

Crown—First Nations Relationships: A Comparative Analysis of the Tsawwassen Final Agreement and *Tsilhqot'in v. British Columbia*

by

Alan Hanna  
B.A., University of Victoria, 2009

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## **Supervisory Committee**

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### **Supervisory Committee**

Dr. Michael Asch, (Department of Anthropology)  
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## Abstract

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This thesis explores contemporary Crown - First Nations relationships in British Columbia through a comparative analysis of the *Tsawwassen First Nation Final Agreement* and the court decision in *Tsilhqot'in Nation v. British Columbia*. The comparative analysis considers First Nations' claims to land, rights and jurisdiction entering the processes of treaty and litigation with respect to how the claims are modified as a result. The reduction of land and limitations placed on claims through treaty and trial are indicative of the quality of the relationships the provincial Crown pursues with First Nations. Given the historic injustices of denying Aboriginal rights and title in BC, the province's history of colonization requires a new relationship to be just and equitable. The Crown's pursuit of economic certainty overwhelms the potential for justice to be achieved, which are both fundamental aspects requiring balance for a healthy relationship to be established. The outcome of the analysis reveals the Crown's ongoing colonization of First Nations in British Columbia. As a result, this thesis attempts to offer a decolonized view of these relationships and some solutions for moving forward by placing the onus of responsibility squarely on the people of British Columbia to demand change from our provincial government.

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## Dedication

*In the pursuit of  
Liberality and Justice*

## Introduction

Thus the hawk addressed the speckle-necked nightingale, as he carried her very high in the clouds, keeping her snatched in his talons. She was weeping piteously, pierced by his curved talons; he addressed her haughtily: “Strange one, why do you scream? Now one who is much superior holds you. You will go wherever I myself carry you, even though you may be a singer. A meal I will make of you, if I see fit, or I shall let you go. Foolish is he who sees fit to set himself up against those who are better; he both loses the victory and suffers pain in addition to disgrace.” So spoke the swift-winged hawk, the long-winged bird.

— Hesiod

Provincial Crown—First Nations relationships in British Columbia are often fraught with tension. The tension stems from a protracted colonial relationship founded upon subjugation, denial of rights and freedoms, appropriation of land, and racism. In 2005 the provincial government of British Columbia, First Nations Summit, Union of BC Indian Chiefs, and the BC Assembly of First Nations signed a document outlining a vision for a new relationship. Logically a new relationship should not replicate the old relationship’s characteristics. However, in many respects, particularly subjugation and the denial of rights and freedoms to be self-determining on their own land, contemporary Crown—First Nations relationships do not liberate either party from the age-old constraints inherent in the old colonial relationship.

This thesis is a comparison between a BC Final Agreement (commonly referred to as a treaty), and a BC court case. Specifically, the *Tsawwassen First Nation Final Agreement* is analysed and compared with the *Tsilhqot’in v. British Columbia* court case. I wrote

this thesis because these are two of three options the Crown makes available to First Nations in the province. The third option available to First Nations is to resist acknowledging or accepting the Crown's authority and face destruction through the oppressive forces of colonization. I am trying to figure out, in a pragmatic fashion, how the Crown (and by the Crown I mean we as a colonial society) operates on this land in relation to First Nations. In other words, I look to the contrast between policy and practice—the ideals we promote as being a fair and equitable society in Canada that shapes policy, without actually living up to those ideals in practice. The analysis of this comparison provides data for a discussion about Crown—First Nations relationships in practice, which in turn illuminates the ongoing legacy of the province's colonialist past. As much as possible, the result is a fair analysis of the outcomes of the processes that are in place for First Nations to engage with our occupying society's government.

The work in this thesis emerges from a personal sense of obligation to contribute to the protracted struggle against colonialism and the ongoing injustices it reproduces on the lands that have become identified as the province of British Columbia. The recent 2010 Olympics emphasized a profound disjuncture for me, when I observed crowds spontaneously singing the Canadian national anthem in the streets of Vancouver. The public's general airs of pride for being Canadian, and more specifically British Columbian, underscored these cathartic displays of patriotic fervour. The disconnect of the Canadian identity with the factual history of this province is revealed when I hold up Canadian ideals of fairness, politeness, and respect for all peoples against the ugly backdrop of British Columbia's unjust treatment of indigenous peoples of the area. This disjuncture is even more striking when recognizing that these injustices persist to this

day, as evinced in the knowledge that the very streets upon which the games were being celebrated are unceded and, for all intents and purposes, were taken from First Nations against their will.

My struggle to come to terms with the anomaly of integrity in Canadian pride in principle amid a society built upon injustice and a denial of the rights in practice of the people who were here first fuels this research. My perspective is that of a settler.

Although I was born and raised in this province, as a person of mixed Blackfoot and European ancestry, I am a relative newcomer and guest on these Coast Salish territories. I understand that I will remain a guest until such a time as there is justice for First Nations in British Columbia. Only then would I conscionably begin to consider BC as my home and native land.

In the context of the New Relationship and its vision for a “new government-to-government relationship based on respect, recognition and accommodation of aboriginal title and rights” (Province of BC et al. 2005:1), I propose this question: Do the relationships we extend to First Nations in British Columbia meet a level of integrity commensurate with Canadian ideals we claim to uphold in the eyes of the world? My response through this research is no. I argue that there is a better standard of relationship based on a process of decolonization that is more aligned with a Canadian sense of humanity and decency. This thesis is an attempt to decolonize the self and the research, while also offering possibilities for a Crown process of decolonization by reconsidering possession of and jurisdiction over First Nations territories, thereby producing a better kind of new relationship. The following paragraphs outline the thesis’ organizational framework.

Chapter one describes the methodology employed in the analysis of the research beginning with brief delineations of human relationships emphasizing ethics and justice, and an introduction to colonization. These sections provide the framework for subsequent discussions on decolonization and the results of the two analyses. In its attempt to offer an example of how decolonization might look in research, this work necessarily employs a decolonizing methodology. A methodology geared toward decolonization can be achieved through anthropological means. Action anthropology in conjunction with a holistic perspective combines to meet that objective. Action anthropology provides the researcher with a perspective derived from lived experience, while the holistic approach makes available a wide range of research for data analysis and synthesis. Together, experience and range produce knowledge at the political, legal, economic, and social intersection of Crown—First Nations relations without bowing to ideological assumptions created through the pervasive process of internal colonization. The chapter concludes with the identification and discussion of selection bias, data sources and use of terminology.

Chapter two presents a general history of Crown—First Nations relationships in BC in order to provide context for the current state of affairs. The historical review examines the colonial administrative process of implementing policy to unilaterally gain and maintain control over Indigenous territories. Although the new colony of Vancouver Island began by following procedure as set out in the *Royal Proclamation, 1763* and extinguished Aboriginal title by signing treaties with First Nations, the practice ended abruptly after the completion of only 14 treaties. The policy that replaced the practice of entering treaties begins a settler history based on legal fictions in British Columbia.

These fictions are as follows: that Indigenous nations have no rights as free people or title to their land, and by extension, that the Crown has an undeniable, legitimate assertion of sovereignty over the entire landscape of what is now British Columbia. When First Nations were finally permitted equal access to the Canadian justice system in the mid 20<sup>th</sup> century, they took their grievances to the courts. Court decisions overturned the province's long held policy of denying Aboriginal rights and title and ultimately force British Columbia's government into a new era of negotiation and accommodation. The dilemma First Nations face today, to negotiate or litigate, stems from this old colonial relationship.

Chapters three and four contain specific analyses of the 2007 BC Supreme Court judgement in *Tsilhqot'in v. British Columbia*, and the modern BC treaty implemented in 2009 entitled *Tsawwassen First Nation Final Agreement* respectively. The analyses outline the First Nations' claims entering the treaty or trial, and how those processes modified the claims as a result. These analyses provide data in terms of size of land, Aboriginal rights and jurisdiction, which are the basis for discussion.

Chapter five is a discussion of the analysis showing how the result of the Tsawwassen treaty differs from the *Tsilhqot'in* judgement. The treaty, or *Final Agreement* as it is legally known, effectively diminished the size of the Tsawwassen claimed territory, exhaustively defines their Aboriginal rights, and strictly limits their jurisdiction over the remaining treaty land in a process that achieves reconciliation for the Crown by incorporating Tsawwassen First Nation into the provincial hierarchy. In contrast, the *Tsilhqot'in* judgement was in favour of the *Tsilhqot'in* Nation for a significant portion of their claim, which addresses jurisdiction implicitly in the ruling, and leaves them

autonomous and independent from the provincial body of government. In either case, these processes reduce the original claims, but to varying degrees. A review of the background conditions and events at the time that Tsawwassen and Tsilhqot'in First Nations invoked these processes as mechanisms to seek justice and engage the Crown is also provided. The background, combined with the different outcomes, reveals a manner in which to consider the relationship the Crown offers to these and other First Nations.

The technical characteristics that influence the political relationships on the Crown's behalf, namely neo-Liberalism and economic certainty that drive legislative mandates are ostensibly devoid of ethical human attributes. These political determinants are in conflict with the human aspects of social relationships such as compassion, justice, equity and human decency, thus dictating the terms of a relationship that contradicts the concept of a sincerely decolonized new relationship based on a humanitarian Canadian ideology. In order to provide a well-rounded discussion, input from the international community is sought pertaining to provincial Crown affairs with respect to colonized First Nations, and a few solutions are identified that would provide the components necessary for higher quality new relationships, namely a balance between certainty and justice.

This thesis concludes that the province offers First Nations a limited and highly constrained relationship through incorporation. The importance of equitable and ethically appropriate relationships between the settler society and First Nations is emphasized. Equitable new relationships would allow British Columbians to decolonize and reconcile our past injustices with the dignity of knowing we insist upon entering relationships of sharing and respect. I argue that we must take seriously the concept of respect for the autonomy of human beings who passed their land down through

generations for thousands of years; practiced diverse systems of laws, economics and politics; and offered to share with us that for which we should be grateful. Choosing to maintain the status quo and not demand decolonized relationships enshrines the racist sentiment of European superiority that established the foundation upon which the province of British Columbia stands. As rational and intelligent human beings, this is simply unacceptable.

## Chapter 1: Methodology

### Introduction

On the whole this thesis is about relationships. There is a general relationship between the Crown (combining provincial and federal governments whose authority originated in the British parliament) and Indigenous peoples in Canada. There are plural relationships recognizing the many distinct First Nations—Crown relationships in British Columbia; relationships between First Nations themselves; and relationships between people, the land, and the environment. These constitute a complex array of interconnectivity that requires the appropriate respect and nurturing to ensure the health and longevity of the relationships. Although this thesis specifically addresses Crown—First Nations relationships, it does not ignore the many other relationships that connect people to the land, to life, and to death. Each of these relational entities is actively engaged from varying perspectives based on peoples' social, cultural, and spiritual values and beliefs. After all, it is the preservation and stewardship of these other relationships that often spark direct confrontation between First Nations and the Crown.

For the purposes of simplification, in this thesis the term Crown refers collectively to the provincial government of British Columbia and the federal government, as both exhaustively share the powers to govern (Dyck 2004:31). The distinction between federal and provincial Crowns will be made as required for clarity.

Crown—First Nations relationships are steeped in a historical context shaped by injustices and an imbalance of power that stems from one society imposing itself upon others. This is the legacy of the expansion of the British empire in the centuries past. As

such, it is a colonial legacy that swallowed many nations around the world—a legacy that maintains its tenacious grip on Indigenous societies to this day, particularly in Canada.

Thus, this thesis considers the present day status of Crown—First Nations relationships in the context of the Crown’s historical presence in British Columbia through processes that serve as mechanisms to resolve past injustices: treaties and litigation.

The methodology used in this analysis is presented as a process of decolonization.

This specific methodology is chosen in response to a comment written by Justice Vickers in his *Reasons for Judgement* in the landmark court case *Tsilhqot’in Nation v. British Columbia* [2007] BCSC 1700 (subsequently *Tsilhqot’in*), where he states: “The central question is whether Canadians can meet the challenges of decolonization” (para. 20).

This statement is an observation about the current status of a process of decolonization in Canada. Asking whether “Canadians can meet the challenges,” Justice Vickers proposes that Canadians are not yet decolonized. This thesis evinces that same view. In response, the methodology utilized here strives to provide an example of decolonization through academic praxis.

This chapter begins with the construction of a generic model of human relationships. The model offers a discussion of the roles ethics, reciprocity and justice plays in relationships in order to establish a basic understanding that can be later used to evaluate Crown—First Nations relationships in British Columbia. Subsequently, an examination is provided of how a decolonizing methodology intersects with anthropological inquiry to produce a practical, effective research mechanism for studying Crown—First Nations relationships. This information combines to create a lens that provides a view of the present political atmosphere in British Columbia from a deeply human perspective, which

is in extreme contrast to the economic based relationship the provincial Crown aggressively pursues at the expense of Aboriginal rights.

### **Relationship—The Canadian Model**

Overall, to be human is to be a social being. To be a social being is to engage in relationships with other humans at some fundamental level. This is not a circular premise. Being in a relationship does not make something human. Animals have relationships and are in constant relation with one or another. So, what makes the human relationship different from all other relationships? The same property that makes us human in the first place: culture. Human relationships are a cultural process that, according to Claude Levis-Strauss, is distinguished from a natural process by the existence of rules (Levis-Strauss 1969:8). Certain rules apply to human relationships that make them distinctly human. Levis-Strauss' work in *Elementary Structures of Kinship* extrapolates rules of exogamy and endogamy (marriage rules regarding the local social group) across cultures based on the underlying rule of the incest taboo (Levis-Strauss 1969:43). Here, at the most fundamental location of the relationship, the reproduction of people and culture, we have basic rules to guide our relationships.

Relationships usually connote a harmonious engagement between humans, which allows for the introduction of the concept of *ēthos* as a guiding principle into this model of a relationship. The term ethics is derived from the Greek word *ēthos*, which Michel Foucault describes as “a way of being and of behaviour” for the self that is ultimately “visible to others” (Foucault 1997:286). The idea that a relationship should be guided by an ethical principle seems practical considering there are at least two involved in a

relationship, the self and at least one other. What becomes apparent is that the self is always in some form of relation with the other, which leads to Foucault's proposition that caring for oneself is inextricably connected to caring for others (Foucault 1997:287). As the self is an integral part of a relationship, and to care for oneself is inherently ethical, then by extension using an *ēthos* that is "good, beautiful, honorable, estimable, memorable and exemplary," (Foucault 1997:286) to guide the relationship produces a general model for a just relationship. The self's expectation to be treated well by others establishes a motivation to treat others at least as equally as well, which is the basis for reciprocity.

Reciprocity is another mechanism (rule) for maintaining good relationships. Indigenous civilizations have used reciprocity in this manner for millennia. Gift-giving in many Indigenous societies create obligations for the recipient of the gift to reciprocate at some later date (Mauss 1967:10). The purpose of the obligation is to establish a relationship based on exchange that can continue in perpetuity. This does not mean that free will is removed from people, assuming that people possess that attribute within their society in the first place. On the contrary, the decision to accept an obligation to reciprocate a gift is to accept one's participation in the relationship. The decision to refuse a gift and not participate in the relationship is tantamount to a "declaration of war" on one hand, whereas the acceptance of a gift is an invitation to "friendship and intercourse" on the other (Mauss 1967:11). Either way, reciprocity is another means of guiding relationships and providing options for people regarding their participation.

The concept of the having the freedom to participate in a relationship is salient at this point. In most cases, societies do not have the freedom to choose whether they want to

participate in a relationship, particularly in imbalanced power relations. The imbalance of power is not uncommon in human relationships (Foucault 1997:283). What power does for one of the parties (the term party is used to include a range of participants from the individual to the collective) is it allows the holder to dictate the terms of the relationship up to and including the ability to opt out. This profound element of the power relationship is evident in the provincial Crown—First Nations relationships in British Columbia. The evidence resides openly in the first sentence of the *New Relationship* document: “We are all here to stay” (Province of BC et al. 2005:1). This statement says that First Nations are stuck in its current situation, which offers few options for seeking justice. The choice for First Nations to not have a relationship with the Crown does not exist, as the two analyses will show. The only option apparently available to First Nations is to seek justice in their present circumstances. Justice; however, is a concept that varies in definition among individuals and groups. What may be defined as justice for one may not represent justice to another. In colonial relationships in BC, colonized nations seek justice through the colonizing society’s court system, which makes its full attainment a dubious endeavour.

Theoretically speaking, justice is a logical element as a mechanism for maintaining equitable treatment among parties. In other words, justice can be used to balance lopsided power relationships. The *Oxford Canadian Dictionary* defines the noun “justice” as being “1. just conduct; fairness...do justice to treat fairly or appropriately” (Barber et al. 2005:445). One party can have more power than others in a relationship, provided the treatment of all parties is “fair” and “appropriate.” Describing justice as a logical element in a relationship is inherent in the Canadian ideology that claims to

espouse fairness, respect for others, and politeness. In practice, though, in the many Crown—First Nations relationships in BC the extreme imbalance of power produces relationships that are anything but fair and are lacking respect. The call for respect in the *New Relationship* is evidence that it is absent from these relationships.

Relationships and the elements of ethos, reciprocity, and the expectation of justice that determine how relationships thrive are key components of the Canadian social identity, an identity that fosters pride among many Canadians. The notion that Crown—First Nations relationships are rife with historic injustices is common knowledge; however, the notion that some of these injustices continue in a contemporary society with Liberal democratic values is a contentious claim, and the subject of the next chapter. Few would argue though, that in principle, a good Canadian relationship would be one in which all parties would be proud to participate, and be respectful and positive for all peoples in Canada. In practice, the actual relationships between the Crown and First Nations are built on injustice and subjugation, which is inappropriate for a Canadian society such as ours in British Columbia that since 1895 promotes *splendor sine occasu* on its official coat of arms, “which freely rendered means ‘brilliance without setting’” to represent the “assured permanence and glory of the Province” (Watt 1987).

With a general model of a Canadian relationship rendered as a backdrop, against which the provincial Crown’s version of its relationships with First Nations can be illuminated, the discussion turns to the methodology employed in this thesis.

