
Between Justice and Certainty



Law and Society Series

W. Wesley Pue, General Editor

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Andrew Woolford

Between Justice and Certainty:
Treaty Making in British Columbia



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Preface and Acknowledgments

This book is a sort of homecoming. My academic career has led me to consider the injustices experienced and the reparational demands made by various groups worldwide, but, until 1997, I had not thought much about the weight of the past in my own home province. In Victoria, where I grew up, the Aboriginal past surrounded me. I played lacrosse for the Saanich Indians. Our mascot, an Aboriginal man with a grossly misshapen nose, was dressed in stereotypical headdress. I participated in intramural sports at my elementary school as part of the “Songhees” team. My stomping grounds were the traditional territories of the First Nation signatories to the Douglas treaties. However, I was happily oblivious to the issues of land claims, residential schools, reserve living conditions, and the other harms enacted against First Nations peoples.

In a sense, *Between Justice and Certainty* is a personal reckoning, an attempt to address my historical ignorance; but it is not an exercise in “white guilt.” Its focus is on the mechanisms of denial and manipulation that are used to avoid an honest engagement with the past. In the pages that follow, I call for a reparative approach to treaty making in British Columbia that is guided by the goals of redistribution, recognition, and reconciliation. However, it is acknowledged that these terms have multiple meanings; in this respect, each term is problematized so as to explore the prospects and perils it presents for justice and certainty in British Columbia.

The British Columbia treaty process was established in 1992 with the aim of resolving the outstanding land claims of First Nations in British Columbia. Since that time two discourses have been prevalent within the treaty negotiations taking place between First Nations and the governments of Canada and British Columbia. The first, that of justice, revolves around the question of how to remedy the past injustices that were imposed on British Columbia’s First Nations so as to improve their current circumstances. The second, that of certainty, asks whether this historical repair can occur without significantly disrupting the social order and whether it can be done in a

manner that provides a better future for *all* British Columbians. Each discourse, as it unfolds in the negotiation process, is characterized by competing visions of what justice and certainty should mean. This book examines the interplay between Aboriginal and non-Aboriginal visions of justice and certainty and asks: Is there a space between justice and certainty in which modern treaties can be made? Can we simultaneously address the injustices of the past and the needs of the future?

On the basis of interviews, fieldwork, and a document analysis of treaty-related materials, I argue that the BC treaty process, as it currently stands, fails to provide a reliable means for the parties to negotiate “between justice and certainty.” In particular, the procedural model on which the BC treaty process is built lacks clear substantive guidelines, thus leaving it susceptible to the manipulations and “symbolic violence” of the more powerful parties (i.e., the provincial and federal governments). This has resulted in negotiations that are defined by the visions of justice and certainty forwarded by the non-Aboriginal governments – visions that prioritize the economic and political interests of business and government over a serious reckoning with the past. These “affirmative reparations” render justice equivalent to achieving certainty in the form of clear and stable business and governance relations between Aboriginal and non-Aboriginal peoples, which sharply contrasts with First Nations demands that non-Aboriginal governments provide a forthright acknowledgment of and apology for infringement on Aboriginal rights and title, significant monetary compensation and land restitution, and recognition of broad powers of Aboriginal self-governance.

However, these Aboriginal justice demands do not meet the economic and political imperatives of neoliberal globalization, and it is on the basis of these broader societal forces that the non-Aboriginal governments’ vision of certainty rests. For them, “rational” and certain settlements need to be forged through treaty making to ensure the ability of governments and businesses to operate efficiently in the global marketplace. In opposition to this affirmative perspective, I argue that the negotiation process needs to be redesigned so that the symbolic and material justice demands of First Nations form the basis for treaty making. Unless the BC treaty process opens itself to the possibility of transformative justice contained within these demands – that is, to a justice that reconfigures symbolic, political, and economic relationships between Aboriginal and non-Aboriginal peoples – the certainty desired by non-Aboriginal governments and businesses is unlikely to prevail. Indeed, the economic and political assimilation that is attempted through affirmative repair is more likely to lead to future conflict than to the trust and mutual respect between Aboriginal and non-Aboriginal societies necessary for certainty to be realized.

I would like to thank the Tsawwassen, Squamish, Tsleil-Waututh, and Musqueam peoples for welcoming me onto their traditional territories to attend meetings and to conduct interviews. I would also like to thank the representatives from these First Nations, the First Nations Summit, the Union of British Columbia Indian Chiefs, the Treaty Negotiations Advisory Committee, the Lower Mainland Treaty Advisory Committee, the Lower Mainland Regional Advisory Committee, and the federal and provincial governments who took the time to meet with me to discuss their visions of certainty and justice. As well, the research presented here would not have been possible without funding support from the Social Sciences and Humanities Research Council of Canada, the Li Tze Fong Memorial Fellowship Foundation, the University of British Columbia, the University of Manitoba, and the Jean MacDonald Fellowship.

