THE POLITICAL STRUGGLE BEHIND THE *DELGAMUUKW* CASE:

The 1994–96 Trilateral Treaty Negotiations with the Gitxsan and Wet'suwet'en[*]

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As the *Delgamuukw* case trial approached its conclusion in the Supreme Court of British Columbia, the plaintiffs' attorney Michael Jackson referred to an event related to the very beginning of the colonial presence in the North American continent. Jackson spoke about a lecture that the Spanish thinker Francisco de Vitoria delivered in 1532 at the University of Salamanca. De Vitoria argued that the original inhabitants of the newly "discovered" lands possessed natural legal rights that were equal to those of any Christian European.[1] Despite this early plea for equality, however, through the centuries such words would usually fall on the deaf ears of colonial governments. As 1992 marked the five hundredth anniversary of the arrival of Christopher Columbus in the "New World," as well as the beginning of the colonial era, it seemed that the winds of change were finally blowing in British Columbia, where a new treaty negotiations process was under way. Clarifying Aboriginal Rights to land and territory became pressing.

The history of treaty signing in British Columbia is different from that found in the rest of Canada. James Douglas, who held the office of governor of the Colony of Vancouver Island from 1851 to 1864 and, in 1858, became the first governor of the Colony of British Columbia, anticipated the assimilation of First Nations people and did not sign treaties, with the exception of some small areas mainly located on Vancouver Island.[2] Nor was the Crown willing to financially support new treaty making.[3]

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[*] This article is based on the author's master's thesis, completed in 2022 at Concordia University in Montreal.

[1] *Delgamuukw v. The Queen* , 1991 CanLII 2372 (BC SC) (Trial Transcript at 23708, 4 April 1990), https://dx.doi.org/10.14288/1.0018501.

[2] Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849–1989* (Vancouver: UBC Press, 1990), 36.

[3] Tennant, *Aboriginal Peoples and Politics,* 25.

Thus, Aboriginal Title in British Columbia was not extinguished, which created an ambiguous legal situation. Following the 1973 *Calder* case, which recognized for the first time that Aboriginal Title had a place in Canadian law,[4] the federal government stated that negotiations would be a better way to resolve Indigenous Land Rights. This led soon after to the establishment of the Comprehensive Land Claims Policy. British Columbia, however, only joined the modern treaty process in the 1990s. Many scholars have criticized the BC treaty process because of its inefficiency: over almost thirty years only three treaties have been signed and implemented. These agreements represent seven First Nations: the five Maa-nulth First Nations, Tla'amin Nation, and Tsawwassen Nation.[5]

This case study aims to deepen our understanding of why this process has had so little success, and it does so by addressing one example of its failure, namely, the 1994–96 trilateral treaty negotiations with two BC First Nations: the Gitxsan and Wet'suwet'en. These negotiations represent a lesser-known chapter of the landmark *Delgamuukw* case, which, in 1997, led the Supreme Court of Canada to clarify the content and definition of Aboriginal Title and to affirm the legal validity of oral history. In 1984, the Gitxsan and Wet'suwet'en filed a lawsuit against the province, claiming ownership and jurisdiction over fifty-eight thousand square kilometres of land. The court proceedings began in Smithers in May 1987 and went through several stages – namely, the Supreme Court of British Columbia (concluded in 1991), the British Columbia Court of Appeal (concluded in 1993), and the Supreme Court of Canada (concluded in 1997). To date the scholarly literature has paid inadequate attention to the consequential fact that, following the Court of Appeal's recommendation, the Gitxsan and Wet'suwet'en joined the newly established BC treaty process in 1994.[6] Although several scholars have engaged with broader aspects of the BC treaty process and the *Delgamuukw* court case and its consequences, the treaty negotiations with the Gitxsan and Wet'suwet'en have remained closed off from closer scrutiny.[7]

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[4] *Calder et al. v. Attorney General of British Columbia,* 1973 CanLII 4 (SCC), https://canlii.ca/t/1nfn4.

[5] See https://www.bctreaty.ca/faq. See also Brian Egan, "Towards Shared Ownership: Property, Geography, and Treaty Making in British Columbia," *Geografiska Annaler: Series B, Swedish Society for Anthropology and Geography* 95, no. 1 (2013): 33.

[6] Discussed in Christopher McKee, *Treaty Talks in British Columbia: Negotiating Mutually Beneficial Future* (Vancouver: UBC Press, 2000); Patricia Dawn Mills, "Reconciliation: Gitxsan Property and Crown Sovereignty" (PhD diss., University of British Columbia, 2005); Val Napoleon, "Ayook: Gitksan Legal Order, Law, and Legal History" (PhD diss., University of Victoria, 2009).

[7] For background information see, for example: Antonia Mills, *Eagle Down Is Our Law: Witsuwit'en Law, Feasts, and Land Claims* (Vancouver: UBC Press, 1994); Richard Daly,

This article frequently references the work of scholars Tony Penikett, Christopher McKee, Frank Cassidy, and Norman Dale. Penikett's invaluable insider account shows how negotiations frequently failed because negotiators' mandates were often unclear.[8] Dale and Cassidy, who contributed back in the 1980s, discuss the Comprehensive Land Claims Policy established by the federal government as early as the 1970s, while McKee concentrates on the BC treaty process, which was put in place in the 1990s.[9] Cassidy and Dale argue that control over resources was an important factor that prevented Indigenous groups from reaching an agreement with the federal and provincial governments. Taking their analyses one step further, I emphasize that, from the 1980s onwards, preserving resources became even more urgent because of the rapidly accelerating dispossession in Gitxsan and Wet'suwet'en traditional territories that was linked to neoliberal governance policies. One manifestation of this was the preferential treatment that the government of British Columbia granted to the big timber companies, resulting in their encroachment on Gitxsan and Wet'suwet'en traditional territory. In this way, my article supports Andrew Woolford's conclusion that the BC treaty process is tied to larger debates – namely, those related to a neoliberal governance model.[10]

While there was a close connection between the Gitxsan and Wet'suwet'en involvement in the BC treaty process and their resistance to the encroachment of the logging industry on their traditional territory, it was not only control of resources that was at stake. Indigenous people's cultural survival depended on the trajectories the negotiations would take as the "health" of their traditional territories and continuation of their hereditary system were synonymous with the well-being of the people. Various rationales put forward by the colonial government to "remediate" past injustice should be, as argued by Indigenous scholar

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Our Box Was Full: An Ethnography for the Delgamuukw *Plaintiffs* (Vancouver: UBC Press, 2005); Frank Cassidy, ed., *Aboriginal Title in British Columbia:* Delgamuukw v. The Queen (Montreal/Lantzville: The Institute for Research on Public Policy/Oolichan Books, 1992); Eric H. Reiter, "Fact, Narrative, and Judicial Uses of History: *Delgamuukw* and Beyond," *Indigenous Law Journal* 1 (2010): 59–65.

8 Tony Penikett, *Reconciliation: First Nations Treaty Making in British Columbia* (Vancouver: Douglas and McIntyre, 2006).

9 Frank Cassidy and Norman Dale, *After Native Claims? The Implications of Comprehensive Claims Settlements for Natural Resources in British Columbia* (Lantzville/Halifax: Oolichan Books/The Institute for Research on Public Policy, 1988); Christopher McKee, *Treaty Talks in British Columbia: Negotiating a Mutually Beneficial Future* (Vancouver: UBC Press, 2000).

