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Prelude to the Treaty-Making Process

To understand the process of treaty-making in British Columbia, and to gain a sense of how non-Aboriginal peoples have arrived at this point in our relationship with the original inhabitants of the province, it is necessary to know something about the Aboriginal peoples of British Columbia, some events of history, and a number of key concepts. Not everyone has to be familiar with all facets of the treaty aspect of the province's Indian land question. However, because the substance of both the negotiations and the final treaty settlements will affect all British Columbians to a greater or lesser extent, it will serve non-Natives well to become knowledgeable about the treaty-making process, particularly if we are to bring an informed approach to this monumental act of reconciliation.

British Columbia's Aboriginal Peoples

In no other part of North America has the Aboriginal population ever been more densely concentrated and culturally diverse than along the coastal areas of present-day British Columbia. While significant populations of Native peoples have resided in other parts of the province – from its northern reaches to its eastern boundary marked by the Rocky Mountains – in sheer numbers and societal differences, they could not match the peoples living along the shores of the Pacific Ocean. To a large extent the uniqueness of the coastal peoples was the result of geography. With the natural barriers of the Pacific Ocean and the forests and mountains of the Coast Range, those along the coast, while maintaining some contact with their neighbours to the north, remained, for the most part, isolated, functioning as universes unto themselves. Many groups had their own language and culture, a means of self-identification, and a territory of which they made use. Indeed, similar to indigenous peoples elsewhere in North America, those living along the coast of British Columbia were more culturally diverse than Europeans.[1]

For some time the demographic facts about Aboriginal peoples in general were uncertain. To a large extent they were also deliberately underestimated in order to justify certain myths about Native peoples or to debase their claims to land.[2] A widely accepted estimate of the pre-contact Aboriginal population in North America is just over one million. Subsequent studies revised this figure upward, with estimates often reaching ten million or more. More recently, these figures have ranged between two and five million.[3] In British Columbia during the 1920s, there were less than 30,000 "status" Indians. However, by 1970 and into the 1980s, the Aboriginal population increased steadily. By the mid-1990s approximately 95,000 Aboriginal people lived in British Columbia, 45 percent of whom lived on reserves.[4]

Unlike most "tribal" societies, the Aboriginal communities of the coastal areas of the province had formal institutional structures in which secular authority over civil affairs was vested.[5] They were highly stratified societies, based on rank, status, and hierarchy, and they had clearly defined and permanent positions of political leadership. The "house" or household was the basic social unit: lineages were divided by each house, based on common ancestry. The concept of private property was vital and just as sophisticated as that of European nations at the time. Each household possessed land for village sites and for hunting and food gathering. Specific items and rights were held in common by the members of each household, including canoes, totem poles, ceremonial objects, and privileges to hunt and fish in specific waters and harvest particular food species.[6]

The coastal peoples built large houses for holding feasts and performances. Such activities were part of the famous potlatches, which performed two main functions. First, they served to legitimize political rank and authority by validating the exercise of chiefly power and influence. Heirs to chieftainship were presented at potlatches, and existing chiefs held potlatches to reaffirm their authority. Food, tools, and clothing were given away as a sign of rank and wealth. Potlatches were vital to maintaining authority. Without them no chief could have assumed his position or maintained it over time. Nor could any individual have been assured of his or her place within a particular house, extended family, or clan without the practice of the potlatch ceremony. Second, the potlatch ensured the circulation of wealth – and a sort of early-day welfare state – as chiefs maintained their rank and attendant prestige by giving away possessions rather than by retaining them as their own.

While lineage and rank were the organizing principles of coastal peoples, individual equality was the central basis on which the Aboriginal peoples of the interior of British Columbia were organized. Relative to their coastal counterparts, interior communities were small and arranged according to kinsfolk. The absence of major water routes and the need to travel widely

made this type of organization almost inevitable. In the northern interior of the province, in the territory of the Sekani and the Tahltan tribal groups, small groups of basically nomadic people were the primary social units. In the southern interior of the province, in the lands of the Kootenay, Okanagan, and Shuswap tribal groups, sedentary winter villages were most common, although, occasionally, large settlements prevailed, especially in the semi-desert areas surrounding much of the Fraser and Thompson Rivers, where fish and some game were abundant.

Since the Aboriginal peoples of the interior lived in relatively small groups, there was less need for the kind of complex organization that was common along the coast. Yet in some villages with larger populations, permanent chieftainship did exist. For example, among the Okanagan people, chiefly rank could be inherited, and one chief could even be considered the leader of an entire tribal group. But in most cases politics as a specialized activity was not common to the Native peoples of the interior.

The form of politics at the tribal level varied considerably along the Pacific coast and across the interior. Tribal groups consisting of many communities over many territories would have had neither the means nor the incentive for much overall coordination of activities. Those with fewer villages and smaller territories would have been able to communicate more readily, and in cases where adjacent tribal groups were similarly cohesive, there would have been a particular interest in each group maintaining boundaries and acting collectively to protect its interests. However, along the coast, neighbouring Aboriginal groups were often invited to potlatches to ensure their awareness of the borders of the various tribes.

Key Concepts Related to Treaties

Aboriginal Rights

Aboriginal rights are based upon the initial occupation of the land by self-governing groups of Aboriginal peoples prior to the arrival of Europeans.[7] As such, Aboriginal rights comprise everything necessary to ensure the survival of Aboriginal peoples as Aboriginal peoples, including the right to use and occupy the land and its natural resources, to preserve and foster Aboriginal languages and economic and cultural practices, and to practise forms of law and government.

Aboriginal peoples maintain that these rights continued after European contact in the sixteenth century and the assertion of British sovereignty in 1849. This view is consistent with the common law doctrine of Aboriginal rights.[8] The doctrine holds that the Crown's acquisition of land in North America was governed by the principle of continuity. This means that property rights, customary laws, and the various institutions of governance of the Aboriginal peoples were presumed to survive and to be protected by

British law. Aboriginal peoples were able to retain their laws, notwithstanding the presence of English law. Under the principle of continuity, different laws could coexist. English law was not to be applied retroactively or arbitrarily to the Aboriginal peoples.[9]

The reasoning behind the doctrine of Aboriginal rights from the perspective of the colonizing nation is fourfold. First, some recognition of the preexisting rights of the colonized nation was seen as acceptable and proper, assuming there was no intention to completely annihilate the colonized people. Second, a recognition of preexisting rights was often necessary in order to exercise effective military control over a particular territory. As will be seen later in this chapter, this reasoning was employed in some of the early treaties concluded between the British Crown and the Aboriginal peoples in the Atlantic region of Canada. These were peace treaties, intended to end warfare. Third, the recognition of preexisting rights was often necessary to accommodate the overtaking of a previously established and functioning legal system in the territory where it might have been too time-consuming and too expensive to remove that system. Fourth, the recognition of preexisting rights was also a response to various concepts of pluralism by the acquiring state or by international law.[10]

Much of the spirit of the doctrine of Aboriginal rights was embodied in the Royal Proclamation of 1763. Issued by King George III of England, and seen by many Aboriginal peoples as their Magna Carta, the proclamation was primarily a response to the prospect of war with North American Indians. Consequently, the proclamation set down certain guidelines by which Britain could establish peaceful relations with the Aboriginal peoples. The continuity of land title was explicitly acknowledged in the proclamation's directive to set aside land in North America for Aboriginal peoples and to reserve it for them as their hunting grounds. The continuity of self-government was implicitly authorized, as well. Indeed, in the treaties concluded between the Aboriginal peoples and the British Crown in other parts of Canada, the continuity of additional Aboriginal rights, such as hunting, fishing, and food gathering, was also assured.

Extinguishing Aboriginal Rights

Since the proclamation of the Constitution Act of 1982, section 35(1) of the act has recognized and affirmed "existing" Aboriginal rights. If Aboriginal rights include those items that are required by Aboriginal peoples to ensure their survival as Aboriginal peoples, how do we determine whether an Aboriginal right exists within a particular Native community? And under what conditions can such an Aboriginal right be extinguished?