This book has benefited from the assistance of many people. Professor R.S. (Bob) Ratner has been my mentor and guide during my PhD studies. His wisdom and encouragement have been instrumental in my scholarly development, and this document has profited greatly from his critical insight and attention to detail. I hope the respect and high regard his students feel for him is some reward for his dedication to them, which surpasses all reasonable expectations. I would also like to thank John Torpey, Charles Menzies, Thomas Kemple, Bruce G. Miller, Wes Pue, Donald Clairmont, Peter Kulchyski, and the anonymous reviewer for UBC Press for providing me with excellent scholarly advice. I am indebted to them for their careful reading of this manuscript and the thoughtful commentary each provided. Finally, thanks to Randy Schmidt (UBC Press) for his editorial guidance and patience with my many questions about this process, and to Joanne Richardson for helping to improve this book's readability. All errors, of course, are the responsibility of the author.

I dedicate this book to my father, John Woolford, who encouraged me to continue my education. To both him and my mother, Linda Woolford, I offer my deepest gratitude for the support they have provided. Last, the process of researching and writing this book would have been far less bearable without my wife Jessica at my side: she has been my constant motivator and tireless editor.

Abbreviations

AIP	Agreement in Principle
APCC	Aboriginal Peoples Constitutional Conference
BCCTF	British Columbia Claims Task Force
BCTC	British Columbia Treaty Commission
CNIBC	Confederation of the Native Indians of British Columbia
DIAND	Department of Indian Affairs and Northern Development
FIRE	Foundation for Individual Rights and Equality
FNC	First Nations Congress
FNTNA	First Nations Treaty Negotiation Alliance
FTNO	Federal Treaty Negotiation Office
HBC	Hudson's Bay Company
IMA	Interim Measure Agreement
LAC	local advisory committee
LMRAC	Lower Mainland Regional Advisory Committee
MOU	Memorandum of Understanding
NDP	New Democratic Party
NSM	new social movement
RAC	regional advisory committee
RMT	resource mobilization theory
SMO	social movement organization
TAC	treaty advisory committee
TNAC	Treaty Negotiations Advisory Committee
TRM	treaty-related measure
UBCIC	Union of British Columbia Indian Chiefs
UBCM	Union of British Columbia Municipalities

Between Justice and Certainty

1

Introduction

In many nations tainted by an unsavoury past, processes are being implemented to acknowledge long-denied narratives of injustice, punish the perpetrators of those injustices, encourage reconciliation between victims and offenders, and offer recompense to survivors and/or the descendants of victims (Adam 2001; Barkan 2000; Minow 1998). Through these processes governments, churches, and private enterprises are being compelled to address their past wrongdoings (Torpey 2001, 2003). This seeming “moral awakening” began in the latter half of the twentieth century, a century many commentators have described as the epitome of human cruelty (see, for example, Alvarez 2001; Bauman 1989; Mann 1999; Minow 1998). In reaction to the horrors of the Second World War, the genocidal machinery of the Nazi regime, the political repression that accompanied the polarized politics of the Cold War, and other instances of mass violence and curtailed freedoms, various social movements have arisen to demand reparation for the crimes of the past.

However, not all reparations movements locate the source of their suffering solely in the recent past. For some, such as the First Nations¹ of Canada, the injustices stretch back to the colonization of what is now called North America. Upon the initial injustice of the expropriation of their lands, further injustices have been heaped, culminating in present circumstances of poverty, dependency, and near cultural collapse.² The length of time over which injustices occurred, as well as their several and still developing forms, makes any simple calculus of reparation impossible. An actuarial equation of compensation for degree of injury suffered and resources lost cannot be formulated to repair these harms. Nonetheless, the complexity of the circumstances of injustice, and the difficulty of compensation, should not be employed as convenient rationalizations for inaction. The past cannot be erased by kind words, cash disbursements, or land distribution, but it can be addressed through these means so as to assuage its negative influence on the future.

The question of dealing with the Canadian past is particularly problematic in British Columbia, where the injustices experienced by First Nations have taken a different shape from those experienced by Aboriginal groups elsewhere in Canada.³ Whereas the Canadian government established treaties with many First Nations soon after contact, in British Columbia few treaties were signed, leaving First Nations of this region more susceptible to the whims of government and vulnerable to extensive expropriation of their lands.⁴ It is this situation that the governments of Canada and British Columbia, and the First Nations of the province, now wish to remedy.

