

Beyond Rights

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Introduction

We want the words and hands of the chiefs on both sides, Indian and Government, to make a promise on paper – a strong promise – that will be not only for us, but for our children and forever ... But we want a solemn promise – a treaty.

– Charles Russ, resident of Laxgalts’ap, speaking to Commissioners Cornwall and Planta, 1887¹

Since 1975, the Canadian government has concluded over two dozen land claims agreements with First Nations and Inuit peoples covering approximately 40 percent of the country’s land mass.² These are known as “modern treaties” to distinguish them from the historic treaties made between European newcomers and Indigenous peoples from the onset of contact, trade, and exploration through to the beginning of the twentieth century.³ Though both forms are legally and politically binding, many Canadians are not aware of their ongoing importance and role in the development of this country (Asch 2018). Historic treaties in particular are sometimes dismissed as dusty artifacts of the past, as an exchange of promises made in another era and not relevant today. Yet the relationship between Indigenous peoples and the rest of Canada lurches from crisis point to crisis point, often because historic treaty rights and the treaty principles of sharing land and respecting Indigenous governance are

not taken seriously. Treaties are foundational to Canada's formation as a country and are at the heart of what many Indigenous people consider their special relationship with the Crown. Indigenous peoples have used treaties to create relationships with newcomers from the very beginnings of contact and exploration on this continent (Asch 2014; Coyle 2017; Craft 2013; Miller 2009; Mills 2017; Leanne Simpson 2008; Williams 1999). When the Truth and Reconciliation Commission on Indian residential schools released its final report in 2015, it spoke to the importance of rebuilding the political relationship between Indigenous peoples and Canadian governments by recovering some of the principles of these early treaty relationships. The report authors wrote, "It is important for all Canadians to understand that without Treaties, Canada would have no legitimacy as a nation. Treaties between Indigenous nations and the Crown established the legal and constitutional foundation of this country" (Truth and Reconciliation Commission of Canada 2015, 33).

In this book, I look at the promises and pitfalls of contemporary treaty making as a means of reforming relationships between Indigenous peoples and the state. I do this through an examination of the Nisga'a Final Agreement, also known as the Nisga'a treaty, which came into effect on May 11, 2000. It is the first modern treaty made in British Columbia. It covers the traditional territories of the Nisga'a Nation, which lie in the Nass River Valley on the northwestern coast of British Columbia. The Nass empties into the Pacific Ocean through Portland Inlet near the southern tip of the Alaska Panhandle. The treaty is the result of over one hundred years of Nisga'a men and women protesting, petitioning, litigating, and then negotiating with federal and provincial governments for recognition of their rights and land title in the form of a treaty. It defines all the Aboriginal rights of the Nisga'a people, including the right to self-government, and recognizes Nisga'a ownership of 2,000 square kilometres in northwestern British Columbia and other treaty rights over 27,000 square kilometres that are known as the Nass Wildlife Area.

This book focuses on the meaning and implications of three main aspects of the treaty: the nature and source of self-government, the nature and source of Aboriginal title, and citizenship. These were among the most difficult and legally complex elements to negotiate because they

touch on fundamental matters such as state sovereignty, the underlying title of the Crown, and the distribution of differing rights across diverse political communities within one state. They are also critical points in the past and present relationship between Indigenous peoples and the rest of Canada. For Nisga'a, negotiating the treaty required revisiting and trying to repudiate key assumptions of a century and a half of Indigenous policy in Canada. The self-government provision in the Nisga'a Final Agreement was possibly its most controversial feature when it was debated in the House of Commons and the Senate and by the public in print media, on radio call-in shows, and in public hearings. Critics and political opponents argued that the provision created a third order of government and was an unconstitutional division of power, as I shall discuss in [Chapter 1](#). But it is also significant that during the years that the treaty was negotiated, the inherent right of Aboriginal self-government and its place in the Canadian Constitution was a particularly important question of policy and law for federal and provincial governments. In some respect, the analysis I offer here serves as a bit of a time capsule because the commitment of federal and provincial governments to making treaties that would deal comprehensively with large, complex legal issues and a multiplicity of rights is waning. They are now looking toward less jurisdictionally complicated sectoral agreements with Indigenous peoples – things such as revenue-sharing agreements and agreements on isolated issues of governance capacity – that are quicker to achieve but are not treaties and are therefore not constitutionally protected. This shift is happening despite recommendations from the Truth and Reconciliation Commission and the work of scholars who point to treaties as a key mechanism of substantive reconciliation in Canada.

Scholarly work on treaty making in North America has addressed the origins, benefits, and drawbacks of historic and modern treaties from a range of disciplinary perspectives. Historians and scholars working to recover Indigenous views on treaties show us that multiple forms of treaty making and treaty relationships have existed since the first days of contact, trade, and exploration (Miller 2009; Promislow 2014; Ray, Miller, and Tough 2000).⁴ Treaties were made to signify political or military alliances, to permit trading relationships, and to allow land settlement after Confederation in 1867. The Indigenous peoples who entered into

them did so from a variety of political and economic contexts, sometimes from positions of strength and sometimes while facing the onset of disorienting change, but they nevertheless expected treaties to result in a binding relationship of mutual support and obligation between the partners (Asch 2014; Cardinal and Hildebrandt 2000; Craft 2013; Lyons 2010; Leanne Simpson 2008). They would not have made them otherwise. There is a common misconception that Indigenous people were tricked or duped to give up much for very little in return (Asch 2018; Craft 2013, 20; Promislow 2014). This is a historical misrepresentation and a misunderstanding of the expectations that Indigenous parties brought to treaty making.