To most legal scholars, in order for an Aboriginal right to be seen as "existing," there must be some evidence that the Aboriginal peoples concerned possessed and exercised the right at some point in their collective

history and that the right was not extinguished by the Crown prior to 1982. In the 1991 Supreme Court of Canada ruling in *Bear Island,* the Court discussed the criteria that must be satisfied for an Aboriginal right to be presumed as "existing":

- the Aboriginal peoples claiming the right, and their ancestors who purportedly exercised the right, existed as an "organized society"
- this "organized society" must have occupied a specific territory over which they assert title
- the occupation of the territory was exclusive of any other Aboriginal community, and
- the occupation of the territory was an "established fact at the time British sovereignty was asserted over the land."[11]

However, assuming that an Aboriginal right existed at the time British sovereignty was asserted over the land, there are two ways to determine whether an Aboriginal right was extinguished prior to 1982. First, an Aboriginal right can be extinguished through a treaty with the Crown. Treaties are therefore very important, as many Aboriginal peoples argue that their rights can be affected only through this mechanism. Consequently, if a treaty does not explicitly refer to certain rights being extinguished, then it should be assumed that the rights continue to exist. This line of reasoning is consistent with the "reserved rights doctrine" developed by the courts in the United States, which states that an Aboriginal right cannot be relinquished unless there is an express intention to do so in the treaty.

Second, the Canadian courts have held that Aboriginal rights can be extinguished outside the confines of treaties through legislation enacted prior to 1982. The intention of the legislation to extinguish a right must be "clear and plain," either expressly or by "unavoidable implication,"[12] although the courts have yet to develop a coherent test to determine the clear and plain intention of government.[13] And if the intention of a law is to extinguish an Aboriginal right by implication, such an act is sufficient only if the interpretation of the law permits no other result. Moreover, legislation that is inconsistent with the exercise of an Aboriginal right is not sufficient cause for the right to be extinguished. The "clear and plain" test is based on the assumption of the Crown's role as the "historic protector of Aboriginal lands."[14]

Aboriginal Treaties

A treaty is a solemn agreement between a recognized group or nation of Aboriginal people and a representative of the Crown. Treaties are intended to create obligations for both parties. In most cases Aboriginal peoples

agree to forego hostilities or claims relating to land in return for Crown guarantees of protection, game rights, reserve lands, or other benefits. Because a treaty is the result of negotiations between a particular Aboriginal group and the government, it is different from an Aboriginal right. As noted earlier, Aboriginal rights are derived from Aboriginal peoples' use and occupation of the land prior to European contact. They are not created by grants from the government or as a result of governmental negotiations.

Although treaties with First Nations have similarities to both international treaties and contracts, they constitute a separate legal category of a special, or *sui generis,* nature. While they are similar to international treaties in terminology, they do not follow the general rules of international law. Instead, Aboriginal treaties are considered by government as agreements between the Crown and subjects of the Crown. And unlike international treaties, they can create legal rights even before they are implemented by specific legislation. Similar to contracts, Aboriginal treaties are binding legal agreements, and they may be subject to the same kind of protections that the law applies to contracts. Yet Aboriginal treaties involve groups as opposed to individuals, and they can prevail over some federal and provincial laws.[15]

The treaties concluded between Aboriginal peoples and the European powers throughout Canada's history come in a variety of forms and reflect the political and economic interests of the parties at the time. Some of the early treaties between the French and Aboriginal peoples took into account French ambitions to colonize New France in order to secure trade and to obtain proof of territorial possession against rival European powers. Aboriginal peoples entered into these treaties to preserve their territories and their governmental autonomy.[16] Most of these treaties were peace treaties, and they were based on mutual respect, with no subjugation of the Aboriginal peoples or cession of their territory.[17]

Other types of treaties did, however, involve land cession in exchange for cash grants, annuities, and other benefits for Aboriginal peoples. A requirement of land cession characterized British treaty policy during the post-War of 1812 period and was seen as a way of securing lands for settlement without engaging in open warfare. The best examples of treaties concluded under these circumstances are the "numbered treaties," the majority of which were arranged between 1871 and 1921 and covered the Prairie provinces and a section of northeastern British Columbia. Other examples of treaties that involved land cessions were the Robinson treaties in Upper Canada (now Ontario) and the Douglas purchase treaties on Vancouver Island, which were concluded in the 1850s.

The last type of treaty is exemplified by the modern land claim agreements in the northern regions of Canada. These treaties involve very large

land masses as well as complex governmental, social, and economic institutions and guarantees. They also confer on the Aboriginal peoples modern-day equivalents of the benefits contained in the numbered treaties.[18]

The problems associated with the older types of treaties are numerous. In addition to the remarkable inequity in the bargaining position of the Aboriginal treaty-makers vis-à-vis the representatives of the Crown, the treaties were also marred by a series of unfulfilled promises, miserly benefits conferred on Aboriginal peoples, a lack of clarity as to the Aboriginal groups subject to the treaty, and, often, a measure of inappropriateness in many of the treaty guarantees. Moreover, these legal problems were made worse by the unique nature of the treaties. As written agreements, the treaties were foreign to Aboriginal oral traditions and, as noted earlier, they occupied a "middle ground," somewhere between an international agreement and a domestic contract.

Aboriginal Title

Aboriginal title is a difficult concept to define because it has no counterpart in English property law; it is of a special nature. Nevertheless, Aboriginal title can be seen in general as a right of Aboriginal peoples to occupy, use, and enjoy their land and all of its natural resources. Aboriginal title originates in the fact that Aboriginal peoples were in possession of what is now Canada prior to European contact,[19] and it finds support in Canadian law in a variety of legal documents and constitutional structures.[20] Prior to 1982, Canadian law provided that Aboriginal title could be regulated and, in some cases, extinguished by legislation.[21] However, since 1982, Aboriginal title, like other Aboriginal rights, has enjoyed constitutional recognition and protection under section 35(1) of the Constitution Act. Consequently, any federal, provincial, or territorial law that interferes with the exercise of an Aboriginal right must undergo constitutional scrutiny. Furthermore, Aboriginal title can be surrendered only to the federal Crown and only with the consent of the relevant Aboriginal community. Once Aboriginal title has been extinguished, the federal government may be required to pay compensation to the Aboriginal peoples concerned.[22]

In order to clearly identify Aboriginal title, the courts have defined it in various legal proceedings. In keeping with the definition noted above, early court rulings described Aboriginal title as protecting Native peoples in the "absolute use and enjoyment of their lands, while at the same time [precluding] them from making any valid alienation [of their lands to anyone other] than the Crown itself, in whom the ultimate title was ... vested."[23] American courts considered Aboriginal title to be a set of principles that should be considered just as sacred to Aboriginal peoples as the concept of fee simple title is to non-Aboriginal peoples.[24] And more

recently, the Supreme Court of Canada defined it as a concept that demonstrated "the Indian nations were regarded in their relations with the European nations ... as independent nations"[25] that possess a kind of legal title to their lands.

It must be made absolutely clear that in British Columbia, as in other parts of Canada, the Crown has both underlying and ultimate title to Native peoples' land. However, because Aboriginal title carries with it rights of use and possession, it constitutes a legal burden on the title of the Crown and on its land-related management activities. The Crown's ownership of all the land in British Columbia has never been questioned by the courts or by government. Indeed, Aboriginal rights (including Aboriginal title) do not supersede Crown title nor do they call it into question. But the rights of Aboriginal peoples, based on Aboriginal title, are such that the underlying title of the Crown is of limited value as long as the burden of Aboriginal title remains, as it does in British Columbia, unextinguished. And there is little practical use to which the Crown may put the land as long as Aboriginal peoples retain this interest in it. As will be seen later in this chapter, these views, which uphold Aboriginal peoples' claim to their land, were articulated by the courts in British Columbia when they issued injunctions halting commercial development in various places in the province. And they are views that the provincial government eventually came to accept when it decided to lay the foundation for a process by which unextinguished Aboriginal title could be dealt with through treaties.

