THE NLHA7KÁPMX MEETING AT LYTTON, 1879, AND THE RULE OF LAW

DOUGLAS HARRIS

> In the last few days the Thompson River and the Nicola Indians have been assembling in large numbers, and have formed a picturesque camp on the reserve to the east of the town. About 1000 men and women are living in tents, and what with the large Council House, which they have erected (200 feet by 40), the corrals and horses picketed all over the flat, the whole has quite a moral effect. The Indians are remarkably well behaved, and not a single one of them has been seen in town after dark. These Indians have assembled for the purpose of making arrangements for the better management of their people and reserves. They elected Michell, the well-known interpreter, Chief of all the tribes that have met. Mr. Sproat, the Indian Commissioner, arrived on invitation from the Indians, last Monday. In the evening he walked to the camp, where he was received by the Chiefs and a salute from five guns. Then Mr. S. tranquilly went through the ordeal of shaking hands with over 800 Indians. It was a rather pretty sight to see so large a number of men and women well dressed, and drawn up in doubleline, and the decorum displayed was well worth noting. Mr. Sproat's surveyor had also to shake hands with the multitude, an act he performed with tolerable grace. Several townspeople besides myself watched the proceedings, and were much pleased with the orderly manner [in which] things were conducted. The Indians then adjourned to the Council House, where the Commissioner thanked the Chiefs for the manner he had been received as agent of the Dominion Government, and the meeting adjourned till Thursday. On walking back to town I thought that it was to be regretted that some of our Provincial Members could not spare the time to be present at the meeting, although they might not understand the language, they could take a lesson in civility, decorum, and general good behaviour on public occasions.
>
> *Mainland Guardian*, New Westminster, BC, 19 July 1879

THIS MEETING WAS THE outcome of a Native attempt to impose the Queen's law on White British Columbian society.[1] At it the Nlha7kápmx (Thompson) elected a head chief and council with the power to make and enforce rules and regulations by which they would live.[2] Their intent was to demonstrate that they were good, law-abiding subjects of the Queen. Their hope was that this display of good faith and loyalty would ensure the predictable and uniform application of the law to all the Queen's subjects. Essentially, the Nlha7kápmx gathered in Lytton attempted to use the legal structure of the emerging nation state of Canada to counter White dominance. They were manoeuvring, through the rules imposed by Whites, to secure predictable and fair treatment from the provincial government. The tool they used was the law, and the relationship they sought to create was to be based on the rule of law: White governments would be required to deal with Native peoples in a principled, rule-based manner, and not, as had become the norm in British Columbia, through the arbitrary exercise of power.

By its angry reaction to the Nlha7kápmx resolutions, the provincial government indicated that it would not deal with Native groups within the rule of law. Rather, White British Columbia opted for the politics of power — racist minority power. Ottawa's complicity manifested itself in a lack of support for the Nlha7kápmx. An important window of opportunity in White-Native relations in British Columbia was closed. The rule of law, in the basic sense in which Joseph Raz understands the phrase (i.e., that people should be able to guide their actions by the law), did not apply to White dealings with Native peoples in British Columbia.[3]

The record of the 1879 meeting is largely found in the newspapers of the day and in the letters Gilbert Malcolm Sproat, Commissioner of the Indian Land Reserve Commission, wrote to the Superintendent-General of Indian Affairs in Ottawa. The Commission began in 1876 as a joint federal-provincial effort to resolve the many land disputes that were threatening Native-settler relations in British Columbia. However, acrimony between the two levels of government

[1] The meeting is discussed in Robin Fisher's *Contact and Conflict* (Vancouver: University of British Columbia Press, 1977), 178-80. It is mentioned by Paul Tennant in *Aboriginal Peoples and Politics* (Vancouver: UBC Press, 1990), 54-55. Cole Harris makes somewhat more of it in "The Fraser River Encountered," *BC Studies* 94 (Summer 1992): 23-24.

[2] The Nlha7kápmx live along the Fraser River from Spuzzum almost to Lillooet, up the Thompson River from the Fraser River almost to Ashcroft, and in much of the Nicola Valley.

[3] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), 210-29.

reduced the Commission and left Sproat the sole remaining commissioner. For many months in both 1878 and 1879, he toured the province with his small entourage, recommending land settlements where he could and, where he could not, referring matters to the province. Sproat was a prolific writer. His letters to Ottawa describe in detail the work of the Commission and are full of opinions about the province's treatment of Natives. Increasingly at odds with the provincial government — one of the province's premiers complained that Sproat was "wholly unfit for anything but verbose, voluminous, tiresome correspondence"[4] — he was the only government participant in the meeting at Lytton in 1879. John Booth Good, the Anglican missionary at Lytton for most of the period between 1866 and 1882, was the other influential White.[5]

THE NLHA7KÁPMX MEETING OF 1879

Sproat arrived in Lytton at the invitation of the Nlha7kápmx in July 1879. He estimated that they had spent about $500 to prepare for the gathering, which he took to be a show of "good feeling towards the Queen."[6] The Queen, as chief of the Whites and as a tangible symbol of White power, was a dominant figure at the meeting and all involved referred to the will of the Canadian state as the "Queen's mind" (not an inaccurate understanding of the Canadian constitution). It was with the "Queen's mind" that the Nlha7kápmx wished to become acquainted — hence, their invitation to Sproat.

At the meeting, the Nlha7kápmx adopted two sets of resolutions,[7] the first of which sought to create a structure of local government. This government would consist of a council comprised of an elected head chief and thirteen elected councillors who would hold office for three-year terms; hereditary tribal chiefs, who would hold office until their deaths and then not be replaced; and the Queen's Indian agent. It would have the power to make rules and regulations for the Nlha7kápmx over matters such as schools, medicine, fishing and hunting, and aspects of personal conduct. Matters of church and

[4] Fisher, *Contact and Conflict*, 189.