The BC treaty process, in which approximately two-thirds of the province's First Nations are engaged in various stages of negotiations with the provincial and federal governments,⁵ has been initiated to provide treaties for First Nations in British Columbia. This process is intended to achieve long-awaited agreements on issues ranging from land ownership to Native self-government. Arriving at this point required years of perseverance and activism on the part of Aboriginal groups and individuals, and still the process may not be a reliable route to change. Questions remain as to whether this process will be able to meet the Supreme Court of Canada's advisement that the governments of Canada and British Columbia have the "moral if not legal duty" (*Delgamuukw v. British Columbia*, 1997) to settle treaties in "good faith" with the First Nations of British Columbia.

Between Justice and Certainty

The idea that the non-Aboriginal governments possess a "moral" and "legal duty" to negotiate in good faith speaks to only one dimension of the treaty-making process: the requirement that "justice" be achieved through fair and open negotiations. However, in the global economic context of modern treaty making, this goal of justice is more than ever tempered by another motivating factor: certainty. Discourses of certainty pervade the treaty-making process, and the form that the realization of certainty takes promises to have repercussions for the type of justice produced through the BC treaty process.

Certainty means that, first and foremost, conflicts between Aboriginal and Crown title be resolved so that there is clarity with regard to who owns and has jurisdiction over lands in British Columbia. It is a practical concept intended to effect tangible changes in the future socioeconomic and legal relationship between Aboriginal and non-Aboriginal peoples in British Columbia. Yet acceptance of these changes depends upon the general, more abstract, perception that "justice" has been achieved through treaty settlement. "Justice" can bestow legitimacy upon the end results of the treaty process if these results produce a general perception that the treaties are "fair." Quite simply, if all parties feel that the terms of the treaty are fair, then no one party will be likely to challenge it at a later date.

Therefore, justice can produce certainty by establishing secure relationships between the parties, thereby bringing about a form of reconciliation through which the formerly conflicting parties can establish trust. Without the reconciliation that derives from justice, the stability of certainty may be disrupted as political and material disputes threaten to rekindle conflicts over rightful ownership and government jurisdiction.

But there is also a tension that exists between justice and certainty. Visions of what constitutes a “fair” settlement differ widely among the parties involved in negotiations. Similarly, visions of what treaty terminology and forms of agreement will best produce certainty are hotly contested. Thus, there is no obvious meeting point at which justice and certainty will combine to forge a reconciliation between Aboriginal and non-Aboriginal communities in British Columbia.

The tension that exists between these foci of the treaty process is experienced on the interface between past and future. While, from the perspective of many First Nations, “justice” requires that reparation and restitution be made for past and present wrongs,⁶ certainty, as the non-Aboriginal governments see it, demands the creation of new relationships reflective of current economic, legal, and political realities. Dealing with injustices requires that an attempt be made to meet the needs of the wronged party, which may involve a redistribution of social wealth and opportunities, a reconfiguration of modes of cultural valuation, and the promise of a new ethical relationship between the parties in which each works to continuously recreate an always tenuous harmony. All of these things suggest forms of resolution less calculable than certainty demands. Certainty, as non-Aboriginal government and business representatives commonly understand it, requires a detailed cataloguing of rights, a relationship clearly defined to meet the vagaries of the future. The question I will deal with in these pages is whether or not a future certainty of this nature is possible within the context of the moral obligations shaped by the past. Stated differently, is there a space between justice and certainty within which modern treaties can be made?

This question will be addressed in the specific context of treaty making in British Columbia, with emphasis placed on the first ten years of the BC treaty process (1992-2002).⁷ Although much of the research presented in *Between Justice and Certainty* is drawn from negotiations and meetings conducted in the Lower Mainland of British Columbia – the area surrounding British Columbia’s largest urban centre, Vancouver – the interviews I conducted, and many of the meetings I attended, dealt with topics extending well beyond the limits of this geographical region.⁸ Moreover, urban treaty negotiations, such as those taking place in the Lower Mainland, present a stark example of the challenges faced in the simultaneous pursuit of justice and certainty. For many urban First Nations, the land and resources they

could potentially claim have already been developed and exploited, leaving them with little foundation on which to build a local economy. Furthermore, as stipulated in the Memorandum of Understanding on Cost-Sharing (hereafter MOU 1993) negotiated between Canada and British Columbia, any urban lands redistributed in treaty are to be valued at current market prices. In densely populated regions such as Vancouver, where the price of property is extremely high, the addition of a small parcel of land to a treaty settlement package could then account for a significant proportion of the final agreement.⁹ Thus, urban First Nations often make strong demands in their negotiations that “compensation” for past infringements of Aboriginal title be paid to them to reflect the value of the land they lost.¹⁰ However, non-Aboriginal governments are reluctant to negotiate on the basis of compensation,¹¹ fearing that this term implies legal liability and that it could open the government to future legal challenges of the sort that certainty is intended to prevent. Therefore, in urban negotiations there is a clear conflict between the First Nations’ desire for symbolic acknowledgment of and monetary compensation for lands and resources lost, and the non-Aboriginal governments’ objective that treaties create certainty.

