REFLECTIONS ON TREATY-MAKING IN BRITISH COLUMBIA

By Signa Alayne Katharina Daum Shanks

A thesis submitted in conformity with the requirements
for the degree of Master of Laws
Graduate Department of the Faculty of Law
University of Toronto

ABSTRACT

Reflections on Treaty-Making in British Columbia

Signa A. K. Daum Shanks
Master of Laws degree
Faculty of Law- University of Toronto

Due to its unique history of indigenous-non-indigenous relations, Canada's most western province is the jurisdiction where tension about land tenure appears in truly distinctive forms. The tense relations, unfortunately, seem even more tragic when one learns of how much time and energy individuals and groups devote to alleviating hostilities. Efforts to facilitate resolution about land issues have been to little avail in British Columbia.

In order to eliminate this oft-repeated pattern of failed strategies, the following presentation describes how all those involved in resolution must gain a better appreciation of the constitutive qualities that "treaty-making" contains. Misapplying these ideas has impeded resolution in the past and this error, if continued, will simply increase the unease about land tenure felt among all British Columbians in the future.

NANASKOMO

Tansi! Apihtawikosisan Signa paskwawiyiniw.

Okiskinohamakewah mamawi:
Beatrice Annetts, Fikile Bam, Leo Barry, Catherine Bell, Sandra Bobyk, Anna Bogar Laidlaw, John Borrows, Sharon Bouthnick, Brian Callilou, Maria Campbell, Gordon Christie, Ron Daniels, Marlene Davey, Allison Dekker, Ken Dekker, Cynthia Dunnigan, David Dyzenhaus (moniyaw takahki), Renate Eschlboeck, Elizabeth Flynn, Lindy-lou Flynn, Donna Greschner, Julia Hall, Peter Hogg, Shin Imai, Rob Innes, Darlene Johnston, Debra Laliberte, Brenda Macdougall, Gail Mackay, Patrick Macklem(okiskinohamakew-nikanistamaw-nepewisi), Brock Martland, Ray Martin, Colleen Matthews, Chantal Morton, Justice Muloto, Yvonne Parkhill, Lisa Philipps, Ramneek Pooni, Jean-Paul Restoule, Danielle Savoie, David Schneiderman, Sandra Schnell, Jaclyn Shanks (okiskinohamakew -nistamemakan), Geraldine Sharpe, Robert Sharpe, Brian Slattery, Neil Soiseth, Ian Steele, Isabel Tarrago, Winona Wheeler (okiskinohamakew-okimam), Alice Williams, Saga Williams, John Whyte, Bob Young.

Taniyikohk soniyawi :
June Callwood Program in Aboriginal Law, Faculty of Law, University of Toronto; School of Graduate Studies, University of Toronto; First Nations House(Jonathan Hamilton-Diabo and Anita Benedict), University of Toronto; Indian Studies Department, Saskatchewan Indian Federated College; Jack and Rita Catherall Travel Scholarship, Massey College; Admissions and Awards (Rosemary Hunter), University of Toronto; Kaye Joachim (Assistant Dean of Graduate Studies) Faculty of Law, University of Toronto; Dean's Office of Osgoode Hall Law School at York University; Aboriginal Studies Program,University of Toronto; Dean's Office, Faculty of Law, University of Toronto (mah-mawci).

Kiiteyiht wiyeyiht nitohtaw:
Socio-Legal Studies Assoction's Annual Meeting 2002 (University of Wales, Aberystwyth); Canadian Indigenous and Native Studies Association Annual Meeting 2002 (University of Toronto); the International Sociological Association World Congress 2002 (Brisbane, Australia).

Reflections on Treaty-Making in British Columbia

Who cares what one person says in the West?

Jan Wong on "This Morning," CBC National Radio (Toronto), 22 November 2000

What is your first word?
Your first word is *wee-as-wey-win-a.*
You say *wee-as-wey-win-a* to us
all the time back home.
You should be saying it out here, too.

Maria Campbell to the author, By the Way Café (Toronto), 19 November 2002

I. The Importance of Treaty-Making and the Importance of Methodology

> "I don't know why such a trifle should come before the *egwugwu*,"
> said one elder to another.
> "Don't you know what kind of man Uzowolu is? He will not listen
> to any other decision,"
> replied the other.
> As they spoke two other groups of people had replaced the first before the
> *egwugwu*, and a great land case began.
>
> Chinua Achebe, *Things Fall Apart*[1]

In October 2002 Joe Gosnell, a hereditary chief of the Nisga'a Nation, reflected that he had "no regrets." After participating in nearly three decades of formal negotiations, Gosnell believed that the land settlement he and his nation created with British Columbia and Canada was "worth every penny and every year." [2] Tripartite talks, leading to the implementation of the Nisga'a Final Agreement ("NFA"), created an arrangement which now reinforces the Nisga'a Nation's goal of self-determination and the Crowns' demand of constitutional supremacy. [3] Nisga'a-Crown disputes about land issues are, for the most part, resolved.

Chief Gosnell's reflections, unfortunately, are not commonplace in British Columbia. This province has a long, and often tense, history of disputes about land occupancy between Aboriginals and non-Aboriginals. Despite that many efforts have been made to improve relations,

---

1 C. Achebe, *Things Fall Apart*, 2nd ed. (Oxford, UK: Heinneman New Windmills, 1971) at 83. I thank Folaboye Adekeye for teaching me more about the egwugwu and what form they can take in Canada.

2 K. Lunman, "Nisga'a spent three decades, $50 million, sign deal and Gosnell has no regrets" (8 October, 2002) *Globe and Mail* A1. Compare this attitude to Gordon Sebastien's comment about the NFA to the Standing Committee on Aboriginal Affairs: "If there is any blood, it will be on the government's head...the government has manipulated the whole treaty process." C. McKee, *Treaty Talks in British Columbia* 2nd. ed. (Vancouver: UBC Press, 2000) at 107.

3 The NFA is the document negotiated and implemented through the *Nisga'a Final Agreement Act*, S.C. 2000, c.7 and the *Nisga'a Final Agreement Act*, S.B.C. 1999, c.2. Notable international coverage included "Canada's Noble Gift," (15 August 1998) *New York Times* A22 and A. DePalma, "Throughout the Americas, Natives Invoke the Law of the Land" (30 August 1998) *New York Times* WK 3.

this tension continues today. [4] Generally speaking, this province's politicians, indigenous leaders and the public believe modern treaty-making is the best way to create reconciliation and future obligations. But as finalising such arrangements is a rarity, what makes the NFA " a model for future agreements" is not the type of agreement it is, but the fact that it exists at all. [5] This province's history and its current situation create an unfortunate question. If so many parties devote themselves to finding solutions, why have solutions not been found?[6]

In an attempt to answer this question, I propose using a certain analytical framework. If treaty-making is the means by which parties attempt to resolve difficulties, understanding the legal footing of these attempts is pivotal. In addition, such an analysis should be constitutively

---

4 See *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 ("*Secession Reference*") at 240, where the Supreme Court of Canada explains that constitutional principles exist which give rise to the duty to negotiate: "federalism, democracy, constitutionalism and the rule of law, and the respect of minorities." See also G. Tremblay, "le procedure implicite de modification de la Constitution du Canada pour le cas de la secession du Québec," (1998) R. du B. 423 at 425. For further reflections about the role of negotiation, see *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 ("*Delgamuukw*") at 1052-1053; H. Foster, " 'Honouring the Queen's Flag': A Legal and Historical Perspective on the Nisga'a Treaty" (Winter 1998/99) 120 B.C. Studies 26; W. Henderson and D. Ground, "Survey of Aboriginal Land Claims" [1994] 26 Ottawa L.Rev. 187 at 207 and J. Jarvis-Tonus, "Legal Issues Regarding Oral Histories" (1992) 12 Canadian Oral History Association Journal 18. For perspectives about the public relations regarding this topic, see S. Delacourt "Natives Offered Limited Powers: Aboriginal Groups Unhappy as Ottawa Lays Out Terms for Self-Government" (11 August 1995) *Globe and Mail* A1; G. Plant, "The Nisga'a Final Agreement" (notes for address, Faculty of Law, University of British Columbia, 29 October 1998) [unpublished] and generally Decima Research Limited, *A Study of Canadian Attitudes Toward Aboriginal Self-Government* (Toronto: Decima Research, 1987).

5 Lunman, *supra* note 2. See also "BC throne speech promising but action necessary," The Canadian Press, February 12, 2003.

6 For remarks about circumstances of this sort, see "Appendix E: The Effects of Severity of Initiation on Activism: Design for an Experiment" in A. Hirschman, *Exit, Voice and Loyalty :Responses to Decline in Firms, Organizations, and States* (Cambridge, Mass.: Harvard University Press, 1970) at 146 to 155.

based. [7] Political and social analysis certainly add insight about the process of treaty-making.[8] But all parties involved in treaty-making constantly reflect about the legal roles they have and the legal roles of the documents they create, and modern treaty-making is, by its very existence a product of Canadian constitutional law. [9] If we do not consider how Canadian law, and the *Constitution* in particular, formulated strategies of all parties (including indigenous groups) in treaty-making, it is difficult to imagine how ideas can be created about future legal and political

---

7 For general descriptions of how parties manipulate current constitutive norms to suit their needs, see P. Hogg and A. Thornton, "The Charter Dialogue Between Courts and Legislatures" in P. Howe and P. Russell, eds. *Judicial Power and Canadian Democracy* (Montreal and Kingston: McGill-Queens University Press, 2001) 106; A. Nadeau, "Du dialogue au dynamisme judicaire" (jan. 2001) 3 J. du Bar. 10; P. Chartrand, "On Canadian Aboriginal Rights Dialogue" in J. Fletcher, ed. *Ideas in Action: Essays on Politics,and Law in Honour of Peter Russell* (Toronto: University of Toronto Press, 1999) 75; K. Roach, "The Myths of Judicial Activism" (2001) 14 Sup. Ct. L. Rev. (2d) 297; K. Roach, "Constitutional and common law dialogues between the Supreme Court and Canadian legislatures" (March 2001) 80 Can. Bar Rev. 481 and J. Hiebert, *Limiting Rights: the dilemma of judicial review* (Montreal: McGill-Queens University Press, 1996).

8 For important reflections about indigenous political efforts, see J. Long, "Political Revitalization In Canadian Native Indian Societies" (1990) 23 Canadian Journal of Political Science 751; J. Long and M. Boldt, "Leadership Selection in Canadian Indian Communities: Reforming the Present and Incorporating the Past" 7 (1987) 7 Great Plains Quarterly 103; M. Boldt and J. Long, "Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians" (1984) 17 Canadian Journal of Political Science 541; F. Cassidy, "Aboriginal Governments in Canada: An Emerging Field of Study" (1990) 23 Canadian Journal of Political Science 73; R. Clinton, "The Rights of Indigenous Peoples as Collective Group Rights" (1990) 32 Ariz. L. Rev. 739 at 739-740. See also P. Fontaine, "No Lessons Needed in Democracy" (11 December 1997) *Globe and Mail* A17 and generally W. Bogart, W. *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Oxford: Oxford University Press, 1994). Indigenous laws' roles are well articulated in T. Porter, "Traditions of the Constitution of the Six Nations" in L. Little Bear, M. Boldt and J. Long (eds.) *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: University of Toronto Press, 1984) 14; L. Rotman, "Developments in Aboriginal Law: The 2000-2001 Term" (2001) Sup. Ct. L.Rev. (2d) 1 at 23.; T. Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills, Ont.: Oxford University Press, 1999) at 19-20. See also K. Deer, "Mitchell Decision: A Good Reason not to Bring our Issues to Court" (10:3)*Eastern Door,* story 3 and R. Price and C. Dunnigan, *Toward an Understanding of Aboriginal Peacemaking* (Victoria, B.C.: UVic Institute for Dispute Resolution, 1995). The concern with how social issues interplay with the law is explained succinctly by J. Borrows who notes "the Court's findings in Marshall II, and in Sparrow, clearly imply a concern with social cohesion," in J. Borrows, "Uncertain Citizens: Aboriginal Peoples and the Supreme Court" [2001] 80 Can. Bar Rev. 15 at 30.

9 It is important to use the law, as Gordon Christie notes, as a "window" to observe how groups formulate their political arguments and to determine what laws the groups believe they must support or oppose. See generally G. Christie, "Judicial Justification of the Development of Aboriginal Law in Canada" (January 2002) (on file with author). This type of evaluation, then, discards analysis based solely on cultural differences. See B. Slattery's explanations about how "from the legal perspective, Aboriginal nations are constitutional entities rather than ethnic or racial groups," in "First Nations and the Constitution: A Matter of Trust" (1992) Can. Bar Rev. 261 at 273. See also P. Macklem, "Distributing Sovereignty: Indian Nations and the Equality of Peoples" (1993) 45 Stan. L. Rev. 1312 at 1324-1325 and P. Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 11-46.

relationships in Canada. [10]

To answer the question I have posed, and to do so with a legal and constitutive framework, a certain method seems particularly helpful. There are, I contend, two large stages of treaty-making in British Columbia. The first phase (Part II of this presentation) includes the circumstances which actually lead to treaty-talks. Meeting at a negotiating table does not happen instantaneously, and it comes from an admission by parties that current relationships are not ideal. The chronology of this phase, therefore, is important to understand in order to appreciate what issues and strategies parties bring with them when they attempt to create a treaty. The second phase (Part III here), because treaties must reinforce Canadian law, is to evaluate the constitutional strength of the documents which these parties develop during negotiations. From these two stages, it should be possible to first discern what norms create and enforce modern treaties and then present these legal norms in their separateness to understand their own individual natures. Gleaning these topics out of the negotiations process and the constitutionalisation of treaty making (the purpose of Part IV) should hopefully develop reflections about what parties do and whether what they do needs to change. If successful treaty-making is the goal, and parties actively pursue this goal, it seems reasonable to argue that understanding how parties demonstrate this pursuit is key if one wishes to determine how treaties are made (or not made) in British Columbia.

At this moment it is important to mention why British Columbia, as a separate jurisdiction, and

---

[10] Both the *Secession Reference*, *supra* note 4 and *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 S.C.R. 203 ("*Corbiere*") offer principles of legal analysis when political and legal questions overlap. See also P. Joffe, "Assessing the *Delgamuukw* Principles: National Implications and Potential Effects in Quebec" (2000) 45 McGill L.J. 155 at 206, fns 258 and 259. A concern also exists that political influences is slower than the impact of court cases. One still needs "frontal attacks in the courts." See J. Walker, *"Race", Rights and the Law in the Supreme Court of Canada* (Toronto: Osgoode Society for Canadian Legal History and Wilfred Laurier Press, 1997) at 343. Regarding the *Constitution*, see *infra* note 12.

treaty-making, as a certain tool, deserve their own evaluation compared to other regions of Canada and other means of dispute resolution. Here, I contend that this province is acting as a sort of experiment for the rest of the country. As will be explained, the province's history is incredibly unique. Its modern circumstances, as well, are often not typical of other parts of Canada. But impasses felt on the west coast are, in fact, indicative of larger issues this entire country is either currently experiencing or will soon face in the very near future.[11] British Columbia can, therefore, be understood for its trailblazing. Modern treaty-making is important for its symbolic roles, but the process of how treaties are made today offers many insights about how parties organise their beliefs and how Canada's entire legal system can adjust for such organisation.

Regarding certain words and phrases, the following explanations apply. "Aboriginal" and "indigenous" are used interchangeably. "First Nations" only refers to groups originally labeled "Indians" by the British, French, Canadian, and provincial governments. "Great Britain", "England", "Canada" or "British Columbia" indicate the respective region's government rather than the people who inhabit that specific country or province. "*Constitution*" refers to the *Constitution Act, 1982,*[12] "s.35(1)" is s.35(1) of the *Constitution,* [13] and any mention of "s.91" or "s.92" pertains to the federal and provincial divisions of power as described in the *Constitution Act, 1867.* [14]

This entire presentation is about the two phases of treaty-making, an examination of the terms

11 K. Coates, in K. Coates, ed., *Aboriginal Land Claims in Canada* (Mississauga: Copp Clark Pitman, 1992) at 4.

12 Schedule B to the *Canada Act 1982*(U.K.), c.11.

13 The section states: "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

14 (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5. Any reference to the *British North America Act* pertains to this same document.

which reappear during these stages, and a reflection about whether these terms are used in a proper way to facilitate treaty talks. In short, this effort is created with the purpose of extracting the tools parties have used in the past to create treaties, and to determine why the use of these tools is providing questionable results. The land west of the Rockies, its history, and how parties understand this history today, illustrates how British Columbia has experienced the effects of many different visions about how land should be treated. The province, as will be easily noted in the next section, also demonstrates how these different versions are not always compatible.

II. From the Royal Proclamation to the Nisga'a Final Agreement: The Path to Treaty-Making

On May 11, 2000 the Nisga'a Final Agreement ("NFA") came into effect. This modern treaty, evolving from negotiations among British Columbia, Canada and the Nisga'a Tribal Council (NTC), is a recent example of how indigenous and non-indigenous peoples in British Columbia have attempted to reconcile differences through the creation of formal legal relationships. What makes the NFA particularly unique as a treaty is its newness, its inclusion of the province as a signatory and its use of many indigenous-defined terms.[15] The fact that the three signatories actually reached an agreement is compelling, but the path that led to this event is equally as poignant.[16]

This part of the presentation is devoted to learning about this path. If a modern treaty was created to rectify difficulties among the two governments and the Nisga'a, it is important to learn what those difficulties were and how those problems developed. Understanding events which created these tensions in the first place helps us understand parties' current positions.

---

15 For helpful discussions which integrate indigenous-based norms with non-indigenous concepts, see E. Colvin, *Legal Process and the Resolution of Indian Claims, Studies in Aboriginal Rights No. 3* (Saskatoon: University of Saskatchewan Native Law Centre, 1981); K. Coates, ed. *supra* note 11; J. Henderson, M. Benson, and I. Findlay, *Aboriginal Tenure in the Constitution of Canada* (Scarborough, ON: Carswell, 2000). The NFA is considered an aberration for its contents and the fact that it exists at all. As of September 30, 2001 the federal government knew of 452 specific claims under review, 118 in negotiation, 48 in active litigation and 47 within the Indian Claims Commission, 12 comprehensive claims in active negotiation and 6 waiting for a response from the federal government. See B. Morse, "Comparative Assessments of the Position of Indigenous Peoples in Quebec, Canada and Abroad," (February 2002) at 70 (on file with author) .

16 Morse notes " the Nisga'a Nation Treaty represents the first such confrontation of the right to self-government as being constitutional in nature and elaborates the jurisdiction of the Nisga'a Lisims Government." Morse, *ibid.* at 77. Morse also notes that British Columbia, when evaluating Aboriginal issues, is the most litigious province in Canada. Morse, *ibid.* at 88. For a general overview of the NFA, see D. Sanders, " 'We Intend to Live Here Forever': A Primer on the *Nisga'a Treaty*" (1999) 33:1 U.B.C.L.Rev. 103.

To explain this path to the NFA, my description includes an explanation of the pre- and post-contact histories of British Columbia. This division highlights how indigenous peoples governed themselves, what governance systems newcomers brought with them when they came to the west coast, and how these two different legal systems correlated. From this comparison, it becomes clear that a fundamental difference between Aboriginals and non-Aboriginals develops about who has the right to govern the land. Out of this dispute comes the idea of "Aboriginal title," so this concept will also receive attention. Finally, descriptions of methods aimed at resolving Aboriginal title issues, the British Columbia Treaty Commission and the NFA, are included.

1. The history of inter-indigenous and European-indigenous relations

a. pre-contact existence

Every region in Canada has its own distinct characteristics, but British Columbia's numerous differences prove this province is best understood as a region of regions. It is a maritime jurisdiction with a mountain range, a place of extreme cold with the potential for balmy summers and a land that can provide nearly every type of food from its soil. While variances among the areas create distinct sectors, the terrains are, if understood properly, interconnected.[17] Their existence rests upon their own internal conditions combined with their relationships to other regions. In short, the separate areas are also definable by how they contrast with and affect other locales.

---

17 J. Barman, *The West Beyond the West: A History of British Columbia* (Toronto: University of Toronto Press, 1991) at 1-12.

These separate regions creating the larger entity now known as British Columbia have hosted societies for a very long time. References, whether they are indigenous sources or archaeological research, indicate a long-standing, continuous and thriving human existence in this part of Canada. [18] And, just as the geography is varied, so are the societies that have formed here over the years.[19] Between two hundred and three hundred separate communities developed in British Columbia just before contact with Europeans. Among these different cultures, at least ten linguistic groups existed, and language use and spiritualism allowed separate nations to find both parallels and differences with each other. [20] So just as the province's landscapes demonstrated, the nations also proved to have independence and interconnectedness. The nations' members learned that autonomous activities could guarantee survival of a community, but a nation's interaction with other cultures could also, if done correctly, ensure internal stability even better. The province's pre-contact history, in other words, details complex nation-to-nation interaction.

This history of inter-nation relations also affected the province's pre-contact macro-economic history.[21] Not only did individual societies rarely collapse due to their strong internal mechanisms, but the entire province was capable of a strong economic independence atypical of other regions. Conflicts due to limited economic opportunities, therefore, were less frequent

---

18 D. Hudson and E. Furniss, "The Plateau: A Regional Overview," in R. Morrison and C. Wilson, eds. *Native Peoples: The Canadian Experience* (Toronto: McClelland and Stewart, 1995) at 471-483.

19 J. Friesen, *Rediscovering the First Nations in Canada* (Calgary: Detselig Enterprises, 1997) at 153 and 155; W. Duff, *The Indian History of British Columbia: The Impact of the White Man*, 2nd ed. (Victoria: Royal British Columbia Museum, 1997) at 15. At 38-46 Duff estimates that at least eighty thousand indigenous peoples lived in British Columbia at the end of the eighteenth century, which was probably nearly half of the entire indigenous population in Canada. See also S. Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: Osgoode Society for Canadian Legal History, 1998) at 190-191.

20 G. Woodcock, *British Columbia: A History of the Province* (Vancouver: Douglas and McIntyre, 1990) at 15.

21 Friesen, *supra* note 19 at 169.

in British Columbia than in other parts of North America.[22] This regional self-sufficiency also affected travel patterns of indigenous nations. British Columbia's cultures, while not averse to visiting distant areas, had less need for faraway contact with other Aboriginals to ensure their own economic stability. The province, as its own larger entity, provided enough staples so nations could easily perpetuate their cultural, social and legal concerns. [23]

b. post-contact existence

So when a region has such a diversity of cultures demonstrating both internal autonomies and fairly successful external relations, it should be unsurprising that foreign influences were not simple to impose. The arrival of Cook (1778) and Vancouver (1793) to British Columbia failed to have the impact either explorer hoped to make. [24] Both men obviously represented strongly entrenched British economic and cultural norms, but the reinforcement of those values did not happen quickly or strongly during early post-contact relations. Besides the indigenous nations' political and economic strengths specific to British Columbia, Great Britain was also just beginning to appreciate the implications of its rather quixotic legal relationship with indigenous peoples. Although England 'won' the right to dominate North America in 1759

---

22 *Ibid.* at 179; Woodcock, *supra* note 20 at 7.

23 Friesen, *ibid.* at 162-163. Compare this understanding to what plains First Nations demonstrated in their pre-contact existences. See J. Milloy, *The Plains Cree: Trade, Diplomacy and War, 1790-1870* (Winnipeg: University of Manitoba Press, 1990) at 5-20.

24 These two explorers' activities are often used to describe first contact communication in British Columbia. Some researchers contend, however, the Tlingit experienced contact in 1741 and Juan Perez Hernandez arrived near Haida Gwaii (Queen Charlotte Islands) in 1774. Whether these differences in contact dates reflect different sources, perhaps they also demonstrate varied definitions in the word "discovery"; there is little evidence of Hernandez or the Tlingits' visitors staking claim to land when they reached the shore. Cook, in comparison, claimed British Columbia for Britain. See Friesen, *ibid.* at 214; Barman, *supra* note 17 at 20. For commentary which observes a romanticism to using Cook as the discoverer of British Columbia see B. Willems-Braum, "Buried Epistemologies: The Politics of Nature in (Post)Colonial British Columbia" (1997) 87 Annals of the Association of American Geographers 3 at 25.

because of its apparent conquest of France at the Battle of the Plains of Abraham,[25] this country also created the *Royal Proclamation of 7 October, 1763* (" *Royal Proclamation*") which created an obligation for the Crown to "protect" the "several Nations or Tribes of Indians".[26] The binary, of the right to govern (nearly all of) North America's population but the duty to safeguard the indigenous people within this population, created two legal roles for England to demonstrate when it interacted with Aboriginals in British Columbia.[27]

Besides the *Royal Proclamation*/sovereignty dichotomy, and the entire region's strong pre-contact situation, England failed to be as colonising as it hoped in British Columbia due to other factors. First, newcomers on the west coast often predicted First Nations' reactions incorrectly. Europeans in British Columbia based much of their preconceived notions on reports of first-contacts in eastern Canada. These perceptions, therefore, were based upon experiences with completely different indigenous nations, so west coast explorers often inaccurately predicted how nations in British Columbia would react to them.[28] Particularly because of the number of different nations out west, Crown representatives were often

---

25 J. Borrows and L. Rotman, *Aboriginal Legal Issues: Cases, Material & Commentary* (Toronto: Butterworths, 1998) at 5-11. For an article describing France's attempt at dominance over indigenous peoples prior to 1759, see C. Jaenen, "French Sovereignty and Native Nationhood during the French Regime," in J. Miller's *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991) 19.

26 The document states

"And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the Several Nations or Tribes of Indians with Whom We are Connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds". R.S.C. 1985, App.II, No.1.

27 Although Cook was instructed "to pursue a policy of creating peaceful relations with indigenous peoples that he encountered", Cook's own legal system was never considered subservient to the legal norms of the indigenous peoples he met. A few colonies, such as Louisiana and some land in what is now known as Quebec, were not part of this newly acquired sovereign governance. Morse, *supra* note 15 at 57. Barman, *supra* note 15 at 155.

28 Friesen, *supra* note 19 at 214. For more commentary about why treaties did not appear and the ramifications of such a fact see R. Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890* (Vancouver: University of British Columbia Press, 1977) at 15 and 153 ff.; K. Brealey, "Mapping Them 'Out': Euro-Canadian Cartography and the Appropriation of the Nuxalk and Ts'ilhqot'in in First Nations' Territories, 1793-1916" (1995) 39(2) The Canadian Geographer 140 at 150 and 154.

unprepared for the multiplicity of responses to their own actions that were often nothing like what happened on the Atlantic coast.[29] These differences made it difficult for England to impose colonizing policies consistently. Additionally, a lapsed colonial presence happened because of British Columbia's physical location. Isolated from most British colonies, this region's lack of connectedness with other European bases discouraged a transcontinental flow of trading goods and weakened the area's role as an outpost. [30] Finally, when explorers reached British Columbia, England was not as concerned with this newly acquired area's economic capability.[31] British Columbia was perceived as a secondary, rather than necessary, contributor to the monarchy's financial coffer when it was first "discovered."[32]

The above influences, which created colonising delay, subsequently affected how other colonial policies were implemented. For example, few military events were part of this region's early post-contact history compared to the east coast. Such a history meant that less Europeans made alliances with indigenous nations. Additionally, apart from the travels of other countries' traders in the interior (such as Russia and France), neither missionary efforts nor immigration policies were strongly emphasised. Because of this situation, a permanent non-indigenous population from England was slow to appear and the influence of religion was less immediate. [33] By the early nineteenth century, England may have believed it had the legal right to control British Columbia, but that right was arguably more difficult to observe than in

---

29 Fisher, *ibid.* at 23.

30 *Ibid.* at 24.

31 P. Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1990) at 4; I. Steele, *Warpaths: Invasions of North America* (New York: Oxford University Press, 1994) at 226-247.

32 Barman, *supra* note 17 at 30.

33 Compare the effects of the Battle of the Plains of Abraham, the American War of Independence or the War of 1812, or even activities of the Hudson Bay Company in founding strong political, and economic bonds between indigenous and non-indigenous peoples. See generally Steele, *supra* note 31. See also B. Christophers, *Positioning the Missionary: John Booth Good and the Confluence of Cultures in Nineteenth Century British Columbia* (Vancouver: UBC Press, 1998) at 3-18.

Prime Minister Macdonald's "National Policy". But despite the appearance that Canada was very dependent upon British Columbia to reinforce its nationalism, Canada would not stop the reinforcement of federalism either. Simply put, Canada's belief in its own ultimate authority influenced every single policy. Again, another duo appeared which affected British Columbia's evolution. Not only did this province experience the tug between the *Royal Proclamation* and Crown sovereignty, it also demonstrated the tension of a province with great natural autonomy being part of a country demanding that federal sovereignty reign over the west coast.

Canada's concern with projecting an image of national stability did not stop at immigration, railways and the shipping of goods. When the federal Crown considered its relations with indigenous peoples throughout the country, it did not hesitate to believe that its sovereignty should also be imposed upon Canada's first inhabitants. Both previous to and after Confederation, Crown representatives created relationships with indigenous nations by writing documents which detailed specific political, legal and economic roles for governments and respective nations. These arrangements became classified as "treaties." Yet treaties, as examples of bilateral relations, are not present in British Columbia's history. Notwithstanding some records written by James Douglas on Vancouver Island between 1850 and 1854, hardly any agreements were reached with First Nations. [38]

This non-treatied history is not a sign that governments were indifferent about Aboriginals'

---

38 The word "treaty" is not in the documents, but these land purchases have since been upheld as treaties, particularly since their principles are similar to the Robinson Treaties in Ontario. See *R. v. White and Bob* (1965) 52 D.L.R. (2d) 481; *R. v. Bartleman,* B.C.C.A.(1984) (unreported); *Claxton v. Saanichton Marina Ltd.,* B.C.C.A.(1989) (unreported). Treaty 8, originally signed in the Northwest Territories (and pertaining to land now part of Saskatchewan and Alberta) was extended into British Columbia by an adhesion in 1899. See A. Ray, "Treaty 8: A British Columbia Anomoly" (1999) 123 B.C. Studies 5. Despite this document's appearance, and despite the Douglas records, only 1.6% of British Columbia is historically treatied.

other parts of the empire. Notwithstanding the tragic impact of diseases upon communities, British Columbia's physicality, indigenous groups' pre-contact natures, the economic imperatives of the time and weakly imposed colonial policies failed to significantly challenge indigenous nations' internal cultural identities and their own inter-nation relations. [34]

But this sluggish colonisation did not last forever. Before the mid-nineteenth century, British Columbia may have been an incidental region, but this position changed when Vancouver Island (in 1849) and most of the mainland (in 1858) became official colonies. These two events, along with their combination as one colony in 1866, created an impetus for England to show a more formal attachment to the west coast. [35] Four years after the Dominion of Canada was created, British Columbia joined this new federal entity in 1871.[36]

Soon after joining Confederation, British Columbia directly experienced Canada's concern that the entire country demonstrate certain national traits. The federal Crown wanted the country's population to increase, so immigration was promoted. Canada also recognised how British Columbia's natural resources could benefit the country, so transnational activities and transportation were emphasised. Furthermore, the federal Crown imagined horrible potential circumstances from the rumoured "Manifest Destiny" plans in the United States, and these imaginings accelerated the implementation of immigration, transportation and resource use further.[37] All of these issues made British Columbia a perfect location to demonstrate (then)

---

34 D. McCalla, "The Economy of Upper Canada" in J. Bumsted, *Interpreting Canada's Past,* 2nd ed. (Toronto: Oxford University Press, 1993) at 354; Barman, *supra* note 17 at 82; Fisher, *supra* note 28 at 22-48.

35 The rest of the province was included by a further enactment in 1863. See D. Williams "Administration of Law and Justice on the Frontier Gold Rush in 1857, 1858" in Bumsted, ed., *ibid.* at 565.

36 See generally J. Chamberlin,*The Harrowing of Eden: White Attitudes Toward North American Natives* (Toronto: Fitzhenry & Whiteside, 1975) . Effects of the gold rush, and continuous impact of diseases upon indigenous populations, were also influential upon how the government determined its functions. See Barman, supra note 17 at 68-71.

37 Friesen, *supra* note 19 at 175 and 217; Harring, *supra* note 19 at 202-205; Barman, *ibid.* at 93.

lives in British Columbia. On the contrary, discussions (if not arguments) about indigenous peoples happened incessantly between British Columbia and Canada.[39] These disputes reached new heights when British Columbia joined Confederation. Canada wanted to create reserves, just as it had in the rest of the country, and place nations on these small land tracts. To justify this position, the federal Crown claimed it had the right to create reserves via s.91(24) of the *Constitution Act, 1867 (*then known as the *British North America Act)* which designated "Indians, and lands reserved for Indians" as a federal prerogative.[40] British Columbia, quick to counter a constitutional argument with a constitutional reply, argued that it, not Canada, had legal authority over the land needed to create the reserves.[41] In other words, both jurisdictions claimed control of Indians because each jurisdiction believed it governed the land needed to demonstrate this control. The passing of the *Indian Act* in 1876 made this debate even more contentious as the document did nothing to clarify the issue of provincial land authority and federal Indian governance.[42]

After innumerable provincial-federal debates about who controlled what, a legal middle ground was reached. The province decided that it would permit land transfers to Canada, but only on the condition that these land transfers would immediately turn into reserves. Canada, in conciliatory response, permitted British Columbia some administrative authority over reserves

---

39 The Terms of Union between British Columbia and Canada stated that the federal government would be in charge of "Indians, and the trusteeship and management of the lands reserved for their use and benefit shall be assumed by the Dominion Government." British Columbia would retain authority over land and resources. See *British Columbia Terms of Union*, R.S.C. 1985, App. II, no. 10. Harring, *supra* note 19 at 186-187 and 212. Debate often centred around the open-ended framing of Article 13, which states " a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government." Tennant, *supra* note 31 at 39-40.

40 Foster, "'Honouring the Queen's Flag'", *supra* note 4 at 18-19.

41 P. Tennant, "Aboriginal Peoples and Aboriginal Title in British Columbia Politics", i n R. Carty, ed. *Politics , Policy, and Government in British Columbia* (Vancouver: UBC Press, 1996) at 49.

42 *An Act to Amend and Consolidate the Laws Respecting Indians*, 39 V, c.18 is often referred to as the "*Indian Act*". Walker, *supra* note 10 at 28-30.

not enjoyed by other provinces. [43] By 1938 British Columbia announced that if Canada needed to create reserves, the province would approve any land transfers necessary without any conditions. The reserve system became, for the most part, resolved by the middle of the twentieth century. [44]

The federal Crown's reserve policy, and the province's subsequent approval of this idea, was not accepted easily by British Columbia's First Nations. Indigenous communities opposed the the *Indian Act* often and vociferously. Because reserve policies in British Columbia, however, were a both provincial and federal affair, protest needed to be doubly presented. Due to this fact, the capacity of British Columbia's First Nations to organise quickly with each other, as they had prior to contact, was of great assistance when they planned their reactions. Interconnectedness among the groups always energized individual nations, but here it also created necessary political relations aimed at demonstrating against government policies imposed without Aboriginals' permission.

The following events demonstrate this point. Just one year after British Columbia joined Confederation, the Coast Salish rallied outside the provincial land registry and demanded recognition of their own land system. In 1874 fifty-six chiefs presented a petition to the federal Indian Commissioner. In 1881 Chief Mountain led a Nisga'a protest delegation to Victoria. Nisga'a and Tsimshian chiefs traveled to Victoria in 1887 to confront the premier. [45] In 1890 the Nisga'a Nation organised the Nisga'a Land Committee (NLC). By 1909 the NLC

---

43 This authority is granted through the enforcement of the *British Columbia Land Settlement Act*, S.C. 1920, c.51. C. Harris, *Making Native Space* (Vancouver: UBC Press, 2002) at 169-264; Barman, *supra* note 17 at 158.

44 Harris, *ibid.* at 261.

45 See generally E. Patterson, "A Decade of Change-Origins of the Nisgha and Tsimshian Land Protests in the 1880s" (1983) 18(3) Journal of Canadian Studies-Revue D'Etudes Canadiennes 40.

arranged the Native Tribes of British Columbia (NTBC) with other chiefs, and the group's executive traveled to England to explain indigenous peoples' plights. In 1910 the chief of the Gitanyow Nation sent a petition to Prime Minister Laurier claiming land ownership for a region located in the Nass Valley. [46] In 1912, the McKenna-McBride Commission started investigating First Nations' issues and its report, released in 1916, acted as a catalyst for the creation of the Allied Tribes of British Columbia (ATBC). [47] Despite the many laws that forbid First Nations' participation in the legal system,[48] indigenous peoples' opposition to Crown policies was a regular, forthright and well-organised political occurrence. [49] Both individual nations and joint-nation organisations proved to be non-acquiescent about non-Aboriginal legal norms, particularly when those norms affected land tenure.

Political fora were not the only venues used by nations to oppose Canadian land policies. First Nations also determined that the non-indigenous judicial system provided a place to

---

46 NAC, RG 10 , MMRC, vol. 11023, file 600.

47 R. Galois, "The Indian Rights Association, Native Protest Activity and the 'Land Question' In British Columbia, 1903-1916" (1992) 8 Native Studies Review 1 at 20-22.

48 See P. Rynard, "'Welcome in, but check your rights at the door': The James Bay and Nisga'a Agreements in Canada" (2000) 33 Canadian Journal of Political Science 210 at 214; Tennant, *supra* note 31 at 89-103; R. Manwani, "In between and out of place: racial hybridity, liquor, and the law in late nineteenth and early twentieth century British Columbia" (2000) 15 Can. J. L. and Soc. 2 at 9; W. Tarnopolsky, "Discrimination and the Law in Canada" (1992) 41 U.N.B.L.J. 215 at 222; the Right Hon. B. McLachlin, "Racism and the Law: The Canadian Experience" (2002) 1 J. Law and E. 1 at 10. The most obvious influence upon whether indigenous peoples appeared in court was s.141 of the *Indian Act* (R.S.C. 1927, c.98) which forbid "without the consent of the Superintendent General expressed in writing [to receive, obtain, solicit, or request] from any Indian any payment or contribution of promise of any payment or contribution for the purpose of raising a fund or providing money for the prosecution of any claim which the tribe or band of Indians to which such Indians belongs, or of which he is a member, has or is represented to have for the recovery of any claim or money for the benefit of the said tribe or band..." This section was not dropped until 1951. For further limitations see *British Columbia Indians Land Settlement Act, 1 July 1920* , R.S.C. c. 51; Order-in-Council PC 1265, 12 July 1924.

49 For an explanation of activities during the mid-twentieth century, see H. Foster, "Letting Go the Bone: The Idea of Indian Title in British Columbia, 1849-1927" in H. Foster and J. McLaren, eds., *Essays in the History of Canadian Law, vol. VI* (Toronto: Osgoode Society for Canadian Legal History by the University of Toronto, 1995) 28 at 68. The Union of BC Indian Chiefs, for example, was organised as a reaction to Trudeau's White Paper. Tennant, *supra* note 26 at 52; Canada, *infra* note 63. Their document, the "Brown Paper", appeared on November 17, 1970. It proposed constructive replacements for ideas rather than simply having reactions to White Paper policies. Friesen, *supra* note 19 at 232; Foster, "'Honouring the Queen's Flag...,'" *supra* note 4 at 14. Compare Friesen's and Foster's perspectives to G. Woodcock's chapter "The Decline and Fall of Native Societies" in Woodcock, *supra* note 20 at 125-141.

challenge Canadian law. As mentioned above, courtroom participation was often legally forbidden.[50] But this lack of participation did not affect indigenous nations' belief that a pre-contact legal notion existed which could guarantee modern indigenous land tenure. At the same time, the nations realised this notion would not be accepted in Canadian courtrooms unless it was explained using Canadian legal notions. In other words, land rights for indigenous peoples needed to uphold the Canadian legal system as much as these rights emulated indigenous legal norms. The pre-contact strength of indigenous nations, again, aided these cultures' belief that the newcomers could indeed be challenged. [51] This time, however, the challenge would happen in the newcomers' courtrooms, and the challenge would be about land "title."