Aboriginal Self-Determination and Self-Government

Aboriginal peoples assert a right to self-determination on the ground that their survival as distinct collectivities is dependent upon their ability to control the social, cultural, political, and economic issues that affect them. Accordingly, self-determination is considered essential in order for Native peoples to move away from the colonial mentality of the Indian Act and to break the cycle of dependency of their peoples on Canadian governments.[26]

Primary to the goal of self-determination is the notion that Aboriginal peoples are unique social entities that have been entrusted with the duty of protecting the land and their culture for present and future generations. It has been argued that this traditional duty cannot be adequately discharged in liberal democracies such as Canada because, historically, such political systems have neglected Aboriginal aspirations and because government policies are often based on the primacy of individual rights and not on collective rights. Neither liberal democracies nor government policies have offered much protection against the assimilation of Aboriginal peoples into the mainstream of Canadian society. Only through self-governing

structures can Aboriginal peoples hope to achieve a measure of autonomy and self-sufficiency.[27]

Almost all discussions of Aboriginal self-determination are rooted in the idea that self-government is considered to be an inherent right accorded to Aboriginal peoples by virtue of their status as the original occupants of the land, whose right to political sovereignty and land entitlement has never been extinguished by treaty or by conquest. Prior to European contact, Aboriginal peoples were organized into politically autonomous structures with sovereign control over their territories. They were never conquered by the French or the English and were generally treated by European nations as independent nations. The recognition and affirmation of Aboriginal and treaty rights in section 35(1) of the Constitution Act of 1982 provides a solid legal foundation upon which Aboriginal self-government can become a reality. Yet it remains to be clarified what types of powers self-governing arrangements will afford Aboriginal communities and how these powers will work in tandem with the legislative powers of the federal and provincial governments.

Observers have offered some general comments on the potential function, structure, and jurisdiction of self-governing arrangements. The overall function of Aboriginal self-government would be to promote greater self-determination and social justice and to eradicate poverty within Aboriginal communities through both economic development and the distribution of wealth. Self-government would also serve to protect Aboriginal languages, cultures, and identities and to provide the means to address policy issues such as housing and health. The structure of Aboriginal government is seen as one that would be distinct and unique from federal and provincial forms of government and one that would be responsible for matters of particular relevance to Aboriginal communities. The jurisdiction of self-governing arrangements is expected to vary according to the needs and requests of particular First Nations, but it may include control over the delivery of social services such as education, as well as control over lands and natural resources necessary for economic regeneration. Jurisdiction could also include control over Aboriginal membership in a particular First Nations group and control over the allocation of federal money so that it remains consistent with Aboriginal priorities.[28]

The Historical Setting

Early Indian Policy in British Columbia: James Douglas and the Treaty-Making Process

From the initial point of European contact by Spanish explorers in the sixteenth century, to the time Vancouver Island was declared a colony of Britain in 1849, very little happened to affect the land rights of Aboriginal

peoples. There was some commercial and trading activity between the British and the Native peoples, but for the most part, Aboriginal peoples were left undisturbed by the Europeans. Village sites were retained, and traditional hunting and fishing grounds went "unmolested."[29]

However, in 1846 British authorities signed the Treaty of Oregon with the United States, thereby establishing an international border, and in 1849 Vancouver Island was declared a British colony. In keeping with the policy of advancing their interests through non-governmental agents, Britain gave the Hudson's Bay Company a grant over the land and its settlement. European settlement in the colony increased. Subsequently, in 1858 Britain proclaimed the Mainland of British Columbia a colony and, during the 1860s, demarcated its eastern and northern borders. Following the unification of the two colonies in 1866, British Columbia joined the Canadian federation as a province in 1871.[30]

From the years 1850 to 1864, James Douglas was the governor of the colony of Vancouver Island. During his tenure, he arranged fourteen purchase treaties with the Aboriginal peoples. These treaties were consistent with British policy and with international law at the time. Indeed, one of the first instructions received by Douglas from the Hudson's Bay Company was to negotiate with the chiefs of the colony's tribes in order to purchase their lands prior to white settlement. Specifically, Douglas was to approach the chiefs on the assumption that they were "the rightful possessors of such lands only as they are occupied by cultivation, or had some houses built on them, at the time when the Island came under the undivided sovereignty of Great Britain in 1849."[31] The company directed Douglas to consider all other land uncultivated or uninhabited and therefore available for settlement purposes. It was made clear to Douglas that the Aboriginal peoples in the vicinity would continue to enjoy hunting and fishing rights.

Following his correspondence with the Hudson's Bay Company, Douglas summoned to a conference the chiefs and other representatives of the Songhee, Klallam, and Sooke tribes residing near present-day Victoria. After some discussion, an arrangement was made whereby the tribes would sell lands to the company, except village sites and enclosed fields. After signing an agreement, the tribes would surrender these lands in exchange for some material possessions, the confirmation of their reserves, the right to hunt over unoccupied lands, and the right to carry on fishing activities. As was the preference of the chiefs involved in these initial negotiations, payment for their lands was made in one instalment.[32]

The arrangement made by Douglas stands in contradiction to the instructions given to him by the Hudson's Bay Company: the company directed Douglas to recognize the Aboriginal peoples as possessing only those lands on which their houses stood or around which they had erected fences. The remaining land was considered to be waste and was to be used for the

purposes of white settlement and for the continued hunting and fishing practices of the Aboriginal peoples.[33] Tennant has attempted to reconcile this contradiction by arguing that the perception of it relies too heavily on the precise wording of the company's instructions rather than on the wording of the treaties themselves. Tennant notes:

> The treaties plainly indicate that Douglas did not regard any land as unowned. The text recognizes each Indian community as initially owning "whole of the lands" it traditionally occupied. A map of the treaty areas around Fort Victoria shows no gaps between the areas sold by the communities owning them. The starting point for each treaty was that local communities of Indians were recognized as owning every square inch of their traditional lands. It was "their lands," excepting their "Villages Sites and Enclosed Fields," as Douglas wrote to Barclay and as the treaties stated, that were being sold to the Company.[34]

Tennant's reading of the Douglas treaties is correct, but it is also peripheral. Regardless of the content of the treaties he arranged, Douglas still went beyond the scope of the directions of the Hudson's Bay Company. Nevertheless, the treaties arranged by Douglas provide some support for the recognition by imperial and colonial authorities of the preexisting land rights of Native peoples.

The Douglas purchase treaties were comparable to other treaties in Canada and mirrored, to a large extent, those agreements concluded in other parts of the British Empire. The Robinson treaties of Upper Canada included provisions for annuities, reserves, and the freedom of Native peoples to hunt and fish over unoccupied Crown lands. Except for the provisions involving annuities and the granting of larger reserve lands, the purchase treaties arranged by Douglas contained similar stipulations. Both the Robinson treaties and the Douglas treaties purported to extinguish Aboriginal title to large territories, reserving Native ownership to small tracts. Also, the text of the Douglas treaties was identical to that used by the New Zealand Company when they purchased land from the Maori – only the names, dates, and the amounts to be paid to the various Maori tribes were different.[35]

Between 1850 and 1854 Douglas arranged fourteen purchase treaties on Vancouver Island. Eleven of the treaties covered the areas of Victoria, Sooke, and Saanich. One was concluded at Nanaimo, and two more at Fort Rupert. These last three treaties were intended primarily to acquire coal deposits – the first non-agricultural economic activity undertaken by non-Aboriginal peoples in British Columbia. Collectively, the purchase treaties covered approximately 358 square miles (576 square kilometres), or about 3 percent of the total land mass of Vancouver Island.