[5] See Peter Robin, "Beyond the Bounds of the West: The Life of John Booth Good, 1833-1916" (Master's thesis, University of Victoria, 1991).

[6] G.M. Sproat to the Superintendent General of Indian Affairs (Supt.-Gen.), 26 July 1879, National Archives of Canada (NAC), Department of Indian Affairs (DIA), RG 10, reel C-10,117, vol. 3669, file 10,691.

[7] G.M. Sproat to Supt.-Gen., 17 July 1879, NAC, DIA, RG 10, reel C-10,122, vol. 3639, file 15,316. Also reported by Sproat in the *Mainland Guardian*, 20 and 23 August 1879, and briefly in the *Daily British Colonist*, 21 August 1879.

council would be separated, except in the area of education. A committee of council, consisting of at least three councillors, would adjudicate alleged violations of the council's rules and regulations. Everybody, including the chiefs and the councillors, was to obey the rules. Clearly, this was to be a rule-based government.

The head chief and councillors were duly elected. According to Sproat, the thirteen councillors were chosen by acclamation — thirteen being the number of Nlha7kápmx people considered to be of sufficient stature to hold office. Meshall,[8] a man from Spuzzum who had served as Sproat's interpreter while the Commission travelled through Thompson territory in 1878, was chosen as head chief. Sproat explained to the Department of Indian Affairs that Meshall was probably elected because of his fluency in English and, consequently, his capacity to understand the Queen's mind towards her Indian subjects.

The chief and councillors then agreed upon a second set of resolutions bearing on local government. A school would be built, a teacher would be hired, and the students would be taught to do arithmetic and to read and write English. The cost would be covered by a school tax levied on the Nlha7kápmx and by fines, half of which would be directed to the school. After education, the priority was medical care, and its costs would be covered by a medical tax and by the other half of the collected fines. Drunkenness, gambling, and the potlatch were all banned. Fines of five to fifty dollars would be imposed by a committee of council for violations. Those found guilty of participating in a potlatch could be forever disqualified from becoming a chief, councillor, or constable. Arable land on the reserve was to be divided "in a fair way" into individual holdings. Land and houses were to be kept neat and well-fenced. Blame was to be assigned for damage caused by trespassing animals, and the person at fault was to pay restitution. "Idleness" was to be curtailed, especially male idleness while women worked in the fields. Restrictions were imposed on hunting and fishing. Finally, precepts of natural justice were to be followed and the rule of law observed when the committee of council sat to hear disputes:

> The tribal Committees of Council must give notice to the tribe that they are going to sit to hear a case and they must hear it and state

[8] There are different spellings of 'Meshall.' Sproat wrote 'Michel,' and the reporter for the *Mainland Guardian* used 'Michell.' The spelling in the text is Good's, and I use it throughout, except when quoting directly from another source.

their minds and their decision must be noted at the time so as to be remembered, and must not be changed after the sitting of the court.

Every person in a tribe is strictly enjoined to respect the proceedings of the Committee of Council and to assist in enforcing their decisions.[9]

Here was a considerable program of local government, and Sproat reacted to it enthusiastically. He thought that the proposed organization would reduce the work of the Department of Indian Affairs, improve White-Native relations, and enable the Nlha7kápmx to run their own affairs better than could a federal official. Nevertheless, in pressing his case to the Superintendent-General of Indian Affairs, Sproat emphasized the money that Ottawa would save by enabling the Nlha7kápmx to organize themselves.[10]

From a late twentieth-century vantage point, these resolutions appear to be a remarkable concoction of Victorian propriety, Canadian paternalism, and indigenous tradition. In a brief account of the meeting, Paul Tennant suggests that it was largely Sproat's creation and that the Nlha7kápmx themselves had little interest in it.[11] However, Sproat repeatedly asserted that the Nlha7kápmx had organized the meeting themselves and were responsible for its outcome. Sproat wrote to the Superintendent-General that the proposed meeting "[was] worthy of [his] attention and might be memorable as a step *taken entirely by the Indians themselves*."[12] The year of planning, the number of people present, and the ceremony to welcome Sproat and his surveyor indicate that the meeting was of considerable importance to the Nlha7kápmx. Its failure reflects neither Sproat's domination nor Nlha7kápmx indifference, but a vitriolic response from Victoria that Ottawa was not prepared to counteract.

J.B. Good concurred with Sproat in a letter to the *Daily British Colonist*, suggesting that "Mr. Sproat had no more to do with the election of Meshall as head chief than the man in the moon."[13] Good also insisted in the letter that Sproat had neither initiated nor attempted any combination of tribes. Good, himself, had lived among

[9] G.M. Sproat to Supt.-Gen., 17 July 1879, NAC, DIA, RG 10, reel C-10,122, vol. 3696, file 15,316.

[10] G.M. Sproat to Supt.-Gen., 26 July 1879, NAC, DIA, RG 10, reel C-10,117, vol. 3669, file 10,691.

[11] Tennant, *Aboriginal Peoples*, 54-55.

[12] G.M. Sproat (his emphasis) to Supt.-Gen., 6 November 1878, NAC, DIA, RG 10, reel C-10,117, vol. 3669, file 10,691.

