Between the Lines: the spirit behind land agreements

David Goodwin¹ and Mick Strack¹

¹School of Surveying,
University of Otago, Dunedin, 9054,
New Zealand

Email: david.goodwin@surveying.otago.ac.nz; mick.strack@surveying.otago.ac.nz


Abstract:
Land agreements negotiated between British authorities and indigenous groups were part and parcel of colonial expansion. Although current interpretations of the historical agreements which formed the basis for European settlement and rights in land acknowledge that a variety of forms of evidence (written, numerical, verbal and pictorial) are admissible in law, and generally recognise that the spirit of an agreement is paramount, special difficulties (principally those of culture and language) are associated with getting to the heart of such agreements. Typically, the written words of legal texts have been scrutinised minutely, but forms of evidence other than the written words have been neglected. This paper compares the unwritten evidence for treaties and concessions in three countries, namely Canada, New Zealand and Zimbabwe. Examples include wampum belts in Canada, and surviving verbal synopses of written documents, for example explanations by missionary translators, which were often couched in figurative or metaphorical language and, at the time, may have carried considerable weight. Despite agreements being negotiated verbally, the official version is generally the written document with appended signatures or written marks. From an indigenous point of view, the verbal agreement often carries greater weight, especially when ratified by some form of cultural protocol, for example smoking a pipe of peace. Failure to recognise such verbal covenants and protocols has at times led to misunderstandings about the spirit of land agreements. The paper concludes that legal processes today not only need to be cognisant of written law but should also pay greater attention to unwritten forms of evidence. In particular, imagery resorted to 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.

Keywords:
Treaties, land tenure, legal evidence, aboriginal title.
1 Introduction

Land agreements negotiated between British authorities and indigenous groups were part and parcel of colonial expansion, and formed the basis for European settlement and rights in land. Although current interpretations of these agreements acknowledge that a variety of forms of evidence are admissible in law, and generally recognise that the spirit of an agreement is paramount, special difficulties are associated with getting to the heart of historical agreements. Typically, written documents have been scrutinised minutely, but forms of evidence other than the written words have sometimes been neglected. This other evidence includes records of debates, discussions and promises offered prior to signing. These were often couched in figurative or metaphorical language, which often carried considerable weight in swaying opinion. However, despite a person’s word being paramount from an indigenous point of view, especially when ratified by some form of cultural protocol such as smoking a pipe of peace, the official version of an agreement today is generally the written document with appended signatures or written marks.

This paper examines and compares the discussions leading to the treaties and concessions and the agreements made between colonial authorities and indigenous groups in three countries, namely Canada, New Zealand and Zimbabwe.

2 Canadian Treaties

British sovereignty was asserted over the lands and the people of Canada by the Royal Proclamation of 1763 but the possession of the lands of the Indians was not ceded and no lands could be purchased other than through the Crown. There is nothing especially remarkable about that: Sovereignty over territory (imperium) is quite different from proprietorship of lands (dominium). However, the explicit statement of that fact reinforces 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 was agreed upon and what was ceded.

A series of 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. 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. 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).

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1 Treaty 1 was signed in 1871 in Manitoba and subsequent treaties were signed in Saskatchewan and central Alberta, before treaty commissioners reached southern Alberta. The lands west of the Rockies (present day British Columbia) were settled from the Pacific west coast without treaties.

2 (Henderson, 1997:75) “The Aboriginal intent was to extend the hand of friendship to the imperial Crown and to protect the Aboriginal way of life and livelihood. To the Crown’s consciousness, such protection brought the
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. 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 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, 1997:255) and it appears that the treaty was never read out in full (Treaty 7 Elders 1997:258).

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).

