Sharing The Land: The Formation of the Vancouver Island (or 'Douglas') Treaties of 1850-1854 in Historical, Legal and Comparative Context

by

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BA (Hons.) University of Victoria, 1969
LLB, University of British Columbia, 1974
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of the Requirements for the Degree of
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Supervisory Committee

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Abstract

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Chapter I introduces the Vancouver Island or 'Douglas' Treaties of 1850-54, entered into between several Vancouver Island First Nations and Hudson's Bay Company Chief Factor, James Douglas, acting as agent of the Crown. The written versions purported to extinguish the aboriginal title of the First Nations to their land. Recent research has indicated that these documents do not accurately reflect what was agreed between the parties at the treaty meetings. The goal of the dissertation is to ascertain the likely terms of the treaties. This task also posed my major research challenge, as very little contemporaneous documentation exists of the formation of the treaties. There are a number of first- and second-hand accounts reduced to writing long after the events described, but they have received little attention from scholars until now. Chapter II is devoted to a critical analysis and comparison of the extant First Nation and colonial accounts, from which I conclude that the treaties were likely agreements by the First Nations to share not cede their land. Chapter III makes a comparison with first person accounts of the Washington or 'Stevens' Treaties of 1854-55, entered into between

Native American tribes and the United States government. I conclude that these accounts bolster the likelihood that the Vancouver Island agreements were sharing treaties. Chapter IV follows up on a fascinating connection between the written versions of the Vancouver Island Treaties and an agreement concerning land between the Ngai Tahu Moari of New Zealand's south island and Henry Kemp, acting as agent of the Crown. The comparison provides a number of useful contrasts and parallels with the Vancouver Island Treaties. Chapter V describes the silencing of the Vancouver Island Treaties by the policies of successive governments, the inattention of scholars and the decisions of Canadian courts. Finally, Chapter VI reviews existing and potential categories of historical treaties between First Nations and the Crown. By analogy with treaty categories in international law and the work of political and legal theorists, I make the case for the Vancouver Island Treaties as examples of modus vivendi (interim or framework agreements).

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Dedication

I would like to acknowledge that much of what I know about treaties I learned from the long-deceased First Nation elders who had the courage to speak out about the Vancouver Island Treaties during their lifetimes. Therefore, it is with gratitude and affection I dedicate this dissertation to the memory of Dick Whoakum, Bobby Yaklam, Joe and Jennie Wyse, and Chief David Latass.

Chapter 1: Introduction

A. Background

On October 16, 2010, the Douglas Treaties made a brief appearance in the media. The Victoria Daily Colonist newspaper reported that members of the Tsartlip First Nation had blocked a public road running through their reserve. According to Chief Ivan Morris, this was done because, "the federal government has failed to live up to the terms of the Douglas treaty signed in 1852."[1] The incident soon dropped out of the news, but First Nations continue to bring unresolved treaty issues to the attention of the public in various ways, including demonstrations and court proceedings. In my opinion, these will continue and intensify until non-First Nations people living within treaty territory, whether on Vancouver Island or across Canada, arrive at a better understanding of how such treaties came to be. My dissertation is intended as a contribution to that process.

How could an interested reader of the Colonist article learn more about what happened in 1852? The obvious answer is a quick Google search, which brings up a Wikipedia entry stating that, "The Douglas Treaties, also known as the Vancouver Island Treaties or the Fort Victoria Treaties, were a series of treaties signed between certain indigenous groups on Vancouver Island and the Colony of Vancouver Island."[2] The entry goes on to say that, "For four years [1850-54] the governor, James Douglas, made a series of fourteen land purchases from aboriginal peoples," and "These fourteen land

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[1] Katie DeRosa, "Tsartlip Blockade Severs Traffic Artery," *Times Colonist* (Victoria, BC), 17 October 2010, 1.

[2] "Douglas Treaties," *Wikipedia*, accessed 14 July 2015, https://en.wikipedia.org/wiki/Douglas_Treaties.

purchases became the fourteen Treaties that make up the Douglas Treaties." That seems straightforward enough, but what did the First Nations get in exchange? Another Google search brings up a federal government site entitled, "Treaty texts – Douglas Treaties,"[3] reproducing the text of each land purchase. The documents confirm that Douglas paid some money and made promises concerning reserves, hunting and fishing. Unfortunately, there's a problem.

In 2006, the Supreme Court of Canada, in the case of *R. v. Morris and Olsen*,[4] discussed the Saanich Treaty and noted that, "the treaty was concluded orally" and "subsequently reduced to writing." Legal Historian Sidney Harring has acknowledged that "the process of making the treaties…was faulty by any standard,"[5] but felt that the problem "…does not alter their validity, as long as the words that were eventually added fairly recorded their oral agreement." However some have argued that the written document does not accurately reflect the terms of the oral agreement.

For example, in 1984, Judge Lambert of the B.C. Court of Appeal, in *R. v. Bartleman*,[6] reported that, "I have examined, at the provincial archives, the foolscap notebook inscribed "Register of Land Purchases from Indians," where the written components of the 11 Fort Victoria treaties were recorded," and concluded that "I do not think that the text of the land grant recorded in the "Register of Land Purchases from

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[3] Aboriginal Affairs and Northern Development, "Treaty Tests – Douglas Treaties," accessed 14 August 2015, https://www.aadnc-aandc.gc.ca/eng/1100100029052/1100100029053.

[4] *R v Morris*, 2006 SCC 59, [2006] 2 SCR 915 at para 24.

[5] Sidney L. Harring, *White Man's Law: Native People in Nineteenth Century Jurisprudence* (Toronto: University of Toronto Press, 1998), 192.

[6] *R v Bartleman*, [1984] 55 BCLR 78 (BCCA) at para 41.

Indians" should be regarded as anything more than some evidence of what was generally agreed to." In 2008 Lambert's position was echoed by legal historian Douglas Harris,[7] who concluded that "…the treaties are best understood as oral agreements," and the written text "…should be considered as evidence of the terms of those agreements, not as the agreements themselves," because the written text "…provides little or highly qualified evidence, at best, of how the Native participants understood the agreements." Although it should be possible to ascertain the terms of the oral agreements by reference to contemporaneous records, again there is a problem.

In 2002, eminent historical geographer, Cole Harris, stated that, "the purchase agreements were oral understandings, the terms of which have been lost."[8] This is not an unreasonable conclusion, when the circumstances surrounding the formation of the treaties are set out. The only contemporaneous report was this laconic entry in the Fort Victoria Journal for April 29th, made by HBC clerk Roderick Finlayson: "In the evening the proprietors of the tract of country lying between the headland and point M^{c}Gregor were paid for their land. They…got 3 [blankets]… each at which they appeared well satisfied."[9] Eight more treaties were concluded over the next two days, but none of these meetings were described in the Fort Journal. None of the words spoken by the First Nations' representatives were recorded. No minutes or other written memorandums of the terms of the agreements were produced at the time, other than lists of the names of First

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[7] Douglas C. Harris, *Landing Native Fisheries: Indian Reserves and Fishing Right in British Columbia, 1849-1925* (Vancouver: UBC Press, 2008), 24.

[8] Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: UBC Press, 2002), 25.

[9] Hudson's Bay Company Archives (hereafter HBCA), Fort Victoria Journals (1846-1850), Ref.# B.226/a/1, Reel 1M149. Also available online at http://www.fortvictoriajournal.ca/.

Nations representatives (with crosses beside each name), followed by the names and signatures of two HBC employees. What documentation *does* reside in the archival record?

On May 16th Douglas wrote a two and a half page letter to HBC headquarters in London, summarizing his version of events.[10] Thirty-six years later, Joseph McKay, who was witness to seven of the nine 1850 Treaties, wrote a two page account of the meetings,[11] which represents the third and final first-hand account by a European. In his letter McKay mentioned the presence of a translator, Thomas,[12] also an HBC employee.

Other than First Nation representatives and HBC employees, who was present? It is impossible to tell from extant records. Only one independent colonist, Walter Colquhoun Grant, had arrived on the Island, but there is no record of his attendance at the meetings. The only clerics in Victoria at the time were the Reverend R. J. Staines,[13] and an Oblate Father, Timothy Lempfrit,[14] but, again, there is no record of their attendance. British and American naval vessels and merchant ships often stopped at Victoria, but there are no ships' log entries or letters by officers or passengers mentioning the

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[10] Hartwell Bowsfield, ed., *Fort Victoria Letters 1846-1851* (Winnipeg: Hudson's Bay Record Society, 1979), 94.

[11] British Columbia Archives (hereafter BCA), Joseph William McKay Fonds, PR-0560, MS-1917, file 27, Letter from Joseph McKay to Dr. James S. Helmcken, 3 December 1888.

[12] Also known as Tomo Ouamtomy and Tomo Antoine. His qualifications as a translator are discussed in Chapter II.

[13] Staines, a Church of England minister, arrived at Fort Victoria in March of 1849 and started a school for the children of HBC officers. See Madge Wolfenden, "Staines, Robert John," in *Dictionary of Canadian Biography*, Vol 8 (Toronto: University of Toronto/Université Laval, 2003), accessed 14 October 2015, http://www.biographi.ca/en/bio/staines_robert_john_8E.html.

[14] Lempfrit arrived at Fort Victoria in June 1849 on the same ship that carried Douglas and his family to their new home. He immediately set up a school for the children of the Company's Metis employees. See Edith E. Down "The History of Catholic Education in British Columbia, 1847-1900," *Study Sessions*, 50 (1983): 569-90.

meetings. The nearest newspaper was in the Oregon Territory,[15] so no journalists were present. One might have expected such colourful events would be memorialized by a painting or sketch, but there is nothing. The same scenario held true for the remaining five treaties, negotiated between 1851 and 1854.

All of this has led Douglas Harris to suggest that, "…given the thin documentary and oral history surrounding the treaties, the written texts assume particular importance."[16] While true, focusing research on the four corners of the document, supplemented only by Douglas' correspondence, has become a largely sterile exercise. I have called the glaring absences in the colonial record the first silencing of the VI Treaties.[17] Given the dearth of contemporaneous and later first person accounts by Europeans, attention naturally turns to the possibility of filling the gap with First Nation accounts. Yet again there is a problem.

While I have been able to identify five first-person First Nation accounts, only one is clearly first-hand, and all were reduced to writing long after the events described. Without exception the accounts were translated, and all but one told to journalists, who published their stories in newspaper articles. As such, they are not usually considered by historians as primary sources, thereby reducing or eliminating their usefulness as accounts of what they purport to describe. This is understandable given the unorthodox nature of such accounts, and the challenges of extracting useful information from them.

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[15] The Oregon Spectator was founded in 1846 and ran until 1855. "Historic Oregon Newspapers," University of Oregon Libraries, accessed 3 November 2015, http://oregonnews.uoregon.edu/.

[16] Douglas C. Harris, "The Boldt Decision in Canada: Aboriginal Treaty Rights to Fish on the Pacific," in *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest*, ed. Alexandra Harmon (Seattle: University of Washington Press, 2008), 140.

[17] While the first silencing appears to have been a matter of happenstance, the second silencing, as described in Chapter V, has been a mixture of happenstance and deliberation.

However, responsibility for the shortcomings of the accounts does not lie with the authors. They were endeavouring with remarkable courage and persistence to voice their understandings in an indifferent and often hostile environment. Therefore, they should not be punished for failing to meet today's historiographical and legal standards. As well, they represent almost the only window into the First Nation understanding of what transpired. For these reasons, they should not be discarded out-of-hand, and every effort must be made to identify any insights they are capable of providing. Taking these accounts seriously offers the possibility of an entirely new perspective on the treaties, namely a crucial insight into the First Nation understanding, which in turn allows new questions to be asked of the colonial documents and correspondence.

What are the limits of what can be achieved by such an undertaking? Historian Adele Perry has remarked upon "the absences that so often appear in the historiography of British Columbia" in general, and that "[t]he most remarkable pattern of silence probably concerns Aboriginal peoples," with the result that "…our knowledge of their place in British Columbia's history remains tellingly fragmented and episodic."[18] She also noted that "[t]he problem of historical absence prompts no simple solutions," and that "[f]inding new sources, new ways of reading old sources, and remaining conscious and critical of the extent to which our practice is created by, and in turn creates Western knowledge will help keep the problem of absence at bay, but it will not and cannot resolve it."[19] That is good advice, which I have endeavoured to follow. As the next

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[18] Adele Perry, "Forum: On Not Going on a Field Trip: Presence, Absence, and the Writing of BC History," *BC Studies*, 132 (Winter 2001/2002): 61.

[19] Ibid., 63.

section of the chapter demonstrates, I have found new sources (the First Nation accounts) and new ways to read old sources (the colonial accounts), while remaining cognizant of the fact that they can only ameliorate not eliminate the silence. Finally, it must be kept in mind that the First Nation accounts are not the treaties either, but only, to repurpose the words of Judge Lambert, "some evidence of what was generally agreed to." The strategies I have applied to the task are set out in the next section.

B. Organization

This section describes the choices I have made which influenced the form and content of the dissertation. It seems that a dissertation is full of choices, and I have attempted to make them explicit throughout, but some need to be dealt with at the very beginning. For example, I have chosen not to frame my dissertation around a particular formal methodology or theory. Methods and theories have been called into service when and where I believe they have the potential to solve problems and advance the goals of the dissertation. Many of the choices do not fit comfortably into either category, and are dealt with first.

1. Choices

In the dissertation title I describe the treaties as "Vancouver Island" first, and "Douglas" second. I believe the phrase "Douglas Treaties" identifies them too closely with only one of the parties. My search for a non-colonial alternative was not entirely successful, and I ended up compromising with the geographic descriptor, "Vancouver Island Treaties," which is reserved for the oral versions. I have also coined the phrase "Douglas Forms" to identify the written versions, both to emphasize that they are not the treaties, and to avoid confusion.

The dissertation title begins with the phrase "Sharing the Land." This is a reference to the crucial, but little noticed, aspect of historical treaties between First Nations and the Crown: they purport to set out the terms of their coexistence on the *same* area of land. In other words, they represent an attempt to allocate the occupation and use of that land between the parties. Identifying the likely terms of that agreed allocation is the major goal of the dissertation, and how to go about that task is the major challenge.

My decision to focus on the treaty relationship as it relates to land brought with it a number of terminological issues. As a retired lawyer, I am (too) familiar with the terminology of western 'property' law, and completely unfamiliar with Indigenous legal concepts concerning land. Coming up with neutral terms has been a challenge. I soon realised there are no perfect alternatives, and that my choices had to be of the 'make-do' variety. Wherever possible I use the term 'land' in lieu of 'territory', a concept that has both legal and anthropological connotations and complications. I have eschewed the words 'property' or 'ownership', as they are too closely related to notions of western law. As well I avoid the word 'possession' as too closely related to western notions of Indigenous relationships to the land. My compromise is 'occupation and use'. The word 'allocation' is used rather than 'sale', 'transfer' or conveyance' for similar reasons. In the same vein, I use the term 'control' instead of 'jurisdiction' as it too is a term of art in law. For the sake of convenience, I use the term 'resources' as a way to describe collectively the minerals, plants and animals utilized by First Nations and non-First Nations inhabitants of the region.

Another important early decision was to restrict my research to voices present only in the archival record, and not to interview any living people as to their

understanding of the treaties. The reasons are twofold. First, after fifteen years of attentive listening and occasional discreet inquiries, I have not heard of any unrecorded oral traditions as to the formation of the treaties. Secondly, I did not interview any First Nation elders on the subject because I do not have requisite expertise, experience, or close relationships with elders necessary to yield meaningful results. Nonetheless, I believe that the five First Nation archival accounts I describe and analyze in Chapter II of the dissertation provide a solid base upon which future researchers can build.

Another crucial choice (noted in the dissertation title) was to focus on the *formation* of the treaties. My treatment of events leading up to and following upon the treaty meetings is designed mainly to provide context and insight into those pivotal events. The pre-treaty section of Chapter II looks outward to the early history of the region, and gradually narrows its focus to Vancouver Island and the sites of the treaty meetings. The goal is to understand, as much as is possible, the influence earlier events may have had on the treaty proceedings. I devote part of Chapter V to post-treaty history, but an entire dissertation could be built on the fate of the treaties from their inception to the present. I believe the post-treaty history of the treaties can be understood as the interplay of silence and voice: how government (in)action, scholarly neglect and judicial intransigence silenced the Vancouver Island Treaties, and how they were given voice by First Nation spokespeople, who against all odds, broke the silence. My goal in Chapter V is twofold: to tell this story, and to describe the evolution of the interpretation of the treaties by officials, scholars and judges.

Not surprisingly, my forty years in the workforce has exerted an influence on the way the present project has unfolded. My training and experience as an anthropologist

has conditioned me towards self-reflexivity (hence the present exercise), a firm belief in the value of context (duly noted in the dissertation title), a willingness (with all due caution) to make cross-cultural comparisons, and a wary attitude towards the classic ethnographies of the Northwest Coast.[20] My masters thesis on the concept of 'culture',[21] demonstrated that it has too many definitions, and that any use of the term must be accompanied by a working definition. Accordingly I have adopted the phrase 'way of life' as a handy designation for the political, legal, social, spiritual and economic institutions that comprise the culture of an organized society at a particular time, in this case the treaty First Nations mid-nineteenth century. I make no attempt to fill in the content of the cultures of the treaty First Nations (that is the job of ethnologists and Indigenous scholars), except as explicitly mentioned in the First Nation accounts examined in the dissertation. That is why I chose not to include "anthropological" in the list of "contexts" in the dissertation title. As an anthropologist I am also reluctant to use the phrase 'oral history', because its meaning is hotly contested in the anthropological and legal worlds, and (in my opinion) nothing is lost and much confusion avoided by eschewing the label for present purposes.[22] I do use the phrase "oral tradition," but only to designate the multi-generational story of the Saanich Treaties, as described at the end of Chapter II.

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[20] The last comment explains why the title of the dissertation does not include a reference to anthropology. While I frequently refer to articles and books by anthropologists, I have avoided the use of ethnographic material in the dissertation.

[21] Neil Vallance, "The Use of the Term 'Culture' by the Supreme Court of Canada: A Comparison of Aboriginal and Non-Aboriginal Cases Since 1982," (master's thesis, University of Victoria, 2003).

[22] I discuss the issue in more depth in Chapter II.

In my years spent researching and writing historical reports on Specific Claims by First Nations I have used over and over again many of the documents that I relied upon in this dissertation and I needed to employ "radical looking"[23] to see them afresh through "new and different lenses." Preparing those reports also ingrained in me a tendency to quote frequently and at length from primary sources. I have continued that practice in the dissertation for two reasons. The first is that they should be presented 'warts and all', and not subjected to my editing. Secondly, reproducing them at length allows the reader to assess the adequacy of my analysis. In the dissertation I also quote frequently from the secondary literature, rather than paraphrase. I do this when I feel that the author has made a point as well or better than I could, as long as it does not interfere with the narrative flow. The dozens of historical reports that I have drafted on Specific Claims share a (required) strict adherence to chronology, which is generally followed in the dissertation, with occasional attempts to free myself from that straitjacket. Finally, my research into First Nation claims alleging breaches of the Vancouver Island Treaties has infected me with an abiding passion to delve as deeply as possible into the mysteries surrounding their creation.

My career as a general practice solicitor (sometimes described as an office lawyer) gave me a dislike of jargon (legal and academic), some skill in drafting plain language documents, and a healthy scepticism about the utility of litigation as a way to solve problems. The presence of the word "legal" in the dissertation refers to my critical review of the Canadian cases on aboriginal law in Chapters V and VI. It should be made

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[23] Peter Clough and Cathy Nutbrown, *A Student's Guide to Methodology: Justifying Enquiry* (London: SAGE Publications 2007), 24.

clear that my legal background has not equipped me to render any opinions as to the reception of British law in the Colony of Vancouver Island, or the content of the Indigenous law of the First Nations of Vancouver Island. For the purposes of this dissertation I adopt the legal definition of "treaty" as articulated by Chief Justice Lamer of the Supreme Court of Canada in the case *of R. v. Sioui* in 1990: "…it is clear that what characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity."[24] The reasons in favour of this definition are discussed at length in Chapter VI. Chapter VI also brings together all aspects of my background in a wide-ranging exploration of treaty categories in history, Canadian law, international law and legal pluralism. The goal of this synthesis is to make a contribution to 'de-colonizing' the existing typology of historical treaties between First Nations and the Crown in Canada.

My emerging role as an expert witness in treaty litigation is a choice, but it is also a responsibility I feel to communicate the results of my work in a courtroom setting, despite my misgivings about the adversarial process. On behalf of counsel for a local First Nation I have written an expert report on one of the Vancouver Island Treaties for use at trial in a treaty case before the Supreme Court of British Columbia. The report is based on (an earlier draft) of Chapter II, and early drafts of the Washington and New Zealand comparisons are attached as Appendices to my report. While it is not unusual in an academic study to leave difficult questions unanswered, an expert report requires opinions, based on the writer's knowledge of the historical record, in response to a list of questions posed by instructing counsel. Having assessed the relative probability of

[24] *R v Sioui*, [1990] 1 SCR 1025 at 1044.

competing points of view in the expert report, I feel an obligation to do no less in the dissertation. Where possible I have reconciled accounts which appear to be in conflict, but where that cannot be done, I have indicated my preferences.

2. Methods

No formal methodology is adopted, although I toyed with discourse analysis and the case study. To compensate for the lack of primary documents, and the problems embedded in the extant documents, I have used critical analysis, comparison and analogy. The First Nation and colonial accounts of treaty formation in Chapter II were both subjected to a close reading and critical analysis. In this task I was guided by the "Documents" chapter of *The Good Research Guide*,[25] which suggests that primary documents should be subjected to the eight questions which follow. What was its ostensible purpose? Who wrote it and what is known about that person? Is it a first hand account and how long after the event was it written? Is it the original? Has it been edited in any way? Are there any words that need explanation?

With respect to the five First Nation accounts, I took heed of the warnings of literary studies scholar, Sophie McCall,[26] concerning "told-to narratives." She noted that historically, in the production of such works, "non-Aboriginal recorders" collected, edited, and structured "stories by Aboriginal narrators," and then subjected them to "numerous changes, omissions, and manipulations, while claiming sole authorship on the title page." McCall noted that such productions are often considered "synonymous with

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[25] Martyn Denscombe, *A Good Research Guide for Small Scale Social Research Projects* (Maidenhead: Open University Press, 2007), 232.

[26] Sophie McCall, *First Person Singular: Aboriginal Storytelling and the Ethics of Collaborative Authorship* (Vancouver: UBC Press, 2011), 2.

literary colonization" and not worth further study, but she believes that there *is* value in the critique of old narratives, provided they make visible "the degrees of authorship and degrees of collaboration between storytellers, recorders, translators, editors and authors."[27] To the limited extent possible, I have made visible the parts played by the participants in the production of each of the five stories presented in Chapter II. Of course, I am not exempt from McColl's warnings, and I have worked hard to make visible my influences and biases in the presentation and critical analysis of these stories. To be clear, I am not speaking *for* the authors of the first person accounts. I see my role as clearing away barriers to the understanding by non-First Nation audiences of the message the First Nation spokespeople were trying to communicate so long ago.

A related concern is effect of time on the accuracy of accounts. For example, all four of the First Nation account-givers were all very elderly when their stories were recorded. The same concern applies to the important first-hand account of Joseph McKay, presented in Chapter II. He was witness to seven treaty meetings but did not put his recollections in writing for thirty-eight years. The dangers of relying upon memory have been forcefully described by historian Allan McGill in his book *Historical Knowledge, Historical Error: A Contemporary Guide to Practice*.[28] Another effect of the passage of time is the 'tainting' of accounts by outside influences. Anthropologist Bruce Miller has comprehensively examined the issue in his monograph *Oral History on Trial: Recongizing Aboriginal Narratives in the Courts*.[29] He pointed out that the effect of

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[27] Ibid., 5.

[28] Allan McGill, *Historical Knowledge, Historical Error: A Contemporary Guide to Practice* (Chicago: The University of Chicago Press, 2007).

[29] Bruce Granville Miller, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts* (Vancouver: UBC Press, 2011).

subsequent knowledge on the accounts is not all that different from the effect upon historians of reading historical documents and ethnographies. A related issue is the effect of time on the motivations of the storytellers. Anthropologist Julie Cruikshank has canvassed this aspect in her book *The Social Life of Stories: Narrative and Knowledge in the Yukon Territory*.[30] She noted that stories often evolve over time to ensure that they remain relevant to succeeding generations of listeners, and to reflect changing political currents. All of these factors have been raised in treaty claims as reasons to dismiss accounts provided long after the events they purport to describe. However, that is no longer an acceptable option in the case of the Vancouver Island Treaties, and all that I can do is identify wherever possible instances of memory failure, outside influence and political bias. As a final note on the subject, I would endorse the following comment made by historian Keith Thor Carlson concerning an even more outré set of stories: "…such narratives as these sit awkwardly against the historical records preserved in archival documents and interpreted through scholarly histories," but "to dismiss such stories is to close the door on another way of knowing – and to the possibility of building future respectful relations built on the foundations of past ones."[31]

In Chapter II the First Nation accounts of treaty formation are presented first, and the non-First Nation accounts, second. The intentional reversal of the standard order of presentation is intended to make the First Nation accounts the standard against which other accounts are measured. My goal was to find out if this approach produced a

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[30] Julie Cruikshank, *The Social Life of Stories: Narrative and Knowledge in the Yukon Territory* (Vancouver: UBC Press, 1998).

[31] Keith Thor Carlson, "Aboriginal Diplomacy: The Queen Comes to Canada and Coyote Goes to London," in *Indigenous Diplomacies* (London: Palgrave, 2009), 159; The accounts related by Carlson are briefly described at the end of Chapter II.

different picture of events and their outcomes. My idea is not unique. A similar approach was proposed by Cardinal and Hildebrandt, who also believed that usual order of presentation of treaty accounts should be reversed. They set out the following order for future studies of the Numbered Treaties: "1. oral evidence and oral history of Treaty First Nations; 2. treaty Commissioners' reports, writings, and documents, 3. Records of missionaries, NWMP, and other eyewitnesses who accompanied the treaty parties… and 4. the so-called articles of the treaty."[32]

By presenting, for the first time, a detailed review and analysis of the First Nation accounts, I have also made possible another first, namely the comparison of the two sets of accounts. Writing expert, Kerry Walk,[33] has identified two ways to make comparisons, namely the "classic" method, and the "lens" or "keyhole" method. The first is a comparison of A and B, in which A and B are weighted equally, and that is how I have compared the colonial and First Nation accounts. According to Walk, such research may encompass two superficially similar things that "have crucial differences, yet turn out to have surprising commonalities." In other words, the First Nation accounts can provide surprising insights into the colonial accounts, and vice versa.

Another way to gauge the credibility of the extant First Nation accounts is to compare them to Indigenous accounts of similar agreements concerning land in other locales. I chose to make two comparisons. For the sake of consistency I used the same approach in these chapters as in Chapter II, namely to mine the archival record for the

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[32] Harold Cardinal and Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is that Our People Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000), 50.

[33] Kerry Walk, "How to Write a Comparative Analysis," The Writing Center at Harvard University, accessed 14 August 2015, http://www.fas.harvard.edu/~wricntr/documents/CompAnalysis.html.

earliest extant accounts by Indigenous spokespeople of treaty formation, and to then compare them with the colonial or government accounts. The first comparison, in Chapter III, is with the Stevens Treaties of 1854-1855, between several Native American 'tribes' living in the northwest corner of what is now Washington State, and the United States Government. The other comparison, in Chapter V, is with a pair of mid-nineteenth agreements in New Zealand, between the Maori people and the British Crown. For these comparisons, I have used Walk's second method, a "lens" or "keyhole" comparison. In this kind of comparison A is less heavily weighted than B, in effect using A as "a lens through which to view B." Thus, I have used the Washington Treaties and the New Zealand agreements ("A") as lenses through which to view the Vancouver Island Treaties ("B"). In other words, the point of the Washington and New Zealand comparisons is mainly to provide insights into the Vancouver Island Treaties, although much is learned about the comparators in the process.

I have repeatedly mentioned the capacity of my intended work to provide 'insights', and it occurred to me that a definition would be useful. The (online) Cambridge Dictionary provides a good definition: "a clear, deep and sometimes sudden understanding of a complicated problem or situation."[34] Collecting insights is all well and good, but for this project something further is required. That additional step is to transform the insights into analogies. Lens (or keyhole) comparisons can also be seen as analogies, which, depending on their strength, have the potential to increase or diminish the persuasiveness of an argument. My 'bible' for arguing by analogy is an unassuming little book called *Logic* by Wesley C. Salmon. While extremely helpful, the book can

[34] Ibid.

only provide guidance to a certain point. Salmon noted that the "strength" of an analogy is dependent on the number of "relevant" similarities, and "Relevance cannot be determined by logic alone – the kind of relevance which is at issue in analogical arguments involves factual information."[35] Thus analogies can be weak or strong, depending on the relevance of the factual similarities. This brings me back to the Washington and New Zealand comparisons. They must demonstrate quality (relevance) not just quantity, if the conclusions I wish to draw from the comparisons are to be persuasive. In the case of the Washington Treaties, my hope is that a treaty experience so close in time and geography to the Vancouver Island Treaties will allow the drawing of strong analogies. The New Zealand experience is close in time but not geography. However, there is a direct connection between one of the New Zealand agreements and the Douglas Forms, which allows for meaningful insights into the treaty-making process between British governments and Indigenous peoples in the mid-nineteenth century.

3. Theories

In my mind the twin goals of theory are to provide explanation and understanding. This short section on theory begins with a consideration of comparison as a low-level theoretical generalization. A history of the Vancouver Island Treaties could consist of a simple recitation of archival records strung together into a chronological narrative. However, the treaties cry out for some level of theoretical generalization, which has not been undertaken to date. One option is to rely upon simple "empirical generalization," such as a comparison of 'A' and 'B', disclosing similarities and differences, in turn

[35] Wesley C. Salmon, *Logic* (Englewood Cliffs, NJ: Prentice-Hall, 1963).

yielding insights into both.[36] Sociologist Martyn Hammersley confirms that making comparisons and drawing analogies, "…lead us to see things differently, to see possible parallels and links that we had not noticed."[37] For the purposes of Chapters II, III and IV, I believe this is sufficient.

Another option is to see historical events through the lens of the "grand theory." In the right hands, the concepts of major theorists can be a useful lens through which to examine historical events. An excellent example is the application by historian Paige Raibmon of Foucault's genealogical method to critique the Indian reserve system developed in British Columbia.[38] Historical geographer Daniel W. Clayton has also used Foucault in his 2000 book entitled *Islands of Truth: The Imperial Fashioning of Vancouver Island*. For Clayton, "There are thinkers who you think with to such an extent that they become part of you but are barely mentioned by name. For me, that thinker is Foucault."[39] His book covers the history of contact among First Nations, explorers and traders on Vancouver Island between the arrival of Captain Cook at Nootka Sound in 1778 and the formation of the Colony of Vancouver Island in 1849. Presumably I could carry his project forward into the colonial period, also using Foucault as my guide. However, I am not comfortable with the adoption of a major theory or theorist to shape or infuse my research.

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[36] Allan G. Johnson, ed., *The Blackwell Dictionary of Sociology* (Oxford: Blackwell Publishers, 2000), 327.

[37] Martyn Hammersley, *Reading Ethnographic Research: A Critical Guide* (London: Longman, 1990), 599.

[38] Paige Raibmon, "Unmaking Native Space: A Genealogy of Indian Policy, Settler Practice, and the Microtechniques of Dispossession," in *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest*, ed. Alexandra Harmon (Seattle: University of Washington Press, 2008), 56-86.

[39] Daniel W. Clayton, *Islands of Truth: The Imperial Fashioning of Vancouver Island* (Vancouver: UBC Press, 2000), xiv.

Fortunately, in between empirical generalization and grand theory is something called "middle range" theory (as used in sociology and archaeology), which is generated by abstraction from empirical data.[40] The process is one of induction not deduction. The coining of the phrase is attributed to sociologist Robert K. Merton, who stated that mid-range theories "lie between the minor but necessary working hypotheses that evolve in abundance in day to day research and the all-inclusive systematic efforts to develop unified theory that will explain all the observed uniformities of social behaviour, organization and social change"[41]. In the dissertation I make use of what I consider mid-range theories in three chapters. I should note that I acquired only such knowledge of the theories as would permit me to apply them in my project. In Chapter III, the concept of the treaties as "performance," formulated by American historian Chris Friday[42], has helped me see First Nation treaty accounts in a new light. In Chapter V, the theoretical approach developed by Haitian anthropologist Michel-Rolph Trouillot in his book *Silencing the Past: Power and the Production of History*[43], has helped me to understand the phenomenon of silencing as it applies to the Vancouver Island Treaties. Chapter VI begins with a foray into statistical theory. Also, a booklet by New Zealand scholar D. F. McKenzie, entitled *Oral Culture, Literacy & Print in Early New Zealand: the Treaty of*

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[40] Gordon Marshall, ed., *Oxford Dictionary of Sociology* (Oxford: Oxford University Press, 1998), 415.

[41] Quoted in Marshall, *Oxford Dictionary of Sociology*, 415.

[42] Chris Friday, "Performing Treaties: The Culture and Politics of Treaty Remembrance and Celebration," in *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest*, ed. Alexandra Harmon (Seattle: University of Washington, 2008), 157-185.

[43] Michel-Rolph Trouillot, *Silencing the Past: Power and the Production of History* (Boston: Beacon Press, 1995). My thanks to fellow grad student Alvaro Flores for bringing this book to my attention.

Waitangi[44], helped me understand the distinction between oral and written treaties. Finally, theoretical approaches developed by British political theorists (especially John Horton) and Canadian legal theorists (Jana Promislow and Jeremy Webber) have helped me to understand the potential of the concept of modus vivendi as a treaty category.[45]

4. Premises and Research Questions

In the dissertation I have made and tested a number of assumptions, and they need to be made explicit at the very beginning:

- The Vancouver Island Treaties are oral agreements concerning land.
- There are very few contemporaneous colonial records or accounts of the treaty meetings. There are no contemporaneous First Nation accounts.
- A search for additional sources of information and insight is warranted.
- The five First Nation accounts in the archival record, dating from 1913 to 1934, are potential sources of information on treaty formation.
- Critical analysis of these five accounts, and comparison with the colonial accounts, can provide insights into the formation of the treaties.

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[44] D. F. McKenzie, *Oral Culture, Literacy and Print in Early New Zealand: The Treaty of Waitangi* (Wellington: Victoria University Press, 1985).

[45] John Horton, "John Gray and the Political Theory of *Modus Vivendi*." *Critical Review of International Social and Political Philosophy*, 9.2 (2006): 155-169; Promislow, Janna. "'Thou Wilt Not Die of Hunger…for I Bring Thee Merchandise': Consent, Intersocietal Normativity, and the Exchange of Food at York Factory, 1682-1763." In *Between Consenting Peoples: Political Community and the Meaning of Consent*, edited by Jeremy Webber and Colin M. Macleod. Vancouver: UBC Press, 2010; Webber, Jeremy. "Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples." *Osgoode Hall Law Journal*, 33.4 (1995): 623-660.

- Research into mid-nineteenth century agreements by Indigenous peoples with the British Crown and the United States can provide insight into the formation of the Vancouver Island Treaties.
- Research into the subsequent treatment of the treaties by governments, settlers, scholars, and the courts can provide insight into the formation of the treaties.
- Research into treaty categories can provide insight into the formation of the treaties.

The above premises can be consolidated and reframed into one big research question and six subsidiary ones. First and foremost, what was agreed at the Vancouver Island Treaty meetings? If the main query is to have an answer, the following subset of questions must be addressed. What insights can be gleaned from the First Nation accounts? What can be learned from a comparison of the First Nation and non-First Nation accounts? What analogies can be drawn from comparisons with other agreements? What can be learned about the treaties from later events? And finally, what can be learned through re-categorizing the treaties?

Given the lack of documents in the archival record, the answers will fall along a continuum ranging from unlikely to likely, but none will be absolute. At the end of the literature which follows, a second set of research questions are identified. The answers to both sets are developed over Chapters II to VI, and are summarized in Chapter VII, which concludes with a look at the future of the treaties.

C. Literature Review: Part 1

One more choice needs to be explained, namely the presentation and organization of my literature review. I decided to review the literature in two parts. A comprehensive review of the literature on the Vancouver Island Treaties is deferred until Chapter V. It may seem counterintuitive to insert this review near the end of the dissertation, but I believe there are three good reasons to do this. First, the older published accounts of the treaties rely entirely on the colonial account and do not mention the any First Nation stories. The more recent academic literature has started to include short snippets of these accounts,[46] but only as a supplement to the usual recitation of events derived from the colonial record. Therefore, to review the Vancouver Island Treaty literature prior to the presentation of the First Nation accounts in Chapter II would once again yield priority to the colonial story, which I am determined to avoid. Secondly, I placed the review in the chapter on silencing because I believe that the literature has contributed to the silencing of the Vancouver Island Treaties. Thirdly, the literature on these treaties is very narrow in scope, and would not provide an adequate introduction to the historic treaties in Canada. On the other hand, the literature on treaties east of the Rockies is diverse, not only in the variety of treaty histories recounted, but also in the themes that have been developed. The first part of the literature review also gives me the opportunity to identify and highlight additional issues to be addressed in the subsequent chapters.

Existing surveys of Canadian treaties almost always follow the chronological and geographical progression of British (and later Canadian) rule and settlement across the

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[46] Harris, *Making Native Space*; Grant Keddie, *Songhees Pictorial: A History of the Songhees People as Seen by Outsiders, 1790-1912* (Victoria: Royal British Columbia Museum, 2003); John Lutz, *Makúk: A New History of Aboriginal-White Relations* (Vancouver: UBC Press, 2008).

continent from east to west to north. There is logic in this from a non-Indigenous perspective, but it does not necessarily accord with the First Nation experience. In order to detach my review from this bias, regional studies are dealt with in reverse chronological and geographical order, starting with the early twentieth century treaties in the northern forest region, then moving south and east across the Prairies, thence to the Great Lakes region, and concluding with the eighteenth century treaties on the Atlantic seaboard. As well, this approach encourages the identification of alternate ways of categorizing the treaties. After that, works that consider Canadian historical treaties as a whole are reviewed. Consistent with my choice of methods, much more attention is paid to First Nation accounts than to the written versions of treaties or the non-First Nation accounts.

1. Northern Forest Treaties (Numbered Treaties 8 through 11)

In 1975, Rene Fumoleau published a pioneering study entitled *As Long As This Land Shall Last: A History Of Treaty 8 and Treaty 11, 1870-1939*.[47] He described how the Yukon gold rush provided the impetus for the Federal Government to enter into a treaty with the First Nations of northern Alberta, north-western Manitoba, and north-eastern B.C.[48] This was accomplished in 1899 with the signing of Treaty 8. The following year the Treaty commission secured the "adhesion" of four additional bands in the southern part of the North-west Territories: "The Dogrib, Yellowknife, Slavey and Chipewyan bands, inhabiting the shores of the Great Slave Lake, met with the Treaty party at Fort Resolution. There is no written account of what happened there, other than

[47] Rene Fumoleau, *As Long As This Land Shall Last: A History Of Treaty 8 and Treaty 11, 1870-1939* (Toronto: McClelland and Stewart, 1975).

[48] Surprisingly, no treaty was entered into with the First Nations of the Yukon until 1995.

the official text of the Treaty,"[49] not unlike the VI Treaties. As a result, Fumoleau was forced to rely upon accounts provided seventy years after the event, again, not dissimilar to the VI Treaties. For example, in 1971, Susie (Joseph) Abel, a member of the Dogrib Band who was present at the treaty negotiations, was interviewed by anthropologist June Helm. Fumoleau quotes extensively from the interview, including this account of the negotiations between Chief Andre Wetah ("Old Drygeese") and the Commissioner (the "Agent"): "'I would like a written promise from you [the Agent] to prove you are not taking our land away from us'…Then Chief Drygeese said, 'There would be no closed season on our land. There will be nothing said about the land… The Agent said, 'OK.' So he signed the paper."[50] Fumoleau concluded that "Expedient answers and facile promises were the substance of these Treaty negotiations," promises which were not kept.[51] Fumoleau's conclusion raises the possibility of a similar scenario with respect to the Vancouver Island Treaties.

The second half of Fumoleau's book deals with the creation of Treaty 11 in 1921, prompted by the discovery of oil in the Northwest Territories. At the time of the treaty, there was no government presence in the Territories, other than the R.N.W.M.P. (renamed R.C.M.P. in 1920), and the only other non-First Nation residents were missionaries and fur traders. Treaty Commissioner Conway and his party traveled down the McKenzie River stopping briefly at various trading posts to obtain the consent of local First Nations to the treaty. According to the eyewitness testimony of Johnny Kay in

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[49] Fumoleau, *As Long As This Land Shall Last*, 94.

[50] Ibid., 97.

[51] Ibid., 108.

1973, "…the man named Mr. Conroy came [to Fort McPherson] by gas boat, that was the first gas boat they seen…. Mr. Conroy said he came here to pay Treaty, but no one knows what he was talking about, and they set up a big tent on the sand bar right at the beach and they brought chairs and tables around that tent."[52] In 1971 Adele Lafferty gave this firsthand account of the meeting at Fort Rae: "The RCMP [Inspector Bruce], the Bishop [Breynat] and the Indian Agent [Commissioner Conroy] were all seated. The Indian Agent said, "…As long as the river flows and the sun rises from east to west in this land of yours…you can continue on hunting, fishing, and trapping the way you have always done…,"[53] and after very little in the way of discussion the treaty was signed as presented. Even though Treaty 11 was entered into seventy years after the first of the Vancouver Island Treaties, the relationship between the First Nation and non-First Nation residents of the treaty territories possessed certain similarities, such as the near absence of settlers, and the lack of interaction with officials of any stripe. This raises the possibility that a relevant variable in treaty formation is the frequency, variety and intensity of interaction at the time negotiations were commenced. While this potentially useful method of sorting treaties is not pursued in the dissertation, other potential characterizations are explored in Chapter VI.

In 2010, a book was published with the promising title of *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905*.[54] The author is John S. Long, a university professor of education. In a sense, his chosen format is similar to

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[52] Ibid., 239.

[53] Ibid., 248.

[54] John S. Long, *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905* (Montreal: McGill-Queen's University Press, 2010).

mine. The first one-hundred-page section provides "historical context," the next section of two hundred pages reproduces "historical documents" in their entirety, and the final fifty-page section, provides his analysis of these documents. However, the "historical documents" are without exception government reports and correspondence. Long did not include any First Nation accounts or any quotations by First Nation participants to be found within the official record. He acknowledged that "It may seem like an insensitive and inappropriate exercise in 'white privilege'…to publish the records of the treaty party,"[55] but felt that the task of presenting "Cree oral accounts" and "Ojibway stories" must be left to members of those First Nations. This challenges my premise that there is value in extracting the earliest First Nation accounts from the historical record and making a side-by-side comparison. Chapter II puts my method to the test.

Long does make an important observation in his conclusion: "A careful explanation of the treaty was essential, for the commissioners had no latitude to change its provisions. 'The terms of the treaty were fixed,' states their official report, and the commissioners 'were not allowed to alter or add to them in the event of their not being acceptable to the Indians'."[56] In other words, the intent was not to negotiate, but merely to persuade the First Nations to accept the treaty as presented, by whatever means necessary.

2. Prairie Treaties (Numbered Treaties 1 through 7)

In my opinion, the most influential book on treaties in Canada is *The Treaties of Canada with the Indians of Manitoba and the North-West Territories including the*

[55] Ibid., 6.

[56] Ibid., 335.

negotiations on which they were based, and other information relating thereto, written by Alexander Morris, and published in 1880.[57] It has the dual distinction of being the earliest book on Canadian treaties, and the one with the longest title. The book covers the Selkirk, Robinson, Manitoulin Island, Stone Fort (No 1), Manitoba Post (No. 2), North-West Angle (No. 3), Qu'Appelle (No. 4), Winnipeg (No. 5), Forts Carlton and Pitt (No 6) and the Blackfeet (No 7) Treaties, plus an Appendix containing the texts of them all. Morris was a treaty commissioner and as such participated in the negotiations for Treaties 3, 4, 5 and 6. His stated intention in writing the book was "to tell the story of these treaties" and "to preserve, as far as practicable, a record of the negotiations on which they were based."[58] In this he succeeded admirably, because he reproduced not only the commission's side of the negotiations but also the addresses made to them by the First Nation participants. Thus, a unique treasure trove of First Nation voices was made available to the Canadian public at a time when no one else was doing anything remotely similar. To my knowledge, nothing similar in format was published until the nineteen sixties.

Morris' book began with an account of the Selkirk Treaty: "In the year 1811, the Earl of Selkirk purchased from the Governor and Company of Adventurers trading into Hudson's Bay, in consideration of ten shillings and certain agreements and understandings contained in the indenture, a large tract of territory within Rupert's Land [all the lands containing rivers flowing into Hudson's Bay]…" In the deed, "…the Earl covenanted, within ten years, to settle within the tract one thousand families…on pain of

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[57] Alexander Morris, *The Treaties of Canada with the Indians* (Toronto: Belfords, Clarke and Co, 1880).

[58] Ibid., 11.

revocation of the grant." [59] In 1817, "the Earl of Selkirk, visited his wide domain, and entered into negotiations with the Indian tribes, for the extinction of their title, to a tract of land… adjacent to Red River and Assiniboine River…extending in breadth to the distance of two English statute miles back from the banks of the river." According to Morris, "The treaty was signed by Lord Selkirk and by five Indian chiefs… The surrender was to the Sovereign Lord, King George the Third."[60] The stipulated consideration was as follows: "…that the said Earl, his heirs and successors…shall annually pay to the Chiefs and warriors of the Chippeway or Saulteux nation, the present or quit rent consisting of one hundred pounds weight of good and merchantable tobacco."[61] One of the First Nation signatories, Chief Peguis, later called into question the terms of the transaction: "…in 1860 Peguis became dissatisfied with the white settlers when they began using lands not surrendered by his tribe, and he made a formal protest to the Aborigines' Protection Society. He also stated that the tobacco payment instituted in 1817 had been simply a goodwill token and that arrangements for the formal surrender of the land had never taken place."[62] In any event, the treaty was superseded in 1870 by Treaty No. 1. The Red River settlement and the Selkirk Treaty represent the first of two ventures by the HBC into colonization and formal treaty making. The second (and last) such project undertaken by the Company commenced in 1849 on the Colony of Vancouver Island.

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[59] Ibid., 13.

[60] Ibid., 12-13.

[61] Ibid., 299.

[62] Hugh A. Dempsey, "Peguis," in *Dictionary of Canadian Biography*, Vol 8 (University of Toronto/Université Laval, 2003), accessed 14 October 2015, http://www.biographi.ca/en/bio/peguis_9E.html .

As late as 2000, historians as eminent as Arthur Ray, Jim Miller and Frank Tough acknowledged, in their book on the Saskatchewan treaties, that "we often relied on Morris' account," although they were quick to add that "we read that version in the new critical manner that has become the standard in academic research over the last fifteen years."[63] Their critical assessment of the long-term impact of *The Treaties of Canada with the Indians* is anything but complimentary: "Morris…depicted Canada's…treaty negotiators as paragons of patience, reasonableness, and good humour," whereas, "First Nations negotiators…come through as high-flying orators with unreasonable 'demands' in negotiations, unless, like a Sweet Grass of the Cree or Crowfoot of the Blackfoot Confederacy, they were portrayed as amenable and eager to sign treaties."[64] What the authors do not acknowledge is that Morris, by reproducing the words of the First Nations negotiators, made it possible for modern scholars to glean a sense of the First Nation understanding of what was at stake, and to make reasonable inferences as to the oral terms of the treaties.[65] Now the review fast-forwards one hundred years for the next useful work on the Prairie treaties.

In 1979, a seminal volume entitled *The Spirit of the Alberta Indian Treaties* (edited by Richard Price) was published, in part as a collection of interpretive essays, but more importantly as a vehicle to reproduce a representative sample drawn from two hundred and fifty interviews conducted over four years as part of the "T.A.R.R.[Treaty

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[63] Arthur Ray, Jim Miller and FrankTough, *Bounty and Benovolence: A History of Saskatchewan Treaties* (Montreal: McGill-Queen's University Press, 2000), 211.

[64] Ibid., 205.

[65] For a more sympathetic analysis of Morris' role see Robert J. Talbot, *Negotiating the Numbered Treaties: An Intellectual & Political Biography of Alexander Morris* (Saskatoon: Purich Publishing, 2009).

and Aboriginal Rights Research] Interview with Elders Program."[66] The purpose of the project is described as "simply to present what Indian people in Alberta feel their treaties were about," based on "what they have been told about the treaties"[67]. This was a new idea, much emulated in succeeding years.

The preface to the T.A.R.R. section undertakes a brief comparison of the interviews from elders of Treaties 6 and 7.[68] Treaty 6 elders "tended to agree that the treaty was an agreement to let white people use the land for farming, and in some cases to let them use timber for building houses and grow grass to feed animals."[69] However, with respect to Treaty 7, "not one elder mentions that the treaty had anything to do with giving up land or sharing it with white people," and the treaty was "an agreement that was made to establish peace, to stop the Indians from killing each other, and to put an end to the disruptions caused by liquor." Land was discussed only "in terms of each tribe being able to choose its own reserves."[70] However, the acceptance of "reserves" would seem imply some form of allocation, and thus sharing, of land.

The most interesting paper in the collection, contributed by David Taylor, is entitled "Two Views on the Meaning of Treaties Six and Seven," in which he described government and First Nation interpretations of Treaties 6 and 7, with special attention

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[66] Richard Price, ed., *The Spirit of the Alberta Indian Treaties* (Edmonton, University of Edmonton Press, 1999).

[67] Lynn Hickey, Richard L. Lightning, and Gordon Lee, "T.A.R.R. Interview with Elders Program," in *The Spirit of the Alberta Indian Treaties,* ed. Richard Price (Edmonton, University of Edmonton Press, 1999), 103.

[68] The collection included interviews from Treaty 8 elders within Alberta, not dealt with in this review.

[69] Ibid., 105.

[70] Ibid., 105-106.

given to the First Nation understanding.[71] He quoted Peter Erasmus, a translator during the Treaty 6 negotiations, who later recalled a powerful speech: "Pound Maker who was not a chief at that time but just a brave, spoke up and said, 'The governor mentions how much land is to be given to us. He says 640 acres, one mile square for each family, he will give us.' And in a loud voice he shouted, 'This is our land! It isn't a piece of pemmican to be cut off and given in little pieces back to us. It is ours and we will take what we want'."[72] Clearly, Pound Maker understood that the government was proposing to take away his land and then offering to return a tiny portion of it as a purported act of generosity.

In his summary Taylor noted that, "Once the decision was taken to make treaty with a particular group of people, it was usually done as speedily as possible…They were assembled and within a few days were expected to give assent to propositions which we now know would be momentous for their future."[73] He also pointed out that, "The lack of emphasis in the negotiations on the surrender by the Indians of their territory is in sharp contrast to the prominence and explicit detail of the surrender clauses of the treaty texts."[74] He concluded that, "The understanding that runs through all of the testimony is that the Indians gave up limited rights in the land, namely, the surface rights. This was

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[71] David Taylor, "Two Views on the Meaning of Treaties Six and Seven," in *The Spirit of the Alberta Indian Treaties*, ed. Richard Price (Edmonton, University of Edmonton Press, 1999), 9-45.

[72] Ibid., 19.

[73] Ibid., 40.

[74] Ibid., 41.

explained as being land required for farming."[75] In other words, he is saying that the Treaty First Nations understood that they were agreeing to share, not cede, their land.

In 1996, another innovative book appeared, entitled *The True Spirit and Original Intent of Treaty 7*, and co-authored by Treaty 7 Elders and Tribal Council with Walter Hildebrandt, Dorothy First Rider, and Sarah Carter.[76] In essence it is a synthesis of interviews conducted with more than eighty elders from six Alberta First Nations, supplemented by chapters comparing the elders' accounts with the accounts of participants in the treaty negotiations and accounts contained in the academic literature. A strong case is made for the reliability of their oral traditions concerning the treaty, but in my opinion the power of the narrative is greatly diminished by the absence of extracts from the interviews. The conclusion of the elders was summarized as follows:

> In the oral histories passed down from generation to generation, their understanding of what happened at Blackfoot Crossing remains consistent. According to the research, this is true whether elders were interviewed in the nineteenth century, in the 1920s, the 1930s, the 1960s, or the 1990s. The elders have said that Treaty 7 was a peace treaty; none of them recalled any mention of a land surrender…. They remembered promising that they would 'share' the land with the newcomers and in return they would be provided with the benefits that the new society could offer them, such as assistance in agriculture and ranching.[77]

A volume somewhat similar to *The True Spirit and Original Intent of Treaty 7* was put together in 2000 by H. Cardinal and W. Hildebrandt, entitled *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as*

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[75] Ibid., 42.

[76] Sarah Carter, Walter Hidebrandt, and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal: McGill-Queen's University Press, 1996).

[77] Ibid., 323-324.

Nations.[78] They drew upon interviews with a large number of elders from those parts of Treaties 2, 4, 5, 6, 7, 8 and 10[79] within Saskatchewan. Although the message is similar to that set out in the above book on Treaty 7, this work reproduces dozens of extracts from the interviews, which in my opinion are far more powerful and convincing than paraphrases and summaries.

Also in 2000, historians Arthur Ray, Jim Miller and Frank Tough took a very different approach to the Saskatchewan treaties in their book, *Bounty and Benevolence: A History of the Saskatchewan Treaties*.[80] The first one hundred pages of the book are taken up with accounts of the Selkirk Treaty (1818), the Ontario treaties (1763-1850) and the first three numbered treaties (1871-3), followed by relatively detailed accounts of Treaties 4, 5, 6, 8 and 10. As the authors explained, "In the past, much treaty research has focused on a particular numbered treaty, but that approach has a tendency towards myopia," whereas a multiple-treaty approach allows "identification of common historical patterns in all treaty-making encounters between the Crown and First Nations."[81] My review of the Vancouver Island Treaty literature (in Chapter V) argues that it suffers from myopia, and my dissertation is in part an attempt to address that gap. The authors made clear from the beginning their intent to analyze treaties from a largely economic perspective. With respect to Saskatchewan First Nations' motivations for entering into treaties, this translated into a focus on "livelihood," namely the desire for help in entering

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[78] Cardinal and Hildebrant, *Treaty Elders of Saskatchewan*.

[79] While the book includes interviews with elders from Treaties 8 and 10, by far the greatest number of interviews quoted in the book are by elders from Treaties 2, 4, 5, 6 and 7.

[80] Ray, Miller, and Tough, *Bounty and Benevolence*.

[81] Ibid., 211.

the farming economy, while protecting their traditional hunting and fishing economy. Although the authors acknowledged that the First Nations "…envisioned the treaty as a pact through which they agreed to share the portions of their ancient territory that lay beyond the boundaries of reserves,"[82] they consistently downplayed this aspect, choosing instead to foreground the hope of First Nations that "taking treaty…would bring them protection and assistance during a transitional period that was expected to be very difficult."[83] In the opinion of the authors, treaty negotiations by Saskatchewan First Nations were directed more towards receiving assurances of non-interference with their traditional livelihood than with retention of aboriginal title to their territory. Their focus on the economic concerns of Prairie First Nations in the 1870s is a valid approach, which may or may not have relevance to the economic circumstances of First Nations on southern Vancouver Island in the early 1850s.

Harold Johnson, a Treaty Six Saskatchewan Cree and a practicing lawyer, took yet another approach. In his book, *Two Families: Treaties and Government*,[84] Johnson adopted the (unsettling) strategy of addressing his readers (presumed to be the descendants of white settlers) in the second person: ""Kiciwamanawa, my cousin: that is what my Elders said to call you. When your family came here and asked to live with us on this territory, we agreed. We adopted you in a ceremony that your family and mine call treaty. In Cree law, the treaties were adoptions of one nation by another. At Treaty No. 6 the Cree adopted the Queen and her children."[85] He adopts the impatient tone of a

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[82] Ibid., 130.

[83] Ibid., 132.

[84] Harold Johnson, *Two Families: Treaties and Government* (Saskatoon: Purich Publishing, 2007).

[85] Ibid., 13.

teacher working with a less than apt pupil, which is a clever reversal of the tone adopted towards the Cree by countless representatives of the Crown. He is not afraid to lecture his 'cousins': "When your family arrived in the southern part of this territory, there were several families already co-existing here. The Nehiyaw, the Dakota, the Anishinabae, and the Metis families had worked out between them how they would live together under the Creator's law. None of these families either exercised or expected to exercise authority over the others."[86] He summarized the Cree understanding of the treaty as consistent with "…our understanding of our role as humans under the laws of the Creator, which mandates that we should be kind and generous and share the bounty of the earth with each other, with the animal nations, the plant nations, and with you, Kiciwamanawak."[87] Johnson's narrative provides invaluable insight into the Cree laws governing treaties, which would have informed the process and content of their negotiations with representatives of the Crown. He also highlights the urgent need for research on the treaty law of the First Nation parties to the VI Treaties, as a way to deepen our understanding of the First Nation accounts presented in this dissertation.

Finally, Johnson rejected the fidelity of the written version of the treaty because "It is apparent that those who recorded the proceedings sought to impress their superiors by writing a version that showed the commissioner and his party in the best light."[88]

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[86] Ibid., 20.

[87] Ibid., 41.

[88] Ibid., 43.

In 2013, Aimee Craft produced a book entitled *Breathing Life into the Stone Fort Treaty: An Anishinabe Understanding of Treaty One*,[89] covering southern Manitoba. Craft is a lawyer and Anishinabe community member, and much of the book is devoted to the indigenous law that informed the First Nation negotiations. She frequently used quotes from newspaper reports of the negotiations, such as this excerpt from Chief Ayee-ta-pe-pe-tung's address to the treaty commissioners: "I understand you are going to buy this land from me. Well God made me out of this very clay that is besmeared on my body. This is what you say you are going to buy from me."[90] She also quoted from recent interviews with elders, such as Victor Courchene: "One old man, much older than me, said his grandfather told him about the Treaty and how it was supposed to work. He said it is like a plate and the resources were on that plate. The white man was invited to come and eat from that plate together with the Anishinabe. This is how he understood the Treaty. They never gave up anything."[91] Craft also quoted current elder Harry Bone, who offered this useful insight into the indigenous understanding of the Anishinabe term for 'reserve': "Ishkonigan does not mean 'leftover' to us, ishkonigan means gigii-mii-ishkonaamin in other words 'we left this land aside for ourselves' not leftover."[92] This raises an intriguing possibility concerning the Vancouver Island Treaties. If Douglas used the English word 'reserve' at the treaty meetings, the translator may have adopted

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[89] Aimee Craft, *Breathing Life into the Stone Fort Treaty: An Anishinabe Understanding of Treaty One* (Saskatoon, SK: Purich Publishing, 2013).

[90] Ibid., 112.

[91] Ibid., 110.

[92] Ibid., 63.

Lekwungan, Halkomelem or Kwagiulth terms having a broader connotation, such as 'all land not shared with Europeans'.

Craft concluded that "while both the Anishinabe and Crown negotiators viewed the treaty as being related to land," the Crown contemplated "a total and complete surrender and acquisition of land', while the Anishinabe "did not view Treaty as a sale of land, but as an agreement to share in its bounty."[93] In sum, "This is what the elders refer to as a 'sharing treaty'."[94]

Research into the negotiation and implementation of the Prairie treaties over the last forty years has generated much of the Canadian literature on treaties. These books and articles show a consistent willingness to interpret the formation and content of the treaties on the basis of information drawn from sources (including the statements of First Nation participants) extrinsic to the written versions produced by the Crown.

Ever since the 1970s a number of authors have questioned the veracity of the written versions, placing greater reliance on oral versions derived from contemporaneous Indigenous accounts and contemporary oral traditions. Specifically, they question the absolute surrenders of territory contained in the written versions, asserting that the oral versions contain promises to share ownership of the land, or at least to retain an unfettered right to hunt and fish over the ceded territory, again based on archival and oral accounts of Indigenous understandings of the treaty terms.

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[93] Ibid., 111.

[94] Ibid., 61.

The statements by Chief Ayee-ta-pr-pr-tung and Victor Courchene, reproduced in the review of Craft's book above, illustrate two recurring themes in First Nation accounts of treaty-making, one expressed in the negative and one in the positive. The first is that a surrender of their land was inconceivable and did not occur, and the second is an acknowledgment of an intention to share the land and its resources with the growing settler population. Finally, Cardinal and Hildebrandt (2000) identified the crucial and as yet unresolved challenge facing those who hope to reconcile the understandings of the treaty parties: "While on the one hand, the fundamental variance between the oral and written record of the treaties might be seen as questioning the validity of the treaties, the Elders are adamant…that…what is at issue is not whether…treaties exist, but whether a mutually acceptable record of them can now be agreed upon and implemented."[95]

3. Great Lakes Treaties

Between 1764 and 1862, First Nations entered into thirty-two "land cession" treaties with the Crown, covering most of the land around the Great Lakes, also known as Upper Canada, or the southern part of Ontario.[96] Given the number of treaties, it is surprising that the literature on them is not correspondingly large. For the purposes of this review I have selected two examples, one based on an early treaty, and the other describing one of the last of the series.

My first choice is an essay by Indigenous legal scholar John Borrows, entitled "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-

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[95] Cardinal and Hildebrandt, *Treaty Elders of Saskatchewan,* 58-59.

[96] Robert J. Surtees, "Canadian Indian Treaties," in *Handbook of North American Indians, History of Indian-White Relations*, Vol 4, ed. Wilcomb E. Washburn (Washington DC: Smithsonian Institution,1988), 204.

Government."[97] At its simplest, the Proclamation dictated the process to be followed, within a vaguely defined area, by First Nations in the disposal of land in favour of the Crown: "The procedure called for the summoning of a formal council, attended by the Indian occupants of the coveted section and by official representatives of the Crown. At this council…the two sides were to agree on terms and record these in an official deed or treaty."[98] According to Ontario scholar Robert Surtees, "The first such treaty concluded in 1764 concerned a stretch of land on each side of the Niagara River"[99]. Borrows took a different tack and argued that the Proclamation plus the subsequent meeting at Niagara taken together constitute the treaty.[100] As Borrows pointed out "The portion of the treaty confirmed at Niagara has often been overlooked, with the result that the manuscript of the Proclamation has not been integrated with First Nation understandings of this document."[101]

The Proclamation by itself "uncomfortably straddled the contradictory aspirations of the Crown and First Nations when its wording recognized Aboriginal rights to land by outlining a policy that was designed to extinguish these rights."[102] Borrows argued that the contradiction can only by resolved by reference to accounts of the formation of the Treaty of Niagara, which "…was regarded as 'the most widely representative gathering

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[97] John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government," in *Aboriginal and Treaty Rights in Canada*, ed. Michael Asch (Vancouver: UBC Press, 1997), 155-172.

[98] Ibid., 202.

[99] Surtees, "Canadian Indian Treaties," 204.

[100] Borrows, "Wampum at Niagara," 155.

[101] Ibid.

[102] Ibid., 160.

of American Indians ever assembled,' as approximately two thousand chiefs attended the negotiations."[103] Rather than address the written version of the 1764 agreement, Borrows focused on the version embodied by the exchange of two-row wampum belts. He quoted from the work of the eminent American scholar Robert Williams to explain the significance of the two rows of wampum, which symbolize the "paths of two vessels, travelling down the same river together. One a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people," and both vessels will "travel the river together, side by side" each in their own boat, and "Neither…will try to steer the other's vessel."[104] In other words, "…the connection between the nations spoken of in the Proclamation is one that mandates colonial non-interference in the land use and governments of First Nations."[105]

Borrows also took issue with the notion that the Royal Proclamation is an assertion of sovereignty over First Nations, despite his acknowledgement of the fact that "the British inserted words in the Proclamation that claimed 'dominion' and 'sovereignty' over the territories that First Nations occupied."[106] He pointed to the Treaty of Niagara as establishing a relationship "in which no member gave up their sovereignty."[107]

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[103] Ibid., 163.

[104] Ibid., 164.

[105] Ibid., 165.

[106] Ibid., 160.

[107] Ibid., 161; This issue is taken up in Chapter V with respect to the Treaty of Waitangi.

My second choice is a lengthy unpublished report by James Morrison prepared for the Royal Commission on Aboriginal Peoples in 1996, entitled "The Robinson Treaties of 1850: A Case Study."[108] These two treaties were entered into between "agents of the Crown and representatives of the Ojibway Nation of northern Lakes Huron and Superior."[109] As pointed out by Morrison, the Robinson treaties are often described as "pivotal in the entire treaty-making process," marking the end of the "orderly progression of agreements with aboriginal people in what is now Ontario," and providing a model for the post-Confederation numbered treaties covering the Prairies and northern Canada.[110]

At the time of the treaties, the Ojibway had been trading furs to Europeans for two hundred years.[111] As well, the impetus for these agreements came from the Ojibway, who were incensed that the provincial government had issued mineral licences over their territory in favour of colonial mining enterprises: "Had it not been for their lengthy protests and the resulting intervention of Governor-General Lord Elgin – who was intent on upholding the honour of the Crown – it is probable that the Robinson treaties would not have been made at all."[112] As far as Morrison is concerned the treaties represented a "victory" for the Ojibwa because, "they officially acknowledged that Native and non-

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[108] James Morrison, "The Robinson Treaties of 1850: A Case Study," in Royal Commission on Aboriginal Peoples (1996).

[109] Ibid., 1; Pagination is a problem with this report, as the original appears to be un-paginated. My copy (as provided to me via e-mail) has been arbitrarily divided into four parts, each separately paginated. Fortunately all but one of my references are from Part I. The last quote is from page 7 of Part III.

[110] Ibid., 2.

[111] Ibid., 13.

[112] Ibid., 4.

native people would continue to co-exist in the territory covered by treaty – and that aboriginal people could expect to benefit from resource development."[113]

One of the extraordinary features of these treaties is that "they were the product of more than five years of intense negotiations,"[114] including two visits from provincial officials seeking to ascertain the merits of the demands by the Ojibway for compensation, and the employment by the Sault Ste Marie Ojibway of a lawyer, Allan McDonall, to represent their interests in negotiations with the provincial government.[115] In the course of his employment he was able to point out that "the government had granted mining privileges before extinguishing the Indian title" and that "such a practice had been expressly forbidden by the Royal Proclamation of 1763."[116] In a petition to the government in 1847 the Sault Ste Marie chiefs acknowledged that they were aware that "there is not yet an instance of the British government occupying the Lands of any of our tribes or parts of tribes without the consent and payment of the Indians found in possession."[117] Morrison convincingly argued that "…in contrast to the later numbered treaties….the interpreters at the 1850 treaty council, both official and unofficial, were a genuine part of the multicultural world of the upper Great Lakes" and "all had considerable experience as cultural brokers."[118] For example, "Louis Cadotte translated for Shingwakonce's Band – for which they paid him $50 – and he and his family were

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[113] Ibid., 5.

[114] Ibid., 7.

[115] Ibid., 46.

[116] Ibid., 55.

[117] Ibid., 33.

[118] Ibid., 86.

formally registered as Garden River Band members during the disbursement of monies on Sept. 11th, 1850."[119]

As far as the drafting of the treaties is concerned, there is no indication that Robinson was working from a pre-prepared template (certainly not one provided by the Colonial Office): "Robinson spent the evening of the 6th drafting the proposed Lake Superior treaty, and part of the morning of the 7th making two fair copies."[120] Two provisions of these treaties need to be highlighted. The first provided an escalation provision within the annuity clause: "…in case the territory hereby ceded…shall at any future period produce an amount which will enable the government of this Province without incurring loss to increase the annuity hereby secured to them, then, and in that case, the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound provincial currency in any one year."[121] This would allow the Ojibway to benefit, at least in theory, from the tax revenue derived from the mining enterprises on their former territory. The second provision of note is a schedule concurrently allotting very large reserves at locations negotiated by the Ojibway (p.304). Unfortunately, the implementation of these provisions did not live up to Ojibway expectations. For example, the annuities were increased only once, in the 1870s, and "within a decade of the treaty, many bands were being coerced into parting with all or most of their reserve lands."[122]

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[119] Ibid., 88.

[120] Ibid., 100.

[121] Ibid.

[122] Ibid., 7.

4. Eastern Seaboard Treaties

Two works are reviewed in this section, and they could not be more different in their understanding of the Maritime treaties. The first is contained in a 1981 booklet by W. E. Daugherty,[123] containing this summary of the treaties:

> Most of the treaties begin with the words "Articles of Peace and Submission,' hardly an indication of agreement signed between two equal powers for mutual benefit. Indeed, it is dubious whether they may be construed as treaties at all… Perhaps, it is more accurate to consider these agreements, called treaties, to be a cross between a document of surrender and an armed truce, with the Indians making most of the concessions with an occasional quid pro quo from the British.[124]

While Daugherty's approach was clearly (and revealingly) a product of its time, the extract was quoted with approval by historian Tom Flanagan in 2000.[125]

The second is a 2002 book by historian William C. Wicken .[126] Wicken's description and analysis of the Mi'kmaq treaty experience is reviewed in some detail, partly as an antidote to Daugherty's opinion, partly because treaty surveys usually give them short shrift, and finally because they have figured prominently in the case law on historical treaties,[127] which is reviewed in Chapter V.

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[123] W.E. Daugherty, "Maritime Indian Treaties in Historical Perspective," Department of Indian and Northern Affairs, 1981, accessed 18 August 2015, http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texttext/tremar_1100100028967_eng.pdf.

[124] Ibid., 45.

[125] Flanagan's argument is canvassed later in this review. Tom Flanagan, *First Nations? Second Thoughts* (Montreal: McGill-Queen's University Press, 2000).

[126] William Wicken, *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Junior* (Toronto: University of Toronto Press, 2002).

[127] See *R v Marshall*, [1999] 3 SCR 456. Reviewed in Chapter V.

The Mi'kmaq concluded five treaties with the British over a span of fifty years, in 1726, 1749, 1752, 1760-61 and 1779,[128] which makes them a rarity among historical treaties, most of which are 'one-offs'. The 1726 treaty ended the "Wabanaki-New England War," and was entitled "Articles of Peace and Agreement." It was signed by "…Massachusetts, New Hampshire, and Nova Scotia…and the Abenaki, Passamaquoddy, Maliseet, and Mi'kmaq people."[129] For a century before the treaty the Mi'kmaq had traded with the French regime, but war erupted because of increased "British activity in the region."[130] The "Articles" contained the following reference to the occupation of land within the territory of the treaty: "…the Indians shall not molest any of His Majesty's Subjects or their Dependants in their Settlements already made or Lawfully to be made or their carrying on their Trade or other affairs within the said Province [of Nova Scotia or Acadia]."[131] The Articles were accompanied by a second document, which contained, "promises made to the aboriginal communities by Nova Scotia officials,"[132] including a statement, "That the Said Indians shall not be Molested in their Persons, Hunting, Fishing and Shooting & planting on the planting Ground nor in any other [of] their Lawfull occasions, By his Majesty's Subjects or their Dependants in the Exercise of their Religion Provided the Missionarys Residing amongst them have

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[128] Wicken, *Mi'kmaq Treaties on Trial*, 40 and 191. Wicken does not discuss this last treaty because "it did not substantially modify the earlier treaties." Stephen Patterson has estimated that the British entered into as many as twenty treaties with the Mi'kmaq, Maliseet and Passamaquoddy between 1725 and 1779. See Stephen Patterson, "Eighteenth Century Treaties: The Mi'kmap, Maliseet and Passamaquoddy Experience," *Native Studies Review* 18.1 (2009): 25-52.

[129] Ibid., 71.

[130] Ibid., 74.

[131] Ibid., 61.

[132] Ibid.

leave from the Government for So Doing."[133] Based on these documents, Wicken concluded that, "…it seems reasonable to suggest that the Mi'kmaq expected that the British would consult with them before making new settlements."[134]

The founding of Halifax in 1749 without the prior consent of the Mi'kmaq caused conflict, which was only smoothed over when General Cornwallis met with Mi'kmaq representatives and reaffirmed the terms of the 1726 treaty.[135] In spite of the absence of a provision concerning allocation of land, Wicken was certain that "Land was the central issue of the dispute,"[136] because the British apparently now interpreted the phrase "settlements lawfully to be made" in the 1726 treaty as referring to British law only, obviating the need for Mi'kmaq consent. Under this new British understanding, "The only restriction that could be placed on new settlements was that they could not be made in areas used or occupied by the Mi'kmaq for 'their hunting, fishing planting grounds,' or other activities."[137] The restored peace did not last long as it became clear to the Mi'kmaq that more settlements on their resource grounds were in the offing (e.g., Fort Lawrence in 1750), and in 1752 the parties made another attempt to resolve their differences. The resulting treaty[138] "…was exactly the same as the earlier [1726] treaty except that seven new articles had been added," each of which addressed a new issue.[139] Surprisingly, none

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[133] Ibid., 64.

[134] Ibid., 220.

[135] Ibid., 176.

[136] Ibid., 180.

[137] Ibid.

[138] The 1852 treaty is the subject of a landmark Supreme Court of Canada decision, *Simon v the Queen*, [1985] 2 SCR 387, which is dealt with in a Chapter VI.

[139] Ibid, 186

of them dealt with the contentious issue of land settlement, other than a general statement that, "It is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of Hunting & Fishing as usual," and "have free liberty to bring for Sale to Halifax, or any other settlement within this Province, skins, feathers, fowl, fish or any other thing they shall have to sell."[140] No reference was made to the second part of the 1726 treaty. In 1755, the British and Mi'kmaq discussed the idea of separate territories, but failed to reach an agreement.[141]

In the final conflict between the French and English in North America, the Mi'kmaq sided with the French,[142] necessitating the negotiation of a series of treaties after the British victory in 1759. The resulting treaties made no reference to hunting and fishing rights, nor did they deal with control over land. They did contain a covenant that they would "not Traffic, Barter, or Exchange any commodities in any manner, but with…the managers of such Truckhouses as shall be appointed or established by His Majesty's Governor."[143] Wicken acknowledged that the new treaties "did not create clear boundaries between Mi'kmaq and British lands,"[144] and he was unable to find anything in the historical record to explain the omission. He concluded that, "…the British simplified future understandings of the [1726] treaty by extracting the written treaty from the oral

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[140] Ibid., 187.

[141] Ibid., 189-190.

[142] J.R. Miller explains the preference of the Mi'kmaq for the French as follows: the French "did not want to take possession of their lands," but the British were "…largely agricultural settlers who inexorably dispossessed the original inhabitants." J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-white Relations in Canada* (Toronto: University of Toronto Press, 1989), 69.

[143] J. R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009), 64; This clause was pivotal in the *R v Marshall* decision

[144] Ibid., 208.

context in which it had been created, remembered, and later modified. Mi'kmaq perspectives became less important.…" Although no treaties were made after 1779, it should not be assumed that relations between the British and the Mi'kmaq were harmonious. In 1794, 1841 and 1854, "…various Mi'kmaq communities would appeal to Crown officials, arguing that the British had violated the treaties,"[145] but "Like the ones before it, the 1854 petition was not answered."[146]

In his survey of Canadian treaties, J. R. Miller described the 1726 treaty as "a prime example of the formal treaty of peace and friendship that Great Britain used frequently –and often futilely – with First Nations in the eighteenth century."[147]

One might have hoped that each treaty would have filled out the framework put into place by the first treaty in 1726, but it seems each was more circumscribed than the last, until the English were in a position to dispense with them altogether by the end of the eighteenth century, and ignore the existing ones in the nineteenth century.

5. Canadian Treaties in General

In 1998 historian Sidney L. Harring published, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (1998), which focused mainly on criminal cases, but did address treaty issues, particularly in the chapter on "Canadian Law and the Prairie Indians." In his opinion, "The Indians understood the treaties as peace and friendship agreements, with specific cessions of some land-use rights on their part in return for payments in cash and goods from the crown," and that, "The First Nations

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[145] Ibid., 222.

[146] Ibid., 224.

[147] Ibid., 62.

expected the land to serve a number of different users, for different purposes," which is consistent with the regional literature on the Prairie treaties.

He did not mince words when he came to describe the understanding of the treaties held by the Canadian government and its appointed commissioners: "The crown's policy was evidently to buy Indian land as cheaply as possible without regard to the social costs that beset tribes forced onto reserves with no source of income," and "This attitude was communicated to the treaty commissioners, who understood their role as simply getting the tribes to sign treaties, no matter what had to be promised in order to accomplish this end."

In 2000 legal scholar Brian Slattery wrote an influential article entitled "Making Sense of Aboriginal and Treaty Rights."[148] In it he made an important statement about the formation of historic treaties:

> At times, the English parties recorded some of the treaty terms in a concise written document that the Indian parties would be asked to "sign." Such a document has sometimes come to be regarded at the "treaty." However, this conclusion is usually unwarranted. In most cases, the treaty was the oral agreement, and the written document just a memorial of that agreement…. Many such documents have proven to be unreliable guides to the oral compacts. They often record only matters of particular interest to the English parties and omit certain terms of significance to the Indian parties. Even the recorded terms may not represent an accurate or balanced account of the true oral bargain. The written documents were often translated to the Indian parties in a manner allowing ample opportunity for misunderstanding and distortion….[149]

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[148] Brian Slattery, "Making Sense of Aboriginal and Treaty Rights," *Canadian Bar Review,* 79.2 (2000): 196-224.

[149] Ibid., 208.

Interestingly, he did not mention the contents of the oral versions of the treaties, nor did he give any examples. Having aptly described the problems with written versions, he then deals with the issue of ascertaining the terms of the oral versions:

> In the absence of compete transcripts of those proceedings the true content of a treaty can be determined only by a comprehensive assessment of all available sources of information, including any written memorials or accounts, but also oral tradition, the broader social and political objectives of the parties, and the history of their relationship.[150]

I take heart from the fact that his suggested solutions to the problem match my own.