10 Andrew Woolford, *Between Justice and Certainty: Treaty Making in British Columbia* (Vancouver: UBC Press, 2005).

Michael Fabris (Krebs), seen "in light of past and present manifestations of dispossession."[11]

This article draws on the theoretical framework proposed by Patricia Dawn Mills, which is highly relevant to understanding the Gitxsan (and Wet'suwet'en) treaty vision. This framework includes some important assumptions: that the Gitxsan coexisted with wildlife for thousands of years and that they wished to maintain this established relationship; that, in order to do this, they needed to be able to regulate the infringement on their hereditary territories; that they possessed the expertise to manage wildlife, forests, and control mineral extraction in a manner aligned with their cultural practices and carried out in the best interests of non-humans.[12] This framework recognizes the Gitxsan and Wet'suwet'en's direct relationship, prior and present, with the land, which I intend to bring to the foreground.

In what follows, I argue that the limitation of the BC treaty process and the attitudes that prioritized big industry over Indigenous sovereignty meant that a historic opportunity to address the 150-year-old Aboriginal land question was missed. As Paul Nadasdy observes in his study related to Yukon, which also applies here, the way in which the two levels of government defined some culturally specific terms, such as "sovereignty" and "territory," remained colonial.[13] Provincial and federal negotiators were frequently unwilling to discuss forms of ownership other than those recognized by the Crown. As Nicholas Blomley states, the standard response of Crown negotiators to this issue is: "I have no mandate to deal with these things, so we have to set them aside."[14] This was and still is the case in British Columbia. The use of the colonial theoretical framework to address Indigenous land claims is but one example of the power imbalance that existed at the negotiating tables. Nevertheless, the causes of the failure of the negotiations with the Gitxsan and Wet'suwet'en were the result of multiple factors, including ongoing dispossession, which translated into a constant threat from an aggressive logging industry, the province's inability to break with the neoliberal governance model, disagreements over the form of government, and right-wing opposition.

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[11] Michael Fabris (Krebs), "Decolonizing Neoliberalism? First Nations Reserves, Private Property Rights, and the Legislation of Indigenous Dispossession in Canada," in *Contested Property Claims: What Disagreement Tells Us about Ownership*, ed. Maja Hojer Bruun, Patrick J.L. Cockburn, Bjarke Skeerlund Risager, and Mikkel Thorup (London: Routledge, 2018), 187.

[12] Mills, "Reconciliation," 190.

[13] Paul Nadasdy, *Sovereignty's Entailments: First Nation State in the Yukon* (Toronto: University of Toronto Press, 2017).

[14] Nicholas Blomley, "Making Space for Property," *Annals of the Association of American Geographers* 104, no. 6 (2014): 1298.

I base my research on a variety of under-explored written sources. While transcripts from the assembly of the House of Commons related to the Reform Party's request to freeze the treaty negotiations in British Columbia in 1995, BC newspapers, and BC court cases played an important role, I also gathered and assessed a variety of unpublished sources produced by the negotiating First Nations as well as those prepared by the provincial negotiators for the cabinet members.[15] The report of the British Columbia Treaty Commission (BCTC) on the suspension of the treaty negotiations with the Gitxsan was crucial in this research, and it yields further insights if placed in the historical context of the injunction war between the Gitxsan and the timber industry that started in the 1980s.[16] The monthly newsletter published by the Gitxsan Treaty Office between 1994 and 1996, *Daxgyet: Gitxsan Treaty Negotiations Journal*, which has never been extensively used before, allowed me to reconstruct the dynamics of the negotiations.[17]

Reconciliation cannot be achieved without addressing the underlying issues that continue to divide Indigenous Peoples and settler societies. It was therefore important for me to address the contentious issues and statements that have been made in the Canadian House of Commons, in the press, and in the internal discussions and briefings that the provincial negotiators prepared for the members of the cabinet. In this, I join John Borrows in pointing out that settler states have important shortcomings and limitations.[18] In particular, in their relationship with Indigenous Peoples, they often expect to achieve a one-to-one translation between Indigenous laws and common law.[19] For Indigenous Peoples, on the other hand, it is extremely difficult to engage in a meaningful dialogue in the context of ongoing dispossession. In addressing these issues, I hope to make a contribution – however small – to the crucial process of reconciliation.

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[15] The government of British Columbia shared limited material via my Freedom of Information Requests. Selected documents were provided by the Gitxsan Huwilp Government and by Don Ryan, Chief Hanamuxw. I was less successful in securing documents from the Wet'suwet'en.

[16] British Columbia Treaty Commission, *Report on the Suspension of Gitxsan Treaty Negotiation*s, 14 March 1996.

[17] No interviews were conducted for this research, but the interviews that Val Napoleon conducted in 2004, as well as those Sharron McCrimmon carried out in 1995, provided valuable context to the present study. Napoleon, "Ayook"; Sharron McCrimmon, "Child Welfare in Gitanmaxx: A Case Study of the Practice of Self-Government" (MA thesis, University of British Columbia, 1996).

[18] John Borrows, *Recovering Canada. The Resurgence of Indigenous Laws* (Toronto: University of Toronto Press, 2002); John Borrows, "Questioning Canada's Title to Land: The Rule of Law, Aboriginal Peoples, and Colonialism," in *Speaking Truth to Power: A Treaty Forum* (Ottawa: Minister of Public Works and Government Services Canada, 1999).

[19] Blomley, "Making Space for Property," 1297.

THE ONGOING DISPOSSESSION AND RESISTANCE

The Gitxsan and Wet'suwet'en, who claimed ownership and jurisdiction over their respective traditional territories in the *Delgamuukw* case, are two distinct Peoples who inhabit the watersheds of the Skeena, Bulkley, and Nechako Rivers in northwest British Columbia. Their languages derive from different language families. The Gitxsan language has been categorized as belonging to the Tsimshiamic family of languages and the Wet'suwet'en as an Athapascan language. Nevertheless, over millennia they developed a very similar kinship and land tenure system. Their societies are traditionally organized in clans and houses.[20] Each individual belongs to a house, which owns a specific territory. The house also possesses something akin to intellectual property: songs, dances, totem poles, and its oral history. These narratives, called adaawk by the Gitxsan and kungax by the Wet'suwet'en, have several functions, including recording a house's history and providing the foundation for laws.[21]

Getting Aboriginal Title recognized has been a long-standing issue in British Columbia, yet by the 1980s other challenges, notably encroachment on the part of an aggressive logging industry, also became pressing. The 1994–96 trilateral treaty negotiations with the Gitxsan and Wet'suwet'en were deeply rooted in the province's economic situation and in the broader political landscape of Indigenous-settler relations. The neoliberalism and globalization of the 1980s created momentum for large-scale economic initiatives as well as an environment favourable for securing investments. This meant eliminating economic borders, using external forces to stimulate internal development, and moving away from social welfare. Neoliberalism shifted a historical pattern of paternalism towards a paradigm that, in theory, promoted partnership with First Nations.[22] Simultaneously, in many places, including British Columbia, massive resource extraction accelerated the dispossession of Indigenous assets, both economic and spiritual. Sociologist Andrew Woolford observes that if neoliberal governments strove to find alternatives to the Indian Act it was not because of moral obligations but simply because governing based on that act had become cumbersome.[23]

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[20] The Gitxsan words *pdeek* and *wilp* are translated into English as "clan" and "house."

[21] Mills, *Eagle Down Is Our Law*; Daly, *Our Box Was Full*.

[22] Gabrielle A. Slowey, "The State, the Marketplace, and First Nations: Theorizing First Nation Self-Determination in an Era of Globalisation," in *Power Struggles: Hydro Development and First Nations in Manitoba and Quebec*, ed. Martin Thibault and Steven M. Hoffman (Winnipeg: University of Manitoba Press, 2008), 44.

[23] Woolford, *Between Justice and Certainty*, 153–54.