Modern treaty making in Canada is a complex affair. Whereas historic treaties were completed over the course of a week and are a few pages long, their modern counterparts can take up to twenty years to negotiate and are usually over two hundred pages long. Research on modern treaties has examined the process of negotiations and the consequences of treaties for the communities who made them. This work reveals that negotiating a treaty is fraught with conflicting expectations, is divisive for communities, and takes up far too much time and resources (Alcantara 2013; de Costa 2008; Egan 2012; Penikett 2006; Woolford 2005). Indigenous communities that negotiate treaties are required to make significant compromises on lands and resources, and the mandates of federal and provincial negotiators have been too fixed on certainty and finality (Penikett 2006; Woolford 2005). Other scholars have addressed social and cultural consequences of land claims and self-government agreements. In analyzing the impact of the land claims agreements among the Kluane First Nation in Yukon, Paul Nadasdy (2017, 87) argues that these agreements make First Nations governments state-like in their adoption of statist concepts of nation, sovereignty, and citizenship, and in their transformation into small-scale bureaucracies. As Nadasdy (2012) and Thom (2014) also illustrate, the land claims process requires Indigenous peoples to define fixed boundaries around their territories that are not representative of historically more fluid territorial relationships. Some scholars criticize contemporary land claims and self-government agreements as mechanisms of territorial dispossession and assimilation that confine Indigenous peoples to small bits of their traditional lands in

exchange for a limited range of self-government (Alfred 2009; Corntassel 2012; Coulthard 2014). Taiaiake Alfred (2005, 39) states, for example, that self-government and Aboriginal rights are “the benefits accrued by indigenous peoples who have agreed to abandon autonomy to enter the state’s legal and political framework.”

This is the persistent dilemma for Indigenous peoples who use state mechanisms and state institutions such as the courts, or the political process, to defend their rights or negotiate governance and matters of economic development and environmental protection in their homelands (Hale 2020). The question becomes whether or not these kinds of engagements lead to deeper incorporation within state structures and paradigms and a corresponding loss of Indigenous values. For Indigenous communities and governments who spend years in courts and treaty negotiations, this challenge is very real. However, I do not propose that it has been the inevitable result of the Nisga’a treaty. Nisga’a and other First Nations in British Columbia and Canada have strategically interacted with governments, missionaries, and traders since at least the time of first exploration and contact (Cooper 1993; Lutz 2008; Patterson 1992; Robertson with the Kwagu’l Gixsam Clan 2012). The Nisga’a have always been confident in their ability to do this. Seeing these engagements as either always constitutive of Indigenous resistance or as always complicit in the perpetuation of non-Indigenous hegemony may not be the most fruitful approach (Richland 2008, 159). I am writing about a treaty that has already been made and about people who mostly want it to work. As Sherry Ortner (2006, 142) explains, people on the margins of power pursue goals that are informed by their “own social and political relations, and by their own culturally constituted intentions, desires, and projects” all the time, with results that are complicated assemblages of resistance, accommodation, and strategic exercises of agency (Feit 2010; Robertson with the Kwagu’l Gixsam Clan 2012). In her analysis of the self-government negotiations between the Dene of the Northwest Territories and the federal and territorial governments, Irlbacher-Fox (2009, 164) describes how during the nineteenth century, the Dene took their furs to various traders to incite competition between the traders and to postpone when they had to repay their debts. She suggests that contemporary Dene negotiators approach land claims and self-government

agreements equally strategically, as things that can provide some useful tools to help their communities. Writing about the James Bay Cree, who negotiated the first modern treaty in Canada in 1975, Harvey Feit (2010, 54) also maintains that the Cree continue to engage government and industry in their territory through “a pattern of partial opposition, partial negotiation, and continuing relationships.”

Any treatment of Indigenous action around land and governance in a contemporary settler state is incomplete without a consideration of the theoretical framework of settler colonialism (Veracini 2010; Wolfe 2006, 2011). Settler colonial theory is now prominent in Native American and Indigenous Studies, although it does not refer solely to the situation of Indigenous peoples. The term “settler colonialism” was coined in 1965 by a US-based Palestinian scholar in a book about Palestine (Kauanui 2016). Settler colonialism is a “land-centred project” that involves permanent settlement and is distinct from other colonialisms that focus on extracting resources (Wolfe 2006, 393). Canada, Australia, New Zealand, and the United States are all examples of settler states, and scholars continue to use the theoretical framework of settler colonialism to describe the occupation of Palestinian territories by Israel (Barakat 2018; Veracini 2010, 2015; Wolfe 2006). Australian scholar Patrick Wolfe’s (2006, 2011) formulation of the features of settler colonialism has been particularly influential. Wolfe (2006, 388) argues that settler colonialism is a “structure rather than an event” to emphasize its continuity in ongoing state projects of land acquisition, usually for resource extraction, and Indigenous dispossession. Wolfe (2006) also states that a logic of elimination is inherently tied to settler colonialism’s imperative of obtaining and maintaining territory. Elimination encompasses physical genocide but is also manifest in the government emphasis on assimilation through such things as residential schools, compulsory enfranchisement, and other coercive projects to remove the collective and legally distinct identities of Indigenous people.