Also in 2000 Tom Flanagan wrote a provocative book, *First Nations? Second Thoughts*,[151] which contained a chapter on "Treaties, Agreements and Land Surrenders." In it he provided the following dismissive characterization of the historical "treaties":

> The eighteenth-century agreements in eastern Canada were expressions of submission to the Crown and promises to keep the peace, with mention of some specific issues, such as return of captives. The Ontario agreements were real-estate conveyances, though the later ones included a few elements that established an ongoing relationship. The Numbered Treaties also focused on the surrender of aboriginal land rights, and they imposed even more continuing obligations than the later Ontario agreements.[152]

He was careful not to use the word "treaty," and he did not bother to mention the Vancouver Island Treaties. His way of dealing with opposing arguments boiled down to allegations that "the advocates of the aboriginal orthodoxy…wish, in effect, to repudiate all the [written versions of] all treaties under the guise of renovation." He went on to predict that, "In the absence of wholesale renovation of the treaties what we are likely to

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[150] Ibid.

[151] Flanagan, *First Nations*.

[152] Ibid., 151.

see is guerrilla warfare in the courts as partisans of the aboriginal worldview attempt to undo extinguishment by gradually undermining the Crown's control of public lands and natural resources."[153] He managed to make the quest of First Nations for justice sound like an evil conspiracy. The specific arguments used by Flannagan to refute contrary opinions need not be discussed here, as Michael Asch has elegantly refuted them in his recent book, *On Being Here To Stay: Treaties and Aboriginal Rights in Canada*.[154]

In 2008 philosopher James Tully addressed the topic of "Indigenous Peoples," and had this to say about the historic treaties between the Crown and First Nations:

> Canada is founded on an act of sharing that is almost unimaginable in its generosity. The Aboriginal peoples shared their food, hunting and agricultural techniques, practical knowledge, trade routes and geographic knowledge with the needy newcomers. Without this, the first immigrants would have been unable to survive. As we have seen, the Aboriginal peoples formalized the relation of sharing in the early treaties in the following form: they agreed to share this land with the newcomers on the agreement that the newcomers would neither attempt to govern them nor use their land without their consent. The treaties involved other exchanges as well, such as trade, military, educational and medical benefits, and political and legal interrelations, but the sharing of land and trade on this understanding were at the heart of the relationship.[155]

This is a ringing endorsement from a prominent theorist of the proposition that at least the "early" treaties were about sharing the land.

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[153] Ibid., 154.

[154] Michael Asch, *On Being Here To Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto, 2013), 34-58.

[155] James Tully, *Public Philosophy in a New Key, Vol I: Democracy and Civic Freedom* (Cambridge: Cambridge University Press, 2008), 245.

J.R. Miller's book, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* is the first nation-wide survey of the treaties by a historian.[156] With respect to the historical treaties, in general terms he followed the standard chronological and geographical progression, beginning in the east and working his way across time and space to the west and north. With respect to treaty categories he was content to follow the standard progression from trade, to peace, friendship and alliance, and finally to territorial or cession treaties. However, he did make two major innovations, arguing that early trade compacts entered into with the HBC should be viewed as treaties, and highlighting the covenant aspect of the treaties, both of which are discussed in Chapter VI on treaty categories.

He went on to state that, "treaties of peace, friendship, and alliance…developed directly out of the commercial relations between Native peoples and newcomers, and like the earlier commercial compacts, manifested many of the same characteristics."[157] His definition of cession treaties is as follows: "Similarly, the third type of treaty between First Nations and Euro-Canadians emerged directly, almost inevitably, from the vicissitudes and pressures of Britain's alliance system in the latter half of the eighteenth century. Territorial treaties were agreements governing non-Native' access to and use of First Nations' lands."[158] He concluded his brief tour of treaty categories by stating that, "They [territorial treaties] emerged in the 1760s and dominated relations between

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[156] J.R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada*. Toronto: University of Toronto Press, 2009.

[157] Ibid., 4.

[158] Ibid., 4-5.

indigenous and immigrant peoples in Canada until the early 1920s."[159] In his concluding chapter, Miller reviewed all the treaties, except the Vancouver Island Treaties, and the only mention of them in the body of the work consists of a single paragraph tucked away in a chapter entitled "Prelude to the Western Treaties."[160]

The last book to be reviewed in this chapter is *On Being Here To Stay: Treaties and Aboriginal Rights In Canada*, by anthropologist Michael Asch and published in 2013.[161] He drew upon research into the Numbered Treaties to make an argument about the understanding of the parties to those treaties, and then to suggest ways in which those understandings could be reconciled. Asch's recommendations are important, but for my purposes, the review is restricted to his conclusions concerning the formation of the treaties. He began by stating that, "for each of the numbered treaties, governments in Canada (and others) insist that Indigenous peoples consented to transfer all authority to the Crown, thereby leaving Settlers free to do as they please with their lands."[162] He then put forward the viewpoint of the First Nations: "They speak with one voice in asserting that what the Crown asked for was permission to share the land, not to transfer the authority to govern it."[163] In particular, "the Indigenous parties all insist that our settlement would bring them no harm and thus that we undertook to assure them that they would be free to continue to live as the always had; no changes would be forced on

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[159] Ibid., 5.

[160] The issue of Miller's categories and the place of the Vancouver Island Treaties in that schema is pursued in Chapter VI.

[161] Michael Asch, *On Being Here To Stay: Treaties and Aboriginal Rights in Canada*. *Toronto: University of Toronto, 2013*.

[162] Ibid., 76.

[163] Ibid., 77.

them."[164] The two viewpoints are radically different, which raises the possibility that there was no common understanding, and thus no treaties. Asch responded to that argument as follows: "…it is my view that, despite cultural differences, there is every chance that these parties could have achieved a degree of shared understanding at the time of negotiations to conclude an agreement based on mutual consent."[165] Of course, that in turn raises the likelihood that one version is more accurate than the other, and based on his research Asch concluded that, "…the 'sharing' interpretation more closely reflects what transpired than does the written version."[166] This is a strong endorsement by a prominent anthropologist of the proposition that the numbered treaties were about sharing the land. Chapter II explores the possibility that the Vancouver Island Treaties belong to this category.

6. Supplemental Research Questions

I have grouped the issues and concerns raised by the works reviewed into six questions to be asked of the Vancouver Island Treaties. Were the treaties surrenders by the First Nations parties of their interest (if any) in the land they occupied? Were the treaties agreements by the parties to share the land? If the answer to that question is yes, how might they have shared the land? Did the Crown negotiators mislead or coerce the First Nation participants? Is the current categorization of the treaties adequate? If the answer to that question is no, are there more apt categories? Now that the groundwork

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[164] Ibid at 78.

[165] Ibid., 80.

[166] Ibid.

has been laid, and armed with two sets of research questions, it is high time to dive into the body of the work.

Chapter II: Formation of the Treaties

A. Introduction

The first section of the chapter sets the scene in a way that highlights the extent and nature of the interactions between the Vancouver Island First Nations and newcomers in the years preceding the treaty meetings. After that I reproduce, analyze and compare the First Nation and colonial accounts of each of the treaties. In the final section I explore the vexed question of why no treaties appear to have been made after 1854.

B. Prior to the Treaties

This section is subdivided into three parts. The first presents a broad overview of the pre-1850 history of the Northwest Coast region, which encompasses the area between Alaska and California west of the Rocky Mountains, including Vancouver Island. The second outlines the history of the presence in the region of the Hudson's Bay Company in general and James Douglas in particular, from 1825 to 1850. The last provides a detailed description and analysis of significant events in the period immediately preceding the Vancouver Island treaty meetings of 1850.

1. Overview

For the purposes of this section the assumption is made that Indigenous societies resident in the region in the mid-nineteenth century were in the habit of negotiating agreements with each other concerning land, based on their existing Indigenous laws. However, I do not attempt to describe any of these Indigenous legal systems, as the subject is beyond the scope of my expertise, and the regional literature does not as yet address Indigenous treaty law. The description of post-contact, pre-treaty events which

follows is based on documents and correspondence mostly generated by the British government, the Governor and Committee of the HBC, and Chief Factor James Douglas. This is a result of the absence of any First Nation voices in the early historical record.

The Imperial history of Vancouver Island begins with the trade in sea otter skins in the last quarter of the eighteenth century. The arrival of British and American maritime fur traders on the west coast of the island alarmed the Spanish government, which asserted a claim to sovereignty by seizing a British ship at Nootka Sound, precipitating the "Nootka Crisis" of 1790.[167] In support of its claim, Britain highlighted a "memorial" written by a British merchant, John Meares, who claimed to have "purchased from Maquilla [Maquinna], the Chief of the District contiguous to and surrounding that place [Nootka Sound], a Spot of Ground, whereon he built a House for his occasional Residence."[168] In 1791, an American trader, James Kendrick, also "purchased" land from Maquinna, pursuant to instructions from the owners of his ship.[169] Kendrick drafted an "instrument of conveyance," a copy of which has survived. In consideration of ten muskets, Maquinna purportedly agreed to "…grant and sell unto John Kendrick…a certain harbor in said Nootka sound…with all the land, rivers, creeks, harbours, islands, etc.," and "with all the produce of both sea and land appertaining thereto," with the proviso that Kendrick "grant and allow the said Macquinah to live and fish on the said territory as usual." The document was executed (affixing Xs) by Macquinna and five

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[167] The outline provided here is based on Daniel Clayton's book *Islands of Truth,* 168-205.

[168] As quoted in Clayton, *Islands of Truth,* 170.

[169] As quoted in F.W. Howay, "An Early Colonization Scheme in British Columbia," *The British Columbia Historical Quarterly*, 3.1 (1939): 51.

other chiefs, and witnessed by various members of Kendrick's crew.[170] Kendrick soon left the area, never to return. In 1795 the ship owners issued a printed circular to prospective purchasers in Europe, claiming that the property had been "purchased under a sacred treaty of Peace and Commerce and for a valuable consideration of the friendly Natives."[171] According to historian F.W. Howay, there were no takers.[172] I have described this first documented "sale" of land by a First Nation on Vancouver Island in some detail as it indicates that First Nations, soon after first contact, were prepared to make more-or-less lasting arrangements to share their land with European and American traders, on terms not unlike the text of the written version of the Douglas Treaties, as will be seen in Chapter II.

The crisis was resolved by the "Nootka Convention," which "granted both Britain and Spain the right to navigate, trade and settle on the Northwest Coast."[173] As the sea otter trade did not extend up the east coast of Vancouver Island, the incident had no direct impact on the treaty First Nations. However, the affray prompted the British government in 1792 to commission George Vancouver to conduct a circumnavigation of the Island, resulting in the production of a well-known chart, replete with English place names,

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[170] Ibid., 52-53.

[171] Ibid., 61.

[172] Ibid.

[173] Clayton, *Islands of Truth,* 173. I am not aware of any agreement between Spain and Britain whereby the former formally gave up its claims to the Northwest Coast. However, under the Adams-Onis Treaty of 1819 between Spain and the United States, Spain agreed to give up its claim to the Northwest Territory north of forty-two degrees. Article 3 of the treaty stated that, "His Catholic Majesty cedes to the said United States, all his rights, claims, and pretensions to any Territories, East and North of the said Line, and, for himself, his heirs and successors, renounces all claim to the said Territories forever." Quotation from Bevans, Charles I., ed., "Adams-Onís Treaty: 1819," in *Treaties and Other International Agreements of the United States of America, 1776-1949,* accessed 22 September 2015, http://www.tamu.edu/faculty/ccbn/dewitt/adamonis.htm.

"which personified Vancouver Island as British." Vancouver's exploring expedition along the east coast of the Island, and those of the Spanish during the same time period, entered into temporary trading relationships with the First Nations they encountered, but did not build any permanent structures that would entail long-term arrangements concerning land.

Notwithstanding the diplomatic arrangement as between Spain and Britain, American fur traders remained active in the area, and the United States government was not prepared to concede sovereignty of the Northwest Coast to Britain. In1818 the two nations created what became known as the Oregon Territory by way of a "Convention of Commerce (Fisheries, Boundary and the Restoration of Slaves)."[174] Article Four stated that, "It is agreed, that any Country that may be claimed by either Party on the North West Coast of America, Westward of the Stony [Rocky] Mountains,[175] shall…be free and open…to the Vessels, Citizens, and Subjects of the Two Powers: it being well understood, that this Agreement is not to be construed to the Prejudice of any Claim, which either…may have to any part of the said Country…." The north/south boundaries were Russian Alaska and Spanish California, resulting in a vast territory encompassing, of course, Vancouver Island.[176] No joint administration was set up to govern the Oregon

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[174] Hunter Miller, ed., "British-American Diplomacy Convention of 1818 Between the United States and Great Britain," in *Treaties and Other International Act of the United States of America,* Vol II (Washington: Government Printing Office, 1931), accessed 14 August 2015, http://avalon.law.yale.edu/19th_century/conv1818.asp#art3.

[175] The north south boundaries were Russian Alaska and Spanish California.

[176] This arrangement was similar to but not quite an international condominium: "Often used as measures of last resort when efforts to resolve territorial disputes through negotiation have failed, condominium arrangements have generally been designed to be temporary in nature." Joel H. Samuels, "Condominium Arrangements in International Practice: Reviving an Abandoned Concept of Boundary Dispute Resolution," *Michigan Journal of International Law*, 29 (2007-2008): 728. In the typical condominium, two nation states agree to co-administer a territory, including the administration of its Indigenous population. The 1818 treaty does fit within the more limited definition of *modus vivendi* (or interim) treaty,

Territory or its native inhabitants. Under this arrangement, Indigenous, British and American residents managed to co-exist for twenty-eight years. During this period, the Hudson's Bay Company came to dominate the fur trade in the Oregon Territory.

2. The HBC and James Douglas in the Oregon Territory

In 1825 the HBC built Fort Vancouver near the mouth of the Columbia River, which became its main establishment on the Northwest Coast. Two years later the Company built Fort Langley near the mouth of the Fraser River, and commenced trading extensively in sockeye salmon with First Nations, including the Saanich and Snuneymuxw, who maintained village sites on the river.[177] In 1833 the HBC built Fort Nisqually on Puget Sound, which is just across the Strait of Juan de Fuca from Victoria. The main business of the Fort was the operation of farms owned by the Puget Sound Company, a subsidiary of the HBC.[178] Every time the HBC decided to establish a fort it must have entered into some form of agreement with the local First Nations as to its location, construction and operation. For example, when James Douglas was instructed in 1843 to oversee the construction of a new post at what is now Victoria harbour, he first met with Songhees representatives, 'and informed them of our intention of building in this place which appeared to please them very much and they immediately offered their services in procuring pickets for the establishment, an offer which I gladly accepted and

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commonly used in diplomacy to designate "an international agreement of temporary or provisional nature intended to be replaced by an arrangement of a more permanent and detailed character." The United Nations, "Treaty Reference Guide," accessed 14 August 2015, https://treaties.un.org/pages/Overview.aspx?path=overview/definition/page1_en.xml#modus

[177] Wayne Suttles, "The Ethnographic Significance of the Fort Langley Journals," in *The Fort Langley Journals, 1827-30*, ed. Morag Maclachlan (Vancouver: UBC Press, 1998), 163. The Cowichan also maintained a village on the Fraser River.

[178] Alexandra Harmon, *Indians in the Making: Ethnic Relations and Indian Identities Around Puget Sound* (Berkeley: University of California Press, 1998), 47.

promised to pay them a blanket…for every forty pickets of 22 feet by 36 inches which they bring'."[179] The Fort Victoria Journals of 1846 to 1850[180] make it clear that the relationship of the "Samose" with the Company in the latter half of the 1840s was largely commercial, supplying furs, fish, produce and labour. These interactions grew more numerous and complex as the HBC establishment gradually expanded beyond the perimeter of the fort, most noticeably with the commencement of crop farming and the livestock ranching for domestic use and for sale to visiting ships.[181]

Although James Douglas visited Fort Victoria regularly after its construction, he and his family did not take up residence until June, 1849. From 1830 to 1849,[182] he lived and worked at Fort Vancouver, rising through the ranks, from accountant, to chief trader to chief factor. In those years Douglas would have witnessed the arrival of a few Metis families from the Red River settlement. Peter Burnett, a lawyer from Missouri, who arrived in the Oregon Territory in 1843,[183] described the Native American attitude towards the HBC and its employees:

> The Indians soon saw that the [Hudson's Bay] company was a mere trading establishment, confined to a small space of land at each post, and was in point of fact, advantageous to themselves. The few Canadian French [retired HBC servants] who were located in the Willamette Valley [just south of Fort Vancouver] were mostly, if not entirely, connected by marriage with the Indians,

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[179] BCA, Sir James Douglas Fonds, Diary of James Douglas, A/B/40/D75.4, "A trip to Victoria, March 1-21, 1843."

[180] HBCA, Fort Victoria Journals (1846-1850), Ref.# B.226/a/1, Reel 1M149.

[181] Finlayson's entry in the Fort Victoria Journal for October 30, 1846 noted that, "We have now about 110 acres sown with winter wheat," and W.C. Grant noted in August 1851, that 150 acres were in cultivation. See James Hendrickson, "Two Letters from Walter Colquhoun Grant," *BC Studies,* 26 (Summer 1975): 11; There are multiple entries in the Fort Victoria Journal concerning the raising and sale of livestock.

[182] Walter Sage, *Sir James Douglas and British Columbia* (Toronto: University of Toronto Press., 1930), 149.

[183] He became a judge in 1848, and moved on to California where he became its first governor in 1850. Stuart Banner, *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (Cambridge Mass: Harvard University Press, 2008), 238-239.

> the Frenchmen having Indian wives, and were considered to some extent as a part of their own people.[184]

Burnett's description of the relationship between Native Americans and settlers from the United States in the mid 1840s is remarkable for its frankness and insight:

> But when we, the American immigrants, came into what the Indians claimed as their own country, we were considerable in numbers; and we came, not to establish trade with the Indians, but to take and settle the country exclusively for ourselves. Consequently, we went anywhere we pleased, settled down without any treaty or consultation with the Indians, and occupied our claims without their consent and without compensation. This difference they very soon understood. Every succeeding fall they found the white population about doubled, and our settlements continually extending, and rapidly encroaching more and more upon their pasture and camas grounds. They say that we fenced in the best lands, excluding their horse from the grass, and our hogs ate up their camas. They instinctively saw annihilation before them.[185]

In anticipation of eventual annexation by the United States, American settlers formed the "Oregon Provisional Government" in 1844, and invited representatives of the HBC to participate. This was agreed after protracted negotiations, including an informal allocation of jurisdiction over land north of the Columbia River to the HBC, where most of their forts and farms were located, and to Americans south of the river, where most of the new arrivals were homesteading. Douglas served as a county court judge in the Provisional Government from 1845 to 1847, with jurisdiction over the territory north of the Columbia, thereby retaining effective control for the HBC over that area, but relinquishing any influence on affairs south of the river.[186]

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[184] Peter H. Burnett, "Recollections of an Old Pioneer," *Quarterly of the Oregon Historical Society,* 5 (1904): 97.

[185] Ibid.

[186] Based on Hamar Foster and Allen Grove, "'Trespassers on the Soil': United States v Tom and a New Perspective of the Short History of Treaty Making in Nineteenth Century British Columbia," in *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest*, ed. Alexandra Harmon (Seattle: University of Washington, 2008), 104; I have been puzzled at the lack of information on Douglas'

In the decades following the 1818 Treaty, negotiations continued between the governments of Britain and the United States, attempting to arrive at a final resolution of their boundary dispute. The British hoped to maintain the existing status quo, with land north of the mouth of the Columbia River allocated to Britain (roughly at the 42nd parallel), while the Americans argued for a border near the 54th parallel. The compromise agreement reached in 1846, enshrined in the "Oregon Treaty," saw the border established along the 49th parallel, an extension of the existing boundary east of the Rockies.[187] Of course, the Indigenous population of the territory was not consulted on this decision that would have such a huge impact on their future.[188] The decision also spelled the end of all HBC establishments south of the 49th Parallel and north of the Columbia River, and the gradual migration northward of its property and personnel, a process that took a decade to complete.

By 1846, "there were already thousands of white settlers in the southern part of the Oregon Territory, the present-day state of Oregon."[189] In 1847 a "Petition of Citizens of Oregon" was sent to the U.S. Senate, complaining that, *inter alia*, "our relations with the various surrounding Indian tribes, and those in our midst, are daily becoming more and more difficult," because the Indians were no longer content "with repeated

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involvement with the Provisional government, and in conversation with an archivist at the Oregon State Archives in 2013 I learned that most of their records for the relevant time period were lost in a fire.

[187] The boundary departed from the 49th parallel at the Pacific coast, bending southward around the tip of Vancouver Island.

[188] This resolved the question of sovereignty as between Britain and the United States, but logically speaking, did not affect the question of sovereignty as between these two countries and the Indigenous inhabitants on either side of the 49th parallel. For an excellent discussion of the issue see Kent McNeill, "Negotiated Sovereignty: Indian Treaties and the Acquisition of American and Canadian Territorial Rights in the Pacific Northwest," in *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest*, ed. Alexandra Harmon (Seattle: University of Washington, 2008), 35-55.

[189] Banner, *Possessing The Pacific*, 231.

assurances given from time to time that the United States would send agents, authorized and empowered to treat with them in relation to their claims to the soil of the country."[190] The territorial government was belatedly established in 1848 by means of a statute, which cautioned that "nothing in the act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians."[191] That the newly established administration was aware of the situation is demonstrated by two reports made in 1849 by the territory's first governor, Joseph Lane. He recommended to the Oregon legislative assembly that, "…the Indians of the Willamette Valley should be removed to some district remote from the settlements, because the destruction of the roots, grasses, and game by the settlers in the valley forced the Indians either to steal or starve."[192] He also reported to the federal government on Indian complaints that "…the whites had taken their lands, brought sickness among them, and killed off the game. In return they had received only promises that the government would pay them for their lands." Lane recommended that, "the government buy their lands, and locate them out of the settlements."[193] Despite considerable pressure to "negotiate land cession treaties…Congress did not take up the issue until 1850," by which time there were 12,000 whites in the Territory."[194]

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[190] 30th Congress, 1st Session, Senate Miscellaneous, No. 136, v 1, serial 511, ordered to be printed, 8 May 1848.

[191] Banner, *Possessing The Pacific,* 239.

[192] C. Coan, "The First Stage of the Federal Indian Policy in the Northwest, 1849-1852," *Quarterly of the Oregon Historical Society*, 22.1 (1921): 52. This is reminiscent of Joseph McKay's explanation of the purpose of the Fort Victoria Treaties, as described in a later section of the chapter.

[193] Ibid.

[194] Ibid; the treaty history of the Oregon Territory is taken up in Chapter III.

3. The Threat of Violence

The goal in this section is not to offer an assessment of violence amongst First Nations circa 1850. Instead, the focus is on the influence, if any, of the potential for violence on the negotiation of the treaties. Specifically, it deals with the influence, if any, of violent incidents between First Nations and the HBC and/or the British Navy, on the attitudes the parties would have brought to the negotiations. In other words, were the white residents afraid of the First Nations, and were the First Nations intimidated by shows of force on the part of the HBC and the British Navy?

As to the first question, the sanguine attitude of HBC employees is demonstrated by a reminiscence of Dr. J. S. Helmcken, describing an incident involving the Songhees, which took place in 1851:

> About this time a Songish Indian killed a cow. The culprit having been discovered, he took refuge in the village; his tillicums [friends] refused to surrender him….Mr. Douglas determined to have the fellow, and therefore three boats started from the fort with about a dozen armed men all told, to take him out of the village; Mr. J. W. McKay was chief in charge. I had a boat and three men….The Indians turned out to receive us with yells, shouts, guns, axes, spears, and so forth. There must have been five hundred men….The big boat grounded, but instead of the men leaping out of the boat the Indians rushed into the water, and took the muskets away from the men…Boats and men returned to the Fort….On the following day some chiefs appeared with a flag of truce….After consultation, the chiefs decided to pay for the cow, and return all the muskets….This I think was the last serious (?) squabble with these people. Of course there were occasional troubles, but generally speaking the natives were peaceable, and we roamed among them and around the country without dread. It says a great deal for their self-command, that they did not fire upon us, but I suppose the party was too contemptibly small, hence its safety.[195]

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[195] First published in the Daily Colonist newspaper on January 1, 1889, and reprinted in John Sebastian Helmcken, *The Reminiscences of Doctor John Sebastian Helmcken*, ed. Dorothy Blakey Smith. (Vancouver: UBC Press, 1975), 141-142.

As to the second question, there were only two occasions prior to 1850 in which the HBC and then the Royal Navy took the opportunity to demonstrate their military superiority. The first incident, as recorded by Roderick Finlayson in his autobiography[196] occurred shortly after his appointment as chief trader at Fort Victoria in 1844, "…when it was found that the natives killed some of our oxen, feeding in open places." The Songhees chief refused to provide restitution, and "the next move I found on their part was a shower of bullets fired at the fort." Finlayson, after determining that the Songhees chiefs' long house was empty, "fired a nine pounder with grape in, and pointed the gun to the lodge, which flew into the air in splinters like a bombshell." An informant then told Finlayson that "none were killed but much frightened, now knowing we had such destructive arms." The Chief then came to the gate, whereupon Finlayson "mentioned that unless the cattle killed were paid for I would demolish all their huts and drive them from the place," and "the next day payment in full in furs was made, when peace was restored and hand shaking took place."

The second event took place on August 24, 1848, as recorded by Finlayson in the Fort Victoria Journal for that date:

> Late in the evening Snitlum with a war party of Skatchets and Tlalums [from the Puget Sound] arrived & made some warlike demonstrations by firing several rounds of bank cartridge, which the Cape Flattery [the Makah] ret[urne]d. Captain Courtenay [of HMS *Constance*] on hearing the firing & seeing so many Indians paddling towards the Ft. supposed something serious had happened & very considerately came over with four armed boats from the ship. Finding only some Cape Flatteries haranguing to the Tlalums in front of the Ft., ordered a salute of 7 guns to be fired from the boats which was done & answ[ere]d by us from the Bastions. All hands including some thirty or so of Marines came on shore all

[196] BC Heritage, "Biography of Roderick Finlayson, 1818-1892," Hudson's Bay Company at Fort Victoria: Fort Life, accessed 14 August 2015, http://bcheritage.ca/fortvictoria/fortlife/rod.html.

> armed & promenaded round the Ft. yard. After which the Captain with the four boats returned to the ship.[197]

According to naval historian Barry Gough,[198] the Constance was the first warship to dock at Victoria. No British military establishments were erected on Vancouver Island and no soldiers temporarily dispatched to the colony during these years. As no First Nation accounts of the incidents exist, it is not possible to determine how these events affected their attitude towards the Europeans in their midst. However, there is little on which to build an argument that the First Nation parties to the Vancouver Island Treaties were cowed by such limited demonstrations of military prowess.

4. Prelude to the Treaties

In March of 1850 Dr. J.S. Helmcken arrived at Fort Victoria to take up his new post as an HBC physician. At the end of April he was sent to Fort Rupert, returning to Fort Victoria in December.[199] In his 1892 reminiscences he noted that, "I suppose too I was not present when Mr. Douglas made the treaty with the Indians in 1850 to surrender their lands. It must have been just before or just after I went to Rupert, still I have a glimmering of having seen them collecting."[200] In 1887 Helmcken wrote "A Reminiscence of 1850,"[201] which provides a glimpse of the setting in which the treaty

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[197] HBCA, Fort Victoria Journals (1846-1850), Ref.# B.226/a/1, Reel 1M149. Also available online at http://www.fortvictoriajournal.ca/.

[198] Barry Gough, *Gunboat Frontier: British Maritime Authority and Northwest Coast Indians, 1846-1890* (Vancouver: UBC Press, 1984), 26.

[199] W. Kay Lamb, "Introduction," in *The Reminiscences of Doctor James Sebastian Helmcken*, ed. Dorothy Blakey-Smith (Vancouver: UBC Press, 1975), xv.

[200] Helmcken, *The Reminiscences of Doctor John Sebastian Helmcken,* 136.

[201] John Sebastian Helmcken, "A Reminiscence of 1850," *Victoria Daily Colonist* (Victoria, BC), December 1887, 3. Reproduced in Helmcken, *The Reminiscences of Doctor James Sebastian Helmcken*, 282.

meetings took place, just outside the fort walls. He recounted a walk taken shortly after his arrival, in the company of Dr. Benson, who would later act as witness to six of the 1850 treaty agreements:

> …we went outside the 'fort' and there lay the *Beaver* [an HBC paddle wheeler]…cannon on deck, muskets and cutlasses arranged in their proper places…with a trading place for Indians, who, I was told, were only allowed a few at a time on board, when on trade….Outside the Fort there were no houses, save perhaps a block cabin or two. Forest more or less existed from ' the ravine,' Johnson street, to the north, and the harbour was surrounded with tall pines, and its bowers bedecked with shrubs, many of which were at this early period in blossom. Cultivated fields existed from Government street to the public schools; likewise across the bay[202]…There were barns up Fort street….[203]

That evening Dr. Benson took Helmcken by canoe across the harbour to "see the Indian village," and Helmcken noted that, "There must have been five or six hundred Indians. By far the greater number had a blanket only for clothing."[204] The scene evoked is of a tiny community of HBC personnel venturing outside the fort, keenly aware of the very visible and numerous First Nation population.

The daily interactions between HBC employees and the local First Nations are documented in the Fort Victoria Journal, for 1846 to 1850,[205] kept by Roderick Finlayson. These were largely of an economic nature, and have been well described by historian John Lutz in his book *Makúk : A New History of Aboriginal-White Relations*.[206]

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[202] Perhaps what is now known as James Bay.

[203] Dr. Alfred Robson Benson arrived at Nanaimo in 1849 aboard the barque *Harpooner*, but quickly made his way to Fort Victoria where he found work with the HBC. See A.S. Monro, "The Medical History of British Columbia: Nanaimo," *The Canadian Medical Association Journal* (August 1932): 187-188.

[204] Helmcken, *The Reminiscences of Doctor John Sebastian Helmcken,* 284.

[205] It is unfortunate that the daily journal for the period between 1843 and 1845, and for the years after 1850, did not survive.

[206] Lutz, *Makúk,* 72-79.

None of the arrangements entered into by the HBC and surrounding First Nations prior to 1850 involved the use of a paper document. In other words, there was no precedent for the making of marks on a sheet of paper, and presumably no understanding of the implications of such an act. No agreements in writing with the British Crown or the United States government had been entered into by the Indigenous peoples of the Northwest Coast prior to 1850, so it is highly unlikely that the Vancouver Island First Nations were aware of any precedents. Thus they were the first, and with perhaps the least prior interaction, to make such treaties in the region. Of course, the HBC and the Colonial Office had great experience with agreements documented on paper, and attached much importance to them, as demonstrated in the documents and correspondence immediately preceding the treaty meetings of 1850.

While the United States government gradually asserted control over the inhabitants of Oregon Territory south of the 49th Parallel, the British government decided to make its presence felt north of the 49th by creating a colony, which would form a bulwark against any further expansionist ambitions of the United States. Britain chose Vancouver Island rather than the mainland for this purpose, delegating most of the functions of colonial administration to the Hudson's Bay Company. This was to be a settler colony, and the HBC was given the task of bringing in colonists, allocating land to them and creating the infrastructure and government services necessary to support the newcomers. The legal instrument creating the colony was a charter, which in January of 1849, granted the title of Vancouver Island to the HBC for a period of ten years, on the

understanding that the HBC would create a settler colony.[207] The Charter did not contain any instructions on how to deal with the First Nation inhabitants of the Island, and the reason is disclosed in a cabinet briefing note dated December 17, 1849:

> With regard to the Indians it has been thought on the whole the better course to make no stipulations respecting them in the grant. Little is in fact known of the natives of this island, by the Company or by any one else. Whether they are numerous or few, strong or weak; whether or not they use the land for such purposes as would render the reservation of a large portion of it for their use important or not, are questions which we have not the full materials to answer. Under these circumstances, any provisions that could be made for a people so distant and so imperfectly known, might turn out impediments in the way of colonization, without any real advantage to themselves.[208]

However, the briefing note concluded with the following admonition: "It must however be added that in parting with the land of the island Her Majesty parts only with her own right therein, and that whatever measures she was bound to take in order to extinguish the Indian title are equally obligatory on the Company."[209]

On the very same date as the briefing note, Archibald Barclay, Secretary of the HBC in London, wrote to Douglas with his views and instructions concerning the "Indian title":

> With respect to the rights of the Natives, you will have to confer with the Chiefs of the tribes on that subject; and in your negotiations with them you are to consider the natives as the rightful possessors of such Lands only as they occupied by cultivation, or had houses built on, at the time when the island came under the undivided sovereignty of Great Britain in 1846.[210] All other land is to be

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[207] James Hendrickson, *Journals of the Colonial Legislatures of the Colonies of Vancouver Island and British Columbia, 1851-1871,* Vol I (Victoria: Provincial Archives of British Columbia, 1980), 374-378.

[208] Colonial Dispatches (hereafter CD), Public Offices document, British Foreign Office to [None], CO 305/1, 635, accessed 20 August 2015, http://bcgenesis.uvic.ca/getDoc.htm?id=V495PA03.scx.

[209] Ibid.

[210] Sovereignty was assumed to have occurred as a result of the Oregon Treaty of 1846, which divided the west coast of North America (south of Russian Alaska and north of Spanish Mexico) between Great Britain and the United States.

> regarded as waste,[211] and applicable to the purpose of colonization. A Committee of the House of Commons, which sat upon some claims of the New Zealand Company reported, in reference to native rights in general that 'the uncivilized Inhabitants of any Country have but a qualified dominion over it, or a right of occupancy only, and that until they establish among themselves a settled form of government and subjugate the ground to their own uses by the Cultivation of it, they cannot grant to individuals not of their own Tribe, any portion of it, for the simple reason that they have not themselves any individual property in it'.[212]
>
> The principle here laid down is that which the Governor and Committee authorize you to adopt in treating with the Natives of Vancouver's Island, but the extent to which it is to be acted upon must be left to your own discretion, and will depend upon the character of the tribe and other circumstances. The natives will be confirmed in the possession of their lands as long as they occupy and cultivate them themselves, but will not be allowed to sell or dispose of them to any private person, the right to the entire soil having been granted to the Company by the Crown. The right of fishing and hunting will be continued to them….[213]

The tenor of the letter is cautionary, warning Douglas at considerable and repetitive length that he is not to entertain any overly generous notions as to the nature and extent of "native rights" to land. Why was Barclay at such pains to lecture Douglas on the subject? Barclay appears to have taken to heart the conclusion of an 1844 *Report from the Select Committee on New Zealand*,[214] "That the acknowledgment by the local authorities of a right of property on the part of the natives of New Zealand, in all wild lands in those Islands…was an error which has been productive of very injurious consequences." In other words, Barclay wanted to ensure that Douglas did not commit a similar "error" on

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[211] The term "waste" in this context meant 'unimproved' land.

[212] The internal quotation is from the 1844 "Report from the Select Committee on New Zealand; Together with the Minutes of Evidence, Appendix, and Index," British House of Commons, 29 July 1844. Reproduced in *Irish University Press Series on Parliamentary Papers*, New Zealand, Vol II. Shannon: Irish University Press.

[213] HBCA, Letter of Archibald Barclay to Sir James Douglas, 17 December 1849, London Correspondence Book Outward. Reproduced in part in James E. Hendrickson, "The Aboriginal Land Policy of Governor James Douglas, 1849-1864" (BC Studies Conference Presentation, Burnaby, BC: Simon Fraser University, 1988), 4-5.

[214] Ibid., xiii.

Vancouver Island. To that end, Barclay advocated that the "natives" be "confirmed in the possession" of such land as "they occupied by cultivation, or had houses built on," with the remainder to be "applicable to the purpose of colonization," without the need for purchase. In other words, he recommended that Douglas set up the equivalent of a reserve system, but conceded that he was authorized to exercise his own discretion, dependent on "the character of the tribe and other circumstances." The letter also highlighted the complex array of responsibilities now faced by Douglas: to ensure the profitability of the growing HBC establishment at Fort Victoria, to prepare the way for the arrival of colonists, while at the same time maintaining good relations with the First Nations on the Island.

In September of 1849, three months *before* the date of the cabinet briefing note and Barclay's letter of instruction, Douglas raised the subject of the First Nation interest in land in an important letter to Barclay:

> Some arrangement should be made as soon as possible with the native Tribes for the purchase of their lands, and I would recommend payment being made in the shape of an annual allowance instead of the whole sum being given at one time; they will thus derive a permanent benefit from the sale of their lands and the Colony will have a degree of security from their future good behaviour. I would also strongly recommend, equally as a measure of justice, and from a regard to the future peace of the colony, that the Indians Fishere's [*sic*], Village Sities [*sic*] and Fields, should be reserved for their benefit and fully secured to them by law.[215]

The letter demonstrates that Douglas was already committed to the "purchase" of the "lands" of the native "Tribes," but according to historian James Hendrickson,[216] "How Douglas first became aware of the Company's obligation to extinguish aboriginal title is

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[215] HBCA, Letter of Archibald Barclay to Sir James Douglas, 17 December 1849, London Correspondence Book Outward.

[216] Hendrickson, "The Aboriginal Land Policy of Governor James Douglas, 1849-1864," 3.

unknown." However, geographer Cole Harris has noted that in April of 1849, five months before Douglas' letter to Barclay, "Andrew Colvile, a prominent director of the company in London and deputy governor" wrote to "George Simpson, governor of the Hudson's Bay Company in North America," stating that 'it would be best to make some bargain with the Indians in the first instance to prevent disputes – and if the consideration to them be by annual payments it will give some hold over them as it could be stopped if they became troublesome'."[217] It is possible that this information was the source of Douglas' preference for an "annual allowance," and supports Hendrickson's speculation that Douglas' awareness of the obligation to purchase may have been gained "through conversations with Eden Colvile…who spent the winter of 1849-50 in Victoria."[218] Even if he did not get the message via Colvile, Douglas certainly knew from his years in the Oregon Territory that the United States followed that policy. It is equally clear that Douglas did not get any instructions from the Colonial Office – confirmed by my perusal of the entire set of Colonial Despatches on the subject of Vancouver Island for the period in question.

Douglas' letter is the first demonstration of his ongoing struggle to maintain what he perceived to be a just balance between the needs of the settlers and First Nations, soon to be coexisting on southern Vancouver Island. Thus, an annuity provides a "permanent benefit" to First Nations and at the same time ensures "their future good behaviour." Similarly, when "fisheries, village sites and fields" are "reserved," the "future peace of the colony" is enhanced.

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[217] Harris, *Making Native Space*, 19-20, 339.

[218] Hendrickson, "The Aboriginal Land Policy of Governor James Douglas, 1849-1864," 3.

At this juncture it is standard practice in the literature on the Douglas Treaties to proceed straight to an account of the treaty meetings based on Douglas' reporting letters to HBC headquarters in London. Not this time. In the case of each meeting, I have chosen to begin with the First Nation accounts. Thus the colonial accounts are considered secondary, useful as a means to provide insight into the First Nation understandings of the treaty negotiations. Reversing the priority results in the emergence of a very different picture of the treaties.

C. The Treaty Meetings

Tucked away in the archival record are examples of First Nation spokespeople attempting to explain their understanding of the Treaties to non-First Nation audiences. Unfortunately, at the time they spoke, their words fell on deaf ears, and their message was ignored. The accounts are few, and they are not without serious problems, but I would argue to no greater degree than the Colonial versions. There are five which have been "reduced to writing" over time. Two are by Chief David Latass[219] describing the 1850 Esquimalt/Songhees treaties and the 1852 North Saanich Treaty. The other three describe the Nanaimo Treaty of 1854 from the viewpoint of Snuneymuxw elders. There are no First Nation accounts of the other Vancouver Island treaty meetings. It should be noted that, unlike contemporaneous accounts, these reflect the understanding of the narrators at the time their stories were told, not at the date of the original meetings.
The Latass accounts are embedded in a long (and rambling) newspaper article published in 1934,[220] and a degree of editorial discretion has been exercised in the choice of extracts

[219] There are four variants of his surname: Latass, Latasse, Latess and Latesse. I have opted to use the first.

[220] Frank Pagett,. "105 Years in Victoria and Saanich! Chief David Recalls White Man's Coming; 80 Years

reproduced here. The article is not available online, nor has it been reproduced in its entirety in any publication. The earliest of the Snuneymuxw accounts is by Dick Whoakum, who gave his version of the Nanaimo treaty in 1913, in sworn testimony before the Royal Commission on Indian Affairs in British Columbia (commonly referred to as the McKenna-McBride Commission). A typescript of the translation of his statement to, and cross-examination by, the commissioners is available online.[221] The second Nanaimo account, published in a Vancouver newspaper in 1922, was given by Bobby Yacklum. The third, and most recent Nanaimo account, provided by Quen-Es-Then (also known as Joe Wyse), also appeared in a newspaper article, originally published in 1933 and recently republished in a compilation of the journalist's work.[222]

On the other hand, it is important to bear in mind that the five First Nation accounts presented in this chapter, were provided by people well placed to have a good understanding of what transpired at the treaty meetings: Whoakum was a signatory, Yacklam and Wyse were the sons of Snuneymuxw signatory chiefs, Latass (or his father) participated in the Songhees/Esquimalt meetings, and he (or his maternal uncles) participated in the Saanich meetings.

The substantial extracts reproduced here enable, for the first time, comparison of the accounts with each other, and with the colonial accounts. Recent academic literature has started to include short snippets of these First Nation accounts,[223] but only as a

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Rent Unpaid." *Victoria Daily Times* (Victoria, BC), 14 July 1934, 1.

[221] Transcripts of testimony before the McKenna/McBride Commission are available on the BC Union of Indian Chiefs website. BC Union of Indian Chiefs, "UBCIC Library and Archives," accessed 15 August 2015, http://www.ubcic.bc.ca/library.

[222] Beryl Mildred Cryer and Chris Arnett, *Two Houses Half-buried in the Sand: Oral Traditions of the Hul'q'umi'num' Coast Salish of Kuper Island and Vancouver Island* (Vancouver: Talonbooks, 2007).

[223] Harris, *Making Native Space*; Keddie, *Songhees Pictorial*; Lutz, *Makúk*.

supplement to the usual recitation of events derived from the colonial record. The academic references are also largely uncritical. To the best of my knowledge, no court decision involving the Vancouver Island Treaties has had occasion to reference these First Nation accounts. Most of the secondary literature on the Vancouver Island Treaties uses selected quotes from primary documents to illustrate a narrative or justify an argument, with the result that unselected parts of these documents receive no attention at all. As well, the practice of quoting short extracts does not allow for an appreciation of the implications of the document as a whole. To avoid these pitfalls the major primary documents are reproduced in their entirety (as they relate to treaties), a running commentary on items of interest in each document is maintained via footnotes, and comments of a more general nature are presented at the end of each major quotation.

1. The Fort Victoria Treaties (1850)

There are four accounts of these treaty meetings, one by Chief David Latass of the Tsawout First Nation in Saanich, and three by HBC employees. Each account is presented, analyzed and compared with the others. The final segment focuses on the relationship between the oral and written versions of the treaties. Consistent with my stated methodology, the Latass account is presented first, even though it is by far the most distant in time from the events described

a. The Latass Account

In 1934, Saanich Chief David Latass gave an interview to Frank Pagett,[224] a reporter for the Victoria Daily Times. The article opened with these prescient words:

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[224] A Google search of his name yielded only one additional reference to his work, an article on the history of the Victoria Public Library, also published in 1934. Frank Pagett, "Victoria is Proud of Senior Public Library," *The Victoria Times* (Victoria, BC), 21 July 1934.

"Tribal groups of Saanich have claims against the Hudson's Bay Company, the Imperial Government, the Dominion of Canada and the British Columbia Government, for a capital sum to make good an agreed rental of Saanich now unpaid for eighty years, according to Chief David Latass, famous orator of the Brentwood division of the Saanich Tribe."[225] According to the article, he was "born a member of the Songhees tribe," but at age seven he went to Brentwood to live, "joining aunts who had become wives of members of the Saanich tribe." An explanation of his relocation is contained in a letter in support of Latass' claim to receive a share of the proceeds of the sale of the old Songhees Reserve in 1911: "David Ledtast [*sic*] born a Songees and both parents live on the Songhees Reserve in the community house. This man when about fifteen years old and after his mother and his father had died was taken by his aunt who was a Saanich Indian to live at Saanich…He is now chief of the Saanich tribe and he has been for many years."[226] He spent the balance of his life with the Tsartlip First Nation at Brentwood in Saanich.

According to the reporter, Latass, who claimed to be 105 years old, was "still mentally keen." In the article Latass addressed the issue of incredulity concerning his age: "White people doubt my age can be 105 years. They see my bright eyes, they saw me move quickly until a few years ago, they heard me speak in council and address the tribes when long past ninety years old, and they said it was impossible for me to have

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[225] Ibid., 1.

[226] The letter was from a Victoria law firm, Hanington and Jackson to the Provincial Minister of Lands, W.R. Ross; National Archives of Canada (hereafter NAC), Hanington and Jackson to W.R. Ross, the Provincial Minister of Lands, RG10, Vol 3690, file 13,886-4. The discrepancy in the two accounts as to Latass' age when he moved to Saanich, does little to support to the accuracy of his claim to be 106 years old.

known James Douglas. But I was a grown man when the big pow-wow was held [in 1850] in Beacon Hill."[227] I have done an extensive search for confirmation or contradiction of his age claim,[228] but the results are wildly disparate, making it impossible to come to any definite conclusion one way or the other. If he indeed exaggerated his age, why did he do so? The question is important because it affects the credibility of everything else he said in the interview. A possible insight is provided by historian Chris Friday, who commented on how important eye-witness status was to Native Americans claiming to have been present at the Stevens Treaty meetings in the Puget Sound area in 1854 and 1855: "For those individuals, having been there was a basis of legitimacy and authority….Such exact knowledge of the treaties and an ability to mobilize it became markers of leadership."[229] It is ironic that a possible attempt by Latess to bolster the legitimacy and authority of his account has had the opposite effect.

Given the uncertainty of his eye-witness status, the frailties of human memory, and the imperfections of translation, I think that the information supplied by David Latass may not be an accurate source of information on the dates and details of the events described.

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[227] Pagett, *105 Years*.

[228] Provincial Archaeologist Grant Keddie, in an article written in 1992 on the ceremonies surrounding a visit to Victoria of the Governor General in 1927, quoted from an (unidentified) newspaper story which noted the participation of "Chief David, of the Saanich Tribe, who is approaching ninety years of age." Grant Keddie, "Installation of a Songhees Chief," *Discovery*, 20.1 (Winter 1992): 2. Ethnographer Diamond Jenness, in his unpublished monograph, "Indians of Vancouver Island," used David Latass as an informant, and noted that he "died in 1937 [*sic*] at the age of over 90." BCA, Diamond Jenness, "Indians of Vancouver Island," (Unpublished monograph, no date [ca. 1930s]). A search of census records yielded one entry, in the 1921 Canadian Census (available online). David is listed as being 65 years old, which if accurate would mean that he was born in 1859. He is listed as unable to read or write, but his wife Genevieve is listed as literate, so presumably she supplied the information to the census taker. On the other hand, his death certificate at BC Archives, also based on information supplied by Genevieve, states that "David Joseph Latess" died at Brentwood in September 1936, at the age of 110 years, which indicates to me that she is not a reliable source on his age.

[229] Friday, "Performing Treaties," 169.

However, I am not looking to him for that kind of information. For the purposes of this chapter, it is his *interpretatio*n of the events that is important. His unique contribution to the search for the oral terms of the Vancouver Island Treaties is a lifetime spent listening and talking to people knowledgeable about the treaties, absorbing information from many sources along the way, and expressing his views as they evolved over the years. In other words, rather than an eye-witness, he is the equivalent of the modern 'expert witness', the first scholar of the Vancouver Island Treaties. The views expressed in his 1934 interview were over fifty years ahead of their time, and would not find expression again until 1989, in an important article by legal historian Hamar Foster on the Saanich Treaty.[230] I checked the editorials and letters to the editor for the two weeks following Latass' provocative article, and found no references, indicating that his account did not prompt outrage, only indifference.

The following excerpt from the transcript of evidence given by Gabriel Bartleman in 1987 in court proceedings brought by the Tsawout First Nation to prevent the construction of a marina on Saanich Inlet, reveals much about the high esteem in which David Latass was held by the Saanich people. Bartleman was seventy-three years old when he was examined by Louise Mandell, counsel for the Tsawout:

> Q …who was the leader of the Saanich people during the time when you were growing up?
> A. A gentleman by the name of Chief David Latesse…
> Q. Was David Latesse an elected leader or was he a leader by his birthright or hereditary line?
> A. He was a leader by his birthright and became a leader through the merits that he had behind him.

[230] Hamar Foster, "The Saanichton Bay Marina Case: Imperial Law, Colonial History and Competing Theories of Aboriginal Title," *UBC Law Review* (1989): 632; See the literature review in Chapter V for more on the article.

> Q. …what did you understand that the merits were which the people recognized in him?
> A. At that time, Chief David Latesse apparently got to understand some of what is called the treaty, and he tried to inform the people that he looked after the best he could at that time.
> Q. Now you mention that Chief David Latesse had knowledge concerning the treaty…
> A. He didn't use the word "treaty," they called it James Douglas' word.
> Q…. and did Chief David speak about what happened to have that treaty concluded?
> A. The understanding that he gave the people at home was that their way of life was never ever going to be disturbed, that they would always be able to take their food and travel as they did before, that nothing would ever be taken away from them.[231]

As a side note, all the First Nation accounts upon which I rely were related by elderly men. How reliable are memories implanted at a young age, and recalled in extreme old age? To my knowledge Bartlemen is the only person to address this issue with respect to the treaty First Nations in this region. During his court testimony he justified his clear memory of a meeting in 1924 or 1925, which took place when he was nine or ten years old, explaining that,

> …whenever my father was called to sit in at a meeting I went along with him, and [that is] how I happened to hear whatever was discussed. I was told to be quiet and sit down and listen. Many of our older people were very disciplining people, and we were told that when there was something especially good to listen to that we should do so. And I think that that's why I have a good memory of some of the discussions that took place on the Saanich Reserve. Usually that was about Douglas' word.[232]

According to Pagett, Latass was "looked after by a well-educated wife, half his age, who aided in interpreting the ancient's vigorous statements,"[233] but "The principal interpreter

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[231] *Saanichton Marina Ltd v Louis Claxton et al*, Transcript of Proceedings at Trial on 2 September 1987, 27-29. Copy in possession of Hamar Foster.

[232] Ibid, 28

[233] Pagett, *105 Years*, 1. Her name was Genevieve Latess, according to David's death certificate. BCA, Death register of David Latesse, GR 2951, Vol 020, Reg # 1936-09-020220, Reel B13363.

of Chief David's reminiscences was his grand-nephew, Baptiste Paull," described as "a boxer and wrestler, whose prowess has won fame throughout the Pacific Coast."[234] What follows are extracts from the interview relevant to the Fort Victoria Treaties:

> I do well remember hearing that Douglas called a meeting of the four sub-chiefs of the Songhees, heads of the groups living at Clover Point, at Cadboro Bay, at Cordova Bay and at Mud Bay [on the same side of the harbour as the fort]. I remember the sense of wealth shared by the Mud Bay group when, after they had agreed to abandon Mud Bay and remove to the old Songhees reserve on the inner harbour, Douglas gave the sub-chief a bale of fifty blankets for distribution among the families of the group. He also gave the other groups presents for waiving their rights of assembly at Mud Bay….
>
> In the years around 1850 the Indians considered that there was lots of land and had no thought of or fear of extensive settlement by white men. The whites were welcomed, they provided a fine market for the large amount of fur which the tribesmen annually collected. The trade goods the whites gave in return for the furs were highly regarded. The whites at that time also had no idea of asking the Indians to give up their land. Areas proposed to be used by whites were limited and the gifts of blankets and trade goods were considered as annual dues as I shall show. I was twenty-one when Governor Douglas gave a big party to the Indians of southern Vancouver Island. The entertainment took place at Beacon Hill on May 24, 1850,[235] and was to celebrate the birthday of Queen Victoria. For weeks in advance the party was the talk of all encampments within eighty miles of Victoria. Invitations were sent to the Songhees, Saanich, Cowitchen, and other tribes and the gathering included men, women and children.[236] The natives were seated in big circles, the chiefs forming the innermost line, the lesser braves being further to the rear, according to their relative importance or youth. The women and children hung around the outskirts of the circles of men, grouping themselves in eager clusters.[237] Hudson's Bay men distributed hard biscuits smeared with

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[234] Paull has an entry on "Wrestlingdata.com," showing a birth date of 1895, and date of death of 1966, enjoying a wrestling career as "Chief Thunderbird" from 1930 to 1955. "Chief Thunderbird," accessed 15 August 2015, http://wrestlingdata.com/index.php?befehl=bios&wrestler=2651&bild=1&details=7&liga=297&jahr=1935

[235] The Fort Victoria Journal entry for May 24, 1850 does not mention this "party," and makes no mention of First Nations at all. However, Roderick Finlayson, the clerk who made the entry, was notably laconic and not prone to noting events other than the day-to-day business of the fort. The journal entry for May 23 does note that, "a large number of the natives are at present assembled here for the purpose of collecting camus." Therefore, it is possible that the "party' took place as described by Latess, even if it did not merit a mention in the journal. HBCA, Fort Victoria Journals (1846-1850), Ref.# B.226/a/1, Reel 1M149.

[236] The date of the Queen's birthday coincided with the height of the Camas harvesting season, which drew visitors from Saanich and the Cowichan Valley, see Fort Victoria Journal.

[237] This description gives a unique visual image of the arrangement of First Nations when meeting with Douglas.

> molasses and also other foodstuffs. After all had eaten Governor Douglas addressed the crowd. He was dressed in a coat of blue with gold shoulder pieces and trimmings. He preceded his speech with a salute to the Great White Queen,[238] given with upraised hand. He stressed the desire of the white man to be friends with the tribes. He assured the chiefs that trade in furs with peaceful use of enough land to grow food were the only reasons for establishment of the settlement. His statement was welcomed by the peace-loving tribes, whose view of white settlement, had it been voiced at all, would have been that there was lots of land and no harm could come from letting the whites have the use of some of it. It must be remembered that the Indians were great bargainers and they would not have had any idea of letting the whites use their land from year to year unless some equivalent trade or gifts be made each year.

The above passage set out the terms by which First Nations would cede specific tracts of land (including the relocation of a village in the instance recounted) to allow expansion of the HBC establishment outside the palisade. There is another, non-First Nation, account of a negotiated relocation, and it is markedly different. In his memoirs Finlayson recounted that "I wanted them ["the Indians"] to remove to the other side of the harbor which they at first declined to do, saying the land was theirs, and after a great deal of angry parleying on both sides, it was agreed that if I allowed our men to assist them to remove they would go, to which I consented."[239] Finlayson did not provide a date for this event, but from the context it would appear that it was some time in 1845. The obvious differences in the second account are the date, Finlayson as HBC negotiator, and the lack of compensation for the relocation. One explanation is that the accounts do not describe the same event. If they do describe the same event, memory has played tricks on

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[238] The reference to the "Great White Queen" is interesting as it is the only indication in the archival record that Douglas invoked the name of the Queen at a treaty meeting.

[239] BC Heritage, "Biography of Roderick Finlayson, 1818-1892," Hudson's Bay Company at Fort Victoria: Fort Life, accessed 14 August 2015, http://bcheritage.ca/fortvictoria/fortlife/rod.html.

one or both of the storytellers. For my purposes, the differences do not matter so much as the similarities.[240]

In the article Latass gave an account of another meeting. While the first meeting resolved immediate issues, the second was much more open-ended. It seems to have been a public celebration and confirmation of the existing terms of their coexistence on the land. Although not mentioned by Latass, First Nation attendees likely responded to Douglas' pronouncements with speeches of their own. In my opinion, successive annual celebrations of the Queen's birthday over the early 1850s would have reaffirmed the agreement of the parties to maintain the status quo of sharing the land and its resources. Neither event as recounted by Latass coincides in time with the accounts which follow of a series of meetings held between April 29th and May 1st, 1850 at Fort Victoria. It is difficult to tell if the omission was deliberate or accidental. He may have been unaware of them, chosen to ignore them, or believed they never occurred.

b. The Finlayson Account

On April 29th, 1850, eleven men, representatives of the "Teechamitsa Tribe"[241] who resided in the vicinity of present-day Victoria, negotiated the first of the fourteen Vancouver Island Treaties. The only contemporaneous report was this laconic entry in the Fort Victoria Journal for April 29th, made by HBC clerk Roderick Finlayson: "In the evening the proprietors of the tract of country lying between the headland and point

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[240] Interestingly, historian Barry Gough retold the Finlayson account in *Gunboat Frontier*, and concluded that "no treaty marked the event..." presumably meaning that the negotiated terms were not reduced to writing. However, the absence of a written version does not negate the existence of an oral treaty setting out the terms of the cession of a parcel of land.

[241] British Columbia, *Papers Connected with the Indian Land Question, 1850-1875* (Victoria: Queen's Printer, 1875), 5.

M^{c}Gregor were paid for their land. They…got 3 [blankets]… each at which they appeared well satisfied."[242] Eight more treaties were concluded over the next two days, but none of these meetings were described in the Fort Journal. Finlayson signed the Teechamitsa document as a witness, along with Joseph McKay, but his signature does not appear on the written versions of any of the other Fort Victoria agreements, indicating that he was not present at those meetings. However, Finlayson did note on May 4th that "Some of the Songes were paid for their lands today," and on the 10th that "The Sokes were paid for their lands today."[243] In sum, none of the words spoken by the First Nations' representatives were recorded in the journal, nor any note made of the terms of the agreements, other than the number of blankets distributed to the Teechamitsa.

c. The Douglas Account

May 8th 1850 Douglas confided, without elaboration, to a friend and colleague at Fort Langley, that the meetings at Fort Victoria had been "rather a troublesome business."[244] In his May 16th, 1850, report to Archibald Barclay, Secretary of the HBC in London,[245] Douglas portrayed himself in a very different light, as a man in control of events, confidently solving any problems as they arose:

> I summoned[246] to a conference, the chiefs and influential men of the Sangees [Songhees] Tribe, which inhabits and claims the District of Victoria, from Gordon Head on Arro Strait, to Point Albert on the Strait of De Fuca as their own particular heritage. After considerable discussion, it was arranged, that the whole of their lands, forming as before stated the District of Victoria, should be sold to

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[242] HBCA, Fort Victoria Journals (1846-1850), Ref.# B.226/a/1, Reel 1M149.

[243] This entry solves a small mystery as to whether the T'sou-ke meeting took place on the 1st or 10th of May. It would seem most likely that the main meeting took place on the 1st, but payment was deferred until the 10th.

[244] BCA, Letter from Douglas to Yale, MS 105, file 1, 7 May 1850.

[245] HBCA, Sir James Douglas to Archibald Barclay, file A.11/72, 16 May 1850.

[246] It is not known how notice of the proposed conference was disseminated or how its purpose was described.

the Company, with the exception of Village sites, and enclosed fields,[247] for a certain remuneration, to be paid at once to each member of the Tribe. I was in favour of a series of payments to be made annually, but the proposal was so generally disliked that I yielded to their wishes and paid the sum at once. The members of the Tribe on being mustered were found to number 122 men or heads of families, to each of whom was given a quantity of goods equal in value to 17/Sterling, and the total sum disbursed, on this purchase £103.4.0 Sterling at Dept. price.

I subsequently made a similar purchase from the Clallum Tribe, of the country lying between Albert Point and Soke Inlet: in consequence of the claimants not being so well known[248] as the Songees, we adopted a different mode of making the payments, by dealing exclusively with the Chiefs, who received and distributed the payments while the sale was confirmed and ratified by the Tribe collectively. This second purchase cost about £30.0.8. I have since made a purchase from the Soke Tribe of the land between Soke Inlet and Point Therringham, the arrangement being concluded, in this, as in the preceding purchase with the chiefs or heads of Families, who distributed the property among their followers. The cost of this tract which does not contain much cultivable land[249] was £16.8.8.

The Cowetchin[250] and other Tribes, have since expressed a wish to dispose of their lands, on the same terms; but I declined their proposals in consequence of our not being prepared to enter into possession; which ought to be done immediately after the purchase, or the arrangement may be forgotten, and further compensation claimed by the natives.

The lands purchased from the other Tribes embrace the seacoast and interior from Gordon Head on the Arro Strait, to Point Gonzales, and from thence running west along the strait of De Fuca, to Point Theringham a distance of about 44 miles, which includes the Hudson's Bay and Puget Sound Company's reserves.[251]

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[247] This is his first known reference to "enclosed" fields, an adjective repeated in the written versions of the Douglas Treaties.

[248] By "not so well known" he presumably meant that HBC officers did not have the same degree of familiarity with the "tribes" beyond the immediate vicinity of the fort.

[249] It seems the "cost," or price, was set at a lower figure by Douglas because the lack of "cultivable land" indicated lower agricultural potential.

[250] The Fort Victoria Journal entry for May 1, 1850, notes that, "Some furs & provisions were traded today from Kawitchins & others." The identity of the "other tribes" is not known. Interestingly, Latass notes in his 1934 interview that the invitations to the meeting included the Cowichan. HBCA, Fort Victoria Journals (1846-1850), Ref.# B.226/a/1, Reel 1M149.

[251] The HBC formed a subsidiary to operate farms at various forts, including Victoria, to supply the wants of its dependents. See Richard Somerset Mackie, "Colonial Land, Indian Labour and Company Capital: The Economy of Vancouver Island, 1849-1858," (master's thesis, University of Victoria, 1984). Presumably, title to these "reserves" would now vest in the companies free of any "Indian" interest.

> The total cost, as before stated, is £150.3.4. I informed the Natives that they would not be disturbed in the possession of their village sites and enclosed fields, which are of small extent, and that they were at liberty to hunt over the unoccupied lands, and to carry on their fisheries with the same freedom as when they were the sole occupants of the country.[252]

It is important to keep in mind that this letter was a private document, intended for Barclay, not for public dissemination. Douglas did not send copies of the treaty documents or even a report to the Colonial Office. Douglas restricted his report to the issue of most importance to his employers, namely confirmation that he had carried out their instructions. Cole Harris has pointed out[253] that "Douglas was often inclined to speak somewhat differently on the same subject to different audiences," listing the Colonial Office, the board of management of the Hudson's Bay Company, and the secretary of state for the colonies as examples. I would argue that Harris should have added the First Nations to his list, because Douglas also tended to speak "somewhat differently" when addressing First Nations. This is not to say that Douglas was mendacious, only that he was careful to frame his report to the HBC in a way that emphasized his compliance with their instructions, while at the treaty meetings he likely decided that it was prudent to finesse the issue of title to the land. The issue is taken up again later in the chapter.

Douglas began his account by stating that he "summoned" the First Nation representatives to the meeting. This is an interesting choice of word, as it can be used as a command, implying to his superiors in London that he could compel their obedience.

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[252] This sentence is similar to, but slightly more generous in its scope than, the wording used in the Douglas Forms.

[253] Harris, *Making Native Space*, 23.

This brings up the issue of duress. My research on the Washington Treaties (see Chapter III) confirms that Governor Stevens threatened the Native Americans at the treaty meetings. He warned them that if they did not surrender their land and move onto reserves chosen by the government, settlers would overwhelm them and take all of their land. There is no hint that Douglas used coercion either to compel the First Nations to attend the meetings or to agree to a set of demands. Of course, the question remains, how were those terms presented to the assembled First Nations? Had the terms been unacceptable to the First Nations, would Douglas have been able to secure their acquiescence? In the circumstances set out earlier in this report, it seems unlikely. In my opinion, whatever terms were agreed at those meetings were made without threats on either side.

The question of why the Cowichan and "other" First Nations intimated to Douglas a desire to "dispose" of their land is puzzling. The HBC had no establishment in the Cowichan Valley, and there were as yet no settlers in the area, so they could not have been seeking compensation. Would the prospect of receiving a large number of blankets have been so alluring that they were prepared to give up all their land in exchange? Or were they perhaps expecting payment in exchange for their consent to the anticipated arrival of newcomers, and the commercial opportunities they would bring with them? In the end the Cowichan never concluded a treaty with Douglas.[254] Another interesting comment by Douglas was the warning that if an agreement was not followed up by the immediate arrival of settlers, "the arrangement may be forgotten." In other words, until settlers appeared on the scene, the First Nations would have had no intimation that their

[254] See the last section of this chapter.

way of life was in jeopardy. Other than the method of payment, there is nothing in the letter to indicate the content of the "considerable discussion" which took place before the transaction was arranged. From the wording of his letter, it appears that Douglas did not negotiate, but merely "informed," the First Nations of their entitlement to village sites, enclosed fields, fishing and hunting. Again, his choice of word is significant, indicating a level of control over the course of the proceedings that he may well not have possessed.

d. The McKay Account

In 1888, Joseph McKay, a former HBC clerk, and a witness to eight of the nine Fort Victoria treaties, wrote an account of the meetings and their content.[255] He was responding to a request for information from Dr. J. S. Helmcken, who was embroiled in a long-running dispute over the status of the Vancouver Island agreements.[256] McKay was only twenty-one years old in 1850, but had been stationed at Fort Victoria since late 1846. By 1888 he had reached fifty-nine years of age, and was employed as an Indian agent on the Mainland. The letter has not been widely referred to in the literature, even though it provides a unique perspective on the formation of the treaties. Only McKay's draft of the letter has been preserved in the archives,[257] and the crossings-out have been retained in this transcription:

> [1] The arrangements entered into with the ~~Indians of the~~ Victoria ~~and~~ Sanich and Sooke Districts Indians respecting ~~The~~ their claims on lands of those ~~two~~ districts were made at the instance of the Home Government during Governor Blanshard's incumbency.[258] Mr. Douglas was Land Agent for the Crown Lands of Vancouver

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[255] BCA, Joseph William McKay Fonds, PR-0560, MS-1917, file 27, Letter from Joseph McKay to Dr. James S. Helmcken, 3 December 1888.

[256] Read more about this in Chapter V

[257] I have taken the liberty of creating and numbering paragraphs for ease of reference.

.[258] Blanshard's resignation as governor took effect in 1851, prior to the Saanich Treaties. Sage, *Sir James Douglas and British Columbia*, 165.

Island. The then Secretary for the Colonies[259] sent ~~the Mr. Douglas~~ to Mr Douglas through A. Barclay Esqre. HBCo's Secretary instructions as to how he should deal with the so called Indian Title. The instructions were embodied in a somewhat lengthy document[260] which began by reciting the ~~Various~~ general views of the Home Government ~~respecting~~ in regard to the land rights of aborigines in the Countries where they ~~have been~~ might be found sojourning.

[2] Mr. Douglas was very ~~careful~~ cautious in all his proceedings. The day before the meeting with the Indians, he sent for me and handed me the document above referred to telling me to study it carefully and to commit as much of it to memory as possible in order that I might check the interpreter Thomas should he fail to explain properly to the Indians the substance of Mr. Douglas' address to them. [3] I remember ~~distinctly~~ one clause in the document in question distinctly stated that the ~~British~~ Government did not ~~acknowledge~~ admit that nomad tribes had any property in lands which they ~~did~~ had not improved nor occupied for permanently industrial or useful purposes, ~~nor~~ and over which they had not established any form of government nor system of land tenure, but that where in the course of settlement ~~the~~ ~~intre~~ by immigrants from the mother Country ~~interfered materially~~ the intruders interfered materially with the sources of food supply on which the aborigenes had ~~been~~ heretofore subsisted, then as a matter of expediency it were ~~sound policy~~ well to ~~make~~ grant to them such considerations in the way of useful commodities as might allay present irritation and prevent breaches of the peace. It was recommended in a subsequent clause that sufficient land to support them be set apart for the use of the Indians and that the Indians be encouraged to cultivate and improve the same after the manner of ~~the~~ civilized people.

[4] Mr Douglas made no ~~there was no~~ purchase of the ~~lands~~ country from the Indians They ~~Indians~~ were told that ~~the Co.~~ only such places as they had occupied and improved ~~were~~ properly ~~to~~ belonged to them, that in addition to their garden patches and village sites some of the lands contiguous to their Villages would be reserved to them and the rest of the country would be open for sale to white settlers.

[5] You[261] will remember that the Districts for which Indians received payments in blankets were the main producers of the kamas root for the whole surrounding country. The destruction of this plant by cattle and sheep caused a great loss to the Songhees Saanich and Sooke Indians as it was ~~to their~~ the ~~principal~~ most important article of trade which they had to offer in dealing with

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[259] No documents have been located in support of McKay's assertion that Barclay was passing on instructions from the Colonial Office. It seems likely that McKay was in error, as the Colonial Office was at pains to distance itself from the process, as set out in a later section of the chapter.

[260] HBCA, Letter of Archibald Barclay to Sir James Douglas, 17 December 1849, London Correspondence Book Outward.

[261] The letter was addressed to Dr. J.S. Helmcken.

> the neighbouring tribes. Hence the expediency of ~~making~~ giving the ~~them~~ above named Indians a valuable consideration for the loss ~~which~~ sustained ~~of~~ in their kamas trade. The Cowichans did not suffer in any way by the settlement of whites in their country and there never has been any reason which [*sic*] they should have had any payments made to them in respect to their country.[262] The payments made to the Fort Rupert Indians were entirely out of order.[263] The Nanaimos had to surrender their principal village sites to make room for the mining operations carried on there.[264]

The first paragraph contains what can only be a reference to Barclay's letter of instruction to Douglas dated December 17, 1849, and discussed earlier in the chapter. The second paragraph indicates that Douglas' address to the gathered First Nations was a summary of Barclay's instructions, and the third paragraph appears to be a summary of the contents of Barclay's 1849 letter of instruction.

The fourth paragraph begins with a denial of any "purchase," which is in direct contradiction to Douglas' reporting letter to the HBC. The second and third sentences of the paragraph represent McKay's recollection of what the First Nations were told. They were first admonished that only the land they occupied and improved "properly belonged to them," but this could be interpreted more broadly to mean that only such land belonged *exclusively* to them. The first part of the third sentence is significant because McKay said that, "*in addition* to their garden patches and village sites some of the lands contiguous to

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[262] The issue of compensation for the Cowichan is much more complex than McKay indicated, as demonstrated in Section D of this chapter ("The End of Treaty Making").

[263] What McKay meant by this is not clear.

[264] Here McKay's memory failed him, as the surrender of their village sites did not take place until 1862, as noted by Anglican minister John Booth Good: "The Nanaimo tribe at the period of my arrival, September 1861, were located in different parts of the town. In the beginning of the year 1862, Mr. Nicol [manager of the HBC coal mine] proposed moving away the whole body on to their own Reserve. The village was felt to be a nuisance; and, besides, seriously in the way of contemplated improvements of the Company's property…. The above tribe in about a month had moved over to their new settlement from all parts of the town. Booth Good, "Mission to the 'Nanaimo Tribe', Vancouver's Island," 116-118.

their Villages would be reserved to them."[265] He does not say what kind of lands, and whether they would be chosen upon request of the First Nations, but it opens the door to a more expansive interpretation of what was agreed at the meeting.[266] The second half of the sentence appears to be a blunt assertion that "the rest of the country would be open for sale to white settlers." However, is it likely that Thomas would have translated the words so literally and candidly? That question is addressed in the next sub-section.

In the last paragraph McKay gives his opinion as to the rationale behind the distribution of blankets at the Fort Victoria meetings, namely to compensate local First Nations for the loss of their camas lands, confirming that the agreements dealt with short-term as well as long-term issues.

e. Linguistic and Cultural Translation

McKay's brief reference to the translator, Thomas, is the only mention of translation in the historical record of the Vancouver Island Treaties. Unfortunately, McKay did not specify whether Thomas spoke in the Chinook jargon or in Lekwungen. The problems of communicating the terms of a treaty through the medium of the Chinook jargon, which has a vocabulary of less than one thousand words, is dealt with in some detail in my comparison with the Washington Treaties (in Chapter III), as the Chinook jargon was used at all treaty meetings. However, there is sufficient documentation of the abilities of Thomas and McKay as linguists, for me to conclude that Thomas likely addressed the First Nations in their own languages, not Chinook.

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[265] Emphasis added.

[266] Intriguingly, this is similar to a provision in the Ngai Tahu agreement of 1848, which is described in Chapter IV.

In March, 1852, Douglas recommended McKay for an increase in salary, noting that he "…is employed as Indian trader, as he speaks the language fluently, and possesses an uncommon degree of tact and address, in managing Indians."[267] In 1934 Latess referred to McKay as "the right hand man and interpreter of Douglas."[268] In 1932, "the Chiefs and Councillors [*sic*] of the Saanich Tribes," based on what was told to them by "some of our men" who "were present at the time" of the Saanich treaties in 1852, stated that "The Indian fully understood what was said as it was interpreted by Mr. McKay, who spoke the Saanich language very well as well as we speak our language, so our old peoples fully understood what took place." The question of what actually took place in 1852 is dealt with later in the chapter.

According to HBC records, Thomas Ouamtany, (also known as Tomo Antoine and Tomo Omtamy), was born circa 1824 at Fort Vancouver, of part-Iroquois background. He joined the HBC circa 1843, and was stationed at Fort Victoria until 1854 as an interpreter.[269] He had a considerable reputation as a linguist, as described by Robert Brown, who hired him in 1864 as translator on an exploring expedition up the east coast of Vancouver Island: " He was at one [time] high in favour with Governor Douglas whose constant factotum he was on every expedition. He served for some time in the H B Company in several capacities, as guide, hunter, and interpreter in all of which capacities he stands unrivalled."[270] Brown went on to comment that "…few [Indians] understood

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[267] HBCA B.226/b/6, 39-42.

[268] Pagett, *105 Years*, 1.

[269] Bruce McIntyre Watson, *Lives Lived West of the Divide: A Biographical Dictionary of Fur Traders Working West of the Rockies, 1793-1858* (Kelowna, B.C.: University of British Columbia Centre for Social, Spatial, and Economic Justice, 2010).

[270] Robert Brown, *Robert Brown and the Vancouver Island Exploring Expedition*, ed. John Hayman (Vancouver: UBC Press, 1989), 26 and 49.

any Chinook or English while Tomo spoke English without an accent, besides understanding nearly every Indian language on the Island."[271]

By 1850, some of the First Nation participants at the treaty meetings would have picked up a few words of English in their trade and paid labour relations with HBC employees. However, it is highly unlikely that any had a sufficient grasp of the English language and English common law to understand Douglas' speech. Therefore, the words spoken by Thomas are crucial. He faced a very difficult task. On the one hand he had to satisfy McKay that he had adequately translated Douglas' speech. On the other, he had to phrase Douglas' proposal in such a way as not to alienate the First Nation parties. Not addressed in McKay's letter is the issue of whether the First Nations agreed to Douglas' proposal without demur, or whether Thomas had to work hard, mediating the respective demands of the parties until some form of consensus was achieved. To read Douglas' reporting letter to the HBC, one would assume the former, and that may be correct, if his opening statement was couched in terms acceptable to the First Nations. Therefore, the key question is how Thomas translated Douglas' words to the assembled First Nations. Did he go to the lengths necessary for the First Nations to comprehend that, in the words of McKay, "the British Government did not admit that nomad tribes had any property in lands which they had not improved nor occupied for permanently industrial or useful purposes, and over which they had not established any form of government nor system of land tenure"? Or did he use words consistent with the Latass account of what Douglas said: "He assured the chiefs that trade in furs with peaceful use of enough land to grow food were the only reasons for establishment of the settlement"? The simple answer is

[271] Ibid.

that his words have not been recorded, and thus cannot be known at this distance in time. The more complex answer is that it may be possible to make a reasonable inference one way or the other by a comparison of these first meetings with the later Vancouver Island treaty meetings, and also with treaty meetings in Washington and New Zealand.
Not dealt with in this section is the likelihood that the Vancouver Island Treaties are bilingual. If the treaties can be characterized as such, the implications are significant. However, the argument is best developed by analogy from the principles of the international law of treaties set out in Chapter VI.

One thing is certain, the words spoken by Douglas and translated by Thomas at the 1850 treaty meetings could not have consisted of a recitation of the wording of the Douglas Form, as it did not exist at that time, as explained in the next sub-section.

f. The Douglas Forms

By comparison with the Vancouver Island experience, nineteenth century treaty meetings in Canada[272] and in the United States[273] were well documented, and they invariably ended with the production of a document containing what purported to be the agreed terms, which was then subscribed by the parties. Quite the contrary occurred at Fort Victoria in 1850. In the last paragraph of his reporting letter of May 16th Douglas made a surprising disclosure: "I attached the signature of the native Chiefs and others who subscribed[274] the deed of purchase to a blank sheet,[275] on which will be copied the

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[272] Miller, *Compact, Contract, Covenant*.

[273] Francis Paul Prucha, *American Indian Treaties: The History of a Political Anomaly* (Berkeley: University of California Press, 1997).

[274] The words "signature" and "subscribed" refer to a column of Xs on a sheet of paper, with a transliterated name beside each X.

[275] The "deed of purchase" for the "Sangees" land was ultimately embodied in six separate documents, the "Clallum" in two documents, and the "Soke" in one document, for a total of nine "Fort Victoria Treaties."

contract or Deed of conveyance, as soon as we receive a proper form,[276] which I beg may be sent out by return of Post." The template, entitled "Form of Agreement for purchase of Land from Natives of Vancouver's Island," duly arrived some months later. Douglas then filled in the blanks with the name of the relevant "Tribe" or "family," a description of boundaries, and the price paid. The final step in this unique process was for Douglas to copy the completed texts of the nine Fort Victoria Treaties onto the spaces left for that purpose at the top of each sheet of paper, the bottom of which had already been "subscribed" with the "signature of the native Chiefs and others." It is not known if Douglas took templates to the subsequent five treaty meetings, or merely continued his practice of adding the text later. However, the fact that the written version of the Nanaimo treaty lacks any text strongly suggests to me the latter.

The best way to display the relationship between the template and the completed blanks is to reproduce the Teechamitsa agreement, showing the template language in **bold**:

> **Know all Men, We, the Chiefs and People of the** Teechamitsa Tribe **who have signed our names and made our marks to this Deed on the** Twenty ninth **day of one thousand Eight hundred and** Fifty **do consent to surrender entirely and for Ever to James Douglas the Agent of the Hudson's Bay Company in Vancouver's Island that is to say, for the Governor Deputy Governor and Committee of the same, the whole of the lands situate, and lying between** Esquimalt Harbour and Point Albert including the latter, on the straits of Juan de Fuca and extending backward from thence to the range of mountains[277] on the Sanitch Arm about ten miles distant.

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[276] It is unclear why Douglas requested a "proper form." He may have believed Barclay to be in possession of, or able to acquire, such a "form," or he may have felt it more prudent to request a template that Barclay would find acceptable as to "form."