[13] *Daily British Colonist*, 12 October 1879.

the Nlha7kápmx since 1866 and spoke their language, but he said that the election of Meshall as head chief "was quite spontaneous on their part and took [him] as much by surprise as it did Mr. Sproat."[14] He claimed that if any White man encouraged the Nlha7kápmx, it was he, in his "humble capacity as guide, philosopher and friend." But in 1879 Good lived in Yale and his influence among the Nlha7kápmx had apparently waned. Good's many efforts to influence the government on their behalf had had little effect, he had not proved as useful as his converts had hoped, and many of the Nlha7kápmx were turning away from the church and towards the state, the latter represented in this case by Sproat. If God could not bring justice, perhaps the Queen could.[15]

Nonetheless, although a Nlha7kápmx initiative, the social organization proposed at the 1879 meeting was radically different from any they could have known prior to the arrival of Whites. The court-like institution was a Western introduction, so was an elected council with the power to create laws and punish offenders. The Nlha7kápmx were proposing a form of social organization with clear vertical lines of authority and specific positions of power occupied by individuals for a set term, a radical departure from a society in which authority was based in the group rather than in the kind of hierarchical structure found in a nation state.[16] James Teit, ethnographer of the Nlha7kápmx, reported that positions of leadership were associated with a particular war or hunt and were usually dissolved upon its completion.[17] Furthermore, the resolutions contemplated the separation of church and state, and of the spiritual and the material — separations which would have been incomprehensible to the immediate ancestors of those who attended the meeting. Clearly, the Nlha7kápmx felt that they must, in Sproat's words, "adopt the new fashion," and the meeting marks an extraordinary step towards recon-

[14] *Daily British Colonist*, 12 October 1879.

[15] Bret Christophers makes this case persuasively in "Time, Space and the People of God: Anglican Colonial Discourse in Nineteenth Century British Columbia" (Master's thesis, University of British Columbia, 1995).

[16] Pierre Clastres, *Society Against the State: The Leader as Servant and the Humane Uses of Power Among Indians of the Americas* (New York: Urizen Books, 1974).

[17] "It has been mentioned before that the influential men always consulted with the men of the tribe, but there were no formal councils. Whenever a man had an undertaking in view that concerned the band, he invited the men of the village to discuss it. At these councils such subjects as the organizing of war-expeditions, marriages, or other matter of public interest, were discussed, each man having a voice in the matter. Generally the advice of the oldest or the most experienced was taken." James Teit, "The Thompson Indians of British Columbia," *The Jessup North Pacific Expedition: Memoir of the American Museum of Natural History* (New York: AMS Press, 1900) vol. 1, part 4, 289.

ciling Native peoples to life in what was rapidly becoming a White province. Primarily, Native agency is found less in the content of the resolutions than in their intended effect on White-Native relations in British Columbia.[18]

In fact, although more extensive, the proposals bear a considerable resemblance to sections 62 and 63 of the Indian Act,[19] the details of which the Nlha7kápmx had probably learned from Good. The design of the Nlha7kápmx resolutions emulated the design of the Indian Act:

> 62. The Governor in Council may order that the chiefs of any band of Indians shall be elected . . . and they shall be elected for a period of three years, unless deposed by the Governor for dishonesty, intemperance, immorality, or incompetency; and they may be in proportion of one head chief and two second chiefs or councillors for every two hundred Indians; but any such band comprised of thirty Indians may have one chief: Provided always, that all life chiefs now living shall continue as such until death or resignation, or until their removal by the Governor for dishonesty, intemperance, immorality, or incompetency.
>
> 63. The chief or chiefs of any band in council may frame, subject to confirmation by the Governor in Council, rules and regulations for the following subjects, viz.:
> 1. The care of public health;
> 2. The observance of order and decorum at assemblies of the Indians in general council, or on other occasions;
> 3. The repression of intemperance and profligacy;
> 4. The prevention of trespass by cattle;
> 5. The maintenance of roads, bridges, ditches and fences;
> 6. The construction and repair of school houses, council houses and other Indian public buildings;
> 7. The establishment of pounds and the appointment of pound-keepers;
> 8. The locating of the land in their reserves, and the establishment of a register of such locations.

[18] Some of the resolutions had a Nlha7kápmx edge. Their court, for example, could have an even number of judges. Sproat had told them that "a Court of 4 would not work among Whitemen, for 2 might think the same and the other two differently, and so there would be a deadlock, but they said that such a thing could not happen in an Indian Court" (G.M. Sproat to Supt.-Gen., 17 July 1879, RG 10, reel C-10,122, vol. 3696, file 15,316). James Teit later reported in a similar vein. Their chiefs, he said, "seldom or never acted in matters of public interest without obtaining the consent of all their people" (Teit, "Thompson Indians," 289).

[19] *Revised Statutes of Canada*, 1876, c. 18.

Much of what the Nlha7kápmx were proposing had been contemplated, even encouraged, by the Canadian government. Good believed the only flaw in the proceedings was that the proposed penalties "erred on the side of stringency."[20] There were some differences between the Nlha7kápmx proposals and what was contained in the Indian Act, the most significant being the number of Nlha7kápmx placing themselves under the leadership of one head chief. Section 62 of the Indian Act allowed for (but did not appear to require) one head chief for every 200 Indians, and there were many more Nlha7kápmx at the 1879 meeting. Furthermore, there was no provision in the Indian Act for the tribunal that the Nlha7kápmx had proposed to judge alleged offences. However, nowhere did the Nlha7kápmx violate the spirit of the instructions emanating from the federal government. In fact, they had every reason to believe that they were doing exactly what was expected of them.

THE RESPONSE

Reactions to the Nlha7kápmx meeting varied. Word of it preceded Sproat down the Fraser River, and the Natives of the lower Fraser River expressed interest in organizing in the same manner as had the Nlha7kápmx. As well, Sproat expected the Okanagan and Shuswap peoples to be keenly interested in the outcome of the Nlha7kápmx meeting of 1879. He believed, apparently with some justification, that the Nlha7kápmx had created a model of social organization which other tribes would want to emulate.