It should be pointed out that both British policy and international law of the time set down three methods by which a sovereign nation could acquire additional land and thus assert its sovereignty. First, land could be acquired through settlement, as long as the land was unoccupied or vacant. This form of territorial acquisition was based on the doctrine of terra nullius. Over time the doctrine was gradually extended to justify the acquisition of inhabited land by occupation, provided the land was not cultivated nor were its indigenous inhabitants uncivilized or unorganized into societies permanently united for political action.[36] Second, the land could be acquired through the conquest of the indigenous peoples, in which case the laws and customs of these peoples would remain in force until altered by the conquering state. Third, the land could be acquired through cession. This method was used in cases where there was a pre-existing society of indigenous people holding specific territories subject to cultivation. Acquisition would require the consent of the indigenous people to transfer their sovereignty and portions or all of their land to the acquiring state. This new relationship would then be set out in a formal treaty. Those acquiring the sovereignty and the territory were required to pay compensation to those who had ceded it.[37]

In the case of the colony of Vancouver Island, it is clear that the land was occupied by indigenous peoples prior to European contact and that trading relations between the Aboriginal peoples and the British had carried on for some time. There was no full-scale armed conflict between the British and the various Aboriginal nations. These facts appear to have left Britain with only the option of acquiring land and asserting British sovereignty through cession – the approach advocated by the Hudson's Bay Company and followed by Douglas. Indeed, this approach to settlement was acknowledged and endorsed by British authorities. In a letter from Lord Carnarvon to Douglas in 1858, the former wrote:

> In the case of the Indians of Vancouver Island and British Columbia, Her Majesty's Government earnestly wish that when the advancing requirements of colonization press upon lands occupied by members of that race, measures of liberality and justice may be adopted for compensating them for the surrender of their territory which they have been taught to regard as their own.[38]

The late Wilson Duff, a well-known anthropologist who undertook studies of the Aboriginal peoples of the Pacific Northwest, noted that the eleven Songhee, Sooke, and Klallam purchase treaties of 1850 contained some irregularities. Douglas arranged the treaties on the assumption that individual families or tribes owned single tracts of land. He failed to account for shared land. For example, the Cheonein (Songhee) were designated as

the owners of the land around Cadboro Bay (directly east of Victoria and north of McNeil Bay, on the eastern side of the island), and therefore the Chicowitch (Songhee), who used the land for similar purposes as the Cheonein, were not considered owners at all. Moreover, Duff found that in establishing the boundaries of the treaties, Douglas was content to accept the territorial situation of the land as it existed in the 1850s, rather than attempt to reconstruct it to resemble the way it was originally.[39] As will be seen in Chapter 3, these irregularities have resurfaced and are now part of the treaty negotiations involving those First Nations and tribal groups that signed the Douglas treaties.

As Douglas opened up new areas of the colony for settlement, the legislative assembly in Victoria proceeded as if additional treaties were necessary. However, by the late 1850s the practice of treaty-making began to deteriorate. The imperial government revoked the Hudson's Bay Company's grant of Vancouver Island. And although the legislative assembly acknowledged the necessity of treaties with Aboriginal peoples, the costs of such purchases were felt to be the responsibility of the imperial government. In a letter to the secretary of state for the colonies, Douglas outlined his practice of making treaties with Aboriginal peoples and asked for the necessary funds to continue to do so:

> As the native Indian population of Vancouver Island have distinct ideas of property in land, and mutually recognize their several exclusive possessory rights in certain districts, they would not fail to regard the occupation of such portions of the Colony by white settlers, unless with the full consent of the proprietary tribes, as national wrongs. Knowing their feelings on that subject, I made it a practice up to the year 1859, to purchase the native rights in the land, in every case, prior to the settlement of any district; but since that time in consequence of the termination of the Hudson's Bay Company Charter, and of the want of funds, it has not been in my power to continue it. Your Grace must, indeed, be well aware that I have, since then, had the utmost difficulty in raising money enough to defray the most indispensable wants of Government.[40]

Despite Douglas's efforts, the British government would not assume any financial obligation for additional treaties. To be sure, the British did not deny the existence of Aboriginal title. Nor did they believe that Aboriginal land should not be purchased prior to settlement. Rather, the authorities in London simply believed that they should not have to bear the costs. This was the responsibility of the colonial government in Victoria.

Notwithstanding the stalemate between colonial and imperial authorities, the colonial government in Victoria attempted to purchase Aboriginal land. Even Douglas's successor was authorized to spend funds from general

revenues for such purposes. However, despite some rather strident public protests and newspaper editorial opinions, the latter of which referred to unextinguished Aboriginal title as a serious impediment to settlement, no treaties were concluded after 1854.[41] Indeed, it was not until 1899 that another treaty affecting Aboriginal land in British Columbia would be signed. All three layers of governmental authority over the colony – from Britain's Colonial Office, to the governor, to the legislative assembly in Victoria – acknowledged the preexisting land rights of Aboriginal peoples. All three placed the onus on the others to resolve the problem. Their efforts were in vain. Nothing was accomplished.

The treaty-making process that was begun by Douglas in the 1850s was now over. In its place came a new process for dealing with Aboriginal peoples, a process designed to assimilate them into the mainstream of the emerging white society while fulfilling the overarching goal of land acquisition. This process later came to be known as the "Douglas system." It contained three basic strategies. The first two strategies were straightforward and, indeed, had been used by British authorities for some time in their efforts to colonize distant South Pacific territories.[42] Not only would Aboriginal peoples be integrated into the British system of education, they would be urged to convert to Christianity. The British saw traditional Aboriginal ways of teaching and the Aboriginal religion and sense of spirituality as insufficient to prepare the Natives for the new social order and doing little to advance the "English element" in the colony.[43]

What was more remarkable was the third strategy. Aboriginal peoples would be required to settle in villages alongside those established by white settlers. Initially, the villages were to be set up on reserves. But because British and colonial officials thought such confinement would undermine the Aboriginal peoples' "pride of independence," they opted instead to move them and give them the same rights of preemption over unsurveyed Crown lands as newly arrived immigrants. In short, this was a de facto denial of Aboriginal title: there was no mention of the preexisting land rights of the Aboriginal peoples, no discussion of providing them with some form of compensation for irreclaimable land, and no talk of any negotiations with them over their land. Indeed, the area outside village sites and enclosed fields – the land the Hudson's Bay Company had acknowledged as initially owned by Aboriginal peoples – was now at the disposal of the Crown and would be treated as if it had never been owned.[44]

The Creation of Reserves

Douglas sought to set aside reserves before white settlement occurred so that Aboriginal peoples could maintain villages, agricultural land, and some sacred areas such as burial grounds.[45] This approach was at variance with that used in the United States, where many Native peoples were

removed from their traditional homes and relocated on large amalgamated reservations. For Douglas, such an approach would only serve to produce hostility among Aboriginal peoples – something that was surely not conducive to settlement and peaceful relations. Accordingly, he chose to allow Native peoples to select the sites of their reserves, as long as the chosen sites received the ultimate approval of the district magistrate and were seen as reasonable and not in conflict with the land sought by white settlers.[46] In addition, Aboriginal peoples would be allowed to continue using the land they held at the time and to use additional arable land, sufficient for growing food.

There is a diversity of views as to the intended size of the allotted reserves. On one hand, Wilson Duff has claimed that, contrary to Douglas's suggestion that Aboriginal peoples were to be granted as much reserve land as they wished and in the areas they desired, the size of the reserves was calculated on the basis of ten acres per family.[47] On the other hand, Robin Fisher has noted that the allotment of ten acres per family was regarded as a minimum.[48] Moreover, in contrast to the reserves established in the coastal regions of British Columbia, those set aside in the southern interior were quite large, as many interior Aboriginal peoples could demonstrate to government officials, through their raising of horses and cattle, that their use of the land was more extensive. Nevertheless, after Douglas's tenure as governor, ten acres per family was established as the minimum that was to be used in laying aside the reserves.