The 1980s and 1990s also saw an increase in Indigenous efforts to regain control over resources in various sectors of the economy in British Columbia. Many of these, like the Nuu-chah-nulth Tribal Council Forestry Program, were related to forestry management. The Nuu-chah-nulth Tribal Council represented fifteen bands that occupied a large part of western Vancouver Island. They held a total of 168 reserves covering forty-nine hundred hectares.[24] However, the province found large enterprises such as MacMillan Bloedel more attractive than Indigenous efforts to restore already damaged forest resources. Based on this approach, the province intended to open up to logging a significant percentage of Meares Island, which was a part of the Nuu-chah-nulth hereditary territory. In response, Indigenous and environmental activists organized a series of blockades and sought international attention. This resistance culminated in 1993 at Clayoquot Sound, where twelve thousand people participated in a blockade.[25]

The situation on Gitxsan and Wet'suwet'en hereditary territories also deteriorated. In the 1980s and 1990s, the Gitxsan and Wet'suwet'en were fighting their own "War in the Woods," which resulted in a series of blockades and several lawsuits that sought to obtain injunctions to protect specific parts of their hereditary territories. Journalist Terry Glavin covered these events in his articles in the *Vancouver Sun* and in his book, *A Death Feast in Dimlahamid*.[26] Glavin explains that each Gitxsan house (wilp) has a responsibility to protect and care for its traditional territory. In the 1980s, some of these territories were still unaffected by settler activities, while others had been taken by settlers many years prior. Nevertheless, the responsibility associated with the wealth of the land, animals, minerals, and spirits remained with the respective *wilp*. This resulted in clashes with the forest industry. For example, at the beginning of the 1980s, Westar Timber Ltd., a giant timber company, started an aggressive logging campaign in the Kispiox Valley on the territory under the stewardship of Chief Wii Muugalsxw, known also as Art Wilson. Massive clear-cutting was increasingly destroying huge areas of an old-growth forest. In March 1988, the Gitxsan, led by Art Wilson, mounted a blockade to prevent the truckers from entering the logging area in the Kispiox Valley. In response, the truckers blocked the road in the opposite direction to prevent the Gitxsan residents from leaving the

[24] Cassidy and Dale, *After Native Claims?* III.
[25] Rachel McRory, "Recording the War in the Woods," Royal BC Museum, 21 July 2021.
[26] Terry Glavin, *A Death Feast in Dimlahamid* (Vancouver: New Star Books, 1998).

village.[27] Elder Antgulilibix, Mary Johnson, joined the blockade early in the morning. She sang traditional songs and spoke to a *Vancouver Sun* reporter about her support for the cause. According to Johnson, it was important to protect the territory for future Gitxsan generations since the land and culture were intricately connected.[28] The following day, about thirty RCMP officers arrived to remove the blockade. They brought an additional bus for those they would arrest, but the blockade was already gone.[29] Other confrontations in the Gitxsan hereditary territories took place at Sam Green Creek, where the Gitxsan opposed the construction of a bridge that would clear a way to logging in the area called "Shedin," and at Suskwa. The blockades put Indigenous communities under great pressure. "The roadblock is a test," said Don Ryan, president of the Gitxsan-Wet'suwet'en Tribal Council, in his statement to the *Vancouver Sun*: "You have husband against wife, brother against brother and father against son."[30] Indeed about 40 percent of Westar Timber employees consisted of Indigenous people, and the roadblocks were directly affecting those who carried them out.[31] Logging was critical to employment in British Columbia.

The 1990s saw increasing professional debates about the future of the forests. In 1995, the *Interior News* wrote: "Future generations will look back on this decade as the time British Columbia saved its forests or destroyed them."[32] Many professional foresters increasingly criticized "the big industry approach" to forest management; they argued that people should be encouraged to develop a different approach to forestry management that would take into account their sense of place. Herb Hammond advocated the so-called "eco system-based management," which meant that the forest should be able to continue functioning as an eco-system.[33] However, such a holistic approach to forestry did not align with the neoliberal approach to resource management. It became urgent for the provincial government to reach an agreement with First Nations in order to be able to encourage economic investments. Faced with the *Calder* case launched by the Nisga'a in 1967, and Indigenous

[27] Terry Glavin, "Indians Block Log Trucks: Tempers Flare at Barricade," *Vancouver Sun*, 29 February 1988, A1.

[28] Terry Glavin, "Elder Inspires Indian Protest: Matriarch Inspires Kispiox Protest behind Roadblock," *Vancouver Sun,* 1 March 1988, B1.

[29] Terry Glavin, "Show of Force by RCMP Angers Kispiox Area Chiefs," *Vancouver Sun*, 2 March 1988, B1; Terry Glavin, "Natives Say Wilderness Now a Rotting Heritage," *Vancouver Sun*, 14 June 1988, A1.

[30] Glavin, "Natives Say Wilderness Now a Rotting Heritage."

[31] Glavin.

[32] "Forest Future Debated by Professionals," *Interior News* (Smithers, BC), 22 February 1995, A4.

[33] "Forest Future Debated by Professionals."

Peoples' rejection of the Pierre Trudeau government's "White Paper" in the 1970s, both levels of government felt compelled to achieve "certainty" by clearly defining who owned the land in the areas not covered by treaties. Because of the *Calder* case, the federal government was forced to revise its approach to Aboriginal Title and to establish a new policy, known as the Comprehensive Land Claims Policy, for Indigenous land claims. Under this new approach, claims would fall into two categories: comprehensive and specific. As Cassidy and Dale explain: "Comprehensive claims were identified as claims based upon the traditional native occupancy of lands not previously dealt with by treaty or other means. Specific claims were defined as those which occurred where an existing act (such as the Indian Act), agreement, or treaty was allegedly violated."[34]

A revised version of the Comprehensive Land Claims Policy was announced by Minister of Indian and Northern Affairs Bill McKnight in 1986, and it established that the parties could enter into negotiations without the precondition of "extinguishment of Aboriginal title."[35] The alternatives were, however, limited. The policy specified that Aboriginal Title can be surrendered "in return for the grant of … other defined rights" or surrendered in non-reserved areas while maintained in "specified or reserved areas."[36] Clearly, it was not possible for First Nations to maintain Aboriginal Title across the entire hereditary territory. Moreover, the government declared that, "in attempting to define the rights of aboriginal people, the Government of Canada does not intend to prejudice the existing rights of others."[37]

THE BC TREATY PROCESS AND THE NEGOTIATIONS WITH THE GITXSAN AND WET'SUWET'EN

British Columbia traditionally considered treaty negotiations as federal business and, until the 1990s, refused to participate. In 1990, BC premier Bill Vander Zalm changed course and decided that the province would participate in treaty negotiations with First Nations.[38] The establishment of the treaty process was endorsed in 1991 by the newly elected New Democratic Party. In September 1992, the representatives of the provincial and federal governments and of the First Nations Summit

[34] Cassidy and Dale, *After Native Claims?* 9.
[35] Cassidy and Dale, 11.
[36] *Comprehensive Land Claims Policy*, published under the authority of the Honourable Bill McKnight, PC, MP, Minister of Indian Affairs and Northern Development (Ottawa, 1986), 12, https://www.afn.ca/uploads/files/sc/comp_-_1987_comprehensive_land_claims_policy.pdf.
[37] *Comprehensive Land Claims Policy*, 21.
[38] Woolford, *Between Justice and Certainty*, 93.

signed a formal agreement. In April 1993, the British Columbia Treaty Commission (BCTC) was appointed as the "keeper of the process."[39] The commission was mandated to facilitate negotiations and, among other things, to allocate funding for negotiations to First Nations. Yet, the way the process was designed, it did not provide any political power to the BCTC, other than moral authority, which was not sufficient to address the power imbalance at the negotiating tables.[40]