## Reasons for a Decolonizing Methodology

A sound methodology that focuses on a process of decolonization begins within the pages of Linda Tuhiwai Smith's 1999 book *Decolonizing Methodologies*. Considering the historical anthropological approach of studying the Indigenous 'other,' Smith offers an opportunity to decolonize by renegotiating the terms of this typically exploitative Eurocentric practice (Minh-ha 1989:56; Smith 2006:59). As such, her insightful directive regarding Western research and Indigenous peoples provides the cornerstone for this thesis:

In this example, the Other has been constituted with a name, a face, a particular identity, namely *indigenous peoples*. While it is more typical (with the exception of feminist research) to write about research within the framing of a specific scientific or disciplinary approach, it is surely difficult to discuss *research methodology* and *indigenous peoples* together, in the same breath, without having an analysis of imperialism, without understanding the complex ways in which the pursuit of knowledge is deeply embedded in the multiple layers of imperial and colonial practices. (Smith 2006:2, emphasis in original)

Imperial and colonial practices are specifically the forces that colonize Indigenous peoples around the world. As opposed to studying the 'other' to witness the effects of colonization, in my opinion Smith is arguing for an analysis of its source, or a reversal of the lens, which is the method employed here. Through this methodology, the elusive and pervasive constraints of colonialism are identified in actions of the Crown. Only then can a discussion toward decolonization begin. Although before structuring a methodology aimed at decolonization, a brief definition of what is colonization is prudent.

Colonization is similar to relationships in two ways: it is a type of relationship between Western settler societies and Indigenous populations on shared territories (Tully

2008:259), and like relationships in general, there is a significant body of scholarly work on the subject. Colonization, the practice of establishing colonies, is not to be confused with colonialism, the processes or systems of operating those colonies, which commonly involves a process of exploiting people (Barber 2005:151) for the economic benefit of the colonizer. Both of these definitions relate directly to external colonization originating with a remote imperial power. In contrast, the concept of colonization in this thesis pertains to an insidious form of internal colonization that lingers long after a colony ceases to be a colony and becomes a sovereign power in its own right.

An autonomous colony, one that has gained its independence from its imperial progenitor, continues to colonize both the indigenous peoples on whose land the colony appeared and its own settler society. This internal colonization is a “boomerang effect” that occurs when the systems used to colonize a foreign land and its peoples returns to the West and colonizes itself (Foucault 2003:103). In North America, colonialism is so deeply entrenched that the colonial political, juridical and administrative institutions simply continue functioning after independence. Political Science professor James Tully explains how internal colonization is maintained through immovable “structures of domination,” such as the law, government administrations, and military forces that are in place to keep Indigenous peoples subsumed internally to the dominant society (Tully 2008:259). As a result, Indigenous societies are subjugated under and within the colonizer’s system of control. One of the effects of internal colonization is that it is insidious: it confounds thinking about the legitimacy of the settler society on First Nations lands and has a normative effect blinding people to its very existence.

One of the most significant impacts of internal colonization is a normative effect that is referred to as the colonization of the mind (Alfred 2009:58-59; Daly and Napoleon 2003:18; Smith 2006:59; Thiong'o 1986; Wilson and Yellow Bird 2010:2)<sup>1</sup>. The colonizer and the colonized are so tightly bound by the pervasive systems of colonization, such as the affirmation of legitimacy through education for example, that both accept their roles in the relationship without questioning the status quo (Alfred 2009:58; Wilson and Yellow Bird 2010:1). Recognising this attribute of internal colonization leads to Wilson and Yellow Bird's opening statement regarding Indigenous peoples' pursuit of decolonization that "first and foremost, decolonization must occur in our own minds" (Wilson and Yellow Bird 2010:2). Accepting that efforts to decolonize begin in the mind points to a cognitive approach for starting that process, which may explain why many of the leading Indigenous scholars on decolonization are teaching in Western academic institutions.

## **Anthropology**

Anthropology is a discipline of Western social science that historically and contemporarily is closely associated with the colonization of Indigenous peoples (Asad 1973:16; Hymes 1972; Minh-ha 1989:58; Pels and Salemink 1999:3; Smith 2006:66-67). Due to the close proximity of anthropological research to Indigenous people, many contemporary anthropologists arrogantly discarded much of pre-war anthropology, accusing it of being "the handmaidens of colonial rule" (Pels and Salemink 1999:5), a

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<sup>1</sup> Early key proponents writing and developing the theory of the colonized mind were Frantz Fanon and Aime Cesaire.

phrase borrowed from Asad's 1973 book *Anthropology and the Colonial Encounter*.

Although Asad's critique of anthropology sparked the so-called post-colonial reflexive era of the discipline, Pels and Salemink argue correctly that Asad was not debating whether early 20<sup>th</sup>-century anthropology was complicit in colonialism (Pels and Salemink 1999:5). On the contrary, Asad specifically says "I believe it is a mistake to view social anthropology in the colonial era as primarily an aid to colonial administration, or as the simple reflection of colonial ideology" (Asad 1973:18). Asad was keenly aware of the dual nature of anthropology to work for and against the colonial system, of which it was a part.

There are several examples that reveal an anthropology (an anthropological school of thought) that was opposed to colonial injustices. In the mid 19<sup>th</sup> century, Lewis Henry Morgan worked with the Seneca to protect their lands in a legal battle against the United States (Asch and Hancock 2007:118). In the early 20<sup>th</sup> century the Boas-trained anthropologist James Teit traveled to Ottawa with a delegation of chiefs from the interior of British Columbia to lobby the government (Wickwire 1998:219). Teit later served on the committee of Allied Tribes of British Columbia to fight various infringements of Aboriginal rights, namely the reduction of reserves resulting from the McKenna-McBride commission. In the 1930s Alfred Radcliffe-Brown was publicly critiquing colonial exploits in Australia (Asch 2009). These examples refute the idea that all colonial era anthropology was inevitably bad for Indigenous peoples. Some of these early anthropologists used their anthropological positions to openly denounce colonial injustices. This critique prompted the anthropological study of colonialism, an accumulation of literature to which this thesis contributes. Studying colonialism through

the anthropological lens has taught anthropologists about our roles in relation to the colonial encounter, and that anthropological objects of inquiry all emerge from historical relationships (Pels 2008:281). These historical relationships shape the colonial encounter and subsequently the manner and methods by which anthropologists come to understand their objects of inquiry.

Anthropology as being both complicit in, and advocate against, colonization is a conflicted duality that anthropology exhibits to this day, as is evident when anthropologists take up opposing positions as expert witnesses for both plaintiffs and defendants in Aboriginal rights and title cases.<sup>2</sup> The Jekyll-and-Hyde characteristic of the discipline provides, as Asad asserts, the “profound contradictions and ambiguities” in social anthropology that presents “potentialities for transcending itself” (Asad 1973:18). In other words, anthropology’s duality in its relationship with colonial systems and Indigenous peoples gives it a unique quality that offers some practical means for decolonization.<sup>3</sup> The two approaches to anthropology selected for this methodology are chosen because they combine to produce a formidable and practical mechanism for decolonizing the mind and research.

Two methods of anthropological research employed in this methodology are both aimed at decolonizing praxis. One method originates with an underrated and almost forgotten practice known as action anthropology. Action anthropology provides an experiential perspective that is applied to the research analysis. The other method is anthropology’s holistic approach, which gives the research depth of understanding and

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<sup>2</sup> For detailed discussion on this topic, see Banks 2008; Culhane 1992; Pinkoski 2008; and Pinkoski and Asch 2004

<sup>3</sup> There is a range of literature on this concept. See works by Ann Stoler and also Peter Pels, for example.

breadth of knowledge from multiple disciplines. Both methods are described on their own accord in greater detail.

### **Action Anthropology**

Action anthropology is a branch of anthropology developed in 1951 by Professor Sol Tax at the University of Chicago. Tax's vision for doing anthropological work emerged in a period of US history commonly referred to as the termination era. During this period the American government was fervently implementing assimilation policy with the ethnocentric belief that Native American peoples would be better off if they were assimilated into the dominant society based on the false assumption that Indigenous cultures were inevitably "disappearing" (Rubinstein 1986:272, Smith 2010:130). As a result of his work emerging in this political climate, Tax established the two key principles of action anthropology: "non-assimilation" and "self-government" (Smith 2010: 137). In other words, action anthropology is rooted in recognizing Indigenous peoples as autonomous groups who possess the right to remain as such.

Tax combined research and action in a fieldwork project with the Mesquakie, or Fox, Indians in 1948 (Tax 1957:17). The Fox Project launched a method Tax characterized as "participant interference" or "learn[ing] while helping" as he and his students worked with the Mesquakie people to solve problems arising from external pressures (Tax 1957:17). Tax makes clear that action anthropologists are not passive, objective observers. Instead, they are "willing to make things happen...or at least be catalysts" (Tax 1975:515). Through this proactive methodology the anthropologist achieves two goals: we help "to solve a problem...and learn something in the process" (Tax 1975:515).

This idea of the anthropologist as activist aligns with Linda Smith's call for "intervening," in which "intervening takes action research to mean literally the process of being proactive and of becoming involved as an interested worker for change" (Smith 2006:147). In Smith's view, action is a necessary part of the decolonizing process.

In order to apply action anthropology for this project, I became "involved" and performed land claims research for a First Nation in the central interior of the province on a volunteer basis during the summer of 2010. This led to subsequent research for the nation's larger treaty group, which is comprised of multiple First Nations. The specific details of the research are confidential, which the First Nation insisted upon before commencing with their project. Although the work cannot be used for my thesis, performing research directly for First Nations provides a fundamental component of the decolonizing methodology by meeting two of action anthropology's objectives, as Tax describes them:

For one thing [the] work requires that [w]e not use people for an end not related to their own welfare; people are not rats and ought not to be treated like them. Not only should we not hurt people; *we should not use them for our own ends.* (Tax 1975:515 emphasis added)

Another component of Tax's action anthropology, "learning while helping," was valuable for gaining a perspective on contemporary relations between the Crown and First Nations. The perspective gained derives from the recognition that relations are tense, both parties with their own objectives, and middle ground a veritable mirage.

In order to acquire a well-rounded perspective on these relations, I was fortunate to be offered a temporary position with the provincial government in the Ministry of Aboriginal Relations and Reconciliation during the spring of 2011. I was hired to update

a guide for First Nations in BC. My job entailed contacting several First Nations and related organizations to confirm contact information. Calling as a government representative, the tension that exists was confirmed from the government perspective. I recognized that some negativity might derive from working in an area that could be linked to telemarketing, but some First Nations people were clear about not wanting to communicate with a government employee.

Working for the Ministry of Aboriginal Relations and Reconciliation made me aware of the debilitating effect of internal colonization. Internal colonization has the capacity to incapacitate people who make a sincere effort to affect changes in Crown—First Nations relationships. There are many good people working for government who see the inherent injustices of the colonization and subjugation of First Nations in British Columbia, but believe themselves to be helpless because, by and large, the structures of domination (political, legal, economic) that determine the relationship are determined in the highest levels of the governmental hierarchy. The corollary to the experience of working for government is recognizing that change will not come from within the system, despite the hopes of some people.

My combined experiences working with multiple aspects of the relationship, First Nations, treaty organization, and government, has helped me to learn about the subtle nuances that emerge in efforts to attain goals and objectives specific to each group. More substantially, this learning provides me with a perspective that reveals a contradiction between the image of the Crown and First Nations. The Crown is obscured behind a cloak of political inhumanity, as a mechanical construct devoid of human qualities. In contrast, First Nations are people with families who are fighting for their rights against a

faceless, emotionless machine. This concept of an image removes the accountability of the settler society whose combined will feeds and directs the Crown's political will. The Crown is comprised of human beings carrying out the will of politicians, themselves humans who are driven by a lust for votes. The perspective gained through my involvement in action anthropology reminds me to be clear that the Crown is a representative of a human society, comprised of human beings who live on the lands of other human beings who were here long before the Crown's society arrived.

My experience qualifies me as an involved research participant fully equipped with a perspective that helps keep the analysis and discussion of political processes pinned to a concept of human relationships. This is the main perspective I have gained as an active action anthropologist.

### **Anthropology's Holistic Approach**

Anthropology's holistic approach is an attribute that gives anthropology an advantage over other disciplines for this research (between a Western society and the colonized nations it dominates). Holism is an approach to research that includes the study of societies in their entirety including, but not limited to, economy, law, politics, religion, and history (Asad 1973:11; Clifford 2005:37). In one introductory cultural anthropology textbook an anthropologist describes the holistic research with this analogy:

Whereas the sociologist or political scientist might examine the beauty of a flower petal by petal, the anthropologist is the person that stands on the top of the mountain and looks at the beauty of the field. In other words, we try and go for the wider perspective. (Haviland et al. 2005:14)

Why a sociologist or political scientist would examine a flower is beside the point.

Anthropologists applying a holistic method, as in this thesis, utilize research from across disciplines to exact a thorough examination of the subject. Holism is necessary when researching the Crown in relation to First Nations, as this minimally entails political, legal, historical, and sociological analyses from experts trained in those disciplines. As such, the holistic methodological approach in this thesis includes research from these disparate disciplines. Anthropology, the study of human beings, is the science used to combine these knowledges and disseminate a holistic exposé.

## **Terminology**

The term First Nations will be used most regularly in this thesis to refer to the nations of Indigenous peoples who have existed on the land of what is now Canada since time immemorial. The term First Nation is synonymous with Aboriginal, Indigenous, Native, and Indian when referring to people who are members of or descended from First Nations. The word Indian is used as defined by section 35.(2) of the *Constitution Act of 1982*: “Definition of ‘aboriginal peoples of Canada’ (2) In this Act, ‘aboriginal peoples of Canada’ includes the Indian, Inuit and Métis peoples of Canada.” Indian was the vernacular in historic times until it fell out of favour with many First Nations people in Canada in the 1980s. When it is used here, it is used with no disrespect. The word connotes a mark of European ignorance under Columbus who erroneously landed on the wrong continent, which he then claimed to ‘discover,’ when hundreds of millions of people already lived here. Americans did not become Indians until Europeans arrived.

The terms settler, settler society, colonizer, newcomer, and interloper are defined as the European people who arrived on what is now Canada in wooden ships, including their descendants, and also the people who arrived subsequent to the colonial settlements. These terms are used as opposed to the negative forms non-Native, non-Indigenous, non-Aboriginal. Unfortunately these terms reflect a binary, which describes the relationship in an us/them format. This is misleading because, as previously mentioned, there are many distinct nations involved in these relationships. Additionally, the binary is evidence that we have not yet reached a place where our relationships can be described as relationships of sharing, where we become you/me/we partners respecting the diversity and autonomy of all internal nations.

The term 'sovereignty' is used specifically to represent the sovereignty of the Crown, which encompasses the western political meaning and use of the term as stemming from Enlightenment scholars such as Thomas Hobbes. When the term is applied to Indigenous peoples, it is used to denote a free and autonomous society. What sovereignty means to Indigenous people, and how that might be defined is not represented in this thesis.

### **A Word on Aboriginal Rights and Title**

There is a litany of academic works on Aboriginal rights and title, some of which will be referenced in this thesis. Aboriginal rights and title are protected in the Canadian Constitution (1982) under section 35.(1) which states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed" (Canada 1982). For a definition of an Aboriginal right, I turn to the Supreme Court of Canada decision in *R. v. Van der Peet* where Lamer C.J. wrote:

To be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. [Additionally,] [t]he practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact with European society. (*R. v. Van der Peet*, [1996] 2 S.C.R. 507, p. 4-5)

Thus in order for a practice to be an Aboriginal right protected by the Constitution, according to the SCC, it must be integral to the distinctiveness of the nation, and grew out of an activity being practiced at the time Europeans arrived. Rights and title are somewhat synonymous, as Aboriginal title is identified as being an Aboriginal right to land (Asch 1999:433, McNeil 2007:130). Indigenous sovereignty is another Aboriginal right that meets Lamer's definition, yet is not recognized by the courts on equal footing with Crown sovereignty (Borrows 1999:575). The issue of the Crown's full acceptance of its own sovereignty while simultaneously denying or subjugating Aboriginal sovereignty is a source of consternation within the Aboriginal rights discourse in Canada.

### **Data Collection**

Data for this study was collected through publicly available government documents, existing academic research, newspapers, court documents, and archival materials. There was no discussion with First Nations people, as this is not a study of First Nations, but rather a study of the dominant society in the form of the Canadian state in the image of the federal and provincial Crowns. The concept behind not interviewing First Nations people pertains to a goal of not putting people under a microscope to study the effects of colonization when that process originates with the expansion of Western imperialism.

Although I am of mixed ancestry, I do not appropriate Indigenous voice nor do I profess to speak for people other than myself. Indigenous people are not mute. John Lutz' 2008 book *Makúk: A New History of Aboriginal-White Relations* draws upon Linda Tuhiwai Smith's work to argue, "sympathetic postcolonial writing leaves indigenous people out" (Lutz 2008:15), while this may be the case for some of the Western academic material, I argue that the majority of the dominant society has left Indigenous people out in general, all the way back to the colonial origins of British Columbia. Indigenous peoples have made their voices loud and clear from the beginning of the relationship with outsiders. Why have we not listened? What is wrong with our ears? My research specifically seeks information from the settler society regarding how we understand our being on these lands and our relationship with First Nations; what are the origins of that understanding in the colonies; and how it is perpetuated in a society where I hear people say that we are no longer a colony of Britain and therefore we are decolonized.

One of the problems with voice, which is the stated premise of Lutz' book, is the concept of misunderstanding: "This book is all about makúk and how those misunderstandings still shape the relationship today" (Lutz 2008:xii). I see the value in considering the relationship from that perspective, because very different worlds, European and multiple First Nations, met and embarked on a precarious journey together. The misunderstandings that arise as a result have been used to bolster racist stereotypes about First Nations people, and the book does well to dispel those stereotypes.

However, I believe that misunderstandings fuelled a superiority complex that manifested itself as racist sentiment about people who are different from white Europeans, which led to the justification for the wholesale pillaging of land and

resources. I am wary of the concept of misunderstanding, because all too often ‘misunderstanding’ becomes an excuse for why events happened the way they did. Allyshia West’s recent 2010 thesis *Indigenous and Settler Understandings of the Manitoulin Island Treaties of 1836 (Treaty 45) and 1862* addresses this matter soundly. The sooner we can understand ourselves as a settler society, and our inherent ability to be conniving, shrewd opportunists to the extent that we can excuse our dispossessing other societies of their land and freedom on the feeble claim that we could not understand one another, the sooner we can begin to work on a new relationship.

### **Comparability of Cases**

The geographic location of the two First Nations in physical relation to the dominant society presents a bias. The Tsawwassen First Nation’s territory is now situated in an urban landscape near Vancouver, while the Xeni Gwet’in’s territory is a rural landscape away from any major city. The bias is negated for two reasons. First, both the Tsawwassen treaty and Tsilhqot’in trial occurred contemporaneously from the early 1990s to 2007, so their comparison is temporally relevant. Second, First Nations do not choose their proximity to colonial settlements. Colonial settlements are after thoughts, thus the research parameters will not be dictated by the location of those settlements. If the colonial government had their way, the Tsilhqot’in Nations would not be rural:

After conflict with the Ts’ilhqot’in [sic] in 1864, the government wanted them to farm and settle ‘where influences of civilization were greater, and where they could be more easily watched and controlled’ (Alexander 1997: 41-42)

This statement evokes the idea that rural First Nations create a greater threat to colonization, which is not necessarily true. More accurately from this statement arises the idea that the Crown wanted to dominate rural First Nations as effectively as urban First Nations. Therefore rural and urban locations are equally desirable to the processes of colonization, as the assertion of Crown sovereignty is unilateral. Additionally, treaty and trial relationships should be assessed on their own merits and not based on their location. Assessing them on their distinct merits allows for an examination of the external forces being exerted on two different First Nations in different geographic locations. A better assessment of effects stemming from an encroaching urban population versus relative isolation can be achieved in this manner.