Although the settler colonialism framework gives us critical insight into the features of this particularly land-centred colonial project, some scholars have argued that it is too rigid and forecloses possibilities of Indigenous resistance, survival, and resurgence (Carey 2020, 25; Kauanui 2016). The theoretical framework of settler colonialism informs this book

because the denial of Aboriginal title in a place like British Columbia has been explicitly about the removal of Indigenous peoples from their territories. However, my analysis also aligns with the work of scholars who highlight the plurality, heterogeneity, and incompleteness of settler governance and sovereignty. This is because much of the debate, political controversy, struggle, and accomplishments of the Nisga'a treaty reveal settler sovereignty to be an unfinished and imperfect project (McHugh and Ford 2012). Indigenous peoples are in fact counting on its incompleteness. Socio-legal scholar Renisa Mawani (2016, 114) points out that though Wolfe's logic of elimination "rightfully emphasizes the intensity of political and legal violence that indigenous dispossession demanded," it affords "too much power to colonial states." Of special relevance for my analysis here, Mawani (2016, 114) contends that attempts to eliminate "indigenous people relied on legal processes that were themselves a fulcrum of struggle that did not always achieve their desired or state objectives." Law has always been a central component of colonial rule, but it is also used in resistance by colonized peoples everywhere in ways that contest its authority and application (Hale 2020; Merry 1991). Treaties themselves are the "product of the encounter between two separate legal orders" (Coyle 2017, 47). When the Nisga'a Tribal Council went to court in 1967 to argue that Nisga'a title had never been extinguished, the resulting Supreme Court judgment in *Calder* altered Canadian law.⁵ It also initiated a body of jurisprudence that categorizes Aboriginal title as a unique right that is produced by the interaction between the Crown and Indigenous peoples (Slattery 2006). One consequence of this jurisprudence is that the content of Aboriginal title itself is not fixed but continues to evolve.

Debates about reconciliation have become part of a global trend in settler states, and Canada is no exception. Reconciliation has taken on particular prominence in the wake of the recent Truth and Reconciliation Commission on Indian residential schools. The word "reconciliation" is everywhere in public discourse and political parlance, lending its value to how varying levels of governments and organizations talk about changing relationships with Indigenous people. Federal and provincial government representatives now commonly refer to modern treaties as mechanisms of reconciliation. When I began research on the Nisga'a treaty, I heard

it repeatedly and fulsomely referred to as a form of reconciliation – as, for example, an “important step toward reconciliation and the dream of true equality.”⁶ The federal government has recently stated that it “is committed to achieving reconciliation with Indigenous peoples through a renewed, nation-to-nation, government-to-government, and Inuit-Crown relationship based on recognition of rights, respect, co-operation, and partnership as the foundation for transformative change.”⁷ In this book, I hold that to fully understand reconciliation in Canada, and the way it is linked to modern treaty negotiations, we must understand its genesis in the Supreme Court judgments of the 1990s that directed governments to use treaties to reconcile the constitutional rights of Indigenous peoples with the sovereignty of the Crown. As many have pointed out, the Supreme Court idea of reconciliation has foregrounded the supremacy of Crown title and sovereignty, meaning that Aboriginal rights must be defined in ways that do not challenge this supremacy (Asch 1999; McNeil 2003; Dale Turner 2013). This has put the burden of reconciliation on Indigenous peoples, as they are required to accommodate their rights and interests to those of the much more powerful Crown. Historically, Indigenous peoples who made treaties did so with the reasonable expectation that the relationship into which they had entered was not one of subordination. Treaties and treaty making are important elements in the work of reconciliation, but they need to be implemented and understood as relationships of mutual obligation and reciprocity rather than a strictly contractual set of rights.

Context and Location

The valley of the Nass River is the centre of the traditional territory of the Nisga’a people. The Nisga’a, who call the river *K’alii-aksim Lisims*, have lived at many village sites on its banks and up its forested slopes since time immemorial. Historically, they followed a pattern of seasonal movement as they harvested resources throughout the year, returning to semi-permanent villages for the winter. There are currently four main villages along the river – *Gingolx*, *Laxgalts’ap*, *Gitwinksihlkw*, and *Gitlaxt’aamiks*. All were Indian reserves before the treaty came into effect on May 11, 2000. *Gingolx*, which sits at the mouth of the Nass, was formerly called *Kincolith* and was founded in 1867 by a group of

Nisga'a Christian converts who settled there with the Anglican missionary Robert Doolan (Patterson 1989). Before a logging road connected the upriver villages to the town of Terrace, Gingolx was the gateway to the Nass and an important focal point for political activity around the land question. Laxgalts'ap, the next upriver village, whose name means "village on village," is the site of several thousand years of settlement (Boston and Morven 1996, 63). It was formerly known as Greenville after the Methodist missionary Alfred Green. Gitwinksihlkw, which lies on the north side of the river, has also been called Canyon City because the river narrows into a canyon near its location. Access to Gitwinksihlkw was by a narrow suspension bridge until a car bridge was completed in 1998. The uppermost and largest village is Gitlaxt'aamiks, formerly New Aiyansh. Nisga'a also live in towns and cities throughout British Columbia and beyond, including the northern towns of Terrace and Prince Rupert, as well as Vancouver.

Gitlaxt'aamiks is the administrative seat of the government of the Nisga'a Nation. It sits on high ground on the south side of the river. This is a recent location and not the traditional site of the village. The original village of Gitlaxt'aamiks was on lower ground on the north side of the Nass River. It was home to Sgat'iin, a prominent *sim'oogit*, or chief, who is famous for having provincial government surveyors escorted off his lands at musket point in 1881. They were accompanying Indian reserve commissioner Peter O'Reilly on his first attempt to lay out reserves on the upper portion of the Nass. During the late 1800s, the Anglican missionary James B. McCullagh established the village of Aiyansh in a grassy meadow just a few kilometres downriver from Gitlaxt'aamiks. Aiyansh grew as a settlement but suffered from flooding. After one particularly bad flood in 1961, the Department of Indian Affairs relocated the village across the river to the higher ground and it became New Aiyansh. The new village site was bare and rocky. People spoke fondly about their life in the former Aiyansh and told me that the flooding was caused by upriver log jams resulting from clearcutting operations that had been ongoing in Nisga'a territory since the 1950s.

