefs to the territories they occupied. It was only later, after the wars had finally crushed tribal power, that African rights to the land were denied by right of conquest. When Colonial magistrates were imposed on the defeated tribes in the 1870s, the Honorable William Ayliff, then Secretary of Native Affairs, toured the territory explaining the new system to the people and obtaining their consent to its introduction. However, as Theal observes, although the chiefs all thanked the Secretary, according to African custom, and gave their consent to the payment of a hut tax, this was not done willingly.[25]

The notion that the Boer republics were established on "empty land" provided further legitimacy to white occupation.[26] Once densely populated by Sotho-Tswana pastoralists and farmers, the region experienced major disruptions during the 1820s. The word Mfecane (a Zulu term meaning "the crushing") is used by historians to describe the period of destructive and violent upheaval caused by the rise of the Zulu kingdom under Shaka. Although the actual causes and extent of the disturbance remain in dispute, the apparent depopulation of many parts of the interior made it easier for the migrant white farmers of the Great Trek to appropriate the areas that became the Transvaal and Orange Free State republics.[27] Speaking in 1962, Dr Dönges, Minister of Finance in the apartheid government, claimed that it was "history" that had drawn the boundaries between black and white South Africans, not the government, and therefore Africans had no moral claim to more land than they already occupied.[28]

STRATEGIES OF LAND ALIENATION IN CANADA AND SOUTH AFRICA

Treaties had a much briefer history in the South African colonies than they did in Canada for a number of reasons. First of all, the abundance of land in Canada and the diminishing indigenous population (due to smallpox epidemics and the erosion of traditional lands and lifestyles) may have made treaties more appealing or practical than military conquest. Secondly, the treaty system of protecting hunting grounds proved highly successful in avoiding the costs of warfare and in bringing indigenous groups under British authority. After the War of 1812, the colony recognized that it needed to protect the lives of its colonists from Indian

attacks and at the same time give the native population a sense of permanency on their lands. Treaties made it possible to accomplish all these objectives.

The reverse happened in southern Africa. Vastly outnumbered by African inhabitants, British and Boer colonists saw military action (with the aid of rival tribal forces and superior weaponry) as their only recourse. The brutal measures used against African peoples (such as the burning of villages and crops) is explained at least in part by the growing paranoia of the white minority in the face of what Sir Theophilus Shepstone called the encroachment of "barbarism and inhumanity."[29] The power and sheer numbers of Africans and fear of swamping can be seen as a powerful incentive to crush rather than negotiate a compromise with African chiefs.

Probably the most significant factor of all in explaining why treaties found favour in Canada but not in southern Africa was that aboriginal North Americans themselves regarded these formal ceremonial agreements as an essential part of their dealings with Europeans. The Aborigines Protection Society acknowledged the Indian treaty skills in a letter to the Secretary of State in 1858:

> The Indians, being a strikingly acute and intelligent race of men, are keenly sensitive in regard to their own rights as the aborigines of the country, and are equally alive to the value of the gold discoveries … the English government should be prepared to deal with their claims in a broad spirit of justice and liberality. It is certain that the Indians regard their rights as natives as giving them a greater title to enjoy the riches of the country than can possibly be possessed either by the English Government or by foreign adventurers.[30]

Robert A. Williams Jr. observes that European colonists could neither avoid dealing with Indians nor disregard Indian conceptions of justice. Indian treaties in this early period affirmed the sovereign capacity of Indian nations and tribes to engage in bilateral governmental relations, to exercise power and control over their lands and resources, and to maintain their internal forms of self-government free from outside interference.[31]

In her study of Prairie Indians and government policy in the nineteenth century, Sarah Carter points out that Indians were anxious to negotiate treaties as a way of ensuring their economic security in the face of a very uncertain future. In 1871, the Cree chief Sweetgrass sent

this message to Adam Archibald, lieutenant-governor of Manitoba and the North-West Territories: "We have heard our lands were sold and we did not like it; we do not want to sell our lands; it is our property and no one has the right to sell them."[32]