The White élite in Victoria were outraged. Concern focused on the wisdom of placing Natives under one head chief and the fear that this posed a serious threat to orderly White settlement. These sentiments had manifested themselves the previous winter, when word of the proposed Nlha7kápmx meeting had reached Victoria. Amor De Cosmos had written a vitriolic editorial about Sproat in the *Daily Standard*:

> The same recklessness, we might almost say ruthless, disregard of the rights of White settlers which has marked the proceedings of the joint commission has been persisted in, so that the advent of the irresponsible gentleman who, unchallenged and unchecked, by a wave of his hand and a flourish of his pen disposed of the lands of the

[20] J.B. Good to the Editor, *Daily British Colonist*, 12 October 1879.

> Province, is regarded by the White population amongst whom the visitation may fall as public calamity, heralded by dismay and pursued by spoliation and disaster.[21]

De Cosmos denounced the proposed meeting as a dangerous folly and serious threat to White British Columbians. The indigenous people were not to be trusted, he argued, and should under no circumstances be allowed to organize. "Singly the Indian tribes are easily dealt with, but once bind them together by ties, whether political or social, and they will be much more difficult either to coerce or persuade." Sproat commented on the letter at some length in a dispatch to Ottawa. He underlined "coerce" and wrote in the margin, "narrow, obsolete policy." Just below this, he wrote: "The Indians and Whites are one people and equity will bind them together more closely." And later, beside a De Cosmos diatribe against the "extortionate" Indian, Sproat commented, "They are moderate and law abiding, under gross neglect and injustice." Sproat clearly felt that if the Native peoples were treated fairly, they would coexist peacefully with the incoming White settlers. His sense of "equity," of course, was limited by the times; he was not advocating an inherent right to Native self-government — far from it. Natives and Whites were to be equally subject to the rules of a White government. The Nlha7kápmx were being prompted to adopt White ways, "to be like good White men."[22] Nevertheless, Sproat's dealings with Native peoples were based on his understanding of them as citizens, not as obstacles to the development of the province.

Despite De Cosmos's objections to the proposed meeting, the Deputy Superintendent-General of Indian Affairs in Ottawa told Sproat to encourage it, "provided the local government does not object."[23] Sproat then suggested to Dr. Israel Powell, British Columbia's superintendent of Indian Affairs, that he attend the meeting, but he received no response.[24]

After the meeting, dire warnings reverberated around Victoria. The concerns of the White élite echoed those raised earlier by De Cosmos. Organized into a "confederation" the Indians were dangerous, would

[21] Enclosure in a letter from G.M. Sproat to Supt.-Gen., 1 December 1878, NAC, DIA, RG 10, reel C-10,117, vol. 3669, file 10,691.

[22] G.M. Sproat to Supt.-Gen., 6 November 1878, NAC, DIA, RG 10, reel C-10,117, vol. 3669, file 10,691.

[23] Deputy Supt.-Gen. to G.M. Sproat, 16 December 1878, NAC, DIA, RG 10, reel C-10,117, vol. 3669, file 10,691.

[24] G.M. Sproat to Supt.-Gen., 26 July 1879, NAC, DIA, RG 10, reel C-10,117, vol. 3669, file 10,691.

cause trouble, and would hamper the settlement and development of the province. One correspondent, in a letter to Victoria's *Weekly Standard*, suggested that the Indian Act contemplated "the formation of a council in a small Indian village or isolated locality," not the combination of several thousand Native peoples under one chief.[25] It was the size of the Nlha7kápmx organization that spooked White British Columbia. James Lenihan, the Deputy Superintendent of Indian Affairs for mainland British Columbia, informed Ottawa that the "new organization . . . [would] be the entering of the small end of the wedge, for the promotion of schemes and intrigue."[26]

Two months after the Nlha7kápmx meeting, Powell sent an urgent telegram to Ottawa:

> To: Hon Supt General Indian Affairs
>
> Please delay confirmation
> Sproats indian
> meeting strong protest
> presented mailed
>
> IW Powell[27]

Behind this telegram was a letter sent to the provincial premier by a group of "Concerned Citizens." Powell forwarded this letter to Ottawa and expressed the opinion that Sproat had "committed a most serious error in attempting to combine the large population of MeklaKapmuk [Nlha7kápmx] under one head chief" and that the scheme was a dangerous departure from established policy towards Native peoples.[28] The "Concerned Citizens" were even more pointed:

> In the first place, we regard a scheme to combine a number of half civilized natives scattered over a large extent of territory sparsely inhabited by Whites, without any controlling influence, exceedingly dangerous to the peace of the Province, especially just at a time when their ancient privileges are being somewhat curtailed, and while they

[25] *Weekly Standard*, 22 October 1879.

[26] J. Lenihan to Supt.-Gen., 28 August 1879, NAC, DIA, RG 10, reel C-10,117, vol. 3669, file 10,691.

[27] Telegram from the Superintendent of Indian Affairs in Victoria, I.W. Powell, to the Supt.-Gen. of Indian Affairs in Ottawa, 26 September 1879, NAC, DIA, RG 10, reel C-10,117, vol. 3669, file 10,691.

[28] I. Powell to Supt.-Gen., 29 September 1879, NAC, DIA, RG 10, reel C-10,117, vol. 3669, file 10,691. .