2. Litigation for land in British Columbia

a. The invention of "Aboriginal Title"

British Columbia's land issues have not, historically, fit easily with other legal topics pertaining to Aboriginals. In geographic regions where historic treaties exist, these documents are used as a reference point to guide courtroom debates. Over the years, treatied nations have organised detailed narratives about specific locales, treaty-makers' written records about

50 Foster, "'Honouring the Queen's Flag...,'" *supra* note 4 at 23.

51 Some writers are aiding others' understanding of the political and personal strength necessary for such sensitive and lengthy legal battles. See generally C. Monet and Skanu'u, *Colonialism on Trial: Indigenous Land Rights and the Gitskan and Wet'suwet'en Sovereignty Case* (Penticton: New Society/Inland/inbook, 1992); A. Ray, "Creating the Image of the Savage in Defence of the Crown" (1990) 6(2) Native Studies Review 13.; T. Alfred, *supra* note 8 at 1-30. For commentary about the role of indigenous peoples must demonstrate when attempting to balance community ties which affirm Aboriginality with the responsibility to be active within "Western intellectual" systems, see. G. Christie, "Law, Theory and Aboriginal Peoples" (January 2003) at 58-59 (on file with author).

meetings which can also be presented, and these documents seem palatable enough for courts to digest when they evaluate land issues. [52] But non-treatied communities, with no written document to interpret, have less historic information explaining Crown-nation relations which the Court can examine. This lack of government documentation, however, did not stop British Columbia's First Nations from believing that they had the right to demonstrate a legal authority over specific terrains. Today, this non-treaty argument, considered a "historic occupation and possession" of an certain area, is called a claim of "Aboriginal title." [53]

This phrase's current form stems from nearly two centuries of debate. Three nineteenth-century decisions from the United States are understood as the first significant influences upon "indigenous title" (the term's first name). In *Johnson v. M'Intosh* [54], *Cherokee Nation v. Georgia* [55] and *Worcester v. State of Georgia* [56] (the "Marshall trilogy"), Chief Justice Marshall of the U.S. Supreme Court reinforced an assumption unique for his time and his vocation. He contended North American indigenous peoples legally controlled the regions they occupied before Europeans arrived. This belief, then, meant that non-indigenous governments could not claim title to North America unless the indigenous nations surrendered the lands to them. These cases' conclusions, in sharp contrast with many "doctrine of discovery" norms, meant that an indigenous nation did not need to prove its authority over the land it occupied. Rather, the nation's sovereignty was assumed until it was proven that the sovereignty was taken away in a proper legal manner. [57]

---

52 Perhaps the most famous work of this sort is A. Morris, *The Treaties of Canada* (Toronto: Belfords, Clarke and Company, 1880).

53 *Calder v. A.G.B.C.* [1973] S.C.R. 313 ("*Calder*").

54 21 U.S. (8 Wheat.) 543 (1823).

55 30 U.S. (5 Pet.) 1 (1831).

56 31 U.S. (6 Pet.) 515 (1832).

57 For detailed explanations of the different doctrines used to justify land acquisition by colonisers, see Borrows and Rotman, *supra* note 25 at 5-20.

Marshall, C.J.'s attitudes are not regularly (or openly) reinforced in nineteenth judicial decisions or government policies of the time. But certain moments in Canada's history demonstrate the cases' conclusions. Government officials were, in many circumstances, not confident that they had legal authority over indigenous nations. Historic treaty negotiations, for example, describe how both indigenous and non-indigenous peoples assumed First Nations owned the land. Policies used for reserves' creation also reflect nations' cultural and legal attachment to certain areas. [58] While the government may not have publicly admitted that its activities were affected by indigenous norms, the fact that indigenous nations' views influenced policies demonstrates that the Crown did not believe in its own unilateral authority or wisdom. [59] Other norms, besides Crown imperatives, overshadowed indigenous-non-indigenous relations and government representatives accepted the legitimacy of these norms.

Although American courts could reinforce it, and some government policies demonstrated it, indigenous title was not a significant part of Canadian jurisprudence until 1888. In *St. Catherine's Milling and Lumber Co. v. the Queen ("St. Catherine's Milling")*, the Judicial Committee of the Privy Council ruled "Indian" land interest existed and a province could not use Indian lands "as a source of revenue until the estate of the (provincial) Crown is disencumbered of the Indian title."[60] By applying protectorate notions prescribed by the *Royal Proclamation,* the Court held that this 1763 document acknowledged indigenous title. Since the decision includes an admission that indigenous title exists, *St. Catherine's Milling* is a

---

58 A. Ray, "Treaty Making," in *I Have Lived Here Since the World Began* (Toronto: Lester Publishing and Key Porter Books, 1996) at 206-221. See also generally D. Arnot, "The Honour of the Crown" (1996) 60 Sask. L. Rev. 339.

59 See P. Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995) 21 Queen's L. J. 173 at 197.

60 (1888), 14 App. Case 46 (P.C.) at 59.

pivotal case. The Council, however, defined the term as personal and usufructuary. These characteristics, therefore, permitted the Crown to create its own understanding of indigenous title's nature. Canada decided that legislation could still limit the contents and the application of indigenous title, so the case permitted governments to control where indigenous peoples lived and how each nation described its culture. [61]

While "Aboriginal title," then, did exist as a legal term during the twentieth century, no example of its existence was seriously evaluated in the courts until the late 1960s and early 1970s. Frank Calder, the first indigenous MLA in British Columbia's history, contended that the Nisga'a Nation had Aboriginal title to a specific land area in northwestern British Columbia. While he lost his argument, Calder's presentation became an opportunity for the Supreme Court of Canada to explain that it also acknowledged the legal existence of Aboriginal title. The Court, furthermore, described how an Aboriginal title claim need not be gauged in fiduciary obligation terms. [62]

Calder's loss, as well, impacted government policies in a remarkable way. A few months after the Supreme Court rendered its decision, the federal government announced that it would hear "land claims" arguments from indigenous nations should a group wish to avoid court proceedings. Such a claim needed to include a map of the specific land area in question and a

[61] W. Henderson and D. Ground, *supra* note 4 at 209. Federal government officials could even justify their policies by referring to another section of *St. Catherine's Milling*, as Lord Watson wrote: "There may be other questions behind, with respect to the right to determine to what extent, and at what periods, the disputed territory over which the Indians still exercise their avocations of hunting and fishing is to be taken up for settlement or other purposes, but none of these questions are raised for decision in the present suit." *St. Catherine's Milling*, *ibid.* at 60.

[62] Six of the seven judges accepted the existence of "Aboriginal title." Three judges, in fact, believed Calder proved his claim. Judges in this case debated whether the *Royal Proclamation* could be used to support for Aboriginal title arguments. Judson, J. stated: "Although I think it is clear that Indian title cannot owe its origin to the Proclamation of 1763, 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. That is what Indian title means." *Calder*, *supra* note 51 at 328.

report describing why the land has cultural importance. If the map and report were accepted by Canada as valid, the government could choose to offer a settlement to the nation.[63] In 1981, the process was renamed the "comprehensive claims" initiative.[64] This policy, besides permitting a nation to claim a specific land tract, also permitted a nation to claim issues about specific cultural activities. This change in policy, however, was double-edged. A comprehensive claim might create a settlement more quickly than a lawsuit and might be more indigenous influenced due to the inclusion of cultural matters, but Canada demanded that any agreement finalised due to comprehensive claims talks include an "extinguishment clause." Such a clause describes how a nation adhering to a comprehensive claim can neither negotiate nor litigate at a later date any topics mentioned in the comprehensive claims agreement.

In 1984 another case, involving a land surrender under *Indian Act* provisions, permitted the Supreme Court of Canada to remark about land claims in general. In *Guerin v. R.* ("*Guerin*") (then) Justice Dickson explained how the *Royal Proclamation* created a "sui generis" obligation upon the Crown, and this obligation meant that standard contractualist notions did not apply to relationships with indigenous peoples. [65] This sui generis duty meant that Canada was obligated to ensure that its own duties, unless justified, did not impair and s.35(1) right of an indigenous nation. [66]

---

63 Canada, *Statement Made by the Honourable Jean Chretien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People, August 8, 1973*. Such a policy is a reversal from the Trudeau government's original position. In 1969 the federal government claimed Aboriginal title issues were "so general and undefined as to be incapable of any specific remedy." See Canada, *Statement of the Government of Canada on Indian Policy, 1969* (Ottawa: Queen's Printer, 1969) (the "White Paper"). The first province to accept the continued existence of Aboriginal title was Quebec. This province was also the first provincial jurisdiction to negotiate land claim settlements, and the James Bay and Northern Quebec Agreement appeared in 1975. See *James Bay and Northern Quebec Native Claims Settlement Act,* S.C. 1976-77, c.32; *Cree-Naskapi (of Quebec) Act*, S.C. 1984, c.18.

64 See Canada, *In All Fairness: A Native Claims Policy, Comprehensive Claims* (Ottawa: Ministry of Supply and Services, 1981).

65 [1984] 2 S.C.R. 325.

66 *Ibid.* at 385 and 387. The decision, despite its date, did not actually use s.35(1) as a reference but instead relied upon common law to support the reasoning.

Aboriginal title was given more constitutional context in 1990. (Then) Chief Justice Dickson held in *R. v. Sparrow* ("*Sparrow*") that the term was an example of an "Aboriginal right" and the *Constitution*'s use of the word "existing" in s.35(1) meant "not extinguished." [67] Furthermore, while a government can still interfere with an Aboriginal right (as *St. Catherine's Milling* permits), that interference must be "reasonably justified" [68] and the justification must be "compelling and substantial."[69] As well, the policies which permit this interference cannot jeopardize the Crown's fiduciary obligations. [70] Six years later, (then) Chief Justice Lamer determined the scope of an Aboriginal right in *R. v. Van der Peet* ("*Van der Peet*"). He concluded that an activity is an Aboriginal right if it is a pre-contact practice, custom or tradition demonstrated since contact, and the practice, custom or tradition is "integral to the distinctive culture of the Aboriginal people claiming the right." [71]

Sparrow and *Van der Peet* provided important guidance about how s.35(1) functions. They have, however, faced extensive criticism for their use of non-Aboriginal standards to define Aboriginality. [72] Because the Court continues to permit Crown interference of the rights, many scholars find it difficult to reconcile the decisions with the *sui generis* obligations attributable to the *Royal Proclamation* as described in *Guerin.*. Because of *Van der Peet*'s requirements, observers contend nations will have even more difficulty explaining their rights due to the evidence necessary to

---

67 [1990] 1 S.C.R. 1075 ("*Sparrow*") at 1076. Gordon Christie notes how the Court did not even address the issue of Aboriginal rights in this case; the issue was determining infringement of rights rather than what an Aboriginal group can claim. See G. Christie, "Judicial Justification...," *supra* note 9 at 22.

68 *Sparrow*, *ibid.* at 1087.

69 *Ibid.* at 1113.

70 *Ibid.* at 1109.

71 [1996] 2 S.C.r. 507 at 549. If an argument is about Aboriginal title, hoever, the "pre-contact" prerequisite shifts into a "pre-sovereignty" requirement. For a more thorough description, see J. Borrows, *Recovering Canada: the Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 61-66.

72 See generally P. Macklem "First Nations Self-Government and the Borders of the Canadian Legal Imagination" 36 McGill L.J. 382 and W. Binnie, " The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 Queen's L. J. 223.

contextualise pre-contact existences.[73] This difficulty will subsequently lower the number of successful claims, and the Crown will subsequently have less moments where it must demonstrate its fiduciary duty. [74]

Despite these noted drawbacks in *Sparrow* and *Van der Peet*, judges of the Supreme Court of Canada did not turn their backs on the existence of Aboriginal title. Particularly because of its discussion regarding evidentiary issues, one recent case decided in 1997 by the Supreme Court of Canada is the most significant examination of Aboriginal title to date. This case, unsurprisingly, started in British Columbia.

b. the impact of *Delgamuukw v. British Columbia*[75]

Earl Muldoe ("Delgamuukw") believed he had an extremely important complaint. His cultural identity was threatened. In a certain section of British Columbia where his family had lived for centuries, he was not permitted to practice his culture's traditions properly because the Crown thought the government controlled the land. When his grievance was compared to Canadian

---

[73] The difficulty lies in how a nation would prove a pre-contact activity or existence if much of the evidence describing this claim would only be admissible at the Court's discretion. See E. Meehan's and E. Stewart's reflections that *Van der Peet* "appears to be a reasonable compromise under difficult circumstances" in E. Meehan and E. Stewart, "Developments in Aboriginal Law: the 1995-96 Term" (1997) 8 Sup. Ct. L. Rev. 1 at 16. Compare this evaluation to A. Zalewski, "From Sparrow to Van der Peet: The Evolution of a Definition of Aboriginal Rights " (1997) 55(2) U. T. Fac. L. Rev. 435; J. Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 Am. Indian L. Rev. 37; L. Rotman, "Hunting for Answers in a Strange Kettle of Fish: Unilateralism, Paternalism and Fiduciary Rhetoric in Badger and Van der Peet" (1997) 8:2 Const. Forum Const. 40; R. Barsh and J. Henderson, "The Supreme Court's Van der Peet Trilogy: Naive Imperialism and Ropes of Sand" (1997) Alta. L. Rev. 117; K. McNeil, "Reduction by Definition: The Supreme Court's Treatment of Aboriginal Rights in 1996" (1997) 5:3 and 4 Canada Watch; J. Gray, "O Canada! Van der Peet as Guidance on the Construction of Native Title Rights" (1997) 2:1 A.I.L.R. 18.

[74] P. Macklem, "First Nations Self-Government...," *supra* note 72 at 445-450.

[75] *Delgamuukw*, *supra* note 4.

legal jurisprudence, it seemed to have all the qualities of an Aboriginal title argument. [76]

Delgamuukw was not the first person to argue for Aboriginal title, nor was his complaint unusual. But what made his (and the Gitksan and Wet'suwet'en nations, which accompanied him) position unique was *how* it was articulated. Delgamuukw's legal counsel announced that this Aboriginal title argument would be presented with standard written documentation and expert witness testimony. But they also stated that it would be explained using oral history.[77] Stories, songs and historical explanations of cultural practices explained why Delgamuukw and the two nations had "jurisdiction" to over 22, 000 square miles in British Columbia.

At trial McEachern, C.J. listened to the most of the oral evidence. But in his decision he concluded that this information did not explain anything that concerned him. He concluded a description of a feast did not describe a legislative system,[78] and details about a "most uncertain and highly flexible set of customs" certainly did not demonstrate a pre-contact legal system. [79] Even if the Court did accept the oral evidence at face value, the events the evidence described did not qualify for constitutional protection, because other Canadian laws extinguished these rights.[80] At British Columbia's Court of Appeal , the panel provided more details about whether Aboriginal jurisdiction survived British sovereignty,[81] the determination

---

76 See generally C. Monet and Skanu'u, *supra* note 51.

77 For examples of how authors claim oral history can be collected, see W. Wheeler, "Narrative Wisps of the Ochekwi Past, A Journey in Recovering Collective Memories" (1999-2000) Oral History Forum 113. See generally G. Vizenor, *The People Named the Chippewa: Narrative Histories* (Minneapolis: University of Minnesota Press, 1984) and *Interior Landscapes: Autobiographical Myths and Metaphors* (Minneapolis: University of Minnesota Press, 1990).

78 *Delgamuukw v. British Columbia* (1991) 79 D.L.R. (4th) 185 at 374.

79 *Ibid.* at 379.

80 Borrows, *Recovering Canada*, *supra* note 71 at 81.

81 *Delgamuukw v. British Columbia* (1993) 104 D.L.R. (4th) 470.

of territorial jurisdiction, the doctrine of continuity[82] and the definition of "self-regulation"[83]. But it still upheld Chief Justice McEachern's decision. Obviously dissatisfied, Delgamuukw appealed to the Supreme Court of Canada.

The Supreme Court's decision contains important analysis about certain concepts previously unexplained. [84] Unlike his commentary in *Van der Peet*, Chief Justice Lamer addressed how Aboriginal title arguments fit within Aboriginal rights jurisprudence. He maintained Aboriginal title is a "broader based conception of Aboriginal rights" [85] which "arises from the prior occupation of Canada by (a)boriginal peoples." [86] This term is "an exclusive use and occupation" of the area claimed, [87] but the land use "need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive to aboriginal cultures." [88] The functions, however, must demonstrate a proprietary interest competitive with other proprietary interests, yet they can also demonstrate a "shared" exclusivity. [89] Finally, he acknowledged that indigenous peoples document their histories orally. [90]

While these aspects of the decision were long-awaited and considered commendable by Delgamuukw's supporters, the findings were not enough to allow the appeal. Instead, the Supreme Court ordered a new trial. As well, the decision provides little explanation of some of the newly-introduced concepts, so evaluating Aboriginal title today remains, in many

82 *Ibid.* at 540.

83 *Ibid.* at 541.

84 For a more expansive synopsis of the case, see K. McNeil, "The Post-*Delgamuukw* Nature and Content of Aboriginal Title" in K. McNeil, *Emerging Justice? Essays on Indigenous Rights in Australia and Canada* (Saskatoon: Native Law Centre, 2001) at 102-135.

85 *Delgamuukw, supra* note 4 at 1094.

86 *Ibid.* at 1082.

87 *Ibid.* at 1083.

88 *Ibid.*

89 *Ibid.* at 1081.

90 *Ibid.* at 1067-1079.

respects, an unrestrained exercise.

This open-endedness is evident in certain ways. First, the activities or lifestyles in question must be ones "that have taken place on the land and the use to which the land has been put by the particular group." [91] So while an Aboriginal group can exercise a right different from past practices, [92] modern methods of self-government will still be illegitimate if they stray far from *Van der Peet's* requirements. [93] The second inarticulated term is "oral history." The Chief Justice concludes "oral histories of aboriginal societies...for many are the only record of their past", [94] but he does not provide parameters for the idea. No parties in the case, then, learned what limits, if any, exist on this idea's meaning, so oral history can be legally "distinguished" as much as it is "applied". Because of these unexplained ideas, some scholars conclude that the case may actually limit the use of s.35(1), because explicitly defined ideas (such as proprietary interest and exclusive use) based upon traditional sovereignist notions trump the undefined pro-Aboriginal aspects (such as oral history and modern "non-integral" land use). Today, *Delgamuukw* is often considered as ambiguous as it is groundbreaking. [95]

So Aboriginal title, conceptually speaking, is at definitional juncture. What is encompassed by oral history? If proof of land use need not be as "frozen" as demanded in *Van der Peet*,[96] is

---

91 *Ibid.* at 1089.

92 *Ibid.* at 1083.

93 *Delgamuukw*, *supra* note 4 at 1115.

94 *Ibid.* at 1067.

95 See generally J. Borrows, "Sovereignty's Alchemy: An Analysis of Delgamuukw v. The Queen" (1999) 37 Osgoode Hall L. J. 537; K. McNeil, *Defining Aboriginal Title in the '90s: Has the Supreme Court Finally Got it Right?* (Toronto: Robarts Centre for Canadian Studies, 1998). For judicial reflections about this difficulty, see Williamson, J's remarks when evaluating a claim filed by the Gitanyow Nation. See *Gitanyow V*, *infra* note 192. See also D. Lambert, "Van der Peet and Delgamuukw: 10 Unresolved Issues" (1998) U.B.C.L. Rev. 249; Borrows, *Recovering Canada*, *supra* note 71 at 87.

96 For an indigenous reaction to the "frozen' state *Van der Peet* creates, see J. Borrows, "The Trickster: Integral to a Distinctive Culture" (1997) 8(2) Const. Forum Const. 29.

the new *Delgamuukw* understanding really 'thawed' if the Crown still can define, and potentially extinguish, the right to that land use? *Delgamuukw* includes many insights about how modern roles for indigenous peoples should be permitted. But because these roles are still invented by governments, they reinforce a historic pattern of a non-indigenous peoples defining indigenous peoples' legal behaviour.

Not incidental to the importance of *Delgamuukw* is the time the courts took to evaluate this case. [97] This effort, taking twenty years to reach the Supreme Court of Canada and creating significant financial costs for all involved, spoke to indigenous and non-indigenous peoples about how land resolution by treaty-making can seem incredibly appealing.

---

97 See M. Jackson's "Legal Overview" in Monet and Skanu'u, *supra* note 51 at x-xi.

3. Negotiation for Land in British Columbia

a. The British Columbia Treaty Commission

While a drove of academics continue to debate what "Aboriginal title" means in the courts,[98] British Columbia's First Nations can choose to avoid this scholarly discussion by resolving their land issues at another venue. [99] Borne out of judicial recommendations, political motives and the absence of treaties, the British Columbia Treaty Commission (BCTC) facilitates negotiations which create formal land agreements between the two Crowns and First

---

98 For some evaluations, see K. McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" 2(3) Australian Indigenous Law Reporter 365; K. McNeil, "Aboriginal Rights: The Legal Landscape in Canada" at 34 and H. Foster, "Litigation and the BC Treaty Process" 64 in British Columbia Treaty Commission, *Speaking Truth to Power III* (Vancouver: BCTC, 2002); K. McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61 Sask. Law Rev. 431; B. Donovan, "The evolution and present status of common law aboriginal title in Canada: the law's crooked path and the hollow promise of Delgamuukw" (2001) 35 U.T.L.Rev. 43; B. Othius, "Defrosting Delgamuukw (or 'how to reject a frozen rights interpretation of aboriginal title in Canada") (June 2001) 12 N.J.C.L. 385; R. Bartlett, "The Content of Aboriginal Title and Equality Before the Law" (1998) Sask. L. Rev. 377; P. Joffe, *supra* note 10; L. McDonald, "Can Collective and Individual Rights Coexist?" 22 Melbourne U. L. Rev. 310; M. Asch and N. Zlotkin, "Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations" in M. Asch, ed. *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: University of British Columbia Press, 1997) 73; Tennant, *supra* note 29 at 177; H. Foster, "Aboriginal Title and the Provincial Obligation to Respect It: Is *Delgamuukw v. British Columbia 'Invented Law'*" (1998) 56 Advocate (B.C.) 221; B. Slattery, "Making Sense of Aboriginal Rights and Treaty Rights" (2000) 79 Can. Bar Rev. 196; D. Dick, "Comprehending 'the Genius of the Common Law'- Native Title in Australia and Canada Compared Post-Delgamuukw" (1998) 5:1 A.J.H.R. 79; N. Bankes, "Delgamuukw, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights" (1998) U.B.C. L. Rev. 317; H. Foster, "Roadblocks and Legal History, Part II: Aboriginal Title and Section 91(24)" (1996) 54 Advocate (B.C.) 531; M. Asch, "The Judicial Conceptualization of Culture after *Delgamuukw and Van der Peet*" (2000) Rev. Const. Stud. 119; G. Bennett, "Aboriginal Title in the Common Law: a stony path through feudal doctrine" (1978) 27 Buf. L. Rev. 617; B. Burke, "Left out in the cold: the problem with aboriginal title under section 35(1) of the *Constitution Act, 1982* for historically nomadic aboriginal peoples" (2000) 38 Osgoode Hall L. J. 1; G. McIntyre, "Aboriginal title: equal rights and racial discrimination" (1993) 16 U.N.S.W.L.J. 57; D. Mercer, "Aboriginal Self Determination and Indigenous Land Title in Post Mabo Australia" (1997) 16(3) Political Geography 189; J. Smith, "The concept of Native Title," (1974) 24 U.T.L.J. 1.

99 B. Fisher, "The Mandate of the British Columbia Treaty Commission" (Jan.1995) 53 Advocate (B.C.) 75.

Nations. [100] "Aboriginal title" is imagined at the commission by negotiations rather than litigation.

The BCTC is not the first commission to appear in British Columbia. The Indian Reserve Commission, existing between 1876 and 1908, was created to resolve land issues between the (federal and provincial) Crowns, to determine reserve sizes and to hear indigenous peoples' responses to these policies. As well, the already-mentioned McKenna-McBride Commission was established in 1912 to reexamine land issues. [101] These two commissions' goals were not completely the same, but their histories reinforce the point that land disputes, and the support for negotiations to resolve these disputes, have a long history in British Columbia.

As "Aboriginal title" became more articulated after 1982, so did governments' concerns about hostilities between indigenous and non-indigenous peoples. Many administrations decided that their respective governments lacked the fundamental knowledge necessary to create successful policies to resolve problems. This concern was understood by the highest rank of British Columbia's government. In 1987, Premier William Van der Zalm created a Native Affairs Secretariat to provide information about indigenous issues to all government

---

100 Coat-tailing on the social reactions that developed after the failure of the Meech Lake Accord and confrontations at Oka, Quebec in 1990 the two Crowns and First Nations Summit(FNS) met to determine how to avoid such problems in British Columbia. All three parties were extremely concerned that hostilities in British Columbia could prove as legally and politically tense as recent events in Quebec had demonstrated. For more details about the political negotiations leading to the Accord, and its failed ratification including Oji-Cree MLA Elijiah Harper's reaction see R. Watts and D. Brown (eds.) *Canada: The State of Federation 1990* (Kingston; Institute of Intergovernmental Relations, Queens University, 1990) and A. Cohen, *A Deal Undone: The Making and Breaking of the Meech Lake Accord* (Vancouver: Douglas and McIntyre, 1990). For expansive discussion of the "Oka Crisis" see House of Commons, Fifth Report of the Standing Committee on Aboriginal Affairs, *The Summer of 1990* (May 1991) and G. York and L. Pindera, *People of the Pines : The Warriors and the Legacy of Oka* (Toronto: Little Brown and Company, 1992). (Then) Prime Minister Brian Mulroney announced his government's "Native Agenda" on September 25, 1990. It had "three parallel initiatives": acceleration of specific claims; settlement of Treaty Land Entitlement issues; acceleration of "negotiations on modern treaties". See House of Commons, Debates at 13320 (25 September 1990). The *Treaty Commission Act,* R.S.B.C. 1996 c. 461 and the *British Columbia Treaty Commission Act,* S.C. 1995, c.45 created the BCTC.

101 H. Foster, "Getting There!" in Law Commission of Canada and British Columbia Treaty Commission, *Speaking Truth to Power* (Ottawa: Minister of Public Works and Government Services Canada, 2001) at 4-5.

departments. Within a year the secretariat received cabinet status, became known as the Ministry of Native Affairs, and it was mandated to negotiate "self-government arrangements with Native communities".[102] In 1989, the premier established the Premier's Council on Native Affairs as a place for indigenous nations to present Aboriginal title claims to the province. As British Columbia's untreatied situation was not articulated well by the courts, the province believed it had an important role in determining s.35 rights.

In 1991, Premier Van der Zalm approved another administrative body. The British Columbia Claims Task Force, assembled to be an advisory board to the government, researched the state of indigenous-non-indigenous relations. It subsequently recommended that

> a new relationship which recognizes the unique place of aboriginal people and First Nations in Canada must be developed and nurtured. Recognition and respect for First Nations as self-determining and distinct nations with their own spiritual values, histories, languages, territories and ways of life must be the hallmark of this new relationship.[103]

The Task Force stated that relationships should be established between the governments and nations to encourage voluntary, multi-staged and independently-chaired land settlement negotiations. It proposed that talks should "achieve lasting agreements as quickly as possible and these talks should be facilitated by a tripartite organization appointed by the First Nations, the federal and the provincial governments." [104] The Task Force also maintained that no negotiating party could be excluded from any stage, and each stage should not have an imposed time length.

---

102 Government of British Columbia, Ministry of Native Affairs, *Annual Report 1988-1989* (Victoria: Province of British Columbia, 1989) at 4.

103 J. Mathias et al, *Report of the British Columbia Claims Task Force* (Vancouver: British Columbia Claims Task Force, 1991) at 8.

104 *Ibid.* at 38.

Van der Zalm's government was defeated in October 1991, but its NDP replacement continued to support the Task Force's findings. The new premier, Mike Harcourt, organised negotiations among Canada, British Columbia and First Nations Summit, and these three parties approved the establishment of the BCTC. [105] The British Columbia Treaty Commission Agreement, signed on September 21, 1992, created the first Canadian tribunal devoted solely to solving intra-provincial land issues through tripartite negotiations.[106]

While the BCTC is not supposed to mirror the litigation process, it still must adhere to many juridical norms. At the beginning of its establishment, commissioners announced that any participating First Nation could not litigate land issues simultaneous to its BCTC activities. Furthermore, parties' positions could not be inconsistent with Aboriginal title jurisprudence. So while the BCTC's structure appeared less adversarial, certain litigation traits still became part of the commission's procedure. In the end, BCTC activities cannot contradict fundamental tenets of Canadian law.[107]

But these strict standards do not stop the BCTC from demonstrating its right to interpret legal norms. Two interpretations are of particular note. First, the BCTC has refused to reinforce the federal Crown's policy of including an extinguishment clause in any finalised treaty. While *Sparrow* explained how extinguishment issues challenge the purpose of s.35, so extinguishment clauses would be extremely hard to justify today, the decision still makes room

105 For thorough commentary on the modifications of Social Credit policies by the NDP see F. Cassidy, ed., *Reaching Just Settlements: Land Claims in British Columbia, Proceedings of a Conference September 21-22, 1990* (Lantzville, British Columbia: Oolichan Books, 1991). First Nations Summit, an umbrella organisation encompassing nearly all Indian bands in British Columbia, acted on behalf of the province's First Nations.

106 E. Stokes, "The Land Claims of First Nations in British Columbia" (1993) 23 University of Wellington Law Review 171 at 190. See the British Columbia Treaty Commission Agreement, 21 September 1992.

107 British Columbia Treaty Commission Agreement, 21 September 1992.

for the possibility of impairment. Yet the commission has gone out of its way to maintain that "those aboriginal rights not specifically dealt with in treaty should not be considered extinguished or impaired." [108] In other words, the commission cannot find any compelling reason why any impairment is justified. In addition, the commission has accepted different forms of oral evidence since its inception. This policy, it should be noted, was enforced before the Supreme Court of Canada rendered *Delgamuukw*, [109] so the commission's activities challenged the Court of Appeal's (and the trial judge's) decision about the legal validity of oral testimony.

The BCTC has adopted a six stage process for negotiating settlements. [110] At Stage 1, a First Nation files a "Statement of Intent" containing certain documents; the Statement must include a map describing a specific region which represents the land claim, a short summary of the nation's organisational structure for administering a settlement, and a description of how the negotiators have received permission from the nation to be its representative. Furthermore, the negotiators must provide information about any other nation claiming cultural attachment to the same area described in the map (such a circumstance is considered an "overlap claim"). The Statement can be amended after it is submitted, but changes happen only at the commission's discretion. After the BCTC approves the Statement's final version, the commission notifies Canada and British Columbia that they and the respective First Nations are invited to attend a meeting (Stage 2) to occur in the next forty-five days. Before the BCTC hosts Stage 2, the governments receive copies of the Statement, each party writes a report detailing their respective negotiations readiness, and the reports are exchanged among the

---

108 British Columbia Claims Task Force, *Report* (Vancouver: British Columbia Claims Task Force, 1991) at 28-29. For a more recent opinion of the federal Crown's perspective about comprehensive claims, see *Federal Policy for the Settlement of Native Claims* (Ottawa: Indian and Northern Affairs Canada, 1993).

109 *Delgamuukw*, *supra* note 4.

110 For more details, see www.bctreaty.net for the most recent explanation.

parties.

Stage 2 is a way for every party to openly express its own position and comment about the other groups' perspectives. If all three parties are satisfied that they understand the other participants' views, they each provide oral assurances about participating in future treaty-making. In addition, they also announce the names of their respective Chief Negotiator, and they provide details about how future administrative processes and financial resources will implement the finalised treaty.

After the commission accepts these assurances, a Framework Agreement ("FA") is negotiated (Stage 2). The FA includes details any other meetings needed to compose agendas, individual work plans, and necessary interim arrangements. It also explains a tripartite work plan for the next three stages. Additionally, any overlaps must be resolved in Stage 3, and these resolutions must be proven by the creation of a negotiated arrangement between the Crowns and all affected indigenous nations. [111] While Stage 3 agreements are not subject to BCTC approval, the commission still has the discretion to observe any discussions during this stage, and it can offer advice should any party asks for its viewpoint.

After the FA is finalised, Stage 4 meetings are held to negotiate an Agreement-in-Principle (AIP). Besides explaining any important issues mentioned in the FA, the AIP must also detail a ratification process and an implementation plan for the upcoming finalised treaty. This AIP needs approval from all three parties, but a party cannot sign the AIP until it also provides proof that the AIP is approved by the community or government the respective party represents. When proof is provided, and the AIP is signed, further meetings are held to create

111 *Ibid.*

a legally binding document (Stage 5). Stage 5's document is then implemented (Stage 6) and the agreement permits a new treaty relationship in Canada to begin. It remains to be seen what the first BCTC treaty will include, as the commission has yet to reach Stage 6 for the first time.[112]

Since its inception, the BCTC has undergone a significant philosophical, and consequently administrative, shift. Negotiations during the BCTC's first years proved that "the idea (that) comprehensive treaties will be concluded quickly is no longer a reasonable expectation for many of the negotiating tables."[113] The commission now believes that many, rather than six, steps are needed to reach agreements. This change was particularly influenced by the commission's observation that a disparate gap exists among First Nations when comparing their negotiating capabilities.[114]

The commission continues to support an incremental attitude because of two cases recently rendered at British Columbia's Court of Appeal. *Haida v. B.C. and Weyerhaeuser* (*"Haida I/II"*)[115] and *Taku River Tlingit First Nation v. Ringstad* (*"Taku River"*)[116] include a significant shift in fiduciary duty interpretation.[117] The BCTC understands these cases as blunt commands about three issues. Overlap concerns must be detailed at a greater length by the

---

112 As of January 2003 "there are now 53 First Nations participating in the BC treaty process, representing 122 Indian Act bands (114 in B.C. and eight in the Yukon) and two-thirds of all [A]boriginal people in B.C. Because some First Nations negotiate at a common table, there are 42 sets of negotiations underway." Five nations are at Stage 2, five nations are at Stage 3, forty-two nations are at Stage Four, and one nation is at Stage Five. British Columbia Treaty Commission, "Status Report" January 2003 at 8.

113 British Columbia Treaty Commission, "Executive Summary," April 2002.

114 Foster, "Getting There!" *supra* note 101 at 3; H. Foster and A. Grove, "Looking Behind the Masks: A Land Claims Discussion Paper for Researchers, Lawyers and their Employers" (1993) 27 U.B.C.L.Rev. 213.

115 *Haida Nation v. B.C. and Weyerhaeuser* 2002 B.C.C.A. 223, CA02799 (*"Haida I"*) and *Haida Nation v. B.C. and Weyerhaeuser* 2002 B.C.C.A. 462, CA027999 (*"Haida II"*).

116 *Taku River Tlingit First N*ation v. *Ringstad* [2002] B.C.C.A. 59.

117 Stephen Cornell, "Nation Building and the Treaty Process," in British Columbia Treaty Commission, *Speaking Truth to Power II* (Vancouver: British Columbia Treaty Commission, 2001) at 20.

knowledgeable parties, the Framework Agreement established at Stage 3 is a legally binding document,[118] and simultaneous litigation and negotiations are no longer forbidden. [119]

Despite the popularity of the BCTC, not all First Nations have used its facilities to resolve land issues. The Nisga'a Nation, for one, did not appear at the commission. Instead, it approached Canada, and later British Columbia, about forging a new relationship. And, unlike BCTC participating nations, it has achieved its goal of finalising a new arrangement. Negotiations are completed, an agreement was written, and the agreement is law. The Nisga'a people are now a treatied people.

b. The Nisga'a Final Agreement

As was already noted, many indigenous nations in British Columbia have a long history of confronting non-indigenous governments. The Nisga'a Nation demonstrates this quality to the fullest extent. If one simply recalls Chief Mountain's disagreement with the Crown's land laws, subsequent Nisga'a protests at the legislature, or Frank Calder's roles as an MLA and his efforts as a litigant, challenging non-indigenous perspectives is an integral part of the Nisga'a Nation's post-contact history.

The Nass Valley Watershed is home to the Nisga'a Nation and is, as is most of British Columbia, untreatied. According to explorers' early evaluations, the area was classified as

---

118 See British Columbia Treaty Commission, "Update," May 2002 at 3.

119 *Ibid.*

politically unnecessary and economically unviable. [120] Yet this valley is of great necessity to the Nisga'a. By using a social kinship structure composed of four clans headed by matriarchs and hereditary chiefs, the nation continues to reinforce its cultural identity here. The Nass Valley's physical geography affects the economic circumstances and the cultural heritage of a society originally considered too irrelevant to conquer.[121]

But as happened with many other nations in British Columbia, the Nisga'as' status of irrelevance changed after Confederation. When the province soldered itself to Canadian constitutional norms, indigenous peoples' lives became controlled by the reserve system. The Nisga'a Nation was unable to evade these laws. Individual Nisga'a, as with other First Nations people, became "registered" and were forced to remain on specific land tracts often uncoordinated with families' socio-economic patterns.

Despite experiencing the reserve system's overbearing effects, the Nisga'a still found the political wherewithal to form the Nisga'a Land Committee (NLC). This organisation functioned to confront governments about the *Indian Act's* effects upon Nisga'a land use and ownership.[122] By 1913, the group went so far as to petition authorities in England for compensation of their taken lands and for the right to reinstate traditional Nisga'a laws. Two years later, the NLC presented the same petition to the federal Minister of Indian Affairs and his deputy Superintendent General. The argument was re-presented again at the McKenna-McBride Commission. None of these efforts transferred land back to the Nisga'a. And when

---

120 As a sign that little European presence was in the Nass Valley compared to the rest of Canada, missionaries did not enter Nisga'a territory until the 1860s. See M. Hurley, *The Nisga'a Final Agreement* (Ottawa: Library of Parliament, Parliamentary Research Branch, 24 September 2001) at 3.

121 See generally Nisga'a Tribal Council, *Nisga'a: People of the Nass River* (Vancouver: Douglas and McIntyre, 1993).

122 Walker, *supra* note 10 at 28-30.

the *Indian Act* included sections banning political activities, the NLC needed to become more reclusive while it strategised.[123] After 1951, when some of the *Indian Act* was repealed, the NLC reappeared with a new name, the Nisga'a Tribal Council (NTC) and it, recharged by Frank Calder's (then) recent election victory, was fully energized to challenge Crown policies throughout the rest of the century. [124]

In 1967, the NTC's efforts became fully appreciated in the courts with the aid of its (now former) MLA. As detailed earlier, Frank Calder, along with the Nisga'a Nation, took an Aboriginal title case to court. The case lost at trial, lost at appeal, and lost at the Supreme Court of Canada. Yet the case's impact is unquestionable. In its decision, the Supreme Court affirmed "Aboriginal title" as a possible legal argument, and three judges actually believed Calder and the Nisga'a Nation proved the argument.[125] When Canada announced its land claims policy a few months later, the NTC decided its experience at the Supreme Court placed it in a strong position at the negotiating table. The NTC began talks with the federal Crown in 1973.