[277] This description is hopelessly vague from a conveyancing perspective, and leaves ample room for misunderstanding. For example, did the territory acquired end at the foot of the mountains, or their mid-point?

The condition of, or understanding of this Sale is this, that our village sites and Enclosed Fields[278] are to be Kept for our own use, for the use of our children, and for those who may follow after us;[279] and the lands shall be properly surveyed hereafter;[280] it is to be understood however that the land itself, with these Small exceptions, becomes the entire property of the white people for Ever; it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.
We have received as payment Twenty seven pound Ten Shillings Sterling.[281]
In token whereof we have signed our names and made our marks at Fort Victoria 29 April 1850.[282]
His mark

1. See-sachasis X
2. Hay-hay kane X
3. Pee Shaymoot X Done in the presence of

[278] It is interesting to note that on December 21, 1850, George Simpson, the North American Governor of the HBC wrote from Lachine Quebec to the Governor and Committee of the HBC in London concerning the discovery of gold on the Queen Charlotte Islands (now Haida Gwai): "I would respectfully suggest for the consideration of the Gov'r & Committee whether it might not be advisable to establish a port in the most eligible situation contiguous to the gold district & to purchase from the Indians & take possession by enclosure & cultivation of some of the most favourable sites for town and the harbours adjacent thereto." HBCA, A.12/5, folio 279. This is a wonderful example of British "ceremonies of possession" as described by Patricia Seed in her 1995 book, *Ceremonies of Possession in Europe's Conquest of the New World*. According to Seed, "One solution to the inability to fence or bound every piece of land Englishmen claimed was planting and enclosing of a small portion of that land, a garden. As a sign of possession the garden represented the entire colonial ambition to possess the land by establishing a part of the project in a central and visible way." Patricia Seed, *Ceremonies of Possession in Europe's Conquest of the New World, 1492-1640* (Cambridge: Cambridge University Press, 1995), 29.

[279] Presumably this wording is intended to convey the idea of perpetuity. However, later in the document the same idea is expressed simply as "for ever."

[280] It is unclear, grammatically, whether the "land itself" refers to the area of the "surrender," or the village sites and fields "kept," nor is there a time frame for the commencement of the survey, other than the vague "hereafter." This caused enormous problems when the allocation and survey of reserves were delayed for decades.

[281] This was paid in goods of equivalent value (at their retail value), namely HBC blankets, according to anthropologist Wilson Duff in his seminal article, "The Fort Victoria Treaties," *BC Studies,* 3 (1969): 3.

[282] Based on the Douglas Forms and Douglas' correspondence, Wilson Duff concluded the meetings for all the Fort Victoria Treaties took place in front of the fort, not in the territory of the signatory First Nations. Duff, "The Fort Victoria Treaties," 3-57. There is an oral tradition to the contrary set out in the section of the chapter on Oral Traditions.

4. Kalsaymit	X	Joseph William Mckay
5. Coochaps	X	[signed] Roderick Finlayson[283]
6. Thlamie	X	
7. Chamutstin	X	
8. Tsatsulluc	X	
9. Hoquymilt	X	
10. Kamostitchel	X	
11. Minayiltin	X[284]	

The first part of the template uses the word "deed," but the language which follows is more consistent with a quitclaim deed, not a deed conveying an interest in land.[285] In the second part the HBC confirms that "our village sites and Enclosed Fields are to be Kept for our own use," and that they would be surveyed at some indefinite time in the future. The use of the word "kept" is significant, because it implies that something was retained, not granted. However, the issue of *what* was kept is beyond the scope of the dissertation. The third part grants to them the "liberty" of continuing to "hunt over the unoccupied lands" and to "carry on….[their] fisheries as formerly."

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[283] Finlayson and Mckay were clerks stationed at the fort. Watson, *Lives Lived West of the Divide*, Vol III.

[284] Finlayson's entry in the Fort Victoria Journal notes that the men were only "ten in number." There is no explanation for the discrepancy.

[285] Admittedly this is not within my expertise as a scholar of the Vancouver Island Treaties, but is based on my thirty-year's experience as a conveyancing lawyer.

While for the purposes of the dissertation they are called the Douglas Forms, for most of the time, and for most people (including some First Nations), they have been treated as if they *were* the Treaties, on the assumption that they accurately reduce to writing the terms of the oral agreements made at the Treaty meetings.[286] There are three questions which beg to be addressed: the source of the wording of the template, the source of the information used to fill in the blanks and the status of the "signature" sheets listing the names of the First Nation representatives and the signatures of the HBC witnesses.

i. Source(s) of the Template

In 1998 Sidney Harring referred to the templates used by Douglas as "instruments sent by the Colonial Office," which is clearly in error.[287] Douglas did not receive a template or even advice on the subject from the Colonial Office. There is no record of any direct correspondence between Douglas and the Colonial Office until 1851,[288] or of any exchange of correspondence on the subject of treaties prior to 1858.

At the same time as it granted to the HBC the ability dispose of land on Vancouver Island for the purposes of promoting colonization, the Colonial Office adopted a 'hands-off' policy with respect to the Indigenous inhabitants, as disclosed in the Cabinet briefing paper dated March, 1849, described earlier in the chapter. This minute likely came to the attention of the Governor and Committee of the HBC in London, and may have prompted Barclay's letter of instruction to Douglas.

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[286] Facsimile copies of all fourteen of the Douglas Forms are available on the BC Archives website.

[287] Harring, *White Man's Law*, 191.

[288] Sage, *Sir James Douglas and British Columbia*, 171.

According to historian John Cell,[289] the Colonial Office in the mid-nineteenth century operated on an "ad hoc" basis, reacting to events rather than dictating policy. In other words, "the Colonial Office did not control the flow of events. It drifted with them. No one 'ran' the British empire." The situation is nicely summed up by Cole Harris:[290] "At mid-century the Colonial Office did not have a consistent Native land policy. Individuals in the Colonial Office had their own ideas, and relevant theories about sovereign rights, [and] reserve land allocations…but there was no theoretical template, even on the most basic issues, that could be dropped into different colonies." The continued commitment of the Colonial Office to this laissez faire approach is confirmed by an 1851 incident involving Douglas and Richard Blanshard, the first governor of the colony. Douglas sought reimbursement for the retail, not wholesale, value of the blankets distributed pursuant to the Fort Victoria treaties, which prompted Blanshard to complain to the Colonial Office. In reply, Benjamin Hawes, undersecretary in the Colonial Office confirmed that it was appropriate for Blanshard to query the expense item, but went on to caution that the Colonial Secretary, Earl Grey "…is far from wishing that unnecessary interference should take place with the proceedings of the company in the acquisition of land from the Natives."[291]

According to lawyers Issac and Annis[292] Douglas was influenced by "the treaty-making procedures being set by the Robinson-Superior and Robinson-Huron Treaties in

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[289] J. W. Cell, *British Colonial Administration in the Mid-Nineteenth Century: The Policy-making Process* (New Haven: Yale University Press, 1970), 24.

[290] Harris, *Making Native Space,* 13.

[291] HBCA, file A.13/5.

[292] T. Isaac, and K. Annis, *Treaty Rights in the Historic Treaties of Canada* (Saskatoon: Native Law Centre, University of Saskatchewan, 2010).

Upper Canada." However, the Robinson treaties were signed in September, 1850, approximately four months after the Fort Victoria Treaties. As well, there are no records indicating that Douglas was aware of the "treaty-making procedures" followed in the Robinson Treaties. I agree with Harring[293] that, "The context of the Douglas Treaties has no relation to the more developed process of the early Ontario or later numbered plains treaties." Having excluded the Colonial Office and Upper Canada as sources for any contribution to the wording of the template, it is time to look at the respective roles of the HBC in London and Douglas in Victoria in the construction of the template.

As mentioned earlier, when Douglas requested "a proper form" in his May 16th letter, Barclay responded by sending a "Form of Agreement for purchase of Land from Natives of Vancouver's Island." Barclay went on to inform Douglas that it was "a copy with hardly any alterations of the Agreement adopted by the New Zealand Company in their transactions of a similar kind with the natives there."[294] Indeed, a goodly portion of the template was copied from Kemp's Deed, used to acquire land from the Ngai Tahu people of New Zealand in 1848. The story of that document, and its journey from New Zealand to Fort Victoria via London is told in the New Zealand chapter of the dissertation. However, to understand just how much was borrowed from Kemp's Deed it is necessary

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[293] Harring, *White Man's Law,* 191.

[294] In July 1849 George Simpson, the North American Governor of the HBC wrote to the Governor and Committee in London, noting that he had "requested Mr. Recorder Thom [an HBC officer stationed at the Red River Settlement] to prepare & forward to me in Canada a form of contract or deed to be entered into with the Indians in question [at Fort Rupert], which I will transmit to the Board of Management [at Fort Vancouver] via Mexico." HBCA A.12/4, folio 413. He followed up with a further letter to London in October 1849, as follows: "He [Thom] has…sent a draft of an agreement, which I requested him to prepare, between the Company & the Indian tribes of Vancouver's Island, which I have the honour to transmit for your consideration, but on which I shall not communicate with Chief Factor Douglas until I have your authority for so doing." HBCA A.12/4, folio 591. A personal search of the HBC Archives in Winnipeg did not yield a copy of the draft deed prepared by Thom, so the wording is not known, and there is no way of knowing whether any of Thom's draftsmanship found its way into the template.

to reproduce Kemp's Deed, highlighting the wording that is identical in each document:[295]

> **Know all men. We the chiefs and people of the tribe called the** "Ngaitahu,*"* **who have signed our names and made our marks to this deed on the** 12th **day of** June, 1848, **do consent to surrender entirely and for ever to** William Wakefield, **the agent of the** New Zealand Company in London, **that is to say,** to the directors of the same **the whole of the lands situate** on the line of coast commencing at Kaiapoi….; the boundaries and size of the land sold are more particularly described in the map which has been made of the same. **The condition of, or understanding of this sale is this, that our** places of residence **and** plantations **are to be kept for our own use, for the use of our children, and for those who may follow after us, and** when **the land shall be properly surveyed hereafter,** we leave to the government the power and discretion of making us additional reserves of land*;* **it is understood, however, that the land itself, with these small exceptions, becomes the entire property of the white people for ever**.

As can be seen, the "alterations" on the HBC template were significant, including the replacement of the word "plantations" by the phrase "enclosed fields," and the addition of the provisions dealing with hunting and fishing. As the issue of "enclosed" fields is the subject of litigation for which I have provided an expert report, nothing more will be said in the dissertation. It is important to remember that Douglas' first mention of the need to protect hunting and fishing, and Barclay's first words on the same subject were contained in 1849 letters that 'crossed in the mail'. As a result it is not possible to determine which (if either) of them is responsible for that section of the wording employed in the template. The scope of the hunting provision has been the subject of litigation,[296] but not the subject of any scholarly literature. The fishing provision has been subject to litigation,[297]

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[295] Makmillen has produced a side-by-side comparison of Kemp's Deed and Barclay's template. See Shurli Makmillen, "Colonial Texts in Post-Colonial Contexts: A Genre in the Contact Zone," *Linguistics and the Human Sciences*, 3.1 (2007): 316.

[296] Examples include *R v White and Bob*, [1964] 50 DLR (2nd) 613 and *R v Bartleman,* [1984] 55 BCLR 78 (BCCA), 12 D.L.R. (4th) 73; and *R v Morris*, 2006 SCC 59 [2006] 2 SCR 915.

[297] *Saanichton Marina Ltd*. *v Claxton*, [1989] 5 WWR 82.

and has been the subject of scholarly attention by Hamar Foster and Douglas Harris.[298] At this juncture I should note that the terms of the Douglas Forms do not receive much attention in this dissertation because one of the goals is to de-emphasize the colonial account, for which the Douglas Forms are central, and to highlight instead First Nation understandings, for which the Douglas Forms are arguably of little relevance.

Is it possible that any of the wording of the Douglas Forms was the result of requests to Douglas from the First Nations who traded with Fort Victoria? There is nothing in the historical record on the subject, and it is hard to imagine Douglas making such a request. The absence of settlers in 1850 meant that First Nations were not as yet facing any competition for game or fish, and were presumably unaware that their unfettered utilization of resources was be put in jeopardy by the arrival of settlers.

ii. Filling in the Blanks

The question of how price, First Nation parties, and boundaries were established can be dispatched relatively quickly. Douglas' May 16th reporting letter clearly confirmed that the method of "payment," lump sum versus annual instalments, was the result of negotiation at the Fort Victoria meetings. The impression is left that all else was settled in conformity with his expectations. For example, was the amount of remuneration determined by Douglas in advance or arrived at by negotiation? While it has long been assumed that the payment provision in each Douglas Form was consideration for the surrender of their land, there is nothing on the face of the document that directly links the

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[298] Examples include Foster, "The Saanichton Bay Marina Case,"; Harris, "The Boldt Decision in Canada."

payment provisions (at the very end of the form) to the cession of land (at the very top of the form).[299] In addition, there is nothing in the First Nation accounts to indicate that they acceded to that view. The First Nation parties are described on each Form as a "tribe" or "family." Presumably Douglas believed he had in each case identified the appropriate entity to negotiate a surrender of land.[300] Similarly, Douglas undoubtedly believed he had a grasp of the extent of land in some way controlled by the named tribes and families. Whether he relied on his own observations or solicited information from First Nation attendees is not known. If he did enquire, it is not known how he phrased the query.

iii. The Status of the "signature" Sheets

As noted earlier in this section, Douglas revealed to Barclay that, "I attached the signature of the native Chiefs and others who subscribed the deed of purchase to a blank sheet." This would indicate that the chiefs and "others" gave their names to Douglas or a clerk, who entered a phonetic rendering of their names onto a sheet of paper, whereupon each man "subscribed" the document by somehow marking an "X" next to his name.[301] However, the uniformity of the "X"s suggests that they may have been made by Douglas or a clerk.[302] It is also possible that each man held or touched the pen that marked the "X" on the sheet of paper. Presumably the interpreter, Thomas, explained to these men that

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[299] I am indebted for this insight to Michael Asch.

[300] For more on this see my brief review (Chapter V, section D, subsection 1) of a 1969 article by Wilson Duff on the Fort Victoria Treaties.

[301] With respect to the Saanich Treaties, there is an oral tradition related by Dave Elliott (described later in the report) that the "X"s were thought to be crosses by elders at the treaty meeting. However, when Elliott inspected the Douglas Forms, he noted that the "X"es all appeared to have been written by the same hand.

[302] With respect to the Nanaimo Treaty (which has no text and is described in more detail later in the report), there are some "X"s that do not have names beside them. This could mean that the "X"es were inserted on blank sheets before the meeting, with names inserted by a clerk during the meeting, who carelessly skipped a couple of lines. Of course, if the "X"s were not inserted at the meeting, there could have been no touching of the pen by the Snuneymuxw participants.

this process signified their consent to what had been agreed orally at the meeting. The collection of loose-leaf sheets that comprised the Douglas Forms were then inserted into a 'Register of Land Purchases from Indians', and stored in the Lands and Works Office. Were copies of these sheets, once the texts had been added, given to First Nation representatives? There is nothing in the historical record to indicate that this was done. In my opinion, the First Nation parties to the Vancouver Island Treaties were not made aware of the existence, let alone the contents, of the completed Douglas Forms for decades. That information was most likely first imparted to them by missionaries over the course of the 1870s and 1880s. The implications of the above for the *legal* status of the Douglas Forms is beyond the scope of the dissertation. As a final, but important, note on the subject of the Douglas Forms, it has to be acknowledged that without them, it is highly unlikely that the fourteen agreements would have achieved recognition as treaties.

2. The Fort Rupert Treaties (1851)

To the best of my knowledge there are no First Nation eye-witness accounts of these two treaties in the Archival record. In August, 1850, Barclay wrote to Douglas with these instructions: "I am also to state that the Governor and Committee consider it highly desirable that no time should be lost in purchasing from the Natives the land in the neighbourhood of Fort Rupert."[303] Two treaties were made on February 8, 1851, at Fort Rupert on the north east coast of the Island, where the HBC had commenced a coal mining operation. Later that month Douglas reported briefly to Barclay: "We have concluded an arrangement with the Chiefs of the Quakeolth Tribe for the purchase of the land about Ft. Rupert, extending from McNeill's harbour to Hardy Sound, which the

[303] BCA, Letter from Archibald Barclay to Sir James Douglas, GR-0332, Reel B16916, Vol I, 250.

purchase also incudes – The agreement was formally executed by all the chiefs, in consideration of a payment of Goods, amounting at Inventory prices to £64 Stg."[304] Oddly, the territory described on the two Douglas Forms is identical, indicating that the two First Nations somehow occupied the same territory, or that HBC officials on the spot were unable to ascertain the respective territories of the two First Nations.[305] The other unique, and unexplained, feature of the Fort Rupert Douglas Forms is the placing of "O"s instead of "X"s next to the name of each First Nation attendee.

The Fort Rupert coal operation turned out to be uneconomical and was shut down after new mines at Nanaimo opened in 1852. The Fort Rupert miners were transferred to Nanaimo in 1853, and by 1854 there were only 12 Europeans resident at Fort Rupert (Gough, 1984). There is very little mention of Fort Rupert in the historical record for the rest of the Colonial period.

3. The Saanich Treaties (1852)

While there are two Saanich Treaties, most of the literature and historical documents do not differentiate, so references to the Saanich agreements can be assumed to apply to both of them, unless otherwise specified.

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[304] Reproduced in Bowsfield, *Fort Victoria Letters*, 157-158.

[305] This single territory has become problematic for the two First Nations, which were later consolidated into one Band. The two constituent groups within the consolidated band have different points of view on the desirability of a certain development on the reserve, which resulted in a law suit, *Queackar-Komoyue Nation v British Columbia* [2007] 1 CNLR 286, in which the Komoyue Heritage Society, formed to create a legal entity to represent the interests of the minority Komoyue members of the Queackar-Komoyue Band, tried to block the issuance of an Environmental Assessment Certificate. The issue did not proceed to trial because the court made a preliminary ruling that the Komoyue Heritage Society did not have locus standi, (appropriate legal status) to maintain the action, which resided solely with the Band.

a. The Latass Account

Over an eleven-year period Chief David Latass made at least four attempts to communicate his views on the Saanich Treaties to non-First Nation audiences. His first known attempt was made in 1923, when he wrote to Dr. Duncan Campbell Scott, Deputy Superintendent of Indian Affairs. While the letter has not survived, Dr. Scott made reference to it in the course of a meeting with representatives of the Allied Tribes of British Columbia, held in Victoria in August of that year: "Now, there is an Indian living here today that was alive when Mackay [*sic*] was negotiating with the Indians, and he states emphatically that no such an understanding was reached between the Saanich Indians as stated in the Treaty; that no such thing ever occurred --- that is the Chief, David Lalask [*sic*]."[306] On this first occasion, his message, as summarized by Scott, seems to be a simple denial of the existence of a treaty. Latass' views were ignored. My guess is that Latass was prompted to write the letter in response to arguments made by representatives of the Allied Tribes *circa* 1923 that the Douglas Forms were evidence of a governmental recognition of Aboriginal title.

In the 1989 *Saanichton Marina* case, Louise Mandell, counsel for the Tsawout First Nation, led testimony[307] from Gabriel Bartleman as to his recollection of a meeting of the Saanich people in 1924 or 1925, called because Tommy Paul had been prevented from selling fish by a federal Fisheries Officer. According to Bartleman such episodes took place "about four times a year." Mandell then asked "do you recall whether…after Tommy Paul raised…the problem, whether there was any action which the chiefs

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[306] Reproduced in BC Union of Indian Chiefs website. BC Union of Indian Chiefs, "UBCIC Library and Archives," accessed 15 August 2015, http://www.ubcic.bc.ca/library.

[307] Foster, "The Saanichton Bay Marina Case."

recommended from that meeting to do about the problem he raised?" Bartleman answered that, "I believe after the meeting Tommy Paul and Chief David went up to Nanaimo to the Fisheries Office…. When they came back they called another meeting, and it was told to them that they could no longer sell fish from…the Saanich Arm…[and that] James Douglas' promises weren't any good." That was the end of the second attempt.

In his testimony Bartleman posed the following scenario: "…maybe you could just picture for yourselves that where then could the native people go to….They had some trust in the Department of Indian Affairs," and apparently went to visit "a gentleman by the name of Ditchburn" in Victoria, who "was 'Commissioner of Indian Affairs'. It is likely that the purpose of the visit was to deliver two statements dated April 4, 1932,[308] the first of which was by David Latass, and witnessed by a Sto:lo elder and activist Simon Pierre. The statement began as follows: "I Chief David Latasse, Tsartlip Reserve, Saanich tribe of Indians…do solemnly deny any knowledge of the so called Saanich treaty, as shown on Exhibit No. 6, filed by PR. Kelly, Chairman of the Allied Indian Tribes of British Columbia, as set forth in their petition, submitted to parliament in June 1926." He went to aver that "The only knowledge we know is in regards to a dispute between the whites and Indians at the time of James Douglas – that there was a settlement of that dispute (been [*sic*] regards to timber matter)…It was not to sell land or surrender any Territory rights." It is apparent that Latass had modified his position somewhat, acknowledging an agreement with Douglas, but only as a means to resolve a very specific

[308] BCA, Statement by Chief David Latasse, RG 10, Vol II: 303, file 974/1-9.

problem. It is not known why Latass and the other chiefs decided to protest in 1932 an event that took place in 1926.

His statement was accompanied by one from "the Chiefs and Councillors [*sic*] of the Saanich Tribes," affirming the truth of Latass' statement, based on what was told to them by "some of our men" who "were present at the time." The statement concluded as follows: "Mr. McKay, interpretering [*sic*] for James Douglas, saying these blankets is not to buy your lands, but to shake hands [of] the Indian in good Harmoney [*sic*] and good tumtums (heart). When I get enough of your timber I shall leave the place…" Thus, the Chiefs went further than Latass, claiming that Douglas gave them his assurance that he did not intend "to buy your lands." Both statements contain many errors in spelling and grammar, indicating that they were composed without outside assistance or influence. In any event, this third attempt was also ignored by Indian Affairs. To be disappointed once again may have convinced Latass that complaining to officialdom was a dead end, and that he had better make his final plea to the public.

Latass made the attempt to reach a much wider audience in his 1934 interview with Pagett. It is clear that the combined efforts of Paget, Latass' wife and his grand-nephew enabled Latass to convey his views in much greater detail and complexity. On the other hand, some of his argument may have been skewed in the process of translation and editing. Latass began his account of the Saanich agreements with a much more elaborate and colourful rendering of the "timber" dispute:

> For some time after the whites commenced building their settlement they ferried their supplies ashore. Then they desired to build a dock where ships could be tied up close to shore. Explorers found suitable timbers could be obtained at Cordova Bay, and a gang of whites, Frenchmen and Kanakas were sent there to cut piles. The first thing they did was set a fire which nearly got out of hand, making such a smoke as to attract attention of the Indians for

> forty miles around. Chief Hotutstun of Salt Spring [Island] sent messengers to Chief Whutsaymullet, of the Saanich tribes telling him that the white men were destroying his heritage and would frighten away fur and game animals. They met and jointly manned two big canoes and came down the coast to see what damage was being done, and to demand pay from Douglas. Hotutstun was interested by the prospect of sharing in any gifts made to Whutsaymullet but also, indirectly, as the Chief Paramount of all the Indians of Saanich. As the canoes rounded the point and paddled into Cordova Bay they were seen by camp cooks of the logging party, who became panic stricken. Rushing into the woods they yelled the alarm of Indians on the warpath. Every Frenchman and Kanaka dropped his tools and took to his heels, fleeing though the woods to Victoria. As they ran they spread the cry that the Indians were on the warpath.
>
> Douglas hastened to meet the two chieftains and found that the party, with scarcely a weapon other than a few fish spears, were camping in harmony with the white members of the logging detachment. All that was asked was pay for trees cut and damage wrought, which Douglas promptly agreed was right and proper. He ordered two bales of blankets brought from the fort and gave each chief one of them. There was no suggestion that the compensation was for anything other than the timber. No suggestion of title to any land was involved in that matter.[309]

According to Latass, the purpose of the meeting was to resolve a dispute. In other words it was a peace treaty, which was retrospective, in that it resolved a threat to the peace, but also prospective, as it served notice to Douglas that future logging operations would require prior approval by the appropriate Saanich authorities. Latass then went on to provide, for the first time, an account of a second meeting, which he considered to be the actual treaty negotiation:

> When Douglas met with Chief Hotutstun in 1852, and discussed with him and his sub-chiefs the allotment of lands to the Hudson's Bay Company, it was arranged that lands not needed by the natives might be occupied by the whites. The Indians were to have reserved to their use some choice camping sites, were to have hunting rights everywhere and fishing privileges in all waters, with certain water areas exclusively reserved to the use of the tribes.
>
> In return for the use of meadowlands and open prairie tracts of Saanich, the white people would pay to the tribal chieftains a fee in blankets and goods. That was

[309] Pagett, *105 Years*, 1.

> understood by us all to be payable each year. It was so explained to us by Joseph MacKay, the interpreter for Governor Douglas. The governor himself solemnly assured us that all asked to be ratified would entirely be to the satisfaction of the Indians. He stated that the only object of the writing was to secure the Hudson's Bay Company peaceful and continued use of land tracts suitable for cultivation. This was accompanied by a gift of a few blankets. We all understood that similar gifts would be made each year, what is now called rent.
>
> I was unmarried and therefore considered too young to take part in those proceedings as a tribal representative, but I was present, in attendance upon my uncles, who were among the tribal elders. At that time I thought as did the Indians that the proceedings were just a pow-wow for the purposes of receiving a few trade goods. I say truly that I have no knowledge of payment of money as mentioned in papers supposed to have been signed by Chiefs Hotutstun and Whutsaymullet[310] and their sub-chiefs. I know of no act of signing such papers and believe that no such signatures were in fact made by those tribesmen.[311]

Just as Latass described two meetings at Fort Victoria, each with a different purpose, he chose to relate two meetings in Saanich, also dealing with immediate and long-term concerns respectively. Latass is very clear in his assertion that neither of the meetings included a cession of land as described in the Douglas Forms. The first meeting was called by the Saanich to ensure that Douglas acknowledged his obligation to pay compensation for the felling of timber on their land. According to Latasse's account of the second meeting, the Saanich agreed that "lands not needed by the natives might be occupied by the whites," specifically "meadowlands and open prairie tracts…suitable for cultivation."[312] Latass neatly turned the usual assumption on its head by asserting that land would be shared with the whites on terms set by the Saanich First Nation. Similarly, in his clever paraphrase of the "promises" in the second half of the Douglas Forms,

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[310] Hotutstun and Whutsymullet were the first names listed on the written versions of the North Saanich and South Saanich treaties respectively.

[311] Pagett, *105 Years,* 1.

[312] Pagett, *105 Years*, 1.

Latass expanded their scope, making them unrestricted. His choice of words also indicates an acquaintance, acquired at some point in this long life, of the wording of the Douglas Forms.

Latasse claimed that the agreements were to be renewed annually, and used the analogy of an annual rent, something easily understood by newspaper readers in the 1930s, but not necessarily an accurate reflection of the understanding of the parties in 1852. The picture that emerges from Latasses' description is a patchwork of habitation and resource sites, some to be shared by the Saanich people and European settlers, and some to be occupied exclusively by one group or the other.

Many First Nation accounts of treaty meetings across Canada contain a denial of the surrender of their lands, but do not go on to describe how the resultant sharing of the land was going to work. Latass' account is almost unique in its portrayal of how an agreement to share the land would operate.[313] Finally, the Latess accounts indicate that he was aware of the Douglas Forms, but was determined to raise his voice in opposition to the false message he believed they conveyed. In a remarkable validation of Latass' interpretation, in 1989 legal historian Hamar Foster independently came to the same conclusion, namely that the Saanich "…believed that they were agreeing to peaceful relations, to share the right to harvest certain resources, and to allow a limited number of colonists to occupy some of the lands they were not themselves occupying."[314]

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[313] The issue is taken up in Chapter VI.

[314] Foster, "The Saanichton Bay Marina Case," 632.

b. The Douglas Account

Douglas provided his account of the Saanich agreements to Barclay in March of 1852:

> The steam saw Mill Company[315] having selected as the site of their operations, the section of land marked upon the accompanying map north of Mount Douglas,[316] which being within the limits of the Sanitch Country, those Indians came forward with a demand for payment,[317] and finding it impossible, to discover among the numerous claimants, the real[318] owners of the land in question, and there being much difficulty in adjusting such claims, I thought it advisable to purchase the whole of the Sanitch Country, as a measure that would save much future trouble and expense. I succeeded in effecting that purchase in a general convention of the Tribe; who individually subscribed the Deed of Sale,[319] reserving for their use, only the village sites and potatoe patches,[320] and I caused them to be paid the sum of £109.7.6 in woollen goods which they preferred to money. That purchase includes all the land north of a line extending from Mount Douglas, to the south end of the Sanitch Inlet, bounded by that Inlet and the Canal de Arro, as traced on the map, and contains nearly 50 square miles or 32,000[321] statute acres of land.[322]

It would appear that Douglas had no intention of entering into a treaty when the "Mill Company" began preparations to operate a sawmill in the territory of Saanich First Nations. In this instance it was clearly the First Nations who took the initiative, probably as a result of Douglas' unilateral commencement of logging on their land. Douglas adroitly used his authority as governor to instigate a treaty over the entire peninsula,

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[315] This was not an HBC enterprise, although all the shareholders were HBC officers. Douglas owned two shares. Mackie, "Colonial Land, Indian Labour and Company Capital," 204.

[316] Mount Douglas is just south of Cordova Bay.

[317] Douglas does not disclose how the Saanich First Nation became aware of the fledgling enterprise, or what prompted them to come forward with a "demand" for payment.

[318] All the "claimants" may have had valid claims upon the resources of the "selected" area.

[319] Whether a Douglas Form was prepared in advance of the meeting or completed later is not known.

[320] This is a rare example given by Douglas of what he understood to be included within "enclosed fields."

[321] This is the first description in which the area is expressed in acres, allowing a calculation of the cost per acre, which yields a figure of approximately 1 1/3 pence per acre. The HBC official policy was to sell land to intending colonists at the rate of £1 per acre.

[322] HBCA, Letter from Sir James Douglas to Archibald Barclay, Reel 1M11.G1/140, 18 March 1852.

which meant that the cost was borne by the HBC, not the shareholders of the Mill Company. If his account is seen as a conflation of the two separate meetings described by Latass, they are remarkably consistent.

c. Oral History and Oral Traditions

The following brief discussion is based largely on my own experience in land claims over the last fifteen years. The phrase 'oral history' is used in many contexts, and has many definitions, all too often resulting in confusion and misunderstanding. In the First Nation context the label is commonly used to designate stories of the past told by today's elders. These stories serve a multitude of purposes, including expressions of Indigenous law concerning land. This is an important aspect, but one that I have deliberately chosen not to pursue, for the reasons set out in Chapter I. Another aspect or category is the testimony of modern elders in court concerning the terms of historical treaties. The courts in Canada have been extremely reluctant to give any weight to such testimony, as demonstrated in my review of the jurisprudence in Chapter V. For these reasons I have deliberately avoided the term in my discussion of treaty accounts.

That said, all of the Indigenous and some of the non-Indigenous accounts (including that of Joseph McKay) presented in this chapter (and indeed throughout the dissertation) can be regarded as examples of oral history that have been reduced to writing. As a practical measure, designed to avoid them being lumped with the oral history of present-day elders, I have in effect created a very narrow subcategory: the earliest first- and second-hand accounts reduced to writing after the treaty meetings. Given that these oral histories were recounted by a wide variety of people to a wide range of audiences over a considerable span of time, one could reasonably expect a significant

disparity in content. As will be demonstrated over the balance of this and succeeding chapters, the oral histories presented in the dissertation are remarkable for the consistency of their descriptions of treaty negotiations concerning land.

Definitions of 'oral tradition' are also multiple and contested, and I have chosen to adopt a definition restricted to third-hand and subsequent stories of treaty meetings, passed down from generation to generation to the present day. Much more could be said on the subject of oral histories and traditions, but for the present project the working definitions set out above will suffice. As it happens, my research did not bring to light any oral traditions concerning the Fort Victoria treaties, the Fort Rupert treaties or the Nanaimo treaty. In 2000, Harriet Vanwort of the Tsawout First Nation searched for oral accounts of the Vancouver Island Treaties, and found "…only one source that relied primarily on the oral history to interpret the meaning of a Douglas treaty. This was the documentation of Saanich oral history."[323] At this point it is important to state that I do not mean to imply that additional oral traditions do not exist, only that they have not as yet made their way into the public domain. That leaves only the Saanich, who have built a multi-generation oral tradition, largely stemming from Latass, three versions of which have been reduced to writing.

In his evidence before the court in the Saanichton Marina case,[324] Gabriel Bartleman recalled what Latass said at the 1924 meeting concerning a meeting with Douglas. Bartleman began with an account of the dispute over timber, followed by a

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[323] Harriet Van Wart, "A Bibliography and Discussion of Douglas Treaty Materials: Phase One of Research on the Tsawout First Nation's Douglas Treaty," (master's thesis, University of Victoria, 2001), 40. Available online at http://web.uvic.ca/igov/index.php/igov-598-community-governance-project

[324] *Saanichton Marina Ltd v Louis Claxton et al*, Transcript of Proceedings at Trial on 2 September 1987, 27-29. Copy in possession of Hamar Foster.

statement that "…it was a time later when Douglas called the people in to what they thought was a peace offering." At this meeting "There was some blankets and I believe some metal it was called – the money was called metal then, and to make a cross on a piece of paper, on a blank piece of paper, native people thought that that was the sign of the cross." Counsel asked if Latass told this story at "public gatherings" and Bartlemen answered, "Many times." Finally, counsel asked if Bartleman had heard the story from any other elders, and he answered, "Yes, Mr. Elliot [*sic*], Dave Elliot."

The best-known version of the oral tradition is contained in a booklet published in 1983, entitled *Saltwater People, as told by Dave Elliott Sr.: A Resource Book for the Saanich Native Studies Program*, edited by Janet Poth.[325] Poth noted that, "The words in this book are all Dave's. Over twenty hours of oral history on audio-tape have been transcribed then edited for the written word."[326] Elliott was "born May 17, 1910 on the Tsartlip Indian reserve in Saanich" and died August 5, 1985.[327] He was five years older than Gabriel Bartleman. In his account of the Saanich treaty meeting Elliott related the tree-cutting episode, but added a second cause of friction with the HBC:

> There was another incident besides that, that already made things not exactly in a state of peace. An Indian boy crossing Douglas' property had been shot and killed. Douglas' property was in the area of Mount Douglas. He had a farm there, and this boy was crossing through. For what reason they shot the boy, I don't know.
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> We weren't in a state of war, but almost. After these loggers left Cadboro[328] Bay and went back to Victoria, our people just turned around and came

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[325] Dave Elliott, *Saltwater People, as told by Dave Elliott Sr.: A Resource Book for the Saanich Native Studies Program*, ed. Janet Poth (Saanichton, BC: School District 63, 1990).

[326] Ibid., 3.

[327] Ibid., 5.

[328] Both the Latass and the subsequent Bartleman account place the incident at Mount Douglas, which overlooks Cordova Bay, and indicates that Elliott was likely in error on this minor point.

home. That's the way things stood when they got the message, or invitation to come into Victoria. Douglas invited all the head people into Victoria.

When they got there, all these piles of blankets plus other goods were on the ground. They told them these bundles of blankets were for them plus about $200 but it was in pounds and shillings.

They saw these bundles of blankets and goods and they were asked to put X's on this paper. They asked each head man to put an X on the paper. Our people didn't know what the X's were for. Actually they didn't call them X's they called them crosses. So they talked back and forth from one to the other and wondered why they were being asked to put these crosses on these papers. One after another, they were asked to put crosses on the paper and they didn't know what the paper said.

What I imagined from looking at the document[329] was that they must have gone to each man and asked them their name and then they transcribed it in a very poor fashion and then asked them to make an X.

One man spoke up after they discussed it,[330] and said, "I think James Douglas wants to keep the peace." They were after all almost in a state of war, a boy had been shot. Also we stopped them from cutting timber and sent them back to Victoria and told them to cut no more timber. "I think these are peace offerings. I think Douglas means to keep the peace. I think these are the signs of the cross." He made the sign of the cross. The missionaries must have already been around by then, because they knew about the 'sign of the cross'! "This means Douglas is sincere."

They thought it was just a sign of sincerity and honesty. This was the sign of their God. It was the highest order of honesty. It wasn't much later they found out actually they were signing their land away by putting those crosses out there. They didn't know what it said on that paper.

I think if you take a look at the document yourself,[331] you can judge for yourself. Look at the X's yourself and you'll see they're all alike, probably written by the same hand. They actually didn't know those were their names and many of those names are not even accurate.[332] They are not even known to Saanich People. Our people were hardly able to talk English at that time and who could understand our language?[333]

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[329] Here Elliott departed from the oral history account and made inferences based on his personal inspection of the document.

[330] Elliott clearly reverted to the oral history at this point.

[331] Once again Elliott departed from the oral history to make inferences based on his inspection of the treaty document. He in fact contradicts the oral history, inferring that the Xs were not made by the First Nations representatives.

[332] It is very difficult to ascertain the accuracy of the transliterations of names on the written treaty forms.

[333] Elliott, *Saltwater People, as told by Dave Elliott Sr.*, 69-73.

The account is basically consistent with the Latess version of the timber dispute, with the addition of the shooting incident, and the interpretation of the X's as crosses. However, in Elliott's retelling, the treaty meeting was held at the behest of Douglas, with the sole purpose of paying compensation for the two incidents, and re-establishing peaceful relations. Elliott does not mention any agreement to share the land. The powerful imagery of placing the "crosses" is contradicted by Elliott's own observation that all the Xs were "probably made by the same hand." He did not attempt to resolve the inconsistency. Elliott's final comments also indicate that HBC officials may not have been overly scrupulous about verifying the status of the signatories as members of the Saanich First Nations.

In 2004 Janice Knighton wrote a master's thesis entitled "The Oral History of the 1852 Saanich Treaty"[334] in which she reprised the accounts given by Gabriel Bartleman and David Elliott, and introduced a third version, based on an interview with John Elliott. His parents are David Elliott and Beatrice Bartleman, and his mother's granduncle is Chief David Latasse. John Elliott introduced a new twist as to the location of the Saanich treaty meeting with Douglas and his officials, who "…took them [the Saanich people] up to that mountain up there, the one…they call…Mount Douglas today. It's one of the highest mountains in that area. We call it P'kols, and [Douglas] pointed outward where our people could roam freely and not be bothered." According to John Elliott, "that was what I was told by Manny Cooper, he's an elder cousin of mine."[335]

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[334] Janice Knighton, "The Oral History of the Saanich Douglas Treaties: A Treaty for Peace," (master's thesis, University of Victoria, 2004). Available online at http://web.uvic.ca/igov/index.php/igov-598-community-governance-project.

[335] Ibid.

4. The Nanaimo Treaty (1854)

The Nanaimo treaty is unique, because the "signature" sheets are not accompanied by a Douglas Form. In tangible form, it consists of only of a six-page list in ink of 159 names under the heading "Sarlequin Tribe."[336] The Douglas Form has either been lost or, more likely, was never completed. To the right of each name is the following: "his X mark" Pinned to the top of the list is a slip of paper with the following words (written in an unknown hand) in pencil: "Similar conveyance of country extending from Commercial Inlet 12 miles up the Nanaimo River made by the Sarlequin Tribe signed Squoniston and others."[337] The treaty is witnessed by three HBC officers and "James Douglas, Governor Vancouver Island." It is the only Douglas Form signed by Douglas.

a. The Whoakum Account

The earliest First Nation account of the Vancouver Island Treaties arose out of testimony before the Royal Commission on Indian Affairs for B.C., established in 1912 under an agreement entered into by federal representative J.A.J. McKenna and B.C. Premier McBride, "to settle all differences between the Governments of the Dominion and the Province respecting Indian lands and Indian Affairs generally in the Province of

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[336] See facsimile reproduced on the BC Archives website.

[337] The above description is based on a personal inspection of the original treaty document at the B.C. Archives at the invitation of the then chief and council of the Snuneymuxw First Nation. I have not located any information which would explain the discrepancy in descriptions of the territory conveyed, between the pencilled notation at the top of the Treaty document, and the description in Douglas' letter. The latter covers a much larger area than the former. According to Willson Duff, at the top of the first five Fort Victoria documents, "Douglas wrote in pencil a memorandum or prologue describing the territory of the group concerned. This was likely done in the presence of the Indians and served as the basis for the description to be written later into the body of the text." Duff, "The Fort Victoria Treaties," 11.

British Columbia."[338] The mandate sounds very broad, but later provisions in the agreement make it clear that the remit of the commission was limited to the increase or decrease in the size of reserves .[339] Revisiting the Vancouver Island Treaties was definitely not on the Commission's agenda. The Commission was made up of two federal commissioners, two provincial commissioners, and a fifth to be chosen by the other four. The Commission held hearings around the province, and transcripts were made of the testimony of witnesses, generally First Nations representatives and Indian agents. The first testimony at the Nanaimo meeting was given by the Snuneymuxw Chief Louis A. Good, who spoke English fluently and did not need a translator. The second speaker was band member Dick Whoakum, who stated he was 83 years old, and thus would have been 24 years old when the Treaty was signed. His name is included among the 159 names listed on the Douglas Form, and accordingly his is the only First Nation account by a signatory to a Vancouver Island Treaty. Whoakum could not speak English, so two interpreters were sworn in. One was Chief Good and the other was Simon Pierre, from the Katzie First Nation on the lower Fraser River. The Snuneymuxw and the Katzie spoke closely related dialects of the Halkomelem language.[340] Pierre's skill as a translator is confirmed by the fact that he was chosen to accompany three prominent Salish chiefs to London in 1906, and translated their speeches to King Edward VII.[341] Thus, both translators possessed the skill to accurately translate from English to Halkemelem and

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[338] The agreement is reproduced in Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913* (Vancouver: UBC Press, 1974), 304.

[339] Ibid.

[340] Wayne Suttles, "Central Coast Salish," in *Handbook of North American Indians, Northwest Coast,* Vol VII (Washington, DC: Smithsonian Institution, 1990), 455.

[341] Keith Thor Carlson, *The Power of Place, the Problem of Time: Aboriginal Identity and Historical Consciousness in the Cauldron of Colonialism* (Toronto: University of Toronto Press, 2010), 265-269.

vice versa. In sworn testimony before the Royal Commission in 1913, Whoakum recalled his meeting with James Douglas:

> I want to tell you people that I was amongst the first people who found coal in Nanaimo….[342]
>
> Two months later,[343] Sir James Douglas himself came over to see where the coal was. Sir James Douglas said "I will buy this coal" but he said "I will not buy anything but the coal." "All the wood and the land is yours." "The land where the coal is, is yours, and the land up the River[344] is yours"….
>
> The Indians that used to live here, their main home was at Departure Bay, at other times they lived on the Island,[345] and on Nanaimo River….I told Sir James Douglas that these three places were our land. Sir James Douglas said "I don't take any land away from you at all. All these three places where you live at different times are yours." The promise that Sir James Douglas made with us, is being broken. We are being pushed off our land.[346] They are now stopping the Indians from cutting the wood and from taking the fish….[347]

Whoakum is clear that Douglas asked only for permission to take the coal, not their land. Douglas' promise that "All these three places where you live at different times are yours" is potentially an important colonial acknowledgement that "village sites" includes all seasonally occupied sites, not just winter villages. Finally, Whoakum is also clear that by

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[342] In 1852 the presence of coal seams at Nanaimo harbour was made known to the HBC by members of the Snunyemuxw First Nation. See HBCA, "Report of Canoe Trip by James Douglas to Colonial Office, 27 August 1852," PRO CO 305/3 fo. 134-139d. The balance of Whoakum's description of the coal discovery is omitted.

[343] Whoakum may have conflated two meetings with Douglas, the first in 1852 when Douglas first visited Nanaimo, and the second in 1854.

[344] This is the Nanaimo River

[345] The "island" is Gabriola Island, which is very close to Nanaimo. See Homer Barnett, *The Coast Salish of British Columbia* (Eugene: University of Oregon, 1955), 22.

[346] According to Joseph McKay, in his 1888 letter, the purpose of the treaty was compensation, because "The Nanaimos had to surrender their principal village sites to make room for the mining operations carried on there." BCA, Joseph William McKay Fonds, PR-0560, MS-1917, file 27, Letter from Joseph McKay to Dr. James S. Helmcken, 3 December 1888.

[347] Transcripts of his testimony before the McKenna/McBride Commission are available on the BC Union of Indian Chiefs website. BC Union of Indian Chiefs, "UBCIC Library and Archives," accessed 15 August 2015, http://www.ubcic.bc.ca/library.

pushing the Snuneymuxw off their land, and "stopping the Indians from cutting the wood and from taking the fish," white settlers had "broken the promise Sir James Douglas made with us." In other words, according to Whoakim, Douglas had promised that the Snuneymuxw could keep their land, and would continue to harvest the resources of the land and water without interference. After listening to Whoakum's statement, Commissioner McKenna engaged in the following exchange:

> Mr. McKenna: What do your people want today?
> A. What we want is to get the land back or to get some settlement.
> Q. You say that you and some other Indians brought down furs to Victoria, and also coal. Before that time, were there no white men here?
> A. No there were no white men before that.
> Q. Then afterwards Sir James Douglas came out?
> A. Yes.
> Q. And you made treaty with Sir James?
> A. Yes. He said "the land is yours."
> Q. And then he paid your people some money?
> A. There was no money paid.[348]
> Q. The Chiefs agreed that the rest of the land was open to Sir James Douglas, and the other people to come in?
> A. There was no white man here.[349]
> Q. But they agreed to allow Sir James Douglas and the others to come in?
> A. By and by the white men came over and made their home here.[350]

McKenna's questions are blunt and Whoakum's responses are equally direct and terse, but disclose a keen awareness of the answers McKenna was trying (without success) to elicit. The statement by Whoakum that "What we want is to get the land back or to get some settlement" anticipates and encapsulates the present-day claims of treaty First Nations. It bears noting that the use of the word "treaty" by McKenna is an exceedingly rare pre-1964 official acknowledgment of the status of the agreement.

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[348] Technically, Whoakum is correct, blankets, not money, were distributed. Alternatively, Whoakum may have meant that the blankets were not a payment, but a gift.

[349] Presumably Whoakum understood McKenna's reference to "the other people" to mean settlers.

[350] Again, Whoakum is careful to point out that "the others" arrived later and simply "made their home here."

The opening statement and subsequent exchange are important because they directly address the issue of the terms of the treaty, with the First Nation version being provided by an eye witness under oath. Whoakum acknowledged the fact of a treaty, presumably to arrange for the sale of coal, but steadfastly denied that it was intended to authorize the indiscriminate occupation of their land by whites. He was the only First Nations speaker at any of the Commission's meetings on the Island to raise the issue of the VI Treaties. It should be noted that the official reports of the Commission did not contain any reference to the testimony heard by the Commissioners. Unfortunately, Whoakum's name does not appear anywhere else in the archival record, so it is not possible to assess his veracity other than as revealed in his statements to the McKenna/McBride Commission. Sadly, when asked by Commissioner McKenna "Do you have any family," Whoakum answered "No sir, I have no family."

b. The Yaklam Account

Recently I was alerted[351] to the existence of a second-hand account of the Nanaimo Treaty by the son of one of the signatories, published in the Vancouver Sun newspaper in 1922, as one of a series on BC First Nations. The author of the article styled himself as "Chief Buffalo Child Long Lance," but this was a *nom de plume*.[352] It appears that Long Lance was an unreliable source of information about his own past, but there is no indication that he would have tampered with the story solicited from Yaklam. How Long Lance learned of Yacklam, and who chose the topic of the article, are unknown. In

[351] My thanks to Dr. Donald B. Smith of the University of Calgary for bringing this to my attention.

[352] Donald B. Smith, "From Sylvester Long to Chief Buffalo Child Long Lance," in *Being and Becoming Indian: Biographical Studies of North American Frontiers* (Chicago: The Dorsey Press, 1989), 183-203.

any event, Long Lance interviewed Bobby Yaklam, who related the story as told by his father, Chief Zok-leston:

> The [HBC] company's exploring ship was first attracted to the site of Nanaimo by the rich seams of coal observed along its shoreline. Going ashore, the captain was met by Chief Zok-leston[353] and a party of Nanaimos….The captain informed the chief that they desired to be friends of his people, and asked him to accept a little present of blankets, shirts and tobacco, as a token of good-will. Chief Zok-leston accepted this offering as a gift and went back to his people with the good news. He gathered them together and distributed these articles among the various heads of families, commanding them to be friendly towards the whites. When the Company began to remove coal from its [the tribe's] land it did not look unkindly upon this, as the Indians had often built fires from it, but had been driven away from them by the disagreeable odor. But, when a few years later the Indians were ordered to clear out of the town and move to their present habitation on the outskirts of Nanaimo, they enquired the reason for this sudden turn of events, and were told that the land which they were occupying belonged to the H. B. Company; that it had been bought from Chief Zok-leston for a number of specified articles, which turned out to be the above blankets, shirts and tobacco.[354]

This account suggests that the Snuneymuxw people were led to believe that the HBC simply sought and obtained their consent to the removal of coal from their land, in return for a "present" of trade goods. While the Yacklum story is very brief, it is consistent with Whoakum's claim that the Snuneymux were not made aware that the arrangement rendered their continued presence on the land entirely at the discretion of the Company and the Crown.

c. The Quen-es-then or Wyse Account

In 1931 a part-time journalist, Beryl Cryer, was hired by the editor of the Victoria Daily Colonist to "submit accounts of native histories and mythologies for the newspaper's popular Sunday Magazine," and over the next three years she contributed

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[353] By examination of the list of names making up the Nanaimo Douglas Form, I found a transliteration of the name of a chief which appears to be a close match to "Zok-leston."

[354] Chief Buffalo Child Long Lance, "Greatest Real Estate Deal Recorded," *Vancouver Sunday Sun* (Vancouver, BC), 4 June 1922.

more than "sixty articles based on narratives by distinguished native elders."[355] Chris Arnett, as editor of a collection of her stories, conducted a thorough examination of the reliability of her accounts, and concluded that. "she strived for accuracy and authenticity in the collection of her data."[356]

In 1933, Cryer met several times with Snuneymuxw elder Quen-Es-Then (Joe Wyse), and his wife Tstass-Aya (Jennie) at their home on the Nanaimo Indian Reserve, recording a number of stories. On one occasion the couple decided to tell the story of a meeting between the Snuneymuxw people and James Douglas. Cryer described the Wyses as "a tall, thin, old couple, both speaking good English," and noted that Joe, "in spite of his great age, is remarkably alert."[357] The death certificate of Joseph Wyse lists his date of birth as May 24, 1852, which means he would have been only two and a half years old at the time of the 1854 treaty meeting. After interviewing the couple Cryer published the resulting story in the Victoria Daily Colonist.[358] The interview began with Jennie stating that, "My man, he can talk English, but I talk it better, so he will tell me, and I will tell you!" Through Jennie, Joe said "…he thanks you, kind, white lady, for coming to hear his stories. Always he has wanted to tell what he knows to the white people, but nobody has time to listen."[359] As with Latass' 1934 interview, Wyse's motivation appears to have been a last chance to tell an important story before he died.

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[355] Cryer and Arnett, *Two Houses Half-buried in the Sand*, 17.

[356] Ibid., 23.

[357] Ibid., 186.

[358] Beryl Cryer, "Ki'et'sa'kun of Nanaimo: Telling How Governor Douglas Renamed Him 'Coal Tyee,'" *The Victoria Daily Colonist* (Victoria, BC), 5 March 1933; reproduced in Cryer and Arnett, *Two Houses Half-buried in the Sand,* 186-92.

[359] Ibid., 187-188.

The following account, according to Arnett,[360], records the Nanaimo treaty meeting between the Snuneymuxw First Nation and James Douglas:

> "Well, one day a Hudson's Bay man came to see my [Quen-Es-Then's] father. 'We want to talk to you and your people about this coal,' he said. 'We will have a meeting. You and all your people, and you must get another chief and his people, and on a certain day we will all talk this thing over.'
> So my father, Chief Sugnuston[361], called all his people, and he told another chief, whose name was Chief Schuna'h'un, to call his tribe, and together they went to the meeting. Now, you know where the big wharf is now where the steamers come? Well, down there is a rock in the water. In those old days it was part of the land, and at that place was a very big house[362]. To that house there went all the Hudson's Bay men, and the two chiefs with their people."
>
> Here Quen-Es-Ten interrupted, "I was at that meeting," he said. "I can remember all the people in that house, and lots outside, but I was only a small boy standing beside my father."
>
> "Then the Hudson's Bay men talked to the Indians. 'This coal that is here,' they said, 'is no good to you, and we would like it; but we want to be friends, so, if you will let us come and take as much of this black rock as we want, we will be good to you.' They told my father, 'The good Queen, our great white Queen over the water will look after your people for all time, and they will be given much money, so that they will never be poor.' Then they gave each chief a bale of Hudson's Bay blankets and a lot of shirts and tobacco, just like rope! 'These are presents for you and your people, to show we are your good friends,' they said. The chiefs took the things, and they cut the blankets, which were double ones, in half, to make more, and gave one to every chief man, then the shirts, and to those who were left they gave pieces of the rope tobacco; so that every man in the tribes had a present."
>
> "Now you know," said Tstass-Aya, "we think there was some mistake made at that meeting, or, maybe, the people could not understand properly what was said; but later, when our people asked for some of the money for their coal, the Hudson's Bay men said to them, 'Oh, we paid you when we gave you those good blankets!' But those two chiefs knew that the man had said, 'The Queen will give you money'."[363]

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[360] Ibid., 186.

[361] Chief Sugnuston is a variant spelling of Squoniston, identified as the chief Signatory of the Nanaimo Treaty in *Papers Concerning*, *supra* note 8 at 11: "...and signed Squoniston and others."

[362] The relocation of the Snuneymuxw from this village on the harbour to the present "Town" reserve took place in 1862. See Booth Good, "Mission to the 'Nanaimo Tribe', Vancouver's Island," 117.

[363] Ibid. 191-192.

The detailed description of the circumstances and locale of the meeting make it very likely that it was the meeting of December 23rd, 1854. The reference to the Queen is a potentially significant indication that the Snuneymuxw by 1854 had gained an appreciation of the Crown as an entity separate from the HBC. There was no mention of a sale of land, just of coal, on the basis that "much money" would be paid for it over time. In other words, the treaty may have ceded mineral rights in exchange for royalties, but nothing more. The account is also consistent with Latass' claim that the distribution of blankets at treaty meetings was not to be considered a one-time event.

d. The Douglas Account

Douglas' report on the Treaty is contained in a December 26, 1854 addendum to a December 25th letter written by him to Barclay, which is here reproduced in its entirety:

> In my letter of yesterday's date I neglected to mention that I concluded a negotiation on the 23rd Inst. with the Nanaimo Indians for the purchase of the District claimed as their hereditary possession by that Tribe. This had been a long pending matter, and of difficult settlement, in consequence of the mineral character of the district purchased. There was on that account a strong disposition on the part of the Indians to make a good bargain, and I was of course obliged to allow them better sums than were given on the occasion of former purchases.[364]
>
> The District thus acquired extends from Dodds narrows in the Canal de Arro to a head land eight miles north of Colvile Town, which is included with all Islands on the coast in the purchase. The coast line may in a rough estimate be given as 20 miles in length by 10 miles in breadth forming about 200 square miles of country,[365] less a small reserve for village sites and cultivated fields which remain for the use of the Indians. The outlay made on that purchase was 668 Blankets

[364] The only white residents at Nanaimo at this time were the coal miners (all employees of the HBC) and their families, who lived in housing supplied by the Company. In other words, there were no colonists. It would appear that on this occasion the negotiation over price centred on the mineral, not agricultural, potential of the land. Mackie, "Colonial Land, Indian Labour and Company Capital."

[365] This description does not match the area described on the penciled notation attached to the six page list of names.

> valued about £270.[366] The Indian Title being thus extinguished I have instructed Mr. Pemberton to prepare the Title Deeds for the 6000 acres of land purchased at Colvile Town[367] by the Company at his earliest convenience. The deed of sale was signed by every male adult member of the Tribe, chiefs as well as the common class of people and they all appeared perfectly satisfied with this arrangement.[368]

Here, in his final report, Douglas is very much the senior executive providing the head office with a cool and collected account of what likely was a tumultuous event. From the point of view of Douglas and the HBC, the main incentive for the making of an agreement with the Snuneymuxw was to clear the way for an immediate purchase of the valuable coal beds, and only secondarily in anticipation of the arrival of settlers.

With this account by Douglas of the Nanaimo meeting the task of presenting and comparing all the extant accounts of the formation of the Vancouver Island Treaties has come to an end. In sum, the chapter has demonstrated that the five First Nation accounts are mutually consistent in their disavowal of a wholesale surrender of their land, and they have opened the door to a new understanding of the standard colonial accounts. The remainder of the dissertation, in one way or another, is a prolonged attempt to shed even more light on the content of these crucial meetings.

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[366] The HBC "Vancouver's Island Trust Account" up to 31 January, 1858, contains an entry under the heading "To Fur Trade" as follows: CD, "Paid Indians for extinguishing their claim to Land at Nanaimo…300£," accessed 4 November 2015 http://hcmc.uvic.ca/~coldesp/jpg_scans/jpg_full_size/co_305_09/00451vjpg)

[367] An early name for Nanaimo. The acreage purchased by the HBC was within the land ceded by the treaty as described by Douglas.

[368] HBCA, Addendum to Sir James Douglas to Archibald Barclay, B.226/b/14 fo.37-39d, 26 December 2004.

D. The End of Treaty Making on Vancouver Island (1854-1862)

1. Douglas' Intentions

Although no agreements using the Douglas Forms were made on Vancouver Island after 1854, Douglas stated in 1861 that, "I made it a practice up to the year 1859, to purchase the native rights in the land."[369] This raises the interesting question of whether he entered into any such agreements between 1854 and 1859. There is no evidence that he did, which suggests that he maintained the policy but not the practice. He explained the change as follows: "…since that time in consequence of the termination of the Hudson's Bay Company's Charter, and the want of funds, it has not been in my power to continue it."[370] Other possible explanations have been proposed in the literature. For example, Banner has suggested that Douglas had a change of heart, realizing that "purchasing land from Indians….had not been a way of advancing the Indians' welfare."[371] Foster and Grove have argued that Douglas may have latched onto a court case in the Oregon Territory as authority for the proposition that there was no legal obligation on the government to purchase Indian land.[372] In my opinion, the best explanation is provided by Cole Harris: "he stopped, I think, because of the costs and the logistical problems involved, and because there was no pressure from the Colonial Office to make such purchases. I doubt he had ever been deeply committed to the principle of

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[369] British Columbia, *Papers Connected with the Indian Land Question, 1850-1875*, 19.

[370] Ibid.

[371] Banner, *Possessing the Pacific*, 216-217.

[372] Foster and Grove, "'Trespassers on the Soil.'"

native title, but…had thought it wise to clear the land of possible Native claims as long as it was not prohibitively costly or troublesome to do so."[373]

The next question is whether Douglas entered into any agreements to "purchase" First Nation land on Vancouver Island after 1859. There are three possible candidates. The first is a purchase agreement entered into by William Eddy Banfield with the Ohiat First Nation in 1859 for an island near present-day Port Alberni on the west coast of Vancouver Island. While Douglas had appointed Banfield as a government agent, he did not enter into the agreement as agent of the Crown, but as a private individual. His correspondence with Douglas on the subject[374] reveals that Banfield initiated the purchase without the prior knowledge or approval of his employer. The document was clearly drafted by Banfield, and the wording bears no relation to the Douglas Form template. In a letter to Douglas, Banfield described the purchase and explained that "I was almost compelled to do so on my first coming among them, they were particularly anxious that I should purchase the ground on which I lived saying that the Americans at Cape Flattery had all bought their ground from the Indians." He sent the signed deed (and two subsequent deeds) to Douglas and asked for forgiveness and approval. While two of the documents found their way into the Register of Land Purchases containing the Douglas Forms, there is no record of any response by Douglas to Banfield's plea. Banfield died in 1862,[375] well before the Alberni District was surveyed. Thus the deeds were never registered, and his goal forever unrealized. Since Banfield was acting in a

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[373] Harris, *Making Native Space,* 34.

[374] BCA, file 107, Colonial Correspondence

[375] Jan Peterson, *Journeys Down the Alberni Canal to Barkley Sound* (Lantzville BC: Oolichan Books, 1999), 40.

private capacity, the deeds do not qualify as treaties under the working definition used in the dissertation.

In 1860, Gilbert Malcolm Sproat participated in the establishment of a lumber mill at the head of the Alberni Inlet, and in 1868 published a book entitled *Scenes and Studies of Savage Life*.[376] In it he described his acquisition of land from the Tseshaht First Nation:

> In the morning I sent a boat for the chief, and explained to him that his tribe must move their encampment, as we had bought all the surrounding land from the Queen of England, and wished to occupy the site of the village for a particular purpose. He replied that the land belonged to themselves, but that they were willing to sell it. The price not being excessive, I paid him what was asked – about twenty pounds' worth of goods – for the sake of peace, on condition that the whole people and buildings should be removed next day.[377]

No written version of the terms of sale was produced. Banfield was present during this negotiation and reported to Douglas that Sproat had "…proceeded to make a treaty[378] with the natives – Sheshat Tribe – and it is with much satisfaction I am enabled to state to you that an arrangement amicable and satisfactory has been effected between the above named gentleman and the Chiefs of the Sheshat tribe."[379] Sproat followed up in a few days with a visit to "the principal house at the new encampment, with a native interpreter," and entered into a conversation with "an old man," who stated that, "We do not wish to sell our land, nor our water," and "We wish to live as we are."[380] However, Sproat's informant also talked about the future:

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[376] Gilbert Malcolm Sproat, *Scenes and Studies of Savage Life* (London: Smith, Elder and Co., 1868).

[377] Ibid., 2-3

[378] It is interesting that Banfield did not describe his own land purchase as a treaty.

[379] Banfield correspondence, BCA, file 107, Colonial Correspondence

[380] Sproat, *Scenes and Studies of Savage Life*, 4.

> …our families are well, our people have plenty of land; but how long this will last we know not. We see your ships, and hear things that make our hearts go faint. They say that more King-George-men will soon be here, and will take our land, our firewood, our fishing grounds; that we shall be placed on a little spot, and shall have to do everything to the fancies of the King-George-men[381].

The apparent contradiction between the willingness of the Chief to sell the mill site, and the evident reluctance of the "old man" to sell any land, can be reconciled by Sproat's admission that "...the Indians…sold the country to us, perhaps, under the fear of loaded canon pointed toward the village."[382] In 1864 the mill closed,[383] and as the Alberni District still had not been surveyed, the twice-purchased land reverted to its former unceded status.[384] While Sproat's arrangement was no more a treaty than Banfield's, both transactions suggest that (during the late 1850s and early 1860s at least) many First Nations made informal arrangements to authorize the occupation of specific parcels of land by European entrepreneurs and settlers.

The third and final candidate is the most likely. Foster and Grove have argued that Douglas made a verbal commitment to compensate the Cowichan First Nation for the pending occupation of their territory by settlers at a meeting in Cowichan in August of 1862.[385] Their argument relies heavily upon a report of the Cowichan expedition in the *British Colonist*:

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[381] Ibid., 3. I must admit to a concern that the words of the "old man" as translated by Sproat seem overly prescient, and might have been reworked by Sproat to fit with his own notions (when he wrote the book) of what the future held for First Nations.

[382] Sproat, *Scenes and Studies of Savage Life*, 7.

[383] Peterson, *Journeys Down the Alberni Canal to Barkley Sound*, 42.

[384] David Rossiter, "Lessons in Possession: Colonial Resource Geographies in Practice on Vancouver Island, 1859-1865," *Journal of Historical Geography*, 33 (2007): 782-787.

[385] Foster and Grove, "'Trespassers on The Soil.'"

> The few natives at present in the district (the major portion of the tribe being absent fishing) agreed without hesitation to the surrender of their lands to the Government, with the exception of their village sites and potato patches, being informed that when the absent members of the tribes had returned to their homes in the autumn, compensation for the lands taken up by the settlers would be made at the same rate as that previously established – amounting in the aggregate to the value of a pair of blankets to each Indian…"[386]

However, Arnett has pointed out that that the autumn meeting never took place and thus no formal agreement was made. He relies on an 1865 letter from the Reverend Garrett to Colonial Surveyor, B.W. Pearse: "According to Garrett, Douglas' plan to negotiate a proper land sale agreement with the Cowichan in the fall of 1862 was disrupted by people from Lamalcha [on Kuper Island, near Cowichan] who 'became troublesome…and the Governor did not think it would be expedient then to carry out his intention'."[387]

Of course, it may be true that an oral treaty, on the terms set out in the newspaper account, was made between Douglas and such of the Cowichan people who were not away fishing on the Fraser River. However, in the absence of minutes of the meeting, or any reference in Douglas' correspondence, or a completed Douglas Form, or a first-person First Nation account, it is a very difficult claim to prove. However, enough attention has now been paid to Douglas and his intentions, and it is time to consider other factors which may have influenced the continuation or termination of the treaty-making process.

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[386] "Cowichan Expedition," *British Colonist* (Victoria, BC), 22 August 1862.

[387] Chris Arnett, *The Terror of the Coast: Land Alienation and Colonial War on Vancouver Island and the Gulf Islands, 1849-1863* (Burnaby, BC: Talonbooks, 1999), 105-106.

2. The View from the Colonial Office

Cole Harris is correct in his surmise (noted above) that Douglas was under no pressure from the Colonial Office. Douglas received no correspondence on the issue from the Colonial Office until the creation of the Colony of British Columbia in 1858. Soon after his appointment as governor of the new colony Douglas received a letter from Sir E.B. Lytton, Bart., Secretary of State for the Colonies, advising that, "…it should be an invariable condition, in all bargains or treaties with the natives for the cession of lands possessed by them, that subsistence should be supplied to them in some other shape…."[388] My reading of Lytton's intent is to lay down rules in the event that Douglas chose to enter into treaties. In 1859, Lord Carnarvon, Undersecretary of State, noted that "Her Majesty's Government earnestly wish that when advancing requirements of Colonization press upon Lands occupied by members of that race [Indians] measures of liberality and justice may be adopted for compensating them for the surrender of the territory which they have been taught to regard as their own."[389] Carnarvon merely expressed an "earnest wish" that Douglas "may" obtain surrenders of territory. In 1861, Lord Newcastle wrote to Douglas acknowledging "…the great importance of purchasing without loss of time the native title to the soil of Vancouver Island," an importance not so great that "…the British taxpayer will be burthened to supply the funds of British credit pledged for the purpose."[390] In other words, Lytton thought it a good idea, but not to the extent of funding it, or requiring the Vancouver Island House of Assembly to proceed

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[388] Reproduced in British Columbia, *Papers Connected with the Indian Land Question, 1850-1875*, 12.

[389] CD, Lord Carnarvon, Undersecretary of State, to Sir James Douglas, CO 410/1, 11 April 1859, 195, accessed 15 August 2015,http://bcgenesis.uvic.ca/getDoc.htm?id=V597049.scx&search=Carnarvon%20to%20Douglas%20april%2011#searchHit1.

[390] Reproduced in British Columbia, *Papers Connected with the Indian Land Question, 1850-1875*, 20.

with further purchases. There is nothing in the Colonial Office correspondence reprimanding, or even mentioning, the failure of Douglas to enter into any more agreements to extinguish native title.

3. The Voice of the Settlers

What was the attitude of settlers, once they started to appear on the scene in significant numbers circa 1859? That is difficult to ascertain, other than through the medium of newspaper editorials. Amor de Cosmos, editor of the *British Colonist* newspaper, wrote several[391] editorials chastising Douglas for his failure to extinguish the title of the First Nations inhabiting the Cowichan Valley (situated between Victoria and Nanaimo). The most significant of his editorial observations reads as follows: "What therefore is expected is the speedy extinction of this title. We call it the title though lawyers may quibble about an Indian title, and say there is no such thing. But still we hold that they possess an equitable title, disguise it in legal lore as you please, and that it is our policy to respect that title, which may be vested in the government now at a trifling expense compared with its value in the future."[392] This represents a surprisingly sophisticated analysis of the title interest of First Nations, unusual for its time.

However, historian Kenton Storey has pointed out that any assumptions as to "the unproblematic relationship between editorial perspectives and public opinion is too simplistic and ignores how editors' material and political interests informed editorial perspectives."[393] In the case of Amor de Cosmos, '…opposition to Douglas'

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[391] At least six between 1859 and 1862.

[392] "Editorial," *British Colonist* (Victoria, BC), 22 August 1860.

[393] Kenton Scott Storey, "What Will They Say in England?: Violence, Anxiety, and the Press in Nineteenth Century New Zealand and Vancouver Island," *The Journal of the Canadian Historical Association*, 20.2 (2009): 32.

administration was a central tenet of the British Colonist's editorial manifesto," which "reflected De Cosmos' political ambitions, Victoria's economic instability, and the development of a competitive local press."[394] Storey concluded that "It was the threat of potential violence which initially compelled him to affirm Aboriginal peoples' inherent right to compensation for their territories," but "following the 1862 smallpox epidemic's decimation of local Aboriginal peoples that popular support for the recognition of Aboriginal title disappeared."[395]

4. First Nation Perspectives

Finally, what might have been the intentions of non-treaty First Nations during this period? Some idea of the attitudes of the Ohiaht and Tseshaht First Nations has been gleaned from the accounts of Banfield and Sproat. Ethnohistorian Daniel Marshall has recently provided a description of the Cowichan First Nation negotiations as seen from their perspective. He argued that the Cowichan were hostile to the idea of entering into any agreement which would open up their territory to white settlement, at least on the terms offered by Douglas.[396] In support Marshall quoted from an 1859 letter by Douglas to Lord Lytton on the subject of the sale of their lands: "…one party [of Cowichans] being in favour of a surrender of a part of their country for settlement; while another party comprising nearly all the younger men of the Tribe strongly oppose that measure and wish to retain possession of the whole country in their own hands."[397] This letter is

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[394] Ibid., 45.

[395] Ibid., 57.

[396] Daniel Marshall, *Those Who Fell From the Sky: A History of the Cowichan Peoples* (Duncan, BC: Cultural and Educational Centre, Cowichan Tribes, 1999), 102.

[397] Ibid., 110.

significant because it demonstrates that for the Cowichan the choice was between sharing some or none of their land, definitely not all of it. In the end, settlement proceeded without an agreement, in part, according to Marshall, because of the effects of small pox, but more importantly because they never received an acceptable offer.[398]

In 1860, naval lieutenant Richard Mayne sailed up the east coast of Vancouver Island, stopping at Comox (situated between Nanaimo and Ft. Rupert) and encountered a different attitude towards land sales. He met with the resident "Comoux Indians," and learned that "They know quite well…the value of the 6000 or 8000 acres of clear land which they possess, and when I went over it with them, took great care to explain that the neighbouring Indians resorted there in the summer for berries, &c., and that a great many blankets would be required as purchase-money whenever we wanted it, an event which they evidently contemplated."[399] In another section of the book Mayne gave a shorter account of the same event, but provided more detail of the use made of this parcel of un-treed land by local First Nations, namely "to collect berries, shoot deer, catch fish, &c., all of which were found in large quantities."[400] This indicates that while several First Nations had access to the rich resources of the un-treed land, the "Comoux" believed they had the authority to negotiate a sale to white settlers, and were prepared to do so if the price was right. This statement suggests that by the end of the 1850s, First Nations on the Island had acquired an understanding of the nature of an alienation of land to whites, but believed they would have control over the size and price of parcels they were prepared to

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[398] Ibid., 122.

[399] Commander R. C. Mayne. *Four Years in British Columbia and Vancouver Island: An Account of Their Forests, Rivers, Coasts, Gold Fields and Resources for Colonisation* (London: J. Murray, 1862), 245.

[400] Ibid., 175.

relinquish. Of course, the "Comoux" expectations were not met, and the land was opened to settlers without compensation of any sort.

The existence of nineteenth century treaties on mainland British Columbia has never been acknowledged, and certainly no written versions are extant. However, there is some indication in the written record and the oral traditions of the Coast Salish that some form of agreement was reached to coexist on the land. In 1860 Douglas addressed assembled First Nation representatives at Lillooet, Lytton and the Okanagan, explaining to them that he would "…stake out and reserve for their use and benefit, all their occupied village sites and cultivated fields, and as much land in the vicinity of each as…was required for their support," and that they "might freely exercise and enjoy the rights of fishing the Lakes and Rivers, and of hunting over all unoccupied Crown Lands in the Colony."[401] The wording is reminiscent of the Douglas Forms, minus any promise of compensation. According to historian Duane Thomson, the First Nation participants in the meetings believed that an agreement had been reached, "…which was regarded by the Indians as a tentative one, to be followed by full negotiations, which would include compensation for abandoning exclusive ownership of their territory."[402] The notion of an unfulfilled agreement has been taken up more recently by Keith Thor Carlson in his article, "Aboriginal Diplomacy: The Queen Comes to Canada and Coyote Goes to London." His research disclosed that

> …many contemporary Sto:lo elders from the lower Fraser River carry oral histories of a promise that was made to them following negotiations between their

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[401] BCA, letter from Douglas to Newcastle, 9 October and 25 October, 1860. In Colonial Despatches online, quoted in Duane Thomson, "The Response of Okanagan Indians to European Settlement," *BC Studies*, 101 (Spring 1994), 101.

[402] Thomson, "The Response of Okanagan Indians to European Settlement," 102. This is certainly consistent with my proposed categorization of the Vancouver Island Treaties set out in Chapter VI.

> leaders and the Crown's representative at a large public gathering in New Westminster in the mid-1860s. According to these intergenerational memories, the Crown committed to providing the Sto:lo people with one third…of all royalties generated from alienated lands and resources within their territory."[403]

Carlson went on to describe one such story in detail, which included "a clear commitment that the Indian people would be able to identify for themselves what lands they wanted as reserves…and in exchange, the white people 'can use the rest'." Carlson's work brings to light the possibility that mainland Salish leaders, in their negotiations with government representatives, brought proposals to share the land and its bounty similar to those made at the southern Vancouver Island treaty meetings. In the following chapter the question of what proposals the Salish and Makah peoples who lived south of what is now the Canada/Us border brought to their treaty meetings, held at various meeting places in the northwest corner of Washington Territory between 1854 and 1855.

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[403] Keith Thor Carlson, "Aboriginal Diplomacy: The Queen Comes to Canada and Coyote Goes to London," in *Indigenous Diplomacies*, ed. J. Marshall Beier (London: Palgrave, 2009), 155-170.

Chapter III: The Washington Treaties of 1854-55

A. Introduction

In the summer of 1966 I was a temporary customs officer at the Port of Victoria, processing travellers arriving via the *M.V. Coho* from nearby Port Angeles, Washington. On one occasion I noticed a Coast Salish family walking off the ferry, carrying pails of fresh-picked berries. I was about to approach them when a senior customs officer advised me in a quiet voice to leave them alone, as they had the right to come and go without customs inspection. At the time I had no idea that I was participating in one of the agreements, both formal and informal, made over the last one-hundred-and sixty-years between Coast Salish communities and a passing parade of governmental officials on both sides of the border.[404] The most prominent of these are the Douglas Treaties and Stevens Treaties, entered into between 1850 and 1855, both of which remained unknown to me until I entered the world of Specific Claims research.

The last chapter applied the methods outlined in the Introduction to a very detailed analysis of the formation of the Vancouver Island Treaties. The methods applied in this chapter are context and comparison, placing the treaties into a wider perspective, and revealing parallels and contrasts with the Washington Treaties. It must be remembered that this is not a side-by-side comparison, but a lens (or keyhole) comparison, using the Washington history as a lens through which to shed light on Vancouver Island's treaty experience. As well, the major focus is on the retrieval and analysis of eye-witness accounts by Native American participants. Comparisons are made

[404] See Bruce Granville Miller, "Life on the Hardened Border," *American Indian Culture and Research Journal*, 36.2 (2012): 24-25.

as they arise but in *italics*, so that they can be skipped on a first reading if so desired, and thereby avoid interrupting the flow of the Washington story. The description of the evolving relationship between Washington treaty parties is divided into three subsections: immediately before, during and shortly after the negotiations. As a form of coda, I discuss two innovative ways to view the treaties formulated by historian Chris Friday.

Much of my knowledge of Washington history has been gained in the course of my doctoral research, including on-site visits to the Oregon and Washington Archives, the Oregon Historical Society and the private collection of the late Barbara Lane. As to secondary sources, I have relied heavily upon legal historian Alexandra Harmon's 1998 book, *Indians In The Making: Ethnic Relations and Indian Identities around Puget Sound*,[405] and Lane's article "Background of Treaty Making in Western Washington."[406] For primary sources I have relied mainly upon the minutes of the treaty meetings[407] and statements made by eye-witnesses long after the treaty events.

Why make this comparison? The obvious argument against such an undertaking is that one party to the Washington Treaties[408] is the United States government. As Harmon noted, "the international boundary does demarcate areas with distinct political and legal

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[405] Harmon, *Indians in the Making*.

[406] Barbara Lane, "Background of Treaty Making in Western Washington," *American Indian Journal*, 3.4 (1977): 2-11.

[407] Edward G. Swindell, "Appendices 'A' and 'B' Consisting of Minutes of Treaty Councils and a Digest of Treaty Provisions," in *Report on Source, Nature and Extent of Fishing, Hunting and Miscellaneous Related Rights of Certain Indian Tribes in Washington and Oregon* (U.S. Department of the Interior, Office of Indian Affairs, Division of Forestry and Grazing, University of Washington, 1942).