Later Indian Policy in British Columbia:
Joseph Trutch and the Denial of Aboriginal Title

Indian policy in the colony underwent some major changes after Douglas retired in 1864. In addition to Aboriginal title being explicitly denied by local authorities, many of the reserves established under Douglas's control were reduced in size. Much of the impetus behind these policy changes was the result of the imperial government's lack of involvement in the affairs of the colony. The imperial authorities held little interest in the colony and, indeed, in the general welfare of its Aboriginal peoples.[49] Support among the English public for the general goals of the British Empire was on the decline, and both London and the Colonial Office saw little advantage in shouldering the costs of maintaining a significant interest in the colony. One result was that much of the control over Indian policy was left in the hands of local officials, who, while sharing interests in the land with other white settlers, were now dealing with issues that deeply affected their lives. It was not surprising, therefore, that Aboriginal peoples would receive less than fair treatment by the colonial government in the years to come.[50]

During this time, Joseph Trutch emerged as one of the most influential

government officials to exercise authority over Aboriginal land policy. Unlike Douglas, Trutch considered the Aboriginal people "uncivilized savages" who were ugly and lazy and prone to lawlessness and violence. No doubt Trutch was a product of Britain's confidence in the superiority of its civilization and its consequent belief that all other races ranked lower on the scale of human existence than the British. Trutch was sceptical about the Aboriginal peoples' ability to improve themselves. As opposed to seeing them on an equal footing with white settlers, Trutch saw them as mere obstacles to the development of the colony by the whites.

During his tenure as commissioner of land and works, Trutch made several changes to existing Indian land policy. Under his guidance, in 1866 the colonial legislature prohibited Aboriginal peoples' rights of preemption. In areas of white settlement, Aboriginal peoples were restricted to their reserves as far as land use was concerned. Theoretically, this made it possible for a white settler to preempt a tract of land larger than a nearby reserve occupied by more than a dozen Aboriginal families.[51] Trutch was also the first colonial official of considerable note to deny the application of Aboriginal title in the colony. In an 1870 address to the governor, Trutch offered the following words:

> The title of the Indians in the fee of the public lands, or any portion thereof, is distinctly denied. In no case has any special agreement been made with any of the tribes of the Mainland for the extinction of their claims of possession; but these claims have been held to have been fully satisfied by securing to each tribe, as the progress of settlement of the country seemed to require, the use of sufficient tracts of land for their wants of agriculture and pastoral purposes.[52]

Trutch's denial of Aboriginal title appears to be consistent with the de facto denial of Aboriginal title on the Mainland of British Columbia, evident in the extension to Aboriginal peoples of the right to preempt unsurveyed Crown lands. But there was still the problem of the Douglas purchase treaties on Vancouver Island, and their recognition of Aboriginal title.[53] Nevertheless, in response to this problem, Trutch argued that Douglas had arranged

> agreements with the various families of Indians ... for the relinquishment of their possessory claims in the district of the country around Fort Victoria, in consideration of certain blankets and other goods presented to them. But these presents were, as I understand, made for the purpose of securing friendly relations between those Indians and the settlement of Victoria, then in its infancy, and certainly not in acknowledgment of any general title of the Indians to the land they occupy.[54]

Trutch's other alteration to Aboriginal land policy was to adjust the boundaries of the reserves established under Douglas's authority. After commencing with the reserve land of the Shuswap people, he made further changes to the size of reserves in the Lower Fraser area. With the concurrence of white settlers and the legislative assembly in Victoria, the reasoning behind the reductions was simple and consistent with Trutch's overall perspective on Aboriginal peoples: they were more bestial than human, and they held lands that they would not and could not develop in a productive way. Such a sentiment was offered by Trutch in his report on the Lower Fraser Indian reserves in August 1867:

> The Indians really have no right to the lands they claim, nor are they of any actual value or utility to them; I cannot see why they should either retain these lands to the prejudice of the general interests of the Colony, or be allowed to make a market of them either to Government or to individuals.[55]

Accordingly, Trutch maintained that every reserve should be adjusted so that Aboriginal families received a maximum of ten acres each. And while it has been difficult to determine precisely how much reserve land was removed under Trutch's authority, a report from one of the surveyors at the time noted that such alterations released approximately 40,000 acres for white settlement.[56]

Trutch's denial of Aboriginal title and, in particular, his depiction of the Douglas purchase treaties as mere friendship agreements, was not only consistent with the way similar treaties were seen in other jurisdictions subject to British colonialism,[57] but it would prove to be remarkably enduring as the colony moved into provincehood. To many non-Aboriginal peoples, Trutch's views were persuasive because they were consistent with their interests and with those of the local government. There was no better way to reinforce non-Aboriginal interests in the land than to demonstrate that Aboriginal peoples neither owned the land nor even conceived of owning it. Continuing Douglas's efforts at treaty-making was pointless: if Aboriginal title did not exist, there was no interest in the land that had to be purchased. Furthermore, the reserves set aside for Aboriginal peoples should not be seen as a recognition of Aboriginal title or of the surrender of title to the land adjacent to reserves. Reserves were nothing more than gifts from the Crown to Aboriginal peoples.[58]

Federal-Provincial Interaction Involving Aboriginal Peoples and the Signing of Treaty Eight

During the discussions surrounding the colony's entrance into the Canadian federation, little time was devoted to Aboriginal peoples residing on

the land. Granted, there was a motion that dealt with the types of protection that should be afforded to these First Nations during the colony's transition to provincial status, but the motion was ultimately defeated. Although apparently written by Trutch, a clause about Aboriginal peoples was included, completely at the insistence of Ottawa, in the final text of the Terms of Union.[59]

Clause 13 of the Terms of Union deals with the Native peoples of British Columbia. It reads:

> The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the union.
>
> To carry out such a policy, tracts of land of such an extent as it has been hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians, on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.[60]

Whether officials in Ottawa believed the colony's policies on Aboriginal peoples were indeed "liberal" is a matter of speculation. If anything, there was a considerable measure of confusion among federal politicians as to the substance of the colony's policy on Aboriginal peoples. One politician thought the reserve allotments were similar to those set aside in Ontario, namely, eighty acres per family; another thought the Aboriginal peoples of British Columbia had surrendered their territory through treaties.[61] At any rate, one commentator has suggested that Trutch and other colonial officials were probably less than forthcoming in the information they offered to their federal counterparts, taking pains to assure Ottawa that the colony's Aboriginal policy was indeed liberal and generous in the allotment of reserve lands and other benefits to Aboriginal peoples.[62]

After British Columbia entered the Canadian federation in 1871, the federal government assumed direct control and responsibility over the province's Aboriginal peoples. Section 91(24) of the Constitution Act of 1867 gave Ottawa legislative jurisdiction over "Indians, and lands reserved for Indians." However, the province still held legislative power in other policy fields, which it used to frustrate the ability of Native groups to alter their plight. In 1872 the provincial legislature prohibited Aboriginal peoples from voting in provincial elections, thereby denying them the most

fundamental of all democratic rights. And some years later, as a result of the province's title to public lands, provincial officials continued to set aside comparatively small reserves and, in some cases, even reduced the size of established reserves without the consent of the Aboriginal residents. Because such acts were within the scope of the province's legislative authority, Ottawa was unable to do much. Ottawa could not force provincial officials to recognize Aboriginal title, nor could it motivate the province to increase the size of reserves beyond the required ten acres per family.

Nevertheless, Ottawa's actions with respect to Aboriginal peoples should not go unexamined. In 1876 the federal Parliament enacted the Indian Act, which consolidated existing federal legislation affecting Aboriginal peoples. It was through an amendment to the act in 1884 that Ottawa outlawed one of the most important political and economic institutions of the coastal peoples: the potlatch. Moreover, the federal cabinet held constitutional power to disallow any provincial statute.[63] Between the late 1880s and the mid-1940s, almost one-half of all provincial acts disallowed by Ottawa emanated from British Columbia, most of which involved the so-called "anti-Oriental" laws that had the potential of impeding the construction of the transcontinental railway system. However, during this time, the federal cabinet exercised their veto power only marginally with respect to provincial legislation that was detrimental to the interests of Aboriginal peoples. The failure of Ottawa to help or protect Aboriginal peoples was consistent with their overall political priorities. Because Native peoples occupied such a low place on the scale of political importance, it was more prudent for Ottawa to do very little to help them than to jeopardize healthy intergovernmental relations or alienate a portion of the electorate in British Columbia by being responsive to Native peoples' needs.