### **How is this Decolonized Research?**

This research is a sincere attempt at decolonized praxis for the following reasons<sup>4</sup>:

- The research does not take for granted that the Crown's sovereignty is legitimate.
- The research does not exploit First Nations as the objects of inquiry (the thesis is about Crown relationships with First Nations, not First Nations themselves).
- This research does not appropriate Indigenous voice.
- The research perspective is derived from active participation in the colonial relationship from multiple locations.
- The researcher does not work from a position that only comprehends society in its present form, and therefore perpetuates the status quo.
- There is no value judgement on peoples' active engagement with the Crown.

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<sup>4</sup> For a discussion on colonized knowledges see Smith 2006 pages 65-68.

The last point must be emphasized. This thesis makes no claim about what First Nations should or should not do. That is not my place. People take into consideration everything that is available to them and make decisions based on what is best for their communities. As a researcher, I do not have, nor do I claim to have, any right to comment on the actions of other people outside of my obligation as a citizen of the state to speak to the manner in which the Crown represents the settler society, of which I am a member in British Columbia.

Beginning with a model of an ideological Canadian relationship and applying a decolonizing methodology that employs specific anthropological tools of enquiry opens an avenue for contemplating Crown—First Nations relationships in British Columbia. The avenue then necessarily begins with a review of the historical relationships through a review of the literature covering the period from the first arrival of European colonizers to the present. This is not a detailed account of every event, but rather a general rendering of the relationships to provide context for driving people into making a decision of whether to litigate or negotiate their encounter with the Crown.

## **Chapter 2: Historical Relationships**

The purpose of this chapter is to show that the colonial government in the earliest days of British Columbia actively sought equitable relationships with the Indigenous peoples on whose land they intended to colonize. Shortly after the initial phase of treaty making on Vancouver Island, however, the land policy changed giving rise to two legal fictions upon which the province and its relationships with First Nations are built. One fiction has since been unveiled by the courts and rejected; the other endures to the present. The first fiction was the denial that Indigenous peoples had any rights to their lands or resources. The new policy of denial was underpinned by racist sentiment toward Indigenous peoples because they were vastly different in both appearance and lifestyle of the British who arrived and claimed authority over the land and peoples. The second fiction is the assumption of Crown sovereignty that gives the colonial government the right to govern Indigenous peoples and take possession of their lands. These legal fictions became the mainstay for British Columbia politics regarding Aboriginal rights and title. This is the history of British Columbia. Our legacy as British Columbians is that we continue to be burdened with that old colonial mentality, but it certainly did not begin that way.

### **The Early Period—Arrival of Europeans**

The actual date of the first arrival of Europeans to the coast of what is now British Columbia is debatable. Many scholars accept 1774 as the first time Europeans appeared on the northwest coast with the arrival of the Spanish navigator Juan Perez Hernandez

(Duff 1997:74; Fisher 1987:1; Tennant 1991:17). This information is considered valid because the voyage is recorded in the ship's journal and is thus verifiable. However, the acceptance of this information discounts an oral account given by a Greek sailor named Apostolos Valerianos, also known as Juan de Fuca, who claimed to have journeyed into the area in 1592 (Sholefield 1914:23). An Englishman named Michael Lok (or Lock depending on the source) received the account, which he published in 1625, some 150 years before the commonly accepted date of European arrival. Despite the unverifiable veracity of de Fuca's story, the strait separating Washington and British Columbia bears his name.

The following few points come from a book published in 1862 by Commander R.C. Mayne of the Royal Navy, who spent four years in the two colonies of Vancouver Island and British Columbia surveying lands and resources. He begins by writing about the accounts of the first European expeditions, of which he acknowledges de Fuca's story, and de Fuca's mention of their turning back upon spotting "the native people," for fear of violence (Mayne 1862:4). The nature of the relations upon these early interactions was capricious, as the Europeans were largely unfamiliar with the social landscape into which they entered. Some encounters were friendly (Mayne 1862:23); others were violent (Duff 1997:78; Mayne 1862:6). The pertinence of stating these events may seem trivial, but too often they are brushed aside as a mere superficial inevitability, as foreigners were bound to arrive here eventually. The relevance of these events, however, is a fundamental point of departure for assessing the Crown—First Nations relationship because the story reminds us who was here first.

Europeans arrived in ships at the homeland of autonomous, freethinking Indigenous nations, who had systems in place for conducting their affairs. The Supreme Court of Canada recognized this fact in 1973 when Justice Judson stated unequivocally about Gitksan and Wet'suwet'en peoples, "the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries" (*Calder* 1973:328). Clearly the relationship began as an international affair between nations that had previously lived oceans apart from one another.

### **Colonial Beginnings—The Douglas Years**

British Columbia's Indian policy formally began in 1850 with the Hudson's Bay Company's (HBC) Chief Factor James Douglas. British authorities awarded the HBC control over the colony of Vancouver Island and the responsibility of its settlement in 1849 (Tennant 1991:17). Although imperial authorities in England had already appointed Richard Blanshard governor, the duties of Indian relations and settlement fell to Douglas, whose experience in the fur trade made him a better diplomat (Fisher 1987:52-53). Douglas began forming the colony's Indian policy before he became governor in 1851 by recognizing that Indigenous peoples had title to the land.

The Colonial Office in England provided Douglas with some general guidelines pertaining to colonial settlement on Indian lands. The British policy was established in 1763 with the *Royal Proclamation* wherein

...the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of

them as their Hunting Grounds. (*The Royal Proclamation* 1763)

This document provides the foundational policy for how the British Crown would acquire Indigenous lands in North America from 1763 onward. The *Proclamation's* guiding principle was carried out directing settlement of the colony. The directive was provided to Douglas in 1849 in a letter from Archibald Barclay, an HBC official in England:

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 the rightful possessors* of such lands only as they are occupied by cultivation, or had houses built on, at the time when the Island came under the undivided sovereignty of Great Britain in 1846. All other land is to be regarded as waste, and applicable for the purposes of colonization. (Tennant 1991:18, emphasis added)

In other words, Douglas was to acquire the so-called “waste” lands, or lands not used in a manner familiar to British colonizers (namely for agriculture or villages), through negotiation. Douglas’ response to Barclay denotes this interpretation, when he wrote, “After considerable discussion it was arranged that the whole of their [Natives] lands...should be sold to the company, with the exception of certain Village sites and enclosed fields....” (Tennant 1991:18). Douglas subsequently negotiated 14 treaties, known as the Douglas or Fort Victoria treaties, throughout Vancouver Island between the years 1850 and 1854 (Duff 1969; 1997:85).

The treaties were negotiated to protect the “Village Sites and Enclosed Fields,” of the signatory First Nations, while guaranteeing their right “to hunt over the unoccupied lands, and to carry on [their] fisheries as formerly” in exchange for the remaining land “becom[ing] the Entire property of the White people for ever” (Duff 1969:9, 11). The act of signing these treaties reveals that Douglas recognized Aboriginal title as ownership of

“every square inch” of their land (Fisher 1987:67; Tennant 1991:20), a form compatible with the British colonizers’ understanding of property. Unfortunately for Indians and settlers alike, these were the last treaties signed for more than a century.

There are at least two plausible reasons Douglas stopped negotiating treaties. One reason is that he ran out of money. In 1861 the Crown refused Douglas’ request for funds to “extinguish” Aboriginal title in the Cowichan and Chemainus valleys claiming it was the colony’s responsibility (Duff 1997:86; Fisher 1987:152; Tennant 1991:21-22). The other reason is a combination of the sudden onslaught of miners pouring in to the goldfields in 1858 (Marshall 2000:ii) with the lack of financial backing of the British government to purchase more land, he was likely overwhelmed with the responsibility of trying to manage peace, order, and control over the colony during the madness of the gold rush.

From the late 1850s until his retirement in 1864, instead of signing treaties, Douglas resorted to establishing reserves, despite instructions from the Colonial Office in England to the contrary. A letter from Parliamentary Under-Secretary Carnarvon in April 1859 explicitly advised Douglas:

In the case of the Indians of Vancouvers [sic] Island and British Columbia Her Majesty's Government earnestly wish that when the advancing requirements of Colonization press upon Lands occupied by Members of that race measures of *liberality and justice* may be adopted for compensating them for the surrender of the territory which they have been taught to regard as their own. (Carnarvon 1859, emphasis added)

Evident in this letter is Carnarvon's belief in British superiority, as he mentions that Indians had to have been taught to understand the concept of ownership of their land.<sup>5</sup> Douglas' actual reasons for not continuing with the "surrender of territory" are open to debate, but his manner for laying out reserves reflects Carnarvon's urgings to be liberal and just in his dealings. Make no mistake, Douglas was still a colonizer; however, his instructions to surveyors such as William Cox and Richard Moody in 1861 "to ensure that 'the extent of the Indian Reserves...be defined as they may severally pointed out by the natives themselves'" (Tennant 1991:31) reflects liberality. In other words, Douglas ordered that the size and location of the reserves were to be determined by First Nations themselves (Duff 1997:86; Fisher 1987:153-154). Thus, although he was no longer capable of producing treaties, his concept of Aboriginal title prevails through his unrestricted reserve creation policy.

In addition to being asked to determine the size and location of reserves under Douglas' government, First Nations were given the same rights as other British subjects under the law and were permitted to purchase and pre-empt land (Fisher 1987:147, 155; Tennant 1991:31). However, these acts did not necessarily represent sheer benevolence on Douglas' part. History professors Robin Fisher and Paul Tennant both acknowledge Douglas' expectation that Natives would become assimilated into colonial life and share in the so-called benefits of civilized society (Fisher 1987:68; Tennant 1991:30). Tennant further argues that Douglas' change in policy in the mainland colony reflects the possibility that he no longer considered all of the traditional territory as the rightful property of the Indians (Tennant 1991:32-33). This is difficult to ascertain considering

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<sup>5</sup> The 'ownership concept' debate is outside of the scope of this thesis, and is a debate the author considers to be rooted in racist machinations for the benefit of justifying the illegitimate appropriation of land.

his earlier work and the context of the rapidly changing landscape in the colonies toward the end of his career. Whether Douglas' later work can be measured in terms of "justice" or "liberality" will remain to be the subject of much debate. His early work, on the other hand, established the high-water mark for Crown—First Nations relations for years to come by acknowledging Aboriginal rights and title.

### **Fiction 1—Indians Have No Title to the Land**

The colonial Indian policy underwent significant change when Douglas retired as governor in 1864. After 1864, the influence of the Colonial Office in England diminished and there was conceivably nobody in the local public office willing continue with land policy, and by extension First Nations relations, as settlement and colonization continued across their lands (Fisher 1987:160). The task went to Joseph Trutch, chief commissioner of lands and works (Fisher 1987:160; Tennant 1991:39). Douglas recommended Trutch's appointment to the position because of his experience as a surveyor and engineer (Fisher 1987:160). As such, Trutch was an opportunistic settler bent on developing the colony and getting rich in the process.

Trutch did not have Douglas' fur trade experience of working with Indigenous peoples. On the contrary, he was a capitalist who built roads and bridges, and stood to benefit by dispossessing Natives of their land (Fisher 2000). He was also a blatant racist who believed in the superiority of British society over other races, and that Indians (or 'savages' to use Trutch's preferred parlance) stood in the way of the colony's progress (Fisher 1987:161-162). His personal beliefs and attitudes toward Natives would be devastating for them and would shape the Crown's future relationships with First

Nations. Trutch completely wiped out any precedence Douglas had set regarding Indian land policy in four ways: he denied that Indians had any rights to their land, falsifying Douglas' treaty policy in the process; revoked the right for Indians to pre-empt land; reduced reserves to a paltry minimum; and he ensured the province maintained complete control over the Indian land policy in BC after entry into Confederation. Together these four actions doomed the province to its present state of affairs with respect to First Nations.

Trutch's statement on Aboriginal title in 1867 became the provincial position on the subject up to recent times:

The Indians really have no right to the lands they claim, nor are they of any actual value or utility to them; and I cannot see why they should either retain these lands to the prejudice of the general interests of the Colony, or be allowed to make a market of them to Government *or to individuals*. (Trutch 1867:42, emphasis in original)

In addition to denying title, Trutch and the local colonial government amended the ordinance law in 1866, the year the colonies of Vancouver Island and British Columbia were consolidated, to deny Indians the right to pre-empt land (without special permission from the government) (Fisher 1987:165; Tennant 1991:41). Next he turned his attention to the reserves.

Trutch systematically began reassessing the size of the reserves that Douglas had allocated, because in Trutch's opinion:

The Indians regard these extensive tracts of land as their individual property; but by far the greater portion thereof they make no use whatever and are not likely to do so; and thus the land, much of which is either rich pasture or available for cultivation and greatly desired for immediate settlement, remains in an unproductive condition—is of no

real value to the Indians and utterly unprofitable to the public interests. (Trutch 1867:42)

The interests of settlers are clearly the only interests Trutch is taking into account.

Furthermore, his directions for reducing the size of reserves along the lower Fraser River while managing Indian relations speaks for itself:

It seems to me, therefore, both just and politic that they should be confirmed in the possession of such extents of lands only as are sufficient for their probable requirements for purposes of cultivation and pasturage, and that the remainder of the land now shut up in these reserves should be thrown open to pre-emption.

But in carrying out such a reduction of these reserves in the manner proposed, very careful management of the dispositions of the Indian claimants would be requisite to prevent serious dissatisfaction; firmness and discretion are equally essential to effect the desired result, to convince the Indians that the Government intend only to deal fairly with them and the whites, who desire to settle on and cultivate the lands which they (the Indians) have really no right to and no use for. (Trutch 1867:43)

The idea that the desired effect is “to convince the Indians that the Government intend only to deal fairly” as opposed to actually dealing fairly is implicit in the statement. In other words, if Trutch believed he was dealing in a “just” manner, he would not be compelled to articulate that the Indians required convincing of the government’s intent. He would be satisfied that just actions would be received as such. On the other hand, when a person is stealing from someone, trying to convince them that what is being done is just, makes perfect sense.

The Aborigines’ Protection Society, who communicated with missionaries in various British colonies throughout the empire, often communicated advice to the Colonial Office in England. In one example, a letter from the Aborigines’ Protection Society in 1858 was

enclosed in a despatch to the colonial government offering their recommendations for the protection of Indigenous peoples during creation of the new colony of British Columbia on the mainland.

As, therefore, the Indians possess an intelligent knowledge of their own rights, and appear to be determined to maintain them by all the means in their power, there can be no doubt that it is essential to the preservation of peace in British Columbia that the natives should not only be protected against wanton outrages on the part of the white population, but that the English Government should be prepared to deal with their claims in a broad spirit of *justice and liberality*... We would beg, therefore, most respectfully to suggest that the Native title should be recognized in British Columbia, and that some reasonable adjustment of their claims should be made by the British Government... It would seem that a Treaty should be promptly made between the delegates of British authority and the chiefs and their people....(Chesson 1858:13-14, emphasis added)

This letter expresses recognition of Aboriginal title and an objective of treating Indigenous nations justly in acquiring that title. When Trutch comes under scrutiny of the Aborigines' Protection Society in 1869 for the province's neglect and mistreatment of Indigenous peoples' rights, he is clearly offended and goes on the defensive, arguing that "the Government appears to me to have striven to the extent of its power to protect and befriend the Native race" (Trutch 1870:10). When the subject turned to title, Trutch wrote, "The title of the Indians in the fee of public lands, or any portion thereof, has never been acknowledged by Government, but on the contrary, is distinctly denied" (Trutch 1870:11). In order to support this statement, he deliberately falsified Douglas' stated reason for signing treaties, that the Natives' "lands...should be sold to the company," when he wrote that the Douglas treaties were

as I understand, made for the purpose of securing friendly relations between those Indians and the settlement of

Victoria, then in its infancy, and certainly not in acknowledgment of any general of the Indians to the lands they occupy. (Trutch 1870:11)

Herein lies the first fiction: the government never acknowledged Aboriginal title, even when they were signing treaties to extinguish it. This is corruption writ large in the name of land expropriation.

Oddly, the government's denial of title was maintained despite the lack of an overt objection to the extension of Treaty 8 into the northeast corner of the province in 1898, which included reserve allocations based on 640 acres per family (Tennant 1991:66). Contrary to the government's denial, Tennant rightly identifies that Treaty 8 "stands as irrefutable evidence that aboriginal title was recognized in a good portion of British Columbia" (Tennant 1991:67). Treaty 8 gives the appearance of selective denial, noting that the Peace River District is in the far north, on the east side of the Rocky Mountains, and not in the Fraser Valley or Vancouver Island, where settler interests are focused. Ultimately, the effect of denying title, as Tennant argues, specifically "served the interest of the Whites and of provincial governments" (Tennant 1991:41), which amounts to the implementation of an Indian land policy based on racism. The manner in which racist policy becomes entrenched in BC political thinking is the highlight of Trutch's political efforts: section 13 in the Terms of Union.

In 1870, Trutch travelled to Ottawa to negotiate British Columbia's entry into the Canadian Confederation, which was implemented the following year. His involvement sealed the fate of Crown—First Nations relations for the province. Of the Terms of Union, only section 13 mentions First Nations:

The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit,

shall be assumed by the Dominion Government and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.

To carry out such policy, *tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government* in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies. (Canada 1871, emphasis added)

Although authority over Indian land policy was transferred to the Dominion government, the section of the clause determining how policy pertaining to reserve lands will be carried out effectively restricted land quantity to the maximum that “has hitherto been the practice of the British Columbia Government.” The maximum was ten acres per family (Brew 1864: 43; Fisher 1987:165; Tennant 1991:4), which was a mere pittance compared with 160 to 640 acres per family that federal Crown representatives were negotiating in the numbered prairie treaties (Morris 2000:315, 331; Tennant 1991:46).

Upon realizing that the Indian land policy in BC was not so “liberal” as Trutch let on, the federal government sent authorities to try to intervene and increase reserve sizes on more than one occasion (Fisher 1987:177). The response from the province was to invoke section 13 and instruct the federal authorities not to interfere (Fisher 1991:177-178, 181). Section 13 of British Columbia’s entry into Confederation encapsulated internal provincial control over First Nations people, despite its own provision to turn over control to the federal government under section 13 in addition to the provision of section 91(24) of the *British North America Act* that confirms federal authority pertaining

to “Indians, and Lands reserved for the Indians” (Canada 1867). The internal provincial control over its Indian land policy, from the moment the British Parliament in England refused the funding to sign further treaties in 1861, has spelled disaster for First Nations within British Columbia.