The revisions that were made to Treaty One in response to the protests of the Saulteaux (Ojibwa), the Swampy Cree, and other signatories is another example. Five years after the signing of Treaties One and Two, several Indian chiefs insisted that many of the verbal agreements (or "outside promises") be written up in a Memorandum to be part of the original treaties. Treaty One and the Memorandum attached to it then became a model for future negotiations. As D.J. Hall observes, this renegotiation demonstrated the participation of the Indians as aggressive negotiators.[33] John Tobias argues that the government at that time had no clear Indian policy (beyond a policy of expediency and the desire to avoid costly conflict) and that negotiating treaties with the Ojibwa of North West Angle and the Saulteaux of Manitoba would not have taken place at all had it not been for the insistence of the Indians concerned.[34]

In South Africa, treaties had a short and unsuccessful history. In the Cape Colony, African chiefs regarded the treaties with colonizing Europeans with a high degree of suspicion. The British practice of rewarding loyal chiefs with land taken from other chiefs did little to create confidence or trust between the colonial authorities and African chiefs. Moreover, the treaty terms were miserly at best, offering the Africans few incentives to negotiate treaties. As Captain Robert Scott Aitcheson admitted to the Select Committee in 1835, the lands assigned to Gaika's people in place of the fertile areas they were forced to vacate were appalling.

> I assure you there was not a blade of grass upon it any more than there is in this room, it was as bare as a parade ground.… But the chiefs had no choice.… We being the stronger party, did not give that latitude to the objections on the part of the native tribes. From first to last, Gaika's concession was an unwilling one … there seemed to be a general agreement that right to land be controlled by the Colonial government.[35]

Although Davenport and Hunt argue that paper treaties were among the most potent instruments of European expansion on the African continent, they admit that these agreements, through cession or concession, depended heavily on the way they were interpreted. The process was further complicated by the fact that the colonists found it difficult

to determine whether the chief who signed the treaty held undisputed authority over the territory in question.[36] Another difficulty was the African approach to land ownership. South African historian Peter Delius writes that when tribal leaders agreed to peace treaties, they did so on the understanding that they were granting settlers the right to use their land (usufructuary rights), not to take ownership of it. In exchange, the chiefs hoped to gain welcome allies against rival tribes and at the same time entrench their own authority over their people.[37]

The fact that four separate treaties are known to have been negotiated with the Zulus for the same territory in Port Natal supports this understanding that private ownership of land was an imported invention. The terms of these alleged treaties (two with Zulu Chief Shaka and two with his successor, Dingane) also reveal the extent to which written agreements served the colonial agenda to take control over vast swaths of land. For example, Shaka's "grant of land" to F.G. Farewell and Company included not only Port Natal and an extensive surrounding area of twenty thousand square miles but also the promise of "cattle and corn, as required" as a reward for Farewell's "kind attention to me in my illness from a wound:"

> The whole of the neck of the peninsula in the south-west entrance, and all the country ten miles to the southern side of Port Natal … and extending along the sea coast to the northward and eastward as far as the river known as by the name "Gumgelote" and now called "Farewell's River" … together with all the country inland … one hundred miles backward from the seashore with all rights to rivers, woods, mines and articles of all denominations contained therein.…[38]

The terms of Dingane's legendary treaty with Voortrekker leader Piet Retief in 1838 are equally generous to the settlers. According to the document retrieved from the site of Piet Retief's murder at the hands of Dingane's *impis* (army), the Zulu chief ceded Port Natal, together with all the land annexed to it, in exchange for a few head of stolen cattle:

> KNOW ALL MEN BY THIS That whereas Pieter Retief, Gouvenor of the Dutch emigrant South Afrikans, has retaken my Cattle, which Sinkonyella had stolen; which Cattle he, the said Retief, now deliver unto me; I, DINGAAN, King of the Zoolas, do hereby certify and declare that I thought fit to resign unto him, Retief, and his countrymen (on reward of the case

hereabove mentioned) the Place called "Port Natal," together with all the land annexed, that is to say, from Dogela to the Omsoboebo River westward; and from the sea to the north, as far as the land may be usefull and in my possession. Which I did by this, and give unto them for their everlasting property.

[Signed] De merk + can Koning Dingaan.[39]

Piet Retief apparently entered into a number of land agreements with Zulu chiefs before his fateful meeting with Dingane. Although, according to historian J.A.I. Agar-Hamilton, no trace of these treaties remain, the Voortrekkers established their first republic on lands "ceded" to them by Dingane.[40] The Voortrekker Republic of Natalia had a short history, however. When the British annexed Natalia in 1843, most of the trekkers decided to emigrate to the highveld; they were replaced by a large influx of British immigrants. By the mid-1850s there were ten thousand whites in the British colony of Natal and the African population (who outnumbered them by ten to one) were placed in reserves.