[408] My preference appellation for these treaties is "Washington" versus "Stevens," for the same reasons that I prefer "Vancouver Island" over "Douglas." However, both adjectives are used interchangeably, depending on an admittedly subjective assessment of context. Harmon is aware that "linking Steven's name to the treaties reflects…a tendency to privilege the perspectives of the people who prevailed in struggles for hegemony," but feels that nonetheless "a single shorthand name for them makes sense." Harmon, *Indians in the Making*, 9.

histories. Treaty making and its ramifications have taken different directions in U.S. and Canadian jurisdictions since 1854."[409] On the other hand, all the Indigenous parties to the Douglas Treaties (with the exception of the Kwakwaka'wakw) and three of the four Stevens Treaties in northwest Washington belonged to the category of "Coast Salish." While the term is an ethnographic construct, Alexandra Harmon in her excellent essay, "Coast Salish History"[410], has argued that it encompasses people who share much in common: "Throughout the centuries for which we have written historical records, and probably for much longer, the people in question have associated and identified with each other on several levels, including levels that bridge tribal divisions and current international boundaries."[411] She went on to describe some of these records: "Government reports, censuses, recorded reminiscences, and anthropologists' observations show a persistent flow and intermingling of people from and among the many pockets of Indian[412] population around northwestern Washington and south-western British Columbia."[413] Based on the work of Wayne Suttles, the pre-eminent ethnographer of the Salish, she explained this flow of people as follows: "Overlapping kin and social ties linked residents in each winter village directly or indirectly to residents

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[409] Alexandra Harmon "Introduction: Pacific Northwest Indian Treaties in National and International Historical Perspective," in *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest*, ed. Alexandra Harmon (Seattle: University of Washington Press, 2008), 16.

[410] Alexandra Harmon, "Coast Salish History," in *Be of Good Mind: Essays on the Coast Salish*, (Vancouver: UBC Press, 2007).

[411] Ibid., 30-31.

[412] In this chapter I use the terms Indian and Native American interchangeably, a compromise adopted by Harmon, "…because there is no consensus on a more appropriate designation, and because the people in question often identify themselves by one or both of those terms," Harmon "Introduction," *The Power of Promises,* 14.

[413] Harmon, "Coast Salish History," 37.

of other villages,"[414] concluding that "[b]ecause of such interconnections, which did not disintegrate when foreign trading ships and colonists arrived in the eighteenth and nineteenth centuries, there is reason to hypothesize that so-called Coast Salish peoples do indeed have a shared history."[415]

This is exemplified by the history of the First Nation described in one of the Douglas Forms as the "Ka-ky-aakan Tribe," who still reside in Metchosin, on the outskirts of Victoria. The document identifies the First Nation signatories as "Descendants of the Chiefs – ancient possessors of this District, and their only surviving heirs – about 26 in number."[416] However, research by anthropologist Daniel Boxberger has demonstrated that the Ka-ky-aakan were in fact a branch of the Klallum people, who had recently migrated from Washington Territory to Vancouver Island: "…whether directly, indirectly, or in more than one movement, sometime after the settlement of the Victoria area by the Hudson's Bay Company in 1843." Boxberger inferred that "Sir James Douglas, in negotiating the treaties with the Klallum, either did not know or did not care how long the Klallum had been living in the area around Beecher Bay," in Metchosin.[417] Another example of this "persistent flow and intermingling" is provided by Lummi Chief Chowitsut, a signatory to the Point Elliott Treaty. Chris Friday has traced his "activities in regional politics and diplomacy during the early and mid-1850s" including the fact that, "On February 11, 1852, he had signed the South Saanich Treaty

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[414] Ibid., 33.

[415] Ibid.

[416] A digital copy is available on the Royal BC Museum website: "The Fort Victoria and Other Vancouver Island Treaties, 1850-1854," British Columbia Archives, accessed 15 August 2015, www.royalbcmuseum.bc.ca/assets/FortVictoriaTreaties.pdf

[417] Daniel Boxberger, "A Comparison of British and American Treaties With The Klallam," (master's thesis, Western Washington University, 1977), 18-19.

on Vancouver Island."[418] Friday conceded that "how and why Chowitsut came to be involved in that treaty remains unclear," but, given the close cross-border ties among Straits Salish peoples, he felt that Chowitsut's presence at the Saanich treaty meeting was "intriguing but not surprising."[419]

Almost as good an argument can be made for a shared history between the Salish and the Makah. The fourth Washington treaty was entered into with the Makah people, famous whalers resident on the very northwest tip of Washington Territory at Cape Flattery, facing Vancouver Island across the Strait of Juan de Fuca. While their language and culture are closely linked to that of the Nuuchahnulth peoples of the west coast of Vancouver Island, anthropologists Ann Renker and Erna Gunther have demonstrated that in the mid nineteenth century "the Makah had ties with neighbours on all sides." For example, "Makah families had fishing rights on the Lyre River in Clallam country…while Clallam and Quilleute families went to the Cape Flattery area for halibut," and in the wider context, "[t]he Makah served as middlemen in trade between the Lower Columbia and Vancouver Island."[420] For example, the "Cape Flattery" Indians are mentioned in 30 daily entries of the Fort Victoria Journal (1846-1850), including this typical entry dated May 3rd, 1850: "Some Nanaimaults arrived to day & traded a few furs. 4 canoes of Cape Flattery Indians arrived also."[421]

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[418] Friday, "Performing Treaties," 162. The treaty in which Chowitsut's name appears is in fact the North Saanich Treaty. His name is number 24 on the list.

[419] Ibid., 163.

[420] Renker and Gunther, "Makah," 422.

[421] HBCA, Fort Victoria Journals (1846-1850), Ref.# B.226/a/1, Reel 1M149.

Finally, Harmon enumerated the common conceptual gaps in the pre-treaty relationship between Indigenous peoples and the newcomers, on both sides of the international border: "The United States and Canada [or Britain], treaties between tribal "chiefs" and colonial sovereigns, written rules and centralized law enforcement, reservations and reserves, racial categories such as Indian and white – all were unknown in Coast Salish [and Makah] territories."[422] That brings up the question of what *did* the parties know about each other prior to the treaties.

B. Before

In 1850 treaty commissioners were appointed by the US government and funds appropriated "to negotiate treaties with the several Indian tribes in the Territory of Oregon, for the extinguishment of their claims to lands lying west of the Cascade Mountains; and, if found expedient and practicable, for their removal east of said mountains."[423] In 1851 nineteen treaties were negotiated with Native American groups in the Columbia River area, but none of them were ratified by Congress. According to historian Stuart Banner, Congress declined to ratify them for two reasons. First, contrary to their instructions, the commissioners had failed to secure the agreement of the Indians to abandon their traditional territory. Secondly, very few (sometimes less than ten) Indian representatives signed each treaty. Apparently "The incongruity of a great nation meeting as equals with groups so small…was too much to bear."[424] None of these abortive treaties dealt with land in the Puget Sound area, and the next wave of negotiations took

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[422] Harmon, *Indians in the Making,* 39-40.

[423] Quoted in Banner, *Possessing the Pacific*, 241, and cited by him as Congressional Globe, 31 Cong., 1st Sess. (1850) 262.

[424] Banner, *Possessing the Pacific*, 247.

place after the separation of Washington from its parent territory. The treaties subsequently negotiated in the remainder of Oregon Territory by Indian Superintendent Joel Palmer provided for the total cession of Native American land and the forced relocation of all Native Americans onto two reserves, the Coast and Grande Ronde Reservations. No provision was made for hunting and fishing rights in the ceded land.[425] As a result, the treaty experience of what became the State of Oregon is less useful than that of Washington Territory for the purpose of comparison with the Vancouver Island Treaties.

The balance of this subsection draws heavily upon two chapters of Alexandra Harmon's book, *Indians In The Making*. The first covers the period between the arrival of Hudson's Bay Company traders and the arrival American settlers, and the second carries the story forward to the eve of the treaty meetings. In both chapters Harmon attempted to analyze events not just from the written record of British traders and American colonists, but also "from the standpoint of the participants who did not write about them," which she acknowledged "requires some speculation." Nonetheless, she felt confident that "recent interdisciplinary scholarship elucidates the processes at work in such encounters, providing a basis for inferences about the natives' views."[426] Informed guesses as to the Indigenous rationalization of encounters with whites run the risk of missing the mark, but there is little alternative given the paucity of contemporaneous material. Fortunately,

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[425] M. Susan Van Laere, *Fine Words and Promises: A History of Indian Policy and Its Impact on the Coast Reservation Tribes of Oregon in the Last Half of the Nineteenth Century* (Philomath, OR: Serendip Historical Research, 2010).

[426] Harmon, *Indians in the Making*, 20.

Harmon always identified her conjectures as such, and provided her sources, allowing readers to assess their strength.

For instance, she made good use of the scant historical record to problematize the commonly held perception that displays of force by British traders convinced the Salish of European military superiority, and to infer likely Native American understandings of these events. In her chapter on the fur trade era (1827 to 1845) Harmon recounted an 1828 incident in which five HBC employees from Fort Langley were killed by Klallum Indians in the Puget Sound area. This provoked a retaliatory expedition by the HBC, resulting in "dead natives, a litter of shattered canoes, and smoldering house timbers."[427] Harmon began her analysis of these tragic events by stating that "In trying to comprehend their effects on each other, King George men [a common Salish appellation for HBC personnel] and Klallums alike drew on concepts and patterns of association they regarded as common sense; but they did not draw on the same concepts and associations."[428] The HBC participants justified their shelling of the Klallum village at Dungeness on the basis that a show of superior force was the only way to deter further violence against Europeans. According to Harmon, "Natives were unlikely to conclude that the destruction at Dungeness had settled the question of King George men's and Indians' relative power because they were unlikely even to frame such a question. Rather than thinking in terms power-wielding institutions or national groups, they focused on individuals," with the result that "Puget Sound natives could acknowledge King George men's advantage in some circumstances while never doubting that eventually, in other

[427] Ibid., 19.

[428] Ibid., 20.

situations, various Klallams would also exhibit powers worthy of King George men's respect"[429]. She concluded that Native Americans "had no conceptual basis at all for weighing HBC or British strength against the combined strength of…Indians."[430]

Her argument is consistent with my discussion in Chapter II on the minimal effect of shows of strength by the British at Fort Victoria.

She then recounted an 1849 skirmish involving the Snoqulamie Indians (from an area near Puget Sound), which resulted in the death of a white settler. On this occasion the response came not from the HBC, but from the newly organized government of the Oregon Territory, and instead of mounting a retaliatory expedition, the government apprehended six Snoqualmie suspects, held a public trial and then hanged two of them. Harmon effectively problematized the Americans' assumption that the official show of force had instilled in the Puget Sound Indians "a wholesome fear of the law and the power of the government,"[431] since at that time "state power, universal laws, and crimes against society were alien, untranslatable concepts" to the Indians of the Puget Sound area..[432] She concluded that "Rather than a righteous American sovereign with power to assign them all a new status, native people probably saw only a small, if formidable, tribe of Bostons who had responded in an exotic way to the harm done by particular local people."[433] Also in 1849, the US government appointed the first Indian agent for the area north of the Columbia River.[434]

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[429] Ibid., 22-23.

[430] Ibid., 24.

[431] Ibid., 54-57.

[432] Ibid., 57.

[433] Ibid.

[434] Ibid., 55.

In the Vancouver Island context, this example of government retaliation suggests that it likely made no difference to First Nations whether shows of force at Fort Victoria emanated from the HBC or the British Navy.

Harmon noted that American migrants started to arrive in the Puget Sound area in 1845,[435] and by the time Washington Territory was created in 1853, there were approximately two thousand settlers living among twelve thousand Salish in the northwestern corner of the territory.[436] The newcomers operated mines, sawmills and commercial fishing enterprises around Puget Sound.[437] Harmon notes that "Many settlers reported, as did John Roger James, that Indians 'were very persistent in declaring the land was theirs'," and "Americans who seemed to acknowledge Indians' territorial prerogatives were thus usually welcome."[438] At the same time, "…it became more common for settlers to move into Indians' territory without permission, to insult or assault Indians, and to cheat Indians out of pay for goods and labor." According to Harmon, "…anticipation that the American chief would finally pay for the Bostons' use of land, as settlers had promised, was probably universal."[439] This raises the important issue of whether the Salish anticipated the payments as compensation for land already occupied (or in the process of being occupied) by whites, or payment for their entire territory. According to anthropologist Barbara Lane, "The Indians had received constant assurances from white settlers and from government representatives that they would be

[435] Ibid., 52.

[436] Ibid., 61.

[437] Ibid.

[438] Ibid., 62.

[439] Ibid., 79.

compensated for lands which were being settled on and for loss or destruction of native property incident to white settlement."[440]

This is a vastly different prelude to treaty-making than experienced north of the border. On Vancouver Island in 1850 there were neither settlers nor Indian agents, and thus no one was handing out assurances of any sort to First nations with respect to their land, nor would they have had any intimation that such assurances were required or in the offing. Knowledge of the expectations of the Puget Sound Salish and the Makah may have filtered across the border, but the historical record is silent on this point. In any event, the clear evidence of Puget Sound Salish expectations in the lead up to their treaty meetings permits an inference that the Vancouver Island Salish let Douglas know of their desire for compensation for land occupied or exploited by the HBC prior to their treaty meetings. In other words, contrary to the common assumption made in the treaty literature, the Vancouver Island treaty meetings may have been instigated as much by First Nation pressure as by Douglas' desire to fulfil his orders from HBC headquarters in London.

By the early 1850s, U.S. government thinking was moving away from the long-standing removal policy (constantly moving Indians westward out of the way of advancing waves of settlers) and towards the idea of putting Indians on reservations within their ceded territories. However, this change did not extend to reserving traditional village sites. The goal was to relocate and consolidate the Indians onto as few reserves as possible, and to isolate them from non-Indians.[441]

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[440] Lane, "Background of Treaty Making in Western Washington," 8.

[441] Ibid.

My reading of the literature indicates that, by contrast, the British in North America rarely included removal provisions in their treaties with Indigenous peoples.

The growing tension between Native American and settler views of who controlled the allocation of land came to a head with arrival of Governor Stevens in 1854, and his determination to secure treaties of cession from the Salish and Makah in the shortest time possible.

C. During

The definition of "during" for the purposes of this section includes both contemporaneous accounts and subsequent recollections of the meetings by attendees. The sole contemporaneous account is to be found in the records or minutes kept by the Treaty Commission. For recollections in the historical record, the section draws upon a number of sources.

1. "Records of the Commission to Hold Treaties with the Indian Tribes in Washington Territory and the Blackfoot Country"

Government officials invited people to the treaty meetings "by sending a runner to each village with bundled sticks equal in number to the estimated inhabitants."[442] *This is likely how invitations to the initial Fort Victoria meetings were sent, as described by Latasse: "Invitations were sent to the Songhees, Saanich, Cowitchen, and other tribes and the gathering included men, women and children."*[443]

The first four treaty meetings were held in the space of a five weeks: "…one on Christmas at Medicine Creek, with residents of south Puget Sound; a second treaty late in

[442] Swindell, "Appendices 'A' and 'B' Consisting of Minutes of Treaty Councils and a Digest of Treaty Provisions," 80.

[443] Pagett, *105 Years*, 1.

January with north Sound groups congregated at Point Elliott; and the third just a week later with people who came from Hood Canal and the Strait of Juan de Fuca to Point No Point,"[444] and the fourth at the end of January with the Makah at Neah Bay.

Governor Isaac Stevens was the Commissioner, and his party consisted of James Doty, secretary, George Gibbs, surveyor, H.A. Goldsborough, commissary, and Frank Shaw, interpreter, plus Col. M.T. Simmons, Special Agent for the Puget Sound District. The first meeting of the Commissioner's party took place on December 7th, 1854, and Stevens "spoke of the necessity of speedily concluding Treaties with them [the Indian tribes] and placing them on Reservation," and "after considerable discussion upon Reservations, Fishing Stations, Farms, Schools etc. the Commissioner directed Mr. George Gibbs to prepare a programme of a Treaty in accordance with the views of the Commission." The Commission reconvened on December 10th and "Mr. Gibbs presented the outline Draft of a Treaty, which after discussion and light modification was adopted as the basis for the Treaties," with the overall goal "generally to admit as few reservations as possible, with a view of finally concentrating them in one." Stevens' drive to separate Indians from whites was reinforced by his personal belief that "…all experience we have had with Indians these three-hundred and sixty years, shows us that the white man and the red man cannot live happily together."[445]

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[444] Swindell, "Appendices 'A' and 'B' Consisting of Minutes of Treaty Councils and a Digest of Treaty Provisions," 79.

[445] Isaac Stevens, "Official Proceedings at the Council in the Walla Walla Valley," U.S. Department of the Interior, Bureau of Indian Affair, accessed 4 November 2015 http://www.lib.uidaho.edu/mcbeth/governmentdoc/1855council.htm

Of course, on Vancouver Island Douglas did not "prepare a programme of a Treaty" in advance of the Fort Victoria meetings in 1850, and it is by no means certain that he prepared templates in advance of any treaty meetings.

The Treaty meeting at Medicine Creek commenced on Christmas Day, and "The Programme of the Treaty was fully explained to the Indians present," and the final version of the treaty document was "ordered to be engrossed." This pre-prepared form (with minor variations) was adhered to in all of the Stevens Treaties. On Boxing Day Stevens addressed the assembled multitude of 630 Indians, including the following remarks: "the Great Father [the President of the U.S.] wishes you to have homes, pasture for your horses and fishing places, he wishes you to learn to farm and your children to go to school, and he now wants me to make a bargain with you, in which you sell your lands and in return be provided with all these things – You will have certain lands set apart for your homes and receive yearly payments of Blankets, axes, etc. – All this is written down in this paper which will be read to you." The minutes record that "The Treaty was then read Section by Section and explained to the Indians by the Interpreter and every opportunity given them to discuss it." Governor Stevens then made it clear that "after signing we have some goods to give you…and after that you must wait until the paper comes back from the Great Father – The goods now given are not a payment for your lands: they are merely a friendly present." The minutes noted that "The Indians had some discussion, and Gov. Stevens then put the Question, 'Are you ready? If so I will sign it' – There were no objections, and the Treaty was then signed by Gov. I. Stevens and the Chiefs, Delegates and headmen on the part of the Indians and duly witnessed by the Secretary, Special Agent and seventeen citizens present." While the official record does

not include any statements by the Salish participants, and does not indicate the presence of any discord, a counter-narrative soon emerged, centering around the question of whether Chief Leschi actually put his mark on the treaty document. This dispute and its consequences are dealt with in the next subsection.

The speeches of Stevens and other members of his party may be pompous and condescending, but at least they are recorded. There is not a single extant quotation from an address made by Douglas at a treaty meeting. The silence of the Vancouver Island Treaties does not emanate just from the absence of First Nation voices.

In this subsection the (slightly abridged) text of the Medicine Creek is reproduced, interspersed with annotations and comparisons, beginning with the preamble:

> Articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, head-men, and delegates of the Nisqually, Puyallup, Stellacoom, S'Homamish, Stehchasss, T'Peek-sin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians, occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.[446]

The end of the preamble contains a refreshingly frank disclosure of the arbitrary nature of the process by which Native American groups were lumped together under one treaty umbrella.

With respect to the "Sangees Tribe," Douglas felt able to identify seven component "tribes," but with respect to the other seven treaties, with "Claimants not so well known as the Songees,"[447] *he seems to have adopted a simpler approach, lumping*

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[446] Available online at: www.fws.gov/pacific/ea/tribal/**treaties**/Nisqualli_Puyallup.pdf

[447] Bowsfield ed., *Fort Victoria Correspondence*, 95.

together any and all First Nations who claimed to occupy a certain geographical area, as evidenced in his report on the Saanich Treaties: "finding it impossible, to discover among the numerous claimants, the real[448] *owners of the land in question, and there being much difficulty in adjusting such claims, I thought it advisable to purchase the whole of the Sanitch Country."*[449]

> Art. 1. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows…

The important word in Article 1 is "convey," which is not to be found in any of the Douglas Forms, nor in any of the Numbered Treaties. The difference is telling – Americans actually acknowledged a Native American title to the land capable of being conveyed, whereas the British would only admit a possessory interest forming some sort of inchoate encumbrance to be cleared from Britain's title. A quit-claim deed is the property law equivalent of a civil law general release of all claims, obtained in exchange for a payment of money made without any admission of liability.[450]

> Art. 2. There is, however reserved for the present use and occupation of the said tribes and bands the following tracts of land… [three reserves of two sections, or 1280 acres, each]; all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest pubic highway is secured to them.

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[448] All the "claimants" may have had valid claims upon the resources of the "selected" area.

[449] HBCA, Letter from Sir James Douglas to Archibald Barclay, Reel 1M11.G1/140, 18 March 1852.

[450] This mini-primer on releases is based on my experience as a lawyer in private practice.

It is interesting to note that, like the Douglas Forms, there is no obligation to survey the reservations in a timely manner. The important wording is hidden in the middle of the Article, in which "the said tribes and bands agree to remove to and settle upon the same within one year after the ratification." This is fundamentally different from the Vancouver Island Treaties. The Native American parties to the Stevens Treaties were being asked to leave their existing villages and burial grounds forever and start a new life on land hastily chosen by the Commission, usually heavily forested land. The Vancouver Island First Nations were faced with no such stark choice, and thus would have been totally unaware of the reserve system that was eventually to be imposed on them.

> Art. 3. The right of taking fish, at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands…

The fishing right set out in this clause has been the subject of much litigation, culminating in the Boldt decision of 1974. The ruling (as modified by the U.S. Supreme Court in 1979) is neatly summarized by Douglas Harris: "Under the Stevens treaties Indian tribes had a right to catch up to 50 percent of the harvestable fish at usual and accustomed places in order to secure for their members a 'moderate living'…" and, "once they had demonstrated the capacity to manage the fisheries, Indian tribes were to assume jurisdiction over their fisheries."[451]

[451] Harris, The Boldt Decision in Canada: Aboriginal Treaty Rights to Fish on the Pacific." In *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest*, edited by Alexandra Harmon, 128-153. Seattle: University of Washington Press, 2008, at 132.

Harris went on to note that "As of 2007, Canada's courts had yet to provide a definitive judicial interpretation of the right to 'fisheries as formerly' in the Douglas Forms,"[452] *which remains true today. The Stevens Treaty documents make specific reference to "gathering roots and berries," which is much more informative than the vague phrase "enclosed fields" used in the Douglas Forms. Unfortunately, gathering roots and berries (and hunting) are described as a "privilege," which makes it much more difficult to claim that these activities have the same level of protection as the "right" of taking fish. No such distinction is made in the Douglas Forms which merely states that the First Nation parties are "at liberty" to hunt and fish.*

> Art. 4. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of thirty-two thousand five hundred dollars [in instalments over 20 years]…all which said sums of money shall be applied to the use and benefit of the said Indians under the direction of the President of the United States…

There is nothing in the Commission Records to indicate whether the price and method of payment were negotiated or merely presented as a fait accompli.

According to James Douglas, the First Nation participants in the nine Fort Victoria Treaties of 1850 were offered the option of receiving a fixed sum by way of annual instalments, but insisted on a lump sum. It should be noted that the territories covered and monies paid as set out in the Douglas Forms are much smaller than in the Stevens Treaties.

> Art. 5. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand two hundred and fifty dollars, to be laid out and expended under the direction of the president, and in such manner as he shall approve.

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[452] Ibid., 144. The leading case to date is the 1989 decision of the BCCA, is *Saanichton Marina Ltd. v Tsawout Indian Band*, which is discussed in Chapter V.

The article reinforces a major thrust of the treaties from the point of view of the American government, namely to relocate the entire Native American population of Northwest Washington onto a small number of areas of undeveloped land.

> Art. 6. The President may…remove them from either or all of said reservations to such other suitable place within said Territory as he may deem fit… or may consolidate them with other friendly tribes or bands…and…may…cause the whole or any portion of the lands hereby reserved…to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege…

The above section gives the U.S. government the power to unilaterally remove Native Americans from their initial reservations to such other locations as the government may decide.

The Minutes provide good examples of the efforts made by Stevens to explain to his audience novel concepts, such as the subdivision of reserve land into lots which would be assigned to "individuals or families": "Governor Stevens asked 'whether if the right of drying fish where ever they pleased was left them, they could not agree to live at one place for a winter residence and potato ground', explaining the idea of sub-division of lands and he desired them to think the matter over during the night." It seems unlikely that one evening would have been sufficient to absorb the implications such a proposal.

There is little in the historical record to indicate the level of commitment by Douglas to the task of ensuring that the assembled First Nations at the treaty meetings understood the concepts contained in his speeches to them

> Art. 7. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

Article 7 is is an attempt to end a practice common in U.S. treaty history. Historian Francis Prucha gives an interesting overview: "[When]…Indians were indebted to the

traders for goods received on credit; the debts could be recovered only by provisions in the treaties for cash annuities….” In addition, “treaties often specified large payments in goods as well as in cash” so that “the traders profited by furnishing these supplies, often at inflated prices.” According to Prucha, “So much influence did the traders have over the Indians that in many cases the government would have been unable to procure the treaties of cession it wanted without providing adequately for traders’ interests.”[453]

Prucha’s statement raises an important question: did Douglas take advantage of his position as HBC Chief Factor in treaty negotiations with First Nations? The fact that Douglas was a senior HBC official may have played a much larger role in obtaining the participation and agreement of the First Nations than his very-hard-to-discern status as an agent of the Crown.

> Art. 8. The said tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof…Nor will they make war on any other tribe…

As with so many of the written provisions of the Stevens Treaties, much turns on the extent to which Native American participants grasped the implications of such provisions, after translation into Chinook and thence into their own language. *This is an explicit claim of jurisdiction over the lives and persons of the Native Americans, an issue absent from the ever-so-terse Douglas Forms*. *This is not surprising, as the powers contained in the 1849 Grant did not extend to civil jurisdiction*.

> Art. 9. [bans alcohol on reservations]

[453] Prucha, *American Indian Treaties*, 219-220.

Again, such a provision may have been inappropriate to insert in the Douglas Forms, as the H.B.C. was granted jurisdiction only over matters concerning land in the 1849 Charter.[454]

> Art. 10. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year of the ratification hereof, and to support, for a period of twenty years, and agricultural and industrial school, to be free to children of the said tribes and bands, in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smith and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the central agency….

While the Douglas Forms provide for the allocation and survey of reserves, no mention is made as to the administration of the reserves once created. Until Vancouver Island was brought within Confederation, there is little indication in the historical record of any attempts to exercise administrative control over the reserves, which is consistent with Douglas' laissez faire policy in this regard.

> Art. 11. [requires freeing of slaves]

The "Pioneer and Democrat" newspaper, published in Olympia, provided brief summaries of the treaty meetings. The newspaper's report of proceedings at Point No Point paraphrased a speech on slavery by 'Lord Jim' of the Clallum: "He said their forefathers had held slaves through a long succession of ages; that they disliked to depart

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[454] In 1854 the Vancouver Island Council approved legislation "prohibiting the Gift or Sale of Spiritous Liquors to Indians" (C.O. 306/1 Vancouver Island Acts, pp. 27-8; quoted in Barry Gough, *Gunboat Frontier: British Maritime Authority and Northwest Coast Indians, 1846-1890*. Vancouver: UBC Press, 1984, at p.220)

from the usages of their ancestors; that they regarded their slaves as property – as much of a chattel as their canoes, blankets, or houses."[455]

> Art. 12. The said tribes and bands further agree not to trade at Vancouver's island…nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

It is a fascinating provision, designed to achieve two goals. One was to give some substance to the international boundary, which was likely ignored by the Salish and Makah since its theoretical appearance in 1846. The other was to stop Native Americans from trading with the HBC at Fort Victoria. In July of 1854, the "Pioneer and Democrat" newspaper declared that, "The Indians…should be made to understand that it is the government of the United States, and not the Chief Factors of the…HBC, to whom they are to look for protection when their rights are violated, or whom they have to fear when evil councils prevail."[456]

The newspaper editorial is important as it discloses the existence of confusion on the part of Native Americans as to the respective roles of the HBC and the US Government in Washington Territory, which allows an inference that First Nations on Vancouver Island were largely unaware of the existence of the Colonial government of Britain, let alone its status vis-a-vis the HBC, at least at the time of the1850 treaties.

> Art. 13. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

No such provision appears in the Douglas Forms, and no ratification was sought from the British Parliament. This lack of ratification has been seen as a serous barrier to

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[455] *Pioneer and Democrat* (Olympia, Washington Territory), 3.21, 3 February 1855, 2, accessed 6 November 2015, http://www.sos.wa.gov/legacy/images/newspapers/SL_dir_olympiapiondemo/pdf/SL_dir_olympiapiondemo_02031855.pdf

[456] Quoted in Harmon, *Indians in the Making*, 74.

recognition of the treaty status of historical agreements with First Nations in Canada, resulting in the creation by the courts of a special 'sui generis' category, not requiring ratification.[457]

> In witness whereof, the said Isaac I. Stevens…and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands, have hereunto set their hands and seals at the place and on the day and year hereinbefore written. [followed by the signature of Stevens, the marks of 62 chiefs etc., and witnessed by M. T. Simmons, Indian agent, James Doty, secretary of the commission, C.H. Mason, secretary Washington Territory, W.A. Slaughter, first lieutenant, Fourth Infantry, plus five bystanders]

One interesting feature of the signature page is the presence of a military officer, and of a number of white spectators, presumably settlers. All the Douglas Forms were signed only by a brace of HBC clerks, with the exception of the Nanaimo Form, which was, for reasons unknown, also signed by Douglas. The progress of the Commission was reported in the Pioneer and Democrat in glowing terms. It appears from this that the meetings were open to the public, numerously attended and reported upon, once again in stark contrast to the VI Treaty meetings.

On January 21st, 1855, the Commissioner's party arrived at Point Elliott, where "the number [of Indians] on the ground reached 2,300, and sticks were returned for 700 absentees, chiefly old men, women and children." The Pioneer and Democrat newspaper provided a colourful description of the arrival of the Native Americans: "The canoes, filled with the natives…advanced along the quiet waters of the Sound in regular platoons, with the most perfect 'dress' and order, and wheeled into line, fronting the treaty ground, in admirable style."[458]

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[457] The legal definition of the historical treaties in Canada is dealt with in Chapter VI.

[458] *Pioneer and Democrat*, 5 February 1855, 2.

The description evokes a powerful image of the solemnity of the occasion from the Native American perspective, an insight not possible for the Vancouver Island Treaty meetings.

Stevens asked Gibbs to prepare "a draft of a treaty to be made in pursuance of the principles contained in that made at Shenaknam [Medicine Creek]," and "The subject of the reservations was fully considered and those selected which were embodied in the paper." The selection process did not include prior consultation with the Salish. Various members of the Commission then addressed the Indians, including Colonel Simmons who was fluent in the Chinook jargon. Barbara Lane has warned that, "It is hazardous to judge the extent of communication of either specific terms or of underlying purposes and effect without a transcript of the actual Chinook jargon used to interpret the treaties…" In fact the Chinook version and an English translation of Simmon's speech are included in the Commission minutes. To my knowledge, this represents the only reproduction of the Chinook jargon version of any speech given by any party (Indigenous or otherwise) at the Washington treaty meetings. The speech has not been referred to in the literature, probably because most of it is an exhortation to stop consuming alcohol. However, towards the end of the English version Simmons makes reference to the treaty document: "As soon as the Indians and Governor Stevens have agreed on the paper, one chief [the US president] will see it. If he think the paper good, he will put his name to it. When he has signed it the paper will be returned and the money will be sent for your land." The most interesting part of the extract is the phrase, "the money will be sent for your land," which in English indicates that the gist of the transaction was the exchange of land for money, and the most interesting word within the phrase is the word "for," used in the

sense of 'in exchange for'. For translations, I consulted the *Dictionary of the Chinook Jargon, or, Trade Language of Oregon*, by George Gibbs, published in 1863.[459] The phrase "the money will be sent for your land" as rendered in the Chinook version is "chahko mesika dolla koopa illahee," which roughly translates back into English as 'comes your money about/concerning the ground/dirt/earth'. The Chinook-English definition of "koopa" as "about/concerning" is much less precise than the English word "for,"[460] leaving plenty of room for divergent interpretations.[461] For instance, the phrase could have been understood by Native Americans as a confirmation of compensation for lands already taken up by settlers, or as consideration for anticipated land sharing. Simmons' speech may be the only example of how the gist of a cession provision was described in Chinook jargon. The existence of Chinook version of the speech also demonstrates that the treaty Commission had the capacity to provide a transcript of the Chinook version of the treaty document as read out loud to Native Americans, but unfortunately chose not to do so. In any event, Lane concludes that "Chinook jargon, a trade medium of limited vocabulary and simple grammar, is inadequate to express precisely the legal language embodied in the treaties," and "[i]ts inadequacy was commented upon by both Indians and non-Indian witnesses to the treaty negotiations."[462]

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[459] George Gibbs, *Dictionary of the Chinook Jargon, or, Trade Language of Oregon* (NY: Cramoisy Press, 1863) as cited in David Starner, Richard Prairie and the Online Distributed Proofreading Team, "Appendix," in *Project Gutenberg EBook*, accessed 29 October 2015, https://en.wiktionary.org/wiki/Appendix:Chinook_Jargon.

[460] The English-Chinook section of the dictionary does not list the word "for." The word for exchange is "huy-huy" and the word for bargain is "mah-kook." Ibid.

[461] It might be worthwhile for scholars of the Washington Treaties to undertake a nuanced translation of the Chinook version of the speech.

[462] Lane, "Background of Treaty Making in Western Washington," 10.

As discussed in the previous chapter the words of James Douglas at the 1850 Fort Victoria Treaty meetings were likely translated into the Lekuwngen and Klallum languages by Thomas (Tomo Antoine). Nothing is known about the translators or method of translation used at the Fort Rupert, Saanich and Nanaimo Treaty meetings. If Chinook was used at some or all of the VI Treaty meetings, the example provided by Simmons use of the jargon lends considerable force to the proposition that the First Nations may not have understood that they were exchanging their land for money. Also, as discussed in the previous chapter, the use of the Lekwungen and Klallum languages certainly would not have removed all the barriers to understanding.

Stevens then "invited the four head Chiefs to speak," but each speech was virtually identical, expressing, in the words of Chief Seattle: "All of the Indians have the same good feeling towards you, and will send it on paper to the Great Father."[463] According to the Minutes, "all the details except the sum to be given for their lands, had been fully explained by Col Simmons, & Mr Shaw, the Interpreter, in previous conversations with the Chiefs and head men, and as is believed, were fully understood. The Chiefs also were consulted as to the fitness of the reservations finally adopted, & approved of them."[464] The Minutes went on to describe how "The talks were interpreted into Chinook by Mr. Shaw and thence to the Indians by a Snohomish called John Taylor, who also interpreted their replies into Chinook. Taylor likewise repeated the treaty, which he perfectly comprehended before hand, paragraph by paragraph."[465] The treaty

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[463] Swindell, p.341. These are the only words of Chief Seattle recorded in the minutes, contrary to a later, and perhaps mythical, recounting of the speech made by him to Governor Stevens. See Jerry L. Clark, "Thus Spoke Chief Seattle," *Prologue*, 18.1 (1985): 58.

[464] Ibid.

[465] Ibid.

document was then signed. According to the Pioneer and Democrat newspaper account, "At the conclusion of the treaty, a salute of 31 guns was fired by the 'Tompkins,'",[466] confirming the solemnity of the occasion and perhaps asserting a claim of superior power by the United States government.

Once again the lack of records makes it impossible to know if any pomp and ceremony was used at the Vancouver Island meetings as a way to emphasize their importance.

The accounts of the first two treaty meetings are at pains to give the impression that no effort was spared to translate the terms of the treaty documents, and that no confusion or doubts were expressed by the Chiefs. Fortunately, the official accounts of the third and fourth treaties *do* disclose the concerns of Native American participants, and suggest that concerns articulated at the first two meetings may have been elided from the minutes. At the third treaty meeting, with "the Clallums," "Chemakums" and "Sko-komish," which took place on January 25th at Point No Point, "The Indians…arranged themselves in a circle under their principal chiefs."

This is reminiscent of Latass' description of the seating arrangements at a celebration of the Queen's birthday in the 1850s: "The natives were seated in big circles, the chiefs forming the innermost line, the lesser braves being further to the rear, according to their relative importance or youth. The women and children hung around the outskirts of the circles of men, grouping themselves in eager clusters."[467]

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[466] *Pioneer and Democrat,* 5 February 1855, 2. The Steamer Tompkins was used as transport by the Commission

[467] Paget, *105 Years*, 1.

At this meeting, for the first time, the initial negotiating positions of the Salish were recorded. Four of the chiefs, on being asked by Stevens "if they had anything to say," replied (in part) as follows:

> Che-law-tch-tat, an old Skokomish Indian then rose and said, "I wish to speak my mind as to selling the land, Great Chief! What shall we eat if we do so? Our only food is berries, deer and salmon – where then shall we find these? I don't want to sign away all my land, take half of it, and let us keep the rest. I am afraid that I shall become destitute and perish for want of food. I don't like the place you have shown for us to live on. I am not ready to sign the paper.
>
> L'Haii-at-acha-u, To-an-hoock next spoke: "I do not want to leave the mouth of the river, I do not want to leave my old home, and my burying grounds. I am afraid I shall die if I do."
>
> Nah-whil-luk. The Skokomish head chief, an old man, rose and said, "I do not want to sell my land because it is valuable. The Whites pay a great deal for a small piece and they get money by selling the sticks [timber]. Formerly the Indians slept but the Whites came among them and woke them up and we now know that the lands are worth much."
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> Hool-hol-tan or Jim[468]. "I want to speak – I do not like the offers you make in the Treaty to us….I don't want to sign away my right to the land. If it was myself alone that I signed for I would do it, but we have women and children. Let us keep half of it and take the rest. Why should we sell all, we may become destitute. Why not let us live together with you.
>
> Mr. Simmons. The agent explained that if they kept half their country, they would have to live on it and would not be allowed to go everywhere else they pleased. That when a small tract alone was left the privilege was given of going wherever else they pleased to fish and work for the Whites….
>
> Jim resumed: "I am not pleased with the idea of selling at all. I want you to hear what I have to say. All the Indians here have been afraid to talk, but I wish to speak and be listened to. I don't want to leave my land. It makes me sick to leave it. I don't want to go from where I was born. I am afraid of becoming destitute."[469]

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[468] This is the same man mentioned in the newspaper account of the treaty, although the newspaper preferred to pass on his comments about slavery rather than his concerns about the major terms of the proposed treaty.

[469] Swindell, "Appendices 'A' and 'B' Consisting of Minutes of Treaty Councils and a Digest of Treaty Provisions," pp. 344-49

Four other speakers spoke in favour of the treaty, and the next morning, for reasons not explained, all eight chiefs declared themselves ready to accept and sign the treaty.

The extracts, at least as translated, indicate that the chiefs understood that they were being asked to "sign away" their land including their traditional villages, in exchange for reservations designated by the U.S. government. This is quite different from the Vancouver Island experience, where the First Nations were not asked to abandon the village sites.

In sum, two of the chiefs at Point No Point rejected the terms offered and two made a counter proposal: a sharing of the land on a 50/50 basis, either on separate territories, or "living together" in the sense of joint occupation. Simmons' response was a threat: total exclusion from the white half of the territory should the Native Americans not accept relocation onto a reserve.

The treaty party quickly moved on to Neah Bay to meet with the Makah. On arrival "Governor Stevens, the agent and interpreter immediately put themselves in communication with the Indians of the Bay through the medium of Capt. E. S. Fowler, a Klallam Sub-chief called Captain Jack, who spoke the Makah language, and two Makahs, Iwell or Jefferson Davis and Peter, who spoke Chinook."[470] The words of eight elders were recorded, all of whom expressed significant concerns about the treaty proposal. For example, Ke-bach-sat of Tso-yess stated that, "My heart is not bad but I do not wish to leave all my land. I am willing you should have half, but I want the other half myself…." A second example is provided by It-an-daha of Wa-atch: "My father, my father! I now give you my heart…; my wish is like the rest, I do not wish to leave the salt water. I want

[470] Ibid, 349-53

to fish in common with the whites. I don't want to sell all the land. I want a part in common with the whites, to plant potatoes on. I want the place where my house is. We do not want to say much, we are all of one mind…" Stevens replied that "…he wanted them to fish but that the whites should fish also…He added as a reason for buying their land that many whites were coming into the Country and that he did not want the Indians to be crowded out."

Again, the Chiefs seemed to understand that they were being asked to give up their land, but were prepared to voice their opposition, and to propose the alternative of equal ownership or ownership "in common" of the land. Like Simmons, Stevens responded with a veiled threat: if they refused to move to reservations, they would be "crowded out" by settlers.

Again, there were virtually no settlers on Vancouver Island, and there is no evidence that threats, veiled or otherwise, were used to secure the agreements.

The minutes went on to note that, "[t]hey were…directed to consult among themselves upon the choice of a head chief. As they declined doing this on the ground that they were all of equal rank, he selected Tse-kow-wootl, the Ozette Chief as the head." Stevens then proceeded to appoint seven "sub-chiefs," effectively supplanting the initial set of representatives. Once "The heads of the Treaty had been adjusted," Stevens stated that, "I am now about to read you a paper. If you like it, we will sign it." According to the minutes, the newly appointed "Indian chiefs and headmen" promptly agreed with the terms of the treaty and signed it. The "Pioneer and Democrat" newspaper had this to say about the treaty: "All the head chiefs and principal men, and a large majority of the tribe were present at the treaty, and there was no dissent whatever to the

terms proposed."[471] The blatant replacement of uncooperative chiefs with compliant ones may seem shocking, but Barbara Lane confirmed that frequently the 'head chiefs', 'sub-chiefs' and 'leading men' were selected by Simmons and Stevens, and that "Generally, Indian signatories were individuals who had some sort of friendly contact with non-Indians. A few spoke Chinook jargon and probably most were men of importance in their communities, although they were not necessarily the most important men."[472]

There is nothing in the historical record to indicate that Douglas exercised any influence over the choice of First Nation leaders at the treaty meetings.

Lane also made the important additional observation that, "[t]he signatories, in the U.S. view, had the capacity to alienate land," even though, "On the Indian side there was no precedent for signing legal documents, nor was there any culturally sanctioned method of formally alienating land."[473] Given the presence of alien legal language in the treaty documents, and given the barriers to accurate translation, what did Native Americans understand to be the effect of the agreements on their future occupation and control of traditional territories? While they may not have grasped the niceties of American property law, many surely would have understood that American settlers wanted to occupy all of their land, and that the objective of the treaty Commission was to negotiate the terms of that dispossession.

This is in direct contrast to the Vancouver Island experience, where the First Nations were not asked to relocate, or in any way amend their traditional way of life. On

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[471] *Pioneer and Democrat,* 3.22, 7 February 1855, 2.

[472] Lane, "Background of Treaty Making in Western Washington," 9.

[473] Ibid.

the one hand this was a good thing, on the other, it may have lulled them into a false sense of security.

2. Subsequent Eye-Witness Accounts

There is support in the above extracts for the argument that at least some Native American negotiators went into the treaty meetings proposing a concept of shared territory. Did their proposals survive pressure from the treaty Commission to cede all their territory in exchange for reserves and access to resources on undeveloped land? Looking at the written treaty documents, the answer is no. Looking at post-treaty statements by eyewitnesses, the answer is less clear. The earliest account emerges from a meeting on the Lummi reservation organized in 1871 by Felix R. Brunot, chairman of the Board of Indian Commissioners Affairs. According to Chris Friday, Indian leaders "did not hesitate to tell him what they believed the treaties meant." Here is what headman David Crockett thought: "I know what Governor Stevens said when the treaty was made; half the Indians put a wrong construction in it, and it fooled them. Governor Stevens gave us to understand that we were to have half of all this country, and the whites the other half."[474] This suggests that some of the proposals made at the treaty meetings were for a partitioning of the land.

One of the names on the Medicine Creek treaty document is that of Leschi, an important sub-chief who reportedly told Stevens that "We want some of the bottom land…so our people can learn to farm, and some of the prairie where we can pasture our horses, and we want some land along this creek so our people may come in from the

[474] Friday, "Performing Treaties," 167.

Sound and camp."[475] In other words, Leschi proposed that his people keep a goodly portion of their land, and give whites access to the remainder. In 1905 Ezra Meeker published *Pioneer Reminiscences of Puget Sound: The Tragedy of Leschi*, which considered the (still unresolved) question of whether Chief Leschi put his mark on the treaty. Meeker concluded that he did not, using the following reasoning: "Is it possible that as shrewd a business man as Leschi had proved himself to be, would sign away his home, and agree to give up everything, and in company with four or five hundred Indians go upon a reservation of two sections…of heavy timbered lan."[476] Recently, the issue has been revisited by Richard Kluger, a writer of popular histories, who concluded that "It is hard to accept that Leschi, a man of considerable intelligence and articulation, did not grasp what was going on and that the central purpose of the treaty was to require the natives to stand aside for the settlers."[477]

Leschi's description of how land was to be allocated is quite close to the kind of land sharing arrangements described by Latass.

Meeker also interviewed Tyee Dick, who did sign the treaty, and asked him why he signed. Dick replied that,

> Oh John Hiton [a translator] made a speech. This was the second day. Hiton he said 'we sign treaty, and then we take farms all the same as white man' and then all the whites and the Governor took off their hats and cheered, and then the Olympia Indians began to sign, and the Squaxons they signed and I held back, but Simmons come and patted me on the back and told me 'that's a good fellow Dick,

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[475] As told to Ezra Meeker by Palalla, a Steilacoom Tribe member, and quoted in Richard Kluger, *The Bitter Waters of Medicine Creek: A Tragic Clash Between White and Native America* (New York: Alfred A. Knopf, 2011), 94.

[476] Ibid., 248.

[477] Ibid., 91.

> you go and sign, and I will see you are treated right and well taken care of', and I know Simmons and thought him good man and signed.[478]

While Douglas may not have been in the habit of patting First Nations men on the back, the esteem in which he was held may have encouraged some participants in the treaty negotiations to make their mark on the blank sheets of paper that were later incorporated into the Douglas Forms.

Meeker then asked, "Did you understand what the treaty was?," and Dick answered, "No, I don't think any of the Indians did understand. Why would they agree to give up all the good land, and that was what we found afterwards the treaty read."[479] Meeker concluded that soon after the treaty, "The nine tribes of the Medicine Creek District being left to themselves, many of them immediately became restless and discontented as the more stupid members were made aware of what the so called treaty meant."[480] It seems that the initial level of understanding of the written terms and their implications ranged from pretty clear in the case of Leschi, to complete incomprehension in the case of Dick and many others.

With respect to the Vancouver Island Treaties of 1850, it seems likely the level of understanding was nowhere near that possessed by Leschi, and much closer to that of Dick.

In the 1920s eighteen Washington State tribes, mostly in the Puget Sound area, received permission to sue the United States government, alleging that it had failed to implement certain promises made in the Stevens Treaties concerning "lands, schools and

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[478] Ezra Meeker, *Pioneer Reminiscences of Puget Sound: The Tragedy of Leschi*, (Seattle: Lowman & Hanford, 1905), 244-245.

[479] Ibid.

[480] Ibid., 283.

annuities."[481] Fishing, hunting and gathering rights were omitted from the claim, with the result that very few depositions broached these subjects. In 1927 the Court of Claims heard testimony from 113 men and women from the Puget Sound area,[482] and as pointed out by Harmon, they were far from unanimous in their responses to questions from counsel.[483] My first example is drawn from the deposition of Lucy Gurand, a member of the Puyallup Tribe, "about 85 years of age," and the only deponent (that I could find) to deny that an alienation of land took place:

> Q. Were you at Medicine Creek the day the treaty was made with Governor Stevens
> A. Yes, sir.
> Q. Did you hear how the treaty was interpreted to the Indians?
> A. Yes, sir
> Q. When they were interpreting that portion of the treaty which provided for a reservation and allotments of land, what rights did the Indians acquire to a reservation and allotments of land as the treaty was then interpreted to them?
> A. She said that the Indians that were there, they didn't understand it thoroughly, but they understood it at the time that the Government is giving them free gifts of some goods.
> Q. What about land?
> A. Well, she understood it; they didn't understand it for land.
> Q. Did they understand the treaty the way the interpreter tried to interpret it to them?
> A. She mentioned two Indian interpreters, John Wayab and Hiton, and they understood at the time the Government was going to give them gifts.
> Q. Did they understand that they were going to get lands for homes and farms?
> A. Not at that treaty; but after the war they got the Indians together and they made them select their reservations.
> Q Did the Indians understand when they made the first treaty that the Government was taking away the lands from them?
> A. No; it was not understood at that time.[484]

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[481] Harmon, *Indians in the Making*, 184.

[482] Ibid., 185.

[483] Ibid., 186.

[484] Swindell, "Appendices 'A' and 'B' Consisting of Minutes of Treaty Councils and a Digest of Treaty Provisions," 647.

This illustrates how a thirteen-year old spectator might make sense of the proceedings as they unfolded before her. As demonstrated in Stevens' speech at Medicine Creek, quoted in the previous subsection, the Commission tried to differentiate between the gifts handed out at the meetings and the money to be paid for the land at a later date, but obviously failed in this case. This is the same meeting attended by Leschi as a chief, and Tyee Dick as an adult tribe member – three individuals with three very different recollections.

Given that, in aggregate, hundreds of people attended the Vancouver Island treaty meetings, it is likely that many versions resided in the memories of participants and bystanders. This is a salutary reminder that the five First Nation accounts presented in this paper are not necessarily representative, even though they were provided by people well placed to have a better-than-average understanding of events.

The next extract from the Court of Claims testimony is the only one (that I could find) by an eyewitness who asserted the retention by Native Americans of certain resource areas, plus a right of access to other land for fishing, hunting and harvesting purposes. Dick Jackson was eighty-six years old when he testified, which made him thirteen or fourteen at the time of the Medicine Creek treaty. He explained his understanding of the treaties as follows:

> When the treaty was made the Indians reserved their right for their fishing and hunting. They [the Commissioners] promise them that even if the creek was running through a white man's field, if there was any fish in there, they have a right to hook that fish out, or if there were any berries inside of white man's ranch, the have a right to go pick inside of that fence and get their own food. That is the promise they received. He says that they reserved everything in the salt water and in the creeks and in the hills, and that is what made the Indians agree to this treaty that was made, because they reserved all of this, they thought they were going to have it all to themselves.[485]

[485] Ibid., 222-224.

Here is an eyewitness asserting the retention by Native Americans of certain resource areas, plus a right of access to other land for fishing, hunting and harvesting purposes. His vision of sharing the land is consistent with the proposals brought to the treaty table by Leschi, and the Makah chief, It-an-daha . Collectively, their accounts provide a rare insight into what sharing the land and its resources might have looked like in practice. As well, the descriptions given by Jackson, Leschi and It-an-daha are consistent with that provided by Latass, confirming that his interpretation of the Saanich treaties is one worthy of serious consideration.

According to Harmon, "Once Stevens pledged that selling the land would not cut them off from fishing grounds, work sites, and other sources of money and food, they were sure they could provide for themselves and were ready to sign."[486] She seems to be arguing that Native Americans understood and accepted that they had surrendered ownership of their land and were prepared to relocate, as long as they retained a right of access to resources on the unoccupied land. The post-treaty recollections presented here indicate that Harmon's point of view may overstate the initial acquiescence of Native Americans to the terms Stevens attempted to impose upon them.

D. After

While the Medicine Creek treaty was ratified in 1855, the others had to wait until 1859. Unfortunately speedy ratification of the Medicine Creek Treaty did not result in prompt payments, "or protection from malicious settlers." Tensions grew quickly and when the Yakimas (who resided east of Puget Sound) "killed a government agent," war

[486] Harmon, *Indians in the Making*, 84.

broke out, but ended inconclusively only months after it had begun.[487] One of the participants in the war was Chief Leschi, who was tried and hanged for his actions. However, according to Harmon, "the war did little to clarify the relationship of natives to settlers." As for the treaties, "initially they were not an effective means to circumscribe and manage" Indians.[488] In spite of the stated goal of the treaties to move treaty Indians onto reserves, "…few Indians moved to Puget Sound reservations during the 1850s or 1860s," and "…the government did not even know who or where all the people encompassed by the treaties were."[489] In fact, it was not until after the Civil War that "[r]ailroads reached the area, and immigrants rode in on them by the thousands, abruptly and decisively tipping the balance of social and economic power in favor of American colonists."[490] This delay is confirmed by Lane, at least with respect to fishing: "In the two decades after the treaty making, the Indians were able to enjoy their treaty protected fishing rights without much difficulty."[491] My review of the literature has found nothing to indicate how long it took for officials to impose hunting regulations on treaty Indians around Puget Sound.

Boxberger's MA thesis, entitled A Comparison of British and American Treaties With The Klallam,[492]*concludes that the British and Americans shared an intent to clear away any impediment to the acquiring of clear title by settlers, and to encourage Indians*

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[487] Ibid., 86-87.

[488] Ibid., 72.

[489] Ibid., 97

[490] Harmon, *Indians in the Making*, 103.

[491] Lane, "Background of Treaty Making in Western Washington," 11.

[492] Daniel Boxberger, "A Comparison of British and American Treaties With The Klallam." Unpublished Master's thesis, Western Washington University, 1977

to become farmers and "conform to white standards." However, he noted a major difference in the process adopted to implement these goals, namely that the British "spent little money and effort in this endeavor," while "[t]he Americans, on the other hand, felt it necessary to allocate funds for men and equipment to implement and speed the transition from native to white life-style."[493] *This is not surprising given that, at least until 1859, any expenditure on First Nations would have been borne by the HBC. Even when the colonial office took over this responsibility, Douglas encouraged a continuation of his parsimony. In an 1859 letter to Bulwer Lytton, at the Colonial Office, Douglas decried the "enormous" sums of money expended by the United States government "in making Indian settlements," because "notwithstanding the heavy outlay, the Indians in those settlements are rapidly degenerating."*[494] *Boxberger's observation as to the laissez faire attitude north of the border is accurate, but once British Columbia joined Confederation, federal government efforts to control treaty First Nations on Vancouver Island via imposition of the* Indian Act *matched if not exceeded the American government's level of intervention in the lives of the Salish and Makah*.[495]

E. Coda

In his article "Performing Treaties: The Culture and Politics of Treaty Remembrance and Celebration,"[496] Chris Friday put forward two new ways to look at the Washington Treaties that have the potential for wider application to treaties made by

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[493] Ibid., 45.

[494] Douglas to Lytton, March 14, 1859, reproduced in *Papers Connected with the Indian Land Question*, 17.

[495] For a description and analysis of this process see John Lutz, "'Relating to the Country': The Lekwammen and the Extension of European Settlement, 1843-1911," *Beyond the City Limits: Rural History in British Columbia*, ed. R.W. Sandwell (Vancouver: UBC Press, 1999), 17-32.

[496] Friday, "Performing Treaties."

Indigenous peoples with colonizing governments. He began by noting that "During the first hundred years of life under the treaties of the 1850s, tribal members articulated their understanding of the treaties multiple times in order to protect reservation lands, secure Indian access to economic resources, and ensure their ability to continue customary practices."[497] He then undertook "…a survey of the ways that Indians in Western Washington have staged public performances of their treaties, especially the Treaty of Point Elliot."[498]

With respect to the treaty meetings themselves, Friday chose to focus on them as "…an important moment for specific Indian individuals to enhance their power or status," with the result that "Indian performances at the time said as much about power relationships among Indians as about the relationship between Indians and whites." *This is an important observation, and the motivations of individuals undoubtedly played a role in the Vancouver Island Treaty meetings. Friday was able to illustrate his argument with extant information on the life of Chief Chowitsut of the Lummi, but there is virtually no information concerning the participation by individuals in the negotiation of the Vancouver Island Treaties. One possible candidate is Chief Che-ah-thluc (also known as "King Freezy") of the Songhees. According to an early settler, James Deans:*

> *The celebrated King Freezy chief of the Songhish tribe was completely under the control of the Hudson's Bay Company to whom he rendered himself valuable by being at all times ready in consideration of a small donation of blankets etc… to exert his authority in quelling any disturbance that broke out or was impending among his subjects. He also possessed considerable influence over surrounding*

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[497] Ibid.,158.

[498] Ibid.,159.

> *tribes and was frequently in the service to the company in staying hostilities among them.*[499]

I suspect that Deans exaggerated the docility of Che-ah-thluc, but the story raises an interesting question - did Che-ah-thluc exert his authority over the Songhees or his influence over other "tribes" at the treaty meetings to enhance his own status or power? While it seems possible, there is no way to know for sure.

The other kind of performance of the Washington Treaties highlighted by Friday was "treaty remembrance," which commenced early in the twentieth century: "In 1910, Tulalip agency superintendent Charles Buchanan initiated a new practice – an annual celebration of the 1855 signing of the Treaty of Point Elliott," and, "For the first several years Buchanan was effusive in his descriptions of successful Treaty Day celebrations."[500] However, over time the Native American participants took control of the annual meetings, using them as a forum to raise various treaty issues, which evolved over time. For example, "In the late 1920s and 1930s Treaty Day became an occasion for leaders of the Northwestern Federation of American Indians – the same people who had organized the multi-tribal *Duwamish* case - to transact their business and plan political and legal strategies in a public forum of Indians from various tribes as well as whites"[501]. Friday argued that, by "…the last quarter of the twentieth century, Treaty Day had become not only a vehicle for 'spiritual prayers, songs, dances, spiritual medicine, and a

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[499] BCA, James Deans, "Settlement of Vancouver Island," E/B/D342, unpublished manuscript, 1878, as quoted by Lutz, *Makúk,* 74.

[500] Friday, "Performing Treaties," 173-174.

[501] Ibid, 176.

noon dinner', but also a venue for pubic proclamations of resource control through the exercise of treaty rights."[502] Friday summed up the process as follows:

> The variations over time in performances of the Stevens treaties by Indians of the Puget Sound region came about because Indians mobilized the treaties and their understandings of them for the purposes of the day. In doing that, Indians did not "rewrite" the treaty promises or invent new ones; rather, they elaborated creatively on the original promises and thus honored a tradition of invoking the treaties to achieve goals they defined. In the early years their struggle was to find ways to articulate an Indian understanding of treaty terms and persuasively urge the implementation of the treaty.[503]

Certainly the oral traditions of the Saanich Treaty formation, by Dave Elliott, Gabe Bartleman and John Elliot can be understood as performances in this tradition. More importantly for the purposes of this dissertation, the accounts of David Latass, Dick Whoakum, Johnny Yaklam and Quen-es-then can also be viewed as performances of the treaties, in which they tried "to articulate an Indian understanding of treaty terms." Finally, Friday has provided an affirmation of the role of the historian in this process: "By examining the history of Indians performing treaties – that is, publicly articulating and negotiating the meaning and application of treaties – historians can contribute to an assessment of treaties as 'transcripts' of power and resistance."[504] *The First Nation accounts I have highlighted in the dissertation may not have been about power, but I do believe they were transcripts of resistance, that may yet become transcripts of power.*

In the chapter which follows I make a much less obvious comparison, with the response of the Maori people to the arrival of European settlers in colonial New Zealand

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[502] Ibid, 176-177.

[503] Ibid, 177.

[504] Ibid, 158.

in the 1840s. What can possibly justify a description of events so remote from the treaty experience of Vancouver Island? While there is a direct connection between these events and the drafting of the Douglas Forms, the main value of the comparison undertaken in the ensuing chapter lies in the insights that emerge from my analysis of the parallels and contrasts between the two sets of Imperial encounters.

Chapter IV: The New Zealand Experience (1835-1865)

A. Introduction

As noted in Chapter II, the Douglas Form was based in part on what Barclay described in 1850 as "a copy with hardly any alterations of the Agreement adopted by the New Zealand Company in their transactions of a similar kind with the natives there."[505] "The New Zealand Connection" (a term coined by Hamar Foster) has been pursued to some extent in the Vancouver Island Treaty literature. In 1989, Foster, who obtained his M.Jur. in New Zealand, was the first to identify "Kemp's Deed" as the precedent used by Barclay.[506] Ten years later Chris Arnett, a historian with Maori antecedents, referred briefly to Kemp's Deed and reproduced the text of the English language version in a footnote.[507] In 2008, Douglas Harris pointed out a major difference between Kemp's Deed and the form sent to Douglas: "Although the structure and content of Barclay's template emulated the New Zealand deeds, the final clauses setting out the hunting and fishing rights were new."[508] Finally, in 2010, Shurli Makmillen completed a PhD dissertation in the English Department at UBC, in which she applied "genre theory" to the Douglas Form and Kemp's Deed. She demonstrated that such documents constitute a valid literary sub-genre, a conclusion not relevant to my project.[509]

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[505] BCA, Fort Victoria Correspondence Inward, 1849-1858, A/C20, VI7, M430, Letter of Archibald Barclay to Sir James Douglas, 16 August 1850.

[506] Foster, "The Saanichton Bay Marina Case," 635.

[507] Arnett, *Terror on the Coast,* 321-322.

[508] Harris, *Landing Native Fisheries*.

[509] Shurli Makmillen, "Land, Law and Language: Rhetorics of Indigenous Rights and Title," (PhD dissertation, University of British Columbia, 2010).

Intrigued by the mystery of how Barclay came into possession of a copy of Kemp's Deed, I reviewed all the extant correspondence between the HBC and the Colonial Office for the relevant period, but found no references to the issue. Finally, I did find an 1848 report by New Zealand Governor Grey to the Colonial Secretary, with an enclosed copy of the deed, which was published in *Further Papers Relative to the Affairs of New Zealand, Correspondence with Governor Grey, Presented to both Houses of Parliament by Command of Her Majesty, July 1849*, and printed in London by "William Clowes and Sons, Stamford Street, for Her Majesty's Stationery Office, 1849."[510] The published English translation of Kemp's Deed would therefore have been available to Barclay, and presumably read by him, well in advance of his 1850 letter enclosing the template for Douglas.

With a likely answer to my first question, I then decided to delve into the story behind the drafting and signing of Kemp's Deed, which in turn led me to research the history of the 1840 Treaty of Waitangi. In the course of that research I realized that intriguing parallels could be made with the First Nation eye-witness accounts of the Vancouver Island and Washington Treaties, but I realized that making a strong analogy between such disparate events would be a challenge. Nonetheless I decided that the potential for useful insights outweighed the risk that I was attempting to compare apples to oranges.

Like the preceding chapter, which focused on a subset of the treaties entered into by Native Americans in Washington Territory, this chapter focuses on a small subset of

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[510] "Further Papers Relative to the Affairs of New Zealand, Correspondence with Governor Grey, Presented to both Houses of Parliament by Command of Her Majesty, July 1849" (London: William Clowes and Sons, Stamford Street for Her Majesty's Stationery Office, 1849).

the land cession agreements entered into by the Maori during the nineteenth century. As well, the same format is followed, namely three subsections: immediately before, during and shortly after the negotiation of Kemp's Deed. The technique used in the last chapter of inserting the comparisons *in italics* is also carried over.

As mentioned above, this comparison is much harder to justify than the one with the Northwest Washington Treaties, because there is no common history between the Maori and the Indigenous populations of the Northwest Coast of North America. As a result, the analogies which can be drawn between the Maori understanding of the Treaty of Waitangi of 1840 and subsequent 'sales'[511] of Maori land to the Crown (such as Kemp's Deed), and the Salish (or Kwakwakawakw) understanding of the terms of the VI Treaties, may not be as strong. On the other hand, the Vancouver Island Treaties, the Treaty of Waitangi and Maori land deeds (from 1847 onward) were all entered into with the British Crown, and this commonality should allow a useful comparison of colonial policies and practices in New Zealand and Vancouver Island in this time period with respect to the creation of agreements concerning land with the Indigenous inhabitants. Another reason for undertaking this comparison is to see if eye-witness Indigenous accounts in the archival record offered perspectives on the formation of treaty-like agreements within other settler colonies. If so, my approach may well have application to historical treaties across Canada and the United States.

As always, the major emphasis in this chapter is on the retrieval and analysis of the earliest recorded accounts by the Indigenous parties to the treaty bargains, plus

[511] The use of single quotes is used to indicate that the use of the word 'sale' may or may not be an accurate characterization of the agreements, an issue wrestled with throughout the chapter.

sufficient context to allow the reader to assess their significance. In the early stages of my research I intended to focus on Kemp's Deed and to pay scant attention to the Treaty of Waitangi. As time went on I realized that the Treaty merits as much attention as Kemp's Deed for three reasons. First, the land sale agreements negotiated with the Maori in the 1840s were a direct outcome of the Treaty, and cannot be understood without a thorough review of the earlier agreement. Secondly, the Treaty literature has greater analytical depth than the writing to date with respect to the land sale agreements, and in my opinion, with respect to most of the Vancouver Island Treaty literature. The subsequent agreements in New Zealand dealt only with the alienation of land because, as far as the British were concerned, the other major topics of concern had been addressed (at least temporarily) in the written Treaty, and thus did not require reiteration in the deeds. This also raises the possibility that the insertion of hunting and fishing provisions in the Douglas Form template represented an attempt to deal with some of those 'other' issues, which constitutes the third reason to undertake a close examination the Treaty of Waitangi.

My education into the country's colonial history began fifteen years ago with the reading of the Waitangi Tribunal Reports on the land and fishing claims of the Ngai Tahu people of the South Island, as part of contract research into the village site and fishing claims of the Snuneymuxw First Nation pursuant to their 1854 treaty. In the drafting of this chapter I have relied heavily on the Waitangi Tribunal's "Ngai Tahu Land Report" ("Wai 27"), and the expert reports and primary documents upon which it is based. The Tribunal is a permanent commission of enquiry and as such makes findings of facts and renders (non-binding) decisions. In other words its reports are more akin to the judgments

of courts than to scholarly monographs. While I have read widely in the secondary literature, I rely heavily on the only two books dedicated to the history Ngai Tahu land claims, both by historian (and partisan Ngai Tahu advocate) Harry Evison,[512] because his accounts are valuable in spite of their obvious bias. Finally, I focused my research at the New Zealand National Archives in Wellington on the retrieval of primary documents and unpublished expert reports relevant to the formation of the 1848 agreement between the Ngai Tahu and the Crown.

A preliminary question which needs to be considered is the legal status of agreements such as Kemp's Deed. Are they a form of treaty? In New Zealand none of the acquisitions of land by the Crown from the Maori are considered to be treaties. There is only one treaty and that is the Treaty of Waitangi. The issue has been taken up recently by New Zealand legal historian Richard Boast,[513] who argues in favour of according treaty status to the land transactions. It remains to be seen whether his proposal will stimulate further discussion. Accordingly, I apply the designation 'treaty' only to the Treaty of Waitangi, but revisit the issue in more detail in the international treaty law section of Chapter VI. Another complicating factor is that written versions of the Treaty of Waitangi and Kemp's Deed exist in both the Maori and English languages, plus translations into English of the Maori language version. Therefore, care is taken throughout the chapter to identify which version is being discussed.

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[512] Henry Evison, *Te Wai Pounamu = The Greenstone Island: A History of the Southern Maori During the European Colonization of New Zealand* (Christchurch, NZ: Aoraki Press, 1993); Henry Evison, *The Ngāi Tahu Deeds: A Window on New Zealand History* (Christchurch, NZ: Canterbury University Press, 2007).

[513] Richard .P. Boast, "Treaties Nobody Counted On," *Victoria University of Wellington Law Review*, 42.4 (2011): 653-670.

B. Before 1848

New Zealand (now frequently referred to as Aotearoa) was discovered by Polynesian explorers about one thousand years ago. Over the next two hundred years the North and South Islands were occupied, and by 1500 a distinctive Maori culture and language had evolved.[514] The Maori language is spoken throughout, but three dialects have emerged: Western North Island, Eastern North Island and South Island.[515] Thanks to the efforts of Chief Hongi Hika, missionary Thomas Kendall and Cambridge professor Samuel Lee, *A grammar and vocabulary of the language of New Zealand* was compiled in 1820, and over the next twenty years thousands of Christian Maori learned to read Maori language versions of the scriptures.[516]

Early accounts of agricultural pursuits among the Maori are drawn from the North Island, such as this one by missionary William Wade from his 1842 book, *A Journey in the North Island of New Zealand*: "Throughout the island they have their potato cultivations and in many parts grow the kumara, or sweet potato, taro, maize, pumpkins, water-melons, and the kind of gourd which forms their calabashes."[517] The Maori population of Aotearoa during the eighteenth century is estimated at 100,000,[518] most of whom lived on the North Island. By 1840 the population had declined to 70,000.[519] In that year the Pakeha population numbered about 2000, most of whom also resided on the

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[514] Janet Davidson, "From Seeds to Flowering: Cultural Change," in *From the Beginning: The Archaeology of the Maori*, ed. John Wilson (Auckland: Penguin Books, 1987), 43-48.

[515] "He Kōrero mō Te reo Māori: Maori Language Information," Peter J Keegan, accessed 7 July 2014, http://www.maorilanguage.info/mao_lang_faq.html.

[516] McKenzie, *Oral Culture, Literacy and Print in early New Zealand*, 11.

[517] Quoted in Banner, *Possessing the Pacific*, 48.

[518] Michael King, *The Penguin History of New Zealand* (Auckland: Penguin Books, 2003), 90-91.

[519] Ibid., 150.

North Island.[520] They consisted mainly of traders plus a sprinkling of missionaries. The decline in Maori population continued throughout the nineteenth century, due in large part to the introduction of European diseases.[521]

The first contrast to be made is that the entire population of Aotearoa spoke one language, whereas at least four languages[522] *were spoken on Vancouver Island, three of which were within the territory covered by the Vancouver Island Treaties*.[523] *The second is that the missionary presence on Vancouver Island at mid-century was minimal, and the third (perhaps as a result of the second) is that no written grammars or vocabularies of any Vancouver Island languages had been produced at the time of the Vancouver Island Treaties. The first similarity, sadly, is the decimation of Indigenous populations in Aotearoa and Vancouver Island by successive outbreaks of small pox, measles, flu and the like*.

1. Treaty of Waitangi (1840)

During the 1820s British missionaries made Maori chiefs increasingly aware of the existence of Britain, the King and his representatives in Australia. Several chiefs were encouraged to travel to Sydney and to England to promote among them the notion of a relationship with the British Crown. By 1832 the British Colonial Office was persuaded that a resident should be appointed to act as an intermediary between the Maori and British residents, and James Busby, the first and only appointee, arrived in 1833 at the Bay of Islands, in the north-east corner of the North Island. Upon arrival he gave a speech

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[520] Ibid., 169.

[521] Ibid., 180-181.

[522] Straits Salish, Halkomelem, Kwakwala, Nuuchahnulth.

[523] Straits Salish, Halkomelem, and Kwalwala.

to a gathering of twenty-two chiefs, which was repeated in the Maori language by a missionary, William Williams. Later, "On missionary recommendation, the two addresses of the day were printed in Sydney and distributed among northern chiefs, presumably to reinforce the words of the Crown and to disseminate them among a wider audience. Nothing quite like this had happened before, and the attempt to impress the Maori probably had some effect."[524] Busby convened another meeting of chiefs in 1834 to approve a flag to be flown on Maori ships visiting Sydney. The following year Busby encouraged a "confederation" of Maori chiefs to issue "A Declaration of the Independence of New Zealand," as a means to deter other nations from asserting claims over the islands.[525]

Over this period the Maori, at least on the North Island, had several opportunities to acquire an awareness of the British Crown, and to develop what they considered to be a relationship between equals. At the time of the Vancouver Island Treaties, First Nations would have had only the barest knowledge (at best) of the existence of the Crown, let alone any kind of relationship with it.

An important consequence of the 1835 Declaration was the acknowledgement by Britain of Maori sovereignty. In 1839 the British government despatched William Hobson to New Zealand with instructions "to take the constitutional steps necessary to establish a British Colony," which meant that he first had to "negotiate a voluntary transfer of sovereignty from Maori to the British Crown."[526] On his arrival Hobson quickly arranged for a meeting with a large number of North Island chiefs at Busby's

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[524] Claudia Orange, *The Treaty of Waitangi* (Wellington: Allen & Unwin, 1987), 13.

[525] Ibid., 19-23.

[526] Ibid., 154-156.

residence at Waitangi in the Bay of Islands. According to historian Claudia Orange (who wrote her dissertation on the treaty), "…there is no evidence that either the Colonial Office or Gipps (the governor of New South Wales) provided any draft of the treaty."[527] The drafting process was summed up by Orange as follows: "In brief then, the treaty in its final English form, comprised Hobson's preamble, the articles developed by Busby…with the most important addition of the guarantee of land and other possessions, and finally, Busby's amended postscript."[528] On the day before the treaty meeting, Hobson asked a missionary, Henry Williams, and his son Edward, to translate the treaty into Maori. Orange notes that "there is no evidence of Maori assistance" in the drafting of the treaty in either language.[529]

The English language original was drafted on-the-spot, on the basis of detailed instructions from the Colonial Office, but without a template,[530] which is the complete opposite of the Vancouver Island drafting process. The translation was also prepared prior to the meeting, but it is the very existence of a translation that is remarkable, since such a thing did not exist (to my knowledge) over the course of the nineteenth century anywhere in North America, let alone on Vancouver Island.

In order to appreciate the differences between the English and Maori versions, each clause in the English version is followed by the same clause in the Maori version[531]

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[527] Ibid., 36.

[528] Ibid., 37.

[529] Ibid., 39.

[530] King, *The Penguin History of New Zealand*, 157.

[531] Claudia Orange, *An Illustrated History of the Treaty Of Waitangi* (Wellington: Bridget Williams Books, 2004), 280-281.

(as translated by I. H. Kawharu in 1988),[532] followed in turn by a basic comparison of the two versions by Orange.

> Article I [English version]
> The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess over their territories as the sole sovereigns thereof.
>
> Article I [Maori version in translation]
> The chiefs of the Confederation and all the chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government over their land.
>
> Comparison:
> "By the Treaty in English, Maori leaders gave the Queen 'all the rights and powers of sovereignty' over their territories. By the Treaty in Maori, they gave the Queen 'te kawanatanga katoa' – the complete governance or government
>
> Article II [English version]
> Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of the Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her majesty the exclusive right of Preemption[533] over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.
>
> Article II [Maori version in translation]

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[532] Ibid., 282. Kawharu was an academic and paramount chief of the Ngati Whatua Maori Tribe.

[533] The term "pre-emption" as used here has a very specific meaning, namely that the Maori could only dispose of their land to the Crown. The term is generally used to denote a right similar to an option to purchase. For example, on Colonial Vancouver Island the term was used to designate a process by which settlers who pre-empted a parcel of land in effect possessed an exclusive option to acquire title, provided they subsequently improved it and had it surveyed.

> The Queen of England agrees to protect the Chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship[534] over their lands, villages and all their treasures. But on the other hand the Chiefs of the Confederation and all their chiefs will sell land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent
>
> Comparison:
> "By the Treaty in English Maori leaders and people, collectively and individually, were confirmed in a guaranteed 'exclusive and undisturbed possession of their lands and estates, forests, fisheries, and other properties'. By the Treaty in Maori, they were confirmed and guaranteed 'te tino rangatiratanga' – the unqualified exercise of their chieftainship – over their lands, villages, and all their treasures."
>
> Article III [English version]
> In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects
>
> Article III [Maori version in translation]
> For this agreed arrangement therefore concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties of citizenship as the people of England.
>
> Comparison:
> "The Treaty in English extended to Maori the Queen's protection and all the rights and privileges of British subjects. The Maori text conveyed this with reasonable accuracy."[535]

While the English language version purports to effect a cession of "sovereignty," or some aspect of "governance," there is no cession of land. The VI Treaties, while purporting to effect a cession of land, make no reference to an assignment of sovereignty. According to Britain, sovereignty over the northern half of the Oregon Territory (which included Vancouver Island) was acquired by the Oregon Treaty of 1846. Article Two of the English version is noteworthy for the explicit confirmation of "exclusive possession"

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[534] Defined as "full authority" by the Waitangi Tribunal, "Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22)," (Wellington, Department of Justice, 1988), section 10.2.2, accessed 17 August 2015, http://www.justice.govt.nz/tribunals/waitangi-tribunal/Reports/wai0022%20Main.

[535] Orange, *An Illustrated History of the Treaty Of Waitangi*, 39.

of their "lands," "fisheries" and "forests," which has no equivalent in the Douglas Forms, other than "fisheries," which are unrestricted, but not "exclusive." The Maori version of Article Two granted something more than "possession', namely "unqualified exercise of their chiefdomship," which indicated a degree of control over the land and its resources, which is completely absent in the Douglas Forms. This absence has been taken by the colonial government and (until very recently) its successors as an absence of any jurisdiction whatsoever over treaty land and resources. It has been assumed that the Oregon Treaty of 1846 was in itself sufficient to justify the assertion of political and legal authority over the lands and persons of the resident First Nations.

On the first day of the treaty meeting (February 5, 1840), the terms were read out to the assembled chiefs in English and then in Maori. Five hours of discussion took place before the meeting was adjourned. On the second day the Maori version of the treaty was signed as presented by over forty chiefs. At the end of the meeting William Colenso, a printer for the Church Missionary Society, attended to "the customary distribution of gifts…[namely] two blankets and a small quantity of tobacco for each signatory to the treaty."[536] As well, 200 copies of the Maori language version were printed and distributed.[537] Orange noted that "In New Zealand itself, the terms of the treaty were probably better known in the 1840s than at any time since…[and T]he text of the treaty was regularly in print."[538] Over the next six months nine hand-written versions in the Maori language were circulated around both islands to obtain additional signatures: "Over five hundred chiefs, among them up to twelve women of rank had signed at about

[536] Orange, The Treaty of Waitangi, 55.

[537] Ibid., 33.

[538] Ibid., 131-132.

fifty meetings."[539] Of course, the additional four hundred and fifty signatories had no opportunity to negotiate terms, merely to sign or not, and to be bound by those terms in any event.

The very public nature of the event, and the wide distribution of copies of the English and Maori versions are in sharp contrast to the near silence which surrounded the VI Treaty meetings and the contents of the Douglas Forms. One similarity between Hobson and Douglas (at least with respect to the five treaties negotiated after the arrival of the template from Barclay) was their unwillingness to entertain any significant deviations from the written document as presented.

The British presented the written document to the chiefs on a take-it-or-leave-it basis, and from a British perspective, the chiefs took it. But did they really? What was the Maori understanding of the outcome of the treaty meetings at Waitangi? In one sense the answer is easy: their understanding is encapsulated in the Maori language version. This assumption was eloquently challenged in 1985 by the late D.F. McKenzie, Professor of English Language and Literature at Victoria University, in a booklet entitled *Oral Culture, Literacy and Print in Early New Zealand: The Treaty of Waitangi*.[540] He used the Treaty of Waitangi as a test case to problematize "…European assumptions about the comprehension, status and binding power of written statements and written consent on the one hand as against the flexible accommodations of oral consensus on the other."[541] In the New Zealand context, he took exception to

> …the European myth of the technologies of literacy and print as agents of change and the missionaries' conviction that what took Europe over two millennia to

[539] Orange, *An Illustrated History of the Treaty Of Waitangi*, 39.