Allowing settlers such as Trutch to establish and control Indian land policy was an error of momentous proportions that had devastating consequences for First Nations, and by extension, the Crown’s relationship with them. Fisher presents a convincing argument regarding the error of allowing a settler government to control land policy and First Nations relations when he writes:

Policy makers in the colonies were not a third party acting as an arbitrator between Indian and European but men who were deeply involved in the society of settlers. They were dealing with matters that intensely affected their own lives and so were hardly likely to be objective. (Fisher 1987:160)

When those who possess the authority to control a given circumstance—in this case the rights of Indigenous people amid a process of European settlement and colonization—stand to gain the most by adamantly denying those rights, it is a conflict of interest. A conflict of interest is defined as being “the situation of a public figure [or figures] whose private interests might benefit from his or her public actions” (Barber et al. 2005:163). A society that grows out of a conflict of interest accordingly finds itself rooted in an unjust foundation. In this case, the unjust foundation underpinning the Crown is its claim of sovereignty, the legitimacy of which is arguably untenable due to the denial Indigenous rights and title to land. Crown sovereignty is British Columbia’s second fiction.

## Fiction 2—Sovereignty

Although this research does not automatically assume the legitimacy of Crown sovereignty, its existence is undeniable. The discussion of sovereignty here is not to disprove it, as there are many qualified scholarly articles that undertake that debate.<sup>6</sup> The purpose of this section is to discuss how assumed Crown sovereignty denies Indigenous sovereignty as an Aboriginal right in order to show the effect that denial has had on Crown—First Nations relationships.<sup>7</sup>

A key aspect of the Crown's assertion of sovereignty in British Columbia is primarily that it is not based on any tangible legal precedent. This means Crown sovereignty is a legal fiction. The British, as an enlightened society, have laws to determine how land new to them can be justly acquired. According to law professor Brian Slattery, legal acquisition can occur through conquest (war), cession through negotiation (treaty), annexation, or the settlement of unoccupied land (Asch and Macklem 1991:511). British Crown sovereignty was asserted over Indigenous peoples the moment Europeans arrived on the shores of the northwest coast of North America based upon the settlement doctrine.

The legitimacy for asserting sovereignty in British Columbia is based on a myth that the land was empty when Europeans arrived (Tennant 1991:41). The myth refers to the land being a *terra nullius*, or empty land. Obviously the land was not devoid of humans, a fact that the enlightened British society could not deny. In the colony of Vancouver Island, the British instructed that treaties were to be signed. When that practice ceased,

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<sup>6</sup> See Borrows' 1999 *Sovereignty's Alchemy* for a thorough analysis.

<sup>7</sup> As mentioned previously, how Indigenous people define sovereignty is not represented here.

colonial societies and their courts developed a specific meaning for ‘empty,’ which is one that places Europeans as the height of a stadial theory of social evolution.<sup>8</sup> If a people have not reached the stage of civilization, one that an enlightened civilized society would regard as such, then they are deemed too primitive to have any kind of organized society that need be acknowledged, and their land can be considered empty (Asch and Macklem 1991:511).

The concept of the northwest Pacific coast being empty is apparent in Mayne’s writing when he discussed the “Powers” of the United States, Russia, and Great Britain as being the only possible claimants of “exclusive possession of the shore of the Pacific” (Mayne 1862:8). As for Indigenous peoples living on the west coast, Mayne considers them an acquirable resource in terms of their labour, equivalent to other natural resources of the land. He remarks that the “aboriginal inhabitants” will be committed as forced labour for a trading company, or alternately be forced to pay “tribute” in furs (Mayne 1862:12). In Mayne’s world, Indigenous people are of no more consequence to the ruling “Powers” than are the trees or the wildlife, certainly not a Power in their own right.

Nowhere in BC is the concept of *terra nullius* more prevalent than in the 1858

*Proclamation* declaring the mainland of British Columbia a colony:

WHEREAS, divers of Her Majesty's Subjects and others have, by the Licence and Consent of Her Majesty, resorted to and *settled on certain wild and unoccupied Territories* on the North-West Coast of North America, commonly known by the Designation of New Caledonia, and from and after the passing of this act to be named British Columbia, and the Islands adjacent. (British Columbia 1858, emphasis added)

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<sup>8</sup> See Morgan’s 1907 *Ancient Society* on pages v-vii for these stages.

The primitive-society-as-*terra-nullius* argument was further defined in the Judicial Committee of the Privy Council regarding its African colony in Southern Rhodesia in 1919. In the ruling of the case *In re Southern Rhodesia*, the judge made the following statement:

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or legal ideas of civilized society. Such a gulf cannot be bridged. (Asch 2007:105)

The idea that there exists an unbridgeable gulf between so-called primitive societies and civilized societies is Eurocentric and racist in its attempt to elevate Europeans over Indigenous nations.

Looking back to the legal mechanisms for asserting sovereignty over lands west of the Rocky Mountains, the first two (conquest and annexation) are ruled out, as they never occurred, and treaty making ceased at 14 treaties in total. By default, the settlement thesis was the principle applied in British Columbia to legitimize Crown sovereignty. However, settlement on empty lands reached an impasse in the Musqueam First Nation fishing rights case *R. v. Sparrow* in 1990. In the case, Chief Justice Dickson ruled that:

It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown. (*Sparrow* 1990:30)

This ruling produces a conundrum. Although “there was from the outset never any doubt” about Crown sovereignty being asserted over the land, and through deduction the settlement thesis (empty land) is the mechanism for asserting sovereignty in BC, Chief

Justice Dickson also acknowledged that the “Musqeam [First Nation] have lived in the area as an organized society long before the coming of European settlers” (*Sparrow* 1990:22). How can the existence of people be acknowledged, while *terra nullius* settlement simultaneously acts as the legal mechanism to legitimize sovereignty? These two claims cannot be reconciled. Thus the settlement thesis appears to get trumped by an argument that sovereignty is applied simply because Europeans arrived, which necessarily involves precluding the recognition of First Nations as sovereign nations. In order to do this, the argument returns to a position where Europeans are in a superior position to First Nations, because one groups’ sovereignty trumps the others’ (Asch and Macklem 1991:511-512). In addition to being Eurocentric and racist, the injustices, such as land expropriation, that occur under the protection of a legal fiction upholding the Crown’s claim to sovereign authority for the benefit of a foreign society is difficult to accept.

First Nations’ acceptance that the Crown suddenly owned and exercised sovereignty over their land was understandably not forthcoming. In 1887 the provincial government sent a royal commission to assess the gravity of Nisga’a resistance to changes brought about by white settlement. Upon being told that the Queen owned all the land, the chiefs responded with laughter, followed by astonishment, then anger (Foster 2007:62). In response to being told that the government would set aside land for reserves, Chief Charles Russ of the Nisga’a Nation said to the commissioners, “Set it apart; how did the Queen get the land from our forefathers to set it apart for us? It’s ours to give to the Queen, and we don’t understand how she could have it to give to us” (Tennant 1991:61). The lunacy of such an assertion, one that claims to suddenly possess all of someone else’s

land, is apparent. The Nisga'a chiefs' next move was to seek justice in the colonizer's court, a prospect that the province was not willing to face.

The provincial government had no intention of having to explain their position on Aboriginal title, particularly considering it was a right the province vehemently denied. In order to avoid a lawsuit, Premier Richard McBride wrote a letter to Prime Minister Wilfred Laurier in 1910, warning that the province losing a court decision over Aboriginal title

[w]ould affect the title to all the land on the mainland...on Vancouver Island, and would have a most disastrous effect on our financial standing and would jeopardize the very large sums of money already invested in this province by English and other investors. I think you will agree with me that this is too serious a matter to be submitted to the determinations of any court, however competent from a legal point of view. In other words, the considerations involved in this matter are political considerations and not legal questions ... The Government of British Columbia therefore cannot agree to submit a determination even by the Privy Council [of] a question of policy of such importance. (Foster 2007:71)

McBride's letter expresses a sincere concern for the potential of losing the case, which can be interpreted as recognition of the culpability of the province in upholding an unjust Indian land policy. Not only would the province not entertain a legal battle, but in doing so they were denying Nisga'a access to the courts and justice. Furthermore, in 1927, Canada amended the *Indian Act* to prohibit Indians from hiring lawyers to pursue claims against the government (Foster 2007:82). These acts are inconsistent with a concept of justice and a just society, making the assertion of Crown sovereignty more troublesome. In 1887, a Nisga'a delegation of chiefs set out for Victoria seeking a treaty (Tennant 1991:58). This was a request that would be denied until the 1970s. Continuing with a

practice of treaty making in the 1850s would have provided better results for provincial officials over the course of the province's history.

Recognizing title and signing treaties provides a better foundation for Crown sovereignty than one comprised of the Eurocentric notions of superiority that the history of the Crown—First Nations experience in BC exemplifies. The potential for treaties to create strong and just relationships between the Crown and First Nations has always been possible. As Asch and Macklem point out about the first treaties in what is now Canada:

[T]reaties were produced in the spirit of 'peace and friendship' to allow for peaceful settlement of non-natives on aboriginal lands, potentially to form a political relationship between two sovereigns, perhaps even a shared form of sovereignty akin to a confederation. (Asch and Macklem 1991:513)

The key is that just treaties are between equals, sovereigns, not between a higher and lower authority. The significance of considering the assertion of sovereignty is to recognize that in British Columbia, the Crown's sovereignty claims to have automatically extinguished the sovereignty of all the existing nations, simply because civilized white people arrived. There is no honour in relationships that begin with this assertion. Treaties offer a means of reconciling those relationships provided that the treaty produces an equitable outcome—a just outcome. When justice is not deemed accessible through treaty, it is sought in court. In either case, justice is the goal.

Ever since the prohibition preventing First Nations from hiring legal council was dropped (not repealed) from the text of the *Indian Act* in 1951, the courts became an effective avenue for seeking justice and forcing the provincial government to face its iniquity. The ruling in the Nisga'a case that Chief Frank Calder brought to bear against the province effectively ended the province's fiction over the denial of Aboriginal title

(Godlewska and Webber 2007:4). The legal fiction of Crown sovereignty, though, remains firmly entrenched in contemporary society at the expense and denial of Indigenous sovereignties. This is the historical context of the Crown relationships with First Nations.

The remainder of this paper considers the inputs and results of two forms of relationship with the Crown: treaty or trial. The objective is not to promote one form over the other, but simply compare the results in terms of traditional territory and jurisdiction including Aboriginal rights. Sovereignty is relevant to these analyses because jurisdiction, or the ability to make laws, arises from sovereignty. A sovereign nation is defined here as a society that has autonomous control over itself, as opposed to being ruled by a single sovereign head of state. Obviously jurisdiction and sovereignty are closely linked. Although a government may possess jurisdiction without sovereignty (as in the provinces of Canada), it is also possible for a sovereign nation to have no jurisdiction, which is subjugation—a condition, it can be argued, that describes the present Crown-First Nation relationships.

### Chapter 3: Litigating Aboriginal Title in BC

The general response, from many First Nations, to injustices sustained through the Crown's outright denial of Aboriginal rights and title in British Columbia has been to take their grievances to the courts. Seeking justice against a society's government, one that usurped control and occupies the land, by appealing to the occupier's legal system epitomizes both desperation and hope that justice is an equal right available to all people. Litigating claims has been the most successful method for getting the Crown's political attention in British Columbia since the law prohibiting First Nations people from hiring legal council vanished from the text of the Indian Act in 1951. From the early 1960s to the present, county, provincial, and supreme courts of BC and Canada have adjudicated the caseload stemming from First Nations—Crown disputes over hunting, fishing, jurisdiction and land. These cases have consistently found the Crown culpable and thus contributed to shaping the relationship with First Nations.

Some argue that litigation is adversarial in nature, creating only winners and losers, leading to acrimonious relations. Although court outcomes are rulings for or against a claimant, in Aboriginal rights and title cases, these do not necessarily translate into a definitive win-loss outcome. The *Calder* case for example did not result in any binding judgement due to a technicality: that the Nisga'a had not acquired a *fiat* (permission from the Lieutenant-Governor of BC) to sue the provincial government. Yet the statements the Supreme Court Justices made changed the landscape of Aboriginal title in Canada from that moment forward. A better description of litigation is to recognize it is a process that

has helped to balance the power inequity between the Crown and First Nations by operating on presumed merits of justice and not prejudice.

This chapter provides a brief history of litigation in BC leading up to *Tsilhqot'in v. British Columbia*. The *Tsilhqot'in* case begins with a background review to discover what events were occurring that compelled the small Tsilhqot'in community of Xenigwet'in of the Nemiah Valley in the central interior of the province to challenge the provincial government in court. This will be followed by an analysis of the claims made entering the case in terms of land and jurisdiction, and the judge's ruling as a result. The chapter concludes with a brief discussion of the effect the case has had on Aboriginal title in BC and the Crown—Tsilhqot'in relationship.

## **Land Claims and the Courts in BC**

The first Aboriginal rights case in British Columbia to have a significant impact on Crown—First Nations relations following the 1951 *Indian Act* amendments was *R. v. White and Bob* in 1963. *White and Bob* was an Aboriginal rights case regarding two Snuneymuxw (Nanaimo) men who were charged and convicted for hunting out of season, a violation of the provincial *Game Act*. The Provincial Court of Appeal and the Supreme Court of Canada both ruled that the early land conveyances (which was the definition being argued by the Crown attorney) between Douglas and the 14 Vancouver Island First Nations signatories were in fact treaties, not conveyances (Berger 2002:102). Thus, because the men were found to be practicing their Aboriginal right as protected by the treaty, they were acquitted. More importantly, for the first time in BC, the courts ruled in favour of an Aboriginal right. Furthermore, the treaties being recognized as such set the

precedent for unextinguished Aboriginal title to exist everywhere in BC outside of the Douglas treaties and Treaty 8 territories.

Two other cases since *White and Bob* have extreme significance for Aboriginal title in BC. These are *Calder* in 1973, discussed previously, and the Supreme Court of Canada's ruling in *Delgamuukw* in 1997, which reinforced the existence of Aboriginal title to the land, one that is a "burden on the Crown's underlying title" (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, p.9). Additionally, a general Crown law cannot extinguish Aboriginal title (*Delgamuukw* 1997:15), and the "Crown is under a moral, if not a legal, duty" to negotiate a resolution to Aboriginal title with First Nations in good faith (*Delgamuukw* 1997, para.186). Beyond its impact on Aboriginal title discourse in BC, a detailed discussion of the benefits and shortcomings of *Delgamuukw* are beyond the scope of this paper. Suffice it to say that while *Delgamuukw* was being argued and re-argued in BC and Canadian Supreme Courts in the first half of the 1990s, events in Tsilhqot'in country were ramping up for the most recent Aboriginal title case in British Columbia.

### **Xeni Gwet'in—Background to the Trial**

The story of the Tsilhqot'in case is relatively straightforward in that it stems from the Crown's historic denial of Aboriginal rights and title. The Tsilhqot'in Nation is comprised of six communities: ?Esdilagh (Alexandria), Tl'esqox (Toosey), Tl'etinqox (Anaham), Tsi Deldel (Alexis Creek), Xeni (Nemiah), and Yunestit'in (Stone). Evident in this list is the pervasive manner in which English names given to the communities show utter disregard for the Tsilhqot'in names they know themselves by. Mentioning

this point (utter disregard) provides a place to begin to understand the events that led up to the court case *Tsilhqot'in v. British Columbia* [2007] that was originally filed in 1989.

The home of the Tsilhqot'in Nation is situated in the central interior of BC. The Tsilhqot'in National Government (TNG) identifies their homeland as being "From the Fraser River to the Coastal Mountains and from the territory of the Stl'atl'imx Nation to the territory of the Carrier Nations is Tsilhqot'in Nen (Chilcotin country)" (TNG 1998), an area of roughly 65,000 square kilometres. Despite the Crown's assertion of sovereignty and the ill effects of colonization, the TNG has always maintained their jurisdiction over their land, as reported in their 1983 *Declaration*:

The Chilcotin Nation affirms, asserts, and strives to exercise full control over our traditional territories and over the government within our lands.

Our jurisdiction to govern our territory and our people is conferred upon us by the Creator, to govern and maintain and protect the traditional territory in accordance with natural law for the benefit of all living things existing on our land, for this generation and for those yet unborn.

We have been the victims of colonization by Britain, Canada and the Province of British Columbia. We insist upon our right to decolonize and drive those governments from our land. (TNG 1983)

The *Declaration* includes a statement (provided with a date of assertion in the revised 1998 copy) announcing that the TNG will reassert their laws and abolish Crown authority over their lands:

The Tsilhqot'in Nation declares that, as of December 11<sup>th</sup>, 1997, the laws enacted by Canada and British Columbia will have no force or effect in the Tsilhqot'in Nen and that the laws of the Tsilhqot'in Nation and its constituent communities will prevail. (TNG 1998)

The TNG's determination to maintain possession and control over their lands has never faltered. The government's resolve stems from the will of the people in the six communities. The war with the provincial government centres on one community, Xenigwet'in.

The story focuses on Xenigwet'in (people of Nemiah). In 1989 the Xenigwet'in, who are no strangers to conflict in defence of their territory, realized they were once again being called to arms. They invited respected *Vancouver Sun* newspaper journalist Terry Glavin to compile their stories for publication in order to invite the public to learn about them and their struggle to live as free people. Some of the background provided here comes from that book, aptly entitled *Nemiah: The Unconquered Country* (Glavin and the People of Nemiah Valley 1992). The relevant contribution this book makes is that it vividly captures a moment in the lives of Xenigwet'in people prior to the trial. Stories such as these allow for an intimate understanding of the scope and nature of the ongoing David-and-Goliath struggle people bring to bear against the insurmountable colonizing forces of state and empire in the name of justice and human rights.

Tsilhqot'in maintained many relationships with neighbouring First Nations. Some relationships were violent and others were amicable depending on the context. Accounts of these interactions are common in old manuscripts written by early European visitors such as James Teit, Father Francois Marie Thomas, and various Hudson's Bay Company traders. Considering that Tsilhqot'in laws and customs govern the interactions with their neighbours, their dealings with European colonizers in a similar fashion is not surprising. Tsilhqot'in controlled access to their country, as stated in the *Declaration*: "The first white men to enter our country did so only with our permission and when we told them to

leave they left. When men settled in our country without permission, we drove them out” (TNG 1998). Not surprisingly, road construction that entered Tsilhqot’in country from the west without their consent in 1864 resulted in a war that ended when “20 white men were dead. Battles erupted all over the countryside and five warriors were hanged at Quesnel Mouth” (Glavin 1990b:B1). Needless to say, the construction of the road was abandoned. Tsilhqot’in had sent a clear message to the Crown about who was in control of Tsilhqot’in country. Subsequent to these 19<sup>th</sup>-century events, in the 1980s when the provincial Ministry of Forests decided it was time to clear-cut the Nemiah Valley without consultation or consent, the Tsilhqot’in asserted their will once again. This time, however, the conflict took place in court.