The BC treaty process, which still exists today, was organized into six stages. In the first stage, called *Statement of Intent*, the relevant First Nation expresses its intention to participate in the treaty process. At this point, the concerned First Nation identifies the area covered by the claim. The second stage is called *Preparations for Negotiations*. The BC Treaty Commission has forty-five days to schedule an initial meeting in which parties are to start exchanging information. At this stage each party appoints negotiators. Moreover, the negotiating First Nation must report whether or not there are any overlapping claims issues with neighbouring First Nations, and the interests of third parties should also be raised. During the third stage, called *Negotiation of a Framework Agreement*, the agenda for the negotiations is established. In the fourth stage, *Negotiation of an Agreement in Principle*, actual negotiations begin and the terms of the treaty are agreed upon. In the fifth stage, the treaty is finalized, and in the sixth stage the implementation plan is developed.[41] In the fourth and fifth stages the negotiating First Nation has the option of requesting the implementation of so-called Interim Measure Agreements. These measures aim at regulating land management and preventing the resource under negotiation from being depleted before the negotiations conclude.[42] Notwithstanding this new approach to negotiations, some First Nations and Indigenous organizations remained skeptical. The Union of British Columbia Indian Chiefs, for instance, was convinced that the negotiations should be carried out on a nation-to-nation basis and that the Province of British Columbia was not a nation.[43]

In 1993, the British Columbia Court of Appeal partially reversed the verdict pronounced by Chief Justice Alan McEachern of the Supreme Court of British Columbia in the *Delgamuukw* case in 1991 (the reversal being very unfavourable for the Gitxsan and Wet'suwet'en) and recom-

[39] McKee, *Treaty Talks in British Columbia*, 33.
[40] Woolford, *Between Justice and Certainty*, 94.
[41] McKee, *Treaty Talks in British Columbia*, 35.
[42] McKee, 41.
[43] McKee, 39. For critical analyses of the BC treaty process, see Janice Switlo, *Gustafsen Lake: Under Siege – Exposing the Truth behind the Gustafsen Lake Stand-Off* (TIAC Communications, 1997); Penikett, *Reconciliation*.

mended entering the newly established BC treaty process. Nevertheless, it failed to define the nature and origins of Aboriginal Title. The Court of Appeal ruled that the plaintiffs had "unextinguished non-exclusive aboriginal rights which received the protection of the common law, and which now receive protection as existing aboriginal rights under s.35(1) of Constitution Act, 1982."[44] Nonetheless, it did not make a declaration with respect to jurisdiction over land and resources or people within the territory.[45] The court recommended that the parties involved further clarify the outstanding issues in the negotiations. The fact that the Court of Appeal did not endorse the Gitxsan and Wet'suwet'en case diminished their chances for success in future negotiations.

In June 1994, the Gitxsan and Wet'suwet'en Hereditary Chiefs signed an accord of recognition and respect with "Her Majesty the Queen in Right of British Columbia." This set the stage for treaty negotiations. The BC Treaty Commission formed two separate negotiating tables as the Gitxsan and Wet'suwet'en had decided to negotiate separately. Two significant developments in the treaty negotiations took place at the beginning of 1995. In February, the Gitxsan and the province signed the "Significant Progress Agreement," and in March the Wet'suwet'en held their Opening Session in Smithers, at which the chief treaty negotiator Herb George presented the Wet'suwet'en vision for treaty making.[46] Yet, even before these events, the Gitxsan and Wet'suwet'en prepared a draft of the future Agreement-in-Principle – the "Gitxsan, Wet'suwet'en, and Gitanyow Community-Based Governance Agreement-in-Principle" – dated 24 January 1995.[47] This document was divided into the following subsections: legal status and capacity, citizenship, land title and land management, renewable resources, non-renewable resources, structures and procedures of government, financial arrangements, taxation, application of federal and provincial laws, and environmental assessment. The last subsection included guidelines on community ratification of the agreement. There is no doubt that the Gitxsan and Wet'suwet'en were well prepared for the treaty negotiations and that they had a clear vision of their objectives.

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[44] *Delgamuukw v. British Columbia*, 1993 CanLII 4516 (BC CA), https://canlii.ca/t/1q09f, para. 263.

[45] *Delgamuukw v. British Columbia*, para. 264.

[46] "The Wet'suwet'en Vision of a Treaty with the Crown," reprinted in Dan George, "The Elders Are Watching: Wet'suwet'en Perspectives on Leadership's Role in the Management of Conflict" (Major Research Project, Royal Roads University, 2010).

[47] "Gitxsan, Wet'suwet'en, and Gitanyow Community-Based Governance Agreement-in-Principle," 24 January 1995. Copy available at Gitxsan Huwilp Government Office (Hazelton).

THE CONFLICT OVER FOREST RESOURCES

The Significant Progress Agreement signed in February 1995 by Mas Gak, Don Ryan, representing the Gitxsan Treaty Office, and Mark Stevenson, representing the Province of British Columbia, recognized the priority of bilateral negotiations related to forest resources. The forest industry had been a nightmare for the Gitxsan since it began a phase of aggressive clear-cutting that destroyed not only the forests but also fish and wildlife. The existence and well-being of forests, fish, and wildlife were vital to the cultural survival of First Nations. Although the Court of Appeal ruled in 1993 in the *Delgamuukw* case that the Aboriginal Rights of the Gitxsan and Wet'suwet'en had not been extinguished, and that First Nations must be consulted before any development affecting these rights occurred, the controversies between the forest industry and some Gitxsan wilps were far from settled.[48]

For example, Takla Track and Timber, which received a cutting permit in the Minaret Creek area, located west of Bear Lake, harvested timber infested with the pine bark beetle. The Gitxsan believed that this timber could spread infestation to other areas. Initially, the Gitxsan mounted a blockade of BC Rail's line near Bear Lake; however, after discussion, both sides compromised. The Gitxsan removed the blockade and Takla Track and Timber agreed to stop logging until the court issued a decision.[49]

The lawsuit, which took place in January 1994, was very disappointing for the Gitxsan. First, the Gitxsan's claim to the territory was rejected on technicalities related to the map representing the territorial boundaries that was used in the *Delgamuukw* case. Second, the presiding judge ruled that there was an attempt to consult the Gitxsan, which they had rejected.[50] The Fort St. James forest district manager, Ray Schultz, justified the cutting operations by referring to concern over the pine bark beetle infestation. In December 1994, he wrote the following to Chief Thomas Patrick:

> The delays incurred by the blockade activities last winter, and resulting in delays in harvesting infested timber, have aided the spread of the beetle. To ensure the beetles do not spread once again to new timber, it is critical that infested timber be removed this winter. A decision about the CP [Cutting Permit] 702 amendment cannot be delayed any longer.[51]

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[48] "Twenty-Four Months since Appeal Decision," *Daxgyet: Gitxsan Treaty Negotiations Journal* 2, no. 7 (July 1995): 6–7.

[49] "Sustut Rail Blockade Lifted: Gitksan, Timber Company Wrangle over Injunction," *Interior News* (Smithers), 19 January 1994, 10.

[50] *Ryan v. Schultz*, 1994 CanLII 2101 (BC SC), https://canlii.ca/t/1dlx4.