In contrast, First Nations engaged in treaty negotiations in rural settings often emphasize the issue of interim measures at their tables. Interim measures were to be reached early in the negotiation process to ensure that the land and resources that First Nations claim through the BC treaty process are not sold off or depleted prior to final agreement. The parties agreed at the beginning of the treaty process that interim measures would be put in place to demonstrate the commitment of the non-Aboriginal governments to establishing “just” and “fair” treaties (BCCTF 1991). In the first ten years of treaty making, however, interim measures of the sort First Nations desire – ones that protect traditional lands for future use – were few and far between; instead, First Nations were more often provided with interim measures and “treaty-related measures” (see Chapter 6) designed primarily to build their governance capacity.¹²

Although compensation is of distinct importance in the Lower Mainland, however, this region also represents a microcosm of treaty-making issues that are evident across the province. First Nations in this area vary greatly in terms of size, ranging from the Squamish Nation, which has a population of approximately 2,910 (1,941 of whom live on reserve), to the Tsleil-Waututh Nation, which has 335 members. First Nations in the Lower Mainland also differ in their approaches to treaty making and their visions of justice. While some First Nations, such as the Tsawwassen, might be described as taking a more pragmatic approach to treaty making (although this description is not intended to discount their commitment to justice), other First Nations in this region, such as the Musqueam, possess visions

of justice that have, to date, prevented them from moving beyond even the earliest stages of the treaty process as they wait for certain concessions to be made by the two non-Aboriginal governments. Furthermore, although these urban First Nations are situated very close to Vancouver, some of them are adjacent to large tracts of land that hold valuable resources. These urban First Nations therefore hold some interests that are similar to those held by rural First Nations in that they are embroiled in a struggle to reach “interim measures” agreements with the non-Aboriginal governments.

Nonetheless, to some extent, the degree of emphasis placed on either interim measures or compensation represents a rural/urban divide within treaty making. This divide, moreover, reflects the differential experiences of colonialism felt by First Nations across British Columbia. Indeed, given the diversity of First Nations cultures, their varying relations with their natural environments, and the multiple paths their interactions with European explorers, traders, politicians, and settlers have taken, it is difficult to make broad generalizations about the First Nations of British Columbia with regard to the visions of justice they bring to the treaty tables. Thus, it is important to bear in mind the sheer scope of treaty negotiations in British Columbia. At the time of writing, the BC treaty process was comprised of fifty-three First Nations negotiating at forty-two separate tables. While most of these tables share common issues and challenges, each also possesses its own particular qualities, including the specific visions of justice and certainty that motivate the actors engaged in negotiation. This said, the purpose of this analysis is not to catalogue all of the visions of justice forwarded by First Nations taking part in, or excluded from, the BC treaty process but, rather, to demonstrate how what will be described as “transformative” visions of justice (see Chapter 2) come into confrontation with non-Aboriginal government and business visions of certainty. Accordingly, the visions presented within these pages represent only a sample of the possible visions of justice and certainty that arise through treaty making in British Columbia.

Before carrying the analysis any further, it is necessary to first provide some basic definitions and descriptions of the terms that provide a framework for this study.

Aboriginal Rights and Title

The concept of Aboriginal rights is often viewed as a distinct principle of Canadian law reflected in the 1982 Constitution under Section 35. Through the enshrinement of these rights, which include the practices, customs, traditions, and communal organization of First Nations, the governmental objective is to ensure the survival of the basic elements of Aboriginal societies in a manner compatible with Crown sovereignty (Slade and Pearlman 1998). Aboriginal title, or land rights, is one element of these broader rights.

Initially, after contact, the Crown assumed that it held title to the land in Canada and that Aboriginal title was merely a burden on it (Stevenson 2000). The Judicial Committee of the Privy Council confirmed this view, describing Aboriginal title as a lesser interest, or as a “personal or usufructory right” (see, for example, *St. Catherine’s Milling and Lumber Co. v. The Queen*, 1888). Indeed, it was upon these principles that British Columbia was colonized and Aboriginal title was ignored and assumed extinguished. However, recent Supreme Court cases have, to some extent, challenged this colonial view, recognizing the existence of unextinguished, yet undefined, Aboriginal rights and title in British Columbia. For example, the *Delgamuukw* ruling (1997) affirms that Aboriginal title to the land does not exist on the basis of a declaration of the Crown but, rather, accrues to First Nations on the basis of their historic occupancy of this region (Slade and Pearlman 1998; Slattery 2000). Aboriginal title, according to *Delgamuukw*, is, therefore, an inalienable, communally held right to the land that arises from First Nations prior occupation of Canada (Slattery 2000). The *Delgamuukw* ruling empowers First Nations to enjoy exclusive use and occupation of the land in forms that go beyond traditional usage, but, at the same time, it places inherent limits on this usage, requiring that First Nations not use the land in a way that contradicts or makes meaningless the term “Aboriginal” title; that is, First Nations cannot use the land in a manner that would destroy the Aboriginal nature of this title (e.g., by selling it outright to a third party).¹³