Discussions between Canada and the Nisga'a, informal for the first three years, became officially classified as "treaty negotiations" in 1976. Talks were lengthy and often intense, and disagreements centred around the treaty's implementation as much as the treaty's contents. [126]

---

123 Hurley, *supra* note 120 at 9. *An Act to Amend the Indian Act,* 17 George V. c.32. This document was also referred to as the "*Indian Act*". This version was passed in 1927.

124 *An Act Respecting Indians,* (1951) 15 George VI c.29. As was the 1927 version, this act became the new "*Indian Act*".

125 T. Berger's *A Long and Terrible Shadow: White Values, Native Rights in the Americas, 1492-1992* (Vancouver: Douglas and McIntyre, 1991) at 140-147 provides helpful details of the court's determining factors for proving Aboriginal title in this circumstance. Justice Hall's remarks exemplify an understanding of how Aboriginal title arguments should be evaluated as a legal ideas with no reliance upon Canadian laws for their justification. But some commentators nevertheless observe that *Calder* still is a "restrained view" and did not project particularly extreme positions. See Binnie, *supra* note 72 at 240.

126 McKee, *supra* note 2 at 49-51.

When Canada and the NTC debated the impending treaty's implementation, it became clear that British Columbia needed to participate in the talks due to the province's legal rights. In 1990 British Columbia agreed to be a signatory of the NFA. [127]

These negotiations had both supportive and critical spectators, and the amount of public reaction was compelling. This wave of responses, however, was partially created by the governments. Both Crowns encouraged the province's residents to voice their views loudly and often. British Columbia organised many fora throughout the province as a means for citizens to present their views about NFA talks. The federal government, as well, projected a more consultative approach about its participation. Both Premier Clark and Prime Minister Chretien permitted a "free vote" in the provincial legislature and the House of Commons about the NFA. In other words, while reactions still would have invariably appeared, British Columbia and Canada worked hard during the later stages of NFA talks to hear the "public interest". [128]

The NFA was initialed by British Columbia, Canada and the NTC in New Aiyansh, British Columbia on August 4, 1998. [129] After a referendum in the Nass Valley on November 7 and 8 1998, a final vote in British Columbia's legislature on April 26, 1999 and Royal Assent in Ottawa on April 13, 2000, the NFA began its implementation phase on May 11, 2000.

The NFA's twenty-two chapters are typical of many modern intergovernmental

---

127 Hurley, *supra* note 120 at 7.

128 For a historical perspective on these final stages, see generally T. Molloy, *The World is Our Witness: The Historic Journey of the Nisga'a Into Canada* (Calgary: Fifth House, 2000).

129 McKee, *supra* note 2 at 101-106.

arrangements. [130] The agreement describes responsibilities among the three signatories, it explains how each party facilitates its respective obligations, and it details how other legislation interplays with the treaty's implementation. Conflict of interest guidelines and financial accountability mechanisms must be equivalent to those used by Canada. Minimum standards for health care and safety legislation must typify provincial or federal policies. Resource use has maximum allocations based on Crown environmental protection standards. A Fiscal Financing Agreement provides annual funds, and the Nisga'a Lisims Government (NLG) pays for local functions. [131] In short, the workings of the NFA are not at all dissimilar to what a municipal, provincial, or federal government might do.

But as Paul Rynard notes, "the Nisga'a treaty contains a very different land regime." [132] The "Nisga'a Lands" , 1, 992 km2 on both sides of the lower Nass River and about one hundred kilometres upriver, is completely and collectively owned by the Nisga'a Nation. [133] The fifty-six Indian reserves located within the NFA's description have new metes and bounds. Any preexisting village located within the Nisga'a Lands is now governed by the NLG. The lands are held in fee simple title, and the title includes forestry, oil, gas and mineral rights.[134] The Nisga'a manage, and collect profit from, these resources. The Nass Wildlife Area, another region of about 15, 000 square kilometres, is located north of the Lands and is used to guarantee harvesting rights (subject to provincial regulations pertaining to conservation and public safety). [135]

---

130 Rynard notes the most significant features in the NFA are the financing and governance provisions. Rynard, *supra* note 48 at 213.

131 Stokes, *supra* note 106 at 38.

132 Rynard, *supra* note 48 at 223.

133 Sanders, *supra* note 16 at 110.

134 NFA, 3.19.

135 *Ibid.* 9.1-3, 10-11 and sch. A.

The treaty's administration is facilitated by seven committees. The Enrollment Appeal Board (federal-Nisga'a) coordinates citizenship issues of the Nisga'a Nation, whereas the Forestry Transition Committee and the Joint Park Management Committee (both provincial-Nisga'a) govern issues about natural resources. The remaining committees, Implementation, Tripartite Finance, Joint Fisheries Management and the Nass Wildlife Committee, have representatives from all sides, typifying topics which are jointly run by both Crowns.[136] These committees, as can be noted by their separate fields, have Crown participation typical of standard divisions of power.

But if some of these functions may appear to potentially conflict with traditional jurisdictional powers of Canada or British Columbia, the Crowns can still limit or extinguish sections' applications should the sections' functions go beyond the "internal matters" of the Nisga'a Nation. [137] Furthermore, the entire treaty is subject to the *Canadian Charter of Rights and Freedoms,*[138] so treaty-makers claim that NFA activities cannot contradict current constitutional law.

The creation of the land base and the treaty's administrative functions were not inexpensive matters to establish. First, the Nisga'a Nation received a capital payment of $190 million to create the bureaucratic frameworks needed to implement the policies. In addition, the federal

---

136 British Columbia Treaty Negotiations Office, *Report on Implementation Activities Undertaken by British Columbia Pursuant to the Nisga'a Final Agreement, May 11, 2000- March 31, 2001.*

137 Rynard, *supra* note 48 at 236. Nisga'a institutions, hunting and fishing regulations, the Nisga'a constitution, language, regulation of trade and commerce and citizenship are determined solely by the Nisga'a Lisims. NFA 2.23. *Sparrow,supra* note 67 at 1109: "Rights that are recognized and affirmed are not absolute."

138 Part 1 of the *Constitution Act, 1982 being* Schedule B to the *Canada Act 1982*(U.K.), 1982, c.11 (the "*Charter*"). Ch. 2.9 of the NFA states: "The *Canadian Charter of Rights and Freedoms* applies to Nisga'a Government in respect of all matters within its authority, bearing in mind the free and democratic nature of Nisga'a Government as set out in this Agreement."

and provincial governments have promised other funds increasing the total allocated to the Nisga'a Nation to $312 million. The land transfer described in the NFA is worth approximately $107 million, the province has committed $41 million for highway upgrading, and buy-outs for certain fishery and forestry rights are worth between $23 and $28 million. In total, the cost for the NFA's implementation is estimated between $500 and $550 million. [139]

The details of the treaty, and the agreement's implementation, are now supported universally by the signatories. But the universality is not particularly evident when the parties' negotiating purposes are compared. The NTC considered the document a way to escape colonialism and to demonstrate self-government. [140] The two Crowns were not averse to the NFA's role in reinforcing self-government policies, but under no circumstances do the Crowns believe that the NFA increases current, and future, obligations to the Nisga'a. [141] So the NFA, as a legal instrument, demonstrates a fine balance between reflecting indigenous sovereignty and reinforcing Crown authority. [142] The negotiating parties, then, have left it up to the rest of Canada to accept this equipoise. As the next section explains, this acceptance has not come easily.

---

139 Sanders, *supra* note 16 at 112. Most of the bureaucratic costs are assumed by Canada. See Foster, *supra* note 34 at 30.

140 Rynard observes the Nisga'as' autonomy as an indigenous nation is questionable since it does not have final authority over hunting and fishing, supposedly pivotal activities in understanding Nisga'a culture. Rynard, *supra* note 48 at 230.

141 C. 22 of the NFA states "This Agreement constitutes the full and final settlement in respect of the aboriginal rights, including aboriginal title, in Canada of the Nisga'a Nation." This phrase is the NFA's "extinguishment clause".

142 As of 10 April 2003, the NLG has enacted forty-five by-laws and sets of regulations. See www.nisgaalisims.ca/ldownload.html. See also E. Wright, "Self-Government- the Nisga'a Experience" in British Columbia Treaty Commission, *Speaking Truth to Power III , supra* note 98.

III. The Constitutional Strength of Treaty-Making

> Does the *Treaty* create a separate Nisga'a nation? NO. The treaty allows the Nisga'a people to govern themselves in a way comparable to a municipal government. The Canadian Constitution, the Charter of Rights and Freedoms, and the Criminal Code will apply to the Nisga'a people.
>
> Advertisement, *Globe and Mail*[143]

> This is not self-determination, this is permission to be self-administering Canadian laws and systems. What are the division of powers going to mean and is there going to be a real division of power? Will such an agreement really mean self-determination for our Nations?This has exposed the Canadian treaty policy of first come, first served.
>
> Saul Terry, President, Union of British Columbia Indian Chiefs[144]

In the previous section, a variety of options are presented for imagining potential legal relations among Aboriginal nations and the Crowns in British Columbia. A nation can remain untreatied, it can travel through the BCTC process or it can act individually and approach the Crowns with a "comprehensive claim."

It should be pointed out that, for the most part, governments and most First Nations must have faith in negotiations or they would not participate. What I want to discuss here, however, is that this faith has not carried over to some of the province's rank and file. Criticisms about treaty-making's current form are common, and they have manifested themselves in many ways. Political organisations, social groups and individuals' perspectives described why the province's first finalised modern treaty, the NFA, was not a good idea.

---

143 Advertisement, "What does it mean to me? The Nisga'a Treaty" (13 October 1998) *Globe and Mail* A10.

144 S. Terry, "Why the Nisga'a Agreement Must Not Be the Blueprint," *Khatou News*, August 1998. In comparison, (then) AFN Grand Chief Phil Fontaine supported the treaty. See Assembly of First Nations, "Nisga'a Bill Receives Royal Assent," (press release) 13 April 2000.

Unsurprisingly, the courts also heard these concerns. This chapter is devoted to examining cases which bring forth this concern and subsequently test the constitutionality of British Columbia's treaty-making. Because the BCTC has not finalised any agreements yet, the NFA is the document which experiences the most constitutional dissection. As I described in the beginning of this presentation, this part continues the search for certain thematic threads which make up treaty-making. The following challenges represent groups' imaginings about how the NFA did not reinforce important constitutional topics.

1. Internal Protest: Barton et al

Unanimity within an indigenous nation can never be assumed, and the first challenge to the NFA demonstrated this reality.[145] In the summer of 1998, two members of the Nisga'a Nation decided they did not support the NTC's negotiating strategy when the Council met with Crown officials to finalise the NFA. Frank Barton and James Robinson ("Barton et al"), one a hereditary chief and the other a hereditary chief -in-waiting, appeared on behalf of themselves and some other Nisga'a Nation members. The two men wanted the Court to either cancel the NFA's AIP or command the Nisga'a Nation to hold another vote to determine AIP approval.[146] To justify their request, Barton et al presented the following facts. The NTC organised a meeting in Nisga'a territory about the NFA's AIP. The meeting included a vote. The vote's results, the NTC contended, demonstrated approval of the AIP. But Barton et al argued this meeting was neither announced fairly nor organised properly. By noting that even

145 H. Foster, "'Honouring the Queen's Flag'," *supra* note 4 at 34.

146 *Barton et al* v. *Nisga'a et al*, Kamloops Registry No. 24853 (B.C.S.C.) ("*Barton I*").

Chief Gosnell admitted the meeting was planned poorly, Barton et al contended that the NTC breached its good faith to the Nisga'a Nation, the vote was invalid, and the NTC subsequently did not represent the Nation properly. As a result, the NFA had "oppressive" effects upon the entire Nisga'a population. [147]

Hunter, J. ruled that this argument failed to explain the "oppressive or unfair prejudice" necessary for an injunction, nor did the party's timing suggest such a remedy was actually needed at all. In other words, had Barton et al filed its legal argument closer to the date of the vote, the Court might have believed that the vote's implications were oppressive. Justice Hunter observed

> the petitioners filed in early May, 1997. Between March 22, 1996 and May 12, 1997, almost 4.8 million dollars have been spent by the Nisga'a Nation on negotiations. Had the petitioners acted sooner there may have been the option of reviewing the A.I.P. before another Special Assembly with adequate notice. That opportunity has passed. [148]

Every aspect of the application was rejected by the Court. Soon after this decision was released, the NFA's AIP was signed by the NTC, British Columbia and Canada.

Barton et al were not satisfied with this result, so they appealed. Goldie, J. affirmed the lower court's observations that the meeting was neither poorly advertised nor poorly run, and that the pleading's timing suggested the purported oppression was inconsequential or

---

147 *Ibid.* at para. 1.

148 *Ibid.* at para. 6.

nonexistent.[149] He opined the group's motion "reminds one that equity aids the vigilant and not those who slumber on their rights." [150] He refused their appeal.

Because the group was not successful in stopping the AIP, they decided to attack the NFA's implementation. Just weeks before the NFA became law, the party sought six injunctions granting interlocutory relief. [151] Basing their argument on a principle of "equity", Barton et al argued the entire province's public interest was jeopardised if the courts considered the Nisga'a Nation's vote and the NFA valid, and that the treaty jeopardised the proper functions of ss. 91 and 92. [152] This time, the plaintiffs also included both governments as defendants.

This entire application was also dismissed. Williamson, J. concluded the group's argument about "equity" actually jeopardised Parliament's executive function.[153] Citing statutory sources [154], *Manitoba (A.G.) v. Metropolitan Stores (MTS) Ltd* (*"Metropolitan Stores"*) and quoting the Supreme Court of Canada, Williamson concluded:

> No interlocutory injunction or stay should issue to restrain (that) authority from performing its duties to the public, unless, in the balance of convenience, the public interest is taken into consideration and given the weight it should carry.[155]

---

149 *Barton et al v. Nisga'a Tribal Council et al*, Vancouver Docket CA025009 and CA025019 (B.C.C.A.) (*"Barton II"*) at para. 23.

150 *Ibid.* at para 18.

151 *Chief Mtn.* v. *H.M.T.Q.* 2000 B.C.S.C. 659 (*"Barton III"*). Chief Mountain is James Robinson's traditional name. An interlocutory injunction is a measure intended to guarantee certain actions do not take place until the courts determine the rights of all parties involved. See G. Fridland, *The Law of Contract in Canada* (Toronto: Carswell, 1986) at 727.

152 *Barton III, ibid.* at para.1.

153 *Ibid.* at paras. 2-6.

154 *Ibid.* at para 8. *Crown Liability and Proceedings Act* R.S.C. 1985, c.C-50; *Crown Proceedings Act,* R.S.B.C. 1996, c.89.

155 *Barton III, supra* note 151 at paras. 10-12, citing *Metropolitan Stores* [1987] 1 S.C.R. 110 at 149.

Not only did Barton et al fail to describe the benefits of an injunction, [156] the group did not even prove the minimum requirements necessary to be granted such a request.[157] Finally, Barton et al was chastised for its tardiness. Since the group took so long to file their pleadings, Justice Williamson concluded that the group's timing showed that the issues in this presentation were truly insignificant. [158]

This decision's appeal was also unsuccessful. [159] Five days after Justice Williamson rendered his decision, the Court of Appeal completely supported Justice Williamson's evaluation. It also reinforced the point that the NFA's constitutionality could not be questioned until after the agreement's implementation date. [160] In the end, the group's timing was criticised in two ways. An injunction was impractical because it would only be valid for a month, and the request could not be evaluated because the NFA was not law. Barton et al was too slow for the complaint it had and too quick for the remedy it wanted.

So the group waited until the NFA became law. But they did not wait for long. Just days after the agreement's implementation in May 2000, Barton et al presented a third argument. The first part was not new. They continued to insist the NFA jeopardized the traditional functioning of ss. 91 and 92 thereby creating a "third order of government". The second reason, however, made its debut. The group contended its concern with the NFA

---

156 *Barton III, ibid.* at para. 26, citing *Metropolitan Stores, ibid.* at 135.

157 *Barton III, ibid.* at para.14, citing *RJR Macdonald v. Canada(Attorney General)* [1995] 3 S.C.R. 199 ("*RJR*") at 340. A plaintiff must show three facts: there is a serious issue to be tried in an action; the plaintiff will suffer irreparable harm if an injunction is not granted; the balance of inconvenience favours the plaintiff.

158 *Barton III, ibid.* at para. 35. Williamson also remarked Barton et al's use of *Campbell et al v. British Columbia* Vancouver A982738 (B.C.S.C.) ("*Campbell I*") , which explained how a delay of filing a legal argument can be justified, was applied incorrectly.

159 *Chief Mountain* v. *HMTQ in Right of Canada* 2000 B.C.C.A. 260 at para. 5 ("*Barton IV*").

160 *Ibid.* at paras. 5-8.

> relates to the governance structure preceding the Treaty which, according to the plaintiff, has always been consensual amongst the Houses and , since European contact, consistent with the power of the Sovereign. The plaintiffs allege that the Treaty creates a coercive structure and places it in the control of the Nisga'a Tribal Council contrary to tradition.[161]

In Supreme Court, the judge rejected both arguments and called the second proposition "socially mischievous". [162] The Court of Appeal, in June 2002, upheld this decision and added two other observations. It concluded Barton et al's argument was a political, rather than legal, attack against the NTC. But, more interestingly, it concluded that if the group's concern about traditional indigenous law was so important, Barton et al should have presented this argument in its first court appearance. At any rate, concluded the Court of Appeal, "traditional governance" was irrelevant to constitutional discourse. How could Barton et al support the Canadian constitution in its first issue yet reject its legality in its second argument?[163]

---

161 *Chief Mountain v. HMTQ in Right of Canada*, 2002 B.C.C.A. 362 ("*Barton V*"), at para 3.

162 *Ibid.* at para. 5

163 *Ibid.* at para. 8. Justice Ian Donald did decide that this issue can be reopened as a challenge of a "third order of government," but he also refused Chief Mountain the right to have some struck-out paragraphs re-included in the upcoming action. He found that the argument of traditional governance, contained in the nineteen paragraphs, is irrelevant to examining constitutional questions and should have been argued much earlier to demonstrate relevance. All parties (including the Crown) did not oppose this challenge. See also *Barton V*, *Ibid.* at para. 6. As of 1 April 2003 no date had been set for a hearing.

2. Other Indigenous Responses: Gitanyow First Nation

Besides criticism about the NFA coming from within the Nisga'a community, opposition to the NFA also came from another indigenous nation. For various reasons, certain nations in British Columbia did not support the Nisga'as' actions. But only one group framed its opposition in a way which could be heard in a Canadian court. The Gitanyow First Nation had little in common with Barton et al's reasoning; public interest, good faith, a third order of government or traditionalism were not forwarded as reasons to stop the agreement.[164] But what this neighbour of the Nisga'a Nation, a culture less famous than the Nisga'a for either protesting the Crown or presenting constitutional arguments, claimed was that it could prove the first "overlap" in British Columbia's history.[165]

The Gitanyow Nation, with a population of approximately 660 people, is located in northwestern British Columbia and, more specifically, in the Nass Valley. Before and after European influence in the area, the Gitanyows' cultural understandings were (and are) defined by the region's own physical traits. [166] And when the BCTC was created, the Gitanyow Hereditary Chiefs ("GHC") decided that a modern treaty was the best way to protect the Gitanyow's connection to this area. In keeping with BCTC requirements, the group submitted both a map and a report explaining the Gitanyow Nation's cultural attachment to the Nass

---

164 See, for example, S. Terry, *supra* note 144.

165 Overlap issues have been forwarded in other venues. The Indian Claims Commission has yet to finalise arrangements about an overlap which was first discussed in 1993. See Indian Claims Commission, *Athabasca Denesuline Inquiry into the Claim of the Fond du Lac, Black Lake and Hatchet Lake First Nations* (Ottawa: Indian Claims Commission , 1993). For discussion about the Gitanyow's lack of negotiation experience compared to the Nisga'a, see A. Rose, *Spirit Dance at Meziadin* (Madeira Park, British Columbia: Harbour Publishing, 2000) at 205.

166 See Chapter Three in N. Sterritt et al, *Tribal Boundaries in the Nass Watershed* (Vancouver: UBC Press, 1998) at 59-97.

Valley. The commission accepted the application and began facilitating tripartite negotiations. On February 6, 1996 Canada, British Columbia and the GHC completed Stage Three and signed a Framework Agreement. [167]

But if another nation's chronology is recalled, Gitanyow-Crown talks were not the only negotiations occurring in early 1996. While the GHC Framework Agreement was signed, the governments and the NTC were finalising the details of the NFA's AIP. On 15 February 1996 this AIP was released to the general public. So just nine days after signing its own Framework Agreement, the GHC received confirmation of a potentially disastrous issue. The NFA's AIP detailed where the NFA would apply, and this description included eighty-four percent of the land described in the GHC's Framework Agreement.[168] In other words, if the NFA became law before the GHC's treaty was ratified, the GHC would lose most of its land claim. To the GHC, these facts described an overlap perfectly.

"Overlap" has a specific constitutive nature in Canada. If an indigenous nation contends an overlap exists, that group claims that the reinforcement of another nation's s.35(1) rights will detract from its own constitutional argument.[169] One nation's constitutionality, therefore, overrides the other group's legal existence. Envisaging overlaps occurred before the Gitanyow filed their claim.[170] As mentioned earlier, the BCTC predicted that overlaps would be such a

---

167 For a description of what was presented to the BCTC to describe how Nisga'a issues pertained to the Gitanyow's claim (thereby taking care of overlap issues on the part of the Gitanyow), see Sterritt et al, *ibid.* at 251-252.

168 See Government of British Columbia , Government of Canada and Nisga'a Tribal Council, "Nisga'a, British Columbia and Canada Release Historic Agreement-In-Principle" (press release) 15 February 1996. 5, 294 km2 of the Gitanyow's 6, 280 km2 claim lies within the Nass Watershed, and the entire Nass Watershed is included in the NFA. See also Rose, *supra* note 165 at 191.

169 N. Sterritt claims the NTC's *Lock, Stock and Barrel: Nisga'a Ownership Statement* (New Aiyansh, British Columbia: Nisga'a Tribal Council, 1995) is the first document to create an overlap intentionally. See N. Sterritt, "Competing Claims Ignored!" (1998/1999) 120 BC Studies 73 at 88.

170 For an extensive explanation see Sterritt, *ibid.* at 75-77 and 80-81.

difficult constitutional problem that the commission demands they must be rectified before any treaty receives commission approval.[171]

But recall that the Nisga'a Nation is not a BCTC nation. When the NTC started talking to Canada thirty years ago, it was not legally required to present information about other cultures' attachment to the Nass Valley. According to the NTC, this fact proved that the GHC did not deserve any sympathy. [172] Besides, countered the NTC, the GHC's opposition demonstrated the group could not read legislation properly. According to the NTC, specific sections to be included in the NFA could address any imaginable problem. The NTC claimed the following sections eliminate the development of an overlap:

> 33. Nothing in this Agreement affects, recognizes, or provides any rights under section 35 of the *Constitution Act, 1982* for any aboriginal people other than the Nisga'a Nation.
>
> 1. If a Supreme court of a province, the Federal Court of Canada, or the Supreme Court of Canada finally determines that any aboriginal people, other than the Nisga'a Nation, has rights under section 35 of the *Constitution Act,1982* that are adversely affected by a provision of this Agreement:
>
> a. the provision will operate and have effect to the extent that it does not adversely affect those rights; and
>
> b. if the provision cannot operate and have effect in a way that it does not adversely affect those rights, the Parties will make best efforts to amend this Agreement to remedy or replace the provision.
>
> 2. If Canada or British Columbia enters into a treaty or a land claims agreement, within the meaning of sections 25 and 35 of the *Constitution Act, 1982*, with another aboriginal people, and that treaty or land claims agreement adversely affects Nisga'a section 35 rights as set out in this Agreement:

171 In late 1994 the BCTC released a map which detailed how forty-two statements of intent creating overlapping claims taking up 111 percent of the province. BCTC, "Traditional Territories of British Columbia's First Nations", November 1994. British Columbia Treaty Commission, "Overlap Agreements a Must in Treaty Negotiations" (newsletter), October 1998.

172 Sterritt, *supra* note 169 at 95-96.

> a. Canada or British Columbia, or both, as the case may be, will provide the Nisga'a Nation with additional or replacement rights or other appropriate remedies;
> b. At the request of the Nisga'a Nation, the Parties will negotiate and attempt to reach agreement on the provision of those additional or replacement rights or other appropriate remedies; and the
> c. If the Parties are unable to reach agreement on the provision of additional or replacement rights or other appropriate remedies, the provision of those additional or replacement rights or remedies will be determined in accordance with Stage Three of the Dispute Resolution Chapter.[173]

If the GHC continued to be unassured even after examining this section, the NTC contended Chapter 11, "Relations With Individuals Who are Not Nisga'a Citizens", permits non-Nisga'a to participate in important decision-making. Since this chapter explains how the "Nisga'a Government will consult with individuals who are ordinarily resident within Nisga'a Lands and who are not Nisga'a citizens about Nisga'a Government decisions that directly and significantly affect them,"[174] the Gitanyow could still have a political and legal voice. But if this chapter , still, did not reassure the GHC, any Gitanyow could apply to be enrolled as an adherent to the NFA, which then qualified her/himself to gain all the rights enjoyed by the Nisga'a.[175]

These sections did not satisfy the GHC. The NTC had the capability to transfer land to the GHC, but that transfer was still at the Nisga'as' discretion. In addition, that transfer potential was not culturally sensitive; the Gitanyow could potentially lose out to another indigenous nation or even a non-indigenous person. In other words, the NFA did not contain any provision which priorised individuals or groups having a greater attachment to the Nass Valley. The Gitanyow's history in the Nass Valley was, according to the NFA, legally

---

173 NFA, c. 2.33.

174 *Ibid.*, c.11.19.

175 A person can join the Nisga'a Nation, but only if the person is not "enrolled' in another land claims process. *Ibid.*, c. 20.3.

irrelevant.[176]

While the GHC was obviously infuriated with the NTC, the GHC soon turned its frustration toward two other parties. Since both governments participated in every stage of BCTC negotiations, and both governments participated in every significant stage of NFA talks, British Columbia and Canada arguably had knowledge about both modern treaties. So it seemed to the GHC that the governments were at fault more than the NTC. The GHC examined the NFA's AIP, reevaluated its own BCTC claim and researched the legal nature of an overlap during 1996 and 1997. It then decided to withdraw from the commission, it filed notice in B.C. Supreme Court that it would be challenging the NFA's constitutionality, and the province's first overlap lawsuit began. [177]

The pleadings took the following form. The GHC argued that the Crowns violated their duty of good faith to the Gitanyow,[178] and these violations occurred because the GHC was not informed properly about the NFA's proposed details. [179] By noting how *Delgamuukw* instructed the Crowns to ensure "negotiations should also include Aboriginal nations which have a stake in the territory claimed",[180] the GHC claimed the governments decided that fiduciary duties could be priorised. Such a choice, argued the GHC, is not possible. The *Royal*

---

176 Sterritt et al, *supra* note 166 at 132-193. Tom Molloy writes that "No agreements have yet been reached with the Gitanyow and Gitskan...This is worrisome, to a degree, but there is nothing in the Final Agreement that would preclude other First Nations from negotiating harvesting or management rights in the Nass area." What is noticeable about this point, however, is that it does not include "land" or "occupancy" rights, which is the GHC's legal contention with the NFA. Molloy, *supra* note 128 at 192.

177 J. Lang, "Clark says Gitanyow claim could be satisfied at no cost to public- Legislature may reconvene to vote on Nisga'a Treaty"(18 November 2002) *Raven's Eye* (n.p.). The Gitanyow announced the treaty was an "act of aggression". Rose, *supra* note 165 at 202.

178 *Gitanyow First Nation v. Canada* [1998] 4 C.N.L.R. 47 ("*Gitanyow I*").

179 See Sterritt et al, *supra* note 166 at 7-11.

180 *Delgamuukw, supra* note 4 at 1123.

Proclamation obligated the Crown to consult with every First Nation, not just the Nisga'a. [181] And such consultation cannot conclude one nation's land claim at the cost of damaging another group's s.35 rights.

The Crowns' response was an evaluation of procedural matters. As explained earlier, BCTC regulations originally stated a nation cannot negotiate and litigate simultaneously about the same issues. The Crowns, therefore, contended the following point. While the GHC organised its court documents, it went to the BCTC and retrieved the paperwork used for its commission activities. The GHC then used this information to create its overlap argument. These steps, the governments argued, demonstrated that the GHC had an active negotiation role and active litigation role at the same time, so they violated a commission regulation. But besides this lawbreaking activity, the Crowns also contended GHC violated its own good faith to the governments. The Crowns presumed that the BCTC documents were confidential and would be inaccessible to any other party. In short, the GHC, not the Crowns, did not uphold its obligations.[182]

The Court did not receive this defence favourably. First, Justice Williamson concluded that all the information the GHC filed at the BCTC was either public knowledge or obtainable by other means. So not only was the information not a regulation violation, it was also not a breach of confidentiality. Besides, even if the information was confidential, the Crowns should remember that an administrative law violation was secondary to a constitutional question. Finally, the Crowns were reproached for their entire defence. Justice Williamson remarked that the Crowns participate in simultaneous litigation and negotiation all the time,

---

181 *Gitanyow I, supra* note 178 at 50.

182 *Ibid.* at 53.

and Courts are expected to make adjustments for this reality. Surely courts and Crowns could do the same for First Nations. While most of the GHC's application was struck, Justice Williamson granted an order which provided that the Crown "in undertaking to negotiate a treaty with the Gitanyow, is obliged to negotiate in good faith".[183] He concluded that *Delgamuukw* explained how a negotiation process is the preferred route "espoused by the Crown and encouraged by Chief Justice Lamer", but that the same case also demands that "Aboriginal title encompasses an *exclusive* right to the use and occupation of land" (Williamson's emphasis). [184]

A few months later, the GHC decided that the declaration was not enough. The Council reappeared in court and demanded a summary judgment on two matters. [185] First, it wanted the Court to find that the Crown must act in good faith to conclude (not merely negotiate) a treaty with the GHC. Second, the GHC demanded that the Court find the NFA's implementation a breach of fiduciary duty, a violation of treaty-making's "integrity", and contrary to "good faith" negotiating because it nullified the purpose of treaty-making. Unsurprisingly, British Columbia and Canada did not support these declarations. Each government replied that its own actions at the BCTC were "voluntary" and, as such, could not represent a fiduciary obligation. Additionally, the negotiations were of a political nature, also permitting the negotiations to escape judicial evaluation.[186]

---

183 *Ibid.* at 54.

184 *Ibid.* at 54, citing *Delgamuukw* supra note 4 at 1123. In *Gitanyow I*, Justice Williamson refused to distinguish between British Columbia and Canada. He surmised each Crown's actions were for and affected by the other and the "Crown is not and never has been divisible." Williamson at 75 using *B.C. v. Mount Currie Indian Band* [1991] 4 C.N.L.R. 4 at 36. To justify this stance, he reminded the parties of *Badger*'s instructions of analysing a circumstance in the way perceived by a First Nation, and he contended the GHC, in the end, would see no difference between the province and Canada. *R.* v. *Badger* [1996] 1 S.C.R. 771 at 798-800.

185 *Gitanyow First Nation v. Canada* [1999] 1 C.N.L.R. 66 ("*Gitanyow II*").

186 *Gitanyow First Nation v. Canada* [1999] 3 C.N.L.R. 89 at 92 and 103 ("*Gitanyow III*").

Justice Williamson approved the GHC's first request. He concluded treaty negotiations were, in accordance with *Nunavik v. Canada*, actions to be evaluated within the fiduciary duty realm. [187] Nor could either government avoid this duty if both were involved in NFA and GHC talks at the same time; both Crowns must be interpreted as one party. [188] Justice Williamson declared

> that the Crown in Right of Canada and the Crown in Right of British Columbia in undertaking to negotiate with the Gitanyow within the framework of the British Columbia treaty process and in proceeding with those negotiations are obliged to negotiate in good faith with the Gitanyow, and all representatives of the Crown in Right of Canada and the Crown in Right of British Columbia are bound by such duty.[189]

The second request, however, was refused. The Court held that this argument, requiring a determination of whether both Aboriginal rights and fiduciary obligations were jeopardised, necessitated a trial.

Unsurprisingly, both Crowns sought leave to appeal. And in the summer of 1999 the Court of Appeal agreed with the governments. Madam Justice Prowse disagreed so vigorously with Justice Williamson's perspective that she determined his decision was analogous to an interlocutory injunction, and she concluded the facts did not merit such a distinction.[190] As an interesting aside, she also observed that it seemed curious, considering that the only stage left for the NFA's approval at this time was Parliament's vote, that none of the parties seemed

---

187 *Nunavik v. Canada (Minister of Canadian Heritage)* [1998] 4 C.N.L.R. 68 (F.C.T.D.).

188 *Gitanyow III, supra* note 184 at 100-102.

189 *Ibid.* at 105.

190 *Luuxhon v. Canada*, 1999 B.C.C.A. 343, Docket CA 025806, CA 025808 (1 June 1999) at para. 5 ("*Gitanyow IV*"). Madam Justice Prowse does not give any jurisprudential justification, nor highlights of facts, for her conclusion.

eager to set a trial date. [191]

Less than a year later, the NFA was implemented. The GHC requested permission to amend its Statement of Claim reflecting this fact, and Justice Williamson approved the changes.[192] This approval is the last legal proceeding filed by the GHC about the NFA. After rejecting a variety of settlement offers from the Crowns, the GHC has returned to the BCTC. [193] Canada, British Columbia and the GHC are currently at Stage 4 of the commission's process. [194] As of 1 April 2003 the GHC is not pursuing its overlap claim.

4. Economic Lobbying: B.C. Fisheries

British Columbia's history of strong economic autonomy has affected many social issues in the province. So it should not be surprising that debates about the NFA also included economic analyses. While economic arguments are not impossible to present in Canadian courts, they must be translated into a constitutional tenet as economic rights are not explicitly stated in the

---

191 *Ibid.* at para 7. She stated " For reasons which were not entirely clear to me, it did not appear that counsel were anxious to proceed with an appeal that quickly. Whether this is because of ongoing discussions between the parties, or because counsel are not available in August, I do not know. Further, as earlier nod, no trial date has been set with respect to the Second Declaration and there does not appear to be any great urgency exhibited by the parties in setting that date."

192 *Luuxhon et al v. HMTQ et al and Nisga'a Nation* 2000 B.C.S.C. 1332 (26 Sept 2000) Docket C981165 (Vancouver) (*"Gitanyow V"*). Justice Williamson did not permit the GHC to reshape the argument as one of Aboriginal rights. He ruled the issue was a treaty, rather than title, matter.

193 "Nisga'a Neighbours Get $13 Million" CBC News, 30 November 1999 (09:43 PST); "Native Offer An Insult" CBC News, 30 November 1999 (12:37 PST); British Columbia Treaty Commission, "Treaty offer disappoints Gitanyow," "Updates," February 2000.

194 A formal settlement offer was made to the GHC in November 1999, but it was rejected because it did not include a way to create a treaty "partnership" in Gitanyow traditional territories. The territories at issue were part of the land described in the NFA. See British Columbia Treaty Commission, *Annual Report 2000- Status of Each Negotiation* at 2. In May 2001 Canada, British Columbia and GHC signed a Memorandum of Understanding permitting the Gitanyow to rehabilitate the Kitwanga River, train employees for this activity and commence water reconstruction. British Columbia Treaty Commission, *Annual Report 2001 : The Year in Review* at 9. In August 2002 the tripartite initialed several near-complete chapters of an AIP. A governance framework was also approved. British Columbia Treaty Commission, *Annual Report 2002: The Changing Landscape* at 7.

Constitution. The B.C. Fisheries Survival Coalition, the Area "C" Salmon Gillnet Association, Lawrence Greene, Phillip Eidsvik and John Cummins ("B.C. Fisheries ") provided such a translation. In late 1998, they decided the NFA's plans for Nisga'a fishing rights impaired the group's own economic existence, but they reformulated this complaint into an argument about culture. B.C. Fisheries contended the treaty gave distinctive economic privilege to the Nisga'a simply because they were Nisga'a.[195] The treaty's sections describing the Nisga'as' fishing opportunities violated B.C. Fisheries' equality right as guaranteed by s. 15 of the *Charter*. B.C. Fisheries, as well, claimed the NFA was "inconsistent" with the constitution as a whole.[196] In response, the two governments contended that the NFA's *Charter* adherence nullified both arguments.

As mentioned earlier, a multiplicity of opinions about the NFA's legality appeared at the end of 1998 and early 1999. In response to this interest, the Courts imposed a case management policy. All cases pertaining to the NFA were heard one after the other by the same judge. The judge assigned to these cases, as well, decided that one decision could explain his reaction to all arguments. B.C. Fisheries was one of these arguments. To that end Justice Williamson, the assigned judge, wrote in four paragraphs that the parties involved in this hearing should refer to another application's decision and that B.C. Fisheries' application was dismissed. B.C. Fisheries did not appeal this decision, nor did they launch any other challenges against the

---

195 *B.C. Fisheries Survival Coalition et al. v. Canada (Minister of Indian and Northern Affairs) and British Columbia(Minister of Aboriginal Affairs)*, 22 January 1999, Docket C985282 (B.C.S.C.) ("*B.C. Fisheries I*"). The Survival Coalition "has actively protested Indian fishing rights for years" and was aided by (then) Reform MP John Cummins in this challenge. Sanders, *supra* note 16 at 106. *Campbell 1*, *supra* note 180 at para. 11. D. Rinehart, "Forest Companies quietly Leery of Nisga'a Impacts" (23 March 1999) *Vancouver Sun* A13. D. Sanders claims "the fishing component of the agreement was, initially, the most controversial issue." Sanders, *supra* note 16 at 114.

196 *B.C. Fisheries I*, *ibid.* at para. 1.

NFA. [197]

5. Non-Aboriginal Lobbying: B.C. Citizens

The second coalition challenging the NFA, the B.C. Citizens First Society and Lloyd Brinson ("B.C. Citizens"), made the same claim as B.C. Fisheries, but they did so on a much grander scale. Not only did the agreement's cultural exclusivity violate the fishing industry's equality rights, but B.C. Citizens argued the NFA impacted every British Columbian's s.15 guarantee. In addition, the NFA was inconsistent with the entire constitution.[198] The remedy sought by the group represented the apparent damage of the agreement. B.C. Citizens demanded that the Court grant an injunction enjoining the Crown from transferring *any* assets to the Nisga'a Nation. Justice Williamson's reaction to this argument was a near replica of his response to the fisheries' lobby. In four paragraphs he dismissed this application and referred affected parties to his response for the third group. Just as did B.C. Fisheries, B.C. Citizens chose not to pursue the matter further. [199]

---

197 *Ibid.* at para. 3. Two months later Justice Williamson permitted the NTC to be added as a defendant, as the NTC argued successfully " the court must be cognizant of the fact that this is a case in which the remedy sought has wide reaching constitutional impact beyond the simple resolution of a dispute between parties. *B. C. Fisheries et al v. Canada et al* 23 March 1999 Docket C985282 (B.C.S.C.) at para 13 ("*B.C. Fisheries II*") .

198 *B.C. Citizens First Society and Lloyd Brinson v. A.G. British Columbia and A.G. Canada* , 22 January 1999, Docket A983229 (B.C.S.C.) ("*B.C. Citizens I*"). Brinson's concern, as a landowner in the Nass Valley, was taken up as an issue by the (then) Reform Party when the NFA was debated in the House of Commons. John Duncan, (then) Reform M.P. for Vancouver Island North remarked Brinson "lacks the bloodlines to qualify" for constitutional protection if the NFA was implemented. See 36th Parliament, 2nd Session, *Edited Hansard* , Number 33, Thursday December 2, 1999 at 1300.