[540] McKenzie, *Oral Culture, Literacy, and Print in Early New Zealand*.

[541] Ibid., 9.

> accomplish could be achieved – had been achieved – in New Zealand in a mere twenty-five years: the reduction of speech to alphabetic forms, an ability to read and write them, a readiness to shift from memory to written record, to accept a signature as a sign of full comprehension and legal commitment, to surrender the relativities of time, place and person in an oral culture to the presumed fixities of the written or printed word.[542]

To emphasize his point McKenzie asked his readers to "Consider the way in which the treaty was presented: it was read out in Maori by Henry Williams. That is, it was received as an oral statement, not as a document drawn up in consultation with the Maori, pondered privately over several days or weeks and offered finally as a public communiqué of agreements reached by the parties concerned."[543] He went on to note that among the Maori, "public discourse and decision-making was oral and confirmed in the consensus not in the document," and a collective oral consensus "…is rarely unanimous about details of wording; it tends to assume continuing discussion and modification."[544] McKenzie concluded that the discrepancies among the various oral and written versions "…do not mean that the treaty is a fraud and the documents useless. It means that they are only partial witnesses to the occasion."[545]

McKenzie's argument that literacy was not prevalent among Maori at the time of the Treaty has been challenged by historian Tony Ballantyne in his book, *Webs of Empire: Locating New Zealand's Colonial Past*.[546] He convincingly argues that literacy

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[542] Ibid., 10.

[543] Ibid., 40.

[544] Ibid.

[545] Ibid.

[546] Tony Ballantyne, "Chapter Seven: Christianity, Colonialism and Cross-cultural Communication," in *Webs of Empire: Locating New Zealand's Colonial Past* (Wellington: Bridget Williams Books Limited, 2012). The e-book edition is not paginated so that the best I can do for a citation is to list the chapter number and the indicator at the bottom of each page as to the percentage of text thus far read, in this case, 26%.

was much more widespread among Maori than McKenzie was prepared to acknowledge. For example, McKenzie had used the ability to sign one's name as a good indicator of literacy, but Ballantyne pointed out that, "We know that in many societies, including Maori, individuals could often read without having the ability to write. McKenzie's sample, moreover, was not representative, as the senior chiefs who signed the Treaty typically belonged to an older social order. Although some of the chiefs acted as patrons and protectors of missionaries and merchants, they were the section of indigenous society least acquainted with Christianity and literacy." In the course of undermining McKenzie's literacy test, Ballantyne did acknowledge that the chiefs whose names appear on the Treaty document were the most likely class of Maori society to approach the treaty as, in McKenzie's words, "an oral statement." In other words, while I accept the force of Ballantyne's corrective as to Maori in general, I do not think it necessarily undermines McKenzie's argument in so far as the Treaty meeting is concerned. *While McKenzie's challenge to "the European myth of the technologies of literacy and print as agents of change," is no longer accepted with respect to the Maori of the 1840s , I believe that it still applies with great force to the relationship between the Douglas Forms and the (oral) Vancouver Island Treaties, and to many historical treaties across Canada and the United States. I pursue this argument in the section of Chapter VI on cession treaties.*

The next question becomes, is it possible to discern the expectations the Maori chiefs brought to the meetings? The primary contemporaneous account was that of Colenso, who produced a pamphlet entitled *The Authentic and Genuine History of the*

Signing of the Treaty of Waitangi.[547] On a first reading of Colenso's account, the five hour discussion period on day one (mentioned above) consisted largely of Maori chiefs coming forward and giving speeches for or against the imposition of a governor, and complaining about loss of certain areas of land, with virtually no discussion of the wording of the written treaty. Thus, the important concern for Chief Tureha was the relative power and influence of the governor and the chiefs: "No Governor for me – for us native men. We, we only are the chiefs, rulers. We will not be ruled over. What! Thou, a foreigner, up, and I down! Thou high, and I, Tureha, the great chief of the Ngapuhi Tribes, low, never never..."[548] His other concern was control over the disposition of land: "Our lands are already gone. Yes, it is so, but our names remain."[549] On the other side of the argument, Chief Tamati Waka declaimed, "O Governor! Sit. I, Tamati Waka, say to thee, sit. Do not thou go away from us; remain for me – a father, a judge, a peacemaker. Yes, it is good, it is straight. Sit thou here, dwell in our midst."[550] On the subject of land he had this to say: "Is not the land already gone? Is it not covered, all covered, with men, with strangers, foreigners – even as the grass and herbage – over whom we have no power?."[551] Te Kemara said, "Let us all be alike (in rank, in power). Then, O governor! Remain. But, the Governor up! Te Kemara down, low, flat! No, no, no." With respect land he claimed that, "I want my lands returned to me. If thou wilt say, 'Return to that

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[547] William Colenso, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (Wellington: Government Printer, 1890).

[548] Ibid., 24.

[549] Ibid.

[550] Ibid., 27.

[551] Ibid.

man Te Kemara his land,' then it would be good."[552] Rewa, chief of the Ngaitawake Tribe said, "Let the Governor return to his own country. Let my lands be returned to me, which have been taken by the missionaries."[553] Chief Moka, of the Patuheka Tribe said, "Let the Governor return to his own country; let us remain as we were. Let my lands be returned to me."[554] At that point, Hobson said that, "all lands unjustly held would be returned."[555]

Analysis of the Colenso account in the literature focuses on what insight it might provide as to Maori understanding of the written text of the Treaty. In other words, they are seen as extrinsic evidence to provide supplementary insight into the intentions of the parties in the negotiation of the written versions of the Treaty. In this approach, the written text retains its primacy. This is exactly what most scholarly works and all court decisions do with respect to the Vancouver Island Treaties. My approach is to examine Colenso's account independent of the written text, and see what picture emerges. In my opinion, one of the major expectations brought to the treaty meeting by the Maori was negotiation of compensation for land occupied by Europeans. This in turn brings to light an unexpected parallel with the Vancouver Island and Washington treaty meetings, which were seen by First Nation and Native American participants as key opportunities to advance claims for compensation as to lands which had been unilaterally occupied or exploited by whites.

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[552] Ibid., 27.

[553] Ibid., 18.

[554] Ibid., 19.

[555] Ibid.

Colenso stood up during the meeting and informed Hobson that "I have spoken to some chiefs concerning it [the treaty], who had no idea whatever as to the purport of the treaty," but his warning was dismissed.[556] Colenso was inferring that the Maori did not understand the intentions of the British in soliciting their signatures to the treaty document, that "the Maori had not been made 'fully aware of…the situation in which they would by their so signing be placed'."[557] However, as demonstrated by the excerpts quoted above, the Maori achieved their short-term goal of securing the agreement of the governor to investigate and redress their concerns about loss of their land, affirmed by appending their signatures and marks to the document. Their longer-term goals are harder to parse from Colenso's account. Orange has compiled a comprehensive (but by no means exhaustive) list of additional motives for the willingness of so many Maori chiefs to append their signatures, such as the reaffirmation of an ongoing relationship with the Crown, a confirmation of chiefly authority, protection against unruly Europeans, reduction of inter-iwi conflict, an increase in trade with Europeans, and reliance upon the recommendations of missionaries.[558]

There are two other lessons relevant to the Vancouver Island Treaties to be learned from this attempt to discern Maori intentions in taking part in the treaty meetings. The first is that even a knowledgeable and sympathetic European witness like Colenso did not have all that much insight into Indigenous understandings of the process, and in my opinion, this observation is equally applicable to James Douglas, notwithstanding his long experience as a trader. The second is that the motivations of the

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[556] Ibid., 33.

[557] Orange, *The Treaty of Waitangi*, 54.

[558] Orange, *An Illustrated History of the Treaty Of Waitangi*, 43-45.

Indigenous parties were not uniform, and that each chief brought to the meetings a unique admixture of expectations. This serves as a salutary reminder that the participants at the treaty meetings on Vancouver Island undoubtedly arrived with an array of short-term and long-term goals, most of which will never be known with any certainty, given the paucity of data.

The next logical question is, what was the Maori understanding of the results of the meetings? The promise by Hobson to address their concerns about the loss of land did result in the appointment of a commission, which in turn returned significant tracts of land to Maori control.[559] With respect to Orange's list of objectives set out above, I think it fair to say that some of them were met in some locales, but only in the short term.

Looking at Article I of the treaty, what might have been the understanding of the Maori as to the transfer of "sovereignty"? With reference to this issue, Orange has noted the significance of the use of the word "kawanatanga" in Article I, and "rangatiratanga" in Article II: "Although both words implied an exercise of power, authority and jurisdiction, rangatiratanga was of Maori derivation, with connotations of chiefly power that were familiar to Maori. Kawanatanga, on the other hand, derived from kawana (governor) and…tended to imply authority in an abstract rather than a concrete sense." She concluded that, "Maori might well have assumed, therefore, that their sovereign rights were actually being confirmed in return for a limited concession of power in kawanatanga."[560] For example, Nopera Panekareoa, the leading chief of the Muriwhenua, explained to his people in May of 1840 that, "The shadow of the land

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[559] Ibid., 50-51.

[560] Orange, *Treaty of Waitangi,* 41.

passes to the Queen, but the substance remains with us."[561] This notion was taken up by historian James Belich, who posited that "'Sovereignty' has two relevant shades of meaning, which we can distinguish by adding the words 'nominal' and 'substantive'. Nominal sovereignty is the theoretical dominion of a sovereign – even a monarch who reigns but does not govern. Substantive sovereignty is the actual dominion of a controlling power…." According to Belich, "There is little doubt that the British had the latter meaning in mind, but it is the former which may have come closer to the Maori understanding of the Treaty."[562] This is confirmed by a remark made by Parliamentary Undersecretary R. Vernon Smith upon reading Panakareo's speech: "…I fear that they will discover that the subjects of Queen Victoria have something more than the shadow."[563]

The Waitangi Tribunal recently revisited the whole issue of sovereignty, and issued a report in late 2014 which included the following statement of considerable relevance to my comparative project:

> Our essential conclusion, therefore, is that the rangatira did not cede their sovereignty in February 1840; that is, they did not cede their authority to make and enforce law over their people and within their territories. Rather, they agreed to share power and authority with the Governor. They and Hobson were to be equal, although of course they had different roles and different spheres of influence. The detail of how this relationship would work in practice, especially

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[561] Waitangi Tribunal, "Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22)," section 10.2.2.(h) quoting from Shortland to Hobson, CO 209/7, 6 May 1840.

[562] James Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Auckland: Auckland University Press, 1986), 21.

[563] Quoted in N.A. Foden, *New Zealand History (1642 to 1842)* (Wellington: Sweet & Maxwell, 1965), 93.

> where the Māori and European populations intermingled, remained to be negotiated over time on a case-by-case basis.[564]

It would seem that the Tribunal has now decided to describe the treaty as an agreement to share jurisdiction, anticipating the negotiation of subsequent agreements as the need arose. At first blush at least, the Tribunal's finding seems to be consistent with the categorization of the Vancouver Island Treaties proposed in my dissertation. However, the report is described as "Stage 1" of an ongoing project, and subsequent iterations and academic commentary may result in significant revisions.[565]

With respect to Article II of the treaty, there does not appear to have been any discussion about the provision for "the full exclusive and undisturbed possession of the Lands and Estates Forests Fisheries and other properties."[566] It is interesting, in light of subsequent obsessive attention to this provision in later years, that it did not raise 'red flags' for those actually present at the treaty meeting. Perhaps it was seen merely as a confirmation of the status quo. There was some discussion about the provision granting to the Crown an "exclusive right of preemption," in which Busby assured the Maori that "the Governor was not come to take away their land, but to secure them in the possession of what they had not sold… and that land not duly acquired from them…would be returned to the Natives….."[567] In other words, the Maori at the meeting were concerned

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[564] Waitangi Tribunal, "He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry" (Wai 1040), section 10.4.4

[565] For an early assessment of the report see David Willliams' case comment in the *Maori Law Review*, November 2014 issue, pp 28-34

[566] Waitangi Tribunal, "Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22)," section 10.5.1. Of course, the interpretation of the "Fisheries" provision later became a matter of ongoing dispute, culminating in a Waitangi Tribunal "Ngai Tahu Sea Fisheries Report" in 1992. The history of the Ngai Tahu efforts to preserve their fisheries is important, but beyond the scope of the dissertation, which for reasons of space must keep its focus on land.

[567] Quoted in Orange, *Treaty of Waitangi*, 46.

about prior loss of land to private individuals, not future alienation in favour of the Crown. McKenzie paraphrased a letter written by Colenso in 1840, stating that he "did not 'for a moment' suppose that the chiefs were aware that 'by signing the Treaty they had restrained themselves from selling their land to whomsoever they will'."[568]

In the Vancouver Island context, the above account lends support to the argument that, even if the Douglas Form was brought to treaty meetings from 1851 onwards, First Nation participants would have paid scant heed to its wording. Their concerns would have been addressed to Douglas orally, and it would have been only his oral responses that mattered.

Finally, now that possible Maori understandings of the treaty have been fully canvassed, it is time to ask if the European signatories had a common understanding of its terms. The answer is no, in two respects. There was confusion as to what qualified as Maori "lands and estates," and as how best to make that land available for colonization.

In the years between 1840 and 1848 there was an ongoing (and sometimes heated) debate in Britain and New Zealand among politicians, government officials, clergymen and officers of the New Zealand Company as to the nature and extent of "the Lands and Estates Forests Fisheries and other properties which they [the Maori] may collectively or individually possess," as set out in Article II of the English version of the Treaty. Some, such as Earl Grey, Secretary of State for the Colonies, writing in 1846, agreed with the proposition that Maori claimants to land would have to demonstrate that they "have actually had the occupation of the lands so claimed, and have been accustomed to use and enjoy the same, either as places of abode, or for tillage, or for the growth of crops…or

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[568] McKenzie, *Oral Culture, Literacy and Print in Early New Zealand*, 43.

otherwise for the convenience and sustentation of life by means of labour expended thereon."[569] Others agreed with the opinion of New Zealand Chief Justice William Martin, given in 1847, that "[s]o far as yet appears, the whole surface of these islands…has been appropriated by the natives, and…is held by them as property."[570] As convincingly argued by New Zealand historian Mark Hickford, officials in the Colonial Office and in the colony eventually adopted a practical approach such that

> …swathes of territory might be acquired without forensically inquiring in advance as to whether the territories claimed were occupied by certain Maori communities as property in accordance with imported theoretical suppositions or were claimed as subject to political jurisdiction of indigenous communities. Investigative evidential and legalistic particularity was generally avoided and discouraged in favour of capturing all possible claimants in purchase negotiations. [571]

In other words, it was possible to hold a narrow view as to Indigenous property rights, and at the same time accept that the wiser course in practice was to acquire all the territory claimed by Indigenous populations, as a purely precautionary measure to avoid future complaint. This may go a long way to explaining the difference between the views expressed by Secretary Barclay of the HBC in his 1849 instructions to Douglas, and his subsequent acquiescence to the contents of the Douglas Form.

The solution to the second problem facing the British Government in the aftermath of the Treaty, namely how to buy out the Maori interest in land, is best

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[569] Part of a royal charter for New Zealand (authorized by 9 & 10 Vict c103) and forwarded to Governor George Grey by Earl Grey (Secretary of State for the Colonies) in 1846, quoted in Mark Hickford, "'Vague Native Rights to Land': British Imperial Policy on Native Title and Custom in New Zealand, 1837-53," *The Journal of Imperial and Commonwealth History*, 38.2 (2010): 189.

[570] William Martin, *England and the New Zealanders* (Auckland: College Press, 1847), 47 as quoted in Hickford, "'Vague Native Rights to Land': British Imperial Policy on Native Title and Custom in New Zealand," 195.

[571] Hickford, "'Vague Native Rights to Land': British Imperial Policy on Native Title and Custom in New Zealand," 196.

described by historian Peter Adams, in his excellent book, *Fatal Necessity: British Intervention in New Zealand, 1830-1847*:

> The solution, as it dawned upon Earl Grey and Governor Grey, lay in the concession which the Crown had procured from the Maoris of a monopoly right to buy that land. If the pre-emption monopoly was used extensively and rigorously, it would effectively neutralize the wide recognition of Maori land rights. Thus, as Earl Grey recommended to his namesake, the purchase of land by the Crown should be carried forward 'as rapidly as possible', partly because the longer the delay the more costly it would be, but chiefly because it was of the 'utmost importance' with a view to the regular colonization of New Zealand, that the control of all the waste lands should be as completely as possible in the hands of the Government.[572]

While the New Zealand government continued to acquire Maori land in a piecemeal fashion until 1909, no treaties were made on Vancouver Island after 1854. As demonstrated in Chapter Two, it has proven impossible to do more than speculate at what point and for what reason or reasons, Douglas decided to retire the Douglas Form. He must have been unaware of the New Zealand precedent, or believed it was not binding on the Colonies of Vancouver Island and British Columbia.

In the latter part of the 1830s and for all of the 1840s the Colonial Office was under considerable pressure to deal with issue of Maori ownership of land because of the demands of land-hungry settlers. The early waves of colonists were brought to Aotearoa by the New Zealand Company, which had a huge influence on early efforts to make land available for colonization.

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[572] Peter Adams, *Fatal Necessity: British Intervention in New Zealand, 1830-1847* (Auckland: Auckland University Press, 1977), 209.

2. The New Zealand Company (1827-1850)

The New Zealand Company (the "NZC") was the brainchild of Edward Gibbon Wakefield. He helped promote its formation in 1827,[573] and was a driving force behind the organization until its demise in 1850. He used the NZC as a vehicle to put into practice his ideas about colonization, and his goal was to create colonies comprised of a landed class of gentlefolk and a landless class of labourers. The cost of establishing such colonies was to be defrayed by acquiring land at little or no cost from the native population or the Crown, and selling it at a fixed price (ideally £ 1 per acre), to wealthy colonists, who would also be responsible for importing the labourers needed to develop the land and colonial infrastructure. The scheme succeeded in bringing over 15,000 colonists to New Zealand,[574] but failed to attract a significant number of landed gentry. As a result, the enormous costs of creating the settlements resulted in losses which totalled £225,000 in 1846. In 1847 the Colonial Secretary agreed to bail out the Company with a loan of £236,000,[575] and the terms of the loan were incorporated into an "Act to Promote Colonization in New Zealand and to Authorize a Loan to the New Zealand Company." Under the terms of the loan, "all the Demesne Lands of the Crown in the Province of New Munster…shall…be absolutely…vested in the New Zealand Company [until July 5th, 1850]…and during such period all the Rights, Powers, and Authorities of her Majesty in reference to the same may be exercised and administered by the said Company in such Manner…as to the said Company shall seem best fitted to promote the

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[573] Until 1830 its name was the New Zealand Association.

[574] King, *The Penguin History of New Zealand*, 173.

[575] Patricia Burns, *Fatal Success: A History of the New Zealand Company* (Auckland: Heinemann Reed, 1980), 292-293.

efficient Colonization of New Zealand…[provided that] the Restrictions on the Conveyance of Lands belonging to any of the aboriginal Natives, unless to Her Majesty, [shall not be suspended]."[576] The intent of this tortured piece of legal drafting was to give to the NZC a three year monopoly on the disposal of Maori land in New Munster Province (which includes the Ngai Tahu territory), but only after it had been acquired in the name of the Crown (using money advanced under the loan). Even with this 'leg up', the fortunes of the NZC did not improve and in 1850 it defaulted on the loan and ceased operations.[577]

There are similarities in the histories of the NZC and the HBC (on Vancouver Island). They were both private enterprises granted certain privileges by the British government to encourage colonization along the lines promoted by Edward Gibbon Wakefield. In fact the 1849 Vancouver Island Charter was to a certain extent modeled on the 1847 Act to Promote Colonization in New Zealand, as explained by historian James Hendrickson: "In the case of Vancouver Island, the Colonial Office looked to New Zealand rather than to Australia as a model for its action in Vancouver Island, no doubt in part because of the precedent provided there by a joint stock company."[578] *In support of this proposition he quoted from the 1849 "Minute, Colonization of Vancouver's Island," in which an unnamed official in the Colonial Office commented that,*

> *The effect [of the Vancouver Island Charter] will be that the land will be vested in the H B Co. under this grant…[and]the legislative authority & right to raise the revenue not derived from land will be in the inhabitants…The same thing or nearly so it will be shewed has been done in the Southern part of New Zealand, where the Crown land and Crown right of preemption from natives are vested*

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[576] New Zealand Archives (hereafter NZA), "Act to Promote Colonizattion of new Zealand and to Authorize a loan to the New Zealand Company," 10 &11 Victoria C. 112, 23 July 1847, file Wai 27, record B3.

[577] Burns, *Fatal Success*, 298.

[578] Hendrickson, "The Aboriginal Land Policy of Governor James Douglas, 1849-1864," 3.

> *until 1852[sic: 1850] in the New Zealand Company, while the right of Government & of raising revenue is in the Legislative Council.*[579]

The magnitude of the scheme undertaken by the NZC was much more ambitious than the rather half-hearted effort made by the HBC. However, the NZC had little capital and hoped to finance its operations from the proceeds of its business. In other words, it was undercapitalized, and from my experience incorporating hundreds of fledgling enterprises, that is an almost sure recipe for crippling debt followed by insolvency. Britain did not finance the transportation of colonists to Vancouver Island nor did it subsidize the construction of colonial infrastructure on behalf of the HBC, which was well capitalized and could easily afford to foot the costs of the undertaking.

The relationship between the NZC and the Crown can best be described as volatile and fractious. In 1839, just prior to the establishment of New Zealand as a colony, the NZC claimed to have purchased large tracts of land on the North and South Islands directly from the Maori and landed several boat-loads of colonists in early 1840. The right of Crown pre-emption in the Treaty of Waitangi put these purchases in doubt, and years of wrangling with the Colonial Office ensued before the matter was put to rest.

After 1840, the NZC consistently maintained the position that the Maori had an interest only in such land as they had improved by way of habitations and horticulture. All other land came under the category of 'waste', which belonged to the Crown and was thus available for settlement without purchase. In 1844, the NZC decided that the policies of the Colonial Office under Lord Stanley were not sufficiently in line with its view, and

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[579] CD, Dispatch to London, Blanshard to Early Grey, CO 305/2, 1, accessed 20 August 2015, http://bcgenesis.uvic.ca/getDoc.htm?id=V49000A.scx.

"procured the appointment of a parliamentary select committee to examine the case."[580] At the hearings, the Colonial Office presented its views, but those of the NZC received support from the committee chair, Lord Howick, who authored the committee's majority report, condemning the Treaty of Waitangi as 'injudicious', and reiterating the views of the NZC as to Maori interests in land. Nonetheless, Lord Stanley rejected the report.[581]

Of course in 1846 Lord Howick became Earl Grey, Secretary for the Colonies, and clearly had not changed his mind, as shown in his 1846 letter to Governor Grey quoted earlier. Presumably he was still of the same mind in 1849, when Barclay wrote to Douglas. Barclay was likely aware that Lord Stanley had declined to adopt Grey's opinion, but assumed Grey's views were now official, and thus a reference to the 1844 Report of the House of Commons select committee report on New Zealand would not be out of order.

However, on other issues the Colonial Office and the New Zealand colonial government were prepared to assist the NZC, demonstrated by the willingness of the Crown to facilitate and finance the operations of the company via statute in 1847. In addition, during the governorship of George Grey, his appointed commissioners did their best to keep the purchase price of land as low as possible, and to allot as little land as possible for the use and benefit of the Maori. This sometimes 'cozy' arrangement is demonstrated by the agreements concerning land made on the South Island during the 1840s, up to and including Kemp's Deed in 1848

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[580] Adams, *Fatal Necessity*, 185.

[581] Ibid.

3. South Island Land Agreements (1839-1847)

To provide general context, the first part of this subsection presents a small selection of comparisons with Vancouver Island. The South Island has an area of approximately 150,000 square kilometres (or 37,000,000 acres), almost five times larger than Vancouver Island's 32,000 square kilometres. The South Island's population of two to three thousand Maori in the 1840s[582] *was less than one tenth of the First Nation population of Vancouver Island in the 1850s, which, according to one census, was over thirty eight thousand*.[583]. *According to the Encyclopedia of New Zealand*,[584] *"The largest political grouping in pre-European Māori society was the iwi (tribe). This usually consisted of several related hapu (clans or descent groups)." One such iwi was the Ngai Tahu who gradually migrated from the North to the South Island over the eighteenth century. By the 1840s they occupied (by a combination of force and intermarriage with the existing population) most of the South Island, with the exception of the northern tip*,[585] *the territory of several iwis, including the Ngati Toa. As noted at the beginning of the previous chapter (on the Washington treaty experience), the Klallum within present-day Washington State appear to have expanded across the Strait of Juan de Fuca to Beecher Bay on Vancouver Island shortly before entering into two (recorded as "Chewhaytsum"*

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[582] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22), section 3.2.4.

[583] The estimate is contained in a census enclosed in a letter from Douglas to the Colonial Secretary. CD, Dispatch to London, Sir James Douglas to Henry Labouchere, Colonial Secretary, CO 305/7, 20 October 1856, 103, accessed 16 August 2015, http://bcgenesis.uvic.ca/getDoc.htm?id=V56024.scx. It should be noted that the early census totals vary a great deal, but they all indicate a larger Indigenous population density than existed in New Zealand.

[584] Rāwiri Taonui, "Story: Tribal Organization," Encyclopedia of New Zealand, accessed 16 August 2015, http://www.teara.govt.nz/en/tribal-organisation/page-1.

[585] Te Maire Tau and Atholl Anderson, eds., *Ngai Tahu: A Migration History, The Carrington Text* (Wellington: Bridget Williams Books, 2008), 12-37.

and "Ka-ky-aakan" on the Douglas Forms) of the nine Fort Victoria Treaties of 1850. The other Vancouver Island Treaty First Nations all have origin stories indicating a presence on the land from time immemorial.

The climate of the South Island (at least south of the Nelson and Marlborough areas,) was cooler than that of the North Island, and as a result, "There were virtually no cultivations (in the sense of planted gardens) in the far south, until the advent of the European potato. But there was…a very elaborate hunting and gathering economy, with particular focus on fish, eels and birds."[586] *This description corresponds very closely to the circumstances of Vancouver Island in the 1850s.*

The following summary of Ngai Tahu dealings with Europeans before 1840 is taken from the *Ngai Tahu Land Report*, produced by the Waitangi Tribunal[587] in 1991:

> European impact on Ngai Tahu life occurred early compared with most other tribes and led to a relationship that was several generations old before Major Bunbury brought the Treaty [of Waitgani] south in the autumn of 1840. Unlike European contact with Maori in the far north, there was little or no missionary presence….From the late eighteenth century, seals were taken in large numbers by European sealing gangs…in Ngai Tahu territory…. Sealers brought the first trade goods, iron tools, blankets and new technology…They also brought new crops which were rapidly taken up by Ngai Tahu who saw the opportunity of providing potatoes and onions and other vegetables to shore parties and to ships' crews wanting provisions…. [588]

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[586] Alan Ward, "A Report on the Historical Evidence: The Ngai Tahu Claim, Wai 27," (Wellington, Document T1, 1998), 172. It is worth noting that pre-contact New Zealand contained no land mammals, which explains the absence of hunting in the catalogue of Maori subsistence activities.

[587] The Waitangi Tribunal heard testimony from Ngai Tahu elders and experts in various fields, and rendered a non-binding decision ("The Ngai Tahu Land Report") in 1991, which became the basis for negotiations between the parties, resulting in a settlement in 1998.

[588] Waitangi Tribunal, "The Ngai Tahu Land Report (Wai 27)," (Wellington: Department of Justice, 1991), section 9.3.13, accessed 17 August 2015, https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68476209/Wai27.pdf.

The early contact period on the South Island was not wildly different than that of the First Nations on Vancouver Island. As between the North and South Islands, I would argue that the circumstances prevailing on the South Island are much closer to those on Vancouver Island than to the history of the North Island. Accordingly, the balance of the chapter focuses almost entirely on South Island events.

The Ngai Tahu entered into a number of land agreements prior to Kemp's Deed of 1848. The first took place in 1838, when the captain of a French whaling vessel, Jean Francois Langois, purported to purchase the Banks Peninsula (on the east coast of the South Island) by way of a deed in French signed by several Ngai Tahu chiefs.[589] The ensuing political squabble between French and British interests is complex, and not very relevant. In February of 1840, three Ngai Tahu chiefs "visited Governor Gipps [of New South Wales] in Sydney, at his invitation….Gipps invited the Chiefs to sign a treaty similar to the Treaty Waitangi. He gave them 10 guineas each." The chiefs decided not to sign it, but on February 15th, did sign "two documents now known as the Wentworth-Jones deeds…[and] by these 'deeds' they 'sold' the south island" to Sydney merchant John Jones and Sydney lawyer William Charles Wentworth.[590] However, they were of no legal effect. The Ngai Tahu understanding of the French deeds and the Sydney deeds is not known.

In May of 1840, Major Bunbury, an appointee of Governor Hobson, brought a copy of the Treaty of Waitangi to the South Island with instructions to obtain as many signatures as possible. One of his stops was Akaroa, on the east coast of the South Island,

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[589] Ibid.

[590] Evison, *The Ngāi Tahu Deeds*.

where the Nagi Tahu Agreement was concluded eight years later. Bunbury's translator was Edward Williams, who read over and explained the treaty to a "small party of Maori" and secured the signature of two chiefs.[591] Meetings at three other locations on the South Island brought the total to seven Ngai Tahu and nine Ngati Toa signatories.[592] According to Harry Evison, "For Ngai Tahu the treaty was a 'non-event', both in the signing of it and in the perception of it. The Treaty of Waitangi was rarely mentioned, if ever, by Ngai Tahu in their numerous petitions, addresses to governors, testimonies to the Native Land Court, and submissions to royal commissions, during the nineteenth century."[593]

If Evison is right, and the Treaty of Waitangi was not remembered, or at least not considered the precursor of the land cession agreements, the parallels with the Vancouver Island situation in 1850 are much stronger. On the other hand, the Ngai Tahu had more experience with Europeans trying to relieve them of their land than did the First Nations on Vancouver Island.

The first post-treaty Nagi Tahu land transaction took place in 1844 at what is today Otago, on the east coast of the South Island, during the tenure of Governor Robert FitzRoy. The NZC approached Fitzroy for permission to purchase 500,000 acres for "a Scottish Free Church settlement," of which 150,000 acres would be required for the settlement and the remaining 350,000 acres would become Crown land. Fitzroy waived the Crown's right of pre-emption as to the land required for settlement. As noted by Evison, "…after two months of sporadic negotiations, the Otago Deed was signed by 23

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[591] Orange, *The Treaty of Waitangi*, 78.

[592] Waitangi Tribunal, "The Ngai Tahu Land Report (Wai 27)," section 4.2.2.

[593] Evison, *The Ngāi Tahu Deeds,* 38.

Ngai Tahu chiefs."[594] The agreed price was £2,500, and the Ngai Tahu reserved 9600 acres for themselves. On the deed the purchaser is shown as "William Wakefield the chief agent of the New Zealand Company in London on behalf of the directors of that company" and includes a description of "the pieces of land that we have cut off for ourselves and our children."[595] One of the most influential negotiators was Chief Karetai, who was praised by William Wakefield in the following terms: "He entered into all the details of the sale, described the boundaries exactly by name and designs on paper, and conducted the transactions on the part of the natives with the tact and readiness of an accomplished man of business."[596] Unfortunately, he drowned two years later.[597]

According to Evison the Ngai Tahu had two motives for entering into the agreement. One was to encourage the development of "a Maori-European *entrepot*" within Ngai Tahu territory, and the other was to obtain "security from their mortal enemies, Ngati Toa."[598] Due to lack of funds, the NZC was not able to send out colonists until 1848.[599] In Evison's opinion, this represents the only transaction with the Ngai Tahu (prior to 1864) that met the standards set by Article II of the Treaty of Waitangi.[600] Unfortunately, these standards were not met at the negotiation of Kemp's Deed four years later, as set out in the next section.

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[594] Ibid., 46-48.

[595] Ibid., 54.

[596] Ibid., 49.

[597] Ibid.

[598] Ibid.

[599] Ibid.

[600] Ibid.

The Otago agreement set a precedent for Ngai Tahu expectations of a respectful negotiation between equals, and the deferred arrival of colonists meant that traditional Ngai Tahu use of the land continued without interference until the time of Kemp's Deed. In these two respects the Ngai Tahu experience was similar to that of the Vancouver Island First Nations during and immediately after negotiation of the Vancouver Island Treaties. However, the Otago agreement involved only a relatively small proportion of the Ngai Tahu territory, and they were able to designate the lands to be "cut off for ourselves and our children," which was not the case on Vancouver Island.

Another post-treaty land transaction took place on the South Island (the Wairau purchase) in 1847 at the northern end of the island, between the Ngati Toa and Governor George Grey, FitzRoy's successor. The price agreed upon was £3,000, and the deed was signed by three Ngati Toa chiefs, in the presence of Grey, and Henry Tacy Kemp (neither of whom signed as witnesses). The funds were supplied by Grey, and the English version of the deed identifies "the Governor" as the purchaser. The territory covered by the purchase is approximately 3,000,000 acres,[601] which included territory claimed by the Ngai Tahu.[602] This disputed territory influenced the course of the negotiations leading up to Kemp's Deed in 1848.

C. During 1848

In 1846 Earl Grey (the former Lord Howick, chair of the 1844 Select Committee on New Zealand) became Secretary of State for the Colonies and sent out new instructions to Governor Grey. They "required that all lands claimed by 'aborigines'

[601] Ibid., 75.

[602] Ibid., 70.

(collectively or individually) were to be submitted for registration" and "…all other lands were then to be proclaimed 'Crown demesne lands'."[603]

Earl Grey's instructions to Governor Grey bear more than a passing resemblance to Barclay's 1849 instructions to Douglas. Like Grey, Barclay abjured the concept of native title, requiring only that "The natives will be confirmed in the possession of their lands as long as they occupy and cultivate them," and "All other land is to be regarded as waste, and applicable to the purpose of colonization."

Governor Grey paid lip-service to Earl Grey's directive, but by 1848 was in the process of implementing a somewhat different policy, as shown in this extract from a long letter to Earl Grey:

> I have therefore deemed it inexpedient to disturb the present tranquility of the country by calling upon the natives generally to register their claims to land; but I have taken care, in as far as possible, to keep the land purchases of the Government so far in advance of the wants of the European settlers[604] as to be able to purchase the lands required by the Government for a trifling consideration. What has then been done was,[605] to extinguish absolutely the native title to the tract purchased, but to reserve an adequate portion for the future wants of the natives, which reserves were registered as the only admitted claims of the natives in that district….[606]

As noted by historian Alan Ward, "Grey's use of terms is illuminating: 'extinguishing the native title' rather than buying land for settlement became an end in itself," and "Kemp's purchase was to be one of the tests of Grey's policy, offering optimum conditions for

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[603] Evison, *Te Wai Pounamu*, 233-234.

[604] This is in contrast to Douglas, who declined to purchase the Cowichan's land prior to the arrival of settlers (as noted in his reporting letter of May 16, 1850, to Barclay, reproduced in Chapter II).

[605] Grey used the past tense, which suggests that he considered the Wairau Purchase to be the first test of his new scheme.

[606] As quoted in Waitangi Tribunal, "The Ngai Tahu Land Report (Wai 27)," section 5.3.8

success: a large block purchase, low price, comparative freedom in negotiating reserves and little prospect of Maori resistance."[607]

While neither Earl Grey nor Barclay perceived any necessity to extinguish native title, Governors Grey and Douglas, as the men on the ground charged with implementing that policy, knew that such a course would be unacceptable to the Maori and First Nations, and without explicitly contradicting their masters, ignored their strictures in practice.[608]

In February, 1848, Governor Grey, in the company of William Wakefield[609], an agent of the NZC, undertook a tour of the South Island which included stops at Akaroa and Otago, where he met with the Ngai Tahu chiefs. According to Evison's summary, "…it was agreed that if Grey sent a commissioner to Akaroa, Ngai Tahu would discuss a sale of the land between the Ngati Toa boundary [in the north] and the Otago Purchase [in the south]." After these meetings, "Grey and Wakefield…decided, without consulting the Ngai Tahu, that the price for the new purchase was to be £2,000, paid in annual installments of £500 over a period of four years."[610]

1. Kemp's Deed/ Ngai Tahu Agreement (1848)

In the four years since the Otago Purchase, what had changed and what had remained constant? On the Colonial side, there was a new Secretary of State for the Colonies, a new governor, and two new officials were appointed to conduct the negotiations. On the Ngai Tahu side, the lead negotiator in 1844 had died, but most of the

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[607] Ward, "A Report on the Historical Evidence," 119.

[608] At least until the late 1850s in Douglas' case (see the discussion in the last section of Chapter II).

[609] A brother of Edward.

[610] Evison, *Te Wai Pounamu*, 242-243.

chiefs present at the Otago negotiations made the journey to Akaroa to take part in the 1848 meetings. The account which ensues demonstrates the change in attitude on the part of colonial officials at all levels, and the efforts of the Ngai Tahu chiefs to ameliorate the effects of these unwelcome changes.

Governor Grey appointed Henry Tacy Kemp as commissioner to conduct the negotiations with the Ngai Tahu. The Waitangi Tribunal report provides this thumbnail sketch: "Kemp, aged thirty, was bilingual, being the son of a Keri Keri [North Island] missionary and born in New Zealand. He had been a secretary and interpreter to the lands claims commissioners…in the 1840s. In 1846 he became the native secretary at Wellington."[611]

Kemp received his instructions from Lieutenant-Governor Edward Eyre, responsible for the administration of New Munster, which included the South Island, who in turn received his instructions from Governor Grey. Grey told Eyre that "The mode in which I propose that this arrangement should be concluded, is by reserving to the Natives ample portions for their present and prospective wants; and then, after the boundaries of these reserves have been marked, to purchase from the Natives their right to the whole of the remainder of their claims to land in the Middle Island."[612] Eyre in turn told Kemp that

> The object of your mission is the extinguishment of any title which may, upon inquiry, be found to be vested in the native inhabitants to the tracts of country lying between the districts purchased from the Ngatitoa tribe and that purchased by the New Zealand Company at Otakou.
>
> In entering upon the arrangements necessary to effect this object, it would be your duty to reserve to the natives ample portions of land for their present and prospective wants, and then, after the boundaries of these reserves have been marked, to purchase from the natives their right to the whole of the remainder of

[611] Waitangi Tribunal, "The Ngai Tahu Land Report (Wai 27)," section 8.4.1.

[612] Ibid.

> their claims to land in the Middle Island.[613] The payment to be made to the natives must be an annual one, and be spread over a period of four or five years, as the only means of removing all possibility of the occurrence of any future disputes or difficulties regarding native claims to land in that part of the Middle Island.[614]

Two days before Kemp's departure, Eyre instructed Daniel Wakefield,[615] the Crown solicitor for New Munster, to prepare a draft deed of purchase. The following account is based on a report by historian Dr. Donald M. Loveridge," presented at the Wai 27 hearings.[616] Wakefield explained his actions as follows: "Understanding that Mr. Kemp was about to start in a few hours on his mission, I prepared the Draft Conveyance in haste and took it myself with a letter…to Mr. Kemp at Government House." Wakefield's covering letter to Kemp stated that, "I have the honor to send you the Draft of a deed of sale and cession to be filled up according to circumstances and when engrossed [written out] on parchment to be executed by Natives in the Middle Island in the Province of new Munster, in the presence of at least two witnesses." The draft deed reads as follows:

> Know all then by this document that we the chiefs and men of the _____ Tribe in New Zealand whose names are undersigned consent on this _____ day of _____ 1848 to give up sell and abandon altogether to William Wakefield Principal Agent of the New Zealand Company of London on behalf of the Directors of the said Company all our claims and title to the lands comprised with the undermentioned boundaries. The names of the said lands are (or the boundaries of the said land are as follow)_____ [several lines left blank, presumably containing not only a description of the lands sold, but also of the lands reserved] which said reserved places we agree neither to sell or let to any party whatsoever. We also agree to give up and abandon altogether all right and title which we may have in any other places besides those described above in the Province of New Munster.

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[613] An earlier name for the South Island.

[614] Ibid.

[615] Yet another brother of Edward.

[616] Donald Loveridge, "Evidence of Dr. Donald M. Loveridge," Waitangi Tribunal, Ngai Tahu Claim (Wai 27), 1989, doc L8.

> We have received as payment for the above mentioned land and for the cession of our rights and title to any other places in the Province of New Munster the sum of _____ in money on this day. [617]

Wakefield was later chastised for making the NZC the grantee instead of the Crown as represented by the governor, and his explanation follows: "…as it was the first Conveyance from Natives to which my attention had been directed, except the Conveyance by the Natives of Otakou [Otago] to the New Zealand Company in 1846 [*sic*: 1844], my knowledge that the purchase was about to be made for the benefit of the New Zealand Company was the cause of my not adverting to the exception respecting conveyances from Natives contained in the above Clause."[618] A comparison of Wakefield's draft with the English version of the Otago Deed reveals that he simply copied the 'boilerplate' from the Otago Deed, with the exception of his addition of the unusual clause including "any other places" in the purchase, which Kemp elected to delete. As noted by Loveridge, "Given that this was the first major purchase of Maori land to be made under the complex new agreement between the British Government and the New Zealand Company [as set out in the 1847 Act to Promote Colonization in New Zealand], given Colonel Wakefield's role in the preparations, and given the source of the £500 which the Commissioner was taking south to pay for the purchase, it seems to me that Kemp was quite unlikely to detect the Crown Solicitor's 'inadvertence'."[619]

In New Zealand the drafter's mistake is not considered problematic, on the ground that the NZC company was acting as agent of the Crown. While it is common

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[617] Ibid.

[618] Ibid., 42

[619] Ibid

practice to explain the designation of the HBC as grantee on the Douglas Forms on the same basis, it has been argued from time to time that the documents are, at least in certain respects, more akin to private agreements than treaties.[620]

As it turned out, in most respects Kemp ignored his instructions from Eyre and the template supplied by Wakefield. Kemp left Wellington by ship on April 29, 1848, arriving at Otago where he persuaded twelve Ngai Tahu chiefs to return with him to the meeting site at Akaroa.[621] While at Otago Kemp was joined by Charles Kettle, a NZC employee and surveyor. On June 7th the ship arrived at Akaroa, and "About 500 Ngai Tahu were assembled at Akaroa when the discussions began on 10 June."[622] There were only a handful of white residents within Ngai Tahu territory at the time. Unfortunately, "Kemp left no record of his negotiations at Akaroa,"[623] other than three short reporting letters to Eyre. No minutes of the meetings were kept. The only other contemporaneous records are Kettle's journal and his report to the NZC.[624] Almost all of the information presented in the Wai 27 and Evison accounts as to the Maori understanding of what took place at the meetings is based on the testimony of a few surviving chiefs before the Smith/Nairn Commission in 1879, thirty years after the event.

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[620] A prime example is the argument of Crown lawyers in the *R*. *v*. *White and Bob* decision, [1964] 50 DLR (2nd) 613.

[621] Waitangi Tribunal, "The Ngai Tahu Land Report (Wai 27)," sections 2.4 and 8.4; Evison, *The Ngāi Tahu Deeds,* 81-8; Evison, *Te Wai Pounamu,* 255-266.

[622] Waitangi Tribunal, "The Ngai Tahu Land Report (Wai 27)," section 2.4.

[623] Evison, *Te Wai Pounamu*, 277.

[624] Waitangi Tribunal, "The Ngai Tahu Land Report (Wai 27)," section 2.4.

The lack of contemporaneous accounts was almost as drastic as the Vancouver Island experience, and if it were not for the extensive testimony of the Chiefs at the Smith/Nairn hearings, no detailed reconstruction of the proceedings would be possible.

According to Kettle, "…the 'correro'[625] commenced by the chiefs coming forward and calling the names of the lands to be sold – commencing from Kaikora, one chief went down to the peninsula- then Taiaroa called the lands from the peninsula to Waitake [Waitaki] – then Solomon from Waitake to Moeraki- Portiki [Potiki] and others southward from thence to the heads of Otakou [Otago]."[626] Kemp thereupon "…rose to announce that his mission was to 'join' the Ngati Toa Purchase with Symond's Otakou Purchase, as Governor Grey had proposed."[627] When it became obvious that Kemp was not prepared to put on the table the disputed territory at Kaiapoi included as Ngati Toa territory in the Wairau Purchase, "Some began to doubt whether they should negotiate with Kemp any further," but "[t]he senior chiefs decided to bide their time…."[628] Chief Tikao then "named a price for the territory being offered, five million pounds," but "Kemp said he could pay no more than £2,000," at which "Tikao, with the approval of the gathering, told Kemp he would not get the land for that sum."[629] According to the eye-witness account of the proceedings provided by Chief Natanahuira Waruwarutu before the Smith/Nairn Commission,

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[625] Misspelling of Korero, a Maori word for 'talking.'

[626] Evison, *Te Wai Pounamu*.

[627] Ibid., 258.

[628] Ibid.

[629] Ibid., 258-259.

> Tikao, after long argument, said 'If I accept your offer, I expect to have returned to me the eel weirs, the mahinga kai,[630] the places of settlement, the burial places, the landing places and also additional reserves out of the land'. Mr. Kemp did not give an immediate assent to that request, and they still went on arguing…and they commenced arguing again on the next day… Mr. Kemp said 'Sufficient; I will agree to your request'. Mr. Kemp said 'I will return to you your eel weirs, the mahinga kai, the settlements of each hapu situated on this land, the landing places, and also a large portion of the land will be returned to you.[631]

Finally, according to Evison, the senior chiefs came to the conclusion that "Only by signing a deed with Kemp confirming that the rangatiratanga [chieftanship] of the land from Kaiapoi southwards was held by Ngai Tahu and not Ngati Toa, could the danger of Grey making another Ngati Toa purchase be averted."[632] According to the Wai 27 report, "The localities of reserves were not discussed."[633] On the twelfth of June, Kemp drafted the deed in Maori on board his ship, where he was later joined by the Otago chiefs and many of the senior local chiefs. Then "Kemp came up on deck and read out his deed," and "without further ado, Kemp went below for the money. Returning on deck, he spread out the deed on the hatch cover and…[t]hen there probably followed, on the crowded deck of the sloop, a bustling business of chiefs arguing, and signing, or not signing…,"[634] whereupon Kemp paid the £500 first installment. According to Evison, "No copy of the deed…was given to Ngai Tahu, but Kemp promised he would soon return and mark out the promised reserves. The chiefs went ashore…and HMS Fly sailed for

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[630] The definition of this phrase has been the subject of much controversy. Evison defines the phrase as "places for getting or producing food" in the southern dialect of Maori. Evison, *The Ngāi Tahu Deeds,* 288. Report defines it as "those places where food was produced or procured." Waitangi Tribunal, "The Ngai Tahu Land Report (Wai 27)," section 2.12.

[631] Copy of transcript of evidence before the Smith/Nairn Commission. NZA, Smith/Nairn Commission, file Wai 27, record B3

[632] Evison, *The Ngāi Tahu Deeds,* 260.

[633] Waitangi Tribunal, "The Ngai Tahu Land Report (Wai 27)," section 8.4.12.

[634] Evison, *The Ngāi Tahu Deeds,* 84.

Wellington…,"[635] From this point forward, the Maori language original is called "the Ngai Tahu Agreement," and the English translation is referred to as "Kemp's Deed."

The Ngai Tahu version of the negotiations demonstrates that the chiefs had some understanding of what was at stake in this particular transaction. Unlike Otago, what was on the table on this occasion was most of the remaining Ngai Tahu territory, and therefore, access to resources on that land had to be safeguarded. The Ngai Tahu believed that Europeans would be willing to share access to the land and its resources, a reasonable assumption based on their prior experience with the few European residents in their midst. The extraordinary aspect of the Ngai Tahu account of the negotiations is that it makes explicit what had been assumed by the Maori in previous transactions, namely that a 'sale' in the European sense was not contemplated, but an allocation of land, some for the occupation and use of the colonists and some to be retained by the Maori, each according to their needs. While the phrase "shared territory," common in the Canadian context, is not commonly used in the New Zealand literature, in my opinion what was proposed by Tikao on behalf of the Ngai Tahu amounted to the same thing.

A literal translation by Te Aue Davis[636] of the original Maori-language document signed by the parties follows;

> Hear this, all people! We, the chiefs, the people of Ngai Tahu, who have signed our names and marks to this document on this 12th day of June in the year 1848, have agreed to surrender entirely to Wideawake (William Wakefield) – the shadow of the Assembly of New Zealand in London, that is, their directors – our lands, our soil lying along the coast of this ocean, beginning…[detailed description omitted] then continuing on to the other ocean at Lake McKerrow (Milford Haven). However the particular shape [or appearance] of the land will be

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[635] Ibid.

[636] She was a respected Maori historian, translator and weaver, receiving an OBE in 1993. "Te Aue Davis (1925-2010)," Museaum of New Zealand/ Te Papa Tongarewa, accessed 16 August 2015, http://collections.tepapa.govt.nz/topic/3654.

> revealed on the survey map.[637] Our places of residence and our food-gathering places are to be left to us without impediment for our children, and for those after us. The Governor will set aside some portion for us later when the land has been clearly surveyed by the surveyors – the greater part of the land will be given to the Europeans forever.
>
> The payment made to us is two thousand pounds, to be paid in instalments. Paid to us now, £500, the next payment £500, the following payment £500, the last payment £500, making a total of £2,000.
>
> We express our agreement by signing our names and marks here at Akaroa on the 12th of June 1848.[638]

Once back in Wellington, Kemp prepared an English translation, which he enclosed with his report to Eyre. It reads as follows:

> Know all men. We the Chiefs and people of the tribe called the "Ngaitahu" who have signed our names & made our marks to this Deed, on this 12th day of June 1848, do consent to surrender entirely & for ever to William Wakefield the Agent of the New Zealand Company in London, that is to say, to the Directors of the same, the whole of [the] lands situate on the line of Coast commencing at "Kaiapoi" recently sold by the "Ngatitoa"…[detailed description omitted] thence in a straight line until it terminates in a point on the West Coast called "Wakitipu-Waitai" or Milford Haven: the boundaries & size of the land sold are more particularly described in the Map which has been made of the same (the condition of, or understanding of this sale is this)[639] that our places of residence & plantations are to [be] left for our own use, for the use of our Children, & to those who may follow after us, & when the land shall be properly surveyed hereafter, we leave to the Government the power & discretion of making us additional Reserves of land, it is understood however that the land itself with these small exceptions becomes the entire property of the white people for ever.
>
> We receive as payment Two Thousand Pounds (£2,000) to be paid to us in four instalments that is to say, we have this day received £500, & we are to receive three other instalments of £500 each making a total of £2,000. In token whereof we have signed our names & made our marks at Akaroa on the 12th day of June 1848
>
> (Signed) {here follow 40 signatures.}
> Witnesses:

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[637] Kemp possessed a sketch map, but there is some dispute as to whether it constituted the "survey map." Evison, *Te Wai Pounamu*, 262-265.

[638] Reproduced in Evison, *Te Wai Pounamu*, 261.

[639] The reason for the brackets is not known.

(Signed) R.A. Oliver, Commander H.M.S. "Fly."
J. Bull, Lieutenant.
John Watson, Resident Magistrate
Charles H. Kettle, J.P., Principal Surveyor, New Zealand Company
H. Tacy Kemp, J.P., Commissioner.
James Bruce, Settler.
(True Translation)
(Signed) H. Tacy Kemp[640]

There are three major differences between the Maori original and the English translation. First, the word "mahinga kai" in the Maori language, literally translated as "food gathering places," was translated by Kemp as "plantations." The second version has a much narrower meaning than the original. The second is that the phrase "The Governor will set aside some portion for us later" was translated by Kemp to read "we leave to the Government the power & discretion of making us additional Reserves of land." The word "discretion" is permissive, and the word "will' is prescriptive. The third instance is "the greater part of the land will be given to the Europeans forever," which becomes "the land itself with these small exceptions becomes the entire property of the white people for ever" in the English version. "The greater part" is a far cry from "these small exceptions."

The English version is clearly intended for a different audience than the Maori one, and I would argue that the same can be said for the Douglas Forms as opposed to the oral versions, which may have borne a considerable likeness to the Maori version, based on the accounts of Latess, Yaklam, Wyse and Whoakum. The next logical step is to place Barclay's template on top of Kemp's English translation, and highlight the differences in bold:

[640] Waitangi Tribunal, "The Ngai Tahu Land Report (Wai 27)," section 8.4.11

> Know all men. We the chiefs and people of the tribe called **the "Ngaitahu,***"* who have signed our names and made our marks to this deed on the **12th** day of **June, 1848**, do consent to surrender entirely and for ever to **William Wakefield**, the agent of the **New Zealand Company in London**, that is to say, to **the directors of the same** the whole of the lands situate **on the line of coast commencing at Kaiapoi….; the boundaries and size of the land sold are more particularly described in the map which has been made of the same**. The condition of, or understanding of this sale is this, that our **places of residence** and **plantations** are to be kept for our own use, for the use of our children, and for those who may follow after us, and <u>when</u> the land shall be properly surveyed hereafter, **we leave to the government the power and discretion of making us additional reserves of land***;* it is understood, however, that the land itself, with these small exceptions, becomes the entire property of the white people for ever. [641]

Two significant phrases in Kemp's Deed are deleted in the Baclay template. First, the Barclay template makes no reference to a map. Secondly, the template makes no mention of "additional reserves." One important word, "plantations" was replaced with the phrase "enclosed fields." To my knowledge, the word "plantation" does not appear in any HBC mid-ninteenth century correspondence, whereas variation of the phrase "enclosed fields" do appear in Barclay's correspondence with Douglas.[642] *On that basis, it would be understandable if Barclay substituted familiar terminology. Missing from Kemp's Deed is the concluding sentence of the Douglas Form: "It is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly." Thus Barclay was left to his own devices in drafting a provision to deal with the harvesting of resources.*

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[641] Makmillen has produced a side-by-side comparison of Kemp's Deed and Barclay's template. See Makmillen, "Colonial Texts in Post-Colonial Contexts," 316.

[642] For examples, see the extracts from Barclay's correspondence in Bowsfield, ed., *Fort Victoria Letters 1846-1851*.

Kemp reported to Eyre on June 19th, stating that "…it affords me much pleasure to be able to state that the deed of conveyance comprising the district referred to…was duly executed by the Native chiefs on the 12th instant, in the presence and with the consent of the people; and I have every reason to believe that the whole of the proceedings gave them general satisfaction."

The self-congratulatory tone of the letter is very similar to that of Douglas' four reporting letters to his immediate superior on the outcome of his treaty meetings with First Nations. Indeed they are typical of many reporting letters I have read by colonial and governmental officials across Canada and the west coast of the United States. My research indicates that these officials had precious little insight into the reasons behind these expressions of "satisfaction." Certainly, it should not be assumed that they represent understanding and acceptance by Indigenous participants of the intentions of the officials penning such missives.

As it happened, Kemp's report afforded very little "pleasure" to Eyre, who responded (via his secretary) with two main complaints. Eyre initially felt a new deed would have to be drafted and signed by the Maori, substituting the Crown for the NZC as grantee. Eventually he was persuaded to accept the argument that the company was acting as agent of the Crown. In Eyre's opinion Kemp's other major failure was "The making [of] a purchase without making a single reserve or in any way indicating the number, extent, or situation of the lands to be set apart as reserves." Eyre believed that having to negotiate a separate agreement as to reserves would result in the reservation of every patch of cultivated land, with disastrous consequences: "Innumerable and unusually-shaped patches of cultivated ground are always dotted over a country which

has been, or is, in occupation of the Natives and His excellency observes you must be well aware that when the District is surveyed and laid out in sections, these irregular patches will, in all probability greatly interfere with and render comparatively valueless a large proportion of the best of the sections."

This statement is very revealing of the abhorrence of many Europeans at the prospect of irregular patches (mainly of potatoes) dotting the countryside, making it impossible to transform the landscape into proper (rectangular) fields. While Douglas had no objection to reserving "village sites and potato fields,"[643] *the assistant colonial surveyor, B.W. Pearce, shared Eyre's views: "By the 'Land Proclamation Act of 1862' Indian Reserves are exempt from settlement. If this was construed to mean Potato gardens, there would be no settlement at all by the whites, as the whole valley*[644] *is covered with them"*[645].

In his report to Governor Grey, Eyre expressed his "regret that Mr. Kemp should have taken upon himself to act in direct disobedience of his instructions upon all the more important points connected with the negociations intrusted to him." However, Governor Grey in his report to the Colonial Secretary, Earl Grey, took a more sanguine view of Kemp's activities: "…suffice it to say that although I regret Mr. Kemp should have departed from his instructions, I still do not view his proceedings in so unfavourable a light as the Lieutenant-Governor does, and I entertain no doubt that the transaction has

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[643] Douglas to Barclay, 1852, reporting on purchase from the Saanich. HBCA, Douglas to Barclay, 1852, Reel 1M11.G1/140.

[644] In this case the Chemainus Valley, between Victoria and Nanaimo.

[645] BCA, Colonial Correspondence, GR1372, F949-4, B.W. Pearse to the Colonial Secretary, 17 May 1867.

been fairly and properly completed…." According to the Wai 27 Report,[646] as a result of his anger at Kemp's disobedience, "Eyre resolved that he would dispense with any further assistance from Kemp. Without first consulting Governor Grey, Eyre decided to appoint Walter Mantell to conclude 'the arrangements with the Natives'."

Eyre's instructions to Mantell are a wonderful demonstration of the tension between the British desire to be generous towards Indigenous people, while at the same time ensuring that this impulse did not manifest itself in reserves that could in any way impede the progress of colonization:

> …as it is desirable to avoid the difficulties which must certainly arise in laying out the lands for settlers from the existence of innumerable small and irregularly-shaped reserves dotted all over the country, or from their occupying important points upon harbours, it will be desirable that you should use your influence to induce the Natives to take their reserves in as few localities as possible, in as limited a number of reserves in each locality as you can persuade them to agree to, and in as regular shaped blocks as circumstances will admit of. Much may be done towards accomplishing this by inducing the Natives of very small settlements to unite in taking their reserves at one locality, and by getting them to consent to give up the smaller patches of cultivations in exchange for additional land nearer the larger one, a liberal provision being made both for their present and future wants and due regard shown to secure their interests and meet their wishes.[647]

Eyre's views were echoed thirteen years later by Lord Lytton, Secretary of State for the Colonies, as expressed in an 1859 letter to Douglas: "…whilst making ample provision …for the future sustenance and improvement of the native tribes, you will, I am persuaded, bear in mind the importance of exercising due care in laying out and defining the several reserves, so as to avoid checking at some future day the progress of the white

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[646] Waitangi Tribunal Ngai Tahu Land Report, 27, Section 8.8.7.

[647] Ibid.

colonists."[648] *However, Eyre's views were only partially consistent with those of Douglas, at least with respect to the reserves allocated by him on Vancouver Island in the early 1850s. Douglas did not favour consolidation onto large reserves, but the few reserves he did allocate during this period were small. Nonetheless, he was prepared to locate reserves on harbours and river mouths, and adjacent to fledgling white settlements, much to the annoyance of early settlers.*

The Waitangi Tribunal and Evison are united in their conclusion that Mantell interpreted his instructions to mean that he was to set aside as few and as small reserves as possible. To achieve this goal he was quite ruthless in his dealings with the Ngai Tahu, misrepresenting the terms of the agreement with Kemp, refusing to take any note of their wishes and outright bullying. Between August and December 1848, Mantell created eleven reserves, and using a formula of ten acres per person, he set aside a total of 6,359 acres for a population he estimated at 637.[649] The reserved land represented ten acres per head, but only .008% of the area (20,000,000 acres) acquired.[650]

In January of 1864, Douglas made this comment on his Indian reserve policy: "The areas…set apart, in no case exceed the proportion of 10 acres for each family concerned."[651] *The identically arbitrary practices of Mantell and Douglas with respect to reserve allocation appear to be coincidental. The disproportion between the huge area included within the Ngai Tahu agreement and the tiny acreage reserved is astonishing.*

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[648] Letter dated May 20, 1859 from Douglas to Sir E.B. Lytton, reproduced in British Columbia, *Papers Connected with the Indian Land Question, 1850-1875*, 18-19.

[649] Evison, *Te Wai Pounamu*, 293.

[650] Waitangi Tribunal Ngai Tahu Land Report 27, section 2.4.

[651] James Hendrickson, ed. *Journals of the Colonial Legislatures of the Colonies of Vancouver Island and British Columbia, 1851-1871,* Vol IV (Victoria, BC: British Columbia Archives, 1980), 80.

The area covered by the Vancouver Island Treaties is miniscule in comparison, but the area of the treaty reserves is generous only in comparison to the Ngai Tahu reserves. Douglas would not have tolerated Mantell's sharp practices, but Douglas' successor in the matter of reserve allocation, Joseph Trutch, would have thoroughly approved. All of the South Island deeds, before and after 1848, set out the location and extent of reserves. Kemp's Deed is a unique exception in this regard. It is an unfortunate happenstance that this was the example chosen by Barclay to form the template that would be used for all fourteen Douglas Forms. Thanks to Kemp and Mantell, deferring the negotiation of the lands to be reserved or excepted had dire results for the Ngai Tahu. The long delay between the formation of the Vancouver Island Treaties and the formation of reserves meant that many former village and resource sites were occupied by settlers, and thus 'off the table' as far as reserve commissioners were concerned.[652] *This failure created many hardships for First Nations, and deep feelings of injustice, which are now playing out in bitter court battles.*

Complaints by Ngai Tahu about the reserve allocation began immediately, via letters and delegations of chiefs sent to Wellington in 1849, all of which were ignored,[653] and Ngai Tahu protests about the loss of their land continued for the next one hundred and fifty years. For example, in 1868 the Ngai Tahu were able to bring their complaints before the recently created Native Land Court,[654] and Chief Judge Fenton grudgingly

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[652] For this story, see Paige Raibmon, "Unmaking Native Space: A Genealogy of Indian Policy, Settler Practice, and the Microtechniques of Dispossession." In *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest*, edited by Alexandra Harmon, 56-86. Seattle: University of Washington Press, 2008.

[653] Evison, *Te Wai Pounamu,* 298-304.

[654] For the history of this unique institution, see David V. Williams, *'Te Kootitango Whenua': The Native Land Court 1864-1909* (Wellington: Hua Publishers, 1999).

agreed to a modest increase in the size of their reserves.[655] As noted by Evison, by the 1870s, "The writing of parliamentary petitions replaced the writing of letters to the Governor, as a means of seeking redress."[656] As well, Maori complaints began to focus less on reserve size and more on the scope of the term "mahinga kai" as used in the Ngai Agreement. For the Maori, the phrase connoted more than cultivations. For example, in 1874 a number of Ngai Tahu chiefs sent a petition addressed to Parliament, reiterating their understanding of the promises made to them by Kemp in 1848: "…the Governor will apportion you land for your children, besides your abodes and your cultivations; your eel-pas[657] shall remain yours also; the large rivers shall remain yours also; your fishing ground on the coast shall remain yours also, &c. Little of all this been fulfilled to us by the Government – much of it is wholly forgotten."[658]

In 1879 a royal commission (the first of several)[659] was appointed to enquire into Ngai Tahu claims. The Smith/Nairn Commission, as it became known, is the most relevant for the purposes of this chapter, because it contains translations of extensive testimony by chiefs who were present during the negotiation of the Ngai Tahu Agreement.

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[655] Evison, *Te Wai Pounamu*, 417-427.

[656] Ibid., 437.

[657] The word pa is often defined "fortified village" Evison, *The Ngāi Tahu Deeds*, 288. In this case it is used to designate an eel weir.

[658] Reproduced in "Appendix to the Report of the Joint Committee on Middle Island Native Claims," Appendices to the Journals of the New Zealand House of Representatives, 1888, session I, I-08.

[659] See for a partial list see Orange, *An Illustrated History of the Treaty of Waitangi*, 224.

In British Columbia, the mandate of the Joint Reserve Commission (1876-80)[660] *and the subsequent McKenna/McBride Commission (1912-16)*[661] *did not include investigating the formation or implementation of the Vancouver Island Treaties. The reports of the Joint Reserve Commission do not record any discussions with First Nation representatives concerning the Vancouver Island Treaties, even though the commissioners were aware of their existence. The only such discussion recorded in the proceedings of the McKenna/McBride Commissioners took place with Dick Whoakum at Nanaimo, and only at his insistence.*

2. The Smith/Nairn Commission (1879-1880)

In 1879, prominent Maori leader H.K. Taiaroa[662] persuaded George Grey, at this time the elected premier of the country, to set up a Royal Commission to investigate Ngai Tahu claims. Two commissioners were appointed, Judge Thomas Smith of the Native Land Court, and Francis Nairn, a Nelson settler.[663] On the first day of hearings the Commission heard from Messrs. Kemp and Mantell, and "On the second day of the…hearing the elderly chiefs…were invited to come forward with their own account of what had happened with Kemp and Mantel in 1848. Natanahira Waruwarutu gave evidence first."[664] While much of the testimony of the chiefs was taken up with the location of contested boundaries, they were also asked whether Kemp's translation of

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[660] For more see the UBCC website: jirc.ubcic.bc.ca

[661] For more see the UBCIC website: http://www.ubcic.bc.ca/Resources/final_report.htm#axzz3vqHdO7sO

[662] A member of the New Zealand Legislative Council who had been elected to the House of Representatives to represent the Southern Maori in 1871. Evison, *Te Wai Pounamu,* 435.

[663] Evison, *Te Wai Pounamu,* 442; Taiaroa appointed the law firm of Izard and Bell to assist at the Commission's hearings.

[664] Ibid., 443.

'mahinga kai' as 'plantations' adequately described the scope of the Maori phrase. The responses of two chiefs to this query are presented, and the first is the following exchange from the examination of Waruwarutu by Mr. Izard, commission counsel:

> Izard:
> I want to go back to the original signing of the deed. In this deed the words are mentioned 'Mahinga Kai'. What do you understand by that? What is the meaning of that term?
> Waruwarutu:
> Mahinga kai is not exclusively confined to land cultivated, but it refers to places from which we obtain the natural products of the soil without cultivating. You know, the plants that grow without being cultivated by man. The whole of this country was covered with Ti or cabbage trees in former times. There was also the fern root, which is not usually cultivated….There were also wood-hens….There were also all the different berries the natives used to get from the forest trees. These were the 'mahinga kai' the natives meant. The promises have not been fulfilled yet. The land has all been sold by the Crown to Europeans.[665]

This prompted Commissioner Smith to ask that, given the extent of mahinga kai, "where was the land of the Pakeha"? Waruwarutu replied that "The Maoris know what parts they did not use for mahinga kai, and that was the part which was to go to the Europeans – the land not known as mahinga kai."

At a hearing of the Commission held in 1880, Chief Tiramorehu gave this description of mahinga kai:

> (Question) Do you mean to say that you thought when you sold this land to Mr. Kemp that you were keeping back all these mahinga kai?
> (Answer) Yes.
> (Question) What land then was to go to the pakeha?
> (Answer) The same land
> (Question) How could it go to the pakeha and be kept back too?
> (Answer) That was mentioned before the sale.
> (Question) I suppose what you mean to say is that you would be allowed to continue to cultivate where you cultivated before and that you were not parting with your rights to use it as a mahinga kai?

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[665] NZA, Testimony of Chief Waruwarutu at Smith/Nairn Commission, Ngai Tahu Claim, file Wai 27, record B3, 8 May 1879. A very similar account was given by Te Uki. Quoted in Evison, *Te Wai Pounamu*, 444.

> (Answer) This was mentioned before Kemp: 'If you give us plenty of money for our land, you will have our land, and if you do not give us what we want, we will have all the mahinga kai back for ourselves.' There are a lot of places along the coast here where the mahinga kais are pretty far apart from one another where the people are living now.[666]

Historian Alan Ward noted that at a later point in his testimony, Tiramorehu "…went on to suggest that, before the sale, it was discussed with Kemp that the settlers could have their sheep runs on 'the big blocks of land, placed between each mahinga kai."[667]

The outline provided by the Ngai Tahu chiefs in their testimony is very similar to, but much more detailed than, the statements by Chief David Latass at Saanich, and the Washington Chiefs at Puget Sound and Cape Flattery. It also demonstrates that Indigenous peoples from widely separated parts of the world, when negotiating the terms of their coexistence with newly arrived representatives of settler governments, responded with similar proposals to share the use and occupation of their land and resources.

The Ngai Tahu had a clear concept of how they and the pakeha would co-exist on the land, consistent with their traditional understanding of land management. Once settlers began to arrive on the South Island in significant numbers it became clear that they could not conceive of co-existing with the Maori on any but their own terms, consistent with their values as to the best use of land. The concepts were seemingly incompatible, and in the end colonial practices won out and the South Island Maori were debarred from access to or say in the fate of their traditional food sources.

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[666] Copy of transcript of evidence before the Smith/Nairn Commission. NZA, Smith/Nairn Commission, file Wai 27. Quoted in Waitangi Tribunal, "The Ngai Tahu Land Report (Wai 27)," record P10, Evidence of Anthony Walzll.

[667] Ward, "A Report on the Historical Evidence," 175.

D. Land Transactions After 1848

As succinctly described in the Wai 27 Report, for a few years,

> There was a period of adjustment when the new Pakeha communities were not self-sufficient in foods and other necessities, when the newly arrived settlers welcomed fresh vegetables, fish, firewood, pigs and other commodities. Ngai Tahu responded to this market by planting their reserves in crops and acquiring livestock. Some built European styled dwellings. Maori labour, too, provided a base income. In the early days, Maori vessels carried cargo and Maori ferrymen took passengers across the island's waters.[668]

Ward has provided a graphic summation of the end of this brief period: "The [sheep] run-holders coming into the [Canterbury] plains quickly burned the top cover to promote fresh pasture and destroyed ti [cabbage tree] stands and began to drain swamps. Tiramorehu naturally complained to the Smith-Nairn inquiry that, contrary to their expectations in 1848, the swampy places, 'the mahinga kai' had been drained, the rivers stocked with new fish species, and the Nagi Tahu debarred from traditional usage of them."[669]

The interactions between the Maori and Pakeha during this brief 'grace' period are very similar to the relations between the Salish and whites in the years immediately following the Vancouver Island and Washington Treaties.

While it is clear that the Ngai Tahu Agreement is very different from its predecessors, was it used as a precedent for future land transactions between the Maori and the Crown? The answer is a definite no. None of the later deeds deferred the allocation of reserves. According to Ward, "…the provision for mahinga kai in the Kemp deed was little more than an accident, [but i]ts inclusion gave Ngai Tahu the opportunity

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[668] Waitangi Tribunal, "The Ngai Tahu Land Report (Wai 27)," section 18.3.1.

[669] Ward, "A Report on the Historical Evidence," 177

from the 1870s of defending their interpretation of the original agreement, using the actual wording of the deed itself."[670] During the Wai 27 proceedings, "Crown counsel, Shonagh Kenderdine, noted that the only deed in which any [explicit] reservation of mahinga kai was made was Kemp's."[671] In fact, the drafters of later deeds went out of their way to avoid any such broad terminology. For example, the Port Levy Deed of 1849, negotiated by Mantell with the Ngai Tahu for land on the Banks Peninsula, contains this provision: "And all the cultivations and all the places situate outside of the boundary [of the reserve]…are to be abandoned by the Maoris in this year that the land may be clear…."[672] The Murihiku Purchase of 1853, again negotiated by Mantell with the Ngai Tahu for 3,000,000 acres of land south of Otago, contains an even more detailed description of the intent to effect a total separation of the Ngai Tahu from their land and its resources, who surrendered "…all the lands within those boundaries [the ceded territory], with the anchorages and landing-places, with the rivers, the lakes, the woods, and the bush, with all things whatsoever within those places, and in all things lying thereupon."[673]

These deeds made it easier for the colonial government of New Zealand, once the colonists arrived, to deny the Ngai Tahu any rights the Ngai Tahu may have thought they retained to traditional food gathering places outside the reserve areas. The same result was experienced by Vancouver Island First Nations, in spite of the provisions in the

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[670] Ibid.

[671] Waitangi Tribunal, "The Ngai Tahu Land Report (Wai 27)," section 2,12.

[672] Evison, *The Ngāi Tahu Deeds,* 146.

[673] Ibid., 161.

Douglas Forms purporting to protect their hunting and fishing activities on the ceded land.

By 1860 five remaining chunks of Ngai Tahu territory on the South Island had been alienated,[674] leaving no land in Maori hands other than the reserves set aside pursuant to the deeds. With respect to the adequacy of reserves, Ward noted that "there was little if any provision for preservation and continued access to…traditional food resources," and he gave the example of fishing: "Even in the late 1860s when further reserves were made to allow for [inland] fisheries, they usually provided small blocks of land near a resource, but insufficient land to control the resource or ensure continued access in the face of alternative land and water uses."[675]

While the dispossession of Maori land on the South Island was nearly complete by 1860, a very different history was emerging on the North Island. With awareness of what the British meant by a 'land sale' came a growing Maori resistance to further sales on the North Island, which exacerbated tensions to the point where violence erupted in 1860, and the ensuing "New Zealand Wars" continued until 1872.[676] Regardless of who 'won' the war, the resistance movement succeeded in the sense that by 1861 the Maori on the North Island still held 22,000,000 acres, out of a total of 28,000,000, a far cry from the situation on the South Island. Mainly through the efforts of the Native Land Court,

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[674] The Ngai Tahu land on Stewart's Island just south of the southern tip of the South Island was alienated in 1864 (The Rakiura Deed); Evison, *The Ngāi Tahu Deeds,* 56-271.

[675] Ward, "A Report on the Historical Evidence," 177. The Ngai Tahu also brought a fisheries claim before the Waitangi Tribunal, which resulted in "The Ngai Tribunal Sea Fisheries Report, 1992." The claim is based not on Kemp's Deed, but on the provisions concerning fisheries in Article II of the Treaty of Waitangi. As a result, I decided not to deal with that claim in this chapter.

[676] King, *The Penguin History of New Zealand*, 218.

Maori-held land on the North Island gradually declined from the 1861 total to 7,000,000 acres in 1911.[677]

The divergent history of the North Island is one reason why I chose to focus on the South Island in the latter part of this chapter. No wars were fought over land on the South Island, a history of peaceful struggle shared with the First Nations of Vancouver Island. However, the Ngai Tahu had the ability to advance their grievances to successive governments with a frequency and effectiveness that the treaty First Nations of Vancouver Island could only dream of until the second half of the twentieth century, as will be explained in the next chapter.

[677] Banner, *Possessing the Pacific,* 124.

Chapter V: The Second Silencing (1864-2015)

A. Introduction

As the major focus of my research is the formation of the Vancouver Island Treaties, the dissertation could end with the end of treaty making, but I believe it is important to track the evolution over time of attitudes towards their existence and import. Specifically, the goal of this chapter is to demonstrate the existence and persistence of a second silencing. To that end, the chapter is divided into three sections, the first of which looks at the words and actions of politicians, government officials and settlers between 1864, when Douglas retired, and 1964, when the B.C. Court of Appeal handed down its landmark decision in *R. v.White & Bob*, confirming the treaty status of the Douglas Forms. There are many examples to draw from, but for reasons of space the section must be illustrative not exhaustive.

The second section consists of an exhaustive chronological review of the small number of published works that have purported to provide an outline of the Vancouver Island Treaties. As mentioned in the introductory chapter, it may seem odd to include the review near the end rather than the beginning of the dissertation. The reasons for this re-ordering bear repeating. First, as will be seen, the literature focuses mainly on the Douglas Forms, and therefore a review in the Introduction would be very difficult, given that the Douglas Forms are not described until Chapter II. Secondly, launching into a review the literature prior to the presentation of the First Nation accounts would be an exercise in once more privileging the Colonial account, a bias I am determined to avoid. Lastly, the placement is an assertion that the literature, until recently, has been complicit in the silencing of the Treaties.

The third section details the role of the courts in determining the legal status and the terms of historical treaties between First Nations and the Crown in Canada, including the four main Vancouver Island Treaty cases. Again, it may seem odd to include this review in a chapter on the silencing of the Treaties. While the outcome of the Vancouver Island Treaty cases reviewed favoured the First Nation protagonists, this section demonstrates that they have at the same time contributed to the silencing of the Treaties. Finally, it is not possible to fully understand the Vancouver Island Treaty cases without an awareness of the development of the broader case law. While most of the Canadian cases since 1964 have contributed to the growth of aboriginal rights in Canada, they have done so with very little recognition of First Nation understandings of the treaties, and thus have played their part in the overall silencing.

B. Politicians, Government Officials and Settlers (1864-1964)

Active silencing began immediately after the treaty meetings. There is no record of the completed forms being sent to the HBC in London, or to the Colonial Office. No copies were distributed locally. The originals were squirreled away in a safe in the Lands and Works Office in Victoria.[678]

The status of the Douglas Forms first became an issue in 1870 when the Aborigines' Protection Society complained to British Columbia Governor Musgrave about "the condition of the Indians in Vancouver Island."[679] Musgrave delegated the response to Joseph Trutch, Commissioner and Lands and Works, who wrote a long

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[678] Adele Perry, "The Colonial Archive on Trial: Possession, Dispossession, and History in Delgamuukw v British Columbia" in *Archive Stories*, ed. Antoinette Burton (Durham: Duke University Press, 2005), 325-350, at 328-329.

[679] British Columbia, *Papers Connected with the Indian Land Question, 1850-1875,* Appendix B, 9.

memorandum which included this comment: "…the title of the Indians in the fee of the public lands, or of any portion thereof, has never been acknowledged by Government, but, on the contrary is distinctly denied."[680] According to Trutch, in 1850 and 1851 Douglas gave "presents" to the local First Nations "for the purpose of securing friendly relations…and certainly not in acknowledgement of any general title of the Indians to the lands they occupy."[681]

In1875, slightly edited versions of the Douglas Forms were published in a miscellaneous compendium of documents entitled *Papers Connected With The Indian Land Question*.[682] It is unlikely that any treaty First Nations were aware of the existence of the Douglas Forms prior to the appearance of that publication. Even though the volume was published by the "Government Printer," it had been proposed by W. F. Tolmie, an opposition member of the legislature, and was produced over the strenuous objections of the premier, G. A. Walkem. A report intended to accompany the bundled documents was prepared, but immediately squelched by the premier.[683]

In the 1880s the published versions of the Douglas Forms became a political issue, when members of a First Nation at Metlakatla on the north coast of B.C. demanded compensation for their land, and pointed to the published versions of the Douglas Forms as a precedent. They were encouraged in their efforts by a number of prominent Protestant clergymen, who wrote supportive letters to the editor of the Victoria Daily

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[680] Ibid., 11.

