

To Make Or Not To Make:

The Historical Analysis of British Columbia's Treaty-Making Process

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Abstract

This paper interrogated why the process of treaties was executed differently in British Columbia (BC) compared to the rest of the West; i.e., why did BC not negotiate any more treaties after 1854? To answer this question, this paper has offered three answers. First, the differing land history of BC in contrast to the Prairie West, which left BC with differing autonomy to enact its land policy. Second, that the difference in actors and institutions that negotiated the Douglas Treaties (in BC) and the Numbered Treaties (across the Prairies) led to these different outcomes. Finally, it analyzes the defence made by BC in modern-day land claims (*Delgamuukw v. British Columbia [1997]* and *Calder et al. v. Attorney-General of British Columbia [1973]*), that white settlement was enough to extinguish Aboriginal title without treaty, to understand why BC made the decisions it did historically, which placed it at such odds with the rest of Western Canada.

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Introduction

“The imaginary of the Canadian state, like other settler states, is animated in part by the assumption of sovereign uniformity: the idea that the state’s authority is evenly applied throughout its territory.”¹ This imaginary is inherently suppressive to the original inhabitants of the land as it is their disappearance Canadian state sovereignty is built on. This suppression, for the vast majority of Canada, was a path of treaty-making; however, for British Columbia (BC), treaty-making, for the most part, was ignored. This paper aims to interrogate why the process of treaties was executed differently in BC compared to the rest of the West. It draws attention to the differing land history of BC in contrast to the Prairie West, leaving it with differing autonomy to enact its land policy. It explores what can be learned from differences in negotiation between the Douglas Treaties (made in BC) and Numbered Treaties (made across the rest of western Canada). Finally, it interrogates the defenses used by BC in modern-day land claims, and what this can tell us, with a focus on *Delgamuukw v. British Columbia* (1997) and *Calder et al. v. Attorney-General of British Columbia* (1973).

¹ Joshua McEvoy and Liam Medzain-Gobin, “Embedded Bordering: Territorial Authority, Indigenous Utilities, and Settler Colonialism in British Columbia.,” *Borderlands Journal* 20, no.1 (2021): 148, doi:10.21307/borderlands-2021-006.

A Brief Summary of British Columbian and Western Canadian Land Politics

Before the analysis of BC's particular relationship to land and treaty begins, a brief understanding of the *1763 Royal Proclamation*, is needed. The *1763 Royal Proclamation* informed Canadian relations with Indigenous Nations Pre-Confederation in 1867 and still underlies these relationships in Canada modern-day constitution. The *1763 Royal Proclamation* lays out how Canada should treat Indigenous populations, stating,

[a]nd 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 [...] [a]nd We do further strictly enjoin and require all Persons whatever, who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands, which, not having been ceded to, or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.²

The British Crown clearly states the expectation for procuring lands for settlement across Canada; here, land was considered Indigenous land and thus had to be sold to the Crown before settlers could use it, and failure to do so was a punishable offense.³ The *1867 British North America Act*, adopts this framework, but classifies

² Government of Canada; Crown-Indigenous Relations and Northern Affairs Canada, "The Royal Proclamation of 1763," abstract; reference material, June 4, 2013, <https://www.rcaanc-cirnac.gc.ca/eng/1370355181092/1607905122267#sec2>.

³ Government of Canada; Crown-Indigenous Relations and Northern Affairs Canada. "The Royal Proclamation of 1763."

Indigenous populations as a subordinate group to be wards of the state⁴ - rather than the previous understanding, which offered more equality between nations. BC, along with the other western provinces, would have been legally required to abide by the *1763 Royal Proclamation* and *1867 British North America Act*, as they were all either territories of the Crown or Canadian provinces.

BC in particular had been a British colony since 1849, ruled and regulated in the day-to-day by the Hudson's Bay Company (HBC), a private company which had been tasked with setting up a settlement colony on Vancouver Island for a grant of ten-years.⁵ After a period of economic downturn and annexation threats from the United States, BC joined Confederation in 1871.⁶ Unlike what would become Alberta and Saskatchewan, who were given their provincehood by the federal government and had no control over their natural resources until the 1930s; or Manitoba, whose entrance into Confederation was negotiated in part by Métis communities in 1870 in the process of rebellions against the colonial government and its land policies.⁷ BC, negotiated its own entrance into Confederation with the *1871 Terms of Union*. This allowed space for BC to pursue problematic policies (such as not making treaties) without much consequence. BC's lackluster treaty-making was foretold in the *1871 Terms of Union* with Clause Thirteen, that

⁴ Eric Adams, "'Equally Applicable to Scotsmen': Racism, Equality, and Habeas Corpus in the Legal History of Japanese Canadians," in *Landscapes of Injustice: A new perspective on the internment and dispossession of Japanese Canadians*, ed. Jordan Stanger-Ross (McGill-Queen's University Press, 2020), 69.

