

“TRESPASSERS ON THE SOIL”:

United States v. Tom and A New Perspective on the Short History of Treaty Making in Nineteenth-Century British Columbia

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The insatiable greed of the white man leads him to desire to obtain all that the Indian has, and if he cannot get it without law, he will have a law enacted which will enable him to get it.

Missionary William Duncan of Metlakatla, 1886

THE BRITISH COLUMBIA “Indian Land Question” has been an issue since the 1860s. Until 1927, when legal restrictions were imposed, Aboriginal groups lobbied, petitioned, and protested in support of their land rights.¹ The campaign for title resumed when these restrictions were dropped in the 1950s, and since the *Calder* decision in 1973, British Columbia has produced most of the Supreme Court of Canada’s leading Aboriginal rights decisions.² For the past ten years, the province has even had its own unique tripartite treaty process.³

This exceptionalism is largely due to the fact that treaty making ceased after a number were made on Vancouver Island in the 1850s. With one exception,⁴ no more were completed until the Nisga’a Treaty, which was finalized in 2000. As a result, land in the province was

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¹ SC 1927, c. 32, s. 149A, which criminalized land claims unless the government approved. See also the Criminal Code offences in RSC 1906, ss.109-10.

² See, for example, *Calder v. AGBC* (1973), 34 DLR (3d) 145; *Guerin v. The Queen*, (1984) 2 SCR 335; *R. v. Sparrow* (1990), 56 CCC (3d) 263; and of course *Delgamuukw v. BC* (1997), 153 DLR (4th) 193.

³ For an early look at this process, see Hamar Foster and Alan Grove, “Looking Behind the Masks: A Land Claims Discussion Paper for Researchers, Lawyers and Their Employers,” *UBC Law Review* 27 (1993): 213-55.

⁴ The exception is Treaty 8 in 1899, discussed in Arthur J. Ray, “Treaty 8: A British Columbia Anomaly,” *BC Studies* 123 (1999): 5.

sold to, or pre-empted by, settlers without extinguishing Aboriginal title, a practice that hampered the efforts of reserve commissioners from the 1870s on.⁵ It also created a cloud over title that today “has grown to lower” over most of the province.⁶

Prior to the renewal of treaty making prompted by *Calder*, land cession treaties in Canada were either never made (as in Quebec and the Atlantic provinces) or treaty making, once commenced, was pursued to completion (as in Ontario and on the Prairies). Only in what is now British Columbia did the process end almost as soon as it had begun, and when the legality of this was eventually challenged, the province managed – until relatively recently – to keep the issue out of the courts. But why treaty making was terminated remains something of a mystery.

To put the matter more concretely: why did Judge Matthew Baillie Begbie – who admonished Governor James Douglas in 1860 that it was imperative that Indian title be extinguished – “inexplicably” change his mind?⁷ In our view, part of the answer to this question may be found in the years that Douglas and other colonial officials spent in Oregon, where federal Indian law required treaties; in a deviation from that law developed by the courts in Oregon and applied in Alaska; and in the close ties between the administrative and judicial elites of British Columbia, Oregon, and Washington. In short, we think that, although British and American territories on the west coast were separate and very different national jurisdictions after 1846, a similar, albeit legally heterodox, attitude towards Aboriginal land rights thrived in both.⁸ In what follows, we attempt to make this case. But first we cast a brief glance at treaty making on colonial Vancouver Island.

⁵ See Cole Harris’s recent and excellent account of this process in *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: UBC Press, 2002).

⁶ Per Southin, JA in *Skeetchestn Indian Band v. British Columbia* (2000), 80 BCLR (3d) 233 at 239.

⁷ See David R. Williams, “... *The Man for a New Country*”: *Sir Matthew Baillie Begbie* (Sidney: Gray’s Publishing, 1977), 105, comparing Begbie to Douglas, 30 April 1860, BCARS, microfiche file 142c, p. 20, with *A.G. and I.B. Nash v. John Tait*, Begbie Bench Books, BCARS, vol. 13, 28 October 1886, p. 446.

⁸ An early plea for comparative analysis may be found in Earl S. Pomeroy, “Toward a Reorientation of Western History: Continuity and Environment,” *Mississippi Valley Historical Review* 41 (1955): 579. For the Pacific Northwest, see, inter alia, W.J. Trimble, “The Indian Policy of the Colony of British Columbia in Comparison with That of the Adjacent American Territories,” *Proceedings of the Mississippi Valley Historical Association* 4 (1913): 11; F.W. Howay, W.N. Sage, and H.F. Angus, *British Columbia and the United States: The North Pacific Slope from the Fur Trade to Aviation* (Toronto: Ryerson Press and New Haven: Yale University Press, 1942); Robin Fisher, “Indian Warfare and Two Frontiers: A Comparison of British Columbia and Washington Territory during the Early Years of

I. THE DOUGLAS TREATIES

In 1850, pursuant to instructions from the Hudson's Bay Company (HBC) and the Colonial Office, James Douglas began to make agreements with the indigenous peoples of Vancouver Island to purchase their land.⁹ It was his responsibility because he was the senior local official of the HBC, the body to whom the Crown had conveyed the Island and charged with extinguishing Indian title.¹⁰ By 1854 fourteen treaties had been made: eleven with the Coast Salish peoples of southern Vancouver Island, two with the Wakashan peoples at the northeastern end of the Island, and one with the Coast Salish at Nanaimo.¹¹ The text used in these transactions was taken from New Zealand precedents for purchasing Maori land.¹²

The "Douglas treaties" are basically deeds of conveyance in which land is transferred to "the white people forever" in return for a monetary consideration, paid largely in blankets. Neither party spoke the other's language, and none of the chiefs would have understood the concept of land as a transferable commodity. It seems more likely that they regarded the agreements as temporary measures designed to secure peace until more permanent arrangements could be worked out.¹³ Although the text is therefore an uncertain guide to what they thought had occurred, the oral and written guarantees that were made, rather than the blankets, are probably why these documents were signed – and why they are properly regarded as treaties. In addition to reserving

Settlement," *Pacific Historical Review* 50 (1981): 31; Barry Gough, "The Indian Policies of Great Britain and the United States in the Pacific Northwest in the Mid-Nineteenth Century," *Canadian Journal of Native Studies* 2, 2 (1982): 321; and Hamar Foster, "Law Enforcement in Nineteenth-Century British Columbia: A Brief and Comparative Overview," *BC Studies* 63 (1984): 3. But only the last of these deals with the law in any detail.

⁹ See, inter alia, Harris, *Making Native Space*, 18–19. One confidential Colonial Office memorandum in 1849 stated that, "in parting with the land of [Vancouver's] Island, Her Majesty parts only with her own right therein, and ... whatever measures she was bound to take in order to extinguish the Indian title are equally obligatory on the [Hudson's Bay] Company" (PRO, CO 305, no. 1, 324–8).

¹⁰ In 1851 Douglas also became governor, replacing the unhappy Richard Blanshard, who had discovered that he had little real authority in a colony so dominated by the fur company.

¹¹ Reproduced in *Papers Connected with the Indian Land Question* (Victoria: Richard Wolfenden, Government Printer, 1875 [reprint 1987]); and Dennis Madill, *British Columbia Indian Treaties in Historical Perspective* (Ottawa: Indian and Northern Affairs, 1981). The southern treaties are discussed in Wilson Duff, "The Fort Victoria Treaties," *BC Studies* 3 (1969): 3–57.

¹² For the New Zealand connection, see Hamar Foster, "The Saanichton Bay Marina Case: Imperial Law, Colonial History and Competing Theories of Aboriginal Title," *UBC Law Review* 23 (1989): 629.

¹³ See Janet Poth, ed., *Saltwater People: As Told by Dave Elliott Sr.*, 2nd ed. (Saanichton: School District 63, 1990), 69–72; and Fisher, "Indian Warfare and Two Frontiers," 39.

village sites and enclosed fields, the signatories were solemnly assured that they and their descendants would be “at liberty to hunt over the unoccupied lands, and to carry on their fisheries as formerly.” To a fishing people, a promise that their fisheries would remain undisturbed would have been a significant inducement indeed.¹⁴

After the Nanaimo treaty of 1854, no more of these agreements were formally recorded; instead, the colony began to sell land without purchasing the Indian title. But the Cowichan, who were the first to have their lands dealt with in this manner, strongly resisted incursions into their territory, frustrating anxious purchasers who had been waiting months, some even years, to take possession.¹⁵ Apparently unwilling to use the monies received from these sales to extinguish Indian title, in 1861 Douglas attempted to pry funds out of the imperial treasury instead. And because he was supposed to have been extinguishing Indian title *before* selling land to settlers, he advised the secretary of state for the colonies that, “until 1859,” it had been his practice to do just that.¹⁶

Douglas thought he could look to Britain for funds because title to Vancouver Island was to revert to the Crown in 1859, thus ending the HBC’s responsibility. But he would not have helped his case by acknowledging that he had made no treaties between 1854 and 1859, when the HBC was supposed to be paying to extinguish Indian title. Nor, one presumes, would he have been inclined to reveal that he had permitted Indian land to be sold to settlers before Aboriginal title had been extinguished.¹⁷ It was much more effective to present the problem in the way that he did: a diligent HBC had done its duty until 1859 and now the imperial Parliament should do the same. But the secretary of state for the colonies was not buying. The Duke of Newcastle informed Douglas that responsibility for extinguishing

¹⁴ This promise was soon being systematically violated: see Douglas Harris, *Law, Fish and Colonialism: The Legal Capture of Salmon in British Columbia* (Toronto: University of Toronto Press, 2001).

¹⁵ According to Joseph William Trutch, “portions of the Cowichan Valley were surveyed by Government and sold in 1859” (Enclosure in Musgrave to Granville, 19 January 1870, in *Papers Connected with the Indian Land Question*, p. 11 of the supplement).

¹⁶ See Douglas to Newcastle, 25 March 1861, *Papers Connected with the Indian Land Question*, p. 19, where he states that he had, until 1859, “made it a practice ... to purchase the native rights in the land, in every case, *prior to* the settlement of any district” (emphasis added).

¹⁷ Although he advised Newcastle that, except for Cowichan, Chemainus, and Barclay Sound, all of the “settled districts” in the colony had been bought from the Indians, he gives the impression that he is classifying them as settled simply because colonists have gone there. He says nothing in his despatch to Newcastle (above n. 16) about having sold land in those districts before extinguishing Indian title. But a decade later, Trutch (above, n. 15) let the cat out of the bag.

Indian title had moved from the HBC to the colony, not to the imperial treasury. And the relatively small sums involved, he added, were quite within the means of colonial taxpayers, particularly for a purpose that was, as both Douglas and the Assembly had acknowledged, so “essential to the interests of the people of Vancouver Island.”¹⁸

Essential or not, the history books do not record a treaty at Cowichan or anywhere else after 1854. One writer has suggested that the reason is simple: the colonial elite, including Judge Begbie, invested heavily in real estate and came to see Indian title as a threat to their financial interests.¹⁹ Another proffered explanation is also financial: Douglas ran out of money. On this view, the Colonial Office decreed that funds to extinguish Indian title had to be raised locally, the colony balked, and that was that.²⁰ But, as Paul Tennant has pointed out, this account does not square with the facts. Not only did the legislature vote funds for buying Indian land but also, for a while, editorial opinion seems to have been in favour of it.²¹ Douglas, moreover, was also governor of the mainland colony, where he ran up a considerable public debt on other projects. The Cariboo Wagon Road alone cost many times what would have been necessary to extinguish Indian title, and funds were found, or at least borrowed, for that.²² Even more telling: soon after Douglas retired, the two colonies probably spent in excess of \$100,000 in capturing and executing the chiefs responsible for the Chilcotin War – a sum that would probably have been sufficient at that time to extinguish Indian title throughout British Columbia.²³ Therefore, the money explanation, although part of the story, fails to satisfy.