There do exist, however, notions of Aboriginal rights that are not situated in the tradition of British common law. As Keith Thor Carlson (1997, 54) writes, “The *Stó:lō* have a very clear understanding of their Aboriginal title and rights. It is based upon countless generations of occupation, use and management of their territories’ resources, and self-government.” These rights, then, do not arise as the result of contact with non-Aboriginal peoples; that is, they are not remnants of traditional ways that are permitted to survive within a new legal order. Instead, they are the rights that have existed since time immemorial when the Creator first made First Nations stewards of the lands.

For now, it is important to note that Aboriginal rights and title remain largely undefined in British Columbia, and the primary means for defining them are either through legal decisions handed down by the courts or through treaty negotiations. Many First Nations in the province and the governments of BC and Canada have selected the latter path for settling the land question in British Columbia. Their stated reason for taking this path is a belief that fair negotiations are the best vehicle for achieving both “justice” and “certainty” within the province.

Justice

Justice can be defined as a solution to a problem that offers “a way out of a morass of conflicting claims” (Fisk 1993, 1). Typically, a problem that requires a “just” solution is referred to as an “injustice.” This raises a question: How does one know when an injustice has been committed? Thus, to claim that justice is required, it is first necessary to establish what injustice(s) occurred. This latter task can be achieved by appealing to one of two senses of normative correctness in order to frame the injustice.¹⁴ The first normative frame is based on the formal legal codes of a particular social grouping. Injustice, from this perspective, is behaviour that contravenes the prescriptions of an accepted legal code. The second sense of normative correctness appeals to a moral code that might be based upon philosophical reason, religious belief, or some other less tangible grounds. For those following this sense of justice, injustice is that which disrupts this higher order.

Justice claims made regarding the conflict over land claims in British Columbia have been based on both legal and moral understandings of justice. For example, the expropriation of First Nations lands in British Columbia has often been challenged on legal grounds. Justice claims of this sort typically refer back to the Royal Proclamation of 1763, in which the British government declared that First Nations lands were to remain reserved for their indigenous inhabitants, unless they were ceded to the Crown. The formal text of the document states that,

Whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds – We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments as described in their Commissions: as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them. (Royal Proclamation, 1763)

However, the applicability of this document to British Columbia has been contested. Soon after settlement on the West Coast took place, colonial government officials began to make the argument that the land was *terra nullius*¹⁵ prior to colonization (Culhane 1997; Slattery 1985). This argument took its most virulent form in the words of Premier Smithe, who suggested to a Nisga'a and Tsimshian delegation seeking extended territories: "When the whites first came among you, you were little better than the wild beasts of the field" (quoted in Raunet 1996, 156; and Tennant 1990, 58). According to this view, the Royal Proclamation did not apply to the lands that would become British Columbia since what was perceived to be a nomadic lifestyle (in Eurocentric eyes) did not constitute "possession." Of course, the assertion that the First Nations of the region were entirely nomadic and had no sense of property was patently false and ignored the well established societies that thrived here long before contact (Raunet 1996).

The argument against the applicability of the Royal Proclamation has in recent court cases (such as *Delgamuukw*) taken the form of denying that the drafters of the document intended it to apply to colonies beyond those existing at the time of its writing. Since British Columbia was not officially a colony at this time, this argument suggests that the proclamation does not apply to this geographic area.

Legal justice claims are also made based on more recent Canadian legal principles, such as the aforementioned Canadian Constitution of 1982. In the framing of the Constitution the architects enshrined the treaty and Aboriginal rights of First Nations in Section 35, an unparalleled move in the history of postcolonial nation-states. According to Boldt and Long (1985, 3), "The constitutional status of aboriginal peoples and the constitutional affirmation and recognition of aboriginal rights commit both present and future generations of Canadians to seek a resolution of the issue [of Aboriginal rights]." Aboriginal rights in British Columbia, however, remain largely undefined and can only be fleshed out through the courts or through negotiations. Many argue that, until this occurs, there will remain a question mark on Crown title and jurisdiction in British Columbia.