> are in a state of transition and hence unable to appreciate or properly utilize the advantages of civilized treatment.[29]

The authors recounted the virtues of a policy of divide and rule:

> We desire especially to bring to your notice, that the past safety and security which we have enjoyed in the Province is owing to the fact that the large Indian population of the Country has been divided into small bands without a head Chief possessing general authority or influence, and without the ability to unite and constitute themselves a powerful and formidable force.[30]

Further, they feared that the "federation" of Indians would become a model that would spread around the province, hampering White access to land and resources:

> Having been informed that the Commissioner has now left the Interior with a view of proceeding to the North West-Coast, we venture to suggest, for the consideration of the Government, that any interference with Tribes in that extensive locality where important fishery interests are involved, apart from the great expense of such a proceeding, can only be productive of evil, as the safest and most practical method of dealing with lands at present monopolized by inter-tribal laws, and where there are few if any White settlers, is *to set them [lands] aside from time to time as emergencies arise*, and the knowledge of the Government as to the real necessities of the Indians justifies.[31]

Here was a flagrant denial of the rule of law. Land was to be doled out to Natives, not on any principled ground, but only when "emergencies arise" and at the complete discretion of the provincial government. In other words, the provincial government would provide reserve land if it were necessary to curb unrest or violence; otherwise, all land was to be available for White settlement and development. In the view of the "Concerned Citizens," reserve land was wasted land; productive land should not be allowed to fall into Native hands. The

[29] Petition to Honourable G.A. Walkem, Attorney General and Premier of BC, signed by Alex C. Anderson, William Duncan, Rod Finlayson, W.I. Macdonald, I.W. McKay, Archdeacon McKinlay, W.F. Tolmie, Charles A. Vernon, and Admiral Prevost, 25 September 1879, NAC, DIA, RG 10, reel C-10,117, vol. 3669, file 10,691.

[30] Ibid.

[31] Ibid (emphasis added).

"Concerned Citizens" were advocating a policy of malicious discretion: land when absolutely necessary, but not necessarily land. Provide for the Native population only as much land as would be required in order to maintain the relative peace of the province. Organized, Native peoples would be in a better position to agitate for more land. Therefore, the provincial government should not allow any political combination of Indians on a scale beyond that of a village. In his letter, Powell stated: "I fully endorse every statement contained in the protest." The letter from the "Concerned Citizens" reflected the preferred provincial policy regarding the provision of land for Native peoples.

Sproat mounted one last defence of the meeting. To the Superintendent-General, he contended that the organization of the Nlha7kápmx was a "hopeful sign" of better relations between Natives and newcomers.[32] It was the beginning of the fairness and equity that would bring enduring peace and prosperity to the province on the west coast. However, the Deputy Superintendent-General of Indian Affairs in Ottawa had already informed Sir John A. Macdonald, Prime Minister and Superintendent-General, of the concerns raised in British Columbia by the proposed "amalgamation."[33] Macdonald indicated to his deputy that the Dominion government did not look favourably upon Sproat's actions,[34] and, in December 1879 Sproat received these instructions from the Department of Indian Affairs: "Any such organization on the part of the Indian Nations or Tribes in BC should be discouraged in every way possible."[35]

In light of the reaction in British Columbia, and without the support of Ottawa, the Nlha7kápmx project was doomed. Shortly thereafter, Sproat resigned his position as commissioner, his work unfinished. The provincial government never recognized the land dispute settlements that Sproat had so painstakingly effected.[36] Uncertainty over title remained. As the settlement of the land question had been the foundation upon which the Nlha7kápmx had proceeded to organize themselves, it is not surprising that, with the

[32] G.M. Sproat to Supt.-Gen., 10 November 1879, NAC, DIA, RG 10, reel C-10,117, vol. 3669, file 10,691.

[33] Deputy Supt.-Gen. to Supt.-Gen., 22 September 1879, NAC, DIA, RG 10, reel C-10,117, vol. 3669, file 10,691.

[34] Macdonald's note in margin of memo, 15 November 1879, NAC, DIA, RG 10, reel C-10,177, vol. 3669, file 10,691.

[35] Deputy Supt.-Gen. to G.M. Sproat, 26 November 1879, NAC, DIA, RG 10, reel C-10,122, vol. 3696, file 15,314.

[36] Robert E. Cail, *Land, Man and the Law* (Vancouver: University of British Columbia Press, 1974), 215.

diminished hope of attaining a secure territory, the resolutions agreed to at their meeting came to nought. Other commissions would follow, including a joint federal-provincial undertaking from 1913 to 1916 that both levels of government accepted.[37] Although approved by the governments, Native peoples never accepted the report of the McKenna-McBride Commission as a satisfactory resolution of their land claims. Further settlement and two railways had increased the pressure on the land, so that when the Commission arrived in the territory of the Nlha7kápmx in 1914, it encountered a people living in great poverty and disinclined to listen to talk about the goodness of the king and the fairness of the Canadian state.

THE RULE OF LAW

What is meant by the rule of law? Here I turn to Joseph Raz for a formal and narrow definition (Raz believes that the expansive equation of the rule of law with equality and justice is largely meaningless).[38] The rule of law, suggests Raz, is but one virtue of a legal system, the fulfilment of which indicates little about the inherent equity of that system. Raz argues that, in the literal sense, the rule of law has two aspects: "(1) that people should be ruled by law and obey it, and (2) that the law should be such that people will be able to be guided by it."[39] It is the second aspect, the capacity to obey the law, that Raz suggests is the basic intuition from which the rule of law derives: "The law must be capable of guiding the behaviour of its subjects."[40] According to Raz, then, the rule of law does not require the rule of good law; it only requires that the law provide sufficient guidance so that subjects of the state may know how the latter will react to their actions before they act. In this sense, the doctrine of the rule of law is merely an attribute of a functioning legal system, necessary but not sufficient to ensure fundamental rights, justice, and equality. From this basic intuition, Raz generates certain principles commonly associated with the rule of law: that laws should be prospective, open and clear, and relatively stable; that particular laws should be generated from well-known general principles; that the

[37] This was the Royal Commission on Indian Affairs for the Province of British Columbia that was created by the McKenna-McBride Agreement of 1912. In a report that filled four volumes, the Commission confirmed some reserves as they existed, reduced the size of some, and increased the size of others.