Generally speaking, the preliminary event leading to the trial was the Crown’s issuance of logging licenses for the Nemiah Valley. In the late 1980s, the Ministry of Forests was steadily increasing the amount of forest to be logged, known as the allowable cut, in the Chilcotin Forest District. Originally set at “2.5 million cubic meters annually,” the cut had increased in excess of 5 million cubic metres by 1989 (Glavin 1989:D7). *Sun* reporter Glavin rendered an image of this volume in vivid terms, as a quantity “that would amount to an annual convoy of bumper-to-bumper logging trucks about 3,500 kilometres in length” (Glavin 1989:D7). The image of feller-buncher machines clear-cutting the pristine Nemiah valley was likened to running “lawnmowers through the bush” (Glavin 1990b:B1). Based upon the experience of witnessing logging practices of the 1970s and 80s that had taken place throughout the Cariboo, Chilcotin, and neighbouring forest districts, several First Nations were vehemently opposed to the effect of turning their forests into deserts (Glavin 1989:D7). What the Ministry did not

understand (or chose to disregard) was the negative impact logging has on First Nations communities that rely on their land for their livelihood.

There are two key issues that arise from the threat of logging in the Nemiah Valley. One is the question of whether the Crown had authority to enter First Nations land and do as they please; the other is the effect that resource extraction has on people who live in these locations. Nothing can express the local impact forest policy and practices have on the lives of families who live in a proposed cut block better than the people themselves. The following excerpt from the Gavin and Xenia book offers this perspective. The passage is from an interview with Xenia elder Eugene William speaking in his second language, English:

“Well, we don’t want them to get all the logs,” he said about the logging companies’ plans. “Sometimes, we need it sometime. All of this would be open, no tree pretty soon. Game, he won’t stay in the open like that, you know? Just like killing all the game. That’s what we say.

“Game, I guess he got to have some timber, to lay down under the tree when the snow comes, rain. The log company, he cut all the tree, all the way.”

He looks worried when he talks about it.

“I don’t know what we would do with no timber. There’d be no more game, too. I don’t know what we’re going to eat.”

So what do you do?

“Try to stop them. I don’t know. We’ll think of something, I guess.” (Gavin et al. 1992:33)

The passage demonstrates the lopsidedness of government-backed industry on one side and the lives of human beings on the other. It seems necessary here to point out that this

takes place in British Columbia, “the best place on earth.” The conflict, as it turns out, did not pit First Nations against the settler society, as one might assume.

Tsilhqot’in people were not working alone in defence of their territory. Conservation groups, ranchers, guide-outfitters, concerned BC residents, and even some forestry companies rallied to support the Xeni Gwet’in’s resistance to the proposed logging (Editorial 1990:5; Glavin 1990a:B1; Taggart and Allen 1990:19). The difficulty that the Xeni Gwet’in faced was in trying to get the provincial government to listen to their concerns. The implementation of several blockades to prevent logging trucks from getting through to the mills failed to garner much of a response that resembled genuine interest in discussing Tsilhqot’in grievances.

Government officials were unable to get past their own arrogance when they eventually did sit down with Tsilhqot’in leaders. Forestry Minister Claude Richmond is reported to have “complained in the Legislature” that “a very few militant native Indians have chosen to draw an area on the map the size of many European countries and proclaim it as theirs” (Wilson 1990:A1). The hypocrisy of Richmond’s statement is evident. Even more telling is the Minister’s use of the phrase “militant native Indians” at a time when the Oka conflict was heating up on Mohawk land in Quebec. Richmond’s attempt to single out First Nations is further evidence of implicit racism stemming from the provincial political arena, as clearly at that time “the forest industry’s assertions have been increasingly viewed with suspicion by the public” (Wilson 1990:A1). The growing opposition to the Ministry of Forests did not arise solely from First Nations, and to single them out is reprehensible. In actuality, First Nations possessed the best defence against

the province's megalomaniacal exertions of unbridled political will by way of their enduring Aboriginal title to the land.

Xeni gwet'in refused to be rounded up like cattle into a reserve as the early colonial government had insisted. Instead they

live spread out, in the old Chilcotin way, over a hundred square miles or so from one end of the Nemiah Valley near Anvil Mountain, to the other end down on the shores of Chilko Lake ... [on] rugged mountain country they've called home since who knows when. (Glavin et al 1992:18)

The emphasis is on the idea that people can be living in their homes, working in the yard or garden, visiting with a neighbour one moment, and the next moment, a few men with chainsaws show up and begin cutting down the trees. When people are approving these actions in offices hundreds of miles away, without discussion or concern for the lives of those families who are affected: How are people supposed to cope with such an invasive, destructive and offensive action? The Tsilhqot'in's response was to load up 30 people in "two vans and five pickup trucks" and head out "on the thirteen-hour trip to Vancouver to formally submit their court case" (Glavin et al. 1992:33).

The case filed in 1990 was called the Nemiah Trapline action. In the action, the Tsilhqot'in declared that Tsilhqot'in people have Aboriginal title to the Nemiah Trapline and Brittany Triangle areas of the Chilcotin Forest Region, which they have continued to occupy throughout time. Furthermore, members of the Xeni Gwet'in band hunt, fish, trap, and gather food resources in the claim areas, and that logging will despoil the territory and prevent their ability to continue these practices. The action ultimately requests compensation for "infringement of aboriginal rights and title" and injunctions preventing further logging in the stated areas (*Xeni Gwet'in First Nations v. British*

*Columbia* [2002] BCCA 434, paras. 12-14). The case prompted provincial politicians to pay attention to concerns of the Tsilhqot'in Nation, at least temporarily.

Two years after the Trapline action was filed, the provincial government halted logging apparently out of respect for the Xeni gwet'in. According to the 2002 BC Court of Appeal's rendering of events in the 1990s, "on 13 May 1992, Premier [Mike] Harcourt promised the Xeni Gwet'in people there would be no further logging in their traditional territory without their consent" (*Xeni* 2002, para. 17). Provincial promises were short lived. In January 1997 the province "issued forest licence A54417...which would permit logging of the Nemiah Trapline and Brittany Triangle lands *without the consent* of the Xeni Gwet'in" (*Xeni* 2002, para. 19, emphasis added). In March of the same year, the province issued two additional licences "which would permit *further* logging of the Nemiah Trapline and the Brittany Triangle lands *without the consent* of the Xeni Gwet'in" (*Xeni* 2002, para. 21, emphasis added). If that was not enough, in November 1997, the province issued two more licences "which would permit further logging without Xeni Gwet'in consent (*Xeni* 2002, para. 23). These actions provoked the introduction of the Brittany Triangle action in 1999, which was combined with the Nemiah Trapline action in 2002 to comprise the trial cited as *Tsilhqot'in v. British Columbia*. For the remainder of this chapter, Tsilhqot'in will be used to identify the Xeni Gwet'in plaintiffs in keeping with the trial terminology.

### ***Tsilhqot'in v. British Columbia—Analysis***

The trial got underway in November of 2002, consisted of 339 days in court, and was not completed until April 2007. The vast majority of the trial was spent on proving

whether Tsilhqot'in people (the plaintiffs) had occupied their territory when Europeans arrived. In legal lexicon, this determination is presented in terms of being able to sufficiently "meet the test for Aboriginal title" (*Tsilhqot'in* 2007, para. 102). The test for Aboriginal title is comprised of three components. In order to prove title, the First Nation must prove "pre-sovereign occupation," in other words that they occupied the claimed territory at the time British sovereignty was asserted;<sup>9</sup> "exclusivity" that this occupation was maintained to the exclusion of others; and "continuity," that within reason the occupation has been continuous to the present (*Tsilhqot'in* 2007, para. 452). The absurdity of investing people's time and tax dollars to prove what seems a rather obvious point did not escape the trial's judge, Vickers J., who commented:

I confess that early in this trial, perhaps in a moment of self pity, I looked out at the legions of council and asked if someone would soon be standing up to admit that Tsilhqot'in people had been in the Claim Area for over 200 years, leaving the real question to be answered...[which] concerned the consequences that would follow such an admission. (*Tsilhqot'in* 2007, para. 1373)

The Crown's (the defendants) necessity that First Nations must prove their occupation of their homeland obfuscates perhaps a better question, which is: why does the Crown not have to prove its claim of sovereignty over Tsilhqot'in lands?

In fairness, the province did implicitly acknowledge Tsilhqot'in title when they originally proposed a defence that argued Crown action specifically extinguished their Aboriginal title (by extension, this could be considered a mechanism for asserting Crown sovereignty). The argument was called the "reserve creation defence," which, to summarize, claimed that when reserves were established, any potential Aboriginal title

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<sup>9</sup> 1846 is the date accepted by the Court in *Tsilhqot'in*.

(which was not recognized at the time anyway, making the argument moot) was thereby extinguished. Canada did not support this defence, and the province subsequently dropped it altogether (*Tsilhqot'in* 2007, paras. 85, 90). Ultimately Crown sovereignty is simply accepted without prejudice. Alternately, the question remains focussed on whether Tsilhqot'in people have any valid claim to the land.

## **Land**

The Tsilhqot'in claimants identified two areas that combine to delineate the Claim Area submitted to the Court. These areas, Tachelach'ed (Brittany Triangle) and Trapline Territory, comprise an area of 438,100 hectares (4,381 km<sup>2</sup>) (Woodward et al. 2008:1.2.2). This represents roughly seven percent of Tsilhqot'in's 65,000 square kilometre traditional territory. Although Justice Vickers did not formally declare Tsilhqot'in Aboriginal title to the area (*Tsilhqot'in* 2007, para. 962), he did recognize Tsilhqot'in title to "almost 200,000 hectares" (2,000 km<sup>2</sup>), nearly half of the Claim Area (Woodward et al. 2008:1.2.2). This does not mean that Tsilhqot'in title is extinguished over the remainder of the Claim Area, only that they did not meet the test of proof for title over the entire area.

The absence of evidence to prove that a First Nation utilized an entire area is the source of much debate in the courts. Tsilhqot'in's attorney Jack Woodward refers to this as the "postage stamp' vs. the 'cultural security and continuity' debate" (Woodward et al. 2008:1.2.8). The plaintiffs filed their pleadings to have the Court recognize Aboriginal title over the entire Claim Area, a pleading that the Crown defendants call an "all or nothing" claim (*Tsilhqot'in* 2007, para. 106). The Crown argues that Aboriginal title

should only be recognized in those areas where evidence of prior use is readily available.

The plaintiffs objected to this argument, calling it a:

...narrow view of Aboriginal title, completely divorced from the realities of Aboriginal life...British Columbia's acknowledgement that Aboriginal title might be established in some exceptional circumstances to a specific 'salt lick' or a 'narrow defile' where game concentrate each year...is entirely incorrect. (*Tsilhqot'in* 2007, para. 556)

In contrast to this view, the plaintiffs argued for a more holistic meaning of Aboriginal title, one that connects people to the land, not just isolated fragments.

*Tsilhqot'in's* legal argument addresses the interrelatedness of people to ancestral land, which is "by definition, the portions of a First Nations' ancestral lands to which they are bound in a relationship of central and defining cultural significance" (Woodward et al. 2008:1.2.8). The significance of the land in maintaining a First Nation's cultural distinctiveness is the main point of the plaintiff's argument. The relationship with the homeland is what makes a society distinct. Removing access to large portions of that land would have a serious impact on that relationship. As the plaintiffs argue:

Aboriginal title preserves the connection to the land that was and remains necessary to sustain Aboriginal communities as distinctive societies. It preserves the foundation of their economies, their cultures, their history, their spirituality and their distinctive way of being. It carves out an essential constitutional space for First Nations to sustain themselves into the future. (Woodward et al. 2008:1.2.9)

Aboriginal title to ensure the protection of and access to the land is necessary for the survival of a distinct society, and is protected under Canada's Constitution. Vickers J. made his ruling within the limitations of the court's ability to decide matters of such magnitude.

Justice Vickers acknowledged that Tsilhqot'in people undoubtedly utilized every bit of the Tachelach'ed Claim Area, but could not make a declaration of Aboriginal title for its entirety (*Tsilhqot'in 2007*, para. 792). Several factors contribute to restricting title to smaller portions of the Claim Area. Primarily, the judge is bound to making a decision based on objectivity and the availability of evidence to establish a claim (*Tsilhqot'in 2007*, paras. 792, 1360). Although Vickers J. did not make a formal declaration of Aboriginal title, which at the surface means the Tsilhqot'in plaintiffs lost the trial, he did find that they met the test for title for over half of the Claim Area, which is an informal win. Recognizing that title exists translates to possessing a form of court-recognized right or authority over at least a portion of the traditional territory. Certainly the TNG asserts their control over their entire traditional territory, as is evident in their declaration. Aboriginal title land is federally protected under section 91(24) of the original *Constitution Act, 1867*, removing it from provincial authority and giving First Nations the ability to determine the activities that takes place on the land, which can be considered a form of jurisdiction.

## **Jurisdiction**

Jurisdiction was not explicitly pleaded in *Tsilhqot'in*. As such, the court did not rule on Tsilhqot'in sovereignty or jurisdiction *per se*. Yet the court ruled in favour of the Tsilhqot'in Nation's "Aboriginal right to hunt and trap birds and animals throughout the claim area" (*Tsilhqot'in 2007*, para. 1240), which prohibits any unjustified activity (in this case forestry) that would infringe upon those rights (*Tsilhqot'in 2007*, para. 1288). Aboriginal rights and Aboriginal title combined determine who has or does not have

authority to decide what activities occur on a given area of land. Although Tsilhqot'in jurisdiction was not on trial, provincial jurisdiction was, and it lost. With respect to the Claim Area, jurisdiction exists in the form of the *Forestry Act* for British Columbia, and Aboriginal title for the Tsilhqot'in Nation. Aboriginal title translates to a limited form of jurisdiction: it "is a right to the land itself" (*Tsilhqot'in 2007*, para. 976), and "the right to use resources, the right to choose land use, and the right to direct and benefit from economic potential of the land are all aspects of Aboriginal title" (*Tsilhqot'in 2007*, para. 1077). Thus, Aboriginal title provides a limited form of jurisdiction to control activities occurring on the land. Despite being limited, this rights-based jurisdiction supersedes provincial authority.

Provincial jurisdiction in terms of the ability to write policy for resource extraction is addressed directly in *Tsilhqot'in*. The province maintains legislative authority only to the effect that it cannot operate indiscriminately and blindly infringe on Aboriginal rights (*Tsilhqot'in 2007*, para. 1079). The combination of the Crown's obligation to avoid infringing Aboriginal rights along with the ruling acknowledging Tsilhqot'in title to at least a portion of the Claim Area led Vickers to also rule that the "provisions of the *Forest Act* do not apply to those areas that meet the test for Aboriginal title" (*Tsilhqot'in 2007*, para. 1053). Although there is no explicit mention of jurisdiction over land management resting with the Tsilhqot'in Nation, this outcome is implicit in the ruling.

The limited form of jurisdiction validated in court over how the land is put to use, which ultimately effects resource extraction, is only one perspective on jurisdiction. Tsilhqot'in people have their own view of their jurisdiction. The Crown's inability to recognize an equal sovereign nation that possesses the fortitude to resist the inexorable

forces of colonization is doomed to fail in meeting its obligation to reconcile the two. Reconciliation is precisely the solution Vickers J. recommended the parties seek through a process of negotiating a modern treaty.

## Results

The results of the trial do little to change the Crown—Tsilhqot'in relationship as it existed prior to the trial—tense and adversarial in itself. The tension derives from a conflict between two self-determining societies. The Tsilhqot'in Nation never surrendered their sovereignty, nor do they accept the validity of the assertion of Crown sovereignty over their country. The two are at an impasse. Canadian courts are not equipped to resolve the issue of reconciling First Nations sovereignty with Crown sovereignty. One reason for this is that reconciliation based on a just resolution requires equity. Equity between the Crown and First Nations stems from recognizing all parties as equals. Arguably, this means recognizing First Nations' sovereignty, as it existed the moment Crown sovereignty was asserted. The courts theoretically cannot recognize this as it destabilizes the validity of the Crown's sovereignty and by extension destabilizes the rule of law (Borrows 1999:579). Thus the court's ability to adequately rule on matters that require reconciliation is significantly constrained.

Justice Vickers' annoyance with being required to speak to a resolution for a problem that the Crown created through negligence is apparent in his statement in paragraph 1368 of his *Reasons for Judgement*:

Courts should not be placed in this invidious position merely because governments at all levels, for successive generations, have failed in the discharge of their

constitutional obligations. Inevitably this decision and others like it run the risk of rubbing salt into open wounds. (*Tsilhqot'in* 2007, para. 1368)

In recognizing the court's limitation in combination with the adversarial nature of a trial, he laments the process' inadequacy in fully addressing issues of Aboriginal interest: "regrettably, the adversarial system restricts the examination of Aboriginal interests that is needed to achieve a fair and just reconciliation" (*Tsilhqot'in* 2007, para. 1369). For this resolution he turns to treaty, to which he says:

This is, of course, not a task for a court. However, in the context of treaty negotiation, it strikes me as a convenient starting point. Recognition that Aboriginal people have historical rights to their ancestral homelands regardless of whether they had developed conceptions of "ownership," "property," or "exclusivity" quickly moves the debate to the real question: what interests are at stake and how are they to be reconciled? (*Tsilhqot'in* 2007, para. 1371)

The treaty process is a difficult alternative considering the arguments presented at trial, and the message they send to First Nations regarding persistent denial of a just and liberal recognition of Aboriginal title.

The Crown's initial denial of Aboriginal right to land (title), and subsequent attempts to derogate the title, which as shown, assures the survival of the First Nation as a distinct society, to small tracts of land is a violation of sections 25(a) of the Canadian Constitution:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763,

[and also section 35.(1)] The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed” (Canada 1982).

Vickers J. recognizes this infraction, adding that “in reality, it appears that the province has been violating Aboriginal title in an unconstitutional and therefore illegal fashion ever since it joined Canada in 1871 (*Tsilhqot’in* 2007, para. 1047). Favouring the interests of the dominant society at the expense of constitutionally protected rights is an outcome Vickers J. cautions against (*Tsilhqot’in* 2007, para. 1350). The problem is: how to get from a courtroom to a negotiating table without cynicism hindering initiative? Whether or not negotiation is on the horizon for the Tsilhqot’in Nation is uncertain, as all parties have appealed the *Tsilhqot’in* decision to the Supreme Court of Canada.