McCullagh aimed to construct an economically independent Christian village along the lines of the Tsimshian village of Metlakatla, founded by the Anglican missionary William Duncan. Among other

things, Aiyansh had a sawmill that produced boards for the new Victorian houses that people were building, a tannery, a cannery, and a printing press (John Barker 1998, 441). McCullagh's approach was often combative, and people remember him for convincing their forefathers and foremothers to burn their ceremonial regalia and cut down their poles. Anglican and Methodist missionaries had reached the Northwest Coast during the mid- to late nineteenth century and invariably became embroiled in matters related to the land question in British Columbia. Some, such as the Methodist Alfred Green at Laxgalts'ap, supported the Nisga'a in their fight for recognition of their Aboriginal title and acted as a kind of cultural translator between them and government officials. Even McCullagh wrote to the superintendent general of Indian Affairs in 1876, saying that the peoples of the Nass and Skeena had come to the conclusion that "the government of the country was an organized system of land robbery" and that "every government official was to be suspected as a corrupt character and could be bought" (Cooper 1993, 387). Nisga'a converts brought traditional teachings into their interpretation of Christianity and were using the authority of the church to support their land claim by the mid-twentieth century (John Barker 1998).

Outside the Nass Valley, Terrace is the nearest town accessible by road from any of the villages. Terrace is on the Skeena River along Highway 16, which is also known as the Highway of Tears. More than two dozen mostly Indigenous women and girls have gone missing or been murdered along its isolated stretches. The 105-kilometre road from Terrace into the Nass Valley was built in 1958 by Columbia Cellulose, an American company headquartered in New York (Rajala 2006). The company pushed the road as far as the future site of New Aiyansh to facilitate access to Tree Farm Licence No. 1. This massive timber licence was granted to Columbia Cellulose by the provincial government in 1948. It covered 825,000 acres and approximately a third of Nisga'a traditional territory (Rajala 2006, 9). This road was unpaved until 2005. In May 2000, as I prepared to visit the Nass Valley for the first time, people repeatedly asked me if I knew how to change a flat tire because the road was so rough that punctures and flat tires were common. I was familiar with twisty gravel roads and the requirement of slow and careful driving; I was also lucky to have only one flat and to have help

fixing it. In my case, this was a temporary inconvenience. For residents of the Nass Valley, the unpaved road with its choking dust in summer and slippery dangerous conditions in winter stood for just how excluded they were from the wealth of British Columbia and Canada more broadly. The roads in the four villages themselves were also unpaved before the treaty came into effect, producing a layer of nose-clogging dust that coated everything in people's homes all summer long. The road from Terrace is now labelled Nisga'a Highway 113, for the 113 years it took to resolve the Nisga'a land claim.

The lava beds near Gitlaxt'aamiks and Gitwinksihlkw are one of the most striking features of the valley. They are the result of a volcanic eruption that took place approximately three hundred years ago. The eruption began at a cinder cone along the Tseax River, a tributary of the Nass. Lava flowed eleven kilometres northward down the Tseax Valley into the Nass Valley, covering a village and fish camps and killing at least two thousand people on the way. The flow pushed the Nass River across the valley and stopped just below the present location of Gitwinksihlkw. According to Nisga'a oral history, the eruption was a supernatural punishment that came after children had been playing with the salmon that were swimming upriver to spawn (Boston and Morven 1996, 148). The "chiefs warned the children they were being disrespectful," but the children unfortunately did not heed the warning (Canada, British Columbia, Nisga'a Tribal Council 1993, 82). Not long afterward, the volcano erupted, spewing lava, smoke, and poisonous gas into the valley. Elder Rod Robinson told me of explorers' log books that chronicle attempting to ascend the Nass River but being stopped by a wind so hot it took the paint off their ship's masts.⁸

A memorial park now covers much of the lava beds, including the crater. Co-managed by the Nisga'a Nation and the Province, it has a visitor centre and a small campground. The road between Gitlaxt'aamiks and Gitwinksihlkw crosses the lava beds, and the park includes an auto-route tour with self-guided stops for tourists. Some of the lava formations have anthropomorphic shapes, and standing alone on these beds can be an eerie experience. Guided hikes to the volcanic crater are also available.

Under the terms of the treaty, the Nisga'a Nation owns approximately 2,000 square kilometres in the Nass Valley, including subsurface and



The lava beds.

Photograph by author.

mineral rights. These are the core treaty lands and consist of 1,930 square kilometres of transferred Crown land and 62 square kilometres of former Indian Act reserve land (Rose 2000, 28). The Nisga'a also have constitutionally protected rights and interests, including rights to hunt or fish for food, social, and ceremonial purposes in 27,000 square kilometres known as the Nass Wildlife Area. The treaty requires that they be consulted on any project in this area that could be expected to have an impact on Nisga'a citizens, treaty rights, and lands. The treaty also provided a cash settlement of approximately \$250 million to be paid out over fourteen years. Nisga'a Lisims Government, which is the representative body for the Nisga'a Nation, put these monies in trust, where they remain today.⁹ The 1,992 square kilometres in the core area constitute 7 percent of the land claimed by the Nisga'a Tribal Council in its negotiations. This number and the boundaries established by the treaty are disputed by neighbouring First Nations, and the matter of overlapping claims is a critical weakness of the treaty negotiating process in British Columbia and Canada today.¹⁰ The text of the treaty is

just over 250 pages long, with an additional 450 pages in appendices. It sets out all the rights and jurisdictional authorities of the Nisga'a people in areas such as governance, lands and title, wildlife, forest resources, fisheries, justice, taxation, and citizenship. Nisga'a governance under the treaty includes four village governments and three urban locals in Prince Rupert, Terrace, and Vancouver. The elected representatives of the village governments and an elected representative from the urban locals all serve in the larger nation government known as the Nisga'a Lisims Government.