[681] Ibid.

[682] Ibid. In spite of its importance, the book was not reprinted until 1987.

[683] Paul Tennant, *Aboriginal People and Politics: The Aboriginal Land Question in British Columbia, 1849-1989* (Vancouver: UBC Press, 1990), 47-49.

Colonist newspaper. A retired HBC officer, Dr. J.S. Helmcken was drawn into the fray, responding angrily to claims by the clergy that Indians possessed an interest in land. For example, the Rev. E. Robson, a missionary in Nanaimo, wrote a letter to the editor[684] in 1886, which began as follows: "Several statements made by Dr. Helmcken in his correspondence on the Indian question in your columns…will place the Doctor in the front rank of 'missleaders'." He proceeded to take Helmcken to task for statements such as this: "British Columbia has not, during the past 35 years, acknowledged any Indian title to land save that given them by, may I say, their conquerors – not by sword, but by civilization and commerce." Robson countered Helmcken's assertion by reference to the Douglas Forms: "Copies of these documents, 13 in number,[685] are now before me, and are denominated 'Conveyance of Land to Hudson's Bay Company by Indian Tribes'," which is the exact title of the Douglas Forms as printed in *Papers Connected*. Robson also quoted from some colonial correspondence, and lamented the absence of any agreements post-1854. He concluded that, "The evil effects of this condition of things has shown itself from year to year in dissatisfaction and difficulty among the Indians where the whites have settled, without the Indian title having first been dealt with."

This prompted an angry response from Helmcken[686] in which he noted that, "A despatch of Sir James Douglas dated March 25th, 1861, and the answer of the Duke of Newcastle thereto, was published in The Colonist, and are triumphantly held up by some as a proof that the Indians held a legal title to the land." In that 1861 letter Douglas had

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[684] E. Robson, "Dr. Helmcken's Letters," *Victoria Daily Colonist* (Victoria, BC), 25 November 1886, A2.

[685] The 14th, of course, had no text.

[686] D. J. Helmcken, "The Indian Title," *Victoria Daily Colonist* (Victoria, BC), 28 November 1886, A2.

provided an interesting retrospective account of his policy with respect to acquiring "the native rights in the land":

> 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; and the sense of injury might produce a feeling of irritation against the settlers, and perhaps disaffection to the government that would endanger the peace of the country.[687]

Helmcken then quoted from Douglas' letter and issued the following invitation to his readers: "Now observe: Sir James does not state that the Indians have a title to the land, but that the native Indians have distinct ideas of property in land, that is to say Indian ideas, not legal ones."[688] Helmcken opined that, "Can anything be more plain than that in this way Sir James made treaties of amity and friendship and paid for them as a matter of policy!" As far as Helmcken was concerned, "It matters not how the papers were made out; the Indians not having any legal right in the land could not give any conveyance of land."[689] Helmcken's revisionist view as to "Indian title" became the official position of the British Columbia government until the commencement of the modern treaty process in the early 1990s.

Similar sentiments were expressed by other prominent colonists, such as Judge Matthew Bailie Begbie. His views on "Indian Title" are of particular interest as his attitude appears to have hardened between 1860 and 1886. In 1860 he was able to advise

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[687] CD, Colonial Office Records, Letter from Douglas to Lord Newcastle, 4779 CO 305/17, 25 March 1861, accessed 17 August 2015, http://bcgenesis.uvic.ca/getDoc.htm?id=V61024.scx.

[688] Helmcken, "The Indian Title," A2.

[689] Ibid.

Douglas as a matter of policy that, "I may also observe that the Indian Title is by no means extinguished. Separate provision must be made for it, and soon; though how this is to be done will require some consideration."[690] In 1886 he again had occasion to remark on the issue, this time in his capacity as a judge. He presided over a suit brought by the Songhees, in which they opposed a proposed encroachment onto the reserve secured to them by their treaty with Douglas. In his bench book, kept during the course of the trial, Begbie observed that, "until a reserve had been duly established, the Indians (not being enfranchised) had no rights to the land, nor could acquire any rights much less transfer any right." According to legal historian David Williams, "He went on to conclude that they had merely a right of occupation at the will of the Crown."[691] It seems that the Vancouver Island Treaties had transformed from a necessary precaution to an embarrassing anomaly, to be explained away by any and all means. This colonial re-categorization of the Treaties as mere expressions of "amity and friendship" was intended to empty them of any substantive content.

These attempts also ignored the issue of the intent and effect (if any) of the promises contained in second half of the Douglas Forms. A detailed description and analysis of the implementation, or non-implementation, of these terms is important, but beyond the remit of this dissertation, and the barest of outlines will have to suffice. With respect to the conversion of "village sites and enclosed fields" into Indian reserves, the dissertation must perforce, remain silent on the subject because the issue is presently

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[690] David R. Williams, *"…The Man For A New Country": Sir Matthew Baillie Begbie* (Sidney, BC: Gray's Publishing, 1977), 105.

[691] Ibid., 106.

before the B.C. Supreme Court, and I have been retained as an expert witness by counsel for the Esquimalt Nation.

With respect to the hunting and fishing provisions in the Douglas Forms, I agree with the comments of Sanderson, J., made in the course of her 2011 judgment in the case of *Keewatin v. Minister of Natural Resources*. She was considering the reaction of the Ojibway people to attempts by Treaty Commissioner Morris to explain the "harvesting provision" in Treaty No 3:

> Lovisek[692] gave evidence that some historians have questioned whether the Ojibway would have paid much attention to a statement that they would be allowed to hunt and fish because they already[693] had the right to hunt and fish, and Morris did not advise them of any intention to take away that right. The Ojibway may have understood Morris' use of the words "before the other lands are wanted" to imply that a further request would be made if and when lands were wanted.[694]

In the context of the Vancouver Island Treaties I believe that, even if Douglas (through his translator) had made reference to hunting and fishing, the First Nations would not have understood him to mean that they were being granted the liberty to continue those occupations, or that their ability to pursue these activities in the future could be curtailed without their prior consent. Nonetheless, successive colonial, provincial and federal governments thought otherwise, and embarked upon a long campaign to bring these activities under their control.

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[692] Joan Lovisek holds a PhD in anthropology from McMaster, and specializes in Ojibwa ethno-history.

[693] Emphasis in original.

[694] *Keewatin v Minister of Natural Resources* [2012] 1 CNLR 13 (Ontario Superior Court of Justice) at para 502. Her decision in favour of the Ojibway claim was overturned on appeal.

According to legal historian Douglas Harris,[695] once B.C. joined Confederation in 1871, government regulation began to impinge on First Nation fisheries, ending with the Federal Department of Fisheries assumption of complete control over all "native" fisheries by the end of the nineteenth century. During this process the Vancouver Island Treaties "…were ignored, or considered to have been superseded by legislation." Thus, in 1878, B.C. Indian Reserve Commissioner G. M. Sproat felt it necessary to remind the Superintendent General of Indian Affairs in Ottawa of the existence of the "fishing as formerly" provision in the Douglas Forms: "I beg leave to remark that…there are old written agreements between certain tribes in Vancouver Island and Mr. Douglas…acting on behalf of the Crown, by which the title was recognized and extinguished on certain conditions, and that one of these conditions was that the Indians should be at liberty to carry on their "fisheries as formerly"…. It is too much the fashion to neglect these old agreements."[696] By 1898 the Department of Indian Affairs, via an intra-department memo, conceded defeat in its sporadic attempts to obtain some recognition of the Douglas Forms from the Department of Fisheries: "The fact of the Treaties having been made with the Indians by which they were induced to surrender their lands would appear to have no weight with the Fisheries Department in determining the rights of the Indians."[697]

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[695] Douglas C. Harris, *Fish, Law and Colonialism: The Legal Capture of Salmon in British Columbia* (Toronto: University of Toronto Press, 2001), 77.

[696] NAC, RG10, vol 3662, file 9756, pt.1.

[697] NAC, RG10, vol 3908, file 107297-1; A history of *Indian Government Under Indian Act Legislation, 1868-1951*, by Wayne Daugherty and Dennis Madill, noted that "During this period [1880-1900] the Indian Affairs Department occupied a low position in contrast with other Departments," and "Other areas of government paid little attention to the needs of the Indian Affairs Department." Wayne Daugherty and Dennis Madill, *Indian Government Under Indian Act Legislation, 1868-1951* (Ottawa: Treaties and Historical Research Centre, Department of Indian Affairs, 1980), 21.

With respect to the provision in the Douglas Forms confirming the "liberty to hunt over the unoccupied lands," I am aware of only one attempt during this period to obtain recognition of this promise, again from the pen of Sproat, who wrote to I. W. Powell, the Federal Indian Commissioner, in 1876:

> I notice in the 'Standard' newspaper of 6 July, that two Indians were fined $10.00 in the Police Court at Victoria for exposing for sale some deer skins in 'contravention of the game law'. The report does not state to what tribe these Indians belonged, but if, as is probable, they belonged to one or other of the tribes, with which the Crown made formal agreements as to surrendering their lands in 1850 and 1851…then [these] Indians committed no offence, because it was expressly agreed that they should be 'at liberty to hunt over the unoccupied lands as formerly'.[698]

By the early years of the twentieth century, provincial game laws were being strictly applied to both treaty and non-treaty First Nations, as shown in the 1916 annual report of the ever-zealous Bryan Williams, the first Provincial Game and Forest Warden:

> Many of the Indians are raising their old story of rights to the land and rights to the game and fish, and it is very evident that they have been wrongly advised. In consequence it has been absolutely necessary to take a firm stand with some of them as they quite refused to listen to reason. It was most unfortunate their adopting this attitude as not only did game suffer, but many Indians did also, as there were more prosecutions of Indians this year than for the three or four previous years put together; some of them not only being sent to gaol, but also losing some valuable furs.[699]

The application of provincial hunting regulations to treaty First Nations continued until the 1964 BC Court of Appeal decision in *White & Bob*.[700]

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[698] NAC, RG10, vol 3633, file 6425-1.

[699] Bryan Williams, Provincial Game and Forest Warden, Twelfth Report, (British Columbia Sessional Papers 1916).

[700] The case is described in Section D of this chapter.

Why did the colonists and their governments, after the mid-1860s, go to such lengths to deny that the Douglas Forms effected, or even contained, a cession provision, or that the provisions regarding fishing, hunting, village sites and enclosed fields had any effect in law? There are two possible answers, one pragmatic and the other has to do with ideology. In the short term they were determined to avoid the vexation and expense of a resumption of treaty-making, which would follow upon any acknowledgement of the Douglas Forms as a valid precedent. The other potential answer is to be found in Michel-Rolph Trouillot's 1995 book entitled *Silencing the Past: Power and the Production of History*.[701] He observed that, "When reality does not coincide with deeply held beliefs, human beings tend to phrase [or create] interpretations that force reality within the scope of these beliefs. They devise formulas to repress the unthinkable, and to bring it back within the realm of accepted discourse."[702] His example was the Haitian Revolution at the end of the eighteenth century. At that time and long afterwards, the idea of a successful revolution led by black slaves was unthinkable to Europeans. The mid-nineteenth century Vancouver Island Treaties may be another example. I would argue that the idea of a series of treaties between James Douglas and Vancouver Island First Nations, negotiated between equals, and setting out the terms of their joint occupation of the same territory, has been unthinkable to the non-First Nation inhabitants of Vancouver Island for most of the last 160 years.

What are these "formulas" mentioned by Trouillot? There are two, both "formulas of silence," and by silence he means "an active and transitive process" in which someone

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[701] Michel-Rolph Trouillot, *Silencing the Past: Power and the Production of History* (Boston: Beacon Press, 1995).

[702] Ibid., 72.

"'silences' a fact."[703] The first formula or technique tends "to erase directly the fact of a revolution." According to Trouillot, early European commentators and historians (and thus Western history) either downgraded the Haitian Revolution to a revolt or rebellion, or ignored it. Similarly, on Vancouver Island, government officials refused to acknowledge the Treaties, as "treaties," referring to them as "conveyances," "agreements" or "arrangements." As will be demonstrated in the next section, prior to the 1970s, popular and scholarly literature on the history of British Columbia largely ignored the Treaties.

C. Literature Review: Part 2

The focus of this review is on the formation of the treaties, not on antecedents or subsequent implementation. Since there are no-book length monographs on the treaties, and not very many accounts in journal articles or book chapters, it is possible to undertake a literature review that is comprehensive without being unwieldy. A review of the literature has never been done before, and is long overdue. The works are divided into three subsections, presented chronologically to make plain the very gradual evolution of attitudes, narratives and analyses. The first period, from 1857 to the 1960s, spans the largely barren first century in the literary life of the Treaties. The second is much shorter, from the 1970s to the 1980s, and saw the relatively rapid appearance of the first significant body of work. The final period, from the 1990s to date, has witnessed a welcome movement away from work focused on colonial accounts, and towards the inclusion of Indigenous perspectives. The goals of the review are to acknowledge how far

[703] Ibid., 48.

critical analysis of the Treaties has progressed, and at the same time demonstrate that much additional work is needed before the literature presents, as fairly and fully as possible, the viewpoints of all parties to the Treaties.

1. Hardly a Ripple (1857-1969)

The first published reference to the Fort Victoria Treaties (of which I am aware) is contained in a "Description of Vancouver Island, by its first Colonist, W. Colquhoun Grant":[704] "The lands of the Sanetch, Tsomass, Tsclallum, and Soke tribes have been purchased from them by the Hudson Bay company in the name of the British Government, leaving to the natives only a few yards of ground reserved around the sites of their villages."[705] However, he acknowledged that, "Hitherto, in Vancouver Island, the tribes who have principally been in intercourse with the white man, have found it for their interest to keep up that intercourse in amity for the purposes of trade, and the white adventurers have been so few in number, that they have not at all interfered with the ordinary pursuits of the natives."[706] He went on (p.304) to give this prescient warning: "As the Colonial population increases, which, however, it is not likely to do very rapidly under the auspices of the Hudson's Bay Company, the red man will find his fisheries occupied; and his game, on which he depended for subsistence, killed by others….."[707]

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[704] W. Colquhoun Grant, "Description of Vancouver Island, by its first Colonist, W. Colquhoun Grant," *Journal of the Royal Geographical Society of London*, 27 (1857): 268-310.

[705] Ibid., 294.

[706] Ibid., 303.

[707] Ibid., 304.

Grant had arrived in the colony in 1849 in the dual capacity of HBC surveyor and independent settler. He failed at both and departed in 1853.[708]

As mentioned earlier, the collection of documents entitled, *Papers Connected With The Indian Land Question, 1850-1875* (hereafter "*Papers Connected*"), [709] was published in 1875. The volume commences with a list of fourteen documents, collectively described as the "Conveyance of Land to Hudson's Bay Company by Indian Tribes." The text of each "conveyance" was transcribed, except for the last, which was described only as follows: "Saalequun Tribe – Nanaimo. A similar conveyance of country extending from Commercial Inlet, 12 miles up the Nanaimo River, made by the Saalequun Tribe, and signed Squoniston and others." These seven pages represent the first public printing of the Douglas Forms. However, the important correspondence from 1849 to 1854, between Douglas and the H.B.C in London concerning the Vancouver Island Treaties, is not included. The balance of the compendium consists largely of government correspondence and reports on the subject of Indian reserves, dating from 1858 to 1875. There is no introduction or commentary on the documents. The volume gives every appearance of having been assembled in haste. While there are a few references to the Treaties in the one hundred and seventy pages of documents, they are never referred to as such.

In spite of its relative obscurity, the first edition of *Papers Connected* was cited from time to time in scholarly literature, as demonstrated by a 1914 article in *The*

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[708] Barry M. Gough, "Walter Colquhoun Grant," in *Dictionary of Canadian Biography*, Vol VIII (Toronto: University of Toronto/Université Laval, 2003), accessed 14 October 2015, accessed 10 January 2015, http://www.biographi.ca/en/bio/grant_walter_colquhoun_9E.html.

[709] British Columbia, *Papers Connected with the Indian Land Question, 1850-1875,* 5-11.

Washington Historical Quarterly, by W.J. Trimble, entitled "American and British Treatment of Indians in the Pacific Northwest."[710] He stated that "Governor Douglas before the founding of the Colony [of British Columbia] had…as agent for the Hudson's Bay Company…bought in 1850-51 considerable areas from various tribes in Vancouver's Island."[711] As authority he cited the *Papers Connected*, and even reproduced "a clause common to all" of the "conveyances."[712] Notwithstanding the acknowledgment of the Treaties, the main thrust of the article was the American treaties with Indians in the north-western states, and the absence of treaties on the remainder of Vancouver Island and the entirety of mainland British Columbia.

The first history of British Columbia produced by a professional historian is Walter Sage's *James Douglas and British Columbia*, published in 1930.[713] Sage described why and how Douglas "purchased" tracts of "Indian" land around Victoria: "Before any land could be sold to settlers or otherwise disposed of, it was first was necessary that the Indians should relinquish their claims. This was rather a delicate matter, but it was successfully accomplished by James Douglas in the spring of 1850."[714] Sage then quoted extensively from Douglas' reporting letter of May 16, 1850 to HBC Secretary Archibald Barclay. Sage concluded that "There can be no doubt that Douglas

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[710] W.J. Trimble, "American and British Treatment of Indians in the Pacific Northwest," *The Washington Historical Quarterly*, 5. 1 (1914): 32-54.

[711] Ibid., 47.

[712] Ibid., 47.

[713] Sage, *Sir James Douglas*.

[714] Ibid., 60.

had made very favourable terms with the natives on behalf of the company, but from his letter it is evident that he tried to play fair."[715]

In 1932 Leonard Wrinch, a student of Walter Sage, completed a master's thesis at UBC on the *Land Policy of the Colony of Vancouver Island, 1849-1866*, which devoted three pages to the treaties,[716] paraphrasing Barclay's December1849 letter of instruction to Douglas, and Douglas' May 1850 report to Barclay on the Fort Victoria treaty meetings. However, Wrinch noted that Douglas' decision to let the treaty First Nations keep their village sites was a regrettable departure from Barclay's instructions:

> It might have been wiser to accept the advice of H.B.H. [Barclay at the Hudson's Bay House in London] and take the villages. The problem of the reserves which led to so much later friction in Victoria and Cowichan could have been avoided. Douglas, however, had not the power even if he had the inclination to slaughter the Indians or drive them into the interior.[717]

Although Wrinch's last words were (I hope) were a tongue-in-cheek reference to the reputation of the United States government *vis-a-vis* Native Americans, his comment as a whole indicates a belief that the Douglas Forms went too far in securing the existing village sites of treaty First Nations.

In 1945, George Shankel obtained a PhD from the University of Washington on *The Development of Indian Policy in British Columbia*.[718] Like Wrinch, his coverage of the treaties consisted of a three-page paraphrase of Barclay's 1849 letter of instruction,

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[715] Ibid., 161.

[716] Leonard A. Wrinch, "Land Policy of the Colony of Vancouver Island, 1849-1866" (master's thesis, University of British Columbia, 1932).

[717] Ibid., 24.

[718] George Edward Shankel, "The Development of Indian Policy in British Columbia" (PhD dissertation, University of Washington, 1945).

and Douglas' 1850 report on the Fort Victoria agreements.[719] He did attach a copy of one of the Douglas Forms as an appendix. After this brief flurry, the Vancouver Island Treaties vanished from the historical literature on British Columbia for the next quarter century. For example a major history of the province, *British Columbia: a History*, written by Margaret Ormsby and published in 1958,[720] makes absolutely no reference to the Vancouver Island Treaties.

Written in 1955 by historian Robert E. Cail while a graduate student at UBC, but not published until 1974, *Land, Man, and the Law*[721] devotes three chapters to "aboriginal land claims," including one on "Imperial Colonial Indian Policy." Cail duly noted that "Douglas made fourteen agreements" and reproduced the written text of the Teechamitsa Form.[722] He went on to note that, "Whatever Douglas' intent was, it is now evident that the Indians never really understood what was happening" because they mistakenly believed that "they were yielding to the white interlopers only the right to use the land."[723] Cail was strongly of the opinion that Douglas would have continued making treaties had not "The insistence of the British government on colonial self-sufficiency made it impossible for him to do so."[724]

The last work to be considered in this section stands alone in that it represents a definite break from the preceding literature, but equally does not fit within the historical

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[719] Ibid., 18-20.

[720] Margaret Ormsby, *British Columbia: A History* (Toronto: Macmillan, 1958).

[721] Robert E. Cail, *Land, Man and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913* (Vanouver: UBC Press, 1974).

[722] Ibid., 171-172; It is the first of the Douglas Forms set out in British Columbia, *Papers Connected with the Indian Land Question*.

[723] Ibid., 173

[724] Ibid., 171.

writing that followed. Anthropologist Wilson Duff's 1969 article, "The Fort Victoria Treaties,"[725] is arguably still the most valuable source of information on the Douglas Forms. The impetus for the work was Duff's experience as an expert witness during the trial of the *R. v. White and Bob* case. The article began with a very close examination of the Douglas Forms, and continued with an ethnographic study of "Songhees[726] Place Names and History." In the final section, "The Treaties: An Ethnographic Appraisal," Duff concluded that "Douglas' assumption that ownership was exclusive led him into ethnographic absurdities in the treaties" with respect to the delineation of territory.[727]

2. The First Wave (1977-1989)

1977 saw the appearance of the second volume of a two-part history of the province, *British Columbia Chronicle, 1847-1871: Gold and Colonists*, by G.P.V. Akrigg and Helen B. Akrigg.[728] They noted that in the early 1850s, "Douglas was having to negotiate treaties with the Indians since London had decided that the colonists must be protected from any future disputes arising out of Indian land claims." They then reproduced the Teechamitsa Form,[729] without further commentary. That same year saw the arrival of Robin Fisher's ground-breaking book, *Contact and Conflict: Indian European Relations in British Columbia, 1774-1890*, the first book devoted to the

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[725] Duff, "The Fort Victoria Treaties."

[726] The term "Songhees" is used by Duff to identify the First Nations resident in the Greater Victoria area, excluding Metchosin, Sooke and the Saanich Peninsula.

[727] Duff, "The Fort Victoria Treaties," 52.

[728] G.P.V. Akrigg and Helen B. Akrigg, *British Columbia Chronicle, 1847-1871: Gold and Colonists* (Victoria: Discovery Press, 1977).

[729] Ibid., 34-35.

subject.[730] Fisher provided a summary of the provisions of the Douglas Forms, and made this observation: "In the pre-settlement period the Indians had no way of learning about European concepts of land ownership, and the signatories of the treaties probably thought that they were surrendering the rights to the use of the land rather than title to it."[731] Like Cail before him, Fisher attempted to imagine First Nation understandings of what was agreed, without considering the possibility that such understandings were closer to the agreed terms than the Douglas Forms.

In 1979 the Hudson's Bay Record Society published an important volume edited by Hartwell Bowsfield, *Fort Victoria Letters, 1846-1851*,[732] which reproduced a selection of letters from Douglas to (with very few exceptions) Archibald Barclay, the Secretary of the HBC in London. Frustratingly, the replies by Barclay are not reproduced, relegated instead to brief mentions in the footnotes.[733] Nonetheless, the collection has become an essential resource for anyone researching the formation of the Vancouver Island Treaties. The volume also contains a lengthy introduction by Margaret Ormsby (1979),[734] in which she summarizes the 1849 exchange of correspondence between Barclay and Douglas on the need to purchase the lands of the "Indians."[735]

All of the works reviewed so far in this sub-section have contained, at most, three pages on the topic of the Treaties. Finally, in 1981, Denis Madill wrote a report for the

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[730] Robin Fisher, *Contact and Conflict: Indian European Relations in British Columbia, 1774-1890* (Vancouver: UBC Press, 1977).

[731] Ibid., 67.

[732] Bowsfield, ed., *Fort Victoria Letters, 1846-1851*.

[733] Fortunately the problem has been alleviated by the arrival online of "Colonial Despatches: the Colonial Despatches of Vancouver Island and British Columbia 1846-1871," available at http://bcgenesis.uvic.ca/.

[734] Bowsfield, ed., *Fort Victoria Letters 1846-1851*, xi-xcix.

[735] Ibid., lv-lvii.

Department of Indian Affairs on *British Columbia Indian Treaties in Historical Perspective*,[736] containing thirty-six pages on the Treaties.[737] The Fort Rupert and Nanaimo treaties in particular are described in more detail than hitherto. In sum, it represents the longest exposition of the purely colonial version of events, although a number of factual errors significantly reduce the usefulness of the work.

In 1984, historian Barry Gough produced a book entitled *Gunboat Frontier: British Maritime Authority and Northwest Coast Indians, 1846-90*.[738] After a standard short-form recital of the formation of the Treaties, Gough gave his views as to the forces behind the decision to negotiate with First Nations: "These treaties…indicate the growth of European settlement and agriculture on the southern tip of Vancouver Island. They also represent white Victorians' desire to have security in the face of large numbers of Indians nearby."[739] Gough's analysis is typical of the literature of the period in which the leading actor is always Douglas, who instigates and negotiates the Treaties, while First Nations are consigned to the role of extras. The impetus to make the Treaties has everything to do with white settlement, and nothing to do with expectations of First Nations.

In 1988, historian James E. Hendrickson delivered an elegantly written paper, "The Aboriginal Land Policy of Governor James Douglas, 1849-1864,"[740] at a BC Studies Convention. Although it has never been published, photocopies of his paper have

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[736] Dennis Madill, *British Columbia Indian Treaties in Historical Perspective* (Ottawa: Department of Indian and Northern Affairs, 1981).

[737] The remainder of his monograph deals with the portion of Treaty 8 (1899) within north-eastern B.C.

[738] Gough, *Gunboat Frontier*.

[739] Ibid., 71.

[740] Hendrickson, "The Aboriginal Land Policy of Governor James Douglas, 1849-1864," 1-27.

achieved a deservedly wide circulation. He did an excellent job of documenting and describing the respective roles of the Colonial Office and the Hudson's Bay Company in the formation of the colony. He also identified and analyzed many of the ambiguities surrounding Douglas' policies and practices with respect to extinguishing native title and the subsequent allocation of reserves.

The final work to be considered in this subsection is a 1989 article by Hamar Foster, "The Saanichton Bay Marina Case: Imperial Law, Colonial History and Competing Theories of Aboriginal Title"[741]. Ostensibly a mere 'case comment', in truth it is a wide ranging discussion of the Douglas Treaties. Like Duff's 1969 article on the Fort Victoria Treaties, it stands at the cusp of change. It was written just before the Province of B.C. finally acknowledged the existence of aboriginal title, and represents the first work on the Treaties authored by a legal historian. The article's discussion of the Douglas Treaties commences with a description of the Tsawout First Nation as of 1850, who "Not more than a year later…signed the second of the two Saanich 'treaties' with Governor James Douglas in February, 1852."[742] This represents the first time in the literature that the First Nation perspective took precedence over the colonial narrative. Not only that, Foster recounted an oral tradition concerning the formation of the Tsawout treaty.[743] Foster has gone on to be a relatively prolific writer on the Treaties, as evidenced in the next sub-section.

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[741] Foster, "The Saanichton Bay Marina Case." The case is considered in details in Section C.1 below.

[742] Ibid., 630.

[743] Ibid., 632-633.

3. A Sea Change (1990-2012)

In 1990 Political scientist Paul Tennant penned a study of *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989*,[744] which followed the standard (three page) format for describing the formation of the Douglas Treaties, providing extracts from the exchange of correspondence between Douglas and Barclay and reproducing the written version of the Teechamitsa Form.[745] Tennant made no mention of possible First Nation understandings of the treaty process. After stating that "The most important fact about the Douglas treaties is that they stand for an unequivocal recognition of aboriginal title,"[746] Tennant devoted the next seventeen pages to the question of why Douglas stopped making treaties after 1854. One weakness of Tennant's analysis is the assumption that the termination of treaty-making was all about Douglas, ignoring any potential role for First Nations in the process, a failing shared by many writers on the subject.

In "Letting Go The Bone: The Idea of Indian Title in British Columbia, 1849-1927,"[747] Hamar Foster undertook a wide-ranging legal analysis of the "Indian Land Question," which of course included a consideration of the part played by the Vancouver Island Treaties in that ongoing saga. Refreshingly, he noted that "The story of the making of the treaties is well-known and need not be recounted here,"[748] and moved on to consider other issues, including the vexing question of "why did the making of these

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[744] Tennant, *Aboriginal Peoples and Politics*.

[745] Ibid., 18-20.

[746] Ibid., 20.

[747] Hamar Foster, "Letting Go The Bone: The Idea of Indian Title in British Columbia, 1849-1927," in *Essays in the History of Canadian Law, British Columbia and the Yukon*, Vol VI, eds. Hamar Foster and John McLaren (Toronto: University of Toronto Press and the Osgoode Society for Legal History, 1995), 28-86.

[748] Ibid., 39.

agreements cease so early." He described with approval Tennant's review of the subject, and went on to consider other possible explanations, the first of which was that "… it was not Douglas who wanted to stop the process, but Aboriginal people themselves," on the basis that by the end of the 1850s "…they knew more about treaties, and had seen the flood of settlement that inevitably followed."[749]

In 1999, anthropologist Chris Arnett made an innovative contribution to the literature, with the provocative title, *The Terror of the Coast: Land Alienation and Colonial War on Vancouver Island and the Gulf Islands, 1849-1863*.[750] One of his innovations was to refer to the non-First Nation inhabitants of the Island as "hwunitum," which is "a Hul'qumi'num word for people of European ancestry, which translates literally as 'the hungry people'."[751] Arnett also pursued the connection between the Douglas Forms and "Kemp's Deed."[752] Another important first is the inclusion of the account of the Nanaimo Treaty meeting by Snunymuxw elders Tstass-Aya and Quen-es-then (Jennie and Joe Wyse).[753] Arnett's some-what limited conclusion was that "Hwulmuhw [people of the land] families saw the agreements as a confirmation of their ownership of ancestral village sites and the food-gathering resources which were the foundation of their economy."[754]

The only work by a First Nation author to be reviewed is a 2001 unpublished master's thesis by Harriet Van Wart, "A Bibliography and Discussion of Douglas Treaty

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[749] Ibid., 44-5.

[750] Arnett, *The Terror of the Coast*.

[751] Ibid., 11.

[752] Ibid., 31-7.

[753] Ibid., 48-9.

[754] Ibid., 35.

Materials: Phase One[755] of Research on the Tsawout First Nation Douglas Treaty."[756] After annotating the standard works, she divided them into three categories, based on how they interpreted "two major themes with the Douglas Treaties": through the written treaty, through oral history, or through both oral and written history.[757] Not surprisingly she concluded that most of the works used the written version, which "…led these authors to conclude that the indigenous peoples surrendered their lands to the British."[758] The only source she found that relied primarily on oral history was David Elliott's account in *Saltwater People*, from which she concluded that, "the Saanich people did not agree to surrender their lands."[759] The third category included the writings of Chris Arnett and Hamar Foster, who both "…imply that the Douglas treaties were not about a surrender of land, because this is not how the indigenous peoples understood the treaties." She then made this astute observation: "Yet, they do not come to a final conclusion on this point. Instead, they leave the reader with two versions of the treaties: one that is about peace and co-existence and does not surrender aboriginal title; and the other where the treaty is the purchase of aboriginal lands by the British."[760] Her comment was made twelve years ago, but the subsequent literature has not pursued the implications of this inconsistency.

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[755] I can find no indication that Phase Two was completed.

[756] Van Wart, "A Bibliography and Discussion of Douglas Treaty Materials: Phase One of Research on the Tsawout First Nation's Douglas Treaty," (master's thesis, University of Victoria, 2001).

[757] Ibid., 29-30.

[758] Ibid., 30.

[759] Ibid., 32.

[760] Ibid., 35.

Legal scholar Douglas C. Harris has published two books, *Fish, Law, and Colonialism: The Legal Capture of Salmon in British Columbia*, published in 2001,[761] and its sequal, *Landing Native Fisheries: Indian Reserves & Fishing Rights in British Columbia*, *1849-1925*.[762] These wer followed by an article, "The Boldt Decision in Canada: Aboriginal Treaty Rights to Fish on the Pacific."[763] All three contain discussions of the "fisheries as formerly" clause in the Douglas Forms. In the first Harris posed the question of why the clause had been included, and concluded that "Governor Douglas had heard the strong and consistent Native representations of ownership of their fisheries, repeated since Europeans arrived in the coast, that would have made any other arrangement impossible without armed intervention."[764] This may well have been Douglas' motivation for inserting the provision in the Douglas Form, but does not necessarily mean that the protection of their fisheries was an issue at the treaty meetings. In the second book Harris made the important point that "…the treaties were concluded in a context of well-established and ongoing commercial activity on the fishery involving the HBC and Native peoples," and "It is hard to imagine, therefore, that the right to 'fisheries as formerly' did not include a commercial aspect…" .[765] Harris' journal article described the legal status of the fisheries provision in the Stevens Treaties, and went on to make a brilliant argument for an expansive interpretation of the fisheries provision in the Douglas Forms, based on the likely understanding of both parties.[766]

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[761] Harris, *Fish, Law, and Colonialism*.

[762] Harris, *Landing Native Fisheries*.

[763] Harris, "The Boldt Decision in Canada."

[764] Harris, *Fish, Law, and Colonialism*, 33-36.

[765] Harris, *Landing Native Fisheries*, 24.

[766] Harris, "The Boldt Decision in Canada," 142-144.

In 2002, an immediate classic appeared, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia*, by historical geographer Cole Harris.[767] Of course the bulk of the book is taken up with the history of reserve formation, but it does contain much of interest to the student of the Vancouver Island Treaties. In the first chapter Harris provided an excellent overview of British colonial land policy with respect to Indigenous peoples during the 1830s and 1840s, but acknowledged that it had little direct influence on the creation of the Douglas Treaties. One of his major points was that Douglas' policies with respect to First Nations were always driven by pragmatic not theoretical considerations. Thus, Douglas' commitment to the acquisition of First Nation land waxed and waned in response to other pressures and priorities as they arose over time.[768] Harris bluntly noted that the written versions of the treaties are "short, murky documents open to many interpretations," and illustrated the point very effectively by exploring the many possible meanings of "village sites" and "enclosed fields" from colonial and First Nation perspectives.[769]

Provincial archaeologist Grant Keddie published a book in 2003 with an interesting perspective, as evidenced by the title: *Songhees Pictorial: A History of the Songhees People as seen by Outsiders*.[770] The chapter on "Aboriginal Title and the Victoria Treaties" contains an abbreviated version of the standard account, with the addition of extracts from the 1888 exchange of correspondence between Dr. Helmcken and Joseph McKay concerning the treaties, and extracts from the statements by David

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[767] Harris, *Making Native Space*.

[768] Ibid., 34.

[769] Ibid., 25-26.

[770] Keddie, *Songhees Pictorial*.

Latess and other North Saanich chiefs in 1932.[771] While these documents are presented, their potential implications are not discussed.

"'Trespassers on the Soil': *United States v*. *Tom* and a new Perspective on the Short History of Treaty making in Nineteenth-Century British Columbia,"[772] by Hamar Foster and Alan Grove, is largely concerned with the issue of why treaty making was terminated. Before launching on their quest, the authors "cast a brief look at treaty making on Vancouver Island,"[773] and examined the events surrounding a possible oral treaty with the First Nations at Cowichan.[774] The bulk of the paper assembles a body of circumstantial evidence in support of Foster and Groves' speculation that a case decided in the Oregon Territory in 1853 influenced Douglas in his decision to terminate treaty making. While the connection remains to be established, the article shines a welcome light on the hitherto neglected story of Douglas' long career in the Oregon Territory.

The next work is the only one I am aware of that undertakes a three-way comparison of British and American treaty policy during the mid-nineteenth century in British Columbia, Washington Territory and New Zealand. The author is Stuart Banner, a law professor at UCLA, and his ambitious book *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska*, was published in 2007.[775] In it he compared the dispossession by Britain and the United States of indigenous land in Australia, New Zealand, Hawaii, California, British Columbia, Oregon, Washington, Fiji,

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[771] Ibid., 48-49.

[772] Foster and Grove, "'Trespassers on the Soil.'"

[773] Ibid., 90.

[774] Ibid., 94-97.

[775] Banner, *Possessing the Pacific*.

Tonga and Alaska. The chapter on British Columbia includes a brief depiction of the Vancouver Island Treaties, and while well written, does not depart from the standard format.

The more interesting aspect of the book, deserving of a closer look, is his attempt to ascertain the variables which determined whether white settlers and their governments recognized the Indigenous inhabitants as "the owners of their land." Banner identified three factors that he believed were common to all ten examples. First was the "presence or absence of agriculture[776] before European contact." He asserted that where "indigenous people were farmers – in New Zealand, Hawaii, Fiji, and Tonga – whites formally recognized them as the owners of their land….[but] Where indigenous people lacked agriculture before European contact – in Australia, California, British Columbia, Oregon/Washington, and Alaska – the colonial acknowledgment of indigenous property rights was weaker or nonexistent."[777] The second factor was "the degree of indigenous political organization."[778] He claimed that, "In Australia and on the west coast of North America, tribes were too small and too divided to formulate any sort of unified land policy in response to white settlements." On the other hand, Hawaii and Tonga were "organized as unitary kingdoms," and as a result "land was sold either very slowly at first (in Hawaii) or not at all (in Tonga)."[779] The third and final factor highlighted by Banner

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[776] Although he did not define this important concept, presumably he used the term as it would have been understood by Europeans.

[777] Banner, *Possessing the Pacific*, 316.

[778] Again, presumably he was using the phrase to describe European assumptions about "degrees" of political organization.

[779] Banner, *Possessing the Pacific*, 317.

was "the relative speed of white settlement and the establishment of imperial control."[780] He concluded that where settlers arrived first, "the imperial governments of Britain and the United States had little choice but to comply with established local practice," and where the colonial government arrived first, "land policy was determined more by the decisions of government officials than by the repeated practices of settlers."[781]

Banner did not quite know what to make of the existence of the Vancouver Island Treaties, as the First Nation parties clearly did not meet his criteria for recognition of ownership by Europeans. It seems the treaties were a minor anomaly that could safely be ignored, since the subsequent land policy of the colonies of Vancouver Island and British Columbia did fit nicely within his criteria. Overall the book is interesting, but not as relevant for my work as it could have been, since his stated goal was to identify European attitudes, not Indigenous ones.

The next work to be reviewed is *Makuk: A New History of Aboriginal-White Relations*, written by historian John Lutz.[782] For the first time the First Nation viewpoint regarding the Treaties is consistently given more prominence than that of Douglas. After a very brief summary of events as related by Douglas, the spotlight switches to a more detailed recitation of events in as provided by Saanich Chief David Latess in 1934.[783] Lutz provided this succinct summary of the First Nation understanding of the treaties in 1850: "Probably the Lekwungen [or Songhees] thought they were being compensated for

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[780] Ibid., 317-318.

[781] Ibid., 318.

[782] Lutz, *Makúk*.

[783] Ibid., 79.

the lands, particularly camus patches, that had already been occupied."[784] He also argued that the format of the Fort Victoria treaty meetings "mirrored the potlatch – a public ceremony in which rights were proclaimed and gifts distributed. Each individual was called by name and given his gifts."[785] While his analogy is intriguing, none of the First Nation accounts make any connection between potlatching and the treaties, and as a result I chose not to pursue the idea in the dissertation. His work has taken the Vancouver Island Treaty literature to the verge of the next step, namely the in-depth critical analysis of the First Nation accounts undertaken in this dissertation.

A recent article by archivist Raymond Frogner, entitled "'Innocent Legal Fictions': Archival Convention and the *North Saanich Treaty* of 1852"[786] contains a detailed examination of the treaty. However, the intended audience is fellow archivists, and the technical language and techniques (such as "diplomatics") used make it almost inaccessible to the non-specialist, with the exception of the section, entitled "The North Saanich Treaty: Provenance Revisited." In this section he described and quoted extensively from "native oral histories" handed down through three generations by elders David Elliott Sr., Gabriel Bartleman and John Elliot Sr. According to Frogner, "Combined, these testimonies are a counterbalance to the traditional archival record of the North Saanich Treaty's genesis."[787]

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[784] Ibid., 80.

[785] Ibid.

[786] Raymond Frogner, "'Innocent Legal Fictions': Archival Convention and the North Saanich Treaty of 1852," *Archivaria*, 70 (Fall 2010): 45-94.

[787] Ibid., 81.

The most recent description of the Treaties is found in *Company, Crown and Colony: The Hudson's Bay Company and Territorial Endeavour in Western Canada*,[788] which is basically a history of the HBC on Vancouver Island. The author, Stephen Royle, had no previous knowledge of the subject matter before researching the book, and the result is oddly disjointed, and a hard slog for the reader. Given the narrow topic of the book, one might have expected more than six pages (out of two hundred and twenty five) to be devoted to the treaties. As usual the Teechamitsa Form is reproduced. The text touches upon some potentially interesting issues, but skips from one to the next, leaving even this knowledgeable reader confused. His primary sources were entirely drawn from the colonial record, and no attempt was made to introduce First Nation perspectives. The publication of such a culturally tone-deaf work serves as an unwelcome reminder of the continued existence and persistence of outmoded approaches.

Cole Harris has stated, with respect to the Vancouver Island Treaties, that "a great deal has been written about them" citing eight works, all of which are included in this review.[789] My review has considered more than two-dozen such accounts, and the number of pages devoted to the formation of the treaties typically ranges from one to three. Most descriptions, over all three time-periods, cover the same ground utilizing similar formats. Fortunately most of the works reviewed also introduce additional primary material or offer new interpretations of the Treaties. While it is true that many people have provided a basic outline of the colonial account, I would not say that a great deal, in terms of length or depth, has been written on the subject.

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[788] Stephen Royle, *Company, Crown and Colony: The Hudson's Bay Company and Territorial Endeavour in Western Canada* (London: I.B. Taurus, 2011).

[789] Cole Harris, *Making Native Space*, 20.

D. The Courts (1964-2014)

1. Background

A few historians, such as Arthur Ray and William Wicken,[790] have written about their experiences as expert witnesses, but almost none undertake what are known as 'case comments'. Those are the exclusive domain of legal historians, such as Hamar Foster and Douglas Harris. Historians often find their publications referred to in court decisions, but discussions of the latter by the former are exceedingly rare, and for good reason. Reading court judgments without a knowledge of legal reasoning and procedural rules is an exercise in frustration. It is often an exercise in frustration for those with legal training. The following review is the first time that the major treaty cases have been presented in a manner accessible to a lay audience. My career as a solicitor gave me considerable insight into litigation without being a participant in it. Thus, I consider myself a knowledgeable outsider. While my practice did not include aboriginal law, my master's thesis remedied this defect to a large extent, as it required me to read over one hundred Supreme Court of Canada (SCC) cases. My background as a solicitor also biases me against the litigation process as a way to find solutions to problems, and my background as an anthropologist makes me cast a very critical eye on court decisions, as will become evident in the review which follows. While I feel that the courts are ill-equipped to incorporate a nuanced understanding of First Nation perspectives, I nonetheless have a great respect for the legal profession in general, and those individuals within it who have tried their best to advance aboriginal rights through litigation, in particular.

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[790] Arthur J. Ray, *Telling It To The Judge: Taking Native History to Court* (Montreal & Kingston: Queen's University Press, 2011); Willam Wicken, *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Junior* (Toronto: University of Toronto Press, 2002).

Before launching into a review of the relevant court cases, it is important to be aware of the differences between academic and judicial utilization of historical documents. When courts are faced with claims requiring interpretation of the terms of historical treaties between First Nations and the Crown, they begin the task by analyzing the historical records introduced as evidence by expert witnesses at trial. The end-result is a written decision, which often bears some resemblance to a work of academic literature. However, the outcome of a court case is always a decision, while academic enquiry does not require or even encourage 'yea or nay' results. In the course of his judgment in the 1999 SCC case of *R*. *v*. *Marshall* (reviewed in this section), Binnie, J., noted the existence of criticism by historians that, "the judicial selection of facts and quotations is not always up to the standard demanded of the professional historian, which is said to be more nuanced," and to possess "an appreciation of the frailties of various sources."[791] He responded by reminding historians that "the courts are handed disputes that require for their resolution the finding of certain historical facts"…and therefore "[t]he judicial process must do as best it can."[792] The word "finding" in this context means making a selection, from the welter of "historical facts" proffered by the experts, of those deemed to assist the court in coming a decision. As explained by legal historian Mark Walters "In contrast [to historians] modern judges will not be concerned if present-day values inform their interpretation of the…past; after all, their conclusions will be binding on living people as part of today's law, and they must be morally and politically defensible as

[791] *R v Marshall*, [1999] 3 SCR 456 at para 37.

[792] Ibid.

such" .[793] For example, the courts will use history to ascertain the intent of the parties at the time of the formation of treaties, but apply modern legal principles to establish their current legal status. The court decisions described in this section are assessed on the attention (if any) paid to First Nation understandings of the treaties in arriving at a decision as to the intent of the parties.

Of the four major court decisions that have considered the Douglas Forms, three deal with the hunting provision, and one with the fishing provision. The case for which I have prepared an expert report will consider the scope of the "villages site and enclosed fields" provision. No decision has considered the scope or legal effectiveness of the cession provision of the Douglas Forms. Why have the court challenges maintained such a narrow focus? In part the answer may be that First Nation claimants until now have preferred to pursue the implementation of the hunting and fishing rights in the Douglas Forms, rather than impugn the Douglas Forms altogether and pin their hopes on Aboriginal title and Aboriginal rights. Another approach could be to make a treaty claim based on an understanding of the Vancouver Island Treaties derived from the First Nation accounts. I discuss the Vancouver Island treaty cases in temporal sequence along with the other major Canadian treaty cases, since each Vancouver Island Treaty decision was much influenced by prior cases dealing with other historical treaties.

2. Finding "Common Intention"

- *White & Bob* (1964)[794]

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[793] Mark Walters, "Towards a "Taxonomy" for the Common Law: Legal History and the Recognition of Aboriginal Customary Law," in *Law, History, Colonialism: The Reach of Empire*, eds. Diane Kirkby and Catharine Coleborne (Manchester: Manchester University Press, 2001), 131.

[794] *R v White and Bob*, [1964] 50 DLR (2d) 613.

This is the earliest and most well-known of the Vancouver Island Treaty decisions, and dealt with two issues, one specific and one general. The narrow question was whether the Nanaimo Douglas Form was a treaty within the meaning of Section 87 (now s. 88) of the Indian Act. The broader challenge was to provide a working definition of treaties between First Nations and the Crown. The latter question is dealt with in Chapter VI.

Messrs. White and Bob were charged with "…having game, namely the carcasses of six deer, in their possession during the closed season without having a valid and subsisting permit under the [B.C.] Game Act…."[795] In their defence the accused contended that "…an agreement (ex. 8) between their ancestors, members of the Saalequun tribe, and Governor Douglas, dated December 24, 1854, for the sale of the land to the Hudson's Bay Company, gave them the right to hunt for food over the land in question…"[796] (para. 3). For the purpose of the appeal it was accepted by both parties that White and Bob "…are native Indians, members of the Saaliquun Tribe, and descendants of the members who signed ex. 8; that they killed the deer on unoccupied land comprised in the sale to the Hudson's Bay Co., and forming part of the ancient hunting grounds of the tribe, for the purpose of providing food for themselves and their families."[797] The Court made only brief reference to the fact that the Nanaimo treaty has no text: "It is common ground that ex. 8 must be taken to include the following clause [the hunting and fishing provisions] appearing in all other transfers of Vancouver Island Indian land,

[795] Ibid., 613.

[796] Ibid., 615.

[797] Ibid.

which, for reasons that need not be mentioned,[798] does not appear in this instrument."[799]

In my experience, courts are very reluctant to rectify agreements in which all the key terms are absent from the written document, yet that is just what the BC Court of Appeal did in this case. Crown counsel and the court were prepared to imply the existence of the treaty text, and, despite the absence of a description of the treaty territory, to concede that the hunt took place "within land comprised in the sale to the Hudson's Bay Company." The relevant statutory provision is Section 88 (then Section 87) of the Indian Act, which reads (in part) as follows: "Subject to the terms of any treaty…all laws of general application from time to time in forces in any province are applicable to an in respect of Indians in the province…."[800] The sole question to be decided by the Court was whether the Nanaimo Douglas Treaty was a "treaty" within the meaning of Section 88.

The Appeal panel consisted of five judges and the reasons for judgement of Davey, JA, (Sullivan, JA, concurring) concluded that, "…the right of the respondents to hunt over the lands in question reserved to them by ex. 8 are preserved by s. 87, and remain unimpaired by the Game Act, and it follows that the respondents were rightfully in possession of the carcasses."[801]

Sheppard, J.A. (Lord, J.A., concurring), came to the opposite result, stating that "Exhibit 8 is neither in form nor in substance a Treaty."[802] According to Sheppard, "The

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[798] I have not been able to ascertain where the reasons *are* mentioned.

[799] *R v White and Bob*, [1964] 50 DLR (2d) 613.

[800] Ibid.

[801] Ibid., 619.

[802] Ibid., para 29.

parties to a Treaty would necessarily be the Crown or an authorized official and the Indians, but the parties to this transaction are the Hudson's Bay Co. and the Indians."[803]

Norris, J.A., rendered a very lengthy decision in favour of the respondents, most of which consisted of a detailed consideration of the applicability to Vancouver Island of the Royal Proclamation of 1763. His remarks were prompted by the persuasive arguments presented by Tom Berger, counsel for the accused, the first lawyer to argue the Royal Proclamation before a court in British Columbia.[804] As Davey and Sullivan did not base their decision on the Royal Proclamation, Norris' disquisition became mere 'obiter' (non-binding remarks), and has been largely ignored ever since. Legal history has been kinder to other parts of his decision, which have been much quoted. For example, he opined that "The Court is entitled 'to take judicial notice of the facts of history whether past or contemporaneous' as Lord du Parcq said…and it is entitled to rely on its own historical knowledge and researches."[805] Norris may have gone too far in suggesting that judges conduct their own researches, as discovered by Lambert, JA, in the 1984 BC Court of Appeal decision of *R. v. Bartleman*, reviewed later in this section.

As well as taking judicial notice of historical events and documents, the Court heard evidence as to the traditional hunting practices of the Snuneymuxw people from an expert witness, Provincial Anthropologist Wilson Duff. The decision was innovative in its use of expert anthropological evidence as to the traditional hunting activities of the

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[803] Ibid., para 30.

[804] Neil Vallance and Hamar Foster, "The Life and Times of the Royal Proclamation of 1763 in British Columbia," *Canada Watch* (Fall 2013): 25-26.

[805] *White & Bob* [1965] *SCR* at para 52.

Snuneymuxw people, but the innovation did not extend to hearing evidence of their understanding of the treaty.

The Crown appealed the decision to the SCC, which, in a very brief decision (1965),[806] affirmed the Court of Appeal decision, adopting the reasons set out by Davey. In other words, the SCC was careful to distance itself from the reasons given by Norris. As a follow-up to the success of *White and Bob*, another test case, *R. v. Cooper, George and George*,[807] was initiated in 1968 by two members of the T'sou-ke Nation, who were charged with "being in possession of salmon at a place where at that time fishing for such fish was prohibited by law, contrary to section 18 of the 'Fisheries Act'."[808] The accused raised the 1850 Sooke Douglas Form as a defence. In the course of his decision B.C. Supreme Court Judge Brown colourfully described the treaty as "this larcenous arrangement," but with obvious regret he found that Section 87 of the Indian Act did not protect treaty rights against incursion by federal statutes, such as the *Fisheries Act*, and convicted the accused.[809]

In a review of the BCCA's handling of aboriginal and treaty rights cases,[810] legal scholar Douglas Harris concluded that "With the exception of *White and Bob*, where the court infused agreements between Aboriginal peoples on Vancouver Island and the HBC with treaty status, Aboriginal peoples did not find a hospitable reception for their claims

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[806] *White & Bob* [1965] *SCR* vi.

[807] *R v Cooper, George and George*, [1968] 1 DLR (3rd) 113.

[808] Ibid.

[809] Ibid., 117.

[810] Douglas Harris, "A Court Between: Aboriginal and Treaty Rights in the British Columbia Court of Appeal," *BC Studies*, 162 (Summer 2009): 137-164.

in BC courtrooms" during the 1960s and 1970s.[811] In fact, the next significant VI Treaty decision did not appear until 1984.

- *R v. Taylor & Williams* (1981)[812]

This was an Ontario Court of Appeal decision, but is much quoted in SCC decisions. The headnote sets out the facts: "The accused…members of the Chippewa First Nation Indian tribes were charged with taking 65 bullfrogs from unoccupied Crown lands for food for their families…. The bullfrogs were taken from an area covered by a treaty entered into in 1818."[813] By this treaty the Chippewa Nation ceded 1,951,000 acres to the Crown in return for a yearly payment of seven hundred and forty pounds currency in goods. The question in issue was "…whether there was other, and for the Indians, more material consideration given to them, namely the reservation to them and their descendants of their aboriginal fishing and hunting rights."[814] At the same time as the "provisional agreement" was signed, the Deputy Superintendent of Indian Affairs and six chiefs held a "council meeting." In a rare show of cooperation, "Counsel for both parties to this appeal agreed that the minutes of this council meeting recorded the oral portion of the 1818 treaty and are as much a part of that treaty as the written articles of the provisional agreement."[815] The first relevant extract from the minutes sets out the Chippewa position: "We hope that we shall not be prevented from the right of Fishing, the use of the Waters,

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[811] Ibid., 162.

[812] *R v.Taylor and Williams*, [1981] 34 OR (2d) 360.

[813] Ibid.

[814] Ibid., 362.

[815] Ibid.

& Hunting where we can find game."[816] The second provides the reply of the Deputy Superintendent: "The Rivers are open to all & you have an equal right to fish & hunt on them."[817] Of course, this serves to bring into painfully sharp relief the frustrating absence of any minutes of the VI Treaty meetings.

Without citing any precedents, the Court set out its views on extrinsic evidence: "Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect."[818] While the courts have been increasingly willing to take into account extrinsic evidence of "surrounding circumstances," such as the minutes of treaty meetings, they remain very resistant to the idea of giving any evidentiary weight to "oral traditions" concerning treaty formation. The VI Treaties suffer not only from a lack of contemporaneous documentation of the "surrounding circumstances," but also a dearth of eye witness accounts by the First Nation participants, making it doubly difficult to obtain judicial recognition of the First Nation accounts presented in Chapter II.

- *Nowegijick v. The Queen* (1983)**[819]**

This is actually a tax case, but it contains a comment by Dickson, J., speaking for the SCC, that is frequently quoted with approval in treaty cases: "…treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in

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[816] Ibid., 364.

[817] Ibid.

[818] Ibid.

[819] *Nowegijick v. The Queen* [1983] 1 SCR 29.

favour of the Indians."[820] According to one commentator, this statement has become "the progenitor of many cases,"[821] and is now referred to as "the Nowegijick principle of liberal and generous construction."[822] Dickson also noted with approval an American case, *Jones v. Meehan*, 175 U.S. 1 (1899), in which it was held that, "Indian treaties 'must…be construed, not according to the technical meaning of [their] words…but in the sense in which they would naturally be understood by the Indians'."[823] Presumably an enterprising counsel put the U.S. case before the Court, and since then the quote has been "relied upon by the Supreme Court of Canada as a foundational authority."[824] I have seen no indication in treaty cases that the phrase "the sense in which they would naturally be understood by the Indians" has been broadly construed to include a consideration of Indigenous law. Instead, it is treated simply as a variant of the well-known legal principle of *contra proferentem*, which means that an ambiguous term in a document will be construed against the interest of the party who drafted it. This paved the way for the acceptance of extrinsic evidence to resolve any "doubtful expressions" in the written versions of treaties, provided the court is prepared to acknowledge the existence of such ambiguities.

- *R. v. Bartleman* (1984)[825]

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[820] Ibid., 36.

[821] J. Timothy S. McCabe, *The Law of Treaties Between the Crown and Aboriginal Peoples* (Markham: LexisNexis, 2010), 63.

[822] Ibid., 224.

[823] *Nowegijick*. 36.

[824] McCabe, *The Law of Treaties*, 86.

[825] *R v Bartleman*, [1984] 55 BCLR 78 (BCCA).

This decision is not often quoted in SCC decisions, but it makes an important contribution to judicial interpretation of the Douglas Forms. Mr. Bartleman shot a deer and was charged with "using a rim-fire cartridge when hunting big game, contrary to the Wildlife Act. His defence was that he was exercising his right to hunt under the North Saanich Indian Treaty of 1852."[826] As well, the hunting took place outside the territory covered by the relevant Douglas Form.[827] The original trial took place in Provincial Court, before Giles, Prov. Ct. J., and his decision was reported in the *Canadian Native Law Reporter* (*sub nom R. v. August & Bartleman*, 1980).[828] Counsel for the accused argued that "any ambiguity in the wording of [a] treaty must be interpreted in a manner favourable to the Indian People,"[829] relying upon *White and Bob*. Giles responded that, "In my opinion, the proposition above stated, though commendably humane in general purport, has been carried to such extremes as to result in manifest absurdity. Take any simple English word or expression, the plain meaning of which has been clear to all for centuries, contrive strenuously to find an ambiguity, then place upon them any warped interpretation that suits the purpose of those seeking to maintain their position."[830] After this diatribe he concluded that "It is inconceivable in my view that Douglas on behalf of the Hudson's Bay Company, or the Indian people for that matter, would purport to give or take rights or privileges over lands owned or occupied by different peoples in different

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[826] Ibid.,para 2.

[827] Ibid., para 7.

[828] *R. v August and Bartleman*, [1980] 1 CNLR 68.

[829] Ibid., 73.

[830] Ibid., 74.

places."[831] Accordingly, he convicted the accused. In the written judgement there is no mention of expert reports or oral history.

Not surprisingly the trial decision was appealed, and the B.C. Court of Appeal took the unusual step of allowing new evidence to be introduced, namely an expert report by anthropologist, Dr. Barbara Lane,[832] as to "the hunting and foraging practices of the Saanich people before 1852." Another unusual feature was the cooperative stance of the Crown: "The Crown accepts the evidence of Dr. Lane and of members of the Tsartlip Band that the oral tradition of the Saanich people, as taught within their families, is that the treaty bestowed a right to hunt on unoccupied land in all their traditional hunting locations. They have continued to hunt throughout those areas because of that belief."[833] The reasons for judgement of Lambert, J.A., disclose a third unusual feature.

After the hearing, but before making his decision, Lambert took it upon himself to visit the provincial archives and make his own examination of the Douglas Forms, plus some correspondence which had not been put in evidence at trial. He justified his actions as follows: "In doing so I have regarded myself as taking judicial notice of indisputable, relevant, historical facts by reference to a readily obtainable and authoritative source."[834] This did not go over well with his colleague Esson, J.A., who concurred in Lambert's decision, but "without reference to such material," as, of course, he had not accompanied Lambert on his field trip.[835] The third judge, Carrothers, J.A., agreed with Esson.[836]

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[831] Ibid., 75.

[832] *R. v. Bartleman*, at 84, para 31.

[833] Ibid., 85, para 35.

[834] Ibid., para 11.

[835] Ibid., 93, paras 66-7.

[836] Ibid., 75.

Based on his examination of the treaties, and especially the Nanaimo Treaty, Lambert concluded that "This evidence tends to confirm that none of the crosses opposite the names of the Indians, with respect to any of the purchases, were made by the Indians. Without the crosses, there is nothing to indicate that the Indians attached any significance to the document or that they even knew that a document was being created."[837] Lambert prefaced the next section of the judgment, "the interpretation and application of the treaty," by stating that, "I do not think that the text of the land grant recorded in the 'Register of Land Purchases from Indians' should be regarded as anything more than some evidence of what was generally agreed to."[838] Unfortunately, his radical view of the Douglas Forms has not been adopted in subsequent decisions. However his point of view has recently received support in the literature from legal scholar Douglas Harris who also has concluded that, "The written texts…should be considered as evidence of the terms of those agreements, not as the agreements themselves."[839] According to Harris, "The BCCA signalled in *Bartleman* that it would not construe Aboriginal treaties in narrow, technical terms but, rather, that it would infuse the slight text of the Douglas treaties with substantial meaning."[840]

- *Saanichton Marina Ltd. v. Claxton* (1989)[841]

Unusually, this case was a civil not criminal proceeding. The First Nation plaintiffs commenced action against a marina company to obtain an injunction preventing

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[837] Ibid., 83, para 29.

[838] Ibid., 86, para 41.

[839] Harris, "The Boldt Decision in Canada," 140.

[840] Harris, "A Court Between."

[841] *Saanichton Marina Ltd. v Claxton,* [1989] 3 CNLR 46.

construction of a marina. In other words, for the first time in a British Columbia court, a First Nation plaintiff was using its Vancouver Island treaty as a sword to fight development on its traditional territory, rather than a shield to ward off criminal charges. The facts, as presented by Hinkson, J.A., for the B.C. Court of Appeal, were as follows: "Saanichton Marina Ltd., pursuant to a license of occupation granted by…the Province…proposes to build a marina adjacent to property it owns on Saanichton Bay on Vancouver Island. The Tsawout Indian Band oppose the construction of the marina because they say the marina, as proposed, will interfere with their right of fishery in Saanichton Bay, granted by treaty in 1852."[842] The relevant phrase in the Douglas Form reads, "we are at liberty…to carry on our fisheries as formerly." Like *R*. *v*. *Bartleman*, this is a B.C. Court of Appeal decision not much quoted by the SCC, but of considerable significance for its interpretation of the fishing right in the Douglas Forms.

Under the heading, "The Meaning of Fishery/Fisheries,"[843] Hinkson relied upon cases that in turn had relied upon dictionary definitions of "fishery":

> In *Fowler v*. *The Queen*, [1980][844] the Supreme Court of Canada had occasion to make reference to the meaning of the word "fishery." Martland J. delivering the judgment of the court said at p.223:
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> > The meaning of the word "fishery" was considered by Newcombe J. in this Court in *Reference as to the Constitutional Validity of Certain Sections of the Fisheries Act*, 1914, [1928]:
>
> In Paterson on the Fishery Laws (1863), the definition of a fishery is given as follows: "A Fishery is properly defined as the right of catching fish in the sea, or in a particular stream of water; and it is also frequently used to denote the locality where such right is exercised."

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[842] Ibid., 47.

[843] Ibid., 50-51.

[844] Citations omitted throughout.

> In Dr. Murray's New English Dictionary, the leading definition is: "The business, occupation or industry of catching fish or taking other products of the sea or rivers from the water."
> The above definitions were quoted and followed by Chief Justice Davey in *Mark Fishing v. United Fishermen & Allied Workers Union* (1972). Chief Justice Davey at p.592 added the words:
>
> > The point of Patterson's definition is the natural resource, and the right to exploit it, and the place where the resource is found and the right is exercised.
>
> On the basis of these authorities it is clear that the word "fishery" may be used to denote not only the right to catch fish but also the place where the right can be exercised.[845]

According to Douglas Harris, "British Columbia's highest court was now telling the province, through *Bartleman* and *Saanichton Marina*, that the hunting and fishing provisions conferred enforceable rights that did more than simply guarantee Native peoples the right to participate on the same terms as the non-Native public."[846] While the court in *Saanichton Marina* delivered a result in favour of the plaintiffs, it is regrettable that the scope of the treaty right was determined solely by reference to common law and dictionary definitions of a "fishery." Another important aspect of the court's decision is a confirmation that, "the right to fish, unlike the right to hunt, is not qualified or limited to unoccupied lands or qualified in any other respect."[847] In other words, the fishing right is unqualified, but the full implications of this have yet to be truly tested by the courts.

- *R. v. Sioui* (1990)[848]

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[845] Ibid.

[846] Harris, "A Court Between," 147.

[847] *Saanichton Marina,* 56.

[848] *R v Sioui,* [1990] 1 SCR 1025.

Like *White and Bob* this case is important for its definition of a treaty, and a discussion of that aspect of the decision is likewise deferred until Chapter VI. The judgment of the Court was delivered by Lamer, J., who set out the facts as follows: "The four respondents were convicted by the Court of Sessions of the Peace of cutting down trees, camping and making fires in places not designated in Jacques-Cartier park contrary to…the Parks Act" of Quebec.[849] The respondents admitted the facts, but "…alleged that they were practising certain ancestral customs and religious rites which are the subject of a treaty between the Hurons and the British, a treaty which brings s.88 of the Indian Act into play and exempts them from compliance with the regulations."[850] The 1760 treaty is in the form of a proclamation, signed by General James Murray, which reads in part as follows: "they [the Hurons] are…allowed the free Exercise of their Religion, their Customs, and liberty of trading with the English."[851]

Lamer took note of the contents of a contemporaneous journal kept by one of Murray's officers, and concluded that the document in question was "not simply a unilateral act, a simple acknowledgment or safe conduct, but the embodiment of an agreement reached between the representative of the British Crown and the representatives of the Indian nations present…."[852]

One of the contested issues before the court was the area protected by the treaty, as the document is silent on the matter. First, Lamer cautioned that "Even a generous interpretation of the document…must be realistic and reflect the intention of both parties,

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[849] Ibid., 1030.

[850] Ibid., 1031.

[851] Ibid.

[852] Ibid., 1057.

not just that of the Huron."[853] The Court also rejected a very restricted area suggested by the Crown. Instead, the Court chose to make a compromise, but without quite acknowledging the fact. In the words of Lamer, "Accordingly, I conclude that in view of the absence of any express mention of the territorial scope of the treaty, it has to be assumed that the parties to the treaty of September 5 intended to reconcile the Hurons' need to protect the exercise of their customs and the desire of the British conquerors to expand."[854] This represents the first appearance of the concept of *reconciling* the intentions of the parties instead of just *ascertaining* their intentions. No definition was provided by the Court, but the definition of "reconcile" that best seems to fit the Court's use of the term is found in the Shorter Oxford English Dictionary: "To adjust, settle, bring to agreement (a controversy, quarrel, etc.)."[855] The Court applied this principle by making an inference that "Murray and the Hurons contemplated that the rights guaranteed by the treaty could be exercised over the entire territory frequented by the Hurons at the time, so long as the carrying on of the customs and rites is not incompatible with the particular use made by the Crown of the territory."[856] In other words, the need to arrive at an equitable decision by today's standards, drove the court to make an inference as to the intentions of the original parties not necessarily supported by the extrinsic evidence, to the lasting frustration of historians.

- *R. v. Badger* (1996)[857]

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[853] Ibid., 1069.

[854] Ibid., 1071.

[855] "Reconcile" in *Oxford English Dictionary* (Oxford: Oxford University Press, 1933), 1675.

[856] *R v Sioui*, 1070.

[857] *R v Badger*, [1996] 1 SCR 771.

The majority decision was delivered by Cory, J., who stated the facts as follows: "The appellant Wayne Clarence Badger was charged with shooting a moose outside the permitted hunting season contrary to s. 27(1) of the *Wildlife Act*…," on privately owned land within the territory of Treaty No. 8. According to Cory, "Mr. Badger shot a moose on brush land…but a farm house was located a quarter mile from the place where the moose was shot."[858] In his "analysis" section Cory noted that "Their [the eleven numbered treaties] objective was to facilitate the settlement of the West."[859] No mention was made of the "objective" of the First Nation parties. Treaty No. 8 states that "they[the said Indians] shall have right to pursue their usual vocations of hunting trapping and fishing throughout the tract surrendered…subject to such regulations as may from time to time be made by the Government…and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading of other purposes."[860] Cory repeated the principle that such treaties "must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing," and confirmed that the principle "applies as well, to those words in a treaty which impose a limitation on the right which has been granted."[861] Note his (common) assumption that the hunting provision was a "right which has been granted," as opposed to an existing right which has been confirmed. Cory then decided that, "The evidence led at trial indicated that in 1899 the Treaty 8 Indians would have understood that land had been 'required or taken up' when it was being put to a use which was incompatible with

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[858] Ibid., para. 23.

[859] Ibid., para. 39.

[860] Ibid., para 31.

[861] Ibid., para 52.

the exercise of the right to hunt." As examples, he cited "when buildings or fences were erected, land was put into crops, or farm or domestic animals were present."[862] He concluded that, "An interpretation of the Treaty properly founded upon the Indian's understanding of its terms leads to the conclusion that the geographical limitation on the existing hunting right should be based upon a concept of visible, incompatible use."[863] As an afterthought, Cory noted that, "No doubt the Indians believed that most of the Treaty No. 8 land would remain unoccupied and so would be available to them for hunting, fishing and trapping."[864] What he doesn't mention is that the First Nations might also have believed that they would retain some control over the location and extent of occupation by non-Indians. The issue of consultation is taken up in the 2005 *Mikesew* case described later in this section. In the end, the court convicted Badger of hunting on occupied land.

- *R. v. Marshall* (1999)[865]

In this case, the accused, a Mi'kmaq Indian, was charged with selling of eels without a license, contrary to federal fishery regulations. According to the head-note, "the only issue at trial was whether he possessed a treaty right to catch and sell fish under the treaties of 1760-61 that exempted him from compliance with the regulations. During the negotiations leading to the treaties…the aboriginal leaders asked for truckhouses 'for the furnishing them with necessaries, in Exchange for their Peltry'." However, "the written document…contained only the promise by the Mi'kmaq not to 'traffick, barter or

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[862] Ibid., para 53.

[863] Ibid., para 54.

[864] Ibid., para 58.

[865] *R v Marshall,* [1999] 3 SCR 456.

Exchange any Commodities in any manner but with such persons, or the manager of such Truckhouses as shall be appointed or established by His Majesty's Governor'."

The majority judgment was delivered by Binnie, J., who began his "Analysis" section with this instruction: "The starting point for the analysis of the alleged treaty right must be an examination of the specific words used in any written memorandum of its terms."[866] This is a good example of the Court's continued allegiance to the primacy of the written version over the oral version of any treaty. The Court then proceeded to give three reasons for the expansive use of extrinsic evidence in treaty cases: "Firstly, even in a modern commercial context, extrinsic evidence is available to show that a written document does not include all of the terms of an agreement."[867] "Secondly, even in the context of a treaty document that purports to contain all of the terms, this Court has made clear in recent cases that extrinsic evidence of the historical and cultural context of a treaty may be received even absent any ambiguity on the face of the treaty."[868] "Thirdly, where a treaty was concluded verbally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written terms."[869] Binnie went on to state that, "If the law is prepared to supply the deficiencies of written contracts prepared by sophisticated parties and their legal advisors in order to produce a sensible result that accords with the intent of both parties, though unexpressed, the law cannot ask less of the honour and dignity of the Crown in its

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[866] Ibid.,para 5.

[867] Ibid.,para 10.

[868] Ibid.

[869] Ibid.,para 12.

dealings with First nations."[870] In other words, the court should be free to make inferences if they uphold the honour of the Crown. The Court proceeded to combine the request of the Mi'kmac during negotiations for truckhouses "for the furnishing them with necessaries, in Exchange for their Peltry," with the promise by the Mi'kmaq not to "traffick, barter or Exchange any Commodities in any manner but with such persons, or the manager of such Truckhouses as shall be appointed or established by His Majesty's Governor," to imply the existence of a permanent treaty obligation. According to Binnie, "My view is that the surviving substance of the treaty is not the literal promise of a truckhouse, but a treaty right to continue to obtain necessaries through hunting and fishing by trading the products of those traditional activities subject to restriction that can be justified by the *Badger* case."[871]

Mclachlan, J., dissented, on the basis that the extrinsic evidence did not support the existence of a general treaty right: "On the historical record, neither the Mi'kmaq nor the British intended or understood the treaty trade clause as creating a general right to trade."[872] In her judgment McLachlin dealt with "Cultural and Linguistic Considerations" and concluded that, "There is nothing in the linguistic or cultural differences between the parties to suggest that the words of the trade clause were not fully understood or appreciated by the Mi'kmaq."[873] The issue of the First Nation understanding of written

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[870] Ibid., para 43.

[871] Ibid., para 56; *R v Badger* (1996) held that the "infringement" test developed by the Court in *R. v Sparrow* (1990) for aboriginal rights applies equally to treaty rights. The test sets out a procedure to determine if an infringement of a treaty right by the Crown is justified. *R v Badger,* [1996] 1 SCR 771.

[872] Ibid., para 96.

[873] Ibid., para 89.

treaty terms with respect to land was crucial to the decisions dealt with in the next section.

The *Marshall* case demonstrates the interpretative leaps the SCC is prepared to make with respect to finding a treaty right. This has led legal historian Mark D. Walters to make this favourable evaluation: "Marshall is premised upon the idea that treaties with aboriginal nations are not documents or written instruments but rather are relationships – or, more precisely, they represent a shared understanding of and commitment to a normative framework for cross-cultural relationships."[874] However, as legal historian Janna Promislow has noted, Walters' optimism was premature. In the 2005 case of *R. v. Bernard; R. v. Marshall*, which considered the same treaty to determine whether it included logging rights, the Court's reasons "…strongly rely on the words of the treaty itself in siding with the Crown and rejecting the claim."[875] In other words, "Text, not relationship, defined the scope of the inquiry. Moreover, the text-driven approach ensures that, at their core, treaty rights represent historical moments of common intention as determined by the courts, whether supported by historical opinion or not."[876] She noted that, "Post-Marshall decisions in lower courts also demonstrate a stubbornly text-driven approach to interpretation," citing the *Victor Buffalo* decision (described in the next sub-section) as an example.[877] Promislow then reiterated the obvious reason for objecting to

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[874] Mark Walters, "Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History after Marshall," *24 Dalhousie Law Journal*, 75 (2001): 78.

[875] Janna Promislow, "'I smooth'd him up with fair words': Intersocietal Law, from Fur Trade to Treaties" (PhD Dissertation, Osgoode Hall Law School, York University, 2012), 237. Chapter V of her dissertation has been published as Janna Promislow, "Treaties in History and Law," *UBC Law Review* 73.3 (2014): 1085-1183.

[876] Ibid., 238.

[877] Ibid.

this approach: "A text-driven approach to treat interpretation disappoints because of the limited access to indigenous perspectives available through a text that First Nations did not draft and often could not read."[878] Promislow then posed two questions: "Why is text-driven treaty interpretation still dominant? Why is it so difficult to move beyond this approach?" In answer, she noted that, "Canadian judges demonstrate the limited nature of their collective imagination in their inability to conceive of treaties beyond their representation in the written text," in part because "Moving past a text-driven approach…involves an epistemological shift to make space for indigenous law and oral histories, but also away from written law and the positivist tradition of history."[879] As a remedy, she recommended that "…the court by-pass the identification of mutual intention on narrow, specific rights in favour of greater attention to the intentions around and parameters of the working relationship to define the historic element of a treaty right."[880] She went on to "…suggest an approach to the treat rights jurisprudence that attends to historical interpretation of mutual intentions to enter into and maintain treaty relations but does not rely on common intentions regarding the meaning and scope of the terms of that relationship to define treaty rights," and "…by interpreting treaty rights as a support for ongoing relationships, rather than as representing the terms of a long stale settlement."[881]

- *Mikisew Cree First Nation v. Canada*[882]

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[878] Ibid., 239.

[879] Ibid., 241.

[880] Ibid., 256-257.

[881] Ibid., 263.

[882] *Mikisew Cree First Nation v Canada* (Minister of Canadian Heritage), [2005] 3 SCR 388.

This case is unique, in that it deals with procedural, not substantive, treaty rights. Like the *Badger* case, it concerned the interpretation of the hunting clause in Treaty 8. In 2000 the federal government approved, without consulting the Mikisew Cree, a winter road which abutted their reserve and "traversed the traplines of approximately 14 Mikisew families…and the hunting grounds of as many as 100 Mikisew people whose hunt (mainly of moose) the Mikisew say, would be adversely affected."[883] The SCC acknowledged that "…the principle of consultation in advance of interference with existing treaty rights is a matter of broad general importance to the relations between aboriginal and non-aboriginal peoples."[884]

The court's "analysis" section began with a statement that the hunting provision created "…from the outset an uneasy tension between the First Nations' essential demand that they continue to be as free to live off the land after the treaty as before and the Crown's expectation of increasing number of non-aboriginal people moving into the surrendered territory. It was seen from the beginning as an ongoing relationship that would be difficult to manage…."[885] In support of this, the Court quoted from a memoir penned by C. Mair, one of the Commissioners, who in turn quoted from one of his own speeches: "The white man is bound to come in and open up the country, and we come before him to explain the relations that must exist between you, and thus prevent any trouble."[886] On this basis the Court concluded that, "Thus none of the parties in 1899 expected that Treaty 8 constituted a finished blueprint. Treaty 8 signalled the advancing

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[883] Ibid.,para 3.

[884] Ibid.

[885] Ibid., para 24.

[886] Ibid., para 25.

dawn of a period of transition. The key as the Commissioners pointed out, was to 'explain the relations' that would govern future interaction 'and thus prevent any trouble'." According to the Court, the "ongoing relationship" with respect to hunting territory would proceed as follows: "In the case of Treaty 8, it was contemplated by all parties that 'from time to time' portions of the surrendered land would be 'taken up' and transferred from the inventory of lands over which the First Nations had treaty rights to hunt, fish and trap, and placed in the inventory of lands where they did not."[887] However, "…the Crown's right to take up lands under the treaty…is subject to its duty to consult and, if appropriate, accommodate First Nations' interests before reducing the area over which their members may continue to pursue their hunting, trapping and fishing rights."[888] The Court confirmed that, "…the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). The Court went on to say that, "…Treaty 8 provides a framework within which to manage the continuing changes in land use already foreseen in 1899 and expected, even now, to continue well into the future."[889]

The Court seems to be saying that the procedural right existed from the beginning, and thus should have governed any taking up of land that occurred between 1899 and the present. However, the claim before the court was a current taking, and no mention was made of the possibility of a claim for a past taking. In theory, the procedural right should apply to all aspects of the treaty and its implementation, including management of the

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[887] Ibid., para 30.