[51] Ray L. Schultz to Thomas Patrick, file 320/30/Patrick, 15 December 1994, Freedom of Information Request 2021-15456. http://docs.openinfo.gov.bc.ca/Response_Package_FNR-2021-15456.pdf

The Gitxsan requested help from an independent forester to better understand the beetle problem.[52] Yet, in December 1994, the Fort St. James Forest District approved the modification to the controversial logging permit issued for the area by Minaret Creek. This permit doubled the area destined for clear-cutting. The Gitxsan leader Gordon Sebastian wrote the following in his letter to the Fort St. James forestry manager:

> The Gitxsan Chiefs object to your unilateral action which approved FL A27823 CP 702. This action clearly indicates a less than cavalier attitude towards the talks on the Xsu Wii Ax table, the Forest Resource Management Agreement table, and indicates a failure of the intent of the Accord of Recognition and Respect signed by your Premier last summer. Further, this unilateral action prejudices the Treaty Talks by mocking all suggestions of the interim measures and other processes set up to resolve present disputes.[53]

Another frustrating situation arose in the Kispiox Forests District, where the Ministry of Forests authorized Repap Carnaby to engage in industrial cutting and construct a logging road. The Ministry of Forests had made a prior commitment that there would be no road in the Upper Kispiox.[54]

While the Gitxsan felt pressed to address all the controversies related to aggressive logging policies, the BCTC announced that the main negotiating table was ready. The Gitxsan welcomed this decision, hoping that it would result in an agreement to stop clear-cutting and construction of the logging road at Sam Green Creek, at least during the negotiations. In April 1995, three NDP ministers, including Minister of Aboriginal Affairs John Cashore, visited the negotiations. During their visit, Anuthlem buhn, Gordon Sebastian, the speaker for the Gitxsan, expressed his disappointment at the lack of progress and the lack of interim arrangements, which had become pressing in the negotiations on forest resource management. He also raised an important issue with respect to provincial negotiators' mandates. He pointed out that the provincial negotiators had quickly reached the limit of their decision-

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[52] "Constructive Arrangement for Gitxsan Rights in the Xsu Wii Aks: A Response to the CP 702 Amendment," Freedom of Information Request 2021-15456. http://docs.openinfo.gov.bc.ca/Response_Package_FNR-2021-15456.pdf.

[53] Gordon Sebastian (Gitxsan Treaty Office) to Ray Schultz (Fort St. James Forest District Manager), 3 January 1995, Freedom of Information Request 2021-15456. http://docs.openinfo.gov.bc.ca/Response_Package_FNR-2021-15456.pdf.

[54] "Gitxsan Chiefs and non-Gitxsan Unite to Save Upper Kispiox from Logging," *Daxgyet: Gitxsan Treaty Negotiations Journal* 2, no. 2 (February 1995): 6–7.

making authority.[55] As a lawyer, Sebastian certainly was aware that any decisions would have to be approved and signed by the cabinet, but the fact that the provincial negotiators' mandates were limited frustrated him. As former Yukon premier Tony Penikett pointed out, for negotiations like these to succeed, senior politicians needed to be involved.[56]

On the other hand, the province blamed the delays in the negotiations on the ongoing blockades. In fact, the provincial negotiators did not join the table precisely because of the blockades that occurred in the summer of 1995 after a dispute with the Ministry of Forests over lack of consultation.[57] Actually, many negotiating First Nations feared this "log-and-talk" approach, realizing that some of them, like the Nisga'a, had been tied up with ongoing negotiations for almost fifteen years while logging continued on their territory.[58]

BUILDING SELF-GOVERNMENT FOUNDATIONS.

For the purpose of the negotiations, the Gitxsan had to restructure their decision-making process. Both First Nations were represented at the negotiating table by a small group of negotiators; the Gitxsan opened the Gitxsan Treaty Office in September 1994.[59] Under normal circumstances, the decisions were consensus based and accepted in the Feast Hall, but this decision-making process could not be easily transferred to the treaty table. Nevertheless, the Gitxsan formed several groups that cooperated with the negotiators. For instance, the Chief's Advisory Team (CAT), which consisted of twelve members, three from each clan, met with the negotiators twice a month. The purpose of these meetings was, on the one hand, to communicate directions to the negotiators and, on the other hand, to get updates on the negotiation process.[60] The CAT was later restructured and renamed as *Gimlitxwhit*.[61] Another team, called SWAT (Strategic Watershed Analysis Team), was tasked with resource mapping in the Gitxsan territory. The information gathered was used, for example, in negotiations with the Ministry of Forests and

[55] "Significant Progress Reviewed," *Daxgyet: Gitxsan Treaty Negotiations Journal* 2, no. 4 (April 1995): 3.

[56] Penikett, *Reconciliation,* 166.

[57] Briefing note from Sandy Fraser to John Cashore, October 1995, Freedom of Information Request IRR-2021-15534. http://docs.openinfo.gov.bc.ca/Response_Package_IRR-2021-15534.pdf.

[58] "Log and Talk," *CHN Forestry Haida Laas Special Report*, 1 June 1994.

[59] "Gitksan Open New Treaty Office," *Interior News* (Smithers), 7 September 1994, A10.

[60] "Chief's Advisory Team: They Are Your Clan Representatives," *Daxgyet: Gitxsan Treaty Negotiations Journal* 1, no. 4 (December 1994): 5.

[61] Carol Eichstaedt, "Gitxsan Restructure for Decision-Making, Implementation," *Daxgyet: Gitxsan Treaty Negotiations Journal* 2, no. 4 (April 1995): 4.

logging companies.[62] The monthly newsletter, *Daxgyet: Gitxsan Treaty Negotiations Journal*, kept communities informed about all the newly formed groups and progress in negotiations.

These undertakings were put in place not only because of the negotiations but also because the ultimate objective was to build self-government capacity. "We must build on our internal capacity to govern our people and land. This is where we will win – not around the negotiation table," stated Gitxsan chief negotiator Mas Gak, Don Ryan.[63] The communities were kept informed as much as possible, but clearly the way decisions were reached in the negotiations could not reproduce the decision-making process in the Feast Hall. Nevertheless, the Gitxsan and Wet'suwet'en chiefs and negotiators aimed to prevent the treaty process from becoming another colonial imposition that ignored their traditional forms of jurisdiction.

While the Canadian state needs to continuously redefine its settler-colonial strategies against Indigenous people,[64] the Gitxsan and Wet'suwet'en did not see these negotiations as an opportunity to obtain a better deal under the colonial system; rather, they saw them as a chance to build their self-government capacity and to assert their Indigenous forms of jurisdiction. In doing this, they had to overcome many obstacles, such as pervasive racial prejudice, political opposition, and even the resentment of their grassroots people.[65]

Without interviews with community members, it is difficult to recreate all the local dynamics and to assess how various Gitxsan and Wet'suwet'en community members reacted to the negotiations. The complex *Delgamuukw* court proceedings in the Supreme Court of British Columbia ended in 1991 with a very disappointing verdict, and it was understandable that people did not trust the new process. Sharron McCrimmon, who conducted interviews in the community of Gitanmaxx in the 1990s for her master's thesis, stated the following about the acceptance of the "Gitxsan, Wet'suwet'en, and Gitanyow Community-Based Governance AIP" prepared by the negotiators:

> The AIP, [Agreement-in-Principle] however, was not ratified by the communities. The fear of self-government at the grass root level and at the council level in some villages, would confound the vision of

[62] Eichstaedt, "Gitsxan Restructure.".

[63] "House Groups Crucial," *Daxgyet: Gitxsan Treaty Negotiations Journal* 1, no. 4 (December 1994): 1.

[64] Fabris, "Decolonizing Neoliberalism?," 187.

[65] See, for example, Maisie Helen Wright, "A Study of the Traditional Governance of the Gitxsan: Its Relevance Today" (MA thesis, University of British Columbia, 1997).