The continuing conflict about the legal effect of the treaty, therefore, is 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, validated by the protocol of smoking the sacred pipe, and recalled in the oral histories of the indigenous people. Formal agreements of many kinds were often also recorded in Wampum belts 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 this cultural meeting place is therefore of great significance to understanding the relative positions of both parties. The Crown commissioners regularly

Aboriginal nations and their lands within the jurisdiction of the United Kingdom. The imperial Crown needed the treaties to justify its jurisdiction in North America to other nations.”

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 Volume 1)

4 Borrows J – interpreting a treaty wampum belt: “the bed of this agreement is white, which is to represent the purity of the agreement, and that people were to live together in peace and friendship and respect, and this motif of peace, friendship and respect is repeated in …. three white rows separating the two purple rows indicating that people can live together, they can create a shared space in the territories they found themselves in, in peace and friendship and respect. At the same time, there are these two purple rows that separate the white rows, that are to indicate that the British Crown would go down their river of life in their ship of State dealing with their own affairs and our people would go down the river of life in our canoe controlling our affairs.”
resorted to the language of fraternity. It is the language of the self-assured civilized man wishing to get agreement to its position by bolstering the status of the illiterate native (who, nevertheless, has all that which the Crown seeks). The Queen is portrayed as a benevolent mother figure for the Indians,\(^5\) 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 Volume 1).

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 will 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, 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).

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 open access. They were not alienating their land forever in a way that would exclude them from it. They were saying\(^6\) 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.

2.1 Treaty Protocol

Different cultural and legal traditions create different views about what gives an agreement validity. The Europeans placed total emphasis on the written text that had to be duly authorised by signatures. The 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 (and the presence of the NWMP assisted in this colourful display of formality) and making speeches. In actual fact, Indian signatures were not collected

\(^5\) 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.”

\(^6\) 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,
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! Dempsey (1972:105) 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.

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.

The treaty negotiations were conducted alongside the ceremony of the pipe, but it is likely that the Treaty commissioners saw these aboriginal ceremonies and protocol as merely heathen entertainment (Taylor, 1999:18).

The Treaty 7 elders remembered smoking the pipe to bless and solemnize a treaty that was to enable them to live in peace and harmony. By smoking the pipe of friendship they did not need to know all the details (some of which were subsequently used against them) of the treaty. Once the pipe had been smoked they believed that they would be ‘taken care of’ and that their lives would be enriched by the government’s ‘magnificent gifts’ and ‘sweet promises’ (Treaty 7 Elders 1997:324-5).

The agreement to the written treaty was compromised by failures in treaty settlement protocol on the part of all parties. The agreement to the content of the oral discussions was similarly compromised by the misunderstanding of the significance of the pipe ceremony. The treaty therefore, cannot be viewed as a meeting of the minds.

3 Zimbabwean treaties and concessions

Nineteenth century treaties and concessions in Zimbabwe have to be viewed in the light of the Matabele war which, by 1894, established conquest as the method of acquiring territory rather than treaty-making. However, earlier agreements still warrant scrutiny since grievances surrounding their signing continue to this day, in particular over verbal assurances given at the time. The first recorded treaty over Zimbabwean soil, signed by Mzilikazi with the Boers in 1853, was primarily a right of way over Matabele territory.

7 And see comment by Gordon Lee “The importance of the sacred pipe ceremony” in Price, 1999:111 and 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 Treaty 7, 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”

8 "From the point of view of the government officials, the ceremonial was merely a picturesque preliminary favoured by Indian custom.”

9 For example, see (Magaisa, 2008).
This was followed\textsuperscript{10} by the Tati and the Shashi concessions (Warhurst, 1973:56,63).\textsuperscript{11} Thereafter, apart from a minor concession in 1871,\textsuperscript{12} no further concessions or treaties were granted until 1888, when Lobengula signed both the Moffat treaty and the Rudd concession. By the Moffat treaty, he agreed not to give away any part of his territories without the sanction of Britain. Lobengula’s motives are a matter of conjecture\textsuperscript{13} but what is certain is that, as with the prior treaties, no land rights were conveyed.