The Aboriginal peoples of the Mainland of British Columbia were not involved in treaty negotiations with the federal government until the late 1890s. With the discovery of gold in the Klondike and the resulting migration toward the Yukon from the Pacific coast, the federal government was anxious to quash any potential violence as miners and other travellers made their way through Aboriginal territory.[64] As one federal official commented at the time:

> The gold seekers plunged into the wilderness of Athabasca without hesitation, and without as much as "by your leave" to the native. Some of these marauders, as was to be expected, exhibited on the way a congenital contempt for the Indians' rights. At various places his horses were killed, his dogs were shot, his bear-traps broken up. An outcry arose in consequence, which inevitably would have led to reprisals and bloodshed had not the Government stepped in and forestalled further trouble by a prompt recognition of the natives' title.[65]

By 1898 federal officials wasted no time in declaring their intention to make treaties with the Aboriginal peoples in the northern sections of British Columbia. The negotiations were set to commence the following spring.[66]

Federal officials wished first to sign a treaty with those tribes that traded with the Hudson's Bay Company at Fort St. John and Fort Nelson, located in the Peace River District of northeastern British Columbia. While there was some confusion among Aboriginal groups with regard to the date of the proposed signing of the treaty, forty-six Beaver Indians signed an adhesion to Treaty Eight on 30 May 1899, and the remaining members of the tribe signed additional adhesions to the treaty later on.

Similar adhesions were not signed by any other Aboriginal group until some years later. Apparently, the treaty commissioners saw little need to obtain adhesions with other Aboriginal peoples until they became troublesome. Moreover, some tribes were reluctant to make treaties. Some felt that their traditional territory was far too large to sell for the sums offered by the federal government. They also believed that they could survive without the assistance of federal authorities.[67] Nevertheless, other Aboriginal groups seemed eager to make treaties, and on 15 August 1910, the Slave and Sekani tribes signed an adhesion to Treaty Eight.[68]

As was the standard practice of the time, the provisions of Treaty Eight reflect a recognition by the federal commissioners that the Aboriginal signatories could continue their traditional economic activities, such as fishing and hunting, over unoccupied Crown lands.[69] Designated tracts of land were surrendered by Aboriginal peoples in exchange for an allotment of one square mile (1.61 square kilometres) for each family of five. Initial cash payments were given to the chiefs and councillors of the various tribes, and provisions were made for education, farm stock, implements, and ammunition. It should be noted, however, that the process of bringing Aboriginal peoples formally into Treaty Eight was rather haphazard. For the most part, federal officials were ignorant of the nomadic lifestyle of Aboriginal peoples,[70] and there is evidence to suggest that the federal government intended to sign treaties with additional tribes in British Columbia but failed to do so.

The government of British Columbia played no significant role in the conclusion of Treaty Eight. Not only did the province have little, if any, "official" presence in the area, but the belief that it held clear title to the land, unencumbered by Aboriginal title, was firm. Because Aboriginal title was viewed as immaterial, so was the need to conclude treaties with Native groups. In addition, federal officials were well aware of the province's position in this regard and knew that any hope of seeing it participate in the negotiations, either by setting aside reserve lands or by bearing some of the costs of the negotiations, was fruitless. However, the federal government

was able to work around the provincial reluctance to relinquish land for reserves by setting aside a parcel of land known as the "Peace River Block" – a 5,500-square-mile (8,855-square-kilometre) section of land that was previously conveyed by the province to the federal government for railway and agricultural purposes.[71]

That the federal government was able to conclude a treaty without the involvement of British Columbia is significant for present-day treaty negotiations in the province. Some have argued that the provincial government should not and need not participate in the negotiations. In addition to the costs of doing so, there is little constitutional authority for the province to act in such negotiations. Constitutional authority over "Indians, and lands reserved for Indians" is assigned to the federal government, with no corresponding legal responsibility attached to the provincial government. If there is no legal requirement for the province to arrange treaties, why, then, should it be engaged in a treaty-making process? Could not the experiences of Treaty Eight be used to support the argument for concluding treaties with Aboriginal groups in British Columbia without the involvement of the provincial government?

To accept this argument as realistic, we would need to make several assumptions. The first is that there is enough federally owned land in British Columbia for treaty settlements; second, that this land holds sufficient commercial potential to allow the Aboriginal economic development initiatives that may be included in some of the treaties to be viable; and third, that the provincial government wishes to play no role in the development of Native communities or industries, nor share in the benefits that may flow from such development. Not only is the plausibility of these assumptions doubtful, but the exclusion of the provincial government from the treaty negotiations would suggest a replication of the conditions on which the adhesions to Treaty Eight were signed: the provincial government denied that Aboriginal title existed in British Columbia; there was little provincial involvement in the areas subject to treaty negotiations; and Aboriginal peoples and non-Aboriginal peoples existed largely independent of one other, with little contact between their respective communities. Surely, these conditions do not apply to British Columbia today, and the argument that the province should refrain from participating in treaty talks should therefore be rejected as an unrealistic conception of contemporary circumstances.

Aboriginal Protests

The legislative enactments of both Ottawa and Victoria induced Aboriginal peoples to take a more direct and confrontational approach to their dealings with government. In 1872 a number of chiefs of the Coast Salish tribes of the Lower Fraser area rallied in front of the provincial land registry

office in New Westminster, demanding the enlargement of the existing reserves. In 1881 a delegation of Nisga'a travelled to Victoria, also demanding additional reserve land. Several years later a number of Tsimshian chiefs led a delegation to Ottawa. They met with Prime Minister John A. Macdonald, who gave the chiefs his reassurance that the issue of insufficient reserve land would be addressed.[72]

However, such forms of protest appeared to accomplish very little in substantive terms. By the late 1880s, the dissatisfaction among Aboriginal peoples reached new heights, manifesting itself in other acts of protest. Both the Nisga'a and Tsimshian tribes refused to allow provincial land surveyors into their traditional territories. Several Tsimshian openly expressed a desire to move their members to Alaska, where, it was reported, the United States would offer them a more generous land policy. And news of the Okanagan and Shuswap tribes forming a confederacy to assert their claims to additional land began to cause anxiety among government officials and white settlers.[73]

The provincial government appeared sufficiently motivated by these events for Premier William Smithe to meet with the chiefs of the Nisga'a and Tsimshian during the early months of 1887. The chiefs demanded additional reserve lands, treaties, and self-government. Smithe, however, refused to take their entreaties seriously, suggesting that such talk of treaties and self-government was nothing more than a disguised plea for more land. Indeed, just after characterizing the Aboriginal peoples prior to European contact as "little more than wild beasts of the field," Smithe offered a rebuttal to the chiefs' view of land ownership with the following words:

> The land all belongs to the Queen ... A reserve is given to each tribe, and they are not required to pay for it. It is the Queen's land just the same, but the Queen gives it to her Indian children because they do not know so well to make their own living the same as the white man, and special indulgence is extended to them, and special care shown. Thus, instead of being treated as a white man, the Indian is treated better. But it is the hope of everybody that in a little while the Indians will be so far advanced as to be the same as a white man in every respect.[74]

In the face of such recalcitrance by the provincial government and the unabated progress of white settlement throughout the province, Aboriginal groups began to develop new forms of political organization. In 1916 various coastal and interior groups formed the first province-wide Aboriginal political organization: the Allied Tribes of British Columbia (ATBC). The ATBC lobbied both the federal and provincial governments for additional reserve lands and for treaties. But perhaps more significantly, because it marked the beginning of a new strategy for Aboriginal groups in their

relations with government, the ATBC threatened litigation as a means of advancing their goals. The reasoning behind the decision to pursue the recognition of Aboriginal rights in court was straightforward. It seemed clear that, after many years, negotiations between Aboriginal peoples and both orders of government were going nowhere. The rights of Aboriginal peoples in the province continued to be restricted. And despite Aboriginal protests, both governments were working together to reduce the size of reserve lands.[75] For the ATBC, litigation would remove their demands from the political forum and place them in the legal arena, where there seemed to be a greater chance that they would receive a fair and objective hearing. A judicial decision recognizing the continuing existence of Aboriginal title in the province would draw attention to the illegality of many of the actions of the provincial government since at least Trutch's time, and it would represent a significant bargaining chip for Aboriginal peoples in their subsequent negotiations with government.