The people of the Tsilhqot’in Nation have chosen to ignore the Crown’s assertion of control and ownership of Tsilhqot’in country. Invasive projects such as the 1864 road and 1980s logging without the permission of Tsilhqot’in people forced a response guided by Tsilhqot’in law. The first conflict ended in bloodshed; the second ended in court. In either event, the Tsilhqot’in Nation sends a clear message to outsiders who think they can claim sovereignty over their land: they will not surrender their country. Too much blood has been spilled in the past protecting it. In view of this deduction, the Crown ostensibly has one option for attempting to produce a successful relationship with Tsilhqot’in people—through showing respect for their autonomy, and sincerity in wanting a relationship based on equity between sovereigns. Achieving a respectful relationship through these means is possible in an International Treaty. And yet, only Tsilhqot’in people can determine what is possible.

## Chapter 4: Made-in-BC Treaty

In a treaty's ability to define the terms and guidelines of conduct, it is an effective mechanism for expressing relationships between parties. Different types of treaties form the framework for different types of relationships. There are treaties of co-existence between sovereign nations, such as the peace and friendship treaties between the British Crown and Indigenous nations in North America in the 17<sup>th</sup> and 18<sup>th</sup> centuries; treaties of sharing, as in the negotiated understanding of the numbered treaties in the Prairies of what is now Canada in the 19<sup>th</sup> and 20<sup>th</sup> century; and there are treaties of cession to which the text of the numbered Prairie treaties attest. The discontinuity in the spoken and written versions of historic numbered treaties has been a source of tension between the First Nations and Crown participants since the written versions were first published, and is the subject of debate too broad for the focus of this thesis.

The objective of this chapter is to analyse a modern British Columbia treaty and discover what kind of relationship is produced as a result. Specifically, an analysis of the *Tsawwassen First Nation Final Agreement* serves to provide the data necessary to extrapolate and reflect on the terms of the resulting relationship by comparing the First Nation's claims made entering the negotiation process with the claims defined in the treaty text. This analysis is not a qualitative evaluation of the treaty in terms of being good or poor, a determination only Tsawwassen people have the right to make. The results of this analysis will show how internal colonization is upheld through this BC treaty by leaving the Crown's assertion of sovereignty unquestioned, ensuring its control and authority remains intact throughout the First Nation's treaty territory. Furthermore,

the analysis reveals internal colonization's powerful ability to colonize the mind in the manner in which the Tsawwassen treaty is promoted as being an equitable solution to the burden Aboriginal title places on the Crown's so-called underlying title.

The chapter begins by considering the impetus that led the province of British Columbia to reconsider its position on Aboriginal title, which resulted in a 1991 joint Task Force that made key recommendations designed to guide successful treaty negotiations in BC. A review of the Task Force report establishes a point of departure for the treaty analysis. The recommendations are considered in relation to their actual implementation in the treaty process and their meaning to a new relationship. Subsequent to the review is an investigation into the background events that occurred at the time Tsawwassen First Nation (TFN) chose to enter the BC Treaty process, followed by the analysis of the resulting TFN *Final Agreement*. The chapter concludes by showing how the results provide evidence that the new relationship produced through the BC treaty process is a restructuring of the old colonial relationship.

### **British Columbia's Treaties**

After 135 years of denying that First Nations had any right to the land they possessed and inherited from their ancestors continuously since time immemorial, in the early 1990s the provincial government of British Columbia decided to begin pursuing treaties. The reasons for this change in policy stem from the courts. As revealed in the last chapter, courts began issuing injunctions prohibiting resource extraction on lands where First Nations claimed title. This action creates uncertainty over who owns the land, makes investors nervous, and impedes the flow of resource industry money into the

province in areas such as mining and logging (Penikett 2006:257). In addition to the lack of certainty, the courts were consistently ruling in recognition of unextinguished Aboriginal rights to land and resources beginning with *Calder* in 1973. Since then, the courts have been directing the province to negotiate rather than litigate resolutions to First Nations' claims (Culhane 1998:335; McKee 2009: 29; Penikett 2006:257). As a result, representatives from the provincial and federal governments sat down with First Nations leaders from within British Columbia in 1991 to form the British Columbia Claims Task Force (BCCTF). The goal of the Task Force was to devise a method for resolving the old Indian land question once and for all.

### ***The Report of the British Columbia Claims Task Force (1991)***

The Task Force drafted a report to guide the development of a process for negotiating treaties in BC that would result in a new relationship between First Nations, federal and provincial Crown governments. Considering the joint effort to outline, harmoniously, a set of guiding principles to create fair treaties based on impartiality, this 1991 *Report* is used here to establish a baseline of principles for proceeding with treaty making in BC. In its *Report*, the joint member Task Force made a few key recommendations designed to provide the best chance for success in negotiating treaties in BC.

One of the key components is that the treaties must be negotiated and managed in-house in British Columbia. The Task Force specifically calls for a “made in British Columbia” treaty process (BCCTF 1991:13). The relevance of this recommendation, which has established the fundamental basis of the BC treaty process to this day, is that it harkens back to the notion of being a conflict of interest. Clearly, after more than a

century of denying Aboriginal title, now that the provincial government is forced to negotiate a resolution to the 'land problem', they are going to do so on their terms. The Union of BC Indian Chiefs (UBCIC), a coalition of BC chiefs that was formed in 1969 to oppose the assimilation policy of the federal government's *White Paper*, flatly denounced the province's authority to negotiate treaties with First Nations, arguing that only whole nations possess that authority (UBCIC 1998). The concept of an internal "made-in-BC" process destabilizes the potential for success from the outset, as the provincial Crown's ability to remain impartial is dubious at best.

Another key component is the need for certainty. The Task Force calls for certainty in First Nations—Crown relationships in addition to certainty over "ownership and jurisdiction over land and resources" (BCCTF 1991:13). The *Report* also claims that certainty can be reached without extinguishing rights and title, and that "those aboriginal rights not specifically dealt with in a treaty should not be considered extinguished or impaired" (BCCTF 1991:13). The idea that certainty can be achieved without extinguishing rights and title is flawed, as the only way certainty, in terms of ownership and jurisdiction, can be achieved over non-treaty settlement lands is if Aboriginal title is extinguished. If title is not extinguished, then the title remains to create uncertainty. Further to this statement, one of the purposes of the treaty is to exhaustively define Aboriginal rights as a "full and final settlement" (TFN et al. 2007:22). Therefore, despite good intentions toward Aboriginal rights and title, the need for certainty serves the province by explicitly and necessarily fully and finally settling (read extinguishing) Aboriginal rights and title giving way to clear recognition of Crown sovereignty (ownership and jurisdiction).

The last prominent point in the *Report* discussed here is the recognition of First Nations' sovereignty as a necessity for a successful new relationship through treaty. The joint Task Force acknowledges that First Nations are "self-determining"<sup>10</sup> and "inherent[ly] sovereign," and that these facts "must be the hallmark of this new relationship" (BCCTF 1991:7-8). Negotiating a treaty between self-determining nations aligns with the recommendation for a "fair" and "impartial" treaty process that will ensure a "level playing field for the participants" (BCCTF 1991:13). The noble regard for equality through the recognition of First Nations' sovereignty in 1991 was likely never taken seriously in the minds of the provincial or federal representatives of the Task Force. One of the provincial government's treaty principles specifically states, "Aboriginal self-government should have the characteristics of local government, with powers delegated from Canada and British Columbia" (Province of BC 2010). The act of negotiating a First Nation into a position with the characteristics of local government, namely a municipality, is an act of incorporation that produces subordination, not a level playing field.

Incorporation is a form of internal colonization that reinforces Crown sovereignty by incorporating First Nations into the federal and provincial power structure at a subordinate position with their permission. Another term for this is reconciliation, where according to Tully, "indigenous peoples are recognised and accommodated as members of Canada and the bearers of...a range of Aboriginal group rights, in exchange for surrendering or denying the existence of their rights as free peoples [sovereignty]" (Tully 2008:264). Under a BC treaty, a First Nation is expected to become like a municipality,

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<sup>10</sup> The distinction between self-governing and self-determining is one of distinguishing between administering or governing oneself within the confines of colonial authority and being sovereign or free to determine the course of one's actions. For more on this see Patricia Monture-Angus 1999 *Journeying Forward*.

thereby effectively rendering the Crown the ultimate legitimate authority, within which the First Nation participates. In this light, BC treaties are treaties of incorporation, and incorporation can be described as assimilation with distinction.

The recommendations outlined in the Task Force report paved the way for treaty negotiations to begin in an equitable manner in British Columbia. In fairness, the Task Force's recommendations are guidelines, not mandates. Likewise, First Nations enter treaties wilfully with the determination to regain as much control over their lives and future as the Crown is willing to permit. With that in mind, Tsawwassen First Nation willingly entered the BC treaty process in 1993. The question is: what options were available to them for maintaining their original rights and title to the urban lands of the greater Vancouver region outside of the treaty process?

### **Tsawwassen First Nation—Background to the Treaty**

Tsawwassen First Nation conceivably had three options available to them for survival as an Aboriginal nation with inherent rights and title to land amid a landscape of Crown denial and the rapid pace of development occurring in Delta, on the outskirts of Vancouver, in the late 1980s and early 1990s. These were: not recognize the Crown's sovereignty and do nothing; litigate; or enter treaty negotiations. TFN chose the treaty route and entered the BC treaty process in its early phase in 1993 with the submission of their *Statement of Intent* (SOI). After 13 years of negotiations, TFN reached a tentative agreement with the provincial and federal governments in 2006. In 2007, TFN members ratified the agreement, which received Royal Assent in the provincial legislature the same year. On April 3, 2009 the *Tsawwassen First Nation Final Agreement* went into effect

after being passed by a Parliamentary bill, *Bill C-34: The Tsawwassen First Nation Final Agreement Act*. The TFN *Final Agreement* is the first modern treaty negotiated through the BC treaty process and the first urban treaty in British Columbia.

The background research provides a method for considering the context around TFN's decision to negotiate a treaty with a foreign interloper that has assumed ownership and control over their ancestral land and in the process caused Aboriginal people much harm. The research is provided in order to illuminate several public statements Chief Kim Baird made regarding her vision for the nation. Once again, this research is not an interrogation of TFN reasoning behind treaty negotiations. This public information is provided to reflect a free-willed decision-making process aimed at improving lives and living conditions that are a result of a long process of colonization and provincial government neglect.

Chief Baird's reasons for pursuing a treaty with the Crown are logical considering the history of the Crown—First Nation relationship. Some of Baird's reasons for entering the treaty process range from “resolving long-outstanding issues” to “securing benefits” for the people and “accommodating our aboriginal rights” (Fournier 2004:A36). Further to these reasons, Baird openly advocated for improved economic opportunities for TFN people now and into the future (Fournier 2004:A36, Simpson 2004:A1). Chief Baird's statements reveal a determination to achieve economic stability in order to maintain or improve the way of life of her community, and her voice provides a human element, a war cry of sorts, to endure and succeed in the face of oppressive colonial forces occurring around the tiny Tsawwassen reserve in the early 1990s.

In April 1992, the inaugural year of the made-in-BC treaty process, growth in the shipping industry was about to sprout a new development at a container port neighbouring the Tsawwassen reserve. The Vancouver Port Corporation made a public announcement to build a “new \$200-million deepsea [sic] terminal at Robert’s Bank,” which would increase Vancouver’s container handling capabilities significantly (Wilson 1992:B13). The Robert’s Bank terminal is adjacent to the TFN reserve, and its expansion would have required additional land. This is land to which TFN claims Aboriginal title.

In addition to the potential anxiety the terminal expansion announcement created among TFN members, certain additional key announcement undoubtedly raised the stakes. In the same April article, the chairman of the port corporation, Patrick Reid, announced that the project would have to be “fast tracked” if it were to be operational in three years time (Wilson 1992:B13). The words “fast tracked” translates to mean more land expropriation without consultation or negotiation, thus removing more land from future treaty negotiating tables indefinitely.<sup>11</sup> In a landscape steadily swallowed up in urban expansion, the thought of more development taking away additional land, already a dwindling and exhausted resource on the delta, undoubtedly raised concerns among the community.

Adding insult to injury, just seven months later, in November, local Delta farmers announced their outrage against the 22 hectares of farmland neighbouring the terminal being required for the expansion (Hawthorn 1992:A7). Now local farmers were getting involved in the process that would determine what parcels of land should be converted into fee simple property to be transferred to a major corporation. The 22-hectare parcel

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<sup>11</sup> According to the BC Treaty Commission (facilitators for the BC treaty process), private property is protected from treaty negotiations except on a willing seller/buyer basis. See BC Treaty Commission website at [www.BCTreaty.net](http://www.BCTreaty.net) under Issues/Land and Resources/Private Property.

was part of 360 hectares of farmland the federal government expropriated in the 1960s for the construction of the coal port (Bellett 1998:B5). The announcement was considered a “terrible blow to the farming community because of the uncertainty” (Hawthorn 1992:A7) it creates for the future of farming in the area, as Delta farmers had been fighting to reacquire the land ever since it was originally removed from local farmland. The battle lines were being drawn over land acquisition between industry and farmers on the delta. In contrast, the concerns of Tsawwassen First Nation were not forthcoming in the 1992 newspapers, at least not yet. The silence would not last long.

The First Nation expressed their interest loud and clear when they submitted their *Statement of Intent* to the British Columbia Treaty Commission the following year. TFN’s *SOI*<sup>12</sup> includes a map of their entire 279,000-hectare (2,790 km<sup>2</sup>) traditional territory covering large portions of the cities of Surrey and Richmond, and the entire municipality of Delta. As a result of the newly minted treaty process, TFN interests could no longer be ignored.

The impact the new port expansion would have on TFN is clear in the potential loss of land neighbouring the reserve. This encroachment is in addition to the insidious effects of colonization over the past 130 plus years. The effect the expansion’s looming inevitability had on TFN people is evident in the way they responded, which was to immediately file a claim in the treaty process. A claim through treaty arguably has a more expedient impact on “fast tracked” projects than attempting to obtain court injunctions that may take several years to acquire. For TFN, the writing was on the wall. Once the port corporation took private control of neighbouring lands, those lands would

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<sup>12</sup> This is stage one of the six stage treaty process which includes the Statement of Intent to Negotiate; Readiness to Negotiate; Framework Agreement; Agreement in Principle; Finalizing; Implementation. See [www.BCTreaty.net/files/sixstages.php](http://www.BCTreaty.net/files/sixstages.php) for a detailed description of these stages.

be off any future negotiating table, and the potential for successfully acquiring an adequate substitution would be significantly reduced. Learning of the news of the expansion without being consulted (a conclusion that can be drawn from the absence of TFN mention in any newspaper articles of the period) is evidence the Crown's utter disregard for TFN interests (or existence for that matter), which subsequently created a sense of urgency to act, particularly when learning of the goal to expedite the project. The treaty process provided an avenue for a quick and unmistakable response, one that could no longer be ignored, that would move them to the forefront of the land debate.

The bizarre state of affairs regarding farmers, industry, First Nations, and land in this province is expressed in an ironic statement one Delta farmer made in 1998. TFN agreed to release its claim to 1,000 hectares of farmland in exchange for \$1 million so the government could settle the "Farm Expropriation Victims" group grievances (Bellett 1998:B5). Offended by this move, "farmer Jack Bates expressed disappointment with the deal," adding, "we believe the expropriation [in the '60s] was illegal and the land was never used for the purposes it was intended. *It should revert back to the original owners*" (meaning the farmers) (Bellett 1998:B5, emphasis added). Not only were TFN facing port expansion on their territory, they also had to deal with farmers who believed that they were the 'originals' on Tsawwassen people's land. Clearly, TFN people were fighting for the basic justice in having their rights recognized in a foreign occupier's society.

Considering the events occurring around the tiny 290-hectare reserve in the 1990s, the decision to negotiate with the interlopers' government begins to make sense. Developers were lining up to build casinos, marinas, industrial parks and waterfront condos on

Tsawwassen land (Bellett 1995:A1, 1999:B4), likely due to rents and leases being lower than market value on reserves than elsewhere (Swanson 1997:C1). Delta residents were protesting the developments taking place on Tsawwassen's reserve, because, in an odd twist of irony, they were not properly consulted and feared the negative effect that an influx of people might have on the Delta community (Bellett 1995:A1). BC Ferries and the Delta container terminal were polluting the waters and shores around the reserve for many years, poisoning marine resources rendering them inedible (Fournier 2002:A3). Rather than trying to fight all of these opposing and encroaching forces on several fronts, a daunting task that many First Nations in British Columbia are often forced to confront, one solution is to assert Aboriginal title and have it recognized in the eyes of the dominant society. This was precisely Tsawwassen's response.

### ***Tsawwassen First Nation Final Agreement—Analysis***

Recognizing that a treaty shapes a relationship, the analysis begins by discerning the difference between a treaty and an agreement, which frames the TFN *Final Agreement* in a certain legal-political context. Following this, the key components that define the *Agreement* between the parties are illuminated, such as certainty, rights, jurisdiction and land. These components of the *Agreement* reveal the details of the sacrifices and gains made in order to construct a relationship. To conclude, the results of this analysis are discussed briefly in the context of the Crown—Tsawwassen First Nation relationship.

## Treaty vs. Agreement

Treaties are not new to Indigenous peoples, who recognize treaty as a way of being in relation to another and as a mechanism for describing a relationship between nations. More accurately, treaties embodied the diversity and sovereignty of the parties and offered a way for those autonomous societies to share a common land without interfering with one another (Borrows 1997:165; Johnson 2007:27-28; Williams, Jr. 1999:36, 51). This describes the British Crown's early treaties with First Nations in the 17<sup>th</sup> and 18<sup>th</sup> centuries.

When considering the made-in-BC Final Agreement, the devolution of the meaning of a treaty in settler society is apparent. An agreement, aside from the general definition of being in accord with one another, is a legal contract (Yogis and Cotter 2009:15). The TFN *Agreement* is not labelled a 'Treaty,' instead, in the section entitled "Nature of Agreement," the document is defined as a "treaty and a land claims agreement within the meaning of section 25 and 35 of the *Constitution Act, 1982*" (TFN et al. 2007:21). Yet the *Constitution Act* does not define treaty *per se*.