The written terms of the Rudd concession\textsuperscript{14} are straightforward, and 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 been “the thin end of the wedge” for the British but which, in itself, did not give away much and, in particular, conveyed no rights in land.\textsuperscript{15} It is the verbal assurances made at around the time of the concession that have since given rise to grievance,\textsuperscript{16} and it is here that figurative language first plays a significant part in conveying exact shades of meaning.\textsuperscript{17} It should be noted that Thompson, as interpreter, 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).

Thompson confined himself to metaphorical terms that he believed would be best understood by the Matabele, which meant sticking mainly to guns\textsuperscript{18} and cattle. Thompson likens Lobengula’s dominion to a dish of milk that is attracting flies\textsuperscript{19} and explains that what is sought is 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

\textsuperscript{10} Seventeen years later, and signed by Mzilikazi’s son, Lobengula.

\textsuperscript{11} The former was over an area disputed with a Bechuana tribe, and the latter was probably also a veiled territorial statement.

\textsuperscript{12} To the painter, Baines.

\textsuperscript{13} As with the Tati and Shashi concessions, Lobengula may have viewed the Treaty as legitimising the extent of his jurisdiction, or perhaps he decided to switch to an alliance with the British simply because he was “alarmed at what people told him he had granted to the Boers” (Warhurst, 1973:60-61).

\textsuperscript{14} The concession, a mining lease for an initial sum then a fixed monthly amount, was signed by Rudd, Thompson and Maguire as representatives of a mining company. It was drafted by Rudd, altered “to suit the understanding of the native mind” and then put into legal form by Maguire (Rouillard, 1947:136). Maguire could not have gained a great deal of experience as a lawyer, since he had ‘not found it necessary to practice’ after being called to the bar in 1883 (Hiller, 1947:151).

\textsuperscript{15} Other than in a negative sense of agreeing not to grant land without the permission of the grantees.

\textsuperscript{16} e.g. when Francis (“Matabele”) Thompson is accosted, years later, by one of Lobengula’s Indunas, he is asked, “Ou Tomoson, how have you treated us, after all your promises, which we believed?”, to which Thompson had no answer (Rouillard, 1977:193).

\textsuperscript{17} An understanding of symbolism was evidently important at the time. 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, “but jet black, the colour conveying to the Matebili almost a declaration of war” (Rouillard, 1977:187).

\textsuperscript{18} Thompson, arriving in Bulawayo, makes the point that the sovereigns carried by the party, amounting to £10 000, were referred to by the natives as ‘lumps of metal’ or ‘buttons’. He gives rough exchange values of goods and ends by writing that “Guns and ammunition, in short, were considered the only things really worth having” (Rouillard, 1977:126-127).

\textsuperscript{19} A reference to other countries interested in securing mineral rights in the country we now call Zimbabwe.
Matebili regarded milk as only fit for children, and not food for men (Rouillard, 1977:188).  

Thompson explained what was meant by the sole right to mine gold by pointing out that it was inadvisable to have two bulls in one herd of cows, which one induna agreed was simply asking for the pair of them to fight rather than looking after the cows. Furthermore, in order to allay fears, Thompson 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).  

Lobengula signed the concession, but in the following months his fears were played upon by rival concession-hunters at Bulawayo, who suggested that the king study the word “land” used in the concession. One of the whites, at a council with 300 indunas, challenged Thompson to explain the word, to which he cleverly replied 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).  

3.1 “Ten White Men”  

Looking back over a hundred years, one phrase continues to trouble writers; a verbal promise allegedly made to Lobengula that only ten white men would be working in his country. However, although it seems that ten men must have been mentioned, it is unclear just what that occasion was. One account is from the Rev. Helm, who writes:  

The Grantees ... promised that they would not bring more than 10 white men to work in his (Lobengula’s) country, that they would not dig anywhere near towns etc & that they & their people would abide by the laws of his country & in fact be as his people (Hiller, 1949:227).  