¹⁸ Newcastle to Douglas, 19 October 1861. See n. 16, p. 20 (referring to a petition from the Assembly that Douglas had included in his despatch). During George Grey's first term as governor of New Zealand, he received more than £73,000 in parliamentary grants-in-aid, primarily to buy Maori land and to ensure security. See John Miller, *Early Victorian New Zealand: A Study of Racial Tension and Social Attitudes, 1839-1852* (Wellington: Oxford University Press, 1958), 92. But this was exceptional: by 1861 the Colonial Office was in no mood to repeat such largesse on Vancouver Island.

¹⁹ Peter Murray, *The Devil and Mr. Duncan: A History of the Two Metlakatlas* (Victoria: Sono Nis, 1985), 121.

²⁰ See E. G. Shankel, “The Development of Indian Policy in British Columbia” (PhD diss., University of Washington, 1946), 43-5; Robin Fisher, *Contact and Conflict*, 2nd ed. (Vancouver: UBC Press, 1992), 153; and Gilbert Malcolm Sproat in an 1876 memorandum to the dominion minister of the interior, BCARS, Add MSS 257, vol. 15, file 15, p. 34.

²¹ Paul Tennant, *Aboriginal People and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: UBC Press, 1990), 23-4.

²² *Ibid.*, 26. Douglas's authority on the mainland – as opposed to the Island, which had a representative assembly – was so ample as to be almost unprecedented, and the Colonial Office cautioned him not to abuse it. He stepped down as governor after the imperial Parliament enacted a new, and less authoritarian, constitution for the colony.

²³ Shankel, “The Development of Indian Policy,” 74.

According to Tennant, what really happened is that, quite apart from financial considerations, Douglas decided that negotiating payment for Indian land was difficult and that even completed treaties did not make adequate provision for Aboriginal peoples' economic security and social development. In September 1853, he therefore advised his HBC superiors that he would not attempt to reopen negotiations at Nanaimo until he felt it was "safe and prudent to do so," adding that the question of Aboriginal rights "always gives[s] rise to troublesome excitements, and has on every occasion been productive of serious disturbances."²⁴ So he resolved on a different approach.

The details of what Tennant has called the "system" that Douglas developed to replace treaties need not detain us. Suffice it to say that he clearly preferred to avoid the turmoil of treaty talks and debates about compensation and proposed instead to guarantee Aboriginal peoples special hunting, fishing, and education rights, and reserves of land adequate to support them in adapting to the new social and economic reality. Douglas also took the position – rather remarkably, given the tenor of the times – that in every other respect Aboriginal peoples would have the same legal rights as non-Aboriginal peoples.²⁵ His successors, on the other hand, reduced the reserves and were clearly of the view that Aboriginal peoples should not have the same rights as settlers; instead, they enacted legislation restricting such rights. And they certainly did not make treaties.

Tennant's theory is a useful corrective to the view that it was only a lack of funds that ended treaty making in British Columbia, and it seems closer to the truth. So does a more detailed variation on this theory, which Cole Harris has recently developed. Harris argues that Douglas did not really change his mind about treaties. He simply made them when he thought it made sense to do so but not otherwise. He stopped making them on Vancouver Island when to continue would have involved acquiring more land than he could protect. On the mainland, he made no treaties because there were too many different bands there and there were not the same expectations. The

²⁴ Douglas to Barclay, 3 September 1853, qtd. in Madill, *British Columbia Indian Treaties*, 21. Douglas was probably referring to the fact that the Nanaimo people were beginning to appreciate the value of the coal deposits that the company wanted. But he may also have been mindful of feelings aroused by recent executions there: see Hamar Foster, "The Queen's Law Is Better Than Yours': International Homicide in British Columbia," in *Essays in the History of Canadian Law*, vol. 5, *Crime and Criminal Justice*, ed. Jim Phillips, Tina Loo, and Susan Lewthwaite. (Toronto: The Osgoode Society, 1994), 41, 61-3.

²⁵ See also Harris, *Making Native Space*, chap. 2, and note that Douglas had personal reasons for favouring racial equality. See notes 80 and 90, below.

Colonial Office, moreover, was fast losing its enthusiasm for liberal humanitarianism and was not pressing him. "There was a jumble of Native land policies around the empire," Harris notes, arguing that, although the idea of Indian title "remained in the air" in the 1850s, the Colonial Office "no longer quite knew what to do with it." For his part, Douglas was a practical man, not a theorist. He may never have taken seriously the idea that treaties were legally necessary, and in the end he appears to have decided that the cost – including the administrative effort, time, and money that would have to be devoted to negotiating them – was not worth it. It was better to allocate generous reserves and ensure that Aboriginal peoples enjoyed the same rights as colonists.²⁶

There is surely much truth in this. But it submerges law in policy, obliterating the difference – however tenuous that difference may sometimes be – between the two. It also appears to assume that Douglas and his successors either did not know or did not care that the idea of Indian title had spawned a body of law that, by the 1850s, was generating treaties in Canada and the United States, including right next door in Washington and Oregon. Yet only twenty years later, British Columbia's continuing refusal to acknowledge Aboriginal land rights after Confederation clearly surprised the Dominion government, which was just embarking upon a major treaty-making project of its own.²⁷

In fact, even in British Columbia the treaty process did not end abruptly in Nanaimo in 1854, although it was certainly suspended. This is an impression fostered by twentieth-century court decisions that have classified only fourteen of a number of events as treaties, partly because Douglas was insufficiently diligent when it came to completing and recording his decisions regarding Indian lands.²⁸ The Nanaimo treaty, for example, has no text. There are simply signatures ("X's") and a notation in the register that the "conveyance" by the Saltequun tribe at Nanaimo in 1854 was "similar" to that of the rest.²⁹

²⁶ Harris, *Making Native Space*, 15, and chap. 2.

²⁷ In 1875 the Dominion temporarily suspended British Columbia's land laws because they made no provision for Indian title. See "Report of the Honourable the Minister of Justice, Approved ... on the 23rd January, 1875," in *Special Committees of the Senate and House of Commons ... to Inquire into the Claims of the Allied Indian Tribes of British Columbia ...* (Ottawa: F.A. Acland, Printer to the King's Most Excellent Majesty, 1927), appendix B, 39-44. But Ottawa was never prepared to force the issue.

²⁸ Chapter 4 of Thomas R. Berger, *One Man's Justice* (Vancouver: Douglas and McIntyre, 2002), reveals how unclear these matters were prior to the decision in *Regina v. White and Bob* (1965), 52 DLR (2d) 481 (SCC). Berger was counsel for the defendants. On Douglas's methods, see, inter alia, Harris, *Making Native Space*, 25-6 and 43-4.

²⁹ *Papers connected with the Land Question*, 11; and see Berger, *One Man's Justice*, 93.

There is an indistinct line between this sort of informality and transactions with no signatures – in other words, oral promises – that can be misunderstood or misrepresented and, if necessary, denied.

Thus in 1860, Douglas reported to the Colonial Office that he had promised the tribes of the Okanagan that the magistrates would reserve as much land as they needed; he said that the tribes were “delighted” with this proposal. But the Okanagan seem to have expected more negotiations and compensation for the lands they were giving up.³⁰ When this did not happen, they felt betrayed – a sentiment that nearly led to warfare in the 1870s. The Shuswap people took a similar view of promises made to them. Government officials, they said years later, had assured them that a “very large reservation would be staked off for us” and that the government would buy “all the tribal lands outside this reservation” that were required for White settlement.³¹ This is also what the Cowichan said about the events that followed Douglas’s rebuff by Newcastle.

II. THE COWICHAN “TREATY”

In the early 1850s, the Cowichan had expressed interest in a treaty but Douglas was unwilling: little was known about their territory and the land was not needed for settlement. By 1859, however, the situation had changed in at least two ways. First, military expeditions in 1853 and 1856 – expeditions that ended in executions and some bitterness – had revealed the agricultural potential of the Cowichan Valley, and the Fraser Gold Rush brought new settlers. Second, Aboriginal people knew what was going on south of the international border, where (as we discuss in Part III, below) by 1853, warfare and a much harsher treaty process were replacing the relatively benign treaty-making of the early 1850s. This probably contributed not only to the problems Douglas had in negotiating the Nanaimo treaty but changed many Cowichan minds as well. Douglas then soured relations further by selling off their land without treaty or payment.³² As the House of Assembly put it in 1861, the Cowichan were aware of the

³⁰ Duane Thomson, “The Response of Okanagan Indians to European Settlement.” *BC Studies* 101 (1994): 101-2, at 96. See also Harris, *Making Native Space*, 344, n. 87.

³¹ “Memorial to Sir Wilfrid Laurier ... from the chiefs of the Shuswap, Okanagan and Couteau Tribes of British Columbia Presented at Kamloops, BC, August 25, 1910.” Chief Bonnie Leonard of the Kamloops band most kindly provided a copy of this document.

³² Foster, “Queen’s Law”; Shankel, “The Development of Indian Policy,” 47-8, 79. Funds originally earmarked for treaties may have been used to mount these expeditions. In the Assembly, Dr. William F. Tolmie, an old HBC colleague from Oregon, asserted that the

compensation that had been paid “in the earlier settled districts of Vancouver Island [and] the neighbouring territory of Washington, and strenuously oppose[d] the occupation of settlers of lands deemed their own.”³³ The denial of Douglas’s request for imperial funds to resolve this problem therefore left the purchasers of land at Cowichan in a tight spot: many of them must have been persons of modest means who had risked everything in coming to Vancouver Island.

Finally, it seems, patience ran out. In August 1862, a group of nearly eighty settlers set out for Cowichan on board the HMS *Hecate*. As one contemporary observer put it, they were determined to go ahead even though “the Indians [were] unwilling to sell, still less to be ousted from their land.”³⁴ It no doubt helped that the *Hecate* was a ship of the Royal Navy: this served to remind the Cowichan of the naval expeditions that had been mounted against them. It is also interesting that the gallows for the executions at Nanaimo in 1853 appear to have been constructed near the coal mines that those treaty negotiations were intended to secure and that, when the treaty was finally made in 1854, the formalities took place at Gallows Point.³⁵ Neither the Cowichan nor the Nanaimo could have missed the significance of this, nor could they have forgotten it by 1862.

Douglas himself accompanied the *Hecate* in order “to prevent the Indians from objecting” to the settlement.³⁶ He apparently meant to do this by paying for the land because a contemporary newspaper account of what occurred describes a scene straight out of the treaty process of the early 1850s. The Indians, according to the *British Colonist*, were promised that “compensation for the lands taken up would be made *as previously established*.”³⁷ But it wasn’t. At least, there

reason Douglas had deferred paying the Cowichan had to do with their conduct, specifically the murder of White men.