The Crown is careful not to explicitly call the agreement with TFN a Treaty with a capital T, denoting an international treaty between sovereign nations, begging the question: Why is the province's common jargon for these agreements with First Nations a 'treaty,' when the agreement is only identified as one in "nature"? The answer may be found in how the provincial Crown views its relationships with First Nations, which is described in the preamble of the TFN *Final Agreement*:

The Parties are committed to the reconciliation of the *prior presence* of Tsawwassen First Nation and of the *sovereignty of the Crown* through the negotiation of this Agreement which will establish a new government to

government relationship based on mutual respect. (TFN et al. 2007:2, emphasis added)

TFN is only recognized as having a prior presence on the land compared with the Crown's ultimate authority. This is the first example of how the Crown views the relationship with the First Nations, who were here before Europeans arrived. This is a subjugated superior and inferior "government to government" relationship, not nation to nation based on equality. Therefore the Agreement produces a legal relationship that defines roles within a singular political structure, not a relationship based on trust between separate political nations.

### **Extinguishment and Certainty**

The *Final Agreement* exhaustively defines TFN's Aboriginal rights and extinguishes any that are not defined. The declaration for an exhaustive approach to rights is found in Chapter 2, section 11, which states "This Agreement constitutes the *full and final settlement* in respect of the *aboriginal rights, including aboriginal title*, in Canada of Tsawwassen First Nation" (TFN et al 2007:22, emphasis added). Extinguishment is stated in section 16, where TFN "releases Canada, British Columbia and all other Persons from all claims, demands, actions or proceedings, of whatever kind, whether known or unknown..." (TFN et al. 2007:22). Although the terminology does not use 'extinguish' directly, Tully makes the connection: "although the term is 'release' rather than the traditional 'extinguishment', the legal effect is the same" (Tully 2008:275). The words 'full', 'final', and 'release' combine to extinguish Aboriginal title on all claimed lands outside of those identified in the *Agreement*. The result is 'certainty' for TFN inside the *Agreement* lands, and for the province of BC outside. This is a far cry from achieving

certainty without extinguishment, as the BC Claims Task Force claimed was possible in 1991.

### **Land and Cash**

What was the price of certainty? The Department of Indian and Northern Affairs Canada (INAC) reports that TFN's traditional territory was roughly 279,600 hectares (2,796 km<sup>2</sup>) including a southern portion of the Strait of Georgia (INAC 2008). Another quantity given for the area of the territory, which likely pertains only to the land is "148,888 hectares...prior to European arrival" (Simpson 2004:A1). After 13 years of negotiations, TFN agreed to an addition of 372 hectares to the reserve's original 290 hectares and 62 hectares of fee simple lands away from the reserve. The fee simple lands are located around Boundary Bay and the Fraser River, which remain in Delta's jurisdiction. TFN also has future options to purchase land at Brunswick Point just north of the existing TFN lands (Province of BC 2007a). The total area of TFN's settlement lands is 724 hectares (7.24 km<sup>2</sup>).

The cash compensation for their 'release' of 278,876 hectares (2,788 km<sup>2</sup>) of traditional territory was \$33.6 million in a one-time payment and \$2.9 million annually for five years, which amounts to \$48.1 million. Put another way, the province of BC bought Tsawwassen's traditional territory for \$69.80 per acre.<sup>13</sup>

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<sup>13</sup> 279,600 hectares claimed - 724 hectares treaty settlement lands = 278,876 hectares = 689,117.60362 acres.  
\$48,100,000/689,117.60362 acres = \$69.80 per acre

## **Modified Rights and Limited Jurisdiction**

The *Agreement* extinguished or limited TFN's Aboriginal rights. As previously discussed rights are considered to be fully and finally settled in the *Agreement*. The settlement of rights is accomplished through the exhaustive and narrow definition, which the *Agreement* refers to as "modification," of those rights on treaty settlement lands (TFN et al. 2007:22-23). TFN rights are categorized under the headings Forest Resources, Fisheries, Wildlife, Migratory Birds, Culture and Heritage, and Environmental Management. Any right that may have existed outside of these categories are effectively extinguished. The following analysis of rights and jurisdiction need not be exhaustive, as only a select few rights provide enough information to gain an adequate understanding of how rights and jurisdiction are modified.

A Coast Salish nation, Tsawwassen is deeply connected with marine resources (Fournier 2002:A3), making fishing and other marine harvesting a paramount Aboriginal right. The Fisheries chapter of the *Agreement*, therefore, is important for the sustainability of the nation. Chapter 9, "Fisheries", grants TFN the right to "harvest for Domestic Purposes" and "Trade and Barter Fish and Aquatic Plants...with other aboriginal people of Canada" (TFN et al. 2007:75). Noteworthy is the relevance of the word Canada, effectively eliminating trade with neighbouring US Coast Salish nations, such as the Lummi Nation just south of Tsawwassen. Other important aspects of these rights are that catch limits are allocated (S.23), harvesting areas are defined and subject to reduction or loss of access (S.11a and b), and federal and provincial regulations still hold ultimate authority over the right (S.2 and 20)(TFN et al. 2007:75-77). In effect, chapter 9 defines the TFN fishing right in a manner that reproduces and affirms provincial

legislation. That is, the Aboriginal right to fish is modified and limited based upon a provincially regulated system of control.

Although the right to fish is not restricted to the shores and waters immediately adjacent to Tsawwassen lands, as additional distant fishing and gathering areas are allocated, Tsawwassen's jurisdiction over the right is also limited. TFN can make laws to designate who can fish under the terms of the *Agreement*, issue licenses, and how the catch is distributed amongst themselves (TFN et al. 2007:82). These laws are subordinate to provincial and federal law, and all other jurisdiction pertaining to the fisheries remains with the Crown (TFN et al. 2007:82). TFN has a limited ability to control its fishery, which is incorporated into existing federal and provincial laws.

Another telling chapter of the *Agreement* is Chapter 14, "Culture and Heritage." In general, TFN is given the right to practice and make laws for the "preservation, promotion and development" of "the culture of Tsawwassen First Nation [which] includes its history, feasts, ceremonies, symbols, songs, dances, stories and traditional naming practices" in addition to heritage resources and Hun'qum'i'num language (TFN et al. 2007:125). Again, these Aboriginal rights are defined exhaustively, which provides no flexibility for the dynamic propensity for change inherent in culture. The finite listing of cultural attributes reflects a narrow view of culture as being static, one crystallized at the time the British Crown asserted sovereignty.

A statement is included that further limits TFN's jurisdiction to make laws pertaining to these ten specific items: "Tsawwassen Government does not have the power to make laws in respect to Intellectual Property or the official languages of Canada" (TFN et al. 2007:125). This is a provocative statement such that on one hand they are authorized to

make laws to protect their symbols, songs, dances and stories, and yet on the other hand, they are not permitted to make laws with respect to their intellectual property, which consists of those very attributes. Furthermore, including the proscription against making a law for official languages seems incongruous with the idea that this is a treaty defining limited jurisdiction over Tsawwassen land, not a transfer of federal jurisdiction over federal state affairs. Perhaps the statement is made for clarity, in the event that the Tsawwassen government proposed a bill to add a third official language in Canada.

The emerging pattern is clear. Tsawwassen's Aboriginal rights are modified and fully defined by the terms of the *Agreement*, leaving intact federal and provincial law over Tsawwassen people and their territory. Certainty for the Crown comes from the declaration that "Canada, British Columbia and all other Persons do not have any obligations in respect of any aboriginal rights, including aboriginal title, of Tsawwassen First Nation" outside of the *Agreement* (TFN et al. 2007:23). Any potential TFN's rights not defined in the *Agreement* are extinguished. Any remnant of a right that was not defined within one of the already limited rights is extinguished. Outside of the treaty settlement boundaries, TFN Aboriginal rights are also fully and finally extinguished. Ultimate jurisdiction over the entire traditional territory is vested in the Crown. The most salient result of the *Agreement* is that TFN sovereignty is extinguished to the benefit of the Crown.

## **Results**

The TFN *Final Agreement* does produce a new relationship with the Crown. The resulting treaty relationship is of a new municipality type that is arguably far better than

the historic relationship based upon rights denial. The trouble is that the old colonial power structure remains intact with the Crown's authority at one end and TFN's subordinate administration at the other. The power imbalance stems from an ethnocentric belief of European superiority. Otherwise Aboriginal sovereignty would have been recognized and respected from the beginning. The new relationship enshrines those Eurocentric, racist origins. In this respect, the relationship is not new at all. It is simply a restructuring of the old colonial relationship with the Crown dominating a First Nation through a treaty of incorporation.

The results of the *Agreement* are commonly framed in terms of what the Tsawwassen Nation got from the province, not the other way around. Presenting the treaty in this way is a typically Liberal practice. A Liberal argument frames the recognition of Aboriginal rights as fundamentally racist because all Canadians should be treated equally as individuals and none should have special rights based on group status (Flanagan 2000:9; Milke 2008:1,3; Smith 1995:vi). The Liberal solution is full assimilation into Canadian society (Smith 1995:261) even if it means making one time cash payment "incentives" to "individual status Indians" to encourage their participation (Milke 2008:101). The main problem with this argument is not the apparent arrogance in the belief that money will buy conformity and that everyone need buckle under an imposed set of beliefs. The problem is that the Liberalism cannot be justly applied so late in the game.

Recalling that the Crown passed laws prohibiting First Nations people from pre-empting land (1866), from voting (1875), from practicing cultural ceremonies (1885), from hiring legal council to pursue claims against the Crown (1927), and passed laws that forced attendance in residential schools (1920), to argue that First Nations should be

forced or coerced to assimilate is a continuation of these injustices against human rights.

One comment regarding upholding the Liberal argument vis-à-vis these historic injustices is to blandly dismiss them. Mark Milke, political science professor and a director at the Fraser Institute, comments:

I fully agree that grievous historic wrongs were committed by some settlers against natives on the North American continent and wrongs have been committed since. *That noted*, on the issue of Indian and non-Indian relations, which is what treaty making is all about, it is a folly to assume all European influence in Canadian history has been wholly negative or wholly positive. (Milke 2008:11, emphasis added)

Aside from recognizing the painful obviousness in his caveat against the extremes in European influence as being neither fully positive nor negative, to brush off a century and a half of historic wrongs with a simple “that noted” is hardly appropriate. Not surprisingly (considering the federal and provincial participants), the BC Claims Task Force also recognized that “the relationship between First Nations and the Crown has been a troubled one,” and insisted that “this relationship must be cast aside” (BCCTF 1991:7). There may be some merit for arguing that simply dismissing the historical troubles may help launch a conversation toward a new relationship, but at what cost? Brushing aside human rights violations presents a serious risk of condoning the historical injustices and creating the potential for reproducing them in the future. Acknowledging and addressing the past, in the least, shows respect through the humility of accepting one’s faults. This would be a more honourable approach to mending fences and seeking, not just a new, but better relationship than the one of the past.

A better relationship begins with more than a fleeting acknowledgment of past wrongs. A treaty has the potential to provide justice for all parties by offering redress for the past

and certainty for the future through the recognition of shared rights over a common territory. Professor of Sociology Andrew Woolford argues that a balance between justice and certainty in treaty can allay the influence past injustices have on the future relationship (Woolford 2005:1). Despite dedicating a great deal of time and effort toward finding this balance, Woolford's conclusion holds little hope for the BC treaty process: "Today, it is clear that, in treaty making, the common sense of neoliberal economics has much greater currency than do questions of justice" (Woolford 2005:186). Upon searching for evidence of whether justice has been served in the Tsawwassen *Final Agreement*, the word justice is mentioned three times, and not with respect to the Crown relationship. The *Agreement* only mentions justice in relation to the correction of individual criminal behaviour, whereas certainty (in particular 'greater certainty') is repeated on 38 separate occasions. Thus, the Tsawwassen treaty is about providing certainty with no mention of achieving justice—a key component in a good relationship between humans.

Evident in the literature, TFN received a lump sum cash payment, additional payments over five years, additional land, and rights to resources. Is this the way to understand the relationship—in terms of what TFN received? Despite all of the published literature providing the details of how much land and money flowed to Tsawwassen First Nation, a decolonized analysis turns to consider what the province gained from the treaty. The provincial benefits are framed in terms of certainty, not land, through the extinguishment of TFN's claim, which is a burden on the Crown's underlying title. Furthermore, the Crown's title is never brought to bear throughout the treaty process.

Thus the mind is colonized in a way to accept these assumptions of the Crown's ownership, control and position as just and legitimate, rather than seeing them inversely, where the Crown is the party gaining legitimate control and ownership through a purchase of Tsawwassen's land. In a decolonized frame, the new relationship would not emerge from the net product of a land claims purchase, but rather from a Treaty recognizing and respecting the autonomy and shared jurisdiction over all lands, not merely the TFN treaty settlement lands. In a just Treaty relationship the Crown and TFN would be equal treaty beneficiaries: both having entered a treaty relationship as equals. However, this is not the Crown's interpretation. The Crown understands the treaty as a final resolution to a problem, not a relationship. This determination is explored in greater detail in the next chapter.

## Chapter 5: Discussion

This chapter explores the comparison of treaty and trial in British Columbia. A discussion regarding the differences between the two methods of engagement and the relationships that result emerges through this comparison. The BC treaty is found to reconcile First Nations with Crown sovereignty through a process of incorporation, while a trial tends to lean toward a more just resolution based on recognizing and compensating for injustices visited upon the First Nation. A search for solutions that can lead to a balanced relationship will follow by seeking input from sources external to BC. Finally, recommendations are suggested to offer a path toward true reconciliation through the recognition of Indigenous sovereignty as opposed to the present practice of denial and extinguishment that is employed by the Crown.

Litigation and negotiation are two fundamental methods of engagement between First Nations and the Crown. Both of these methods are substantially different in design and subsequently so too are the outcomes. On a grand scale, BC treaties incorporate First Nations into the existing state political structure without disrupting the hierarchical division of sovereign power between federal and provincial governments. The act of incorporation resolves the question of certainty for the province. Court decisions on the other hand attempt to rule on behalf of justice by upholding the law and the Constitution. Recognizing that courts are Crown institutions that cannot upset the constitutional division of powers through the recognition of Indigenous sovereignty reveals the limitations of the courts. The courts are thus limited in their inability to provide a holistic semblance of justice that would place First Nations and the Crown in parity.

Another downside to litigation is the possibility that the claimant may lose its case and subsequently the rights being claimed. Additionally, the claimant risks failing to obtain injunctions required to halt whatever activity that is infringing on their rights. If an injunction is not forthcoming, then the infringement may occur in the meantime and the claim would be futile. Bearing these apparent weaknesses, or limitations, of the court in mind, ideological (pure) justice cannot be achieved. What becomes apparent in this comparison is that the trial provides First Nations with less restrictive outcome than a BC treaty. Court-recognized Aboriginal title effectively removes provincial authority over First Nations land where title is proven, and places it squarely in federal jurisdiction where it belongs. In federal jurisdiction, First Nations' rights and title retains constitutional protection, which gives First Nations authority over how land is utilized.

In summary, treaties serve the province through certainty; litigation serves the First Nation through seeking a resolution to injustice. The contrast between certainty and resolving injustice devolves to a deduction that reveals BC treaties as not providing equitable reconciliation for First Nations, thus reproducing a colonized relationship. To gain a better assessment of this conclusion, we turn to a comparison of the results of the *Tsawwassen First Nation Final Agreement* and the ruling in *Tsilhqot'in*.

## **A Treaty and Trial Comparison**

The comparison considers two fundamental aspects of the treaty and trial processes: land and jurisdiction entering and departing the engagements. Comparing these two aspects allow a discussion to take place with respect to the Crown's objective of a new relationship with First Nations. The comparison begins with land, and moves to

jurisdiction, within which Aboriginal rights are included given the ability to pass laws pertaining to those rights. Ultimately, the results reveal two disparate mechanisms that can be used to advise First Nations and the provincial Crown on the two approaches for engaging with the other. The following list of data from the analysis compares lands and jurisdiction of Tsawwassen First Nation and Xeni Gwet'in:

<b>Description</b>	<b>TFN Treaty</b>	<b>Xeni Gwet'in Trial</b>
Land In	2,796 km <sup>2</sup>	4,381 km <sup>2</sup>
Land Out	7.24 km <sup>2</sup>	2,000 km <sup>2</sup>
Jurisdiction In	Self-proclaimed	Self-proclaimed
Jurisdiction Out	Limited	Unmodified

The data sets are incongruous, which must be explained. Treaty settlement land is different from Aboriginal title land. Treaty settlement land is recognized within provincial jurisdiction as legally belonging to the First Nation. Aboriginal title land remains as Crown land with constitutionally protected Aboriginal rights attached. However, these definitions are purely from a Crown-as-sovereign perspective, as some would argue (myself included) that unceded, unsurrendered Aboriginal land is not legitimately Crown land. Also, self-identified jurisdiction differs from jurisdiction that is recognized in provincial legislation. These too vary based upon perspective. Land, Aboriginal rights, ownership and jurisdiction are entanglements that are not entirely assessable independently of each other, nor are they clearly definable as their meanings change in conjunction with perspective. The following discussion takes this attribute of rights and title into consideration and attempts a holistic rendering for comparison.

The following information is the interpretation recognized by the Crown, vis-à-vis the governments of BC and Canada. Tsawwassen First Nation has roughly 662 hectares of “Tsawwassen land,” over which they have limited jurisdiction, and 62 hectares of private fee simple land over which they have no jurisdiction (Province of BC 2007a). In comparison, Xeni Gwet’in have proven Aboriginal title over 200,000 hectares of traditional territory over which they have court-recognized rights translating to control, but no provincially recognized jurisdiction. In contrast, the Tsilhqot’in Nation maintains self-proclaimed jurisdiction over their entire 65,000 square kilometre territory.

In other words, from a Tsilhqot’in perspective, they possess full jurisdiction. From a court perspective, they possess unextinguished and constitutionally protected Aboriginal rights in contrast to Tsawwassen’s “full and final” “release” (extinguishment) of Aboriginal rights over all land outside of the treaty settlement lands. Within Tsawwassen’s treaty settlement lands, TFN possess the ability to pass laws on ten aspects of their culture: history, feasts, ceremonies, symbols, songs, dances, stories, traditional naming practices, heritage resources, and language as compared to Tsilhqot’in’s undefined rights and unrestricted ability to manage those rights.

The comparison of jurisdiction is purely one of perspectives. Tsawwassen First Nation has a legally protected and modified ability to pass laws that the province of BC will recognize and presumably uphold. Tsilhqot’in govern themselves and maintain their own laws despite the Crown’s sovereignty. Does this make Tsilhqot’in law or jurisdiction any less valid? They certainly were not any less valid to the deceased road builders of 1864. Tsawwassen has a legally protected right to govern matters on their treaty lands; Tsilhqot’in have a constitutionally protected right to ensure the survival of their distinct

culture through the preservation and management of their country. Tsawwassen is protected through a provincial *Agreement*, Tsilhqot'in are protected by federal constitutional law. The deduction becomes clear: Tsawwassen First Nation is incorporated into the colonial structure, whereas Tsilhqot'in are closer to independence as a sovereign nation.