The Nisga'a treaty is the result of approximately twenty years of negotiations that began after *Calder*, a landmark Supreme Court of Canada judgment of 1973. However, the Nisga'a struggle for recognition of their Aboriginal title goes much further back, beginning in the second half of the nineteenth century. Nisga'a first encountered Europeans much earlier than that. In 1793, Captain George Vancouver sailed up the coast of British Columbia looking for a northwest passage. He ventured into the mouth of the Nass and explored parts of Portland Inlet but did not ascend the river (McNeary 1976). He met several people in canoes, probably Nisga'a, who expressed an interest in trade. In 1831, the Hudson's Bay Company established a trading post on the Nass near the present village of Gingolx. It was called Port Simpson but was also known as Fort Nass (Patterson 1983, 41). Its site is now occupied by the Gingolx cemetery. The tides and weather made Fort Nass an unsuitable spot, however, and the company moved farther south to what is now the Tsimshian village of Lax Kw'alaams. The Nisga'a were disappointed with this development because having the fort at the mouth of the Nass gave them trade advantages. Cooper (1993, 107) writes that by the late 1820s, "the Nisga'a were well supplied with muskets by American traders and they had gained a reputation as an aggressive tribe who tolerated no intrusions upon their river." From the beginning of their interactions with Europeans, Nisga'a vigorously maintained their independence and territorial rights, while also engaging the newcomers in trade in ways that were to their best advantage. This practice of strategic engagement carried on into treaty negotiations during the twentieth century.

The Crown colony of British Columbia was formed in 1859. In 1871, the colony joined Canada as its westernmost province. The Nass Valley

had already begun to attract settlers and the attention of the fishing, logging, and mining industries. First Nations throughout the new province were becoming increasingly worried about incursions into their territories and the theft of their resources. At the same time, provincial officials refused to acknowledge anything like Aboriginal title and declined to enter into treaties despite the precedent set in much of the rest of Canada. The history of the formation of British Columbia and the denial of Aboriginal title has been well told by others (see Fisher 1977; Foster 1995, 2007; Tennant 1990). Here I offer the main points of reference leading up to the negotiation of the Nisga'a treaty after 1973. I will return to aspects of this history at various times in the following chapters.

In 1881, Peter O'Reilly, the Indian reserve commissioner for British Columbia, travelled to the north coast to lay out reserves in Nisga'a and Tsimshian territory. At this time, many Nisga'a were particularly concerned about two new canneries that had opened at the mouth of the river. O'Reilly spent little more than one week on the Nass. Such a brief visit did not give him enough time to really consult with chiefs up and down the river. The reserves that he surveyed were "hastily allotted and ill considered" (Harris 2008, 73), and the whole process deeply alarmed the Nisga'a. They did not want reserves, they wanted recognition of their ownership and territorial rights. A few years later, in 1887, a group of Nisga'a and Tsimshian men travelled to Victoria to convey their concerns to Premier William Smithe. During their meetings with Smithe they expressed their desire to be "free" upon their land, asserting both their demand for recognition of their Aboriginal title and their authority to govern themselves outside of the Indian Act (Tennant 1990, 57). They asked for a public inquiry to be held into the land question and for a treaty. Smithe rejected their demands and said they were wrong to think they could get a treaty.

In 1907, Arthur Calder and Charles Barton spearheaded the formation of the Nisga'a Land Committee (Tennant 1990, 86). Calder structured the committee to include representatives from each of the four *pdeek* (tribes) and the four villages. The committee combined the essentials of Nisga'a tribal organization and hereditary leadership but was also a "planned political restructuring for the purposes of achieving greater

effectiveness in dealing with the white political system” (Tennant 1990, 86). Along with several other Aboriginal rights organizations that were then forming in British Columbia, the committee’s goal was to push the federal and provincial governments to recognize Aboriginal title and the obligations of treaty making (Tennant 1990). At a 1913 meeting in Gingolx, members of the Nisga’a Land Committee hired the lawyer and clergyman Arthur O’Meara to draft a petition to be sent to the British Privy Council. This petition asserted that the Nisga’a Nation held unsurrendered Aboriginal title, as a collective, and requested that the Privy Council rule on it (Haig-Brown 2005). A few years earlier, O’Meara had helped draft a similar petition for the Cowichan First Nation of Vancouver Island. Indeed, as the twentieth century began, multiple BC First Nations created petitions that “sought to revive the protective functions of the British Crown” (Feltes 2015; McHugh and Ford 2012, 32). The preamble to the Nisga’a petition included a statement that Nisga’a spokespersons have repeated time and again during their defence of the treaty:

We are not opposed to the coming of the white people into our territory, provided this be carried out justly and in accordance with the British principles embodied in the Royal Proclamation. If therefore, as we expect, the aboriginal rights which we claim should be established by the decision of His Majesty’s Privy Council, we would be prepared to take a moderate and reasonable position. In that event, while claiming the right to decide for ourselves the terms upon which we would deal with our territory, we would be willing that all matters outstanding between the Province and ourselves should be finally adjusted by some equitable method to be agreed upon which should include representation of the Indian Tribes upon any Commission which might then be appointed.¹¹

The proclamation referred to here was issued by King George III in 1763, and I will discuss it in more detail in [Chapter 2](#). It set out the basic requirements of treaty making between the Crown and Indigenous nations under British rule in North America. While they wanted to invoke the authority of the Crown at its highest level, the Nisga’a

had to send their petition to the federal government in Ottawa first. In March 1914, the federal Cabinet passed an Order-in-Council stating that the government would refer the petition to the Judicial Committee of the Privy Council in England only if the Nisga'a and by extension all other BC First Nations accepted three conditions. First, if the courts did rule in favour of Aboriginal title, the Nisga'a "would surrender the title completely in return for the same sort of treaty benefits awarded elsewhere in Canada." Second, they would accept the recommendations of the upcoming McKenna-McBride Commission on reserve allocations. And third, if a court case arose, they would be represented by lawyers hired for them by Canada (Tennant 1990, 93; Wickwire 2005, 307). Not surprisingly, the Nisga'a did not agree to these conditions.