> the Gitxsan "high politics." Some chiefs complained that others were unfairly claiming territory that wasn't theirs … At a grass root level, there was concern that some of the chiefs who would have decision-making power were abusers. The Gitxsan and Wet'suwet'en later split to pursue their own treaty negotiations. The AIP contained the Gitxsan assumptions which they would take to the treaty talks.[66]

The "Gitxsan, Wet'suwet'en, and Gitanyow Community-Based Governance Agreement-in-Principle," prepared jointly by the Gitxsan and Wet'suwet'en, was not accepted unanimously. However, it became the main indicator of what to ask for at the negotiations. The AIP stated that the house remained the highest authority, that it had jurisdiction over the land, and that it was a legal entity. Yet it introduced a new office operating under the authority of the house – namely, the Finance and Resource Information Office, or FRIO. It suggested creating the Land Coordination Office (LANCO), which would consist of the house representatives and of a representative of the Government of Canada.[67] Its subsection 4.2, which relates to renewable resources, stipulates that the house has the authority to make laws in relation to the protection, preservation, and conservation of all renewable resources located on the house's territory.[68] Provincial and federal laws are recognized, but if they are not in accordance with the laws of the house, then the laws of the house prevail. On the other hand, some points covered by the AIP were a result of a compromise between the Gitxsan, the Wet'suwet'en, and the federal negotiators.[69] The AIP emphasized that the fiduciary relationship between the federal Crown and the Gitxsan, Wet'suwet'en, and Gitanyow should be maintained and that the Indian Act would continue to apply to the Gitxsan, Wet'suwet'en, and Gitanyow, unless inconsistent with the laws of the house.[70]

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[66] McCrimmon, "Child Welfare in Gitanmaxx," 48.
[67] "Gitxsan, Wet'suwet'en, and Gitanyow Community-Based Governance," 10–15.
[68] "Gitxsan, Wet'suwet'en, and Gitanyow Community-Based Governance," sub-agreement no. 4, renewable resources, 21.
[69] Conversation with Don Ryan, 1 December 2022.
[70] "Gitxsan, Wet'suwet'en, and Gitanyow Community-Based Governance," sub-agreement no. 9, application of federal and provincial laws, 43.

DIFFERING VISIONS OF LAND MANAGEMENT AND GOVERNANCE STRUCTURE

Clearly, Gitxsan and Wet'suwet'en negotiators had similar objectives, although they negotiated separately. For their part, the federal and provincial governments strove to achieve "certainty" related to land ownership. The aim of government policy was that, after reaching a settlement, the lands in British Columbia would become fee simple lands and would no longer be under federal jurisdiction.[71] What the Gitxsan proposed was an alternative to this approach. The land would not be converted to fee simple: it would be managed collectively under joint jurisdiction.[72] In July 1995, *Daxgyet: Gitxsan Treaty Negotiations Journal* reported on the "havoc" in the negotiations due to conflicting visions of land management. Both levels of government suggested placing land in three categories: category A, in which Aboriginal Rights would be the primary concern; category B, in which there would be shared jurisdiction; and category C, in which Canada or the province would be the primary authority.[73] In response, the Gitxsan chief treaty negotiator Mas Gak, Don Ryan stated: "the immediate impact of [this] land model would fragment House territories, watersheds, ecosystems and jurisdiction."[74] As Fabris argues in his article about property forms on reserves, these kinds of agreements should be approached carefully as there is usually more at stake than "a struggle over control of a particular parcel of land."[75] The forms of land ownership and stewardship decided upon would determine what kind of relationship Indigenous people would have with their territory. Thus, ensuring the continuity of Indigenous laws associated with their traditional forms of ownership and stewardship was crucial to their relationship to their land and to their cultural survival.

The issue of conflicting views on the land selection model was raised by both parties. In November 1995, the *Interior News* interviewed the provincial chief negotiator, Mark Stevenson, who acknowledged that the question of the treaty model should be addressed immediately to ensure progress in the negotiations.[76] The conflicting views also

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[71] Mark L. Stevenson and Albert Peeling, *Executive Summary of Memorandum Re Canada's Comprehensive Claims Policy*, 10, https://www.ourcommons.ca/Content/Committee/421/INAN/Brief/BR9225222/br-external/StevensonLMark-e.pdf.

[72] "Gitxsan Ready to Explore Model That Could Save Taxpayers Millions If Province Returns to Table," *Daxgyet: Gitxsan Treaty Negotiations Journal* 3, no. 2 (February–March 1996): 3.

[73] "Land Selection Rejected," *Daxgyet: Gitxsan Treaty Negotiations Journal* 2, no. 7 (July 1995): 1.

[74] "Land Selection Rejected."

[75] Fabris, "Decolonizing Neoliberalism?," 196.

[76] Jennifer McLarty, "Resource and Wet'suwet'en Treaty: Co-Management or Land Selection – That's the Issue," *Interior News* (Smithers), 15 November 1995, A13.

resurfaced in discussions about the proposed Aboriginal self-governance model. The "Speaking Notes" from the "Provincial Comments" on the "Gitxsan, Wet'suwet'en, and Gitanyow Community-Based Governance Agreement-in-Principle," dated 15 January 1996, prove that the province did not support the governance structure proposed by the concerned First Nations. These notes read:

> Proposed system as outlined in the AIP does not appear consistent with the interests for efficient government structures. It is unclear how efficiencies or economies of scale will be envisioned under this system. While FRIO will be established to provide administrative efficiencies, the constituent Houses have the authority to disband FRIO at any time.[77]

Delegating too much power to a self-governing First Nation was not an option. The province also expressed its concerns over democratic representation:

> There is potential for a small number of citizens attending a House meeting to have the authority to pass a House law, with a great number of citizens not being represented. The province will seek to ensure non-aboriginal participation, in this case, Community Members, in decision-making structures.[78]

Furthermore, concerns about democratic representation were voiced in a more aggressive way by the political opposition, something that I discuss further in the next subsection. While those concerns seemed valid to many British Columbians at the time, the logic presented was highly inconsistent. It seems that the province was primarily seeking non-Aboriginal representation in Aboriginal self-government. Although the province recognized the efforts, time, and resources dedicated to the AIP, the proposed structure was "too Aboriginal" to be accepted. As later studies related to the Nisga'a and Yukon First Nations settlements revealed, building governance structure that was detached from Indigenous tradition and history had introduced many challenges.[79]

Furthermore, the dispossession of forest resources continued. In the Kispiox Forest District, the situation went from bad to worse. In the

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[77] "Speaking Notes: Provincial Comments on the GWG CBG AIP, dated Jan. 24 1995," Freedom of Information Request IRR-2021-15534. http://docs.openinfo.gov.bc.ca/Response_Package_IRR-2021-15534.pdf.

[78] "Speaking Notes."

[79] See, for example: Carole Blackburn *Beyond Rights: The Nisga'a Final Agreement and the Challenges of Modern Treaty Relationships* (Vancouver: UBC Press, 2021); and Nadasdy, *Sovereignty's Entailments*.

Suskwa and Xsi Madsi Ho'ot watersheds, the Ministry of Forests authorized Skeena Cellulose to proceed with clear-cutting upon completion of what it considered to be adequate tests for determining whether or not Aboriginal Rights were being infringed. It refused, however, to make the criteria of the tests public. This triggered the blockade organized by the Suskwa chiefs on the forest service road.[80] Minister of Aboriginal Affairs John Cashore sent a letter to the Gitxsan negotiators stating that the treaty negotiations would be delayed if the blockades did not stop.[81]

The *Vancouver Sun* reported on the inflexible attitude of British Columbia's attorney general, Ujjal Dosanjh, who stated that he would not tolerate blockades while the negotiations were ongoing. In response, the Gitxsan treaty negotiator Don Ryan pointed out that the blockades were the consequence of the government's ignoring Aboriginal Rights.[82] In October the blockades were removed, and treaty negotiations resumed. The trilateral session held in October in Victoria gave positive signs of reaching consensus.[83] There was also some hope that the Forest Resources Management Agreement would be finalized at the December session.[84]

Yet, at the end of January 1996, the province announced its withdrawal from negotiations with the Gitxsan. The province was, however, willing to continue negotiations with the Wet'suwet'en. Since the Gitxsan and Wet'suwet'en had similar treaty negotiation objectives, this was a surprise. John Cashore, the minister of Aboriginal affairs, identified the lack of progress and road blockades as the main causes of the suspension of negotiations, denying that it had anything to do with the upcoming election.[85] According to Cashore, the province could only devote limited resources to the negotiations and that such resources were required elsewhere, where the desired goal was more likely to be achieved. Frank Cassidy, a professor at the University of Victoria who acted as a consultant for the Wet'suwet'en, did not share this point of view. According to Cassidy, this decision jeopardized the entire comprehensive claims

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[80] "Province Creates Friction," *Daxgyet: Gitxsan Treaty Negotiations Journal* 2, no. 8 (August 1995): 1.