As mentioned elsewhere in this thesis, the purpose of this research is not to reflect or impose any value judgement. Tsawwassen First Nation negotiated and entered a treaty in the best interest of the people. Incorporation into the provincial structure may be the best solution for some First Nations. For others, anything short of maintaining their sovereignty is unacceptable, sovereignty being non-negotiable. The comparison of the two processes offers some results for people to consider. By extension the analysis offers a glimpse into the Crown's version of a relationship with First Nations, which seems purely economic in definition and tends to further entrench the values of the colonial past.

## **Discussion**

The Province of British Columbia clearly states the intended objectives of the treaty process by identifying its benefits. These benefits are divided into two groups, benefits for First Nations, and benefits for all British Columbians. The benefits for British Columbians are (in order of appearance):

Treaties provide certainty about who owns and who has legal authority over land and resources.

Treaties bring clarity on hunting and fishing rights for all British Columbians.

Certainty encourages investment and bolsters the provincial economy.

Total benefits from treaties, including increased investment, could reach \$50 billion — \$1 billion to \$2 billion each year for the next 20 to 25 years.

With cash settlements and certainty over land and resources, treaties strengthen British Columbia's economy and help sustain communities throughout the province.

Aboriginal and non-Aboriginal communities and governments have the opportunity to build partnerships for mutual economic and social benefit.

Increased economic activity in First Nations communities will benefit all neighbouring communities and stimulate the provincial economy as a whole.

Treaties mean First Nation citizens will pay taxes like all other British Columbians. (Province of BC 2007b)

There are not too many ways to perceive the province's interests and objectives through the stated benefits. The province clearly aims to gain certainty over improving the provincial economy, which includes showing how First Nations will benefit their settler neighbours, and pay taxes. The only mention of a relationship in this list is the mere mention of a mutual "social benefit," which is only secondary to the "economic" benefit and is almost obscured in the context of the rest of the list.

Without reproducing the benefits for First Nations list in its entirety, revealing the first item is sufficient to reveal the province's ambition while exposing the irony created in a colonized perspective: "Treaties provide cash, land and natural resources for First Nations" (Province of BC 2007c).<sup>14</sup> The "cash" potentially being awarded to First Nations through treaty comes from settler society's exploitation of land and resources that have been illegitimately appropriated from First Nations. This is a facet implicitly

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<sup>14</sup> For the entire list of benefits for First Nations see [http://www.treaties.gov.bc.ca/overview\\_benefit.html](http://www.treaties.gov.bc.ca/overview_benefit.html).

acknowledged in the courts when judges order compensation for the infringement of Aboriginal rights, failing to consult with First Nations before extracting resources, and past expropriation of land turned fee simple. Herein lays the contrast of certainty and justice: treaties provide certainty for non-Indigenous British Columbians, whereas courts provide justice for First Nations.

### **A New Relationship?**

The search to appropriately assess the provincial Crown's stated aspirations for a new relationship with First Nations can be answered by asking the right question. Someone once commented to me in a rhetorical manner: If there were no court rulings recognizing Aboriginal title in British Columbia, would the provincial government negotiate treaties? The answer was no; it would be business as usual. This comment illuminated the Crown's impetus for a new relationship with First Nations as being purely motivated by the courts.

Courts operate in terms of justice—that is their business. A court's primary purpose is to assess the disputed claims of parties and make a ruling in favour of justice. This may be a simplification of a complex system of law, but it describes the fundamental principle of a justice system. The consistent court rulings recognizing unextinguished Aboriginal title in British Columbia is significant and reflects the value in a system that is designed to balance injustice with justice. One of the effects of these rulings was to drive the provincial government to the negotiating table.

Treaties are the province of British Columbia's attempt to resolve the Indian land question through a process of extinguishment and incorporation, while in the process gain

certainty over who owns the land. Through a decolonizing lens, the act of achieving certainty is more clearly stated as legitimizing the Crown's own ownership and jurisdiction (sovereignty) over land to which the courts consistently acknowledge Aboriginal title. Therefore, the Crown's assertion of sovereignty as illegitimate is implicit in the mere act of negotiating treaties in British Columbia, which, decolonized, means that the Crown's present occupation and control over the majority of the province is illegitimate.

The colonized mind has a distorted view of the society in which we live, which serves to disguise the implied culpability in the Crown's unjust acquisition of and jurisdiction over much of the province. For example, the fiction of legitimacy comes in the form of statements such as "we are all here to stay" and through actions such as the province's 150<sup>th</sup> birthday celebration in 2008, or the more recent 2010 Olympic Games that promoted the Four Host First Nations as partner hosts creating an image of harmony to shroud underlying disputes over rights and title.

The alternate story to the fiction must be one of non-fiction. The colonies of Vancouver Island and British Columbia were British colonies. As such the source of colonial sovereignty was the British Crown. When British Columbia joined Confederation in 1871, the source of sovereignty switched to Canada, along with all responsibilities relating to First Nations (section 13 of the *Terms of Union*). The province of British Columbia has never been an autonomous sovereign nation or state, yet it negotiates treaties with nations it has subjugated. Through the *Terms of Union* and the *British North America Act*, the province retained control and ownership of Crown lands within the provincial boundaries.

In actuality, 84.1 percent of the land mass is provincial Crown land, federal park land accounts for 9.3 percent, 6.2 percent is private, and First Nation reserves make up 0.4 percent (HTG 2010). This is remarkable when contrasted with the 100 per cent control First Nations asserted prior to the arrival of Europeans who changed the allocation simply by showing up. Nevertheless, Crown land in provincial possession explains why: when BC treaties are negotiated the provincial government provides 100 percent of the land, while the federal government provides a minimum of 75 percent of the settlement money (PricewaterhouseCoopers 2009:3). Thus the non-fiction is found in what the provincial government brings to the negotiating table to gain Crown certainty: illegitimately acquired land that has unextinguished Aboriginal title still attached, and a small amount of money acquired from the resources of that land. In decolonized words, the provincial government negotiates with First Nations using First Nations' own land, while extinguishing an Aboriginal right to sovereign self-determination as free peoples protected by Canada's Constitution. This is the unmasked, decolonized story of treaty making in British Columbia.

### **External Input**

Turning to external sources for input on a discussion of non-colonial relationships between nations is required in order to escape the distortions produced in the colonized mind. Beginning with a trial judge's comments from a case in Australia, which was quoted in a Canadian fishing case in 1996 between the Crown and Algonquin fishers, we can start to compile some suggestions for a relationship that balances certainty with justice. In *R. v. Côté*, [1996] the Chief Justice quoted from an Australian ruling:

Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. (Borrows 1999:588; *R. v. Côté*, [1996] 39 at para. 53)

The idea that this statement needs saying is profound in this day and age. Yet, as this thesis has shown, the province has not been forthcoming with respect to justice for First Nations in BC. The next offer of advice is found in an American-authored introductory anthropology textbook discussing the ethics of respecting peoples' rights to resources and autonomy:

Whether one is an anthropologist or not, one can appreciate the rights of any group of people to have their lives, property, and resources secure from domination by powerful outsiders. The most important factors in considering the rights of indigenous peoples to be left alone are ethical ones. (Peoples and Bailey 2006:394)

These statements need no elaboration; yet, including them here seems profound. In 1960, the General Assembly of the United Nations passed resolution 1514, outlawing colonization. Specifically, the resolution declares:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of United Nations and is an impediment to the promotion of world peace and co-operation.
2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.
4. N/A

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom. (UN 1960:67)

Item number four refers to war and is therefore not applicable. Items one through five provide clear evidence of the international community of states' anti-colonial position. Item number six (not listed above), however, reveals a conundrum of internal colonization. Item six states that "disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations" (UN 1960:67). This clause can be viewed from multiple perspectives: namely from Canada's perspective as a country and from a First Nation's perspective as an autonomous nation with their own territory. Oddly, BC's interests are only served under Canada's interests, whereas First Nations' interests stand alone, thus revealing the statuses of BC as a province, and First Nations as distinct nations. As Canada and First Nations can argue for protection under clause six, we begin to see the necessity for resolving the colonial relationship through negotiation between nations. The discontinuity revealed in clause six calls for a just resolution that serves Canada and First Nations to restore the unity and integrity of all parties concerned. Unfortunately, the BC treaty process does not provide the justice required to meet the needs of state and nations, as external evidence suggests.

The Inter-American Commission on Human Rights (IACHR) made a ruling on a case that the Hul'qumi'num Treaty Group (HTG) brought before them in 2008. The HTG, an organization representing several Vancouver Island First Nations, claimed that the

Canadian Crown committed human rights violations against “property, culture, religion and equality under the law” (HTG 2011). The IACHR ruled in favour of the HTG and admitted a case go forward against Canada stating:

..the BCTC process has not allowed negotiations on the subject of restitution or compensation for HTG ancestral lands in private hands, which make up 85% of their traditional territory. ...Likewise, the IACHR notes that by failing to resolve the HTG claims with regard to their ancestral lands, the BCTC [BC Treaty Commission] process has demonstrated that it is not an effective mechanism to protect the right alleged by the alleged victims. (HTG 2011)

This decision, although non-binding, provides a clear message to the Canadian and British Columbian governments about the international community’s view of the Crown’s relations with First Nations. Being human rights violators is not the reputation Canada conveys on the international stage. As opposed to Canada’s standard denial, ending the violations would allow this ugly side of the Canadian identity to begin to mend, and undoubtedly secure certainty for the province of British Columbia. Some of the solutions that would lead to an effective resolution necessarily involve recognizing Indigenous sovereignty and sharing jurisdiction.

## **Solutions**

Several solutions have been offered that would correct the Crown’s miserable track record of failing our obligations to First Nations. These solutions provide a common thread: justice. Justice, it seems, is best served by making parties whole. Recalling the arrival of Europeans to the continent, First Nations were already here, sovereign and in possession of the country. The British Crown arrived late and brought little to offer

beyond an inherent white paternal superiority complex. Shortly after Canada patriated our *Constitution Act* in 1982, anthropology professor Michael Asch published *Home and Native Land* (1984), where he considers examples of minority societies maintaining their autonomy within larger states. In the book Asch offers a “method of consociation” for Canada, where First Nations have the legislative authority “to develop and protect aboriginal ways of life” (Asch 1984:91). Through this method, First Nations establish a joint relationship with the federal government and would maintain representation at a federal level. This relationship aligns with a solution Jim Tully (2008) offers in *Public Philosophy in a New Key*, where he advocates for Canada to be comprised of a dual confederation state (Tully 2008:236). In Tully’s model,

the ‘first’ confederation (or federation) is the treaty confederation of the First Nations with the Crown and later with federal and, to some extent, provincial governments. The second confederation (or federation) is the constitutional confederation of the provinces and federal government. (Tully 2008:236-37)

Thus First Nations’ mutual relations with federal, and to a lesser degree provincial, governments are honoured on their own terms, while the old Canadian confederation between the provinces and federal government is also maintained.

Although a brief introduction is hardly sufficient to do more than direct the reader to these sources for a proper discussion, the idea here is to argue that equitable solutions, ones that do not jeopardize the stability of the state, exist. Both solutions effectively preserve the autonomy of self-determining First Nations, and connect them with the Canadian state in a manner that is respectful of all parties. The key is the preservation of each party’s sovereignty. The Crown is not unfamiliar with the idea of Indigenous sovereignty, as is evident by the sheer existence of the *Royal Proclamation*, but it was

also offered as a solution in the BC Treaty Commission's third lecture series *Speaking Truth to Power*.

In 2002, co-director of the Harvard Project on American Indian Economic Development Stephen Cornell gave a presentation on Indigenous governance. In short, he argues that in order to be successfully self-sufficient, First Nations require sovereignty. Early in the presentation, however, Cornell makes a comment that is indicative of the Crown's perspective and apparent apprehension toward Indigenous sovereignty:

Sovereignty matters. That's the term in the United States. I know in Canada that's a term that has particular connotations. Someone up here said, 'that's the "S" word, don't use that word.' Let's call it "jurisdiction" if you prefer. (Cornell 2002:5)

Sovereignty has a negative connotation in Canada, and particularly British Columbia, because the Crown claims it and refuses to recognize the value and justice in acknowledging First Nations' fundamental right to it. Not surprisingly, jurisdiction is also a carefully guarded commodity in BC. Yet, the example of sovereign Indian nations in the United States stands in evidence that recognizing it is not only viable, but also justifiable.

Given the call for decolonization from the international community and the solutions available for to employing it in practice, the Crown's actions and denial are inexcusable. Clearly, the only new relationship the Crown makes available to First Nations in BC is the subjugated relationship of the colonial era and mentality. Despite alternatives that offer paths to a just relationship, freedom, and dignity, British Columbians are destined to remain serfs to the provincial political ambitions behind the modern made-in-BC treaty.

Although litigation provides a much narrower forum where claims are concerned, it at least offers some semblance of justice for First Nations from within the Crown's system. The conclusion that can be effectively drawn from this research is that both certainty and justice is required for a balanced and healthy relationship to take shape. Treaties provide only certainty; litigation primarily justice, and neither provides both sufficiently. Therefore, the Crown—First Nations relationships remain unsettled, colonial and fraught with tension.

## Conclusion

This thesis began at the point of origin for the colonies of Vancouver Island and British Columbia. The pioneers of the settler society, Europeans bent on colonizing distant lands, arrived here, on the homelands of other human beings who were members of diverse free and sovereign nations. Although early British colonial authorities in England instructed local colonial officials to recognize and respect these basic human qualities, which they observed as the 14 Fort Victoria treaties stand in testament, the policy soon devolved into a policy of denial and expropriation.

Joseph Trutch's Indian land policy was clearly based on his personal racist sentiment toward Indigenous people combined with the narcissistic European belief in their superiority above others who were different. The evidence for this disclosure of the ugly side of British Columbian history is publicly available in the government records from the colonial period. An argument claiming that contemporary relations are racist is not supportable, nor would making such a claim be of any use or value in a discussion on settler—First Nations relations. However, a simple test can measure the degree of our society's potentially lingering superiority complex by answering the following question in earnest: What gives us the right to occupy and rule the lands of other people without their consent? The possible answers hopefully reveal an introspective look into ourselves as a settler society. What is relevant here is to recognize that by maintaining full control and possession of First Nations land gained by racist and ethnocentric measures (to the degree that we are willing to spend millions of dollars in court denying Aboriginal rights and title to the rightful nations who possess them) is to validate those beliefs through our

complicity. Our complicity is normalized because our minds are desensitized to the wrongs committed that ensured our ultimate possession and control of other peoples' countries.

The colonization that occurs in the mind distorts people's view of the world and our place in it. The normative effect of a colonized mind is to make the history of British Columbia appear virtuous and problem-free, which is a fiction. People accept the right to be here as natural and condoned by a singular true authority, the Crown governments, without question. To do so makes us complicit in the illegitimate activities people employed through policy and legislation to gain access to the lands and resources of British Columbia. Arguably, not many would really want to lift the mask and see the ugly reality of our past. To do so may interrupt a good night sleep. The argument I make here is that there is nothing honourable in maintaining this denial. The international community has repeatedly offered feedback on the state of our society and our relations with First Nations in BC. Once we accept that Crown—First Nations relations is not merely a political 'thing,' that these relationships are ours with the people who lived here before we came along, we can begin to demystify the fictions disguising the Crown and be ready to consider a new relationship between and among people.

The result of Trutch's policy was devastating to First Nations, while simultaneously extremely economically beneficial to European settlers. Contemporary British Columbian society struggles to come to terms with this history. My research has shown that the neo-Liberal response is to blithely shrug off past injustices and move on. Not only is this insulting to those most affected by the onslaught of European colonization and settlement, it is abjectly contemptible framed within the high regard Canadians and

British Columbians have for ourselves as a free and just society. The solution is not to dismiss the past, but to acknowledge it, address it, and correct it by changing how we move together into the future in a manner that aligns our practices more closely with our ideological principles as a fair and respectful Canadian state. The colonial Crown governments themselves do not possess the initiative to make changes effecting settler society's authority over the land. This initiative must be injected from the source of much of the political will: the public, who can demand that our government better align our society with our values and beliefs as rational, intelligent human beings.

The most fundamental aspect of Crown—First Nations relationships is that these relationships are between human beings. The Crown is representative of our human society, of which the majority in BC are a combination of relatively newly arrived and those descended from people who had homelands elsewhere in the world. First Nations people are comprised of compassionate, caring people with loved ones, families, hopes and dreams who are at least as much a part of this land as on it. These basic acknowledgements are where human relationships begin. Seeking a relationship solely through a contract driven by monetary ambitions in the name of certainty, as in a BC treaty, produces only an agreement between entities, and severely neglects the justice required to address human compassion through equity and redress for the past. We cannot change the past, but can affect the future.

Modern British Columbia treaties are difficult to directly cross compare with litigation, as both are very different mechanisms for resolving the protracted conflicts between Crown governments and First Nations. Treaties theoretically offer the best possibility for resolving the tension by offering an avenue to a relationship that balances the need for

certainty and justice for the Crown and First Nations. To argue that only the Crown seeks certainty would be a mistake. Certainty over land and jurisdiction provides all parties, Crown and First Nations, the ability to realize economic benefits from the land and its resources. Similarly, to argue that only First Nations seek justice is equally erroneous. All British Columbians require justice in order to respectfully address the past and build a relationship for the future. The Crown and settler British Columbians deserve to see justice served through our relations with First Nations on whose land we have made our homes. Yet the analysis of the treaty process here shows how certainty for the Crown heavily outweighs any actual evidence of justice for anyone, which leads many First Nations to the courts.

Court rulings offer the parties a glimpse of what the justice and liberality that the early colonial Crown administrators recommended might look like in a resolved claim. Justice as meted out by the courts affirms the Aboriginal right to live on relatively large tracts of home territory and to determine how the land is utilized, much more so than is offered through the BC treaty process. The existence and enjoyment of these rights are protected by the Canadian Constitution at a federal level, emphasizing the position of First Nations at a level that is at par with the Canadian state, not lower and within the colonially developed structure. However narrow in scope, these rulings hint of the possibility of achieving a just relationship. With justice as the priority in Crown - First Nations relationships, certainty will automatically follow.

The purpose of this thesis was to offer a decolonized examination of the relationships between the Crown and First Nations in British Columbia through treaties and litigation. The results are not pretty, as some ugly truths are revealed about our settler society.

There are solutions to create equitable relationships that all British Columbians can venerate with pride. This will only happen when people can muster the strength and courage to decolonize our minds and face our own picture of Dorian Gray. Once we do this, we can demand the justice required for honour in our relations with First Nations. Until then, we can only look to Hesiod's poem for inspiration by recognizing that there remains the potential for setting the nightingale free.

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