[38] Raz, *The Authority of Law*, 210-29.

[39] Ibid., 213.

[40] Ibid., 214. Raz credits F.A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944), for his understanding of the rule of law, but he rejects Hayek's conclusions.

principles of natural justice should be observed; that the independence of the judiciary should be assured, the courts accessible, and hearings fair and without bias; and that the enforcement of laws should be carried out in accordance with the law. However, at its core the rule of law simply curtails the arbitrary exercise of power by establishing predictability.

Under a regime governed by the rule of law, the capriciousness of might as right is replaced by general guiding principles that are broadly known and by particular legal rules that are informed by those principles and applicable to all, including government. According to Raz, only when the exercise of law is predictable is there a recognition of autonomy and respect for human dignity. Uncertainty provides the opportunity for arbitrary power: "One is encouraged innocently to rely on the law and then that assurance is withdrawn and one's very reliance is turned into a cause of harm to one."[41] Without the rule of law there is no security. E.P. Thompson has argued that, although the "shams and inequities" concealed by particular legal rules ought to be exposed, "the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good."[42]

ENGLISH LAW IMPOSED

In June 1853, during the Cowichan expedition to seek out and capture the Natives thought to be responsible for killing Peter Brown, a White shepherd,[43] and at the beginning of colonial administration and the imposition of English law in British Columbia, Governor James Douglas wrote in his diary:

> The Indians were alarmed at our appearance, but I soon quieted their fears by friendly assurances, and had afterwards a conference with their chiefs in which I gave them a great deal of good advice. I endeavoured to make them understand that [they] were her Majesty's subjects and that the Government would respect their rights — and treat the Indians with justice and humanity as long as they obeyed the laws of the land, and that it was the duty of the chiefs to advise and restrain their people from doing wrong, and to give up offenders against the

[41] Ibid., 222.

[42] E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon Books, 1975).

[43] See Barry M. Gough, *Gunboat Frontier: British Maritime Authority and Northwest Coast Indians, 1846-1890* (Vancouver: University of British Columbia Press, 1984), 50-56.

> laws whenever they required to do so — for if they attempted to defend or screen them from justice they would become accomplices in crime. They are too ignorant and barbarous as yet to feel the full force of such arguments, but by keeping them before them, their minds will gradually open to their truth and justice. I also assured them that they would receive immediate compensation for any injury done to them by the Whites . . . Her Majesty had commanded me to afford them protection.[44]

What was going on? In the best tradition of eighteenth-century English assize courts, Governor Douglas presided over a court of law in the territory of the Cowichan people and executed the two Natives he found guilty of murder.[45] It was a perfunctory trial intended as public spectacle for a Native audience; it was, in short, a symbolic demonstration of the power of the state. In the past, English power had been demonstrated in other ways, as in 1850 when the preceding governor, Richard Blanshard, in an act of indiscriminate retribution, sent gunboats from Victoria to destroy the villages of suspected murderers.[46] Thus, it was not surprising that the Cowichan were "alarmed" when Douglas arrived in gunboats a scant three years later to dispense his brand of justice. However, the essential difference between the two actions is that Douglas accompanied his display of force with an entreaty to join the state. Everyone, regardless of position or culture, was subject to Her Majesty's law, as Douglas explained to the Native peoples along the coast at every opportunity. He told them of the necessity of obeying the law and of its essential fairness. Obey the law and the Queen would treat her Indian subjects with "justice and humanity" was the refrain. Douglas was imposing English law, and invoking the rule of law.[47]

Sproat essentially repeated to the Nlha7kápmx in 1878 what Douglas had told the Cowichan in 1853:

[44] J. Douglas, *Diary*, 4 January 1853, British Columbia Archives and Record Service, Private Papers, 2d ser., reel 737A.

[45] Douglas Hay, "Property Authority and the Criminal Law," in his *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (London: Allen Lane, 1975), 27, described the eighteenth-century English courts as follows: "The assizes were a formidable spectacle in a country town, the most visible and elaborate manifestation of state power to be seen in the countryside, apart from the presence of a regiment."

[46] Gough, *Gunboat Frontier*, 32-49.

[47] Hamar Foster, "International Homicide in Early British Columbia" in *Crime and Criminal Justice*, ed. Jim Phillips et al. (Toronto: University of Toronto Press, 1994), 61, has argued that this trial "represents the first, unequivocal application of English criminal law and procedure to an Aboriginal person accused of murder" in British Columbia.

> I said generally that the heart of the great chief at Ottawa towards them was what the heart of Sir James Douglas had been; that he wished them to have land to work on, but not land to lie on their backs and look at; that the government wished Indians and Whites to be the same; and that all the special arrangements for the Indians were temporary; they could not read or write, on this account White men might cheat them; the government in some degree intervened and protected them; all talk about the "Great Mother" was gabble; the Queen was just and kind to Indians as to Whites, but they must not suppose that they were children; they were strong men, and their aim should be to be like good White men — meanwhile, as they were the old people of the country, they got land for nothing and paid no taxes. White men paid for their land and paid taxes. The Government was a kind friend, but not an indulgent mother. Their fate was in their own hands; if they did not work they would die off. The old fashion was passing; they must adopt the new fashion and in doing so they would find that the Queen had one heart for all; and so forth.[48]

Thus, in a sense, the meeting at Lytton in 1879 followed logically from Douglas's words to the Cowichan in 1853 and Sproat's words to the Nlha7kápmx in 1878. The Nlha7kápmx had learned the new rules, couched in terms of truth and justice, and were attempting to enforce them. Power in British Columbia had shifted dramatically to the White settler government. The Nlha7kápmx understood this and understood the rules of the new game, or so they thought. Rather than a middle ground, the Queen was imposing Imperial and Dominion law on all her subjects. This meant she would protect all her loyal subjects, be they Native or White. Natives had to follow the rules, but so did the Whites. The rule of law was to be observed. Thus, to the Nlha7kápmx, the Queen was potentially a significant ally against a provincial government that was allowing their land to be taken without compensation by incoming miners, ranchers, and farmers. They thought that by appealing to the Queen they could ensure that the rule of law would be imposed on Native-White relations.