This Order-in-Council galvanized Indigenous resistance across the province. First Nations in British Columbia continued to organize to defend their land and demand treaties throughout the first decades of the twentieth century. In 1927, the federal government amended the Indian Act to make it illegal (by virtue of section 141) for any person to receive or solicit any payment from an Indigenous person for the purpose of prosecuting a claim against the government (Tennant 1990, 112). Written with men such as Arthur O'Meara in mind, the amendment made it impossible for any First Nation individual or organization to hire a lawyer to assist with a land claim (Haig-Brown 2005). Section 141 was not removed from the Indian Act until 1951. After its removal, Frank Calder spearheaded the formation of the Nisga'a Tribal Council in 1955 (Tennant 1990, 123). By this time, Calder was a BC MLA and the first Indigenous elected representative in any legislative assembly in the Commonwealth.¹² He became the first president of the Nisga'a Tribal Council and served in that position until 1974, when James Gosnell was elected. The tribal council was incorporated as a society in 1963. Its mandate covered a broad range of social and economic issues but concentrated on negotiating and settling the comprehensive land claim based on Nisga'a Aboriginal title. Rod Robinson (Sim'oogit Minee'eskw) was another early founder and member of the tribal council. When I spoke with him, he reflected on how the council had held its first annual convention in a house in Greenville in 1955. Initially, its mandate was to "settle with the white man" a just and reasonable solution to the land question and

to improve living conditions in the valley.¹³ Robinson recalled that ten years later, during the tenth annual convention in Canyon City, people said, “We’ve talked and talked, now let’s test the white man’s law, let’s test British justice to see how just British justice is, let’s go to court.”¹⁴

In 1967 the Nisga’a Tribal Council took its case to the BC Supreme Court with the help of the young lawyer Tom Berger. In *Calder*, it sued for a declaration that Nisga’a Aboriginal title had never been lawfully extinguished in the province. It lost this case and then lost again in the BC Court of Appeal. In 1972, the tribal council took the case to the Supreme Court of Canada. The stakes in this case were particularly high. Losing would mean that the highest Canadian court had ruled against the presence of Aboriginal title in British Columbia, thereby quashing all other Aboriginal title claims in the province. When the Nisga’a decided to press ahead with their litigation, they lost many allies among BC First Nations. Of seven justices in the Supreme Court, six agreed that Nisga’a Aboriginal title had existed in the past. This was more than any BC government had ever agreed to. Three of the justices ruled that title had been extinguished by various ordinances, acts, and proclamations issued or passed by the colonial government of British Columbia before 1871, when the province joined Confederation (Godlewska and Webber 2007, 5).¹⁵ Three others ruled that it had not been so extinguished. The seventh, Justice Pigeon, abstained on a technicality.¹⁶ Even though the court split on the extinguishment decision, the *Calder* ruling opened the possibility that Aboriginal title still existed in British Columbia and elsewhere in Canada. The federal government responded to this development by establishing a process for receiving and negotiating comprehensive land claims where treaties had not previously been made, primarily British Columbia, Yukon, the Northwest Territories, and northern Quebec (Sanders 1999, 108). Completed comprehensive land claims are also known as modern treaties. Ottawa also began negotiating with the Nisga’a Tribal Council.

These negotiations started in 1976. The provincial government did not participate in them until 1990. Without the involvement of the province of BC, Nisga’a and federal government negotiators were confined to talking about things within federal jurisdiction, such as fishing and self-government on existing reserves. In Canada, the underlying title

to Crown land – about which I will say more in [Chapter 1](#) – is held in right of the provinces. The provincial government declined to join the negotiations because its elected officials refused to acknowledge the presence of unextinguished Aboriginal title. Their position was that there was nothing to discuss. Provincial leaders changed their approach to questions of Aboriginal land claims and the necessity of treaty making when the costs of uncertainty around land title in the provincial resource sector became too great to ignore (Blackburn 2005). In British Columbia, the late 1980s and early 1990s saw almost constant protests by First Nations against logging, mining, and oil and gas exploration in their traditional territories (Blomley 1996). This agitation was referred to as the “war in the woods.” Blockades against logging on Lyell Island in Haida Gwaii and in Clayoquot Sound on the west coast of Vancouver Island permanently halted operations at these locations (Blomley 1996). The costs to these industries were significant and drove political change in the province more than social or moral considerations (Blackburn 2005). A 1990 study by Price Waterhouse estimated that “almost \$1 billion of currently proposed mining and forest industry investments could be affected by the non-settlement of comprehensive land claims.”¹⁷

In 1993, Victoria established the BC Treaty Commission to oversee the negotiation of treaties in the province. The Nisga’a negotiations were already under way, and the Nisga’a treaty is *not* a product of the BC treaty process. The first treaty to come out of the BC treaty process is the Tsawwassen Final Agreement. Signed by the federal and provincial governments and the Tsawwassen First Nation in 2007, it came into effect in 2009. The Maa-nulth Final Agreement was concluded in 2006 and came into effect in 2011. Five First Nations on the west coast of Vancouver Island are parties to this agreement. The Tla’amin Final Agreement was signed in 2014 and came into effect in 2016. These treaties share some key features with the Nisga’a Final Agreement, and the First Nations who concluded them struggle with many of the same issues involving implementation. The BC treaty process was supposed to hasten treaty making in the province, but this has not occurred, and the few First Nations that have concluded their agreements are the exceptions in what is a very difficult process. Currently, over fifty First Nations are involved in the process: fourteen have reached the final agreement stage,

and thirty-six are negotiating an agreement in principle.¹⁸ Others have walked away from the table due to costs, time delays, and insurmountable differences with federal and provincial negotiating mandates on matters of lands, governance, and the scope of rights (de Costa 2008).