This statement might mean that the promise was made by Rudd and his party at the time the concession was signed (Blake, 1977:47), but Helm’s use of ‘the grantees’ is ambiguous and could equally well have applied to only two of the grantees at a date.

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20 Thompson repeats these words to Lobengula on a later occasion, with reference to the same Concession, and years later, during a Privy Council appeal case, he was again to repeat his statement, confirming he had said the Europeans only wanted the milk (i.e. minerals) not the calf (land).  
21 Councillor, advisor, chief e.g. of Lobengula.  
22 A similar proverb is found in Swahili: ‘Two bulls do not live in the same cowshed’. Parker, quoted in (Pongweni, 1989:7).  
23 The assegai is figurative: one thousand Martini-Henry breech-loading rifles were offered with one hundred thousand rounds of ball cartridges.  
24 Thompson’s use of metaphor extends to describing his relationship with his companions. When Lobengula asks whether Rudd, Maguire and Thompson are brothers, Thompson replies, “speaking in the usual metaphorical style”, ‘Yes, there are four of us. The big one (Rhodes) is at home looking after the house, and we three have come to hunt.’ Thompson clearly does not see his style as a deception. (Rouillard, 1977:130-131).  
25 In a letter to the London Missionary Society dated 29th March 1889, some five months after the signing of the concession.
later than the signing of the concession, or even by other members of the mining company at a still later date.26

In the months following the signing of the concession, Lobengula, seeking reassurance, decided to send two indunas to Britain, bearing two letters. The first letter, authenticated by Helm, was a declaration of Lobengula’s territorial claims27 and a request to the Queen for protection under the Moffat treaty. The second letter, quite possibly a forgery,28 said that the indunas were making the journey to confirm on Lobengula’s behalf that there was a queen, and to ask for someone to be sent by the Queen herself 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, this was untenable 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,29 and Lobengula also did not really have the power in custom to grant land rights in Matabeleland (Palmer, 1977:27). The Lippert concession30 was probably an attempt to outmanoeuvre Rhodes by securing the land rights to the country,31 and subsequent confirmation of the concession by John Moffat32 seemed to be a case of the end justifying the means since he firmly believed that “only the disappearance of their military state could save the Ndebele” (Warhurst, 1973:64). Although further details of the concession are beyond the scope of this paper, when Rhodes bought the concession it served to buttress the Rudd concession, whose

26 Rudd himself was on the road south within hours of the signing leaving Maguire and Thompson in Bulawayo, and further meetings were held with Lobengula at which attempts would almost certainly have been made to allay the King’s fears concerning the concession. Maguire and Thompson were in a precarious position and must have been nervous when Helm was sent for and the indunas called together for a meeting. In the interim, matters had in no way been improved when Maguire made the mistake of cleaning his teeth with scarlet toothpaste in a sacred pool and was accused of witchcraft by the Matabele, and one possibility is that it was at the ensuing ten-and-a-half-hour meeting that Thompson uttered the reassurance that only ten whites could be expected to take up the concession, perhaps viewing this not as a binding promise but as a glib estimate justifiable in defusing an explosive situation. Another possibility is that the mention of ‘ten whites’ was made still later, perhaps justifiable in a still later than the signing of the concession, or even by other members of the mining company at a still later date.26

27 At that stage effectively the British South Africa Company, since its creation on October 29th 1889.

28 Sometimes referred to as the Rennie Tailyour Concession, since R Tailyour and E.A. Maund represented the German financier Lippert (Cherer Smith, 1978:35).

29 The Lippert Concession 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).

30 This was helpful to Rhodes, if anything, since it was easier dealing with one monarch than numerous petty chieftains.

31 The letter bore Lobengula’s official elephant seal which was kept by the trader Fairburn, who opposed Rhodes (Blake, 1977:49).