199 *B.C. Citizens I, ibid.* at para. 4. As in *B.C. Fisheries I, supra* note 195, the NTC argued for, and won , the right to be added as a defendant in this matter. Justice Williamson concluded this application was ever more significant than the fisheries debate. See *B.C. Citizens First Society and Lloyd Brinson v. A. G. British Columbia and A.G. Canada*, 23 March 1999, Docket A983229 (B.C.S.C.) ("*B.C. Citizens II*").

6. Opposition from the Opposition: Campbell et al

Elected officials are obviously interested in how Canada's constitution functions. Some MLAs from British Columbia's legislature took this interest extremely seriously. Gordon Campbell, Michael de Jong and Geoffrey Plant ("Campbell et al"), all members of British Columbia's Official Opposition, and the third part of the triad arguing against the NFA, contended the agreement was inconsistent with the *Constitution*, it was inconsistent with ss. 91 and 92 thereby creating a "third order of government", it did not guarantee constitutional rights to non-Nisga'a, and it was a type of constitutional amendment necessitating a province-wide referendum before it could have legal authority.[200]

The Crowns responded that in order to determine a law's unconstitutionality, and in order to determine whether it interferes with Parliamentary procedure, the law must be implemented. By applying many cases from the Supreme Court of Canada, [201] particularly the *Secession Reference*, the Crowns contended "the very fact that the Court may be asked hypothetical questions in a reference, such as the constitutionality of proposed legislation, engages the

---

200 Sanders, *supra* note 16 at 120 fn. 80. *Campbell I, supra* note 157 at para. 2. This final argument is catered specifically to meet the requirements of the *Constitutional Amendment Approval Act*, R.S.B.C. 1996, c.67, which requires the government to have a referendum if an issue is perceived to amend current sections of the constitutions. (The Act is only one section long, and s. 1 states: "The government must not introduce a motion for a resolution of the Legislative Assembly authorizing an amendment to the Constitution of Canada unless a referendum has first been conducted under the *Referendum Act* with respect to the subject matter of that resolution."

201 *Campbell I, supra* note 157 at para 16; *Reference re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 at 785; *Reference re: Canada Assistance Plan (B.C.)* [1991] 2 S.C.R. 525 at 559.

Court in an exercise it would never entertain in the context of litigation."[202] The Crowns' use of jurisprudence contrasted remarkably with Campbell et al's strategy. While this group also mentioned Canadian law, it relied heavily upon *Rediffusion (Hong Kong) Ltd. v. Attorney General of Hong Kong*, [203] *Trethowan v. Pedan*[204] and *Edmonton Telephones Corp. v. Stephenson* [205] to justify its request that the NFA be terminated even before it started its legal life.

Justice Williamson's take on the matter was different than the arguments forwarded by any of the parties. Rather than determining the constitutionality of the NFA, Justice Williamson contended that he must establish whether he had the jurisdiction to even examine such an issue. By applying *Alcan Smelters and Chemicals Ltd. v. C.A.S.A.W. Local 1*, Justice Williamson found he did not have the necessary authority. He concluded that the argument, as presented, was beyond the Court's scope. In short, he had no choice but to dismiss the application.[206]

In response, Campbell et al re-framed its issues. Reappearing, unaccompanied by either B.C. Fisheries or B.C. Citizens, Campbell et al now contended a "pressing public interest" necessitated a trial to evaluate the NFA's constitutionality due to the "state of uncertainty which pervades these negotiations and creates an air of economic disquiet throughout British Columbia as long as this issue remains outstanding". [207] While this argument was different

---

202 *Campbell I, supra* note 158 at para. 18, citing *Secession Reference, supra* note 4 at 236.

203 *Campbell I, supra* note 158 at para. 19 citing [1970] A.C. 1136 (P.C.).

204 (1930) , 31 S.R. (N.S.W.) 183.

205 *Campbell I, supra* note 158 at para. 19, citing (1994) 24 Alta. L.R. (3d).

206 *Campbell 1, supra* note 158 at paras. 30-36 citing *Alcan Smelters and Chemicals Ltd. v. C.A.S.A.W. Local 1 (1977)*, 3 B.C.L.R. 163 (B.C.S.C.). Williamson also notes this case was "quoted with approval" by the Court of Appeal in *Can-Dive Services v. Pacific Coast Energy Corp.* (1993) 77 B.C.L.R. (2d) 128 (B.C.C.A.).

207 *Campbell et al v. B.C. et al*, A982738 (B.C.S.C.) ("*Campbell II*") at para. 7.

than the first appearance, the use of jurisprudence remained the same. In response, the Crowns' arguments were no different than before, either in logic or in case law. The governments maintained that the constitutive nature of a law cannot be determined unless and until the law is implemented.[208]

The Court, which continued to be Justice Williamson, reflected that this argument was a determination of "the independence of the legislative branch, and the need to resolve important identified constitutional issues as soon as possible." [209] He observed two facts which supported his dismissal of the application, and each fact was a clear challenge to Campbell et al's legal reasoning. First, the group's use of jurisprudence was impossible to justify. Not only was it not binding upon the Court, Justice Williamson concluded the group did not even interpret the cases correctly. [210] The group's poor courtroom presence was also noted in its use of the phrase "public interest". The Court stated that the public interest of a law, understood by noting the interplay of laws with a community's socio-economic functions, cannot be understood properly until a law is enforced. So how could Campbell et al even comprehend the public interest if the NFA was not yet implemented? Justice Williamson cushioned these criticisms, however, with a personal promise. By admitting that the NFA did interplay with constitutionalism, particularly in the form of the public interest, he concluded that a trial "should be set at the earliest possible date once the legislation has been enacted" and that he would personally "ensure that the court does what is reasonable to accommodate" an early date.[211]

---

208 McKee, *supra* note 2 at 100.

209 *Campbell II*, *supra* note 207 at para. 8.

210 *Ibid.* at paras. 19, 21, 23.

211 *Ibid.* at para. 33.

This decision was not appealed either. Instead, the group waited until the NFA was implemented, and they presented their argument in present tense. They contended the NFA reinforces a third order of government, violates Campbell et al's (and all British Columbians') *Charter* rights, and contradicts the entire *Constitution*'s purpose. This argument became a larger affair than previous appearances. Due to the main parties' presentations, and the accepted interveners' arguments, the hearing started on May 15, 2000 and lasted for two weeks. Justice Williamson, assigned to this hearing, concluded Campbell et al's legal opinions were incorrect again.[212]

To reach this conclusion, Justice Williamson observed two methodological problems. First, Campbell et al framed the entire legal issue incorrectly. The concern was not, as Campbell et al contended, an Aboriginal rights matter. The circumstances actually described a treaty rights situation. Furthermore, the group's use of case law was (again) questionable, if not completely erroneous.[213] But instead of dismissing the application based on these errors alone, Justice Williamson decided he would still examine the arguments regardless of their legal irrelevance. He concluded Campbell et al's claim of a third order of government claim was impossible to prove. When the NLG's municipal-like activities were compared to the more sweeping authority of ss. 91 and 92, the NFA could not supersede either the Crowns' rights or their duties. But Justice Williamson added that even if the NFA's functions are not appreciated correctly, the agreement's *Charter* adherence creates a "shield" to ensure any Nisga'a activities do not violate non-Nisga'a rights in the future.[214] Due to his obligation to enforce a "large

---

212 *Campbell et al v. AGBC/AG Cda & Nisga'a Nation et al* A982738 (B.C.S.C.) ("*Campbell III*").

213 *Ibid.* at para. 73.

214 *Ibid.* at para. 156. Notwithstanding *Corbiere, supra* note 10 at 248-9, Justice Williamson notes the lack of jurisprudence to determine this legal issue.

and liberal interpretation in favour of aboriginal peoples" [215] which is done by determining that the NFA demonstrates s.35(1) "as contemplated" by the *Constitution*'s composers, he contended his analysis also reinforced a purposive analysis of s.35(1). [216]

But Justice Williamson did not stop there. Not only did Justice Williamson write about what Campbell et al forwarded, he also wrote about what the group did not present. How did Campbell et al understand the Crown's fiduciary obligations? [217] Did the NFA protect a marginalised minority, which is explained in the *Secession Reference* as an important underlying constitutional value? [218] Finally, Campbell et al completely avoided discussing traditional indigeneity. Justice Williamson used the term "Aboriginal law" to describe when traditional indigenous legal norms also demonstrate a "limited right to self-government" thereby receiving constitutional protection. [219] A constitutional relationship such as the NFA could be created because "after assertion of sovereignty by the British Crown, and continuing to and after the time of Confederation, although the right of the aboriginal people to govern themselves was diminished, it was not extinguished." [220] If the right to self-governance was never completely eliminated, does it not follow that this right deserves constitutional protection?

This decision *was* appealed. But other events, rather than the Court's findings, stopped Campbell et al's legal argument. The provincial government called an election for May 16,

---

215 *Campbell III*, *supra* note 212 at para. 158, reaffirming *Sparrow*'s description that "it is crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake." *Sparrow*, *supra* note 67 at 1112.

216 *Campbell III*, *ibid.* at para. 185.

217 *Ibid.* at para. 81.

218 *Ibid.* at para. 142.

219 *Ibid.* at paras. 83-87 and 137.

220 *Ibid.* at para. 179.

2001. In a very convincing victory, the Liberal Official Opposition became the new government, and the individuals who made up Campbell et al became Premier, Minister of Natural Resources and Minister of Justice. Legally, Campbell et al's action suddenly became one of a party suing itself. While it remained unresolved whether a method existed for such a circumstance to continue, Campbell et al chose not to examine this legal question. It abandoned the appeal in August 2001.[221]

While the plaintiffs abandoned the suit, another group presented one more issue about Campbell et al's argument. The NTC decided that it, as a defendant, had legal bills which were not its responsibility. It argued that Campbell et al should pay the NTC's costs. [222] Campbell et al (now all government officials) responded that when they were Opposition MLAs, they acted for the "public interest", so the argument was in "good faith". Such an action, therefore, meant that each party must pay its own costs. [223]

But Justice Williamson disagreed with Campbell et al again. He held the group did not represent the public interest. Had the men really cared that the general public's opinion be considered, they should have observed how B.C. Fisheries, B.C. Citizens' and Barton et al presented all the arguments necessary to present this interest. Not only, then, were Campbell et al's efforts irrelevant, their arguments actually *impaired* judicial proceedings.[224] In addition, Campbell et al's arguments created an advantage that no other group could possibly experience. The group , after all,

---

221 The NFA provides that "No party will challenge, or support a challenge to, the validity of any provision of this Agreement" NFA, c.2, s.20.

222 *Campbell v. Attorney General (British Columbia)* 2001 B.C.S.C. 1400, A982738 ("*Campbell IV*"). Perhaps demonstrating the awkwardness of Campbell et al asking for costs, but now part of government, the AGBC did not appear on this matter.

223 *Ibid.* at para. 7.

224 *Ibid.* at para. 23.

> might have obtained a political benefit. They are not an organization which has as its object the taking of litigious initiatives to effect public policy. The principle forum in which they operate is that of the legislative assembly. Within that forum, they have a highly visible platform, ready access to the media, and legislative immunities which give them rights to raise issues and to challenge government initiatives in a manner denied other groups in society.[225]

On that note, the Court held that the (now) Premier, Minister of Natural Resources and Minister Justice were responsible for the legal costs incurred by the NTC.

225 *Ibid.* at para. 13.

IV. The Themes of Treaty-Making

What becomes apparent, so far, is that British Columbia is not a province of outstanding results when dispute resolution about land is attempted. The BCTC still may be supported by participating negotiators, but its failure to finalise a treaty has made it lose much of its cachet among First Nations and the general public. [226] The other example, the NFA, is a finalised treaty, but it also did not garner universal approval and it took nearly three decades to settle. This province demonstrates that results are rare and even when they do happen, they fail to escape what negotiations are supposed to avoid - litigation and delay.[227]

In this section, I devote the discussion to the recognition of predominant constitutive topics which appear throughout the previous two parts' demonstration of (essentially) poor treaty activities. When reflecting about the history of negotiations and how this history gets constitutional legitimacy, certain themes are regular in appearance and are, I argue, key in understanding why British Columbia's history has evolved as it has. These terms, however, must also be understood in their fullest form so that any use of them is properly recalled. To that end, this part is a sort of lexicon. Understanding these ideas' completeness does not necessarily demonstrate approval of their use, but what it does do is help consider the potential of how the term was (or can be) used.

226 For observations about this issue, see www.ubcic.bc.ca/welcome.htm. A clock shows details "how much time has passed without a ratified treaty".

227 Compare the differences in perspectives between Molloy, *supra* note 128 at 195 and J. Borrows, "Re-Living the Present: Title, Treaties,and the Trickster in British Columbia" (Winter 1998/99) B.C. Studies 99. For further commentary about the multilayered approach used by Borrows, see generally G. Vizenor *Manifest Manners* (Minneapolis: Hanover; London: Wesleyan University Press, 1994).

While explaining these ideas, two characteristics about the terms should be noted. First the notions appearing here are inexorably linked. While they have their own internal components, their roles are also defined by how the other terms function. While detailing one idea, another concept might appear in an explanation before it receives attention. This difficulty, while compositionally bothersome, is a trait of many legal tenets, particularly constitutional ones. They have an interconnectedness which means that their own inner mechanisms shift into other realms in order to help those ideas, and the larger constitution in its entirety, become fully understood.

Second, I have chosen a certain order for these ideas. The ideas which I perceive as the most prevalent appear first, while the concepts which are less publicly acknowledged appear at the end. This order, however, does not denote a decreasing order of influence. Instead, I argue that the obviously stated ideas are part and parcel of the less labeled concepts, but the unacknowledged ideas are, in fact, actually no less important. In other words, the concepts I describe at the beginning are necessary to understand first so that the final ideas are properly (and fully) developed. The last terms may actually be constitutively stronger as they are not dependent upon an acknowledged label for continuance. This necessity, of teasing out an idea from the evaluation of other concepts, does not mean that the notion is juridically weak. As the Supreme Court of Canada has noted, examining some constitutional norms may mean that other constitutional ideas are also exposed,[228] and these exposed ideas may be *more* influential than the obviously stated terms, as their existence and evolution is

---

[228] Regarding unwritten constitutional principles, see *Reference re Remuneration of Judges* [1997] 3 S.C.R. 3 at 63-64; *Secession Reference*: "the Constitution also "embraces" unwritten, as well as written rules" *supra* note 4 at 239. In *Reference Re: Manitoba Language Rights* [1985] 1 S.C.r. 721 at 752 the entire Court affirmed "the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada...it is the principle of the rule of law."

not reliant upon repeated recognition. [229]

In this study, I contend that constitutionalism, the duty to consult, oral history, sovereignty, Aboriginal law and inter-Aboriginal law all took certain shapes during British Columbia's history. Fully analysing their nature helps to describe why British Columbia's history evolved the way it did.

1. Constitutionalism

The most obviously debated issue was constitutional interpretation. Not only did groups contend certain sections deserved consideration, they debated *how* these sections should be understood and subsequently applied. Debating a constitution's function is not unexpected and is considered by many, including the Supreme Court, completely necessary.[230] In British Columbia, groups challenged the negotiations' topics and the product of these negotiations (the NFA) by considering treaties' contents, their process, a purposive interpretation of s.35(1), the influence of the "public interest," and the importance of the *Charter.*

a. process, content or both

Before groups even created a constitutional opinion, they decided whether their position was one about the treaty's contents, the treaty's formulation, or that both issues were of concern. Regarding a document's contents, this type of debate is less frequent at the BCTC, but the NFA underwent immediate and intense scrutiny on this matter. Particularly about how it was

229 See L. Sager, "Fair Measure: The Legal Status of Unenforced Constitutional Norms" (1978) 91 Harv. L.Rev. 1212 at 1214. See also B. Slattery in F. Cassidy, ed., *supra* note 105 at 113-132.

230 *Secession Reference*, *supra* note 4 at 258; Walker, *supra* note 10 at 324-325.

tantamount to a "third order of government" and a violation of non-Nisga'a *Charter* rights, the NFA's details were constantly tested for their constitutional validity. All arguments failed. By appreciating the NFA's practical application, courts found the NFA to mirror municipal, rather than federal or provincial, activities so it could not override either s.91 or s.92. Furthermore, courts concluded that the agreement could not invalidate any non-Nisga'a's *Charter* rights because the agreement enforced a full application of the *Charter*.

The process of treaties, however, was a more complicated matter. The BCTC and the courts were extremely concerned about process. Yet this concern is not fully articulated. Because the GHC withdrew from litigation, and its argument was the strongest presentation about process, it remains unclear what parties must do to ensure that a treaty's process demonstrates constitutionality. Here, considering the implications of *Delgamuukw*, *Haida I/II* and *Taku River* provide assistance. As major stake holders must be included in an Aboriginal title concern, and this inclusion is demonstrated through a duty to consult, it seems completely necessary that the early stages of a treaty's process be open to more parties than processes have been in the past. Particularly if a treaty is based on the assumption of exclusive use, as was the NFA, governments must be careful that they actually ensure that the use is, and will be, exclusive. As well, the negotiating nation should not be immune from investigating this matter as well. A treaty's contents may seem unchallengeable today if it is *Charter* bound, but the path to treaty-making must be more inclusive if it is to withstand constitutional evaluation.[231] A treaty's process, to be constitutional, must have a higher level of binding consultation with *actual* affected parties than the NFA demonstrated.

---

231 For comments about gaining Aboriginal peoples' respect if included in issues pertaining to Aboriginal rights, see J. Borrows, "Questioning Canada's Title to Land: The Rule of Law, Aboriginal Peoples and Colonialism," in Law Commission of Canada, *Speaking Truth to Power*, *supra* note 101 at 46.

b. having purpose

For modern treaty-making to be a constitutive notion, it must stem from a certain section of the *Constitution*. Treaties, by their very nature, should perpetuate the purpose of s.35(1). Historically, governments did not want s.35(1) included in the *Constitution*. When this section actually did become part of the document, the Crowns hoped it would become a way to limit, rather than create, indigenous rights. [232] The Supreme Court emphasizes a different perspective about the section's current role. The Court concludes that the section's purpose is to eliminate past injustices, demonstrate cooperation and flexibility between an indigenous nation and the Crown, and enforce all other constitutional norms.[233]

In British Columbia, every side argued that it alone demonstrated s. 35's purpose the best, but the courts found that the Crowns' activities represented the purpose most successfully. Making

232 While the government may not have liked the idea, Parliament in its entirety was actually supportive of the inclusion of Aboriginal rights. See House of Commons, *Report of the Special Committee on Indian Self-Government*, (Ottawa: Queens Printer, 1983) at 56: "The Committee recommends that the right of Indian peoples to self-government be explicitly stated and entrenched in the constitution of Canada." See also Assembly of First Nations, *Proposals for Amendments and Additions to the Constitution Act, 1982*, presented at the First Ministers Constitutional Conference on Aboriginal Rights, Ottawa, March 15, 1983.

233 In *Van der Peet* Lamer (then)C.J.C. determined s.35(1) was included in the *Constitution* to "bring about a reconciliation of the prior presence of Aboriginal societies to the (unquestioned) existence of Crown sovereignty." G. Christie, "Judicial Justification...", *supra* note 9 at 29, citing *Van der Peet*, *supra* note 71 at 538-539. Christie states: "reconciliation was originally conceptualized in *Sparrow* as a matter of working out a new relationship between federal power and federal duty (federal power was always, of course, present, while federal duties came into existence as a result of the fiduciary relationship the Crown historically entered vis-à-vis Aboriginal peoples)." Christie at 30, citing *Sparrow*, *supra* note 67 at 1119. In *Mitchell* v. *M.N.R.* [2001] 1 S.C.R. 911 ("*Mitchell*"), Binnie, J. wonders whether Mitchell's argument actually can "advance the objective of reconciliation of aboriginal peoples with Canadian sovereignty, which, as established by the *Van der Peet* trilogy, is the purpose that lies at the heart of s.35(1)(1)." *Mitchell* at 957. The benefit to indigenous peoples can be seen as a form of reparation, and interpreted as an unwritten purpose of the section. See *Secession Reference*, "the Constitution also embraces unwritten, as well as written rules." , *supra* note 4 at 32, quoting *Reference re Remuneration of Judges, supra* note 228 at 35. Cases have used N. Lyon's remarks that that "Section 35 calls for a just settlement for aboriginals peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown." "An Essay on Constitutional Interpretation" (1988) 26 Osgoode Hall L.J. 95 at 100. See *Sparrow*, *supra* note 67 at 1106; *Van der Peet*, *supra* note 71 at 628 and 637 (the final reference by (now) Chief Justice McLachlin). For the point of flexibility, see *Sparrow, supra* note 67 at 1093: "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time." For a general discussion see J. Borrows "Uncertain Citizens," *supra* note 8 at 32-37.

treaties, and making one such as the NFA, were examples of what s.35(1) can create. [234] Yet where purposive analysis is unclear is about about the interplay of a Nisga'a's own *Charter* rights with the implementation of s.35(1). As mentioned earlier, the *Charter* was considered a "shield" from future legal problems. Its purpose for the Nisga'a is yet to be explained. What if, for example, the application of a Nisga'a's *Charter* right is considered a proper purposive interpretation of that section, but such an application conflicts with the purpose of s.35(1)? It is difficult to imagine how this moment can be overcome if traditional definitions regarding *Charter* rights prevail. The friction caused by traditional *Charter* interpretations and a modern application of s.35(1) is not yet understood.[235] It is also unclear how a comprehensive claim's purpose can override another First Nation's purposive interpretation of its own s.35(1) rights. This area, of conflicting s.35 rights both within a nation and against other nations, needs further guidance from the courts.

c. the importance of the general public

"Public interest" was an oft-repeated phrase in courts and at the negotiating table.[236] The NFA's history demonstrates how parties concerned themselves with taking the public interest into

234 Hurley, *supra* note 120 at 14. K. Roach, in *Constitutional Remedies in Canada* (Aurora, Ont.: Canada Law Book, 1999) 15-3, states: "A purposive approach to remedies for aboriginal rights will recognise that both the history and future of aboriginal rights involve elements of self-determination." D. Sanders contended s.35(1) "reflects a broad consensus in Canadian thinking that the aboriginal people have been denied their rights and have legitimate claims against the Canadian state." See also D. Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983) 61 Can. Bar. Rev. 314 at 316.

235 G. Christie, "Aboriginal Citizenship: Sections 35, 25 and 15 of the *Constitution Act, 1982*," December, 2002 (on file with author) at 5-8.

236 Public interest discourse, while often evident in jurisprudence, is most common when political activities demonstrate an immediate effect upon legislative functions or a group is actively pursuing a new role in the legislature. Aboriginals' legal issues have undergone some public interest scrutiny before. This phrase has recently received attention when defining the limits of fiduciary duty. See *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746 at 773 for a discussion of the "public interest" versus the "Indian interest". For a general discussion about the interplay between legislative norms and personal roles in society see V. Held, *The Public Interest and Individual Interests* (New York: Basic Books, 1970).

account. Both Crowns encouraged the province's residents to voice their concerns at government-sponsored meetings. Each government also permitted a "free vote" when the NFA underwent "third reading" in the legislature and the House of Commons. It is unclear whether the fora or the free votes actually affected British Columbia's or Canada's opinions, but the point to understand here is that the Crowns felt a great need to create the image that the public interest mattered. During treaty-talks, the BCTC also imagines it has an important obligation to inform the general public of the commission's activities. [237] The judiciary have continued this trend. They chided NFA critics for using the term incorrectly, and they contended that non-Nisga'as' public interest benefitted from the application of the NFA. [238]

But when British Columbia's courts used the concept of "public interest" to enforce Aboriginal rights, this use demonstrated an uncomfortable fit with Supreme Court commentary. (Then) Chief Justice Dickson, in *Sparrow* (reaffirmed in *Van der Peet* and expanded in *Gladstone*), found the interplay of s.35(1) and the public interest disquieting. He remarked that the combination of these two concepts threatens s.35(1)'s purpose and the protective nature of fiduciary obligations.[239] This attitude continues in the *Secession Reference* . This 1998 case stipulates that protecting minorities and Aboriginals is a Canadian constitutive norm. In other words, when legislation is created to mitigate problems caused by the majority the public interest should not be of issue, particularly if the public disagrees with the legislation.[240]

One recent case dabbles in overlaps, fiduciary duty, purposive interpretation and the public

237 See the commission's web site at *supra* note 110.
238 *Chief Mountain v. H.M.T.Q.* , 2000 B.C.S.C. 659 at para. 12, citing *Metropolitan Stores, supra* note 155 at 149.
239 Dickson, (then) C.J.C. and Laforest, J., warned that the term was "too vague" to aid proper s. 35 interpretation. *Sparrow, supra* note 67 at 1079.
240 *Secession Reference, supra* note 4 at 261-263.

interest. In *Paul v. Canada* the Federal Court (Trial Division) held that a Métis community's overlap claim, which names the Dogrib First Nation as a third party, was invalid because

> the public interest largely favours the defendants (the Crown and the Dogrib). The plaintiffs seek to enjoin the continuation of a land claims process which itself is in the public interest because it is a process- a mechanism for the reconciliation of Aboriginal peoples into Canadian society.[241]

But for the Court to justify the connection of the public interest to s.35(1), it demonstrated a questionable application of *Delgamuukw*.[242] By simply deciding that a stalled negotiation process is not in the best interest of the general public, the Court failed to acknowledge the potential damage to the Métis' s.35(1) rights, and it did not integrate the Supreme Court of Canada's instructions about including affected parties in negotiations. Furthermore, this decision means that the Metis' rights, and the inclusion of affected parties in negotiations, are *not* in the public interest, which is another dubious assumption.

What *Paul* demonstrates, and what makes the public interest troubling, is that it conflicts with s.35(1)'s purpose when a standard idea of the public interest is used. It creates a majority-minority binary, it elongates treaty-making due to events invented to present the public opinions, and it encourages litigation. [243] Public interest, in its current form, needs to be constrained in order for other s.35 norms to be enforced. It only works properly in early stages

---

241 *Paul v. Canada* (2002) FCT 615 at para. 164 (F.C.T.D.).

242 *Ibid.* citing *Delgamuukw, supra* note 4 at 1125.

243 G. Christie, "Judicial Justification of Recent Developments in Aboriginal Law" (2002) 17(2) *Can. J. of Law and Soc.* 41 at 69.

when used as a way which enforces Crowns' fiduciary duties. [244] If the public interest can be defined as "affected" rather than "any" parties, it might have a place in treaty-making because it cannot help ensure that the duty to consult is properly enforced. But courts must be careful not to permit this concept to challenge governments' responsibilities to Aboriginal peoples.

d. *Charter* attitudes and *Charter* practice

Few observers conclude that indigenous nations were, historically, treated fairly by the Canadian legal system. In response to this perspective, treaty-making is often considered a means to mitigate damages experienced by indigenous peoples. Because of this consideration, a certain vocabulary is readily apparent in treaty talks. Ideas such as "injustice", "inequity", and "unequal" are used to describe pre-resolution relationships. In comparison, promises of "fairness", "retribution", "equality" and "reconciliation" often appear when forms of resolution are proposed. [245] These words, in Canadian constitutional law, are often considered part and parcel of *Charter* discourse.

Many examples appeared in this study. The 1969 White Paper stated "to be an Indian must be to be free- free to develop Indian cultures in an environment of legal, social and economic equality with other Canadians". [246] Throughout the 1990s the Gitanyow wondered why the Crown

---

244 P. Macklem writes "British Columbia, by establishing a process designed to reach binding agreements with Aboriginal nations, has assumed wide discretion to pursue policies that seek to balance the interests of Aboriginal nations with those of third parties and the public. Fiduciary law ought to ensure that Aboriginal interests are not unduly compromised by negotiating tactics employed by provincial negotiators to achieve such a balance." Macklem, *Indigenous Difference*, *supra* note 9 at 277-278.

245 For discussion from indigenous sources regarding the appropriateness of using equality, see C. Cornelius, "The Thanksgiving Address " (1992) 9:3 *Akwe:kon Journal* 14; H. Cardinal and W. Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is that Our Peoples will One Day Be Recognized as Nations* (Calgary: University of Calgary Press, 2000). See also commentary in *Corbiere*, *supra* note 10 at 249 and Morse, *supra* note 15 at 75.

246 White Paper, *supra* note 60 at 3.

thought it could unfairly priorise the Nisga'a's claim above the Gitanyow's arrangement at the BCTC. [247] The Union of B.C. Indian Chiefs, similar to the GHC, claimed the NFA created inequality among nations. [248] Phil Fontaine's opinion of the NFA describes how the agreement permits the Nisga'a to legally 'catch up' with other treatied First Nations. [249] The BCTC is constantly attempting to alleviate differences among negotiating parties and among different nations. Case law also confirms a concern that inequality is replaced by the equalising possibilities of modern treaties. Barton et al argued for "equity" to be protected. [250] Lamer, C. J.C's concerns of a 'morality' in *Delgamuukw* suggest that an immorality, or unfairness, existed before this decision was rendered.[251] Even as recently as February 11, 2003, British Columbia's Lieutenant Governor Iona Campagnolo stated in her Speech from the Throne that "years of paternalistic policies that fostered inequity..." can be replaced by "workable, affordable treaties that will provide certainty, finality and equality." [252] In short, many notions of personal improvement are part of land dispute resolution, the most obvious notion being a search for equality.

But whether the *Charter* was cited as the source for this search was another matter. When proponents of the current forms of treaty-making mentioned the Nisga'as' roles, s.35(1) was heavily emphasised. This fact is curious, as the Nisga'a actually become *Charter*-ed simultaneously to becoming treatied. Conversely, the word "*Charter*" is used repeatedly when parties explained non-Nisga'a roles. The *Charter*, when mentioned by governments and courts,

---

247 Sterritt et al., *supra* note 166 at 3-4.

248 Terry, *supra* note 144.

249 Assembly of First Nations, *supra* note 144.

250 *Barton III*, *supra* note 151 at para. 12.

251 *Delgamuukw*, *supra* note 4 at 1068 citing *Kruger v. the Queen* [1978] 1 S.C.R. 104 at 109 and 123.

252 The Honourable I. Campagnolo, "Speech from the Throne for the Opening of the Fourth Session, Thirty-Seventh Parliament of the Province of British Columbia, February 11, 2003" at 16 and 17.

ensures that s.35(1) will not get out of constitutional control instead of being referenced as a way to create individual rights for the Nisga'a. In other words, the NFA seems to invoke the *Charter* more than s.35(1), as the document explains how s.35(1) must adhere to the *Charter*.

A reason for this imbalance in how exactly the Nisga'a are supposed to demonstrate group and individual rights, I think, is due to a presumption about what equality can mean. If a strict notion of equality is continued, one that presents the dichotomy of "formal" versus "substantive" understandings of *Charter* rights, it seems difficult to imagine how this juridical relationship can be explained. So the governments, and the NTC, rarely expanded upon this difficulty. Here, however, I argue that what could help alleviate this trouble is to consider a fuller notion of equality, one which includes how indigenous nations understand that the *Charter*, as a document, is just as much about redressing past injustices as s.35(1) represents. In other words, guaranteeing equality for an indigenous person means enforcing ideas of equity. [253] Perhaps an indigenous person's *Charter* right as enforced by s.35(1) and a non-treatied person's *Charter* right could coexist more easily when indigenous, rather than liberal originating, perspectives are

[253] The Supreme Court of Canada sees fiduciary relationships as reinforcements of equity. The Crowns, it then follows, demonstrate a principle of equity when they demonstrate their fiduciary duty to indigenous peoples. See *Lac Minerals v. International Corona Resources* [1989] 2 S.C.R. 574 at 595-600.

applied. [254] Such an application seems constitutionally justified in order to ensure s.35(1)'s purpose. The Crown, as well, is not incapable of supporting such an expansion. [255]

This concern of reconciling individualist notions with group rights, however, may end up being a red herring. If stake holders are included in the early stages of treaty-making, the chances that they will protest treaties in the future should decrease. If fiduciary duties are considered right away, proper inclusion lessens *Charter* dependence later on and "public interest" ideas are less needed. *Delgamuukw* instructs treaty-makers to include parties in this manner.[256]

Debating the topic of constitutionalism will always occur in treaty-making. The discourse most difficult to articulate is the relationship between the *Charter* and s.35(1), and the NFA intensifies this difficulty. Determining how the individualistic concepts correlate with group rights is a

---

254 J. Tully contends a sovereign people's constitution is based on equality, not equity. *Strange Multiplicity: Constitutionalism in An Age of Diversity* (Cambridge: Cambridge University Press, 1995) at 66. Where Tully's perspective needs to be tested is when a treaty, perceived by an indigenous nation and the Crowns as an exemplification of the *Constitution*, has internal mechanisms which, in fact, create equity rather than equality. Compare Tully's opinion to P. Macklem's belief that each negotiated agreement, as an extension of the constitution, should have a separate "appropriateness of criteria" when devising what equality might mean. P. Macklem, *Indigenous Difference*, *supra* note 9 at 31. G. Christie contends the demand that a non-indigenous term, such as equality, keep to a non-indigenous definition, such as disallowing equality to take the form of equity, simply continues the imposition of legal systems which negotiations are attempting to escape. The point here is that equality is not unusable by indigenous nations, but the term's scope must be a choice of Aboriginals as well. See G. Christie, "Aboriginal Rights, Aboriginal Culture, and Protection" (1998) 36 Osgoode Hall L.J. 447 at 467. The limitations of an invented concept of equality and its imposition upon other groups has faced scrutiny elsewhere. See the Women's Legal Education and Action Fund *Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada* (Toronto: Emond Montgomery, 1996) at xv-xxvi. For discussion how policies based on equitable notions can demonstrate s.15 equality in the context of Aboriginal citizenship issues, and how this area has received "scant attention" from both constitutional scholars and the judiciary, see G. Christie, "Aboriginal Citizenship...," *supra* note 235 at 13-15. See also generally Cardinal and Hildebrandt, *supra note* 245 for ways in which equality is demonstrated in indigenous communities. As well, (Then) Justice McLachlin wrote for the majority in *Reference re Provincial Boundaries(Saskatchewan)* that "the doctrine of the constitution as a living tree mandates that narrow technical approaches are to be eschewed: Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357, at p. 366. It also suggests that the past plays a critical but non-exclusive role in determining the content of the rights and freedoms granted by the Charter. The tree is rooted in past and present institutions, but must be capable of growth to meet the future." [1991] 2 S.C.R. 158 at 180. For comments about the traditional use of equality discourse, see Borrows, *Recovering Canada*, *supra* note 71 at 103.

255 The Crown is already comfortable with different understandings of equality. See generally Christie, *supra* note 235. See also generally Canada, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Ministry of Supply and Services, 1995).

256 *Delgamuukw*, *supra* note 4 at 1123.

square even the Supreme Court finds difficult to circle.[257] Yet what is clear is that much of this problem seems attributable to *historic* understandings of the *Constitution* and the *Charter*. When treaty-makers demonstrated flexibility about ideas, negotiations proved less difficult. Conversely, when parties argued for strict application of terms, tensions increased. A balance is found between the *Constitution* and equality when negotiations are seen as a way to permit indigenous nations to 'catch-up' with the rest of Canada. All parties, and the courts, need to acknowledge that such a *Charter* understanding is necessary to permit modern treaties' constitutionality. [258] Simply put, treaty-making does not permit static notions of *Charter* rights to continue.

2. Duty to Consult

Another norm affecting treaty discussions was the "duty to consult". This term is an extension of the fiduciary duty created by the *Royal Proclamation*. Although it is one of the oldest legal notions in Canada's history, the Crown's fiduciary obligation to indigenous peoples has experienced little legal explanation, and this shortage of information has become even more obvious since s.35(1) was introduced.[259] One way which the courts have articulated this idea is

257 *Charter* arguments have been used by Aboriginals as individuals. See *Corbiere*, *supra* note 10 at 249, where L'Heureux-Dubé, J. discusses for the majority the balance between individual equality and other issues pertaining to Aboriginal peoples: "The contextual approach to s.35(1) requires that the equality analysis of provisions relating to Aboriginal people must always proceed with consideration of and respect for Aboriginal heritage and distinctiveness, recognition of Aboriginal and treaty rights, and with emphasis on the importance for Aboriginal Canadians of their value and history." For commentary about the difficulties such rights balancing creates, see A. Hutchinson, Waiting for CORAF: A Critique of Law and Rights (Toronto: University of Toronto Press,1995) at 48. Charter discourse has not escaped scrutiny about its interplay with Aboriginal issues. If the Charlottetown Accord had passed, the Charter would have applied to any current and future forms of Aboriginal governments. See K. McNeil, "Aboriginal Governments and the *Canadian Charter of Rights and Freedoms*" (1996) 34 Osgoode Hall. L.J. 61 at 62. For commentary about how equality discourse has already affected the analysis of group rights, see Walker, *supra* note 10 at 341.

258 Christie, "Aboriginal Citizenship...," *supra* note 235 at 5-12. For comments about equality as an "organizing principle" which goes past a historic application of "equality", see Macklem, *Indigenous Difference*, *supra* note 9 at 28-33.

259 P. Macklem, "Aboriginal Rights, State Obligations" (1997) 36 Alta. L. Rev. 97 at 111-113. Laforest, J. stated in *LAC Minerals*, *supra* note 253 at 643 that "there are few concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship."

by determining that the Crowns must inform any nation about upcoming Crown activities if those activities might impair that nation's potential s.35(1) rights. [260] This obligation to inform is called the "duty to consult". [261]

It should be no surprise that the GHC used this duty for their litigation strategy because the term suits their situation perfectly. The nation explained how the NFA's evolution impacted the GHC's claim at the BCTC. Although the NFA's early stages happened before the duty to consult was understood by courts, the NFA's later stages certainly conflicted with this idea. This conflict's importance was emphasised in *Delgamuukw*'s discussion about stake holders. [262] While this case, and others, explain when the trigger for the duty happens, [263] the duty's actual nature is less understood.[264]

This indefinite state, however, will not likely last for long. Two cases mentioned already, *Taku River* and *Haida I/II*, discuss triggered duties, damage to s.35(1) claims, and the role of corporate activities approved by governments. [265] Both cases have made their way through British Columbia's court system, and the Supreme Court of Canada has granted leave to appeal in both decisions.

---

260 See generally S. Lawrence and P. Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000) 79 Can. Bar. Rev. 252.

261 Recently, a case has determined that the duty to consult is an obligation to "negotiate" rather than simply inform. See *Bob, Sam et al v. HMTQ et al*, 2002 B.C.S.C. 733, L021077, citing *Taku River , supra* note 116 at para. 36.

262 *Delgamuukw*, *supra* note 4 at 1123.

263 *Halfway River First Nation* v. *B.C.* [1997] 4 C.N.L.R. 45 (B.C.S.C.) at 71 citing *R.* v. *Jack* 16 B.C.L.R. (3d) 201 (C.A.).

264 P. Macklem, "The Theoretical Framework of the Duty to Consult" in Canadian Bar Association-Ontario, *First Nations, the Environment and Development: The Emergence of Duty to Consult* (Toronto: CBAO, 29 January 1999) at 12 and 13-15.

265 The importance of third parties has been considered for some time. See generally F. Cassidy, et al. *Third Party Interests and Comprehensive Claims Settlements in British Columbia* (Victoria: Institute for Research on Public Policy, 1990).