⁵ "History of B.C.," Welcome BC, (2024), <https://www.welcomebc.ca/choose-b-c/explore-british-columbia/history-of-b-c>.

⁶ Hamar Foster, "The Imperial Law of Aboriginal Title at the Time of the Douglas Treaties," in *To Share Not Surrender* ed. Hamar Foster, Neil Vallance and Peter Cook, (University of British Columbia Press, 2021), 92. and Jean Barman, "Distant Oversight," in *The West Beyond the West: a History of British Columbia*, (University of Toronto Press, 2007), 98.

⁷ Jennifer Reid, "'Setting the Stage' The North-West to 1885," in *Louis Riel and the Creation of Modern Canada: Mythic Discourse and the Postcolonial State*, ed. David Carrasco and Charles Long, (University of New Mexico Press 2008), 11.

laid out that land policy in BC would happen in a manner “as *liberal* as that hitherto pursued by the British Columbia Government.”⁸ The manner that BC previously pursued land policy was deeply conservative, and this clause ensured this pattern would continue. This conservative pattern regarding land policy was spearheaded by Joseph Trutch, who was appointed as Chief Commissioner of Lands and Works by James Douglas (who negotiated the Douglas Treaties) in 1864, and he worked endlessly to reduce the reserve allotments for Indigenous nations which had been previously negotiated by Douglas.⁹ The reserve system in BC was a constant source of contestation between BC and the Dominion government, with BC pushing back against extending or enlarging reserves, arguing it was a waste of space that could be otherwise used for settler farms.¹⁰ This type of conflict, was common throughout the early BC-Dominion relationship, where BC tested boundaries laid out by the Dominion, the Dominion offered pushback, and BC pushed back against this response – a vicious cycle.

Another example of this cycle was BC’s brutal treatment of Asian Canadians and Indigenous populations. BC has an extensive history of anti-Asian and anti-Indigenous racism to the point the dominion government had to intervene:

[i]n 1871, the British Columbia legislature disqualified “Chinese or Indians” from voting in provincial elections, a list expanded to include Japanese Canadians in 1895. British Columbia enacted more than one hundred pieces of

⁸ Department of Justice Government of Canada, “Final Report of the French Constitutional Drafting Committee, 1871 British Columbia Terms of Union” November 3, 1999, n.p. <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/pl142.html>.

⁹ Robin Fisher, “Joseph Trutch and Indian Land” in *Historical Essays on British Columbia*, ed J. Friesen, (Mc-Gill-Queen’s University Press 1976), 257 and 261 and Patricia Burke Wood and David Rossiter, “The Invention of British Columbia” *Unstable Properties: Aboriginal Title and the Claim of British Columbia*, (University of British Columbia Press 2022), 43-44.

¹⁰ George Abbott, “A Royal Commission Frustrates Hopes” in *Unceded: Understanding British Columbia’s Colonials Past and Why it Matters Now*, (Purich Books, imprint of UNB Press 2025) 88-89.

legislation in the ensuing decades imposing racist restrictions on mobility, additional taxes, and work prohibitions on Indigenous peoples, Chinese Canadians, Japanese Canadians, and an undefined larger category of Asians alongside them. The federal government disallowed a number of these laws as unconstitutionally invading the federal government's exclusive jurisdiction over "Naturalization and Aliens," and courts struck down several others as either contrary to the division of powers or in conflict with existing federal law.¹¹

While the Dominion government's intervention in such matters was not from a place of progressive moral standing, it does indicate tension between what was considered "acceptable" behaviour for the time and what policies BC was pursuing. BC was a province that "toed the line" of appropriate politics of the era for its own goals; in the case of land for agriculture and settlement futures of the province.¹²

Coast versus Plains: The Making of the Douglas and Numbered Treaties

Comparison of the two major sets of treaties negotiated across Western Canada, used to govern relationships between Indigenous Nations and the Crown, provide helpful insights into how this treaty-making process came to be so different. The Douglas Treaties are the fourteen treaties signed in on Vancouver Island by James Douglas between 1850 and 1854.¹³ Whereas the Numbered Treaties are eleven treaties made across Western and Central Canada between 1871 and 1921.¹⁴ (See Figures 1 and 2).