Unfortunately for the Nlha7kápmx, the Queen's representatives in Ottawa withdrew their support for the meeting and its outcome, and White British Columbia would have nothing to do with either. The rule of law did not apply. Raz's point that reliance on the law becomes a source of harm when the rule of law is abandoned is particularly

[48] G.M. Sproat to Supt.-Gen., 6 November 1878, NAC, DIA, RG 10, reel C-10,117, vol. 3669, file 10,691.

telling. As the letters from the provincial government to Ottawa indicated, only the spectre of Native violence might elicit more land for Native peoples in British Columbia. Government repression was equally likely.

THE RULE OF LAW ABANDONED

When one considers Native-White relations in light of Raz's notion of the rule of law — that citizens should be able to guide their actions by the law — the record is damning. The provincial government in particular, but also the federal government, simply did not do what the law required or what earlier colonial laws required with regard to Native peoples. The most flagrant violations concerned the taking of land. The imbalance of power meant Native land claims could be ignored, albeit at some peril, but the danger was never enough in British Columbia to force White society to secure title through treaty. Rather than obeying the law and abiding by the rule of law, White society took advantage of the disease and turmoil in indigenous societies in order to further its own interests. Arbitrary power triumphed over the rule of law.

British Columbia had not respected its colonial obligations with regard to land. Imperial aboriginal land policy was well known; aboriginal title had to be extinguished before land could be open to settlement. This directive was contained in The Royal Proclamation of 1763: "any Lands . . . which not having been ceded to or purchased by Us [the Crown] as aforesaid, are reserved to the said Indians, or any of them."[49] Land had to be purchased by or ceded to the Crown by occupying Natives before it could be settled. In British Columbia, aboriginal title had never been extinguished, and the practice was to allot no more than ten acres of reserve land per family. Across the Prairies, the federal government was extinguishing title through treaty and providing 160 acres of reserve land per family. In 1874 Lord Dufferin, Canada's Governor-General, explained the situation in Canada and British Columbia:

> In Canada the accepted theory has been that while the sovereignty and jurisdiction over any unsettled territory is vested in the Crown, certain

[49] "Appendix No. 1; The Royal Proclamation, October 7, 1763," *Revised Statutes of Canada 1970* (Ottawa: Queen's Printer, 1970), 123-29. Whether the Royal Proclamation applies to British Columbia has been the focus of much modern legal argument, most recently in the British Columbia Court of Appeal in *Delgamuukw v. British Columbia*, [1993] 5 W.W.R. 97, 104 D.L.R. (4th) 470, 30 BCC.A. 1, 49 W.A.C. 1.

> territorial rights, or at all events rights of occupation, hunting and pasture, are inherent in the aboriginal inhabitants.
>
> As a consequence the Government of Canada has never permitted any land to be occupied or appropriated whether by corporate bodies or by individuals until after the Indian title has been extinguished and the Districts formally surrendered by the tribes or bands then for a corresponding consideration.
>
> In British Columbia this principle seems never to have been acknowledged. No territorial rights are recognized as pre-existing in any of the Queen's Indian Subjects in that locality. Except with a few special cases dealt with by the Hudson Bay Company before the foundation of the Colony, the Indian title has never been extinguished over any of the territories now claimed as Crown property by the Local Government, and lands have been pre-empted and appropriated without any references to the consent or wishes of the original inhabitants.[50]

We know this story.[51] The provision of land for the Nlha7kápmx was woefully inadequate. When Sproat travelled up the Fraser River through the territory of the Nlha7kápmx in 1878, he witnessed the hardship that resulted from British Columbia's land policy.

> I am sorry to say that I found, as my Field Minutes show, that many of these Nekla-Kap-a muk [Nlha7kápmx] tribes had much to complain of. Some of them had no land reserves at all; others had lost old village sites and fisheries; some had bits of land disproportionate to their requirements; others had land and no water for irrigating it. Places very dear to the Indians had been taken from them, and in several instances, they had been deprived of their cultivated fields without compensation. Familiar as I have been with the history of this province from an early time, I was not prepared for the state of affairs which my inquiries unfolded, and I must question if the facts were known to any government of this country before or since Confederation.[52]

According to Sproat, Natives read or had read to them whatever appeared in the newspapers on Indian matters,[53] and were well aware

[50] Lord Dufferin to Lord Carnarvon, 12 December 1874, NAC, DIA, RG 10, reel C-10,106, vol. 3611, file 3756-1.

[51] See Cail, *Land, Man and the Law*; Fisher, *Contact and Conflict*; and Tennant, *Aboriginal Peoples and Politics*.

[52] G.M. Sproat to Supt.-Gen., 6 November 1878, NAC, DIA, RG 10, reel C-10,117, vol. 3669, file 10,691.

[53] G.M. Sproat to the Editor, *Daily British Colonist*, 9 September 1879.

that elsewhere in Canada aboriginal title was being extinguished through treaty.[54] In return for ceding full title to the Crown, the Natives in the North-Western Territory were receiving cash, annuities, and reserves with land of 160 acres per family from the federal government. The Native peoples in British Columbia had fared very poorly in comparison, and they knew it.