Ottawa, Victoria, and the Nisga'a finalized an agreement in principle in 1996 and a final agreement in 1998. The treaty was approved by a special assembly of the Nisga'a Nation held between October 5 and 7 in 1998. A referendum on the final agreement was held for Nisga'a citizens on November 6 and 7 of that year. Voting took place in the four villages and in the urban locals of Vancouver, Terrace, and Prince Rupert. It was restricted only to those individuals who were eligible to be enrolled in the treaty, which was one reason eligibility criteria became so important early on, as I discuss in [Chapter 3](#). In the referendum, acceptance or refusal of the treaty was determined by a simple majority of voters. Sixty-one percent of Nisga'a who were eligible to vote cast ballots in the referendum, 73 percent of whom voted in favour of the treaty. The final agreement was then brought to the BC legislature for debate and ratification. The legislature passed the bill in the spring of 1999 after a lengthy and acrimonious debate.

The treaty bill – Bill C-9 – was introduced in the House of Commons in October 1999 and moved into the Senate in February 2000. It was ratified, becoming law, on April 13, 2000, and then legally came into effect at midnight on May 10, 2000. At this time, the federal Liberal Party was in power and Jean Chrétien was the prime minister. The Reform Party under the leadership of Preston Manning was the Official Opposition. Reform was a right-of-centre party that began in Alberta and quickly rose to dominate the right in Canada. It built itself on a platform favouring free enterprise, lower taxation, private property, and minimal government spending. It opposed all forms of separate rights or collective rights for Indigenous people, Quebecers, or any minority. Reform MPs took every opportunity to oppose the treaty, dismissing it as a collection of race-based rights that entitled one set of Canadians at the expense of others.

In British Columbia, the treaty came into effect during the tenure of the New Democratic Party. Espousing left-of-centre politics, the New Democrats supported the agreement, and Premier Glen Clark

played an important role in getting it through the legislature even though he made the mistake of calling it a template for future treaties in the province. This comment would haunt Clark but was also not how the Nisga'a negotiators wanted their treaty to be viewed by other First Nations. In the provincial election of 2001, the Liberal Party won a huge majority and would remain in power for the next sixteen years. At this time, the BC Liberal Party had much more in common with the federal Reform Party than with the federal Liberals. They had not supported the treaty when they were in Opposition, and they had promised to hold a public referendum on treaty making in the province if they were elected. They delivered on their promise in 2002, and I will return to these events and the reasoning behind them in [Chapter 1](#). Before they were elected, Liberal leader Gordon Campbell launched a court case challenging the constitutionality of the Nisga'a Final Agreement. The Liberals' election in May 2001 was consistent with public perception around Aboriginal rights, title, and treaty making in British Columbia. More specifically, it was consistent with a vast amount of suspicion, resentment, and lack of awareness about the legal realities of Aboriginal rights and title. The Liberal Party now speaks a language of new relationships and reconciliation in respect of Indigenous issues but maintains a strong pro-industry, pro-resource-development orientation in all its governing and policy positions. It was in power from 2001 to 2017, at which point it was toppled by a coalition of the NDP and the Green Party.

Chapter Summary

The Nisga'a Final Agreement states that the Nisga'a Nation "has the right of self-government, and the authority to make laws" (Canada, British Columbia, Nisga'a Nation 1998, ch. 11, s. 1). [Chapter 1](#) examines the legal arguments over the source of this authority and the place of Indigenous government alongside federal and provincial governments. In Canada, this issue has drawn the attention of legal and constitutional scholars, as well as the highest courts. It has also prompted decades of Indigenous activism (Papillon 2014). The struggle to implement Indigenous jurisdictions is a struggle to make Indigenous legal orders possible within Canada. The Nisga'a treaty does not create any exclusive jurisdiction for

the Nisga'a Nation, but it does establish concurrent jurisdiction through which Nisga'a lawmaking is paramount in fourteen areas.

Traditionally, Nisga'a territory was divided into approximately forty segments or House territories. These are the *ango'oskw*. When the treaty came into effect, the Nisga'a Nation became the owner of 2,000 square kilometres of territory, representing 7 percent of their total claim. In the process, its Aboriginal title was modified into the Western property law concept of fee simple. [Chapter 2](#) explores how the state's criteria of legibility imposed this prerequisite but also how Nisga'a negotiators pushed for a broader, fuller fee simple to signal their ancestral inheritance and temporal priority on their territory. Throughout this chapter, I trace the complicated legal, political, and economic factors underwriting the transformation of property regimes on Nisga'a land.

Since 1975, all modern land claims agreements in Canada have included sections on enrolment and eligibility, which set out who is entitled to receive treaty benefits. To be enrolled as a citizen of the Nisga'a Nation and have access to the treaty rights, a person must have a Nisga'a maternal ancestor within four generations. The Nisga'a argue that this entails a return to traditional matrilineal practices and a rejection of patrilineal identity requirements of the Indian Act. Critics saw it as a proxy for blood, itself a signifier for race, and accused the Nisga'a of enacting race-based membership criteria. Some disparaged the treaty itself as a set of race-based "special rights" that violates democratic principles. In [Chapter 3](#), I show that matrilineal ancestry is not the same as blood, but that ideas about it are tainted by the past and present racialization of Indigenous people in Canada (Kauanui 2008; Sturm 2002). The misreading of genealogical forms of reckoning used by Indigenous peoples reduces them to the status of a racial minority (Kauanui 2008). The treaty creates a form of treaty citizenship for Nisga'a that should reflect the importance of treaties as mechanisms that mediate the respective rights, duties, and relational obligations between treaty partners.