³³ Petition by the House of Assembly to the Duke of Newcastle in 1861, qtd. in “Statement of Facts and Claims on behalf of the Indians of British Columbia,” compiled by J.M. Clark, KC, in 1910, BCARS, NWP 970.5 C5938. This is the petition that Douglas sent to Newcastle. See n. 18, above.

³⁴ R.C. Mayne, *Four Years in British Columbia and Vancouver Island* (London: John Murray, 1862), 152. Cowichan oral history is even more emphatic. See Daniel P. Marshall, *Those Who Fell from the Sky: A History of the Cowichan Peoples* (Duncan: Cowichan Tribes, 1999); and Chris Arnett, *The Terror of the Coast* (Burnaby: Talonbooks, 1999).

³⁵ One of the condemned hanged at Nanaimo was Cowichan. For more detail regarding this aspect of Cowichan history, see Arnett, *The Terror of the Coast*; and Graham Brazier, “How the Queen’s Law Came to Cowichan,” *The Beaver* 81, 6 (2002): 31.

³⁶ Sproat, “Rough Memorandum on Cowichan Reserve,” February 1878, NAC, RG10, vol. 3662, file 9756, pt. 1.

³⁷ *British Colonist*, 22 August 1862 (emphasis added). The events at Cowichan in 1862 are also discussed in Hamar Foster, “Letting Go the Bone: The Idea of Indian Title in Nineteenth-Century British Columbia,” in *Essays in the History of Canadian Law*, vol. 6, *British Columbia*

is no real evidence that it was. And Douglas did not make a formal record of the transaction. If he had, it might have made its way into the books as the fifteenth Douglas treaty.

Even before the *Hecate* sailed, there were those who questioned what was going on. Lieutenant Edmund Hope Verney, commander of the gunboat *Grappler*, had been in the area a few days before and expressed a concern that there might have been “some underhand dealing among the officials in this matter.”³⁸ What he meant is not clear. But the Cowichan were not happy, and they complained. In 1866, for example, a delegation went to see the new governor to tell him that they “wanted to be paid for the lands taken by the white men.”³⁹ Other tribes, they said, “have had Indian claims allowed, why not we? The lands we occupy we do not wish to give up: for the rest we wish to be paid.”⁴⁰ But by then there was not only a new governor, there was also an entirely new regime.

The commissioner of lands and works, in particular, was unsympathetic. Joseph William Trutch was committed to a policy of taking Indian lands without compensation, even lands in reserves that had been formally laid out and guaranteed by the Douglas administration.⁴¹ Responding to repeated complaints to Governor Anthony Musgrave by the Cowichan and their supporters, Trutch reported in late 1869 that he could find “no record of any promise having been made to these Indians that they should be paid for the lands in the Cowichan Valley, nor can I learn that any such promise has ever been made.” (Apparently then, as today, one cannot believe everything that one reads in the newspapers – even the *British Colonist*.) Trutch conceded that the Cowichan may have expected to be paid, as other tribes had been. He also conceded that it was likely that Douglas

and the Yukon, ed. Hamar Foster and John McLaren (Toronto: The Osgoode Society, 1995), 44-6, at 28.

³⁸ Arnett, *The Terror of the Coast*, 104, citing Allan Pritchard, ed. *Vancouver Island Letters of Edmund Hope Verney, 1862-65* (Vancouver: UBC Press, 1996), 82.

³⁹ The new governor was Frederick Seymour, the second since Douglas. William Young, the acting administrator during the transition, advised Seymour in a memorandum dated 19 November 1866 that payment for Cowichan lands should not be delayed “one day longer than is absolutely necessary” because “the faith of the Indian in the white man had been severely tried” Shankel, “The Development of Indian Policy,” 80.

⁴⁰ Remarks of Comiakien chief Soucahlelzip, from notes by Bishop Hills of the “Speeches of Indian Chiefs, Nov. 14th 1866 (about their lands), copy sent to Gov. Seymour, Dec. 10. 66.” We are grateful to Mrs. Mavis Gillie for providing us with a copy of these notes from the Anglican Diocesan Archives.

⁴¹ Enclosure in J.W. Trutch to the acting colonial secretary, 28 August 1867, in *Papers Connected to the Land Question*, 41-3, referring to reserves on the lower Fraser River, at Kamloops, and in the Shuswap. See also n. 49, below.

had intended to pay “gratuities.”⁴² But he maintained that there had been no promise, notwithstanding Governor Douglas’s acknowledged “intention.”⁴³ The fact that the government had already acted on Trutch’s advice and unilaterally reduced reserves without paying compensation may help to explain why Musgrave pronounced himself satisfied with this rather doctored account of events at Cowichan. That, and the fact that Trutch was his brother-in-law.

A decade later, Reserve Commissioner Gilbert Malcolm Sproat investigated what had happened and, typically, left a lengthy memorandum on the subject.⁴⁴ Pretty much everything he unearthed supports the Cowichan version of events, including a letter written in 1865 by the Reverend A. C. Garrett to the surveyor general. According to Garrett, Governor Douglas had made “definite promises” to the Indians at Cowichan in 1862. In particular, he said, Douglas assured them that he would return in the autumn, “have a gathering of all their tribes, and make them suitable presents. This promise was never fulfilled.” Sproat concludes that in 1869 Trutch knew most of these facts, “except perhaps Sir James Douglas’ alleged unfulfilled promise.”⁴⁵ The “perhaps” is interesting and rather takes the shine off what would have otherwise been a most charitable concession.

In light of the foregoing, we conclude that, although the Nanaimo treaty of 1854 is the last one acknowledged in the history books, a treaty of sorts was made at Cowichan in 1862. It was not formally recorded, nor, apparently, was it honoured. But then the Nanaimo treaty was only a set of marks with no text. Did the same sort of thing happen in the Okanagan and the Shuswap? Who knows? But a good case can be made that, although Douglas abandoned the treaty process after 1854, circumstances obliged him to revive it – or at least part of it – at Cowichan.

⁴² The Saanich people had received £41.13s. 4d in goods and blankets, marked up 300 per cent (as was HBC practice when selling goods to non-employees). The real amount was therefore closer to £14. In applying this mark-up, Douglas had in mind that the HBC was entitled to be reimbursed for money spent on colonization when its grant expired.

⁴³ *Papers Connected to the Land Question*, 10 of the supplement, enclosure in Musgrave to Granville, 29 January 1870.

⁴⁴ Sproat, “Rough Memorandum on Cowichan Reserve.”

⁴⁵ *Ibid.*, quoting Garrett to the surveyor general, 10 March 1865. Garrett was at the Indian Mission in Victoria but visited other locales, including Cowichan. See Frank A. Peake, *The Anglican Church in British Columbia* (Vancouver: Mitchell Press, 1959), 60, 63. The attitude of the *British Colonist* in December 1862 had been that “the Indians have a right to be paid for their lands. If the Government has made any agreement with them they should in honour fulfill it.” Qtd. in Arnett, *The Terror of the Coast*, 97.

To most colonists, the issue was a practical, not a legal, one. Whether treaties were *legally* required was rarely debated, and Aboriginal peoples in the mid-nineteenth century had neither the technical knowledge nor the resources to go to court to debate it. Nor was a test case, whereby the legal status of Aboriginal title might be raised in litigation between settlers, ever brought in colonial British Columbia.⁴⁶ However, if Douglas and his successors thought that there was no legal obligation to extinguish Indian title before settlement, there was little support for such complacency in imperial law. Only two years before the Colony of Vancouver Island was established, the Supreme Court of New Zealand had ruled that Native title in the British Empire existed at common law whether acknowledged by treaty or not.⁴⁷ And between 1787 and 1835, both the Congress and the Supreme Court of the United States, relying upon British practice and the Royal Proclamation of 1763, had confirmed the legal status of Indian title.⁴⁸ It is possible that Douglas did not know about any of this. But if he did know, then why would he think that he could dispense with treaties?⁴⁹

The line between law and policy in the common law system is, admittedly, indistinct. At the time, there was also the calculated indifference of the Colonial Office: by the 1850s, enthusiasm for humanitarian causes in far-away possessions was waning in Britain, and the Indian Mutiny in 1857 and the Maori Wars of the 1860s served only to emphasize the ingratitude of the indigenous inhabitants of the Empire. No one, therefore, was keeping too close a watch on how careful Douglas and his successors were being about Aboriginal title.⁵⁰

On the other hand, no one in the imperial government told them that they could ignore it, either. In fact, in 1859 the Colonial Office

⁴⁶ For New Zealand and US examples of such cases, see *The Queen v. Symonds* (1847), [1840-1932] NZPCC 387 (NZSC) and *Johnson v. McIntosh*, 21 US (8 Wheat.) 543 (1823).

⁴⁷ *The Queen v. Symonds*.

⁴⁸ See the cases discussed in Hamar Foster, "Forgotten Arguments: Aboriginal Title and Sovereignty in *Canada Jurisdiction Act Cases*," *Manitoba Law Journal* 21 (1992): 355-63, at 343-89, and the statutes discussed in Part III, below.

⁴⁹ Perhaps he thought that these legal principles did not apply in British Columbia or that telling the tribes that they could keep whatever land they wanted constituted sufficient compliance. If so, it was a policy that his successors quickly reversed. As a Musqueam chief reported in 1913: "Since these [survey] posts were put down by Sir James Douglas ... the land has been lessened twice. The Indians were not notified or consulted ... and after that three persons came ... and told some of the Indians that the posts ... meant nothing at all." Qtd. in Cole Harris, *The Resettlement of British Columbia* (Vancouver: UBC Press, 1997), 91.

⁵⁰ Harris, *Making Native Space*, 24. See chaps. 1 and 3 as well.

told Douglas that whenever Indian lands were required for settlement, “His Majesty’s Government earnestly wish that ... measures of liberality and justice may be adopted *for compensating [the Indians] for the surrender of the territory which they have been taught to regard as their own.*”⁵¹ Yet that very year Douglas sold land at Cowichan without paying for it. Then, a year later, Begbie informed him that Indian title on the mainland “was by no means extinguished” and that “[s]eparate provision must be made for it, and soon.”⁵² Why was this not done? Partly, no doubt, because a wish is not a command, however earnest. And in politics, if one can get away without doing something onerous, then one usually will. But, again, we think that a piece of the puzzle may be missing – a piece that Begbie, who did not arrive in the colony until late 1858, may not have become familiar with until later.

III. THE TRUE INTERESTS OF A WHITE POPULATION: UNITED STATES V. TOM

In 1846 the Treaty of Washington fixed the international boundary west of the Rockies at the 49th parallel.⁵³ This meant that formal colonization could now proceed, so in 1849 Great Britain created the Colony of Vancouver Island, which had been confirmed as British even though it extended south of 49°. A year earlier, Congress had transformed the Provisional Government organized by the settlers by creating the federal territory of Oregon, which, until 1853, included what is now the State of Washington. But the new territorial administration was immediately faced with a problem: although the Provisional Government had legally committed itself to respecting Indian land, no treaties extinguishing Indian title had been made.⁵⁴ As delegate Samuel R. Thurston told Congress in February 1850, two months before Douglas began negotiating his Fort Victoria treaties, “although the white population in Oregon [is] about fifteen thousand ... the Indian title ... in that territory has never been extinguished.”