By the mid-1870s Ottawa was also well aware of Native discontent over land in British Columbia. As early as 1875, David Laird, the Minister of the Interior, wrote the following:

> The Indians of British Columbia complain that the quantity of land which the Local Government propose to assign them as reserves is utterly inadequate to their necessities; and they further allege that, where land matters are concerned, their rights are ignored and their claims subordinated to those of the White settlers. The result of this state of things is that there is a universal and growing feeling of dissatisfaction among the Indian population of the Province, and a corresponding uneasiness and alarm among the White settlers.[55]

As the Reserve Commission was getting under way, Sproat queried Ottawa about how he should react to Native insistence that title be extinguished. He was concerned that the Commission would be unable to resolve, to the satisfaction of the Native people, the question of reserve boundaries, as Governor-General Dufferin had recently been publicly enunciating in British Columbia the Crown's policy that aboriginal title must be extinguished prior to settlement. Dufferin had visited Good's Lytton mission in 1876. Sproat himself thought extinguishment was expensive and, by itself, solved nothing. In fact, he would have preferred to exempt British Columbia from the Indian Act and would have pursued a policy of generous reserves and equal access to other land.[56] However, neither his nor the federal government's policy had been pursued by the province, and, in Sproat's words, "the Indians in this province [were] wide awake" to the injustice done them by the province."[57]

[54] G.M. Sproat to Supt.-Gen., 30 September 1876, NAC, DIA, RG 10, reel C-10,112, vol. 3637, file 7131.

[55] Canada, *Sessional Papers*, 3d Parl., 2d sess., 1875, no. 8, p. 9.

[56] G.M. Sproat to D. Laird, Minister of the Interior, 30 September 1876, NAC, DIA, RG 10, reel C-10112, vol. 3637, file 7131.

[57] G.M. Sproat to Supt.-Gen., 30 September 1876, NAC, DIA, RG 10, reel C-10,112, vol. 3637, file 7131.

A letter in the *Daily British Colonist* from William, the "Chief of the Williams Lake Indians," indicates just how clearly the Native peoples understood their position and how important the land issue had become:

> The Whites have taken all the salmon and all the land and my people will not starve in peace. Good friends to the Indians say that "her Majesty loves her Indian subjects and will do justice." Justice is no use to the dead Indian. They say "Mr. Sproat is coming to give you land." We hear he is a very good man, but he has no horse. He was at Hope last June and he had not yet arrived here. Her Majesty ought to give him a horse and let justice come fast to the starving Indians. Land, land, a little of our own land is all that we ask from her Majesty.[58]

As this letter demonstrates, the Queen was viewed by the Native peoples as the source of justice, and the Queen's representatives were viewed as potential allies in disputes with the province over land. Certainly Sproat would have known, and perhaps a segment of the Native population also would have known, that British Columbia's Land Act of 1874 was disallowed by the federal government because it made no provision for reserves and accorded Natives no rights to land.[59] The Queen, whose representatives had promised the rule of law, was seen by Natives as an ally in their struggle to secure land — hence, the plaintive cry to give Sproat a horse so that justice could come quickly.

CONCLUSION

The meeting in Lytton in 1879 was not imposed on the Nlha7kápmx; it was their meeting. Sproat was an important participant, there to assist, and Good was in the background; but they were not the directing minds. The radical departure from traditional Nlha7kápmx ways that was contemplated in the proposed resolutions was self-imposed; it was the Nlha7kápmx response to the seriousness of their situation.

The Nlha7kápmx were attempting to cultivate an alliance with the Queen. Sproat was their conduit to her, and it was she whom they sought to impress. Representatives of the Queen, like Douglas and Sproat, had told indigenous peoples since the early days of the colony

[58] *Daily British Colonist*, 7 November 1879.

[59] Cail, *Land, Man and the Law*, 198.

that the Queen was just and kind, that rules applied to all, and that she would treat her Native subjects with fairness and equity. In 1879, the Nlha7kápmx were still prepared to believe that this was true. The Queen was perceived to be an ally in their efforts to extract treatment that would be in accordance with her promises. This explains the Nlha7kápmx undertaking to form a council and pass resolutions that would govern their behaviour, as the Indian Act directed. The Nlha7kápmx were attempting to create a social order that they hoped, in its familiarity, would be acceptable to the White government. Somewhat ironically, they had assumed the state's institutions of social and political control for their own ends. By complying with the law, specifically as laid out in the Indian Act, the Nlha7kápmx passed the ball to the federal government, which, as the Queen's representative, would ensure, they believed, that her Indian subjects would be treated fairly, or at least that they would not be subjected to the arbitrariness of power. The Nlha7kápmx were in no position to impose the law on the provincial government; that was a job for the Queen's representatives — one they would surely fulfil to protect the Queen's peaceful, law-abiding, and much-aggrieved Indian subjects. By refusing to endorse the efforts of the Nlha7kápmx in the face of provincial opposition, the federal government dropped the ball. In doing so it shattered what might have become a relationship based on trust and the rule of law.

To a considerable extent, the Nlha7kápmx were trying to understand and play by the rules of White society. By showing that they were prepared to organize themselves in a way which they believed would be approved by the Queen, the Nlha7kápmx expected her to ensure that her White subjects obeyed the rules as well. My claim is that, in the meeting of 1879, the Nlha7kápmx were manoeuvring to impose the rule of law not only on themselves but also on their relations with White settler society. The Nlha7kápmx wanted to know what the law was so that they could live by it, but also, and more importantly, so that they could require White settler society to live by the law as well. If the Queen believed the Nlha7kápmx to be loyal and law-abiding, then surely she would require the same of her White subjects. This was not to be.

ACKNOWLEDGEMENTS: *The author would like to thank Jim Phillips and Alan Brudner of the Faculty of Law, University of Toronto; the historical geographers at UBC, particularly Daniel Clayton and Bob Galois; and John Hannaford, Anne Lawson and Candy Thomson.*