[Chapter 4](#) discusses the treaty relationship between the Nisga'a and the federal government, which has proved disappointing to the Nisga'a. Broadly speaking, governments see a treaty as a legal mechanism whose purpose is to produce certainty around the scope and nature of

Aboriginal rights (Blackburn 2005). The Nisga'a criticism of the government's approach is that while it may fulfill the legal and technical requirements of the treaty, it does not fulfill the broader spirit and intent. They are now active in the Land Claims Agreements Coalition (LCAC), attempting to improve treaty implementation, and appear to be making some progress. Together, the members of LCAC have developed a model framework for a Modern Treaties Implementation Review Commission, and though they continue to lobby the federal government to develop this commission, their momentum is slipping as Ottawa turns its focus to the creation of a Rights Recognition Framework.

Notes on the Research

The research for this book began in 1999, when the Nisga'a Final Agreement was introduced in the House of Commons. My approach was multi-sited from necessity, as the legal document and the people who had worked on it were moving between the Nass Valley, Vancouver, and Ottawa (Marcus 1995). I began in Ottawa, where members of the Nisga'a Tribal Council had gathered as Bill C-9 was debated in the House and the Senate. During the fall of 1999, I watched the debate in the House of Commons and attended the meetings on Parliament Hill of the Standing Committee on Aboriginal Affairs as it reviewed the bill. I met members of the Nisga'a, provincial, and federal negotiating teams as this process unfolded. In early 2000, I travelled to Vancouver and Victoria, and then to Terrace, Prince Rupert, and the Nass Valley, following the routes that the treaty negotiators had taken as they logged miles between local, regional, provincial, and federal negotiating sites. I was in Gitlaxt'aamiks in May 2000 when the treaty came into effect, and I attended the celebrations in Gitwinksihlkw on May 11. The night before, I sat with a group of Nisga'a and non-Nisga'a treaty negotiators in Nass Camp as midnight approached, because the treaty would legally come into effect at the stroke of midnight. Nass Camp was a former logging camp that then featured a store, gas station, restaurant and pub, and trailers for rent. There was a lot of enthusiasm in the cabin that night among the lawyers and negotiators who had gathered for celebrations the following day. On May 11, I walked across the Gitwinksihlkw suspension bridge while the helicopter carrying BC premier Ujjal Dosanjh flew overhead

and landed in one of the few flat places by the river, delivering him for the festivities.

I returned to the Nass Valley in 2006, 2007, and 2011. I began following the work of the Land Claims Agreements Coalition in 2010 and first discussed its goals with elected Nisga'a officials Kevin McKay, who was the chief executive officer of Nisga'a Lisims Government, and Nelson Leeson, then president of the Nisga'a Nation, in Gitlaxt'aamiks in 2011. I attended two coalition conferences on treaty implementation in Ottawa. Both were critical to my appreciation of the goals of other First Nations and Inuit in Canada who have made modern treaties and the challenges they face regarding implementation.

Many, many Nisga'a women and men worked on the treaty negotiations over many years. Along with a core team of negotiators, specialized committees and working groups drew on expertise across the Nisga'a communities. Some examples are the Nisga'a Government Committee, the Lands and Resources Committee, the Fiscal and Implementation Working Group, the Nisga'a Constitution and Laws Working Group, the Lands, Access and Environmental Working Group, the Fisheries Committee, the Wildlife Working Group, and more. These and at least twenty other bodies were organized under the umbrella of the Nisga'a Tribal Council.¹⁹ The village governments also sent observers to the treaty talks, and representatives of other important community services, such as the Health Board, the Nisga'a School Board, and Wilp Wilxo'oskwhl Nisga'a Institute (the Nisga'a House of Learning), participated in the working groups leading up to the final agreement. Wilp Wilxo'oskwhl Nisga'a Institute is a pioneering post-secondary educational facility in the Nass Valley, now located in Gitwinksihlkw.

Among Nisga'a citizens there are many differing opinions and experiences of the treaty. I would not expect consensus in any community or set of communities, especially not on something this legally complicated and so fraught with the weight of historical injustice and hope and expectations for the future. While some of these differences become apparent in this book, I do not claim to capture the full gamut of community views on and experiences of the treaty. These views and experiences are diverse and changing, as one would expect. During my research, I spoke with treaty negotiators, politicians, bureaucrats,

political activists, Nisga'a citizens and government workers, lawyers for the Province, lawyers for the federal government, and lawyers for the Nisga'a. People shared a range of perspectives on the treaty: some were for it, others against it, and some wanted to see how it all evolved over time. Most interviews and conversations were on a not-for-attribution basis to ensure that people could comment freely. I am indebted to the negotiators on all sides who spent long hours explaining legal complexities to me. In places throughout this book, I discuss some aspects of Nisga'a culture in relation to provisions of the treaty. I base these passages on the generous explanations given me by elders, as well as on written sources including the invaluable four-volume *Ayuukhl Nisga'a Study* produced by the Nisga'a Tribal Council in 1984 and then republished in 1995. Another important source was *From Time before Memory*, a book produced by Nisga'a School District No. 92 (Boston and Morven 1996). These sources represent the knowledge and expertise of generations of Nisga'a men and women. Any errors of characterization are mine alone.

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