⁵¹ Lord Carnarvon to Douglas, 11 April 1859, in *Papers Connected with the Indian Land Question*, 18 (emphasis added).

⁵² Williams, “... *The Man for a New Country*,” 105.

⁵³ For the background to this treaty, see Norman A. Graebner, “The Northwest Coast in World Diplomacy, 1790–1846” in *The Changing Pacific Northwest: Interpreting the Past*, ed. David H. Stratton and George A. Frykman (Pullman: Washington State University Press, 1988), 3–22.

⁵⁴ The Dominion government was faced with a similar problem after British Columbia joined Canada in 1871.

As a result, he concluded, “no man owns a foot of land in Oregon; but all of us are trespassers on the soil.”⁵⁵

What he meant was that extinguishment by treaty had been British and US policy for at least a century. It had, moreover, been given the force of law through the Royal Proclamation of 1763 and, in the United States, through the Northwest Ordinance of 1787 and the Indian Trade and Intercourse Acts of 1790 and 1834, respectively. In the 1834 act, Congress had specifically required treaty making in the “Indian country,” which was defined as including “all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas.”⁵⁶ So when the Treaty of Washington confirmed in 1846 that Oregon was part of the United States, the new territory was “Indian country” as defined by the 1834 act and subject to federal Indian law.

Accordingly, in June 1850 Congress passed a statute authorizing the appointment of a treaty commission for Oregon and providing that the “law regulating the trade and intercourse with the Indian tribes east of the Rocky Mountains, or such provisions of the same as may be applicable, be extended over the Indian tribes in the Territory of Oregon.” This confirmed that Oregon was subject to the special laws and obligations contained in the 1834 act.⁵⁷ A few months later, Congress also enacted the Donation law, which provided for free land grants.⁵⁸ The way was now clear to make treaties and to confirm the settlers’ land titles.

And that is what happened. An assortment of officials, including federal Indian superintendent Anson Dart, negotiated and signed at least nineteen treaties with the tribes. By the time the amended version of the Donation Act expired in 1855, title to more than 2,500,000 acres of the surrendered land had been formally transferred, gratis, to nearly 7,500 non-Aboriginal homesteaders. These treaties, however, were not popular in the settler community. They were seen as too generous to the tribes, and they did not provide for removal of

⁵⁵ The *Oregon Spectator*, 11 July 1850.

⁵⁶ Section 1 of *An Act to regulate trade and intercourse with the Indian tribes, etc.* (1834), reproduced in Francis Paul Prucha, ed. *Documents of United States Indian Policy*, 2nd ed. (Lincoln: University of Nebraska Press, 1990), 64-8. (Article 1, s. 8, cl. 3 of the US Constitution assigns authority to regulate commerce with the Indian tribes to Congress.)

⁵⁷ *An Act authorizing the Negotiation of Treaties with the Indian Tribes in the Territory of Oregon, for the extinguishment of their Claims to the lands lying west of the Cascade Mountains, and for other Purposes* (1850), in Prucha, *Documents of United States Indian Policy*, 80-1.

⁵⁸ 31st Congress, sess. 1, chap. 76 (1850). Free land in Oregon made the colonization of Vancouver Island even more challenging.

the Indians to large reservations. The US Senate therefore refused to ratify them.⁵⁹ This left putative owners, whose land grants had been legally confirmed because everyone thought that Indian title was being disposed of, in a somewhat awkward position. If Oregon was Indian country, then their land grants were subject to the requirement in the Indian Trade and Intercourse Act, 1834, that Indian title be extinguished by federally sanctioned treaty. Oregonians were thus in much the same position as the settlers at Cowichan would be a decade later: they had taken title to land before Indian title had been extinguished. The difference was that Oregon, unlike Vancouver Island, was subject to US law and, in particular, to the 1850 statute regarding treaty making. It was also subject to a federal government that had exclusive authority over Indian matters and that was committed – for its own reasons – to enforcing federal Indian law. So in Oregon, treaty making had to, and did, continue.

Something rather interesting happened before the process was complete, however. In December 1853, the Oregon Supreme Court decided the case of *United States v. Tom*, in which, “Tom, an Indian,” was indicted pursuant to s. 20 of the Indian Trade and Intercourse Act, 1834, for selling a gill of brandy worth twenty-five cents to another Indian.⁶⁰ The case, however, was not as ordinary as it might sound. First of all, Tom had a lawyer.⁶¹ Even more unusually, the defence moved to quash the indictment on the ground that Oregon was not “Indian country,” which meant that federal Indian law, including the 1834 act, did not apply.

In ruling on the motion, the court began by noting that the 1850 act appeared to make the 1834 act effective in Oregon only insofar as local circumstances made its various provisions “applicable” – a common statutory provision. The judges therefore decided that whether the earlier act met this test was for them to decide, and they went on to hold that, insofar as the liquor prohibition was concerned,

⁵⁹ S.F. Dicken and E.F. Dicken, *The Making of Oregon: A Study in Historical Geography* (Portland: Oregon Historical Society, 1979), 18; C.F. Coan, “The First Stage of the Federal Indian Policy in the Pacific Northwest, 1849-52,” *Oregon Historical Quarterly* 22, 55 (1921): 63; Fisher, “Indian Warfare and Two Frontiers,” 43; and Cesare Maring, “History of Western Washington Since 1846,” in *Handbook of North American Indians*, vol. 7, *Northwest Coast*, ed. Wayne Suttles (Washington: Smithsonian Institution, 1990), 169. A list of the unratified treaties is contained in Stephen Dow Beckham, “History of Western Oregon Since 1846,” in Suttles, *Handbook*, 181. Notwithstanding his earlier rhetoric, Thurston was instrumental in opposing ratification of these treaties.

⁶⁰ Oregon 1 (1853): 26.

⁶¹ A few months earlier, Siam-a-sit and Squ-eath had been hanged at Nanaimo for murder, and they had no lawyer. There were no lawyers on Vancouver Island in 1853.

Oregon was Indian country:⁶² “[D]efenceless white persons, women and children, who are exposed to violence of drunken savages,” needed the protection of s. 20. And, crude as this statement may be, it was all they needed to say to decide the case on its facts.⁶³

However, the court went on to state that, although Oregon was “generally supposed to be part of the Indian country named by Congress” in the 1834 act, in fact it was not. Chief Justice George H. Williams explained that in 1834 the United States and Great Britain had jointly occupied Oregon, which stretched from Spanish California in the south to Russian Alaska in the north, so it was not part of the United States at that time. Oregon therefore could not have been subject to the act and was not Indian country.⁶⁴ Moreover, he added, “much of the act of 1834 is clearly unsuited to the present condition of the country.” How, then, was one to tell which provisions of federal Indian law applied and which did not? According to the chief justice, “[a]ll which tends to prevent immigration [and] the free occupation and use of the country by whites must be considered repealed.” The proper test for deciding what portions of the act applied in Oregon was therefore a simple one: “Whatever militates against the true interests of a white population is inapplicable.”⁶⁵

This forthright way of putting the matter is remarkable because these are words that could have been spoken by almost any settler, politician, or land-jobber west of the Rockies, whether north or south of 49°. They are, however, the words of a federally appointed chief justice. Certainly judges in British colonies might think along similar lines, but they would have had sense enough to disguise it in legal language.⁶⁶ So far as the Oregon Supreme Court was concerned, Oregon was not subject to most of the federal Indian laws that applied elsewhere in the United States; and until Congress said otherwise, any law that was not in “the true interests of a white population” was,

⁶² One of the three members of the Oregon Supreme Court who heard the defence motion was somewhat uncomfortable with the broad discretion that he purported to believe Congress had conferred upon his court. See *Tom*, at 29, per McFadden, J.

⁶³ *Tom*, at 28 and 30, per Williams, CJ and McFadden, J, who added that the law was also necessary to protect the Indians themselves.

⁶⁴ Technically, McFadden, J did not actually rule on whether Oregon was Indian country. Although he stated that he doubted that it was, he thought that the question did not need to be decided.

⁶⁵ *Tom*, at 27, per Williams, CJ.

⁶⁶ Olney, J. preferred to say that that any conflict between federal law and the “rights of the whites” had to be resolved in favour of the latter. He stated that in making “the true interests of the white population” the test, the chief justice meant “his ideas of what is *expedient* for them” (emphasis in original).

quite simply, not law.⁶⁷ *Tom* therefore looks very much like a signal to Washington that not only the settlers but also their judiciary thought that the Pacific Northwest was special and that any treaty making that took place there should reflect this.

In 1855 the commissioner of Indian affairs requested US Attorney General Caleb Cushing to respond to *Tom*. Cushing described its reasoning as “strange” and “untenable,” and subjected the decision to a lengthy and scathing criticism. Whether the test for applicability was the right of the White population or their interests, he wrote, the decision violated the United States Constitution because it gave Oregon rather than Congress jurisdiction over commerce with the Indian tribes.⁶⁸ The attorney general concluded by stating that “a white settler has the same right ... to oust the Indians as he has to oust white men, and no more: that is, the right to substitute robbery for purchase, and violence for law.”⁶⁹ So federal law, in this case the combination of the acts of 1834 and 1850, prevailed. But Chief Justice Williams and his court were not simply rattling their swords: they were telling Congress that it was the Indians, not the Whites, who were the trespassers, and they were setting the tone for the new treaties.

What happened to *Tom* is unclear because, once the point about Indian country had been made, his fate was of interest only to him. And because the indictment based on the liquor prohibition in the 1834 act was upheld, there was nothing for the US attorney general to appeal. There was also little if any prospect that *Tom*, who no doubt was convicted, could find the resources to do so.⁷⁰ The Oregon Supreme Court’s ruling on Indian country was therefore never reviewed by a higher court. In Oregon it survives only as a particularly unattractive, albeit forthright, curial statement of the *grundnorm* of the settler state. But its spirit clearly informed the new, less generous, process that would soon provide substitutes for the failed treaties. The result was warfare, Aboriginal displacement, and defeat.⁷¹

⁶⁷ For a critique of the reasoning in *Tom*, see Deborah Niedermeyer, “The True Interests of a White Population’: The Alaskan Indian Country Decisions of Judge Matthew P. Deady,” *International Law and Politics* 21 (1988): 195–253.

⁶⁸ Cushing may overstate somewhat here. Although the chief justice did say that Oregon was not Indian country, he did not deny the authority of Congress to so declare; he simply said, rather disingenuously, that they had not done so clearly enough in the acts of 1834 and 1850.

⁶⁹ Hon. Caleb Cushing to the Secretary of the Interior, 22 June 1855, 7 *Ops. Attys. Gen.* 293 at 294, 298, 299.

⁷⁰ In the 1850s the only possible appeal would presumably have been a prohibitively expensive one to the US Supreme Court.

⁷¹ See C.F. Coan, “Adoption of the Reservation Policy in the Pacific Northwest, 1853–55,” *Oregon Historical Quarterly* 23 (1922):1–38; Beckham, “History of Western Oregon”; Maring, “History of Western Washington.”