¹¹ Adams, "Equally Applicable to Scotsmen': Racism, Equality, and Habeas Corpus in the Legal History of Japanese Canadians," 70.

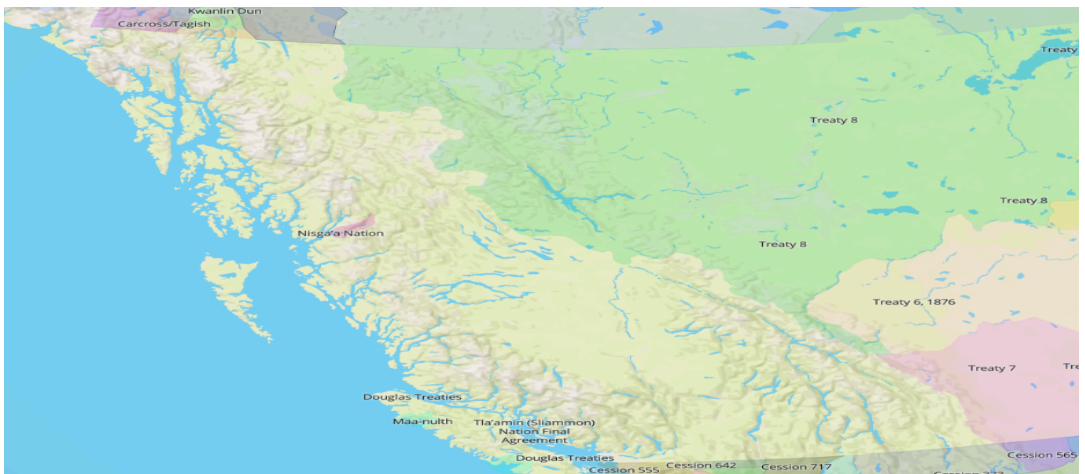
¹² Abbott, "A Royal Commission Frustrates Hopes," 88-89.

¹³ Government of Canada; Crown-Indigenous Relations and Northern Affairs Canada, "Treaty Texts - Douglas Treaties," agreement, November 3, 2008, <https://www.rcaanc-https://www.rcaanc-cirnac.gc.ca/eng/1100100029052/1581515763202>, n.p.

¹⁴ Government of Canada; Crown-Indigenous Relations and Northern Affairs Canada, "Treaty Texts - Douglas Treaties," n.p.



15 **Figure 1**



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Figure 2

The Douglas Treaties were negotiated prior to both the Confederation of Canada in 1867 and BC’s entrance into Confederation in 1871, thus, they were

15 “Our Home on Native Land,” Native Land Digital, n.d., n.p.

16 “Our Home on Native Land,” Native Land Digital, n.d., n.p.

negotiated when BC was a direct colony of the British Empire. In contrast the Numbered Treaties were made after Confederation, meaning Indigenous Nations were not entering into deals with the British directly, but rather the Dominion of Canada, which, saw Indigenous nations as becoming wards of the state. This difference is crucial as it shows that Indigenous Nations entered treaty relationship with different entities in different eras, who expected entirely different outcomes from these negotiations. Treaty-making in BC took place at the time where Indigenous Nations were extended a more equal hand (though still deeply violent and paternalistic) under the guiding principles of the *1763 Royal Proclamation*. Conversely, treaty-making in the prairies after Confederation immediately placed Indigenous peoples in subordinate positions, possibly making that path more appealing to colonial officials.

Furthermore, the Douglas Treaties were negotiated over the span of four years with a consistency of authorities who negotiated them; Joseph William McKay and Alfred Robson Benson.¹⁷ Oppositely, the Numbered Treaties were negotiated over a much longer period of fifty years, and thus, see less regularity of colonial authorities.¹⁸ The primary colonial signatory to the Numbered Treaties in each case was the then -current Indian Affairs Commissioner.¹⁹ The Numbered Treaties were negotiated by an official who was part of a larger colonial institution – the Indian Affairs Commission – whereas as the Douglas Treaties were negotiated under the authority of one government and one man who did not have

¹⁷ Government of Canada; Crown-Indigenous Relations and Northern Affairs Canada, “Treaty Texts - Douglas Treaties,” n.p.