Indeed, the attractiveness of using litigation increased when, in a 1921 case arising in Nigeria, the Judicial Committee of the Privy Council ruled that Aboriginal title was a preexisting right that must be presumed to survive, unless established otherwise by the context or the circumstances in which the right operated.[76] Thus, if an analogous claim from British Columbia could reach the Judicial Committee, then there might be a good chance the law lords would offer a similar ruling.

The ATBC would continue their operations for only about a decade. Due largely to a series of amendments to the Indian Act, the goals of the ATBC were severely limited. In 1884 Ottawa amended the act's provisions prohibiting the potlatch to extend to many Aboriginal ceremonies and activities that involved the exchange of goods, material, or money. In addition – and probably as a result in part of the Judicial Committee's ruling on the preexistence of Aboriginal title – the federal government made a further amendment to the Indian Act in 1927, which prohibited any Aboriginal group from raising funds to support claim-related activities without the government's consent. This provision would remain in effect until 1951.

Despite the efforts by government to suppress Aboriginal political and legal activities, another political organization emerged in 1931 in the wake of the ATBC: the Native Brotherhood of British Columbia (NBBC). Grouping the interests of the north and central coast peoples, the NBBC continued the ideals of the ATBC. But they also sought to broaden the scope of the ATBC's concerns. The NBBC advocated improvements to the level of education among Aboriginal peoples, greater recognition in law of their hunting, fishing, and logging rights, and the decriminalization of the potlatch. Notwithstanding the Indian Act's prohibition on claims activity, the NBBC remained steadfast in their insistence on government recognition of Aboriginal title. The NBBC effectively performed the role of liaison between

their constituency and government officials, assisting individual members in their interaction with government and holding forums through which various concerns could be raised. Yet the overall effectiveness of the NBBC was limited by their inability to forge a province-wide alliance with tribal groups on the south coast and in the interior of British Columbia.[77]

As time wore on, other Aboriginal political organizations would emerge in the province. Some organizations, such as the Nisga'a Tribal Council and, later, the Nuu'Chah'Nulth Tribal Council, arose from the remnants of the NBBC and sought to work toward the resolution of their respective land claims. Others, such as the North American Indian Brotherhood, were comprised of various Aboriginal groups from the interior and the southern coast of British Columbia. These groups also sought the recognition of Aboriginal title by government but held additional concerns about the socioeconomic status of Native peoples and about the restrictions placed upon Native development and self-determination by the Indian Act and the administration of Indian affairs. Still others, like the Confederation of Native Indians of British Columbia, provided a forum for coordinating the activities of other Aboriginal organizations, with a view to uniting their common interests. Collectively, these organizations would respond to governmental initiatives and serve as political forums that reflected Aboriginal understandings, perceptions, and identities.[78]

The Role of the Courts, and Federal and Provincial Policy Responses

The willingness of various Aboriginal political organizations to resort to litigation would do much to induce changes to both federal and provincial policies concerning Aboriginal title in those areas of Canada where formal treaties did not exist. Indeed, from the early 1970s to the early 1990s, various judicial decisions would not only cause such changes but would give Aboriginal peoples a solid foundation on which their subsequent negotiations with both orders of government could proceed.

One of the most important cases affecting Aboriginal title in British Columbia was the 1973 Supreme Court of Canada decision in *Calder*.[79] Frank Calder was a hereditary chief of the Nisga'a and the member of the provincial legislature for Atlin. Calder was instrumental in the formation of the Nisga'a Tribal Council. Among his notable accomplishments was his effort to obtain from the courts a declaration that Aboriginal title was still in effect in British Columbia. The legal argument put forward by the Nisga'a was twofold: they argued first that the Nisga'a held Aboriginal title to their ancient tribal lands in the Nass Valley prior to the assertion of British sovereignty; and second, that such title had not been lawfully extinguished. Therefore, the Nisga'a claimed, they still held Aboriginal title to these lands.

Initially, the case was heard by the British Columbia Supreme Court. Counsel for the provincial government responded to the Nisga'a argument by asserting that Aboriginal title did not exist in British Columbia because the Royal Proclamation of 1763 (which, for the province, was the source of Aboriginal title) did not apply to the province. For Aboriginal title to have meaning and application in British Columbia, it had to have been created explicitly by imperial authorities at the time British sovereignty was asserted over the land. Moreover, the province's lawyers argued that even if Aboriginal title had existed in British Columbia before the assertion of sovereignty, it had been extinguished implicitly prior to 1871 by colonial land legislation.

While both the British Columbia Supreme Court and, later, the British Columbia Court of Appeal upheld the province's legal argument, the Supreme Court of Canada granted leave to the Nisga'a to appeal the rulings. In the Supreme Court the result was somewhat different, although the appeal was ultimately dismissed. Six justices found that the Nisga'a held Aboriginal title before the assertion of British sovereignty. However, on the question of whether Aboriginal title continued to exist in the province, the justices were split evenly: three held that Aboriginal title continued to exist; three ruled that, while Aboriginal title may have existed, it was extinguished by the assertion of British sovereignty and, implicitly, by colonial actions prior to 1871. Moreover – and this was the reason for the appeal's dismissal – four of the seven justices found that the Nisga'a had brought the suit before the Court improperly, as they had failed to obtain a fiat from the British Columbia government to do so.

Nevertheless, the Supreme Court ruling was sufficiently divided to induce the federal government to adopt a new policy on Aboriginal title. Prior to the ruling in *Calder,* the federal government's Aboriginal policy was not clearly defined. In 1969 Ottawa introduced the White Paper, which sought the eventual elimination of the various "privileges" of Aboriginal peoples, with the ultimate goal of "normalizing" their integration into Canadian society. Among other things, the White Paper would have done away with the Indian Act, phased out federal obligations to Aboriginal peoples, and parcelled out reserve lands on the basis of individual ownership. However, the White Paper was condemned by almost all Aboriginal groups as racist in intent and a form of cultural genocide. In 1971 the federal government withdrew it. In its place Ottawa established the Core Funding Program, which provided Aboriginal groups with the resources necessary for the promotion of their causes through research, legal channels, and publicity.[80] But it was not until the 1973 *Calder* ruling that a common ground emerged between Ottawa and Native communities. The federal government then began a process of treaty-making in the north and commenced negotiations with the Nisga'a over land in the Nass Valley. Indeed, former

prime minister Pierre Trudeau, in recounting the Supreme Court's decision and its policy implications, remarked that the case pushed him to reconsider the colonialist assumptions underlying his administration's policy on Aboriginal peoples and to acknowledge the possibility of Aboriginal self-determination, treaty rights, and self-government as key organizing principles.[81]

In 1984 the Supreme Court of Canada went further in recognizing Aboriginal title as an established legal right in Canadian law. Following their earlier finding in *Calder,* the Court's majority ruled in *Guerin* that Aboriginal peoples' interest in their lands was a preexisting legal right not created by the Royal Proclamation of 1763, but rather derived from the historic occupation and possession by Aboriginal peoples of their tribal lands. Consequently, preexisting Aboriginal title was still a valid legal right on reserve lands in British Columbia and on traditional tribal lands not subject to treaties with the Crown.[82]

For many Aboriginal groups, after *Guerin* the courts seemed to be the most effective vehicle by which to advance their interests against those of government. Within several weeks of the *Guerin* ruling, the Nuu'Chah'-Nulth nations blocked access to MacMillan Bloedel's timber berth on Meares Island. While Meares Island was not reserve land, the chiefs of the Clayoquot and Ahousaht First Nations sought a declaration from the courts that any provincial permit that allowed logging or in any other way interfered with Aboriginal title on the island was beyond the powers of the provincial government. They applied to a British Columbia Supreme Court judge for an injunction to halt logging until this claim had been resolved at trial. Central to this application was the desire to preserve evidence of the Aboriginal peoples' historic use of the natural resources of the area. The province countered the claim by insisting again that Aboriginal title to the land had been extinguished by colonial land legislation prior to 1871. MacMillan Bloedel argued that economic chaos would prevail if the injunction was granted by the court.