Not all appeals to legal justice claims, however, rely on interpretations of British or Canadian common law. Aboriginal arguments for legal justice are also made based on what is referred to as Aboriginal common law, or "natural law" (Ahenakew 1985, 24; Lyons 1985, 19). This form of legal argument, like non-Aboriginal legal arguments that are drawn from a Judeo-Christian tradition, cannot be easily separated from moral justice claims since it rests on the supposition that Aboriginal rights are granted by the Creator and therefore are not under the jurisdiction of worldly governments. In other words, a sacred covenant is in place between Aboriginal peoples and the Creator that has made the former stewards of the land.¹⁶ Based on

this central tenet, Aboriginal legal structures were developed to provide the rules to guide these societies.

This synthesis of moral and legal argumentation demonstrates that the two categories are not mutually exclusive. Indeed, in appeals made to legal justice the moral system underpinning these claims is often taken for granted or ignored. One of my goals is to critique facile separations such as these; however, I do not do this before tapping their analytical potential. As Latour (1993) has described in reference to artificial separations of culture and nature, it is our tendency to construct distinctions and then to act as though they really exist as a natural division. But before we dismiss the separation as a construction, it is first necessary to examine the impact this division has upon the way we view and experience the world.

Along these lines, those making moral claims for justice tend to base their arguments on precepts that intermingle with legal codes but which, in their minds, transcend these codes and speak to a higher order. Such claims are offered both in support of and in opposition to treaty making. In support, arguments are made concerning the dire conditions of many First Nations reserves, pointing out that the colonial past has contributed to, or caused, current First Nations hardships. Given that non-Aboriginal well-being is predicated on the resources and land taken from First Nations, this argument continues, it is only fair that redistribution and recognition be provided to right this historic wrong. Thus, from this perspective, it is determined that a clear-cut wrong has occurred (regardless of whether or not this wrong was codified legally) and reparation is in order. Furthermore, the long history of forced assimilation and the assault on Aboriginal cultures in British Columbia, in combination with the expropriation of lands, are viewed here as lending credence to the justice claim that changes need to be made. Poole (2001, 5) suggests that such a moral sense is inescapable: "I suspect that almost all the citizens of Canada ... even those who are most vehemently opposed to the claims of indigenous people – are uncomfortably aware of the immense injustice that lies at the core of their nation's history."

Poole's insight does appear to hold true for those who present justice claims against treaty making as these people rarely deny that great hardships have been placed on First Nations in British Columbia. However, instead of sympathizing with First Nations demands for reparation, these individuals lodge moral claims that emphasize the importance of cross-cultural "equality." From this perspective, present generations should not be held liable for crimes committed by earlier generations. What is most important is that the past be left behind so that a better future can be constructed based upon the equality and liberty of *all* citizens. For those persuaded by this viewpoint, treaties threaten to reinforce the distinctness and "special interests" of a particular ethnic group, which will lead to further

differentiation between people rather than fulfilling a liberal ideal of uniform citizen rights and responsibilities.

The discourse of justice operationalized within the BC treaty process often attempts to balance these two perspectives. However, while the authors of the report that is the foundation of the British Columbia treaty process – *The Report of the British Columbia Claims Task Force* (BCCTF 1991, 16) – agree that “the relationship between First Nations and the Crown has been a troubled one,” they do not go so far as to make a strong moral claim about the need for treaties; rather, the theme of the report, as well as much of the tripartite discussions about treaties (see, for example, BCTC 2000b; Federal Treaty Negotiation Office 1996), concerns the need to build better “future” relationships between Aboriginal and non-Aboriginal groups within the province, thereby minimizing the issue of justice (legal or moral) and focusing on the political need for treaty settlements.

Certainty

Certainty, like justice, is framed in differing, and sometimes contradictory, ways. Moreover, the manner in which certainty is framed can have a significant impact on the way in which justice is framed, the process of justice employed, and the end results of the justice process.

In contrast to the abstract quality of justice claims, appeals to certainty express a view of the “real” world, of “common sense,” of pragmatic actions that need to be taken in order to secure or enhance our situations under current global political-economic circumstances. In Weber’s terminology (1946 [c. 1922-3]: 220, 298-9), certainty can be considered the formal rationality that sits in contrast to substantive justice. Whereas the former is oriented towards norms rationally established in accordance with pre-defined ends, such as the maintenance of a particular political-economic system, the latter is “oriented toward some concrete instance or person.” In this sense, substantive justice addresses the specific needs called for by the injustice that has been experienced, while certainty asks that the present not be disrupted in repairing the past.