To take one example: the treaty at Medicine Creek in Washington Territory forced the Nisqually and Puyallup tribes onto reservations and took away prime farmland. The war that ensued ended in defeat for the tribes and, after two trials, the conviction of Leschi, a prominent chief, for murder. The first jury could not reach a verdict because two of the jurors concluded that the killing was part of an act of war. Governor Isaac Stevens, to whom history has not been kind, therefore arranged to have the trial moved to a more compliant venue. The second jury convicted.⁷² Justice Obadiah B. McFadden, who had participated in the *Tom* decision, wrote the opinion denying the appeal, and Leschi was hanged on 19 February 1858.⁷³

Now, James Douglas was not delicate about executions. But neither was he a fan of American Indian policy, the evil effects of which quickly became known to the tribes north of the international boundary.⁷⁴ He was particularly opposed to the large-scale removals in the new treaties, and it is likely that the wars in Washington and Oregon helped to persuade him that treaty making of any sort was increasingly ill advised. If so, after 1853 he could look to *Tom* as authority for the proposition that Oregon, which until 1846 included British Columbia, was not Indian country. In other words, a man who was already sceptical about treaties might see certain advantages in a decision that, legally, treaties did not have to be made in the Pacific Northwest unless clearly mandated by a legislature with jurisdiction to do so.

Tom was of course not a binding precedent north of the border, which was now a completely separate national jurisdiction. Nonetheless, in 1849 the imperial Parliament had specifically withdrawn Vancouver Island from the Indian territories,⁷⁵ and United States law on Indian title was a much more tangible presence in British Columbia than was the Royal Proclamation of 1763 or the New

⁷² Remarkably, one of the prosecutors switched to the defence for the second trial. See Janice Schuetz, *Episodes in the Rhetoric of Government-Indian Relations* (Westport: Praeger Publishers, 2002), chap. 1.

⁷³ *Leschi v. Washington Territory*, 1 Washington Territory Reports 13 (1857), reprinted in Book 40 of the Pacific State Reports.

⁷⁴ See Harris, *Making Native Space*, 35; and Fisher, "Indian Warfare and Two Frontiers," 42-3. Douglas's colleague, Dr. William F. Tolmie, had testified for the defence in the Leschi case, and, after the jury's verdict, Tolmie unsuccessfully urged the authorities to commute the death sentence.

⁷⁵ (1849) 12 and 13 Vict., c. 48 (UK). All of what is now British Columbia was part of the "Indian territories" pursuant to (1803) 43 George III, c. 138 (UK) and (1821) 1 and 2 George IV, c. 66 (UK). The mainland was withdrawn from these territories when it became a Crown colony in 1858: (1858) 21 and 22 Vict., c. 99 (UK).

Zealand Supreme Court.⁷⁶ Another consideration is the notion that the whole coast, from northern California to Alaska, was really a single region ("Cascadia," as some would have it) requiring compatible policies. This sentiment may even have contributed to a decision of Federal District Court Judge Matthew P. Deady in *United States v. Seveloff*, which also involved the sale of liquor to Indians. Sitting in Portland, Judge Deady relied upon *Tom* to rule in 1872 that Alaska, too, was not Indian country.⁷⁷

We will return to this part of the story below. For now the point is that the land question in Alaska, like the land question in British Columbia, was left unaddressed until the 1970s, when, a century after *Seveloff*, Congress passed the Alaska Native Claims Settlement Act.⁷⁸ So, although *Tom* may have been something of a judicial comet in Oregon, flaming out soon after it appeared, its progeny lived on in Alaska. And it is not difficult to see how a British official who was becoming disenchanted with treaty making might find its conclusions comforting.

IV. THE OREGON CONNECTION

Was Douglas comforted? Did he even know about *Tom*? There is reason to believe that he did. He had been a justice of the peace for the Indian Territories since the 1830s and had lived and worked in Oregon for nearly twenty years before permanently transferring to Fort Victoria in 1849. During this period, he had become increasingly involved in civil governance and with issues respecting land. He also collected newspaper articles, including ones on law, and as early as

⁷⁶ Or the theories of colonial officials such as Herman Merivale. See David T. McNab, "Herman Merivale and Colonial Office Indian Policy in the Mid-Nineteenth Century," *Canadian Journal of Native Studies* 1, 2 (1981): 277-302 and Harris, *Making Native Space*, 6-9, 13-4.

⁷⁷ Because Alaska, like Oregon, was not part of the US in 1834. See *United States v. Seveloff*, 27 F. Cas. 1021. *Seveloff* is discussed by Niedermeyer, "The True Interests of a White Population"; Sidney L. Haring, "The Incorporation of Alaskan Natives under American Law: United States and Tlingit Sovereignty, 1867-1900," *Arizona Law Review* 31 (1989): 284-7, at 270. After the US purchased Alaska in 1867, the military officer sent to govern the new territory was ordered to stop at Victoria and consult with Governor Seymour "with the object of cordial cooperation on our part toward securing" peace between Indians and Whites. See Major General H.W. Hallbeck, Headquarters, Military Division of the Pacific, San Francisco, to Lt. Col. R.N. Scott, 3 September 1867, and Lt. Col. R.N. Scott to Gov. Seymour, Victoria, BC, 24 September 1867, both in BCARS, GR 1392, box 1, file 3.

⁷⁸ 43 USCA, ss. 1601-28 (1971). Because of its climate and location, there was "little pressure to settle" Alaska until it became a state in 1958 and oil was discovered. See David H. Getches and Charles F. Wilkinson, *Cases and Materials on Federal Indian Law*, 2nd. ed. (St. Paul: West Publishing, 1986), 775.

1837, he began compiling detailed notes on pre-emption rights and on various departments of the US government.⁷⁹ The HBC and its officers were prominent landowners in Oregon, so it would have been their business to inform themselves in this way, especially when the trickle of land-hungry American pioneers coming over the Oregon Trail became a flood.

President Tyler sent the first federal Indian agent to Oregon in 1842, and Douglas and Chief Factor John McLoughlin supplied Dr. Elijah White with men, food, and weapons. They also sent along Thomas McKay, McLoughlin's stepson and a man with a formidable reputation among the tribes, as White's escort, a move that gave his initiatives the imprimatur of the HBC.⁸⁰ These initiatives consisted primarily of a series of "treaties of amity" to regulate trade and intercourse among the tribes, the HBC, and American economic migrants. The tribes agreed to punish any of their members who violated these treaties and, in return, White agreed to pay them compensation for allowing Americans to pass through their territories. He also urged Washington to "save [the Indians] from being forcibly ejected from the lands and graves of their forefathers."⁸¹

Foremost among White's treaties was the "civil compact" that the HBC helped him negotiate with the Nez Percé, an arrangement that the Indians viewed as a declaration of good faith on behalf of the Whites generally.⁸² And this impression can only have been strengthened when, in 1844, the recently established Oregon Provisional Government passed "An Act in relation to Indians" stating that "such vacant land as [the Indians] occupy with their villages or

⁷⁹ "James Douglas, Miscellaneous Notes and Clippings, 1837," BCARS, Add. MSS 678, vol. 2. We are grateful to John Adams, author of *Old Square-Toes and His Lady: The Life of James and Amelia Douglas* (Victoria: Horsdal and Shubart, 2001), for providing us with the archival file number for this source.

⁸⁰ In 1871 Judge Deady ruled that, because McKay had been a British subject and his wife was Chinook, his son was not a US citizen and therefore could not vote. See *McKay v. Campbell*, 16 Fed. Cas. 161 (Oregon District Court), commented upon in Malcolm Clark, Jr., *The Diary of Judge Matthew P. Deady, 1871-1892: Pharisee among Philistines*, 2 vols. (Portland: Oregon Historical Society, 1975), 1: 115. It may have been the prospect of laws and rulings like this that influenced Douglas's decision to leave Oregon. See n. 90, below.

⁸¹ See "Elijah White, Sub-Agent Indian Affairs, WRM, Willamette Valley, Oregon to Hon. J.M. Porter, Secretary of War, Washington, DC," 15 November 1843, reprinted in A.J. Allen, *Ten Years in Oregon: Travels and Adventures of Doctor E.J. White and Lady, West of the Rocky Mountains* (Ithaca: Press of Andrus, Gauntlett, & Co., 1850), 213-5.

⁸² *Ibid.*, 215. However, as one writer has remarked, pacts such as the one with the Nez Percé "were helpful in that they postponed hostilities until the white population had increased." See Ray H. Glassley, *Indian Wars of the Pacific Northwest* (Portland: Binford and Mort, 1953 [1972]), 3.

other improvements, and such fisheries as they have heretofore used," should be protected.⁸³ It was this government that Douglas and McLaughlin joined in 1845, after the region north of the Columbia was constituted a separate county. And when the Organic Act was passed in 1848 to establish Oregon as a federal territory, it provided that nothing should affect Indian rights "so long as such rights remain unextinguished by treaty between the United States and such Indians." It also extended the Northwest Ordinance of 1787 to Oregon, notably the provision that the "utmost good faith shall always be observed towards the Indians [and] their lands and property shall never be taken away from them without their consent."⁸⁴

Soon after Oregon was divided into counties, Douglas was elected to a three-year term as senior judge of the County Court for Vancouver, the region north of the Columbia that the HBC expected to be confirmed as British. The position involved extensive administrative as well as judicial responsibilities.⁸⁵ Douglas therefore would have known that the Aboriginal peoples of the Pacific Northwest expected treaties. He would have known that the Provisional Government had acknowledged that some sort of legal obligation in this regard existed. And he would have known that the immediate source of this obligation was US federal Indian law. When he settled on Vancouver Island, he learned something else: the Aboriginal peoples there were, if anything, even more jealous of their property rights than were those in Oregon.⁸⁶

Douglas's connection with Oregon and Washington did not end when he moved north. He remained in contact with the governors of both territories and with HBC people who had stayed south of 49°

⁸³ "An Act in Relation to Indians," 23 December 1844, cited in Theodore Stern, *Chiefs and Change in the Oregon Country: Indian Relations at Fort Nez Percés, 1818-1855* (Corvallis: Oregon State University Press, 1996), 2: 234. The wording is similar to that of the treaties Douglas began making on Vancouver Island six years later and probably reflects the views of the Swiss jurist Emer de Vattel, whose writings were especially influential among mid-nineteenth-century colonizers.

⁸⁴ 9 US Stat. 323, cited in Beckham, "History of Western Oregon," 180.

⁸⁵ Victor John Town, "Comparison and Contrast of the Territorial Government of Washington and the Colonial Government of British Columbia" (MA thesis, University of British Columbia, 1940), 38. See also Stern, *Chiefs and Change*, 120. By 1846 two HBC men (including Douglas) were county court judges and two (including Tolmie) were members of the legislature. When Oregon was ceded to the US in 1846, four of its senior elected officials were therefore British subjects.

⁸⁶ In his despatch to Newcastle of March 1861 (see n. 16), Douglas states that "the native Indian population ... have distinct ideas of property in land ... and would not fail to regard the occupation [of their lands] by white settlers, unless with the full consent of the proprietary tribes, as national wrongs."

to retire or to manage the company's remaining operations.⁸⁷ He also continued to oversee these operations, notably those of the Puget Sound Agricultural Company, an HBC subsidiary. Moreover, others who had been involved with the Oregon Provisional Government went on to hold the sort of office that he would. Peter H. Burnett, for example, who had been a member of the Oregon legislature and a judge, moved to California and became its first governor. In his gubernatorial message for 1851, he opined that "a war of extermination will continue to be waged between the two races until the Indian race becomes extinct." Burnett regretted this but felt that it was "beyond the power and wisdom of man to avert."⁸⁸ Douglas would have been appalled at such a vision. But what about the suggestion in *Tom* that the law of Indian title did not apply in the west as it did in the east?