32 Sometimes referred to as the Rennie Tailyour Concession, since R Tailyour and E.A. Maund represented the German financier Lippert (Cherer Smith, 1978:35).
weakness was in not giving control over land. Thompson, when asked by Rhodes about the signing of the Lippert concession, says that, knowing Lobengula’s feelings about land, he was probably unaware of what he had put his signature to (Rouillard, 1977:189).

To complete the picture of land agreements, a claim by the Matabele community that their right to the unassigned land in Southern Rhodesia had survived conquest was summarily dismissed by the Judicial Committee of the Privy Council in favour of the Crown (Privy Council, 1918:233), then in 1923 Southern Rhodesia was granted responsible government. Apart from a side-step in which “UDI” was declared,33 this was the status quo when Zimbabwe was granted independence from Britain in 1980.

4 The Treaty of Waitangi, New Zealand

In three relatively simple articles, the English version of the Treaty of Waitangi is essentially about sovereignty (ceded to the British Crown), property rights (retained by Māori for so long as they wished) and citizenship (protected for all people) respectively. In the Māori language version it is more explicitly about kawanatanga (governing authority granted to the Crown), rangatiratanga (Māori authority over their own property and lives) and tikanga (protection of Māori custom) respectively. The conflicts between these different words and therefore different understandings have been intensively argued, and they are largely unresolved, except to the extent that there is general agreement that the focus should be on the principles expressed by the Treaty rather than the words. It is however acknowledged that it is unlikely that Māori would have signed the Treaty if they had been required to relinquish their rangatiratanga or mana (personal and tribal authority). Henry Williams offered his verbal endorsement of the proposed Treaty, saying that the missionaries fully approved of it, 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” (Rogers, 1998:165 & Orange, 1987:45).

It is further generally acknowledged that, while the Māori chiefs at Waitangi on the 6th of February may have been party to some discussions about the content of the Treaty, it is more than likely that the Crown representatives, sent around the country “like travelling quacks, selling some cure-all elixir” (Moon, 2002:132), were more concerned with gathering additional signatures on copies of the Treaty than with explaining its terms and implications.34

The Colonial Office had long asserted a desire to ensure that Māori understanding was clear. The instructions to Captain Hobson were explicit, namely that “… the free and intelligent consent of the natives, expressed according to their established usages shall be first obtained.”35 As it turned out, the application of the Treaty by the Crown

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33 The Unilateral Declaration of Independence by the Rhodesian government, in 1965.
34 “It therefore requires an enormous speculative leap to assume that every Māori signatory received the same explanation as that provided at the Waitangi signing. Certainly, on the basis of Edward (Marsh) Williams’s accounts, the processes of signature-catching tended to be hasty, relatively informal, and deprived of the depth and quality of clarification that was needed to ensure that Māori comprehension of the agreement was sufficient to allow them to give their free and intelligent consent” (Moon, 2002:133).
35 Instructions from the Marquis of Normanby to Captain Hobson, R.N. Downing Street, August 14th 1839.
relied more on the established usages of English law, and Crown deeds to land regularly trumped native title.\textsuperscript{36}

So how did Māori envisage the Treaty guarantees and protections? Te Kemara,\textsuperscript{37} 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”. He was clearly concerned that Māori signatories risked losing their mana. As Rogers (1998:170) 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.”

On the other hand, 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, 1975:50), which seems to suggest an understanding of a benevolent and guiding Queen who nevertheless was a titular head only. Nopera Panakareao would not hold that view for long. A scant eight months later, observing the practical implementation of the Treaty, he 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 Māori understood the implications of selling land, and the exclusive rights that were subsequently claimed by the settler owner. Māori certainly recognised the importance of land to their continued ways of life, and many understood the worthlessness of the items of exchange:

The land will remain for ever to produce food, and after you have cut down the old trees to build houses, the saplings will continue growing, and in after years will become larger trees; while the payment I ask for will soon come to an end. The blankets will wear out, the axes will be broken after cutting down a few trees, and the iron pots will be cracked by the heat of the fire (Te Waharoa to Rev. Brown at Matamata 1835 in Caselberg, 1975:29).