In *Taku River*, a company wanted to reopen one of its mines located in British Columbia's northwest corner. To build the mine, the company needed a road. To build the road, the company needed a certificate. The province issued a certificate, the company commenced road construction, and Taku River Tlingit First Nation ("Taku River") took exception to this entire process. Taku River went to court and argued that the road construction occurred in an area which is part of the nation's land claim. To that end, the government had a duty to tell the nation about the certificate issuance. But Taku River's argument went well beyond describing Crown activities. The nation also contended that the company's activities should also be taken into question. The Supreme Court agreed with Taku River, [266] as did the Court of Appeal. The Appeal Court used two observations to defend its conclusion. First, it maintained that even if a nation knows about a company's proposed actions, this information does not decrease a company's responsibility. [267] The second point is particularly intriguing because it, when considered fully, permits the judiciary to remark about an Aboriginal right not argued in a case. The Court held that if a judge notes that the duty to consult exists in a circumstance presented in court, but no party in this respective hearing acknowledges the duty, the respective judge ruling on this case may need to consider this obligation anyway. Because a failed duty to consult can "result in a serious injustice" to an indigenous nation, the court must act expeditiously to bring such a matter to the attention of all parties concerned. [268]

Similar circumstances are examined in *Haida I* and *Haida II*. [269] Here, a company (Weyerhaeuser) received a license to log in an area located on the Queen Charlotte Islands which the Haida

---

266 (2000) 7 B.C.L.R. (3rd) 310.

267 These negotiations were reinforced by the *Environmental Assessment Act*, R.S.B.C. 1996, c. 119. See *ibid.* para. 201, citing *Delgamuukw, supra* note 4 at 1112-1113.

268 *Supra* note 271 at para. 195-198.

269 The lower court decision of *Haida I, supra* note 115 and *Haida II, supra* note 115 is *Council of the Haida Nation et al v. Minister of Forests et al*, 2000 B.C.S.C. 1280 SC 3394 (*Haida Nation*").

consider part of its land claim. In Court, the Haida argued that both the province and the company knew the logged land in question was part of the Haida's s.35(1) argument. Their knowledge, therefore, triggered a duty to tell the Haida about this permit. And since *both* parties had the knowledge, they were both at fault. Halfyard, J. concluded that the company and the Crown had indeed violated a "moral" duty,[270] but the Haidas' application was nonetheless dismissed because no "legal" duty was apparent to the Court. [271]

But when the Haida appealed, the Court of Appeal agreed with them. It found the province knew of the land claim for at least eight years,[272] the land claim has a "reasonable probability" of legal success, and the logging was a *prima facie* breach of fiduciary duty.[273] The duty was triggered when the Crown learned of the land claim, and the company intentionally worsened this violation by its logging.[274]

In August, 2002 the Court released a second Reasons for Judgment (*"Haida II"*) and explained how Weyerhaeuser became a third party and subsequently actions violated the duty. Because the company had "knowing receipt"[275] of the logging's potential effects upon the land claim, this fact changed the company from an non-responsible party to a "constructive trustee and, in that capacity, owes a trust or a fiduciary duty to the original beneficiary of the original fiduciary

---

270 On this point, the decision steers away from instructive description in *Delgamuukw*, where (then) Chief Justice Lamer explains how moral issues are part of Aboriginal title legal discourse. *Haida Nation*, *ibid.* citing *Delgamuukw*, *supra* note 4 at 1164.

271 *Supra* note 269 at para. 64.

272 *Haida I*, *supra* note 115 at para. 22 .

273 *Ibid.* at paras. 47-50.

274 *Ibid.* at para. 45, citing para. 120 of *Trans Canada Pipelines Ltd. v. Beardmore (Township)* (2000) 186 D.L.R. (4th) 403 and referencing S. Lawrence and P. Macklem, *supra* note 259 at 255.

275 "Knowing receipt" is often attributed to *Gold v. Rosenberg* [1997] 3 S.C.R. 767 at 784.

obligation." [276] Lambert, J. explained how the Supreme Court of Canada notes that a duty extends "where other persons who were not in a fiduciary relationship with the claimant acted in concert with the fiduciary or knew of the fiduciary obligations." [277] Particularly because "the Crown provincial no longer has day to day control of activities" creating the damage, "Weyerhaeuser owes obligations of consultation to the Haida people." [278] Since the company and the Crown have

> legally enforceable duties to the Haida people to consult with them in good faith and to endeavour to seek workable accommodations between the aboriginal interests of the Haida people, on the one hand, and the short-term and the long-term objectives of the Crown and Weyerhaeuser to manage T.F.L. 39 and Block 6 in accordance with the public interest, both aboriginal and non-aboriginal, on the other hand. [279]

Both the Crown and Weyerhaeuser were granted leave to appeal by the Supreme Court of Canada.

Should *Taku River* and *Haida I/II* be upheld, determining the nature of the duty to consult, and the parties responsible for that nature, will be a more expansive affair. At minimum, corporations' activities, if these activities occur on land an indigenous nation claims Aboriginal title to, will face serious scrutiny. But if the Court considers the purpose of the duty to consult, and the purpose of s.35(1), it seems implausible to reinforce such a narrow interpretation. In other words, *any* third party which damages a claim's potential should be responsible for the effect of that damage. Consider the BCTC's interpretations of these cases as one way to

---

276 *Haida II*, *supra* note 115 at para. 65.

277 *Ibid. at* para. 66, citing *Hunter Engineering v. Southam* [1989] 1 S.C.R. 426 at 471. He notes the continuation of this perspective by Iacobucci, J. in *Air Canada v. M & L Travel Ltd.* [1993] 3 S.C.R. 787 at *ibid.* at para. 67.

278 *Supra* note 274 at para. 93.

279 *Ibid.* at para. 104.

understand what form a third party can take. The commission uses these cases as justification to continue its concerns with overlaps. The BCTC interprets other nations, and even the commission, as potential impingers upon a fiduciary duty. Third parties' activities, if the third parties knowingly reinforce the violated duty by acting in ways approved by the Crown, are as responsible as the government, regardless of the parties' nature (or culture). [280] *Taku River* and *Haida I/II* provide a moment for the Supreme Court of Canada to remind the entire country of the *Royal Proclamation*'s purpose. Any party, if it acts based on approval from government policies or laws, should face serious examination if its actions impact how an indigenous nation frames its own s.35(1) arguments.

3. Oral History

In the second part I described how oral history is a new and nebulous part of s.35(1) discourse. [281] Chief Justice Lamer invited Aboriginal societies to use oral sources, and this invitation demonstrated his belief that indigenous peoples document their histories in a unique manner. His reflection is laudable but, as the term has yet to be significantly re-explored by the Court, its meaning remains very open-ended. This lack of definitive explanation from the highest judiciary can make the term's significance difficult to surmise. [282]

---

280 Robert Edwards states: "A hallmark of the fiduciary relationship is its adaptability to differing circumstances." See F. Cassidy, ed., *supra note* 105 at 35.

281 Before *Delgamuukw* was rendered, oral history was also acknowledged in *Paulette et al. v. R.* 72 D.L.R. (3d) 61. This case, however, also did not delineate the nature of the term.

282 It is probable that many opinions, as has happened with the understanding of Aboriginal title, will surface regarding how oral history should be collected and interpreted. See, for example, L. Roness and K. McNeil, "Legalizing Oral History: Proving Aboriginal Title in Canadian Courts" (2000) 39:3 Journal of the West 66. For commentary about oral history in treaty cases, see *R. v. Badger* , *supra* note 184 at 798-799. For an example of an argument for a criminal acquittal based on oral testimony, see *R. v. Catarat* . S.P.C. 26 August 1998, P.C. 98004.

Keeping this in mind, understanding how treaty-making used oral history means looking less at court cases and more at negotiations. When this is done, oral history's full nature is easier to observe. Consider the mapmaking necessary for comprehensive claims and early BCTC talks. These visual aids, based upon community members' perspectives, are created from spoken information so "exclusive" or "shared" use explanations therefore rely upon oral history. Oral history is also used to confirm modern arrangements. Stage 2 at the BCTC has oral assurances, not written documentation, demonstrate agreement and a commitment to future responsibilities. [283] When *Delgamuukw* was rendered in 1997 it simply reinforced the point that oral history can be used to explain Aboriginal title. What treaty talks prove, however, is that the Crowns will take one perspective about oral history at the negotiating table and have another opinion in the courtroom.[284]

But while little litigation contains significant analysis of oral history, oral history was not completely absent from court cases. Its influence is seen not by looking for debates regarding its use. Rather, it is observed by noting when oral history was not questioned at all. Barton et al's recollection of a meeting, which included perceptions of others' feelings of exclusion (arguably hearsay) was not rejected because it was oral. The argument was dismissed, instead, because the evidence did not prove the legal argument Barton et al argued. The GHC's court application also proves this point. It was created largely from documents taken from the BCTC. As mentioned earlier, these commission documents are a creation of (mainly) oral sources. Rather than weighing the value of this information, Justice Williamson simply integrated it into his judicial analysis. In short, oral evidence value was taken *at par* with other forms of evidence collection.

283 For discussion about the important of oral assurances from an indigenous perspective, see generally Cardinal and Hildebrandt, *supra* note 245.

284 For an explanation of British Columbia's reaction to oral history during trial litigation, particularly the opinion of (then) Crown Counsel Geoff Plant, see Monet and Skanu'u, *supra* note 51 at 176-177.

So far, treaty-making shows a great dependency on, and support of, oral history's use. This support is evident by examining First Nations', courts', and even governments', actions. But oral history is obviously still considered unique because it automatically challenges notions which are part of standard evidentiary procedure. These challenges have sparked many criticisms about oral history's validity, and these concerns should be given serious attention.

First, the bias of an oral history presenter is noted. Is that person's story-telling impartial? [285] If a witness remembers the information differently over time, should it be assigned the same weight as a written document? How can the court and commissioners, furthermore, feel assured that the person is in fact an expert, as few others are able to confirm this status due to cultural and linguistic barriers? Additionally, as it is likely that the presenter has close ties with the indigenous community asserting Aboriginal title, is it also likely that the witness will support a certain agenda even before he or she testifies? [286]

Second, the entire process of gathering and presenting oral history challenges the administration of justice. Because it differs from well-established evidentiary techniques and overall courtroom procedures, oral history's inclusion impacts other stages of both negotiations and litigation. A

285 For information about reorganising oral evidence, see generally L. Murray and K. Rice, eds. *Talking on the Page: Editing Aboriginal Oral Texts* (Toronto: University of Toronto Press, 1999) and B. Gover and Macaulay, " 'Snow Houses Leave No Ruins'" (1996) 60 Sask. L. Rev. 67.

286 The claim, articulated by one observer as considering oral history akin to the child's game of "telephone," argues that a a watered down version of the history will be presented, and the presenter will also likely integrate a specific goal into the presentation. J. Borrows, "Listening for a Change: The Courts and Oral Tradition" (2001) 39(1) Osgoode Hall L.J. 1 at 7 and 9. Two ways which oral evidence can be disallowed is through the use of the "hearsay rule" and the "best evidence rule". The hearsay rule does not permit out of court statements to be used as support for a legal position, and the best evidence rule allows written documentation to override oral testimony. See A. Keane, *The Modern Law of Evidence* (London: Butterworths, 1989) at 8 and 20. Legal counsel in the trial level of *Delgamuukw, supra* note 78 attempted to avoid the hearsay rule by arguing for the "reputation exception", which is the argument that the reputation of the sources is more substantial than the conflicting opinions. Chief Justice McEachern did not accept this argument . *Delgamuukw, supra* note 78 at 438, 440, 441. In response to this evaluation, Lamer, (then) C.J.C. noted he was "concerned by the specific reasons the trial judge gave for refusing to apply the reputation exception." *Delgamuukw supra* note 4 at 1077.

case may need to be relocated, a courtroom might need to be physically changed to integrate the evidence, and the entire proceedings could be delayed due to all of these changes. As more changes happen, more situations affect parties' evaluative skills and more subjectivity happens.[287]

Finally, the pressure on the witnesses presenting oral history is immense. Because, arguably, of the high legal stakes in a land issue as it impacts a nation's cultural, economic and legal status, the stress placed upon the witnesses should not be underrated. As most witnesses would be older community members, they might not speak English or French as their first language, and they might travel less than other community members, the courtroom atmosphere could seem incredibly daunting. Moreover, they might struggle with whether testifying in court reflects a rejection of indigenous legal norms and a promotion of Canadian legal values which are the source of the land issue. Due to differences in cultural norms, the rejection of the oral history by the courts could also be taken as a rejection of the presenter's authority and cultural integrity. All of these factors may make the presented feel marginalised and invalidated rather than experiencing a sense of importance and worth. [288]

These concerns, as I stated earlier, should be seriously appraised. The first criticism, regarding the subjectivity of witnesses using oral history, is a commonly-forwarded concern. The presenters' memories, their capacity to be evaluated as an expert, and their agenda-setting are serious matters. But for this criticism to have legitimacy as a reason to omit oral history, it must not be a principle that can apply to other court circumstances. When applied to other witnesses,

---

287 "T.A.R.R. Interview with Elders Program," in R. Price, *The Spirit of Alberta Indian Treaties* (Edmonton: Pica Pica Press, 1987) at 103; Borrows, *Recovering Canada* , *supra* note 71 at 15.

288 Borrows, "Listening for a Change, *supra* note 286 at 14; Borrows, *Recovering Canada*, *supra* note 71 at 91.

however, this concern proves to be a universal. "Expert", even all, witnesses can change their minds and therefore develop different memories of topics over time. As each person is the supposed specialist is his/her field, only a few people can counter their work . Finally, every expert witness is presenting original work which challenges previously established beliefs. In other words, every witness' efforts must have an agenda to be considered because the testimony is either used to support or debunk other opinions. If oral history is flawed, so is scholarly research used by parties arguing against the use of oral history and all witnesses in general. [289] The Supreme Court of Canada has already recognised this fact in *R. v. Marshall.* Binnie, J. wrote for the majority how litigation can be stalled due to disagreeing opinions among academics about whose research is the least subjective.[290] Subjectivity afflicts all witnesses, regardless of what sources (written or oral) formulate their opinions.

Regarding the administration of justice in land disputes, procedural modifications will invariably occur if oral history is used more frequently. Translation assistance and court/negotiation relocation, for example, will undoubtedly be necessary. These types of changes, however, have already become part of other judicial proceedings and have not created significant administrative concerns. The ramifications of *R. v. Gladue* , for example, illustrate that language issues,

289 For evaluations of biases among scholars who rely upon written sources see generally P. Novick, *That Noble Dream: The Objectivity Question and the American Historical Profession* (New York: Cambridge University Press, 1993); D. Bourgeois, "The Role of the Historian in the Litigation Process" 1986 (68) Can. Hist. Rev. 2; G. Iggers, *Historiography in the Twentieth Century: From Scientific Objectivity to Post-Modern Challenges* (Hanover and London: Wesleyan University Press, 1997); H. Rothman, "Historian v. Historian: Interpreting the Past in the Courtroom" (1993) The Public Historian 15; B. Sheehan, "The Problem of Moral Judgments in History" (1985) 84:1 South Atlantic Quarterly 37; V. Strong-Boag, "Contested Space: The Politics of Canadian Memory" Journal of the Canadian Historical Association, New Series, Vol. 5, Calgary 1994; S. Winchester, "Lies, Damn Lies and Maps" (7 December 2002) *Globe and Mail* D3; Borrows, "Listening for a Change," *supra* note 286 at 9; Borrows, *Recovering Canada*, *supra* note 71 at 89.

290 In *R. v. Marshall* [1999] 3 S.C.R. 456 ("*Marshall I*") at 488 Justice Binnie states " the litigating parties cannot await the possibility of a stable academic consensus." He is particularly reacting to criticism about the use of historical methods in court. This observation by Justice Binnie seems to demonstrate a certain problem with oral history is rampant among traditional academics. It seems that "the similarities between oral and written history are legion." Borrows, "Listening for a Change" *supra* note 286 at 15. For comments about how all presenters depict their own cultural and social positions within their work, see E. H. Carr, *What is History?* (Harmondsworth, UK: Penguin Books, 1964) at 35.

community participation and a court's physical form can be modified without difficulty and (if need be) spontaneously.[291] Even if some changes seem too radical for the judicial process, it should be noted that the Crown has actually *supported* the changes. Because modifications happen on a case by case basis, they undergo constitutional evaluation repeatedly. Besides, court relocation can, in fact, favour the party which is against the use of oral history. [292]

The final concern, regarding stress upon a person presenting oral history, is difficult to reconcile. Discomfort in a court is not an issue which disappears easily. Indigenous communities' lawyers, however, have an important role to play in minimising the negative effects a witness experiences. [293] If courtroom adjustments do happen, such as the ones the *Gladue* case permits, this issue will hopefully dissipate.

While my response, so far, is a reaction to specific criticisms about oral history, I also want to argue that critics' premises contain two other flaws. First, they demonstrate improper understandings of how oral history can be analyzed. When *Delgamuukw* was at the trial level, oral history was often criticised for not being scholarly or professional enough to receive legal recognition. But today "oral history" is a recognised sub field of the scholarly field of history. It

---

291 *R. v. Gladue* [1999] 1 S.C.R. 688. See A. Ehman, "A People's Justice" 11 (4) National 12; J. Bayly, "Unilingual Aboriginal Jurors in a Euro-Canadian Criminal Justice System " in R. Silverman and M. Nielson, eds., *Aboriginal Peoples and Canadian Criminal Justice* (Toronto and Vancouver: Butterworths, 1992) at 169; B. Morse, "A Unique Court: S107 Indian Act Justices of the Peace" (1982) 5 Canadian Legal Aid Bulletin 131. See generally A. Hamilton, *A Feather, Not a Gavel: Working Towards Aboriginal Justice* (Winnipeg: Great Plains Publications, 2001; Morse, *supra* note 15 at 65-66; "Indian Police Get Chance 'to Paddle Own Canoe'" (20 April 1990) *Globe and Mail* A11; E. Warhaft, T. Palys and W. Boyce, "'This is how we did it': One Canadian First Nation Community's Efforts to Achieve Aboriginal Justice" (1999) 32 Aust NZ J Criminology 168. For general comments about how collecting oral history is not as difficult as one presumes, see P. Thompson, *The Voice of the Past: Oral History* 3rd. ed. (New York: Oxford University Press, 2000) at 118-125. See also Borrows, "Listening for a Change," *supra* note 286 at 20; Borrows, *Recovering Canada*, *supra* note 71 at 22.

292 Notably, Chief Justice McEachern visited the land in question during the *Delgamuukw* trial. This experience, obviously, did not favour the Aboriginal parties. See Monet, and Skanu'u, *supra* note 51 at 104.

293 See generally H. Foster and A. Grove, *supra* note 111 and S. Imai, "A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering" (2002) 9(1) Clinical L. Rev. 195.

is also part of other efforts in the humanities, social sciences and natural sciences. [294] While academic discourse about oral history was limited in its scope when *Delgamuukw* started, an influx of specialists exist today. Evaluating the importance of oral history is much less difficult to do, and it can be done by the type of people critics claim must be used to evaluate information (that is, academics). [295] These experts, furthermore, can be used by *both* Crowns and Aboriginals. In other words, Crowns can use expert evaluation to critique opponents' oral history, and they can also use oral history to support their own arguments if they so choose. [296] Oral history can be evaluated better, and the legitimate information can then provide more details to contextualise the past, a contextualisation that the Supreme Court of Canada believes is in need of significant assistance. Chief Justice McLachlin remarked in *Mitchell* that s.35(1) cases must provide more historical context if Aboriginals' arguments are to succeed. [297] In short, my point

---

294 Two examples of academic discourse are the following: *The Oral History Review* is published by the University of California (Berkeley), and *Oral History Forum/Forum d'histoire orale* is published by the Canadian Oral History Association.

295 Compare the research techniques among the following works: A. Mills, *Eagle Down is Our Law: Witsuwit-en Law, Feasts and Land Claims* (Vancouver: UBC Press, 1994) ; H. Dallan, "The growing voice of indigenous peoples: Their use of story-telling and Rights Discourse to Transform Multilateral Development Bank Policies" (1991) 8(2) Ariz. Journal of Intl. & Comp. Law 14; A. Palmer, "Evidence 'Not in a Form Familiar to Common Law Courts': Assessing Oral Histories in Land Claims Testimony after *Delgamuukw v. B.C.*" (2001) 38(4) Alta. L. Rev. 1040; W. Wheeler, "Indigenous Oral Tradition Histories: An Academic Predicament," report prepared for the Plaintiffs in *Chief Victor Buffalo et al. Her Majesty the Queen et al.* F.C.T.D., file nos. T-2022-89 and T-1254-92 (2001) ; S. Venne, "Understanding Treaty 6: An Indigenous Perspective" in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, *supra* note 98 at 173; J. Cruikshank, "Oral Tradition and Oral History: Reviewing Some Issues" (1994) 75 Can. Hist. Rev. 37; J. Cruikshank, "Oral History, Narrative Strategies and Native American Historiography: Perspectives from the Yukon Territory, Canada" in N. Shoemaker, ed., *Clearing a Path: Theorizing the Past in Native American Studies* (New York: Routledge, 2002) 3-27; H. Cardinal and W. Hildebrandt, "Tapwewin: Speaking the Truth or Speaking With Precision and Accuracy" in Cardinal and Hildebrandt, *supra* note 245 at 48-59; J. Borrows, "Listening for a Change," *supra* note 286; J. Jarvis-Tonus, *supra* note 4; M. Pylpchuk,"The Value of Aboriginal Records as Legal Evidence in Canada: An Examination of Sources" (1991) 32 Archivaria 51. For a larger context of the relevance of non-written sources, see J. Bruchac, J. *Lasting Echoes: An Oral History of Native American People* (Portland: Silver Whistle, 1997).

296 Such a circumstance is *very* imaginable today. If a nation goes to court, for example, the Crown could use oral history to prove that this nation does not have the exclusive use it claims by using another indigenous nation's members as Crown witnesses to explain a history of shared use (suggesting an "overlap").

297 See Chief Justice McLachlin's comments about the "paucity of evidence " in *Mitchell*, *supra* note 233 at 948.

here is that oral history actually has the characteristic of scholarly approval that critics claim is absent, and this characteristic cannot do anything but improve the accuracy of courtroom arguments, because it will provide a greater quantity of evidence.

My second point about oral history's critics pertains to their failure to appreciate the judiciary's capabilities. By rejecting oral history, a critic automatically dismisses the skills which judges regularly hone. A judge must be prepared to evaluate the fairness of courtroom adjustments and the subjectivity of a witness in any proceeding. Appellate judges also reevaluate trial transcripts (and, therefore, any procedural changes and witness testimonials) for their own hearings. In short, determining who presents a more objective view is an exercise which judges perform repeatedly. [298] If oral history contains mistakes which impair a case's fairness, the judge will be as cognizant of this fact as counsel opposing the history. If counsel does not believe that the Court observes the oral history's bias, he or she can simply bring this point to the Court's attention as would be done for any other questionable matter.

As British Columbia's history proves, oral history aids the resolution of land issues. Its use, furthermore, is supported by the Crown during negotiations and was not challenged during the NFA's court cases because it keeps well within constitutional bounds.[299] What is learned here, then, is that governments' opposition to oral history is litigious strategy rather than legal belief. [300] It seems, then, that the only parties who truly disparage oral history's validity are the

---

298 R. Deslisle, *Evidence: Principles and Problems* (Toronto: Carswell, 1984) at 202. See also Borrows, "Listening for a Change" *supra* note 286 at 35-36; Borrows, *Recovering Canada, supra* note 71 at 20.

299 The use of oral history in s.35 issues by the Crown also happened in venues outside British Columbia. See Indian Claims Commission, *supra* note 165 at 50.

300 See for example, *Chief Victor Buffalo et al v. HMTQ et al* (currently underway) and *Benoit v. the Queen* (F.C.T.D.) , 7/7/2000, Docket T-2288-92.

people who appear as Crown expert witnesses lamenting its utility on the witness stand. [301] Treaty-makers, in order to achieve results, must use oral history. Treaties, in order to be constitutional, must include oral history within their construction to reinforce other legal norms.

4. Sovereignty

When issues between Aboriginals and non-Aboriginals are examined, questions about sovereignty invariably arise. [302] Generally understood, sovereignty describes an absolute authority demonstrated by a community. The community has mechanisms to demonstrate the authority, two of which are the creation and enforcement of laws. In Canada, the Crown claims sovereignty and therefore also claims the right to impose legal norms upon those who are located in this country. [303] Unsurprisingly, indigenous nations have constantly disputed this assertion. [304] But, as unsurprisingly, these Aboriginal opinions have not received support

301 A. von Gernet, "What my Elders Taught Me: Oral Traditions as Evidence in Litigation," in O. Lippert, ed. *Beyond the Nass Valley: National Implications of the Supreme Court's* Delgamuukw Decision (Vancouver: The Fraser Institute, 2000) 103; Borrows, *Recovering Canada*, *supra* note 71 at 23.

302 For comments on the contestibility of sovereignty, see P. Macklem, "Distributing Sovereignty...," *supra* note 9 at 1346.

303 For writers who contend sovereignty for indigenous nations is constitutionally protected and can be demonstrated through self-government, see H. Foster, "Forgotten Arguments: Aboriginal Title and Sovereignty in *Canada Jurisdiction Act* Cases" (1992) 21 Man. L.J. 343; P. Hutchins, c. Hilling, and D. Schulze, "The Aboriginal Right to self-government and the Canadian Constitution: The Ghost in the Machine" (1995) 29 U.B.C. L. Rev. 251; A. Lafontaine, " La coexistence de l'obligation fiduciare de la Courounne et du droit a l'autonomie gouvernmentale des peuples autochtones" (1995) 36 C. de d. 669; D. Lambert, *supra* note 93; P. Macklem, "First Nations...," *supra* note 40; P. Macklem, "Normative Dimensions...," *supra* note 59; K. McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty," (1998) 5 Tulsa J. Comp. Of Intl. Law 253; K. McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1993) Queen's L. J. 95; B. Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L.J. 308; B. Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L. J. 681.

304 K. McNeil states "No Canadian court has yet come up with a convincing explanation of what happened to Aboriginal sovereignty or how that sovereignty can be denied": "Aboriginal Rights in Canada....", *ibid.* at 298. For discussion about how indigenous sovereignty cannot be contingent upon Canadian recognition, see Alfred, *supra* note 8 at 19-20. For expansion about separation from the Canadian state, see Alfred, *supra* note 8 at 3 and 128. M. Boldt and A. Long argue "the concepts of aboriginal rights and sovereign Indian self-government are considered by most Indian leaders to be virtually synonymous." See Boldt and Long, ed. *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) at 319.

from the judiciary. In 1990 Chief Justice Dickson wrote in *Sparrow* that "there was from the onset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands (is) vested in the Crown."[305] Since this decision appeared, courts have not openly disputed its conclusion.[306]

So if the Supreme Court contends in case law, and governments announce in public statements and courtroom arguments, that the Crown has final authority, what more can this presentation explain? Here, I argue that *Sparrow* and Crown policies mention this notion in a very articulate and strict way. Yet activities which happened in British Columbia clearly demonstrate an understanding of sovereignty which conflicts with what the Court instructed and what governments supposedly promote about *Sparrow* .

To see this contrast, recall activities at the BCTC. The BCTC's refusal to include extinguishment or infringement clauses in treaties is a sign the Crown does not have the power *Sparrow* suggests. *Sparrow* may not permit extinguishment phrases, but it still allows Crowns the right to modify or limit s.35 rights without a nation's approval. The BCTC refuses to recognise this prerogative. Additionally, the commission's use of oral history is much more flexible than any court case has permitted. Keep in mind that this policy has been in place since the commission's inception. So the BCTC has, in fact, demanded that the Crown reinforce a policy which went against the trial and appeal findings of *Delgamuukw*. Finally, the BCTC has chosen to use *Taku River* and *Haida I/II* as a means to radically alter some of its policies affecting negotiating parties' roles. The commission has decided that a third party can be an indigenous nation , and it argues that

---

305 *Sparrow*, *supra* note 67 at 1103. Evaluations of this decision have wondered whether any progressive notions in it can survive the imposing force of Crown sovereignty. See generally Binnie, *supra* note 72.

306 Lamer, (then)C.J.C. noted the Court believed "rights to self-government, if they existed, cannot be framed in excessively general terms." *Delgamuukw, supra* note 4 at 1114.

the major negotiating stages are legally binding. The Crowns have not approved this interpretation. But the Crowns have not left the commission, so it demonstrates an acceptance of these changes. In sum, governments have allowed their own positions to be weakened by the enforcement of BCTC proceedings.

The NFA's evolution, though arguably less so than the BCTC, also departs from the Supreme Court's commentary about sovereignty. The mere fact that the triad made an agreement together shows that Crowns realised their legal obligations were different than they imagined or wished. If Canada did not believe the NTC's challenge was legally valid, it would not have validated the Nisga'as' land claim. Due to its self-created duties as described in the *Royal Proclamation*, the Crown has made itself obligated to protect indigenous peoples. If that protection means that the Crown must negotiate an arrangement in the form of a comprehensive claim, and the Crown loses some of its authority because of this claim's agreement, so be it.[307] Aboriginal title cases represent that moment when the governments' roles must change in order for the fiduciary duty to be fulfilled. Discussing the NFA was one of those moments.

Observers may claim that because treaty-talks are "voluntary", the Crowns' absent protests at the BCTC and comprehensive claims negotiations simply demonstrate acts of compromise. In other words, the Crowns are free to choose a new relationship, and that freedom is, of its own right, a demonstration of sovereignty.

But such a claim misses the point. When a government comes to the table it, admittedly, *does* have the power to alienate its own internal components. But treaty-talks also create a moment

---

307 Macklem, "Distributing Sovereignty...," *supra* note 9 at 1346 for an explanation of why sovereignty should be flexible enough to adopt to the goals of a specific legal moment.

where a nation gains some power which formerly belongs to the Crown, and this newly acquired power gains s.35(1) protection. After this change happens, a Crown cannot unilaterally decide that this power must be returned to the governments. It must justify the return in the courts. The power might be returned, but the return is at the Court's, not the Crown's, discretion. If the Court decides the return will jeopardise the Crown's fiduciary duty, the power will never leave the nation's realm. When a Crown transfers a power, and that power turns into a treaty right, it cannot change back into its original form. This lost authority is, in fact, expected due to fiduciary obligations inherent with treaty-making . [308]

So here I argue that treaty-making, by its very nature, shows that sovereignty has changed. But as with any observation about a legal norm, this argument's strength is not fully understood unless it can be confirmed in the courts. In British Columbia's court system, the Supreme Court has explained how the notion of sovereignty is not static. Justice Williamson, by fully uncrating the implications of the Marshall trilogy and *Van der Peet,* made the following conclusion. If courts contend that nations were sovereign prior to contact,[309] this sovereignty was stopped by the Crowns, and the notion of sovereignty is fundamental to understanding a culture, it then follows that nations have a constitutional right to demonstrate sovereignty as long as that demonstration does not violate other constitutional norms. In short, *Van der Peet* demands of the Court to recognise the current constitutional existence of indigenous sovereignty because it *was never extinguished.* [310] Indigenous sovereignty, therefore, is a s.35(1) right. If a nation wants a treaty to explain this sovereignty, the Crown has a fiduciary obligation to create a treaty.

---

308 For an explanation of this obligation, see generally D. Arnot, *supra* note 58. See P. Macklem's comments that "Crown practice in negotiating treaties with First Nations suggests Crown recognition and acceptance of Aboriginal self-government." "Normative Dimensions...," *supra* note 59 at 217.

309 The following decisions refer to (then) Chief Justice Marshall's rulings: *Van der Peet, supra* note 71 at 541, 543, 575, 644; *Mitchell, supra* note 233 at 992; *Wewaykum v. AGC* 2002 SCC 79 File. no. 27641 at para. 75; *Simon v. the Queen* [1985] 2 S.C.R. 387 at 405; *Sparrow, supra* note 67 at 1103; *R. v. Sioui* [1990] 1 S.C.R. 1025 at 1053-1054.

310 *Campbell II, supra* note 207 at para. 93.

This conclusion was not overturned by the Court of Appeal. But it is also important to imagine whether this conclusion is strong enough to withstand evaluation beyond the Court of Appeal. On this concern, I offer two responses.

The most recent, and arguably famous, case about sovereignty to date at the Supreme Court of Canada is of assistance on this matter. In *Mitchell v. M.N.R.,* Grand Chief Mike Mitchell of the Akwesasne Mohawk Indian Reserve went shopping in the United States. When returning home, he entered Canadian Customs with blankets, bibles, motor oil, food, clothing, and a washing machine. Notwithstanding the oil, he claimed these items were for trading and political processes with another Mohawk reserve located in Canada. These processes, he argued, were integral to Akwesasne's Mohawk cultural identity, could pass the *Van der Peet* , and therefore demonstrated s.35(1). Because of this fact, Mitchell argued his purchases in the United States should not be part of any taxation evaluation at the Canadian border. Mitchell won at trial, and the Federal Court of Appeal upheld the decision. [311]

When the matter appeared at the Supreme Court, the rejection of Mitchell's argument was unanimous, but the bench split on why it allowed the appeal.[312] Here, I contend that this rejection is not a refusal to recognise indigenous sovereignty. [313] Rather, Mitchell claimed that his argument was based on constitutional premises (that is, s.35), yet his claim essentially challenged provincial, federal, American and even international law. In other words, he did not use the legal tools he claimed were essential to his argument. He contended he was constitutional, but he did not use the constitution properly because he went beyond the document's juridical

311 *Mitchell v. Minister of National Revenue* [1999] 1 F.C. 375; *Mitchell v. Canada(Minister of National Revenue*) [1999] 1 C.N.L.R. 112 (F.C.A.).
312 *Supra* note 233.
313 For a personal/professional analysis of this case, see P. Hutchins and A. Choksi, "From *Calder* to *Mitchell*: Should the Courts Patrol Cultural Borders?" (2002) 16 S.C.L.R. (2d) 241.

bounds.

But this case's importance is not merely in what it explained indigenous sovereignty cannot be. The decision also includes commentary helpful for understanding what sovereignty is capable of being. Chief Justice McLachlin's majority decision may reject Mitchell's argument, but she does not dismiss Mitchell based on a historic or static notion of sovereignty. Instead, she recognises that sovereignty has a fluidity,[314] and she concludes that Mitchell presents a "paucity of evidence" to prove his point.[315] Chief Justice McLachlin does not believe the argument is impossible to make. Rather, her conclusion is that she cannot understand indigenous sovereignty unless it is fully explained to her, and Mitchell did not provide such an explanation. *Mitchell* cannot override *Sparrow* because it is an inarticulated argument. [316]

Justice Binnie, in a separate decision supported by Justice Major, concurs with Chief Justice McLachlin's holding. He also agrees that Mitchell did not present enough evidence. But, most importantly, Justice Binnie also makes constitutional space for the argument that sovereignty can change. But introducing the term of "merged" or "shared sovereignty", [317] he details an understanding that different forms of this idea, when constitutionally appropriate, can be forwarded. He even goes as far as to state that Aboriginal peoples "are not subjugated by Canadian sovereignty." [318] As does Chief Justice McLachlin, he undoubtedly reinforces

---

314 *Mitchell, supra* note 233 at 952-953.

315 *Ibid.* at 987.

316 For comments about the dangers of supporting a case which has extreme facts, see B. Kellock and F. Anderson in F. Cassidy, ed. *supra.* note 105 at 97 -112. They contend at 112 that if a circumstance is not keeping to constitutive norms, "even the most sympathetic court (can)not guarantee such an order."

317 For another jurisdiction's interpretation of how to envision this type of government see "Gibraltarians Say No to Shared Sovereignty" (8 November 2002) *Globe and Mail* A23. Justice Binnie also uses the term "collective sovereignty" to describe the balance between indigenous and constitutional issues. See *Mitchell, supra* note 233 at 977-978.

318 *Mitchell, supra* note 233 at 980-981.

traditionalist notions of sovereignty which parallel *Sparrow*. But my point here is that this reaction is unsurprising considering what Mitchell argued. Mitchell was asking for sovereignty via s.35(1), but his argument was dubious since its effects clearly go beyond Canadian constitutional norms.[319] The Supreme Court of Canada, as did Justice Williamson's court and the Court of Appeal, can determine that sovereignty for an indigenous nation is a constitutional right.[320] What an argument must reinforce, however, is an understanding of modern Canadian constitutive norms which explains this new form of sovereignty. As (then) Justice McLachlin contended, "Parliament and the legislatures in Canada have never enjoyed absolute supremacy. From the beginning, they have had only such powers as the constitution gave them." [321] What a party needs to do, then, is prove how its definition of sovereignty keeps to the *Constitution*. With this point in mind, Mitchell's circumstances did not keep to those norms. [322] Treaty-making, due to its constitutive nature, must be constitutional. Because the Crown must give up some power during treaty-making, this process can easily prove to the Supreme Court that the *Sparrow* understanding of sovereignty has undergone some modifications.

Another way to suggest that the Supreme Court can accept that sovereignty should move beyond *Sparrow* is the following point. Consider what treaty-making means. [323] The Crown meets with a nation and creates an arrangement. The parties agree, so they do not have any need to learn of

---

319 D. McNab contends " Whatever the form or style of claim, aboriginal people have not, in my experience, advanced spurious or frivolous ones." See McNab in Coates, ed. *supra* note 11 at 87. For discussion of how traditional Crown sovereignty conflicts with s.35(1)'s purpose, see Borrows, *Recovering Canada*, *supra* note 71 at 82.

320 *Campbell II*, *supra* note 207 at para. 171.

321 B. McLachlin, "Charter Myths" (1999) 33 (1) U.B.C.L.Rev. 23 at 30.

322 J. Bakan, in particular reference to the NFA, highlights how a written legal framework can stay intact even if the framework's contents are modified. See "No referendum needed on Nisga'a Deal, experts say" (27 August 1998) *Vancouver Sun* A19. In the *Secession Reference* the Supreme Court states "sovereignty is a political fact for which no purely legal authority can be constituted." *supra* note 4 at 288-289. This statement also suggests a flexibility, rather than a strictness, to the notion of sovereignty.

323 For comments about how treaties represent respect, interchange and mutual sharing, see Cardinal and Hildebrandt, *supra* note 245 at 9 and 37.

the judiciary's opinion about the matter. As long as the agreement keeps to constitutional bounds, it will not create a third order of government, nor will it violate the *Charter*. To expect the Supreme Court to rule on whether treaty-making is a demonstration of sovereignty, and that this new sovereignty must actually be protected due to fiduciary obligations, is demanding a near impossibility. Notwithstanding claims similar to Campbell et al or Barton et al, treaty-making will not create much case law because treaty-making is done so litigation is not created. The Supreme Court, in other words, cannot rule on an issue it does not evaluate.

British Columbia, when negotiations and litigation are fully appreciated, shows that sovereignty has already expanded and that the Crown does not reject the practicality or legality of this fact.[324] The most recent case in the Supreme Court to debate sovereignty, *Mitchell*, rejected the most expansive definition to be presented as of yet, but the Grand Chief's definition is, I argue, inappropriate for the constitutional norms sovereignty must demonstrate. When meeting at the negotiation table, whether considered voluntary or a duty, Crowns give up power, and "sovereignty" moves further away from *Sparrow*. My observation is that British Columbia demonstrates that governments' authority changes and that judges can uphold the constitutionalism of these changes.

New treaties, by their own creation, represent "a relation of equality in which each views itself and the other as independent and distinct".[325] When treaties are used as a resolution mechanism,

---

324 Tom Molloy, federal negotiator during the NFA also perceives a flexible approach which is adaptive to specific situations, rather than one government-created form: "the treaty process, if it is to be successful, depends not on imposed solutions but on complex and (it) appropriate negotiations." Molloy, *supra* note 128 at 162. The possibility of "flexibility" of constitutive terms when examining Aboriginal rights has already been accepted at the Supreme Court. Ironically, this observation is made in *Sparrow*, *supra* note 67 at 1106.