Technically, for non-Aboriginal governments at least, certainty refers to a “legal technique that is intended to define with a high degree of specificity all of the rights and obligations that flow from a treaty and ensure that there remain no undefined rights outside of a treaty” (Stevenson 2000, 114). This is not a new goal within the Canadian enterprise of treaty making. Traditionally, Canada required the “extinguishment” of Aboriginal rights in exchange for the rights defined in a treaty as a means to achieve a definitive form of certainty. This was accomplished by having the First Nations sign an agreement saying they would “cede, surrender, and release” all undefined Aboriginal rights and thereafter exercise only those rights delineated in the treaty.¹⁷

First Nations across the country find this phrasing offensive because it erases by act of government much that is essential to Aboriginal identity – their tie to the land and the rights bestowed on them by the Creator. There are also pragmatic reasons for First Nations to reject this wording. The absolute certainty sought through the language of extinguishment is not practical (BCCTF 1991). The world is far too unstable a place for a single document to remain relevant over all time; rather, the new concept of certainty aspired to through treaties produces a “reasonable certainty” that includes “predictable procedures for revision and amendment” (BCTC 2000b, 24).

However, the language that will be used to establish this new concept of certainty is still an issue of considerable debate. In the Nisga’a Final Agreement, a modern-day treaty settled in British Columbia outside of the BC treaty process, the text states that the Aboriginal rights of the Nisga’a will be “modified” and that the Nisga’a will “release” those rights not specified in the final agreement (Molloy 2000; Nisga’a Final Agreement 1998).¹⁸ However, this reformulation of certainty has not decided the matter, as many First Nations feel that “modifying” Aboriginal rights is little different from “extinguishing” Aboriginal rights (see UBCIC 1999). In general, there are a range of perspectives on certainty that differ according to the emphasis they place on “finality” and the extent to which they recognize Aboriginal rights.

For those who stress the need for finality, their interests usually lie in establishing a particular form of certainty – economic certainty. The undefined nature of Aboriginal rights in British Columbia has produced a situation of “uncertainty” in which investors and developers are unsure of the security of projects taking place on Crown land. A survey of representatives from British Columbia’s forest products, oil and gas, and mining industries conducted by Price Waterhouse (1990) suggests that the following factors continue to create uncertainty for their operations: the unsettled nature of who has rights and access to land and resources; the risk that production or shipment could be disrupted by court injunctions or blockades that will affect the company’s reliability as a supplier; and the possibility that treaty settlements may redistribute land without providing satisfactory financial compensation to affected companies (Mitchell-Banks 1998).

These factors have led some in the business community to support a model of certainty that emphasizes “finality” with respect to the nature and scope of Aboriginal rights and jurisdictional authority. The Business Council of British Columbia (1997), for example, recommends that the government employ the same language of certainty in all treaties signed through the BC treaty process and suggests that the language of extinguishment is the most effective means for achieving the goal of finality. Both the provincial and federal governments also see the need for finality

as this will, in their eyes, prevent future conflicts over Aboriginal rights and title and build a more stable environment for investment.

In contrast, some Aboriginal and justice-based perspectives on certainty claim that “finality” means greater uncertainty for First Nations. In effect, First Nations are asked to gamble the rights of future generations on treaty rights that are untested (Stevenson 2000). In the words of Bill Wilson (1985, 62): “no generation or special group has the right to sign away the rights of any future generation. Even if land claims are resolved today, the future descendents of the original occupiers of the land will be entitled to negotiate their own bargain in regard to aboriginal title and rights.” Here, the tension between justice and certainty becomes apparent. Wilson presents a view of certainty based upon principles of justice, arguing that it would be an injustice to the future generations to saddle them with a deal from which they cannot extricate themselves. From this perspective, there is no absolute truth to which the negotiators of treaties can attach themselves, and, therefore, there is no possibility of fixing relationships for all time; instead, treaties must reflect the contingency of life rather than impose an absolute and final relationship (Macdonald 2000).

Balancing Justice and Certainty

The project of treaty making involves finding a balance between justice and certainty; it is a matter of contending with the past so as to guarantee a better future. However, this project is confronted by many hazards. Parties to the treaty-making process each have different emphases, leading them to prioritize either justice or certainty, either dealing with the past or securing the future. This is not an uncommon phenomenon in conflict resolution, and it has been described by authors elsewhere as being a tension between “too much memory” and “too much forgetting” (e.g., in South Africa [Minow 1998]) or between “justice” as an ideal and “peace” as an immediate pragmatic requirement (e.g., in the former Yugoslavia [Doubt 2000]). The challenge is to overcome the tendency to fall into an either/or bind and to recognize that certainty and justice need not be mutually exclusive.

However, it is also important to recognize the social context of British Columbia’s treaty negotiations and how this context can play a role in privileging discourses of certainty over discourses of justice. In the present neoliberal political climate, economic discourses hold currency and are seen as the prevailing “common sense.” The ascendancy of this economic pragmatism does not bode well for the goal of justice since justice is difficult to ascertain and to agree upon. Under these conditions it is possible that we may find ourselves in the ironic situation of trying to deal with the past without actually discussing it because justice seems too lofty a goal in the face of concrete market imperatives. The chapters that follow make a case for the need for justice in British Columbia’s treaty-making process and

demonstrate the risks of concentrating too heavily on achieving certainty as well as on the repercussions this may have for long-sought reconciliation.