Even if he had never heard of the Royal Proclamation of 1763, Douglas must have arrived on Vancouver Island in 1849 knowing that United States law, which was based on British law and practice, required that Indian title be extinguished. So the instructions he received to purchase Indian title on Vancouver Island before allowing settlement would not have come as a surprise. But he found negotiating treaties increasingly arduous, and in December 1853, the highest court west of the Rockies proclaimed that treating before settlement was not required unless compelled by statute.⁸⁹ A year later, in December 1854, Douglas concluded the treaty at Nanaimo, and even if he did not find *Tom's* racially based reasoning appealing, it could have encouraged him to think that he was not legally obliged to make any more.⁹⁰ It would of course have been difficult to refuse

⁸⁷ Douglas remained quite close to his old boss, John McLoughlin, and in their respective jurisdictions, both men became wealthy landowners. On the former, see W.R. Sampson, *John McLoughlin's Business Correspondence, 1867-48* (Seattle: University of Washington Press, 1973); and B.B. Baker, *The Financial Papers of Dr. John McLoughlin* (Portland: Oregon Historical Society, 1949).

⁸⁸ Qtd. in Robert F. Heizer and Alan J. Almquist, *The Other Californians: Prejudice and Discrimination under Spain, Mexico and the United States to 1920* (Berkeley: University of California Press, 1971), 26. Governor Stevens is alleged to have said something similar. See Albert Furtwanger, *Answering Chief Seattle* (Seattle: University of Washington Press, 1997), 113n.

⁸⁹ In this connection, it may be worth noting that the only courts on Vancouver Island in the 1850s were lay magistrates and a superior court with one judge (also a layman) who was Douglas's brother-in-law. But Douglas himself, notwithstanding his occasional protestations that he knew little about law (see, for example, Douglas to Labouchere, *British Parliamentary Papers*, 21: 392), was hardly a neophyte.

⁹⁰ Douglas would not have found the reasoning attractive because his mother was Creole and his wife, Amelia, was the daughter of Chief Factor William Connolly and a Cree

to complete the negotiations at Nanaimo: the HBC wanted the coal and expectations had been raised. But it was his last recognized treaty, and the timing is, to say the least, interesting.

It is true that, eight years after *Tom*, Douglas sought imperial funding to make a treaty at Cowichan. As scholars such as Tennant and Harris point out, Douglas was a practical man who sought practical solutions: in 1861 a treaty may have seemed the only option. But he resisted as long as he could. And when he realized that he could weather the Cowichan crisis without formalizing these proceedings or paying for the land, the idea was dropped, even though the written and oral records suggest that a treaty of some sort was made. This was seen to be in the interests of the White population at the time, and it set an important precedent – one that Trutch would soon follow.

Douglas could change course like this because of the difference between Oregon and British Columbia in the 1850s and 1860s, which we have already noted. Treaty making could not be abandoned in Oregon because there was a federal government in that country that was determined to enforce federal law, however compromised the treaties that resulted might be.⁹¹ Until 1871, there was no such law or federal authority in the British possessions to the north.⁹² There was only a distant Colonial Office that, by 1860, had relinquished its management of Indian affairs in Canada and had no intention of assuming real responsibility for such matters in its colonies on the Pacific coast. As a result, there was no Caleb Cushing to tell Douglas that selling land at Cowichan without extinguishing Indian title was theft. So if Douglas decided that *Tom* was a green light and that he could permit settlement before extinguishing Indian title, he would have been correct in thinking that there was really no one to gainsay him. Even if he thought that a generous reservation policy was a fair equivalent, his successors took a rather different view of what “generous”

woman. See *Connolly v. Woolrich and Johnson et al.* (1867), 11 LC Jur. 197; and *Johnstone et al. v. Connolly* (1869), 17 BJRQ 266. His children were therefore of mixed blood, and some “half-breeds” as well as Indians were discriminated against in Oregon. See n. 80, above. This may be one of the reasons why his policy provided for equal rights for all. The prohibition against “aborigines” pre-empting land in British Columbia was not enacted until after Douglas retired.

⁹¹ See, for example, *Worcester v. Georgia*, 31 US (6 Pet. 515) (1832), which confirmed that the US Constitution conferred exclusive jurisdiction over Indians and their lands upon Congress, and the *Crow Dog* case, discussed in the text accompanying n. 106, below.

⁹² Apart from the Royal Proclamation of 1763, of which Douglas may have been unaware and which appeared on its face to apply only in the east.

meant. And until union with Canada in 1871, there would be no one to challenge them, either.⁹³

There is admittedly no direct evidence that *Tom* played a role in this or even that Douglas knew about the decision. But as a former judge and land manager in Oregon, with many sources of information south of 49°, he must have known. And even if he did not, American influence was even more important later on, when the last “Douglas treaty” was slipping into history and a different breed of man came to dominate the colonial government.

V THE SPIRIT OF TOM

Joseph William Trutch, viewed by many as the architect of the policy denying Indian title in British Columbia, lived and worked in Oregon as a young man. The territorial surveyor general, John Bower Preston, had hired him in 1852 as an assistant surveyor, and he was there in 1853 when *Tom* was decided. Trutch was, by all accounts, a man intent on making the right connections. He soon married Preston’s sister-in-law and, after several years in Oregon and Illinois, he went to British Columbia, where he displayed a similar determination to prosper. From 1859 to early 1864 he worked as an engineer and surveyor, enjoying a series of lucrative government contracts. He was elected to the Vancouver Island House of Assembly in 1861. Trutch’s long and successful public career really began, however, when Douglas, in one of his last official acts, made this former Oregonian British Columbia’s commissioner of lands and works in April 1864.

By then, Trutch was already a well connected member of the colonial elite. In 1863 his sister had married Peter O’Reilly who, in 1880, would become British Columbia’s Indian reserve commissioner. Trutch’s position would be further consolidated in 1870 when his brother John married Zoe Musgrave, the sister of Anthony Musgrave, the governor who shepherded British Columbia into Confederation with Canada.⁹⁴ Trutch was also a friend of Judge Begbie and Attorney General (later Justice) Henry Pering Pellet Crease. More important for present

⁹³ In fairness, it should be noted that Arthur Kennedy, who succeeded Douglas as governor of Vancouver Island, believed that “the growing difficulties with the Indians would continue to increase as long as the extent of their land was left undefined and their just claims not liquidated.” But his bad relations with the elected assembly ensured that he would make little progress on this front, and the assembly demanded instead that the reserves at Cowichan and elsewhere be made available for sale or lease to settlers. See Shankel, “The Development of Indian Policy,” 75-9.

⁹⁴ *Dictionary of Canadian Biography*, vol. 13 (Toronto: University of Toronto Press, 1994), 1,034.

purposes, his many friends and correspondents included Judge Mathew P. Deady of the Oregon District Court, who is important to an understanding of the subsequent career of *Tom*. Deady had been a judge since 1853 and regularly sat on the Ninth Circuit with Circuit Court Judge Lorenzo Sawyer of San Francisco and US Supreme Court Justice Stephen Field. This would be unremarkable were it not for the fact that in 1870 Field's brother, David Dudley Field, became the father-in-law of Governor Musgrave – who was of course also related by marriage to Trutch.⁹⁵ Cascadia was a small world.

Trutch's surviving letters to Deady deal mainly with personal and business matters, including letters of introduction for various family members and business associates.⁹⁶ Would further research reveal letters that discuss Indian title? Even if it would not, it is clear from John McLaren's work that Canadian and American judges west of the Rockies consulted one another on other legal matters, notably those affecting the status of the Chinese.⁹⁷ Is it not likely that they also discussed the law of Indian title? And came to a common view? Certainly there was no doubt in Trutch's mind that such title was a chimera. As he said in a letter to Prime Minister Macdonald in 1872, just as Canada was embarking on treaty making in the Northwest, British Columbia had never "bought out any Indian claims to land" and to start now would be to "go back of all that has been done here for 30 years past."⁹⁸ By the 1880s, Begbie, who had once urged Douglas

⁹⁵ For years the Ninth Circuit was made up of Sawyer, Field, and a District Court judge, often Deady. See Niedermeyer, "The True Interests of a White Population," 211. See also Clarke Jr., *The Diary of Judge Matthew P. Deady*, 1: 315.

⁹⁶ In 1883, for example, Deady sent Trutch an article on juries that Trutch promised to give to "our Judges here." He added that he "heartily" concurred with the views that Deady had "so forcibly expressed" and regretted that he had missed Mrs. Deady when she passed through from Alaska a few days earlier. In another, he introduces George Preston, a son of Oregon's surveyor general in the 1850s, "whom I am sure you remember." Trutch to Deady, 13 August 1882 and 29 August 1883, Deady, Matthew Paul Papers, MSS 48, Oregon Historical Society Research Library, Portland, Oregon. The younger Preston's visit is also recorded in Deady's diary, vol. 2, 399-400.

⁹⁷ See, for example, Begbie to Deady, 18 February 1886, in which Begbie sent Deady a newspaper clipping that showed, as he put it, that he had "been following your example (and indeed citing your authority) for quashing by-laws against Chinamen." This letter is cited in John McLaren, "The Early British Columbia Judges, the Rule of Law and the 'Chinese Question': The California and Oregon Connection," in *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West*, ed. John McLaren, Hamar Foster, and Chet Orloff (Pasadena and Regina: Ninth Judicial Circuit Historical Society and Canadian Plains Research Centre, 1992), 263, at 237.

⁹⁸ Trutch to Macdonald, 14 October 1872, reproduced in Robert E. Cail, *Land, Man and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913* (Vancouver: UBC Press, 1974), 297-9. Thirty years was an exaggeration: the Douglas treaties, which Trutch dismissed, had been made barely twenty years earlier.

to extinguish Indian title on the mainland as soon as possible, was adding a judicial gloss to this theme in a decision on Indian title that preceded *Calder* by nearly a century.

The occasion was the spectacular clash between missionary William Duncan and the Church Missionary Society, and one of the issues was the ownership of two acres of land at Metlakatla. Duncan's supporters relied on Indian title, but in his ruling, Begbie wrote that, before reserves are laid out, Indians "have no rights whatever except such as the grace and intelligent benevolence of the Crown may allow." To be sure, British law was never as clear on the point as it might have been. But these sentiments do not sound like the Begbie of 1860.⁹⁹

Whether *Tom* influenced Douglas and his successors or not, the view that treaties were unnecessary prevailed not only in British Columbia but also in Alaska, notwithstanding that they were being made east of the Rockies and south of the border in Washington and Oregon. Why? If there is, as we are suggesting, a legal dimension to this question, the key to answering it is Deady, whose first judicial appointment was to the territorial supreme court when the chief justice of that court was George Williams. Deady did not sit on the bench that decided *Tom*, but he and Williams were friends and "political allies" from the 1850s until Deady's death in 1892.¹⁰⁰ In 1859, when Oregon became a state, President Buchanan appointed Deady a federal district judge, and in 1864 Williams was elected to the US Senate. President Ulysses S. Grant made Williams US attorney general in 1872.¹⁰¹ In that same year – and only two months after Trutch advised Prime Minister Macdonald that it would be to "go back on" all that had been done in British Columbia if treaties were made – Deady decided the first of his Alaska "Indian Country" cases.¹⁰²

⁹⁹ Williams, "... *The Man for A New Country*," 105.