The abandonment of South African treaties for outright military conquest and annexation of tribal lands had far-reaching consequences for the African population. Delius describes the dramatic rise and fall of the powerful Pedi (northern Sotho) nation who, like the Zulus after them, were "bludgeoned into submission" by British-led armies. In contrast to the promises of annuities and benefits of North American treaties, the British imposed taxes on African people to induce compliance and bring them under white control and domination. The custom of forcing Africans to kneel when paying their taxes is one of the methods the white minority used to reinforce their position of power.[41] When a hut tax of ten shillings per annum was first levied in the Cape Colony in the late nineteenth century, most Africans tried to come up with the money by selling their crops or cattle rather than their labour. However, once their lands were taken, increasing numbers of them were forced to seek wage labour in the white-owned mines, industries and farms.

CONCLUSION

The status of Canadian treaties under international law is still a matter of debate among Canada's (non-aboriginal) legal and academic community. Some legal analysts claim that the colonial powers clearly recognized aboriginal rights when they made the majority of the treaties in the mid-1800s. As evidence, they cite the decisions of Chief Justice John Marshall of the United States Supreme Court in *Johnson v. McIntosh* and

Worcester v. Georgia which upheld the view that Indian title was absolute, subject only to the preemption right of purchase acquired by the United States as the successor of Great Britain. For this reason, Government land grants could not become operative until the Indian title had been extinguished in accordance with common law principles, that is, with the Indians' consent and on the payment of compensation. Chief Justice Marshall's rulings paved the way for recognition of aboriginal rights in Canada. His approach to aboriginal title was formally adopted by the Canadian government in 1880 on the approval of the British Privy Council in Westminster. While treaties were considered to be legally binding by the British and Canadian governments and the Indian nations involved, it was the European courts which decided exactly what these rights entailed. The verdict in *Attorney General of Canada vs Attorney General of Ontario* (1897), for example, shows the bias in the court's perspective:

> Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no rights to their annuities, whether original or augmented beyond a promise and agreement, which was nothing more than a personal obligation by its governor, as representing the old province … that the Indians obtained no right which gave them any interest in the territory they surrendered.[42]

In 1965, Pierre Trudeau (as Minister of Justice in the Pearson administration), declared: "The way we propose it, we say we won't recognize aboriginal rights. We will recognize treaty rights. We will recognize forms of contracts which have been made with the Indian people by the Crown and we will try to bring justice to that area and this will mean that perhaps the treaties shouldn't go on forever. It's inconceivable, I think, that in any given society one section of the society have a treaty with another section of the society."[43] These views were later restated in the Liberal Party government's White Paper of 1969 when the problem of the language in treaties was raised. From the government's point of view, the treaties were honoured: annuities were paid, reserve lands set aside, and benefits provided, apart from a few exceptions where Indians had failed to select the reserve lands they wanted.[44]

However, Treaty Indians regard the legality of treaties differently. As Harold Cardinal wrote in his response to the White Paper in 1970, not only the words but also the spirit of the treaties have to be respected: "To us who are Treaty Indians there is nothing more important than our

Treaties, our lands and the well-being of our future generations.… The intent and spirit of our treaties must be our guide, not the precise letter of a foreign language. Treaties that run forever must have room for the changes in the conditions of life."[45] In 1973, a case in the Northwest Territories, *Paulette et al. v. The Queen* raised for the first time the fundamental question of whether the literal words of treaties represent the understanding of Indian signatories.[46] Legal historian Bruce Wildsmith agrees that the intention of both parties in treaty negotiations was to make a legal obligation of a permanent nature that neither side could evade unilaterally. In his view, Indian treaties constitute a legally enforceable obligation, although the extent of appropriate compensation when breaches of treaty obligations occur remains to be determined.[47] Historians Peter Cumming and Neil Mickenberg concur with this view. Native rights have a four-hundred-year history in international law and have been part of the common and statutory law of British North America and of Canada for well over two centuries. Rights which originated in such a rich history, in their view, cannot be easily ignored.[48]