Part of the tension between justice and certainty results from a lack of discussion surrounding the primary goals of treaty making. While various actors within the BC treaty process have made statements about the importance of justice or certainty, little preliminary work was done to establish clear substantive guideposts for the treaty process; instead, it was assumed that the sophistication of the treaty process design would allow the negotiating parties to surmount this substantive opacity. Chapter 2 examines the question of procedural justice, arguing that procedural safeguards are insufficient for guaranteeing a just resolution to a long-standing conflict. It will be suggested that consideration of the substance of justice, of the reparative ends the parties hope to achieve and the needs of the wronged party, must be acknowledged prior to negotiations and should be the basis for the justice procedure that is developed. Nancy Fraser's (1997) model of the "dilemmas of justice" is recommended as a starting point. This model could serve as a heuristic tool for understanding both the symbolic and material justice demands of British Columbia's First Nations. It also allows for the examination of the potential consequences of pursuing reparative strategies that either affirm or transform the social context in which the injustices initially occurred. This evaluative aspect of Fraser's theory is utilized to develop the concept of "affirmative reparations," a term I use to describe the strategic ends pursued by the non-Aboriginal governments through the BC treaty process.

Chapter 3 presents a historical account of the relationship between justice and certainty in British Columbia. Prior to the second half of the twentieth century the certainty of colonial land acquisition for settlement and economic development was achieved and maintained through the imposition of colonial justice on the First Nations peoples of British Columbia. First Nations demands for recognition of their Aboriginal title to the lands were both ignored and prohibited during this early period, and the non-Aboriginal governments installed mechanisms to forcibly assimilate First Nations persons in order to put an end to these justice demands. However, changes in the rationality of governance after the Second World War contributed to a move away from control-based strategies for achieving certainty towards attempts to seek First Nations consent for non-Aboriginal visions of justice and certainty.

This change in the non-Aboriginal governments' political strategy with regard to the land question in British Columbia was in part motivated by the social movement and legal activity engaged in by First Nations at both the provincial and national levels. These attempts by First Nations to challenge and "reframe" white visions of justice and certainty are described in Chapter 4. Indeed, First Nations in BC succeeded in creating a significant

degree of *uncertainty* for non-Aboriginal governments and businesses through their legal victories and protest actions. The end result of their efforts was the establishment of the BC treaty process. No longer would justice simply be imposed on First Nations in British Columbia; instead, they were to have a role in designing a process through which they would negotiate a resolution to the land question with the governments of Canada and British Columbia.

Chapter 5 details the procedural components of the BC treaty process. The emphasis is on the limitations of this process; in particular, on the power imbalances that exist between First Nation and non-Aboriginal government actors engaged in the process and the consequences these power imbalances have for the fair resolution of treaties. One important consequence that will be discussed is how the material and symbolic advantages possessed by the non-Aboriginal governments provide them with the opportunity to define the nature of the negotiations in a manner that privileges visions of certainty that affirm the socioeconomic and legal status quo over visions of justice that demand a serious moral reckoning with the continuing harms of colonialism.

Chapter 6 outlines how the affirmative thrust of treaty negotiations is manifested in the discourses employed by actors engaged in the BC treaty process. In this chapter, I demonstrate how certain visions of justice are made inadmissible to the treaty process. Indeed, only those visions of justice compatible with a particular vision of certainty – one that reaffirms and solidifies the political, economic, and legal interests of the non-Aboriginal governments and industry – are perceived as being “sensible” or “realistic.” Thus, the BC treaty negotiations are characterized as being directed by the “symbolic violence” (Bourdieu 1991) of non-Aboriginal government visions of justice and certainty.

But what does certainty really mean in the context of the BC treaty process? Chapter 7 seeks to address this question by exploring the divide between Aboriginal and non-Aboriginal visions of certainty that are presented at the treaty negotiation tables. Here, I characterize the specific forms of political, economic, and legal certainty sought by the non-Aboriginal governments as responses to broader social processes of globalization and neoliberalism. It is within this context, I argue, that visions of justice are limited to those congruent with visions of certainty that affirm rather than transform existing social and economic relationships within British Columbia.

Chapter 8 applies the arguments developed in the preceding chapters to the question of what a renewed process of treaty making might look like. I argue that such a process would involve an opening of the negotiations to visions of justice and certainty that extend beyond the non-Aboriginal government mandates. Moreover, I identify a transformative, ongoing, and relational notion of “reconciliation” as a potential middle ground between justice and certainty.