The British Columbia Supreme Court rejected the chiefs' legal argument and thus denied the application for an injunction. The chiefs then petitioned the British Columbia Court of Appeal in *Martin et al*. v. *The Queen in Right of the Province of British Columbia et al*. The court was divided three to two in favour of granting the injunction. Justice Seaton gave one of the majority judgments:

> The [British Columbia Supreme Court] judge thought the claim to Indian title so weak that he could safely conclude that it could not succeed. I do not agree with that view ... The proposal is to clear-cut the area. Almost nothing will be left. I cannot think of any native right that could be exercised on lands that have been recently logged ... I am firmly of the view

> that the claim to Indian title cannot be rejected at this stage of the litigation ... The Indians have pressed their land claims in various ways for generations. The claims have not been dealt with at all. Meanwhile, the logger continues his steady march and the Indians see themselves retreating into a smaller and smaller area. They, too, have drawn the line at Meares Island. The island has become a symbol of their claim to rights in the land ... It is too important to the Indians' case that they be able to show their use of this forest. I do not mean to suggest that the Indians ought to continue to use the forest as they used it in the past. The importance of the evidence of extensive use is that it may demonstrate a right to continued use ... It has ... been suggested that a decision favourable to the Indians will cast a huge doubt on the tenure that is the basis for the huge investment that has been and is being made. I am not influenced by that argument ... There is a problem about tenure that has not been attended to in the past. We are being asked to ignore the problem as [the province of British Columbia has] ignored it. I am not willing to do that.[83]

The court was also explicit in its judgment of what was expected of the provincial government. According to Justice MacFarlane:

> The fact that there is an issue between the Indians and the province based upon Aboriginal claims should not come as a surprise to anyone. Those claims have been advanced by the Indians for many years. They were advanced in [the Calder case], and half the court thought they had some substance ... *I think it is fair to say that, in the end, the public anticipates that the claims will be resolved by negotiations and by settlement*. This judicial proceeding is but a small part of the whole process which will ultimately find its solutions in a reasonable exchange between governments and the Indian nations.[84] [emphasis added]

After *Martin,* the British Columbia Supreme Court issued injunctions to many First Nations whose claims had not been heard. As a result, logging was halted on Deer Island in Kwakiutl territory, further railway development was prevented along the Thompson River, and logging preparation was enjoined in the Gitxsan and Wet'suwet'en territory. These injunctions prevented the province from treating the land as though Aboriginal title did not exist, and they also prompted the major natural resource development companies to consider whether their own interests would not be better served if the province entered into treaty negotiations with First Nations.[85]

One of the results of *Martin* was the creation of the provincial Ministry of Native Affairs in 1988. Judicial support for the claims of Aboriginal groups induced the new Social Credit government to entertain a more

accommodating policy on Aboriginal issues than earlier provincial governments. Yet, like their predecessors, the government still refused to acknowledge Aboriginal title and to enter into treaty negotiations with the First Nations. Despite this fact, several events would work in tandem to force a change in the government's position. By 1989 public support for treaties hit approximately 80 percent, as public knowledge about land claims increased.[86] Several conferences involving representatives of tribal groups and senior officials in the natural resource sector produced a consensus of opinion that treaty negotiations may be necessary if the development of the province's resource sector was to continue unimpeded.

Under these conditions, the new minister of Native affairs, Jack Weisgerber, along with his deputy minister, Eric Denhoff, approached the provincial cabinet and suggested that negotiations with First Nations might be the best course of action for the government to pursue. After touring the province to meet with a number of First Nations, Premier Bill Vander Zalm appointed a Native affairs advisory committee to consider the government policy options. In time, a number of the committee's members declared their support for negotiations, and it seemed likely that this would be the policy position recommended to the premier.[87] Soon after, Native blockades were erected by the Mohawk at Oka and at Kahnawake, not far from Montreal, creating a spillover effect across Canada, particularly in Alberta and British Columbia.[88] Various Aboriginal groups in these provinces set up their own blockades, both in support of the Mohawk claims to land and to draw attention to their specific grievances with government. Vander Zalm visited a number of the blockades in British Columbia and addressed the protesters. By the fall of 1990, the premier announced that his government would commence negotiations with First Nations. But still, Vander Zalm refused to acknowledge Aboriginal title in the province.

Delgamuukw

In 1987 the Gitxsan and Wet'suwet'en tribal nations launched a legal action in the British Columbia Supreme Court. Their claim was for a right of ownership and jurisdiction to more than 22,000 square miles (35,420 square kilometres) of their traditional territory on the grounds that no part of it had been ceded to or purchased by the Crown. The preexisting land rights of the Gitxsan and Wet'suwet'en people remained therefore unextinguished. In March 1991 the court delivered its judgment. Chief Justice McEachern rejected the claim. In dealing with the two sources of Aboriginal title, the Royal Proclamation of 1763 and the common law, the chief justice found that the proclamation did not apply to British Columbia, as the colony did not fall within the territories contemplated by the language of the document. The extent of the North American continent was simply unknown in 1763. As regards the common law, although the chief justice

left the scope of Aboriginal rights largely undefined through a review of some recent cases, he found that these rights arose through the occupation and use of the specific lands for Aboriginal purposes for an indefinite, long period of time prior to British sovereignty. However, after considering a series of colonial enactments, he found that such interests had been extinguished implicitly when the Crown exercised complete dominion over the territory by opening the land to settlement prior to 1871.[89]

Justice McEachern's ruling was castigated by First Nations and by many members of the academic and legal communities. Leave to petition the British Columbia Court of Appeal was granted, and in June 1993 the court rendered its decision.[90] The court's majority rejected Justice McEachern's view that all the Aboriginal rights of the Gitxsan and Wet'suwet'en peoples had been extinguished prior to 1871. However, the majority were careful to make it clear that those Aboriginal rights that do remain do not entail the unfettered right to use, occupy, and control the lands and their resources. On the question of jurisdiction, which amounted to a claim to a right to self-government, the court's majority held that such authority would constitute legislative powers that could encroach upon those of the federal and provincial governments. Consequently, not only would powers of this sort be inconsistent with the legislative authority laid down in sections 91 and 92 of the Constitution Act of 1867, but they would run contrary to the principle of parliamentary supremacy. In short, the court found that it held "no power to make grants of constitutional authority in the face of clear and comprehensive statutory and constitutional provisions"[91] and that no group could make rules that derogated from an act of Parliament.

Despite these findings, and doubtless as an affirmation of the treaty-making process currently under way in British Columbia, both the court's majority and dissenting opinions suggested that negotiations between First Nations and the federal and provincial governments would be the best method of determining the nature and scope of the Aboriginal rights still in existence. Indeed, the court's emphasis on the resolution of these issues through negotiations also extended to that "form of Indian self-government [that could operate] beyond the regulatory powers of the Indian Act" and that could coexist with "other levels of government."[92]