325 P. Macklem, *Indigenous Difference*, *supra* note 9 at 112. For more comment about treaties representing an agreement between two sovereigns, see Cardinal and Hildebrandt, *supra* note 245 at 57.

indigenous nations in British Columbia may not have complete autonomy in how they function, but neither do governments. [326] As Richard Clayton notes, "the basis of sovereignty and the changes effected...should properly be regarded as reflecting a common law development, the evolution of the judiciary's sense of its own constitutional obligations." [327] If treaty-makers want agreements to happen, it is no longer a matter of arguing whether sovereignty should change. [328] By creating a treaty, that change has already occurred. [329]

5. "Aboriginal Law" and "Inter-Aboriginal Law"

Earlier I stated that that concepts were explained in a rough order of most-mentioned to least acknowledged. To that end, my final theme is built upon the existences of the previous four concepts.

Throughout British Columbia's history of land negotiation and litigation, one assertion is now accepted by all parties. This fact is used to justify a purposive interpretation of s.35(1), the

---

326 *Campbell III*, *supra* note 212.

327 R. Clayton, "Escaping the Past: The Impact of Legal Tradition on Constitutional Interpretation" (on file with author) at 4. See also generally O. Dixon, "The Common Law as the Ultimate Constitutional Foundation" (1957) 31 A.L.J. 240.

328 Examples of writing which explains a need for re-framing the understanding of the term include P. Macklem, "First Nations Self-Government...," *supra* note 71 and P. Macklem, "Distributing Sovereignty...," *supra* note 9.

329 For a general discussion of such a moment of change, see A. Dicey, "Will the Form of Parliamentary Sovereignty be Permanent?" (1899) 13 Harv. L. Rev. 67. For remarks about how the Crown changed its attitude about "sovereignty" after other historic treaties were signed, see A. Ray, J. Miller and F. Tough, *Bounty and Benevolence* (Montreal and Kingston: McGill-Queen's University Press, 2000) at 186 and 192. See P. Macklem, "Distributing Sovereignty...," *supra* note 9 at 1346: "Sovereignty is a contested site of interpretation, and thus remains open to transformation." See also J. Bertleson's comments about a "modern sovereignty" in *A Genealogy of Sovereignty* (Cambridge, UK: Cambridge University Press, 1995) at 189. See generally H. Spruyt, *The Sovereign State and its Competitors: An Analysis of Systems Change* (Princeton, NJ: Princeton University Press, 1994). See also Borrows, *Recovering Canada*, *supra* note 71 at 121.

application of the *Royal Proclamation*'s fiduciary duty, and the descriptions of pre-contact society contained in the Marshall trilogy. The idea that Aboriginals participated in political activities before the arrival of Europeans is undisputed by indigenous nations, the judiciary and even the Crowns . Whether articulated in negotiation procedures, government-sponsored research,[330] court arguments [331] or Supreme Court case law, [332] perspectives agree that pre-contact indigenous nations must have had governments which ensured that communities' cultures survived.[333] As an automatic effect of this idea, it follows that pre-contact nations also demonstrated separate sovereignties. To explain this effect, recall the previous section's discussion. If a nation has a government which functions autonomously and reinforces a cultural identity separate from other jurisdictions, that government structure reinforces sovereignty. [334]

If the sovereignties of pre-contact indigenous nations are acknowledged, another fact follows. Recall that I explained earlier how the contents of sovereignty include the power to be a law maker and law enforcer. What, then, must also be accepted is that pre-contact (sovereign)

---

330 See "Early Patterns of Treaty Making" in *Report of the Royal Commission on Aboriginal Peoples Volume 1: Looking Forward, Looking Back* (Ottawa: Canada Communication Group-Publishing) at 125: "Although the political discourse between Europeans and Aboriginal nations was based on mutual respect and recognition of their powers as nations, the discourse between the colonial powers embodied their claim to sovereign authority over the Aboriginal nations." In the *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991) vol. 12 at 18: "Aboriginal peoples have always had governments, laws and some means of resolving disputes within their communities."

331 *Barton I, supra* note 146.

332 *Worcester, supra* note 56 at 552 :"The Indian nations had always been considered as distinct, independent political communities, retaining their own rights, as the undisputed possessors of the soil from time immemorial. The very term 'nation', so generally applied to them, means ' a people distinct from others'." At 544, the case continues: "the soil was occupied by numerous and warlike nations equally willing and able to defend their possessions." See also *Van der Peet, supra* note 71 at 543; see *R.* v. *Côté* [1996] 3 S.C.R. 139 at 172, *R.* v. *Sioui* [1990] 1 S.C.R. 1025 at 1052-1053. In *Delgamuukw, supra* note 4 at 1106 Lamer, C.J.C. writes of the "aboriginal system of governance." See also B. Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon: University of Saskatchewan Native Law Centre, 1983) at 17.

333 Friesen, *supra* note 19 at 37.

334 J. Henderson, M. Benson, I. Findlay, *supra* note 15 at 88.

governments invented and imposed legal norms. [335] In other words, Aboriginal societies had laws before Europeans arrived. All of these norms were indigenous laws. But some of these norms, I contend, are also examples of "Aboriginal law". [336] This concept, I contend, is not mentioned repeatedly like the other terms, but its implicit nature is actually as constitutively strong as the contents of the other themes' natures.

Where is "Aboriginal law" found? Justice Williamson, in his third examination of Campbell et al's proceedings, creates a heading in his reasons for judgment which is a subtitle for a section detailing his understanding of the unextinguished sovereignty and the NFA's demonstration of this sovereignty as protected by s.35(1). Justice Williamson does not include explicit guidance about what Aboriginal law means as a separate entity, but this idea is interwoven with his understanding s.35(1)'s purpose, division of power concerns and fiduciary obligations. In short, it is an idea which is elemental to the other constitutive notions which create Justice Williamson's reasoning.

But is "Aboriginal law" its own legal entity? I have just argued that this phrase is presented as part of other constitutive norms, but to be separately identifiable in a legal sense as the four

---

335 D. Johnston, "First Nations and Canadian Citizenship," in W. Kaplan, ed. *Belonging: The Meaning and Future of Canadian Citizenship* (Montreal: McGill-Queens University Press, 1993) 349 at 353. A. Lajoie et al have also written about France's recognition of indigenous peoples' sovereignty. See *Le statut juridique de peuples autochtone du Québec et le pluralisme* (Cowansville, QC: Yvon Blais, 1996) at 140.

336 "Aboriginal law," by its creation, is constitutional and indigenous in nature. In comparison, I consider "indigenous law" a description for the laws used by indigenous peoples. Indigenous laws do not require acknowledgment from non-indigenous peoples to be legitimate. John Borrows describes how "Indigenous law originates in the political, economic, spiritual, and social values expressed through the teachings and behaviour of knowledgeable and respected individuals and elders." Borrows, *Recovering Canada*, *supra* note 71 at 13. Aboriginal laws, as I describe later, are such that their status relies upon constitutional recognition. Some, but not all, indigenous laws are Aboriginal laws, while all Aboriginal laws are indigenous laws. My understanding of the term is similar to Justice Williamson's use of "Aboriginal law" in subtitling paragraphs 83 through 87 in *Campbell III*, *supra* note 212. Compare this use to other writers who use "Aboriginal law" as a label for any Canadian law which pertains to Aboriginal peoples. See, for example, E. Meehan and E. Stewart, *supra* note 73, L. Rotman, "Developments in Aboriginal Law: The 1999-2000 Term" (2000) 13 S.C.L.R. (2d) 2, L. Rotman, *supra* note 8 and S. Imai, *Aboriginal Law Handbook* (Scarborough: Carswell, 1999).

previous categories have included, "Aboriginal law" must demonstrate certain traits. First, as Aboriginal law pertains to indigenous peoples, determining this terms' constitutionality means using s. 35 analysis. And as Aboriginal law does not stem from either a historic or a modern treaty, it must be tested as an "Aboriginal right". *Van der Peet*, as explained earlier, describes the characteristics that a concept must have to be an Aboriginal right. A practice is considered an Aboriginal right if it existed prior to contact, if has occurred since contact and if it is integral to understanding the culture from whence the practice is derived. When applying this test to Aboriginal law, the first requirement is easily established. Aboriginal law, by its very nature, is a pre-contact notion.

For the test's second part, the continuity of Aboriginal law can be demonstrated in one of two ways. The Supreme Court explains how a practice still exists even if it is not currently demonstrated, because its continuity will be accepted by the Court when an indigenous group proves that the practice was terminated against the group's will. As described in the second part of this presentation, many Crown policies and laws were intentionally invoked to stop indigenous laws. The *Indian Act*, the *Constitution Act, 1867* and the *Constitution* forbid many indigenous peoples from practicing legal norms as demonstrated through events such as potlatches, travel, naming ceremonies, and indigenous land tenure recognition. Another way to prove this second part of the *Van der Peet* test is to support Justice Williamson's belief about unextinguished sovereignty. If sovereignty was never extinguished, as he concludes, and sovereignty is demonstrated by a legal system, indigenous legal systems were not extinguished either. [337]

---

337 *Campbell II, supra* note 207 at para. 93. For additional commentary on this realisation, see R. Depew, "Popular Justice and Aboriginal Communities" (1996) 36 Journal of Legal Pluralism and Unofficial Law 21 and E. Dickson-Gilmore, "Finding the Ways of the Ancestors: Cultural change and the invention of tradition in the development of separate legal systems" (1992) 34 Can. J. Crim. 80.

The third part of the *Van der Peet* test, regarding the integrality of an activity for defining cultural identity, needs careful consideration. It is widely held that cultural norms impact the creation of laws. But the Supreme Court of Canada has also described how the reverse is true. [338] Certain laws, therefore, are pivotal to understanding cultural identity. So if an indigenous law existed prior to contact, it is integral to a culture and did not disappear of a nation's free will, this pre-contact law qualifies for constitutional protection .[339] In short, an indigenous law is transformed into an Aboriginal law.

How does the legal recognition of "Aboriginal law" as a separate norm affect ideas about Aboriginals' current constitutional roles? Certain pre-contact rules would need to be legally enforced. Indigenous notions about land occupancy seem an obvious qualifier, as the judiciary has concluded that territoriality is imperative to defining a culture. [340] As well, some issues pertaining to languages, families, religious practices, and even criminal law could also be imagined as integral to cultural identity.[341] If the Courts accepted that "traditional forms of Aboriginal criminal justice are viewed as protected by s.35(1)," as Patrick Macklem observes, "aspects of the current Canadian criminal justice system that interfere with such arrangements will have to meet strict standards of constitutional justification." [342] In short, if an indigenous legal norm

---

338 See the Supreme Court's comments about how democracy, and its form of law making , "accommodates cultural and group identities". *Secession Reference*, *supra* note 4 at 252-254.

339 Indigenous legal norms, particularly when they describe attachments to a land base, are fundamental in defining cultural identity. See W. Macleod, "Law, Procedure, and Punishment in Early Bureaucracies" (1934) 25 Journal of Criminal Law, Criminology and Police Science 225; M. Rossignol, "Property Concepts among the Cree of the Rocks" (July 1939) 12:3 *Primitive Man: Quarterly Bulletin of the Catholic Anthropological Conference* 61; M. Carswell, "Social Controls among the Native Peoples of the Northwest Territories in the Pre-Contact Periods" (1984) 22 Alta. L. Rev. 303.

340 See *Delgamuukw*, *supra* note 4 at 1072.

341 C. Long, *Religious Freedom and Indian Rights: The Case of Oregon v. Smith* (Lawrence, Kansas: University Press of Kansas, 2000) at 9.

342 P. Macklem, "Aboriginal Peoples, Criminal Justice Initiatives and the Constitution" (1992) U.B.C.L. Rev. 280 at 283.

transforms into an Aboriginal law, the courts need to recognise its s.35(1) existence and the Crowns must demonstrate their fiduciary duty by permitting this norm to be enforced.[343] And, in particular reference to this study, unless a nation voluntarily decided to not want its inclusion, an Aboriginal law must be clearly included in a modern treaty's contents.

Yet Aboriginal law has another component. Recall that the notion of sovereignty is indeed used to determine a community's internal mechanisms. But sovereignty also enforces boundaries. Individuals who do not belong to a respective sovereign, and other sovereign's governments, must respect certain limits of this original government.[344] When a sovereign creates laws, these rules are as much about creating exclusion for those not belonging to the sovereign as they are about providing self-definition to those living within a sovereign's government's boundaries.[345] These norms, defining how pre-contact nations related to other pre-contact nations, are inter-indigenous laws. If an inter-indigenous law merits constitutional protection, it is an example of an "inter-Aboriginal law".

Of course, inter-Aboriginal law must also pass constitutional muster before it has any legal significance. As does an Aboriginal law, an inter-Aboriginal law easily proves the first two steps of the *Van der Peet* test because it obviously existed prior to contact, and its continuance was not given up by nations voluntarily. [346] Regarding the third part of the test, many norms about inter-

---

343 For remarks about how Aboriginal legal systems are within Aboriginal and treaty rights, see J. Henderson, M. Benson and I. Findlay, *supra* note 15 at 287.

344 For a thorough explanation of this characteristic of sovereignty, see J. Bertleson's chapter on "Inventing Outsides" in Bertleson, *supra* note 329 at 88-136.

345 Sterritt et al write "competing claims between First Nations have existed since time immemorial, and indigenous legal systems on the Northwest Coast allows for a number of forms of dispute resolution." Sterritt et al, *supra* note 166 at 7.

346 *Ibid.* at 145.

nation relations would undoubtedly *not* be culturally necessary for, nor necessarily unique to, Aboriginal nations. Where inter-Aboriginal law is extremely demonstrative of cultural identity, however, is when territoriality is considered. Territorial boundaries define personal, familial, economic and political understandings. They create a sense of citizenship and individual identity. They also, however, create demarcations acting as limits on the actions of those who do not belong to the nation. British Columbia's pre-contact nations might not have moved or traveled as much as other nations in North America, but they did not stay in the same place either. As communities had knowledge about cooperation, disputes and dispute resolution, rules obviously governed how nations governed their relationships with each other. [347] If these rules defined a culture's integrality, they require constitutional protection. [348] Just as laws within an indigenous community were "already there", [349] so too were laws which defined inter-nation ways of relating, particularly with regard to land attachment. [350]

If inter-Aboriginal law, as an extension of Aboriginal law, is constitutionally protected, how does this idea affect modern land settlement? If a nation proves inter-Aboriginal laws about territoriality, the right to practice the inter-Aboriginal laws must be permitted. This norm would be demonstrated by nations, that negotiated prior to contact, meeting with each other to create

347 See, for example, Sterritt et al, *supra* note 166 at 3 to 14.

348 "Prior to the coming of Europeans, Indian nations entered treaty relationships with each other." Cardinal and Hildebrandt, *supra* note 245 at 53.

349 P. Macklem, *supra* note 302 at 197.

350 Observing the historic land bases of separate nations is freely admitted during negotiations and courtroom arguments. Foster, "'Honouring the Queen's Flag'," *supra* note 4 at 34. See also P. Grose, "An Indigenous Imperative: The Rationale for the Recognition of Aboriginal Dispute Resolution Mechanisms" (1995) 12 Meditation Quarterly 327.

legal understandings. These discussions would likely include talks about territorial boundaries and (possible) joint use of some or all of the territories in question. Furthermore, for the talks to be inter-Aboriginal law, they must occur among indigenous nations alone without Crown intervention.[351] Crowns would need to support the demonstration of this activity because of fiduciary obligations. But inter-Aboriginal law is a s.35(1) right with the Crown acting as a third party rather than a primary participant.

Furthermore, it is necessary to remember that inter-Aboriginal law's nature demands that its application occur prior to other s.35(1) rights' implementation. Because inter-Aboriginal law obviously modifies nations' own arguments about Aboriginal title, enforcing other s.35(1) rights before inter-Aboriginal law would harm inter-Aboriginal laws' topics. In other words, enforcing inter-Aboriginal law before other s.35(1) rights, if those rights pertain to land occupancy and use, is *sine qua non.*

Supporting inter-Aboriginal law has practical, as well as constitutional, appeal. *Paul* recognises this fact. Here, the Court proposes negotiation techniques for indigenous-Crown relations, but it also concludes that different nations should negotiate among each other before the Crown even attempts to resolve a problem. Lemieux, J. reflects that there are "internal matter(s)" which only indigenous nations are capable of solving. [352] The BCTC has also described how functions, which I argue make up inter-Aboriginal law but have not been given separate legal recognition by

---

351 It is arguable that the federal government already admits inter-Aboriginal law exists and it should be promoted. See T. Molloy, *supra* note 128 at 54. Regarding overlaps, Molloy writes "First Nations should resolve such issues among themselves."

352 *Paul, supra* note 241 at para. 33.

the commission, aid treaty talks. [353] Even Robert Nault, Canada's current Minister of Indian Affairs, has also admitted that some legal issues do not have obvious resolution processes which the Crown can implement. [354]

As Justice Williamson contended, "Aboriginal peoples had legal systems."[355] These systems achieve, when *Van der Peet* is applied consistently, constitutional protection. Pre-contact sovereignty, even when sovereignty is understood in an "old" sense, [356] automatically includes a recognition of inter-Aboriginal law's constitutionality because inter-Aboriginal law is made up of other constitutive terms. If pre-contact sovereignty is accepted, so is inter-Aboriginal law. If the purpose of s.35(1) is applied, inter-Aboriginal law reinforces its purpose. It is gleaned from oral sources . It helps to remind parties about duty to consult issues, as nations could negotiate arrangements right away rather than wait for a problem, such as overlaps, to develop. Finally, inter-Aboriginal law means recognising Canadian legal norms and indigenous laws at the very same time. This recognition is a constitutional necessity. As Chief Justice Lamer remarked in *Van der Peet*,

> until we have exhausted the traditional means by which aboriginal and non-aboriginal legal perspectives may be reconciled, it seems difficult to assert that it is necessary for the courts to suggest more radical methods of reconciliation possessing the potential to erode

353 For an example of where inter-Aboriginal law happens already, see A. Gebauer reported for the Canadian Press: " 'Many of the First Nations have overlaps, but its not necessarily a problem,' said Brian Mitchell. In many instances, he said, First Nations involved will reach agreement between themselves before the treaty process begins with two governments." Mitchell is the BCTC's Communication Director. See "Gitanyow Going to Court over Dispute With Nisga'a" 8 July 1998. Although not obvious from most s.35(1) interpolation, inter-Aboriginal law would also aid problems which are addressed by enforcement of distributive justice notions. See, for example, McLeod , *supra* note 40 at 1289; P. Macklem, *Indigenous Difference, supra* note 9 at 158-159; Walker, *supra* note 10 at 333. Walker argues that improving the disparities which occur due to poor race relations is an organising, though unwritten, principle of constitutional discourse. Inter-Aboriginal law demonstrates such a function.

354 Indian Affairs Minister Robert Nault's comments do not provide a formulated reaction to overlaps' creations. He stated "in the face of unresolveable impasses on overlap issues, the only solution may be to negotiate a treaty with each group in turn, while respecting the rights of other aboriginal groups." Indian and Northern Affairs Canada, "Speaking notes for the Honourable Robert D. Nault, Minister of Indian Affairs and Northern Development to the Senate Committee on Aboriginal Peoples, March 23, 2000, Ottawa, Ontario."

355 *Campbell II, supra* note 207 at paras. 83 and 85.

356 *Mitchell, supra* note 233 at para. 61.

aboriginal rights seriously.[357]

Here, the jurisgenesis of inter-Aboriginal law represents the traditional, but more complete, method to interpret s.35(1). Aboriginal rights are not eroded, and the Crowns can reinforce their own constitutional legitimacy by protecting inter-Aboriginal law's continuance. Inter-Aboriginal law is the sum of all the constitutive parts which make up modern -treaty-making. It, above all, represents a way to reconcile Aboriginal and non-Aboriginal legal perspectives.[358]

As stated at the beginning of this section, the most obviously stated terms were described before the more subtly included ideas, as the latter terms are seen when the earlier notions are presented in their properly modern form. In the next section, what becomes clear is that the terms' natures as described here may be part of treaty-making, but the application of these natures appeared irregularly. The erratic use of the constitutive terms I have just described, I argue, is why treaty-making fails in British Columbia.

---

357 *Van der Peet, supra* note 71 at 666-667.

358 John Borrows notes " Canadian law concerning Aboriginal peoples thus originates in a culturally mixed medium drawn together from diverse jurisprudential sources." See Borrows, *Recovering Canada, supra* note 71 at 4.

V. Reflections on , or the Elimination of, treaty making in British Columbia

> "This report demonstrates B.C.'s commitment to implementing treaties..."
> Attorney General Geoff Plant, remarking about the Second Implementation Report of the Nisga'a Final Agreement, 6 February 2003. [359]

To close this presentation, one more story deserves attention. The following event involves a well-known individual and a familiar topic. Gordon Campbell, as premier, believed that his government did not know enough about the general public's opinions. To learn about the constituents' views, he decided a referendum would be held in the spring of 2002 by sending eligible voters a mail-in ballot with eight statements requiring a "yes" or "no" response. The premier claimed the referendum's results would allow future government policies to reflect British Columbians' views about a certain activity. The activity was treaty-making. [360]

Responses to this referendum were diverse, [361] and some of these reactions were framed for the courts. Chief Judith Sayers of Hupacaseth First Nation sought an injunction to stop the entire referendum process before it was completed. She imagined the referendum's implications

---

359 Nisga'a Lisims Government, Indian and Northern Affairs, Treaty Negotiations Office, "Nisga'a Treaty Successes Highlighted in Report," (press release) 6 February 2003.

360 *Referendum Act*, R.S.B.C. 1996, c. 400.

361 The referendum process took the following form. In early April 2002 Elections BC mailed 2, 127, 829 referendum packages to registered voters, 16, 390 packages were mailed to unregistered voters (who needed to prove they qualified as voters in provincial matters) and about 2,500 people obtained referendum packages from government offices. Voters needed to mail their ballots in, and ballots needed to be received at Elections BC's office by 15 May 2002. At Elections BC, 763, 480 ballots were received and counted, and these counted ballots represented 35.83% of all persons who received a package. See Elections BC, "Treaty Negotiations Referendum," 3 July 2002. Legislation stipulates "if more than 50% of the validly cast ballots vote the same way on a question stated on the government that initiated the referendum" the result is binding. See *Referendum Act, ibid.* s.4. The government declared the significance of treaty-making was of a "public interest" thereby permitting application of the *Referendum Act.* See also the Treaty Negotiations Referendum Regulation, B.C. Reg. 50/2002 ("Referendum Regulation").

counterintuitive to the elimination of land disputes. To support this claim, Chief Sayers argued the referendum's regulation was invalid because of its ambiguity, its contradictory nature and its inconsistency "with the obligations on the government to negotiate treaties in good faith and in conformity with the honour of the Crown."[362] Justice Hutchinson at B.C. Supreme Court, and then Justice Low at the Court of Appeal, held Chief Sayers did not demonstrate that the referendum caused the irreparable harm necessary to obtain such an injunction. Unsatisfied with these results, Chief Sayers reappeared with a different argument. This second time, she claimed that the referendum's regulation was ultra vires the *Referendum Act* and therefore unconstitutional. The Court held, by applying the *Secession Reference,* that Chief Sayers was "seeking to have the courts assume a supervisory role in the matter of politics." This argument was also dismissed.[363]

On May 15, 2002, the last day Elections B.C. accepted completed ballots, another group learned that its courtroom argument failed. A group of Aboriginal leaders, dubbed the "Referendum Five," sought an injunction against British Columbia's Chief Electoral Officer to enjoin her from counting and reporting the ballot results. [364] Madam Justice Smith concluded this request did meet *RJR* requirements necessary to receive an injunction. [365] As well, she also held that the Referendum Five failed to prove that British Columbia did not demonstrate its duty to consult, and that they also failed to prove how the referendum did not represent the public interest.[366] The Court was "of the view that the challenges raise a serious issue regarding the constitutionality of the Regulation that merits further examination of a trial", [367] but such a

362 *Ke-kin-is-uks et al v. HMTQ et al* 2002 B.C.C.A. 238.
363 *Ke-kin-is-uks v. HMTQ , Att. General et al* 2002 B.C.S.C. 802.
364 *Bob, Sam et al v. HMTQ et al, supra* note 261.
365 *RJR, supra* note 157 at 340.
366 *Bob, Sam, et al , supra* note 261 at paras. 50-61.
367 *Ibid.* at para. 41.

trial was only possible after a referendum-based policy became implemented.

These failed legal attempts caused much delight for Premier Campbell and Attorney General Geoff Plant, and they found the referendum's numbers equally as pleasing. On July 3, 2002 Elections B.C. announced the following responses for the eight statements:

> **Private property should not be expropriated.**
> Agree: 84.52% Disagree: 15.48%
>
> **Terms and conditions of leases and licences should be respected; fair compensation for unavoidable disruption of commercial interests should be ensured.**
> Agree: 92.12% Disagree: 7.8%
>
> **Hunting, fishing and recreational opportunities on Crown land should be ensured for all British Columbians.**
> Agree: 93.14% Disagree: 6.86%
>
> **Parks and protected areas should be maintained for the use and benefit of all British Columbians.**
> Agree: 94.5% Disagree: 5.5%
>
> **Province-wide standards of resource management and environmental protection should continue to apply.**
> Agree: 93.63% Disagree: 6.37%
>
> **Aboriginal self-government should have the characteristics of local government, with powers delegated from Canada and British Columbia.**
> Agree: 87.25% Disagree: 12.75%
>
> **Treaties should include mechanism for harmonizing land use planning between Aboriginal governments and negotiating local governments.**
> Agree: 91.79% Disagree: 8.21%
>
> **The existing tax exemptions for Aboriginal people should be phased out.**
> Agree: 90.51% Disagree: 9.49%. [368]

368 "Treaty Negotiations Referendum," *supra* note 361.

Before the Liberal Party became government, and after it won the 2001 election, it publicly argued that treaties should not modify non-Aboriginal British Columbians' legal and economic positions.[369] These referendum's results demonstrated, according to the premier and the attorney general, that the general public also supported this view. After Elections BC announced the numbers, Minister Plant declared that the results were "binding" thereby necessitating all future provincial legislation to reinforce the referendum's statements. [370]

But not everyone agreed with Minister Plant's conclusions. Legal experts, instead, considered the results irrelevant since any referendum cannot modify a Crown's mandatory constitutional obligations.[371] Besides this law-related criticism, the referendum was also chastised for its political role. Critics argued that its format was framed so results would simply reflect the government's already-held opinion. One of the most scathing criticisms explained how even this goal was not achieved properly.[372] In short, the referendum was lambasted for its mean-spiritedness, its poor setup and its illegality. [373]

The referendum acts as a microcosm for many issues that appeared throughout this entire

369 British Columbia, Office of The Premier, "British Columbians Endorse Principles for Negotiations," 3 July 2002.

370 It is notable that the Attorney General did not think the results were binding before they were announced. On April 3, 2002 Jim Beatty of the *Vancouver Sun* reported that Plant believed "the principles will not legally bind the province". Plant stated that he only needed to be "mindful of the public interest." See "Treaty Vote 'Not Binding'" (3 April 2002) *Vancouver Sun* A3. Compare these comments to Plant's speaking notes for his press conference on 3 July 2002: "since a majority of validly cast ballots has been cast in favor of each of the eight statements of principle, those statements of principle are binding on government. "British Columbia, Minister of Attorney General Treaty Negotiations Office, "Minister Responsible for Treaty Negotiations Geoff Plant Speaking notes: Post-Referendum Press Conference July 3, 2002".

371 P. Macklem, "The Probable Impact and Legal Effect of Proposed Treaty Referendum" (November 2001) 59 Advocate (B.C.) 895. Compare to British Columbia, Minister of the Attorney General, letter from Geoff Plant to Phillip Steenkemp, "Instructions to Negotiators" 31 July 2002 (on file with author).

372 Angus Reid, a veteran pollster, remarked that the referendum was " 'one of the most amateurish, one sided attempts to gauge the public will that I have ever seen in my professional career.'" R. Mickleburgh, "Vote result magnifies deep flaws apparent from start" (4 July 2002) *Globe and Mail* A8.

373 The Hon. Lincoln Alexander, Chair of the Canadian Race Relations Foundations, argued the referendum "has racist underpinnings." Letter from Hon. Lincoln Alexander to Hon. Gordon Campbell, 30 April 2002 (on file with author).

study. It shows how certain parties mold their political concerns about land into legal arguments, how certain constitutive tenets are used to support these opinions and how the judiciary evaluates these claims.[374] But what the referendum also demonstrates, unfortunately, is that an apparent commitment to resolution shows little success *again*. The government, currently, has yet to create significant referendum-based policies to clarify land tenure issues.[375]

Restating this presentation's purpose is helpful at this juncture. I examined the history of negotiations, the constitutionality of this history and the terms which appeared in these stages in order to understand why, if all parties claim they want to make treaties, treaties do not exist. And after considering these three sections, one important reflection is clear. When the terms' constitutive natures are extracted and understood on their own, these natures do not match how the terms were used during treaty-making and litigation. In other words, the second and third sections should equate the fourth part, and such an algebra clearly did not happen. [376] The ideas were misused, so difficulties happened during the pursuit of treaty-making, and any agreements which have occurred because of these difficult pursuits are subsequently constitutionally unstable.[377]

This observation rests on the assumption that treaty-making must use modern interpretations

---

374 Regarding the referendum's process, see H. Foster, "Interview," CBC Radio(Victoria), 12 March 2002; A. Hall, "The Denigration of a 'Great National Question': The Campbell Referendum on the Indian Title in British Columbia" (March 2002) (on file with author); P. Macklem, "The Probable Impact...," *supra* note 370; Assembly of First Nations, "National Chief Rejects BC Referendum on Treaty Rights but is 'impressed by Low Response'" 3 July 2002.

375 D. Saunders, "Plebiscites just get in the way of democracy" (9 November 2002) *Globe and Mail* F3.

376 For comments about the regularity of legal principles' application, see J. Borrows in *Speaking Truth to Power*, *supra* note 101 at 39.

377 P. Macklem writes: " the constitution specifically requires the reform of existing treaty processes." Macklem, *Indigenous Difference, supra* note 9 at 266. For remarks about the absence of scholarly presentations critiquing the treaty-making process in either a positive or negative manner, and the negative ramifications of this trend, see Sterritt et al, *supra* note 166 at 4.

of the concepts to reinforce constitutionalism.[378] I contend that this assumption is necessary, however, because it is imperative to understand that British Columbia's treaty-making is, by its very existence, not historic. Forcing today's agreements to reinforce past ideas about treaties and law is, therefore, constitutionally improper.[379] Courts demand that constitutive ideas demonstrate modernity. On the argument, then, that treaty-making should not be excluded from this principle I conclude that treaty-makers and NFA did not demonstrate modernity enough.

My claim of recognising unconstitutionality in the NFA might seem inaccurate as the NFA, in fact, underwent constitutional scrutiny and passed with flying colours. In other words, the case law suggests the NFA is constitutional. Here, however, is where I contend my methodology's setup is helpful. By extracting the legal norms and subsequently comparing their natures to the protesters' arguments, it is clear that these groups (except for the GHC) did not use the terms correctly or consistently. Campbell et al's format was particularly flawed. They presented historic notions of sovereignty, an incomplete application of the duty to consult, and too much reliance upon a traditional "public interest". Moreover, they failed to understand the purpose of s.35(1). [380]

But while Campbell et al arguments were legally nonsensical, Chief Mountain et al's (previously "Barton et al") presentations are legally and culturally distressing. This group's argument, one of contending that an indigenous nation's s.35 rights should be overridden by

---

378 Compare my contention to other writers who (correctly) point out that some indigenous issues can also be justified using ideas that are, what I consider, more traditional. See, for example, Macklem, *supra* note 9 at 119-125 regarding formal equality.

379 An oft-quoted example of this perspective is a passage from *Hunter v. Southam Inc.* [1984] 2 S.C.R. 145 at 156.

380 For an exhaustive reaction to Campbell et al's reasoning, see British Columbia's "Written Argument of the Attorney General of British Columbia" (1 May 2000) (on file with author) for *Campbell III*, *supra* note 212.

both the *Charter* and historic understandings of ss. 91 and 92, conflicts with jurisprudence which explains the purposive definition of s.35 (1). Chief Mountain et al continue to fight the NFA. But if they are successful , their win will place them in worse stead. The implications of this decision could also affect all other nations in the province (and arguably the rest of the country). Chief Mountain claims he wants protection of his indigenous ways. But if he wins, he will actually damage his own indigenous existence, as even his lawyer points out, because he ultimately argues that Canada's sovereignty and indigeneity are completely incompatible. [381] In sum, the NFA's unconstitutionality was not proven because the arguments (except for the GHC) were formulated incorrectly. If a document, such as the NFA, is not challenged with a proper use of the constitution, its own constitutionality is not disproved. A constitutional defence is unnecessary when the offence it experiences is unconstitutional.

On that note, how do I contend that the NFA demonstrates unconstitutionality? First this agreement is founded on a claim of exclusive use. This contention, when compared to the proper form of the duty to consult, *Delgamuukw*'s instructions about shared use, and accepted understandings about pre-contact history and Aboriginal law, cannot be justified. In the Nass Valley, another group claims that its s.35(1) existence is dependent upon a cultural attachment to this area. The courts have accepted this argument as true. [382] This acceptance makes the NFA troubling in two ways. Not only is the GHC's fiduciary protection violated by the Nisga'as' land claim, the NFA is based on an untrue premise. Suppose the government believes that the NFA's exemplification of "exclusive use" is the proper definition. This term, however, is not permitted this definition with any other nation in British Columbia and also contradicts the

381 On this point, the entire premise of Barton et al's legal argument seems completely counterintuitive and incredibly "anti"-Aboriginal, as courts have elucidated. See J. Weston, "How Tom Berger got it wrong" (22 April 2002) *Vancouver Sun* A15.

382 *Gitanyow IV, supra* note 190 at 332.

definition as described in *Delgamuukw*.[383] If a nation, in a comprehensive claim or at the BCTC, claims exclusive use, this term is understood to mean that no other nation has an attachment to the land in question. The courts have held that such a description does not describe the Nass Valley. Because the NFA relies upon either an incorrect definition of the term, or a poor application of the correct definition, the document violates the rule of law.[384] That the only defences the Crown could think of in response to the GHC were that negotiations are political and voluntary, and that the GHC might have violated a regulation, continues the weakness of the Crown's constitutional legitimacy in this situation.

But the NFA also fails constitutionally in two other ways. Consider what legal position the document places the Nisga'a people in. First, the emphasis on non-Nisga'a *Charter* rights creates a legal reassurance that, in the end, *Charter* rights will trump a full application of s.35(1). Such a interpretive hierarchy contradicts both the Crowns' fiduciary obligations and a purposive interpretation of s.35(1). [385] How can the *Charter* justify the application, or modification, of a s.35(1)right? [386] Again, the Crowns do not protect the Nisga'a as required by the *Royal Proclamation.* Second, the extinguishment clause also legally hurts the Nisga'a Nation and makes the NFA a flawed document. It was, legally speaking, possible for Canada to demand the inclusion of such a clause when NTC-Crown talks commenced. This historic

383 *Supra* note 180. Interestingly, Tom Molloy noted, when reflecting about government policies, "What a deal of trouble we might have spared ourselves had we only observed our own laws!" Molloy, *supra* note 128 at 118.

384 Borrows, "Questioning Canada's Title to Land...," *supra* note 231 at 37.

385 *Van der Peet, supra* note 71 at 551; *Delgamuuk*w, *supra* note 4 at 1065-1066; *R. v. Marshall* [1999] 3 S.C.R. 533 at 547-548. For reflections about why currently understood equality norms may not be helpful for marginalised groups see M. Deveaux, "Conflicting Equalities? Cultural Group Rights and Sex Equality" (2000) 48 Political Studies 522 at 522-539. For commentary about scholars reluctance to discuss this matter further, see Christie, "Aboriginal Citizenship...," *supra* note 235 at 15.

386 Sanders, *supra* note 16 at 123. For general discussion about this type of impasse, see L. McDonald, *supra* note 98.

circumstance, however, cannot be a legal excuse today. Not only did *Sparrow* explain how extinguishment clauses cannot be part of arrangements, but Aboriginal rights are part of the *Constitution*, so they cannot be extinguished by any means. The NFA cannot demand of the Nisga'a that they do not demand constitutional protection in the future. [387]

The BCTC's constitutionality, unfortunately, is equally as bleak. The commission's bureaucracy does not work, and this poorly administered body creates unconstitutional conditions.[388] The knowledge gap among negotiating parties, as admitted by the commission, places different groups in different positions of power when they commence treaty talks. [389] These disparities then affect how treaty-making evolves and what treaties will contain. The BCTC attempts to mitigate this problem by providing (limited) research assistance, "time outs" and more interim consultation with commissioners. But the differences persist.[390] In addition, the commission's slow pace affects treaty-making. Some issues affecting First Nations, such as environmental damage, are worsened because of how long negotiations take. [391] The lengthy time frame, therefore, can damage life-patterns worse or even permanently. Because the BCTC does not ensure that nations will be able to use their own histories, their explanations of sovereignty and their understanding of s.35(1) to the best of their abilities, some nations receive better treatment than others. Such an effect cannot be considered an enforcement of a proper fiduciary obligation.

---

387 Rynard *supra* note 48 at 221; Macklem, *Indigenous Difference, supra* note 9 at 159.

388 An argument about the practicality of addressing budgetary constraints and proper consultation with affected stake holders, regardless of the constitutionality of such issues, is succinctly addressed generally in I. Nonaka and D. Teece, eds., *Managing Industrial Knowledge* (London: SAGE, 2001).

389 *Supra* note 112.

390 Foster, "Getting There!," *supra* note 101 at 3; British Columbia Treaty Commission, "Executive Summary" of *Looking Back, Looking Forward: A Review of the BC Treaty Process* (2001) 2. The Hon. Robert Nault, Minister of Indian Affairs, refers to these issues as "impediments." See Canada, Ministry of Indian Affairs "Speaking notes for the Honourable Robert D. Nault, P.C., M.P., Minister of Indian Affairs At Speaking Truth to Power III," Vancouver, 15 March 2002.

391 For comparative jurisdictions' reflections, see Indian Claims Commission of Ontario, *Indian Negotiations in Ontario: Making the Process Work* (Ontario: Indian Claims Commission of Ontario, 1994) at 8.

A third issue about the bureaucracy, but one which intensifies the effects of the two points just mentioned, is the overall financial position of the BCTC.[392] Governments have not, according to the commission, provided adequate funding. As the BCTC's budget does not allow the commission to function at full capacity, a two-tier system has, unfortunately, developed. Nations in a better economic position when they enter talks can, if the commission cannot, do activities (such as research) which place them in a better negotiating position than poorer nations.[393] Governments' budgetary choices have impaired commission activities, the commission then cannot provide the best arrangements for nations, so the Crown violates its duty again.[394] If *Haida I/II* and *Taku River* are applied here, the BCTC could easily be classified either as an extension of the government or a third party because the BCTC enforces these poorly funded negotiations. It, then, would also be responsible for the failed duty. Since the BCTC openly admits that it is not functioning properly, it seems inarguable to note that the fiduciary breach has already happened.