[81] James MacKinnon, "Blockades 101: How Can We Hope to Draw Up Complex Treaties When We Can't Understand the Blunt Message of a Blockade?," reprinted from *Monday Magazine*, 21–27 September issue, *Daxgyet: Gitxsan Treaty Negotiations Journal* 2, no. 9 (September 1995): 9.

[82] Mike Crawley, "Roadblock Indians Claim Province Broke Promises," *Vancouver Sun*, 21 August 1995, B2.

[83] "October-December Trilaterals Could Be Start of Something Serious," *Daxgyet: Gitxsan Treaty Negotiations Journal* 2, no. 10 (October 1995): 1.

[84] "Deadline Looms for Consultation Facilitators," *Daxgyet: Gitxsan Treaty Negotiations Journal* 2, no. 12 (December 1995): 3.

[85] Tom Barrett, "Cashore Says Gitxsan Treaty Talks Not Broken Off Because of Election," *Vancouver Sun*, 3 February 1996, A13.

process.[86] Cassidy noted that the BC government's withdrawal from the negotiations left the Gitxsan and Wet'suwet'en no other option than to pursue a costly appeal to the Supreme Court of Canada.[87]

THE POLITICAL CLIMATE IN THE ADVENT OF THE 1996 PROVINCIAL ELECTION

To picture the broader political context, it is important to mention a debate in the House of Commons that took place in December 1995. John Duncan, who represented the Reform Party, then in opposition, requested that the government freeze any negotiations with First Nations for a one-year period prior to the upcoming election in British Columbia.[88]

The Reform Party of Canada was a right-wing populist group led by Preston Manning. Linked to the oil industry in Alberta, the party advocated policies that supported free enterprise and low taxes. Moreover, it opposed immigration and the existence of so-called "special interests" groups.[89] Duncan, who represented this party, questioned the treaty negotiation process in British Columbia and complained that third parties and municipalities had been excluded from the negotiations and that, consequently, they were not in a position to defend their own interests.

The provincial NDP government, which negotiated with many BC First Nations, including the Nisga'a (who were close to reaching an agreement), was under attack from the opposition both in the province and in the Canadian Parliament. Many MPs shared Duncan's opinion and believed that freezing the ongoing negotiations before the provincial election would be the best solution.[90] Furthermore, the Skeena Reform MP, Michael Scott, classified any possible future Aboriginal self-governments as undemocratic. The *Interior News* wrote the following in February 1995:

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[86] Frank Cassidy, "The Reasons for Settling Land Claims Are Compelling," *Vancouver Sun*, 14 February 1996, A13.

[87] Cassidy, "The Reasons for Settling."

[88] House of Commons Official Report, 7 December 1995, vol. 133 no. 273, 1st session, 35th Parliament, 17348, https://www.ourcommons.ca/DocumentViewer/en/35-1/house/sitting-273/hansard. John Duncan became minister of Aboriginal affairs in the Stephen Harper government.

[89] See, for example, Murray Dobbin, *Preston Manning and the Reform Party* (Toronto: Lorimer, 1991).

[90] For example: Chuck Strahl (Fraser Valley East) in House of Commons Official Report, 7 December 1995, 17351; and Mike Scott (Skeena) in House of Commons Official Report, 7 December 1995, 17364.

> Scott says his main concern is that an undemocratic system of government will be created … He said Canada pushes for democratic reforms in totalitarian regimes elsewhere in the world, yet seems to be letting native self-government evolve in the opposite direction. "At home we're going to embrace and endorse governments that are not democratic," he said. "I find that offensive in the extreme."[91]

Right-wing populists classified anything that interfered with unrestricted private property rights, as well as any "special rights," as undemocratic, and Scott's statement expressed these beliefs. Even discussions of past injustices committed against Indigenous people circled back to populist arguments. "We recognize there were injustices. Do we correct those injustices by creating further injustice now?" asked Scott in one of his treaty negotiations meetings held in October 1994 at R.E.M. Lee Theatre in Prince Rupert.[92] These varying opinions on how to address Aboriginal land claims must have influenced the political directions that the NDP decided to take. There was tension in the province. The opposition accused the NDP of causing unrest by accepting the treaty negotiations, while Indigenous Peoples were not satisfied with negotiations and ongoing dispossession. The situation and public opinion seemed to turn against the NDP, and the breakup of the negotiations with the Gitxsan was collateral damage.

The Gitxsan Treaty Office requested (in a letter dated 5 February 1996) that the BC Treaty Commission mediate the differences between the Gitxsan and British Columbia.[93] In response, deputy minister Philip G. Halkett confirmed the province's "support for the appointment, by the Commission, of a fact finder to determine the background which led to this situation and to recommend next steps,"[94] while Don Ryan wrote to Acting Chief Commissioner Barbara Fisher to remind her that the current adjournment of the appeal to the Supreme Court of Canada ended on 15 March. He feared that the BC Treaty Commission's examination of the facts would take a long time.[95] The commission was able to release the report within weeks, but this did not bring the parties back to the negotiating table. The commission identified that the main

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[91] "Pending Self-Government Deal Called 'Undemocratic' by Skeena Reform MP," *Interior News* (Smithers), 15 February 1995, A8.

[92] "Scott Gets Earful on Land Question," *Terrace Standard*, 12 October 1994, A1-2.

[93] Chief Commissioner Alec Robertson to Don Ryan, Angus Robertson, and Tom Molloy, 9 February 1996, copy in possession of Don Ryan.

[94] Deputy Minister Philip G. Halkett to Chief Commissioner Alec Robertson, 9 February 1996, file no. 63300-20/GitX1/Cor, 63300-20/WETS1/COR, copy in possession of Don Ryan.

[95] Don Ryan to Barbara Fisher, 12 February 1996, copy in possession of Don Ryan.

cause for the breakup of the treaty negotiations was, among other things, the series of road blockades.[96] The blockade in Suskwa in August 1995 resulted in the cancellation of treaty negotiations scheduled for September. However, after the court issued an injunction, the blockades stopped, and negotiations resumed in October 1995.