¹⁸ Government of Canada; Indigenous and Northern Affairs Canada, “The Numbered Treaties (1871-1921),” reference material, February 15, 2013, <https://www.rcaanc-cirnac.gc.ca/eng/1360948213124/1544620003549>.

¹⁹ Government of Canada; Indigenous and Northern Affairs Canada, “The Numbered Treaties (1871-1921).”

whole infrastructure supporting him. Douglas had struck out and begun treaty-making on his own without template.²⁰ Thus, this treaty-making process was less formal and more reliant on one man, leading to the more important influence of a central authority. Thus, when officials came to power after James Douglas who saw treaties as less central to British Columbian land policy, they already had more control over treaty-making and thus could shape it as they saw fit.

This is how officials such as Joseph Trutch could end treaty-making hopes in BC in his 25-year long position as Governor of the province after James Douglas. Douglas and Trutch had differing opinions of the Indigenous peoples whose lands they were occupying that informed their approach. Douglas abided by the 1763 *Royal Proclamation* to some extent, making the 14 treaties still present on Vancouver Island today; and Douglas in both public and private correspondences, painted a picture of Indigenous peoples as being rational, thinking beings who could become respectable members of the Commonwealth.²¹ Douglas was by no means a paragon of Indigenous rights, he regularly referred to Indigenous peoples as “savages” and “barbarians” in “primal states”²² but he saw treaty-making as the appropriate response for settlement in BC, leading to the negotiations of the Douglas Treaties.²³

Trutch, on the other hand, stood for a less egalitarian view of Indigenous peoples and thus treaty-making in the province. Trutch was appointed Chief Commissioner of Land and Works and then Governor of BC after Douglas’

²⁰ Hamar Foster and Neil Vallance, “Treaty Timeline,” In *To Share Not Surrender*, ed. Hamar Foster, Neil Vallance and Peter Cook, (University of British Columbia Press, 2021), 8.

²¹ Perry, “Indigenous Land, Imperial Travels and James Douglas,” In *To Share Not Surrender* ed. Hamar Foster, Neil Vallance and Peter Cook, (University of British Columbia Press, 2021), 42.

²² Perry, “Indigenous Land, Imperial Travels and James Douglas,” 43.

²³ Perry, “Indigenous Land, Imperial Travels and James Douglas,” 43.

retirement in 1864, and had previously been a land surveyor and farmer and was confident in his superiority as an Englishman in Canada, seeing Indigenous populations as “lawless and violent.”²⁴ These views informed his approach to governance; land was needed to amass a fortune, and suppression of Indigenous populations without treaty was the way to do it.²⁵ Trutch, unconstrained by the likes of Douglas, rapidly reduced reserve allotments after his appointment, opening an estimated 40,000 acres of reserve land to settler use, primarily for farming and agriculture.²⁶ Additionally, he regularly re-wrote and re-defined Douglas’ proposals for reserve allotments, in one case claiming that Douglas had approved 10 acre reserves, when the reality was that Douglas had *required* 10 acres to be given, even if nations had asked for less.²⁷ Trutch denied any hopes of treaty-making both on Vancouver Island and mainland BC, with his violent attitudes toward Indigenous peoples which ended in quick reductions to any sort of guarantees previously offered. This ended Douglas’ short-lived attempt to treaty the land. The centralization of treaty-making in BC around one primary figure made it easy for one man’s opinions to shape the path of history.

Moving eastward across the plains in the era of the Numbered Treaties, two things were happening. The first was the need of the dominion government for land for settlement in modern-day Alberta and Saskatchewan. This need was met via the First National Policy, which attempted to clear the prairies of Indigenous peoples through violence. The North-West Mounted Police (now RCMP) was created to drive Indigenous peoples from their lands via violence, starvation, and then

²⁴ Fisher, “Joseph Trutch and Indian Land Policy,” 256-257.

²⁵ Fisher, “Joseph Trutch and Indian Land Policy,” 257.

²⁶ Fisher, “Joseph Trutch and Indian Land Policy” 261.

²⁷ Fisher, “Joseph Trutch and Indian Land Policy,” 265.

treaty-making.²⁸ Here treaty-making was an imperative to open the vast swaths of land required for the wheat economy.