¹⁰⁰ Niedermeyer, "The True Interests of a White Population," 210. Deady did not sit on *Tom* because of "Whig chicanery." A mistake in the documents invalidated his appointment, and Obadiah McFadden took his place. However, when Washington was made a separate territory, McFadden went to that court and Deady was reinstated to the Oregon court. See Clarke, Jr., *The Diary of Judge Matthew P. Deady*, I: xxxv.

¹⁰¹ In 1873 President Grant nominated Williams to be chief justice of the US Supreme Court. There were concerns about his qualifications, however, as well as a whiff of scandal, and the president subsequently withdrew the nomination. See S. Tesier, "The Life of George H. Williams: Almost Chief Justice," *Oregon Historical Quarterly* 47 (1946): 255; and Clarke Jr., *The Diary of Judge Matthew P. Deady*, I: 142, 155-6.

¹⁰² Deady's court had been assigned jurisdiction over Alaska in 1868. See Niedermeyer, "The True Interests of a White Population," 210-1. On Deady's judicial record, see Ralph James Mooney, "Formalism and Fairness: Matthew Deady and Federal Public Land Law in the Early West," *Washington Law Review* 63 (1988): 317-70; and "Matthew Deady and the Federal Judicial Response to Racism in the Early West," *Oregon Law Review* 63 (1984): 561-637.

The facts of *United States v. Seveloff* are basically those of *Tom*.¹⁰³ Ferveta Seveloff, a “Sitka Creole,” had been charged with selling liquor to “one John Doe, an Indian,” and sent south to Portland to be tried by Deady.¹⁰⁴ Because the statute under which he had been charged was the 1834 Indian Trade and Intercourse Act, the defence made the same objection to the indictment that defence counsel in *Tom* had made but with more success. Deady acquitted Seveloff and ruled that Alaska – like Oregon – was not part of the United States in 1834 and was therefore not Indian country.¹⁰⁵

Deady would use *Tom* and what we have called the “spirit” of *Tom* in three more decisions to confirm his conclusion that, unless Congress explicitly legislated otherwise, Alaska was not Indian country. He did this even after the United States Supreme Court ruled in the landmark case of *Ex parte Crow Dog* that all the territory described in the 1834 act as Indian country “remains Indian country so long as Indians retain their original title to the soil.” If that were not clear enough, the court added that the definition in the 1834 act “now applies to all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, although much of it has been acquired since the passage of the Act of 1834.”¹⁰⁶ Yet in *Kie v. United States*, Deady suggested that the “anomalous condition of Alaska was probably not considered by the [Supreme] Court” and ruled that, because Russia had not made treaties and the United States had purchased Alaska from the Russians, this act extinguished Indian title. In other words, he stuck to his guns: Alaska was *not* Indian country.¹⁰⁷ And Deady’s view prevailed: no treaties were made.

The provincial authorities in British Columbia during this period were likewise convinced of the anomalous condition of their province, and did little to prevent settlers from pre-empting Indian lands before

¹⁰³ *United States v. Seveloff*, above n. 77, decided 10 December 1872.

¹⁰⁴ A “Creole” in Alaska was a person of mixed Russian and Native ancestry. See Harring, “The Incorporation of Alaskan Natives,” 284.

¹⁰⁵ There was no statute in force in Alaska comparable to the 1850 law in Oregon, so Deady could not pick and choose which provisions of the 1834 act might apply. Congress subsequently extended the liquor prohibition in the Indian Trade and Intercourse Act to Alaska.

¹⁰⁶ 109 US 556 (1883), 561.

¹⁰⁷ 27 F. 351 (CCD Or. 1886), 353-4. The Alaska court had jurisdiction to try the case under another federal statute, however. For a discussion of *Kie*, see Harring, “The Incorporation of Alaskan Natives,” 289-93; and Niedermeyer, “The True Interests of a White Population,” 241-5. The ramifications of Alaska not being “Indian country” continue today. See David M. Blurton, “*John v. Baker* and the Jurisdiction of Tribal Sovereigns without Territorial Reach,” *Alaska Law Review* 20, 1 (2003): 1.

the reserve commission could allot reserves. They also never tired of asserting British Columbia's uniqueness when Ottawa complained about its heterodox Indian policy.¹⁰⁸ As a consequence, in both Alaska and British Columbia, the law of aboriginal title was suspended. Indeed, the debate about whether the Indian Trade and Intercourse Act, 1834, automatically applied in newly acquired territory such as Oregon and Alaska strikingly resembles the debate in Canada over whether the Royal Proclamation of 1763 "followed the flag" to British Columbia.¹⁰⁹ It is true that Dominion politicians and officials often grumbled about the intransigence of the BC government and muttered occasionally about making treaties or at least submitting the issue to court. But in the end, the Dominion government did neither.¹¹⁰ Nor did it do what Congress had done in Oregon; that is, pass a statute requiring that treaties be made.¹¹¹ Canada's fragile Confederation was not about to be imperiled over an issue such as Indian title.

The fact is that, legally, British Columbia was surrounded: it had *Tom* to the south of it and *Seveloff* to the north, both stating that, in the absence of contrary legislation, Cascadia was not Indian country. So, if we are correct in thinking that the spirit of *Tom* was influential, it seems reasonable to wonder whether British Columbia's rogue Indian policy might represent "the farthest extension of US Indian law into Canada."¹¹² Certainly the settler population and their representatives were sympathetic to the sort of views expressed by the judges in *Tom*, and insofar as Aboriginal title was concerned, these views became, in effect, the law of British Columbia for over

¹⁰⁸ As R.E. Gosnell put it, British Columbia "had interests which are *sui generis* in a degree greater perhaps than is true of any other province in Canada." See "British Columbia and British International Relations," in Allan Smith, "The Writing of British Columbia History," in *British Columbia: Historical Readings*, ed. W. Peter Ward and Robert A.J. Macdonald (Vancouver: Douglas and McIntyre, 1981), 10.

¹⁰⁹ See, inter alia, the decisions in *Calder v. A.G.B.C.* and *Delgamuukw*, above n. 2, before they reached the Supreme Court of Canada. The court appeal in *Calder*, reported at (1971), 13 DLR (3d) 64, was especially clear. The justices in that case ruled that, because Britain did not acquire sovereignty over British Columbia until after the issue of the Royal Proclamation of 1763, the proclamation did not apply there; and because no other legislation or treaty could be found recognizing Nisga'a title, such title could not exist. The first proposition is, structurally, the same one that *Tom* and *Seveloff* adopted with respect to the application of the Indian Trade and Intercourse Act of 1834 to Oregon and Alaska.

¹¹⁰ See Foster, "Letting Go the Bone"; and Hamar Foster, "A Romance of the Lost: Tom MacInnes' Role in the History of the BC Indian Land Question," in *Essays in the History of Canadian Law*, vol. 8, *In Honour of D.C.B. Risk*, ed. G.B. Baker and J. Phillips (Toronto: Osgoode Society for Canadian Legal History and University of Toronto Press, 1999), 171-212.

¹¹¹ Although in 1875, it may have come close. See the report of the Dominion minister of justice referred to in n. 27, above.

¹¹² The phrase is Sid Harring's, in a personal communication to the authors. Professor Harring was kind enough to read and comment upon a draft of this chapter.

100 years. As a result, there were no treaties extinguishing Indian title, and reserve allotments could not be adequately carried out because so much land came into the hands of settlers before the reserve commissioners could act. The question of title was deferred and denied until, by the 1990s, it could no longer be avoided.

VI. TRESPASSERS ON THE SOIL

Trutch was a man likely to be attracted by the idea, first expressed in *Tom* but given important legal force in *Seveloff*, that whatever militated against the interests of a White population could not be law. Did he tell Douglas that land could be sold to settlers without worrying about extinguishing Indian title? Or did Douglas, who presided over just such a process at Cowichan, reach that conclusion on his own? It would not have been difficult. According to *Tom*, Oregon was not Indian country, and by 1858, not only Vancouver Island but also the mainland had been withdrawn from the "Indian territories" as defined by the imperial Parliament.¹¹³ And what did Begbie mean when he said at Douglas's retirement dinner that he had disagreed with the governor "in almost every point of public policy"?¹¹⁴ Did these disagreements include the fact that in 1860 he had advised Douglas to extinguish Indian title on the mainland, and this had not been done? If so, Begbie eventually came on side.

In the absence of documentation establishing that colonial authorities were aware of and impressed by cases such as *Tom*, the influence of Oregon law on the premature end of treaty making on Vancouver Island – and its complete absence on the mainland – can only be guessed at. But it seems almost inconceivable that Douglas and Trutch, with their strong Oregon connections, would not have known about these developments. And it is, at the very least, interesting that the last recognized Douglas treaty was signed within a year of the decision in *Tom*, and that by the 1870s, Judge Deady and Lieutenant Governor Trutch were applying similar reasoning to Alaska and British Columbia.

It is certainly true that there were other factors at work. Before the gold rushes, the number of settlers was disappointing, and Douglas was always reluctant to buy Indian land too far in advance of settlement because he believed that the Indians would not regard such arrangements

¹¹³ See n. 75, above, and accompanying text.

¹¹⁴ Qtd. in Williams, "... *The Man for a New Country*," 155-6 and 197. As Williams points out, this was a strange remark because the two men not only had similar styles (i.e., authoritarian) but in fact agreed on most issues. Begbie may have had too much to drink.

as binding. Eventually, it seems, he decided that he did not have to buy the land at all. It may be that this was simply pragmatism. But if this experienced property manager and former county court judge was aware of US federal Indian law and its roots in British law and practice, then perhaps he saw in *Tom* an exception that applied in British Columbia, whatever the situation might be in Oregon.

Even if *Tom* did not have an immediate effect on Indian policy in British Columbia, what about later on? In 1872, when Judge Deady invoked the case as a precedent for deciding that Alaska was not Indian country, Ottawa was just discovering that its brand new province was not about to let reserve allocation interfere with White immigration. Nor would British Columbia countenance any revival of the treaty process: Trutch told Macdonald this in 1872 and BC politicians kept repeating it until 1990. By 1886 Judge Begbie was even proclaiming in his Metlakatla decision that “[n]o proposition ... could be more decisively or clearly consistently established than this, that ... Indians (not being enfranchised) had no rights to the land” other than occupation “at the will of the Crown.”¹¹⁵ He stated that this was also the law in the United States – “whose law is founded on ours.” But he declined to cite any US precedents, and counsel for the defendants apparently had less than twenty-four hours to prepare.¹¹⁶ So the decision was hardly a well considered one.

Brushing aside the contrary opinions of the Dominion minister of justice, the governor general, and a prominent local cleric as political and mischievous “all round,” Begbie concluded that it was the right of every “civilized power ... to occupy and settle in a country utterly barbarous.”¹¹⁷ The following year, missionary William Duncan and

¹¹⁵ *A.G. and I.B. Nash v. John Tait*, above n. 7.