The protocols of manaakitanga (host responsibilities) at Waitangi were imperfectly met by Hobson, and after two days of discussions the invited Māori chiefs were ready to return to their homes. The signing ceremony was thus completed quickly on 6 February under the fatherly figure of Hobson and his colourful entourage.\textsuperscript{38} As each chief signed the document, they shook hands with Hobson who announced each time ‘He iwi tahi tatou’ – ‘We are now one people.’ This was perhaps wishful thinking, but arguably is the basis to suggest that the spirit of the Treaty was one of partnership between equal peoples.

The meeting at Waitangi between representatives of the Crown and chiefs of the northern confederation represented the effort made to obtain the free and intelligent consent of Māori to the Treaty provisions. There is strong evidence that the verbal discussions there focused on what would be protected for Māori – their rights to and

\textsuperscript{36} In cases such as \textit{R v Symonds} (1847) NZPCC 387 and \textit{Wi Parata v Bishop of Wellington} (1877) 3 NZ Jur. (NS) 72.

\textsuperscript{37} From a speech at the Waitangi negotiations originally recorded by William Colenso (Caselberg, 1975:44).

\textsuperscript{38} \textit{Orange}, 1987:43 “a gala atmosphere” – tents, flags, uniforms, and theatrical ceremony.
authority over their lands (Orange, 1987:46). Recent judicial analysis of the effect of treaties with indigenous people,\textsuperscript{39} support the view that it is the understandings of the indigenous signatories that should prevail.

5 Discussion and conclusions

The treaties and land agreements in the three countries discussed above have had significant adverse effects on historical and current relationships between the Crown and the indigenous people. An important aspect of the spirit of land agreements was the attempt to establish trust relationships between the contracting parties around the time of the treaty proceedings. For example, Lobengula seeks reassurance from Thompson that his “heart is white towards the Matebili” (Rouillard, 1977:186), the words of Henry Williams that the Treaty of Waitangi is “the act of love towards (Māori) on the part of the Queen” carry considerable weight because he has proved trustworthy over a number of years, and Crowfoot’s trust relationship with Colonel Macleod is instrumental in enabling negotiations. Misunderstandings and grievances have developed in regard to the indigenous understanding of the verbal agreements and the Crown’s acceptance and implementation of the written documents. These grievances have fuelled mistrust between the parties to the treaties that has betrayed the original trust relationship asserted by the signatories.

Similarly, in asserting their inherent superiority over the indigenous tribes, the colonial authorities were expected to model standards of honourable behaviour. In all three countries, the British Queen is invoked by the Europeans as representing a level of justice higher than governments.\textsuperscript{40} The natives often acknowledged the overriding authority of the Queen and were led to expect that the Europeans would act honourably. They were often surprised when they did not. 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 these cross cultural agreements, and after the various cultural protocols were completed, 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 of the ceremony enhanced the expectation of the honourable implementation of the verbal understandings.

Europeans acted as if what was written and signed was of paramount importance, and they seemed to see no impediment to verbal misrepresentation in order to gain consensus. The natives, on the other hand, appeared to set most store by the verbal discussions and assurances supported by the trust relationship as it 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

\textsuperscript{39} Clearly summarized by the Waitangi Tribunal, 1997:386-388.

\textsuperscript{40} almost one of ideal justice - even divinely ordained
generically understood and better representing the nature of agreements than the monocultural legal jargon of the written document.

It is apparent that perceived injustices that still fester today trace back to the verbal exchanges just as greatly as to the written agreements. Legal and administrative processes and settlements today are cognisant of the written word and black-letter law, but they should pay greater attention to ways in which trustworthiness was established and to unwritten forms of evidence. In particular, 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.

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