Second was the tension between BC, the prairies and the Dominion over BC's lack of treaty-making, sometimes going so far as to express fears of a war breaking out over land policy in BC.²⁹ In this era, feelings of honouring the Crown and following legal sources (such as the *1763 Royal Proclamation*) were well referenced and well respected.³⁰ Aboriginal title was seen as alive and well on the Prairies and thus needed to be extinguished post-haste by colonial officials, and BC was not performing their duties to the crown.³¹ The Numbered Treaties were negotiated because colonial authorities in Western and Central Canada viewed it as the way to keep in consistency with British law while creating the settler colonial state of Canada. Whereas BC, under the leadership of Trutch, did not.

Land-Claims and Treaty-Making in the Courts in Modern Day British Columbia

The bulk of this essay has looked at the possible historical reasons for differences in treaty-making between BC and the rest of Canada. It will now turn to the more modern era and examine land claims cases that were brought to the courts and how they were argued on both sides. Specific attention is paid to the cases of *Calder v. BC (1973)* and *Delgamuukw v. BC (1997)*. However, despite this focus, these are not the only efforts by Indigenous Nations to gain title or land related rights in BC. The Nisga'a endured 110 years of non-recognition for their lands, their struggle

²⁸ Janine Brodie, "The New Political Economy of Canadian Regionalism," in *Understanding Canada: Building on the New Canadian Political Economy*, ed. Wallace Clement (McGill-Queen's Press, 1997), 250.

²⁹ Perry, "The Imperial Law of Aboriginal Title at the Time of the Douglas Treaties," 105.

³⁰ Foster, "The Imperial Law of Aboriginal Title at the Time of the Douglas Treaties," 105-106.

³¹ Foster, "The Imperial Law of Aboriginal Title at the Time of the Douglas Treaties," 106.

beginning in 1890 and not seeing the fruits of their legal efforts until May 11th, 2000 after repeated hampering by BC and Canada³². Other cases in BC such as *Guerin v. The Queen* (1984), *R. v. Sparrow* (1990), and *R. v. Van der Peet* (1996) also represent ongoing struggle for land and rights recognition. While these cases did not directly address the issue of Aboriginal title and its possible extinguishment, they did advance questions of Aboriginal rights (*Sparrow* and *Van der Peet*) and the Crown's responsibility to Indigenous Nations (*Guerin*) prior to *Delgamuukw* in 1997. Additionally, Indigenous nations are working their way through the courts for appropriate land rights and self-government in BC, often done in partnership with the BC Treaty Commission established in 1992.

As a primer, Aboriginal title is found in English Common Law, and presumes that, “[I]ndigenous people occupied and controlled the land in accordance with traditional laws and customs prior to the introduction of British sovereignty.”³³ Thus, this title was a recognized as a threat to British control of Canada and needed to be extinguished. As laid out in the *1763 Royal Proclamation* Aboriginal title can be extinguished via sale or secession to the Crown or explicit extinguishment by the Crown.³⁴ As Yurkowski notes, paradoxically the Crown always holds an underlying title to the land, and can override Aboriginal title, but in order to do so, the reason must be, explicitly made and, “compelling and substantial”³⁵. This extinguishment clause becomes key in modern court cases.

³² Abbott, “A Royal Commission Frustrates Hopes” 97-98.

³³ Rachel Yurkowski, “‘We Are All Here to Stay’; Addressing Aboriginal Title Claims after *Delgamuukw v British Columbia*,” *Victoria University of Wellington Law Review* 31, no. 3 (2000): 473.

³⁴ Government of Canada; Crown-Indigenous Relations and Northern Affairs Canada. “The Royal Proclamation of 1763.”

³⁵ Yurkowski, “‘We Are All Here to Stay,’” 473.

BC has faced numerous land claims in recent decades. The first of interest is *Calder v. BC (1973)*, which was launched by the Nisga'a against the BC government around the right to land and Aboriginal title. The Nisga'a argued that BC had never directly extinguished Aboriginal title, as required in the 1763 *Royal Proclamation*, and thus the actions taken by the British Columbian government since have been unlawful.³⁶ This resulted in the Supreme Court of Canada (SCC) ruling on both – whether Aboriginal title still exists and if it had been extinguished in BC. BC provided a counterargument to these accusations of unlawful land seizure, arguing that they had implicitly extinguished Aboriginal title to the land,

that this right [Aboriginal title], if it ever existed, had been lawfully extinguished, that with two societies in competition for land—the white settlers demanding orderly settlement and the Indians demanding to be let alone—the proper authorities deliberately chose to set apart reserves for Indians in various parts of the territory and open up the rest for settlements. They held that this had been done when British Columbia entered Confederation in 1871 and that the Terms of Union recognized this fact.³⁷

Here BC acknowledges that it has never been done explicitly, but that the existence of white settlement was enough for title to transfer to the Crown. Despite these arguments, *Calder v. BC (1973)* was thrown out by the SCC for improper filing.³⁸ However, despite no direct ruling in the continued existence of Aboriginal title and if it has been extinguished it did in a roundabout way confirm its existence, as six out of the seven Supreme Court Justices recognized that title has always been part

³⁶ *Calder et al. v Attorney-General of British Columbia*, Supreme Court of Canada, 1973, <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/5113/index.do>, 318.