[888] Ibid., para 56.

[889] Ibid., para. 63.

land and its resources. At last, the Court has taken a small step toward the idea of the treaty as a "framework" for an ongoing relationship, an idea taken up again in Chapter VI.

- *R. v. Morris* (2006)[890]

The last case reviewed is also the last of the four major Vancouver Island treaty decisions. *R. v. Morris* went to the Supreme Court of Canada on the very narrow issue of whether the right to hunt contained in the North Saanich Douglas Form included the right to hunt deer at night. The facts are set out in the headnote: "The accused, both members of the Tsartlip Indian Band of the Saanich Nation, were charged with several offences under the provincial Wildlife Act, including…hunting at night…with the aid of a light, and hunting without reasonable consideration for the lives, safety or property of other persons…"[891] As a defence the accused raised their right to "hunt over the unoccupied lands…as formerly" under the North Saanich Douglas Form. The majority decision, penned by Deschamps and Abella, J.J., concluded that "Although the prohibition against dangerous hunting contained in s. 29 of the Wildlife Act is a limit that does not infringe the treaty right, the complete prohibition on hunting at night with an illuminating device set out in s. 27 is overbroad because it prohibits both safe and unsafe hunting, and, in the case of aboriginal hunters, infringes their treaty right."[892] The minority decision was co-authored by McLachlin, CJ, and Fish, J. In their view, hunting at night is inherently

[890] *R v Morris*, 2006 SCC 59 [2006] 2 SCR 915.

[891] Ibid.

[892] Ibid.,para 4.

dangerous, and therefore, a blanket ban on hunting at night is justified on the ground of public safety.[893]

Deschamps and Abella stated that in arriving at a decision in treaty cases a certain process must be followed, namely that "…the promises in the treaty must be placed in their historical, political and cultural contexts to clarify the common intentions of the parties and the interests they intended to reconcile at the time."[894] The first step was a finding that, "The interests of the colonial government in preserving the traditional Tsartlip way of life were a reflection of the economic and demographic realities of the region, including concerns for the safety and security of the small numbers of settlers."[895] Secondly, to ascertain the First Nation interest Deschamps and Abella resorted to statements by James Douglas, in which he "…represented to the Indian people with whom he entered into treaties that the treaties would secure for them the right to continue their pre-treaty hunting practices."[896] They then concluded that, "The promises made by Douglas confirm that the parties intended the treaty to include the full panoply of hunting practices in which the Tsartlip people had engaged before they agreed to relinquish control over their land on Vancouver Island."[897] In other words, the judges made the assumption, without reference to any First Nation accounts of treaty formation, that it was in the interest of the First Nation parties to "secure" their hunting practices having agreed to "relinquish their control over their land."

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[893] Ibid.,para 64.

[894] Ibid.,para 18.

[895] Ibid.,para 21.

[896] Ibid., paras. 22-3.

[897] Ibid.

As explained earlier in the chapter, courts are very reluctant to consider 'extrinsic evidence' when interpreting the terms of a written document, so the reference in this case to the statements by Douglas was unusual, but supposedly necessary because of the "lean and often vague vocabulary of historic treaty promises."[898] The judges concluded that, "These external acknowledgments by Douglas are significant where, as here, the treaty was concluded orally and subsequently reduced to writing. The oral promises made when the treaty was agreed to are as much a part of the treaty as the written words."[899] However, in their search for the intent of the First Nation parties the judges did not have recourse to any "external acknowledgments" or otherwise of the First Nation participants. It seems they were comfortable making assumptions about First Nation intentions without any reference to First Nation accounts. The next section addresses three cases where the courts have addressed First Nation understandings of treaty formation

3. Cession versus Sharing Treaties

- *Re Paulette*

Re Paulette is a1973 decision of Chief Justice Morrow of the Supreme Court of the North West Territories,[900] in which he ruled on the validity of a land surrender clause in two of the northern treaties. Francois Paulette and fifteen other chiefs had applied to the Northwest Territories Registrar of Land Titles for a caveat over 400,000 square miles of crown land notwithstanding the land cession provisions in Treaties 8 and 11, concluded in 1899 and 1921 respectively. Morrow relied upon the testimony of eye-witnesses to the

[898] Ibid., para 18.

[899] Ibid., para 24.

[900] *Re Paulette et al and Registrar of Titles (No. 2)* [1973] 42 DLR (3d) 8.

treaties in deciding that "Notwithstanding the language of the two treaties there is sufficient doubt on the facts that aboriginal title was extinguished that such claim for title should be permitted to be put forward."[901] Unfortunately the decision was overturned on appeal to the Supreme Court of Canada[902] on unrelated grounds, eliminating the legal significance of Morrow's decision, but leaving untouched his decision to give credence to the eye-witness testimony.

- *R. v. Horse* (1988)[903]

The accused were charged under the *Saskatchewan Wildlife Act* while hunting for food upon privately-owned land, without the permission of the owner. The land in question was within Treaty 6 territory, which contained the following provision as to hunting: "Her Majesty further agrees with her said Indians that they…shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered… saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by her said Government…or by any of the subjects thereof…."[904] When the case reached the Supreme Court of Canada, counsel for the accused advanced the novel argument that "Indians were by the treaty entitled to hunt over land taken up for settlement under a joint use concept.[905] That is upon the settlement of these lands, the Indian right to hunt was not extinguished but rather the lands came to

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[901] Ibid., 40.

[902] *Paulette et al v The Queen* [1977] 2 SCR 628.

[903] *R v Horse*, [1988] 1 SCR 187.

[904] Ibid., para 28.

[905] This argument was not raised in any of the lower court decisions. Prov Court [1983] 3 CNLR 121; Sask QB [1984] 2 CNLR 135; Sask CA [1984] 4 CNLR 99.

be used jointly by the Indian and the settler."[906] As authority for this proposition, counsel relied upon an exchange between Commissioner Morris and Chief Tee-Tee-Quay-Say during the course of negotiations, as recorded in Morris' 1880 book, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*.[907] Tee-Tee-Quay-Say stated "We want to be at liberty to hunt on any place as usual," and Morris replied, "You want to be at liberty to hunt as before. I told you we did not want to take that means of living from you, you have it the same as before, only this, if a man, whether Indian or Half-breed, had a good field of grain, you would not destroy it with your hunt."[908]

The judgment of the court was delivered by Estey, J., who expressed a great deal of reluctance to use extrinsic evidence "in the absence of ambiguity," or "...where the result would be to alter the terms of a document by adding to or subtracting from the written agreement."[909] Nonetheless, he grudgingly proceeded to quote a number of extracts from Morris' book, but only statements *by* Morris.[910] He made only one [indirect] reference to the First Nation understanding: "Nowhere in Morris' dispatch or in the records of negotiations are there statements made by the Indians expressly requesting the right to hunt on occupied lands."[911] The Court concluded that the extracts from Morris' book, "…rather than supporting the reading of the Treaty advanced by the

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[906] *R v Horse*, [1988] 1 SCR 187 at para 31.

[907] Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*.

[908] *R v Horse* at para 34.

[909] Ibid., para 35, Part C.2.a; In the Sioui decision, Lamer acknowledged the dictum in *R. v Horse* that "…extrinsic evidence is not to be used as an aid in interpreting a treaty in the absence of ambiguity or where the result would be to alter its terms by adding words to or subtracting words from the written agreement," but concluded that "The ambiguity arising from this document thus means that the Court must look at extrinsic evidence to determine its legal nature."

[910] Ibid., paras 39-43.

[911] Ibid., 208, para 47.

appellants [Horse *et al*], reinforces the conclusion that the argument of the appellant for joint use of lands taken up by settlement must be rejected,"[912] and it was[913]. Estey's judgment gives the distinct impression that a claim based on the concept of joint use was a waste of the Court's time.

Legal scholar Patrick Macklem wrote a scathing review of the *Horse* decision in 2002, which included these important remarks concerning Estey's judgment:

> His refusal to concede that the substance of the treaty might permit hunting on settled lands denies the possibility that a surrender of Aboriginal lands can be viewed in nonexclusive terms. That is, the surrender could involve an invitation by Aboriginal people to non-Aboriginal people to use the land in question and to assert priority when their use conflicts with Aboriginal interests. Justice Estey's judgment assumes it is legitimate to apply non-Aboriginal assumptions about the meaning of surrender in a context in which joint use by Aboriginal and non-Aboriginal people is possible.[914]

The Royal Commission on Aboriginal Peoples (the "Commission") amassed an enormous body of evidence on the historical treaties, which formed the basis for an extensive report in 1996. Section 2 of Chapter 2 of Volume 2, "Legal Context of the Treaty Relationship" contained a review and analysis of the jurisprudence to that date, and came to some harsh conclusions. Like Macklem the Commission was highly critical of the decision in *Horse*, as demonstrated by these pointed remarks: "It seems illogical to recognize the two-sided nature of treaty negotiations but to conclude that the one-sided technical language recorded by the Crown is the whole treaty."[915] Similarly, the

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[912] Ibid., 203, para 38.

[913] Ibid., 210.

[914] Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2002), 148-150.

[915] "Legal Context of the Treaty Relationship," Royal Commission on Aboriginal Peoples, Vol II (1996), accessed 4 November 2015, http://caid.ca/Vol_2_RepRoyCommAborigPple.html.

numbered treaties were 'signed' by chiefs who "were asked to make their marks or to touch a pen," but "…can this formality make the Crown's memorandum of the oral agreement the exclusive evidence of its content?"[916]

The Commission also addressed one of my major complaints about the way treaty claims are brought before the courts: "Treaties are often up for interpretation in court cases, but usually in a narrow and ultimately frustrating context. Often the question at issue is whether an Indian person whose First Nation is party to a treaty has a defence to a charge of hunting or fishing out of season. The variations of the facts are endless, but the pattern is common. Treaties often do provide for such a defence."[917] However, "…the context does not invite a broad look at what the treaty was all about from the perspective of the First Nation party…. The courts seldom have an opportunity to address more fundamental but controversial treaty questions which as whether the treaty nation's Aboriginal title to its traditional territories was effectively extinguished."[918]

This in turn raised other important questions for the Commission: "What if the two parties had completely different concepts of the agreement each believed had been reached? What if there never was agreement at all?" Their answer was to provide a list of common grounds: "Both parties perceived the treaties as providing for a shared future. The treaties were to define relationships between governments. They guaranteed a sharing of the economic bounty of the land. They guaranteed peace and prevented war.

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[916] Ibid.

[917] Ibid.

[918] Ibid. The report highlights another problem with this approach: when "treaty rights come to courts in connection with criminal prosecutions…[t]here is no readily available mechanism to implement in positive terms a right that has been given judicial recognition as a defence to a charge of unlawful hunting or fishing"

They involved a mutual respect that was to be enduring." They also gave a more specific example, namely that the treaties "include an agreement to share territory between treaty nations and the newcomers as represent by the Crown," with the result that "Aboriginal title continues to co-exist with the Crown's rights throughout the areas covered by the treaties." However, the report went on to warn that "It is…possible that the courts could continue to give effect to the written text of a treaty, however illegitimate that may be from the treaty nation's perspective."[919] Their warning was to prove accurate. Unlike the *Horse* case, a great deal of evidence in support of the possibility of a joint use concept was tendered at the trial level in the *Buffalo v*. *Canada* case, but with no different result.

- *Buffalo v*. *Canada* (2005)

The case of *Buffalo v*. *Canada* (2005) was brought to trial in the Federal Court of Canada.[920] The trial was a mammoth undertaking: 370 days over five years, with over 5000 documents entered as evidence, resulting in a 178 page "Phase one" judgment delivered by Federal Court Judge Teitelbaum. The case was also complex, raising multiple issues, but only one is dealt with in this review, namely the effect of the "land surrender clause" in Treaty 6: "The Plain Wood and Cree Tribes of Indians…do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada for her Majesty the Queen…forever, all their rights, titles and privileges whatsoever, to the lands included within the following limits…embracing an area of one hundred and

[919] Ibid.

[920] *Buffalo v Canada* [2006] 1 CNLR 100.

twenty-one thousand square miles…more or less….”[921] According to Teitelbaum, the argument put forward by the plaintiff’s main expert witness, historian Arthur Ray, as outlined by the Court, has two parts. First, “Professor Ray’s thesis in regard to the land surrender issue was that the theme, or tenor, or Morris’s message to the Indians during the Treaty 6 negotiations was that they wanted to share the land with the Indians and not take anything away from the Indians’ livelihood.”[922] Secondly, “Professor Ray emphasized in his testimony that the documentary record is silent on the topic of the surrender clause. He maintained that nothing in the record indicates that this clause was ever translated or explained to the Cree at Treaty 6; rather, the focus of the treaty talks was on what the Cree were to receive.”[923] Teitelbaum largely ignored the first part of Ray’s argument, but devoted a huge amount of space to refuting the second part. For example he described with approval the argument of the main Crown expert, archaeologist Dr. Alexander von Gernet, to the effect that “the land surrender is axiomatic and non-negotiable, hence its minimal discussion.”[924] The judge then proceeded to discuss and reject, in considerable detail, the oral testimony of elders, based largely on criticisms advanced by von Gernett.[925]

After discarding the elders oral testimony, Teitelbaum proceeded to declare his faith in the reliability of the contemporaneous accounts of two members of the government party (Commissioner Morris and commission secretary Dr. Jackes), the

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[921] Ibid., 180, para 272.

[922] Ibid., 181, para 274.

[923] Ibid., para 275.

[924] Ibid., 183, para 291.

[925] Ibid., 183, para 291.

memoir of a missionary (Methodist minister John McDougall) and the recollections of a Metis translator (Peter Erasmus).[926] These four accounts are replete with extracts of statements by First Nation participants in the negotiations, but Teitelbaum, with one exception,[927] quoted only the words of the four authors. Teitelbaum's conclusion is not surprising: "…from the government's perspective, the land surrender was absolutely non-negotiable – unlike various other parts of the treaty, such as money, agricultural implements, and livestock…In my opinion, the Cree leadership was aware of this and accepted it going into treaty, hence the lack of protracted discussion on this topic."[928]

It seems likely that the law on this issue will remain undeveloped until a test case is able to make its way through the court hierarchy to the Supreme Court of Canada, some years hence. However, some more promising approaches to this important topic are developed in the next chapter.

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[926] Ibid., 205-15, paras. 458-494.

[927] Ibid., 210, para 464.

[928] Ibid., 217, para 509.

Chapter VI: Exploring Treaty Categories

A. Introduction

In Chapter I, the review of the Canadian literature identified the standard treaty categorizations of trade, peace and goodwill, and cession, and highlighted the development of a new category, the sharing treaty. Chapter II demonstrated that the sharing category better describes the Vancouver Island Treaties than the cession category. Chapter V gave an overview of colonial, settler, government, academic and the judicial attempts to isolate the Vancouver Island Treaties and consign them to a category that could be labeled 'inconsequential'. The purposes of this chapter are to critique the standard categories, highlight some emerging ones and to propose a new category, modus vivendi (or framework) treaties. I argue that this new category is consistent with the First Nation understandings documented in the dissertation, and flexible enough to incorporate the interests and understandings of both parties. I should note that Janna Promislow's work features prominently throughout the chapter, because it lays much of the necessary groundwork for what I hope to achieve (and has saved me an enormous amount of work).

The chapter begins with an explanation of why the Vancouver Island Treaties occupy so little space in the Canadian literature on historical treaties between the Crown and First Nations. It then shifts to an analysis of the existing characterizations of treaties used in the Canadian literature, followed by consideration of some recently articulated categories. Next is a review of the jurisprudence which has created an overarching category, the sui generis treaty. That leads into a survey of the treaty categories in use within modern international law, with particular reference to modus vivendi treaties. Finally, I outline the development of the concept of modus vivendi in political and legal

theory. At each step, I test the potential of new categories to provide insights into the formation and terms of the Vancouver Island (and possibly other) Treaties. As this is an exploratory venture, the results are necessarily preliminary and partial, but my hope is that they will prove sufficiently compelling to provoke constructive debate and stimulate further research.

Historian J. R. Miller's *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* is a well-written and comprehensive survey. However, Miller devotes only one page (out of 309) to the Vancouver Island Treaties, emphasising "the fact that BC's history of relations with First Nations had been dramatically different from that of the eastern part of the country"[929]. He gives the impression that the Vancouver Island Treaties are outliers, with no substantive connection to the continuum of treaty making in the rest of Canada, and in one sense he is correct. My research has demonstrated that, contrary to common belief, no precedents from the Colonial Office or from the treaty experience of Upper Canada contributed to the formation of the Douglas Forms. They represent an amalgam of Hudson's Bay Company policies and an 1848 agreement in the Maori language between the British Crown and the Ngai Tahu people of New Zealand. The Douglas Forms may indeed be a statistical anomaly, a category of one. But what of the Vancouver Island Treaties, what is their place within the treaty history of Canada? Are they merely an isolated and minor[930] cluster of common-or-garden land cessions,

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[929] Miller, *Compact, Contract, Covenant,* 146.

[930] References to the treaties often minimize their impact by focusing on the small geographical area covered by the treaties, usually expressed as 3% of Vancouver Island, compared to the enormous area of the eleven Numbered Treaties, which cover a significant percentage of the entire country. On the other hand, when the area they cover is expressed as 284,250 hectares, or 702,375 acres, the total becomes more impressive. This territory covers all of the City of Victoria, Greater Victoria, (including Saanich, Esquimalt, View

bereft of connections to the rest of Canada's historical treaties? This image is reinforced by maps portraying the treaties of Canada, which literally represent the Vancouver Island Treaties as a tiny cluster of dots in the southwest corner, far away from their nearest neighbour in the northeast corner of the province.[931]

In *Making History Count: A Primer in Quantitative Methods for Historians*, Charles H. Feinstein and Mark Thomas have addressed the topic of statistical outliers: "These are observations in a data set that do not conform to the patterns suggested by the remainder of the sample."[932] They then pose the question, "What should be done about them? It is tempting to discard the observations entirely."[933] The authors of Canadian treaty surveys have been uniformly at a loss as to where to place the Vancouver Island Treaties in their standard east-to-west progression of treaty making. As a result they are usually inserted awkwardly, and out-of-order chronologically, as a brief add-on to vastly more detailed descriptions of the Numbered Treaties. Feinstein and Thomas suggest that the temptation to marginalize or erase outliers should be resisted, because their presence may be the result of "measurement errors, arising from incomplete information,"[934] and thus it "may provide valuable information about the model as a whole."[935]

Royal, Langford, Colwood, and Metchosin), the Town of Sooke, the City of Nanaimo, and the area around Port Hardy, with a combined population approaching one half million, and a value in the billions of dollars.

[931] For the federal government map see http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/htoc_1100100032308_eng.pdf. For other maps see https://www.google.ca/search?q=images+first+nations+treaties+canada&biw=1240&bih=633&tbm=isch&tbo=u&source=univ&sa=X&ved=0CBwQsARqFQoTCJjL9eqa4MYCFYZbkgodMCcDuA.

[932] Charles H. Feinstein and Mark Thomas, *Making History Count: A Primer in Quantitative Methods for Historians* (Cambridge: Cambridge University Press, 2002), 316.

[933] Ibid., 317.

[934] Ibid., 319.

[935] Ibid., 443.

I would argue that the standard treatment of the Vancouver Island Treaties as outliers is a strong indicator that the existing framework of 'trade and commerce', 'peace and goodwill' and 'cession' treaties is flawed by reason of "incomplete information." As noted by Promislow, all three existing categories provide an "over-representation of colonial interests" and "inadequately represent indigenous perspectives,"[936] demonstrating an urgent need for fresh approaches. New models need to be developed, in which the Vancouver Island Treaties are no longer shunted into a corner and ignored. As demonstrated earlier in the dissertation, much work has already been done in recent times to develop the concept of the sharing treaty, and its application to many treaties across Canada, including the Vancouver Island Treaties. To that extent, the Vancouver Island Treaties now have a place within the larger picture of treaty-making in Canada. Yet, in the course of my research I observed another feature shared by many treaties between nation-states and Indigenous peoples, namely that they were intended as the start of a process, not its culmination. In other words, they were in some sense interim agreements. I began to search for categories and concepts which could capture these agreements. The end of the chapter is devoted to that search, but the process begins with a review of Promislow's survey of existing treaty categorizations.

B. Categories in the Canadian Literature

Promislow's dissertation is wide ranging, but one of her objectives is particularly relevant to my enterprise: "By canvassing treaty histories and survey-style discussions of historical treaties, I will demonstrate that treaty typologies remain largely on colonial

[936] Promislow, "'I smooth'd him up with fair words,'" 199-200.

terms. I will argue for a re-organization of this schema in favour of one that situates and explains particular treaties in relation to evolving relationships rather than evolving colonial interests."[937] She described the existing typology in the following terms:

> Canadian history is reported to encompass more than 500 historic treaties. A common method for summarizing this history divides treaty-making into pre- and post- 1850, which sets the Robinson treaties on the northern shores of Lake Superior and Huron as the dividing marker. Alternatively, the treaty timeline is divided by confederation, with the post-confederation era coinciding with the negotiation of the numbered treaties in the old northwest. Confederation as a marker emphasizes a change in colonial authority from colonial governments to the new Dominion government. By contrast, 1850 more clearly marks the beginning of a new phase of treaty-making in which treaties covered larger territories. The earlier date also signifies the completion of a shift in the subject matter of treaties from alliance to land that began with the Royal Proclamation of 1763. Alliances, generally known as 'peace and friendship treaties,' established or re-affirmed peace through establishing mutual military support or neutrality. Such agreements often included or set the stage for trading commitments with indigenous peoples, which were an important element of maintaining peaceful relations in at least the eighteenth century….
>
> In survey treatments, the post 1850 and post-confederation period is typified by treaties that dealt with large expanses of territory and many Indian nations or tribes. The written terms address land surrenders, annual presents or annuities, commitments to set aside reserves, and continued access to Crown lands for harvesting activities until taken up for settlement. They are thus presumed to be different in scope and nature than the eighteenth-century peace and friendship agreements. The numbered treaties have also been further divided by some historians into the first seven 'settlement treaties' (1871-1877) and the later three [sic; actually four] 'northern resource development' treaties (1899-1921, drawing attention to the different impetus for colonial action in these two time periods.
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> Between these two main types of treaties, some surveys attend to the Royal Proclamation of 1763 and treaties in Upper Canada in the late eighteenth and early nineteenth centuries. Following the formalization of British treaty-making policy in the Royal Proclamation, scholars note a transitional era in which a critical shift occurs after the War of 1812 when the British need for military

[937] Ibid., 154.

> support from indigenous allies waned and settler pressures for land increased. Prior to 1812, the move from the peace and friendship format towards the geographically limited land cession agreements of the second period was already in progress. Further changes were introduced in the later era, replacing one-time payments with annual annuities…and connecting treaty-making to the creation of reserves….[938]

She summarized as follows: "…the surveys that give a basic shape to Canada's treaty-making history carry forward the historiographical habits of previous generations. Most critically, the distinctions between eras and types of treaties in the surveys correspond to the colonial administration's interests in making a treaty in a particular time and place…and inadequately represent indigenous perspectives."[939] From this she concluded that, "The over-representation of colonial interests is particularly strong in the continued separation of land from peace and friendship treaties and/or fur trade agreements."[940] She went on to provide a brief survey of the literature asserting that First Nations "…agreed to share their territories and resources with the newcomers."[941] and noted the stark "interpretive divide" between this literature and the decisions of the SCC.[942] My own reading of the literature and case law (as set out in Chapters I & V) is consistent with her position.

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[938] Ibid., 182-86.

[939] Ibid., 199.

[940] Ibid., 200.

[941] Ibid.

[942] Ibid.

1. Revisiting the Standard Categories

a. Trade

As noted in the Chapter I literature review, the first of Miller's two contributions to the expansion of treaty categories was the inclusion within the definition of "commercial compacts," agreements between commercial enterprises, such as the HBC, and First Nations. Miller argued that, "Royal authority made them quasi-government entities. For that reason the agreements they forged with First Nations should be understood as treaties."[943] The proposition has a potentially serious implication, not explored by Miller. If he is suggesting that the HBC as a "quasi-government" authority acted as the agent of the Crown, such treaties might qualify for the protection of Section 35 of the Constitution Act. Intriguing as this possibility may be, it is beyond the scope of my project to revisit the many early compacts from this perspective.

Another issue not considered by Miller is whether these "commercial compacts' dealt with land in any way. Building forts in furtherance of a trade arrangement would have required permission from First Nations. This is a sharing of the land of sorts, but of a temporary nature, which might or might not be followed up by more comprehensive and permanent arrangements. The arrangements surrounding the construction of Fort Victoria are a good example. The issue is taken up again, later in the chapter.

b. Peace and Goodwill

After reading Wicken's account of the Mi'kmaq treaties[944] I was left with the distinct impression that the series of five agreements, from the British perspective, were

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[943] Miller, *Compact, Contract, Covenant*, 4.

[944] Wicken, *Mi'kmaq Treaties on Trial*. Reviewed in Chapter I.

more of a pacification scheme, in both senses of the word, intended to "quell the anger, agitation and excitement [of the Mi'kmaq]," and to "bring peace [to the Mi'kmaq], especially by the use or threat of military force."[945] Wicken convincingly argued that, from the Mi'kmaq perspective, the treaties represented an alternative to armed conflict in their ongoing struggle to retain control over as much of their land as possible during a time of great violence and political volatility. To describe this process as one of "peace and friendship" thus seems wholly inadequate. It may be that the Eastern Seaboard Treaties have more in common with the Numbered Treaties than has been acknowledged in the past, in that they too can now be understood as agreements between the Crown and First Nations concerning control over the allocation of land. My point of view is shared by Promislow, who noted that, "the characterization of these agreements as peace and friendship treaties does not recognize that, in spite of the absence of land cession terms, the agreements addressed land and territory as a matter of jurisdiction."[946]

c. Cession

In his decision in the *Buffalo* case, Teitelbaum, J., made much of the long-standing trade relationships between the Cree people and European traders in Treaty 6 territory, and the pre-treaty knowledge of the Cree concerning the terms of earlier cession treaties. In other words, Teitelbaum, J., seemed to be making an assessment of Cree understanding of the terms of the written treaty document based on his assessment of the variety, duration, frequency and intensity of their pre-treaty interactions with European traders and government officials. This suggests the existence of a continuum of

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[945] "Pacify," Oxford Dictionaries Online, accessed 23 October 2015, http://www.oxforddictionaries.com/definition/english/pacify.

[946] Promislow, "'I smooth'd him up with fair words,'" 184.

awareness, from high to low. Are there any treaties which are accepted by both parties as having effected a cession? The only possible candidates I am aware of are the Huron/Superior Treaties. In his monograph on the treaties (see review in Chapter I) Morrison briefly addressed the question of the Ojibway comprehension of the cession provision in the treaties, and concluded that by and large their understanding "does correspond to the language of the Treaty text."[947] Assuming for present purposes that these treaties were at the highest end of the scale, the awareness of the Vancouver Island First Nations would have been at the lowest end, given their relatively limited and brief interaction with European traders, and virtually non-existent awareness of the existence of the British Crown.

However, there are problems with a sliding scale approach. For instance, what factors other than informed consent might have motivated First Nation representatives to put their names to a treaty document containing a cession provision? Duress comes to mind with respect to many of the treaty negotiations described in the dissertation, and the Washington Treaty meetings are a good example. Another problem is the assumption by Teitelbaum, J., that a basic understanding of land surrenders, coupled with cession language in the written treaty, are tantamount to informed consent. Anthropologist Michael Asch has addressed this issue in an article entitled "On the Land Cession Provisions in Treaty 11."[948] Relying in part on testimony in the *Paulette* case (discussed in Chapter V of the dissertation), Asch noted that the Dene people "…approached negotiations guardedly and were particularly concerned with whether the treaty contained

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[947] Morrison, "The Robinson Treaties of 1850," 123.

[948] Michael Asch, "On the Land Cession Provisions in Treaty 11," *Ethnohistory* 60.3 (2013): 51.

provisions pertaining to the cession of land…."[949] In other words the Dene understood what a sale of land was, and were anxious to find out if the terms proposed by the government representative contained such a provision. The key lies in their understanding of where the terms of a treaty resided, namely in the exchange of oral promises, not in the piece of paper. This may hold true for many of the historical treaties in Canada, including the Vancouver Island Treaties. This insight is reinforced by D.F. McKenzie's booklet entitled *Oral Culture, Literacy & Print in Early New Zealand: the Treaty of Waitangi*,[950] previously discussed in Chapter IV with respect to the Treaty of Waitangi. He described the disconnect between the persistence of Indigenous orality, and European views on literacy, as follows:

> …the European myth of the technologies of literacy and print as agents of change and the…conviction that what took Europe over two millennia to accomplish could be achieved – had been achieved…in a mere twenty-five years: the reduction of speech to alphabetic forms, an ability to read and write them, a readiness to shift from memory to written record, to accept a signature as a sign of full comprehension and legal commitment, to surrender the relativities of time, place and person in an oral culture to the presumed fixities of the written or printed word.[951]

I would argue that the First Nation negotiators of many of the historical treaties, and especially the Vancouver Island Treaties, maintained a complete reliance on the spoken word, and were not aware of any need to concern themselves with the written words. In this, they were not being obtuse or wilfully blind, they were merely relying on their previous experience of how important agreements were concluded.

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[949] Ibid., 458.

[950] McKenzie, *Oral Culture, Literacy & Print in Early New Zealand: the Treaty of Waitangi*.

[951] Ibid., 10.

2. Treaties as "Sacred Promises"

Miller's second innovation was to propose a fourth category, or perhaps characterization, of the Prairie treaties, each of which created a "covenant" between the participating First Nation and the Crown. He argued that, "Officials did not realize that the protocol, including the pipe ceremony, converted the product of the talks into a covenant to which the Great Spirit was also a party, that the heart of the treaty was the kin-like relationship it created, and that everything spoken was as much part of the treaty as whatever government scribes recorded."[952] In spite of the word "covenant" forming part of the book's title, the concept was only introduced in his "Conclusion" chapter, and its implications were not fully developed.

In *White and Bob*, Davies, JA, characterized treaties between the Crown and First Nations as "solemn engagements" by "persons of authority," thereby possessing a certain "sanctity."[953] In *R. v. Sioui*, Lamer, CJ, opined that "It must be remembered that a treaty is…an agreement the nature of which is sacred."[954] In *R. v. Badger*, Cory, J, reiterated that "Treaties are sacred promises and the Crown's honour requires the Court to assume that the Crown intended to fulfill its promises."[955] The *Shorter Oxford Dictionary* gives several definitions of "sacred," but the relevant one for present purposes is, "Secured by religious sentiment, reverence, sense of justice, etc., against violation, infringement, or encroachment,"[956] and defines "sanctity" as having "The quality of being sacred."[957]

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[952] Miller, *Compact, Contract, Covenant* at 295.

[953] *White and Bob*, (1964), 50 DLR (2d), at 649.

[954] R. v Sioui, [1990] 1 S.C.R. 1025, at 1063.

[955] *R. v. Badger*, [1996] 1 SCR 771 at para 47.

[956] *The Shorter Oxford English Dictionary on Historical Principles* (London: George Newnes, 1933), 1776.

[957] Ibid., 1786.

However, an idea of the strict limits placed upon the term "sacred" by the Supreme Court of Canada is provided by the very next sentence in Cory's judgment: "Treaty rights can only be amended when it is clear that effect was intended." He was referring to the Natural Resources Transfer Agreement of 1930 (between the Federal Government and the Prairie provinces), by which Treaty 8 (and other Numbered Treaties) were amended to alter First Nation hunting rights without the consent, or even any consultation with, treaty First Nations.

The treaties may in some sense be sacred, but they can also be framed as frauds perpetrated on First Nations by unscrupulous government officials. There is a notable reluctance to use the term in the literature, but I believe the thought has occurred to many who have read widely in the official correspondence. John Borrows has acknowledged that the treaties between the Crown and First Nations could be viewed as "…filled with fraud, duress and manipulation – or as expedient temporary bargains, designed by the Crown to separate Indians from their lands."[958]

However, he has decided to put that aside in favour of a more generous perspective, where "…treaties can be regarded as sacred creation stories about Canada's formation if placed in their best light."[959] This is a very different conception of the word than the one used by the Supreme Court of Canada. Borrows illustrated this point of view by reference to the Numbered Treaties. Listening to elders speak about their treaty, he realized that, "…they regarded the treaty as flowing from a sacred source. They did not rely on the written text of the treaty to arrive at this conclusion. Because First Nations

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[958] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), 27.

[959] Ibid.

followed their own legal traditions in creating treaties, their interpretation was that treaties were made with the Creator as well as with the Crown."[960] According to Borrows this sacred aspect is "one reason why many First Nations would not consider abandoning them despite generations of government neglect."[961]

Cree lawyer and advocate Harold Johnson aptly described the disconnect between judicial and First Nation notions of the sacred: "Your law of contract and treaty allows for breach and remedy. The Creator's law does not allow for any breach whatsoever. Failure to comply has consequences, and no matter how severe the failure, the promise never becomes null and void; the consequences just keep getting greater and greater."[962] Until there is some reconciliation of the two concepts, the category remains a work-in-progress.

What of the Vancouver Island Treaties? There is nothing in the text of the Douglas Forms or in any of the Colonial accounts to indicate whether Douglas used Christian references in his addresses to the First Nations at treaty meetings. To his credit, Douglas believed that the terms of the Douglas Forms were sacred in the sense that they were inviolable, as shown by the following address he made in 1859 to the First Vancouver Island House of Assembly:

> When the Settlement at Victoria was formed certain reservations were made in favour of the native tribes. They were to be protected in their original right of fishing on the Coasts and in the Bays of the Colony, and of hunting over all unoccupied Crown Lands: and they were also to be secured in the enjoyment of their village sites and cultivated fields. These rights they have since enjoyed in full and the Reserves of land covering their Village sites and cultivated fields

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[960] Ibid., 25-26.

[961] Ibid., 26.

[962] Johnson, *Two Families*, 29.

> have all been distinctly marked on the maps and surveys of the Colony, and the faith of Government is pledged, that their occupation shall not be disturbed.[963]

Douglas' view may have been shared (at least initially) by Saanich elders who told Dave Elliott[964] that the Xs on the Douglas Form were "signs of the cross" and "the sign of their God,' representing the white people's "highest order of honesty." Did the First Nation participants at the treaty meetings use their own spiritual terms or invoke the 'Creator' at the treaty meetings? Unfortunately, there is nothing in the historical record that might provide an answer to this question. Hopefully, scholars of Indigenous law will provide insight into the nature of treaty law amongst the First Nations of Vancouver Island. In any event, the SCC has ruled that an absence of solemnity does not negate the existence of a treaty.[965]

C. The Content of Sharing Treaties

As my review of the Canadian literature on the historic treaties in Chapter I has shown, the concept of the sharing treaty is well established, even though it has received no recognition from the courts to date. However, the Canadian literature that documents the First Nation understanding of their treaties as agreements to share their land with newcomers does not go into any detail concerning the content of such agreements. In other words they do not inquire into what a sharing treaty would look like on the ground, either figuratively or literally. The goal of this section is to bring together examples drawn from various parts in the dissertation of Indigenous representatives attempting to

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[963] Reproduced in James E. Hendrickson, ed. *Journals of the Colonial Legislatures of the Colonies of Vancouver Island and British Columbia,* Vol II (Victoria: Provincial Archives of British Columbia, 1980), 71-73.

[964] For the complete oral tradition see Chapter II.C.3.c.

[965] *R. v. Sioui*, [1990] 1 S.C.R. 1025, at 1060.

explain their understanding of agreements to share the land. Of the three court cases which considered the existence of sharing treaties, only *R. v. Horse* contained an indirect reference through the words of Commissioner Morris, setting a limit on the scope of the sharing principle: "…if a man, whether Indian or Half-breed, had a good field of grain, you would not destroy it with your hunt."[966] This is similar to the more detailed description of shared use provided by Dick Jackson with respect to the Medicine Creek treaty in Washington Territory:

> When the treaty was made the Indians reserved their right for their fishing and hunting. They [the Commissioners] promise them that even if the creek was running through a white man's field, if there was any fish in there, they have a right to hook that fish out, or if there were any berries inside of white man's ranch, the have a right to go pick inside of that fence and get their own food.[967]

Another proposal for the allocation of land at that treaty meeting was provided by Chief Leschi: "We want some of the bottom land…so our people can learn to farm, and some of the prairie where we can pasture our horses, and we want some land along this creek so our people may come in from the Sound and camp."[968]

My curiosity about such arrangements had originally been piqued by David Latass' fascinating outline of how sharing the land would play out in practice in Saanich:

> The Indians were to have reserved to their use some choice camping sites, were to have hunting rights everywhere and fishing privileges in all waters, with certain water areas exclusively reserved to the use of the tribes.
> In return for the use of meadowlands and open prairie tracts of Saanich, the white people would pay to the tribal chieftains a fee in blankets and goods. That was understood by us all to be payable each year.[969]

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[966] Estey, J., quoting Alexander Morris in *R. v Horse*, [1988] 1 SCR 187 at para 34.

[967] Swindell, "Appendices," 222-224.

[968] As told to Ezra Meeker by Palalla, a Steilacoom Tribe member, and quoted in Kluger, *The Bitter Waters of Medicine Creek*, 94.

[969] Pagett, *105 Years*, 1.

As noted in Chapter IV, my research in New Zealand has also turned up examples, such as the testimony of Chief Waruwarutu before the Smith/Nairm Commission:

> Waruwarutu: Mahinga kai is not exclusively confined to land cultivated, but it refers to places from which we obtain the natural products of the soil without cultivating. You know, the plants that grow without being cultivated by man. The whole of this country was covered with Ti or cabbage trees in former times. There was also the fern root, which is not usually cultivated…. There were also wood-hens….There were also all the different berries the natives used to get from the forest trees….The Maoris know what parts they did not use for mahinga kai, and that was the part which was to go to the Europeans – the land not known as mahinga kai."[970]

In addition, Chief Tiramorehu testified that, "There are a lot of places along the coast here where the mahinga kais are pretty far apart from one another."[971] According to historian Alan Ward, Chief Tiramorehu suggested that, "before the sale, it was discussed with Kemp that the settlers could have their sheep runs on 'the big blocks of land, placed between each mahinga kai."[972]

While there are no Vancouver Island Treaty examples other than that contained in the Latass account, the Washington and New Zealand examples do lend weight to Latass' understanding, although a total sample of three is hardly statistically significant. This raises the issue of whether there is any point in collecting and discussing them. My argument is similar to that concerning the importance of collecting and analyzing the five First Nation accounts of treaty formation. Until now, the only available story of how the

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[970] NZA, Testimony of Chief Waruwarutu at Smith/Nairn Commission, Ngai Tahu Claim, file 27, B3, 8 May 1879.

[971] Quoted in Ward, "A Report on the Historical Evidence," 175.

[972] Ibid.

land covered by the treaties was going to be allocated and developed has been the colonial one where the land was to be of surveyed into blocks, a few of which to be reserved for First Nations, and the rest opened up to white settlers. The expectations of the First Nation parties for the management and allocation of treaty land have to date been virtually *terra incognita*. The fact must be kept in mind that there were two parties to the agreements, and that the expectations of both parties are equally important. Anything that can shed light on the First Nation side of this story is considerably better than nothing. Further information from other sources, such as archaeology, ethnology, traditional use studies and Indigenous law are required to flesh out the concept. Evidence of the Maori understanding of the term manhinga kai in the Ngai Tahu agreement was a significant factor in the decision of the Waitangi Tribunal on the Ngai Tahu land claim. It is not beyond the realm of possibility that First Nation understandings of land sharing under the Vancouver Island Treaties could become a significant factor in future negotiations and claims.

My wide reading in the literature and my own research suggest that proposals to share the land were a not uncommon response by Indigenous peoples to demands for their land from British and American governments and settlers. Was it reasonable for the Indigenous peoples to bring to treaty negotiations proposals to share their land? Given the Indigenous lack of a clear understanding of western agricultural practices and land ownership regimes, it seems eminently logical.

As noted in earlier chapters, Colonial officials such as Pearse on Vancouver Island and Eyre in New Zealand had acquired some idea of how Indigenous utilization of the land might expand, based largely on the very visible proliferation of potato patches.

Instead of welcoming this evidence of agricultural aptitude, they immediately identified it as a serious threat to their colonizing schemes.[973] What then, were the likely expectations of Governors Douglas, Stevens and Grey? I would go so far as to say that Douglas and Grey had no immediate plans to interfere with the existing way of life of the Indigenous peoples, but all three would have rejected any form of co-management or partnership with Indigenous people concerning future decisions for the allocation and use of land. There are many reasons for this, but their belief in the superiority and inevitability of western agriculture and land ownership were important factors. This narrow vision blinded colonial administrators, and the settlers who followed in their footsteps, to the variety, extent and importance of the products of the land grown, managed and harvested by Indigenous peoples.

This raises an intriguing question: are the Indigenous and European visions of the occupation and use of the land truly incompatible? With respect to the Northwest Coast, prominent ethno-botanists Douglas Deur and Nancy Turner have convincingly argued against the stereotype of First Nations and Native Americans as non-cultivators of the land at the time of European contact: "Certainly, Northwest Coast peoples were cultivating plants in some manner: they seeded or transplanted propagules, intentionally enhanced garden soils, altered local hydrology of garden sites, and weeded out a wide variety of competing plants."[974] In their opinion, "Whether an appreciation of traditional plant management would have dramatically changed the direction of colonization policy

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[973] See discussion in Chapter IV.

[974] Douglas Deur and Nancy Turner, *Keeping it Living: Traditions of Plant Use and Cultivation on the Northwest Coast of North America* (Seattle, University of Washington Press, 2005), 29.

is unclear…..”[975] A rather romantic vision of such an accommodation is provided by historian James Murton: “Can we imagine a garden that featured, alongside the roses, bright red bog cranberries and bushes bursting with pale red huckleberries? A farm that grew wapato and blueberries? A rural place that reached back not just into the European tradition but also into the local botanical tradition? That reached out to Sto:lo [Salish] gardeners for ideas? The result surely would be a different sort of experiment in making a place on the land.”[976]

D. *Sui Generis* Treaties in Canadian Law

With respect to the legal status of historical treaties between First Nations and the Crown, legal scholar Patrick Macklem has noted that in early decisions the courts considered them as “…not having the force of law, and amounted to little more than non-binding political arrangements…..”[977] As an example Macklem cited the notorious 1929 case of *R. v. Syliboy*,[978] in which a Nova Scotia county court judge considered a 1752 agreement between the Mi’kmaq and the Crown, and concluded that, “…the Mi’kmaq nation was an ‘uncivilized people’ and thus not an ‘independent power’ possessing the status to enter into a treaty with another nation.”[979] Macklem went on to note that, “…the idea that a treaty was unenforceable in a court of law gave way to the view that a treaty is

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[975] Ibid.

[976] James Murton, “The Long Question of Food and Land: A Review Essay,” *BC Studies*, 184 (Winter, 2014/15): 130.

[977] Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001), 144.

[978] *R v Syliboy*, [1929] 1 DLR 307 (Nova Scotia County Court).

[979] Macklem, *Indigenous Difference and the Constitution of Canada*, 139.

a form of contract with the Crown."[980] This approach made the treaties enforceable, but with severe limitations, as "…such rights do not check the exercise of legislative authority because the principle of legislative supremacy prevents the Crown from contractually binding itself from enacting certain types of legislation."[981] The *Natural Resources Transfer Agreement Act* (described in Chapter IV, Part D) is an example of subsequent federal legislation trumping the hunting provisions of the Numbered Treaties. Macklem described another problem with the contractual approach by reference to the 1979 trial decision in *Pawis v*. *The Crown*,[982] in which four members of the Ojibway First Nation pleaded the fishing provisions of their Robinson-Huron Treaty as a defence to charges of violating federal fishing regulations. As noted by Macklem, "Dismissing these arguments, Marceau, J., first held that the Robinson-Huron Treaty was 'tantamount' to a contract. Viewing a treaty as a form of contract enables its enforcement in a court of law but also triggers certain issues specific to actions in contract,"[983] such as limitation periods, and Marceau convicted the accused on the ground that the relevant limitation period had expired.

In 1982, section 35 of the *Constitution Act* was enacted, which recognized and affirmed "existing…treaty rights" of First Nations. From that point on, the courts no longer treated treaties as forms of contract, but *analogies* with contract law remain popular with judges and academics.[984] Section 35 protected historical treaties from

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[980] Macklem, 140.

[981] Ibid.

[982] *Pawis v The Crown,* [1979] 102 D.L.R. (3d) 602 (Federal Court Trial Division).

[983] Macklem, *Indigenous Difference and the Constitution of Canada,* 141.

[984] See Sebastien Grammond, "Aboriginal Treaties and Canadian Law," *20 Queen's Law Journal*, 57 (1994): 60. He claims that, with respect to Canadian treaties with First Nations, "…the basic analogy on which

encroachments by both provincial and federal legislation, but only with respect to subsequent legislation. For example, it does not apply retroactively to events such as the 1930 *Natural Resources Transfer Agreement* legislation, mentioned earlier in the chapter. Another limitation on the protection provided by Section 35 was developed by the Supreme Court of Canada in the case of *R. v. Sparrow*.[985] In that case the court decided that statutory incursions are permissible if the impugned legislation can be justified according to a set of criteria established by the court.[986]

Macklem has argued that S. 35 affords not only a protection from unjustified legislation, but also allows a new characterization of the historical treaties between First Nations and the Crown, as "…constitutional accords, articulating basic terms and conditions of social co-existence and making possible the exercise of constitutional authority."[987] Unlike contracts with the Crown, "…treaties do not distribute delegated state power, they distribute constitutional authority."[988] This is an appealing and popular argument with theorists, but one that I do not have space to pursue.[989] These

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Canadian jurists rely is that of contract." For an argument in favour of bringing back the contractual approach, see Claire E. Hunter, "New Justification for an Old Approach: In Defense of Characterizing First Nations Treaties as Contract," *University of Toronto Faculty of Law Review*, 62.1 (2004): 61.

[985] *R v Sparrow,* [1990] 1 SCR 1075.

[986] As an outsider to the world of litigation, I find the justification test set out in Sparrow and modified by subsequent cases to be labyrinthine. In his text, *The Law of Treaties Between the Crown and Aboriginal Peoples*, author J. Timothy S. McCabe devoted thirty pages to the explication of the test, which did little to enlighten me. Macklem, *Indigenous Difference and the Constitution of Canada*, 360-390.

[987] Macklem *Indigenous Difference and the Constitution of Canada,* 154.

[988] Ibid., 155.

[989] For those interested in the subject, see pages 158-76 of Promislow's dissertation, where she discusses treaties as "constitutional narrative," and reviews the work of such eminent legal and political theorists as John Borrows, James (sak'ej) Henderson, Kent McNeil, and James Tully, who envision historical treaties as the source of "a dynamic ongoing constitutional process." Promislow, "'I smooth'd him up with fair words,'" 158-176.

constitutional narratives have in common a tendency identify the historical treaties with principles of justice, which is a worthy aspiration, but the association of the Vancouver Island Treaties with such principles is a task best left to others. When I examine treaties my tendency is to focus on their pragmatic side. Before enlarging on this aspect, the judicial definition of the treaties needs to be described and assessed. While the current legal definition was first formulated in the 1985 SCR decision of *R*. *v*. *Simon* (and later refined by *R*. *v*. *Sioui*), the court derived its authority to do so from a forgotten part of the decision in *R*. *v*. *White and Bob*. As a result, the section begins with a reprise of that underappreciated case.

- *R*. *v*. *White and Bob* (1964)

The facts of the case have been discussed in Chapter III, and this second look is restricted to the question of the definition of historical treaties between First Nations and the Crown. The Crown had argued that the 1854 Nanaimo Douglas Form failed to meet the requirements of a treaty, enumerated as follows:

> (1) A document that on its face is so described or uses that word in the text, and,
>
> (2) Deals with fundamental differences between the parties (quare, political differences?) and not merely with private rights, such as in this case the sale of land, and,
>
> (3) A formal document in which the terms are set out with some degree of formality, and,
>
> (4) An agreement to which the Crown is a party, or which it has authorized one of the parties to make on its behalf.[990]

[990] *R v White and Bob* [1964], 50 DLR (2nd) 613 at para 10.

Two judges (Shepard, JA, with Lord, JA concurring) agreed with the fourth Crown argument on the ground that the HBC was acting on its own behalf, not as agent of the Crown. One (Norris, JA) affirmed the treaty status of the Nanaimo agreement, based on the applicability of the Royal Proclamation of 1763. The remaining two judges (Davey, JA, with Sullivan, JA concurring) also affirmed the treaty, but on other grounds. Davey concluded that the agreement did meet the second and fourth requirements: "Considering the relationship between the Crown and the Hudson's Bay Company in the colonization of this country, and the Imperial and corporate policies reflected in those agreements, I cannot regard ex. 8 [the Douglas Form] as a mere agreement for the sale of land made between a private vendor and a private purchaser."[991] Both Davey and Norris dealt with the Crown's first and third arguments. Davey phrased his argument as follows:

> In the section [88 of the Indian Act] 'Treaty' is not a word of art and in my respectful opinion, it embraces all such engagements made by persons in authority as may be brought within the term 'the word of the white man' the sanctity of which was, at the time of British exploration and settlement, the most important means of obtaining the goodwill and co-operation of the native tribes and ensuring that the colonists would be protected from death and destruction. On such assurances the Indians relied.[992]

His comment contains an important message to the Crown: Canadian governments could be held accountable for promises made to First Nations in the historic treaties. The wording used by Norris is painfully (to modern ears) condescending, but carries another important message to the Crown:

> The nature of the transaction itself was consistent with the informality of frontier days in this Province and such as the necessities of the occasion and the customs and illiteracy of the Indians demanded. The transaction in itself was a primitive one – a surrender of land in exchange for blankets to be divided between the Indian signatories according to arrangements between them – with a reservation

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[991] Ibid., para 13.

[992] Ibid., para 104.

> of aboriginal rights, the document being executed by the Indians by the affixing of their marks. The unusual (by the standards of legal draftsmen) nature and form of the document considered in the light of the circumstances on Vancouver Island in 1854 does not detract from it as being a 'Treaty'.[993]

Norris' contribution is an early statement that the courts would not permit governments to use technical arguments to avoid their treaty responsibilities. I hesitated to insert these two quotations, but I believe they serve as a salutary reminder of the endemic condescension towards First Nation issues evinced by the courts at that time. The dated wording may also explain why the case has not achieved iconic status in the world of aboriginal law.

Having disposed of the Crown's objections to the treaty status of the Nanaimo agreement, Davey, J.A. did something remarkable. He identified, in essence created, a new *kind* of treaty, restricted to agreements between First Nations and the Crown. He described the new category as follows: "…it does not mean an 'executive act establishing relationships between what are recognized as two or more independent states acting in sovereign capacities…. It is also clear in my opinion that the word is not used in its widest sense as including agreements between individuals dealing with their private and personal affairs. Its meaning lies between those extremes."[994] The "extremes" referred to by Davey are concepts developed by the English common law and European nation states, and, of course, no thought was given to First Nation legal concepts. Nonetheless, it represented a remarkable innovation, years ahead of its time.[995] That time came more

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[993] Ibid.

[994] Ibid., para. 12.

[995] For example, the 1979 Federal Court case of *Pawis v The Queen*, referred to in the previous subsection, cited cases on contract, but made no reference to *White & Bob*.

than twenty years later, when the Supreme Court of Canada acknowledged the new category and gave it a name. This event occurred in 1985 when the Court heard the case of *Simon v*. *The Queen*, a reconsideration of the treaty status of the Mi'kmaq agreement of 1752, which had been so resounding rejected in the *Syliboy* case.

- *Simon v*. *The Queen* (1985)[996]

Constitutional law maven Peter Hogg provided this concise summary of the decision in *Simon v*. *The Queen*: "…the question arose whether legal recognition should be given to a 'peace and friendship' treaty signed in 1752 by the governor of Nova Scotia and the Chief of the Micmac Indians. The document purported to guarantee to the Indians 'free liberty of hunting and fishing as usual' in the treaty area. The Supreme Court of Canada held that this was a valid treaty…..."[997] Hogg singled out the following quote from the decision of "Dickson C.J. for the Court," containing a brief definition of an "Indian treaty": "In my opinion, both the Governor and the Micmac entered into the Treaty with the intention of creating mutually binding obligations which would be solemnly respected."[998] Dickson then did something even more important – after refining the treaty definition created by Davey, he gave it a name: "An Indian treaty is unique; it is an agreement sui generis which is neither created nor terminated according to the rules of

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[996] *Simon v the Queen*, [1985] 2 SCR 387.

[997] Peter Hogg, *Constitutional Law of Canada, Student Edition,* (Toronto: Carswell, 1997), 635.

[998] *Simon v the Queen*, [1985] 2 SCR 387 at para 24; In their 1972 book, Cumming and Mickenberg provided this definition of a treaty: "It seems certain that both the Government and the Indians entered into the various treaties with the intention of creating mutually binding obligations"[998]. This bears a remarkable similarity to the definition pronounced by Dickson. Peter A. Cumming and Neil H. Mickenberg, *Native Rights in Canada* (Toronto: Indian-Eskimo Association of Canada in association with General Pub. Co., 1972).

international law."[999] As a matter of convenience, historical treaties between the Crown and First Nations will be referred to as sui generis treaties over the rest of this chapter.

The 1752 Treaty did not contain a cession of land, and the Crown argued that only agreements that ceded land were treaties within the meaning of Section 88 of the Indian Act. Dickson rejected this notion, saying that "In my view, Parliament intended to include within the operation of Section 88 all agreements concluded by the Crown with the Indians that would otherwise be enforceable treaties, whether land was ceded or not."[1000] Of course, as set out in Chapter I, Wicken has argued that the 1752 treaty was one of a series in which the Mi'kmaq attempted to retain some control over the piecemeal dispossession of their land, which took place every time the British founded another settlement within Mi'kmaq territory. The legal questions at issue in *R. v. Simon* were framed in such a way that no expert reports, oral history or enquiries into the Mi'kmaq understanding of the treaty, were required. The third case, *R. v. Sioui*, further refined the definition.

- *R. v. Sioui* (1990)[1001]

As with *White & Bob*, the facts of *R. v. Sioui* have already been set out in Chapter IV, and this second visit is limited to the issue of defining historical treaties between the Crown and First Nations. In the "Analysis" section of this decision, Chief Justice Lamer discussed at length the issue of whether the document in question (Murray's 1760

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[999] Ibid., para 33.

[1000] Ibid.,para 50.

[1001] *R v Sioui,* [1990] 1 SCR 1025.

memorandum) was a treaty. Lamer quoted with approval Dickson's definition in *R. v. Simon*, and then added his own gloss "…it is clear that what characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity."[1002] These three elements are now the sine qua non of the sui generis treaty, along with the requirement that the parties are the Crown and one or more First Nations.

Treaty categorization, as opposed to definition, was discussed by McLachlin, J., in *R. v. Marshall*. [1003] The Nova Scotia Court of Appeal had suggested that, "peace treaties fall in a different category from land cession treaties for purposes of interpretation, with the result that, when interpreting peace treaties, there is no 'presumption' that rights were granted to the aboriginal signatories in exchange for entering into the treaty."[1004] In McLachlin's mind "This raises the issue of whether it is useful to slot treaties into different categories each with its own rules of interpretation."[1005] She concluded that "the principle that each treaty must be considered in its unique historical and cultural context suggest that this practice should be avoided."[1006] Presumably she was arguing not against categories per se, but only the notion that different categories should have different rules of interpretation. Nonetheless, she does highlight the danger of forcing every treaty into one of a limited repertoire of

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[1002] Ibid., 1044.

[1003] *R v Marshall*, [1999] 3 SCR 456.

[1004] Ibid., para 80.

[1005] Ibid.

[1006] Ibid.

categories, and thereafter ignoring any features that do not fit neatly into the chosen slot. Categories should be heuristic, not determinative.

In her dissertation, Janna Promislow has noted two positive aspects of the broad SCC definition: "It does not establish any barriers to arguing that a treaty was made regardless of the form of documentation," and "…mutuality is important only with regard to identifying an 'intention to create obligations' and the presence of 'mutually binding obligations,' neither of which demands a finding of shared meaning with respect to the treaty itself or particular treaty promises."[1007] In this regard she was explicitly criticizing the interpretative approach of 'common intention' applied by the SCC in cases from Sioui onwards. Promislow believes that the SCC should "by-pass the identification of mutual intention on narrow, specific rights in favour of greater attention to the intentions around and parameters of the working relationship to define the historic element of a treaty right."[1008] She went on to suggest "…an approach to the treaty rights jurisprudence that attends to historical interpretation of mutual intentions to enter into and maintain treaty relations but does not rely on common intentions regarding the meaning and scope of the terms of that relationship to define treaty rights."[1009] In other words, the courts should be "interpreting treaty rights as a support for ongoing treaty relationships, rather than as representing the terms of a long stale agreement."[1010] My detailed review and analysis of the case law in Chapter IV, has led me to the same conclusion.

[1007] Promislow, "'I smooth'd him up with fair words,'" 230-231.

[1008] Ibid., 256-257.

[1009] Ibid., 262.

[1010] Ibid., 263.

As the sui generis category is about process, it does not presuppose any particular content, leaving the field open for new categories that address the issues at stake for the parties to each treaty negotiation. The sui generis category also does not address the circumstances that might induce First Nations and the Crown to enter such a treaty relationship, and the conditions that were necessary for the achievement and success of such an arrangement. These key issues are addressed in the last section of the chapter on political and legal theory, but first I must lay more groundwork. In *Simon v*. *The Queen* (1985), Dickson made this observation on the relevance of the international law of treaties: "… it may be helpful in some instances to analogize the principles of international treaty law to Indian treaties."[1011] Although the suggestion was made thirty years ago, it still merits serious consideration.

E. Treaty Categories In International Law

The definition contained in the Vienna Convention on the Law of Treaties of 1969 states that, "Treaty means an international agreement concluded between States in written form[1012] and governed by international law, whether embodied in a single instrument or in two or more related instruments." In other words, the definition of an "international treaty" is a simple tautology: an agreement between or among nation states. A classic treatise on the subject, *The Law of Treaties,* by Lord McNair, makes it

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[1011] S*imon v the Queen*, [1985] 2 SCR 387 at para 33.

[1012] According to the section on "The Law of Treaties: What is a Treaty?," on the website of *Public International Law: An Introduction to Public International Law for Students*, the International Law Commission has clarified that, "the word 'written' does not mean that oral and tacit agreements under international law have no legal force or that the substance of the VCLT articles may not be relevant to them – it merely means that they are not dealt under the VCLT." Ruwanthika Gunaratne "Law of Treaties 1: What is a Treaty," *Public International Law: An Introduction to Public International Law for Students,* accessed 20 August 2015, https://ruwanthikagunaratne.wordpress.com/2013/05/26/law-of-treaties-vienna-convention-on-law-of-treaties-1969/

abundantly clear that "an agreement made between a State and a native chief or tribe cannot be regarded as a treaty in the international sense of the term."[1013] A recent treatise, *Modern Treaty Law and Practice*, by Anthony Aust,[1014] merely restated with approval McNair's opinion, so nothing appears to have changed.

Legal theorist Peter Fitzpatrick[1015] has provided what I consider a useful account of the events resulting in this state of affairs. He argued that over a period of three centuries Europeans used natural law (in both its Christian and secular forms), with help latterly from positive law, to take away from indigenous peoples the ability to participate in international law and thus to enter into international treaties.[1016]

Fitzpatrick's argument began with a discussion of the lectures of Francisco de Vitorio, in which "he is seen as getting international law off to an aptly exalted start in the early sixteenth century with his universalist, humanitarian espousal of the interests of the Indian during the Spanish colonization of the Americas."[1017] Consistent with that view, Vitoria "found that 'the Indies' had not been 'without an owner': the Indians had rights of *dominium* of the land and, furthermore, they were basically human beings even

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[1013] Lord Arnold Duncan McNair, *The Law of Treaties* (Oxford: Clarendon, 1961), 52.

[1014] Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2007).

[1015] Peter Fitzpatrick, "Terminal Legality: Imperialism and the (De)composition of Law," in *Law, History, Colonialism: the Reach of Empire*, eds. Diane Kirkby and Catherine Coleborne (Manchester: Manchester University Press, 2001), 9-25.

[1016] Positive law, and its later iteration, legal positivism, are used here in the following sense: "n. statutory man-made law, as compared to 'natural law' which is purportedly based on universally accepted moral principles, 'God's law,' and/or derived from nature and reason. The term 'positive law,' was first used by Thomas Hobbes in Leviathan (1651)." See "Positive Law," The Free Dictionary, accessed 6 November 2015, http://legal-dictionary.thefreedictionary.com/Positive+Law.

[1017] Ibid., 9.

if ones with considerable, but remediable, shortcomings."[1018] However, Indians could be excluded from the category of "rational beings," and thus from the benefits of natural law, if they engaged in "cannibalism and sexual perversion, to more picayune affronts to European taboos of diet and dress – nudity, consuming food raw, eating reptiles, and so, considerably on."[1019]

According to Fitzpatrick things remained thus until the Peace of Westphalia in 1648. Thereafter, international law was "found" in the notion of "sovereignty," which marked "the contained independence of the nation-state, its free-standing completeness, and it was the qualification for entry into the society of nations."[1020] With the advent of nationalism in the eighteenth century, "nation" became identified with "its distinct territory and a people gainfully attached to it." This "positivist affixing of the national idea to a reassuring materiality" reinforced "the opposition between a civilized territoriality and those not explicitly enough attached to the earth."[1021] Fitzpatrick used quotations from the writing of eighteenth-century philosopher E. de Vattel to reinforce his point that the "uncertain occupancy" of "wandering tribes whose small numbers can not populate the whole country" would be subject to "entirely lawful" occupation by European nations. The end result was their final "exclusion from the reach of international law" by the early nineteenth century.[1022] Once colonial occupation occurred,

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[1018] Ibid.

[1019] Ibid., 11.

[1020] Ibid., 14.

[1021] Ibid.

[1022] Ibid., 17-18; In the face of their exclusion from international law, some Indigenous peoples have sought recognition of their rights via the United Nations, as set out by Sharon Venne in her book, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Rights* (Penticton,BC: Theytus

positive law took over, because "the supreme justification of imperial rule was that it brought order to chaos, reined in 'archaic instincts', and all this aptly enough through subjection to 'laws'."[1023] From then on "it was solely the colonist who was to provide civil and civilized order." The "progressive and evolutionary assumptions of imperial rule" allowed the colonist to "know and speak for the natives better than they could themselves." Thus, even if "some legal or quasi-legal capacity is allowed to the native to effect the conclusion of a treaty with the colonist, the treaty can still be disregarded when some higher imperative of civilization supervenes."[1024] In my opinion this last statement neatly encapsulates the formation and subsequent history of the VI Treaties from the standpoint of officials and settlers.

As previously mentioned, the legal definition of the sui generis treaty sets a minimal threshold test, requiring only the satisfaction of the three procedural requirements, regardless of the nature and extent of the substantive content. In this respect the sui generis treaty is very similar to international treaties, which can have anything as their subject matter. However, international treaties have accumulated more procedural rules, and have also been categorized by subject matter. To give an idea of the range of issues that come under the purview of the law of treaties, chapter headings in McNair's classic treatise include, "The Conclusion of Treaties," "Interpretation and Application of Treaties," "Breach of Treaty," "State Succession and Other Changes," "Termination of Treaties" and "Effects of War." There are many valuable analogies with

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Books, 1998). However, this approach is based on human rights rather than treaty law, and is not pursued further.

[1023] Ibid., 19.

[1024] Ibid., 21.

sui generis treaties to be drawn from this large tome, but for now I have chosen only one topic to demonstrate the point - "Bilingual and Multilingual Treaties" - based on his chapter on treaty interpretation.

1. Bilingual and Multilingual Treaties

My interest in the interpretive challenges posed by bilingual treaties was sparked by the struggle of the Waitangi Tribunal to resolve the question of whether "mahinga kai" in the Maori language version or "plantations" in the English version of Kemp's Deed more accurately reflected the outcome of the negotiations. This in turn started me thinking about the Canadian sui generis treaties in general, and the circumstances of the Vancouver Island Treaties in particular. Given that there was no written form of the Straits Salish language at the time of the Vancouver Island treaty meetings, are the Douglas Forms authoritative by default? Do the later First Nation accounts thereby possess less authority? As the Canadian literature and case law on bilingual sui generis treaties is quite undeveloped, I turned to the principles of international law for guidance and useful analogies, and in particular a classic treatise, *The Law of Treaties*,[1025] by Lord McNair. He stated the general rule on bilingual treaties as follows: "The parties are free to choose the language or languages in which a treaty is expressed. It is customary and desirable that the treaty itself should indicate which text or texts are to be regarded as authentic (*faisant foi*)."[1026] However, he went on to confirm that in a bilingual treaty, "In the absence of provision to the contrary neither text is superior to the other."[1027]

[1025] Lord Arnold Duncan McNair. *The Law of Treaties*. Oxford: Clarendon, 1961

[1026] McNair, *The Law of Treaties,* 30.

[1027] Ibid., 432.

By analogy, can the Canadian sui generis treaties be considered bilingual, and if so, which version is to be considered authentic? My reading of the literature and case law indicates that until recently there was an unspoken assumption that the English language written version are always more authentic than the versions originating in a First Nation language. According to the logic of international treaty law this is an unwarranted assumption. For example, it is generally accepted that the 1850 Fort Victoria Treaties were at first concluded orally, and only later reduced to writing, with the result that the oral terms existed simultaneously in English and relevant First Nation language prior to written versions in either language. From this it can be inferred that the two oral versions are equally authentic, and neither is superior to the other. The same reasoning applies to the later written versions, namely that the superiority or greater authenticity of the Douglas Forms (plus the correspondence of Douglas) over the First Nation accounts (as described in Chapter II) should not be assumed. In other words, the fact that the First Nation language versions have been preserved only through recollections in English translation long after the event, does not mean that the Douglas Forms should be accorded greater authority, no matter how tempting it may be as a matter of convenience to privilege the latter and avoid the hard work of ascertaining the content of the former.

2. Modus Vivendi Treaties

The texts on international law I have consulted do not cover the full range of treaty categories in current use, and for that information I had to resort to the "Definition of key terms used in the UN Treaty Collection" section of the United Nations website.[1028]

[1028] The United Nations, "Definition of key terms used in the UN Treaty Collection," accessed 20 August 2015, http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml.

The purpose of the section is to provide "an overview of the key terms employed in the United Nations Treaty Collection to refer to international instruments binding at international law: treaties, agreements, conventions, charters, protocols, declarations, memoranda of understanding, modus vivendi and exchange of notes," with a view helping the reader achieve "a general understanding of their scope and function." The first key term is the word 'treaty' itself: "Usually the term 'treaty' is reserved for matters of some gravity that require more solemn agreements," and a list of "typical examples" is provided: "Peace Treaties, Border Treaties, Delimitation Treaties, Extradition Treaties and Treaties of Friendship, Commerce and Cooperation." It strikes me that some of these terms could usefully be applied as categories of Canadian *sui generis* treaties, but that exercise is beyond the scope of this brief sortie into the world of international treaties.

Of particular interest is the definition of the term "protocol," used for an "agreement" less formal than those entitled 'treaty'." The protocol, "…based on a Framework Treaty, is an instrument with specific substantive obligations that implements the general objectives of a previous framework or umbrella convention." I would argue that the Ngai Tahu agreement and the other Maori land purchase agreements are analogous to protocol agreements used to implement a framework treaty, namely the Treaty of Waitangi. To do so emphasizes the connection between the two sets of agreements, and that the land purchases can usefully be viewed as a continuation of the treaty process initiated by the Treaty of Waitangi. On Vancouver Island there are no written post-treaty protocol agreements. However, the arrangements that must have been made to allow the Puget Sound Company to establish four farms near Fort Victoria in 1850-51 could be viewed as the implementation of protocols put in place by the treaties.

However, of greatest interest for present purposes is the instrument called a "modus vivendi."

The Latin phrase *modus vivendi*, which usually translates as "way of living," is used in international law, political theory and legal theory. The latter two uses are taken up in the next section of the chapter. The UN Treaty Collection defines the *modus vivendi* as "an instrument recording an international agreement of temporary or provisional nature intended to be replaced by an arrangement of a more permanent and detailed character. It is usually made in an informal way, and never requires ratification."[1029] In other words a modus vivendi is intended to be replaced by, and to provide the framework for, one or more future agreements. The substantive content of modus vivendi usually include terms resolving certain immediate problems, deferring more complex concerns, and establishing a process by which to resolve both the deferred and future concerns.

The 1818 treaty entered into by the United States and Great Britain, which created the Oregon Territory,[1030] provides an excellent example. The agreement was clearly an interim measure designed to postpone the challenging task of allocating the Oregon Territory until such time as continuing negotiations, and intervening events, such as the arrival of American settlers, resulted in the conclusion of a permanent treaty, which finally happened in 1846. The 1818 treaty contained no provisions for the administration of the territory, leaving it up to American and British nationals within the territory to cobble together an *ad hoc* administration to make informal allocations of land and to

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[1030] Previously described in Chapter II, Section B, Subsection 1, 56.

resolve disputes. It also made no provision for dealing with the Indigenous population of the territory, so that the HBC continued its standard policy of trade relations, while newly-arrived American settlers began to make private arrangements with Native Americans concerning land. This worked tolerably well until the settler population south of the Columbia River became too large and aggressive, creating an urgent need for a more formal system of government. This in turn provided the final impetus for the two governments to reach an accord. The laissez-faire arrangement lasted twenty-eight years, and was in place throughout Douglas' long tenure at Fort Vancouver. The experience may have predisposed him towards a minimalist view of the level of government intervention required to regulate the activities of settlers and First Nations.

The UN definition accords well with the intentions of First Nations as disclosed in their accounts of the formation of the Vancouver Island Treaties. From their standpoint, the treaties constituted an acknowledgment by the newcomers that they were no longer guests, and henceforth would have to negotiate the terms of their continued occupation of land and harvesting of resources, as often as required by changing circumstances. This proposition receives support from two brief references in the Vancouver Island Treaty literature. In 2008 Foster and Grove produced this observation on the First Nation understanding of the Vancouver Island Treaties: "It seems likely…they regarded the agreements as temporary measures designed to secure peace until more permanent arrangements could be worked out."[1031] When Lutz made his intriguing connection between the treaties and the concept of the Potlatch, he noted that, "[l]ike other claims of

[1031] Foster and Grove, "'Trespassers on the Soil,'" 91.

ownership, in the Lekwungen worldview, this one would need to be periodically revalidated with a feast and gifts."[1032] His inference that (at least from the First Nation perspective) the treaties needed to be revitalized from time to time is consistent with my argument.

The *Dictionary of Diplomacy*[1033] provides an alternative (and somewhat cynical) definition of modus vivendi, under its more common name of "interim agreement": "a temporary or provisional agreement which is designed ostensibly to be replaced later on by one which is possibly more detailed, probably more comprehensive, and certainly more permanent. Interim agreements tend to be popular because they can be presented both as the only way to advance to a final settlement and the only way to forestall one."

I was able to locate a recent example of this variant form in a New York Times story entitled "Kerry to Press for 'Framework' Accord to Keep Mideast Peace Effort Moving."[1034] The authors of the article stated that, "In an intensifying diplomatic effort, Secretary of State John Kerry is making a major push to secure what Obama administration officials are calling a 'framework' accord that would be a critical first step to a comprehensive Middle East peace agreement. But critics are already branding it as an effort to play for time." The story paraphrased comments by Gilead Sher, a former Israeli peace negotiator, to the effect that, "…the framework agreement was the most the United States could possibly accomplish at this point," and "…having a framework

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[1032] John Lutz. Lutz, John. *Makúk: A New History of Aboriginal-White Relations*. Vancouver: UBC Press, 2008.

[1033] Geoff Berridge, and Lorna Lloyd, *The Palgrave Macmillan Dictionary of Diplomacy* (New York: Palgrave Macmillan, 2012).

[1034] Michael R. Gordon and Jodi Rudoren, "Kerry to Press for 'Framework' Accord to Keep Mideast Peace Effort Moving," *The New York Times* (New York, NY), 1 January 2014.

agreement is better than nothing." Of course, the situation on Vancouver Island in 1850 was vastly different than that in the US capital in 2013, but it is possible to discern some intriguing parallels, namely pursuing 'the art of the possible' and the strategy of 'buying time' in situations where the parties have very different agendas and an incomplete appreciation of each other's point of view.

The 'realpolitik' aspect of the second definition resonates with the intentions of Douglas, as disclosed in his correspondence. I believe Douglas saw the Treaties as a way to achieve the immediate goals of satisfying First Nation demands for compensation, extinguishing aboriginal title, and assuring the continuation *pro tem* of his working relationship with First Nations. In the longer term, Douglas may have anticipated that First Nation population decline and assimilation would diminish and eventually eliminate the need for further agreements.

A closer-to-home and less cynical example of a modus videndi is provided by a recent framework agreement reached by several treaty First Nations in Ontario, as described in a government news release[1035] announcing that, "Premier Kathleen Wynn and the Matawa member First Nations Chiefs were in Thunder Bay today, where they joined Matawa community members, to officially celebrate the recent signing of a landmark regional framework agreement to develop the Ring of Fire." The agreement was seen as "a first step in the historic community-based negotiation process that will

[1035] Office of the Premier of Ontario, "Ontario and Matawa Member First Nations Celebrate Historic Framework for Negotiations on the Ring of Fire," (News release, 24 April 2014), accessed 20 Aug 2015, http://news.ontario.ca/opo/en/2014/04/ontario-and-matawa-member-first-nations-celebrate-historic-framework-for-negotiations-on-the-ring-of.html.

bring together the nine First Nations and the Province of Ontario to discuss and negotiate an approach for development of First Nations' traditional territories."

While the literature on international law provides useful definitions, and examples can be found in popular media, neither source provides any theoretical underpinning for the concept, not does it address certain basic questions. For instance, does it matter if the parties did not understand, let along share, each other's values, or if they had very different motives for entering into the agreements? Both of these difficult issues are tackled in the final section of the chapter.

F. Modus Vivendi in Political and Legal Theory

In political theory, the term is often associated with the writings of the eminent theorist John Rawls.[1036] Political theorist John Horton has succinctly described how Rawls has used the term: "Rawls introduces the idea of a modus vivendi with the express purposes of rejecting it, in the process of comparing it unfavourably with his own theory of justice….Rawls characterizes modus vivendi as a form of political settlement based solely on a balance of political forces, rather than being grounded in a set of moral principles – it is in short, simply the best deal that the parties think that they can get at that moment in time…and will be inherently unstable…."[1037] Philosopher Duncan Ivison added this comment on the Rawlsian approach: "A modus vivendi, for Rawls, is akin to a treaty between states. The terms and conditions of a treaty represent an equilibrium point

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[1036] It is also often associated with the writings of John Gray. See John Gray, *Two Faces of Liberalism* (Cambridge: Polity Press, 2000). However, I find his version of modus vivendi, which relies heavily on a concept he dubbed "value pluralism," to be confusing.

[1037] John Horton, "Towards a Political Theory of Modus Vivendi" (Unpublished manuscript, Keele University, 2009).

between the two parties, but each remains ready to impose its will on the other if the advantages of breaking the agreement begin to outweigh the costs."[1038] Rawls' view of international treaties as amoral in their conception and demise seems overly harsh. When applied to treaties between the Crown and First Nations, the analogy may have application only with regard to the apparent willingness of the Crown over time to shirk or break its treaty responsibilities.

Horton also dealt with the criticism of theorists, such as Rawls, that a *modus vivendi* "…lacks the guidance of an ideal theory." For Horton that is not a failing but a virtue: "…its flexibility and indeterminacy can be seen as reflecting the character of political activity when it is not construed as being directed towards building an ideal society, but as engaged in the immediate and everyday business of coping with conflict and managing the collective arrangements of a society."[1039] Horton elaborated: "It is rather a conception of legitimate political arrangements conceived as the practical outcome of processes of negotiation, bargaining and compromise prompted by conflict and disagreement." For Horton, "The various parties to a modus vivendi must be able and willing to live with it, as at least a basis for possible further bargaining, negotiation and compromise in the future." He illustrates the level of consent involved as follows: "Adjectives like 'grudging', 'wary' and 'reluctant' will often be appropriate in these kinds of case to characterise the acceptance that *modus vivendi* attracts; and this reflects

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[1038] Duncan Ivison, "Modus Vivendi," *Encyclopedia of Political Theory*, accessed 14 March 2015, https://knowledge.sagepub.com/publicstart?authRejection=true. Ivison was presumably referring to a statement made by John Rawls, *Justice as Fairness: A Restatement* (Cambridge: The Belknap Press, 1990), 192.

[1039] John Horton, "John Gray and the Political Theory of *Modus Vivendi*," *Critical Review of International Social and Political Philosophy*, 9.2 (2006): 164.

the fact that it will not be any party's ideal."[1040] Finally, Horton believes that a modus vivendi has another key dimension: "Secondly, a modus vivendi is an ordered arrangement in which a tolerable level of peace and security is preserved or established." Ivison saw a long-term potential for modus vivendi, which "might well acquire resilience over time, just because of the persistence of plurality and the increasing awareness of the parties that this is indeed the best way to proceed, given the circumstances they face." However, Horton warned that "…a modus vivendi, while not needing to be constantly renegotiated, must be continuously reaffirmed in practice," and thus "…exists only so long as the parties to it continue to accept it; when that ceases to be so, either renegotiation or coercion are pretty much the only options."[1041] In the Vancouver Island context, I would argue that coercion was the preferred option of the colonial administration after the retirement of Douglas, causing the demise or extended hiatus of any modus vivendi created or reaffirmed by the treaties. It should be noted here that I am suggesting only that the existence of any modus vivendi relationship was put in peril, not the continued existence of the treaties themselves.

While the relationship between the HBC and First Nations on Vancouver Island at the time of the treaties would appear to meet the criteria for a modus vivendi set by Horton and Ivison, they provide no examples, although it may be assumed that the theorists had in mind practical political arrangements within a (western) state. On the other hand, there would seem to be no bar to applying the concept to political

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[1040] Ibid.