¹¹⁶ The case was an application for an injunction to restrain Duncan’s people from trespassing on land that was claimed by the Church Missionary Society. Begbie had adjourned the proceedings for a day to see if counsel could be obtained for the “poor savages,” and, although described as appearing for Duncan, Theodore Davie made submissions in support of the defence. Davie did not, however, refer to the *Symonds* case (see above n. 47). See Jennifer Harry, “What Happened to Sir Matthew Baillie Begbie?” (Unpublished paper, Law 362, University of Victoria, 1989).

Begbie’s failure to cite US authority in support of his view is interesting. If he was aware of such cases as *Tom* and *Seveloff*, did he not cite them because they were difficult to reconcile with the leading US Supreme Court decisions? The only legal authority he refers to is the trial court decision in *Regina v. St. Catherine’s Milling and Lumber Company*, [1885] 10 Ontario Reports 196, which had rejected the notion of Indian title and therefore clearly supported Begbie’s conclusion. Two years later, however, the Judicial Committee of the Privy Council ruled on appeal that Indian title *is* an interest in land protected by s. 109 of the BNA Act. See [1888] 14 AC 46.

¹¹⁷ The report of the Dominion minister of justice that Begbie dismissed as a product of “compulsion of politics” is the report referred to in n. 27, above.

his Tsimshian followers left Metlakatla and moved across the line to establish New Metlakatla in Alaska. Of course, Alaska wasn't "Indian country" either; Deady had seen to that. But there were very few settlers there, and the Americans were prepared to give Duncan the land he wanted.¹¹⁸ Was Begbie's view of US law influenced by Deady?

The fact is that by the 1870s and 1880s, relations between the elites in British Columbia and the western United States were even closer than they had been in the 1850s. As we have already argued, Trutch and Deady are key figures. Trutch had been in Oregon when the legal test of "the true interests of a white population" was first promulgated in 1853, and he remained at the centre of the BC Indian Land Question until he retired in 1889. He was chief commissioner of lands and works from 1864 until Confederation and British Columbia's first lieutenant-governor from 1871 to 1876. In 1880 he became the Dominion's agent in British Columbia, with particular responsibility for the railway. He also advised on Indian land matters, kept in touch with Deady, and even influenced the appointment of his brother-in-law, Peter O'Reilly, as Indian reserve commissioner.

For his part, Deady was acquainted with many prominent British Columbians. In 1873 he visited Victoria and met with Dr. William Fraser Tolmie, whom he knew from his Oregon days.¹¹⁹ In 1880 he decided that it was time to see Alaska, the territory over which his court had exercised jurisdiction since 1868, and on his way he stopped again in Victoria, where he met with Trutch, O'Reilly, and Justice John Hamilton Gray. He also went to see coal baron Robert Dunsmuir at Nanaimo before proceeding to Sitka.¹²⁰ On the return journey, he stopped again, playing billiards at the Union Club with Justice Gray and Chief Justice Begbie and travelling to New Westminster with Trutch. He also went to church with Begbie and watched him play cricket at Beacon Hill Park. Over dinner with Mr. and Mrs. Trutch, who had visited him in Portland in the summer of 1876, Deady and his hosts "went over all the old people of Oregon."¹²¹ He socialized with

¹¹⁸Accounts of the events leading to Duncan's departure for Alaska may be found in Murray, *The Devil and Mr. Duncan*, chaps. 15 and 16; and in Jean Usher, *William Duncan of Metlakatla: A Victorian Missionary in British Columbia* (Ottawa: National Museums of Canada, Publications in History, no. 5, 1974), chaps. 6 and 7.

¹¹⁹Clarke Jr., *The Diary of Judge Matthew P. Deady*, 1: 137-8.

¹²⁰*Ibid.*, 1: 309-10. On Dunsmuir's subsequent history with the courts and the issue of Chinese labour in the mines, see Alan Grove and Ross Lambertson, "Pawns of the Powerful: The Politics of Litigation in the Union Colliery Case," *BC Studies* 103 (Autumn 1994): 3.

¹²¹Clarke Jr., *The Diary of Judge Matthew P. Deady*, 1: 313-15. It seems that the Trutch family also retained property in Oregon. See *Trutch v. Bunnell*, 4 *The Pacific Reporter* 588 (1883).

various other members of British Columbia's ruling elite during this visit, and there was one particularly evocative moment when Deady met Begbie and Justice Crease at their chambers in the courthouse. As he records in his diary, "I [put] on the latter's gown and wig and sat in the [Chief Justice's] seat and was much complimented on my judicial appearance."¹²² He then made a short tour of the Interior with Trutch and visited Victoria at least once more, in 1890, when he met with Trutch and Begbie for what was probably the last time.¹²³

Of course, none of this proves a direct link between Deady's jurisprudence and BC Indian land policy. People can know each other and share views without conspiring together, particularly when the law of Indian title in British North America was unsettled. Equally, what lawyers and judges believe the law to be may not always be as important as what the public, the media, and government officials believe it to be, especially when any appeal to higher authority is unlikely. But surely it is not unreasonable to suggest that these men discussed Indian title and commiserated about what they saw as ill-advised federal Indian policy in both their countries.¹²⁴ They may not have agreed on everything, but as McLaren has argued in the context of the anti-Chinese discrimination cases, "the commonality of belief and perception" among the British Columbia and Oregon judges is striking.¹²⁵ Perhaps they also sought a common approach to Indian title in Alaska and British Columbia, where the turmoil at Metlakatla – and on the Nass and Skeena Rivers – could not be contained by a flimsy international border. Old and New Metlakatla are, after all, only seventy miles apart.

The approach that Begbie and Deady adopted may have sat uneasily with the law laid down elsewhere – most explicitly in US Supreme Court jurisprudence – but it managed to stop just short of openly confronting it. Deady justified his rulings by distinguishing such cases as *Crow Dog*.¹²⁶ Begbie simply did not refer to contrary precedent,

¹²² Clarke Jr., *The Diary of Judge Matthew P. Deady*, 1: 313.

¹²³ *Ibid.*, 1: 315–18 and 2: 601.

¹²⁴ Begbie's attitude towards Dominion Indian policy may be gleaned from an 1885 decision in which he stated that this policy was one where "every Indian ... is fed by the eleemosynary daily bounty of the state." He concluded that such an approach "may fit a mass of state-fed hereditary keepers educated with habitual idleness" but not "a race of laborious independent workers" such as the Indians of British Columbia. Qtd. in Williams, "... *The Man for a New Country*," 102, n. xx. The case was probably *Caskane et al. v. Findlay and McLellan* (BCARS, Begbie Benchbooks, vol. 13, 127), which involved the Songhees Indian reserve in Victoria.

¹²⁵ McLaren, "The Early British Columbia Judges," 244.

¹²⁶ And his views triumphed, in a way, years later in the United States Supreme Court. See *Tee-Hit-Ton Indians v. United States*, 348 US 272 (1955).

and his Metlakatla decision is unreported, even today. Both judges also benefited from the fact that, at least for the time being, the possibility of an appeal with respect to Indian title was slim to nil.¹²⁷ And, as British Columbia's Confederation debates reveal, by the 1870s there was a marked official reluctance to discuss the details of Indian policy in public, a reluctance that may possibly have contributed to the elusive record on this point.¹²⁸ The result, as we have suggested, is that British Columbia, like Alaska, went its own way.

There is no better illustration of this point than the *Calder* case itself. When it came before the Court of Appeal in 1971, one of the justices made it clear that, whatever the law in New Zealand or the United States might be, it was not the law in British Columbia. And another unwittingly turned Samuel Thurston's proposition on its head. Notwithstanding the absence of treaties extinguishing Aboriginal title in the province, he said, it was not the settlers but the Indians who, in law, were trespassers on the soil.¹²⁹ Two years later, Supreme Court Justice Emmett Hall described this as "a proposition which reason itself repudiates."¹³⁰ But it was nonetheless an accurate summary of a century of law and policy. Had he been aware of *United States v. Tom*, Justice Hall could have added that it was a proposition that found its first judicial expression on the west coast in 1853.

Until now, the question of why the treaty process ended so prematurely in British Columbia has been addressed in terms of finances and policy. The role of the law has been neglected or discounted, and most of us have proceeded as if the neighbouring US territories and legal developments there are not particularly relevant to what happened here. In this article, we have endeavored to show that they are relevant, and that, whether our speculations are close to the mark or not, the need to look beyond our borders in such matters is clear.

¹²⁷ As Harring, "The Incorporation of Alaskan Natives," 326, puts it, "None of Deady's [Alaska] rulings was ever appealed to the United States Supreme Court. No Alaska native had either the resources or sufficient confidence in American legal institutions to do so." Indeed, in *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (Cambridge: Cambridge University Press, 1994), 220, Harring suggests that Deady "mooted" his decision in *United States v. Kie* in order to prevent an appeal by remanding the case to the trial court on the grounds that the sentence had been miscalculated.

¹²⁸ Foster, "Letting Go the Bone," 57-8.

¹²⁹ (1971), 13 DLR (3d) 64 at 94 (BCCA), *per* Tysoe, JA: "As a result of [colonial land legislation] the Indians of the Colony of British Columbia became in law trespassers on and liable to ejection from lands in the Colony other than those set aside as reserves for the use of the Indians."

¹³⁰ (1973), 34 DLR (3d) 145 at 217 (SCC).

SELECT CHRONOLOGY

- 1763 The Royal Proclamation (George III) (UK)
 1787 The Northwest Ordinance (US)
 1818 The Treaty of Joint Occupation (US and Great Britain)
 1834 The Indian Trade and Intercourse Act (US)
 1843 The Oregon Provisional Government is formed and Fort Victoria is established
 1844 An Act in Relation to Indians (Oregon Provisional Government)
 1845 James Douglas is elected to the Vancouver County Court in Oregon
 1846 The Treaty of Washington ends the Joint Occupation of Oregon

WASHINGTON, OREGON,
ALASKAVANCOUVER ISLAND,
BRITISH COLUMBIA

- | | | |
|------|---|--|
| 1848 | The Oregon Territory is established. | |
| 1849 | | The Colony of Vancouver Island is established. |
| 1850 | Congress enacts the Donation Act, extends the 1834 Act to Oregon, and treaty making begins. | Douglas makes 9 treaties. |
| 1851 | | Douglas makes 2 treaties. |
| 1852 | | Douglas makes 2 treaties. |
| 1853 | Indian wars in Oregon; Washington Territory is carved out of Oregon; <i>US v. Tom</i> is decided. | |
| 1854 | Indian wars in Oregon. | Last recorded treaty at Nanaimo. |
| 1855 | Indian wars in Washington and Oregon. | |
| 1856 | Indian wars in Washington and Oregon. | |
| 1858 | Indian wars in eastern Washington. | The Colony of BC is established. |
| 1860 | | Begbie advises Douglas that Indian title must be extinguished. |
| 1862 | | The Cowichan "treaty" is made. |
| 1867 | The US purchases Alaska from Russia. ● | |
| 1872 | <i>US v. Seveloff</i> (Deady). | Trutch advises Ottawa that treaties should not be made in BC. |
| 1886 | <i>US v. Kie</i> (Deady) | <i>AG and Nash v. Tait</i> (Begbie). |