The BCTC's unconstitutionality is noted in another way. When the commission was created, Crown participation occurred because governments accepts invitations. The commission informs the Crowns when a nation files a Statement of Intent, and it then suggests that the governments meet that First Nation. But consider the upsurge of nations using the process, and recall that negotiations are promoted by both the judiciary and the Crowns as the best

---

392 British Columbia Treaty Commission, "Political leaders must act on recommendations, says Treaty Commission Ninth Annual Report" (news release) 30 September 2002; Barman, supra note 17 at 340; British Columbia Treaty Commission, "Update" May 2002 at 1. For important commentary about the long term effects of such priorities, see M. Angus,*"and the last shall be first": Native Policy in an Era of Cutbacks* (Ottawa: Aboriginal Rights Coalition, 1990).

393 Lunman, *supra* note 2.

394 Macklem, *Indigenous Difference*, *supra* note 9 at 266. For analysis demonstrating concerns pertaining to budgets, marginalised groups and distributive justice see J. Keene, "Claiming the Protection of the Court: Charter Litigation Arising from Government 'Restraint'" (1998) 9 N.J.C.L. 97 at 115.

method for resolving s.35(1) issues. [395] If it is in the best interest for a nation to negotiate, the Crown must guarantee that this negotiation happen. To that end, the Crowns have a duty, rather than a choice, to come to the negotiating table if an indigenous nation wants to negotiate. Furthermore, indigenous sovereignty is a constitutional right, and if an indigenous nation wants a treaty to demonstrate this sovereignty, the Crowns, again, *must* negotiate.[396] For the federal government to publicly announce that it can unilaterally withdraw from negotiations is constitutionally incorrect.[397] Again, as with the bureaucratic concerns, the BCTC finds itself in a compromising legal position because it aggravates this violation by continuing its policy of "voluntariness" during talks. It could easily be considered an extension of the government or a third party , so it will likely be found responsible for this violation as well.

I have argued that the BCTC and the NFA are constitutionally defective. I see these flaws as a creation of parties keeping to constitutional definitions which are not part of treaty-making . In sum, I argue that had parties understood the importance of modern constitutionalism, they would not have devised the treaty-making formats which currently exist. To support this contention further, looking at where the constitutive norms were fully applied demonstrates how a modern understanding helps create successful negotiations. To illustrate this point, imagine how much slower any stage would be without the use of oral history or without the Crowns admitting that their own sovereign conditions needed to change shape. Consider, as well, how an appropriate understanding of the duty to consult during early stages mitigates overlaps and makes more parties feel included thereby decreasing the urge to rely upon

---

395 See Macklem, *supra* note 9 at 267 fn. 4 and 275 -276, explaining *Makivik Corp. v. Canada (Minister of Canadian Heritage)* [1999] 1 F.C. 58 (T.D.) at 84.

396 Macklem, *supra* note 394. Borrows, *Recovering Canada, supra* note 71 at 135. Compare this perspective to the attitude of Canada's NFA negotiator: "unlike labour negotiations, treaties are not based on a legal duty to negotiate an agreement." Molloy, *supra* note 128 at 33.

397 Lunman, *supra* note 2.

traditional public interest ideas later on. In short, when modernist notions of the *Constitution* are applied, treaty-making is easier. When these understandings appear haphazardly, any negotiated treaties are constitutionally flawed.

By recalling the beginning of this study again, I reflected that political and social relations in the province are directly affected by land issues, so the fact remains that disputes about the land continue to subsequently create tension in many circles. Imagining replacements, then, for current strategies (since these strategies fail) seems imperative. As I have concluded that treaty-making does not work because constitutive norms of treaties are improperly used, it would seem that using them properly is the first recommendation to make. So it is also, at this juncture, to permit my presentation to change shape. Imagining what would makes these terms become properly used should also be a goal of examining this province's history. On that note, I argue that the best way to enforce constitutive norms for treaty-making is to ensure that their proper use happens from the very beginning of treaty-talks, thereby forcing parties to continue these terms' conditions to exemplify the rule of law. Whatever issue appears constitutionally significant at the very beginning of treaty-talks, therefore, should be the first concern. On this matter, I agree with the BCTC that an issue which needs to be completely resolved before treaties will work is the issue of overlaps.

Why does the resolution of overlaps provide the key to ensuring better treaty-making? I contend that its importance can be found in understanding the best way to solve overlaps. As First Nations have described, [398] as governments have supported, [399] and as courts have

---

398 Sterritt et al, *supra* note 345; Cardinal and Hildebrandt, *supra* note 245.

399 Gerbauer, *supra* note 353.

concluded, [400] there are some topics pertaining to indigenous peoples that non-indigenous peoples simply do not understand. This conclusion, furthermore, has a legal form. Non-indigenous governments are often unaware of nations' histories and connectedness, a connectedness which affects nations' actions insurmountably. That connectedness cannot be ignored during treaty talks. It explains nations' capacity to organise quickly as a larger political entity, but it conversely explains why a nation such as the Gitanyow will challenge the Nisga'a about forgetting their historic relations. Furthermore, when overlaps are considered in a legal sense, this connectedness could be appreciated for the role it could play in eliminating the dispute at the core of an overlap claim. Shared exclusivity should be imagined, as the BCTC understands, during treaty talks' early stages. Solving this problem relieves the stress level of the talks' remaining stages.

As a further extension of this position, I also contend that the discussions about land title and shared use have a constitutional way in which these early talks can happen. Furthermore, this way, because of its form, sets the tone in treaty-making so modern constitutive terms continue to be used during all talks' later stages. Additionally, I argue that this form must be used because of its own constitutionality. The way to solve overlaps, and therefore the way to guarantee the rest of treaty-making is constitutional, is to enforce inter-Aboriginal law. Overlaps cannot develop if nations do not disagree, and nations do not disagree if they can communicate with each other and create arrangements. Recognising pre-contact inter-nation relations guarantees that parties must respect the modern notions of the terms in every other stage of treaty-making. In short, overlaps and inter-Aboriginal law are constitutionally complementary. Overlaps are created by historic interpretations of treaty-making's terms, and

---

400 *Paul, supra* note 241 at para. 33.

inter-Aboriginal law, on the other hand, is composed of the modern understandings of these very same ideas. If inter-Aboriginal law happens, the flaws of the BCTC and the NFA seem difficult to envision when parties understand how they must communicate, what they must communicate about, and what norms must be included in that communication. The goal of treaty-making can be met because the equation, one of the components of treaty-making matching how are the components are used, happens.

But even if the constitutionality of inter-Aboriginal law is not fully supported, its practicality has serious merit. As the BCTC argues, overlaps solved at early stages alleviate political tensions among the Crowns, First Nations, and the general public. These tensions, as I mentioned earlier, are not difficult to observe.[401] Furthermore, financial costs for all parties are less when overlaps are taken care of quickly. Prolonged negotiations and/or litigation create even more budgetary strains on parties. The GHC's courtroom protests demonstrate this issue.

If British Columbia's treaty-making is seen for what it is, a modern invention stemming from Aboriginal title analysis, constitutive terms should be articulated in the ways to protect this inventiveness. So far, parties have relied upon historical contexts, and treaty-making has subsequently veered away from its goals. Yet as the Supreme Court of Canada has noted, "care must be taken that historical matters...do not stunt its (the law's) growth." [402] This is

---

401 For comments about how a misperception exists that more than one hundred percent of the province can be validly claimed, see C. Barnes, "Chief Joe Mathias remembered as champion of aboriginal rights," Canadian Press, 15 March 2000; British Columbia Chamber of Commerce, "Indian Affairs and Northern Development," in *2002-2003 Policy and Positions Manual* (Vancouver: British Columbia Chamber of Commerce, 2002) at 160. Borrows, *Recovering Canada*, *supra* note 71 at 118, 144 and 157.

402 *Re B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486 at 509. See also M. Rizzo and D. Whitman, "The Camel's Nose is in the Tent: Rules, Theories, and Slippery Slopes" (November 2002) (on file with author) at 71-72.

important because, as (then) Chief Justice Dickson observed, the *Constitution*

> is drafted with an eye to the future...Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind. [403]

The complementary and antithetical binary of "overlap" and "inter-Aboriginal law" is an important pair to envision. Neither term is *ad hominem*, and the application of inter-Aboriginal law is not a paradigmatic shift. Rather, as I have argued, it simply reinforces norms *which already exist* and are already supported by governments, indigenous nations and the judiciary. [404] To ensure its constitutionality, inter-Aboriginal law does need to be enforced before any other s.35(1) issue. But this placement, in fact, aids the other issues' resolution. Permitting nations to reach agreements among themselves about land ensures every other stage of treaty-making will be less difficult.[405]

Preventing future problems by describing the above proposal, however, does not eliminate one other reflection. This study is, after all, about current treaty-making, so it should provide remarks about what goes on right now. To that (unfortunate) end, this presentation must also include the blunt observation that Chief Gosnell's negotiated document, and the current commission in British Columbia, are still constitutionally unviable. If parties in British

---

403 *Hunter v. Southam*, *supra* note 378 at 155. Lamer, (then) C.J.C. cited this case's conclusion in *Van der Peet*, *supra* note 71 at 535-536.

404 J. Borrows, "Questioning Canada's Title to Land...," *supra* note 231 at 36.

405 The potential of British Columbia acting as a role model for overlaps is not impossible. But it should also be noted that other jurisdictions outside Canada are struggling with this same topic, and they should also be considered when creating reflections. See the Inter-American Court, *The Mayagtna (Sumo) Awas Tingni Community v. Nicaragua* (August 31, 2001), (Ser. C) No. 79, and S. J. Anaya and C. Grossman, "The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples" (2002) 19 Ariz. J. Intl and Comp. L 1.

Columbia are concerned that treaty-making be constitutional, it is a regretful but necessary conclusion to reflect that the BCTC's functions and the NFA's implementation need to be eliminated. [406]

406 Macklem, *Indigenous Difference*, *supra* note 9 at 266.

VI. Kîsîhcikê

> Today, more than ever before in the history of mankind, everything is interrelated...Theoretically, almost everyone now knows this. But how does the knowledge find expression in practical politics? In the practical politics of each one of us?
>
> Václav Havel, *The Art of the Impossible*[407]

As a postscript, my final reflection represents a conflict which impacts anyone interested in indigenous legal issues for familial reasons. Using the *Constitution* to find solutions can be considered by some Aboriginals a promotion of Canadian (and colonising) legal processes. Justifying the use of non-indigenous norms to create protection for indigenous peoples can, therefore, be incredibly difficult to reconcile. After all, if I describe how inter-Aboriginal law is dependent upon *Van der Peet* for its very existence, I am using a non-indigenous tool to survive in a non-indigenous society. Such creativity with *Van der Peet* can be taken, then, as a sign that one set of (indigenous) values is tossed aside and another (non-indigenous) value system is considered superior.[408] Struggling with the question of whether such a strategy is legally or ethically correct seems even more disheartening when one finds non-indigenous sources arguing that relying upon constitutional norms to solve constitutional problems simply reinforces the flaws that constitutional discourse contains. [409]

But positing inter-Aboriginal law, and arguing that overlaps are the most important issue to resolve, I think, truly does not betray indigenous legal (and cultural) perspectives. My optimism exists because of how inter-Aboriginal law, if it is enforced, functions. It

---

407 (New York: Alfred A. Knopf, 1997) at 141.

408 See J. Borrows, *Recovering Canada, supra* note 71 at 56 to 76 for some general effects of saddling with current Canadian constitutive norms.

409 J. Bakan, *Just Words*: *Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) at 42.

demonstrates to all Canadians that an indigenous resolution method can eliminate problems that a non-indigenous system created. Moreover, this method is so important that non-indigenous legal concepts must guarantee its continuance. [410] Bluntly stated, unless *Van der Peet* is rejected by the Supreme Court of Canada, it is the case to be reckoned with. Yet that reckoning can be pro-Aboriginal. Besides, I also argue that turning my back to *Van der Peet* only increases my potential for poor preparation when imagining courtroom battles against the Crowns. It is overly-simplistic and equally shortsighted for analysts to state the case is incorrect while not inventing ways it can be used to indigenous peoples' advantage. While scholars and lawyers work to create "alternatives" to *Van der Peet*, indigenous nations go to court, faces judges who demand that they use this case, and experience the lonely juridical moment of trying to make due with what they constitutionally have.[411] In other words, analysts should give careful pause to the question of whether failing to provide solutions with *Van der Peet* is professionally or morally responsible. It is not incorrect to create ideas external to current constitutional bounds, but such creativity cannot be done at the expense of abandoning indigenous peoples in the courtroom.

But besides the constitutive role it plays, inter-Aboriginal law does something else. Its application automatically exposes another norm which threads its way through British Columbia's entire history. When this norm is revealed and reinforced, Aboriginal societies

---

[410] For remarks about the "misguided and oppressive nature" of works which continue to translate Aboriginal issues into liberal norms without arguing that the issues deserve, in fact, the same juridical status at these liberal ideas, see G. Christie, "Law Theories, and Aboriginal Peoples," *supra* note 51 at 38-41.

[411] For more reflections about non-indigenous peoples criticizing indigenous peoples for using Canadian tools on the claim that such a choice is not indigenous enough, see C. Voyageur's comments about "Contemporary Indian Women's Concerns" and "Speaking with Our Own Voices" in O. Dickason and D. Long, eds., *Visions of the Heart: Canadian Aboriginal Issues* (Toronto: Harcourt Brace, 1996) at 105-110. As well, compare my perspective to comments of P. Hutchins and A. Choksi, *supra* note 313, particularly at 275-283 where the authors discuss "alternatives" to *Van der Peet*. For commentary about how cases affect future circumstances, see C. Bell and M. Asch, "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation" in M. Asch, ed. *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and the Respect for Difference* (Vancouver: UBC Press, 1997).

remember to communicate with each other, [412] governments do not forget their responsibility to all of their constituents, [413] and all British Columbians see the benefits of improving cultural relations.

When I want to remember this norm, I simply recall what British Columbia's landscapes so beautifullly demonstrate.[414] This norm may not have official constitutive standing but it, *interconnectedness*, makes us remember that we do not fully understand our own worth until we recognise and protect our relationships with each other. Treaty-making is a process which must epitomize this (often forgotten) law.

---

412 G. Christie explains: "the identity of these individuals -and the various communities they collectively comprise- is provided by the responsibilities they have, which work to weave the web of which they are parts. They are, quite simply, things the individual *must* do, responsibilities to family, clan and community that *must* be respected, that *must* lead to action." Christie, "Law, Theory and Aboriginal Peoples," *supra* note 51 at 55. See also Sterritt et al, *supra* note 166 at 251 for description of "protocol" and at 11 for the observation that " a case could not be made within indigenous law for Nisga'a ownership of the territories in question."

413 Here, I contend that inter-Aboriginal law challenges the Crown to apply *Van der Peet* consistently. A party cannot apply an idea when it benefits its own circumstances and then reject the principle when convenient for other situations. See *Pacific Fishermen's Defence Alliance v. Canada* [1988] 1 F.C. 488 at 506-507 and Borrows, "Questioning Canada's Title to Land...," *supra note* 231 at 36-37.

414 Borrows, *Recovering Canada*, *supra* note 71 at 31.

BIBLIOGRAPHY

Press Releases and Media Articles

Assembly of First Nations. "National Chief Rejects BC Referendum on Treaty Rights but is 'Impressed by Low Response,'" 3 July 2002.

_____. "Nisga'a Bill Receives Royal Assent," 13 April 2000.

Barnes, C. "Chief Joe Mathias remembered as champion of aboriginal rights," Canadian Press, 15 March 2000.

Beatty, J. "Treaty Vote Not Binding," *Vancouver Sun*, 3 April 2002, A3.

British Columbia , Canada and Nisga'a Tribal Council. "Nisga'a, British Columbia and Canada Release Historic Agreement-In-Principle," 15 February 1996.

British Columbia Civil Liberties Association. "BCCLA supports Nisga'a treaty, opposes referendum," 3 December 1998.

British Columbia, Office of the Premier. "British Columbians Endorse Principles for Negotiations," 3 July 2002.

British Columbia Treaty Commission. "Overlap Agreements a Must in Treaty Negotiations," October 1998.

_____. "Traditional Territories of British Columbia's First Nations," November 1994.

"Canada's Noble Gift," *New York Times*, 15 August 1998, A22.

Canadian Broadcasting Corporation. "Nisga'a Neighbours Get $13 Million", 30 November 1999, 09:43 PST.

_____. "Native Offer An Insult," 30 November 1999, 12:37 PST.

Canadian Press. "Gitanyow Going to Court over Dispute With Nisga'a," 8 July 1998.

CBC Radio(Victoria). "Interview with Hamar Foster," 12 March 2002 (transcript).

Delacourt, S. "Natives Offered Limited Powers: Aboriginal Groups Unhappy as Ottawa Lays Out Terms for Self-Government," *Globe and Mail* , 11 August 1995, A1.

Deer, K. "Mitchell Decision: A good reason not to bring our issues to court", *Eastern Door*, 10:18, Story 3.

DePalma, A. "Throughout the Americas, Natives Invoke the Law of the Land," *New York Times,* 30 August 1998, WK 3.

Elections BC. "Treaty Negotiations Referendum," 3 July 2002.

Fontaine, P. "No Lessons Needed in Democracy," *Globe and Mail* , 11 December 1997, A17.

Gebauer, A. "Gitanyow Going to Court over Dispute With Nisga'a," Canadian Press, 8 July 1998.

"Gibraltarians Say No to Shared Sovereignty", *Globe and Mail*, 8 November 2002 , A23.

"Indian Police Get Chance 'to Paddle Own Canoe,'" *Globe and Mail,* 20 April 1990, A11.

Lang, J. "Clark says Gitanyow claim could be satisfied at no cost to public- Legislature may reconvene to vote on Nisga'a Treaty", *Raven's Eye*, 18 November 1998.

Lunman, K. "Nisga'a spent three decades, $50 million, sign deal and Gosnell has no regrets,"

Globe and Mail, 8 October 2002, A1.
Mickleburgh, R. "Vote results deep flaws apparent from start," *Globe and Mail*, 4 July 2002, A2.
"No referendum needed on Nisga'a Deal, experts say," *Vancouver Sun*, 27 August 1998, A19.
"NWT government warned against land claim deal," *Globe and Mail,* 24 August 2002, A7.
Rinehart, D. "Forest Companies quietly Leery of Nisga'a Impacts," *Vancouver Sun*, 23 March 1999, A13.
Saunders, D. "Plebiscites just get in the way of democracy," *Globe and Mail*, 9 November 2002, F3.
Simpson, J. "Consequences of Delgamuukw Now Ticking in B.C.," *Globe and Mail*, 26 May 1998, A22.
Terry, S. "Why the Nisga'a Agreement Must Not Be the Blueprint," *Khatou News*, August 1998.
Weston, J. "How Tom Berger got it wrong," *Vancouver Sun*, 22 April 2002, A15.
"What does it mean to me? The Nisga'a Treaty," *Globe and Mail*, 13 October 1998, A10.
Winchester, S. "Lies, Damn Lies and Maps," *Globe and Mail*, 7 December 2002, D3.

Documents

Anaya, S. *Fiduciary Obligation under International Law in General.* Research Study prepared for the Royal Commission on Aboriginal Peoples. 13 December 1994.
Assembly of First Nations. *Proposals for Amendments and Additions to the Constitution Act, 1982.* Presented at the First Ministers Constitutional Conference on Aboriginal Rights, Ottawa. March 15, 1983.
B.C. Cattlemen's Association. *Treaty Talks*, September/October 1999.
British Columbia, Minister of Attorney General Treaty Negotiations Office. "Minister Responsible for Treaty Negotiations Geoff Plant Speaking Notes: Post-Referendum Press Conference," 3 July 2002.
British Columbia, Minister of the Attorney General. Letter from Geoff Plant to Phillip Steenkemp, "Instructions to Negotiators, " 31 July 2002.
_____. *Written Argument of the Attorney General of British Columbia in Campbell et al v. British Columbia et al.* Vancouver Registry No. A982738.
_____, Ministry of Native Affairs. *Annual Report 1988-1989.* Victoria: Province of British Columbia, 1989.
British Columbia Chamber of Commerce. *2002-2003 Policy and Positions Manual.* Vancouver: British Columbia Chamber of Commerce, 2002.
British Columbia Claims Task Force. *Report* . Vancouver: British Columbia Claims Task Force, 1991.
British Columbia Treaty Commission. *Annual Report 2000: Status of Each Negotiation.*
_____. *Annual Report 2001* : *The Year in Review.*
_____. *Annual Report 2002: The Changing Landscape* .
_____. "Executive Summary," April 2002.

_____. *Looking Back, Looking Forward: A Review of the BC Treaty Process*. 2001.
_____. "Overlap Agreements a Must in Treaty Negotiations," *Newsletter,* October 1998.
_____. "Political leaders must act on recommendations, says Treaty Commission Ninth Annual Report" (news release), 30 September 2002
_____. "Status Report," January 2003.
_____. "Traditional Territories of British Columbia's First Nations," November 1994.
_____. "Treaty offer disappoints Gitanyow," *Updates*, February 2000.
_____. "Update," May 2002.
British Columbia Treaty Negotiations Office. *Report on Implementation Activities Undertaken by British Columbia Pursuant to the Nisga'a Final Agreement, May 11, 2000- March 31, 2001.*
Campagnolo, the Hon. I. "Speech from the Throne for the Opening of the Fourth Session, Thirty-Seventh Parliament of the Province of British Columbia," 11 February 2003.
Canada. *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government.* Ottawa: Ministry of Supply and Services, 1995.
_____. Department of Indian Affairs and Northern Development. *Comprehensive Land Claims Policy.* Ottawa: Supply and Services, 1986.
_____. *Federal Policy for the Settlement of Native Claims*. March 1993.
_____. *In All Fairness: A Native Claims Policy - Comprehensive Claims*. Ottawa: Ministry of Supply and Services, 1981.
_____. Ministry of Indian Affairs. "Speaking Notes for the Honourable Robert D. Nault, P.C., M.P., Minister of Indian Affairs At Speaking Truth to Power III." Vancouver: 15 March 2002.
_____. Minister of Indian Affairs and Northern Development. *Comprehensive Land Claims Policy*. Ottawa: Minister of Supply and Services, 1987.
_____. Ministry of Indian and Northern Affairs. "Speaking Notes for the Honourable Robert D. Nault, Minister of Indian Affairs and Northern Development ot the Senate Committee on Aboriginal Peoples, March 23, 2000, Ottawa, Ontario".
_____. *Outstanding Business: A Native Claims Policy.* Ottawa: Supply and Services, 1982.
_____. *Statement Made by the Honourable Jean Chretien, Minister of Indian Affairs and Northern Development, on Claims of Indian and Inuit People.* Ottawa: 8 August 1973.
_____. *Statement of the Government of Canada on Indian Policy.* Ottawa: Queen's Printer, 1969.
Canadian Bar Association-Ontario. *First Nations, the Environment and Development: The Emergence of Duty to Consult* . Toronto: CBAO, 29 January 1999.
House of Commons. "Debates of the House of Commons of the Dominion of Canada." Ottawa: Maclean, Roger & Co., 1876.
_____. "Debates," 25 September 1990.
_____. *Report of the Special Committee on Indian Self-Government.* Ottawa: Queens Printer, 1983.
_____. Fifth Report of the Standing Committee on Aboriginal Affairs. *The Summer of 1990.*

May 1991.
Hurley, M. *The Nisga'a Final Agreement.* Ottawa: Library of Parliament, Parliamentary Research Branch, 24 September 2001.
Indian Claims Commission. *Athabasca Denesuline Inquiry into the Claim of the Fond du Lac, Black Lake and Hatchet Lake First Nations.* Ottawa: Indian Claims Commission, 1993.
Letter from Honourable Lincoln Alexander to Honourable Gordon Campbell, 30 April 2002.
Mathias, J. et al. *Report of the British Columbia Claims Task Force.* Vancouver: 1991.
McNeil, K. *Defining Aboriginal Title in the '90s: Has the Supreme Court Finally Got it Right?* Toronto: Robarts Centre for Canadian Studies, 1998.
Royal Commission on Aboriginal Peoples. *Final Report.* 5 vols. Ottawa: Minister of Supply and Services Canada, 1996.
Wheeler, W. "Indigenous Oral Tradition Histories: An Academic Predicament." Report prepared for the Plaintiffs in *Chief Victor Buffalo et al. Her Majesty the Queen et al.* (F.C.T.D.), file nos. T-2022-89 and T-1254-92 (2001).

Agreements and Legislation

An Act to Amend the Indian Act. 17 George V. c.32.
An Act Respecting Indians (1951) 15 George VI c.29
British Columbia Land Settlement Act S.C. 1920, c.51.
British Columbia Terms of Union. R.S.C. 1985, App. II, no. 10.
British Columbia Treaty Commission Agreement. 21 September 1992.
Treaty Commission Act. R.S.B.C., c. 461.
British Columbia Treaty Commission Act. R.S.C. 1995, c.45.
British North America Act 1867. 30 FCT (U.K.) , c.3.
Canada Act 1982. (U.K.), 1982, c.11.
Constitutional Amendment Approval Act. R.S.B.C. 1996, c.67.
Cree-Naskapi (of Quebec) Act. S.C. 1984, c.18.
Crown Liability and Proceedings Act. R.S.C. 1985, c. 50.
Crown Proceedings Act. R.S.B.C. 1996, c.89.
Environmental Assessment Act. R.S.B.C. 1996, c.119.
Indian Act. R.S.C. 1927, c.98.
James Bay and Northern Quebec Native Claims Settlement Act. S.C. 1976-77, c.32.
Nisga'a Final Agreement Act. S.C. 2000, c.7.
Nisga'a Final Agreement Act. S.B.C. 1999, c.2.
Nisga'a Final Agreement Between the Nisga'a Nation, the Government of British Columbia, and the Government of Canada , 1998.
Order-in-Council PC 1265. 12 July 1924.
Referendum Act. R.S.B.C. 1996, c.400.
Royal Proclamation of 1763. R.S.C. 1985, App. II, No.1.
Treaty Commission Act. R.S.B.C., c. 461.

Treaty Negotiations Referendum Regulation. B.C. 50/2002.
36th Parliament, 2nd Session, *Edited Hansard*, Number 33, Thursday December 2, 1999.

Unpublished

Christie, G. "Aboriginal Citizenship: Sections 35, 25 and 15 of the *Constitution Act, 1982*" (December, 2002).
_____. "Judicial Justification of the Development of Aboriginal Law in Canada" (January 2002).
_____. "Law, Theory and Aboriginal Peoples" (January 2003).
Clayton, R. "Escaping the Past: The Impact of Legal Tradition on Constitutional Interpretation" (January 2003).
Hall, A. "The Denigration of a 'Great National Question': The Campbell Referendum on the Indian Title in British Columbia" (March 2002).
Morse, B. "Comparative Assessments of the Position of Indigenous Peoples in Quebec, Canada and Abroad" (February 2002).
Plant, G. "The Nisga'a Final Agreement." Notes for address, Faculty of Law, University of British Columbia, 29 October 1998.
Rizzo, M. and D. Whitman, "The Camel's Nose is in the Tent: Rules, Theories, and Slippery Slopes" (November 2002).
Slattery, Brian. "The land rights of Indigenous Canadian peoples as affected by the Crown's acquisition of their territories". D.Phil. Diss. , University of Oxford, 1979.
Terry, J. "Aboriginal Self-Government in Canada: Some Recent Developments in Case Law and Policy" (1995), presented at Australasian Law Teachers' Association Annual Meeting.

Books

Achebe, C. *Things Fall Apart*. 2nd ed. Oxford, UK: Heinneman New Windmills, 1971.
Alfred, T. *Peace Power, Righteousness: An Indigenous Manifesto*. Don Mills, Ont.: Oxford University Press, 1999.
Angus, M. *"and the last shall be first": Native Policy in an Era of Cutbacks*. Ottawa: Aboriginal Rights Coalition, 1990.
Armitage, A. *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand*. Vancouver: UBC Press, 1995.
Asch, M. *Home and Native Land: Aboriginal Rights and the Canadian Constitution. Toronto*, ON: Methuen, 1993.
Asch, M., ed. *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity and the Respect for Difference*. Vancouver: UBC Press, 1997.
Bakan, J. *Just Words: Constitutional Rights and Social Wrongs*. Toronto: University of Toronto Press, 1997.

Bakan, J. and D. Schneiderman, eds. *The Constitution and Social Justice*. Ottawa: Carleton University Press, 1992.

Barman, J. *The West Beyond the West: A History of British Columbia*. Toronto: University of Toronto Press, 1991.

Bartleman, J. *Out of Muskoka*. Manotick, ON: Penumbra Press, 2002.

Behrendt, L. *Aboriginal Dispute Resolution: A Step Towards Self-Determination and Community Autonomy*. Sydney: Federation Press, 1995.

Berger, T. *A long and terrible shadow: white values and native rights in the Americas since 1492*. 2nd ed. Vancouver: Douglas & McIntyre, 1999.

Bertleson, J. A *Genealogy of Sovereignty*. Cambridge: Cambridge University Press, 1995.

Bhabha, H. *The Location of Culture*. London: Routledge, 1994.

Biersteker, T. and C. Weber, eds. *Sovereignty as a Social Construct*. Cambridge: Cambridge University Press, 1996.

Bogart, W. *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada*. Oxford: Oxford University Press, 1994.

Boldt, M. and J. Long, eds. *The Quest For Justice: Aboriginal Peoples and Aboriginal Rights*. Toronto: University of Toronto Press, 1985.

Borrows, J. *Recovering Canada: The Resurgence of Indigenous Law*. Toronto: University of Toronto Press, 2002.

Borrows, J. and L. Rotman. *Aboriginal Legal Issues: Cases, Material & Commentary*. Toronto: Butterworths, 1998.

British Columbia Claims Task Report. *Report of the British Columbia Claims Task Force*. Vancouver: The Task Force, 1991.

British Columbia Treaty Commission. *Speaking Truth to Power II*. Vancouver: British Columbia Treaty Commission, 2001.

_____. *Speaking Truth to Power III*. Vancouver: British Columbia Treaty Commission, 2002.

Brody, H. *Maps and Dreams: Indians and the British Columbia Frontier*. Vancouver: Douglas and McIntyre, 1981.

Browlie, I. *Treaties and Indigenous Peoples*. Oxford: Clarendon Press, 1992.

Brown, J. and E. Vibert, eds. *Reading Beyond the Words: Contexts for Native History*. Peterborough, ON: Broadview Press, 1996.

Bruchac, J. *Lasting Echoes: An Oral History of Native American People*. Portland: Silver Whistle, 1997.

Bumsted, J. *Interpreting Canada's Past*. 2nd ed. Toronto: Oxford University Press, 1993.

Campbell, R. and L. Pal. *The Real Worlds of Canadian Politics: Cases in Policy and Process*. Peterborough, Ont.: Broadview Press, 1991.

Cardinal, H. and W. Hildebrandt. *Treaty Elders of Saskatchewan: Our Dream is that Our Peoples will One Day be Clearly Recognized as Nations*. Calgary: University of Calgary Press, 2000.

Carr, E. *What is History?*. Harmondsworth, UK: Penguin Books, 1964.

Carty, R. ed. *Politics , Policy, and Government in British Columbia*. Vancouver: UBC Press, 1996.

Cassidy, F., ed. *Aboriginal Self-Determination.* Lantzville, B.C.: Oolichan Books, 1991.

_____. *Reaching Just Settlements: Land Claims in British Columbia. Proceedings of a Conference Held February 21-22, 1990.* Lantzville, BC: Oolichan Books, 1991.

Cassidy, F. et al. *Third Party Interests and Comprehensive Claims Settlements in British Columbia.* Victoria: Institute for Research on Public Policy, 1990.

Cassidy, F. and N. Dale. *After Native Claims? The Implications of Comprehensive Claims Settlements for Natural Resources in British Columbia.* Montreal: The Institute for Research on Public Policy, 1988.

Chamberlin, J. *The Harrowing of Eden: White Attitudes Toward North American Natives.* Toronto: Fitzhenry & Whiteside, 1975.

Coates, K. *Aboriginal Land Rights and Claims in Canada. Toronto*: Copp Clark and Pitman, 1991.

Coates, K., ed. *Indian Land Claims in Canada: a Regional Perspective.* Toronto: Copp Clark, 1992.

Cohen, A. *A Deal Undone: The Making and Breaking of the Meech Lake Accord.* Vancouver: Douglas and McIntyre, 1990.

Colvin, E. *Legal Process and the Resolution of Indian Claims, Studies in Aboriginal Rights No. 3.* Saskatoon: University of Saskatchewan Native Law Centre, 1981.

Christophers,C. *Positioning the Missionary: John Booth Good and the Confluence of Cultures in Nineteenth Century British Columbia.* Vancouver: UBC Press, 1998.

Cruikshank, J. *Life Lived Like a Story.* Vancouver: UBC Press, 1992.

Culhane, D. *The Pleasure of the Crown: anthropology, law and First Nations.* Burnaby, B.C. Talonbooks, 1998.

Davis, S. *Land Rights and Indigenous Peoples: The Role of the Inter- American Commission on Human Rights.* Cambridge, Massachusetts: Cultural Survival, 1988.

Decima Research Limited. *A Study of Canadian Attitudes Toward Aboriginal Self-Government.* Toronto: Decima Research, 1987.

Deslisle, R. *Evidence: Principles and Problems.* Toronto: Carswell, 1984.

Dicey, A. *The Law of the Constitution.* 10th ed. London: Macmillan, 1965.

Dickason, O. *Canada's First Nations: A History of Founding Peoples.* Norman: University of Oklahoma Press, 1992.

Dickason, O. and D. Long, eds. *Visions of the Heart: Canadian Aboriginal Issues.* Toronto: Harcourt Brace, 1996.

Duff, W. *The Indian History of British Columbia: The Impact of the White Man,* 2d ed. Victoria: Royal British Columbia Museum, 1997.

Eber, D. *Images of Justice.* Montreal and Kingston: McGill-Queen's University Press, 1997.

Elks, D. *Beyond Sovereignty: Territory and Political Economy in the Twenty-First Century.* Toronto: University of Toronto Press, 1995.

Englestad, D. and John Bird, eds. *Nation to Nation: Aboriginal Sovereignty and the Future of Canada.* Concord, Ont.: House of Anansi Press, 1992.

Fisher, R. *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890.* Vancouver: University of British Columbia Press, 1977.

Fleras A. and J. Elliott. *The Nations Within: Aboriginal-State Relations in Canada, the United States and New Zealand.* Toronto: Oxford University Press, 1992.

Fletcher, J., ed. *Ideas in Action: Essays on Politics,and Law in Honour of Peter Russell.* Toronto: University of Toronto Press, 1999.

Foster, H. and J. McLaren, eds. *Essays in the History of Canadian Law, vol. VI* . Toronto: Osgoode Society for Canadian Legal History by the University of Toronto, 1995.

Frideres, J. *Native Peoples in Canada: Contemporary Conflicts*. Scarborough: Prentice-Hall, 1993.

Fridland, G. The *Law of Contract in Canada.* Toronto: Carswell, 1986.

Friesen, J. Rediscovering *the First Nations in Canada.* Calgary: Detselig Enterprises, 1997.

Friesen, J. *When Cultures Clash: Case Studies in Multiculturalism.* Calgary : Detselig Enterprises Ltd, 1993.

Glavin, T. *A Death Feast in Dimlahamid.* Vancouver: New Star Books, 1989.

Grant, J. *Moon of Wintertime: Missionaries and the Indians of Canada in Encounter since 1534.* Toronto: University of Toronto Press, 1984.

Hamilton, A. *A Feather, Not a Gavel: Working Towards Aboriginal Justice.* Winnipeg: Great Plains Publications, 2001.

Hannum H. *Autonomy, Sovereignty and Self-determination: the Accommodation of Conflicting Rights.* Philadelphia: University of Pennsylvania Press, 1992.

Harring, S. *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence.* Toronto: Osgoode Society for Canadian Legal History, 1998.

Harris, C. *Making Native Space.* Vancouver: UBC Press, 2002 .

Harris, J. *Property and Justice.* Oxford: Clarendon Press, 1996.

Harris, R, ed. *The Historical Atlas Vol. 1.* Toronto: University of Toronto Press, 1987.

Havel, V. *The Art of the Impossible.* New York: Alfred A. Knopf, 1997.

Heard, A. *Canadian Constitutional Conventions: The Marriage of Law and Politics. Toronto*: Oxford University Press, 1991.

Held, V. *The Public Interest and Individual Interests.* New York: Basic Books, 1970.

Henderson, J., M. Benson and I. Findlay. *Aboriginal Tenure in the Constitution of Canada.* Scarborough, Ont.: Carswell, 2000.

Hiebert, J. *Limiting Rights: the dilemma of Judicial Review.* Montreal: McGill-Queens University Press, 1996.

Hirschman, A. *Exit, Voice and Loyalty :Responses to Decline in Firms, Organizations, and States.* Cambridge, Mass.: Harvard University Press, 1970.

Howe, P. and P. Russell, eds. *Judicial Power and Canadian Democracy.* Montreal and Kingston: McGill-Queens University Press, 2001.

Hutchinson, A. Waiting for CORAF: A Critique of Law and Rights. Toronto: University of Toronto Press, 1995.

Iggers, G. Historiography *in the Twentieth Century: From Scientific Objectivity to Post-Modern Challenges.* Hanover and London: Wesleyan University Press, 1997.

Imai, S. *Aboriginal Law Handbook.* Toronto: Carswell, 1999.

Indian Claims Commission of Ontario. *Indian Negotiations in Ontario: Making the Process*

Work. Ontario: Indian Claims Commission of Ontario, 1994.

Jefferson, C. *Conquest by Law.* Ottawa: Solicitor General of Canada, 1994.

Jenness, D. *The Indians of Canada,* 7th ed. Toronto: University of Toronto Press, 1977.

Kaplan, W., ed. *Belonging: The Meaning and Future of Canadian Citizenship.* Montreal: McGill-Queens University Press, 1993.

Keane, A. *The Modern Law of Evidence.* London: Butterworths, 1989.

Kerr, D. *Historical Atlas of Canada* 3rd revised ed. Toronto: Thomas Nelson & Sons (Canada) Limited, 1975.

Kunin, R., ed. *Prospering Together: The Economic Impact of the Aboriginal Title Settlements in B.C.* , Vancouver, BC: Laurier Institution, 1998.

Lajoie A., et al. *Le statut juridique de peuples autochtone du Quebec et le pluralisme.* Cowansville, QC: Yvon Blais, 1996.

Laski, H. *The Foundations of Sovereignty and Other Essays.* New York: Harcourt, Brace, 1921.

Law Commission of Canada. *Speaking Truth to Power: A Treaty Forum.* Ottawa: Law Commission of Canada, 2001.

Lewis, N. *The Missionaries: God against the Indians.* London: Martin Secker & Warburg Ltd, 1988.

Little Bear, L., M. Boldt and J. Long, eds. *Pathways to Self-Determination: Canadian Indians and the Canadian State.* Toronto: University of Toronto Press, 1984.

Lippert, O., ed. *Beyond the Nass Valley: National Implications of the Supreme Court's Delgamuukw Decision.* Vancouver: The Fraser Institute, 2000.

Long, C. *Religious Freedom and Indian Rights: The Case of Oregon v. Smith.* Lawrence, Kansas: University Press of Kansas, 2000.

Long, D. and O. Dickason, eds. *Visions of the Heart: Canadian Aboriginal Issues.* Toronto: Harcourt Brace Canada, 1996.

Loo, T. *Making Law, Order and Authority in British Columbia, 1821-1871.* Toronto: University of Toronto Press, 1994.

MacCormick, N. *Legal Reasoning and Legal Theory.* Oxford: Clarendon Press, 1978.