The Gitxsan explained that there was no progress at the treaty table because the province insisted on a land selection solution, while the Gitxsan and Wet'suwet'en sought control over the entirety of their hereditary territories. The Gitxsan were put in a difficult position. On the one hand, the province delayed acceptance of the mediation meeting; on the other hand, action was needed in order to proceed with an appeal of the *Delgamuukw* case to the Supreme Court of Canada. Obviously, the province denied that the upcoming election had any impact on its decision to withdraw from the negotiations, although the question remains as to whether or not this was true. The provincial government failed to secure the appropriate Intermediate Agreements to protect the Gitxsan hereditary territories from destruction, but, at the same time, decided not to tolerate blockades. In fact, the situation surrounding the blockades should be contextualized. Nicholas Blomley, a specialist in legal geography, observed that "the Summer of 1990 saw the most extensive round of blockades ever. Nearly thirty blockades occurred, involving some twenty different groups."[97] Blomley went on to explain that, after British Columbia joined the treaty negotiations, blockade activity decreased. This occurred not only because the First Nations decided to join the treaty table but also because the government pressured them by making the continuation of treaty negotiations dependent on their stopping blockade activities.[98] The NDP government justified this approach on the basis of its concerns that an Indigenous group could use blockades as a means of putting pressure on the government in order to "jump the negotiations queue."[99] In 1988, Wet'suwet'en Chief Satsan, Herb George, made the following statement in regard to blockades in his speech at the Robson Square Media Centre in Vancouver: "We are frustrated and we are angry. We are not lawless and we are not irresponsible. In fact, we are very responsible. We are prepared to take these actions and accept the consequences of these actions."[100]

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[96] British Columbia Treaty Commission, 4.

[97] Nicholas Blomley, "Shut the Province Down: First Nations Blockades in British Columbia, 1984–1995," *BC Studies* no. 111 (Autumn 1996): 9.

[98] Blomely, "Shut the Province Down," 10–11.

[99] Blomely, "Shut the Province Down," 15.

[100] Terry Glavin, "Blockades Last Resort, Forum Told," *Vancouver Sun*, 18 October 1988, D10.

The Gitxsan and Wet'suwet'en experience with the treaty talks was not unique.[101] Tensions around the various negotiating tables were rising, and BC Treaty Chief Commissioner Alec Robertson stated that the province was unable to "reconcile the 'inherent contradictions' in the province's present policies with 'moral commitments' the government undertook regarding the treaty-making process."[102]

At the same time, although outside of the BC treaty process, the province was negotiating with the Nisga'a, who accepted the land selection model, while the Gitxsan insisted on addressing their entire hereditary territory. Surely, the Nisga'a agreement was, from the province's perspective, easier to accept. However, even the Nisga'a right to self-government was challenged in 2000 by the leaders of the BC Liberal Party in the case known as *Campbell v. British Columbia*.[103] The right-wing opposition was strong, and the NDP government needed both Indigenous and non-Indigenous votes in the upcoming election to stay in power.

CONCLUSION

The Gitxsan experience is but one example of unsuccessful negotiations held under the BC treaty process. The provincial government was not ready to take such a consequential step and to accept the co-management scenario. The Gitxsan and Wet'suwet'en project was not given a chance to be implemented. In his paper, which he presented at a Treaty Forum held in Vancouver in 1999, John Borrows wrote:

> Some may argue that past wrongs cannot be fully addressed because too much in the present relies upon these prior violations and indiscretions … A house built upon a foundation of sand is unstable, no matter how beautiful it may look and how many people may rely upon it. It would be better to lift the house and place it on a firmer foundation, even if this would create real challenge for people in the house. Ultimately, this would benefit all within the house.[104]

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[101] See, for example, "Election Stalling Talks, Chief Says," *Vancouver Sun*, 6 October 1995, D22.

[102] Stephen Hume, "BC's Honour in Treaty Talks under Fire: Allowing Resources to Be Taken from Lands That Are under Negotiation Seriously Impairs the Process, Victoria Is Told – Chief Commissioner Disagrees with Minister," *Vancouver Sun*, 21 June 1996, A1.

[103] For a thorough discussion of the Nisga'a Treaty, see Blackburn, *Beyond Rights*.

[104] John Borrows, "Questioning Canada's Title to Land: The Rule of Law, Aboriginal Peoples, and Colonialism," in *Speaking Truth to Power: A Treaty Forum* (Government Services Canada, 1999), 38–39.

Many recent events in British Columbia have proved Borrows's theory to be accurate. In November 2021, a tactical police team used an axe to smash the door to a cabin where members of the Wet'suwet'en Gitdumden clan stayed when they blocked the road to the Coastal GasLink workers' camp. The RCMP arrested fifteen protesters as well as journalists Amber Bracken and Michael Toledano.[105] Furthermore, the controversy surrounding logging practices continues. In his letter to Premier John Horgan, former chief treaty negotiator Don Ryan, now Chief Hanamuxw, recently expressed concern that these practices ignore the Gitxsan's Aboriginal Title to their land. His concerns, a déjà vu of the problems brought up by the Gitxsan to the provincial government in the 1980s and 1990s, are the following:

> British Columbia continues to authorize forestry activity on our Wilp's territory without our free, prior and informed consent. Further, you continue to do this without taking meaningful steps to actually ascertain where we have Aboriginal title in accordance with our laws or where our territory is located. British Columbia – despite having a mass of evidence from us and other Gitxsan Huwilp – turns a blind eye to the factual reality that the lands and resources it is giving to others belong to the Gitxsan and, in particular, our Wilp.[106]

The same problems are likely to re-emerge until "the unstable construction of the house is fixed." Translating between two different governance and legal systems and finding common ground is not easy. Therefore, a nation-to-nation approach is crucial to ensure a successful result. Indigenous Peoples need assurance that their distinct cultures, which are intricately connected to their political-juridical orders, will not disappear as a result of modern treaties. The models of self-government proposed by the provincial and federal governments under the modern treaty process remain colonial. Because of the self-interest of governments and their lack of recognition of pre-colonial laws, customs, and practices, Indigenous forms of self-governance that have existed for millennia cannot gain political recognition in this country. The path towards self-government and self-determination should start with a change in the relationship with the Crown. Wet'suwet'en community member, Dan George, in his research paper about leadership and conflict management, observed: "In most situations power supersedes everything including culture. Such is the relationship that the Wet'suwet'en has with the

[105] Amber Bracken, "In Photos: A View of RCMP Arrests of Media, Indigenous Land Defenders on Wet'suwet'en Territory," *Narwal*, 25 November 2021.
[106] Don Ryan to Premier John Horgan, 30 September 2021, copy in possession of the author.

Crown and industry … To address this power imbalance, the parties need to move away from competition and move towards collaboration where group-interest replaces self-interest."[107]

Chief Satsan, Herb George, in an interview given in 1993 to the *Province*, said:

> We talk about governing ourselves according to our structures and institutions, and the people have great difficulty with that because they can't understand it … And we can't seem to get them to appreciate that it doesn't matter whether they understand how we're going to govern ourselves – all that matters is that we know how to do that.[108]

Pursuing economic development at any cost and keeping pace with increasingly "globalized" industries has been detrimental to many local initiatives undertaken by various First Nations. The BC treaty process, like previous legal confrontations, did not put Indigenous interests at the forefront but, rather, concentrated on achieving the "certainty" required to secure economic investment. The province's neoliberal approach to renewable and non-renewable resource development and exploitation remained unchanged. Logging licences were and still are granted to big companies without proper consultation with the local First Nations. The policy that led to significant resource depletion, caused damage to Indigenous cultures, and was responsible for recent natural catas trophes that occurred in 2021 in British Columbia, has to change. The disastrous forest fires and floods that recently devastated large areas of the province were exactly what the Gitxsan and Wet'suwet'en negotiators tried to prevent.

Despite *Delgamuukw* and other subsequent court trials, it seems that the dialogue that was abandoned in 1996 never reached a meaningful conclusion. The Gitxsan and Wet'suwet'en continue to protect their hereditary territories. Sadly, the attitude of the provincial and federal governments has not changed significantly. Using John Borrows's analogy, the foundations of our shared home of Canada remain unstable.

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[107] Dan George, "The Elders Are Watching: Wet'suwet'en Perspectives on Leadership's Role in the Management of Conflict" (Major Research Project, Royal Roads University, 2010), 41.

[108] "Q and A: Native Rights," *Province*, 4 July 1993, A31.