³⁷ *Calder et al. v Attorney-General of British Columbia*, 329.

³⁸ Foster, “The Imperial Law of Aboriginal Title at the Time of the Douglas Treaties,” 94.

of Canadian law through the *1763 Royal Proclamation*, but were hung on if it had been extinguished in BC.³⁹

The landmark case of Aboriginal title in BC was still to come. While Calder had cracked open the conversation around BC's claim to land, *Delgamuukw v. BC* (1997) blew it open. Similarly to Calder, Delgamuukw claimed title to 58,000 square kilometers of land in the province for all the Gitksan and Wet'suwet'en peoples.⁴⁰ Again they claimed that they had never ceded their territory, and thus the actions of the BC government were infringing on their traditional lands and rights.⁴¹ BC once again cited implicit extinguishment to defend their lack of treaty-making, claiming, "there was no [A]boriginal title in British Columbia because settlement had extinguished any pre-existing systems of [A]boriginal law and introduced British law in its place".⁴² Again BC argued the existence of settlement was enough to replace explicit reinstatement of title through treaties. However, in this case the SCC definitively ruled that BC had not legitimately, and explicitly extinguished title, ruling, "[a] provincial law of general application cannot extinguish aboriginal rights. First, a law of general application cannot, by definition, meet the standard 'of clear and plain intention' needed to extinguish [A]boriginal rights without being *ultra vires* the province."⁴³ This ruling resulted in the legal and colonial reconfirmation and re-recognition of Aboriginal title in BC, explicitly ruling BC's previous actions as unlawful.

Both Calder (1973) and Delgamuukw (1997) allow for the opportunity to investigate BC's historical decision-making processes around treaty-making in the

³⁹ Foster, "The Imperial Law of Aboriginal Title at the Time of the Douglas Treaties," 94.

⁴⁰ Yurkowski, "We Are All Here to Stay," 474.

⁴¹ Yurkowski, "We Are All Here to Stay," 474-475.

⁴² Yurkowski, "We Are All Here to Stay," 475.

⁴³ *Delgamuukw v BC*, S.C.R. 1010. Supreme Court of Canada, 1997, 1022.

modern-day. What was uncovered is a clinging-to of conceptions around land use which stem from this historical period. BC defended itself in both cases by claiming that Indigenous forms of land use and governance that existed long before colonization, were extinguished with the implementation of British legal, land and governance traditions. The understandings of “good” and “waste” land that empowered Trutch, were replicated in the 1973 and 1997 court cases where BC defended itself, by proclaiming settler society won the battle for settlement of BC, and thus Aboriginal title was considered an irrelevance in the governing of the province.⁴⁴

Conclusion

BC has historically been a province deeply resistant to ideas of Aboriginal title and treaty-making on “its” lands and has done its best to minimize policy that relates to questions of land for and around Indigenous nations. Despite this, Indigenous peoples have never stopped resisting dispossession, and land claims have slowly worked their ways through the courts (along with other resistance and resurgence movements). I conclude that treaty-making in BC was left undone and ignored by colonial officials until recent decades, as BC (in comparison to the remainder of the Canadian west) had different entry into Canadian Confederation under different circumstances that left it with significantly more autonomy and differing conceptions of land than its neighbours. Additionally, when comparing the historic treaties in BC (the Douglas Treaties) to the Numbered Treaties, numerous differences become apparent, particularly those of colonial officials involved in land policy. Finally, modern-day court cases (Calder and Delgamuukw) reveal how

⁴⁴ Calder et al. v Attorney-General of British Columbia, 329 and Yurkowski, ““We Are All Here to Stay,”” 475.

BC conceptualizes and defends its past actions. What is gleaned from this paper's exploration is that colonial conceptions of land, flow though and inform BC's treaty-making decisions from 1850 to 1997.

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