Macklem, P. *Indigenous Difference and the Constitution of Canada.* Toronto: University of Toronto Press, 2001.

Mair, C. and Historical Society of Alberta. *Through the Mackenzie Basin: An Account of the Signing of Treaty No. 8 and the Scrip Commission, 1899.* Edmonton: University of Alberta Press, 1999.

Malone, P. *The Skulking Way of War: Technology and Tactics Among the New England Indians.* Lanham, Md.: Madison Books, 1993.

Martin, C., ed. *The American Indian and the Problem of History.* New York: Oxford University Press, 1987.

McKee, C. *Treaty Talks In British Columbia.* Vancouver: UBC Press, 1997.

McNeil, K. *Common Law, Aboriginal Title.* Oxford: Clarendon Press, 1989.

_____. *Emerging Justice? Essays on Indigenous Rights in Australia and Canada.* Saskatoon: Native Law Centre, 2001.

McNeil, W. *Plagues and Peoples.* Garden City, N.B.: Anchor Books, 1976.

Mellon, H. and M. Westmacott, eds. *Political Dispute and Judicial Review: Assessing the Work of the Supreme Court of Canada.* Scarborough, Ont.: Nelson Thompson, 2000.

M'Gonigle, R. M. and W. Wickwire. *Stein. The Way of the River.* Vancouver, BC: Talon Books, 1988.

Miller, J. *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada,* 4th ed. Toronto: University of Toronto Press, 2000.

Miller, J., ed. *Sweet Promises: A Reader on Indian-White Relations in Canada.* Toronto: University of Toronto Press, 1991.

Milloy, M. *The Plains Cree: Trade, Diplomacy and War, 1790-1870.* Winnipeg: University of Manitoba Press, 1990.

Mills, A. *Eagle Down is Our Law: Witsuwit'en Law, Feasts and Land Claims.* Vancouver: University of British Columbia Press, 1994.

Molloy, T. *The World is Our Witness: The Historic Journey of the Nisga'a Into Canada.* Calgary: Fifth House, 2000.

Monet, C. and Skanu'u. *Colonialism on Trial: Indigenous Land Rights and the Gitskan and Wet'suwet'en Sovereignty Case.* Penticton: New Society/Inland/inbook, 1992.

Morris, A. *The Treaties of Canada with The Indians of Manitoba and The North-West Territories including The Negotiations on Which They Are Based, and Other Information relating Thereto.* Toronto: Willing & Williamson, 1880.

Morrison, R. and C. Wilson, eds. *Native Peoples: The Canadian Experience.* Toronto: McClelland and Stewart, 1995.

Murray, L. and K. Rice, eds. *Talking on the Page: Editing Aboriginal Oral Texts.* Toronto: University of Toronto Press, 1999.

Musgrave T. *Self-determination and National Minorities.* Oxford: Clarendon Press,1997.

Nisga'a Tribal Council. *Lock, Stock and Barrel: Nisga'a Ownership Statement.* New Aiyansh, British Columbia: Nisga'a Tribal Council, 1995.

Nisga'a Tribal Council. *Nisga'a: People of the Nass River.* Vancouver: Douglas and McIntyre, 1993.

Nonaka, I. and D. Teece, eds., *Managing Industrial Knowledge.* London: SAGE, 2001.

Novick, P. *That Noble Dream: The Objectivity Question and the American Historical Profession* New York: Cambridge University Press, 1993.

Pal., L., ed. *How Ottawa Spends 1999-2000.* Ottawa: Carleton University Press, 1999.

Perelman, C. *The Idea of Justice and the Problem of Argument.* London: Routledge & Kegan Paul, 1963.

Phillipps, A. *The Politics of Presence: The Political Representation of Gender, Ethnicity, and Race.* Oxford: Clarendon Press, 1995.

Pinder, L. *The Carriers of No: After the Land Claims Trial.* Vancouver: Press Gang Printers, 1991.

Price, R. *Legacy: Indian Treaty Relationships.* Edmonton: Plains Publishing, 1991.

_____. *The Spirit of Alberta Indian Treaties.* Edmonton: Pica Pica Press, 1987.

Price, R. and C. Dunnigan. *Toward an Understanding of Aboriginal Peacemaking.* Victoria, B.C.:

UVic Institute for Dispute Resolution, 1995.
Raunet, D. Without *Surrender without Consent: A History of the Nishga Land Claims.* Vancouver: Douglas and McIntyre, 1984.
Ray, A. *I Have Lived Here Since the World Began.* Toronto: Key Porter, 1996.
Ray, A., J. Miller and F. Tough. *Bounty and Benevolence.* Montreal and Kingston: McGill-Queen's University Press, 2000.
Reynolds, H. *Aboriginal Sovereignty: Three Nations , One Australia.* Allen & Unwin, 1996.
Richardson, B. *Strangers Devour the Land: A Chronicle of the Assault upon the Last Coherent Hunting Culture in North America, the Cree Indians of Northern Quebec, and their Vast Primeval Homelands.* New York: Random House, 1975.
Richardson, B., ed. *Drumbeat: Anger and Renewal in Indian Country.* Toronto: Assembly of First Nations and Summerhill Press, 1989.
Roach, K. *Constitutional Remedies in Canada.* Aurora: Canada Law Book, 1995.
Rose, A. *Spirit Dance at Meziadin.* Madeira Park, British Columbia: Harbour Publishing, 2000.
Rose, C. *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership.* Boulder, CO: Westview, 1994.
Rotman, L. *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada.* Toronto: University of Toronto Press, 1996.
Schneiderman, D. and K. Sutherland, eds. *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics.* Toronto: University of Toronto Press, 1997.
Sharpe, R. *Injunctions and Specific Performance.* Aurora, Ont.: Canada Law Book, 2000.
Shoemaker, N. ed. *Clearing a Path: Theorizing the Past in Native American Studies.* New York: Routledge, 2002.
Silverman, R. and M. Nielson, eds. *Aboriginal Peoples and Canadian Criminal Justice.* Toronto and Vancouver: Butterworths, 1992.
Slattery, B. *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title.* Saskatoon, SK: University of Saskatchewan Native Law, 1983.
Soifer, A. *Law and the Company We Keep.* Cambridge: Harvard University Press, 1995.
H. Spruyt, *The Sovereign State and Its Competitors: An Analysis of Systems Change.* Princeton, NJ: Princeton University Press, 1994.
St. Germain, J. *Indian Treaty Making Policy in the United States and Canada, 1867-1877.* Toronto: University of Toronto Press, 2001.
Steele, I. *Warpaths: Invasions of North America.* Toronto: Oxford University Press, 1994.
Sterritt, N. et al, *Tribal Boundaries in the Nass Watershed.* Vancouver: UBC Press, 1998.
Stonechild, B. and B. Waiser. *Loyal till Death: Indians and the Northwest Rebellion.* Calgary: Fifth House, 1997.
Sunstein, C. *After the Rights Revolution: Reconceiving the Regulatory State.* Cambridge: Harvard University Press, 1990.
Tennant, P. *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* . Vancouver: UBC Press, 1990.
Thompson, P. *The Voice of the Past: Oral History,* 3rd. ed. New York: Oxford University Press, 2000.

Titley, B. *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada*. Vancouver: UBC Press, 1986.

Trakman, L. and S. Gatien. *Rights and Responsibilities*. Toronto: University of Toronto Press, 1999.

Tully, J. *Strange Multiplicity: Constitutionalism in An Age of Diversity*. Cambridge: Cambridge University Press, 1995.

Vizenor, G. *Interior Landscapes: Autobiographical Myths and Metaphors*. Minneapolis: University of Minnesota Press, 1990.

_____. *Manifest Manners: Postindian Warriors of Survivance*. Hanover; London: Wesleyan University Press, 1994.

_____. *The People Named the Chippewa: Narrative Histories*. Minneapolis: University of Minnesota Press, 1984.

Wa, G. The *Spirit in The Land*. Gabriola, B.C.: Reflections, 1989.

Walker, J. "Race", *Rights and the Law in the Supreme Court of Canada*. Toronto: Osgoode Society for Canadian Legal History and Wilfred Laurier Press, 1997.

Watts, R. and D. Brown, eds. *Canada: The State of Federation 1990*. Kingston: Institute of Intergovernmental Relations, Queens University, 1990.

Weaver, S. *Making Indian Policy: The Hidden Agenda 1968-1970*. Toronto: University of Toronto Press, 1981.

Westen, P. *Speaking of Equality: An Analysis of the Rhetorical Force of 'Equality' in Moral and Legal Discourse*. Princeton: Princeton University Press, 1990.

Women's Legal Education and Action Fund. *Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada*. Toronto: Emond Montgomery, 1996.

Woodcock, G. *British Columbia: A History of the Province*. Vancouver: Douglas and McIntyre, 1990).

York, G. and L. Pindera. *People of the Pines: The Warriors and the Legacy of Oka*. Toronto: Little Brown and Company, 1992.

Young, I. *Justice and the Politics of Difference*. Princeton: Princeton University Press, 1990.

Young, R. *The Secession of Quebec and the Future of Canada*. Kingston and Montreal: McGill-Queen's University Press, 1995.

Articles

Anaya, S. "The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective" (1990) Harvard Indian Law Symposium 191.

Anaya, S. and C. Grossman. "The Case of the Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples" (2002) 19 Ariz. J. Intl. and Comp. L. 1.

Arnot, D. "The Honour of the Crown" (1996) 60 Sask. L. Rev. 339.

Asch, M. "The Judicial Conceptualization of Culture after *Delgamuukw and Van der Peet*" (2000) Rev. Const. Stud. 119

Asch, M. and C. Bell. "Definition and Interpretation of Fact in Aboriginal title litigation" (1994)

19 Queen's L.J. 503.

Asch, M. and P. Macklem. "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29 Alta. L. Rev. 498.

Bakan, J. "Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Or What you Need)" (1991) 70 Can. Bar Rev. 302.

Bankes, N. "Delgamuukw, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights" (1998) U.B.C.L. Rev. 31.

Barsh, R. and J. Henderson. " The Supreme Court's Van der Peet Trilogy: Native Imperialism and Ropes of Sand" (1997) 42 McGill L. J. 993.

Bartlett, R. "The Fiduciary Duty of the Crown to the Indians" (1989) 53 Sask. L. Rev. 301.

Bartlett, R. "The content of aboriginal title and equality before the law" (1998) 61(2) Sask. L. Rev. 377.

Bell, C. "New Directions in the Law of Aboriginal Rights" (1998) 77 Can. Bar Rev. 57.

_____. "*R. v. Badger*. One Step Forward and Two Steps Back" (1997) 8 Const. Forum Const. 21.

Bennett, G. "Aboriginal Title in the Common Law: a stony path through feudal doctrine" (1978) 27 Buf. L. Rev. 617.

Binnie, W. "The Sparrow Doctrine: Beginning of the end or End of the Beginning?" (1990) 15 Queen's L.J. 223.

Boldt, M. and J. Long. "Tribal Traditions and European-Western Political Ideologies: The Dilemmas of Canada's Native Indians" (1984) 17(3) Can. J. Pol. Sci. 537.

Borrows, J. "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1998) 22 Am. Indian L. Rev. 37.

_____. "Listening for a Change: The Courts and Oral Tradition" (2001) 39:1 Osgoode Hall L. J. 1.

_____. "Re-Living the Present: Title, Treaties and the Trickster in British Columbia" (1998) B.C. Studies 99.

_____. "Sovereignty's Alchemy: An Analysis of Delgamuukw v. The Queen" (1999) 37 Osgoode Hall L. J. 537.

_____. "The Trickster: Integral to a Distinctive Culture" (1997) 8: 2 Const. Forum Const. 29.

_____. "Uncertain Citizens: Aboriginal Peoples and the Supreme Court" (2001) 80 Can. Bar Rev. 15.

Bourgeois, D. "The Role of the Historian in the Litigation Process" 1986 (68) Can. Hist. Rev. 2

Brealey, K. "Mapping Them 'Out': Euro-Canadian Cartography and the Appropriation of the Nuxalk and Ts'ilhqot'in in First Nations' Territories, 1793-1916" (1995) 39:2 The Canadian Geographer 140.

Brest, P. "The Fundamental Rights Controversy: The Essential Contradictions of Constitutional Scholarship" (1981) 90 Yale L.J. 1063.

Burke, B. "Left out in the cold: the problem with aboriginal title under section 35(1) of the *Constitution Act, 1982* for historically nomadic aboriginal peoples" (2000) 38 Osgoode Hall L. J. 1.

Carswell, M. " Social Controls among the Native Peoples of the Northwest Territories in the Pre-

Contact Periods"(1984) 22 Alta. L. Rev. 303.
Cassidy, F. "Aboriginal Governments in Canada: An Emerging Field of Study" (1990) 23 Can. J. Pol. Sci. 73.
Christie,G. "Aboriginal Rights, Aboriginal Culture, and Protection" (1998) 36 Osgoode Hall L.J. 447 at 467.
_____. "Judicial Justification of Recent Developments in Aboriginal Law" (2002) 17(2) C.J.L.S. 41.
Clinton, R. "The Rights of Indigenous Peoples As Collective Group Rights" (1990) 32 Ariz. L. Rev. 739.
Cornelius, C. "The Thanksgiving Address " (1992) 9:3 Akwe:kon Journal 14.
Cruikshank, J. "Oral Tradition and Oral History: Reviewing Some Issues" (1994) 75 Can. Hist. Rev. 37.
Dallam H. "The growing voice of indigenous peoples: their use of storytelling and rights discourse to transform multilateral development bank policies" (1991) 8(2) Ariz. J. Int'l and Comp. L. 117.
Depew, R. "Popular Justice and Aboriginal Communities" (1996) 36 Journal of Legal Pluralism and Unofficial Law 21.
Deveaux, M. "Conflicting Equalities? Cultural Group Rights and Sex Equality" (2000) 48 Political Studies 522.
Dicey, A. "Will the Form of Parliamentary Sovereignty be Permanent?" (1899) 13 Harv. L. Rev. 67.
Dick, D." Comprehending 'the Genius of the Common Law'- Native Title in Australia and Canada Compared Post-Delgamuukw" (1998) 5:1 A.J.H.R. 79.
Dickson-Gilmore, E. "Finding the Ways of the Ancestors: Cultural change and the invention of tradition in the development of separate legal systems" (1992) 34 Can. J. Crim. 80.
Donovan, B. "The evolution and present status of common law aboriginal title in Canada: the law's crooked path and the hollow promise of Delgamuukw" (2001) 35 U.T.L.Rev 43.
Ehman, A. "A People's Justice" (2002) 11(4) National 12.
Elliot, D. "*Baker Lake* and the concept of Aboriginal Title" (1980) 18(4) Osgoode Hall L. J. 653.
Fisher, B. "The Mandate of the British Columbia Treaty Commission" (Jan. 1995) 53 Advocate (B.C.) 75.
Foster, H. "Aboriginal Title and the Provincial Obligation to Respect It: Is *Delgamuukw c. British Columbia* 'Invented Law'?" (1998) 56 Advocate (B.C.) 221.
_____. "Forgotten Arguments: Aboriginal Title and Sovereignty in *Canada Jurisdiction Act* Cases," (1992) 21 Man. L.J. 343
_____. "Honouring the Queen's Flag: A Legal and Historical Perspective on the Nisga'a Treaty" (Winter 1998/1999) BC Studies 26.
_____. "Roadblocks and Legal History, Part II: Aboriginal Title and Section 91(24)" (1996) 54 Advocate (B.C.) 531.
Foster, H. and A. Grove, "Looking Behind the Masks: A Land Claims Discussion Paper for Researchers, Lawyers and their Employers" (1993) 27 U.B.C.L.Rev 213.
Galois, R. "The Indian Rights Association, Native Protest Activity and the 'Land Question' I n

British Columbia, 1903-1916" (1992) 8 Native Studies Review 1.
Gover, B. and M. Macaulay." 'Snow Houses Leave No Ruins" (1996) 60 Sask. L. Rev. 6.
Gray, J. "O Canada! Van der Peet as Guidance on the construction of Native Title Rights" (1997) 2(1) Australian Indigenous Law Reporter 18.
Grosby, S. " Territoriality: The Transcendental, Primordial Feature of Modern Societies" (1995) 1 Nations and Nationalism. 143 .
Grose, P. "An Indigenous Imperative: The Rational for the Recognition of Aboriginal Dispute Resolution Mechanisms" (1995) 12 Mediation Quarterly 327.
Gupta, A. and J. Ferguson. "Beyond Culture: Space, Identity and the Politics of Difference" (1992) 7 Cultural Anthropology 6.
Hall, G. "The Quest for Native Self-Government: The Challenge of Territorial Sovereignty" (1992) (50:1) U.T. Fac. L. Rev. 39.
Harper, A. "Canada's First Nation Administration: Basic Concepts and Objectives" (1945) IV(2) American Indigena 119.
Henderson, W. and D. Ground. "Survey of Aboriginal Land Claims" (1994) 26 Ottawa L. Rev. 187.
Hurley, J. "The Crown's Fiduciary Duty and Indian Title: *Guerin v. The Queen"* (1985) 30 McGill L. J.559.
Hutchins P. and A. Choksi, "From *Calder* to *Mitchell*: Should the Courts Patrol Cultural Borders?", (2002) , 16 Sup. Crt. L. Rev. (2d) 241.
Hutchins, P., C. Hilling, and D. Schulze. "The Aboriginal Right to self-government and the Canadian Constitution: The Ghost in the Machine" (1995) 29 U.B.C. L. Rev. 251.
Imai, S. "A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering" (2002) 9(1) Clinical L. Rev. 195
Ivison, D. " Decolonizing the Rule of Law: Mabo's Case and Postcolonial Constitutionalism" (1997) 17 Oxford J. Leg. Stud. 252.
Jarvis-Tonus, J. "Legal Issues Regarding Oral Histories" (1992) 12 Canadian Oral History Association Journal 18.
Joffe, P. "Assessing the *Delgamuukw* Principles: National Implications and Potential Effects in Quebec" (2000) 45 McGill L.J. 155.
Keene, J. "Claiming the Protection of the Court: Charter Litigation Arising from Government 'Restraint'" (1998) 9 N.J.C.L. 97.
Kline, M. "The Colour of Law: Ideological Representations of First Nations in Legal Discourse" (1991) 3 Social and Legal Studies 451.
Lambert, D. "Van der Peet and Delgamuukw: 10 Unresolved Issues" (1998) U.B.C. L. Rev. 249.
Lafontaine, A. " La coexistence de l'obligation fiduciare de la Courounne et du droit a l'autonomie gouvernmentale des peuples autochtones" (1995) 36 C. de d. 669.
Langford, T. and J. Ponting. "Canadians' Responses to Aboriginal Issues: The Role of Prejudice, Perceived Group Conflict, and Economic Conservatism" (1992) 29 (2) Canadian Review of Sociology and Anthropology 140.
Lawrence, S. and P. Macklem. "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000) 79 Can. Bar Rev. 252.

Long, J. "Political Revitalization in Canadian Native Indian Societies" (1990) 23 Can. J. Pol. Sci. 751.

Long, J. and M. Boldt. "Leadership Selection in Canadian Indian Communities: Reforming the Present and Incorporating the Past" 7 (1987) Great Plains Quarterly 103.

Lyon, N. "An Essay on Constitutional Interpretation" (1988) 26 Osgoode Hall L.J. 95

Macklem, P. "Aboriginal Peoples, Criminal Justice Initiatives and the Constitution" (1992) U.B.C. L. Review 280 (special edition).

_____. "Aboriginal Rights, State Obligations" (1997) 36 Alta. L.R. 97.

_____. "Constitutional Ideologies" (1988) 20 Ottawa L. Rev. 117.

_____. "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 Stan. L. Rev. 1312.

_____. "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L. J. 382.

_____. "Indigenous Peoples and the Canadian Constitution: Lessons for Australia?" (1994) 5(1) Public Law Review 11.

_____. "Normative Dimensions of an Aboriginal Right of Self-Government" (1995) 21 Queen's L. J. 173.

_____. "The Probable Impact and Legal Effect of Proposed Treaty Referendum" (Nov. 2001) 59 Advocate (B.C.) 895.

_____. "What's Law Got To Do With It? The Protection of Aboriginal Title in Canada" (1997) 35 Osgoode Hall L.J. 125.

Macleod, W. "Law, Procedure, and Punishment in Early Bureaucracies" (1934) 25 Journal of Criminal Law, Criminology and Police Science 225.

Mandell, L. "Gitksan-Wet'suwet'en Land Title Action" (1988) 1 Canadian Native L. Reporter 14.

Manwani, R. "In between and out of place: racial hybridity, liquor, and the law in late nineteenth and early twentieth century British Columbia" (2000) 15 Can. J. L. and Soc., no. 2, 9.

McCallum, A. "Dispute Resolution Mechanisms in the Resolution of Comprehensive Aboriginal Claims: Power Imbalance Between Aboriginal Claimants and Governments" (1995) 2(1) E Law - Murdoch University Electronic Journal of Law.

McDonald, L. "Can Collective and Individual Rights Coexist?" 22 Melbourne University Law Review 310.

McIntyre, G. "Aboriginal title: equal rights and racial discrimination" (1993) 16 The University of New South Wales Law Journal 57.

McLachlin, B. "Charter Myths," U.B.C.L. Rev. (1999) 33: 1 23

McLachlin, B. "Racism and the Law: The Canadian Experience" (2002) U.T. J. L. Equality 1.

Mcleod, C. "The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past," (1992) 30 Alta. L. Rev. 1276.

McNeil, K. "Aboriginal Governments and the *Canadian Charter of Rights and Freedoms*" (1996) 34 Osgoode Hall. L.J. 61.

_____. " Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty," (1998) 5 Tulsa J. Comp. Of Intl. Law 253.

_____. "Aboriginal title and Aboriginal rights: What's the connection?" (1997) 1 Alta. L. Rev. 117.

_____. "Aboriginal title and the division of powers: rethinking federal and provincial jurisdiction" (1998) 61(2) Sask. L. Rev. 431.

_____. "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19 Queen's L.J. 95.

_____. "Extinguishment of Native Title: the High Court and American Law" (2001) 2(3) Australian Indigenous Law Reporter 365.

_____. "The Onus of proof of aboriginal title" (1999) 37(4) Osgoode Hall L. J. 775.

_____. "Reduction by Definition: The Supreme Court's Treatment of Aboriginal Rights in 1996" (1997) 5: 3 and 4 Canada Watch 60.

Meehan, E. and E. Stewart, "Developments in Aboriginal Law: The 1995-96 Term" (1997) 8 Sup.Ct.L.Rev. 1.

Mercer D. "Aboriginal Self Determination and Indigenous Land Title in Post Mabo Australia" (1997) 16(3) Political Geography 189.

Morgan, E. "The Imagery and Meaning of Self-Determination." (1988) 20 N. Y. Intl Law 355.

Morse, B. "A Unique Court: S107 Indian Act Justices of the Peace" Canadian Legal Aid Bulletin 5 (1982) 131.

_____. "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in R. v. Pamajewon," (1997) 42 McGill L.J. 1011.

Nadeau, A. "Du dialogue au dynamisme judicaire" jan. 2001 3 J. du Bar. No. 1, 10

Oortiz, A. "Some Concerns Central to the Writing of 'Indian History'" (1977) 10 The Indian Historian 17.

Othius, B. "Defrosting Delgamuukw (or 'how to reject a frozen rights interpretation of aboriginal title in Canada") (June 2001) 12 N.J.C.L. 385.

Owen, D. "Fiduciary obligations and Aboriginal peoples: devolution in action" (1994) 3 C.N.L.R. 1.

Palmer, A. "Evidence 'Not in a Form Familiar to Common Law Courts': Assessing Oral Histories in Land Claims Testimony after *Delgamuukw v. B.C.*" (2001) 38(4) Alta. L. Rev. 1040.

Patterson, E. "A Decade of Change-Origins of the Nisgha and Tsimshian Land Protests in the 1880s" (1983) 18(3) Journal of Canadian Studies-Revue D'Etudes Canadiennes" 40.

Peterson, J. "Ethnogenesis: Settlement and Growth of a 'New People'" (1982) 6(2) American Culture and Research Journal 23.

Pratt, A. " Aboriginal Self-Government and the Crown's Fiduciary Duty- Squaring the Circle or Completing the Circle?" (1992) 2 N.J.C.L. 163.

Pylpchuk, M. "The Value of Aboriginal Records as Legal Evidence in Canada: An Examination of Sources" (1991) 32 Archivaria 51.

Ray,A. "Creating the Image in Defence of the Crown: The Ethnohistorian in Court" (1990) 6(2) Native Studies Review 13.

_____. "Treaty 8: A British Columbia Anomoly" (1999) 123 B.C. Studies 5.

Reilly, A. "The ghost of Truganini: use of historical evidence as proof of native title" (2000)

28(3) Federal Law Review 453.
Roach, K. "Constitutional and common law dialogues between the Supreme Court and Canadian legislatures" (March 2001) 80 Can. Bar. Rev. 481.
_____. "Remedies for Violations of Aboriginal Rights" (1992) 21 Man. L.J. 498 .
_____. "The Myths of Judicial Activism" (2001) 14 Sup. Ct. L. Rev. (2d) 297.
Roness, L. and K. McNeil. "Legalizing oral history: proving aboriginal claims in Canadian courts" (2000) 39(3) Journal of the West 66.
Rossignol, M. "Property Concepts among the Cree of the Rocks" (July 1939) 12:3 Primitive Man: Quarterly Bulletin of the Catholic Anthropological Conference 61.
Rothman, H. "Historian v. Historian: Interpreting the Past in the Courtroom" (1993) 15 The Public Historian 15.
Rotman, L. "Developments in Aboriginal Law: The 1999-2000 Term" (2000) 13 Sup. Ct. L. Rev. 2.
_____. "Developments in Aboriginal Law: The 2000-2001 Term" (2001) Sup. Ct. L.Rev. 1.
_____. "Hunting for Answering in a Strange Kettle of Fish: Unilateralism, Paternalism and Fiduciary Rhetoric in Badger and Van der Peet" (1997) 8:2 Constitutional Forum 40.
Ryder, B. "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L.J. 302.
Rynard, P. "'Welcome in, but check your rights at the door': The James Bay and Nisga'a Agreements in Canada" (2000) 33(2)Can. J. Pol. Sci. 211.
Sager, L. "Fair Measure: The Legal Status of Unenforced Constitutional Norms" (1978) 91 Harv. L. Rev. 1212 .
Sanders, D. "The Rights of the Aboriginal Peoples of Canada" (1983) 61 Can. Bar. Rev. 314.
_____. " 'We Intend to Live Here Forever': A Primer on the *Nisga'a Treaty*" (1999) 33:1 U.B.C.L. Rev. 103.
Schneiderman, D. " Theorists of Difference and the Interpretation of Aboriginal and Treaty Rights" (1996) 14 Int. J. Can. Stud. 35.
Sheehan, B." The Problem of Moral Judgments in History" (1985) 84 South Atlantic Quarterly 19.
Slattery, B." Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L. J. 681.
_____. "First Nations and the Constitution: A Matter of Trust" (1992) 71 Can. Bar Rev. 261.
_____. "Making Sense of Aboriginal Rights and Treaty Rights" (2000) 79 Can. Bar Rev. 196
_____. "Some thoughts on Aboriginal Title" (1999) 37 U. N.B. L. J. 19.
_____. "Understanding Aboriginal rights" (1987) 66 Can. Bar Rev. 727.
Smith, J. "The concept of Native Title" (1974) 24 U. T. L. J. 1.
Sterritt, N. "Competing Claims Ignored!" (1998/1999) 120 BC Studies 73.
Stokes, E. "The Land Claims of First Nations in British Columbia" (1993) 23 University of Wellington Law Review 171.
Strong-Boag, V. "Contested Space: The Politics of Canadian Memory" (1994) 5 Journal of the Canadian Historical Association 4.
Sunstein, C. "Against Tradition" (1996) 13 Soc. Phil and Policy 207.
Tarnopolsky, W. "Discrimination and the Law in Canada" (1992) 41 U.N.B. L. J. 215.

Tremblay, G. "le procedure implicate de modification de la Constitution du Canada pour le cas de la sécession du Québec" (1998) R. du B. 423.

Upton, L. "The Origins of Canadian Indian Policy" (1973) 10(4) Journal of Canadian Studies 51.

Warhaft, E., T. Palys and W. Boyce. "'This is how we did it': One Canadian First Nation Community's Efforts to Achieve Aboriginal Justice" (1999) 32 Aust NZ J Criminology 168.

Wheeler, W. "Narrative Wisps of the Ochekwi Past, A Journey in Recovering Collective Memories" (1999-2000) 19-20 Oral History Forum 113.

Willems-Braum, B. "Buried Epistemologies: The Politics of Nature in (Post)Colonial British Columbia," (1997) 87 Annals of the Association of American Geographers 3.

Yurkowski, R. "We are all here to stay": addressing aboriginal title after Delgamuukw v. British Columbia" (2000) 31(3) V. U. W. L. R. 471.

Zalewski, A. " From Sparrow to Van der Peet: The Evolution of a Definition of Aboriginal Rights" (1997) 55(2) U.T.Fac.L.Rev. 435.

Zion, J. and R. Yazzie, R. "Indigenous Law in North America in the Wake of Conquest" (1997) 20 B. C. Int'l & Comp. L. Rev. 55.

Cases

A.G. v. Metropolitan Stores [1987] 1 S.C.R. 110.

Air Canada v. M.& L Travel Ltd. [1993] 3 S.C.R. 787.

Alcan Smelters and Chemicals Ltd. v. C.A.S.A.W. Local 1 (1977), 3 B.C.L.R. 163 (B.C.S.C.).

Attorney General for Ontario v. Bear Island Foundation [1989] 2 C.N.L.R. 73.

B*arton et al v. Nisga'a Tribal Council et al*, 31 July 1998, 24853, Kamloops (B.C.S.C.).

Barton et al. v. Nisga'a et al, 2000 B.C.S.C. 0324, 31 July 1998.

Barton et al. v. Nisga'a Tribal Council et al, 1 October 1998, CA025009 and CA025019, Vancouver (B.C.C.A.).

B.C. v. Mount Currie Indian Band [1991] 4 C.N.L.R. 436.

B.C. Citizens First Society and Lloyd Brinson v. A.G. British Columbia and A.G. Canada 22 January 1999, A983229, Vancouver (B.C.S.C.).

B.C. Citizens First Society et al v. British Columbia and Canada, 23 March 1999, A983229, Vancouver (B.C.S.C.).

B.C. Fisheries Survival Coalition et al v. Canada et al, 22 January 1999, C985282 , Vancouver (B.C.S.C.).

B. C. Fisheries Survival Coalition et al v. Canada et al, 23 March 1999, C985282 , Vancouver (B.C.S.C.).

Benoanie v. Canada (Minister of Indian Affairs) [1993] 2 C.N.L.R. 97.

Benoit v. the Queen (7 July 2000) Docket T-2288-92 (F.C.T.D.).

Blueberry Indian Band v. Canada [1995] 4 S.C.R. 344.

Bob, Sam et al v. HMTQ et al 2002 B.C.S.C. 733.

Calder v. A.G.B.C. [1973] S.C.R. 313.
Campbell et al v. British Columbia et al (22 January 1999) A982738, Vancouver (B.C.S.C.).
Campbell et al v. British Columbia (5 February 1999) A982738 (B.C.S.C.).
Campbell et al v. AGBC/AG Cda & Nisga'a Nation et al 2000 B.C.S.C. 1123.
Campbell v. Attorney General (British Columbia) and Nisga'a Nation 2001 B.C.S.C. 1400.
Campbell et al v. Nisga'a 200 B.C.S.C. 619.
Can-Dive Services v. Pacific Coast Energy Corp. (1993) 77 B.C.L.R. (2d) 128 (B.C.C.A.).
Cherokee Nation v. Georgia [1831] 30 U.S. (5 Pet.) 1.
Chief Mtn. v. H.M.T.Q. 2000 B.C.S.C. 659.
Chief Mountain v. HMTQ in Right of Canada 2000 B.C.C.A. 260.
Chief Mountain v. HMTQ in Right of Canada 2002 B.C.C.A. 362.
Claxton v. Saanichton Marina Ltd, B.C.C.A.(1989) (unreported).
Corbiere v. Canada (Minister of Indian and Northern Affairs) [1999] 2 S.C.R. 203.
Council of the Haida Nation et al v. Ministry of Forests et al 2000 B.C.S.C. 1280 SC3394.
Delgamuukw v. British Columbia [1991] 79 D.L.R. (4th) 374 (B.C.S.C.).
Delgamuukw v. British Columbia [1997] 3 S.C.R. 1010.
Egan v. Canada [1995] 2 S.C.R. 513.
Eldridge v. British Columbia(A.G.) [1997] 3 S.C.R. 624.
Gitanyow First Nation v. Canada [1998] 4 C.N.L.R. 47.
Gitanyow First Nation v. Canada [1999] 1 C.N.L.R. 66.
Gitanyow First Nation v. Canada [1999] 3 C.N.L.R. 89.
Gold v. Rosenberg [1997] 3 S.C.R. 767.
Guerin v. the Queen [1984] 2 S.C.R. 335.
Haida Nation v. B.C. and Weyerhaeuser 2002 B.C.C.A. 147 CA027999.
Haida Nation v. B.C. and Weyerhaeuser 2002 B.C.C.A. 223 CA02799.
Haida Nation v. B.C. and Weyerhaeuser 2002 B.C.C.A. 462 CA027999.
Halfway River First Nation v. B.C. [1997] 4 C.N.L.R. 45 (B.C.S.C.).
Halfway River First Nation v. B.C. (Ministry of Forests) [1999] 64 B.C.L.R. (3d) 206 (B.C.C.A.).
Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development [1980] 1 F.C. 518.
Horse v. the Queen [1988] 1 S.C.R. 187.
Hunter Engineering v. Southam Inc. [1984] 2 S.C.R. 145.
Irwin Toy Ltd. v. Quebec [1989] 1 S.C.R. 927.
Johnson v. M'Intosh [1823] 21 U.S. (8 Wheat.) 543.
Ke-kin-is-uks et al v. HMTQ et al 2002 B.C.C.A. 238 CA 029584.
Ke-kin-is-uks et al v. HMTQ, Att. General et al 2002 B.C.S.C. 802 021466.
Kruger v. the Queen [1978] 1 S.C.R. 104.
Lac Minerals v. International Corona Resources [1989] 2 S.C.R. 574.
Lovelace v. Ontario [2000] 1 S.C.R. 950.
Luuxhon v. Canada and British Columbia (24 November 1998) C981165, Vancouver (B.C.S.C.).
Luuxhon et al v. Canada et al (17 June 1998) C981165, Vancouver (B.C.S.C.).
Luuxhon et al v. Canada et al (20 July 1998) C981165, Vancouver (B.C.S.C.).

Luuxhon et al v. Canada et al (23 December 1998), C981165 Vancouver (B.C.S.C.).
Luuxhon et al v. Canada et al (23 March 1999) C981165, Vancouver (B.C.S.C.).
Luuxhon et al v. Canada et al (8 July 1999) C981165, Vancouver (B.C.S.C.).
Luuxhon v. Canada 1999 B.C.C.A. 343 CA 025806, CA 025808.
Luuxhon et al v. HMTQ et al and Nisga'a Nation 2000 B.C.S.C. 1332.
Mabo v. Queensland [1992] 175 C.L.R. 1.
Makivik Corp. v. Canada(Minister of Canadian Heritage) [1999] 1 F.C. 58 (T.D.).
The Mayagtna (Sumo) Awas Tingni Community v. Nicaragua (Ser.C) No.79 (Inter-Am. Court).
McKinney v. University of Guelph [1990] 3 S.C.R. 229.
Mitchell v. Canada (Minister of National Revenue) [1999] 1 C.N.L.R. 112 (F.C.A.).
Mitchell v. Minister of National Revenue [1999] 1 F.C. 375.
Mitchell v. M.N.R. [2001] 1 S.C.R. 911.
Nunavik v. Canada(Minister of Canadian Heritage) [1998] 4 C.N.L.R. 68 (F.C.T.D.).
Osoyoos Indian Band v. Oliver (Town) [2001] 3 S.C.R. 746.
Pacific Fishermen's Defence Alliance v. Canada [1998] 1 F.C. 498.
Paul v. Canada [2002] FCT 615.
Paulette et al. v. R. 72 D.L.R. (3d) 61.
Pawis v. the Queen [1979] 102 D.L.R.(3d) 302.
R. v. Adams [1996] 3 S.C.R. 101.
R. v. Badger [1996] 1 S.C.R. 771.
R. v. Bartleman, B.C.C.A.(1984) (unreported).
R. v. Big M Drug Mart Ltd. [1985] 1 S.C.R. 295.
R v. Catarat, S.P.C. 26 August 1998, P.C. 98004.
R. v. Côté [1996] 3 S.C.R. 139.
R. v. Gladstone [1996] 2 S.C.R. 723.
R. v. Gladue [1999] 1 S.C.R. 688.
R. v. Horseman [1990] 1 S.C.R. 901.
R. v. Howard [1994] 2 S.C.R. 299.
R. v. Jack 16 B.C.L.R. (3d) 201 (B.C.C.A.).
R. v. Marshall [1999] 3 S.C.R. 533.
R. v. Morin [1992] 1 S.C.R. 771.
R. v. Oakes [1986] 1 S.C.R. 103.
R. v. Pamajewon [1996] 2 S.C.R. 821.
R. v. Powley (2001) 196 D.L.R. (4^{th}) 221.
R. v. RJR-MacDonald Inc. v. Attorney General for Canada et al [1995] 3 S.C.R. 199.
R. v. Simon [1985] 2 S.C.R. 387.
R. v. Sioui [1990] 1 S.C.R. 1025.
R. v. Sparrow [1990] 1 S.C.R. 1075.
R. v. Syliboy [1929] 1 D.L.R. 307.
R. v. Van der Peet [1996] 2 S.C.R. 507.
R. v. White and Bob (1965), 52 D.L.R. (2d) 481.

Re B.C. Motor Vehicle Act [1985] 2 S.C.R. 486.
Reference re: Canada Assistance Plan (B.C.) [1991] 2 S.C.R. 525.
Reference Re: Manitoba Language Rights [1985] 1 S.C.R. 721.
Reference re Provincial Boundaries(Saskatchewan) [1991] 2 S.C.R. 158.
Reference re Remuneration of Judges [1997] 3 S.C.R. 3.
Reference re: Resolution to Amend the Constitution [1981] 1 S.C.R. 73.
Reference re Secession of Quebec [1998] 2 S.C.R. 217.
RJR Macdonald v. Canada(Attorney General) [1995] 3 S.C.R. 199.
Semiahmoo Indian Band v. *Canada* [1997] 148 D.L.R. (4th) 523.
Simon v. the Queen [1985] 2 S.C.R. 387.
St. Catherine's Milling and Lumber Co. v. *The Queen* [1888] 14 A.C. 46 (P.C.).
Taku River Tlingit First Nation v. Ringstad et al (2000) 7 B.C.L.R. (3rd) 310.
Taku River Tlingit First Nation v. Ringstad [2002] B.C.C.A. 59.
TransCanada Pipelines Ltd. v. Beardmore (Township) (2000) 186 D.L.R. (4th) 403.
Wewaykum v. AGC 2002 SCC 79 File. no. 27641 n. 40.
Worcester v. Georgia, [1832] 31 U.S. (6 Pet.) 515.

Web sites

www.ubcic.bc.ca/welcome.htm
www.bctreaty.net
www.gitanyowchiefs.bc.ca/treatyhtml
www.nisgaalisims.ca/ldownload.html