[1041] John Horton, "Realism, Liberal Moralism and a Political Theory of Modus Vivendi," *European Journal of Political Theory*, 9.4 (2010): 440-441.

arrangements between the representatives of western states and Indigenous peoples, including by way of treaties. Fortunately, the concept of modus vivendi as developed in legal theory has been applied to relationships that have arisen in the past between European traders and First Nations.

It seems to me, as a sometime anthropologist, that modus vivendi as used in legal theory has its origins in the concept of legal pluralism developed within anthropology by the likes of Sally Engle Merry.[1042] She noted in 1988 that "classic" legal pluralism arose from "…the study of colonial societies in which an imperialist nation, equipped with a centralized and codified legal system, imposed this system on societies with far different legal systems, often unwritten and lacking formal structures for judging and punishing. This kind of legal pluralism is embedded in relations of unequal power."[1043] Since Merry's ground-breaking article, legal pluralism has been the subject of much critical attention, which has resulted in more nuanced approaches. For my purposes, the approach taken by legal scholar Jeremy Webber is particularly useful. He argued for a vision of legal pluralism as "the coexistence of multiple contending orders, each with its own autonomous source of legitimacy," one of which is "state law."[1044] He noted that "These orders may well interact in a manner that is not simply hierarchical, one order necessarily granted precedence over all the others. They may contend in a manner more akin to a

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[1042] Sally Engle Merry, "Legal Pluralism*," Law & Society Review*, 22.5 (1988), 869-896.

[1043] Ibid., 873. Modus vivendi as developed in legal theory also bears some relation to the notion of a "contact zone" as enunciated by Mary Louise Pratt, which treats the relations among colonizers and colonizers "…not in terms of separateness and apartheid, but in terms of co-presence, interaction, interlocking understandings and practice." Like Merry, she sited this zone "within radically asymmetrical relations of power." Mary Louise Pratt, *Imperial Eyes: Travel Writing and Transculturation*. (London: Routledge, 1992), 6-7.

[1044] Jeremy Webber, "Legal Pluralism and Human Agency," *Osgoode Hall Law Journal*, 44 (2006), 189.

negotiation."[1045] This fits well with my own approach, which has emphasized "negotiation" over "imposition" in the description of early relationships among the HBC, the colonial government and the multiple treaty First Nations on Vancouver Island.

An offshoot of legal pluralism can be found in historian Richard White's concept of the "middle ground," which also does not assume the dominance of the new arrivals over the pre-existing population. While he wrote[1046] about particular peoples (the Huron and the French) at a specific place (the Great Lakes region) within a fixed time frame (1650-1815), the idea of the "middle ground" has wider application. He justified the concept as follows:

> By middle ground I meant [in the first edition of the book]…two twinned things. First, I was trying to describe a process that arose from the willingness of 'those who…[sought] to justify their own actions in terms of what they perceived to be their partner's cultural premises.' Such actors sought out cultural congruencies, either perceived or actual.' These 'often seemed – and, indeed, were results of misunderstandings or accidents.' Such interpretations could be ludicrous, but it did not matter. 'Any congruence, no matter how tenuous, can be put to work and take on a life of its own if it is accepted by both sides'. This was and is a process of mutual and creative misunderstanding."[1047]

White listed the following elements necessary for the creation of a middle ground: "a confrontation between imperial or state regimes and non-state forms of social organization, a rough balance of power, a mutual need or a desire for what the other possesses, and an inability of one side to commandeer enough force to compel the other

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[1045] Ibid.

[1046] Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815, Twentieth Anniversary Edition* (Cambridge: Cambridge University Press, 2011).

[1047] Ibid., XII.

to do what it desired."[1048] While it is difficult to determine from White's book how much time was required for the development of a middle ground, he did say that it "depended on the creation of an infrastructure that could support and expand the process," and must be "long-lasting."[1049] White acknowledged that, "Middle grounds as coherent spaces were difficult to produce," in response to a wry comment by Philip Deloria in 2006 that, "people are starting to take the middle ground as a general metaphor, a kind of watered down idea about the mechanisms of compromise in all kinds of social and political situations."[1050]

This brings up the question of whether a middle ground might have been produced in the Pacific Northwest in the middle of the nineteenth century. With respect to Native American/HBC relations in Washington Territory in the 1850s, Alexandra Harmon made reference to White, who was her dissertation supervisor, and his concept of the middle ground. She concluded that, "a comparable culture of relations" developed "[a]s Hudson's Bay men and local people cohabited, traded, and tried to indulge each other's desires without forfeiting their own," and by so doing "cleared and gradually expanded a figurative arena for their joint activities – a cultural space where people from dissimilar societies could serve their separate interests by observing common, specialized rules." This raises the further question of whether the Vancouver Island Treaties can also be framed as the affirmation of an existing middle ground. Before answering that question, two more works by Promislow and Webber must be considered. Promislow has

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[1048] Ibid.

[1049] Ibid., XIII.

[1050] Philip J. Deloria, "What Is the Middle Ground, Anyway?" *William and Mary Quarterly*, LXIII.1 (2006): 15.

provided a useful critique of White's work, and Webber has applied the concept of modus vivendi to the time and place of White's middle ground.

In a 2010 essay, Promislow criticized one aspect of White's concept of middle ground, arguing that, "…one should guard against…the assumption that invention was the key dynamic of intersocietal space."[1051] Promislow preferred the idea of cultural adaptation: "Adaptation would be found where Aboriginal and European people had sufficiently robust resources within their own normative systems to cope with aspects of the encounter, such as how to do business with new trading partners….."[1052] In the end, she compromised, stating that an awareness of adaptability, "…would direct our attention to continuity in indigenous (and European) norms, alongside or in place of newly minted *sui generis* forms."[1053] For her primary research, Promislow studied archival records of the interactions between the Cree and HBC traders at York Factory between 1682 and 1763. Based on that research, she argued that, "The picture which emerges is a working intersocietal space in which normative expectations that were shared at the level of practice were not always shared at the level of meaning. This was an intercultural space that fits White's conception of the middle ground as an environment in which 'one took the convergences one could find', but with no particular requirement that the meanings behind these convergences were ever sorted out."[1054] Promislow added that her study "…portrays intersocietal normativity as a space that required active negotiation,

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[1051] Janna Promislow, "'Thou Wilt Not Die of Hunger…for I Bring Thee Merchandise': Consent, Intersocietal Normativity, and the Exchange of Food at York Factory, 1682-1763." In *Between Consenting Peoples: Political Community and the Meaning of Consent*, eds. Jeremy Webber and Colin M. Macleod (Vancouver: UBC Press, 2010), 83.

[1052] Ibid.

[1053] Ibid.

[1054] Ibid., 104.

adaptation, and renewal to maintain its vitality,"[1055] which is consistent with the concept in political theory, and provides a neat segue to the notion of modus vivendi postulated by Jeremy Webber.

In a 1995 journal article, "Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples,"[1056] Webber argued that, "At the moment of their encounter, Aboriginal and non-Aboriginal societies possessed their own sets of norms, each created in ignorance of the other," and they could have chosen to settle "their intercommunal conflicts through the use of force, as was done in some colonial situations."[1057] Instead, "for a whole host of motives, noble and ignoble, they generally sought to live peacefully with each other, hammering out a *modus vivendi* that became the foundation of a normative community that crossed the cultural divide."[1058] He described the process as follows:

> The distinctive norms of each society furnished the point of departure, determining the spirit of interaction, colouring the first interpretations of the other's customs, and shaping the beginnings of a common normative language. But the final product was above all the result of mutual adaptation, in that the structure of the relationship was formed as much from compromises on the ground as from abstract principles of justice. It was the outcome of trial and error, not the application of pre-existing rules. This process created a new, cross-cultural community – one which did not, however, displace its constituent societies. Its aspirations were modest, restricted to intercommunal relations.[1059]

[1055] Ibid., 105.

[1056] Jeremy Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples," *Osgoode Hall Law Journal*, 33.4 (1995): 623-660.

[1057] Ibid., 626.

[1058] Ibid.

[1059] Ibid., 627.

He pointed out that such a "community" could come into being even if "shaped by relations of force and domination," such as "the period of colonization, marked as it was by warfare, the seizure of lands, and the decimation of the Aboriginal parties by disease," as long as "there emerged a series of principles recognized by Aboriginal and non-Aboriginal societies as normative."[1060] The examples used by Webber to illustrate his concept were drawn from British and French North America in the eighteenth century. Based on his survey of the literature, including White's work, he concluded that, "These arrangements were common in situations where Aboriginal peoples retained a high degree of political independence, especially in the context of the fur trade. They were less common but sometimes present at the frontier of agricultural colonization, where Aboriginal autonomy and colonist's vulnerability occasionally produced a rough equilibrium,"[1061] which was the case, at least for a short while on Vancouver Island in the 1840s and 1850s. Finally, Webber asked the question, "What drove the parties to this normative turn – to create, out of fact, norms to regulate conduct?." He followed with the simple assertion that,"The answer lies in the value of peace and stability."[1062] This, of course, matches the second requirement for a modus vivendi provided by Horton.

As with White's "middle ground" and Promislow's "inter-societal space," Webber's "final product" or "community" seems to be predicated on a gradual building process over an extended period of time. And yet, Harmon[1063] believes that a middle ground or "cultural space" was able to sprout rapidly in Washington Territory, and the

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[1060] Ibid., 628.

[1061] Ibid., 642.

[1062] Ibid., 656.

[1063] Harmon, *Indians in the Making*.

political theorists do not require an extended lead-in to the formation of a modus vivendi, although it is likely that such a build-up would increase the likelihood of its longevity once created. Perhaps the apparent contradiction can be reconciled if some treaties are viewed as confirming the terms of a modus vivendi already in existence, and others as evidence of a nascent modus vivendi. Two sets of treaties, both concluded in 1850, demonstrate this proposition. The Huron/Superior Treaties are examples of the first type, entered into after two hundred years of increasing interaction with Europeans, and the Vancouver Island Treaties are examples of the second, concluded after only twenty-five years of trade.[1064] Envisioning a continuum between these two extremes, the Treaty of Waitangi and the Ngai Tahu agreement would be closer to the Huron/Superior end, and the Washington Treaties, much closer to the Vancouver Island end.

In their articles, Promislow and Webber did not explicitly consider the possible relationship between the modus vivendi as "intersocietal space," and as treaty. However, in her dissertation, Promislow offered an insight which describes treaty making between First Nations and the Crown (modern and historic) in a manner consistent with both concepts: "treaty-making is an iterative process, in which earlier relationships shape what is possible and desirable when the time comes to reformulate and rearticulate the terms of the relationship," and concluded that, "treaties become a matter of incremental agreement, an iterative process of arriving at a working relationship and adjusting to changes of circumstance."[1065] That is an apt marrying of modus vivendi, as used in international diplomacy and as conceived in political/legal theory, effectively rendering

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[1064] I base the estimate on the commencement of year-round trade with the arrival of HBC forts in the region, beginning with Fort Vancouver.

[1065] Promislow, "'I smooth'd him up with fair words,'" 212.

moot the need to reconcile the values and intentions of the contracting parties. This understanding applies to the Vancouver Island and other sui generis treaties, and equally well to modern treaties between the Crown and First Nations.

Recently I was made aware[1066] of an excellent example of a modern modus vivendi treaty between the Haida Nation and the Province of British Columbia concerning "land and natural resource management."[1067] Haida territory encompasses the Haida Gwaii archipelago, west of Prince Rupert. In 1851 Europeans became aware of the presence of gold on the islands, and Douglas noted in a letter to the HBC in London that "A party of Natives from the Gold District [Haida Gwai, then known as the Queen Charlotte Islands]… made an offer of their lands to the company [the HBC] at a price to be agreed upon hereafter."[1068] However the gold fever subsided in 1852 and no treaty was concluded with the Haida,[1069] The recitals to the 2010 agreement are as follows:

> WHEREAS:
>
> A. The Parties hold differing views with regard to sovereignty, title, ownership and jurisdiction over Haida Gwaii, as set out below.
>
> HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA as represented by the Minister of Aboriginal Relations and Reconciliation ("British Columbia")

[1066] My thanks for fellow UVic PhD student Megan Harvey for alerting me to the existence of this agreement.

[1067] Find more information at "Agreements," Haida Nation, accessed 4 November 2015, http://www.haidanation.ca.

[1068] Douglas to Barclay, 24 February, 1851, (HBCA A.11/73, folios 72-8; reproduced in Bowsfield, *Fort Victoria Letters*, at p. 156.

[1069] Margaret Ormsby. "Introduction," *Fort Victoria Letters 1846-1851*. Hartwell Bowsfield, editor. Winnipeg: Hudson's Bay Record Society, 1979, xi-xcix, at xciv

> The Haida Nation asserts that:
>
> Haida Gwaii is Haida lands, including the waters and resources, subject to the rights, sovereignty, ownership, jurisdiction and collective Title of the Haida Nation who will manage Haida Gwaii in accordance with its laws, policies, customs and traditions.
>
> British Columbia asserts that:
>
> Haida Gwaii is Crown land, subject to certain private rights or interests, and subject to the sovereignty of her Majesty the Queen and the legislative jurisdiction of the Parliament of Canada and the Legislature of the Province of British Columbia.
>
> Notwithstanding and without prejudice to the aforesaid divergence of viewpoints, the Parties seek a more productive relationship and hereby choose a more respectful approach to co- existence by way of land and natural resource management on Haida Gwaii through shared decision-making and ultimately, a Reconciliation Agreement.
>
> B. This Protocol confirms an incremental step in a process of reconciliation of Haida and Crown titles.
>
> C. The Parties agree to focus on shared and joint decision-making respecting lands and natural resources on Haida Gwaii and other collaborative arrangements including socio- economic matters pertaining to children and families.
>
> D. The Parties agree that this Protocol represents the development of a new relationship between the Parties.
>
> E. Under this Protocol, the Parties will operate under their respective authorities and jurisdictions.[1070]

The "definition' section includes the following phrases:

> 1.1. "Framework Agreement" means the Framework Agreement between the Haida Nation, Canada and British Columbia respecting the negotiation of the Reconciliation Agreement;

[1070] "Agreements," Haida Nation, accessed 4 November 2015, http://www.haidanation.ca.

> 1.6. "Reconciliation Agreement" means the comprehensive agreement to be ratified at the conclusion of the negotiations under the Framework Agreement.[1071]

The body of the agreement deals with the processes and protocols to be followed by the parties in the future with respect to sharing on a number of fronts including resource revenues and forest tenures. The opening statement setting out the agreement to disagree as to whether the islands are Haida lands or crown land fits beautifully into Promislow's definition of "a working intersocietal space" where "normative expectations that were shared at the level of practice were not always shared at the level of meaning," creating "an environment in which 'one took the convergences one could find', but with no particular requirement that the meanings behind these convergences were ever sorted out."[1072] This agreement also clearly fits the category of sharing treaty as used to describe many of the historical treaties in Canada. Finally, I believe that the terms of this modern modus vivendi/sharing treaty, negotiated by two parties facing each other as equals, are a very close match to the main points of the historic Vancouver Island Treaties, had they been accurately reduced to writing. On that positive note, it is time to bring this dissertation to a close with a summing up and a glimpse into some of the possible futures that await these enduring treaties. In other words, this is as close as I am likely to get to a reconstruction of the Vancouver Island Treaties, albeit with content that addresses modern concerns, but arising from a similar context and creating a similar process.

[1071] Ibid.

[1072] Promislow, "'Thou Wilt Not Die of Hunger…for I Bring Thee Merchandise,'" 104.

Chapter VII: Conclusion

A. Introduction

This chapter is largely retrospective, drawing conclusions from the results of the research described in each chapter. It is also prospective, outlining some possible futures for the Vancouver Island Treaties. The two sets of questions set out in Chapter I are not answered seriatim, but all are addressed in the course of coming to the conclusions set out below.

The challenge of finding fresh insights into the treaties, given the sparse historical record, demanded creative solutions, and a number of innovative choices were made and methods deployed. Some involved a drilling down to the nitty-gritty of the documents, and others an opening up to the bigger picture. I am happy with the results, at both the microscopic and macroscopic levels, as each method made its contribution to the overall understanding of the background, formation and fate of the treaties. The collation and analysis of First Nation accounts of treaty formation, extracted from the archival record, has proven exceptionally useful in the Vancouver Island setting, and in the chapters devoted to the Washington Territory and colonial New Zealand. The decision to present these Indigenous accounts first, using them as a lens through which to view the formation of the treaties, and relegating the colonial accounts to the status of context and commentary, has also been productive of fresh understandings not only the Vancouver Island Treaties, but also the Washington Treaties and New Zealand agreements. I would suggest that both techniques have the potential to produce new insights into the formation of historical treaties across Canada and elsewhere.

The selective application of mid-range theories has done its job, although I suspect more will be done in the future by those better versed in such matters. While the historical treaty experiences drawn upon by constitutional and other theory-minded scholars in Canada cover a long time-period and a wide swath of territory, they do not, as yet, include the Vancouver Island Treaties. My hope is that the accounts presented and analysed in my dissertation will finally attract the theoretical attention the Vancouver Island Treaties deserve.

B. Inferences and Analogies

It is important to reiterate that the statements made in this section are inferences or arguments by analogy, based on my research outlined in the previous chapters. In other words, they are my opinions, nothing more. To avoid repetition, every assertion should be deemed to commence with the words "In my opinion."

1. Formation of the Vancouver Island Treaties (Chapter II)

The pre-treaty section of the chapter revealed how the Oregon Territory (south of the Columbia River) was flooded with settlers before the arrival of any formal government administration. Although no treaties were negotiated before Douglas' departure in June of 1849, he would have been aware of the treaty expectations held by Native Americans and white settlers alike, and painfully aware of the effects of unrestrained settlement by whites in the absence of such treaties. On the eve of the first treaty meeting on April 29, 1850, Douglas was ready to carry out his duty to his employer, but in a manner tempered by his long experience of events south of the 49th Parallel, and in a way that did not jeopardize the respectful relations he had built with the local First Nations. On the assumption that the meeting was organized by Douglas, the

First Nations would likely have arrived unaware of Douglas' corporate agenda. They likely had an agenda of their own, although its contents are not known, except by way of inference from the retrospective First Nation accounts of the meetings. Nonetheless, the preliminary section of the chapter provided a useful backdrop to the drama about to unfold, and demonstrated that the First Nation negotiators likely would have assumed they were going to be dealing with Douglas in his usual capacity as Chief Factor of the HBC, and that they would be meeting with him as equals, in the absence of coercion on either side.

The central section of the chapter presented the five First Nation accounts. Individually, they have significant weaknesses, but in combination they provide a strong denial of the cession or surrender of their land in favour of the HBC or the Crown. The pieces of the puzzle contributed by each account add up to a convincing argument that the oral agreements included the following terms: compensation for land already occupied and resources previously harvested by non-First Nation residents; continuation of the terms of their existing joint occupation and enjoyment of land and resources; and, agreement to negotiate expansion of non-First Nation establishments and activities, provided it did not interfere with the existing way of life of the First Nations. In sum, the First Nation negotiators likely agreed to share, not surrender, their land and its resources.

The account of Joseph McKay, an eye-witness to seven of the Fort Victoria treaties, provided a description of what Douglas likely said in his address to the assembled First Nations at Fort Victoria in 1850, and a surprising confirmation that there was no surrender of land, albeit on the basis that the First Nations had no interest in the land capable of being surrendered. However, it is not likely that Thomas (and any

subsequent translators) conveyed to First Nations that they had no interest in their land. It is more likely that Thomas explained the purpose of the meetings to the assembled First Nations in a way consistent with the First Nation understandings set out above. The analysis and comparison of the First Nation and colonial accounts also support an inference that the Douglas Forms and Douglas' reporting letters to the HBC are not reliable indicators of the terms of the agreements he reached with First Nation parties at the treaty meetings. I would argue that Douglas, in common with the First Nation parties, viewed the Vancouver Island Treaties as transitional measures. However, he did not contemplate that they would form the framework for future agreements, but rather they would be rendered obsolete by the rapid integration of First Nations into the colonial economy. In sum, I was able to reconcile the First Nation accounts with the understandings reached by both parties at the treaty meetings, but not with the terms set out in the Douglas Forms. It should be remembered that the details of what took place at the treaty meetings will never be known, but at least a broad outline is now possible.

2. The Washington Treaties (Chapter III)

In the period prior to the arrival of white settlers in the Puget Sound area and the signing of the Oregon Treaty of 1846, there is little to differentiate the interactions of the HBC with First Nations on Vancouver Island and Native Americans in the northwest corner of what became Washington Territory. The major change which occurred during these years was the arrival of significant numbers of white migrants, people who brought with them an expectation that treaties were a necessary component of opening up the land for settlement. These early settlers, through their words and actions, provided Native Americans with a strong foretaste of what might be in store for them.

A surprisingly different picture of the Washington Treaties emerged when the written versions were problematized, and an attempt made to recover the terms of the oral agreements as viewed through the lens of Native American accounts extant in the archival record. The huge factor not present in the record of the Vancouver Island Treaties is the presence of the (translated) voices of the Native American participants in the Minutes of the Washington Treaty meetings. These contemporaneous statements are invaluable, and bring home the magnitude of the loss caused by the absence of any minutes of the Vancouver Island Treaty meetings.

The close scrutiny of the Stevens treaty document was useful more as a source of contrasts than parallels with the Douglas Forms. The differences serve to highlight the very different objectives and procedures of the U.S. government in its treaty dealings with Native Americans. That goal was to remove the Native Americans from their traditional villages onto less desirable land, where they would become dependents of the US government. The minutes of the Washington treaty meetings also reveal much about the 'take no prisoners' approach of Governor Stevens in his drive to secure the 'consent' of Native Americans to the terms set out in the draft treaty documents. In the circumstances, it is surprising that Native American voices weren't completely excised from the official account. The biggest surprise was the presence in the minutes of the words of chiefs who had the courage to counter Stevens' agenda with proposals to share the land on an equal basis. However, it is clear that Stevens was prepared to manipulate words and events to achieve the desired outcome, which makes it difficult to ascertain the fate of proposals put forward by Native American negotiators – did they agree to give up on their initial requests to share the land and its resources, or did they come away

believing that the agreement was somehow consistent with their proposals? While post-treaty reminiscences indicate that Native Americans left the meetings with a wide range of understandings, at least some still believed that an arrangement had been made to share land and its resources. In sum, the Washington comparison increases the likelihood that First Nation negotiators attending the Vancouver Island Treaty meetings put forward proposals to share the land and its resources, and that they left the meetings confident that their proposals had met with approval. Finally, the strength of these inferences is enhanced by the shared pre-treaty history of the participants in both sets of treaties.

3. The New Zealand Experience (Chapter IV)

The first result of the New Zealand comparison was the compilation of enough relevant similarities between the New Zealand and Vancouver Island experiences to justify a comparison. The second, and unexpected, result was the realization that an examination of the Treaty of Waitangi could provide insights into the Vancouver Island Treaty experience. For example, the 1840 treaty meeting at Waitangi can be understood as one of a series, based on a relationship created by the previous meetings, bringing with it the expectation of future meetings to settle issues as they arose. This allows an inference that the Vancouver Island meetings were preceded by agreements with the HBC concerning the establishment and operation trading posts and farms, and would be followed by others as needed.

The contrasts between the Waitangi meeting and the Fort Victoria meetings are also illuminating. The draft Treaty of Waitangi was translated into the Maori language prior to the meeting, the meeting itself was attended by a crowd of spectators, and afterwards many copies of the signed document, in both languages, were printed and

widely circulated. On the other hand, the Maori language version was drawn up without any Maori consultation, and was read out at the meeting, with the result that "…it was received as an oral statement, not as a document drawn up in consultation with the Maori, pondered privately over several days or weeks and offered finally as a public communiqué of agreements reached by the parties concerned."[1073] In other words, the Maori would have relied upon the oral promises made during the five-hour meeting, not on the terms of the written document. This allows an inference to be made that, even if copies of the Douglas Form were present at post-1850 treaty meetings on Vancouver Island, the First Nation parties likely would have relied upon the terms orally agreed to, not on the words inside the form.

Giving priority to the Maori side of the Treaty negotiation, as derived from Colenso's contemporaneous account, revealed that land was a major pre-occupation of the chiefs, along with strong expectations that a compensation process would be worked out as to land already occupied by Europeans. Viewed in this way, it can be argued that the meeting was as much about remedying a short-term concern, as it was an agreement concerning governance and control of land over the longer term. This is consistent with First Nation understandings that the Vancouver Island Treaties had both a short-term aspect (compensation for land and resources already taken by the HBC), and a longer-term one (future issues would be dealt with via further meetings).

Turning now to the Ngai Tahu Agreement, it seems clear that the Ngai Tahu chiefs prior to 1848 had much more experience with Europeans attempting to acquire their land than did the Indigenous inhabitants of Vancouver Island prior to 1850. In 1848,

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[1073] McKenzie, *Oral Culture, Literacy & Print in Early New Zealand*.

when faced with yet another European (Henry Kemp) wishing to acquire their land, the Ngai Tahu were able to negotiate an agreement in which they retained their homes and mahinga kai (places where food was harvested), and allocated land not needed for those purposes to Europeans for their homes and sheep farms. This bears more than a passing resemblance to the initial proposals made by Native American participants in the Washington Treaty meetings, and the First Nation understandings of the Vancouver Island Treaties. The descriptions by Maori chiefs at the Smith/Nairn hearings of how a sharing of the land and its resources might play out on the ground also show a startling resemblance to the First Nation understandings of land sharing on Vancouver Island and the understanding of some Native Americans in northwest Washington. In sum, the New Zealand experience, like the Washington experience, is consistent with, and lends support to the First Nation understandings of the Vancouver Island Treaties. While the formation of the Vancouver Island, Washington and New Zealand agreements was followed in each case by a brief period of superficially successful co-existence, any collaboration soon ceased. From then on the three histories diverge, and further comparisons have not been attempted.

4. The Second Silencing (Chapter V)

Over the first one hundred and fifty years the treatment of the treaties by successive governments in Vancouver Island (and later British Columbia) usually followed some variant of the following pattern: maintain total silence; if questioned, deny their existence; and if confronted with copies of the Douglas Forms, explain them away as mere expressions of goodwill. As far as the implementation and enforcement of the hunting provisions in the Douglas Forms is concerned, provincial governments at first

followed a policy of benign neglect, followed by strict enforcement of game laws when hunting licenses became a source of provincial revenue. With respect to the federal government, an initial period of non-enforcement of fisheries regulations was followed by increasingly strict enforcement, while the response of the Department of Indian Affairs was limited to occasional and ineffectual complaints to the Department of Fisheries. One thing absent from all government deliberations was the First Nation perspective on the treaties – taking into consideration the understanding of David Latass was inconceivable.

References to the Vancouver Island Treaties in popular and scholarly literature were virtually non-existent in the early years, followed by a very long period when they were summarily disposed of via a brief and standardized recitation of events featuring James Douglas. The literature merely perpetuated the stereotype of the treaties as an interesting but unimportant episode in the history of the province. More recently, the academic literature has evolved substantially, recognizing the growing importance of the treaties and the need to incorporate First Nation perspectives. My dissertation is a further step in that direction.

The case law on historical treaties in Canada between the Crown and First Nations has taken an interesting path. In most cases, claims have been framed as contests between provincial/federal legislation and the hunting/fishing provisions in the written forms of the treaties. Courts typically have described their task as reconciling a treaty right with statutory provisions that "are in the interest of all Canadians,"[1074] such as public safety or conservation of fish and game. The judicial decision-making process in

[1074] CJ Lamer in *R v Gladstone* [1996] 2 SCR 723 at para 75.

such cases frequently involves a search for the so-called common intention of the parties as to a specific provision of the treaty under scrutiny. The result is often an identification of intent that supports a decision that may well do justice to the parties, but does not do justice to the historical evidence. While the approach followed by the courts has evolved, it still favours treaty texts over understandings of the treaties based on First Nation accounts drawn from the historical record. In particular, the few treaty claims advancing a concept of sharing the land and its resources have received short shrift from the courts in Canada. In short, the approach taken by the Supreme Court of Canada in treaty cases to date is out of step with most of the recent Canadian literature on the issue (as set out in Part 1 of the Literature Review), and with the approach taken in this dissertation. The courts in Canada have not as yet been prepared to acknowledge the existence of treaties that share not cede land.

5. New Treaty Categories (Chapter VI)

The search for new categories was largely successful. The existing category of sui generis treaty as created by the Supreme Court of Canada fits well with the notion of treaties as a commitment to enter a process, while the Supreme Court of Canada's fixation on finding "common intent" is problematic and in my opinion should be abandoned. A potential category of the sacred treaty was examined, but the understandings of First Nations and non-First Nations (at least as articulated by the courts) cannot as yet be reconciled. The category of sharing treaties is well established in the literature (if not the law), and I believe the time has come to fill in its content and scope. As a start I have collected Indigenous explanations of sharing land and resources from Vancouver Island, Washington State and New Zealand, which show remarkable

similarities as responses to the arrival of western notions of land tenure, agriculture and resource extraction. The attitude of the newcomers has been summarized aptly by activist and writer, Thomas King: "[T]here is no doubt that colonists knew how to share. They simply did not want to share with Indians."[1075] The forms of sharing envisaged by the Indigenous peoples described in the dissertation might have been workable if the newcomers had shown the slightest interest in modifying their attitudes and practices.

Looking to the law of international treaties for insight proved to be productive, yielding a useful analogy with the category of bilingual and multilingual treaties, with important implications for the Vancouver Island Treaties. Until now it has been taken for granted that the authoritative version was in English, as reduced to writing by the Douglas Forms. This implies that the First Nation versions were merely translations into their languages of the original English language versions. However, under the principles of international law there is no justification for considering English language versions to be more authoritative than the First Nation versions, even though the latter are more difficult to ascertain. In other words, authenticity resides in the oral versions, not in the Douglas Forms, which therefore should not be relied upon as a guide to the terms of the bilingual or multilingual treaties.

A search of common treaty categories in international law also yielded the modus vivendi, which seems to be a good fit with the Vancouver Island Treaties, at least at their inception: an agreement of "…temporary or provisional nature intended to be replaced by an arrangement of a more permanent and detailed character. It is usually made in an

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[1075] Thomas King, *The Inconvenient Indian: A Curious Account of Native People in North America*n (Minneapolis: University of Minnesota Press, 2013), 24.

informal way, and never requires ratification."[1076] In the years immediately after the formation of the treaties there was an expectation on the part of First Nations that the treaty process would resume, with revisions to the existing treaties and the creation of new ones. During his tenure in office Douglas was always willing to listen to the complaints of First Nations, and thus might have been prepared to countenance such a process had it not been for the arrival of settlers en masse and their strident demands for priority in all matters concerning land. Douglas' retirement in 1864 put matters into the hands of people with no intention of further negotiations with First Nations. Over 130 years were to pass before negotiations resumed, both for new treaties and renegotiation of the historical treaties.

While modus vivendi as articulated in international law is pragmatic but conceptually shallow, the literature in political theory has been able to provide much-needed depth. Theorists have used the concept to describe political relations within a (western) society as, "…legitimate political arrangements conceived as the practical outcome of processes of negotiation, bargaining and compromise prompted by conflict and disagreement," where "…a tolerable level of peace and security is preserved or established."[1077] Can the concept successfully be transferred to historical political arrangements between the Crown and First Nations? The answer is yes, as demonstrated by the proponents of modus vivendi in legal theory. The concept was re(de)fined as follows: "a working intersocietal space in which normative expectations that were shared

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[1076] The United Nations, "Definition of key terms used in the UN Treaty Collection," accessed 20 August 2015, http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml.

[1077] John Horton, "John Gray and the Political Theory of *Modus Vivendi*," *Critical Review of International Social and Political Philosophy*, 9.2 (2006): 164.

at the level of practice were not always shared at the level of meaning."[1078] Thus the First Nations parties to the Vancouver Island Treaties and James Douglas held inconsistent understandings of the First Nation interest in land, but were able in practice to negotiate, at least in the short term, the continuation of their working relationship concerning the allocation of land and the harvesting of its resources.

One characteristic of such an intersocietal space was its emergence over a considerable (but unspecified) period of time. This suggests that insufficient time may have passed on Vancouver Island to create a modus vivendi of the kind proposed by the legal theorists. However, if the Vancouver Island Treaties are considered as an analogue to the international modus vivendi treaty, they may be seen as indicators of a nascent "intersocietal space" which, at worst, was snuffed out, or at best, put on hold until the arrival of better times.

To sum up, the Vancouver Island Treaties are no longer round pegs trying to fit within square holes, they are no longer outliers. They do fit within an alternate suite of categories: sui generis, sharing, bi-lingual, and modus vivendi, none of which reflect a purely colonial interest. While the sharing treaty may at present be more closely aligned with First Nation perspectives, it provides a crucial counterbalance to the strictly colonial categories. The sui generis, bilingual and modus vivendi categories encompass First Nation and colonial interests in equal measure, and once the Indigenous law of treaties is more developed, I am sure more categories will emerge.

[1078] Promislow, "'Thou Wilt Not Die of Hunger…for I Bring Thee Merchandise,'" 104.

C. Future Directions

First, the efforts of the First Nation spokespeople highlighted in this dissertation need to be recognized, for without them I believe the Vancouver Island Treaties would have no future. They were not alone in their resistance, as explained by Alexandra Harmon, who acknowledges that treaties involving indigenous peoples in disparate times and places are diverse in nature, but "…their histories have an important commonality: indigenous people have ensured the treaties' evolving and present-day significance by remembering them and telling their own stories about them despite colonial authorities' efforts to suppress or discredit those indigenous representations."[1079]

I can see four paths that the Vancouver Island Treaties might follow in the future, and they are not mutually exclusive. The preferred path (or perhaps the only possible one until now) has been litigation. The process has achieved some victories, but often they are pyrrhic, since attempts to implement change based on these judgments have not met with success equal to the cost in money, time, energy and dashed hopes. The positive impact of litigation may be felt more in symbolic than practical ways, influencing the attitude of the Canadian public, and who in turn can create change through their votes.

Another approach, a favourite of mine, is educating the non-First Nation public of Vancouver Island and Canada about the history and significance of the treaties. A wonderful example of this occurred in May 2012, when the Snuneymuxw First Nation, under the leadership of then Chief Douglas White, in cooperation with Vancouver Island University, hosted a conference at Nanaimo on the "Pre-Confederation Treaties of

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[1079] Harmon "Introduction: Pacific Northwest Indian Treaties in National and International Historical Perspective," 12-13. Paraphrasing an unpublished conference presentation by historian John Wunder.

Vancouver Island," featuring presentations by scholars[1080] and by First Nation elders and leaders on many aspects of the treaties. A successful effort was made to ensure the attendance of large numbers of the non-First Nation residents of Nanaimo, and as a result, the conference became a community celebration of the Vancouver Treaties.

A third, and related approach, is performance of the treaties by First Nations. As demonstrated in Chapter III this has been productive in Washington State. My travels in New Zealand demonstrated to me that the national celebration of the Treaty of Waitangi each year is a positive force for reconciliation between Maori and Pakeha.[1081] In June 2013, representatives of Saanich First Nations held a re-enactment of their treaty at the summit of Mt Douglas, at the same time renaming it P'kols Mountain. The event was videotaped and posted on Youtube,[1082] under the title "Reenacting Douglas Treaty Signing on Pkols," with speeches by various Saanich chiefs, and by actors portraying Douglas and an unidentified catholic priest, all telling the story of a peace treaty, not a cession of land. To my knowledge this is the first live performance or re-enactment of a Vancouver Island Treaty. I am sure there will be more.

The last option is negotiation with government, at all levels. Only in the last quarter-century have the governments of Canada and its provinces shown any willingness to imagine, and hesitantly implement, a greater presence of Indigenous peoples in decision-making concerning land and its resources. There is still a good deal of suspicion on both sides, but progress has been made. I will close this dissertation by describing an

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[1080] Hamar Foster, John Lutz and I were honoured to participate as panel members.

[1081] To my knowledge, there is no celebration of the Ngai Tahu agreement of 1848, which may not as yet be seen in a positive light.

[1082] Video by Ashlee Blossom, "Reenactment of the Douglas Treat Signing on PKOLS," accessed 20 August 2015, https://www.youtube.com/watch?v=bjRzCiTIykg.

exciting example of collaboration between several Vancouver Island Treaty First Nations and both levels of government. On April 15, 2015, the Sooke Mirror newspaper reported that "Five Vancouver Island First Nations, and the governments of B.C. and Canada reached a major reconciliation milestone in the B.C. treaty process with the signing of the Agreement-in Principle."[1083] Such agreements-in-principle are usually examples of what are commonly called "Incremental treaty agreements," which "…allow First Nations to enjoy economic benefits in advance of a Final Agreement."[1084] In other words, they are modus vivendi! As explained by Chief Gordon Planes of the T'sou-ke First Nation:

> Our ancestors committed themselves to protecting our way of life and building an even better future for our people when they made the first treaties with the Crown in the 1850s. We are honouring their accomplishments as we build on the foundation that they laid by signing this Agreement-in-Principle today and continuing our work toward a modern treaty with Canada and British Columbia.[1085]

This is a wonderful confirmation not only of the survival of the Vancouver Island Treaties, but their incorporation into the modern treaty process. It is apparent that the treaties are finally, against all odds, realizing their potential to exert a positive influence on the future of the relationship between First Nations and Canada.

[1083] "AIP Signed by Local First Nations Bands," *Sooke Mirror* (Sooke, BC), 15 April 2015.

[1084] Ibid.

[1085] Ibid.

Bibliography

Archival Sources

British Columbia Archives (BCA)

Hudson's Bay Company Archives (HBCA)

National Archives of Canada (NAC)

New Zealand Archives (NZA)

Colonial Dispatches - http://bcgenesis.uvic.ca/ (CD)

Published Sources

Abercrombie, Nicholas Stephen Hill, and Bryan Turner. *The Penguin Dictionary of Sociology*. New York: Penguin, 1984.

Adams, Peter. *Fatal Necessity: British Intervention in New Zealand, 1830-1847*. Auckland: Auckalnd University Press, 1977.

Akrigg, G.P.V. and Helen B. Akrigg. *British Columbia Chronicle, 1847-1871: Gold and Colonists*. Victoria: Discovery Press, 1977.

Arnett, Chris. *The Terror of the Coast: Land Alienation and Colonial War on Vancouver Island and the Gulf Islands, 1849-1863*. Burnaby, BC: Talonbooks, 1999.

Asch, Michael. *On Being Here To Stay: Treaties and Aboriginal Rights in Canada*. Toronto: University of Toronto, 2013.

---------"On the Land Cession Provisions in Treaty 11." *Ethnohistory* 60.3 (2013): 451-467.

Aust, Anthony. *Modern Treaty Law and Practice*. Cambridge: Cambridge University Press, 2007.

Ballantyne, Tony. "Chapter Seven: Christianity, Colonialism and Cross-cultural Communication." In *Webs of Empire: Locating New Zealand's Colonial Past.* Wellington: Bridget Williams Books Limited, 2012.

Banner, Stuart. *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska*. Cambridge Mass: Harvard University Press, 2008.

Barnett, Homer. *The Coast Salish of British Columbia*. Eugene: University of Oregon, 1955.

Belich, James. *The New Zealand Wars and the Victorian Interpretation of Radical Conflict*. Auckland: Auckland University Press, 1986.

Berridge, Geoff and Lorna Lloyd. *The Palgrave Macmillan Dictionary of Diplomacy*. New York: Palgrave Macmillan, 2012.

Boast, Richard P. "Treaties Nobody Counted On." *Victoria University of Wellington Law Review*, 42.4 (2011): 653-670.

Borrows, John. "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government." In *Aboriginal and Treaty Rights in Canada*, edited by Michael Asch, 155-172. Vancouver: UBC Press, 1997.

---------Canada's Indigenous Constitution. Toronto: University of Toronto Press, 2010.

Bowsfield, Hartwell, editor. *Fort Victoria Letters 1846-1851*. Winnipeg: Hudson's Bay Record Society, 1979.

British Columbia. *Papers Connected with the Indian Land Question, 1850-1875*. Victoria: Queen's Printer, 1875.

Brown, Robert. *Robert Brown and the Vancouver Island Exploring Expedition*. Edited by John Hayman. Vancouver: UBC Press, 1989.

Burnett, Peter H. "Recollections of an Old Pioneer." *Quarterly of the Oregon Historical Society,* 5 (1904): 64-99.

Burns, Patricia. *Fatal Success: A History of the New Zealand Company*. Auckland: Heinemann Reed, 1980.

Cail, Robert E. *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913*. Vancouver: UBC Press, 1974.

Cardinal, Harold and Walter Hildebrandt. *Treaty Elders of Saskatchewan: Our Dream is that Our People Will One Day Be Clearly Recognized as Nations*. Calgary, University of Calgary Press, 2000.

Carlson, Keith Thor. *The Power of Place, the Problem of Time: Aboriginal Identity and Historical Consciousness in the Cauldron of Colonialism*. Toronto: University of Toronto Press, 2010.

---------"Aboriginal Diplomacy: The Queen Comes to Canada and Coyote Goes to London." In *Indigenous Diplomacies*, edited by J. Marshall Beier, 155-170. London: Palgrave, 2009.

Carter, Sarah, Walter Hidebrandt, and Dorothy First Rider. *The True Spirit and Original Intent of Treaty 7*. Montreal: McGill-Queen's University Press, 1996.

Cell, J.W. *British Colonial Administration in the Mid-Nineteenth Century: The Policy-making Process*. New Haven: Yale University Press, 1970.

Clark, Jerry L. "Thus Spoke Chief Seattle." *Prologue*, 18.1 (1985): 58.

Clayton, Daniel W. *Islands of Truth: The Imperial Fashioning of Vancouver Island*. Vancouver, BC: UBC Press, 2000.

Clough, Peter and Cathy Nutbrown. *A Student's Guide to Methodology: Justifying Enquiry*. London: SAGE Publications 2007.

Coan, C. "The First Stage of the Federal Indian Policy in the Northwest, 1849-1852." *Quarterly of the Oregon Historical Society*, 22.1 (1921): 46-84.

Colenso, William. *The Authentic and Genuine History of the Signing of the Treaty of Waitangi*. Wellington: Government Printer, 1890.

Cruikshank, Julie. *The Social Life of Stories: Narrative and Knowledge in the Yukon Territory*. Vancouver: UBC Press, 1998.

Craft, Aimee. *Breathing Life into the Stone Fort Treaty: An Anishinabe Understanding of Treaty One*. Saskatoon: SK: Purich Publishing, 2013.

Cryer, Beryl Mildred and Chris Arnett. *Two Houses Half-buried in the Sand: Oral Traditions of the Hul'q'umi'num' Coast Salish of Kuper Island and Vancouver Island*. Vancouver: Talonbooks, 2007.

Cumming, Peter A. and Neil H. Mickenberg, *Native Rights in Canada*. Toronto: Indian-Eskimo Association of Canada in association with General Pub. Co., 1972.

Daugherty, Wayne and Dennis Madill. *Indian Government Under Indian Act Legislation, 1868-1951*. Ottawa: Treaties and Historical Research Centre, Department of Indian Affairs, 1980.

Davidson, Janet. "From Seeds to Flowering: Cultural Change." In *From the Beginning: The Archaeology of the Maori*, edited by John Wilson, 43-8. Auckland: Penguin Books, 1987.

Deloria, Philip J. "What Is the Middle Ground, Anyway?" *William and Mary Quarterly*, LXIII.1 (2006): 15-22.

Denscombe, Martyn. *A Good Research guide for Small Scale Social Research Projects*. Maidenhead: Open University Press, 2007.

Deur, Douglas and Nancy Turner. *Keeping it Living: Traditions of Plant Use and Cultivation on the Northwest Coast of North America*. Seattle: University of Washington Press, 2005.

Down, Edith E. "The History of Catholic Education in British Columbia, 1847-1900." *Study Sessions*, 50 (1983), 569-90.

Duff, Wilson. "The Fort Victoria Treaties." *BC Studies,* 3 (1969): 3-57.

Elliott, Dave. *Saltwater People, as told by Dave Elliott Sr.: A Resource Book for the Saanich Native Studies Program*, edited by Janet Poth. Saanichton, BC: School District 63, 1990.

Evison, Henry. *Te Wai Pounamu = The Greenstone Island: A History of the Southern Maori During the European Colonization of New Zealand*. Christchurch, NZ: Aoraki Press, 1993.

---------*The Ngāi Tahu Deeds: A Window on New Zealand History*. Christchurch, NZ: Canterbury University Press, 2007.

Feinstein, Charles H. and Mark Thomas. *Making History Count: A Primer in Quantitative Methods for Historians*. Cambridge: Cambridge University Press, 2002.

Fisher, Robin. *Contact and Conflict: Indian European Relations in British Columbia, 1774-1890*. Vancouver: UBC Press, 1977.

Fitzpatrick, Peter. "Terminal Legality: Imperialism and the (De)composition of Law." In *Law, History, Colonialism: the Reach of Empire,* edited by Diane Kirkby and Catherine Coleborne, 9-25. Manchester: Manchester University Press, 2001.

Flanagan, Tom. *First Nations? Second Thoughts*. Montreal: McGill-Queen's University Press, 2000.

Foden, N.A. *New Zealand History (1642 to 1842)*. Wellington: Sweet & Maxwell, 1965.

Foster, Hamar. "The Saanichton Bay Marina Case: Imperial Law, Colonial History and Competing Theories of Aboriginal Title." *UBC Law Review* (1989): 629-650.

Foster, Hamar. "Letting Go the Bone: The Idea of Indian Title in British Columbia, 1849-1927." In *Essays in the History of Canadian Law, British Columbia and the Yukon*, Vol VI edited by Hamar Foster and John McLaren, 28-86. Toronto: University of Toronto Press and the Osgoode Society for Legal History, 1995.

Foster, Hamar and Allen Grove. "'Trespassers on the Soil': United States v. Tom and a New Perspective of the Short History of Treaty Making in Nineteenth Century British Columbia." In *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest*, edited by Alexandra Harmon, 89-127. Seattle: University of Washington, 2008.

Friday, Chris. "Performing Treaties: The Culture and Politics of Treaty Remembrance and Celebration." In *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest*, edited by Alexandra Harmon, 157-185. Seattle: University of Washington, 2008.

Frogner, Raymond. "'Innocent Legal Fictions': Archival Convention and the North Saanich Treaty of 1852." *Archivaria*, 70 (Fall 2010): 45-94.

Fumoleau, Rene. *As Long As This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939*. Toronto: McClelland and Stewart, 1975.

Gibbs, George. *Dictionary of the Chinook Jargon, or, Trade Language of Oregon*. NY: Cramoisy Press, 1863.

Good, John Booth. "Mission to the 'Nanaimo Tribe', Vancouver's Island." *The Mission Field,* 8 (1863): 116-118.

Gough, Barry. *Gunboat Frontier: British Maritime Authority and Northwest Coast Indians, 1846-1890*. Vancouver: UBC Press, 1984.

Grammond, Sebastien. "Aboriginal Treaties and Canadian Law." *Queen's Law Journal*, 20 (1994): 57-87.

Grant, W. Colquhoun. "Description of Vancouver Island, by its first Colonist, W. Colquhoun Grant." *Journal of the Royal Geographical Society of London*, 27 (1857): 268-310.

Gray, John. *Two Faces of Liberalism*. Cambridge: Polity Press, 2000.

Great Britain. *Further Papers Relative to the Affairs of New Zealand, Correspondence with Governor Grey, Presented to both Houses of Parliament by Command of Her Majesty, July 1849*. London: William Clewes and Sons, 1849.

Hammersley, Martyn. *Reading Ethnographic Research: A Critical Guide*. London: Longman, 1990.

Harmon, Alexandra. *Indians in the Making: Ethnic Relations and Indian Identities Around Puget Sound*. Berkeley: University of California Press, 1998.

--------"Coast Salish History." In *Be of Good Mind: Essays on the Coast Salish*. Vancouver: UBC Press, 2007.

--------"Introduction: Pacific Northwest Indian Treaties in National and International Historical Perspective." In *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest*, edited by Alexandra Harmon, 3-32. Seattle: University of Washington Press, 2008.

Harring, Sidney L. *White Man's Law: Native People in Nineteenth Century Jurisprudence*. Toronto: University of Toronto Press, 1998.

Harris, Cole. *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia*. Vancouver: UBC Press, 2002.

Harris, Douglas C. *Fish, Law and Colonialism: The Legal Capture of Salmon in British Columbia*. Toronto: University of Toronto Press, 2001.

---------"The Boldt Decision in Canada: Aboriginal Treaty Rights to Fish on the Pacific." In *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest*, edited by Alexandra Harmon, 128-153. Seattle: University of Washington Press, 2008.

---------*Landing Native Fisheries: Indian Reserves and Fishing Right in British Columbia, 1849-1925*. Vancouver: UBC Press, 2008.

--------- "A Court Between: Aboriginal and Treaty Rights in the British Columbia Court of Appeal." *BC Studies*, 162 (Summer 2009): 137-164.

Helmcken, John Sebastian. *The Reminiscences of Doctor John Sebastian Helmcken,* edited by Dorothy Blakey Smith. Vancouver: UBC Press, 1975.

Hendrickson, James E., editor. *Journals of the Colonial Legislatures of the Colonies of Vancouver Island and British Columbia,* Vol II. Victoria: Provincial Archives of British Columbia, 1980.

--------- "Two Letters from Walter Colquhoun Grant," *BC Studies*, 26 (Summer 1975): 3-15.

Hickey, Lynn, Richard L. Lightning, and Gordon Lee. "T.A.R.R. Interview with Elders Program." In *The Spirit of the Alberta Indian Treaties*, edited by Richard Price, 103-112. Edmonton, University of Edmonton Press, 1999.

Hickford, Mark. "'Vague Native Rights to Land': British Imperial Policy on Native Title and Custom in New Zealand, 1837-53." *The Journal of Imperial and Commonwealth History*, 38.2 (2010): 175-206.

Hogg, Peter. *Constitutional Law of Canada, Student Edition*. Toronto: Carswell, 1997.

Horton, John. "John Gray and the Political Theory of *Modus Vivendi*." *Critical Review of International Social and Political Philosophy*, 9.2 (2006): 155-169.

----------"Realism, Liberal Moralism and a Political Theory of Modus Vivendi," *European Journal of Political Theory*, 9.4 (2010): 431-448.

Howay, F.W. "An Early Colonization Scheme in British Columbia." *The British Columbia Historical Quarterly*, 3.1 (1939): 51-63.

Hunter, Claire E. "New Justification for an Old Approach: In Defense of Characterizing First Nations Treaties as Contract." *University of Toronto Faculty of Law Review*, 62.1 (2004): 61.

Isaac, T. and K. Annis. *Treaty Rights in the Historic Treaties of Canada*. Saskatoon: Native Law Centre, University of Saskatchewan, 2010.

Johnson, Allan G., editor. *The Blackwell Dictionary of Sociology*, Oxford: Blackwell Publishers, 2000.

Johnson, Harold. *Two Families: Treaties and Government*. Saskatoon: Purich Publishing, 2007.

Keddie, Grant. "Installation of a Songhees Chief." *Discovery*, 20.1 (Winter 1992): 2.

--------- *Songhees Pictorial: A History of the Songhees People as Seen by Outsiders, 1790-1912*. Victoria: Royal British Columbia Museum, 2003.

King, Thomas. *The Inconvenient Indian: A Curious Account of Native People in North Americ*an. Minneapolis: University of Minnesota Press, 2013.

King, Michael. *The Penguin History of New Zealand*. Auckland: Penguin Books, 2003.

Kluger, Richard. *The Bitter Waters of Medicine Creek: A Tragic Clash Between White and Native America*. New York: Alfred A. Knopf, 2011.

Lamb, W. Kay. "Introduction." In *The Reminiscences of Doctor John Sebastian Helmcken*, edited by Dorothy Blakey Smith, 11-32. Vancouver: UBC Press, 1975.

Lane, Barbara. "Background of Treaty Making in Western Washington." *American Indian Journal*, 3.4 (1977): 2-11.

Long, John S. *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905*. Montreal: McGill-Queen's University Press, 2010.

Lutz, John. *Makúk: A New History of Aboriginal-White Relations*. Vancouver: UBC Press, 2008.

--------- "'Relating to the Country': The Lekwammen and the Extension of European Settlement, 1843-1911." In *Beyond City Limits: Rural History in British Columbia,* edited by R.W. Sandwell, 17-32. Vancouver: UBC Press, 1999.

Madill, Dennis. *British Columbia Indian Treaties in Historical Perspective*. Ottawa: Department of Indian and Northern Affairs, 1981.

Macklem, Patrick. *Indigenous Difference and the Constitution of Canada*. Toronto: University of Toronto Press, 2002.

Makmillen, Shurli. "Colonial Texts in Post-Colonial Contexts: A Genre in the Contact Zone." *Linguistics and the Human Sciences*, 3.1 (2007): 314-326.

Marshall, Daniel. *Those Who Fell From the Sky: A History of the Cowichan Peoples*. Duncan, BC: Cultural and Educational Centre, Cowichan Tribes, 1999.

Marshall, Gordon, editor. *Oxford Dictionary of Sociology*. Oxford: Oxford University Press, 1998.

Martin, William. *England and the New Zealanders*. Auckland: College Press, 1847.

Mayne, Commander R. C. *Four Years in British Columbia and Vancouver Island: An Account of Their Forests, Rivers, Coasts, Gold Fields and Resources for Colonisation*. London: J. Murray, 1862.

McCabe, J. Timothy. *The Law of Treaties between the Crown and Aboriginal Peoples*. Markham: LexisNexis Canada Ltd., 2010.

McCall, Sophie. *First Person Singular: Aboriginal Storytelling and the Ethics of Collaborative Authorship*. Vancouver: UBC Press, 2011.

McGill, Allan. *Historical Knowledge, Historical Error: A Contemporary Guide to Practice*. Chicago: The University of Chicago Press, 2007.

McKenzie, D.F. *Oral Culture, Literacy and Print in Early New Zealand: The Treaty of Waitangi*. Wellington: Victoria University Press, 1985.

McNair, Lord Arnold Duncan. *The Law of Treaties*. Oxford: Clarendon, 1961.

McNeill, Kent. "Negotiated Sovereignty: Indian Treaties and the Acquisition of American and Canadian Territorial Rights in the Pacific Northwest." In *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest,* edited by Alexandra Harmon, 35-55. Seattle: University of Washington, 2008.

Meeker, Ezra. *Pioneer Reminiscences of Puget Sound: The Tragedy of Leschi*. Seattle: Lowman & Hanford, 1905.

Megill, Allan. *Historical Knowledge, Historical Error: A Contemporary Guide to Practice*. Chicago & London: The University of Chicago Press, 2007.

Merry, Sally Engle. "Legal Pluralism*." Law & Society Review*, 22.5 (1988): 869-896.

Miller, Bruce Granville. *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts*. Vancouver: UBC Press, 2011.

--------- "Life on the Hardened Border." *American Indian Culture and Research Journal*, 36.2 (2012): 24-25.

Miller, J.R. *Skyscrapers Hide the Heavens: A History of Indian-white Relations in Canada*. Toronto: University of Toronto Press, 1989.

-------- *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada*. Toronto: University of Toronto Press, 2009.

Morris, Alexander. *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*. Toronto: Belfords, Clarke & Co, 1880.

Monro, A.S. "The Medical History of British Columbia: Nanaimo." *The Canadian Medical Association Journal* (August 1932): 187-189.

Murton, James. "The Long Question of Food and Land: A Review Essay." *BC Studies,* 184 (Winter, 2014/15): 125-37.

Orange, Claudia. *The Treaty of Waitangi*. Wellington: Allen & Unwin, 1987.

-------- *An Illustrated History of the Treaty of Waitangi*. Wellington: Bridget Williams Books, 2004.

Ormsby, Margaret. *British Columbia: A History*. Toronto: Macmillan, 1958.

-------- "Introduction," *Fort Victoria Letters 1846-1851*. Hartwell Bowsfield, editor. Winnipeg: Hudson's Bay Record Society, 1979, xi-xcv

Oxford English Dictionary. Oxford: Oxford University Press, 1933.

Patterson, Stephen. "Eighteenth Century Treaties: The Mi'kmap, Maliseet and Passamaquoddy Experience." *Native Studies Review,* 18.1 (2009): 25-52.

Perry, Adele. "Forum: On Not Going on a Field Trip: Presence, Absence, and the Writing of BC History." *BC Studies*, 132 (Winter 2001/2002): 57-66.

-------- "The Colonial Archive on Trial: Possession, Dispossession, and History in Delgamuukw v. British Columbia." In *Archive Stories*, edited by Antoinette Burton, 325-350. Durham: Duke University Press, 2005.

Peterson, Jan. *Journeys Down the Alberni Canal to Barkley Sound*. Lantzville BC: Oolichan Books, 1999.

Pratt, Mary Louise. *Imperial Eyes: Travel Writing and Transculturation*. London: Routledge, 1992.

Price, Richard, editor. *The Spirit of the Alberta Indian Treaties*. Edmonton: University of Edmonton Press, 1999.

Promislow, Janna. "'Thou Wilt Not Die of Hunger…for I Bring Thee Merchandise': Consent, Intersocietal Normativity, and the Exchange of Food at York Factory, 1682-1763." In *Between Consenting Peoples: Political Community and the Meaning of Consent,* edited by Jeremy Webber and Colin M. Macleod. Vancouver: UBC Press, 2010.

--------- "Treaties in History and Law," *UBC Law Review*, 47.3 (2014): 1085-1183.

Prucha, Francis Paul. *American Indian Treaties: The History of a Political Anomaly*. Berkeley: University of California Press, 1997.

Raibmon, Paige. "Unmaking Native Space: A Genealogy of Indian Policy, Settler Practice, and the Microtechniques of Dispossession." In *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest*, edited by Alexandra Harmon, 56-86. Seattle: University of Washington Press, 2008.

Rawls, John. *Justice as Fairness: A Restatement*. Cambridge: The Belknap Press, 1990.

Ray, Arthur J. *Telling it to the Judge: Taking Native History to Court*. Montreal & Kingston: McGill-Queen's University Press, 2011.

Ray, Arthur, Jim Miller and Frank Tough. *Bounty and Benevolence: A History of Saskatchewan Treaties*. Montreal: McGill-Queen's University Press, 2000.

Renker, Ann M. and Erna Gunther. "Makah." In *Handbook of North American Indians, Northwest Coast*, Vol VII. Washington, DC: Smithsonian Institution, 1990.

Rossiter, David. "Lessons in Possession: Colonial Resource Geographies in Practice on Vancouver Island, 1859-1865." *Journal of Historical Geography*, 33 (2007): 770-790.

Royle, Stephen. *Company, Crown and Colony: The Hudson's Bay Company and Territorial Endeavour in Western Canada*. London: I.B. Taurus, 2011.

Sage, Walter. *Sir James Douglas and British Columbia*. Toronto: University of Toronto Press, 1930.

Salmon, Wesley C. *Logic*. Englewood Cliffs, NJ: Prentice-Hall, 1963.

Samuels, Joel H. "Condominium Arrangements in International Practice: Reviving an Abandoned Concept of Boundary Dispute Resolution." *Michigan Journal of International Law*, 29 (2007-8): 727-776.

Seed, Patricia. *Ceremonies of Possession in Europe's Conquest of the New World, 1492-1640*. Cambridge: Cambridge University Press, 1995.

Slattery, Brian. "Making Sense of Aboriginal and Treaty Rights." *Canadian Law Review*, 79.2 (2000): 196-224.

Smith, Donald B. "From Sylvester Long to Chief Buffalo Child Long Lance." In *Being and Becoming Indian: Biographical Studies of North American Frontiers*. Chicago: The Dorsey Press, 1989.

Sproat, Gilbert Malcolm. *Scenes and Studies of Savage Life*. London: Smith, Elder and Co., 1868.

Storey, Kenton Scott. "What Will They Say in England?: Violence, Anxiety, and the Press in Nineteenth Century New Zealand and Vancouver Island." *The Journal of the Canadian Historical Association*, 20.2 (2009): 28-59.

Surtees, Robert J. "Canadian Indian Treaties," in *Handbook of North American Indians, History of Indian-White Relations*, Vol IV, edited by Wilcomb E. Washburn, 202-10. Washington DC: Smithsonian Institution, 1988.

Suttles, Wayne. "Central Coast Salish." In *Handbook of North American Indians, Northwest Coast*, Vol VII, 453-475. Washington, DC: Smithsonian Institution, 1990.

--------"The Ethnographic Significance of the Fort Langley Journals." In *The Fort Langley Journals, 1827-30*, edited by Morag Maclachlan, 163-210. Vancouver: UBC Press, 1998.

Swindell, Edward G. "Appendices 'A' and 'B' Consisting of Minutes of Treaty Councils and a Digest of Treaty Provisions." In *Report on Source, Nature and Extent of Fishing, Hunting and Miscellaneous Related Rights of Certain Indian Tribes in Washington and Oregon*. U.S. Department of the Interior, Office of Indian Affairs, Division of Forestry and Grazing, University of Washington, 1942.

Talbot, Robert J. *Negotiating the Numbered Treaties: An Intellectual & Political Biography of Alexander Morris*. Saskatoon: Purich Publishing, 2009.

Tau, Te Maire and Atholl Anderson, editors. *Ngai Tahu: A Migration History, The Carrington Text*. Wellington: Bridget Williams Books, 2008.

Taylor, David. "Two Views on the Meaning of Treaties Six and Seven." In *The Spirit of the Alberta Indian Treaties,* edited by Richard Price, 9-45. Edmonton, University of Edmonton Press, 1999.

Tennant, Paul. *Aboriginal People and Politics: The Aboriginal Land Question in British Columbia, 1849-1989*. Vancouver: UBC Press, 1990.

Thomson, Duane. "The Response of Okanagan Indians to European Settlement." *BC Studies*, 101 (Spring 1994): 96-117.

Trimble, W.J. "American and British Treatment of Indians in the Pacific Northwest." *The Washington Historical Quarterly*, 5. 1(1914): 32-54.

Trouillot, Michel-Rolph. *Silencing the Past: Power and the Production of History*. Boston: Beacon Press, 1995.

Tully, James. *Public Philosophy in a New Key, Democracy and Civic Freedom,* Vol I. Cambridge: Cambridge University Press, 2008.

Vallance, Neil and Hamar Foster. "The Life and Times of the Royal Proclamation of 1763 in British Columbia." *Canada Watch* (Fall 2013): 25-26.

Van Laere, M. Susan, *Fine Words & Promises: A History of Indian Policy and Its Impact on the Coast Reservation Tribes of Oregon in the Last Half of the Nineteenth Century*. Philomath, OR: Serendip Historical Research, 2010.

Venne, Sharon. *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Rights*. Penticton, BC: Theytus Books, 1998.

Walters, Mark. "Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History after Marshall." *24 Dalhousie Law Journal*, 75 (2001): 75-138.

---------"Towards a "Taxonomy" for the Common Law: Legal History and the Recognition of Aboriginal Customary Law." In *Law, History, Colonialism: The Reach of Empire,* edited by Diane Kirkby and Catharine Coleborne, 125-139. Manchester: Manchester University Press, 2001.

Watson, Bruce McIntyre. *Lives Lived West of the Divide: A Biographical Dictionary of Fur Traders Working West of the Rockies, 1793-1858*. Kelowna, BC: University of British Columbia Centre for Social, Spatial, and Economic Justice, 2010.

Webber, Jeremy. "Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples." *Osgoode Hall Law Journal*, 33.4 (1995): 623-660.

--------- "Legal Pluralism and Human Agency." *Osgoode Hall Law Journal*, 44 (2006): 168-198.

White, Richard. *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815, Twentieth Anniversary Edition*. Cambridge: Cambridge University Press, 2011.

Wicken, William. *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Junior*. Toronto: University of Toronto Press, 2002.

Williams, David R. "*...The Man for a New Country": Sir Matthew Baillie Begbie*. Sidney, BC: Gray's Publishing, 1977.

Williams, David V. *'Te Kootitango Whenua': The Native Land Court 1864-1909*. Wellington: Hua Publishers, 1999.

Willliams, David V. "case comment," *Maori Law Review*, November 2014 issue, 28-34.

Newspaper Articles

"AIP Signed by Local First Nations Bands." *Sooke Mirror* (Sooke, BC), 15 April 2015.

"Cowichan Expedition." *British Colonist* (Victoria, BC), 22 August 1862.

Cryer, Beryl. "Ki'et'sa'kun of Nanaimo: Telling How Governor Douglas Renamed Him 'Coal Tyee.'" *The Victoria Daily Colonist* (Victoria, BC), 5 March 1933.

De Cosmos, Amor. "Editorial." *British Colonist* (Victoria, BC), 22 August 1860.

DeRosa, Katie. "Tsartlip Blockade Severs Traffic Artery." *Times Colonist* (Victoria), 17 October 2010, 1.

Gordon, Michael R. and Jodi Rudoren. "Kerry to Press for 'Framework' Accord to Keep Mideast Peace Effort Moving." *The New York* Times (New York, NY), 1 January 2014.

Helmcken, D.J. “The Indian Title.” *Victoria Daily Colonist* (Victoria, BC), 28 November 1886, A2.

Helmcken, John Sebastian, “A Reminiscence of 1850.” *Victoria Daily Colonist* (Victoria, BC), December 1887, 3.

Long Lance, Chief Buffalo Child. “Greatest Real Estate Deal Recorded,” *Vancouver Sunday Sun* (Vancouver), 4 June 1922.

Pagett, Frank. “105 Years in Victoria and Saanich! Chief David Recalls White Man's Coming; 80 Years Rent Unpaid.” *Victoria Daily Times* (Victoria, BC), 14 July 1934, 1.

Pagett, Frank. "Victoria is Proud of Senior Public Library." *The Victoria Times* (Victoria, BC), 21 July 1934.

Robson, E. “Dr. Helmcken’s Letters.” Letter to the editor. *Victoria Daily Colonist* (Victoria, BC), 25 November 1886, A2.

Unpublished Sources

“Appendix to the Report of the Joint Committee on Middle Island Native Claims.” Appendices to the Journals of the New Zealand House of Representatives. 1888. Session I, I-08.

Bartleman, Gabriel. *Saanichton Marina Ltd v Louis Claxton et al*. Transcript of Proceedings at Trial in 2 September 1987, 27-29.

Boxberger, Daniel. “A Comparison of British and American Treaties with The Klallam.” Master’s thesis, Western Washington University, 1977.

Deans, James. “Settlement of Vancouver Island.” BCA, E/B/D342. Unpublished manuscript, 1878.

Hendrickson, James E. “The Aboriginal Land Policy of Governor James Douglas, 1849-1864.” BC Studies Conference Presentation, Burnaby, BC: Simon Fraser University, 1988.

Horton, John. “Towards a Political Theory of Modus Vivendi.” Unpublished manuscript, Keele University, 2009.

Knighton, Janice. “The Oral History of the Saanich Douglas Treaties: A Treaty for Peace.” Master’s thesis, University of Victoria, 2004.

Jenness, Diamond. “Indians of Vancouver Island.” Unpublished monograph, BCA, no date [ca. 1930s].

Loveridge, Donald. “Evidence of Dr. Donald M. Loveridge.” Waitangi Tribunal, Ngai Tahu Claim (Wai 27), 1989, Doc L8.

Mackie, Richard Somerset. “Colonial Land, Indian Labour and Company Capital: The Economy of Vancouver Island, 1849-1858.” Master’s thesis, University of Victoria, 1984.

Makmillen, Shurli. “Land, Law and Language: Rhetorics of Indigenous Rights and Title.” PhD dissertation, University of British Columbia, 2010.

Morrison, James. “The Robinson Treaties of 1850: A Case Study.*”* Royal Commission on Aboriginal Peoples, 1996.

Promislow, Janna. “’I smooth’d him up with fair words’: Intersocietal Law, from Fur Trade to Treaties.” PhD Dissertation, Osgoode Hall Law School, York University, 2012.

Shankel, George. “The Development of Indian Policy in British Columbia.” PhD dissertation, University of Washington, 1945.

“Report from the Select Committee on New Zealand: Together with the Minutes of Evidence, Appendix, and Index.” British House of Commons, 29 July 1844. Reproduced in *Irish University Press Series on Parliamentary Papers*, New Zealand, Vol II. Shannon: Irish University Press.

Vallance, Neil. “The Use of the Term ‘Culture’ by the Supreme Court of Canada: A Comparison of Aboriginal and Non-Aboriginal Cases Since 1982.” Master’s Thesis, University of Victoria, 2003.

Van Wart, Harriet. "A Bibliography and Discussion of Douglas Treaty Materials: Phase One of Research on the Tsawout First Nation's Douglas Treaty.” Master’s thesis, University of Victoria, 2001.

Ward, Alan. “A Report on the Historical Evidence: The Ngai Tahu Claim, Wai 27.” Wellington, Document T1, 1998.

Williams, Bryon. Provincial Game and Forest Warden, Twelfth Report. British Columbia Sessional Papers, 1916.

Wrinch, Leonard A. “Land Policy of the Colony of Vancouver Island, 1849-1866.” Master’s thesis, University of British Columbia, 1932.

Digital Resources

Aboriginal Affairs and Northern Development. "Treaty Texts – Douglas Treaties." Accessed 14 August 2015. https://www.aadncaandc.gc.ca/eng/1100100029052/1100100029053.

BC Heritage. "Biography of Roderick Finlayson, 1818-1892." Hudson's Bay Company at Fort Victoria: Fort Life. Accessed 14 August 2015. http://bcheritage.ca/fortvictoria/fortlife/rod.html.

BC Union of Indian Chiefs. "UBCIC Library and Archives." Accessed 15 August 2015. http://www.ubcic.bc.ca/library.

Bevans, Charles I., editor. "Adams-Onís Treaty: 1819." In *Treaties and Other International Agreements of the United States of America, 1776-1949*. Accessed 22 September 2015. http://www.tamu.edu/faculty/ccbn/dewitt/adamonis.htm.

Blossom, Ashlee. "Reenactment of the Douglas Treat Signing on PKOLS." Video. Accessed 20 August 2015, https://www.youtube.com/watch?v=bjRzCiTIykg.

"Chief Thunderbird." Accessed 15 August 2015. http://wrestlingdata.com/index.php?befehl=bios&wrestler=2651&bild=1&details=7&liga=297&jahr=1935.

"Te Aue Davis (1925-2010)." Museum of New Zealand/ Te Papa Tongarewa. Accessed 16 August 2015. http://collections.tepapa.govt.nz/topic/3654.

Daughtery, W.E. "Maritime Indian Treaties in Historical Perspective." Department of Indian and Northern Affairs, 1981. Accessed 18 August 2015. https://www.aadncaandc.gc.ca/eng/1100100028966/1100100028968.

Dempsey, Hugh A. "Peguis." In *Dictionary of Canadian Biography*, University of Toronto/Université Laval, 2003. Accessed 5 July 2015. http://www.biographi.ca/en/bio/peguis_9E.html.

"Douglas Treaties." *Wikipedia*. Accessed 14 July 2015. https://en.wikipedia.org/wiki/Douglas_Treaties.

"Fort Victoria Journal" www.fortvictoriajournal.ca

"The Fort Victoria and Other Vancouver Island Treaties, 1850-1854." British Columbia Archives. Accessed 15 August 2015. www.royalbcmuseum.bc.ca/assets/FortVictoriaTreaties.pdf.

Finlayson, Roderick. "Biography of Roderick Finlayson, 1818-1892." BC Heritage. Accessed 14 August 2015. http://bcheritage.ca/fortvictoria/fortlife/rod.html

"Further Papers Relative to the Affairs of New Zealand, Correspondence with Governor Grey, Presented to both Houses of Parliament by Command of Her Majesty, July 1849." London: William Clowes and Sons, Stamford Street for Her Majesty's Stationery Office, 1849. Accessed 6 November 2015. http://catalog.hathitrust.org/Record/001103504

Gough, Barry M. "Walter Colquhoun Grant." *In Dictionary of Canadian Biography, Vol VIII*. Toronto: University of Toronto/Université Laval, 2003. Accessed 10 January 2015. http://www.biographi.ca/en/bio/grant_walter_colquhoun_9E.html.

Gunaratne, Ruwanthika. "Law of Treaties 1: What is a Treaty." *Public International Law: An Introduction to Public International Law for Students*. Accessed 20 August 2015. https://ruwanthikagunaratne.wordpress.com/2013/05/26/law-of-treaties-vienna-convention-on-law-of-treaties-1969/.

"Agreements." Haida Nation. Accessed 4 November 2015. http://www.haidanation.ca.

"He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry (Wai 1040)." Accessed 20 August 2015. http://www.justice.govt.nz/tribunals/waitangi-tribunal/Reports/he-whakaputanga-me-te-tiriti-the-declaration-and-the-treaty-the-report-on-stage-1-of-the-te-paparahi-o-te-raki-inquiry.

"Historic Oregon Newspapers." University of Oregon Libraries. Accessed 3 November 2015. http://oregonnews.uoregon.edu/.

"Insight." Cambridge Dictionaries Online. Accessed 14 August 2015. http://dictionary.cambridge.org/dictionary/english/insight.

Ivison, Duncan. "Modus Vivendi." *Encyclopedia of Political Theory*. Accessed 14 March 2015. https://knowledge.sagepub.com/publicstart?authRejection=true.

Keegan, Peter J. "He Kōrero mō Te reo Māori: Maori Language Information." Accessed 7 July 2014. http://www.maorilanguage.info/mao_lang_faq.html.

Miller, Hunter, editor. "British-American Diplomacy Convention of 1818 Between the United States and Great Britain," In *Treaties and Other International Act of the United States of America,* Vol II. Washington: Government Printing Office, 1931. Accessed 14 August 2015. http://avalon.law.yale.edu/19th_century/conv1818.asp#art3.

Office of the Premier of Ontario. "Ontario and Matawa Member First Nations Celebrate Historic Framework for Negotiations on the Ring of Fire." News release, 24 April 2014. Accessed 20 Aug 2015. http://news.ontario.ca/opo/en/2014/04/ontario-and-matawa-member-first-nations-celebrate-historic-framework-for-negotiations-on-the-ring-of.html.

"Pacify." Oxford Dictionaries Online. Accessed 23 October 2015. http://www.oxforddictionaries.com/definition/english/pacify.

Pioneer and Democrat (Olympia, Washington Territory). Accessed 6 November 2015. http://www.sos.wa.gov/legacy/images/newspapers/SL_dir_olympiapiondemo/pdf/SL_dir_olympiapiondemo_02031855.pdf.

"Positive Law." The Free Dictionary. Accessed 6 November 2015. http://legaldictionary.thefreedictionary.com/Positive+Law.

Royal Commission on Aboriginal Peoples. "Legal Context of the Treaty Relationship." Report of the Royal Commission on Aboriginal Peoples, Vol IV. Accessed 4 November 2015. http://caid.ca/Vol_2_RepRoyCommAborigPple.html.

Stevens, Isaac. "Official Proceedings at the Council in the Walla Walla Valley." U.S. Department of the Interior. Bureau of Indian Affair. Accessed 4 November 2015. http://www.lib.uidaho.edu/mcbeth/governmentdoc/1855council.htm.

Taonui, Rāwiri. "Story: Tribal Organization," Encyclopedia of New Zealand. Accessed 16 August 2015. http://www.teara.govt.nz/en/tribal-organisation/page-1.

"Te Aue Davis (1925-2010)." Museaum of New Zealand/ Te Papa Tongarewa. Accessed 16 August 2015. http://collections.tepapa.govt.nz/topic/3654.

The United Nations. "Treaty Reference Guide." Accessed 20 August 2015. http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml.

Waitangi Tribunal. "Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22)." Wellington, Department of Justice, 1988. Accessed 17 August 2015. http://www.justice.govt.nz/tribunals/waitangi-tribunal/Reports/wai0022%20Main.

Waitangi Tribunal. "The Ngai Tahu Land Report (Wai 27)." Wellington: Department of Justice, 1991. Accessed 17 August 2015. https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68476209/Wai27.pdf.

Waitangi Tribunal, "He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry" (Wai 1040). Wellington, Department of Justice, 2014. Accessed December 22, 2015.

https://forms.justice.govt.nz/search/WT/reports/reportSummary.html?reportId=wtDOC_84146995

Walk, Kerry. "How to Write a Comparative Analysis." The Writing Center at Harvard University. Accessed 14 August 2015. http://www.fas.harvard.edu/~wricntr/documents/CompAnalysis.html.

Wolfenden, Madge. "Staines, Robert John." In *Dictionary of Canadian Biography*, Vol 8. Toronto: University of Toronto/Université Laval, 2003. Accessed 14 October 2015. http://www.biographi.ca/en/bio/staines_robert_john_8E.html.

Jurisprudence

Buffalo v Canada, [2006] 1 CNLR 100.

Keewatin v Minister of Natural Resources [2012] 1 CNLR 13 (Ontario Superior Court of Justice).

Mikisew Cree First Nation v Canada, (Minister of Canadian Heritage), [2005] 3 SCR 388, 2005 SCC 69.

Nowegijick v The Queen, [1983] 1 SCR 29.

Pawis v The Crown, [1979] 102 D.L.R. (3d) 602 (Federal Court Trial Division).

Paulette et al v The Queen, [1977] 2 SCR 628.

Queackar-Komoyue Nation v British Columbia, [2007] 1 CNLR 286.

Re Paulette et al and Registrar of Titles, (No. 2) [1973] 42 DLR (3d) 8.

R. v August and Bartleman, [1980] 1 CNLR 68.

R v Badger, [1996] 1 SCR 771.

R v Bartleman, [1984] 55 BCLR 78 (BCCA).

R v Cooper, George and George, [1968] 1 DLR (3rd) 113.

R v Gladstone [1996] 2 SCR 723.

R v Horse Prov Court [1983] 3 CNLR 121; Sask QB [1984] 2 CNLR 135; Sask CA [1984] 4 CNLR 99; [1988] 1 SCR 187.

R v Marshall, [1999] 3 SCR 456.

R v Morris, 2006 SCC 59 [2006] 2 SCR 915.

R v Sioui, [1990] 1 SCR 1025.

R v Sparrow, [1990] 1 SCR 1075.

R. v Syliboy, [1929] 1 DLR 307 (Nova Scotia County Court).

R v Taylor and Williams, [1981] 34 OR (2d) 360.

R v White and Bob, [1964] 50 DLR (2nd) 613.

Saanichton Marina Ltd. v Claxton, [1989] 3 CNLR 46.

Simon v the Queen, [1985] 2 SCR 387.